

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 24-CV-02289

VERMONT JOURNALISM TRUST,)
 Plaintiff,)
)
 v.)
)
VERMONT DEPARTMENT OF)
PUBLIC SAFETY,)
 Defendant.)
)

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY
JUDGMENT AND DEFENDANT’S REPLY MEMORANDUM IN FURTHER SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant Vermont Department of Public Safety (“the Department”), by and through its counsel the Vermont Attorney General’s Office, hereby submits this memorandum of law in opposition to Plaintiff’s motion for summary judgment and in further support of its motion for summary judgment.

MEMORANDUM OF LAW

- 1. Plaintiff is not entitled to summary judgment because it has not established that it is entitled to judgment as a matter of law, taking all of Defendant’s assertions as true.**

In order to prevail on summary judgment, the moving party must accept all of the nonmoving party’s facts as true and show that they win as a matter of law and that there is no dispute of material facts. *See Hammond v. Univ. of Vt. Med. Ctr.*, 2023 VT 31, ¶ 23. (In determining whether a genuine dispute of material fact exists, the Court generally accepts allegations by the non-moving party as true; however, those allegations must be “supported by affidavits or other admissible evidence.”)

Here, Plaintiff argues in its motion for summary judgment that it disagrees with Defendant's claim that the release of the audio and video footage right before Ms. Vekos' trial will interfere with the government's ability to prosecute its case and the defendant's right to a fair trial. Plaintiff disagrees with Defendant's proffered facts, without any evidence,¹ including that the requested footage concerns the Vermont State Police's investigation of Ms. Vekos for DUI. *See* Plaintiff's Undisputed Facts p. 8. Plaintiff further disputes that the footage contains evidence of whether Ms. Vekos committed a DUI. *Id.* Plaintiff even disputes Defendant's assertion that the prosecution plans to use the video footage at Ms. Vekos trial. *Id.* at 9.

Plaintiff has failed to establish that, taking the nonmoving party's allegations as true, it is entitled to judgment as a matter of law. Instead, Plaintiff's legal arguments ignore Defendant's factual assertions. Plaintiff baselessly claims that Defendant has not explained why releasing the footage would interfere with the proceedings. However, the Defendant provided a sworn affidavit from the prosecutor who explains that for the specific crime of DUI, every aspect of how Ms. Vekos appears, sounds, and what she says is important evidence. *See* Defendant's Motion for Summary Judgment at 8-9. Moreover, the prosecutor further explains in the affidavit how Ms. Vekos' trial will at times focus on the conduct of the officers, and their conduct on video is equally critical to the prosecution's case. *Id.*

For summary judgment purposes, Plaintiff must accept Defendant's facts as true and explain why, under relevant law, Plaintiff still wins. Specifically, Plaintiff would need to

¹ For purposes of Defendant's Motion for Summary Judgment, Plaintiff's attempts to dispute Defendant's facts should be disregarded because Plaintiff does not support its claims that facts are disputed with any evidence, as is required by V.R.C.P. 56(c)(2) ("A nonmoving party responding to a statement of undisputed material facts and asserting that a fact is genuinely disputed ... must file a paragraph-by-paragraph response, *with specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute*[.]") (emphasis added).

establish that even accepting all of Defendant's assertions as true, the records are not exempt under 1 V.S.A. § 317(c)(5)(A)(i)-(ii), which Plaintiff has failed to do. Plaintiff both disputes and disregards Defendant's proffered facts, thereby conceding that Plaintiff cannot show that taking the nonmoving party's assertions as true, it is entitled to summary judgment, as is required. Accordingly, Plaintiff's motion for summary judgment must be denied.

2. The arrest records exception does not apply to the video footage of Ms. Vekos – Plaintiff already has the 'arrest records' of Ms. Vekos' arrest.

Defendant's Motion for Summary Judgment should be granted because the arrest records exception does not apply to the video footage of Ms. Vekos, and the exemption for records of detecting and investigating a crime that are expected to interfere with enforcement proceedings does apply. As explained in Defendant's Motion, the requested footage is exempt under 1 V.S.A. § 317(c)(5)(A)(i)-(ii) and analogous FOIA provision 5 U.S.C. § 552(b)(7)(A). While FOIA law on the investigation records exemption is helpful in showing that the records are exempt because they are likely to interfere with enforcement proceedings, FOIA does not contain the same arrest records exception as Vermont's PRA and there is no FOIA guidance on how these provisions interact. Further, there is no precedent to establish that body camera and cruiser camera footage captured while an individual is investigated for a crime and as a result arrested is covered by the arrest records exception in the PRA. The PRA arrest records exception to the law enforcement records exemption has been used to release documents that reflect the fact that a person has been arrested, not video footage that is created during a law enforcement investigation that leads to criminal charges.

