STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Washington Unit — Docket No. 23-CV-05003

VERMONT JOURNALISM TRUST,
Plaintiff,

v.

CITY OF RUTLAND, VERMONT,
Defendant.

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

For the reasons explained below, Plaintiff Vermont Journalism Trust, Ltd. opposes Defendant City of Rutland's Motion for Summary Judgment and, pursuant to Vermont Rule of Civil Procedure 56, cross-moves for summary judgment for all its claims because there is no genuine dispute as to any material fact, and Plaintiff is entitled to judgment as a matter of law. In support, Plaintiff offers: (1) the following incorporated Memorandum of Law; (2) its accompanying Statement of Undisputed Material Facts (Pl.'s SUMF), and (3) accompanying exhibits.

MEMORANDUM OF LAW SUPPORTING PLAINTIFF'S OPPOSITION TO SUMMARY JUDGMENT AND ITS OWN MOTION TO DISMISS

PRELIMINARY STATEMENT

In this action, Vermont Journalism Trust, Ltd. ("VTDigger") seeks access to body camera and dash camera footage of a July 2023 police chase that resulted in the death of Jessica

Ebbighausen, a rookie City of Rutland police officer. The effort is of high public interest. VTDigger's pursuit of these records comes on the heels of a spike in car crash fatalities in Vermont and the release of a report demonstrating that five state troopers were disciplined during the first half of 2023 alone for violating the state police's vehicle pursuit policy aimed at curtailing police chases. *See* Plaintiff's Statement of Undisputed Material Facts ("Pl.'s SUMF") ¶¶ 11-12.

Before VTDigger filed this action, the City of Rutland ("Rutland") denied VTDigger access to all of the records, claiming that the fair trial, litigation, and ethics exemptions to the Public Records Act ("PRA") properly shielded the records in their entirety. *See* Pl.'s SUMF ¶ 8 (citing 1 V.S.A. § 317(c)(5)(A)(ii); § 317(c)(14) and § 317(c)(3)). Rutland has since released certain footage, but its concession still sheds no light on the chase itself. Seeking refuge under the fair trial exemption, Rutland continues to withhold the bulk of the records. *See* Rutland's Motion for Summary Judgment ("Def.'s Br.") at 2-3. Abandoning its previous reliance on the litigation and ethics exemptions, Rutland now argues instead that it is properly withholding certain of its records in their entirety under the privacy exemption, § 317(c)(5)(A)(iii), and the redaction guidance in § 317(c)(5)(D). *Id.*

None of these exemptions apply here. The requested records are the product of crime detection and reflect an initial arrest, and as such, they cannot be withheld under § 317(c)(5) of the PRA as records dealing with the detection and investigation of crime. In fact, police departments routinely release body camera and dash camera footage of arrests to news agencies in Vermont. *See* Pl.'s SUMF ¶ 15. To comply with the law and promote public accountability of police in making arrests that deprive individuals of their freedom, Rutland should do the same here.

Nor does the fair trial exemption apply because Rutland has failed to demonstrate that disclosure would seriously interfere with the fair trial right. Rutland also cannot rely on two

arguments it failed to raise at the administrative stage regarding privacy and witness-identifying information. Even if the Court proceeds to the merits with respect to these arguments, both fail to justify withholding here. Rutland makes only conclusory assertions that fail to demonstrate that a significant privacy interest in the release of "personal emotional reactions" and other unspecified footage outweighs the significant public interest in their release. Rutland also cannot rely on Section 317(c)(5)(D) to withhold records in their entirety. Rather, Rutland is limited to making redactions solely to witness-identifying information.

By failing to raise the litigation and ethics exemptions in its summary judgment motion, Rutland has waived reliance on these exemptions. But even if the Court considers these arguments, the litigation exemption has no bearing here because the City is not party to any relevant litigation. Likewise, the ethics exemption is irrelevant because the release of public records is plainly not an extrajudicial statement proscribed by the Vermont Rules of Professional Conduct. Because no exemptions to the PRA apply to withhold these records on a blanket basis, VTDigger seeks an order compelling their rightful disclosure.

