

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. )  
 )

**MOTION TO DISMISS**

Defendant Vermont Department of Public Safety (“the Department”), by and through the Vermont Attorney General’s Office, hereby moves to dismiss the Complaint pursuant to Vermont Rule of Civil Procedure 12(b)(6). In support of the motion, Defendant respectfully submits the following Memorandum of Law.

**MEMORANDUM OF LAW**

Plaintiff brings this Public Records Act (1 V.S.A. § 317) (“PRA”) claim against the Vermont Department of Public Safety alleging that the Department improperly declined to provide it with video footage of the arrest and processing of a criminal defendant in a case pending in Chittenden County, Eva Vekos. The Department withheld responsive records as exempt from disclosure under an exception to the PRA for documentation of an investigation of a crime. The exemption for investigation documents applies where the records, if released, would be likely to interfere with enforcement proceedings and infringe the defendant’s right to a fair trial. Here, the requested documents are expected to be key evidence in the upcoming trial. Should that evidence be released to the public prior to trial, that would interfere with the prosecution of Ms. Vekos and infringe her right to a fair trial. The Department also asserted that

the release of the requested documents could cause the prosecutors in the case to run afoul of the Vermont Rules of Professional Conduct. The criminal case is currently ongoing and therefore the footage is still exempt from disclosure under the PRA.

### **Factual Background**

On January 26, 2024, VTDigger reporter Alan Keays submitted a Public Records Act request to the Department requesting “all audio and video footage of Vermont State Police interactions with Eva Vekos on Jan. 25 (2024).” Complaint ¶ 14. The request is attached to the Complaint as Exhibit A. The Department responded to the request in writing on February 1, 2024, declining to produce the requested footage noting that it relates to an ongoing criminal investigation and is exempt from disclosure as “records dealing with the detection and investigation of crime” under 1 V.S.A. § 317(c)(5). The Department’s response is attached to the Complaint as Exhibit B. The Department asserted that it consulted with the prosecutor’s office (the Attorney General’s Office) and that the prosecutor advised that the release of the footage “could interfere with the ongoing investigation and with any potential enforcement proceeding(s) that may result from the investigation.” Ex. B. Those proceedings are no longer theoretical as there is currently an active criminal case against Eva Vekos related to the events of January 25, 2024. *See* Criminal Case No. 24-CR-01332, Chittenden County.

On February 15, 2024, Mr. Keays appealed the Department’s decision. Compl. ¶ 16. The appeal letter is attached to the Complaint as Exhibit C. Public Safety Commissioner Jennifer Morrison responded to the appeal on February 23, 2024, denying the request again, noting the same issue with the active investigation and enforcement proceedings, and adding the exemption under 1 V.S.A. § 317(c)(3) applicable to records that would cause a professional to violate the relevant ethical standards. Compl. ¶ 17. Commissioner Morrison’s response is

attached to the Complaint as Exhibit D. Commissioner Morrison’s letter explains that the prosecutors risk violating the Vermont Rules of Professional Conduct if the footage were to become public, and the PRA prevents disclosure under those circumstances pursuant to 1 V.S.A. § 317(c)(3). Ex. D. On June 10, 2024, Plaintiff, the entity that operates news website VTDigger.org, filed this lawsuit against the Department for a violation of the Public Records Act seeking to compel disclosure of the footage of Ms. Vekos’ arrest, which could interfere with the current criminal proceedings against Ms. Vekos and undermine Ms. Vekos’ interests at her trial. Compl. ¶ 1, Ex. D at 3.

### **Legal Standard**

In reviewing a motion to dismiss under V.R.C.P. 12(b)(6), “the court must assume that the facts pleaded in the complaint are true and make all reasonable inferences in the plaintiff’s favor.” *Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10, 209 Vt. 514. However, courts are not required to accept as true conclusory allegations or legal conclusions couched as factual assertions. *See Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1, 955 A.2d 1082.

