

SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

_____	x	
	:	
TIME WARNER CABLE NEWS NY1,	:	
	:	
Petitioner,	:	
v.	:	
	:	Index No. _____
NEW YORK CITY POLICE DEPARTMENT	:	
and WILLIAM J. BRATTON, in his official	:	<u>VERIFIED PETITION</u>
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.	:	
_____	x	

Time Warner Cable News NY1 ("NY1"), as and for its Verified Petition, alleges
as follows:

Preliminary Statement

1. Petitioner NY1 brings this Article 78 proceeding pursuant to the Freedom of Information Law ("FOIL"), New York Public Officers Law § 84 *et seq.*, seeking to vindicate NY1's and the public's right to footage recorded by the New York City Police Department ("NYPD") as part of its Volunteer Body-Worn Camera ("BWC") Pilot Program.

2. The BWC Pilot Program ("BWC Program") began in New York City as national attention focused on interactions between law-enforcement and members of the public. With the deaths of Eric Garner, Michael Brown, Jr., Tamir Rice, Freddie Gray, and others after encounters with the police routinely appearing as front-page news, the stated purpose of the BWC Program was to "provide transparency, accountability, and protection for both the police officers and those they serve. . . ."

3. In order to make the BWC footage available to its viewers, NY1 requested a sampling of footage recorded through the BWC Program pursuant to FOIL.

4. The NYPD denied NY1's request for unedited footage without specifying what material it plans to redact, how much material will be excluded from disclosure, or how the redaction will be performed. Instead, Respondents suggested that they may provide NY1 with edited footage, but only on the condition that NY1 remit \$36,000.00, the alleged cost to the NYPD of performing its unidentified redactions.

5. FOIL does not permit public records to be withheld absent a full explanation of the materials that are exempt from disclosure. FOIL also does not permit agencies to levy any charge for review and redaction of records (let alone a \$36,000.00 charge). As a result, the NYPD's response to NY1's request violates FOIL.

6. Indeed, the NYPD's response to NY1's request for footage runs counter to both the public policy of openness underlying FOIL, as well as the purported transparency supposedly fostered by the BWC program itself.

7. Having exhausted its administrative remedies, NY1 petitions the Court to order the NYPD and Commissioner Bratton to comply with their obligations under FOIL by providing NY1 with the requested BWC footage, without charging fees for the review and redaction of those records. Because the fees demanded by the NYPD have no basis in law, NY1 also requests that the Court award its reasonable attorneys' fees and costs in connection with this proceeding.

8. NY1 has not made any previous application to this or any other court for the relief requested herein or for any similar relief.

The Parties

9. Petitioner NY1 is a cable news television channel that provides 24-hour news coverage focusing on New York City.

10. Respondent NYPD is a law enforcement agency administered under Title 14 of the New York Administrative Code. The NYPD is a public agency subject to the requirements of FOIL.

11. Respondent William J. Bratton is a public officer who is named in his official capacity as Commissioner of the NYPD.

The Body-Worn Camera Pilot Program

12. In December 2014, the NYPD launched the BWC Program, which tests the use of BWCs by NYPD officers. *Body-Worn Cameras in NYC: An Assessment of NYPD's Pilot Program and Recommendations to Promote Accountability*, Mark G. Peters and Philip K. Eure, New York City Department of Investigation, Office of the Inspector General for the NYPD (July 2015) at i, available at <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf>.

13. Under the BWC Program, 54 BWCs were put into use across six police precincts in New York City. *Id.*

14. The stated purpose of the Program is “[t]o visually and audibly record specific categories of interactions between uniformed members of the service and the public and to retain associated video for a period of time.” *Id.* at App’x A (Operations Order 48, Issued Dec. 2, 2014).

15. A joint statement on the BWC Program issued by Mayor Bill de Blasio and Public Advocate Letitia James underscored that the Program “will provide transparency,

accountability, and protection for both the police officers and those they serve” Joint Statement of Mayor de Blasio and Public Advocate James on the Police Department’s Launch of the Body Camera Pilot Program (Sept. 4, 2014), *available at* <http://www1.nyc.gov/office-of-the-mayor/news/429-14/joint-of-mayor-de-blasio-public-advocate-james-the-police-department-s-launch-of>.

NY1’s FOIL Request

16. On April 10, 2015, NY1 reporter Courtney Gross sent a letter to the Records Access Officer (“RAO”) of the NYPD’s FOIL Unit Legal Bureau. Ms. Gross requested video footage from the NYPD’s BWC pilot program in accordance with FOIL. Specifically, Ms. Gross’s request asked for unedited video files from the BWC program for the following weeks:

December 5-12, 2014
January 16-23, 2015
February 20-27, 2015
March 13-20, 2015
April 3-10, 2015

A true and correct copy of Ms. Gross’s letter is annexed to this Petition as Exhibit A.