STATEMENT OF FACTS

The Police Chase and Arrest of Suspect

Officer Jessica Ebbighausen, 19, took her first step towards a career in law enforcement on May 23, 2023, when she joined the Rutland City Police Department as a part-time officer. *See* Pl.'s SUMF ¶ 6. At the time, Ebbighausen was a Level-2 certified recruit and planned to undergo training to become a full-time officer at the Vermont Police Academy in August. *See id.*

Six weeks later, the Rutland City Police Department received a call regarding an attempted break-in. *See id.* ¶ 1. A police officer who responded saw a truck driving away and gave chase, joined by two more police cruisers on Woodstock Avenue. *See id.* ¶ 2.

One of those police cruisers was driven by Ebbighausen, with her supervising officer Richard Carvaggio in the passenger seat. *See id.* ¶ 3. Fleeing the police cars, the truck crossed the center line and struck Ebbighausen's cruiser head-on "at speeds between 76 and 82 mph[.]" *See id.* ¶¶ 4, 15. Ebbighausen "was thrown from her vehicle," where neither she nor her supervising officer "were wearing seatbelts." *Id.* ¶ 15. Ebbighausen was pronounced dead at the scene. *See id.* ¶ 5.

Public Records Request and Constructive Denial

On July 28, 2023, VTDigger reporter Alan Keays sent a PRA request to Rutland Police Chief Brian Kilcullen seeking "any and all audio and dash and body camera video footage from the Rutland City Police Department to the crash on July 7 on Woodstock Avenue involving city police." *Id.* ¶ 7.

On August 4, 2023, Chief Brian Kilcullen denied VTDigger's request, citing the PRA's litigation exemption under 1 V.S.A. § 317(c)(14), the professional ethics confidentiality exemption under 1 V.S.A. § 317(c)(3), and the fair trial exemption under 1 V.S.A. §317(c)(5)(A)(ii). *See id.* ¶ 8. Five days later, VTDigger timely appealed the denial to Rutland Mayor Michael Doenges, who did not respond to the request or to a follow-up query later that month. *See id.*

Because VTDigger did not receive a written determination of its appeal within five business days of receipt of either the August 9, 2023 appeal or the August 28, 2023 follow-up query, it filed suit to challenge the constructive denial of the request under 1 V.S.A. § 318(a)(2). *See id.* ¶ 9.

Significant Public Interest Supports Release of the Records

Ebbighausen's death "has garnered significant ongoing public interest, with VTDigger and other news outlets throughout the State covering" the crash. *Id.* ¶ 10. Her death is just one of the 69 car crash fatalities in Vermont in 2023, "which is an issue of great public concern due to the 'comparatively high' number of fatalities" during the past three years. *Id.* ¶ 11. Her death also "highlights the inherent danger of high-speed pursuits." *Id.* ¶ 12. Recognizing this danger, the Vermont State Police "updated its vehicle pursuit policy in 2021," which now "limits pursuits to instances where there is probable cause to believe a violent crime has taken place." *Id.* During the first six months of 2023 alone, five state troopers faced disciplinary action for violating the policy, which includes "several protocols designed to curtail vehicle pursuits[.]" *Id.*

In Ebbighausen's case, Tate Rheaume, the man arrested after fleeing from the scene of an attempted break-in, was hospitalized after the crash, with police stating the following day that his condition was "serious but stable" and that "[h]e was in state custody on $500,000 bail and . . . scheduled to be arraigned in Rutland" two days later on initial "charges of grossly negligent operation of a motor vehicle and attempting to elude, both with death resulting[.]" *Id.* ¶ 13. Rheaume now faces new charges brought by Rutland County State's attorney in March, including "aggravated murder, which carries a mandatory minimum sentence of life in prison without parole if Rheaume is convicted." *Id.* ¶ 14.

Across Vermont, police departments routinely release body camera and dash camera footage of arrests like Rheaume's that draw significant public interest to news outlets. *See id.* ¶ 16. Doing so promotes public accountability and increases public trust. *See id.* But because Rutland declines to release these records, VTDigger seeks through this PRA litigation to obtain records that

shed light on key questions of public interest surrounding Ebbighausen's death and inform the public on the life-or-death policies and practices of their local police. *See id.* ¶ 17.

ARGUMENT

For the following reasons, the Court should grant VTDigger's motion for summary judgment. First, as a threshold matter, because the requested records are the product of crime detection and reflect an initial arrest, they cannot be withheld under any of the exemptions listed in § 317(c)(5)(A) of the PRA.

