
New York Supreme Court

Appellate Division—First Department

SPECTRUM NEWS NY1,

Petitioner-Appellant,

– against –

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

Respondents-Respondents,

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

BRIEF FOR *AMICI CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND A COALITION OF MEDIA ENTITIES IN SUPPORT OF PETITIONER-APPELLANT

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae 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. *Amici* have obtained access to BWC footage for newsgathering purposes in the past, and intend to seek such access in the future, including pursuant to the Freedom of Information Law (“FOIL”). Consequently, *amici* have a strong interest in ensuring that this Court rejects the NYPD’s request to create an *additional* hearing in response to a lawful FOIL request. Such a hearing finds no basis in FOIL and threatens all requesters from receiving records in a prompt manner. *Amici* respectfully submit this *amici curiae* brief in support of Petitioner-Appellant.

The identity of the *amici* are as follows: The Reporters Committee for Freedom of the Press; ABC, Inc.; The Associated Press; Association of Alternative Newsmedia; Atlantic Media, Inc.; Brechner Center for Freedom of Information; Cable News Network, Inc.; CBS Broadcasting Inc., on behalf of CBS News and WCBS-TV; Daily News, LP; The E.W. Scripps Company; First Look Media Works, Inc.; Gannett Co., Inc.; Hearst Corporation; Investigative Reporting Workshop at American University; Investigative Studios; The Marshall Project; MPA – The Association of Magazine Media; National Newspaper Association;

The National Press Club; National Press Club Journalism Institute; National Press Photographers Association; NBCUniversal Media, LLC; New York Public Radio; The New York Times Company; The News Leaders Association; Online News Association; POLITICO LLC; ProPublica; Radio Television Digital News Association; Society of Professional Journalists; Univision Communications Inc.; VICE Media; WNET.

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of New York’s FOIL, Pub. Off. Law §§ 84-90, is to ensure an open and accountable government. As the Court of Appeals has explained, FOIL is based on “a presumption of [public] access to [government] records,” and an agency seeking to withhold such records “carries the burden of demonstrating that an exemption applies to the FOIL request.” *Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462 (2007). Consistent with FOIL’s purpose, courts have consistently rejected agencies’ attempts to skirt their duties under FOIL based on claims of burden or difficulty in responding to lawful requests. *See, e.g.*, Brief for Petitioner-Appellant Spectrum News NY1 (“App. Br.”) at 18–22 (collecting cases).

Amici agree with Petitioner-Appellant Spectrum News NY1 that the purported burden of reviewing and redacting records is not a ground for denying access and write to underscore why the Supreme Court’s January 29, 2019 Order (“Order”), App. Br. at 15, allowing the New York City Police Department (“NYPD”) to further delay public access to police body-worn camera (“BWC”) footage should be reversed. Law enforcement officers serve an important and powerful role in society, and the NYPD designed the BWC program is designed to build trust and better relationships between officers and the communities they

serve. The Order threatens the prompt access to BWC footage necessary to foster that trust.

Not only does the Order conflict with the very purpose of the NYPD's BWC program, it also rests on faulty legal and factual grounds. Indeed, FOIL's plain text contains no provision allowing agencies to withhold records based on the difficulty of making discretionary redactions. Moreover, even if the purported "unreasonable difficulty" of reviewing and redacting BWC footage were a proper consideration—which it is not—the footage can easily be edited and redacted with modern video editing technology.

For the reasons set forth herein, *amici* urge this Court to reverse the Supreme Court's Order requiring a hearing to determine whether the NYPD can perform the redactions necessary for it to comply with Petitioner-Appellant's FOIL request without "unreasonable difficulty."