"The general consensus in these cases is that an arrest is the result of the detection and investigation of crime, but is not part of such detection and investigation." *Caledonian Rec. Pub. Co. v. Walton*, 154 Vt. 15, 22 (1990) (referring to cases where states consider what constitutes an

arrest record). “Thus, we find that arrest records are not records dealing with the detection and investigation of crime but instead are the products of crime detection.” *Id.* at 26. “Both an arrest and the issuance of a citation involve a finding by a law enforcement officer that there is probable cause to believe a person has committed a crime and both involve the commencement of a criminal proceeding based on that finding.” *Id.* The “commencement of a criminal proceeding” does not occur in the field when a defendant is handcuffed, but instead when the charging documents are filed with the court – all of which Plaintiff already has. *See* Plaintiff’s Opposition at 7-8 (Discussing their detailed article written based on the charging documents).

In this case, the “arrest records” under the PRA, described as the “result of the detection and investigation of crime” are the charging documents that Plaintiff already possesses and reported on.

3. The PRA allows the court to balance competing interests and that balance falls in favor of nondisclosure until Ms. Vekos’ trial is over.

The Vermont Supreme Court explained in *Walton* that disclosure is critical to the functioning of democracy and this interest in disclosure is particularly acute in the area of law enforcement. *Walton*, 154 Vt. at 21, citing *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 772-73, (1989). However, “[o]n the other hand, the state has significant interests in protecting the public from criminal activity, prosecuting those who commit crimes, and protecting the privacy rights of individual citizens. These interests may, at times, override the interest in public disclosure. The Public Access statute was intended to mirror the constitutional right of access, and as such, the exceptions enumerated in the statute allow a balancing of the competing interests.” *Id.*

“The state’s interests in nondisclosure are at their apex where there is an open criminal investigation or ongoing criminal proceedings that might be impaired.” *Galloway v. Town of*

Hartford, 2012 VT 61, ¶ 22 (2012) (Dooley, J, concurring). “The Legislature intended to exclude records involving [investigations that might be tied in with a criminal investigation], presumably to protect the integrity of the law enforcement and prosecutorial function.” *Rutland Herald v. City of Rutland*, 2012 VT 26, ¶ 23 (2012) (dealing with employees’ disciplinary records being sought by media).

Upon reviewing other states’ laws similar to Vermont’s PRA, the *Walton* Court found that “[t]he general consensus in these cases is that an arrest is the result of the detection and investigation of crime, but is not part of such detection and investigation.” 154 Vt. at 22. Video footage displaying police officers in the process of detecting and investigating a person for DUI is certainly part of the detection and investigation of a crime. Records that have found to be “arrest records” under Vermont’s PRA, and therefore not exempt as part of the detection and investigation of a crime, have included: citations, a list of names of persons cited or arrested and the charges against them, and an affidavit of probable cause. *See Walton*, 154 Vt. 15 and *Oblak v. University of Vermont Police Services*, 210 Vt. 550 (2019). The arrest records released in these precedential cases are much more similar to the records Plaintiff already obtained and reported on, and not at all similar to video footage capturing detectives in the process of detecting and investigating someone for DUI. In *Galloway v. Town of Hartford*, the Court determined that the officers’ brief detention of the homeowner constituted an arrest, but the Court did not have to grapple with whether the records of the incident were in fact part of the detection and investigation of a crime because in that case there was no crime. 2012 VT 61. As such, *Galloway* is distinguishable and has no precedential impact on the circumstances in this case.

Plaintiff’s argument that any video footage showing an arrest is not exempt requires the Court to do exactly what it explained does not make sense in its Order on the Motion to Dismiss

– which is to allow the exceptions at amended Subsection 317(c)(5)(B) to render the exemptions at subsection 317(c)(5)(A) “a near nullity.” October 30, 2024 Opinion and Order at 13.

Moreover, as Plaintiff notes, they already have records reflecting the initial arrest of Eva Vekos and have reported on them. Plaintiff’s Opp. at 12. The Court also must consider that when the arrest records exception was drafted by the legislature, police officers in Vermont (or elsewhere) did not wear cameras so it likely never occurred to the drafters that there could exist audio and video footage of a person being investigated for a crime, which also captures the individual being arrested for that crime during the investigation.

The interest in nondisclosure in this case is extremely high because of the upcoming criminal trial. The public in addition to the government both have an interest in the State’s ability to prosecute crime. These heightened interests are not outweighed by the PRA’s preference for disclosure, especially in this case where the Plaintiff has already “published extensively on this case, including a detailed story on police interactions with Ms. Vekos leading up to her arrest.” Plaintiff’s Opp. at 12. The public has nothing further to gain from seeing footage of an event that has already been reported on in detail, whereas the State, the public, and Ms. Vekos face significant consequences if the witnesses and jury view the footage prior to trial, which will irreparably interfere with the enforcement proceedings, as explained at length in Defendant’s Motion for Summary Judgment. *See* Motion at 8-10.

CONCLUSION

For all of the foregoing reasons, Defendant Vermont Department of Public Safety respectfully requests that this Court grant summary judgment to Defendant and deny Plaintiff's Motion for Summary Judgment.

DATED at Montpelier, Vermont, this 3rd day of January 2025.

STATE OF VERMONT

CHARITY R. CLARK
ATTORNEY GENERAL

By: /s/ Michelle Bennett
Michelle Bennett
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-0392
ERN: 10886
michelle.bennett@vermont.gov
*Counsel for the Vermont Department of
Public Safety*