

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

NEW YORK LAWYERS FOR THE PUBLIC INTEREST,

Petitioner,

-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,

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

Index No. _____

VERIFIED PETITION

PRELIMINARY STATEMENT

1. This Article 78 Proceeding asserts the right of Petitioner, New York Lawyers for the Public Interest ("NYLPI"), and the public, to access the unredacted police body-worn camera ("BWC") footage of the September 6, 2017 fatal encounter between the New York Police Department ("NYPD") and Miguel Richards.

2. Mr. Richards, a college exchange student experiencing a mental health crisis, was shot *sixteen times* by NYPD officers after a fifteen-minute confrontation in which he stood silent and motionless, holding what turned out to be a toy gun. The incident was the first fatal shooting involving NYPD officers captured on BWCs since the court-ordered BWC pilot program began in April 2017. Ashley Southall & Joseph Goldstein, *Police Release Body Camera Footage of Shooting Death in Bronx*, N.Y. Times, (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/nyregion/police-body-camera-footage-new-york.html>.

3. New York’s Freedom of Information Law (“FOIL”) expresses this State’s strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State, the City, and their agencies. Pub. Off. Law § 84. FOIL proceeds under the premise that the public is vested with an inherent right to know and notes that “[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve . . . it is incumbent upon the state and its localities to extend public accountability” *Id.* Therefore, pursuant to FOIL, *all* government records are presumptively open for public inspection and copying. *Id.* Although this presumption is subject to certain statutory exceptions, “the agency involved shall have the burden of proving that such record falls within” those exceptions. Pub. Off. Law § 89(4)(b).

4. On September 14, 2017, the NYPD publicly released a selected compilation of BWC footage from four of the officers involved in the shooting of Miguel Richards. That BWC footage showed various perspectives that led up to the shooting of Mr. Richards. But this publicly-released footage did not include footage from all of the BWCs of all the officers present, nor did it include footage during the aftermath of the shooting. Following the public release of certain footage from this incident, NYLPI issued a FOIL request for the complete, unedited footage of the encounter, including footage from all of the BWCs of all of the officers involved in the fatal incident, from the time the officers arrived on the scene until they departed.

5. Even though the NYPD had already released portions of video to the public, the NYPD initially provided a blanket denial to NYLPI’s FOIL request. Following a number of subsequent requests from NYLPI, the NYPD ultimately released heavily-redacted BWC footage — in some cases, more than half of the footage from an officer’s BWC was withheld, including by blurring video and muting audio.

6. In support of its decision to withhold this presumptively public information, the NYPD invoked a litany of FOIL exemptions, without undertaking to specifically indicate which portions of video and audio were withheld pursuant to each exemption. Moreover, the NYPD's limited justifications for the claimed FOIL exemptions were generalized, conclusory, and wholly without merit.

7. The NYPD's refusal to release a full record of this controversial encounter keeps valuable records shrouded with the cloak of secrecy that undermines the purposes that both FOIL and the NYPD's BWC program serve, namely fostering transparency and accountability between the government and the public. As interactions between police officers and the public, particularly those resulting in the use of deadly force, have featured prominently in our local and national conversation, the public's right to access contemporaneous records has never been more paramount.

8. This Article 78 petition seeks to compel the NYPD to comply with its statutory mandate under FOIL, and respectfully asks this Court to direct the NYPD to provide Petitioner with records in response to its FOIL request.

PARTIES

9. Petitioner NYLPI is a non-profit civil rights law firm that seeks to advance equality and civil rights through the power of community lawyering and partnership with the private bar. NYLPI focuses on disability justice, health justice, and environmental justice. NYLPI's Disability Justice Program works to advance the civil rights of, and ensure equality of opportunity, self-determination, and independence for, those with disabilities. NYLPI's Disability Justice Program recently started an advocacy campaign to improve the City's response to those experiencing mental crises.

10. Respondent NYPD is an agency administered under New York City Administrative Code, Title 14. The NYPD is responsible for law enforcement in the City of New York, and is subject to the requirements outlined in FOIL. *See* Pub. Off. Law §§ 84 *et seq.*

11. Respondent Mr. James P. O'Neill is a public officer who is named in his official capacity as Commissioner of the NYPD.

