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Department of Public Safety
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November 9, 2018

Via Email: rappel@robertappellaw.com

Robert Appel
30 Main Street, Suite 350
Burlington, VT 05401

RE: Public Records Request Appeal

Dear Mr. Appel:

I write in response to your letter, dated October 26, 2018, in which you appeal the withholding of certain information in documents the Department of Public Safety provided in response to your Public Record Act (PRA) request dated August 13, 2018. Specifically, you seek Vermont State Police reports and photographs relating to two incident numbers: 17A503639 and 17OLC2006. On August 24, 2018, the Department of Public Safety (DPS) provided you with a redacted copy of the report for incident number 17A503639.¹ The redactions applied to that copy of the report are the subject of your appeal.

For the reasons set forth below, I am releasing to you a second copy of the report for incident number 17A503639, with various redactions removed and specific bases for redactions noted in the records. Moreover, I am also releasing to you a photograph related to incident number 17A503639 that has since been located.

I. The Records Requested are "Public Records"

The Public Records Act (PRA) defines a "public record" as "any written or recorded information, regardless of physical form or characteristics, which is produced or acquired in the course of public agency business." 1 V.S.A. § 317(b). The report provided to you in redacted form is a written record of the Vermont State Police, a division of DPS, and was produced in the course of an investigation. Accordingly, the report requested meets the definition of "public record," and is a DPS record.

¹ Given that incident number 17OLC2006 was investigated by the Orleans County Sheriff's Department, you were directed to contact that office for records relating to that incident. Also, on September 19, 2018, DPS notified you that it was not able to locate photographs.

II. The Report is a Record Involving the Investigation of a Crime

Having determined that the records at issue here meet the definition of a public record, I must determine whether any of the PRA's enumerated exemptions to disclosure apply. In this regard, the PRA exempts from public inspection and copying "[r]ecords dealing with the detection and investigation of crime" but only to the extent such production would lead to the consequences outlined in 1 V.S.A. § 317(c)(5)(A)(i)–(vi), including where release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

§ 317(c)(5)(A)(iii). The PRA also states that in construing exemptions under subdivision 317(c)(5), courts are to be "guided by the construction of similar terms" in the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7). § 317(c)(5)(C). And importantly, the PRA states as follows:

It is the intent of the General Assembly that, consistent with the manner in which courts have interpreted subdivision (A) of this subdivision (5), a public agency shall not reveal information that could be used to facilitate the commission of a crime or the identity of a private individual who is a witness to or victim of a crime, unless withholding the identity or information would conceal government wrongdoing. A record shall not be withheld in its entirety because it contains identities or information that have been redacted pursuant to this subdivision.

§ 317(c)(5)(D).

In considering the PRA exemptions under subdivision 317(c)(5)(A), I must determine whether, as a threshold matter, the records at issue here deal with "the detection and investigation of crime." § 317(c)(5)(A). In making this determination, the Vermont Supreme Court has instructed that, among other interests, one must assess:

whether the records at issue contain the type of information that might "endanger the state's position in criminal prosecutions" or "reveal the names of informants," or other information that might "threaten to intimidate potential witnesses," such as "speculations of a suspect's guilt, officers' views as to the credibility of witnesses, statements by informants, . . . or blood and other laboratory tests."

Bain v. Windham Cty. Sheriff Keith Clark, 2012 VT 14, ¶ 22, 191 Vt. 190, 201 (2012) (alteration in original) (quoting *Caledonian Record Pub. Co. v. Walton*, 154 Vt. 15, 23 (1990)).²

² With respect to the federal counterpart to Vermont's subdivision 317(c)(5), federal case law provides that Exemption 7—for "records or information compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7)—applies as follows: "This protection extends to both investigatory and non-investigatory records." *Stanko v. Fed. Bureau of Prisons*, 842 F. Supp. 2d 132, 138 (D.D.C. 2012); *see also Williams v. F.B.I.*, 730 F.2d 882, 886 (2d Cir. 1984) ("[W]e hold that FBI investigatory records are protected from disclosure so long as they fall within one of the six protected subcategories of Exemption 7."); *Richardson v. U.S. Dep't of Justice*, No. CV 17-1181 (JDB), 2018 WL 4637364, at *5 (D.D.C. Sept. 27, 2018) ("ATF originally compiled the records in Richardson's criminal case for law enforcement purposes, thus satisfying the first requirement of Exemption 7(C).").

Here, the report for incident number 17A503639 is a criminal investigatory record of the Vermont State Police, which contains information regarding potential witnesses and officers' views, among other investigative information. The report is a record generated by a law enforcement agency for the purpose of investigating and detecting crime. Thus, I conclude that the report satisfies the threshold requirement under subdivision 317(c)(5)(A), as a record that deals with "the detection and investigation of crime." § 317(c)(5)(A).

