

**OFFICE OF THE CITY ATTORNEY**

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January 14, 2022

Honorable Leslie Rutledge  
OFFICE OF THE ATTORNEY GENERAL  
323 Center Street, Ste. 200  
Little Rock, Arkansas 72201

**RE: Arkansas Freedom of Information Act**

**■ Release of public records during an ongoing criminal investigation**

Dear General Rutledge:

The purpose of this letter is to request an opinion from your office as to the City's duty to release public records, including those which may be deemed personnel records, during an ongoing criminal investigation. The circumstances, as more fully outlined below, has created a tension between a prosecuting attorney's obligation not to unfairly taint a criminal investigation, or the person being investigated, with the City's obligation to meet the laudable purpose of the Arkansas Freedom of Information Act ("AFOIA") – Ark. Code Ann. §§ 19-25-101 to -112.

**FACTUAL BACKGROUND**

Since becoming the Chief of the Little Rock Police Department ("the Department") in 2019, Chief Keith Humphrey ("Chief Humphrey") has members of his Command Staff<sup>1</sup> join him with patrol duties on holidays. Not only does this assist on particularly busy holiday nights such as New Year's Eve, it also provides some relief to the other officers.

On December 31, 2022, Chief Humphrey was patrolling the City streets in a City vehicle when he became involved in a disturbance with a weapon at the Superstop convenience store located at 5100 Asher Avenue. Upon exiting his vehicle, he realized shots had been fired and an individual was armed with a firearm, so he drew his service weapon and returned fire. At this time, there were people in the immediate area, in addition to himself, who would suffer death or serious physical injury if hit by the assailant's gunfire. Chief Humphrey continued to fire until the immediate threat

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<sup>1</sup> The "Command Staff" of the Department consists of the Chief of Police, the Assistant Chiefs of Police, and the Majors who are in charge of the various divisions of the Department.

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was neutralized because armed assailant ran away. (This person was later captured by law enforcement)

Immediate contact between Chief Humphrey, Assistant Chief Crystal Young-Haskins, Mayor Frank Scott, Jr., and myself, occurred when Chief Humphrey initiated separate telephone calls. The decision was quickly made that the Arkansas State Police (“ASP”) and the Office of the Prosecuting Attorney (“the Prosecutor”) should conduct the criminal investigation necessitated by this officer involved shooting (“OIS”). Typically, the Department would conduct both the criminal, and the internal, investigation if one of its officers was involved in an OIS; however, because Chief Humphrey, as head of the Department, is also the final arbiter as to Department investigations – criminal, and internal.

Neither the City, nor through it the Department, are involved in the criminal investigation. Nor will the City or Department send a recommendation to the Prosecutor as to the conclusion to reach after the criminal investigation.

In the past, the City has been requested to provide information on various topics about City employees. If a record is a personnel record, the City makes a decision about AFOIA disclosure, informs the employee, and adheres to the statutory process to seek an opinion from your office about disclosure. *See* Ark. Code Ann. § 25-19-105 §§ (b)(6); (b)(12); and, (c). As the custodian of the records in question, the City seeks an opinion from your office as to the disclosure requested so far.

**THE CURRENT REQUEST FOR AFOIA GUIDANCE AS TO CHIEF HUMPHREY**

The Prosecutor has a very serious concern that the disclosure of any information the City has about Chief Humphrey before the conclusion of the criminal investigation creates an ethical issue. The Model Rules of Professional Conduct have specific guidelines as to actions taken by a Prosecutor in such an investigation.

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. A statement referred to in this paragraph ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

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- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
- (2) in a criminal case, or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(b) Notwithstanding paragraph (a) and its sub-paragraphs, a lawyer may state:

- (1) the claim, offense, or defense involved and, except where prohibited by law, the identity of persons involved;
- (2) the information contained in a public record;
- (3) that an investigation of the matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
  - (i) the identity, residence, occupation and family status of the accused;

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- (ii) that an investigation of the matter is in progress;
- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

ARK. RULES OF PROFESSIONAL CONDUCT, Rule 3.6. In addition, these Rules mandate special responsibilities of a prosecuting attorney:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilty of the accused or mitigates the offense, and, in connection with sentencing, disclosure to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) except for statements that are necessary to inform the public of the nature and extend of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the

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prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.

