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July 21, 2021

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VIA EMAIL ONLY

RE: Public Records Petition of Eugene Weekly and Ardy Tabrizian

Senior Prosecutor Hasselman:

Oregon Public Records Law presumes the public interest favors disclosure of public records, and Respondent has the burden to demonstrate competing interests outweigh the public interest in disclosure.¹ Determining the case-specific interest in disclosure requires consideration of “the importance of the particular government activity at issue; how ‘high profile’ the matter is; whether disclosure would impede government functions; whether disclosure would help the public better monitor public business; and the effect of disclosure on any privacy interests.”² In this case, every factor supports the public interest in disclosure.

Respondent Eugene Police Department cites two countervailing interests justifying non-disclosure of BWC video here: (1) the public interest in allowing officers to use body worn cameras without “having every video subject to release and public viewing” and (2) Landon Payne’s and his family’s privacy interest in protecting from public disclosure an “intimate moment” of Payne “suffering from a mental health crisis.”

Because those countervailing interests are insufficient to outweigh the significant public interest in accessing these public records, the BWC video should be immediately released³ without cost to Petitioners.

¹ *ACLU of Oregon, Inc. v City of Eugene*, 360 Or 269, 285 (2016).

² [Oregon Attorney General’s Public Records and Meetings Manual](#) at 33 (June 2019).

³ Petitioner acknowledges the facial blurring requirements imposed by ORS 192.345 (40) but has no reason to believe that such a requirement would prevent Respondent from promptly redacting and releasing BWC video here.

I. Petitioner's Argument

- a. Disclosure of BWC in this particular case will not impede the use of body cameras nor will it subject all future BWC videos to release and public viewing.

Respondent provides no evidence or argument supporting its claim that disclosure in this case would adversely affect its interest in allowing police officers to use body worn cameras in their work. In fact, your office previously rejected this exact claim in the Public Records Request of Brandon Cordell dated October 5, 2018, because the City similarly failed to offer any credible argument that disclosure of video would impede their body worn camera program.⁴

Respondent also cites no case law and provides no factual support for its claim that disclosure of BWC video in this case would impede Respondent from applying the public interest balancing test to a future request for BWC video. Nor could it.

When an agency receives a request for BWC video, the first step is to identify the public interest in disclosure. Contrary to Respondent's position⁵, it is well-settled law that the public has an interest in monitoring the operation of its police.⁶ Acknowledging that public interest does not end the inquiry but failing to take it into account is a legally significant error. In other words, monitoring the operation of police is a self-evident public interest supporting disclosure of BWC video which Respondent must consider when making release decisions.

Respondent, however, failed to acknowledge this interest in the first instance and conducted no balancing whatsoever in arriving at its decision to withhold a public record. Respondent's response to the petition incorrectly implies that a requestor has the burden of identifying the public interest in disclosure of BWC to trigger Respondent's duty to engage in the required balancing test.⁷ That is contrary to the law as well as agency practices recommended by the Attorney General.⁸

Although Respondent asserts that it does not have a de facto policy of rejecting all requests for body camera video—a claim Petitioner continues to dispute⁹—its

⁴ Exhibit 1. ("The City identifies two interests that it claims are to be protected by non-disclosure. First, is a public interest in allowing officers to use body worn cameras in their work. However, the City provides no evidence or argument on why disclosure in this circumstance would adversely affect that interest.")

⁵ See Respondent's Res. at 4 ("because a reporter would like to monitor police interactions does not mean that it is always in the public interest to do so")

⁶ *ACLU of Oregon, Inc. v City of Eugene*, 360 Or 269, 285 (2016).

⁷ *Id.* ("[T]he request never mentions *any* public interest necessitating disclosure of the requested records. Absent any basis for affirmatively concluding that the public interest requires disclosure, the City properly relied on ORS 192.345(40) to deny Petitioner's request.")

⁸ [Oregon Attorney General's Public Records and Meetings Manual](#) at 32 (June 2019).

⁹ Respondent claims without evidence that "its response to previous Eugene Weekly requests for body worn camera video" proves that it conducts a case-by-case analysis because it provided cost estimates for disclosure in those matters. Petitioner Eugene Weekly believes it has only asked Respondent for body

fundamental misunderstanding of clearly established law produces the same result. When Respondent fails to begin its analysis with the presumption that OPRL favors disclosure of BWC video and then compounds that error by refusing to acknowledge the self-evident public interest that BWC video promotes, Respondent cannot conduct a proper balancing test for that set of public records.

- b. The public has a significant interest in disclosure of BWC video depicting the totality of the circumstances underlying an officer's decision to arrest and use force against a person in mental health crisis who later dies.

