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 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Because none of the arguments asserted by Defendant Vermont Department of Public Safety's ("Department") Motion to Dismiss pursuant to Vermont Rule of Civil Procedure 12(b)(6) hold any merit under the law, Plaintiff Vermont Journalism Trust ("VTDigger") respectfully requests that this Court deny the Motion in its entirety, for the reasons set forth more fully below.

**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. *See* Compl. ¶¶ 11-12.

After Ms. Vekos's arrest, the Department denied VTDigger access to footage of the records, citing the PRA's interference with enforcement proceedings exemption. *See* Compl. ¶¶ 14-15; 1 V.S.A. §§ 317(c)(5)(A)(i). After VTDigger appealed to the Department's commissioner, the commissioner cited the same interference exemption and asserted, for the first time, the

professional ethics and litigation exemptions. *See* Compl. 16-17; 1 V.S.A. §§ 317(c)(3), 317(c)(14). Now abandoning its previous reliance on the litigation exemption, the Department argues instead in its Motion here that it is properly withholding records under the fair trial exemption, § 317(c)(5)(A)(ii).

None of the cited exemptions apply. These records reflect the initial arrest of Ms. Vekos, and as such, they cannot be withheld under § 317(c)(5)(A), which only pertains to records concerning the detection and investigation of a crime. Not only are arrest records clearly public under the PRA, but bodycam and dashcam arrest footage is also routinely released by police departments in Vermont and around the country to promote public accountability and comply with public records laws. For example, Vermont State Police released dashcam footage this summer of a DUI arrest involving a driver traveling the wrong way on a highway. *See* Molly Ormsbee, *Dashcam footage captures near head-on collision on Vermont highway*, NBC 5 (Jul. 1, 2024), https://www.mynbc5.com/article/dashcam-footage-captures-wrong-way-dui/61468926.[1]

Just this month, the Miami-Dade Police Department similarly released bodycam footage of the highly-scrutinized detention of Miami Dolphins player Tyreek Hill in a show of "commitment to transparency and maintaining public trust," a department official said in a statement. Becky Sullivan, *Bodycam footage shows Miami-Dade Police forcibly handling Dolphins star Tyreek Hill*, NPR (Sept. 9, 2024), https://www.npr.org/2024/09/09/nx-s1-

[1] "[I]t is well settled that, in ruling on a Rule 12(b)(6) motion to dismiss, courts may properly consider matters subject to judicial notice, such as statutes and regulations, and matters of public record." *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 10 n.4. Courts routinely take judicial notice of newspaper articles. *See, e.g.*, *Garber v. Legg Mason, Inc.*, 347 F. App'x 665, 669 (2d Cir. 2009) (rejecting party's argument that Court could not take judicial notice of newspaper articles on a motion to dismiss).

5106872/tyreek-hill-police-bodycam-videos-miami-dolphins. The Department has demonstrated no reason why the requested footage should not likewise be released.

Nor does the interference or fair trial exemption apply because the Department has failed to demonstrate that disclosure would seriously interfere with either an enforcement proceeding or the fair trial right. And the Department also cannot rely on the fair trial exemption for a second reason: it failed to raise the argument at the administrative stage and thus waived it. Likewise, the records cannot be withheld under §317(c)(3), as release of the bodycam footage would not cause the records custodian to violate any applicable rules of professional conduct and, in any event, the release of public records is plainly not an extrajudicial statement proscribed by the Vermont Rules of Professional Conduct.

## 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 an ongoing suspicious death investigation. *See* Compl. ¶¶ 4-5. Soon after she arrived, state police troopers on scene suspected Ms. Vekos was under the influence of alcohol. *See* Compl. ¶¶ 6-7; *see also* Alan J. Keays, *Addison County State's Attorney Charged with DUI After Allegedly Showing Up Impaired at Crime Scene Investigation,* VTDIGGER (Jan. 26, 2024), https://vtdigger.org/2024/01/26/addison-county-states-attorney-charged-with-dui-after-allegedly-showing-up-impaired-at-crime-scene investigation/.

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." Compl. ¶ 8. Ms. Vekos was then arrested for driving under the influence. *See id.* ¶ 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*. ¶ 10.

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." Compl. Ex. A.

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* Compl. Ex. B. On February 15, 2024, Mr. Keays appealed Mr. Weaver's denial to DPS Commissioner Jennifer Morrison. *See* Compl. Ex. C.

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. Ex. D.

Given the Department's continued efforts to block VTDigger's lawful access to these records, VTDigger has been compelled to file this lawsuit to obtain the audio and video footage from Ms. Vekos's arrest, as required by the PRA.