Second, even if Rutland could claim a § 317(c)(5)(A) exemption, none of the cited provisions apply here. The fair trial exemption does not apply because Rutland has failed to demonstrate that disclosure would seriously interfere with the fair trial right. And while Rutland unequivocally failed to preserve the privacy exemption and § 317(c)(5)(D) arguments by not raising them below at the administrative stage, Rutland also has not and cannot demonstrate that either the privacy exemption or § 317(c)(5)(D) applies as a blanket exemption to withhold records that are of significant public interest. Instead, Rutland must release these records with redactions limited to information concerning medical treatment, bodily exposure, and witness-identifying information.

Finally, by abandoning the litigation and ethics exemptions at summary judgment, Rutland has waived them. But in any case, they have no bearing here, where Rutland is not party to relevant ongoing litigation and the release of public records is plainly not an extrajudicial statement proscribed by the Vermont Rules of Professional Conduct.

I. BECAUSE THE REQUESTED RECORDS DO NOT DEAL WITH THE DETECTION AND INVESTIGATION OF CRIME, THEY MUST BE RELEASED

The requested records here indisputably document the police chase resulting in the initial arrest of Rheaume. While agencies are permitted to withhold "[r]ecords dealing with the detection and investigation of crime" that fall within one of six enumerated exemptions, 1 V.S.A. § 317(c)(5), the Vermont Supreme Court has made clear that § 317(c)(5) does not apply to arrest and other records that "are the *products* of crime detection[.]" *Caledonian Rec. Pub. Co. v. Walton*, 154 Vt. 15, 26 (1990) (emphasis added) (finding arrest and citation records "are public records which must be disclosed and are not included within the detection and investigation exemption"). Indeed, Section 317(c)(5)(B) of the PRA expressly makes public "records reflecting the initial arrest of a person[,]" which the Vermont Supreme Court has interpreted 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, ¶ 15 (2012). In *Galloway*, the Court rejected an agency's argument that it could withhold from VTDigger any records produced while detaining a homeowner erroneously suspected of burglary prior to deciding against charging him with a crime.

While those records may not have put the Hartford police officers in the best light because officers "used considerable force in restraining the suspect" before determining he was "in fact, the homeowner," they indisputably "reflect[ed] the initial arrest" under the PRA and thus could not be withheld from disclosure. *Id.* at ¶¶ 1, 4.

According to Rutland, all of the remaining requested records fall within § 317(c)(5). But Rutland fails to demonstrate how "an agency record" that merely reflects "the initial arrest and charge of a person" could possibly "qualify as confidential under the PRA." *Oblak v. Univ. of Vermont Police Servs.*, 2019 VT 56, ¶¶ 8, 16 (2019) (citing 1 V.S.A. §

317(c)(5)(B)) (ruling an affidavit of probable cause is subject to disclosure). Just as the Court in *Galloway* and in *Oblak* rightly concluded that records reflecting the initial arrest of a person are subject to disclosure, the requested records here documenting the arrest of Rheaume must also be released. The footage indisputably documents the police chase resulting in the initial arrest of Rheaume.

Rheaume was hospitalized immediately following the crash, with police stating the following day that "[h]e was in state custody on $500,000 bail and . . . scheduled to be arraigned in Rutland" shortly on initial "charges of grossly negligent operation of a motor vehicle and attempting to elude, both with death resulting[.]" Pl.'s SUMF ¶ 13. The affidavit of probable cause, which was filed in Rheaume's criminal proceeding on Jul. 10, 2023, is dated one day after the crash. The affidavit states that officers met with Rheaume at the hospital the evening of the crash and that police also spoke with witnesses and Rheaume's ex-girlfriend that same day in advance of preparing the affidavit. *Id.*; Keays Decl., Ex. A.

It does not matter that at least a portion of the audio and video recordings VTDigger seeks were recorded prior to Rheaume's charge with a crime here. The *Galloway* Court rejected a nearly identical argument in reversing the trial court's decision that "audio and video recordings" of a de facto arrest could be withheld as investigatory records merely because the recordings took place prior to the final decision being made to bring criminal charges. 2012 VT at ¶¶ 8, 15. The Court there recognized the significant public interest in records leading to an arrest, observing that "[i]nformation 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.* ¶ 15 (quoting *Walton,* 154 Vt. at 24).

