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Vermont Superior Court
Washington Unit
24-CV-02289

STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Washington Unit — Docket No. 24-CV-02289

VERMONT JOURNALISM TRUST,
Plaintiff,

v.

VERMONT DEPARTMENT OF PUBLIC SAFETY,
Defendant.

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, CROSS-MOTION FOR SUMMARY JUDGMENT, AND INCORPORATED MEMORANDUM OF LAW

Because there is no genuine dispute as to any material fact, and Plaintiff Vermont Journalism Trust ("VTDigger") is entitled to judgment as a matter oflaw, VTDigger cross-moves for summary judgment in this matter, pursuant to V.R.C.P. 56, and opposes Defendant Vermont Department of Public Safety's ("Department") Motion for Summary Judgment. In support of this Motion, it offers below: (1) the following incorporated Memorandum of Law; and (2) its Statement of Undisputed Material Facts.

MEMORANDUM OF LAW

PRELIMINARY STATEMENT

In this Vermont Public Records Act ("PRA") suit, VTDigger seeks access to bodycam, dashcam and audio footage of the arrest of Addison County State's Attorney Eva Vekos for driving under the influence. These records are of significant public interest, given Ms. Vekos's role as a prosecutor and the impact of this event on her ability to perform her duties and, temporarily, to even practice law.

In denying the Department's Motion to Dismiss, this Court ruled that "at least some" of the requested "footage likely would be accessible as reflecting [Ms. Vekos's] initial arrest," given that the PRA mandates that initial arrest records must be made public. Op., dated Oct. 30, 2024, at 11. Despite the Court's ruling, the Department continues to ignore the plain text of the PRA in arguing baselessly that all of the requested records can be withheld blanket-fashion under the interference and fair trial exemptions. Neither of these exemptions apply to the requested records because the Department has failed to meet its burden to demonstrate that pre-trial publicity of an arrest that was already widely reported on would somehow seriously interfere with either an enforcement proceeding or the fair trial right.

This Court should thus deny the Department's Motion for Summary Judgment and grant VTDigger's Motion for Summary Judgment.

STATEMENT OF FACTS

On January 25, 2024, Addison County State's Attorney Eva Vekos arrived at a home on Swinton Road in Bridport, VT to assist Vermont State Police with a suspicious death investigation. *See* Plaintiffs Statement of Undisputed Material Facts ("Plaintiffs SUMF") ,r,r 1-2. Soon after she arrived, state police troopers at the scene suspected Ms. Vekos was under the influence of alcohol. *See id.* ,r,r 3-4. Ms. Vekos refused to complete a field sobriety test, telling state police officers that "[i]t doesn't matter if I do the tests or not, however I perform, you're going to take me under arrest." *See id.* ,r 8. Ms. Vekos was then arrested for driving under the influence. *See id.* ,r 9. The interaction between Ms. Vekos and the responding state troopers was recorded on a trooper's body camera starting at around 9:20 p.m. *See id.*,r 4.

On January 26, 2024, VTDigger reporter Alan Keays submitted a formal PRA request to the Vermont Department of Public Safety seeking "all audio and video footage of Vermont State Police interactions with Eva Vekos on Jan. 25, 2024." *See id.* ,r 11.

On February 1, 2024, DPS Public Records Act Specialist Sam Weaver denied the request, citing the PRA's detection and investigation of crime exemption under 1 V.S.A. §317(c)(5)(A)(i). *See id.* ,r 12. On February 15, 2024, Mr. Keays appealed Mr. Weaver's denial to DPS Commissioner Jennifer Morrison. *See id.* ,r 13.

On February 2, 2024, the State filed charging documents publicly in the criminal proceedings against Ms. Vekos that describe in granular detail the police interactions with Ms. Vekos leading up to her arrest. *See* Information By Attorney General ("Charging Documents"), *State v. Vekos,* Dkt. No. 24-CR-01332, attached as **Exhibit A.**

On February 7, 2024, VTDigger ran a story quoting extensively from the Charging Documents. *See id.* ,r 10 (citing Alan J. Keays, *'Can't You Just Have a Friend Come and Get Me,' Prosecutor Asked Trooper During DUI Probe,* Documents Reveal, VTDIGGER (Feb. 7, 2024), https://vtdigger.org/2024/02/07/cant-you-just-have-a-friend-come-and-get-me-prosecutor-asked-trooper-during-dui-probe-documents-reveal/).

