

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 156731/2018

NEW YORK LAWYERS FOR THE PUBLIC INTEREST,

MOTION DATE N/A

Petitioner,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY POLICE DEPARTMENT, JAMES O'NEILL

DECISION AND ORDER

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

In this special proceeding, petitioner, New York Lawyers for the Public Interest, ("petitioner" and/or "NYLPI") seeks access to a complete record of police body-worn camera ("BWC") footage of the shooting of Miguel Richards on September 6, 2017, who was killed in his Bronx apartment by New York City Police Department officers summoned to check on him by his landlord. Respondents, New York City Police Department and James O'Neill, ("respondents" and/or "NYPD") oppose the Petition, claiming that the redactions were proper to protect an unwarranted invasion of Mr. Richards' personal privacy and claiming that disclosure would endanger the life and safety of witnesses. In addition, four seconds of footage was redacted as it is claimed to be exempt intra/inter-agency material.

BACKGROUND

On September 6, 2018, Mr. Richards' landlord, concerned for the welfare of his tenant, a college exchange student from Jamaica whom he had not heard from in several days, contacted the police to conduct a wellness check at his third-floor apartment and provided the police access

to his apartment. (NYSCEF Doc. No. 1, ¶¶ 12, 13). When they gained access to the apartment, the police found Mr. Richards, apparently experiencing a mental health crisis, standing in the corner of his bedroom with sunglasses on and holding what the officers believed to be a weapon. (NYSCEF Doc. No. 1, ¶14). Each of the eight police officers present during the incident wore BWCs pursuant to a pilot program undertaken by the NYPD. (NYSCEF Doc. No. 1, ¶¶ 18, 20-22).

On September 14, 2017, NYPD released to the public a compilation of edited portions of the BWC footage of four of the police officers present at the scene of the incident. (NYSCEF Doc. No. 19, ¶18). On September 15, 2017, petitioner submitted a request to NYPD pursuant to the Freedom of Information Law ("FOIL"), seeking: "Unedited video files from all body cameras worn by the uniformed officers who were involved in the fatal encounter with Miguel Richards in the Bronx on September 6, 2017, which are related to that fatal encounter, from the time each officer first arrived at the site of the fatal encounter until the time they departed the site." (NYSCEF Doc. No. 2). Respondents initially denied that request and following an appeal by petitioner, NYPD issued a further response on November 17, 2017, in which NYPD disclosed eight body-worn camera videos responsive to the incident, wherein it had redacted or withheld portions of the video and audio based on various FOIL exemptions. (NYSCEF Doc. No. 1, ¶¶ 30-40, NYSCEF Doc. No. 19, ¶¶62-66).

Based on the footage respondents have released to the public, we know that during an encounter that lasted approximately fifteen minutes, the officers repeatedly attempted to persuade Mr. Richards to drop the knife he was holding and to show them what he was holding in his other hand. The officers can be heard telling Mr. Richards that, "this isn't going to end well," that Mr. Richards was "seconds away from getting shot" and asking him, "do you want to

die?"; Mr. Richards stood completely still and silent. (NYSCEF Doc. No. 1, ¶14; NYSCEF Doc. Nos. 6, 13). Eventually, an officer with a Taser stun gun entered Mr. Richards' bedroom to stun him. Mr. Richards appeared to raise his arm, at which point the officer with the Taser fired it at him and two officers behind him fired sixteen shots at Mr. Richards with their service weapons. Mr. Richards was fatally wounded after he apparently raised what turned out to be a toy gun. (NYSCEF Doc. No. 1, ¶¶ 14-17; NYSCEF Doc. Nos. 6, 13).

At the administrative stage of this proceeding, NYPD initially issued a blanket denial to NYLPI's FOIL request based on a single FOIL exemption that it no longer invokes, before claiming additional exemptions to redact extended segments of video and audio footage of the incident, including claims that the redacted footage was exempt by the provisions of Public Officers Law §§ 87(2)(e)(i), 87(2)(b), 87(2)(f), 87(2)(a), 87(2)(g)(iii), and 87(2)(g). (NYSCEF Doc. No. 1, ¶¶30-40, NYSCEF Doc. No. 19, ¶¶62-70).