NYPD’s Denial of NY1’s FOIL Request

17. On April 27, 2015, Lt. Richard Mantellino, the RAO at the Legal Bureau of the NYPD, responded to NY1’s FOIL request. That response stated that no “determination [could] be rendered” on NY1’s request because “further review” was required “to assess the potential applicability of exemptions set forth in FOIL, and whether the records [could] be located.” He estimated that “this review will be completed, and a determination issued, within 90 business days of this letter.” A true and correct copy of Lt. Mantellino’s letter is annexed to this Petition as Exhibit B.

18. On August 4, 2015, Lt. Mantellino wrote “in further response” to Ms.

Gross's April 10, 2015 FOIL request. At that time, he rejected the request for unedited video files, stating that "the recorded videos . . . contain information that (i) if disclosed, would constitute an unwarranted invasion of the privacy of numerous individuals; (ii) is confidential and relates to a criminal investigation; (iii) could endanger the life or safety of a person or persons; (iv) constitutes non-disclosable intra- or inter-agency communications; (v) if disclosed, can impair the security of the NYPD's information technology systems; or (vi) is otherwise exempt from disclosure pursuant to statutory law." A true and correct copy of Lt. Mantellino's letter is annexed to this Petition as Exhibit C.

19. Although the RAO's August 4, 2015 letter purported to invoke various exceptions under the FOIL statute, the letter indicated that, as of that date, the requested footage had not even been reviewed to determine that any exceptions were in fact applicable: "Should [Ms. Gross] wish to obtain copies of non-exempt footage contained in recordings made during the time periods listed in the FOIL request, the recordings *would have to be reviewed* in real time by trained personnel in order to locate and copy non-exempt footage." Exhibit C (emphasis added).

20. The RAO's August 4, 2015 letter estimated that the review necessary "to copy non-exempt portions" of the footage would cost \$36,000.00. That letter stated that "[p]rocessing" would not begin until the \$36,000.00 "copying fee" was remitted. The RAO provided no estimate of how long after receipt of the \$36,000.00 it would provide the footage. Exhibit C ("The time required to process the video recordings will depend on the volume of other FOIL requests being processed and the availability of trained personnel to process requests.").

NY1's Administrative Appeal

21. By letter dated September 1, 2015, NY1 appealed the RAO's adverse determination to Mr. Jonathan David, the NYPD's Records Access Appeals Officer. A true and correct copy of NY1's appeal letter is annexed to this Petition as Exhibit D.

22. In that letter, NY1 observed that the NYPD had failed to provide any factual detail supporting the application of any of the exemptions claimed by the NYPD. Accordingly, NY1 argued, the NYPD had failed to meet its burden to demonstrate that any portion of the footage requested by Ms. Gross qualifies for exemption.

23. NY1 further argued that the \$36,000.00 "copying fee" demanded by the NYPD is excessive and improper, and effectively bars public access to information that FOIL is intended to guarantee. Exhibit D.

The NYPD's Denial of NY1's Appeal

24. By letter dated September 16, 2015, the NYPD, through Records Access Appeals Officer Jonathan David, affirmed its August 4, 2015 denial of NY1's request for unedited BWC footage. The NYPD also affirmed the August 4, 2015 decision to condition NY1's access to edited BWC footage upon payment of a \$36,000.00 fee. A true and correct copy of this letter (the "Appeals Determination") is annexed to this Petition as Exhibit E.

25. In the Appeals Determination, the NYPD acknowledged that "[t]he RAO's August 4, 2015, determination [had] provided a limited generic factual description of the types of BWC Footage for which FOIL exemptions were claimed, and generically described the kinds of harm" that could flow from the disclosure requested by NY1.

26. The Appeals Determination provided a somewhat lengthier—but no less generic—description of hypothetical scenarios under which a FOIL exemption might

conceivably apply. For example, it stated, in conclusory fashion, that “[a]n example of footage that is exempt from disclosure pursuant to POL § 87(2)(a) is the depiction of the arrest of an individual that was ultimately terminated in favor of the arrested person.” Exhibit E at 3. However, the Appeals Determination did not state that the requested BWC footage *in fact depicts* the arrest of any individual that ultimately terminated in that individual’s favor. Similarly, the Appeals Determination did not state with any particularity that the requested BWC footage *in fact contains* any material subject to any other FOIL exemption.

27. The Appeals Determination stated that “[t]o the extent that [NY1’s] appeal may be deemed a request that the NYPD assume the entire cost of preparing a copy of the requested BWC Footage, it is further denied because this would constitute an excessive and unreasonable burden not required by FOIL.” Exhibit E at 4. The Appeals Determination provided no legal citation for the proposition that a FOIL-mandated disclosure of agency records may be conditioned upon payment of a fee where the agency, in its sole discretion, deems the disclosure too burdensome.