On February 23, 2024, Commissioner Morrison denied Mr. Keays's appeal, reiterating the same exemption as Mr. Weaver and asserted the professional ethics confidentiality exemption under 1 V.S.A. § 317(c)(3) and the litigation exemption under 1 V.S.A. § 317(c)(14). *See* Compl. ,r 13.

On June 10, 2024, VTDigger filed this lawsuit to obtain the audio and video footage from Ms. Vekos's arrest, as required by the PRA. *See id.* ,r 14. VTDigger filed this suit to promote public accountability in the public interest. *See id.* ,r 15. The public's interest is especially strong here in

light of actions Ms. Vekos took in the wake of her arrest, including refusing to work collaboratively with law enforcement officials, taking an unexplained three-week medical leave, and continuing to act as Addison County State's Attorney despite a temporary suspension of her law license. *See id.* ,r 16.

On Dec. 3, 2024, the Department filed a *Vaughn* Index following the Court's denial of the Department's Motion to Dismiss. *See id.* ,r 17. The *Vaughn* Index contains nine records, which are all described as footage depicting Ms. Vekos and her interactions with police the night of her arrest. *See id.* ,r 18. The footage begins at the investigation scene and ends once Ms. Vekos is processed at the New Haven Barracks. *See id.*

ARGUMENT

I. THE REQUESTED FOOTAGE MUST BE DISCLOSED BECAUSE IT DEPICTS THE INITIAL ARREST OF MS. VEKOS

As this Court recognized in its opinion denying the Department's Motion to Dismiss, "if Subsection (c)(5)(8)" of the PRA "applies, disclosure prevails" because that provision mandates that initial arrest records be made public. Op., dated Oct. 30, 2024, at 5. The plain text of the PRA unequivocally declares that "records reflecting the initial arrest of a person ... shall be public"- "[n]otwithstanding" exemptions that would otherwise shield records that, if disclosed, would deprive a defendant of the right to a fair trial or could interfere with enforcement proceedings. Op. at 11 (citing 1 V.S.A. § 317(c)(5)(B)). Because "[i]t is clear that Ms. Vekos was arrested on the relevant date" and "the arrest appears in the requested footage," the Court correctly already found that "at least some of that footage likely would be accessible as reflecting her initial arrest." *Id.*

The Vermont Supreme Court has interpreted the scope of the term "initial arrest" broadly to include "all records . . . that were identified by the police as being generated as a result of the incident[.]" *Galloway v. Town of Hartford,* 2012 VT 61, ,r 15 (2012). In *Galloway,* VTDigger's

founder sought all records generated as a result of a police burglary investigation that resulted in the mistaken de facto arrest of the homeowner. *Id.* ff 1, 15. In ordering that all records concerning the 15-minute police encounter be released, including "audio recordings of the incident, the witness's 911 call, officers' reports, the dispatcher's log, and written witness statements," the Supreme Court explained the important policy rationale underpinning the required disclosure of arrest records: "Information concerning the operations of the police department in making arrests and the charges upon which arrests are made is vital to the democratic system." *Id.* ,-i 15. In other words, under Vermont law, the Legislature made the determination to uphold the vital democratic principle that there are no secret arrests.

Remarkably, the Department in moving for summary judgment ignores both the *Galloway* Court and this Court's recent ruling and continues to argue for a blanket withholding of all of the requested records, even though several records indisputably include footage of Ms. Vekos's initial arrest. For example, the Department's Vaughn Index demonstrates that Record Nos. 6 to 9 contain footage of Ms. Vekos and troopers during the time when the arrest took place. *See* Defendant's Vaughn Index, Record Nos. 6-9, attached as Exhibit 1 to Defendant's Motion for Summary Judgment, at 1-2 (No. 6: Body worn camera showing troopers' "interactions with Eva Vekos at the investigation scene in Bridport" where she was arrested and in cruiser; No. 7: dash camera footage of same; No. 8: same as No. 6; No. 9: Cruiser camera footage during arrest); Defendant's Memorandum of Law in Support of its Motion for Summary Judgment, dated Dec. 11, 2024 ("Def.'s Memo. of Law"), at 2.