ARGUMENT

I. The BWC program was created to increase transparency with respect to law enforcement conduct.

In announcing the rollout of the NYPD's BWC program, Police Commissioner James P. O'Neill said that BWCs enhance officers' safety and accountability to the public, and are part of the Department's continued effort to build trust and better relationships within the communities they serve. NYPD Press Release, *NYPD Completes Rollout of Body-Worn Cameras to All Officers on*

Patrol (March 6, 2019), <https://perma.cc/EWU5-PD9B>. With respect to BWC footage, Commissioner O'Neill made clear that the public is “*entitled* to this information.” Michael R. Sisak, *NY Court: Public Allowed to See Police Body Camera Footage*, Associated Press (Feb. 19, 2019), <https://perma.cc/HTU7-CC45> (emphasis added).

These statements about the purpose of the NYPD’s BWC program mirror the principles reflected in FOIL, which expressly recognizes that “a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions.” N.Y. Pub. Off. Law § 84. By enacting FOIL, the Legislature “provide[d] the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy.” *Alderson v. N.Y. State Coll. of Agric. & Life Sci. at Cornell Univ.*, 4 N.Y.3d 225, 230 (2005) (citation omitted). FOIL makes clear “that government is the public’s business and that the public, individually and collectively and represented by a free press, should have access to the records of government.” Pub. Off. Law § 84. Accordingly, FOIL imposes a broad mandate of disclosure on government agencies, *M. Farbman & Sons, Inc. v. N.Y.C. Health & Hosps. Corp.*, 62 N.Y.2d 75, 79–80 (1984), based on the premise that “the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government,”

Capital Newspapers, Div. of Hearst Corp. v. Whalen, 69 N.Y.2d 246, 252 (1987) (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979)).

Members of the news media play a critical role in “informing and educating the public, offering criticism, and providing a forum for discussion and debate.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978). Many news organizations rely on access to BWC and other law enforcement video footage to report on matters of public concern. *See, e.g., New Body Cam Video Released of 2016 Police Shootout with Chelsea Terror Bomber Ahmad Khan Rahimi*, CBS2 (Sept. 27, 2019), <https://cbsloc.al/2VKEwty>. Sometimes, these videos also help members of the news media report on the newsworthy activities of members of the public, such as protests. *See, e.g., Violent Protests Break Out at UC Berkeley*, ABC News (Feb. 2, 2017), <https://abcn.ws/2zaE2D1> (showing video footage from helicopters and from the ground).

Fundamentally, BWC footage sheds light on the conduct of law enforcement officers. BWC videos have been essential, for example, to the public’s understanding of police use-of-force incidents, including police shootings. *See, e.g., Nausheen Husain, Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing*, Chi. Trib. (Jan. 18, 2019), <http://bit.ly/2YukZOOh>. In one instance, access to BWC footage of the fatal shooting of Gerald Hall by D.C. Metro Police in Washington, D.C., enabled the news media to quickly settle

conflicting reports about what occurred by walking the public through the video of the incident, pausing at crucial moments to show Mr. Hall was wielding a knife. *See* Tom Roussey, *Family Says Man Killed in Police-Involved Christmas Day Shooting in D.C. was 'Not Armed'*, ABC7: WJLA (Dec. 27, 2016), <http://bit.ly/2oEvQmc>.

News media reporting based on this type of footage has even prompted internal reform. For instance, the Charlotte-Mecklenburg Police Department reevaluated its use-of-force policy after the public's reaction to released BWC footage of the 2016 shooting death of Keith Lamont Scott. *See* Joe Marusak & Mark Washburn, *CMPD Releases Full Video of Fatal Keith Lamont Scott Shooting*, Charlotte Observer (Oct. 4, 2016), <http://bit.ly/2z6xmFQ>; Jane Wester & Lavendrick Smith, *After Keith Scott Shooting, CMPD is Reviewing Its Use of Force Policy*, Charlotte Observer (Sept. 15, 2017), <http://bit.ly/2DCARYr>. This kind of timely and impactful reporting would not be possible if law enforcement agencies could withhold or delay public access to such records solely on the basis that redacting them would be “unreasonably” difficult.

