

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

In the Matter of the Application of

PATROLMEN’S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,

Petitioner

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

- against -

BILL DE BLASIO, IN HIS OFFICIAL
CAPACITY AS MAYOR OF THE CITY OF
NEW YORK, CITY OF NEW YORK, JAMES
P. O’NEILL, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE NEW YORK CITY
POLICE DEPARTMENT, and NEW YORK
CITY POLICE DEPARTMENT,

Respondents.

Index No. 150181/2018

Hon. Shlomo S. Hagler

Mot. Seq. No. 004

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

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Proposed intervenors the Reporters Committee for Freedom of the Press, Hearst Corporation, The Associated Press, BuzzFeed, Cable News Network, Inc., The Center for Investigative Reporter, Daily News, LP, Dow Jones & Company, Inc., Gannett Co., Inc., Gizmodo Media Group, LLC, New York Public Radio, The New York Times Company, NYP Holdings, Inc., and Spectrum News NY1 (collectively, “News Media Intervenors”) respectfully submit this memorandum of law in support of their motion to intervene as parties pursuant to Section 7802(d) of the New York Civil Practice Law and Rules (“CPLR”).

PRELIMINARY STATEMENT

Petitioner Policemen’s Benevolent Association of the City of New York, Inc. (“PBA”) is the collective bargaining representative of all members of the New York City Police Department (“NYPD”) in the rank of Police Officer. *See* Verified Petition/Complaint of PBA, Dkt. 1 (“PBA Pet.”), ¶ 10. By this Article 78 proceeding, the PBA asks this Court to construe New York Civil Rights Law § 50-a (“Section 50-a”) as prohibiting Respondents Mayor Bill de Blasio, Police Commissioner James P. O’Neill, the City of New York, and the NYPD from releasing officer body-worn camera (“BWC”) footage from three specific police-involved shootings and from similar “potential incidents in the future.” *Id.* ¶¶ 186, 192, and 203.¹

The PBA seeks a broad “declaration that BWC footage constitutes a[] ‘personnel record’ as that term is used in Civil Rights Law § 50-a and that the release of BWC requires a court order or the relevant officer’s permission.” *Id.* ¶ 199. The PBA also contends that release of BWC footage is categorically prohibited by Public Officers Law § 87(2)(f), *id.* ¶ 182, a discretionary exemption to disclosure under New York’s Freedom of Information Law, N.Y. Pub. Off. Law §§

¹ On February 7, 2018, the PBA sought a temporary restraining order and preliminary injunction seeking to prevent Respondents from releasing to the public BWC footage from a fourth officer-involved shooting: the January 29, 2018 fatal shooting of Michael Hansford (“Hansford”). *See* Dkt. 39 ¶¶ 11-15. As noted below, on February 9, 2018 the Court denied the PBA’s application for a temporary restraining order.

84-90 (“FOIL”). In sum, the PBA seeks a far-reaching “declaration as to the rights and obligations of Respondents with respect to the public release of BWC footage” that would have the effect of placing all BWC footage beyond the reach of the press and the public. PBA Pet. ¶ 200.

News Media Intervenors are members and representatives of the press who require access to records of law enforcement, including BWC footage, to fully and accurately report on public safety and criminal justice issues that are of central concern to the citizens of this State. News Media Intervenors have obtained access to BWC footage for newsgathering purposes in the past, and intend to seek such access in the future, including pursuant to FOIL. Further, as discussed in more detail below, they have reported extensively on the three police-involved shootings specifically addressed in the PBA’s Petition, which are unquestionably matters of legitimate public interest and concern.

News Media Intervenors respectfully request leave to intervene in this matter to protect their rights of access to police body-worn camera footage under New York law, including the public’s right of access to such footage under New York FOIL. As set forth in detail below, the News Media Intervenors are “interested person[s]” within the meaning of CPLR § 7802(d). As members and representatives of the news media who report on the actions of law enforcement in New York, News Media Intervenors have a direct and substantial interest in preserving and enforcing the public’s rights to obtain BWC footage—rights that Petitioner, by this action, seeks to destroy.