The NYPD Has Violated the Freedom of Information Law

28. This Article 78 proceeding is expressly authorized by Section 89(4)(b) of the Freedom of Information Law, N.Y. Pub. Off. Law § 89(4)(b). FOIL was enacted to accommodate, to the fullest extent possible, public access to records and information in the possession of governmental agencies. See N.Y. Pub. Off. Law § 84 (“The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.”). FOIL’s exemptions from disclosure are therefore to be construed narrowly, and the disclosure duties imposed upon state

agencies construed liberally, to allow the public maximum access to government records. See *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 568 (1986).

29. The NYPD has violated Section 87(2) of FOIL by conditioning the disclosure of non-exempt BWC footage on remittance of a \$36,000.00 “copying fee” intended to compensate the NYPD for employee time purportedly necessary to review and redact the requested footage. FOIL permits an agency to pass on *only* “the actual cost of reproducing any other record,” which *does not* include “search time,” “administrative costs,” or other preparation fees not related to the actual physical reproduction of a requested record. N.Y. Pub. Off. Law § 87(1)(b)(iii), (c)(iv); *see also* Committee on Open Government Advisory Opinion, FOIL-AO-18127 (May 27, 2010) (“[I]f [an agency] redacts information electronically, in my view, it would not be able to charge for employee time spent redacting.”).

30. Moreover, by asserting that broad categories of exemption apply to the requested records, without describing any specific example of exempt footage actually contained within the requested records, the NYPD has violated section 89(4)(a) of FOIL, which requires that an agency’s determination on appeal “*fully* explain . . . the reasons for further denial” of a FOIL request. FOIL does not permit an agency to enumerate a list of FOIL exemptions and offer hypothetical circumstances under which records *might* fall under each exemption. N.Y. Pub. Off. Law § 89(4)(a) (emphasis added).

Requested Relief

WHEREFORE, Petitioner seeks judgment:

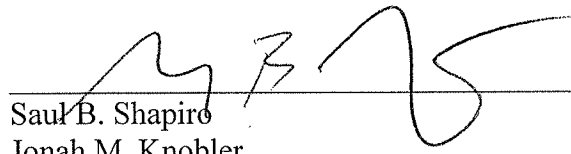
(1) Pursuant to CPLR 7806, directing the NYPD and Commissioner Bratton to comply with their duty under FOIL to disclose all portions of the requested records that are not subject to any exemption and to specifically identify any material purportedly exempt from disclosure, without conditioning disclosure upon the payment of a fee not arising from the cost of actual reproduction of records;

(2) Awarding reasonable attorneys' fees and litigation costs incurred in prosecuting this special proceeding, as provided by N.Y. Pub. Off. Law § 89(4)(c), because the NYPD lacks any reasonable basis in law either for demanding a \$36,000.00 fee for the disclosure of these records or for failing to offer a full explanation for the asserted application of numerous FOIL exemptions; and

(3) Granting such and other further relief as the Court deems just and proper.

Dated: January 13, 2016

By:



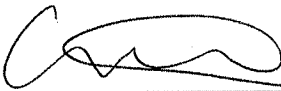
Saul B. Shapiro
Jonah M. Knobler
Amy N. Vegari
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036-6710
(212) 336-2000

Attorneys for Petitioner NY1

VERIFICATION

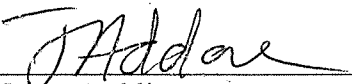
STATE OF NEW YORK)
 : ss.:
COUNTY OF New York)

Courtney Gross, being duly sworn, hereby states that she is a reporter employed by Time Warner Cable News NY1, Petitioner in the above-captioned matter; that she has read the foregoing petition; and that it is true to her own knowledge, except as to matters therein stated on information and belief and as to those matters she believes to be true. The sources of the information and the bases for her beliefs are the exhibits attached hereto.



Courtney Gross

Sworn to before me this
12th day of January, 2016



Notary Public
JOYCE ADDAE
Notary Public, State of New York
No. 01AD5050610
Qualified in New York County
Commission Expires December 22, 2016

Exhibit A

Records Access Officer
NYC Police Department
F.O.I.L. Unit Legal Bureau
One Police Plaza – Room 110-C
New York, New York 10038

April 10, 2015

To whom it may concern:

I am submitting the following Freedom of Information Law request on behalf of NY1 News:

We request the unedited video files from the NYPD's body camera program for the following weeks: December 5 through 12 of 2014, January 16 through 23 of 2015, February 20 through 27 of 2015, March 13 through 20th of 2015 and April 3 through 10th of 2015. We request these files be delivered electronically.

We appreciate a response to this request within five business days.

