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**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY**

**HURUBIE MEKO and LNP MEDIA,  
GROUP, INC.,**

**Petitioners,**

**v.**

**CITY OF LANCASTER,**

**Respondent,**

**THE OFFICE OF THE DISTRICT  
ATTORNEY OF LANCASTER COUNTY:**

**Intervenor.**

**Docket Number: CI-21-00277**

**BRIEF IN SUPPORT OF PETITION FOR REVIEW UNDER ACT 22**

Petitioners, LNP Media Group, Inc. ("LNP") and Hurbie Meko ("Meko"), through its counsel, Dilworth Paxson LLP, asks this Court to enforce Act 22 of 2017, which specifically authorizes any member of the public to request video or audio recordings created by law enforcement agencies, demands that a public agency make reasonable redactions and release non-exempt footage that cannot be redacted, and allows a right of appeal to the Court of Common Pleas when a denial is invoked.

## **INTRODUCTION**

This is a case of first impression in the Commonwealth of Pennsylvania interpreting Act 22 of 2017. While it is significant in that this law has yet to be interpreted, the spine of this case is really one of basic statutory construction, albeit the implications are far from basic. Under Act 22 of the 2017, there is a right of access enabling any member of the public to request and review body-worn camera footage (“BWC”) as a means of creating accountability and public trust in law enforcement institutions. *See generally* 42 Pa.C.S.A. §§ 67A01, *et seq.*

The law provides only two options for law enforcement:

- Option 1: Release the footage; or,
- Option 2: Redact footage if that footage will be used in prosecutions and release the unredacted portion of the footage.

In this instance, there is no Option 3 in the law that permits them to withhold the footage wholesale. *See* 42 Pa.C.S.A. § 67A05(e) (“Nothing in this section shall be construed to prohibit a law enforcement agency from redacting an audio recording or video recording in order to protect potential evidence in a criminal matter, information pertaining to an investigation, confidential information or victim information.”).

As difficult as it may be for the City of Lancaster (“City”) and the Lancaster County District Attorney (“Lancaster DAO”) to come to the terms with arguably a consequence as a result of a poorly written law, redaction is precisely what the Pennsylvania legislature provided for in this case. In fact, the City previously complied with Act 22 as written by redacting and releasing footage similar BWC footage from the Lancaster Police Department.<sup>1</sup> Now, however,

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<sup>1</sup> LNP | LancasterOnline managing editor Stephanie Sadoski filed an Act 22 request earlier in 2020. After review, the City provided Sadowski with approximately 20 hours of video, with some redaction. The City used AXON Evidence.com to exchange the footage.

the City and Lancaster DAO penned in their own interpretation of the law and flatly denied the request for footage in whole.

### **FACTUAL BACKGROUND**

In the summer of 2020, protests erupted across the nation in response to the murder of George Floyd on May 25, 2020, which recently resulted in an across-the-board conviction on all counts for former Minneapolis police officer, Derek Chauvin. Citizens in Lancaster County, as well as thousands of citizens across the United States, zeroed in on police reform and accountability, participating in marches and demonstrations to raise awareness and effectuate change. On September 13, 2020, the Lancaster City Bureau of Police (“LCBP”) responded to an incident involving a mentally ill young man, Ricardo Munoz. The LCBP officers at the scene recorded BWC footage of the encounter. The BWC footage showed Mr. Munoz charging an officer with a knife; Mr. Munoz was subsequently shot and killed by the responding LCBP officer.

That same evening, a large crowd of protesters gathered outside of LCBP headquarters in Lancaster City and demonstrated throughout the evening into the morning. Observing news agencies, as well as private citizens, recorded video and took still photos of the events, all of which took place on public streets and sidewalks. Other LNP | LancasterOnline correspondents were at the scene of the protest, taking videos and photos and live-tweeting the events as they unfolded in the public streets. Multiple times in the evening, police and the protesters clashed, resulting in tear gas, foam rounds and/or rubber bullets, and other crowd control measures being deployed by LCBP and the Lancaster County Special Emergency Response Team. Some protestors were looting and committing arson, according to official charging documents, and thus arrested.