III. Information Exempt Under Subdivisions 317(c)(5)(A)(iii), 317(c)(5)(D), and 317(c)(7)

I have reviewed the exemptions cited for the redactions in the first copy of the report released to you on August 24, 2018. As you will note in the copy released to you here, many of the previous redactions have been removed, in large part because it does not appear that an enforcement proceeding based on incident number 17A503639 is "pending or prospective." See *Johnson v. F.B.I.*, 118 F. Supp. 3d 784, 791 (E.D. Pa. 2015) (quoting *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995)). Accordingly, I am reversing in part the agency's decision on appeal. However, I am upholding certain redactions as exempt under subdivision 317(c)(5)(A)(iii) and also as exempt under subdivisions 317(c)(5)(D) and 317(c)(7).

Subdivision 317(c)(5)(A)(iii)

DPS's August 24, 2018 letter stated that redactions were made under subdivision 317(c)(5)(A)(iii), as release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." § 317(c)(5)(A)(iii). Case law that interprets this exemption's federal counterpart—Exemption 7(C)—finds that Exemption 7(C)'s scope extends to the identities of third parties, including witnesses and potential suspects. *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995) ("In a number of cases, this court has found that individuals have an obvious privacy interest cognizable under Exemption 7(C) in keeping secret the fact that they were subjects of a law enforcement investigation. That privacy interest also extends to third parties who may be mentioned in investigatory files, as well as to witnesses and informants who provided information during the course of an investigation." (citations omitted)); *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996), *amended* (Feb. 20, 1996) (noting Exemption 7(C) scope to cover "names of informants, witnesses, and potential suspects"). For instance, "courts have found that 'an individual has a general privacy interest in preventing dissemination of his or her name and home address.'" *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 485 (2d Cir. 1999) (quoting *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir. 1992)). In addition, "The courts have also recognized a privacy interest in information contained within agency documents that might lead to the identification of witnesses or informants that goes beyond the mere protection of names and addresses." *Id.* (citing *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990)).

Under the federal balancing test, the above-described privacy interest is weighed against the public interest in scrutinizing government conduct. See *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 285–88 (2d Cir. 2009). However, this public interest does not appear to be

relevant here, since release of private individuals' identities, and information that could lead to their identities, would do little to shed light on government conduct in this instance. See *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 780 (1989) ("Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'"); *Halpern v. F.B.I.*, 181 F.3d 279, 297 (2d Cir. 1999) ("Likewise, there is little or no public interest in having the identities of private parties revealed because that information sheds little or no light on the FBI's performance."). Moreover, the privacy interests in nondisclosure of identifying information of third parties are significant. See *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) ("There is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm." Recognizing this danger, Exemption 7(C) 'affords broad[] privacy rights to suspects, witnesses, and investigators.'" (alteration in original) (citations omitted)); *Rodriguez v. U.S. Dep't of Army*, 31 F. Supp. 3d 218, 231 (D.D.C. 2014) ("In the case of records related to investigations by criminal law enforcement agencies, Exemption 7(C) takes into consideration the 'strong interest' of all individuals—suspects, witnesses, and investigators—in not being associated unwarrantedly with alleged criminal activity." (quoting *Dunkelberger v. Dep't of Justice*, 906 F.2d 779, 781 (D.C. Cir. 1990))); *Petrucelli v. U.S. Dep't of Justice*, 153 F. Supp. 3d 355, 362 (D.D.C. 2016), *aff'd*, No. 16-5042, 2016 WL 5349349 (D.C. Cir. Aug. 22, 2016) ("Considering an individual's 'strong interest in not being associated unwarrantedly with alleged criminal activity,' a government agency is not at liberty to disclose the name of or identifying information about an individual referenced in law enforcement records, even if the requester already knows, or is able to guess, the individual's identity." (citations omitted)).

Lastly, the fact that the report describes actions taken in 2017 does not lessen the privacy interests at issue here. While it appears that the death of an individual may be a factor in assessing an individual's privacy interest, see *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003) ("We have recognized, however, that the privacy interest in nondisclosure of identifying information may be diminished where the individual is deceased."), the mere passage of time alone does not lessen such an interest. The D.C. Circuit has stated, "Where, as here, there is a reasonable possibility that the individuals in question are alive, their privacy interests remain strong. The passage of time, without more, does not materially diminish these interests." *Id.* at 666. The passage of approximately one year since the documented actions took place does not alter the analysis here.

Accordingly, as annotated in the report, the redactions made to protect identities—and information that could lead to individuals' identities—are proper under subdivision 317(c)(5)(A)(iii). This includes all of the redactions in the report except the redactions discussed below on pages 11, 15, 16, and 24 of the report.

Subdivision 317(c)(5)(D)

The redactions within the report are also exempt under subdivision 317(c)(5)(D), which exempts “information that could be used to facilitate the commission of a crime or the identity of a private individual who is a witness to or victim of a crime.” Notably, the Legislature did not insert a temporal limitation within its directive not to release the information described in subdivision 317(c)(5)(D). See *Rutland Herald v. City of Rutland*, 2012 VT 26, ¶ 32, 191 Vt. 387, 401 (2012) (discussing prior version of subdivision 317(c)(5) and stating “we have rejected the argument that § 317(c)(5) contains a temporal limit.”).