II. To achieve the goals of FOIL and the BWC program, BWC footage must be available promptly and affordably.

It is crucial that BWC footage be routinely released by law enforcement to enable the public and press to evaluate department-wide practices, not just individual incidents. FOIL is designed to ensure that the public can oversee “the

day-to-day functioning of State and local government[,] thus providing the electorate with sufficient information to make intelligent, informed choices with respect to both the direction and scope of governmental activities.” *Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 565–66 (1986) (emphasis added) (internal marks and citations omitted). The NYPD’s claimed entitlement to a hearing to evaluate the “burden” it asserts in complying with Petitioner-Appellant’s FOIL requests would, if approved as a general practice, prevent the public from promptly obtaining such important day-to-day information. *See, e.g., Vivian Ho, Body Cam Study Finds Oakland Police Speak Less Respectfully to Black People*, Gov’t Tech. (June 6, 2017), <https://perma.cc/V2TX-EL4B> (analyzing 981 traffic stops made by 245 Oakland officers in April 2014 and finding that officers were more apt to use terms of respect when dealing with white motorists compared to black ones).

For FOIL to serve its purpose, the public must be able to easily access records in a time-efficient and cost-effective manner. Allowing an agency to trigger a lengthy and expensive hearing process any time it claims that making redactions to public records would be too difficult contravenes FOIL’s purpose of “encourag[ing] public awareness and understanding of and participation in government.” *See Beechwood Restorative Care Ctr. v. Signor*, 5 N.Y.3d 435, 440 (2005) (citation omitted). The high financial costs of litigation already tend to

“disincentiv[ize] challenging open record request denials while at the same time incentivizing officials to issue denials,” even if the law quite clearly mandates disclosure. Heath Hooper & Charles N. Davis, *A Tiger with No Teeth: The Case for Fee Shifting State Public Records Law*, 79 Mo. L. Rev. 949, 953 (2014). Moreover, the cost in time would disincentive journalists and newsrooms to request records knowing that they would be released long after a controversy has disappeared from public consciousness. *Id.* at 968.

Affirming the Supreme Court’s Order ruling that *additional* hearings are needed will lead to higher costs and more uncertainty in disclosure and will, therefore, further deter newsrooms from filing FOIL requests for BWC videos. As it stands, many newsrooms already find it difficult to enforce the public’s right to government records in light of increasingly tight budgets and staffing constraints. *See id.* at 964 (noting survey responders in a study of newsrooms and records requests said fewer reporters in the newsroom made it harder to hold public agencies accountable). Smaller community newspapers are under particular economic pressure and spread their resources thinly, often trying to do more with less. David Bauder & David A. Lieb, *Decline in Readers, Ads Leads Hundreds of Newspapers to Fold*, Associated Press (Mar. 11, 2019), <https://perma.cc/TUU4-BR2B>; Jared Brey, *As Newsrooms Do More with Less, Can Reporters Keep Up?*, Colum. Journalism Rev. (Sept. 12, 2018), <https://perma.cc/F7V3-CL2W>. On top

of these economic difficulties, the Supreme Court's Order gives agencies yet another tool to delay disclosure and deter under-resourced newsrooms from litigating even clear instances of FOIL noncompliance. The Order further threatens to undermine "the constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve" by deterring and pricing out the press. *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

FOIL does attempt to mitigate this risk to some degree by allowing a requester to recover its attorney's fees. Pub. Off. Law § 89(4)(c)(ii). However, any such award only comes at the end of the matter and only if the requester both "substantially prevail[s]" and "the court finds that the agency had no reasonable basis for denying access." *Id.* Giving agencies tools to protract litigation and increase costs will undoubtedly discourage requesters from pursuing litigation in the first place. And, even when such fees are ultimately recovered, the unnecessary procedural step imposed by the Supreme Court's Order will delay the release of public records and thereby defeat the purpose of speedy access that is crucial to timely news coverage of breaking events and ongoing controversies in the community. As the United States Supreme Court has observed, "[d]elays imposed by governmental authority" in making information available are inconsistent with the press' "traditional function of bringing news to the public

promptly.” *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 560–61 (1976); *id.* at 609 (Brennan, J., concurring) (noting that “delay . . . could itself destroy the contemporary news value of the information the press seeks to disseminate.”).