These records of the initial arrest of Ms. Vekos therefore must be released. The Department does not provide enough detail about the remaining Record Nos. 1-5-which appear to relate to Ms. Vekos's processing at Vermont State Police barracks-to determine for certain whether they

qualify as initial arrest records. VTDigger therefore requests that the Court review these records *in camera* to determine whether any portion of them qualifies as initial arrest records.

Nevertheless, the Department claims blanket withholding is appropriate here because, it says, "categorical withholding is often appropriate under" an analogous federal Freedom of Information Act ("FOIA") exemption concerning interference with law enforcement proceedings. *See* Def.'s Memo. of Law at 7-8. This argument fails for at least two reasons.

First, as the Court already determined in its ruling denying the Department's Motion to Dismiss, the PRA only allows withholding records at all under the exemptions at issue "to the extent that the production of such records" specifically could or, in the case of the fair trial exemption, would, result in the harms described in the PRA. Op. at 5. Categorical withholding simply is not allowed because the plain language of "'[t]o the extent' necessarily requires some kind of content-based examination of the record." *Id.* And even when that content-based examination would otherwise justify withholding, the Department must still release whatever portion of the records are deemed to be initial arrest records. *Id.*

Second, while federal courts have sanctioned categorical withholding in some circumstances under the interference exemption, agencies are still required under a categorical approach to both identify "functional categories of information that are exempt from disclosure and disclos[e] any reasonably segregable, non-exempt portion of the requested records." *Long v. U.S. Dep't of Just.*, 450 F. Supp. 2d 42, 75-76 (D.D.C.), *order amended on reconsideration*, 457 F. Supp. 2d 30 (D.D.C. 2006) (explaining that to categorically withhold all documents without proper justification "would eviscerate the principles of openness in government that the FOIA embodies").

The Department met neither of these requirements here. The Department failed to disclose, at the very least, clearly non-exempt initial arrest records. And the Department failed to identify functional categories of information that are exempt. Courts have found that "[t]he hallmark of an acceptable" functional category is that "it allows the court to trace a rational link between the nature of the document and the alleged likely interference." *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 789 F.2d 64, 67 (D.C. Cir. 1986). But the Department has proposed no rational link between the "video and audio footage of VSP interactions with Ms. Vekos on the night of January 25" that justifies blanket withholding of all of the police interactions under the interference exemption. Def.'s Memo. of Law at 8. Nor does the Department cite to any cases employing a categorical approach in the fair trial context because there are none.

Because at least some of the records at issue are indisputably initial arrest records that the PRA mandates are public, the Court should reject the Department's claim that they can all be categorically withheld and order their release. With respect to the remaining records, the Court should view them in camera to determine whether any qualify as initial arrest records.

II. DISCLOSURE WOULD NOT INTERFERE WITH ENFORCEMENT PROCEEDINGS OR DEPRIVE MS. VEKOS OF HER RIGHT TO A FAIR TRIAL

Even if the Court finds that some of the requested records do not reflect an initial arrest, the Department still must release the records, because it has not demonstrated that the interference with enforcement proceedings or the fair trial exemptions apply. The Department cites no case law to support its argument that these exemptions apply because the requested records are "expected to be pivotal evidence in Ms. Vekos' trial[.]" Defendant's Statement of Undisputed Material Facts ("Def.'s SUMF") ,r 12. Nor does the Department explain why releasing this footage would somehow interfere with the proceedings or deprive Ms. Vekos of her fair trial right, given that VTDigger already published a story reporting in granular detail on the police interactions with Ms.

Vekos at the time of the arrest. *See* Alan J. Keays, *'Can't You Just Have a Friend Come and Get Me,' Prosecutor Asked Trooper During DUI Probe,* Documents Reveal, VTDIGGER (Feb. 7, 2024). That story was based on the Charging Documents released in the criminal proceedings. *See* Ex.A.