Further, as discussed below, the interests of the News Media Intervenors are independent of, and distinct from, the interests of the government officials and entities named as Respondents in this litigation. Though Respondents argued in response to the PBA’s request for a temporary

restraining order that BWC footage is not a “personnel” record subject to Section 50-a, *see* Dkt. 42 ¶¶ 6-8, Respondents, including the NYPD, have taken different positions in the past that are not consistent with that argument. *See, e.g.*, PBA Pet. ¶¶ 7, 55; *see also* Dkt. 13 (Letter stating NYPD’s position that BWC footage is not protected by § 50-a); Dkt. 14 (same). Intervention by the News Media Intervenors, who will present to the Court a consistent and full-throated defense of the public’s rights of access to BWC footage under FOIL, is thus critical. Indeed, because Petitioner attempts to convert Section 50-a into a wholesale, absolute exemption for BWC footage under FOIL, and to preclude even the discretionary release of such footage by government entities and officials in all circumstances, it is imperative that members of the press who frequently seek access to such footage be given an opportunity to be heard in this proceeding.

News Media Intervenors’ interest in this action is only heightened by this Court’s recent ruling denying a temporary restraining order sought by the PBA. The PBA has indicated its desire to immediately appeal that ruling to the Appellate Division, and any ruling resulting from such an appeal will have a significant impact on News Media Intervenors’ rights of access to BWC footage.

Permitting the News Media Intervenors to participate fully as parties in this matter will cause no undue delay in the resolution of this proceeding,² and their presence will assist the Court in reaching a proper resolution of the important issues this case presents. Accordingly, for

² On February 9, 2018, this Court orally denied the PBA’s application for a temporary restraining order, finding there was no likelihood of success on the merits because the BWC footage is not a personnel record subject to Section 50-a. In a February 15, 2018 letter, the PBA requested the scheduling of a conference to discuss proposals to facilitate a timely appeal of that finding. To News Media Intervenors’ knowledge, that conference has not yet been held and the PBA has not yet appealed. News Media Intervenors’ proposed memorandum in response to the PBA’s Petition is filed concurrently herewith.

all the reasons set forth herein, the News Media Intervenors respectfully seek leave to intervene in this matter for the purpose of asserting and enforcing their rights, and those of the public more generally, to access BWC footage under New York law.

RELEVANT BACKGROUND

Over the past several years, video recordings of use-of-force incidents—including use of lethal force by police officers in New York City—have received substantial news media coverage and prompted a nationwide discussion about the relationship between police and the communities they are sworn to serve. *See* Mercy Benzaquen, Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. Times (Dec. 14, 2017), <http://nyti.ms/1IMtFWL> (collecting videos of police use of force against, among others, Eric Garner, Laquan McDonald, and Philando Castile). That discussion, in turn, has prompted the adoption of body-worn camera programs by law enforcement agencies in New York and across the country—programs that are billed as mechanisms to increase transparency and accountability to the public. *See* Yale Law School Media Freedom & Information Access Clinic, *Police Body Cam Footage: Just Another Public Record 3* (Dec. 2015), <https://perma.cc/LNW5-BWRL>. Indeed, while touting the NYPD’s BWC program earlier this year, Mayor de Blasio stated that police body-worn cameras “ensure community members feel the power of transparency. They build trust through transparency.” *Transcript: Mayor de Blasio, Commissioner O’Neill Announce all Officers on Patrol to Wear Body Cameras by End of 2018*, Office of the Mayor (Jan. 31, 2018), <https://perma.cc/RYG4-LTBB>.