FACTS

Miguel Richards' Death

12. Miguel Richards was a college exchange student from Jamaica who lived in the Bronx, within the 47th police precinct. Southall & Goldstein, *supra*.

13. On September 6, 2017, Mr. Richards' landlord approached the NYPD out of concern for his quiet, young tenant from whom he had not heard in several days when his knocks on the door to his apartment went unanswered. Ashley Southall & Jeffrey C. Mays, *Police Consider Releasing Body Camera Footage in Fatal Bronx Shooting*, N.Y. Times, Sept. 7, 2017, <https://www.nytimes.com/2017/09/07/nyregion/bronx-police-shooting-body-cameras.html>. The police agreed to visit Mr. Richards' third-floor apartment to conduct a wellness check. *Id.*

14. Mr. Richards' landlord brought officers to Mr. Richards' locked apartment. *Id.* Once the landlord provided the officers access to the room, the officers found Mr. Richards standing by a wall at the foot of his bed, apparently experiencing a mental health crisis. *Id.* He was wearing sunglasses and held what the officers apparently thought was a weapon. Southall & Goldstein, *supra*. During an encounter that lasted approximately fifteen minutes, the officers repeatedly yelled that, "this isn't going to end well," that Mr. Richards was "seconds away from getting shot" and asking him, "do you want to die?" *Id.* Mr. Richards stood completely still and silent. *Id.*

15. Eventually, an officer with a Taser stun gun entered Mr. Richards' bedroom to stun him. *Id.* Mr. Richards appeared to raise his arm, at which point the officer with the Taser fired it at him and two officers behind him fired sixteen shots at Mr. Richards with their service weapons. *Id.*

16. Mr. Richards was fatally wounded. *Id.*

The Aftermath of Miguel Richards' Death

17. The object in Mr. Richards' hand was later identified as a toy gun. *Id.*

18. On September 14, 2017, the NYPD released a compilation of selected footage from BWCs worn by four of the eight NYPD officers equipped with BWCs who were present during the encounter with Mr. Richards, some of which was digitally altered to show the events in slow motion. *Id.*

19. News accounts of Mr. Richards' death demonstrate the significant public concern surrounding it, in particular how the police interacted with an individual experiencing a mental health crisis. The New York Times stated that “[i]n their verbal interactions with the man, the officers’ language is sparse, and limited to orders to comply or be hurt. As much of the encounter unfolds, officers have guns and flashlights pointed at Mr. Richards. There is little of the so-called ‘verbal judo’ that commanders and trainers often say can be essential in dealing with people in emotional stress.” Southall & Goldstein, *supra*. Indeed, “until that final moment, the video chronicles a slow-moving scene that defies the notion that tense police encounters with the mentally ill generally escalate out of control quickly.” *Id.*

Body-Worn Camera Program

20. On August 12, 2013, Judge Shira Scheindlin of the United States District Court for the Southern District of New York issued an extensive decision finding that the City of New York engaged in a policy and practice of unconstitutional and racially discriminatory stop and frisks in

violation of the Fourth and Fourteenth Amendments. *See Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (“Liability Opinion”).

21. Judge Scheindlin issued a second opinion on the same day ordering the development and implementation of a series of remedial reforms, including a set of initial reforms to be developed immediately and a more thorough set of reforms to supplement them (“Joint Remedial Process”). *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (“Remedies Opinion”). Among the remedies ordered by Judge Scheindlin was the use of BWCs on a pilot program basis for a one-year period by officers on patrol in one precinct per borough. *Id.* at 685.