Moreover, case law indicates that even if an investigation has concluded, certain reasons for nondisclosure remain. See *Galloway v. Town of Hartford*, 2012 VT 61, ¶ 23, 192 Vt. 171, 181, 57 A.3d 684, 691 (2012) (Dooley, J., concurring) (analyzing prior version of subdivision 317(c)(5) and stating, “The residual reasons against disclosure even after an investigation’s conclusion—articulated by a number of federal appeals courts in the early 1970s—include concerns about chilling citizen cooperation in future cases or revealing investigatory tactics.” (citing *Aspin v. Dep’t of Def.*, 491 F.2d 24, 30 (D.C. Cir. 1973), and citing *Frankel v. SEC*, 460 F.2d 813, 817–18 (2d Cir. 1972)); *Aspin v. Dep’t of Def.*, 491 F.2d 24, 30 (D.C. Cir. 1973) (“Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings.”); *Frankel v. SEC*, 460 F.2d 813, 817 (2d Cir. 1972) (stating that unlimited disclosure of investigation after completion would impact future efforts, and providing the following example: “The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed”).

As you will note in the copy of the redacted report released to you here, the legislative mandate in subdivision 317(c)(5)(D) provides a basis for all of the redactions that remain in the document. First, most of the redactions have been made to protect identities of witnesses or victims; these redactions include names, dates of birth, addresses, and other information that could lead to the identity of those individuals. See *Wool v Burlington Police Dep’t*, No. 327-6-16 Wncv, 2016 WL 5944414, at *1 (Vt. Super. Ct. June 13, 2016) (“In the Court’s view, the ‘identity’ of a witness would also include personally identifying information, such as birthdate, social security number, and home address. Such information could easily be used to locate and harass such persons.”). Second, you will also note that the redactions on pages 11, 15, 16, and 24, relating to the surveillance video, have specifically been redacted under subdivision 317(c)(5)(D) as information the release of which “could be used to facilitate the commission of a crime” against the farm in question. See § 317(c)(5)(D). Thus, because the redactions do not “conceal government wrongdoing,” the information exempt from disclosure under subdivision 317(c)(5)(D) has been properly redacted. See § 317(c)(5)(D).

Subdivision 317(c)(7)

Finally, excluding those redactions noted on pages 11, 15, 16, and 24 as exempt under § 317(c)(5)(D) because the information could be used to facilitate commission of a crime, the

redactions in the report also are proper under 1 V.S.A. § 317(c)(7) as “personal documents” about individuals. This exemption also is noted within the records released to you today.

Subdivision 317(c)(7) protects from disclosure “[p]ersonal documents relating to an individual, including information in any files maintained to hire, evaluate, promote, or discipline any employee of a public agency, information in any files relating to personal finances, medical or psychological facts concerning any individual or corporation . . .” § 317(c)(7). This exemption depends on the “content” of the record, and not the file where the information is maintained. See *Rutland Herald v. Vermont State Police*, 2012 VT 24, ¶ 22, 191 Vt. 357, 369 (2012). Additionally, the Vermont Supreme Court has stated,

we must construe the term “personal documents” in a limited sense to apply only when the privacy of the individual is involved. Thus, it covers personal documents only if they reveal “intimate details of a person’s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends.” Consistent with legislative intent, we must also examine the public interest in disclosure.

Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101, 110 (1993) (citation omitted). Here, “intimate details” about third parties have been redacted, including dates of birth, addresses, and other related information, as such details are considered “personal documents” that could lead to harassment and perhaps embarrassment. I cannot discern any public interest in the disclosure of such information here. Accordingly, leaving aside the information redacted for purposes of preventing the commission of a crime, the redactions in the records also are proper under subdivision 317(c)(7).

IV. Conclusion

For these reasons, your appeal is granted in part and denied in part, and, as requested, the specific bases for redactions are noted within the record. However, I have also determined that certain information is not exempt from disclosure. Accordingly, such information is no longer redacted. Although the redactions are proper under subdivisions 317(c)(5)(A)(iii), 317(c)(5)(D), and 317(c)(7), in the event that DPS receives a subsequent request for records relating to incident number 17A503639, it reserves the right to apply any and all appropriate exemptions to any subsequent request. See *Dickerson v. Dep’t of Justice*, 992 F.2d 1426, 1430 n.4 (6th Cir. 1993) (explaining that “where exemption (7)(A) has become inapplicable,” records may still be protected under other exemptions).

Finally, please accept this as notice that you have the right to appeal my decision to Superior Court pursuant to 1 V.S.A. § 319.

Sincerely,


Thomas D. Anderson
Commissioner