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 REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

The Vermont Public Records Act's ("PRA") core purpose is to further government accountability. 1 V.S.A. § 315. And through its PRA request for records related to the police chase that resulted in the untimely death of a rookie police officer, Vermont Journalism Trust ("VTDigger") is seeking to do exactly that. While the PRA expressly makes these types of records reflecting an initial arrest public, the City of Rutland ("Rutland") urges this Court to ignore the plain text of the PRA and binding court precedent and instead withhold these records for several reasons, all of which fail, as shown below.

First, Rutland provides no support for its claim that records reflecting an initial arrest can be withheld merely because it was not the agency that ultimately placed the defendant under arrest. Neither the PRA nor case law recognizes such a distinction, which, if adopted, would thwart the

transparency aim of the PRA. Because there is no such caveat to the PRA's mandate of disclosure of initial arrest records that would allow for the blanket withholding of these records on these grounds, they must be released.

Second, Rutland has not met its high burden of demonstrating that release "would" as opposed to hypothetically "could" deprive a person of a right to a fair trial by merely pointing to the graphic nature of some portion of the footage. Indeed, in its response, Rutland never even attempts such a showing.

Third, Rutland fails to demonstrate that by not fulfilling its statutorily-mandated obligations at the administrative stage—namely, to review records and make a written appeal determination—the Court should somehow find that it should be rewarded for its failure by now being allowed to raise two new exemptions during summary judgment that it failed to preserve below.

Finally, if the Court decides to proceed to the merits with these new exemptions, Rutland's arguments still fail because it made only conclusory assertions with respect to both privacy and witness-identifying information that does not justify the blanket withholding of records. For these reasons, the Court should grant VTDigger's Motion for Summary Judgment.

ARGUMENT

I. BECAUSE THE IDENTITY OF THE ARRESTING AGENCY IS NOT A FACTOR IN WHETHER THE RECORDS REFLECT AN INITIAL ARREST UNDER THE PRA, THE RECORDS MUST BE RELEASED

Rutland argues the records are properly withheld because it was not the agency that ultimately placed the defendant in the police chase under arrest. *See* Def.'s Response in Opposition to Plaintiff's Combined Opposition and Cross-Motion, dated Jun. 5, 2024 ("Def.'s Resp. Br.") at 4. But when the PRA mandates that all "records reflecting the initial arrest of a person" be made

public, it makes no exception based on the identity of the arresting agency. 1 V.S.A. § 317(c)(5)(A)-(B). Nor does Rutland cite any case law supporting its argument for the blanket withholding of records in this context. Even if Rutland did not have custody of the records for some period of time, *see* Def.'s Resp. Br. at 6, the Vermont Supreme Court has explicitly found that an agency record "does not change its status" simply because it may have transferred hands. *Oblak v. Univ. of Vermont Police Servs.,* 2019 VT 56, ¶ 12. In *Oblak*, the Court ordered an agency to release a police record that had also been filed in court because "it was prepared by [the agency] in the course of public agency business" and "kept by" the agency. *Id.* ¶¶ 11-12. Rutland's reasoning, if adopted by this Court, would only serve to thwart the transparency and accountability aims of body and dash cameras.

The Vermont Supreme Court has interpreted "records reflecting the initial arrest of a person" 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). "Even a de facto arrest" without formal arrest "would require [an agency] to release records of the incident." *Id.* ¶ 12 (ordering all records "generated as result of" 15-minute involuntary detention released because it counted as de facto arrest despite release of defendant with no charges brought). As Rutland itself concedes, "the audio and video footage that is under the custody of the Rutland City Police Department certainly includes some information that was ultimately used as a basis for arresting and charging Rheaume." Def.'s Resp. Br. at 4.

Here, Rutland police involuntarily detained the defendant right before the police chase while confirming whether his ex-girlfriend wished to press charges. *See* Keays Decl., Ex. A at ¶¶ 2, 16. Rutland police did not have the opportunity to conduct the initial arrest because the defendant fled, prompting the chase that ultimately led to the arrest by state police. *See id.* at ¶¶ 8,

16. Because these records are the "product[] of crime detection" and reflect an initial arrest, they cannot be withheld under § 317(c)(5) of the PRA. *Caledonian Rec. Pub. Co. v. Walton*, 154 Vt. 15, 26 (1990) (finding arrest and citation records "are public records which must be disclosed and are not included within the detection and investigation exemption").

II. EVEN IF THE RECORDS DO NOT REFLECT AN INITIAL ARREST, RUTLAND FAILS TO DEMONSTRATE THEY CAN BE WITHELD UNDER 1 V.S.A. § 317(c)(5)(A)

A. Rutland Fails to Demonstrate Release of the Records Would Deprive the Defendant of a Fair Trial.

In blanket fashion, Rutland argues a fair trial would be "nearly impossible" anywhere in Vermont if the records are released because "their contents are exceptionally graphic, prejudicial, and would evoke such strong emotion from the public[.]" Def.'s Resp. Br. at 5. But without more, Rutland has not met its burden to demonstrate that release of the records would, in fact, impede a fair trial to such an extent that procedural safeguards could not ensure fairness here. This Court must thus find that the fair trial exemption under 1 V.S.A. § 317 (c)(5)(A)(ii) does not apply.