Sincerely,

Courtney Gross
Reporter
NY1 News
75 Ninth Ave
New York, NY 10011
Courtney.Gross@ny1news.com
646.625.0612

Exhibit B



POLICE DEPARTMENT
LEGAL BUREAU
F.O.I.L Unit, Room 110C
One Police Plaza
New York, NY 10038

04/27/15

Courtney Gross
NY1 News
75 Ninth Ave
New York, NY 10011

FOIL Req #: 2015-PL-3860
Your File #:

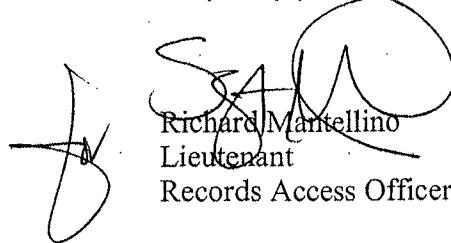
Dear Sir or Madam:

This is in response to your letter dated 04/10/15, which was received by this office on 04/20/15, in which you requested access to certain records under the New York State Freedom of Information Law (FOIL).

Your request has been assigned to Police Officer Halk (646-610-6430) of this office. Before a determination can be rendered, further review is necessary to assess the potential applicability of exemptions set forth in FOIL, and whether the records can be located. I estimate that this review will be completed, and a determination issued, within ninety business days of this letter.

This is not a denial of the records you requested. Should your request be denied in whole or in part, you will then be advised in writing of the reason for any denial, and the name and address of the Records Access Appeals Officer.

Very truly yours,



Richard Mantellino
Lieutenant
Records Access Officer

Exhibit C



POLICE DEPARTMENT
LEGAL BUREAU
FOIL UNIT, ROOM 110C
ONE POLICE PLAZA
NEW YORK, N.Y. 10038

August 4, 2015

Ms. Courtney Gross
NY One News
75 Ninth Avenue
New York, NY 10011

RE: FREEDOM OF INFORMATION LAW REQUEST 15-PL-103860

Dear Ms. Gross:

This letter is in further response to your letter dated April 10, 2015, wherein you requested, pursuant to the Freedom of Information Law (FOIL), N. Y. Public Officers Law (POL) §§ 84 et seq., copies of unedited video footage recorded by body worn cameras.

As a preliminary matter, it is not possible to provide you with unedited video files because the recorded videos, which depict interactions between police officers, supervisors, and individuals who seek assistance from the police or who are the subject of a police investigation or inquiry, and thus contain information that (i) if disclosed, would constitute an unwarranted invasion of the privacy of numerous individuals; (ii) is confidential and relates to a criminal investigation; (iii) could endanger the life or safety of a person or persons; (iv) constitutes non-disclosable intra- or inter-agency communications; (v) if disclosed, can impair the security of the NYPD's information technology systems; or (vi) is otherwise exempt from disclosure pursuant to statutory law. Accordingly, access to the requested recordings in their unedited form must be denied pursuant to POL § 87(2)(a), (b), (c), (f), (g), (i), and pursuant to POL § 89(2).

Should you wish to obtain copies of non-exempt footage contained in recordings made during the time periods listed in the FOIL request, the recordings would have to be reviewed in real time by trained personnel in order to locate and copy non-exempt footage. I estimate the cost to copy non-exempt portions from the five weeks of video footage at approximately \$ 36,000.00. The time required to process the video recordings will depend on the volume of other FOIL requests being processed and the availability of trained personnel to process requests. Processing will commence upon receipt of your remittance for the copying fee.

You may appeal this decision or any portion thereof. Appeals must be made in writing, within 30 days of the date of this letter, and must be forwarded to: Jonathan David, Records Access Appeals Officer, New York City Police Department, One Police Plaza, Room 1406, New York, NY 10038.

Sincerely,

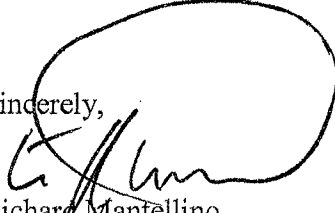

Richard Mantellino
Lieutenant
Records Access Officer

Exhibit D



Rec'd on
9/1/15 at 6:17pm
by Jonathan David

Jonathan David
Records Access Appeals Officer
NYC Police Department
F.O.I.L. Unit Legal Bureau
One Police Plaza – Room 1406
New York, New York 10038

September 1, 2015

Dear Mr. David:

On August 4, 2015, the New York Police Department (“NYPD”) issued a wholesale denial of our New York Freedom of Information Law (“FOIL”) request, which we appeal now. See 15-PL-103860 dated August 4, 2015. In our initial FOIL request we sought unedited video files from the NYPD Body-Worn Camera (“BWC”) program for the following weeks: December 5 through 12, 2014, January 16 through 23, 2015, February 20 through 27, 2015, March 13 through 20, 2015 and April 3 through 10, 2015. We appeal on the grounds that the legislative intent of FOIL and the purpose of the BWC program require public access to the requested records, the NYPD failed to satisfy their burden of proof, and the proposed fee for edited video is an unreasonable bar to public access.