The Legislature intends Vermont courts construing both the fair trial and interference provisions to "be guided by the construction of similar terms contained in 5 U.S.C. § 552(b)(7) (Freedom of Information Act) by the courts of the United States." 1 **V.S.A.** § 317(c)(5)(C). Freedom of Information Act ("FOIA") cases show that these exemptions should not apply.

A. The Interference Exemption Does Not Apply

The interference exemption permits the withholding of "[r]ecords dealing with the detection and investigation of crime, but only to the extent that the production ... could reasonably be expected to interfere with enforcement proceedings[.]" 1 **V.S.A.** § 317(c)(5)(A)(i). FOIA caselaw holds an agency may not withhold records under the analogous federal interference exemption "simply because the material is related to an enforcement proceeding." *North v. Walsh,* 881 F.2d 1088, 1097 (D.C. Cir. 1989). Instead, FOIA exemption 7(A) requires an agency to demonstrate such release would "reasonably be expected to interfere with ... pending or reasonably anticipated" enforcement proceedings. *Citizens for Resp. & Ethics in Washington v. U.S. Dep'tof Just.,* 658 F. Supp. 2d217, 225 (D.D.C. 2009).

Exemption 7(A)'s legislative history indicates Congress intended the exemption to apply when such a proceeding *"would be harmed* by the premature release of evidence or information not in the possession of known or potential defendants," or when "disclosure of such information would substantially harm such proceedings by *impeding any necessary investigation* before the proceeding." *North,* 881 F.2dat 1098 (quoting 120 Cong. Rec. Sl 7,033 (May 30, 1974)) (emphasis

in original); *see also Rutland Herald v. City of Rutland*, 48 A. 3d 568, 575 (2012) (noting that premature release of evidence and other "similar concerns" are at play in determining whether to disclose records under federal FOIA's analogous provision).

In interpreting FOIA, government agencies and courts also rely on the United States Attorney General's Memorandum on the 1974 Amendments to the FOIA. *See, e.g., Wash. Post Co. v. U.S. DOJ*, 863 F.2d 96, 102 (D.C. Cir. 1988). Regarding the scope of the interference exemption, the Memorandum focuses on indicia of actual *interference* with a proceeding, including whether "interference would be created by a release which might alert the subject to the existence of the investigation, or which would 'in any other way' threaten the ability to conduct the investigation." United States Attorney General's Memorandum on the 1974 Amendments to the FOIA, Department of Justice, *available at* https://www.justice.gov/oip/attorney-generals-memorandum-1974-amendments-foia#:~:text=The%201974%20Amendments%20added%20at,in%20subsection%20(b)%5D.%22 *(quoting* 120 Cong. Rec. S 9337 (May 30, 1974) (letter of Senator Hart)).

Ms. Vekos's appearance in the requested footage, as well as the fact that discovery in the case is complete-meaning that the footage has already been viewed by both sides in the case-make clear that the "interference with enforcement proceedings" exemption cannot apply. In enacting exemption 7(A), Congress sought to restrict a defendant's use of FOIA to impede or interfere with government investigations through premature access to information, and the PRA follows in that goal. When, as here, the defendant already possesses this information, however, this concern no longer exists, and any concerns of investigative interference, through premature access to investigative material, are moot.

Throughout its brief, the Department seeks to import a fair trial consideration into the interference exemption. But the interference exemption cannot be used that way. As the Southern District of New York explains in *Radar Online,* "[i]t appears unlikely that Congress intended that Exemption 7(A) [regarding interference would] apply to documents 'which could reasonably be expected to impair the ... ability to seat a fair and impartial jury"' because "[t]hat reading of Exemption 7(A) would swallow Exemption 7(B)," which concerns fair trial." *Radar Online LLC v. FBI,* 692 F. Supp. 3d 318, 344 n.10 **(S.D.N.Y.** 2023). Instead, issues of jury impartiality must be raised under exemption 7(B), which carries a higher demonstration of harm. *Id.;* 5 U.S.C. § 552(b)(7)(A)-(B) (Compare "(A) *could* reasonably be expected to interfere with enforcement proceedings *with* (B) *would* deprive a person of a right to a fair trial or an impartial adjudication") (emphasis added).