The public interest here is at its apex because "[a]n arrest is the exercise of the government's power to deprive an individual of freedom," with 20-year-old Tate Rheaume facing an aggravated murder charge that carries a mandatory minimum sentence of life in prison without parole if convicted. *Id.* (quoting *Walton*, 154 Vt. at 24). And, [w]hile in some cases involving police functions there is an overriding public interest in preserving secrecy (*e.g.*, in the investigation of pending or proposed criminal charges)," the Vermont Supreme Court has recognized that "no overriding public-interest concern is discernible" in cases like here "when the executive act of arrest has been committed." *Walton*, 154 Vt. at 24. Police departments frequently release body camera and dash camera footage of arrests to news agencies in Vermont and the same should be done here to promote public accountability. *See* Pl.'s SUMF ¶ 15. Because the requested records are the product of crime detection and reflect an initial arrest, they cannot be withheld under § 317(c)(5) of the PRA.

II. DISCLOSURE WOULD NOT DEPRIVE RHEAUME OF HIS RIGHT TO A FAIR TRIAL

The fair trial exemption permits the withholding of "[r]ecords dealing with the detection and investigation of crime, but only to the extent that the production . . . would deprive a person of a right to a fair trial or an impartial adjudication[.]" 1 V.S.A. § 317(c)(5)(A)(ii). Rutland cites no case law or record evidence to support its argument that because this case "has led to criminal charges and garnered significant public attention," "disclosure of any of these records to Plaintiff, a news publication entity, would result in tainting a jury pool to such a degree as to prevent the Criminal Court from conducting a fair trial." Def.'s Br. at 2.

As a threshold matter, a party seeking summary judgment may not merely rely on "allegations alone[.]" *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 266 (1981). Here, Rutland filed no separate statement of undisputed material facts, as required by V.R.C.P. 56(c)(2), nor any

other evidentiary material to support the facts alleged. On this basis alone, Rutland's motion should be denied.

Should the Court nonetheless consider the merits of this argument, the Legislature intends Vermont courts construing this provision 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). To demonstrate the Freedom of Information Act ("FOIA")'s fair trial exemption applies, an agency must meet a two-part test: "(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." *Wash. Post Co. v. U.S. Dep't of Just.*, 863 F.2d 96, 102 (D.C. Cir. 1988). In creating this standard, Congress intentionally "made the threshold . . . higher than for most of the other exemptions for law enforcement material" by "requir[ing] that release 'would'"—as opposed to could—"deprive a person of fair adjudication." 863 F.2d at 102. "[M]ere conclusory statements" like those made by Rutland will not suffice because "the agency must show how release of the *particular* material would have the adverse consequence that the Act seeks to guard against." *Id.* at 101 (emphasis added). Rutland cannot satisfy this exacting standard.

Instead, Rutland vaguely asserts that "disclosure of any of these records to Plaintiff, a news publication entity, would result in tainting a jury pool to such a degree as to prevent the Criminal Court from conducting a fair trial." Def.'s Br. at 2. But this speculative claim in no way demonstrates that any particular record would in fact impair the fair trial right here. *Playboy Enters., Inc. v. U.S. Dep't of Just.*, 516 F. Supp. 233, 246 (D.D.C. 1981), *aff'd in part, modified in part sub nom. Playboy Enters., Inc. v. Dep't of Just.*, 677 F.2d 931 (D.C. Cir. 1982) (rejecting claim that portions of report on Klan informant should be withheld merely due to "the degree of

publicity that might come about" and allegedly interfere with informant's murder trial). As the U.S. Supreme Court has held in the change of venue context, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Skilling v. United States*, 561 U.S. 358, 384 (2010) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976)).

Rutland has failed to show why judicial safeguards such as *voir dire* would be insufficient to ensure fairness here. Nor has it demonstrated how release of footage of the crash would taint a jury pool, where the crash itself has already been widely reported on in Vermont. *See* Pl.'s SUMF ¶ 10. Because Rutland has failed to demonstrate that disclosure would seriously interfere with the fair trial right, the records should be released.[1]

III. RUTLAND CANNOT RAISE TWO NEW § 317(c)(5) ARGUMENTS IT FAILED TO PRESERVE AT THE ADMINISTRATIVE STAGE, AND, IN ANY EVENT, THEY LIKEWISE FAIL ON THE MERITS TO APPLY

When Rutland originally denied Reporter Keays' public record requests, it never claimed the right to withhold based on a privacy exemption nor under § 317(c)(5)(D). "[T]he preservation requirement prohibits a party from raising issues for the first time before the trial court, without having raised them before the agency." *Pratt v. Pallito*, 2017 VT 22, ¶ 12 (2017). This requirement "ensure[s] that the original forum is given an opportunity to rule on an issue prior to [court] review." *Id.* ¶ 14. Rutland flouts the preservation requirement by raising both the privacy exemption and § 317(c)(5)(D) for the first time in summary judgment briefing.