By its Petition, the PBA now seeks a declaration that, instead of building public “trust through transparency,” *id.*, BWC footage should always be kept from public view. According to the PBA, Section 50-a creates an absolute prohibition on the public release of BWC footage under FOIL and precludes even the voluntary release of BWC footage by government entities

like Respondents. In addition to seeking a categorical prohibition on the release of any BWC footage by Respondents in the future, the PBA's Petition also seeks, specifically, to prohibit Respondents from releasing BWC footage regarding three officer-involved shootings: (1) the September 6, 2017 shooting of Miguel Antonio Richards ("Richards"), (2) the October 22, 2017 shooting of Paris Cummings ("Cummings"), and (3) the November 13, 2017 shooting of Cornell Lockhart ("Lockhart"). Further, as noted above, in seeking a temporary restraining order, the PBA also sought to prevent Respondents from releasing BWC footage in connection with the more recent fatal shooting of Michael Hansford.

News Media Intervenors consist of members and representatives of the news media who report on public safety, criminal justice, and law enforcement in New York. They regularly rely on public records obtained from law enforcement agencies to fully and accurately report on law enforcement activities, and have sought and obtained BWC footage in the past from Respondents. News Media Intervenors intend to request such footage for newsgathering purposes from New York law enforcement entities in the future.

News Media Intervenors have reported extensively on the three officer-involved shootings addressed in the PBA's Petition, and have utilized BWC footage released by Respondents in connection with that reporting. *See, e.g.*, Ashley Southall & Joseph Goldstein, *Police Release Body Camera Footage of Shooting Death in Bronx*, N.Y. Times (Sept. 14, 2017) (reporting on the Richards shooting), <http://nyti.ms/2oaseKH>; Tina Moore & Chris Perez, *Dramatic Bodycam Footage Shows NYPD Cops Shooting Suicidal Man*, N.Y. Post (Nov. 27, 2017) (reporting on the Cummings shooting), <https://perma.cc/9XDU-52Y8>; Rocco Parascandola & Graham Rayman, *SEE IT: Bodycam Footage Shows Bronx Cops Fatally*

Shooting Suspect at Center for Mentally Ill, N.Y. Daily News (Nov. 29, 2017) (reporting on the Lockhart shooting), <https://perma.cc/X4WD-VQUS>.

Because BWC footage and other recordings provide an objective, first-hand account of police interactions with citizens, they can be particularly valuable sources of information for members of the press when reporting on matters of public concern.³ For that reason, the Reporters Committee for Freedom of the Press and other of the News Media Intervenors sought to actively participate in the development of the NYPD's rules governing its release of BWC footage to the public by submitting, in July 2016, comments concerning the NYPD's then-proposed BWC policy. *See Re: Request for Comments on the NYPD's Proposed Body-Worn Camera Policy*, Reporters Comm. for the Freedom of the Press (July 29, 2016), <https://www.rcfp.org/sites/default/files/2016-07-29-nypd-bodycam-policy-comments.pdf>. As those comments make clear, the News Media Intervenors' strongly disagree with any interpretation of New York law that would amount to a blanket, wholesale exemption of BWC footage from FOIL. *Id.* at 3 (“withholding must be the exception rather than the rule”).

News Media Intervenors now seek leave to intervene in this matter for the purpose of enforcing the public's rights of access to BWC footage. Before making this motion counsel for the News Media Intervenors conferred with counsel for Petitioner and Respondents. Affirmation of Thomas B. Sullivan (“Sullivan Aff.”) ¶ 7. Counsel for Petitioner asked to first see a copy of the papers. Counsel for Respondents stated that they took no position on this motion.

³ This is especially true with respect to use-of-force incidents. Indeed, despite recent changes to NYPD policies, the Inspector General recently reported that NYPD police “officers are still not properly documenting all reportable use-of-force incidents, including an under-reporting of force incidents in arrest reports.” Press Release, City of N.Y. Dep't of Investigation, DOI Investigation Finds Non-Compliance by NYPD with New Use-of-Force Reporting Requirements (Feb. 6, 2018), <https://perma.cc/8GYA-FSH6>.