FOIL and the BWC Program Require Broad Public Access to BWC Footage

In its statement of legislative intent, FOIL places the burden squarely on the state to do everything in its power to increase the public’s faith in its government through transparency. “[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible. . . . Access to [government information] should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.” N.Y. Public Officers Law (“POL”) § 84. Indeed, the New York Court of Appeals has affirmed this, noting that “FOIL imposes a broad duty of government to make its records available to the public.” *Gould v. New York City Police Department*, 89 NY2d 567, 274 (N.Y. 1996).

As part of a settlement agreement in *Floyd v. The City of New York*, the City agreed to a court-installed monitor who was required to, among other things, oversee a BWC pilot program for NYPD officers. One of the core goals of the BWC pilot program is that the program should “foster[] positive relations with the community.” December 2, 2014 Operations Order Pilot Program-Use of Body-Worn Cameras (“Operations Order”) ¶ 1.

In the wake of numerous violent confrontations between police officers and civilians caught on camera across the country, it has never been more important to achieve the goal of positive and trusting relations between the NYPD and the citizens of New York. This goal, and

the goal of government transparency proffered by FOIL, will not be possible if the NYPD keeps the BWC footage under a "cloak of secrecy or confidentiality" through the overly-broad application of the POL § 87 exemptions.

The NYPD Did Not Prove that the Requested Footage Is Exempt under POL§ 87

The NYPD relied on six exemptions to the presumption that government records should be made publicly available to deny TWC's request for unedited BWC footage. The NYPD failed to meet its burden because it offered only a general explanation devoid of a minimal level of factual detail as to why all of the BWC footage is exempt. New York law states, "[t]o ensure maximum access to government documents, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109; see, *Public Officers Law* § 89 [4] [b]) . . . '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 571)." *Gould*, 89 NY2d at 275.

To rightfully deny public access to the requested records, the NYPD must articulate a "particularized and specific justification for withholding the record." *Gould*, 89 NY2d at 275 (internal quotations and citations omitted). In *Church of Scientology v. New York*, the Court of Appeals held that New York had not satisfied its burden of proving the requested records were exempt where "State officials . . . tendered only references to sections, subdivisions and subparagraphs of the applicable statute and conclusory characterizations of the records sought to be withheld." 46 N.Y.2d 906, 907-08 (N.Y. 1979). Under those circumstances, the agency provided no "factual basis to determine whether the materials sought come within the [POL § 87(2) exceptions]" and the State's denial of access failed. *Id.*

The NYPD's bare explanation that the videos "depict interactions between police officers, supervisors, and individuals who seek assistance from the police or who are the subject of a policy investigation" and thus are all exempt under six separate exemptions¹ does not constitute a "particularized and specific justification" as required by New York law. Here, as in *Church of Scientology*, the NYPD has provided only broad generalizations and "conclusory characterizations" of the requested records. The NYPD has provided no particularized or specific facts to justify their position that all unedited footage should be withheld. Rather, they rely on just the sort of statements lacking evidentiary support that the Court of Appeals deemed insufficient. Some glaring examples include that the NYPD failed to identify the actual statute

¹ The NYPD stated that disclosure would constitute an unwarranted invasion of privacy of the subject individuals, POL § 87(2)(b), reveal confidential information surrounding a criminal investigation, POL § 87(2)(e)(iii), endanger the lives of individuals, POL § 87(2)(f), contain exempt inter-agency or intra-agency materials, POL § 87(2)(g), could impair the security of the NYPD information technology systems if made available to the public, POL § 87(2)(i), and the requested records are specifically exempted from disclosure by New York and/or federal law, POL § 87(2)(a).

that they claim exempts the requested records under POL § 87(2)(a), the types of exempt inter- or intra- agency communications featured in the footage under POL § 87(2)(g), and the risks to persons' safety or NYPD information technology systems under POL § 87(2)(f) & (i).

Additionally, the NYPD states that the footage, compiled for law enforcement purposes, would reveal confidential information surrounding a criminal investigation. POL § 87(2)(e)(iii). The wholesale application of this exception is misplaced because the Operations Order requests activation of the BWCs in circumstances other than criminal investigations. Such circumstances include "[a]ny public interaction, regardless of context, that escalates and becomes adversarial," Operations Order ¶6(f), "[a]ll interior vertical patrols of non-Housing Authority buildings and Housing Authority buildings," *id.* ¶ (g), and any situation at the officers discretion where "it would be beneficial to record," *id.* ¶ 7. It strains reason to suggest that video taken in accordance with the above provisions of the Operations Order always constitutes confidential information related to a criminal investigation. Based on the many shortcomings of the NYPD's denial of our petition, we again request access to the BWC footage.

The Proposed Cost of Edited Records is a Bar to their Rightful Public Dissemination.

We also take issue with the NYPD's proposed imposition of an excessive \$36,000 fee on those seeking access to this important information. We believe this fee is a bar to public access to information and undercuts the very purpose and scope of FOIL: to foster transparency and trust between government and the citizenry. Additionally, the NYPD cannot and will not build trust within its community by eliminating any reasonable opportunity to view the BWC footage.