## ARGUMENT

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

Since the requested records indisputably reflect the initial arrest of a person, they must be disclosed. 1 V.S.A. § 317(c)(5)(B) ("Notwithstanding [that § 317(c)(5)(A) exempts records dealing with the detection and investigation of crime], "records reflecting the initial arrest of a person . . . shall be public."). Indeed, the Vermont Supreme Court has interpreted Section 317(c)(5)(B) of the PRA 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). 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 unequivocally determined that agencies cannot withhold arrest and other records that "are the *products* of crime detection[.]" *Caledonian Rec. Pub. Co. v. Walton*, 154 Vt. 15, 26 (1990) (emphasis added).

The Department cites no cases that support its remarkable proposition that it should be able to withhold arrest records whenever it claims that there is an "active criminal case pending in which the footage will be key evidence." Def.'s Mot. at 6. While the Department argues that an ongoing criminal proceeding somehow transforms the requested arrest records into exempt investigation records, Def.'s Mot. at 5-6, the case law it relies on stands for the opposite proposition: "[T]he Legislature wanted arrest records to be disclosed whether or not they fit within the general exception for records dealing with the detection and investigation of crime." *Walton,* 154 Vt. at 25-26. And the plain language of the PRA supports the release of the records because "the proviso clearly requiring the disclosure of arrest records contains no exception for ongoing investigations." *Id.* at 28.

The Department misconstrues the cases it relies on and the plain language of the PRA to argue that the audio and bodycam footage at issue here should be withheld because they are unlike the citations and the affidavit of probable cause at issue in *Walton* and *Oblak v. University of Vermont Police Services*, 2019 VT 56 (2019). Def.'s Mot. at 6-7. But the Department provides no explanation for how the requested records documenting Ms. Vekos's arrest should somehow fall outside *Galloway*'s broad interpretation of the PRA mandating that agencies release "all records . . . that were identified by the police as being generated as a result of the incident[.]" *Galloway*, 2012 VT at ¶ 15.

As the Court in *Oblak* ruled, an arrest record cannot be withheld simply because police claim there is an open investigation. *Oblak*, 2019 VT at ¶¶ 4, 11, 16 (finding "public has a right to access the affidavit of probable cause," which it "characterized as a police arrest record," because it "does not qualify as confidential under the PRA"). In fact, the court in a recent case involving bodycam records rejected a similar argument to the one here, ordering that "[t]he bodycam videos" . . . "must be disclosed" because they "are essentially identical to what the Court ordered disclosed in Galloway as 'related to' an arrest." *Burlington Police Officers' Ass'n v. Burlington Police Dept.*, No. 378-4-19 CNCV, 2019 WL 13172490, at *3 (Vt. Super. Jul. 1, 2019). So, too, here.

Releasing the arrest records here is consonant with the Court's longstanding recognition of how "vital to the democratic system" it is to make public "[i]nformation concerning the operations of the police department in making arrests and the charges upon which arrests are made." *Galloway*, 2012 VT at ¶ 15 (citations omitted). Indeed, the Court has found that "no overriding public-interest concern" in secrecy "is discernable when," as here, "the executive act of arrest has been completed." *Id*.

Making arrest records public is even more important here, where the arrest at issue concerns Addison County's top prosecutor. In that role, she not only enjoys a lesser degree of privacy than others but also should be held accountable to the public. *See, e.g.*, 1 V.S.A. § 315 ("Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment.").

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

But even if the Court finds that these records are not required to be disclosed since they reflect an initial arrest, the Department still must release the records, because it has not

demonstrated that either the interference with enforcement proceedings or fair trial exemptions apply. The Department cites no case law to support its argument that these exemptions apply because "[t]he video footage Plaintiff requested can reasonably be expected to be pivotal evidence in a criminal trial, and releasing the footage to the public could interfere with witness testimony." Def.'s Mot. at 6. 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 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). Under the federal Freedom of Information Act ("FOIA")'s analogous provision, an agency must meet a two-part test to demonstrate the exemption applies: whether disclosure of the requested records "(1) could reasonably be expected to interfere with (2) enforcement proceedings that are . . . pending or reasonably anticipated." *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Just.,* 658 F. Supp. 2d 217, 225 (D.D.C. 2009). The legislative history of federal FOIA's analogous provision demonstrates that it is intended to apply only where a proceeding "*would be harmed* by the premature release of evidence not in the possession of known or potential defendants." *North v. Walsh*, 881 F.2d 1088, 1098 (D.C. Cir. 1989) (quoting 120 Cong. Rec. S17,033 (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).

Because Ms. Vekos was present at her arrest and knows the identity of the witnesses already, it is unclear "how [the Department's] investigation will be impaired by the release of information that the targets of the investigation *already possess.*" *Chesapeake Bay Found., Inc. v. U.S. Army Corps of Engineers*, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (emphasis in original). Without more, the Department has utterly failed to meet its burden to withhold records under the interference exemption.

B. The Fair Trial Exemption Does Not Apply

1. The Department Failed to Preserve This Exemption at the Administrative Stage

When the Department originally denied VTDigger's public record request, it never claimed the right to withhold based on the fair trial exemption. It cannot raise it now. "[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. Thus, by avoiding this required step, the Department robs VTDigger of the ability to accurately analyze its legal position and determine whether a lawsuit is warranted.