On November 9, 2020, Petitioner Meko filed an Act 22 request for body camera footage from the evening of September 13, 2020, with LCBP's open records officer. Pursuant to 42 Pa.C.S.A. § 67A03(1), the request was personally delivered to the LCBP's open records officer and made within 60 days of the date the video recording was created. Moreover, the request stated with particularity the incident or event that is the subject of the audio recording or video recording, including the date, time and location of the incident or event (*see* 42 Pa.C.S.A. § 67A03(2)), and included a statement describing the requester's relationship to the incident or event that is the subject of the audio or video recording (*see* 42 Pa.C.S.A. § 67A03(3)).

On December 14, 2020, Respondent denied Petitioner Meko's request, arguing as follows:

The video you have requested contains numerous incidents of unrest that are part and parcel of riot and other criminal charges currently pending before the Court of Common Pleas. Given the length of the acts alleged in those charges and the variety of acts involved, there is no reasonable method in which to redact the audio and video from the requested body camera footage so as to safeguard the investigative information and ensure a fair trial for both the defendants and the Commonwealth. Pursuant to Section 67A04(a) of Act 22 of 2017, your request is denied in that the City of Lancaster Bureau of Police in conjunction with the District Attorney's Office of the County of Lancaster has determined that the requested video contains potential evidence in a criminal matter, information pertaining to an investigation, or a matter in which criminal charges have been filed, confidential information or victim information and the reasonable redaction of the audio or video recording would not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information.

Respondent's denial was a boilerplate recitation of the provisions of 42 Pa.C.S.A. § 67A04—which were misapplied in this matter—but which provides that:

[I]f a law enforcement agency determines that an audio recording or video recording contains potential evidence in a criminal matter, information pertaining to an investigation or a matter in which a criminal charge has been filed, confidential information or victim information and the reasonable redaction of the audio or video

recording would not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information, the law enforcement agency shall deny the request in writing. The written denial shall state that reasonable redaction of the audio recording or video recording will not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information.

42 Pa.C.S.A. § 67A04(a).

## **ARGUMENT**

### **A. ACT 22 REQUIRES “REASONABLE REDACTION” AND PRODUCTION**

At its heart, this case is merely one of statutory construction and one in which the City and Lancaster DAO have misread and misapplied the law. Act 22 states :

Except as provided in this section, if a law enforcement agency determines that an audio recording or video recording contains potential evidence in a criminal matter, information pertaining to an investigation or a matter in which a criminal charge has been filed, confidential information or victim information and the reasonable redaction of the audio or video recording would not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information, the law enforcement agency shall deny the request in writing. The written denial shall state that reasonable redaction of the audio recording or video recording will not safeguard potential evidence, information pertaining to an investigation, confidential information or victim information.

42 Pa.C.S.A. § 67A04(a). However, the law instructs that redaction shall occur wherever “reasonable.” *See id.*; *see also* 42 Pa.C.S.A. § 67A05(e) (“Nothing in this section shall be construed to prohibit a law enforcement agency from redacting an audio recording or video recording in order to protect potential evidence in a criminal matter, information pertaining to an investigation, confidential information or victim information.”).

Both federal and state courts are growing increasingly weary of agency arguments that requested BWC footage cannot be redacted to preserve privacy and other legally exempt information. As recently as this month, the Pennsylvania Commonwealth Court, in *Cent.*

*Dauphin Sch. Dist. v. Hawkins*, decided that a school district was required to redact portions of a school bus video instead of withholding the video to protect student privacy, consistent with the latest Pennsylvania Supreme Court decision concerning public access and video redaction. 2021 WL 1567524, at \*1 (Pa. Commw. Ct. Apr. 22, 2021) (citing *Easton Area Sch. Dist. v. Miller*, 232 A.3d 716, 719 (Pa. 2020)). *Hawkins* was decided under Act 22's sibling, the RTKL, but the rationale is and should be the same here. This is especially true since the Legislature expressly contemplated redaction in Act 22. See 42 Pa.C.S. § 67A05. Tellingly, the *Hawkins* court quoted at length *Evans v. Federal Bureau of Prisons*, a District of Columbia Circuit Court case in which the federal government claimed it could not segregate from a prison surveillance video information of non-involved individuals. 951 F.3d 578 (D.C. Cir. 2020). The D.C. court, however, rejected the government's assertions, finding that the government failed to carry its burden demonstrating that redaction and production would be unreasonable. The court observed:

[I]t is not at all clear from the government's affidavit why it cannot segregate the portions of the record that do not do so. More specifically, we live in an era in which teenagers regularly send each other screenshots from all sorts of video media. Presumably, most of these teenagers have fewer resources than the United States government. It is not at all clear why the government could not at least isolate some screenshots that would meet the same sort of segregability standards typically applied to printed material.

The government further does not explain why it cannot by use of such techniques as blurring out faces, either in the video itself or in screenshots, eliminate unwarranted invasions of privacy. The same teenagers who regale each other with screenshots are commonly known to revise those missives by such techniques as inserting cat faces over the visages of humans. While we do not necessarily advocate that specific technique, we do hold that the government is required to explain why the possibility of some similar method of segregability is unavailable if it is to claim the protection of the exemption.

*Id.* at 587.

Although Act 22 case law has yet to be developed, the best precedent guiding determination in this matter is the Pennsylvania Supreme Court's recent decision in *Miller* cited by the *Hawkins* court above. *See* 232 A.3d at 719. In *Miller*, under a similar public access law, a requester sought information in connection with an incident involving an elementary school teacher who, according to the requester, had roughly physically disciplined a child on a school bus outside of the school. Specifically, the requester sought a copy of the surveillance video from the school bus security camera capturing the incident. *See id.* The Pennsylvania Supreme Court wholeheartedly rejected the agency's failure to redact the footage, noting that the agency "can effectuate access to the requested record without violating . . . privacy rights by redacting . . . images in the video." *See id.* at 733.

In short, a government agency must determine if the video recording contains exempt information (e.g. potential evidence, information pertaining to an investigation, confidential information, or victim information), but even if it does, the agency *must* grant the request and disclose footage if exempt information can be safeguarded by reasonable redaction. Previously, the LCBP properly complied with an Act 22 request for similar BWC footage and redacted in part, and released in part, the BWC footage as public record. Here, the City and Lancaster DAO summarily claim an inability to apply refined redactions and release the disclosable portions of the requested BWC footage. The failure to pursue reasonable redaction in this case not only goes against the black-letter law, but it also undercuts the purpose of the Act. If the BWC footage at play in this case is exempt from access, what sort of footage, exactly, did the Pennsylvania legislature intend to grant access while drafting Act 22?

**B. PETITIONERS HAVE MET ACT 22'S REQUIREMENTS FOR RELEASE OF FOOTAGE**

Act 22 delineates that secure release of the footage the Petitioner must establish two factors:

- a. That Respondent's denial was arbitrary and capricious; and
- b. That the public interest in disclosure of the body camera footage, or the interest of the Petitioners, outweighs the interests of the law enforcement agency or an individual's interest in nondisclosure.

42 Pa.C.S. § 67A06(e). Here, both elements are met and thus this Honorable Court has discretion to order disclosure, in whole or with redactions, upon finding that the public interest in disclosure outweighs law enforcement's or any individual's interest in nondisclosure.

"A preponderance of the evidence standard, *the lowest evidentiary standard*, is tantamount to 'a more likely than not' inquiry." *Carey v. Dep't of Corr.*, 61 A.3d 367, 374 (Pa. Commw. Ct. 2013) (emphasis added).

***Arbitrary and Capricious***

It is more likely than not that Respondent's and Intervenor's denial of access was arbitrary and capricious. Petitioners' requested information cannot be considered exempt for investigative or evidentiary purposes, as the entire protest occurred in the public view.