Vermont courts construing this provision must "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 exemption applies, an agency must therefore meet a two-part test: "(1) that a trial or adjudication is pending or truly 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." *Washington Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988). Mere "speculation about potential publicity and its effect on a future jury[,]" as Rutland does here, "does not satisfy the level of certainty required." *Chiquita Brands Int'l, Inc. v. United States SEC*, 10 F.Supp. 3d 1, 5 (D.D.C. 2013) (quoting *Washington Post*, 863 F.2d at 102) (internal citations omitted). Rather, the party seeking to prevent disclosure of the

records must "show why common judicial safeguards such as *voir dire* would be insufficient to ensure fairness[.]" *Id*. Rutland has not even attempted to make such a showing and offers pure speculation that the records may potentially elicit "strong emotion from the public" because "their contents are exceptionally graphic" and "prejudicial[.]" Def.'s Resp. Br. at 5. But an assertion of negative pretrial publicity alone, "even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Skilling v. United States*, 561 U.S. 358, 361 (2010).

Rutland fails to show how the release of the relevant records would compromise the fairness of the trial to the point where judicial safeguards, such as *voir dire*, would be ineffective. Rutland claims that the "public[] interest . . . must be balanced against the broader public interest of safeguarding the public good and ensuring justice can be served and the judicial process maintained." *Id.* However, Rutland points to no case law that supports this novel balancing test. And, even if there were such a test, Rutland provides no support for its claim that withholding records from the public would indeed safeguard the public good or ensure justice is served in this case. To the contrary, VTDigger seeks these records to shed further light on the crash to the extent that it determines they provide important journalistic value in the public interest. While the motive of the requester is immaterial to the agency's response here, VTDigger does not seek to sensationalize the tragic death of a police officer.

Because Rutland has failed its high burden of demonstrating that release "would" as opposed to "could" deprive a person of a right to a fair trial, the records must be released. *Wash. Post Co.*, 863 F.2d at 102.

B. Rutland Fails to Demonstrate It Can Withhold Records In Their Entirety On the Basis of Privacy Concerns Or to Conceal Witness-Identifying Information.

While Rutland argues, in a conclusory fashion, that records can be properly withheld in their entirety under 1 V.S.A. § 317(c)(5)(A)(iii) and 1 V.S.A. § 317(c)(5)(D), the case it cites for

this proposition, in fact, states the opposite. *See* Def.'s Resp. Br. at 4 (citing *Galloway*, 2012 VT at ¶ 15). The Vermont Supreme Court in *Galloway* held that "all records . . . generated as a result of" an "initial arrest" must be disclosed under the PRA, noting that "no overriding public-interest concern [in withholding] is discernible when the executive act of arrest has been completed." *Galloway*, 2012 VT at ¶ 15.

As a threshold matter, because Rutland fails to demonstrate that it preserved either of these two new exemptions raised for the first time during summary judgment, Rutland unequivocally waived them. Nevertheless, Rutland argues that this Court should not find it waived the exemptions below for two reasons: (1) "there was effectively no administrative decision" given that the request was "constructively denied;" and (2) Rutland "did not have custody of their records at the time of the request, nor had they reviewed the records at that point in time." Def.'s Resp. Br. at 6. But Rutland fails to acknowledge that it was obligated at the administrative stage to both "make a written determination on an appeal within five business days" that includes "the reasons and supporting facts for upholding the denial," 1 V.S.A. 318 § (c)(1), (2)(B), and to "undertake a reasonable search to identify and disclose responsive, nonexempt public records." *Toensing v. Attorney Gen. of Vt.*, 2017 VT 99, ¶ 35 (Vt. 2017). It never did so. Because the PRA is based on a presumption of access and Rutland failed to meet its statutory obligations here, this Court should find that its review of the 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). Otherwise, a party seeking documents would be unable to assess the chances of success in litigation before embarking on a lawsuit.

But even if the Court decides to proceed to the merits with these two new arguments, Rutland has only made conclusory assertions with respect to its new claims under the privacy and

witness-identifying exemptions and fails to justify the blanket withholding of records. *See* Def.'s Resp. Br. at 4; *see also* Vermont Journalism Trust's Combined Opposition and Motion for Summary Judgment, dated May 8, 2024, at 12-16.

Rutland has not demonstrated any significant privacy interest in withholding personal emotional reactions or other unspecified footage, let alone a privacy interest that outweighs the significant public interest in their release. *See Galloway*, 2012 VT at ¶ 15 (*quoting Walton*, 154 Vt. at 24) (noting the significant public interest in "[i]nformation concerning the operations of the police department in making arrests and the charges upon which arrests are made[,]" which "is vital to the democratic system"). Nor has it acknowledged that its own "previous disclosures or admissions[,]" including the release of footage in this case, "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). Nor can Rutland rely on Section 317(c)(5)(D) to support the blanket withholding of records, since, on its face, it provides only for limited redactions to witness-identifying information. *See id.* § 317(c)(5)(D) (noting "[a] record shall not be withheld in its entirety because it contains identities or information that have been redacted pursuant to this subsection").

Because the records reflect an initial arrest and Rutland has not shown that either the privacy exemption or Section 317(c)(5)(D) applies to withhold records in their entirety, the records must be released.

CONCLUSION

VTDigger respectfully requests an order requiring the Rutland City Police Department to promptly provide copies of access to all recordings responsive to VTDigger's request, declaring that in denying VTDigger's request, the 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.

VERMONT JOURNALISM TRUST, LTD

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[1] Clinic summer fellows Johanna Li and Celina Rivernider 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.