

JAMES DUFF LYALL  
EXECUTIVE DIRECTOR

JIM MORSE  
PRESIDENT



November 30, 2017

Brandon del Pozo  
Chief of Police  
Burlington Police Department  
One North Avenue  
Burlington, Vermont, 05401

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LIBERTIES UNION  
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Re: **Appeal of Public Record Request Denial Pursuant to  
1 V.S.A. § 315 *et. seq.*,**

Dear Chief del Pozo:

On behalf of Reed Doyle, we write to appeal the denial of Mr. Doyle's request to inspect redacted public records in the custody of the Burlington Police Department ("the Department"). Mr. Doyle believes these records show serious officer misconduct. He demands they be made available to him.

Mr. Doyle was denied access to requested body-camera video and other police records because 1) BPD refused to redact the video, and 2) the Chittenden State's Attorney's Office advised BPD not to release records in its possession. As explained more fully below, Vermont law does not authorize the Department to withhold records that are, as alleged of the body camera video at issue here, readily capable of redaction necessary to protect any information that is either exempt or made confidential by statute. Similarly, the advice from Chittenden County State's Attorney's Office, which is not the custodian of the requested records, relies on an inaccurate and incomplete reading of the law. Hence, neither of the Department's cited grounds for denial provide a lawful basis to deny Mr. Doyle with access to the requested records.

### **Factual Background**

On June 17, 2017, Reed Doyle was walking his dog in the area of Roosevelt Park. He witnessed several officers engaged in heated discussion with a group of children in the park. One of the group had been arrested. As the group protested, Mr. Doyle witnessed a police officer threaten to pepper spray the group if they did not retreat. As one of the children was walking backwards away from the officers with his hands in the air, a police officer forcefully pushed him with both arms. The boy, believed to be between 11

and 13 years old, protested against the officer's use of force. The officers then huddled up for a discussion and subsequently arrested the boy.

Mr. Doyle filed a formal complaint with the Burlington Police Department about this incident, believing it represented officer misconduct and unreasonable use of force. During the following weeks, he repeatedly sought information related to whether the appropriate Department officials were reviewing his complaint or meting out any disciplinary measures to the officer whom he witnessed using force. After five weeks of inconclusive and incomplete communication from the Department, he felt that the Department's response was inadequate.

On August 21, 2017, Mr. Doyle wrote to Burlington Police Department Community Liaison, Lacey-Ann Smith, requesting "to inspect any publicly available records (body cams, police reports, etc.) from an incident that took place on the evening of June 17, 2017 at approximately 7 PM in Roosevelt Park in the Old North End of Burlington, VT." Understanding the potential privacy issues involved, he asked whether faces in the requested body camera footage could be redacted.

In response, Deputy Chief Janine Wright stated that the video and police reports could not be released because of an ongoing criminal prosecution and the fact that one of the individuals involved in the incident Mr. Doyle observed had been sent to court diversion. After several emails between Mr. Doyle and Deputy Chief Wright, Mr. Doyle repeated his question regarding whether to the Department could block out faces in videos – seeking redaction of the public records instead of complete withholding.

On August 28, 2017, in response to Mr. Doyle's request for the statutory justification for the Department's withholding of the requested record, Deputy Chief Wright referred Mr. Doyle to the language in Vermont's Adult Court Diversion statute as a purported basis upon which the Department could deny Mr. Doyle access to the body camera video from the officers involved. Specifically, Deputy Chief Wright cited 3 V.S.A. § 164 (c)(1), which states in relevant part that "files held by . . . the law enforcement agency related to the charges shall be confidential."

On September 5, 2017, Deputy Chief Wright responded that "You can block out faces but unfortunately, the only option we have is to block out the entire video and not just a small portion that would follow that person around." After further questioning from Mr. Doyle, on September 6, 2017, Deputy Chief Wright responded that BPD "must follow the requirements of the Chittenden State's Attorney's Office who has advised me that I cannot release the police reports or the body cam footage."

