

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE

PART 15

Justice

NEW YORK LAWYERS FOR THE PUBLIC INTEREST

INDEX NO. 158010/2019

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO.

- v -

NEW YORK CITY POLICE DEPARTMENT, and
JAMES P. O'NEILL, in his official capacity as
Commissioner of the New York City Police Department

The following papers, numbered _ to _ were read on this motion to/for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is

The motion is decided in accordance with the accompanying decision and order.

DATED: 6/1, 2020



MELISSA A. CRANE, J.S.C

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
Check if appropriate: DO NOT POST REFERENCE SETTLE ORDER SUBMIT ORDER
 FIDUCIARY APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 15

-----X
 NEW YORK LAWYERS FOR THE PUBLIC INTEREST

Petitioner,

Index No.: 158010/2019

-against-

Mot. Seq. No. 001

NEW YORK CITY POLICE DEPARTMENT, and
 JAMES P. O'NEILL, in his official capacity as Commissioner
 of the New York City Police Department,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice
 Law and Rules

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MELISSA A. CRANE, J.S.C.:

In this Article 78 proceeding, petitioner, New York Lawyers For the Public Interest (“NYLPI”) seeks unredacted copies of body-worn camera footage that police officers recorded during the fatal shooting of Susan Muller on September 17, 2018, in addition to the 911 calls, pursuant to the New York Freedom of Information Law (“FOIL”) § 84. Respondents oppose the petition and claim an exemption under Public Officers Law “POL” § 87(2)(e)(i), that disclosure would interfere with the ongoing Departmental investigation into the shooting. Respondents also argue for redactions to the footage to protect decedent’s privacy.

Facts

NYLPI is a nonprofit civil rights law firm that works to advance equality and civil rights through community lawyering. NYLPI’s Disability Justice Program seeks to improve New York City’s response to individuals who experience mental health crises. Petitioner makes a FOIL

request for body-worn camera footage of Susan Muller's fatal shooting to inform the public as to how the NYPD interacts with emotionally disturbed individuals.

On September 17, 2018, NYPD officers shot and killed Susan Muller after arriving at her Queens home in response to her 911 call to report a burglary (Pet ¶¶ 18-22). Earlier that day, a pharmacy refused to dispense Ms. Muller anti-depressants and she became distraught (Pet ¶ 17). Ms. Muller subsequently consumed alcohol (*id.*). Later that evening, when the police came to her home, Ms. Muller was likely experiencing a mental health crisis (Pet ¶¶ 17-22). The NYPD had responded to 911 calls at Ms. Muller's house on nine previous occasions. During the most recent incident, Ms. Muller had acted irrationally and the police took her to a hospital for mental health treatment. According to reports, the officers searched Ms. Muller's home but did not find the burglar (Pet ¶ 20). Ms. Muller then approached an officer with a kitchen knife (*id.*). The officer asked her to drop the kitchen knife twice. When she refused, that officer shot Ms. Muller three times in the torso (Pet ¶ 22). The time the officers entered the apartment, to when the officers fatally shot Ms. Muller, lasted just fifty seconds (*id.*).

On October 2, 2018, NYLPI filed a FOIL request for the unedited audio and video files from the body-worn cameras that the officers wore during the shooting, and the 911 audio files. On March 9, 2019, the NYPD denied NYLPI's FOIL request, citing exemptions under *inter alia* POL § 87(2)(e)(i), POL § 87(2)(f), POL § 87(2)(b), POL § 87(2)(g)(iii), and POL § 87(2)(a). On April 3, 2019, NYLPI appealed the NYPD's denial. On April 15, 2019, the Records Access Appeal Office denied petitioner's appeal, and cited to POL § 87(2)(e)(i), that the NYPD's internal investigation into the incident remains active and ongoing, and could lead to prosecution of the officers involved in the shooting. Further, releasing the body-worn camera footage might

cause witness tampering or tainting of the jury pool. On April 29, 2019, NYLPI asked respondents to reconsider its denial. On May 6, 2019, the NYPD denied petitioner's appeal, again asserting that disclosure of the footage could interfere with the ongoing investigation.

Within four months petitioner brought this special proceeding. After a party-stipulated adjournment of the return date of the motion, the court scheduled oral argument for March 4, 2020. After oral argument, the court took the case on submission due to the public policy issues it presented.

Discussion

Petitioner asks this court for an Order: (i) directing respondents to produce unedited copies of the body camera footage and 911 calls; or, alternatively (ii) directing an *in camera* review of the footage; and (iii) attorneys' fees and costs.

When an agency denies record access, the entity seeking the records may commence a special proceeding for judicial review of the denial of the FOIL request. The standard "affected by an error of law" applies to judicial review of FOIL requests rather than an "arbitrary and capricious" standard (*Mulgrew v Board of Educ of City School Dist of City of New York*, 87 Ad3d 506 [1st Dept 2011]). The Legislature enacted FOIL with a presumption of access to public records. "All agency records are presumptively available for public inspection and copying, unless they fall within 1 of 10 categories of exemptions, which permit agencies to withhold certain records" (*Hanig v State Dept of Motor Vehicles*, 79 NY2d 106, 108 [1992]).

Exceptions to disclosure must be narrowly construed. The burden rests on the agency to demonstrate that the requested material qualifies for an exemption (POL § 89[4][b]). POL § 87(2)(e)(i) exempts from disclosure records that "are compiled for law enforcement purposes and

which, if disclosed, would interfere with law enforcement investigations or judicial proceedings” (*Matter of Legal Aid Society v New York City Police Dept* 274 AD2d 207, 214-215 [1st Dept 2000], *lv dismissed and denied* 95 NY2d 956 [2000]; *Matter of Pittari v Pirro*, 258 AD2d 202, 206-208 [2d Dept 1999], *lv denied* 94 NY2d 755 [1999]). An assertion that disclosure of law enforcement records would interfere with a pending proceeding is a sufficiently particularized justification for the denial of access to the records (*Leshner v Hynes*, 19 NY2d 57, 63 [2012]). To invoke the law enforcement exemption, respondents must show that the records: (1) were compiled for law enforcement purposes; and (2) if disclosed, would interfere with law enforcement investigations or judicial proceedings (*Matter of Madeiros v New York State Educ. Dep’t*, 30 NY3d 67, 74 [2017]).