In opposing the Petition, respondents now rely on five exemptions to support the eighteen minutes of redacted BWC footage, largely consisting of the post-shooting footage. Specifically, respondents oppose releasing the redacted footage on the basis that disclosure would constitute an unwarranted invasion of Mr. Richards' and his family's personal privacy under Public Officers Law §§ 87(2)(b) and 89(2)(b), including disclosure of medical history pursuant to Public Officers Law § 89(2)(b)(i) and under Public Officers Law § 87(2)(f) claiming that disclosure would endanger the life and safety of witnesses. An additional four seconds of video were redacted as respondents maintained it contained inter/intra-agency material that is exempt pursuant to Public Officers Law § 87(2)(g).¹

¹ Without conceding that the NYPD has met its burden to justify its redactions, petitioner does not oppose partial visual redactions to the faces of bystanders present at the scene, or to the face of Mr. Richards' landlord/superintendent, if those redactions are narrowly tailored to the

NYPD blurred the faces of the witnesses claiming that disclosure would constitute an unwarranted invasion of personal privacy and could endanger their lives. NYPD claims that the exemptions also apply to the audio of the individual who made the 911 call and other witnesses who cooperated with the police, who might face retribution and blame for initiating a call or providing the police with information that led to Mr. Richards' death. (NYSCEF Doc. No. 19, ¶¶68; NYSCEF Doc. No. 21, ¶¶ 11-32).

NYPD also blurred images of Mr. Richards' body after having been shot, as well as scenes of his blood on the floor, walls and furniture, claiming the footage is exempt to protect his privacy and the privacy and dignity of Mr. Richards' family members and further claiming that the redactions are necessary to protect against an unwarranted invasion of personal privacy relative to medical treatment being administered to Mr. Richards and police officers. (NYSCEF Doc. No. 19, ¶¶69-70; NYSCEF Doc. No. 21, ¶¶ 11-32).

Petitioner contends that respondents' reliance on asserted privacy interests on behalf of Mr. Richards' family, lacks merit as NYPD waived that exemption by not raising it at the administrative stage. Petitioner argues that NYPD did not invoke the privacy exemption at all in its initial denial of records and claims that following extensive correspondence with NYLPI, the NYPD eventually claimed exemption of this footage, but solely on the basis that Mr. Richards was receiving medical treatment and HIPAA regulations prevented disclosure. (NYSCEF Doc. No. 9, p. 2). Moreover, in response to the privacy exemptions asserted in opposition to the Petition, petitioner submits affidavits from Mr. Richards' parents who both affirm, that they were never contacted by the NYPD to determine their privacy interest in the footage and fully support releasing the footage to the public. Finally, petitioner avers that since the NYPD has already

faces of those individuals. Petitioner also does not oppose four seconds of partial visual redactions to a police vehicle's Mobile Data Terminal.

publicly disclosed much of the footage of Mr. Richards' shooting, asserting privacy interests over the remaining footage serves no purpose.

Additionally, petitioner maintains that refusing to release the redacted BWC footage is inconsistent with the NYPD's obligations under FOIL, a law aimed at fully accommodating the public's access to government records, and the BWC program, which is itself intended to promote transparency and accountability on the part of the NYPD to the public that it serves. Petitioner now seeks judicial relief to compel the NYPD to produce unedited and complete versions of video records responsive to its FOIL request.

STANDARD OF REVIEW/ANALYSIS

It is well settled that all records of a public agency, including police records, are presumptively open for public inspection and copying, and that the burden rests at all times on the government agency to justify any denial of access to records requested under FOIL (see *New York State Rifle and Pistol Assoc. v Kelly*, 55 AD3d 222, 224, 863 N.Y.S.2d 439 [1st Dept. 2008]; *New York Civil Liberties Union v. New York City Police Department*, 20 Misc.3d 1108[A], 866 N.Y.S.2d 93, 2008 NY Slip Op 51279[U] [2008]); (see also, *Gould v New York City Police Dep't*, 89 N.Y.2d 267, 274, 675 N.E.2d 808, 653 N.Y.S.2d 54 [1996] (FOIL was enacted "[t]o promote open government and public accountability"); (Public Officers Law § 84; *Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 224, 76 N.Y.S.3d 460, 100 N.E.3d 799 [2018])).

