

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 24-CV-02289

VERMONT JOURNALISM TRUST,)
 Plaintiff,)
)
 v.)
)
VERMONT DEPARTMENT OF)
PUBLIC SAFETY,)
 Defendant.)
)

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant Vermont Department of Public Safety (“the Department”), by and through its counsel the Vermont Attorney General’s Office, hereby moves for summary judgment pursuant to Vermont Rule of Civil Procedure 56. In support of the motion, Defendant submits the following Memorandum of Law and accompanying Statement of Undisputed Material Facts.

MEMORANDUM OF LAW

Preliminary Statement

Plaintiff seeks to publicly broadcast video and audio footage of the Vermont State Police’s investigation of Eva Vekos for drunk driving immediately before she will face a jury of her peers as a criminal defendant. Both the State prosecuting the drunk driving charge and the criminal defendant Ms. Vekos stand to suffer tangible harm by the premature release of this footage, which will be key evidence in her trial. Vermont’s Public Records Act (1 V.S.A. § 317) (“PRA”), and its federal counterpart the Freedom of Information Act (“FOIA”), both recognize the harm presented by this scenario and provide a pathway to prevent it – an exemption to the requirement to disclose public records when those records deal with the investigation of a crime and their release is expected to interfere with the prosecution (and defense) of that crime.

In this particular crime, driving under the influence of intoxicating liquor, information as simple as Ms. Vekos' appearance on video and statements made by Ms. Vekos captured on video and audio, have significant evidentiary value. Whether or not Ms. Vekos appears intoxicated in the video and the statements she made will persuade jurors as to whether the officers' actions were reasonable, and whether Ms. Vekos is guilty of the crime with which she is charged. While the applicable exemption does not apply to an entire investigative file, it does apply to entire categories of records, and here the Plaintiff seeks only one category of records – the audio and video footage of Ms. Vekos' interactions with VSP officers. Therefore, in this case, the exemption prevents the release of all of the footage Plaintiff requested.

Factual Background

On January 26, 2024, VTDigger reporter Alan Keays submitted a Public Records Act request to the Department requesting “any audio and video footage of Vermont State Police interactions with Eva Vekos on January 25, including any body cam, dash cam or footage and audio from the New Haven Barracks.” *Defendant's Statement of Undisputed Material Facts* (“SUMF”), ¶ 1. The Department responded to the request in writing on February 1, 2024, declining to produce the requested footage noting that it relates to an ongoing criminal investigation and is exempt from disclosure as “records dealing with the detection and investigation of crime” under 1 V.S.A. § 317(c)(5). *Id.*, ¶ 2. The Department asserted that it consulted with the prosecutor's office (the Attorney General's Office) and that the prosecutor advised that the release of the footage “could interfere with the ongoing investigation and with any potential enforcement proceeding(s) that may result from the investigation.” *Id.*, ¶ 3. On February 15, 2024, Mr. Keays appealed the Department's decision. *Id.*, ¶ 4. Public Safety Commissioner Jennifer Morrison responded to the appeal on February 23, 2024, denying the

request again, noting the same issue with the active investigation and enforcement proceedings, and adding the exemption under 1 V.S.A. § 317(c)(3) applicable to records that would cause a professional to violate the relevant ethical standards. *Id.*, ¶ 5. Commissioner Morrison’s letter explains that the prosecutors risk violating the Vermont Rules of Professional Conduct if the footage were to become public, and the PRA prevents disclosure under those circumstances pursuant to 1 V.S.A. § 317(c)(3). *Id.*, ¶ 6.

There is currently an active criminal case against Eva Vekos related to the events of January 25, 2024. SUMF, ¶ 7. Assistant Attorney General Rosemary Kennedy is assigned to the enforcement proceedings involving Eva Vekos. *Id.*, ¶ 8. The audio and video footage withheld by the Department of Public Safety concerns the Vermont State Police’s investigation of Ms. Vekos for driving under the influence of intoxicating liquor (“DUI”) on or about January 25, 2024. *Id.*, ¶ 9. This investigation led to Ms. Vekos being criminally charged with a violation of 23 V.S.A. § 1201(a)(2) and she was arraigned on this charge on February 12, 2024. *Id.*, ¶ 10.