[1] Rutland erroneously cites *Rutland Herald v. Vermont State Police* for the proposition that there is no temporal limitation on the fair trial exemption and that it is not required to redact any records withheld under § 317(c)(5). *See* Def.'s Br. at 3 (citing 2012 VT 24, ¶¶ 14, 26). But the *Rutland Herald* court interpreted an earlier version of § 317(c)(5), which was amended the following year and now expressly requires redactions under subsection D and, pursuant to FOIA case law, temporally limits the fair trial exemption to a period with a pending or imminent trial. *See* 2013 S.B. No. 148 (enacted in 2013 to adopt a standard nearly identical to the FOIA law enforcement exemption).

This Court should reject these new arguments because they were not preserved below. In an analogous case, New York's highest court unequivocally ruled that judicial review of an agency's "administrative determination is limited to the grounds invoked by the agency" in its denial. *Madeiros v. New York State Educ. Dep't*, 30 N.Y.3d 67, 74 (2017).

Allowing an agency to raise new exemptions in court "would be contrary to our precedent, as well as to the spirit and purpose of FOIL[,]" the court explained, where the New York Freedom of Information Law, like the PRA, is "based on a presumption of access in accordance with the underlying 'premise that our public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.'" *Id*. at 73-74; *see* 1 V.S.A. § 315 (finding it is the "policy of this subchapter to provide for free and open examination of records consistent with Chapter 1, Article 6 of the Vermont Constitution. Because these arguments were not raised below, Rutland has waived them before this Court.

A. Disclosure would not constitute an unwarranted invasion of privacy

The Vermont Public Records Act exempts from disclosure records "dealing with the detection and investigation of crime only to the extent that the production . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]" 1 V.S.A. § 317(c)(5)(A)(iii). Rutland brusquely invokes this exemption, without further explanation, to withhold eight records (18, 33, 34, 36-40)[2] in their entirety that it claims "[p]rimarily . . . have to do with personal emotional reactions to the incident, medical treatment of an individual, and, in the instance of record 40, extreme state of undress and bodily exposure in a medical setting." Def.'s Br. at 3.

[2] These records concern the following: 150105 Radio M959 Getting Checked; Officer Parker's Body Cam; Officer Dumas' Body Cam; Commander Prouty's Body Cam; Officer Rose's Body Cam; Commander Whitehead's Body Cam; Officer Dickerson's Body Cam; and Officer Ducharme's Body Cam.

In construing the privacy exemption, this Court has looked to federal cases that interpreted the parallel FOIA provision. *See, e.g.*, *Wool v. Burlington Police Dep't*, 2016 WL 5944414, at *1 (Wash. Cnty. Super. Ct. Vt. June 13, 2016) (J. Tomasi). In determining whether the exemption applies, "[t]he first question to ask . . . is whether there is any privacy interest in the information sought." *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 284 (2d Cir. 2009). This privacy interest pertains to "avoiding disclosure of personal matters" and "keeping personal facts away from the public eye[,]" *id.* at 286, with courts recognizing that public officials and employees "may not have as great a claim to privacy as that afforded ordinarily to private citizens[.]" *Lesar v. U.S. Dep't of Just.*, 636 F.2d 472, 487 (D.C. Cir. 1980).

The agency bears the burden to "account for the privacy interests at stake, recognizing that previous disclosures or admissions may have diminished those interests," *Buzzfeed, Inc. v. U.S. Dep't of Homeland Sec.*, 610 F. Supp. 3d 139, 145 (D.D.C. 2022), and that merely speculative harm is insufficient. *See Fowlkes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 139 F. Supp. 3d 287, 293 (D.D.C. 2015) (finding privacy exemption "is not so broad as to protect" the name of judge who convened a grand jury). Once an agency demonstrates a substantial privacy interest, "the Court must balance the privacy interest of individuals mentioned in the records against the public interest in disclosure." *Id*.

