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June 5, 2024

Margaret Villeneuve, Clerk
Superior Court, Washington Unit
65 State Street
Montpelier, VT 05602

Re: Vermont Journalism Trust v. City of Rutland, 23-CV-05003

Via E-File

Dear Margaret,

Enclosed please find a Response to “Plaintiff’s Combined Opposition to Defendant’s Motion for Summary Judgment, Cross-Motion for Summary Judgment, and Incorporated Memorandum of Law” on behalf of the City of Rutland and Rutland City Police Department in the above matter. I have also enclosed a certificate of service for the same.

If you have any questions, please feel free to contact me.

Sincerely,

/s/ Megan A. LaChance
Megan A. LaChance, Esq.

CC: Jared K. Carter, Esq.
Heather E. Murray, Esq.
Timothy Cornell, Esq.
Matthew A. Bloomer, Esq.

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 23-CV-05003

VERMONT JOURNALISM TRUST,)
Plaintiff)
v.)
CITY OF RUTLAND,)
Defendant)

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

NOW COMES defendant, City of Rutland, by and through its attorney, Megan A. LaChance, Esq., and hereby opposes Plaintiff’s Cross-Motion for Summary Judgment. The City offers the following Memorandum and accompanying exhibits in support of its position.

Memorandum

In the interest of ongoing disclosure, the City is including three exhibits consisting of clips of Officer Dumas’ body camera footage (*see* Defendant’s Exhibit 1, #34). These clips were presented during a recent weight of the evidence hearing and are now part of the public record, thereby no longer falling under the fair trial exemption as allowed by 1 V.S.A. § 317(c)(5)(A)(ii). Preliminaries out of the way, the City now turns to responding to Plaintiff’s cross-motion.

A significant portion of Plaintiff’s cross-motion for summary judgment is spent arguing how the previously relied upon litigation and ethics exemptions were seemingly abandoned by the City in its motion for summary judgment, and their contention that the Court should not rely upon these exemptions in making a determination since they were not brought up in that motion.

See Plaintiff's Combined Opposition to Defendant's Motion for Summary Judgment, Cross-Motion for Summary Judgment, and Incorporated Memorandum of Law ("Pl.'s CMSJ") at 2. The City acknowledges that it did not raise those two exemptions in its motion, and that this was an intentional choice.

The litigation exemption was initially relied upon in error as the Rutland City Police Department was not then, nor is it currently, a named party in any litigation that would involve the requested records. The City therefore made the determination to not continue reliance on this exemption.

Regarding the previously relied upon ethics exemption, the City also determined to discontinue reliance on this provision, though for a different reason. While the City believed that at the time of Plaintiff's initial request there may have been statements that could have been recorded in the video footage that would have been determined to be extrajudicial, it was later discovered that those statements did not get inadvertently recorded in the video footage. The reliance on this exemption was therefore dropped.

In addition to pointing out aspects of the City's motion that would logically be construed as being intentional, the Plaintiff seems to enjoy changing their reasoning for requesting the audio and video records from the City. While Plaintiff states correctly that no motive or reason for requesting the records needs to be given, they seem to want to play on the City's sympathies and change their reasoning based on a flavor de jour. *See* Pl.'s CMSJ at 13. Plaintiff has proceeded from providing no reason, to stating that it wishes to uncover any "internal policy or management deficiencies," to finally claiming to seek out the records to answer questions of public interest and inform the public of "life-or-death policies and practices." *See* Plaintiff's Complaint at 5; and Pl.'s CMSJ at 5-6. If Plaintiff truly were interested in the policies and

practices of the Rutland City Police Department, it is then curious that they never once requested the crash report or the Department's policy manual. Both documents are public records and would be provided without objection if requested. The City did, in fact, provide the policy manual to other news agencies who requested it alongside a request for audio and video records similar in nature to Plaintiff's request. The City remains dumbfounded as to why Plaintiff has failed to request either of these records.

Regardless of Plaintiff's motives, however, the City's rationale for withholding the requested records remains the same. The withholding of records under the exemptions cited in the City's original motion was done with the intent to protect private citizens, maintain the dignity of the injured and deceased, and ensure the justice and fairness of the pending criminal proceeding.

Argument

The Court should deny Plaintiff's cross-motion for summary judgment for the following reasons. First, the records requested do not reflect an initial arrest and are properly withheld under the exemptions as laid out in 1 V.S.A. § 317(c)(5)(A) & § 317(c)(5)(D).

Secondly, the City maintains that the fair trial exemption from 1 V.S.A. § 317(c)(5)(A) applies in this case. Defendant's dissatisfaction with the City's ability to demonstrate that disclosure of these records "would seriously interfere with the fair trial right," does not mean that the City has failed to demonstrate this. Pl.'s CMSJ at 6. The City will, however, elaborate on this for the sake of clarity before the Court.

Lastly, Defendant incorrectly asserts that the City did not preserve the privacy exemption and associated arguments per 1 V.S.A. § 317(c)(5)(D) at the administrative stage. There was no agency review or determination made. Further, the records were in the custody of the Vermont

State Police and unavailable for access by the Rutland City Police or the public when the City first responded to Plaintiff's request, making it difficult to determine the precise exemptions that would apply once the City regained custody of the records.