ARK. RULES OF PROFESSIONAL CONDUCT, Rule 3.8

The AFOIA exempts from disclosure “[u]ndisclosed investigations by law enforcement agencies of suspected criminal activity...” Ark. Code Ann. § 25-19-105 (b)(6). The Arkansas Supreme Court has clearly held that the phrase “undisclosed investigations by law enforcement” is synonymous with the description “ongoing criminal investigation.” *See Martin v. Musteen*, 303 Ark. 656, 660, 799 S.W.2d 540, 542 (1990). Requests for release of City records pursuant to AFOIA began January 1, 2022.<sup>2</sup> Many of these requests are clearly for records that are part of an ongoing criminal investigation and exempt from immediate disclosure pursuant to the AFOIA. For example, body camera footage of the OIS involving Chief Humphrey on December 31, 2021, is part of the initial criminal investigation. But, as noted in footnote 2, there was also a request for all “De-escalation Training” that Chief Humphrey had undergone. While such information may be relevant to an ongoing criminal investigation, it was not created for the criminal investigation. Hence, absent some other AFOIA exemption, the City would typically disclose any such public records.

This OIS investigation is not typical: the City is not conducting the criminal investigation. Further, the views of the Prosecutor are different:

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<sup>2</sup> The attached list and dates of requests shows the following for January 1, 2022:

- All body camera footage of the shooting incident involving Chief Humphrey on 31 December 2021
- All video the Department has of the and pertaining to the shooting incident Chief Humphrey was involved in on 31 December 2021
- All issuance and log out documentation for Body Cameras to Chief Humphrey, all Assistant Chiefs and all Majors for use on 31 December 2021
- The Crime Scene Log for the shooting incident involving Chief Humphrey on 31 December 2021 along with all documentation and communications pertaining to the log
- All documentation and audio pertaining to Chief Humphrey logging into the system on 31 December 2021
- All emails and memos from Chief Humphrey to Command Staff from 01 November 2021 to 01 January 2022
- All cell phone communications (including text messages) for Chief Humphrey on 31 December 2021 and 01 January 2022
- All “De-escalation Training” (including former agencies) the Department has for Chief Humphrey

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It is our office's position in every criminal investigation that no information be released until the case is closed...the rights of the accused and the integrity of the investigation are best protected...that practice.

E-mail from John F. Johnson, Chief Deputy Prosecuting Attorney to Thomas M. Carpenter, Little Rock City Attorney (January 5, 2022, 3:18 PM CST) (on file with writer).<sup>3</sup> It is the competing nature of two legitimate concerns – i.e., fairness to a person under investigation, and compliance with the AFOIA – that leads to this opinion request.

In response to Chief Deputy Prosecutor Johnson's request, the City took the position that it would honor the request made. However, as the requests increased, it became clear that there were a number of items that did not square with various interpretations of information that can be initially exempted from AFOIA disclosure.

The City believes that the following requests can be denied because the items sought are exempt from disclosure because of an ongoing criminal investigation:

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<sup>3</sup> The entire email reads:

Tom,

It is our office's position in every criminal investigation that no information be released until the case is closed. It is our opinion that the rights of the accused and the integrity of the investigation are best protected by following that practice. Also, because we have not received the investigative file [from the ASP], we cannot agree to any piecemeal release of information as there is no way for this office to know what information is relevant and what is not relevant. *Release of information prior to the closing of the case can only serve to taint the potential jury pool and potentially have a negative impact on the rights of the defendant.*

Finally, Rule 3.8 (e) of the Arkansas Rules of Professional Conduct states: The prosecutor in a criminal case shall: "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting...from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.

For these reasons, we would ask that no information pertaining to this investigation be released.

Please do not hesitate to contact me if you have further concerns.

E-mail from John F. Johnson, Chief Deputy Prosecuting Attorney to Thomas M. Carpenter, Little Rock City Attorney (January 5, 2022, 3:18 PM CST) [explanation added] [emphasis added] (on file with writer).