ARGUMENT

I. THE COURT HAS BROAD DISCRETION TO PERMIT INTERVENTION

Under CPLR § 7802(d), a court may allow “other interested persons to intervene” in an Article 78 proceeding brought against a public officer. Intervention is “a matter addressed to the sound discretion of the court.” *White v. Inc. Vill. of Plandome Manor*, 190 A.D.2d 854, 854 (2d Dep’t 1993).

An “interested person” within the meaning of CPLR § 7802(d) is any party with a “real and substantial interest in the outcome of the proceedings.” *Cnty. of Westchester v. Dep’t of Health*, 229 A.D.2d 460, 461 (2d Dep’t 1996); *see also Bernstein v. Feiner*, 43 A.D. 3d 1161, 1162 (2d Dep’t 2007). This test has been broadly interpreted in favor of permitting intervention. For instance, the New York Criminal Bar Association was permitted to intervene in a case addressing certain legislative changes, where the outcome had the potential to “substantially affect” the Association’s ability to “represent indigent criminal defendants in a manner that is consistent with constitutional mandates.” *N.Y. Cnty. Lawyers’ Ass’n v. Bloomberg*, 30 Misc. 3d 161, 165-66 (Sup. Ct. N.Y. Cnty. 2010). Similarly, schoolchildren were allowed to intervene as defendants in a proceeding questioning the procedural validity of a Panel for Educational Policy vote on the location of a potential school. *Steglich v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 32 Misc. 3d 1203(A), 2011 WL 253504, at *6-7 (Sup. Ct. N.Y. Cnty. 2011). In short, a “real and substantial interest” can be shown in a variety of ways by parties who stand to be affected by the result of a legal action.

The standard for intervention in an Article 78 proceeding is broader and more lenient than the standards governing permissive and mandatory intervention in civil actions under CPLR §§ 1012, 1013. *See Elinor Homes Co. v. St. Lawrence*, 113 A.D.2d 25, 28 (2d Dep’t 1985); *Bernstein*, 43 A.D.3d at 1162. Further, “[t]he bases for permissive intervention in Article

78 proceedings are also broader than the bases for standing to originate the proceeding.” *N.Y. Cnty. Lawyers’ Ass’n*, 30 Misc. 3d at 163; *see also O’Brien v. Barnes Bldg. Co.*, 85 Misc.2d 424, 439 (Sup. Ct. Suffolk Cnty. 1974), *aff’d sub nom. O’Brien v. Biggane*, 48 A.D.2d 1018 (2d Dep’t 1975). Notably, courts have applied this flexible standard to permit members of the news media to intervene in Article 78 proceedings in order to assert the public’s right to access public records under FOIL. *See Victor v. N.Y.C. Office of Admin. Trials & Hearings* (Sup. Ct. N.Y. Cnty, May 26, 2016), Index No. 100890/15 (granting The New York Times Company’s motion to intervene in an Article 78 proceeding where a party argued Section 50-a prohibited public disclosure of reports issued by the Office of Administrative Trials and Hearings).

II. THE NEWS MEDIA INTERVENORS’ MOTION TO INTERVENE SHOULD BE GRANTED

Under the permissive standard for intervention in an Article 78 proceeding, the News Media Intervenors must show only that they have some “real and substantial interest in the outcome” of this matter. They easily satisfy that requirement.

News Media Intervenors are members and representatives of the press that report regularly on the activities of law enforcement and public safety and criminal justice matters in New York. *See Sullivan Aff.* ¶¶ 3-5. As such, they have a very “real and substantial interest” in the outcome of this proceeding. Reporters and news organizations, including News Media Intervenors, require access to BWC footage to fully and accurately report on matters ranging from traffic stops to officer-involved shootings. As set forth above, they have reported on the three officer-involved shootings addressed in the PBA’s Petition; they have also reported on the more recent fatal shooting of Michael Hansford by police, *see, e.g., Kevin Fasick & Natalie Musumeci, Video Shows Knife-Wielding Man Attack Landlord Before He’s Killed by Cops*, N.Y. Post (Jan. 30, 2018), <https://perma.cc/U3BY-7VBV>. News Media Intervenors frequently seek to