22. Judge Scheindlin’s Remedies Opinion found that “[t]he use of body-worn cameras by NYPD officers would address a number of the issues raised in the Liability Opinion.” *Id.* It explained that video recordings would provide a “contemporaneous, objective record of stops and frisks” and serve a variety of other useful functions, including encouraging lawful and respectful police-citizen interaction, alleviating mistrust between the NYPD and the black and Hispanic communities, and offering a way to help determine the validity of accusations of police misconduct. *Id.*

23. Justice Ariel Belen was appointed to serve as the Facilitator to guide the Joint Remedial Process described in the Remedies Opinion. *See Hon. Ariel E. Belen (Ret.), New York City Joint Remedial Process: On NYPD’s Stop, Question, and Frisk, and Trespass Enforcement Policies; Final Report and Recommendations*, at i (May 15, 2018), <https://www.jamsadr.com/files/uploads/documents/articles/belen-new-york-city-joint-remedial-process-may-2018.pdf> (“Final Report”). The Final Report sets forth a series of supplemental reform proposals, after collecting community input, as required by the Remedies Opinion. *Id.*

24. The Final Report describes the benefits of BWCs: “The most well-known recent response to the call for greater accountability and transparency has been the adoption of BWC programs by police departments across the country.” *Id.* at 102. It further states:

[W]hether BWC programs are effective depends on the extent to which they actually increase transparency in police interactions. . . . Another benefit of BWCs is that the information recorded, similar to the use of [Early Intervention Systems], is a significantly less subjective way to assess performance during a stop and frisk, which benefits both police officers and community members. As with open data, research shows, the existence of an objective record supports both positive and negative claims by the police department and the public, minimizing time spent investigating unfounded complaints or misconduct. This in turn provides a mechanism for greater accountability.

Id. at 102-03.

25. The Final Report cautions that “[w]hile many groups were in favor of body-worn cameras, there was a general sense that without access to the footage BWCs would not serve their purpose.” *Id.* at 123.

26. The Final Report further cautions that “[i]ndividuals with mental illness, who have physical disabilities, or who are developmentally disabled are at risk of being subjected to heightened police scrutiny and force based on completely mistaken assumptions.” *Id.* at 253.

27. As of mid-November 2017, about 1,350 officers in 20 pilot precincts were wearing cameras. Peter L. Zimroth, *Seventh Report of the Independent Monitor* 3 (Dec. 13, 2017), <http://nypdmonitor.org/reportsandotherdocuments/monitor-reports/>.

28. The NYPD has repeatedly emphasized that its BWC program promotes transparency and accountability to the public. The NYPD’s BWC procedures proposed last year state, “[t]he BWC pilot program will serve to provide a contemporaneous, objective record of encounters, facilitate review by supervisors, foster accountability, and encourage lawful and respectful interactions between the public and the police.” NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy app. B, at 1 (April 2017),

http://nypdnews.com/wp-content/uploads/2017/04/NYPD_BWC-Response-to-Officer-and-Public-Input.pdf. The NYPD's press release announcing those procedures further stated: "Not only will body-worn cameras enhance transparency and accountability, they will further improve the trust that continues to grow in [relationships between New York City communities and officers]." Press Release, NYPD News, NYPD Releases Proposed Police Officer Body-Worn Camera Procedure (April 7, 2017), <http://nypdnews.com/2017/04/nypd-releases-proposed-police-officer-body-worn-camera-procedure/>. The NYPD has also made clear that its commitment to transparency extends to footage of officer shootings: "[t]he Department believes that allowing the public to see footage of officer shootings is an important way to demonstrate our commitment to transparency and will continue to advocate for such a policy." NYPD, *The Way Forward: The NYPD's Response to the Joint Remedial Process Report 29* (June 8, 2018), *available at* <https://www.politico.com/states/f/?id=00000164-8604-d20a-a96f-969773bb0000>.

29. A joint statement on a prior pilot BWC program issued by Mayor Bill de Blasio and Public Advocate Letitia James underscored that the program would "provide transparency, accountability, and protection for both the police officers and those they serve" Joint Statement of Mayor de Blasio and Public Advocate James on the Police Department's Launch of the Body Camera Pilot Program (Sept. 4, 2014), <http://www1.nyc.gov/office-of-the-mayor/news/429-14/joint-of-mayor-de-blasio-public-advocate-james-the-police-department-s-launch-of>.