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1. All body camera footage of the shooting incident involving Chief Humphrey on 31 December 2021
2. All video the Department has of the and pertaining to the shooting incident Chief Humphrey was involved in on 31 December 2021
3. The Crime Scene Log for the shooting incident involving Chief Humphrey on 31 December 2021 along with all documentation and communications pertaining to the log
4. All Incident Reports pertaining to the shooting Chief Humphrey was involved in on 31 December 2021
5. All Incident Reports pertaining to the shooting Chief Humphrey was involved in on 31 December 2021
6. All issuance and log out documentation for Body Cameras to Chief Humphrey, all Assistant Chiefs and all Majors for use on 31 December 2021
7. Any and all records relating to the shooting incident and discharge of a service weapon regarding Chief Humphrey on 31 December 2021
8. Copies of radio traffic from 31 December 2021 regarding the shooting incident and subsequent response at the Superstop on Asher Avenue **[except any initial calls to 911 that there was a problem at the location and emergency help was requested]**

The City believes that the following items can be deemed partially exempt from disclosure because of an ongoing criminal investigation. However, the exemption would apply at most to the time frame of December 31, 2021 until the criminal investigation is closed. The exemptions the City believes are covered are in bold and underlined below.

7. All emails and memos from Chief Humphrey to Command Staff from 01 November 2021 to 01 January 2022 **[except any that pertain to the OIS on December 31 2021]**

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8. All cell phone communications (including text messages) for Chief Humphrey on 31 December 2021 and 01 January 2022 **[except any that pertain to the OIS on December 31 2021]**

9. All audio of all 911 calls pertaining to the incident **[meaning only those that reported an incident was in process, but not any that deal with the reaction of any person or entity that was involved to the OIS on December 31 2021]**

10. All FOI requests made to the Little Rock Police Department from 31 December 2021 to 06 January 2022, along with all responses and information supplied to each request **[except any that pertain to the OIS on December 31 2021]**

11. All documentation and audio pertaining to Chief Humphrey logging into the system on 31 December 2021 **[except any that pertain to the OIS on December 31 2021]**

12. Copies of any Incident Reports from 31 December 2021 regarding the shooting incident and subsequent response at the Superstop on Asher Avenue **[exception any initial report completed by Chief Humphrey as would be done in the normal course of business]**

13. Copies of email and text messages to or from any city employee, board member, city manager, city attorney, mayor and his staff regarding the shooting incident on 31 December 2021 and subsequent response at the Superstop on Asher Avenue **[except any that went sent by, or to, the ASP or the Prosecutor as part of the ongoing criminal investigation]**

14. Copies of any correspondence between the city attorney, any [Little Rock Police Department] employee and any member of the staff of the [Pulaski County Prosecuting Attorney's office] regarding the 31 December 2021 and subsequent response at the Superstop on Asher Avenue **[except any that went sent by, or to, the ASP or the Prosecutor as part of the ongoing criminal investigation]**

The City believes that the following items are exempt from disclosure because they deal with an employee evaluation that has not resulted in a demotion, suspension, or termination, nor has any City administrative process been completed. *See* Ark. Code Ann. § 25-19-105 (c).



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15. Copies of any records regarding the administrative leave/suspension of Chief Humphrey as a result of the 31 December 2021 shooting incident

16. Copies of an complaints filed about Chief Humphrey without regard to the outcome of any investigation or personnel action

Finally, the City believes that it should comply with the disclosure of the information contained in the following requests.<sup>4</sup>

17. Records of the City [of Little Rock] and the Little Rock Police Department pertaining to Chief Humphrey's training, certification or qualifications with regard to firearms, including but not limited to, daytime and nighttime shooting and/or other training on the use of deadly force

18. Documentation of training received by Chief Humphrey regarding [Body Worn Cameras] and [Motor Vehicle Recording System]

19. Any internal [memoranda] sent by the Chief of Police or other [Little Rock Police Department] leadership regarding [Body Worn Cameras] and [Motor Vehicle Recording System] since 01 January 2021 to 07 January 2022]

20. Documentation of Chief Humphrey's [Commission on Law Enforcement Standards & Training] approved course for firearms training and score for the last [two] years

21. A list of who was in attendance of the "Weapon Mounted Light Class and Low Light Pistol Qualification" on 10 November 2021 from 1600-1900

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<sup>4</sup> The City received three additional requests, but these three really did not seek public records that would be subject to the AFOIA. Instead, questions were posed. They are listed here only because the attachment to this letter shows the dates of all requests received by the City through January 13, 2022. Two of the requests sought the creation of a public record that would answer questions about the manner in which ASP conducted the criminal investigation as opposed to the procedure set out in the Department's general orders, and whether there were drug screenings done as required when the Department conducts a criminal investigation.