In furtherance of FOIL's legislative policy favoring disclosure, "[e]xemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter*

of Capital Newspapers Div. of Hearst Corp. v Burns, 67 NY2d at 566; see *Matter of Gould v New York City Police Dept.*, 89 NY2d at 275; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 30, 535 N.E.2d 243, 538 N.Y.S.2d 190 [1988]).

It is also well established that “the purpose of body-worn-camera footage is for use in the service of other key objectives of the [BWC pilot] program, such as transparency, accountability, and public trust-building.” (see *Matter of Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v De Blasio*, 171 AD3d 636, 637, [1st Dept. 2019]). These key objectives are also noted in the NYPD's BWC proposed procedures which provide in part that, “[t]he BWC pilot program will serve to provide a contemporaneous, objective record of encounters, facilitate review by supervisors, foster accountability, and encourage lawful and respectful interactions between the public and the police.” NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy app. B, at 1 (April 2017) http://nypdnews.com/wp-content/uploads/2017/04/NYPD_BWC-Response-to-Officer-andPublic-Input.pdf. (NYSCEF Doc. No. 1, ¶ 28).

Based on the record before the court, it is apparent that respondents' objections to release portions of the BWC footage have evolved since petitioner made its FOIL request on September 15, 2017. (NYSCEF Doc. Nos. 3, 5, 8 and 12). As noted, initially, respondents had relied on a single blanket exemption in objecting to petitioner's FOIL request, and then relied upon six exemptions, to currently, asserting five exemptions to release the entirety of the BWC footage from the September 6, 2017 fatal shooting. Petitioner does not oppose the redactions of the four seconds of footage that involves partial visual redactions to a police vehicle's Mobile Data Terminal, accordingly, the court need only examine the veracity of the privacy exemptions

claimed under Public Officers Law §§ 87(2)(b) and 89(2)(b), including disclosure of medical history pursuant to Public Officers Law § 89(2)(b)(i) and under Public Officers Law § 87(2)(f) claiming that disclosure of the redacted footage would endanger the life or safety of witnesses.

As an initial matter, petitioner's contention that NYPD waived the privacy objection set forth in Public Officers Law §§ 87(2)(b) and 89(2)(b), by not initially raising the objection in response to the FOIL request lacks merit. The objection was asserted in respondents' subsequent responses at the administrative stage and petitioner has had a full and fair opportunity to respond to respondents' objections. (NYSCEF Doc. Nos. 5 and 9). Accordingly, the court will consider those objections here.

Pursuant to Public Officers Law § 87(2)(b), an agency "may deny access to records" where disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of [the statute]." If a FOIL request is denied, the agency "must show that the requested information falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access." (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d 562, 566, 505 NYS2d 576, 578, 496 NE2d 665, 667 [1986]). The law defines an "unwarranted invasion of personal privacy" with a nonexclusive list of examples (see Public Officers Law § 89 [2][b][i]-[vi]).

"[W]here none of the [enumerated exemptions under Public Officers Law § 89 (2) (b) are] applicable, a court 'must decide whether any invasion of privacy . . . is "unwarranted" by balancing the privacy interests at stake against the public interest in disclosure of the information' " (*Matter of Harbatkin v New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 380, 971 NE2d 350, 948 NYS2d 220 [2012], quoting, *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485, 829 NE2d 266, 796 NYS2d 302 [2005]).

Against this backdrop of well-established legal authority, the court must decide whether respondents' redaction of approximately eighteen minutes of BWC footage, falls squarely within the FOIL privacy exemption set forth in Public Officers Law §§ 87(2)(b) and 89(2)(b), and whether disclosure would constitute an unwarranted invasion of personal privacy, including disclosure of medical history pursuant to § 89(2)(b)(i), and under § 87(2)(f), the life or safety of others exemption. (NYSCEF Doc. No. 24). The court's analysis proceeds under the premise that the public is vested with an inherent right to know and "that official secrecy is anathematic to our form of government", unless respondents "convincingly demonstrate" the need to withhold the information from the public. (see, *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571, 393 NE2d 463, 419 NYS2d 467 [1979]).