As noted above, LNP | LancasterOnline and several other newsgathering organizations were on-site the entire time throughout the evening of September 13, 2020, filming and photographing the unfolding events in front of LCBP headquarters. In addition, numerous citizens were recording the protest using their own cellphones and were posting still photos and videos to social media sites such as Facebook Live and other content streaming platforms.



Beyond media and citizenry scrutiny of the public scene, Lancaster City, moreover, utilizes a surveillance system that captures video from numerous locations throughout the City.<sup>2</sup>

To be clear, these events did not take place within a private residence, on private property, or within any building. Instead, these events took place on an open street, subject to wide public observation. To withhold footage of *public events*—where the only distinction is the perspective of a different lens, in this case, a body camera—is arbitrary and capricious.

Notably, Act 22 is a fairly new law, and as such, there is very little decisional case law interpreting its provisions. But Act 22’s purpose is clear: to provide greater transparency in law enforcement, not less.

In that connection, for this Court to hold that the events which unfolded on September 13, 2020, in a public street in front of LCBP headquarters—many of which have already been recorded and transmitted to the public by the media and citizenry—are not subject to public review, would certainly deprive Act 22 of any effective value.

### ***Public Interest in Disclosure***

It is more likely than not that the public interest in disclosure of the requested body camera footage, or the interest of the Petitioners, outweighs the interests of LCBP or an individual’s interest in nondisclosure. In making its public interest disclosure determination, this Court may consider:

- a. The public’s interest in understanding how law enforcement officers interact with the public;
- b. The interests of crime victims, law enforcement and others with respect to safety and privacy; and

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<sup>2</sup> See Lindsey Blest, *Lancaster Safety Coalition Wants to Replace Its Fleet of Cameras With 360-Degree Ones*, LNP | LancasterOnline (Jul. 10, 2019), available at [https://lancasteronline.com/news/local/lancaster-safety-coalition-wants-to-replace-its-fleet-of-cameras-with-360-degree-ones/article\\_9c95f612-a282-11e9-82f3-837e71197425.html](https://lancasteronline.com/news/local/lancaster-safety-coalition-wants-to-replace-its-fleet-of-cameras-with-360-degree-ones/article_9c95f612-a282-11e9-82f3-837e71197425.html).

- c. The resources available to review and disclose the audio recording or video recording.

42 Pa.C.S.A. § 67A06(e).

As the United States Supreme Court has observed, “[t]he free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . .” *Estes v. Texas*, 381 U.S. 532, 539 (1965). There is indeed a “basic assumption [in] our political system that the press will often serve as an important restraint on government,” as “[an] untrammelled press is a vital source of public information,” and “an informed public is the essence of working democracy.” *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (internal citations and quotations omitted) (alterations added).

There has always been a significant public interest in understanding how law enforcement interacts with the public in the United States. However, given the current public concern regarding police reform and accountability—as well as the countering opinions that have emerged in our national discussion of effective policing methods—there is an even stronger public interest in viewing these protests from the perspective of the responding law enforcement officers. Here, Respondent and Intervenor utterly failed to identify any victim whose safety or privacy would be violated by disclosure of the requested body camera footage. To be sure, the events in questions were not attacks on an individual, they were public demonstrations. The only pending criminal charged mentioned in Respondent’s denial was “riot,” which is a victimless crime. Like the Requester in *Miller*, this Requester has no interest in the faces of law enforcement. *See Miller*, 232 A.3d at 733.

Moreover, the names of the law enforcement officers were openly displayed on badges as they actively responded to the public protests. There can be no legitimate concern as to the

identification of specific officers, as those identifies were already made public via their openly displayed badges. As to the other participants in the protest, they voluntarily chose to participate in a demonstration occurring in the public sphere. There is no privacy risk that was not assumed by their attendance at this event. Finally, the objection raised in providing this requested information was that given the length of the video it would be difficult to redact. There, however, is no provision of Act 22 that provides Respondent the option to not provide responsive footage based on the length of the footage. There is simply no basis for redaction in this matter.

### **CONCLUSION**

Petitioners ask this Honorable Court to order access to the sought record, pursuant to Act 22 of 2017.

Respectfully submitted,

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