

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

ACLU OF TENNESSEE, Inc.)	
)	
Intervening Plaintiff,)	
v.)	No. 2:17-cv-02120-jpm-DKV
)	
THE CITY OF MEMPHIS,)	
)	
Defendant.)	

**CITY’S OBJECTION TO MONITOR’S RESPONSE TO REQUEST FOR AUTHORITY
TO USE CAMERAS AT COVID TESTING SITE**

Pursuant to Fed. R. Civ. P. 53(f)(2), the Defendant, the City of Memphis (“the City”), respectfully submits a formal objection to the Independent Monitor’s response to the City’s March 20, 2020 request for authority to use drones and/or mobile cameras to provide security at the City’s COVID drive-through Testing Facility.

Specifically, the City objects to the Monitor’s determination that Sections G and H of the Consent Decree are applicable to the recording and maintenance of security video at the COVID Testing Facility.

I. Background

On March 11, 2020, the World Health Organization declared COVID-19 a pandemic.¹ As the confirmed cases of COVID began to rise within the city of Memphis and surrounding region, the City set up a drive-through testing facility (“Testing Facility”) on the City-owned grounds of the Liberty Bowl stadium, also locally known and referred to as “Tiger Lane.”² The Testing Facility is a drive-through tent erected for the specific purpose of testing persons with symptoms

¹ See <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>.

² See https://memphistn.gov/news/what_s_new/c_o_v_i_d-19_update_from_mayor_strickland__3-19_.

of the virus without requiring the person to exit his or her vehicle. The testing process itself is handled by a health care provider, not City employees.

On March 20, 2020, the City's chief legal officer, Jennifer Sink, submitted a request for authority from the Independent Monitor, Ed Stanton, to use drone cameras over the Testing Facility in an effort to provide security and to address real-time traffic and crowd control issues. (See Email Chain, attached as **Exhibit A.**) Ms. Sink further explained that the drone cameras would likely not be "so specific as to allow identification of individuals or specific car owners, unless something alerts MPD and a closer look is warranted. If weather does not permit the use of drones, we will use mobile cameras." (See Email Chain, Exhibit A.)

Regarding the retention of any video footage obtained at the testing site, Ms. Sink requested that the decision on retention of video be made after the fact, when the City had more information available to determine its actual needs regarding security of the Testing Facility. (See Email Chain, Exhibit A.)

On March 21, 2020, Ms. Sink sent a follow up email to the Monitor and noted that the Testing Facility is within the site of some Memphis Police Department ("MPD") cameras that were already in place, and that the tent and testing equipment must remain in place at Tiger Lane even when there is not an active testing event. For that reason, the City needs cameras in place at all times to secure the area.

Later in the evening on March 21, 2020, the Monitor responded as follows:

Based on your emails below, I approve the City's flying of drones or mobile cameras over the drive-through COVID-19 testing site on Tiger Lane, subject to the following two conditions:

- The drones / cameras may not be used to identify individuals, specific car owners, license plates, or other individualized information for the purpose of a criminal investigation or other law enforcement matter unless such

use is authorized and documented as required by § G of the Consent Decree; and

- All footage collected by the drones / cameras that is *not* used to identify individuals, specific car owners, license plates, or other individualized information may not be maintained for more than 14 days. After that time, the footage “shall be destroyed,” consistent with § H of the Consent Decree, unless, during the maintenance period (which, again, shall not exceed 14 days), the City determines the footage to be relevant to (1) a “lawful investigation of criminal conduct” to which (2) the identification of individualized information gave rise. Such footage may *not* be kept more than 14 days to further pre-existing criminal or non-criminal investigations or to support future criminal or non-criminal investigations because § H only allows personal information to be “collected in the course of a lawful investigation of criminal conduct” to which that personal information is relevant.

(Email Chain, Exhibit A.)

II. The City’s Objections

The City has several concerns with the Monitor’s response, and it seeks the Court’s review under Fed. R. Civ. P. 53(f), which states:

(2) *Time to Object or Move to Adopt or Modify.* A party may file objections to-- or a motion to adopt or modify--the master's order, report, or recommendations no later than 21 days after a copy is served, unless the court sets a different time.

(3) *Reviewing Factual Findings.* The court must decide de novo all objections to findings of fact made or recommended by a master, unless the parties, with the court's approval, stipulate that:

- (A) the findings will be reviewed for clear error; or
- (B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

Fed. R. Civ. P. 53(f).

A. The use of drone and mobile cameras at the Testing Facility does not implicate Section G of the Consent Decree.

First, the City objects to the Monitor’s assertion that the City’s use of cameras at the COVID Testing Facility implicates Section G of the Consent Decree.