The NYPD has already publicly disclosed much of the footage preceding and including Mr. Richards' shooting; respondents are asserting the privacy exemption over the post-shooting footage, claiming that any public interest in understanding how the NYPD interacts with emotionally disturbed individuals ceased once the interaction with Mr. Richards ended. (NYSCEF Doc. No. 23, at p. 10). This reasoning is rejected by the court. As noted, the stated objectives of the BWC pilot program is to promote transparency, accountability, and public trust-building and to provide a contemporaneous, objective record of encounters between the public and the police. (NYSCEF Doc. No. 1, ¶ 28). The notion that the public's interest to be informed on how the NYPD interacts with emotionally disturbed individuals, ceased after the officers were no longer engaged in firing their service weapons, is contrary to the spirit and intent of the freedom of information laws and the objectives of the BWC pilot program.

Petitioner correctly argues that NYPD's redactions cloak in secrecy the actions of the police officers in the moments following the shooting, and how the officers continued to interact

with Mr. Richards after they shot him. Those police officers' actions, and not just the images of Mr. Richards' body and blood spatter on the furniture, are kept from disclosure. As such, the redactions shield several minutes of video footage immediately following the shooting that are of significant interest to the public as the footage depicts the happenings that ensued in those moments, detailing how the officers interacted with Mr. Richards after he was subdued and the items he held in his hands were recovered. (NYSCEF Doc. No. 25, at p. 7).

As noted, where none of the enumerated exemptions under §89(2)(b) apply, the court must weigh the competing interests of public access and personal privacy, to determine whether disclosure would result in an "unwarranted invasion of personal privacy". (see *Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485-486, 829 NE2d 266, 796 NYS2d 302 [2005]; *Matter of Dobranski v Houper*, 154 AD2d 736, 737, 546 NYS2d 180 [1989]). Here, respondents stated concern to exempt the footage from disclosure to safeguard the privacy interests of Mr. Richards and his family, is resolved by the affidavits of Mr. Richards' family who support public disclosure of the footage. (NYSCEF Doc. Nos. 26 and 27). Indeed, the affidavits demonstrate that Mr. Richards' family "consent to, and strongly support, the release of any and all video footage relating to the shooting." (NYSCEF Doc. Nos. 26 and 27).

Moreover, contrary to respondents' claim that petitioner failed to show that the footage already disclosed is insufficient to meet the public's need to be informed, this court finds that there is significant public interest in disclosing the redacted footage as it would illuminate the officers' immediate response after the shooting and their interactions with Mr. Richards who was fatally shot after apparently suffering from a mental crisis.

Transparency is one of the key objectives of the BWC pilot program. The fact that respondents have released almost all the pre-shooting footage demonstrates the public's interest

in the information and diminishes the expressed privacy concerns. To argue that the post-shooting record is no longer subject to disclosure because the interaction with Mr. Richards ended after shots were fired, is belied by the redacted footage. It is clear from the redacted footage that the officers continued to interact with Mr. Richards and public disclosure of this footage will contribute to a greater understanding of the incident and simultaneously promote the key objectives of the BWC pilot program. Indeed, shielding the post-shooting footage from public disclosure, violates the statute's stated requirement of providing maximum public access to government records, (*Matter of Capital Newspapers Div. of Hearst Corp. v Burns*, 67 NY2d at 566; *Matter of Gould v New York City Police Dept.*, 89 NY2d at 275) and frustrates the key objectives of the BWC pilot program.