“Where pleadings rely upon outside documents, those documents merge into the pleadings and the court may properly consider them under a Rule 12(b)(6) motion to dismiss.” *Davis v. Am. Legion*, 2014 VT 134, ¶ 13, 198 Vt. 204, 114 A.3d 99 (internal quotations and alterations omitted); *see also* V.R.C.P. 10(c) (“A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”). On a motion to dismiss, courts need not accept allegations that purport to describe or interpret these documents. *Davis*, 2014 VT at ¶ 13. “When a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.” *Id.* (alteration and quotation omitted).

“Similarly, it 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, 186 Vt. 605, 987 A.2d 258 (mem.) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)); *see also Sprague v. Nally*, 2005 VT 85, ¶¶ 2-3, 178 Vt. 222, 882 A.2d 1164 (taking judicial notice of facts set forth in filings in previous judicial proceeding).

Although Public Records Act claims often require fact-specific inquiries, they may be resolved on a Rule 12(b)(6) motion to dismiss when the issue “is a pure question of law.” *Cashman v. Cina*, No. 21-CV-427, 2022 WL 1242677, at \*1 (Vt. Super. Feb. 23, 2022). In this case, Plaintiff’s claims are foreclosed by the express, unambiguous language of categorical statutory exemptions to the PRA. *See* 1 V.S.A. § 317(c)(3) & (5). These exemptions are facially applicable based on the Complaint’s own allegations. Thus, the issue before the Court “is a pure question of law” that may be resolved on a motion to dismiss. *Cashman*, 2022 WL 1242677, at \*1; *see also Welch v. Seery*, 138 Vt. 126, 129, 411 A.2d 1351, 1353 (1980) (affirming 12(b)(6) dismissal of PRA claim); *cf. Shlansky v. City of Burlington*, 2010 VT 90, ¶ 6, 188 Vt. 470, 13 A.3d 1075 (applicability of PRA exemption an issue of law).

## ARGUMENT

- 1. The requested records are exempt from disclosure under § 317(c)(5)(A)(i)-(ii) because they deal with the detection and investigation of a crime and can reasonably be expected to interfere with enforcement proceedings and deprive Ms. Vekos of her right to a fair trial.**

The records Plaintiff seeks are exempt from disclosure based on the plain language of 1 V.S.A. § 317(c)(5)(A)(i)-(ii). “In construing § 317(c)(5), our primary goal is to discern and give effect to the intent of the Legislature. We look first to plain meaning of statutory language, and if the plain meaning resolves the interpretation issue, we generally look no further.” *Rutland*

*Herald v. City of Rutland*, 2012 VT 26, ¶ 21, 191 Vt. 387, 396–97, 48 A.3d 568, 574 (2012) (internal citations omitted). “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.” *Id.*, ¶ 23 (dealing with employees’ disciplinary records being sought by media). This principle was articulated in *Caledonian-Record Publishing Co. v. Walton*, 154 Vt. 15, 23, 573 A.2d 296, 300–01 (1990), in which the Vermont Supreme Court drew a distinction between arrest records and records “dealing with the detection and investigation of crime,” and noted that policy reasons for protecting the latter include the need to protect State’s position in criminal prosecutions by shielding material that may be used to disadvantage of the prosecution, such as speculation about a suspect’s guilt or an officer’s view as to credibility of witnesses, or information that might reveal the names of informants and threaten to intimidate potential witnesses.

“The purpose of this exemption is to prevent harm to the government’s case in court by not allowing litigants earlier or greater access to agency investigatory files than they would otherwise have.” *New York Times Co. v. United States Dep’t of Just.*, 390 F. Supp. 3d 499, 512 (S.D.N.Y. 2019) (internal citations omitted) (Referring to FOIA exemption 5 U.S.C. § 552(b)(7)(A) which has similar language to 1 V.S.A. § 317(c)(5)(A)(i)). The exemption requires a showing that “(1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm.” *Id.*, quoting *New York Times Co. v. United States Dep’t of Justice*, No. 14-CV-03776 (AT) (SN), 2016 WL 5946711, at \*7 (S.D.N.Y. Aug. 18, 2016). However, “the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding .... [R]ather, [] courts may make generic

determinations that with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.” *Id.* (citations omitted).

