August 18, 2011

Laurence J. Dupuis
ACLU of Wisconsin Foundation
State Headquarters
207 E. Buffalo St, Suite 325
Milwaukee, WI 53202-5774

Dear Mr. Dupuis,

I am in receipt of your public records requests in which you state you seek access to various cell phone related records of the Madison Police Department received on August 4, 2011. The exact terms of your request are:

We hereby request disclosure of all records in your possession relating to your acquisition of cell phone location records. This request encompasses records regarding real-time tracking and records regarding where cell phones have been in the past, and it encompasses all available methods of locating cell phones, including “cell site,” triangulation, and GPS. This request includes but is not limited to the following records:

- Policies, procedures and practices you follow to obtain cell phone location records
- Data retention policies, detailing how long cell phone location records are kept, databases in which they are placed, and agencies (federal, state and local) with which they are shared
- The use of cell phone location records to identify “communities of interest” (detailing those persons who have been called, or called by a target) in investigations
- The use of cell phone location records to identify all of the cell phones at a particular location
- Your use of “digital fences” (systems whereby you are notified whenever a cell phone comes within a specific geographic area)
- The legal standard (e.g. probable cause, relevance) you proffer to obtain cell phone location records
- Judicial decisions and orders ruling on your applications to obtain cell phone location records
• Statistics regarding your use of cell phone location records, including the number of emergency requests for which no court order was obtained

• The form in which cell phone location records are provided (hard copy, through specific online databases)

• Communications with cell phone companies and providers of location-based services regarding cell phone location records, including
  o company manuals, pricing, and data access policies
  o invoices reflecting payments for obtaining cell phone location records
  o instances in which cell phone companies have refused to comply with a request or order

Public records custodians must respond to such requests "as soon as practicable and without delay." §19.35(4)(a), Wis. Stats. This is a flexible requirement that takes into account many factors including the scope and breadth of the request and the public resources available to process the request. The nature of your request is very broad, both as to the types of records sought and as to the persons from whom those records are sought. Additionally, there are several ambiguities within the text of your request. Thus, the ten-day response time you cite in your letter is unrealistic considering the breadth of your request.

As to your requests for policies and procedures, I direct your attention to:

This website contains the complete policy manual of the Madison Police Department.

The remainder of your request lacks any definite time-period as to which you seek records from. Cell phones have been around since at least the mid 1980's and we may have responsive records going back that far. "A request for a record without reasonable limitation as to subject matter or length of time does not constitute a sufficient request....A request can be denied if it is too burdensome and the requester could have limited the request but failed to do so. Section 19.35(1)(h), Stats.; Schopper v. Gehring, 210 Wis.2d 208, 565 N.W.2d 187 (Ct. App. 1997)." Understanding the Wisconsin Public Records an Open Meetings Laws, State Bar of Wisconsin, December 1999.

Your request is also problematic as to the large number of persons, communications and records that it encompasses. Your request, by its very terms, would require us to examine every email, memorandum, note or file in the possession of each member of the police department in order to determine whether they possess any responsive records "...relating to ...acquisition of cell phone location records." Under the Public Records Laws the City is obligated to construe requests very broadly in favor of releasing all records relevant to the request. Your enumeration of specific elements of this request without limitation to those specific elements expands rather than contracts the scope of this broad request. Furthermore I am certain that the broad terms of your request would result in the collection of untold numbers of documents totally unrelated to your area of interest. Processing such a broad and burdensome request would be inconsistent with the conduct of government business. See State ex rel. Gehl v. Connors, 2006 WI App 2455.

Additionally, some of the records that you seek undoubtedly relate to ongoing investigations.
and/or ongoing prosecutions. Thus some of these cell phone materials are not being maintained as a public record as they are not held in the custody, care and control of this agency’s records custodian. Instead, such items are being held as evidence in criminal investigations/prosecutions. The Wisconsin Public Records Laws do not provide you or any other person with access to inspect evidence in a pending criminal investigation or prosecution.

Furthermore, even if this evidence were subject to disclosure under the Wisconsin Public Records Laws, the records custodian must carefully weigh the competing public interests involved when deciding to release any record in their possession. Custodians begin with a presumption of complete public access to such records. However, custodians must consider whether inspection of the record could result in harm to the public interest that would outweigh the benefits of such inspection. When such harm substantially outweighs the benefits of public inspection, such records or portions thereof, must remain confidential. Thus, I would deny you access to evidence/records of an active police investigation or prosecution. Even in cases where a prosecution has commenced, it is not unusual to have further investigative work that needs to be completed as prosecutor’s review a case and prepare for trial. See sec. 19.36(10)(b), Wis. Stats. The release of investigation records could interfere with the ability to prosecute such cases and frustrate the ability to complete any additional investigative tasks as these cases move towards judgment. For instance, the release of such evidence in an ongoing investigation or prosecution may influence witnesses’ ability to recall key events. In addition, disclosure would, in many other ways, compromise the ability to aggressively prosecute the case. These outcomes are clearly contrary to the public’s interest in maintaining an effective and fair criminal justice system.