Having found that respondents have failed to articulate a particular and specific justification for shielding the redacted footage from disclosure, and noting that Mr. Richards' family has not asserted any privacy concerns, but rather supports public disclosure, "FOIL 'compels disclosure, not concealment'". (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462-463, 880 NE2d 10, 849 NYS2d 489 [2007]). Accordingly, the court finds that the redacted footage is not exempt from disclosure as there exists a strong public interest in disclosure which is outweighed by the diminished claims of privacy asserted by respondents. (NYSCEF Doc. No. 24).

As to the statutory exemption concerning medical treatment being provided to Mr. Richards after he was shot, and medical treatment provided to NYPD officers, the court finds that respondents have failed to meet their burden under Public Officers Law § 89(2)(b)(i), to demonstrate that the redacted video and audio footage should be kept from disclosure.

Explicitly exempt from mandatory disclosure are records that "if disclosed would constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87 [2] [b]). An unwarranted invasion of personal privacy expressly includes, but is not limited to, "disclosure of employment, medical or credit histories or personal references of applicants for employment" (Public Officers Law § 89 [2] [b] [i]); (see, *Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 110, 588 NE2d 750, 580 NYS2d 715 [1992]). In support of this exemption, respondents rely on the holding in *Hanig*, where the Court reasoned that when assessing whether a record is a medical history, "the relevant inquiry is as to the nature of the information, not who compiled it, or where it appears, or whether it is a precise technical evaluation." *Id.* 79 N.Y.2d at 111. Respondents maintain that unlike a paper medical record, which merely describes the medical treatment provided, a video recording goes one step further, and shows the medical treatment provided.

Respondents also submit the affirmation of Allison L. Arenson, Assistant Counsel and the Managing Attorney of the BWC unit of the NYPD's Legal Bureau, who affirms that "the footage depicts NYPD officers providing medical treatment to Richards. This footage, as well as the associated audio, was redacted from the video to protect the privacy interests of Richards and his family. Finally, the audio of one member of the NYPD giving medical instructions to another member of the NYPD was removed." (NYSCEF Doc. No. 21, ¶12).

Respondents exemption, however, is inconsistent with the Court's reasoning in *Hanig*, where the Court explained that the exemption is intended to "encompass[] the very sort of detail about [a] personal medical condition that would ordinarily and reasonably be regarded as intimate, private information." *Id.* at 112. Ms. Arenson affirms that the redacted footage contains 4 minutes and 41 seconds, where Mr. Richards was visible on the recording, suffering from

gunshot wounds and that the footage depicts NYPD officers providing medical treatment to Mr. Richards. (NYSCEF Doc. No. 21, ¶12). Other than this conclusory statement, respondents have not submitted any medical reports or records detailing the medical findings and treatment provided to Mr. Richards and the officers depicted in the redacted footage.

The redacted footage depicts the general nature of Mr. Richards' condition following the fatal shooting and the officers tending to him following the incident. The redacted footage does not reveal details of any existing medical condition of either Mr. Richards or the police officers and, therefore, cannot reasonably be considered a relevant and material part of Mr. Richards' or of each officer's medical history. (see, *Matter of Beyah v Goord*, 309 AD2d 1049, 1050, 766 NYS2d 222 [3d Dept 2003]). Moreover, as noted Mr. Richards' family has consented to the footage being disclosed to the public and as such there is no "unwarranted invasion of personal privacy" from disclosing the footage, as the family has waived any privacy interest in the footage. (see *Matter of Dobranski v Houper*, 154 A.D.2d 736, 737, 546 N.Y.S.2d 180 [1989]; *Matter of Ruberti, Girvin & Ferlazzo v New York State Div. of State Police*, 218 A.D.2d 494, 498, 641 N.Y.S.2d 411 [1996]).

In addition to not being exempt from disclosure as a "medical history", the footage at issue is not protected by the Health Insurance Portability and Accountability Act, 45 C.F.R. §§ 160, 162, 164 ("HIPAA"). Respondents concede that NYPD is not subject to HIPAA, as it is not a covered entity or a non-qualified person, as defined by the statute, but argue by analogy that the video records are specifically exempt from disclosure under Public Officers Law §87(2)(b) because the footage depicts "medical treatment" contained in a record maintained by a non-covered entity. While the court agrees that the decision to withhold a medical record from disclosure does not depend upon the identity of the record holder, the analysis does however,

turn on the detail of the sensitive and confidential information being disclosed. (see, *Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NYS2d at 112). Here, as noted, Mr. Richards' family has waived any claim to privacy provided by HIPPA and as such, respondents have failed to demonstrate that the redacted footage is exempt from disclosure on the basis that it depicts Mr. Richards' medical treatment.