Ms. Vekos is expected to have a jury trial on her DUI charge in February of 2025. SUMF, ¶ 11. The requested footage contains direct and circumstantial evidence of whether Ms. Vekos committed the crime of which she is accused. *Id.*, ¶ 12. Every aspect of Ms. Vekos’ presentation on the night of January 25, 2024, including the way she speaks, what she says, the way her face appears, her interactions, her coordination and movement, her demeanor, etc., is at issue in the trial and will be the subject of the jury’s determinations regarding her guilt. *Id.*, ¶ 13. The prosecutor intends to use the requested footage in trial as evidence of Ms. Vekos’ guilt and believes it is imperative that the jurors view this evidence in the context of a trial and not through a media source or any other preview outside of the courtroom. *Id.*, ¶ 14.

The requested footage is also evidence that relates to the reasonableness of the officers' questioning of Ms. Vekos and their conduct in response to her actions. SUMF, ¶ 15. The prosecutor anticipates that the officers' questioning and conduct will be challenged by Ms. Vekos' defense counsel, Mr. Sleight. *Id.* The prosecutor believes it is imperative that the jurors view this evidence and hear the arguments in the context of a trial and not through a pre-trial media source or any other preview outside of the courtroom. *Id.* All three officers that appear in the footage, Trooper Kelsey Dobson, Sergeant Eden Neary, and Detective Trooper Ryan Anthony, are expected to testify at the trial. *Id.*, ¶ 16.

The release of the requested footage prior to the trial could reasonably be expected to interfere with the proceedings by unnecessarily exerting influence on potential jurors' perceptions of Ms. Vekos and the witnesses, including whether they are credible, as well as the evidence to be presented at trial. SUMF, ¶ 17. The disclosure of the records to the media in this case carries a substantial risk of tainting jury impartiality and witness testimony because of the heightened media coverage and interest in Ms. Vekos' arrest, her subsequent communications with law enforcement, medical leave, and bar license. *Id.*, ¶ 18. Ms. Vekos, like any other defendant, is entitled to a fair trial and the evidence should be fairly considered by a jury of her peers, in the context of a trial. *Id.* Counsel for Ms. Vekos has expressed concern that the prior release of the requested video may impact his client's ability to receive a fair trial. *Id.*, ¶ 19. The venue of Ms. Vekos' trial has already been moved to Chittenden County. *Id.*, ¶ 20. The prosecutor is concerned that widespread dissemination of this evidence will further limit the jury pool and risk ensuring Ms. Vekos a fair trial full of impartial and unbiased jurors. *Id.*

Legal Standard

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

V.R.C.P. 56(a); *see also Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 14, 200 Vt. 125, 129 A.3d 108. In determining whether a genuine dispute of material fact exists, the Court generally accepts allegations by the non-moving party as true; however, those allegations must be “supported by affidavits or other admissible evidence.” *Hammond v. Univ. of Vt. Med. Ctr.*, 2023 VT 31, ¶ 23. “[B]are allegations” are not sufficient to establish a disputed material fact. *Johnson v. Harwood*, 2008 VT 4, ¶ 5, 183 Vt. 157, 945 A.2d 875. And “[a] dispute of fact is material only if it might affect the outcome.” *Hammond*, 2023 VT 31, ¶ 23 (quotation omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Id.*

“Summary judgment is the procedural vehicle by which most FOIA actions are resolved.” *Radar Online LLC v. Fed. Bureau of Investigation*, 692 F. Supp. 3d 318, 336 (S.D.N.Y. 2023) citing *Jones-Edwards v. Appeal Bd. of Nat. Sec. Agency Cent. Sec. Agency*, 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005). “In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that [1] its search was adequate[,] and [2] any withheld documents fall within an exemption to the FOIA.” *Id.* citing *Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