FOIL prohibits public agencies from including in the cost to petitioners any time it may take the agency to review or to search for the record. An agency may only charge to prepare or copy the record (POL §87(1)(b)(iii)). Edits to existing video footage is not "preparing" records for copying. "[I]f redactions are made as a result of a review of existing records, whether those records exist on paper or electronically, the records would already have been 'prepared'" and a fee would not be permitted by statute. Committee on Open Government, May 27, 2010 Advisory Opinion at <http://www.empirejustice.org/assets/pdf/issue-areas/public-benefits/freeman-5-27-10.pdf>. Accordingly, we believe \$36,000 is not justified to copy five weeks of video onto a DVD.

New York is not alone in grappling with this issue. All across the country police departments have been confronted with mounting request for footage obtained by BWCs. See Reporter's Committee for Freedom of the Press, Access to Police Body-Worn Camera Footage at <http://www.rcfp.org/bodycams> (detailing state legislation and police department policies for public access to BWC footage). Significantly, police departments are not all wholly rejecting these requests. In Seattle, WA, working with the police department, a computer programmer created a YouTube channel to host BWC footage that, as a result of custom software, quickly blurs facial features and removes audio to avoid privacy concerns. See Jessica Glenza, Seattle



Police Post Blurry Body-Camera Videos to YouTube in Transparency Bid, The Guardian, March 9, 2015 at <http://www.theguardian.com/us-news/2015/mar/09/seattle-police-posting-body-camera-footage-youtube-transparency>. The NYPD has the opportunity to be at the forefront of this timely issue and we encourage a vigorous review of our request.

We appreciate a response to this appeal as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to be "Courtney Gross", written over a horizontal line.

Courtney Gross
Reporter
NY1 News
75 Ninth Ave
New York, NY 10011
Courtney.Gross@ny1news.com
646.625.0612

Cc: Robert Hardt, Dan Jacobson

Exhibit E

[illegible]



POLICE DEPARTMENT
Office of Deputy Commissioner,
Legal Matters
One Police Plaza, Room 1406A
New York, New York 10038

September 16, 2015

Ms. Courtney Gross, Reporter
NY One News
75 Ninth Avenue
New York, NY 10011

VIA MAIL AND FACSIMILE TO (212) 379-3575

RE: FREEDOM OF INFORMATION LAW REQUEST 15-PL-3860

Dear Ms. Gross:

This letter is in response to your letter dated September 1, 2015, which appealed the determination of the Records Access Officer ("RAO"), dated August 4, 2015, which granted access, in redacted form, to the records you requested by letter dated April 10, 2015 ("the FOIL Request"). The FOIL Request sought an unedited copy of all video footage recorded by NYPD body worn cameras ("BWC Footage") during five separate week-long periods, pursuant to the Freedom of Information Law, N.Y. Public Officers Law ("POL") § 84 *et seq.* ("FOIL").

The September 1, 2015, appeal letter purports to challenge a claimed "wholesale denial" by the RAO of the FOIL Request. However, the RAO's August 4, 2015, determination, rather than denying the request, granted access to the BWC Footage you requested, subject to the necessary redaction of exempt information contained therein, upon payment of the estimated cost of preparing a redacted copy of the video footage that you requested. As fully explained below, the claimed exemptions that warrant the limited denial of access to information that is exempt pursuant to FOIL carefully balanced the right of access to the records with the interests that FOIL's exemptions seek to protect, and, accordingly, the RAO's partial denial of access is affirmed. In addition, the RAO's request for payment of the estimated copying fee, the amount of which is commensurate with the breadth of the FOIL request, is entirely consistent with the provisions of FOIL, and is affirmed for reasons that are fully explained below.

The September 1, 2015, letter also based the administrative appeal on the ground that the RAO's August 4, 2015, determination failed to satisfy a purported "burden of proof" that the RAO was allegedly required to meet with a "particularized showing" of the applicability of the exemption when denying a request for records. However, pursuant to POL § 89(3)(a), in responding to a FOIL request, the RAO is only required to "grant or deny" the request in writing, whereas POL § 89(4)(a), which permits any person whose request for records was denied by the agency's RAO to file a written administrative appeal, requires the agency, in response to an administrative appeal, to "fully explain in writing to the person requesting the record the reasons

for further denial" if the administrative appeal is denied. The RAO's letter dated August 4, 2015, and the instant determination comply with these statutory requirements.