The public interests in protecting the integrity of ongoing investigations are a recognized and explicit exception to the general rule of access to public records. See secs. 19.35(1)(am)1, 19.36(10)(b), Wis. Stats. Indeed, the Wisconsin Open Meetings Laws embodies these interests in the well-recognized rule that permits public bodies to meet in closed sessions to discuss strategies for crime prevention and detection. Our courts have long recognized that exceptions to the Open Meetings Laws are reflective of public policy that supports keeping related or similar records confidential. Thus, the records of ongoing investigations and sensitive crime fighting and detection tools must be kept confidential. Likewise, fulfilling your request may undermine the effectiveness of certain investigative techniques if those techniques were widely known to criminals or those contemplating the commission of crimes.

Additionally, Chapter 950 of the Wisconsin Statutes codifies the long-standing public policy of protecting crime victim’s rights. The records you requested may contain information related to such crime victims. If I were to fulfill this request I would have to weigh the presumed benefits of inspecting these records against the public policy of protecting crime victim’s rights and the public policy of avoiding further trauma for these crime victims. Such crime victims often receive services from the Dane County District Attorney’s Office that assist them in dealing with the releases of evidence that occur during the various legal proceedings. Allowing the haphazard release of such evidence through the public records process defeats that effort and would blinds ide these crime victims. This would leave them unprepared to cope with the significant emotional/psychological impact that such evidence may have. Thus, prior to the release of such evidence, I would confer with the Dane County District Attorney’s Office regarding the impact upon any identified crime victims.

Your request is so broad as to also encompass records related to employee misconduct investigations. Even if I determined that such records were open to public inspection, I would not be able to comply with your ten-day deadline. Under sec. 19.356, Wis. Stats., I am obligated to provide notices to affected employees that allow them to bring a lawsuit to prevent the release of such records.
Some elements of your request are so vague as to be difficult to understand. For example, I do not understand what you are requesting when you ask for “the use of cell phone location records to identify ‘communities of interest’”. Other elements of your request seek access to records for which the City is not a custodian. These include the “company manuals” of cell phone providers.

One of the over-arching concerns regarding your request is that it assumes that the Madison Police Department is keeping a separate record or database of all cell phone related investigations. That assumption would be incorrect. Cell phone information is simply evidence gathered whenever the facts known to the department suggest that this evidence may assist in the solving of a crime. Our records system is not organized in such a manner as to identify cases and records by the type of evidence that may have been gathered during the course of an investigation. Furthermore, your implicit assumption that we track this cell phone information may have supported your requests for statistical data. We do not have any such statistical records nor are we obligated to create any such records. Sec. 19.35(1)(L), Wis. Stats.

Finally, public records requestors are obligated to pay for both the actual and necessary costs of locating and reproducing any records that you request. Indeed, if those costs exceed $5.00 you would be required to prepay those costs as a condition of our copying or reproducing the records. Furthermore, you would be responsible for reimbursing the City for the costs of locating and compiling records where those costs exceed $50.00. In short, even if we were to process your request, it is highly likely that you would have to prepay a substantial sum of money as a condition of processing this request. It is impossible for me to provide a more accurate estimate of these costs given the lack of a time limit on your request.

In arriving at the above determinations, I have reviewed the requested information and carefully balanced the public interest in nondisclosure of these records against the strong presumption that public records should be open to inspection. You are advised that any decision to withhold public records may be subject to review by Mandamus under Sec. 19.37 Wis. Stats., or upon application to the Wisconsin Attorney General or Dane County District Attorney. I have consulted with the City Attorney regarding the denial of access for a portion of this record per 3.70(6) MGO.

Even though the breadth of your request forces me to deny it as it is currently drafted, I would welcome the opportunity to meet with you to discuss these matters further. The Madison Police Department has a long and proud heritage of working closely with the public that we serve. We find that when the public has a better understanding of how we perform our duties we, in turn, are more effective at meeting their needs. I suggest that we meet to discuss your interests in this topic matter.

Sincerely,

Mary A Schauf
Captain of Police

CC Roger Allen, OCA
Mayor Records File