ARGUMENT

1. **The requested records are exempt from disclosure under § 317(c)(5)(A)(i)-(ii) because they deal with the detection and investigation of a crime and can reasonably be expected to interfere with enforcement proceedings and deprive Ms. Vekos of her right to a fair trial.**

The records Plaintiff seeks are exempt from disclosure based on the plain language of 1 V.S.A. § 317(c)(5)(A)(i)-(ii), which has substantially similar language as FOIA exemption 5 U.S.C. § 552(b)(7)(A). Both 1 V.S.A. § 317(c)(5)(A)(i)-(ii) and 5 U.S.C. § 552(b)(7)(A) “permit[] government agencies to withhold records or information compiled for law enforcement purposes where the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings. *Radar Online LLC v. Fed. Bureau of Investigation*, 692 F. Supp. 3d 318, 337 (S.D.N.Y. 2023) (internal citations and quotations omitted). “The purpose of this exemption is to prevent harm to the government’s case in court by not allowing litigants earlier or greater access to agency investigatory files than they would otherwise have.” *New York Times Co. v. United States Dep’t of Just.*, 390 F. Supp. 3d 499, 512 (S.D.N.Y. 2019) (internal citations omitted) (Referring to FOIA exemption 5 U.S.C. § 552(b)(7)(A) which has similar language to 1 V.S.A. § 317(c)(5)(A)(i)).

“Exemption 7(A) reflects the Congress’s recognition that ‘law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case.’” *Citizens for Resp. & Ethics in Washington v. U.S. Dep’t of Just.*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978)).

As the *Radar* court has explained,

[i]n order to demonstrate that Exemption 7(A) applies, the government must satisfy three elements. First, as a threshold matter, the government must show that [sic] “that the requested records were compiled for law enforcement purposes.” *Local 32B-32J, Serv. Employees Int’l Union, AFL-CIO v. Gen. Servs. Admin.*, 1998 WL 726000, at *7 (S.D.N.Y. Oct. 15, 1998) (internal quotation marks omitted). Second, the government must show that “a law enforcement proceeding is pending or prospective.” *Amnesty Int’l USA v. C.I.A.*, 728 F. Supp. 2d 479, 525 (S.D.N.Y. 2010). With respect to this element, “it is sufficient that the government’s ongoing...investigation is likely to lead to [law enforcement] proceedings.” *Azmy v. U.S. Dept. of Def.*, 562 F. Supp. 2d 590, 605 (S.D.N.Y. 2008). Third, the government must show that “release of the information could reasonably be expected to cause some articulable harm.” *Amnesty Int’l*, 728 F. Supp. 2d at 525.

Radar Online LLC, 692 F. Supp. 3d at 337.

Notably, “[u]nder exemption 7(A) the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding. Rather, federal courts may make generic determinations that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.” *Radar Online LLC*, 692 F. Supp. 3d at 342 (citing *Radcliffe v. I.R.S.*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008), *aff’d*, 328 F. App’x 699 (2d Cir. 2009)) (internal citation omitted).

Moreover, “[c]ategorical withholding is often appropriate under Exemption 7(A).” *Citizens for Resp. & Ethics in Washington v. U.S. Dep’t of Just.*, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (citing *Robbins Tire*, 437 U.S. at 236, 98 S.Ct. 2311 (“Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally ‘interfere with enforcement proceedings.’”)). Therefore, an agency may satisfy its burden of proof “by grouping documents in categories and offering generic reasons for withholding the documents in each category.” *Id.* “Because generic determinations are

permitted, the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document. The government may not, however, make its justifications file-by-file.” *Radar Online LLC*, 692 F. Supp. 3d at 342.

Here, Plaintiff requests “any audio and video footage of Vermont State Police interactions with Eva Vekos on January 25, including any body cam, dash cam or footage and audio from the New Haven Barracks.” Plaintiff’s request is for a specific type of records with specific content, not the whole file. Therefore this case deals with only one category of records – video and audio footage of VSP interactions with Ms. Vekos on the night of January 25 – and that entire category is exempt based on the three factor test used by the Second Circuit Court of Appeals to determine whether exemption 5 U.S.C. § 552(b)(7)(A) applies, which has similar language to 1 V.S.A. § 317(c)(5)(A)(i).