Section G of the Consent Decree states:

Any police officer conducting or supervising a lawful investigation of criminal conduct which investigation may result in the collection of information about the exercise of First Amendment rights, or interfere in any way with the exercise of such First Amendment rights, shall immediately bring such investigation to the attention of the Memphis Director of Police for review and authorization.

Consent Decree, § G (1), (ECF No. 151, PageID 6283) (emphasis added).

The City submits that providing security for a medical testing facility does not implicate the First Amendment or give rise to any First Amendment concerns. The use of the cameras at the Testing Facility is for the purposes of providing security for the facility and the workers and evaluating traffic patterns for future events. This is not a situation where the City anticipates protests or political rallies to occur.

Moreover, persons utilizing the Testing Facility are not engaged in the exercise of First Amendment rights. Indeed, those persons are there by appointment and are not even allowed to exit their vehicles. Accordingly, the cameras at the Testing Facility will not be used to collect information about the exercise of First Amendment rights, nor will the use of the cameras interfere with the exercise of First Amendment rights.

Thus, the City requests that the Court review the Monitor's determination that the use of cameras at the Testing Facility implicates Section G of the Consent Decree.

B. The retention of video footage of the Testing Facility does not implicate Section H of the Consent Decree.

The City further objects to the Monitor's determination that Section H of the Consent Decree applies to the City's retention of the video footage obtained by the drones and mobile cameras at the Testing Facility.

Section H states:

The defendants and the City of Memphis shall not maintain personal information about any person unless it is collected in the course of a lawful investigation of criminal conduct and is relevant to such investigation. Information which has been collected in violation of this Decree shall be destroyed.

Consent Decree § H, (ECF No. 151, PageID 6284) (emphasis added).

As a threshold matter, taking aerial or mounted video footage of a medical Testing Facility, its surrounding area, and vehicles visiting the area cannot be reasonably be considered “maintain[ing] personal information about any person” such that it implicates Section H of the Consent Decree. As noted above, the persons visiting the Testing Facility are not allowed to exit their vehicles, so their identities would be clearly unknown to any MPD employee viewing the footage.

Moreover, the Monitor’s imposition of a fourteen-day retention requirement for any video footage obtained at the Testing Facility is not grounded in Section H of the Consent Decree or the rulings of this Court. Notwithstanding the inapplicability of Section H, the fourteen-day retention requirement is seemingly arbitrary in nature and inadequate in the situation the City is facing. The Testing Facility will likely be in place for much longer than fourteen days. If the City is required to purge all video footage of the Testing Facility area every fourteen days, it will lose the ability to review older footage for evidence of criminal activity, should it occur, and it will lose the ability to study, compare, and contrast traffic patterns.

Additionally, if the City is required to destroy photo and video obtained of the Testing Facility, it will not be able to use it in After Action Reviews, which would be helpful in MPD’s planning for future events like this.

For these reasons, the City respectfully requests that the Court rule that Section H does not apply to the retention of video footage at the Testing Facility. Alternatively, but if the Court finds that it does apply, that the City be allowed to maintain the video footage from the drones and other

mobile cameras used at the Testing Facility at least until the Testing Facility is taken down and also for some period of time for purposes of After Action Reviews.

CONCLUSION

The City respectfully requests that the Court rule that the Monitor's determination that the use of drones and mobile cameras to provide security and traffic pattern study at the COVID Testing Facility implicates the Consent Decree, and the fourteen-day retention period for the video. Further, in light of the circumstances the City requests an expedited ruling.

Respectfully Submitted,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.

s/ Bruce McMullen

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*Attorneys for Defendant, The City of
Memphis*

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March 2020, a copy of the attached pleading was filed electronically. Notice of this filing will be served by operation of the Court's electronic filing system to all counsel of record.

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s/ Bruce McMullen

Bruce McMullen

CERTIFICATE OF CONSULTATION

Pursuant to Local Rule 7.2(a)(B), on March 30, 2020, counsel for the City, Jennie Silk, emailed and phoned Tom Castelli, counsel for Intervening Plaintiff, regarding the relief sought in this filing. Intervening Plaintiff has not responded to those communications.

s/ Bruce McMullen

Bruce McMullen

EXHIBIT A

From: "Edward L. Stanton III" <Edward.Stanton@butlersnow.com>
Date: March 21, 2020 at 8:10:34 PM CDT
To: "Sink, Jennifer" <Jennifer.Sink@memphistn.gov>, Will Perry <Will.Perry@butlersnow.com>, Jim Letten <Jim.Letten@butlersnow.com>
Cc: Terri Wiseman <Terri.Wiseman@butlersnow.com>, "McMullen, Bruce" <bcmullen@bakerdonelson.com>, "Saleem, Zayid-mem" <Zayid.Saleem@memphistn.gov>, "Glover, R. Mark" <mglover@bakerdonelson.com>
Subject: RE: Request re: On-Site COVID testing