Moreover, allowing agencies to delay production of *certain* records by claiming their review and redaction would be unreasonably difficult and demanding a hearing, while quickly releasing any favorable footage, transforms BWCs into a public relations device for law enforcement, rather than creating trust and accountability as intended. *See* Steve Friess, *Police Turn Body Cams Into Tools for Public Relations, Not Accountability*, Colum. Journalism Rev. (Oct. 23, 2017), <https://perma.cc/66WG-8WJK>. Consider, for instance, the viral December 2017 bodycam video—released the same day the footage was taken—of two New York law enforcement officers trying to corral a squirrel that had broken into an apartment and eaten holiday cookies. *Cookie-Stealing Squirrel Lunges at Police Officer*, NBC 5 (Dec. 30, 2017), <https://bit.ly/2oOTC53>. Contrary to FOIL’s goals of helping the public understand how the government operates, the Order effectively grants agencies discretion to determine which records the public should be able to timely access.

This case, in particular, highlights how extended FOIL litigation can undermine the law’s purpose of informing the public. NY1 filed its FOIL request in 2015. App. Br. 5. Over four years of administrative review and litigation, the

requested footage has necessarily lost some of its relevance to the public. *See Neb. Press Ass’n*, 427 U.S. at 561. The U.S. Supreme Court has observed on more than one occasion, “[t]he peculiar value of news is in the spreading of it while it is fresh.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918). Moreover, delayed access does not allow the media to fulfill its constitutional role of “bar[ing] the secrets of government and inform[ing] the people.” *See N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). The requirement of *additional* hearings not provided for in FOIL will only cause further delay and ultimately result in a complete denial of prompt and meaningful public access to records.

III. A burdensomeness inquiry has no basis in FOIL and runs counter to the statutory framework of discretionary withholdings.

A. FOIL’s text does not allow agencies to deny disclosure due to the burden of making discretionary redactions.

NYPD’s reliance on the burden or difficulty of making discretionary withholdings under Section 87 should be disregarded as FOIL’s text recognizes no such exemption to disclosure. Brief for Respondents (“Resp. Br.”) at 59–71. If the NYPD believes that the cost of making redactions is too burdensome or difficult, its recourse is to disclose the records unredacted or with fewer discretionary redactions. *See also* App. Br. at 24. It cannot, as it does here, claim that production is too burdensome and thereby withhold public records wholesale.

The Supreme Court’s Order providing that there must be a hearing to assess whether the NYPD can avoid FOIL’s statutory *requirements* based on its *optional* withholdings does not comport with the law’s framework and plain text. All agency records are open to the public unless specifically exempt from disclosure. *See Data Tree*, 9 N.Y.3d at 462. FOIL specifically enumerates *discretionary* exemptions that are narrowly construed. *Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 362 (2002). Unless the agency demonstrates that the requested material “falls squarely within the ambit of one of the[] statutory exemptions,” FOIL demands disclosure. *Id.* (quoting *Fink*, 47 N.Y.2d at 571).

As NY1 correctly notes, the Court of Appeals has never held that the burden of applying discretionary redactions is a sufficient ground for withholding records from the public. *See App. Br.* at 18–22. This reflects FOIL’s clear mandate that agencies “*shall . . . make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that*” fall within a specific, enumerated exemption. Pub. Off. Law § 87(2) (emphasis added). The statute makes clear that an agency “*may*”—*but is not required to*—withhold certain records. *Id.* Put another way: While agencies have a statutory duty to disclose records, there is no obligation or basis to discretionarily withhold records.