I. THE RECORDS REQUESTED DO NOT SHOW THE INITIAL ARREST

Plaintiff contends in their cross-motion that the records they have requested "are the product of crime detection and reflect an initial arrest." Pl.'s CMSJ at 2. In this the Plaintiff is mistaken since it was the Vermont State Police who eventually placed criminal defendant, Tate Rheame, under arrest, and not the Rutland City Police. *See* Declaration of Alan J. Keays, Exhibit A at 8 (Affidavit of Sgt. Thomas Howard at 6).

While 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 Rheame, it is properly withheld under the exceptions stated in 1 V.S.A. § 317(c)(5)(A)(iii) and 1 V.S.A. § 317(c)(5)(D). The City is aware that prior court precedent indicates such records should be disclosed if they do not fall under an exception, but as the City has already argued in its Motion for Summary Judgment, they do. *See Galloway v. Town of Hartford*, 2012 VT 61, ¶ 15 (2012) (citing *Caledonian-Rec. Pub. Co. v. Walton*, 154 Vt. 15 (1990)).

II. THE FAIR TRIAL EXEMPTION IS PROPERLY RELIED UPON BY THE CITY IN REFUSING TO PRODUCE RECORDS

The City has, from the very beginning, cited the fair trial exemption as allowed pursuant to 1 V.S.A. § 317(c)(5)(A)(ii) as a basis for withholding the records requested by Plaintiff. The City is aware of its duty to disclose records that relate to the detection and investigation of a crime provided that their production would not "deprive a person of a right to a fair trial or an impartial adjudication [.]" *Id.* Where records have been found, in the determination of the City,

to not have this particular impact, the City has disclosed them to Plaintiff. *See* Defendant's Exhibits 1-4.

Plaintiff alleges the City has not met its burden in showing that Rheaume would be deprived of a fair and impartial trial. Pl.'s CMSJ at 9-10. In applying the two-part test set out by the D.C. Circuit court in *Washington Post Company v. United States Department of Justice*, the City concludes that the records currently being withheld still fall within the exception. 863 F.2d 96, 102 (D.C. Cir. 1988). While this case is not specific to Vermont, it is specific to the Freedom of Information Act (FOIA) upon which Vermont's Public Records Act is modeled. Part one of the *Washington Post* test is "that a trial or adjudication is pending or imminent," which is easily met in this case since the criminal proceedings against Rheaume are widely known to be occurring and have been reported on by multiple news agencies, including Plaintiff. *Id.*

The second part of the *Washington Post* test is that the "material sought would seriously interfere" in conducting a fair trial. *Id.* As Plaintiff acknowledges in their Declaration, the pending case "has garnered significant ongoing public interest." Declaration of Alan J. Keays at ¶ 6. This alone would of course not be enough reason to withhold the records, even though it may prove a contributing element in the analysis.

The particular reason for withholding the records under the fair trial exception is that their contents are exceptionally graphic, prejudicial, and would evoke such strong emotion from the public were they to be disclosed that it would prove nearly impossible to find an impartial jury in the State, let alone in Rutland County, to hear this case. While there is likely to be public interest in these records, the public's "interest" or morbid curiosity must be balanced against the broader public interest of safeguarding the public good and ensuring justice can be served and the judicial process maintained.

III. THE CITY DID NOT FAIL TO PRESERVE ARGUMENTS AT THE ADMINISTRATIVE STAGE

The City cannot have failed to preserve the arguments of privacy and protection of the identity of witnesses at the administrative stage given that there was effectively no administrative decision. When Plaintiff appealed the Rutland City Police Department's response to the Mayor, they were constructively denied. Plaintiff's Statement of Undisputed Material Facts (Pl.'s SUMF) at ¶ 8. While technically a denial, no determination was actually made at the agency level.

Additionally, the Rutland City Police did not have custody of their records at the time of the request, nor had they reviewed the records at that point in time.¹ Inability to access the records and discover what they contained made it impossible to raise the privacy and witness issues since these could not have reasonably been known at the time of the initial response. Once the City regained custody of their records, it was discovered that these two particular exemptions would apply to certain records, and they were therefore raised by the City in their Motion for Summary Judgment.

Conclusion

For the foregoing reasons, the City requests the Court deny Plaintiff's motion and enter judgment that the withheld records are exempt from disclosure under the VPRA, and further that the Court order that each party is to bear its own costs and attorneys fees.

¹ Per their standard operating procedure, the records were handed over to Vermont State Police within days of the July 7th incident in order to allow the outside agency to conduct a review and investigation. Those records were remanded to Rutland City Police custody at the conclusion of the State Police's investigation.

DATED at Rutland, Vermont June 5, 2024.

By: /s/ Megan A. LaChance
Megan A. LaChance
1 Strongs Avenue
Rutland, VT 05701

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

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VERMONT JOURNALISM TRUST,)
 Plaintiff)
 v.)
CITY OF RUTLAND,)
 Defendant)

CERTIFICATE OF SERVICE

NOW COMES City Attorney Megan A. LaChance, Esq., and hereby certifies that on the 5th day of June, 2024, the undersigned served a Motion for Summary Judgment on behalf of the City of Rutland and the Rutland City Police Department via electronic service on the following, pursuant to Rule 5(b)(2) of the Vermont Rules of Civil Procedure:

Heather E. Murray, Esq.
Hem58@cornell.edu

Jared K. Carter, Esq.
Jc2537@cornell.edu

Timothy Cornell, Esq.
tcornell@cornelldolan.com

Dated at the City and County of Rutland, Vermont this 5th day of June, 2024.

CITY OF RUTLAND

/s/ Megan A. LaChance
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