



July 15, 2016

BY EMAIL

The Honorable Libby Garvey, Chair  
The Honorable Jay Fisetto, Vice Chair  
The Honorable Katie Cristol  
The Honorable Christian Dorsey  
The Honorable John Vihstadt  
Arlington County Board  
2100 Clarendon Blvd. Suite 300  
Arlington, VA 22201

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RE: Item #60, County Board Recessed Meeting, July 19, 2016

Dear Chair Garvey, Vice Chair Fisetto and Board Members:

We understand that the County Board of Arlington County (the County Board) will consider at its July 19<sup>th</sup> Recessed Meeting approval of a license agreement between the County Board and the Defense Threat Reduction Agency (DTRA) that would permit the installation of "explosive detection equipment" on County property in public spaces. While some instruments such as seismographs do not raise any significant privacy issues, the placement on public property of other kinds of recording devices, such as acoustic microphones, do raise potential constitutional and policy issues if they are capable of recording private conversations or otherwise effecting mass surveillance of the conduct and conversations of members of the public. Even if equipment to be installed in public spaces is merely suspected of being capable of listening in on and recording the audio or video of private conversations, the reported presence of such equipment may create chilling effects on people's conduct in public spaces as people fear that their private conversations could be recorded and catalogued by the government.

For these reasons, we respectfully request that the County Board take action to deny the DTRA permission to install this equipment on County-owned property, unless the DTRA agrees to allow the County to make the specifications regarding the capabilities of the equipment and any future "updates" to the equipment transparent to the public. Devices for measuring "seismic, acoustic, air pressure, radiation, light, and radio frequency signals" are all well-established technologies, and there no is way to design an explosive device that evades the creation of these kinds of signals. Accordingly, there would seem to be little justification for keeping information regarding the nature of the DTRA equipment to be placed in Arlington and other cities around the country hidden from the public.

Arlington County staff appear to suggest that the DTRA's blanket request that the license agreement and all supporting material may be accommodated simply by

citing Section 2.2-2705.2 subsection 4 of the Virginia Freedom of Information Act (FOIA) quoted here:

4. Information concerning the prevention or response to terrorist activity or cyber attacks, including (i) critical infrastructure information; (ii) vulnerability assessments, operational, procedural, transportation, and tactical planning or training manuals, and staff meeting minutes; (iii) engineering or architectural plans or drawings, or information derived from such plans or drawings; and (iv) information not lawfully available to the public regarding specific cybersecurity threats or vulnerabilities or security plans and measures of an entity, facility, building, structure, information technology system, or software program if disclosure of such information would (a) reveal the location or operation of security equipment and systems, elevators, ventilation, fire protection, emergency, electrical, telecommunications or utility equipment and systems of any public building, structure or information storage facility, or telecommunications or utility equipment or systems or (b) jeopardize the safety of any person.

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The same categories of information concerning any person or entity submitted to a public body for the purpose of antiterrorism response planning or cybersecurity planning or protection may be withheld from disclosure if such person or entity in writing (1) invokes the protections of this subdivision, (2) identifies with specificity the information for which protection is sought, and (3) states with reasonable particularity why the protection of such information from public disclosure is necessary to meet the objective of antiterrorism, cybersecurity planning or protection, or critical infrastructure information security and resilience. Such statement shall be a public record and shall be disclosed upon request.

Any public body receiving a request for records excluded under this subdivision shall notify the Secretary of Public Safety and Homeland Security or his designee of such request and the response made by the public body in accordance with § [2.2-3704](#).

In order for the County to accede to the DTRA's confidentiality request as to any of the information related to the installation of this equipment, however, FOIA makes clear that the County Board (not the staff) must make certain findings that: 1) any information to be held confidential (i.e., "the Agreement and supporting documentation") is, in fact, related to terrorism response, involves "critical infrastructure" or another permitted category of excludable information, and 2) the disclosure of the information would reveal the location of the equipment or jeopardize safety.

In addition, the law requires that the County Board (not the staff) make a written statement on the record that identifies "with specificity" what information is to be withheld from public disclosure and states with "reasonable particularity" why the

protection of the information withheld is “necessary” to meet the objective of “antiterrorism, cybersecurity planning or protection, or critical infrastructure information security and resilience.”

The information included in the County Board report associated with Item #60 on the County Board’s agenda does not meet the specificity and particularity requirements that are required to invoke the protections against disclosure offered by the Virginia FOIA and could not be cited in support of withholding the information if access to the documents is requested by the public in the future.

The ACLU believes that the County Board should default in favor of transparency in all public actions whenever and to the greatest extent possible. In this case, without such transparency, citizens can have no assurance that the equipment the DTRA intends to place in Arlington does not have the capability of recording private conversations conducted in public spaces or of invading personal privacy in other ways. Moreover, without such transparency, citizens can have no assurance that future upgrades of the equipment will not introduce such capabilities. For these reasons, the ACLU of Virginia asks that the County Board refuse to accede to DTRA’s request to place “explosive detection equipment” on Arlington County property unless DTRA agrees, at a minimum, to allow the County to disclose to the public the nature and capabilities of the equipment to be located in the County.

Very truly yours,



Claire Guthrie Gastañaga  
Executive Director  
ACLU of Virginia

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