In alleging that the NYPD failed to meet its burden of proving that the FOIL exemptions cited in the RAO's August 4, 2015, letter applied to the denied portions of the BWC Footage, the September 1, 2015, letter cited to opinions of the Court of Appeals in cases that ruled on a different issue: whether the agency had met its burden of proof in litigation brought pursuant to POL § 89(4)(b). The cited cases are not relevant to the burden that POL § 89(3)(a) places upon the RAO, who is only required to "grant or deny" the request in writing. The Court of Appeals has clarified that the burden of making a particularized showing that an exemption applies - as described in the cases cited in the appeal letter - only applied to the agency's burden of proof *in litigation*, after an agency's final denial of access under FOIL was challenged in an Article 78 proceeding.

The September 1, 2015, letter also contends that FOIL and the BWC program itself require "Broad" public access to BWC Footage, and complains that the NYPD has wrongly placed a 'cloak of secrecy or confidentiality' over the requested BWC footage. However, FOIL does not permit an agency to engage in the blanket, indiscriminate disclosure of its records. Rather, an agency is required to determine, in the first instance, what may be disclosed and what must be withheld in accordance with the balance defined by FOIL. It is FOIL that defines the policy of the State of New York with respect to the disclosure of agency records, and therefore it is pursuant to FOIL that requests for access to records are determined. Neither the BWC program nor the stipulation that is referenced in the September 1, 2015, letter provides any other mechanism for obtaining the records that were requested in the April 10, 2015, FOIL request. Accordingly, to the extent that the appeal claims an independent basis (besides FOIL) for obtaining the requested records, it is denied. Moreover, there is no merit to the allegation that the NYPD has applied FOIL's exemptions in an over-broad manner so as to blanket the records with a cloak of confidentiality, inasmuch as the RAO granted access to the records you requested, subject to redaction of exempt portions, and subject to the payment of an estimated copying fee and fee to prepare the record that is commensurate with the broad scope of the FOIL request.

THE CLAIMED EXEMPTIONS APPLY TO THE REQUESTED RECORDS

The RAO's August 4, 2015, determination provided a limited generic factual description of the types of BWC Footage for which FOIL exemptions were claimed, and generically described the kinds of harm that would or could occur if BWC Footage were to be disclosed in the "unedited" form sought in the FOIL Request. As stated by the RAO, the footage depicts, *inter alia*, interactions between police officers, supervisors, and individuals who seek assistance from the police or who are the subject of a police investigation or inquiry. The claimed exemptions are applicable to footage that depicts such interactions because the harms defined by the FOIL exemptions would or could occur if such materials were to be the subject of indiscriminate disclosure, as described in typical examples below. However, the RAO's August 4, 2015, letter did not assert that all the interactions between police officers and others are exempt pursuant to the cited exemptions. Only those interactions whose disclosure would result in the listed harms are subject to a FOIL exemption. However, it is important to note that, with

respect to any particular recorded segment, more than one exemption may apply to shield a portion of BWC Footage from disclosure. As noted, it is not possible to list, in this letter, every instance of each exempt moment in time captured by the requested footage; the following examples of exempt footage fully explain the need to affirm the RAO's determination that disclosure of the footage sought in the FOIL request can only be made in redacted form.

For example, POL § 87(2)(g) exempts those portions of footage that depicts a police officer seeking advice from a colleague or a supervisor in connection with a particular incident, as well as the advice provided to the police officer. This is because the exemption for intra-agency materials encompasses even brief exchanges of opinions and/or recommendations between co-workers and/or supervisors that precede - or that follow - agency activities. Those activities in themselves may be subject to other exemptions.

An example of footage that is exempt from disclosure pursuant to POL § 87(2)(a) is the depiction of the arrest of an individual that was ultimately terminated in favor of the arrested person. Such a recording is sealed by operation of law, pursuant to NY Criminal Procedure Law § 160.50, and the NYPD is prohibited by that statute from disclosing it to any member of the public. Another type of interaction that the NYPD is prohibited from disclosing, pursuant to NY Civil Rights Law § 50-b(1), is any footage that depicts or tends to identify the victim of a sex offense, as would occur when a person seeks to report such an offense to the police. These are just two examples of the limitations on the disclosure of a record by a statute other than FOIL, that become incorporated into FOIL's exemptions pursuant to POL § 87(2)(a).

There are many situations where interaction between the police and members of the community are recorded and depict a member or members of the community in surroundings or under circumstances that give rise to an expectation of privacy on the part of the member(s) of the community. If, for example, disclosure of the communication would result in some kind of personal hardship to the community member(s), the communication and the footage is exempt pursuant to POL §§ 87(2)(b) and 89(2) as an unwarranted invasion of personal privacy. This exemption is also claimed for BWC Footage that may have captured police officers engaged in purely private activities.

Similarly, when a community member provides a police officer with some confidential information about a police investigation, the communication is exempt pursuant to POL § 87(2)(e)(iii) because it would disclose confidential information about a criminal investigation, or be exempt pursuant to § 87(2)(e)(i) or (ii) where its disclosure would interfere with a prosecution or deprive a person of a fair trial. This may also occur when BWC Footage captures an incident or a part thereof that becomes the subject of a criminal prosecution and the disclosure of the video, which may be slated to become evidence in the criminal prosecution, would necessarily be subject to the control of the criminal court and of the procedural rules that govern disclosure in proceedings therein.