There is no basis in FOIL’s text for agencies to withhold records because redactions would be too difficult or burdensome to discretionarily redact. *See*

Newsday, 98 N.Y.2d at 362. The NYPD points to FOIL’s Section 89(3)(a). Resp. Br. at 38–39. However, that provision has nothing to do with the kind of discretionary disclosure issue here. It simply refers to “voluminous” *requests* and the difficulty of “locating or reviewing the requested records” or “providing the requested copies”—at no point does it make reference to the difficulty of making entirely optional redactions of a single public record. Pub. Off. Law § 89(3)(a). The NYPD’s attempt to create an additional withholding provision, found nowhere in the statute itself, and demand an additional associated hearing, should be rejected. *See N.Y. Civil Liberties Union v. NYC Police Dep’t*, 32 N.Y.3d 556, 567 (2018) (“We are not at liberty to second-guess the Legislature’s determination, or to disregard—or rewrite—its statutory text.” (citation omitted)).

B. The NYPD’s burdensomeness calculations are not reasonable in light of modern video redaction technology.

Even if it were proper for the court to hold a hearing to assess the burden imposed on an agency in making optional redactions—which it is not—the NYPD’s 3,000 hour estimate, *see* Resp. Br. at 57, for the work required to redact the BWC footage is inaccurate. Although it claims that making redactions require “a laborious process” requiring “lengthy technical redaction[s]” outside the scope of FOIL, *id.*, widely available, affordable, and efficient video-editing software and services can handle all of the redactions necessary for the NYPD to release requested footage under FOIL.

For instance, in 2017 Fast Redaction announced a new video editing program that would cut redaction time by up to ninety percent as compared to manually redacting. *See AI-Powered FastRedaction.com Launches at 2017 IACP Tech Conference*, Police One (June 16, 2017), <https://perma.cc/8CU5-AC2C>. The program automatically tracks and blurs objects, marking them with a tracking number and removing the information throughout the video. *Id.* The technology is already proven to be a valuable resource for numerous police departments across the country. *Redact Your Videos Online*, Fast Redaction, <https://fastredaction.com> (including testimonials from police department representatives in Lynchburg, Virginia; Cleveland, Ohio; and Post Falls, Idaho).

Programs designed for the general public can also fulfill FOIL redaction specifications. One popular video editing software, Adobe Premiere Pro, is available for just \$20.99 per month. *Adobe Premiere Pro*, Adobe, <https://adobe.ly/2DCvZCQ>. Should the NYPD find appropriate grounds to anonymize an individual's identity, Premiere Pro also gives users the ability "to apply a feathered mask to protect a person's identity and then track that mask as it moves across the frame." *Blur a Face as it Moves Throughout a Clip*, Adobe (June 15, 2015), <https://adobe.ly/2L3evkm>. Adobe's website even provides a simple, four-and-a-half minute tutorial on how to implement the redactions. *Id.*

Despite an abundance of affordable and efficient methods for redacting BWC footage, the NYPD explains that it follows a laborious process of blurring moving objects frame-by-frame. *See* Resp. Br. at 9–11. The public should not be penalized for the NYPD’s use of inefficient technology. *Cf.* Pub. Off. Law § 89(3)(a) (“When an agency has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it shall be required to do so. When doing so requires less employee time than engaging in manual retrieval or redactions from non-electronic records, the agency shall be required to retrieve or extract such record or data electronically.”). Moreover, the department’s unreasonable redaction practices run afoul of BWC program’s trust-building goal and runs counter to FOIL’s purpose of “discourage[ing] official secrecy.” *Alderson*, 4 N.Y.3d at 230 (citation omitted).

CONCLUSION

For the foregoing reasons, *amici* urge this court to reverse the Supreme Court’s ruling that the NYPD is entitled to a hearing to assess whether redacting the requested BWC footage would be unreasonably difficult.


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