The third item sought public records which supported statements in a press release issued on January 12, 2022. This office stated that such records, if they exist, should be disclosed.

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22. A list of who was in attendance of the “Deadly Force” instruction with [Chief Deputy City Attorney] Alex Betton on 01 December 2021 from 0800-1000
23. A list of all sworn [Little Rock Police Department] personnel who [have] not taken the “Weapon Mounted Light Class and Low Light Pistol Qualification” course
24. Copies of any training files of Chief Humphrey, including firearm qualification, from date of hire through 12 January 2022
23. All AFOIA requests submitted by staff members of KATV-Channel 7, KTHY-Channel 11, KARK-Channel 4, Fox 16, and [Mr.] Joseph Flaherty of the *Arkansas Democrat-Gazette* to all [City of Little Rock] departments and agencies from 01 January 2021 to 12 January 2022

The City has no interest in adversely impacting the Prosecutor’s desire to conduct a criminal investigation that meets the ethical standards set forth above. It is true that the first AFOIA case rejected concern about the attorney/client privilege aspect of the predecessor to these rules. *See Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). Yet, that opinion was not written with any concept of the speed of information present now, nor with the numerous platforms available, used, and consulted, by people seeking information from other than traditional news sources. In such an era, does the concern raised by the Prosecutor impact any AFOIA obligation of the City to disclose information? Further, does such an impact extend also to personnel records, or performance evaluation records.

The guidance of your office on these questions is requested by the custodian of the records at issue here. Please let me know if I can provide any additional information.

Sincerely,



Thomas M. Carpenter  
Little Rock City Attorney

TMC:ct

att. (1) List of AFOIA requests

cc. Chief Keith Humphrey, Little Rock Police Department  
Mayor Scott and Members of the Little Rock Board of Directors

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Assistant Chief Crystal Young-Haskins, Little Rock Police Department

Larry Jegley, Prosecuting Attorney for the 6<sup>th</sup> Circuit

John Johnson, Chief Deputy Prosecuting Attorney for the 6<sup>th</sup> Circuit

Bill Sadler, Public Information Officer, Arkansas State Police

Alexander J. Betton, Chief Deputy City Attorney

Debbie Wisdom, Law Office Administrative Coordinator

Stacey Witherell, Director, Little Rock Department of Human Resources

**NATURE OF ITEMS SOUGHT PURSUANT TO AFOIA RELEVANT TO THIS  
REQUEST FOR AN OPINION OF THE ATTORNEY GENERAL**

**31 DECEMBER 2021**

■ **USE OF DEADLY FORCE INCIDENT OCCURRED**

**01 JANUARY 2022**

- All body camera footage of the shooting incident involving Chief Humphrey on 31 December 2021
- All video the Department has of the and pertaining to the shooting incident Chief Humphrey was involved in on 31 Decemeber 2021
- All issuance and log out documentation for Body Cameras to Chief Humphrey, all Assistant Chiefs and all Majors for use on 31 December 2021
- The Crime Scene Log for the shooting incident involving Chief Humphrey on 31 December 2021 along with all documentation and communications pertaining to the log
- All documentation and audio pertaining to Chief Humphrey logging into the system on 31 December 2021
- All emails and memos from Chief Humphrey to Command Staff from 01 November 2021 to 01 January 2022
- All cell phone communications (including text messages) for Chief Humphrey on 31 December 2021 and 01 January 2022
- All “De-escalation Training” (including former agencies) the Department has for Chief Humphrey

**02 JANUARY 2022**

**03 JANUARY 2022**

**04 JANUARY 2022**

- Records of the City [of Little Rock] and the Little Rock Police Department pertaining to Chief Humphrey’s training, certification or qualifications with regard to firearms, including but not limited to, daytime and nighttime shooting and/or other training on the use of deadly force