Petitioner's FOIL Request and Denials by the Respondents

30. NYLPI filed a FOIL request on September 15, 2017, with the NYPD FOIL Unit, for unedited video from the BWCs worn by the officers involved in the September 6, 2017 deadly shooting ("Request"). A true and correct copy of this letter is attached as Exhibit A. NYLPI sought access to the entire accounting of the fatal event that took place that day, requesting:

Unedited video files from all BWCs worn by the uniformed officers who were involved in the fatal encounter with Miguel Richards in the Bronx on September 6, 2017, which are related to that fatal encounter, from the time each officer first arrived at the site of the fatal encounter until the time they departed the site.

31. In its response on October 4, 2017, despite having publicly released portions of BWC footage relating to the incident, the NYPD issued a blanket denial to NYLPI's request ("Original Denial"). The NYPD merely cited Pub. Off. Law § 87(2)(e)(i), stating that the records would interfere with law enforcement investigations or judicial proceedings. A true and correct copy of this letter is attached as Exhibit B.

32. On November 3, 2017, NYLPI appealed the NYPD's denial, sending a letter to the NYPD's Records Access Appeals Officer asserting that the Original Denial was insufficient. A true and correct copy of this letter is attached as Exhibit C.

33. On November 17, 2017, the NYPD issued a further response to the Request, releasing heavily-redacted copies of BWC footage from eight officers. The letter listed a series of exemptions to FOIL, in addition to § 87(2)(e)(i), that the NYPD had not previously claimed formed the basis of the redactions, with no indication of which exemption applied to which redaction. The NYPD invoked Pub. Off. Law § 87(2)(b) (unwarranted invasion of personal privacy); § 87(2)(f) (endangering life or safety of any person); § 87(2)(e) and § 87(2)(a) (personnel records exempt under Civil Rights Law § 50-a); § 87(2)(g)(iii) (non-final agency determination); and § 87(2)(g) (inter/intra-agency material). A true and correct copy of this letter is attached as Exhibit D.

34. The released footage from eight police officers was heavily redacted such that the viewer could not discern the events transpiring behind long portions of footage that were entirely blurred and muted. In some instances, the video from certain BWCs had more redacted content than unredacted content. A true and correct copy of the video footage provided by the NYPD has been submitted to the Court as Exhibit E.

35. The table below sets forth each of the video and audio redactions to the released BWC footage. Nearly 77% of the footage from one camera and more than half of the footage from two other cameras contains redactions. In total, the NYPD provided nearly eighteen minutes of footage containing visual or audio redactions.

Officer Camera	Total Length of Video	Full Visual Redaction ¹	Partial Visual Redaction	Full Audio Redaction ²	Total Time Containing Redactions	Percent of Footage Containing Redactions
1 ³	20:06	15:37-15:49, 16:24-16:27, 17:32-17:46, 17:55-18:50, 18:54-19:24	00:04-00:09, 00:12-00:13, ⁴ 15:28-15:36, 15:51-16:24, 16:27-16:40, 16:49-16:58, 17:03-17:07, 17:10-17:32, 17:46-17:51	17:58-18:03, 18:22-18:37, 19:33-19:35	03:21	16.67%
2	18:54	14:36-14:56, 15:57-17:20, 17:26-17:30, 17:43-18:32	14:15-14:36, 14:57-15:30, 15:40-15:46, 15:53-15:57	16:45-16:50, 17:10-17:20	03:46	19.93%
3	04:55	02:46-04:55	00:29-00:34, 00:44-00:48, 00:55, 01:26-01:29, 1:39-1:42, 1:46-1:47	02:46-04:55	02:32	52.52%
4	02:34		00:48-00:49, 00:55-00:56, 01:16-01:59, 02:29-02:34	00:03-00:04	00:56	36.36%
5	06:23	02:25-03:54	00:05-00:13, 00:17-00:19, 00:21-00:23, 00:35-00:36, 01:20-1:22, 1:30, 1:39-02:23, 04:15, 04:30-04:35, 05:01-05:02, 05:07-05:18, 04:58,	02:25-03:54	03:12	50.13%

¹ The chart of redactions does not include more than eight and a half minutes of footage that appears to have been obscured by the arms of two police officers that covered their respective cameras.