Similarly, respondents have not met their burden to redact video and audio footage associated with the officers seeking and receiving medical treatment under Public Officers Law §§87(2)(b) and 89(2)(b)(i). As noted, the video and audio record does not reveal details of any existing medical condition and, therefore, cannot reasonably be considered a relevant and material part of each officer's medical history. (see, *Matter of Beyah v Goord*, 309 AD2d 1049, 1050, 766 NYS2d 222 [3d Dept 2003]; *Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NYS2d at 112). Nor have respondents submitted any proof in the form of medical reports or records to demonstrate the officers were receiving medical treatment after the shooting ceased, in a manner that would trigger the exemption encompassed under § 89(2)(b)(i). Accordingly, the court finds that the video and audio records are not exempt from disclosure. (NYSCEF Doc. No. 24).

Finally, respondents assert the unwarranted invasion of personal privacy exemption under Public Officers Law § 87(2)(b) and the life or safety exemption under Public Officers Law §87(2)(f), to support the redaction of video and audio footage depicting audio of Mr. Richards' landlord and other witnesses who can be seen and heard interacting with the police officers. (NYSCEF Doc. No. 21, ¶¶17-24). As noted, petitioner consents to the redactions that blur the faces of the landlord and other witnesses, but opposes the audio redactions from the footage, contending that there is obvious public interest in disclosure of the audio record, as it is relevant

to the officers' state of mind and provides the public with the necessary context within which the officers conducted themselves as they received important information about Mr. Richards from his landlord when they arrived to the scene, including that Mr. Richards was believed to have a gun. Additionally, petitioner contends that since respondents have already released audio footage containing the landlord's voice and the voices of other witnesses, NYPD has not met its burden to demonstrate how releasing additional audio footage would constitute an unwarranted invasion of personal privacy and pose any life or safety risk to said witnesses, especially when the faces of these witnesses have not and will not be revealed.

Public Officers Law § 87(2)(f) permits an agency to deny access to records, that, if disclosed, would endanger the life or safety of any person. Here, petitioner has already consented to the redactions from the footage that blur the faces of the landlord and other witnesses and thus, the court need only examine the veracity of respondents claimed privacy and safety exemptions as it relates to the redacted audio footage. The court finds that respondents have failed to demonstrate that the public's interest in disclosure of the audio footage is outweighed by the speculative safety concerns raised by NYPD. Indeed, this exception may not be applied simply because there is speculation that harm may result, as in *Matter of Grabell v New York City Police Dept.* (47 Misc 3d 203, 996 NYS2d 893 [Sup Ct, NY County 2014], *affd as mod* 139 AD3d 477, 32 NYS3d 81 [2016]), or where no threat can be shown as in *Matter of Laveck v Village Bd. of Trustees of Vil. of Lansing* (145 AD3d 1168, 42 NYS3d 460 [3d Dept 2016]), where personally identifying information of participants in a deer management program was ordered to be disclosed by the Court. The propriety of an exemption claimed under this FOIL section requires a court to consider whether the information sought "could by its inherent nature ... endanger the life and safety" of those as to whom the information is sought (*Matter of Bellamy v New York*

City Police Dept., 59 AD3d 353, 355, 874 N.Y.S.2d 60 [1st Dept 2009], quoting *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349, 694 N.Y.S.2d 14 [1st Dept 1999]).