VTDigger does not contest redactions to the records concerning "medical treatment of an individual" and an "extreme state of undress and bodily exposure in a medical setting." Def.'s Br. at 3. While its motives are immaterial to the agency's response to this request, VTDigger does not seek to sensationalize the tragic death of Ebbighausen. Rather, VTDigger intends to report on the records' contents to the extent that in its editorial discretion they provide important journalistic value in the public interest.

But these records cannot be withheld in their entirety merely because they also contain "personal emotional reactions to the incident" and presumably other information as well, which Rutland has not demonstrated qualifies as a more than *de minimis* privacy interest. Nor do these emotional reactions outweigh the "significant" public interest in the footage of this police chase, disclosure of which will "likely advance that interest." *Roth v. U.S. Dep't of Just.*, 642 F.3d 1161, 1174–75 (D.C. Cir. 2011). Ebbighausen's death has indisputably "garnered significant ongoing public interest, with VTDigger and other news outlets throughout the State covering" the crash. Pl.'s SUMF ¶ 10. Her death is just one of the 69 car crash fatalities in Vermont in 2023, "which is an issue of great public concern due to the 'comparatively high' number of fatalities" during the past three years. *Id.* ¶ 11. And recent reporting demonstrates that at the time of the crash, Rheaume was driving at high "speeds between 76 and 82 mph," during which Ebbighausen "was thrown from her vehicle," where neither she nor her supervising officer "were wearing seatbelts." *Id.* ¶ 14.

Her death "highlights the inherent danger of high-speed pursuits[,] which the Vermont State Police recognized when it "updated its vehicle pursuit policy in 2021" to "limit[] pursuits to instances where there is probable cause to believe a violent crime has taken place." *Id.* But police still engage in pursuits that arguably fall outside the policy, with five state troopers facing disciplinary action for violating the policy in the first six months of 2023 alone. *Id.* ¶ 12.

Transparency is even more crucial here because Rheaume faces potentially life-altering charges brought by Rutland County State's attorney in March, including "aggravated murder, which carries a mandatory minimum sentence of life in prison without parole if Rheaume is convicted." *Id.* ¶ 13. As one court recognized in finding a significant public interest in releasing records of people dying while detained in pretrial custody, "[i]nvestigative reporting on topics such as this, far from impeding the public interest, actually enhances it." *Wessler v. U.S. Dep't of Just.*,

381 F. Supp. 3d 253, 260–61 (S.D.N.Y. 2019). Similarly, release of the records here would enhance the public interest by highlighting issues of public safety and the comportment of the police. Because Rutland only provides conclusory assertions for its claim that certain records can be withheld in their entirety under the privacy exemption, the Court should release the records, with the caveat that VTDigger does not object to reasonable redactions concerning medical treatment and bodily exposure.

B. Rutland can only redact records under § 317(c)(5)(D), not withhold them

Section 317(c)(5)(D) of the PRA provides redaction guidelines for record production under § 317(c)(5)(A) and is not a standalone exemption. 1 V.S.A. § 317(c)(5)(D). The provision clarifies that while an agency "shall not reveal . . . the identity of a private individual who is a witness to or victim of a crime," "[a] record shall not be withheld in its entirety because it contains identities or information that have been redacted pursuant to this subsection." *See id.* In other words, as this very Court has previously acknowledged, § 317(c)(5)(D) directs public agencies to "redact[] the personal identifying information" where it "appears in such records[,]" not withhold the records on a blanket basis. *Wool v. Burlington Police Dep't*, 2016 WL 5944414, at *1 (Wash. Cnty. Super. Ct. Vt. June 13, 2016) (J. Tomasi).

Rutland incorrectly invokes § 317(c)(5)(D) to withhold the records in their entirety. Without further explanation, Rutland asserts that six records (1, 2, 17, 34, 36, and 38[3]) should be withheld in their entirety because they are "[r]ecords that identify a witness[.]" Def.'s Br. at 3. This claim ignores the plain text of the provision and its application in Vermont courts. While there may be witness-identifying information present on audio and video recordings involving the police

[3] The City indicates that these records are: (1) 1435 Initial Call; (2) 1439 Initial Call Ending; (17) 145754 Radio M932 Witness; (34) Officer Dumas' Body Cam; (36) Commander Prouty's Body Cam; and (38) Commander Whitehead's Body Cam. Def.'s Br. Ex. A.