B. The Fair Trial Exemption Does Not Apply

Vermont's fair trial exemption allows withholding of records, "dealing with the detection and investigation of crime, but only to the extent that the production . . . *would* deprive a person ofarightto a fair trial or an impartial adjudication[.]" 1 V.S.A. § 3l 7(c)(5)(A)(ii) (emphasis added). Notably, the PRA uses the lower threshold word "could" instead of "would" for all of the other detection and investigation exemptions, including interference, except for law enforcement techniques and procedures. *See id.* In interpreting the same language in FOIA's analogous fair trial and interference exemptions, courts recognize that the fair trial exemption's "would" language carries with it a heightened standard. *See Wash. Post Co.,* 863 F.2d at 102 ("Congress made the threshold of (7)(B) higher than for [7(A)].....Whereas (7)(A), (C), (D) and (F) permit records to be withheld if release *'could* reasonably be expected to' cause a particular evil, (7)(B) requires that release *'would'* deprive a person of fair adjudication.") (emphasis added). Ignoring this distinction

between the fair trial and interference exemptions, the Department conflates the two throughout its motion.

To demonstrate the fair trial exemption applies, a party must demonstrate "(1) that a trial or adjudication is pending or imminent; and (2) that it is more probable than not that disclosure of the material sought *would* seriously interfere with the fairness of those proceedings." *Id.* (emphasis added). "Mere conclusory statements" are insufficient to meet this heightened threshold. *Id.* at 101. Instead, agencies asserting the 7(B) exception "must show" how release *"would* deprive a person of a right to a fair trial." *Id.* Neither "unsupported assertions," nor "pretrial publicity-even pervasive, adverse publicity" establish the certainty of deprivation the statute demands. *Id.* at 102; *Skilling v. United States,* 561 U.S. 358, 384 (2010) (quoting *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 554 (1976)); *see also Playboy Enters., Inc. v. United States Dep't of Justice,* 516 F. Supp. 233,246 (1981) (denying the fair trial exemption applies where "the degree of publicity that might come about as a result of the disclosure of the Report is speculative at best").

Rather than providing the Court with clear evidence that disclosure "would" interfere with fairness, the Department resorts to exactly the type of bare, conclusory statements that fail this high threshold. The affidavit that supposedly provides all the facts needed for the Department's motion does nothing more than repeat the bare assertion that pre-trial publicity *"could* reasonably be expected to interfere with the proceedings by unnecessarily exerting influence on potential jurors' perceptions of Ms. Vekos and the witnesses," Affidavit of Rosemary M. Kennedy ,r 10. The Department fails to cite any caselaw showing that any pretrial viewing of the footage would necessarily taint the jury pool. Indeed, the Department admits that it has already changed the venue to Chittenden County and does not explain why this change of venue does not alleviate its concerns. *Id.* ,r 13.

Critically, the Department ignores that VTDigger has already published extensively on this case, including a detailed story on police interactions with Ms. Vekos leading up to her arrest. *See* Plaintiff's SUMF ,-i 10 (citing Alan J. Keays, *'Can't You Just Have a Friend Come and Get Me,' Prosecutor Asked Trooper During DUI Probe,* Documents Reveal, VTDIGGER (Feb. 7, 2024), https://vtdigger.org/2024/02/07/cant-you-just-have-a-friend-come-and-get-me-prosecutor-asked-trooper-during-dui-probe-documents-reveaV). The Department cites no case law supporting its position that the mere prospect of additional pre-trial publicity establishes that releasing the records would deprive Ms. Vekos of her right to a fair trial and ignores case law demonstrating the opposite. *See Skilling*, 561 U.S. at 384; *Playboy Enters., Inc.*, 516 F. Supp. at 246. Because the Department has failed to demonstrate release would deprive Ms. Vekos's fair trial right, the records must be released.

CONCLUSION

Because the requested footage reflects the initial arrest of Ms. Vekos and does not interfere with any ongoing enforcement proceedings or deprive Ms. Vekos of her right to a fair trial, Plaintiff VTDigger respectfully requests that this Court deny the Defendant's Motion for Summary Judgment and grant Plaintiff's Motion for Summary Judgment.

Dated: December 23, 2024
Ithaca, NY

Respectfully submitted,

VERMONT JOURNALISM TRUST, LTD

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