## **Argument**

### **A. The Public Records Act Establishes a Default Rule of Access in Service of Government Accountability.**

Grounded in constitutional principles, the Vermont Public Records Act ("PRA") recognizes that "[o]fficers 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.” 1 V.S.A. § 315(a). The law expressly acknowledges that the balance between personal privacy and government oversight tips in favor of holding government officials accountable for their official actions. *Id.* (“All people, however, have a right to privacy in their personal and economic pursuits, which ought to be protected *unless* specific information is needed to review the action of a governmental officer.” (emphasis added)).

To implement these core principles, the PRA provides that “any person may inspect or copy any public record of a public agency.” 1 V.S.A. § 316(a). Public agencies may only withhold a record if it falls within one or more specific statutory exemptions. 1 V.S.A. § 317(c). However,

“a public agency shall not withhold any record in its entirety on the basis that it contains some exempt content if the record is otherwise subject to disclosure; instead, the public agency shall redact the information it considers to be exempt and produce the record accompanied by an explanation of the basis for denial of the redacted information.”

1 V.S.A. § 318(e).

Mr. Doyle’s request goes to the heart of the PRA’s purpose. Based on police conduct he personally witnessed, he believes body camera video from the officers involved is “needed to review the action of a government officer.” *Id.* In fact, top U.S. law enforcement officials have recognized that ensuring officer accountability is a central purpose for the widespread deployment of officer-worn body cameras such as the one that created the public record Mr. Doyle seeks to access. As former U.S. Attorney General Loretta Lynch stated: “Body-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve.”<sup>1</sup>

**B. The Requested Body Camera Video and Other Records Are Not Exempt from Disclosure Because They Reflect an Initial Arrest, Include Alleged Acts of Government Wrongdoing, and Are Capable of Being Redacted.**

Records dealing with the detection and investigation of crime are exempt to the extent they meet certain parameters. 1 V.S.A. § 317(c)(5)(A). However, records “reflecting the initial arrest of a person . . . and records reflecting the charge of a person *shall be public.*” 1 V.S.A. § 317(a)(5)(B) (emphasis added). It is indisputable a police officer’s body camera video of an arrest “reflect[s] the initial arrest of a person.” *Id.* Therefore, it must be made public unless it meets the exemptions of 1 V.S.A. § 317(c)(5)(A).

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<sup>1</sup> Mark Berman, *Justice Dept. Will Spend \$20 Million on Police Body Cameras Nationwide*, WASH. POST, (May 1, 2015), available at <http://www.washingtonpost.com/news/post-nation/wp/2015/05/01/justice-dept-to-helppolice-agencies-across-the-country-get-body-cameras>.

Regardless of whether those exemptions apply, which we assume the Department is asserting given its stated need to redact the video, the PRA requires disclosure of otherwise exempt portions of records where such withholding would conceal government wrongdoing. See 1 V.S.A. § 317(c)(5)(B)(requiring the disclosure of information where withholding would conceal government wrongdoing, even if the disclosed information could facilitate the commission of a crime or reveal the identity of a victim of crime). Even where such records contain private identities of witness or victims, or other information that may be withheld under exemptions, “a record shall not be withheld in its entirety because it contains . . . information that could have been redacted.” 1 V.S.A. § 317(c)(5)(D). The legislature doubled-down on this provision by also explicitly requiring agencies to redact information they consider exempt and to produce the remainder of the record with an explanation of the basis for the denial of the redacted information. See 1 V.S.A. § 316(e) (“A public agency shall not withhold any record in its entirety on the basis that it contains some exempt content if the record is otherwise subject to disclosure; instead, the public agency shall redact the information it considers to be exempt and produce the record.”). Thus, the legislature has made clear that while investigation records may be exempt from public access, they are not wholly exempt when they contain only some exempt content, reflect the initial arrest or charge of a person, or show government wrongdoing. Given this duty to disclose records that are not wholly exempt, and that the records requested by Mr. Doyle show an initial arrest and alleged government misconduct he witnessed, the Department must disclose them under the PRA.