² The NYPD informed NYLPI that once an officer's camera is activated, footage automatically includes a muted clip of the 30 seconds prior to the activation. See Exhibit G. All officer cameras contain audio redactions for the first 30 seconds, except for the footage from the camera of Officer 4. Audio muted for this reason (amounting to three minutes and 30 seconds) is not listed on the chart of redactions.

³ This chart does not include redactions that were subsequently removed from the footage after the NYPD granted NYLPI's request for reconsideration of the NYPD's invocation of Civil Rights Law § 50-a. See *infra* ¶¶ 39-40. The NYPD removed audio redactions to 18:09-18:23 and 18:38-19:25 of the camera of Officer 1 and 15:58-16:46 and 16:51-17:10 of the camera of Officer 2.

⁴ The first two partial redactions to the camera of Officer 1 were not redacted from footage publicly released by the NYPD.

			05:20-05:24, 05:28, 05:32-05:38			
6	05:29	02:26-04:01	00:03-00:09, 00:12- 00:14, 02:05-02:07, 04:19-04:25, 04:30- 04:34, 05:08-05:11, 05:18-05:24	00:31-00:34, 01:37-01:40, 02:26-04:01	02:21	42.86%
7	00:41	Officer turns off camera when shots are fired at 00:41	00:01-00:05, 00:36- 00:40		00:10	24.39%
8	01:22	00:00-01:03		00:31-01:03	01:03	76.83%
TOTAL	60:24				17:47	28.72%

36. On December 15, 2017, NYLPI appealed the NYPD's significant redactions and withholdings made to the camera footage. NYLPI asserted that the NYPD's submission was incomplete and its claims in support of the withheld footage were inadequate. NYLPI renewed its request for the redacted/withheld BWC footage and any other footage regarding the incident from the time each officer first arrived at the scene of the fatal encounter until the time they departed the site. A true and correct copy of this letter is attached as Exhibit F.

37. The NYPD responded on December 20, 2017, informing NYLPI that the footage provided was, in fact, a complete accounting of all video generated for this incident, and requesting additional time to review the applicability of the claimed exemptions. A true and correct copy of this letter is attached as Exhibit G.

38. On January 9, 2018, the NYPD provided a further response. The letter added some limited support for the NYPD's withheld footage, but largely echoed the statutory language of claimed exemptions, offered conclusory justifications for them, and provided scant additional information about which exemption applied to which redaction. A true and correct copy of this letter is attached as Exhibit H.

39. On February 27, 2018, NYLPI requested reconsideration of the NYPD's invocation of Civil Rights Law § 50-a to withhold footage. The NYPD had asserted in another case,

Patrolmen's Benevolent Ass'n of City of N.Y., Inc. v. De Blasio, No. 150181/18 (Sup. Ct. N.Y. Cnty. Jan. 9, 2018), that BWC footage is not a personnel record under the statute, in defense of its release of compiled BWC footage to the public. A true and correct copy of this letter is attached as Exhibit I.

40. On February 28, 2018, the NYPD emailed NYLPI a response that it maintained its position that Civil Rights Law § 50-a supported its withholding. A true and correct copy of this email is attached as Exhibit J. However, on March 20, 2018, the NYPD reversed its position and granted NYLPI's request, providing two additional video files. A true and correct copy of the NYPD's letter, representing the agency's final determination, is attached as Exhibit K. The new footage provided by the NYPD only revealed a few minutes of previously muted audio, leaving most of the NYPD's redactions fully intact. A true and correct copy of the footage provided on March 20, 2018 is attached as Exhibit L.

41. Petitioner timely commenced this Article 78 proceeding, within four months of the NYPD's final determination of Petitioner's appeal, *see* C.P.L.R. § 217, to force the NYPD to comply with its obligations under FOIL and provide Petitioner with records responsive to the Request.

VENUE AND JURISDICTION

42. Pursuant to C.P.L.R. §§ 7804(b) and 506(b), venue in this proceeding lies in New York County, the judicial district in which both Petitioners' and Respondents' principal offices are located.