Plaintiff requests “any audio and video footage of Vermont State Police interactions with Eva Vekos on January 25, including any body cam, dash cam or footage and audio from the New Haven Barracks.” Ms. Vekos was charged with a crime based on the events in the video. *See* 24-CR-01332. The criminal proceeding is ongoing in Chittenden Superior Court. *See* 24-CR-01332. The footage is exempt from disclosure because it deals with the detection and investigation of a crime, and its release can be expected to interfere with the ongoing criminal case against Ms. Vekos and could deprive Ms. Vekos of her right to a fair trial. The 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. *See Ex. D*, p. 2. Accordingly, the footage is exempt from disclosure as a matter of law based on the plain language of 1 V.S.A. § 317(c)(5)(A) and the facts alleged in the Complaint and Exhibits.

2. **The requested records are not within “the products of crime detection” common law exception to the exemption for records dealing with detection and investigation of a crime because of the active criminal case pending in which the footage will be key evidence.**

The Vermont Supreme Court has determined that records including (1) a list of names of persons cited or arrested and the charges against them, and (2) an affidavit of probable cause in a case where the charges were dismissed, are “the products of crime detection” and not subject to withholding under § 317(c)(5)(A). *See Caledonian Record Publishing Co.*, 154 Vt. 15 and *Oblak v. University of Vermont Police Services*, 210 Vt. 550 (2019). Plaintiff’s attempt to rely on this precedent is misplaced. In *Oblak*, the probable cause affidavit that was requested related to a charge that had been dismissed by the Criminal Division of the Superior Court. 210 Vt 550,

¶ 2. In *Caledonian Record Publishing Co.*, the records sought were a list of names of individuals cited or arrested and the charges against them. 154 Vt. at 17.

The video and audio footage Plaintiff requested here is not comparable to a list of names of persons cited or arrested or an affidavit of probable cause for a dismissed case. A list of names of persons cited or arrested could not impact witness testimony in the same way that video footage of a defendant could. A probable cause affidavit for a dismissed case could not become trial evidence because in a dismissed case of course there is no trial. While it may be that the video footage requested here is colloquially speaking a product of crime detection, it is much more than that; it is key evidence in an ongoing investigation and upcoming trial. See Ex. D. Therefore the “products of crime detection” precedent is inapposite here and does not indicate that the Legislature intended for the footage of Ms. Vekos to be subject to public disclosure while enforcement proceedings against her are pending.

**3. The records are exempt from disclosure under the PRA because public disclosure of the requested footage could cause a violation of the Vermont Rules of Professional Conduct for the prosecuting attorneys.**

The Public Records Act exempts from disclosure any record which, “if made public pursuant to this subchapter, 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 records Plaintiff requested are further exempt from disclosure because publicizing the records could cause the prosecutors in Ms. Vekos’ case to violate the Vermont Rules of Professional Conduct.

Rule 3.8 of the Vermont Rules of Professional Conduct requires that prosecutors “exercise reasonable care to prevent investigators [and] law enforcement personnel ... in the employment or under the control of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited making under Rule 3.6 or [R]ule [3.8].” Rule 3.6 prohibits an attorney from making an “extrajudicial statement that the lawyer knows or reasonably should

know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding the matter.” V.R.P.C. 3.6. As noted in Exhibit D to the Complaint, “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.” Ex. D, p. 3. Accordingly, the footage is exempt from disclosure under 1 V.S.A. § 317(c)(3).

### **CONCLUSION**

For all of the foregoing reasons, Defendant Vermont Department of Public Safety respectfully requests that this Court dismiss Plaintiff’s Complaint pursuant to V.R.C.P. 12(b)(6) for failure to state a claim upon which relief may be granted.

DATED at Montpelier, Vermont, this 9<sup>th</sup> day of August 2024.

STATE OF VERMONT

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