Good evening, Jennifer –

Based on your emails below, I approve the City's flying of drones or mobile cameras over the drive-through COVID-19 testing site on Tiger Lane, subject to the following two conditions:

- The drones / cameras may not be used to identify individuals, specific car owners, license plates, or other individualized information for the purpose of a criminal investigation or other law enforcement matter unless such use is authorized and documented as required by § G of the Consent Decree; and
- All footage collected by the drones / cameras that is *not* used to identify individuals, specific car owners, license plates, or other individualized information may not be maintained for more than 14 days. After that time, the footage "shall be destroyed," consistent with § H of the Consent Decree, unless, during the maintenance period (which, again, shall not exceed 14 days), the City

determines the footage to be relevant to (1) a “lawful investigation of criminal conduct” to which (2) the identification of individualized information gave rise. Such footage may *not* be kept more than 14 days to further pre-existing criminal or non-criminal investigations or to support future criminal or non-criminal investigations because § H only allows personal information to be “collected in the course of a lawful investigation of criminal conduct” to which that personal information is relevant.

Please advise if you have additional questions or concerns. I’ll keep an eye out for the inquiries about social media search terms that you mentioned will be forthcoming.

Regards,

ELS

Edward L. Stanton III
Butler Snow LLP

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P.O. Box 171443, Memphis, TN 38187-1443
Edward.Stanton@butlersnow.com | [vCard](#) | [Bio](#)

[Twitter](#) | [LinkedIn](#) | [Facebook](#) | [YouTube](#)

From: Sink, Jennifer <Jennifer.Sink@memphistn.gov>

Sent: Saturday, March 21, 2020 5:48 PM

To: Edward L. Stanton III <Edward.Stanton@butlersnow.com>; Will Perry <Will.Perry@butlersnow.com>; Jim Letten <Jim.Letten@butlersnow.com>

Cc: Terri Wiseman <Terri.Wiseman@butlersnow.com>; McMullen, Bruce <bmcmullen@bakerdonelson.com>; Saleem, Zayid-mem <Zayid.Saleem@memphistn.gov>; Glover, R. Mark (mglover@bakerdonelson.com) <mglover@bakerdonelson.com>

Subject: Re: Request re: On-Site COVID testing

Hello,

We anticipate starting the testing sites on Monday. Can you please advise as to your position on the use of cameras during this event?

As some additional information, once set up, the testing site will be in place for a while.

At Tiger Lane, the area is already in the line of site of RTCC cameras that were already in place. The tent and other pieces of equipment, all of which is expensive but not feasible to take down and set back up in between test days, will remain even when there is not an active testing event. We need cameras in place at all hours for security

purposes.

If you have any questions, please let me know.

Jennifer

From: Sink, Jennifer
Sent: Friday, March 20, 2020 3:57:21 PM
To: Edward L. Stanton III <Edward.Stanton@butlersnow.com>; will.perry@butlersnow.com <will.perry@butlersnow.com>; Jim Letten <Jim.Letten@butlersnow.com>
Cc: Terri Wiseman <Terri.Wiseman@butlersnow.com>; McMullen, Bruce <bmcullen@bakerdonelson.com>; Saleem, Zayid-mem <Zayid.Saleem@memphistn.gov>; Glover, R. Mark (<mglover@bakerdonelson.com>)
Subject: Request re: On-Site COVID testing

Ed, Will, and Jim,

The City is setting up a drive-through COVID-19 testing site on Tiger Lane, which is City property. The purpose is to provide a location for the public to obtain the COVID-19 test. The testing process is being handled by UTHSC, but the city is providing support, including law enforcement. UTHSC has requested police presence. We expect testing to start Monday. We also expect that additional on-site testing events will be held in the future.

For security concerns and for real-time traffic and crowd control decisions, we would like to fly drones over the testing area. The information will be used in the aggregate (meaning no one car or person specified) to pick up traffic patterns so that we can safely and effectively control traffic. Additionally, the drone cameras will be used to monitor security concerns. We don't believe the visual will be so specific as to allow identification of individuals or specific car owners, unless something alerts MPD and a closer look is warranted. If weather does not permit the use of drones, we will use mobile cameras.

I understand that you will have questions about how long the video will be retained. I would like to request that we discuss the appropriate retention time after the first testing process, so we can address the need more directly. Frankly, this event is unprecedented. We are planning extensively but do not know what to expect. I would prefer that decision be made after the fact, when we all have more information to base it upon.

Can we have your permission to execute in this manner?

Finally, we are going to do a threat assessment related to drive-through testing, which will involve searching social media. We will be submitting some terms to you for approval in the next 24 hours

Jennifer A. Sink, Esq.

Chief Legal Officer

City of Memphis

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Memphis, TN 38103-2079

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