obtain BWC footage for newsgathering purposes from law enforcement entities across the State, and certain of the News Media Intervenors, such as The Center for Investigative Reporting, have outstanding FOIL requests for BWC footage pending with the NYPD. Because the News Media Intervenors intend to continue to seek access to BWC footage in the future, including under FOIL, the broad-ranging relief sought by Petitioner—relief that extends far beyond the BWC footage related to the four specific officer-involved shootings that have been cited by the PBA in this litigation—poses a real and substantial threat to the News Media Intervenors’ ability to continue to use BWC footage to report on matters of substantial concern to the public.

Moreover, the interests of the News Media Intervenors are separate and distinct from those of the government officials and entities, including the NYPD, who have been named as Respondents in this matter. Though under Article 78 it is not necessary for the News Media Intervenors to demonstrate that their interests would not otherwise be adequately protected—as is required for intervention as of right under CPLR § 1012—that concern is plainly present here. *Greater N.Y. Health Care Facilities Ass’n v. DeBuono*, 91 N.Y.2d 716, 721 (1998); *see also Feiner*, 43 A.D.3d at 1162 (explaining that Section 7802(d) “grants the court broader power to allow intervention in an article 78 proceeding than is provided pursuant to either CPLR 1012 or 1013 in an action” (citation omitted)); *Ferguson v. Barrios-Paoli*, 279 A.D.2d 396, 399 (1st Dep’t 2001) (same). While Respondents now appear to argue that BWC footage is not a “personnel” record subject to Section 50-a, *see* Dkt. 42 ¶¶ 6-8, Respondents, including the NYPD, have taken positions inconsistent with that argument in the past, *see, e.g.*, PBA Pet. ¶¶ 7, 55; *see also* Dkt. 13 (Letter stating NYPD’s position that BWC footage is not protected by § 50-a); Dkt. 14 (same). The News Media Intervenors’ position, on the other hand, has never wavered: Section 50-a has no application to BWC footage. The News Media Intervenors, who

will vigorously defend their and the public's rights of access to BWC footage under New York law, including FOIL, should be permitted to intervene in this proceeding.

III. THE MOTION IS APPROPRIATE IN THE CASE'S CURRENT POSTURE

This motion is timely even though the Court has already ruled on the PBA's application for a temporary restraining order, and Petitioner has indicated a desire to appeal that ruling. In an Article 78 proceeding, a court may grant permission to intervene "at any point of the proceeding, including after judgment for the purposes of taking an appeal." *DeBuono*, 91 N.Y.2d at 720. For example, in *Romeo v. N.Y.S. Dep't of Educ.*, parents brought an Article 78 proceeding against the state department of education, claiming that the education commissioner had incorrectly found that they were not residents of a certain school district. 39 A.D.3d 916, 916-17 (3d Dep't 2007). After the court ruled in petitioners' favor and annulled the commissioner's determination, the school district moved to intervene. *Id.* at 917. The Appellate Division found that the motion was appropriate, finding that while the district would not be directly bound by the court's judgment, the commissioner would be forced to take an action which would effectively force the district to comply. *Id.* Therefore, the "district should have been permitted to intervene at the time of its motion for the purpose of taking an appeal." *Id.* at 918. Here too, the News Media Intervenors would be injured by any appellate judgment against Respondents, and should also be permitted to intervene to participate in any appeal.

CONCLUSION

For all the foregoing reasons, the News Media Intervenors respectfully request that this Court grant their motion for leave to intervene as a party in this proceeding for the purpose of asserting and protecting their rights of access to police body-worn camera footage under New York law, and grant the News Media Intervenors such other and further relief as is just and proper.

Dated: New York, NY
March 1, 2018

Respectfully submitted,

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