43. Article 78 of the C.P.L.R. (C.P.L.R. § 7804(b)) confers jurisdiction over this matter upon this Court.

44. This Court has jurisdiction over the matter because the NYPD's denial of NYLPI's appeal cannot be further "reviewed by appeal to a court or to some other body or officer." C.P.L.R. § 7801[1].

CAUSE OF ACTION:
ARTICLE 78 REVIEW OF WRONGFUL DENIAL OF FOIL REQUEST

45. Petitioner repeats and realleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

46. Article 78 is the appropriate method of review of final agency determinations concerning FOIL requests.

47. Petitioner has a legal right under FOIL to gain access to the public records sought in the Request.

48. FOIL recognizes the public's right to access and review government documents; agency records are presumed to be public and subject to disclosure under FOIL.

49. Respondents produced only heavily-redacted video footage and have failed to properly invoke exemptions under FOIL for those redactions.

50. Respondents have not met their burden to provide specific and particularized justifications for redacting the requested records. In particular, Respondents have not sufficiently indicated which redactions were made on the basis of which claimed exemptions.

51. None of the exemptions from FOIL that have been cited by Respondents (nor any other FOIL exemptions) properly apply to the material Petitioner has requested.

52. Petitioner has exhausted its administrative remedies and has no other remedy at law.

53. Petitioner has not made a prior application for the relief requested herein.

54. Because the NYPD had no reasonable basis for its redaction of the footage requested by NYLPI on September 15, 2017, Petitioner is entitled to the unredacted footage which is the subject of this action.

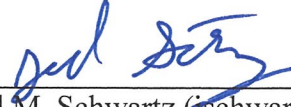
CLAIM FOR RELIEF

Petitioner respectfully requests that this Court enter judgment, pursuant to C.P.L.R. § 7806, on its behalf:

- a. directing the NYPD and Commissioner O’Neill to comply with their duty under FOIL to provide Petitioner access to the unedited video records requested in its September 15, 2017 FOIL request;
- b. ordering, in the alternative, an *in camera* review of the unedited video records in the event this would better inform the Court as to the contents of the records requested by Petitioner, and that redactions are not warranted;
- c. awarding Petitioner its reasonable attorney’s fees pursuant to Public Officers Law § 89(4)(c); and
- d. granting Petitioner such other and further relief as this Court deems necessary and equitable.

Respectfully Submitted,

Dated: July 19, 2018
New York, New York



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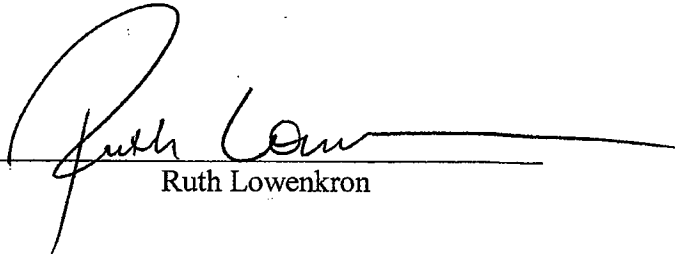
Attorneys for Petitioner

VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

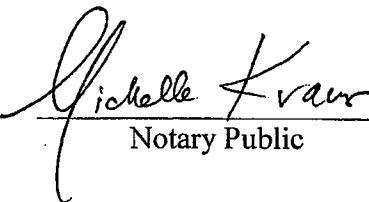
Ruth Lowenkron, being duly sworn, deposes and states under penalty of perjury:

1. I am the Director of the Disability Justice Program and an officer of the Petitioner New York Lawyers for the Public Interest in these proceedings.
2. I make this verification pursuant to C.P.L.R. § 3020(d)(3).
3. I have read the attached Verified Petition and know its contents.
4. The statements in the Verified Petition are true to my knowledge, or upon information and belief. As to those statements that are based upon information and belief, I believe those statements to be true.



Ruth Lowenkron

Sworn to and subscribed before me
this 19th day of July, 2018



Notary Public

MICHELLE KRAUS
NOTARY PUBLIC-STATE OF NEW YORK
No. 01 KR6078086
Qualified in New York County
My Commission Expires 12-15-2018