Police officers in Eugene and elsewhere experience challenges in delivering police services to people experiencing a mental health crisis. For example, in 2012 the United State Department of Justice found that gaps in Oregon's mental health system lead to increases in police encounters with people with mental illness, including people who are in crisis, often rendering law enforcement as first responders to calls for service involving .¹⁰ Furthermore, the law recognizes that police response to persons experiencing a mental health crisis requires special consideration. When dealing with someone with a mental illness, officers must consider the subject's mental and emotional state before using force.¹¹

The public disclosure of BWC video involving such incidents undeniably promotes the public understanding of these challenges. The BWC video in this case depicts the totality of circumstances faced by the officers as they attempted to resolve Payne's need for police and medical service. In addition, the BWC video will shed light on an important aspect of this event: the officers' decision to take Payne to jail rather than diverting him to a hospital. Indeed, in DA Perlow's response to Petitioner's questions about this case, she identified the decision not to take Payne to the hospital as a critical misstep: "In hindsight, Mr. Payne should not have been cleared by CAHOOTS [sic] for transport to the jail. He should have been transported to the hospital given his condition."¹²

The public interest in disclosure of the BWC video in this case is incontrovertible and overrides any competing interests in non-disclosure.

- c. Neither decedent nor his family has a privacy interest in non-disclosure.

As an initial matter, Payne's mental health crisis and his contact with police and medical providers was hardly an "intimate matter." The events occurred entirely outdoors, Payne was yelling for help, and many neighbors saw and overheard the interaction.

camera video once as part of a joint request with Civil Liberties Defense Center. Petitioner cannot find a record of Respondent's response having included a fee estimate for production and the issue became moot once CLDC obtained the BWC video as part of civil discovery.

¹⁰ In re Investigation of the Portland Police Bureau, [Findings Letter dated September 12, 2012](#).

¹¹ *Deorle v Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001)

¹² Exhibit 2.

In addition, the OPRL does not condition the release of BWC video upon the consent of those depicted—in fact, the Legislature expressly considered and rejected just such a proposal. Instead, the Legislature presumptively protected most privacy interests in BWC video by requiring facial blurring when the public interest requires disclosure.

In general, privacy interests are individual and personal in nature and, as such, do not survive a person’s death. Moreover, the privacy interests of a third party, such as decedent’s family, should not override the public interest in disclosure when a BWC video depicts the totality of circumstances of an in-custody death. Regardless, the issue is moot in this case because decedent’s wife does not object to the release of video evidence.

Respondent’s assertion that “it is not at all clear that [Payne’s] family or estate”¹³ want video released to Petitioner is disingenuous. In formulating its initial response to Petitioners’ request, Respondent contacted Angela Payne to ask about her preferences regarding release of ICV to Petitioners. Ms. Payne indicated she did not object. Respondent did not, however, inform Ms. Payne that Petitioners also sought BWC video and did not inquire as to her preferences regarding disclosure of that video. Petitioners did.

On July 27, 2021, Ms. Payne told Petitioner Ardy Tabrizian she does not object to Petitioners obtaining BWC video, especially because the footage may provide context regarding how Respondent, CAHOOTS, and Eugene-Springfield Fire EMTs arrived at a decision not to take Mr. Payne to a hospital.

d. Respondent’s request was narrowly tailored

Petitioner sought BWC video associated with a specific date, time, and event. It is difficult to see how the Request could have been more narrowly tailored. Respondent does not claim, for instance, that it cannot locate specific responsive video based on parameters of the request. Nor does Respondent claim that the requested records are too voluminous to provide to your office for review.

e. Respondent does not dispute that a complete fee waiver for the requested record is in the public interest.

Respondent claims that your office is without authority to waive fees associated with the production of BWC video because Petitioner “never requested a fee waiver.” That is not correct. In fact, Petitioner did request a waiver using a combination of the public records portal, which does not contain a specific field directed toward fee waivers, and subsequent email correspondence with Melinda McLaughlin, Respondent’s records custodian in this case.¹⁴

Respondent denied the request for a fee waiver by denying the request for BWC video. Your office has the authority to review that denial.

¹³ See Respondent’s Res. at 4

¹⁴ Exhibit 3.

Respondent did not address, let alone contest, Petitioner's evidence and argument regarding the public interest in granting a fee waiver. Therefore, no genuine issue of material fact exists that would preclude you from ordering the requested relief. But there is an additional reason supporting the grant of a complete fee waiver in this case.

Respondent's denial of Petitioners' request frustrates the purposes of the OPRL and led directly to this petition. Had Respondent engaged in the proper balancing test—as they did with other video records for which they provided an estimate—they would have concluded that the public interest favored disclosure and engaged in the analysis of whether a fee waiver or reduction was required. They did not.

For the foregoing reasons, your office should waive all fees associated with Petitioners' request for BWC video.

II. Conclusion

For the reasons stated herein, Petitioners respectfully request that you issue an order:

- Declaring Respondent's blanket denial of Petitioners' Request a prima facie violation of the OPRL;
- Finding that the public interest requires disclosure of the requested BWC video;
- Disclosing all BWC video in Eugene Police Dept. Case No. 20-05537;
- Waiving all fees associated with Petitioners' Request.

Respectfully submitted,

/s/ Ellen Osoinach

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