Also, the disclosure of BWC Footage that contains an interaction between a police officer and a witness or a complainant could, in many cases, endanger the life or safety of such a witness or complainant. The avoidance of such a harm as a result of the indiscriminate disclosure of police records is a paramount interest that FOIL seeks to protect, and redaction of such content is

required pursuant to POL § 87(2)(f). Contrary to the contention made in the appeal letter, the language contained in the referenced NYPD Operations Order does not foreclose such situations from being included in BWC Footage.

In addition, some BWC Footage may depict with clarity some of the information technology assets deployed by the NYPD in patrol vehicles and in the hands of police officers. Thus, BWC Footage may depict police officer engagement in processes that, if disclosed, would jeopardize the security of the NYPD's information technology assets and are therefore exempt under POL § 87(2)(i).

In challenging the RAO's limited denial of access, the September 1, 2015, letter calls on the NYPD to spell out the precise information that is exempt from disclosure in each portion of the BWC footage that is exempt. To do so would destroy the interests that FOIL permits this agency to protect from disclosure, and is neither required nor appropriate. Indeed, any attempt to do so would be unreasonably burdensome and, as such, is not required by FOIL.

We note that the above examples are meant to explain the applicability of the claimed exemptions to the situations depicted in the BWC Footage, but are neither an exhaustive list of the type of footage contents for which exemptions can and will be claimed, nor are they intended to limit the NYPD's ability to claim additional exemptions should footage falling within such additional exemptions be identified during the copying process.

THE REQUEST FOR PAYMENT WAS APPROPRIATE AND REASONABLE

The RAO's August 4, 2015, determination to provide access to non-exempt portions of the video footage was accompanied by a request for payment of the estimated cost of preparing a copy of the disclosable portions of the BWC Footage that was requested. The five weeks of BWC Footage that are subject to the FOIL request contain the above described categories of exempt information, but the precise extent of the exempt portions of the video footage cannot be determined prior to embarking on the copying process by qualified NYPD personnel who can redact exempt materials as part of the copying process. I note that the listed categories of exempt information are not exhaustive of all exempt information contained in the five weeks of BWC Footage that are subject to the FOIL Request, as it is anticipated that other exempt materials may be contained in the recordings. Accordingly, the ability to claim the appropriate exemption is appropriately reserved for the time that copying is undertaken pursuant to your approval of the preparation costs.

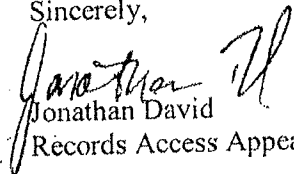
Moreover, the FOIL exemptions claimed by the RAO and sustained herein are not claimed "wholesale" to deny the request, but are valid exemptions that must be evaluated on a second by second basis within the recordings at the time that the BWC Footage is copied and redacted; this is a labor-intensive process whose importance cannot be gainsaid. To the extent that the administrative appeal may be deemed a request that the NYPD assume the entire cost of preparing a copy of the requested BWC Footage, it is further denied because this would constitute an excessive and unreasonable burden not required by FOIL.

The RAO's estimate of the cost of processing a copy of the BWC Footage was reasonable based on an estimate that the total time of footage recorded during the five weeks specified in the FOIL request was approximately 190 hours, and that in addition to the 190 hours required to view the recordings in real time, an additional 60% (or 114 hours) will be required to copy the BWC Footage in a manner that will redact the exempt portions of the BWC Footage, for a total of approximately 304 hours. The lowest paid NYPD employee with the skills required to prepare a redacted copy of the recordings is in the rank of police officer, and the cost of compensating a police officer is \$120.00 per hour. Multiplying \$120.00 by 304 hours equals \$36,480, which closely approximates the amount estimated by the RAO. This approximate cost does not include the time required to locate and collate the recordings, for which no charge is made, as that time is a part of the search for responsive records, and not a part of the time required for copying.¹ In sum, the copying cost, as estimated by the RAO, is reasonable and commensurate with the breadth of the FOIL Request.

Should you wish to limit the scope of the FOIL Request, the RAO will provide a revised estimate of the cost of copying the materials specified in a more limited version of the FOIL Request.

Other exemptions under FOIL may also apply. You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.

Sincerely,


Jonathan David
Records Access Appeals Officer

c: Committee on Open Government

¹ Please note that these figures are estimates that may have to be revised, consistent with the actual amount of time expended during the copying process.

Index No.

SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

TIME WARNER CABLE NEWS NY1,

Petitioner,

-against-

NEW YORK CITY POLICE DEPARTMENT and WILLIAM
J. BRATTON, 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.

Defendant.

VERIFIED PETITION

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