

New York Court Orders Further Review of Body Camera Footage

By Christine Walz, Madelaine Harrington, and Lin Weeks

A New York Supreme Court judge has ordered the New York City Police Department to provide the cable news channel Time Warner Cable NY1 with footage from its officers' body cameras requested under New York's Freedom of Information Law.

The order requires the NYPD to review body-worn camera footage identified in NY1's FOIL request, to produce any video that is not exempt from production within 60 days of the order. Any footage withheld will be the focus of a later hearing on whether the NYPD can redact exempt information from the footage "without unreasonable difficulty."

Background

In August 2013, a federal judge for the Southern District of New York ordered that the NYPD undertake a body-worn camera pilot program in at least five precincts for one year as part of a remedy addressing the Department's violations of the Fourth and Fourteenth Amendments through its "stop and frisk" practices. *Floyd v. City of New York*, 959 F. Supp. 2d 668, 684-86 (S.D.N.Y. 2013). Prior to the planned start of that program, in July 2014, Eric Garner was killed after being put in a chokehold by an NYPD officer outside a storefront in Staten Island. Garner's death, which was captured on video recorded on the cellphones of bystanders, received international attention. On December 3, 2014, a Staten Island grand jury declined to indict the police officer who had placed Garner in a chokehold; non-violent protests resulted throughout the city.

As the NYPD appealed the decision ordering it to implement a body-worn camera pilot program, it independently announced that it would begin distributing body-worn cameras to its officers who volunteered to wear them. Fifty-four officers received body-worn cameras at the beginning of that program in December 2014, and in April of 2015, a reporter for NY1 sent a FOIL request to the NYPD for the unedited recordings taken during five one-week spans during that period.

The NYPD replied that it could not provide NY1 with unedited footage, arguing that release of the footage could potentially constitute an invasion of privacy, breach confidentiality of ongoing investigations, endanger the life or safety of subjects of the recording, reveal police communications, or interfere with the security of NYPD information technology systems. The NYPD also estimated that it would cost \$36,000 to review and edit the footage before it could be produced. NY1 administratively appealed the denial and fee, but the NYPD denied the appeal.

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In its order denying the administrative appeal, the NYPD stated that although it believed it would be justified in denying NY1's request altogether, if NY1 were to pay the \$36,000 fee, the NYPD would review and edit the video and provide the non-exempt portions.

First Interim Order

Following the denial of its administrative appeal, NY1 filed a petition under NY CPLR Article 78 seeking a judgment directing the NYPD to produce the requested videos without conditioning the production on fees tied to review and editing. In an [Interim Order](#) addressing NY1's petition, Judge Katheryn E. Freed highlighted the 2013 decision in *Floyd v. City of New York*, which found that the NYPD exhibited a "pervasive and persistent" practice of targeting and stopping young black and Hispanic men without reasonable suspicion. 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013). This practice violated not only the Fourth and Fourteenth Amendments, but also "the bedrock principles of equality."

Notwithstanding this recognition, the court found that the NYPD had demonstrated that some of the footage requested would fall within the FOIL exemptions, including footage that would constitute an unwarranted invasion of privacy, footage that would endanger the life and safety of a person, and footage that would interfere with law enforcement investigations or judicial proceedings. The court also agreed with the NYPD, that, pursuant to Civil Rights Law § 50-a(1), footage relating to an incident that subjects an officer to discipline, and becomes part of her personnel record, is confidential and not subject to disclosure under FOIL.

NY1 challenged the NYPD's unsubstantiated assertion that redaction would be too burdensome with its existing technology.

Because the NYPD had demonstrated that review and redaction were necessary to comply with NY1's request, the court next questioned whether it would be unduly burdensome for the NYPD to redact footage subject to an exemption and disclose the remainder. NY1 challenged the NYPD's unsubstantiated assertion that redaction would be too burdensome with its existing technology. The court agreed, noting that the NYPD had neglected to update its software to any of several programs that could significantly decrease the cost and time needed to redact exempt footage. This position was "untenable" given the "substantial likelihood that the footage captured would be subject to a FOIL request." Still, Judge Freed found burdensomeness of review and redaction to be a question of fact and set a hearing to address the issue.

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NY1 challenged the necessity and propriety of that hearing in a motion for reargument filed October 28, 2016. In its brief in support of that motion, NY1 argued that a “burden” exemption is only available in specific circumstances: (1) “needle-in-a-haystack” scenarios, in which requested documents are extremely difficult to identify, and (2) instances in which an advanced computer program is needed to access otherwise inaccessible data, effectively forcing the public agency to create a “new record” to respond to the FOIL request. NY1 challenged the contention put forth by NYPD that FOIL contained a more general burdensomeness exemption on both legal and public policy grounds. In the alternative, NY1 requested that the court grant leave to appeal and stay the present proceedings pending that appeal’s resolution.

The NYPD responded, highlighting that NY1 conceded that a “burden” exemption may apply in particular situations. The NYPD then argued that NY1’s characterization of the “burden” exemption was too narrow, and asserted that the 2008 amendments to FOIL “added a broader burdensome element to the analysis.” Specifically, the NYPD pointed to N.Y. Pub. Off. Law 89 (3)(a) which provides: “[a]n agency shall not deny a request on the basis that the request is voluminous or that locating or reviewing the requested records or providing the requested copies is burdensome... if the agency may engage an outside professional services to ... provide the copy...” (emphasis added by NYPD). The NYPD interpreted this statement as conditional; in essence arguing that an agency may deny a request if unable to engage an outside professional service to copy and produce the footage. Additionally, the NYPD filed a cross motion to appeal from Judge Freed’s first interim order.

The court concluded that each video should be disclosed unless the particular video contained exempt footage and it was unduly burdensome to redact the footage.

On April 13, 2017 Judge Freed entered a [second interim order](#) clarifying the former: “It is well settled,” she wrote, “that a request pursuant to FOIL cannot be rejected merely because of its ‘breadth or burdensomeness.’” The only question, according to the court, was “whether the NYPD can be compelled to redact those moments in the BWC footage containing exempt material, so that *all* of the videos can be turned over in some form,” or whether the NYPD would be allowed to simply withhold videos with exempt material in their entirety. (emphasis added).

The court concluded that each video should be disclosed unless the particular video contained exempt footage *and* it was unduly burdensome to redact the footage. The determination of whether to disclose a particular video would be contingent on this narrow issue only, and made on a case-by-case basis. To that end, the NYPD could not claim that the

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act of *identifying* the videos subject to a possible exemption was itself unduly burdensome. It was directed to “review the videos and make an individual determination as to each one prior to the hearing,” and to provide NY1 with a copy of the videos that do not contain exempt material within 60 days of the order.

Conclusion

Both the NYPD and NY1 were granted permission to appeal the court’s ruling. Of particular note, the NYPD was granted permission to appeal on the issue of whether there is a “burden exemption” to a FOIL request. As it stands, the enumerated FOIL exemptions outline categories of *content*, but there is no portion of FOIL directly stating that an agency may withhold information, regardless of content, based on the burden of identifying, redacting, and producing the material.

A ruling establishing a “burden exemption” would give rise to a new question: whether an agency may rely on the “burdensomeness” of responding to a request alone to deny a FOIL request. The answer to this question would have a profound effect on agencies’ power to reject FOIL requests, and their corresponding duty to integrate current technology in their data storage and processing systems.

Christine Walz, Madelaine Harrington, and Lin Weeks are associates in the New York office of Holland & Knight. They are members of the Next Generation Committee.

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