chase—names of 911 callers, passersby at the accident scene, and so forth—this is precisely the kind of information contemplated by § 317(c)(5)(D)'s instruction to redact, not withhold.[4]

If the Court were to adopt Rutland's misreading of § 317(c)(5), it would render meaningless the very purpose of that section of the PRA: if the targeted instruction to withhold witness-identifying information in § 317(c)(5)(D) were read to require the withholding of entire records there would in some cases be no reason for the separate enumerated list of exemptions under § 317(c)(5)(A). This section of the PRA, consistent with the broad presumption of disclosure contemplated by the PRA, the Legislature carefully enumerated the bases on which an agency may withhold certain law enforcement records, many of which often presumably also contain information covered by § 317(c)(5)(D). *See* 1 V.S.A. § 317(c)(5)(A). For instance, many records "could reasonably be expected to disclose the identity of a confidential source" under § 317(c)(5)(A)(iv) would also reveal "the identity of a private individual who is a witness" under § 317(c)(5)(D). *See id.* § 317(c)(5)(D).

Likewise, it is unclear how a record that "would disclose techniques and procedures for law enforcement investigations" under § 317(c)(5)(A)(v) would not in many cases also necessarily "reveal information that could be used to facilitate the commission of a crime" under § 317(c)(5)(D). *Id.* §§ 317(c)(5)(A)(v), 317(c)(5)(D). Because the Court must not "construe the statute in a manner that makes this language superfluous[,]" Rutland's redundant reading of § 317(c)(5)(D) cannot stand. *Baldauf v. Vt. St. Treasurer*, 215 Vt. 18, 30 (2021).

[4] As discussed *supra* at n.1, Rutland erroneously cites *Rutland Herald v. Vermont State Police* for the broad proposition that it bears no obligation to redact records under § 317(c)(5). *See* Def.'s Br. at 3 (citing 2012 VT 24, ¶¶ 14, 26). This holding is outdated, as subsection (D) was not added to § 317(c)(5) until 2013, a year after *Rutland Herald* was decided. *See supra* at n.1.

IV. BY ABANDONING THE EXEMPTIONS UNDER §§ 317(c)(14) and 317(c)(3), RUTLAND HAS WAIVED THEM, AND, IN ANY EVENT, NEITHER APPLIES HERE

A. By failing to raise §§ 317(c)(14) and 317(c)(3) at summary judgment, Rutland waives both

Vermont Rule of Civil Procedure 56(a) requires a moving party to identify "each claim or defense . . . on which summary judgment is sought." Vt. R. Civ. P. 56(a). A court will grant summary judgment on those claims and defenses if "there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law." *Id.* Here, Rutland failed to raise exemptions in its summary judgment motion under §§ 317(c)(14) and 317(c)(3) that it previously relied on at the administrative appeal stage. *See generally* Def.'s Br. The Court should thus consider these exemptions abandoned for purposes of summary judgment. *See Jud. Watch of Fla., Inc. v. U.S. Dep't of Just.*, 102 F. Supp. 2d 6, 12 (D.D.C. 2000) (declining to consider argument not raised in summary judgment motion "because the party opponent is . . . denied an opportunity to respond" if the argument is only made in a reply).

B. Because Rutland is not a party to the relevant litigation, it cannot rely on § 317(c)(14)

An agency may only rely on § 317(c)(14) to withhold records where the requested records are "relevant to litigation to which the public agency is a *party of record*[.]" § 317(c)(14) (emphasis added). In its denial of VTDigger's PRA request, Rutland claimed that the exemption applies more broadly to any records "relevant to litigation to which the *State (public agency)* is a party of record." *See* Pl.'s SUMF ¶ 8, Ex. B (emphasis added). But Rutland cites no case law to support its novel interpretation. To the contrary, case law interpreting § 317(c)(14) has involved agencies that were in fact parties of record to the relevant litigation. *See, e.g., Shlansky v. City of Burlington*, 188 Vt. 470, 473 (2010) (sought records from city relating to traffic-stop litigation brought by the city);

Wesco, Inc. v. Sorrell, 177 Vt. 287, 289–90 (2004) (sought records from Attorney General's Office and Agency of Natural Resources relating to criminal and civil enforcement actions respectively brought by each agency).