In light of this duty to disclose records that are not wholly exempt, it is worth noting that face-blurring video editing technology is low-cost and widely available to police departments. YouTube, the popular video-sharing website has offered its users a free face-blurring capability since at least 2012.<sup>2</sup> There are also free open source software tools with similar functionality.<sup>3</sup> To comply with the PRA’s mandate that public agencies undertake redaction to provide access to non-exempt portions of public records, the Department has an obligation to utilize available technology in compliance with this statutory duty.

C. The Adult Court Diversion Statute Provides No Basis for Denying Access to a Redacted Police Body Cam Video.

In Deputy Chief Wright’s denial, she cited the confidentiality provisions in the Adult Court Diversion statute, 3 V.S.A. § 164 (e)(1), as a basis for denying Mr. Doyle access to the records of the incident he witnessed. While that statute requires confidentiality of files “related to the charges,” it does not reference the PRAs specific requirement that the Department provide access to “records reflecting the initial arrest of a person” in §

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<sup>2</sup> *Face Blurring: When Footage Requires Anonymity*, YOUTUBE GLOB. BLOG (July 18, 2012), <http://youtube-global.blogspot.com/2012/07/face-blurring-when-footage-requires.html>.

<sup>3</sup> *ObscuraCam: Secure Smart Camera*, GUARDIAN PROJECT (2015), <https://guardianproject.info/apps/obscuracam/>.

317(a)(5)(B). Under well-established rules of statutory construction, the more specific PRA statute—with its reference to records reflecting the initial arrest and its mechanism for protecting individual privacy—must be given effect.

Moreover, even assuming *arguendo* that the Diversion statute was intended to override the PRA’s default rule of access to records reflecting the initial request of a person, like the body cam video, the manifest purpose of the Diversion statute’s confidentiality requirement is to protect the accused individual who qualifies for diversion. It is not to prevent concerned members of the public from reviewing the conduct of the law enforcement officers involved in making the arrest. If this were true, government misconduct in any way related to a diversion proceeding could be withheld from public scrutiny—an obviously absurd result.

Mr. Doyle’s request to access the body camera video, in redacted form where appropriate, allows the Department to comply both with the PRA and the Diversion statute’s confidentiality provisions. The Diversion statute expressly provides that that disclosure of “research and reports that do not require or establish the identity of individual participants [is] allowed.” 1 V.S.A. § 164(e)(5). A copy of the body cam video with faces blurred per the PRA’s redaction requirement would not “establish the identity of the individual” and thus would not run afoul of the statute’s provision.

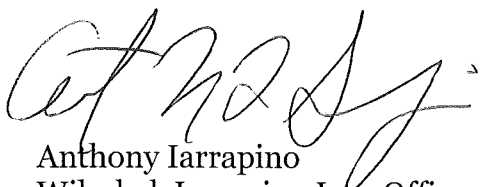
#### CONCLUSION

For the reasons set forth above, Mr. Doyle is entitled, pursuant to the PRA, to inspect records, redacted where necessary, related to the incident described above and in his multiple public records requests filed with the Department.

To prevent litigation, you must reverse the denial of Mr. Doyle’s request to inspect the requested records. You are required to make a written determination with respect to this appeal within five business days. 1 V.S.A. § 316(a)(3). If you persist in denying Mr. Doyle access to the records, the Department’s written determination on this appeal must include the asserted statutory basis for denial and a brief statement of reasons and supporting facts for denial. 1 V.S.A. § 316(c)(1).

If you have any questions, please do not hesitate to contact Anthony Iarrapino via email at [anthony@ilovt.net](mailto:anthony@ilovt.net) or via phone at 802-522-2802.

Sincerely,



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