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Adam Steinbaugh
Foundation for Individual Rights in Education
510 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106

Krista Stearns
Assistant General Counsel
Portland State University
P.O. Box 751
Portland, Oregon 97207

Re: Petition of Adam Steinbaugh, on behalf of the Foundation for Individual Rights in Education (FIRE), seeking audio recordings from police body cameras

Dear Mr. Steinbaugh and Ms. Stearns:

In his public records petition, received by this office on March 13, 2019, Adam Steinbaugh, on behalf of the Foundation for Individual Rights in Education (FIRE), requests that we order Portland State University (PSU) to release the audio portion of police body camera recordings generated during an event on January 24, 2019.

On January 24, 2019 the PSU International Socialist Organization was scheduled to have a meeting in a room on the PSU campus. Information was posted on social media in advance of that meeting indicating that individuals associated with the Patriot Prayer movement intended to come to this meeting as well. PSU elected to cancel the meeting, citing safety concerns. Multiple PSU police officers in the company of the PSU police chief were present at the meeting location and informed the organizers of the cancelation. PSU police officers wear body cameras and, here, three such cameras recorded anywhere from five to 25 minutes of audio and video surrounding the interactions between the officers and the meeting attendees.

In the aftermath of this cancelation, FIRE submitted a public records request that broadly sought records concerning the actions of PSU public safety officials relating to this event. PSU has already provided certain documents to FIRE pursuant to this request, but withheld the body camera recordings citing ORS 192.345(40). PSU also informed FIRE that, if released, it would cost \$108.36 per minute of footage to apply the statutorily mandated redactions to the faces of people visible in the video. FIRE attempted to narrow its request, specifying that it did not seek any video footage and only wanted the audio feed from the cameras. PSU asserted that it neither could, nor would, provide an audio-only version of the recordings.

FIRE has appealed to this office requesting that we order PSU to release the audio track from these three body camera recordings. For the reasons discussed below, we grant the petition.

DISCUSSION

A. Police body camera recordings – ORS 192.345(40)

ORS 192.345(40) conditionally exempts from disclosure,

Audio or video recordings, whether digital or analog, resulting from a law enforcement officer's operation of a video camera worn upon the officer's person that records the officer's interactions with members of the public while the officer is on duty.

Both parties agree that the record at issue fits within this description, the only contested issue is whether or not the public interest nonetheless requires disclosure in this instance. In such cases, the reviewing authority must determine “the nature and significance of two competing interests—the public's interest in disclosure and the public body's interest in confidentiality” and then “balance those competing interests and determine, as a matter of law, which interest predominates.” *ACLU v. City of Eugene*, 360 Or 269, 271 (2016).

Here FIRE has accused PSU of violating the First Amendment right of assembly of its students by its unilateral cancelation of their meeting. The apparent context of the cancelation, in response to public statements by Joey Gibson that he intended to attend the meeting, and his encouragement of other members of his organization to likewise attend, also weighs into the analysis. Mr. Gibson and the Patriot Prayer organization have been the subject of much local media attention. The response of local government to him and Patriot Prayer has likewise been the subject of ongoing public scrutiny.

PSU argues that the creation of this exemption demonstrates a legislative recognition that “body camera footage often contains information that is considered potentially private, sensitive or confidential and that it should not automatically be subject to disclosure.” Such recordings can include images “of people in their most vulnerable state” that could “expose personal habits and affects, disclose conditions in their home, and otherwise capture personal information.” We agree with all of these statements in the abstract. But, having reviewed the audio and video feeds in question, none of those interests are implicated by the recordings in this case. We also reject, without detailed discussion, PSU's argument that individuals in a public space have a generalized expectation of privacy.

Under *ACLU v. City of Eugene* we find little particularized interest on PSU's part in the confidentiality of these recordings and some public interest in the governmental response to the event at issue. Accordingly, the balance tips in favor of disclosure.

B. Response to a records request – ORS 192.329(2)

Having concluded that the records at issue are not exempt from disclosure, we turn next to the question of in what form they must be released. PSU asserts that extracting the audio portion of the body camera recordings would involve creating a new record, which it is not required to do under the public records law. FIRE responds that releasing only a portion of a record does not constitute creating a new record, rather it involves releasing a partial record.

The plain text of ORS 192.345(40) addresses the audio and video portions of a body camera recording separately. The section exempts from disclosure “audio or video recordings” that result from the operation of a “video camera.” When a “video” recording is to be released, ORS 192.345(40)(c) further provides that all faces visible must be “rendered unidentifiable.” No mandatory redaction provision is made for audio recordings, though they remain electively subject to any other applicable public records exemption.

A digital video file is a container that contains multiple “tracks.” Each track contains audio or video data that will play in concert with the other tracks when viewed in the appropriate player software. With modern video editing software it is a trivial matter to delete, and thereby redact, an entire “track” of a video file. PSU has offered no suggestion to this office that its video in this case is for technical reasons resistant to such redaction. If PSU has the technical ability to comply with the requirement that it redact only the faces present in a body camera video feed prior to release, a fairly complex video editing task, it is not possible that it lacks the capacity save an audio-only version of these video files.

Contrary to how the parties have framed the issue, this is not a question of creating a new record, but rather of the format in which a record must be produced. In *Petition of Kessler*, MCDA PRO 18-35 (2018), we addressed the similar question of whether or not the City of Portland was required to separately provide only the “metadata” of various emails. That is, was it required to provide the addressing and header information separately from the content of the messages. We concluded that because it did not maintain a “metadata-only” version of the emails, it did not have to produce the record in that form pursuant to ORS 192.324(3). However, the City was required to produce the emails in their native format, but with the understanding that it could redact the non-responsive portions of those emails.

However, *Kessler* is distinguishable here in that the legislature has expressly addressed the audio and video components of a body camera recording as separate items. This is consistent with our understanding of the nature of digital video files as a container holding separate audio and visual components and of the trivial nature of separating the two.

Separately and alternatively, if a digital video file is viewed as a single record, as we found the email files in *Kessler* to be, obscuring the entire video track can be seen as a “redaction” of the record. Certainly ORS 192.345(40)(c)’s requirement that the video be edited so that the faces are rendered unidentifiable could be accomplished by obscuring the entire video track.¹ It would create an odd result and an unreasonable barrier to access were a public body able to charge a requestor for its time to review and segregate into exempt and non-exempt portions of a record that a requestor has expressly not asked for.²

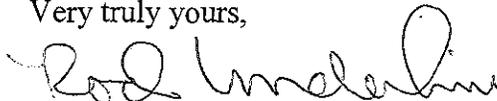
¹ We do not mean to suggest that a police agency may comply with ORS 192.345(40)(c) by obscuring the entire video track where a requestor has actually requested the video portion of the recording. We simply note that an agency is always permitted, with the consent of the requestor, to redact more of a record than it would otherwise be legally entitled to in order to economize time, effort, and associated fees.

² An agency can assess fees for the time necessary to, at its election, either extract the requested portion of the record or blanket redact the undesired portions of the record.

ORDER

Accordingly, the petition is granted. Portland State University is ordered to promptly provide FIRE with the three body camera recordings at issue with the video portion either deleted or otherwise entirely redacted. This production is subject to the payment of fees, if any, not to exceed PSU's actual costs in producing the requested records.

Very truly yours,



ROD UNDERHILL

District Attorney

Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.

19-07