The Vermont Rules of Civil Procedure make plain that only the individuals or entities named in civil actions are parties of record; others cannot maintain such a status vicariously. *See* V.R.C.P. R.17(a) ("Every action shall be prosecuted in the name of the real party in interest."). And in criminal actions like the one at issue here, as the official title makes clear, the State's Attorney brings prosecutions solely on behalf of the State of Vermont and represents neither the municipality in which the alleged offense occurred or the law enforcement agency that apprehended the offender. *See* 13 V.S.A. § 4638.

Here, neither the Rutland City Police Department nor the City of Rutland has demonstrated that it is party to any litigation involving the records sought by VTDigger or the events surrounding their creation. Neither are they parties to the prosecution of Rheaume, which has been brought by the State's Attorney for Rutland County on behalf of the State of Vermont. *See State v. Rheaume,* Dkt. No. 23-CR-06504; Pl.'s SUMF ¶ 14. To permit an agency to withhold records based on a supposed link to litigation involving a separate agency ignores the textual limitations written into § 317(c)(14), which plainly permits withholding only where "the" public agency, not "any" public agency, is a party to ongoing litigation, and only where the public agency is the "party of record," not merely aligned in interest with the party of record. 1 V.S.A. § 317(c)(14). Because Rutland is not a party of record to the criminal proceeding against Rheaume, the litigation exemption does not apply.

C. Even if not waived, § 317(c)(3) does not apply because public records are plainly exempt from the Rules of Professional Conduct's prohibition on extrajudicial statements

Section 317(c)(3) of the PRA exempts records that, if disclosed, "would cause the custodian to violate duly adopted standards of ethics or conduct for any profession regulated by the State." 1 V.S.A. § 317(c)(3). In its denial of VTDigger's PRA request, Rutland cited Rules 3.6 and 3.8 of the Vermont Rules of Professional Conduct, which together proscribe extrajudicial statements that will have a substantial likelihood of materially prejudicing a proceeding. *See* Pl.'s SUMF ¶ 8, Ex. B. But "[s]imply handing over public records to reporters without comment is not necessarily an 'extrajudicial statement.'" *Cox Ariz. Publ'ns, Inc. v. Collins*, 852 P.2d 1194, 1198 (1993). Indeed, as the Arizona Supreme Court explained, "the contents of public records are generally exempt from the foregoing ethical restrictions." *Id.* at 1199.

Like Arizona's rule, Vermont's Rule 3.6 specifically allows lawyers to make statements concerning "information contained in a public record[.]" Vt. R. Prof. Cond. 3.6(b)(2). And Rule 3.8(f) does the same by incorporating Rule 3.6's prohibitions and exemptions regarding extrajudicial statements. The policy underpinning Rule 3.8(f) further supports release here because the analogous ABA Model Rules of Professional Conduct provision was adopted not to restrict the release of public records but to "restrict prosecutors, on ethical principles, from issuing . . . subpoenas [of law enforcement] unless they had a reasonable belief that the information sought would not be privileged from disclosure." A. Jeffry Taylor, *Work in Progress: The Vermont Rules of Professional Conduct*, 20 Vt. L. Rev. 901, 922 (1996). Because the requested information is contained in public records that are plainly exempt from the Rules' prohibition on extrajudicial statements, § 317(c)(3) does not apply to withhold the records.

CONCLUSION

VTDigger respectfully requests an order requiring the Rutland City Police Department and City of Rutland to promptly provide copies of access to all recordings responsive to VTDigger's request, declaring that in denying VTDigger's request, the Rutland City Police Department and City of Rutland violated VTDigger's rights under 1 V.S.A. §§ 315–20, and requiring the City of Rutland to pay all costs and attorney's fees VTDigger incurred in pursuing this action.

Dated at Montpelier, Vermont 8th day of May, 2024.

VERMONT JOURNALISM TRUST, LTD

By: _/s/_ *Jared K. Carter*_____

Heather E. Murray, Esq.
Jared K. Carter, Esq.
Cornell Law School First Amendment Clinic[5]
Myron Taylor Hall
Ithaca, New York 14853
hem58@cornell.edu
jc2537@cornell.edu
(607) 255-8518

[5] Clinic students Matthew Hornung, Johanna Li, and Robert Plafker drafted portions of this brief. The Local Journalism Project and the Clinic are housed within Cornell Law School and Cornell University. Nothing in this Complaint should be construed to represent the views of these institutions, if any.