As to the first factor, all requested records were compiled by VSP for law enforcement purposes. SUMF, ¶ 9; *See Halpern v. F.B.I.*, 181 F.3d 279, 296 (2d Cir. 1999) (“[A]ll records of investigations compiled by the FBI are for law enforcement purposes.”).

As to the second factor, Ms. Vekos was charged with a crime based on the events in the video and enforcement proceedings are pending. *See* 24-CR-01332; SUMF, ¶ 10. The criminal proceeding is ongoing in Chittenden Superior Court and Ms. Vekos is expected to have a jury trial on her DUI charge in February of 2025. *See* 24-CR-01332; SUMF, ¶ 11.

As to the third factor, the release of the footage can be expected to interfere with the ongoing criminal case against Ms. Vekos and could deprive Ms. Vekos of her right to a fair trial. The video footage Plaintiff requested is expected to be pivotal evidence in Ms. Vekos’ trial as it contains direct and circumstantial evidence of whether Ms. Vekos committed the crime of which she is accused. SUMF, ¶ 12. Every aspect of Ms. Vekos’ presentation on the night of

January 25, 2024, including the way she speaks, what she says, the way her face appears, her interactions, her coordination and movement, her demeanor, etc., is at issue in the trial and will be the subject of the jury's determinations regarding her guilt. SUMF, ¶ 13. The prosecutor intends to use the requested footage in trial as evidence of Ms. Vekos' guilt. *Id.* ¶ 14. It is integral to the prosecutor's ability to put on her case that the jurors view this evidence in the context of a trial and not through a media source or any other preview outside of the courtroom. *Id.*

The requested footage is also evidence that relates to the reasonableness of the officers' questioning of Ms. Vekos and their conduct in response to her actions. SUMF, ¶ 15. The officers' questioning and conduct will likely be challenged by Ms. Vekos' defense counsel. *Id.* Again, it is imperative for the prosecution that the jurors view this evidence and hear the arguments in the context of a trial and not through a pre-trial media source or any other preview outside of the courtroom. *Id.* All three officers that appear in the withheld footage, Trooper Kelsey Dobson, Sergeant Eden Neary, and Detective Trooper Ryan Anthony, are expected to testify at the trial. *Id.*, ¶ 16. The release of the requested footage prior to the trial could reasonably be expected to interfere with the proceedings by unnecessarily exerting influence on potential jurors' perceptions of the government's case, including the witnesses and whether they are credible, the evidence, and the defendant, Ms. Vekos. *Id.* ¶ 17.

The disclosure of the records to the media in this case carries a substantial risk of tainting jury impartiality and witness testimony because of the heightened media coverage and interest in Ms. Vekos' arrest, her subsequent communications with law enforcement, medical leave, and bar license. SUMF, ¶ 18. Ms. Vekos, like any other defendant, is entitled to a fair trial and the evidence should be fairly considered by a jury of her peers, in the context of a trial. *Id.* Counsel

for Ms. Vekos has expressed concern that the prior release of the requested video may impact his client's ability to receive a fair trial. *Id.* ¶ 19. The venue of Ms. Vekos' trial has already been moved to Chittenden County. *Id.* The prosecutor is concerned that widespread dissemination of this evidence will further limit the jury pool and risk ensuring Ms. Vekos a fair trial full of impartial and unbiased jurors. *Id.*, ¶ 20. For all of the foregoing reasons, the requested records can reasonably be expected to interfere with Ms. Vekos' upcoming trial.

Accordingly, each of the elements of the test for whether the records are exempt under 5 U.S.C. § 552(b)(7)(A) and the analogous 1 V.S.A. § 317(c)(5)(A)(i) have been met and the category of records requested by Plaintiff is exempt from disclosure.

CONCLUSION

For all of the foregoing reasons, Defendant Vermont Department of Public Safety respectfully requests that this Court grant summary judgment to Defendant.

DATED at Montpelier, Vermont, this 11th day of December 2024.

STATE OF VERMONT

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