The Department flouts the preservation requirement by raising this exemption for the first time in its motion to dismiss briefing. In an analogous case, New York's highest court 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 this exemption was not raised below, the Department has waived it before this Court.

2. The Department Has Failed to Demonstrate Release of the Records Would Seriously Interfere with Fair Trial Right

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). To demonstrate FOIA's analogous 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 the Department here 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). The Department cannot satisfy this exacting standard.

The Department argues that "[t]he video footage Plaintiff requested can reasonably be expected to be pivotal evidence in a criminal trial," Def.'s Mot. at 6. But mere "speculation about potential publicity and its effect on a future jury[,]" as the Department engages in 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 *Wash. 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.*

Here, the Department has failed to show why judicial safeguards such as *voir dire* would be insufficient to ensure fairness here. The Department's mere assertion that "[t]he video footage Plaintiff requested can reasonably be expected to be pivotal evidence in a criminal trial," Def.'s Mot. at 6, plainly does not suffice to demonstrate that these particular records would impair the fair trial right in this case. *See 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)). Nor has the Department demonstrated how release of footage of the arrest would taint a jury pool, given that Ms. Vekos's arrest and subsequent actions have already been widely reported. Because the Department has failed to demonstrate that disclosure would seriously interfere with the fair trial right, the records should be released.

## III. BECAUSE PUBLIC RECORDS ARE NOT EXTRAJUDICIAL STATEMENTS AND THE ETHICS EXEMPTION DOES NOT APPLY TO NON-CUSTODIANS, THE RECORDS MUST BE RELEASED

Section 317(c)(3) of the PRA exempts from public disclosure those 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). The Department argues that release of the footage "could cause the prosecutors in Ms. Vekos's case to violate the Vermont Rules of Professional Conduct," Def.'s Mot. at 7, specifically Rules 3.6 and 3.8. As support for this

assertion, the Department claims that "the prosecutors in this case have specifically requested [the Department], as the investigating agency, not to disclose the video records on grounds that the release of the requested records would have a substantial likelihood of materially prejudicing the pending proceeding against Ms. Vekos." *Id.* at 8.

As a threshold matter, the plain language of Section 317(c)(3) states it only applies to the actual "custodian" of the records. The Vermont Supreme Court has defined the word "custodian," according to its dictionary definition, as "[a] person or institution that has charge or custody of property, papers, or other valuables" or "who ha[s] it within their power to release or communicate public records." *Pease v. Windsor Dev. Rev. Bd.,* 2011 VT 103, ¶ 19 (citations omitted). As the custodian of the requested records here, the Department ignores the plain meaning of Section 317(c)(3) by improperly broadening its scope to cover purported ethical violations by parties who are not the custodians of the records.

Even if prosecutors' actions do fall under the exemption, release of public records alone is never an extrajudicial statement under Rules 3.6 or 3.8. *See Cox Ariz. Publ'ns, Inc. v. Collins*, 852 P.2d 1194, 1198 (1993) ("Simply handing over public records to reporters without comment is not necessarily an 'extrajudicial statement.'"). 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).

If the Department's argument is accepted, wide swaths of public criminal records could be withheld based on the mere claim that their release could prejudice a proceeding. To avoid a similar outcome, the Superior Court in a recent case rejected the Attorney General's Office's attempt to rely on the ethics exemption to exempt "all records in the Attorney General's office," where their release could purportedly run afoul of confidentiality obligations under Rule 1.6. *Energy & Environment Legal Institute v. Atty. Gen. of Vermont*, 2017 WL 11676871, at *2 (Vt. Super. 2017). Because the ethics exemption only applies to the records custodian, and public records are plainly exempt from the Rules' prohibition on extrajudicial statements, Section 317(c)(3) cannot be a basis for withholding the records.[2]

## CONCLUSION

Because the records requested do not deal with the detection or investigation of a crime, nor would they interfere with an investigation, the right to a fair trial or the Vermont Rules of Professional Conduct, Plaintiff VTDigger respectfully requests that this Court deny the Defendant Department's Motion to Dismiss.

[2] Again, by failing to raise the litigation exemption in its briefing, the Department has abandoned this exemption. *See, e.g.*, *Patterson v. Balsamico*, 440 F.3d 104, 114 n.5 (2d Cir. 2006) ("This Court generally will not consider arguments raised for the first time in a reply brief."); *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 motion "because the party opponent is . . . denied an opportunity to respond" if the argument is only made in a reply). Even if the Court proceeds to the merits with respect to this exemption, the Department has failed to demonstrate it applies. 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). Since no showing has been made here, the exemption does not apply.

Dated at Montpelier, Vermont this 30th day of September 2024.

Respectfully submitted,

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[3] Clinic students Grace Braider, Zachary Jacobson 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 Opposition should be construed to represent the views of these institutions, if any.