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**06 JANUARY 2022**

- All firearm qualifications on file for Chief Humphrey along with all documentation and communications pertaining to the records; please include all remedial training pertaining to the qualifications, if any
- All Incident Reports pertaining to the shooting Chief Humphrey was involved in on 31 December 2021
- All audio of all 911 calls pertaining to the incident
- All FOI requests made to the Little Rock Police Department from 31 December 2021 to 06 January 2022, along with all responses and information supplied to each request

**07 JANUARY 2022**

- (To LRPD Major Andre Dyer): It is my understanding that after the shooting [Chief] Humphrey was involved in on [31 December 2021] you escorted him to his office to meet with his attorney instead of following General order 303 and escorting him to the Major Crimes Division at the 12<sup>th</sup> Street Station.

Why did you violate this Order? Did [Chief] Humphrey order you to violate [G.O.] 303? Surely you did not make it worse by not taking him for Drug and Alcohol Screening?

**The recommendation of the Acting Chief of Police and the Office of the Chief of Police referenced in a City press release dated 12 January 2022**

- 
- Documentation of training received by Chief Humphrey regarding [Body Worn Cameras] and [Motor Vehicle Recording System]
- Any internal [memoranda] sent by the Chief of Police or other [Little Rock Police Department] leadership regarding [Body Worn Cameras] and [Motor Vehicle Recording System] since 01 January 2021 to 07 January 2022]
- Documentation of Chief Humphrey's [Commission on Law Enforcement Standards & Training] approved course for firearms training and score for the last [two] years
- A list of who was in attendance of the "Weapon Mounted Light Class and Low Light Pistol Qualification" on 10 November 2021 from 1600-1900
- A list of who was in attendance of the "Deadly Force" instruction with [Chief Deputy City Attorney] Alex Betton on 01 December 2021 from 0800-1000
- A list of all sworn [Little Rock Police Department] personnel who [have] not taken the "Weapon Mounted Light Class and Low Light Pistol Qualification" course

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**08 JANUARY 2022**

**09 JANUARY 2022**

**10 JANUARY 2022**

**11 JANUARY 2022**

- Video of the Chief Humphrey shooting incident

**12 JANUARY 2022**

- Copies of radio traffic from 31 December 2021 regarding the shooting incident and subsequent response at the Superstop on Asher Avenue
- Copies of any Incident Reports from 31 December 2021 regarding the shooting incident and subsequent response at the Superstop on Asher Avenue
- Copies of any training files of Chief Humphrey, including firearm qualification, from date of hire through 12 January 2022
- Copies of any [Motor Vehicle Recording System] and body worn camera footage from 31 December 2021 regarding the shooting incident and subsequent response at the Superstop on Asher Avenue
- Copies of email and text messages to or from any city employee, board member, city manager, city attorney, mayor and his staff regarding the shooting incident on 31 December 2021 and subsequent response at the Superstop on Asher Avenue
- Copies of any correspondence between the city attorney, any [Little Rock Police Department] employee and any member of the staff of the [Pulaski County Prosecuting Attorney's office] regarding the 31 December 2021 and subsequent response at the Superstop on Asher Avenue
- Copies of any records regarding the administrative leave/suspension of Chief Humphrey as a result of the 31 December 2021 shooting incident
- Copies of an complaints filed about Chief Humphrey without regard to the outcome of any investigation or personnel action
- Copies of any records regarding complaints made about Chief Humphrey made by [Mr.] Russ Racop including, but not limited to[,] the one recently sustained and sent to [Director of the Little Rock Human Resources Department] Witherell
- All AFOIA requests submitted by staff members of KATV-Channel 7, KTHY-Channel 11, KARK-Channel 4, Fox 16, and [Mr.] Joseph Flaherty of the *Arkansas Democrat-Gazette* to all [City of Little Rock] departments and agencies from 01 January 202` to 12 January 2022

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- **The recommendation of the Acting Chief of Police and the Office of the Chief of Police referenced in a City press release dated 12 January 2022**
  
- **Any and all records relating to the shooting incident and discharge of a service weapon regarding Chief Humphrey on 31 December 2021**