Respondents first argue that disclosure of the police officers’ body-worn camera footage would interfere with the ongoing internal Force Investigation of the incident. Specifically, respondents assert that disclosure could reveal the layout of the scene of the incident and the possible witnesses that the Force Investigation Division needs to interview (Tr. dated March 4, 2020, p.4, lines 12-15). However, the investigation is no longer ongoing. Susan Muller’s shooting occurred on September 17, 2018. Ten months later, on July 25, 2019, the Queens District Attorney’s office concluded its investigation (*see* Paul Kogan Memo of Law dated October 16, 2019, p.4).¹ Respondents stated during oral argument that, after the District Attorney concludes its investigation, the footage goes to the NYPD’s Force Investigation Division. The Force investigation could “take approximately three to six months, at which point

¹ Although in their opposition papers, respondents stated that the District Attorney’s investigation concluded on July 25, 2019, during oral argument on March 4, 2020, respondents stated that the District Attorney finished their investigation in January 2020 (Tr. dated March 4, 2020, p.5, lines 1-2), thus contradicting its prior statement.

we would be willing to release the footage” (Tr. dated March 4, 2020, p.5, lines 7-9). According to that timeline, the internal Force Investigation should be finished by now.

Respondents rely on the holding in *Information Law Request v New York City*, 2020 WL 752519 (NY Co, Sup Ct 2020), finding that respondents had a valid basis under POL § 87(2)(e)(i) for withholding body-worn camera footage during a Force investigation. However, unlike in this case, in *Information Law Request* respondents promptly notified petitioner at the conclusion of the investigation in January 2020 and disclosed the footage in full. The court in *Information Law Request* noted that, because petitioner received the materials requested in the FOIL request, the relief sought within the petition is moot. Here, respondents have not turned over the footage, yet the internal Force Investigation is at its end. Respondents cannot claim that disclosure would interfere with an ongoing law enforcement investigation once that investigation has concluded (*see Information Law Request v New York City*, 2020 WL 752519 (Sup Ct, NY Co 2020) [release of body camera footage while the investigation was still ongoing would have interfered with the investigation]).

Further, respondents’ assertion that releasing the footage would taint the jury pool is speculative in a city of eight million people (*see Collins v NYPD*, 2017 WL 1591134 at *5 [Sup Ct, NY Co 2017] [law enforcement exemption did not apply where mere hope to apprehend accomplices is not evidence of an ongoing investigation but rather speculation]; *see also, Malcolm v NYPD*, 2017 NYLJ LEXIS 3730 at *25 [Sup Ct, NY Co 2018] [NYPD caused unreasonable delay in producing records and family had public interest in receiving the records for ‘clarity and closure’]).

Moreover, the NYPD's body-worn camera footage program promotes transparency, accountability, and public trust-building (*see Patrolmen's Benevolent Assn. of the City of NY v de Blasio*, 171 Ad3d 636, 637 [1st Dept 2019]). Public accountability is particularly important with respect to police shootings of civilians, where the public's interest in disclosure is at its highest. The NYPD has articulated that its commitment to transparency extends to footage of officer shooting (*see NYPD, The Way Forward: The NYPD's Response to the Joint Remedial Process Report 29* [June 8, 2018]). Here, public policy compels the release of the body-worn camera footage after an investigation ends.

Respondents also argue that the NYPD should produce redacted videos because otherwise there would be an unwarranted invasion of Susan Muller's personal privacy. Respondents' argument is unconvincing. First, respondents do not identify what specific redactions they want to make. In addition, *New York Lawyers for the Pub. Interest v New York City Police Dept*, 64 Misc3d 671 (Sup Ct, NY Co 2019) involved another fatal shooting of a civilian and college student, Miguel Richards, who also had experienced a mental health crisis at the time officers shot him. In that case, the court ordered the NYPD to release unredacted body-worn camera footage of the fatal shooting, finding that disclosure of footage of what happened after police officers shot Richards did not reveal his medical history or invade his or his family's personal privacy (*New York Lawyers for the Pub. Interest v New York City Police Dept*, 64 Misc3d at 676). Nor did release of the footage endanger the life or safety of others involved in the incident, like the EMTs (*id.*). Similarly, in this case, releasing body-worn camera footage promotes transparency, accountability, and public trust-building. It provides a contemporaneous, objective record of encounters between the public and police. The inherent

right of the public to know outweighs privacy concerns. To hold otherwise is contrary to the spirit of the FOIL law and objectives of the NYPD's body-worn camera footage program.

Accordingly, it is

ORDERED that the court grants the Petition as set forth in this decision; and it is further

ORDERED that respondents shall provide petitioner unredacted copies of body-worn camera footage that police officers recorded during the fatal shooting of Susan Muller on September 17, 2018, in addition to the 911 calls, within 20 days of the e-filed date of this decision; and it is further

ORDERED that the court denies petitioner's request for attorneys' fees without prejudice. Petitioner did not produce invoices, statements, or any documents demonstrating the amount of fees incurred. However, the court grants petitioner the opportunity to make an application by motion for reasonable attorneys' fees within 30 days of the e-filed date of this order.

Dated: June 1, 2020

ENTER:



HON. MELISSA A. CRANE, J.S.C.