Moreover, respondents have already released extensive audio footage of the landlord and other witnesses in video and audio released to the public, without altering the voices to alleviate any concern that the landlord and other witnesses may be identified by the audio recording of their voices. In addition, petitioner has demonstrated that the landlord has spoken to the press after the incident and had his name published in newspaper reports of the shooting, thus diminishing any minimal privacy interest to be gained by withholding the audio record from disclosure. It is well established that "[t]he statutory exemptions contained in the Public Officers Law, [are intended to] strike a balance between the public's right to open government and the inherent risks carried by disclosure of police files" (Gould, 89 NY2d at 278, citing Public Officers Law § 87 [2] [b], [e], [f]). (see *Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 440, 980 NYS2d 73 [1st Dept 2014]). Here, the court finds that since petitioner has consented to the redactions that blur the faces of the landlord and other witnesses, respondents have not demonstrated that the disclosure of the audio records of said witnesses depicted on the redacted footage, will endanger their lives or safety. Accordingly, the audio record must be disclosed. (NYSCEF Doc. No. 24).

We turn now to petitioner's request for attorney's fees. Pursuant to Public Officers Law § 89(4)(c), the court "may award counsel fees in a FOIL proceeding where a litigant 'has substantially prevailed' and when the agency 'had no reasonable basis for denying access' to the records or documents in question" (*Matter of Maddux v New York State Police*, 64 AD3d 1069, 1070, 883 N.Y.S.2d 365 [2009], lv denied 13 N.Y.3d 712, 919 N.E.2d 719, 891 N.Y.S.2d 304 [2009], quoting Public Officers Law § 89 [4] [c]). Even in cases where documents are ultimately

required to be disclosed, the agency may be found to have had a reasonable basis for initially denying access (see, e.g., *Norton v Town of Islip*, 17 AD3d 468, 793 N.Y.S.2d 133 [2d Dept 2005]; *Hopkins v City of Buffalo*, 107 AD2d 1028, 486 N.Y.S.2d 514 [4th Dept 1985]; *Niagara Environmental Action v City of Niagara Falls*, 100 AD2d 742, 473 N.Y.S.2d 653 [4th Dept 1984]; *New York Times Co. v City of New York Fire Dept.*, 195 Misc 2d 119, 127-28, 754 N.Y.S.2d 517 [2003] [holding that a reasonable legal basis for withholding portions of records precluded an award of attorney's fees]). Notably, "even when these statutory prerequisites are met, the decision to grant or deny counsel fees still lies within the discretion of the court" (*Matter of Henry Schein, Inc., v Eristoff*, 35 AD3d 1124, 1126, 827 NYS2d 718 [2006]; see *Matter of Todd v Craig*, 266 AD2d 626, 627, 697 NYS2d 722 [1999], lv denied 94 NY2d 760, 727 NE2d 577, 706 NYS2d 80 [2000]).

Here, petitioner has substantially prevailed as the court has directed respondents to disclose almost all the redacted video and audio footage requested, except for the noted redactions that petitioner has consented to; specifically, blurring the faces of the witnesses and the landlord but disclosing the audio record, and the four seconds of footage exempt as intra/inter-agency material. (NYSCEF Doc. No. 24).

As to whether respondents had a reasonable basis for denying access to approximately eighteen minutes of redacted post-shooting footage, respondents have maintained that the footage was exempt from disclosure based on the belief that disclosure would result in an unwarranted invasion of personal privacy to Mr. Richards and his family. (NYSCEF Doc. Nos. 5, 9). Mr. Richards' family submitted their affidavits waiving any privacy interests and consenting to the footage being released, in the reply papers submitted in further support of the

Petition. Therefore, the court finds that NYPD had a reasonable legal basis for withholding portions of the BWC footage from disclosure.

Additionally, based on the record, it is clear that respondents attempted to comply with the FOIL requirements as NYPD did release a significant portion of the BWC footage to the public prior to receiving petitioner's FOIL request. Based on the record and in the exercise of this court's discretion, petitioner's request for attorney's fees is denied. Accordingly, it is hereby,

ORDERED and ADJUDGED that the Petition is granted, in part, in accordance with this court's decision, order and judgment; and it is further

ORDERED that within thirty (30) days, respondents deliver to the petitioner the un-redacted portions of the video and audio footage as set forth above; and it is further

ORDERED and ADJUDGED, that petitioner's request for attorney's fees and costs is denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

6/12/2019

DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE