**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

| | |
|---|---|
| **BLACK LIVES MATTER D.C. et al.,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**MURIEL BOWSER et al.,**<br><br>**Defendants.** | Case No. 2018 CA 003168 B<br>Calendar 13<br>Judge John M. Campbell |

**ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION**

This is before the Court on the plaintiffs' motion for a preliminary injunction. This order grants that motion; as background, it also explains in more detail the reasons for the Court's denial of the defendants' motion to dismiss.

## I. Factual Background

The Neighborhood Engagement Achieves Results Act (NEAR Act) went into effect in the District of Columbia on June 30, 2016. Its seven titles mandate various changes to the District's criminal justice, public health, and safety programs and policies. Title II(G) of the Act amended D.C. Code §5-113.01, entitled "Records - Required," pertaining to the Metropolitan Police Department, to require "the Mayor [to] cause the Metropolitan Police force to keep records" of the following information about all police stops made in D.C.:

A. The date, location, and time of the stop;
B. The approximate duration of the stop;
C. The traffic violation or violations alleged to have been committed that led to the stop;
D. Whether a search was conducted as a result of the stop;
E. If a search was conducted:
    i. The reason for the search;

ii. Whether the search was consensual or nonconsensual;
iii. Whether a person was searched, and whether a person's property was searched; and
iv. Whether any contraband or other property was seized in the course of the search;

F. Whether a warning, safety equipment repair order, or citation was issued as a result of a stop and the basis for issuing such warning, order, or citation;
G. Whether an arrest was made as a result of either the stop or the search;
H. If an arrest was made, the crime charged;
I. The gender of the person stopped;
J. The race or ethnicity of the person stopped; and
K. The date of birth of the person stopped.

D.C. Code §5-113.01(a)(4B).

If there was any doubt, given the nature of the data to be collected under this mandate, the legislative history of the NEAR Act makes plain that these records were not simply to be kept in case MPD wished to use them for its own internal agency monitoring purposes. Rather, the purpose, evident in the mandate itself and explicit in the Committee Report, was this: "Open data institutionalizes a culture of transparency and accountability. When police departments share data with the public, it not only furthers this culture but increases opportunities for community participation and collaboration in policing." D.C. Council, Report on Bill 21-0360 at 23 (January 27, 2016) (emphasis added) (Knizhnik Decl. Attach. A at 23).[1] Indeed, counsel for the District acknowledged this dominant underlying purpose in a September 28, 2018, status hearing. The central purpose of the legislation, then, is not just to collect information about police encounters, but to have that information become "open," able to be "shared," and thus accessible to the public. The command to collect and keep the data is instrumental, serving the larger purpose of transparency and accountability on the part of MPD.

[1] Some of the legislative history and other materials cited in this section are most conveniently found as a series of attachments to a document titled Declaration of Shana Knizhnik, which is itself an attachment to the plaintiffs' Motion for a Preliminary Injunction. For simplicity's sake, they will be cited here as "Knizhnik Decl.," followed by the letter designation and page number of the attachment. For example: Knizhnik Decl. Attach. A at 23.

The record shows, and the District does not seriously dispute, that essentially no progress was made towards achieving this goal in the two years between the NEAR Act's effective date and the filing of this lawsuit. The D.C. Council allocated $150,000 for fiscal year 2017 (beginning October 2016) in order to implement the data collection requirements of the NEAR Act. This was based on an analysis by the District's Chief Financial Officer, concluding that this amount was sufficient. Knizhnik Decl. Attach. B at 128, Attach. C at 7-9. On April 5, 2017, in response to a FOIA request, the ACLU was informed that "although the NEAR Act became law, it has not been implemented … and existing records do not contain the NEAR data." Knizhnik Decl. Attach. R. Earlier, in a February 27, 2017, letter to a D.C. Councilmember, MPD Chief Newsham stated that complying with the Act was "challenging," and that while MPD was "working to come into compliance," it had to evaluate where these changes fit with "mission critical objectives" that assertedly took priority. Knizhnik Decl. Attach. G at 56-57.

A full year later, almost two years after the Act was passed, matters had not progressed. In February 2018, Defendant Donahue, the Deputy Mayor for Public Safety and Justice, acknowledged to the D.C. Council Judiciary Committee that MPD was not collecting data required by the Act, and that to do so would require a "fundamental change" to computer systems and/or a new "police protocol." He said the government had "turned [its] attention" to discovering what changes might be required. D.C. Council, Judiciary Committee Oversight Hearings (Feb. 22, 2018). Defendant Newsham acknowledged the same in his responses to the Committee. Knizhnik Decl. Attach. K at 54. In March, in a Judiciary Committee oversight hearing, Defendant Donahue elaborated on the same point, stating that he did not know how long it would take to change MPD's computer systems, or how much it would cost. Pressed to explain why it took almost two years to realize this, he testified that D.C. had "sequenced"

implementing the NEAR Act behind other provisions of law. D.C. Council, Judiciary Committee Oversight Hearings (Mar. 29, 2018). The witnesses provided no timetable for implementing the requirements of the statute. At approximately the same time, the plaintiffs submitted another FOIA request, for all NEAR Act data to date (almost two years), and for any documents reflecting a plan for achieving full implementation. Knizhnik Decl. Attach. S. In early May 2018 the government responded with samples, showing no change in data collection practices since the Act's passage. Knizhnik Decl. paragraph 6. The government provided no response to the request for documents reflecting an implementation plan. *Id*.

This action was filed on May 4, 2018. The plaintiffs subsequently moved for a preliminary injunction that would require compliance with the NEAR Act's data collection mandate on some set schedule. The District opposed the motion on jurisdictional grounds, arguing lack of standing and that the case raised a political question, and also contended that there was no available cause of action that the plaintiffs could assert. On the merits, the District denied that the delay recounted by the plaintiffs was unreasonable, attributed it to inherent issues in modifying computer systems, and argued generally that injunctive relief was not appropriate. The District later filed a motion to dismiss the case on the jurisdictional and cause-of-action grounds. The Court held hearings and heard arguments from counsel on all these issues on September 28, October 5, November 2, and November 16, 2018.

## II. The Motion to Dismiss

The Court denied the motion to dismiss from the bench on November 2, 2018.

As to the political question doctrine, the defendants argued that because the NEAR Act explicitly places responsibility for enforcement of the Act in the executive, the exercise of that

responsibility is insulated from judicial review. The Court agreed with the plaintiffs, however, that the political question doctrine is far narrower. It simply does not hold that legislative directives placing responsibility for implementing a particular matter in the executive can never be reviewed by the courts. In fact, courts do exactly that, routinely and in a variety of contexts. *See* Plaintiff's Opposition to Defendants' Motion to Dismiss at 7-8 (citing cases). This is not a circumstance when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political branch," *Baker v. Carr*, 369 U.S. 186, 217 (1962), within the meaning of separation of powers jurisprudence.

On the question of standing, the defendants contended that the plaintiffs have failed to plead or show that they have suffered an injury-in-fact, specifically in the form of what is called "informational injury." Informational injury occurs when an organization shows that "(1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm [the legislature] sought to prevent by requiring disclosure." *Elec. Privacy Info. Ctr. v. Pres. Advisory Comm'n on Election Integrity, 878 F.3d 371, 378 (D.C. Cir. 2017) ("EPIC"*) (citation and internal quotation marks omitted).

Under the first part of this test, the plaintiffs must show that the statute requires that information be disclosed to them, and that this has not happened. The plaintiffs acknowledged that the statute is silent about disclosure. The NEAR Act says MPD is to "keep" records. It does not say "publish" or "disseminate" or "make publicly available" whatever records are kept. As noted above, however, this question is answered by the statute's clear purpose, as made plain in its legislative history, and as conceded by government counsel in oral argument to the Court. The instruction to "keep … records" encompasses a mandate to collect data to begin with, but

then also to make it accessible to the public in order to further "opportunities for community participation and collaboration in policing." Committee Report, at 23. The Committee Report describes this in terms of "releasing … data sets" to the public. *Id.* Simply put, participation and collaboration cannot happen if the community does not have the information that is supposed to be contained in the records.

It is also clear, in any event, that a "public disclosure" provision in the statute itself was unnecessary, given the existence of the D.C. Freedom of Information Act, D.C. Code §2-531-539. There is no dispute that MPD is subject to FOIA, and specifically that the information at issue here is subject to disclosure under FOIA – or would be, if it had been collected. The record here shows, moreover, that all three plaintiffs filed FOIA requests asking MPD to release data collected under the NEAR Act, and that the requests could not be complied with only because MPD had not collected the information required by the statute. As the plaintiffs argue, MPD therefore deprived them of information that, "on [their] interpretation" of the law, they are entitled to obtain. *EPIC*, 878 F.3d at 378.

The second part of the "informational injury" test for standing is whether the denial of information to these plaintiffs is the sort of harm the legislature intended to prevent. This requirement has the effect of screening out plaintiffs who are trying to force an agency to do something that is unrelated to any statutory purpose to collect and report data, by claiming that if the agency did as they demand, it would generate data that the plaintiffs could then acquire through FOIA. *See, e.g. American Society for the Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011); *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 113 (D.D.C. 2009); *Judicial Watch, Inc. v. Office of Director of National Intelligence*, 2018 U.S. Dist. LEXIS 47595 (D.D.C. Mar. 22, 2018). This requirement is easily

met here. As noted above, the entire purpose of this section of the NEAR Act is to collect and preserve data; and at least one purpose of collecting the data – indeed, to judge by the legislative history, the primary purpose – is to be able to share it with the larger community, as the District has conceded. There is no serious doubt about this. The plaintiff organizations, for their part, assert without contradiction that they have thousands of members in this community, and that their organizational purposes include monitoring and seeking to prevent police misconduct.

The defendants also argued that the defendants do not and can not state a claim because, according to the defendants, there is no common-law cause of action that can be brought in this court for unreasonable delay in implementing a statutory mandate (or for not implementing it at all, for that matter). If this is the law, it means that there is no judicial remedy available to compel MPD to do what the law says it must do.

The defendants pointed to the wording of the complaint, which alleges in paragraph 34 that the defendants' "continuing failure to implement the statutory requirements of Title II(G) of the NEAR Act constitutes 'unreasonable delay' of a statutory mandate, for which relief is available under this Court's general equitable powers." Because the phrase is in quotation marks, the defendants searched for its origin. They found it in the D.C. Administrative Procedure Act, D.C. Code §2-510(a), which permits judicial review of an agency "order or decision," and includes a remedy "to compel agency action unlawfully withheld or unreasonably delayed," *id.* §2-510(a)(2). Such review is available, however, only in a "contested case," and only by petition to the D.C. Court of Appeals, not to the Superior Court. This case, obviously, is not brought under the DCAPA, fits none of these limiting criteria, and is not brought in the Court of Appeals. The defendants asserted that they can locate no comparable common-law cause of action for unreasonable delay *per se*, and, further, that there is no support for believing that this

court's general equity powers extend to reviewing agency action or inaction generally, as opposed to reviewing specific agency decisions or orders in a typical "contested case."

The Court rejected this argument. It is true that the Complaint borrows a phrase from the DCAPA to describe what it contends is an unlawful act by the MPD. It is also true that this case is not brought under the DCAPA. This, however, is irrelevant. First, the Court reads the use of the phrase "unreasonable delay" as being descriptive of the facts, not necessarily as an effort to invoke a particular statute or body of law. To the extent it echoes a phrase from the DCAPA, it also echoes the general equitable notion that an agency of the government, charged by law with doing a particular thing, should be subject to challenge in the courts by affected parties if the required action is not taken. This is a bedrock proposition, uncontroversial, and consistent with basic principles of judicial review and the rule of law. It is not peculiar to the DCAPA.

Consistent with this, review by the Court of Appeals in contested cases under the DCAPA is not, as defendants seem to suggest, the exclusive avenue for review of agency actions or failures to act. To the contrary, the DCAPA process is an exception to the Superior Court's general jurisdiction to adjudicate civil actions at law or in equity that involve local D.C. law. *Nunnally v. D.C. Metro. Police Dep't*, 80 A.3d 1004, 1008 (D.C. 2013). This jurisdiction presumptively extends to cases, like this one, seeking equitable relief from the allegedly unlawful exercise of agency discretion. *Id*.; *Martin v. District of Columbia Courts*, 753 A.2d 987, 991 (D.C. 2000); *District of Columbia v. Sierra Club*, 670 A.2d 354, 358-59 (D.C. 1996). As the Court of Appeals emphasized in the *Sierra Club* case, "the availability of review by this court of agency decision in 'contested cases' … does not preclude judicial review in other matters, because 'any party aggrieved by an agency's decision may initiate an appropriate equitable action in the Superior Court to seek redress.'" 670 A.2d at 359 (citation omitted). This

"strong presumption" favoring judicial review "'reflects a recognition that review is essential to promoting agency responsiveness to legislative mandates …. Unreviewability gives the executive a standing invitation to disregard … statutory requirements.'" *Id*. at 358 (quoting *People's Counsel v. Public Serv. Comm'n of the District of Columbia*, 474 A.2d 1274, 1278 n.2 (D.C. 1984) (Ferren, J., concurring)). Here, plaintiffs seek precisely such judicial review.

For these reasons, the Court ruled that the case presents a justifiable question, that the plaintiffs having standing to bring it, and that the Complaint states a cause of action. The Court therefore denied the motion to dismiss.

**III. The Motion for a Preliminary Injunction**

The plaintiffs moved for a preliminary injunction. They sought an order generally directing the defendants to cease unreasonably delaying the implementation of the data collection requirements of the NEAR Act. Specifically, they asked the Court to order the defendants to make changes to their IT data collection forms and databases, to train officers to use the new or revised system, and to begin collecting data using this system within a certain time frame.

"A preliminary injunction is an extraordinary remedy, and the trial court's power to issue it should be exercised only after careful deliberation has persuaded it of the necessity for the relief." *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1975). Preliminary injunctive relief may be warranted when the moving party demonstrates "(1) that there is a substantial likelihood [it] will prevail on the merits; (2) that [it] is in danger of suffering irreparable harm during the pendency of the action; (3) that more harm will result to [it] from the denial of the injunction than will result to the defendant from its grant; and, in appropriate cases, (4) that the public interest will not be disserved by the issuance of the requested order." *In re Estate of Reilly,* 933

A.2d 830, 834 (D.C. 2007). Relief does not necessarily require a "mathematical probability of success on the merits." *Id.* at 837. The degree of probability of success needed "will vary according to the court's assessment of the other factors pertinent to the analysis." *Id.*

In their motion for a preliminary injunction, the plaintiffs had initially requested that the Court order the defendants to make changes to the software system that MPD already uses to record information about stops, in effect creating a new digital form that would allow additional information (required by the NEAR Act but not covered by the existing software) to be captured. The plaintiff opposed this solution on many grounds, including that a court should not be in the business of trying to manage an executive agency's IT solutions. At an early hearing, however, the Court asked why MPD could not merely provide its officers with a new one-page form, digital or not, that simply asked for the categories of information required by the NEAR Act, as at least an interim solution while the main digital system was modified. Following up on this, the plaintiffs attached just such a sample form to an October 26, 2018, filing. Plainly, producing such a form was not difficult, and the form they produced was itself simple; it also was indeed limited to a single page.

The defendants persistently opposed this solution. They argued among other things, that it would represent yet "one more form" for busy officers to fill out, and would add unnecessary and potentially harmful redundancy from the point of view of the Jencks Act, for example. Instead, the government announced on October 5 that it intended to implement an interim solution that would not require reworking its digital system in the short term, and would not require any additional forms. The Court directed defendants to file a report by October 19, 2018, laying out their plans for that implementation. The defendants did so, and in their status report announced that "the District will be in compliance with Title II(G) of the NEAR Act by

November 2018." On instructions from the Court, the defendants filed a supplemental status report on November 15, 2018, in order to clarify exactly how and in what form their interim solution would assertedly collect the data required by the Act. The plaintiffs responded to both of these filings, in writing and at hearings held on November 2 and November 16, laying out their objections to both the scope and the sufficiency of the defendants' plan.

At this point, in sum, the focus of the dispute had effectively become the issue of irreparable harm. The District defendants contested the Court's authority to enter any order at all (as well as the plaintiffs' standing to complain), but they did not seriously disagree that their delay in implementing the NEAR Act had been lengthy. They had no persuasive explanation for this. Rather, they contended – plainly under the pressure of this lawsuit – that an injunction was unwarranted because they were, finally, now making progress towards implementation.

A. The Existing Data Systems

In order to understand the defendants' interim plan, it is first necessary to set out briefly how MPD collects data on police stops. The defendants' two status reports (filed October 19 and November 15, 2018) explain the process.

To summarize, stops by police are currently recorded in two different electronic systems. First, for traffic, bicycle, or pedestrian stops that do not result in an arrest or search, police issue a Notice of Infraction or "NOI" form, resulting in a citation or a written warning. Anyone who has ever received a parking ticket or a traffic ticket knows what this form looks like. *See* Defendants' November 15, 2018, Status Report, Ex. 2 (reproducing copy of NOI form). The NOI form's information is entered into an electronic ticketing information management system (eTIMS) operated by DMV through its contractor, Conduent. The current form captures some, but not all, of the information required by the NEAR Act. Specifically, it records four of the

seven applicable mandatory data points: the date, time, and location of the stop (required by subpart "A" of the statute, D.C. Code §5-113.01(a)(4B)); whether a warning or citation was issued, and its basis (subpart "F"); the gender of the person stopped (subpart "I"); and the person's date of birth (subpart "K").[2] The form does not record the remaining three pertinent requirements imposed by the NEAR Act: (1) the duration of the stop (subpart "B"), (2) the alleged violation that led to the stop (subpart "C"), and (3) the race or ethnicity of the person stopped (subpart "J").

Second, for all other stops – those resulting in a search or in an arrest – the officer enters information into MPD's own electronic system, called "COBALT," maintained by MPD's contractor, Mark43. The resulting information is kept in MPD's Records Management System (RMS). Like the NOI form, the existing RMS form has fields for some but not all data required by the Act. Specifically, there are spaces on the form for the date, time, and location of the stop (subpart "A"); the length of the stop (subpart "B"); whether property was seized in a search (subpart "E(iv)"); whether a warning or citation was issued, and its basis (subpart "F"); whether an arrest was made (subpart "G"); if so, the crime charged (subpart "H"); the person's gender (subpart "I"); the person's race or ethnicity (subpart "J"); and the person's date of birth (subpart "K"). The existing RMS form does not have specific fields for six categories of data called for by the Act (subparts "B" through "E(iii)"): the length of the stop; the alleged violation that led to the stop; whether a search was conducted; the reason for any search; whether the search was consensual; and whether the search was of a person or a person's property.

[2] Because no search or arrest is involved, by definition, in NOI stops, several subparts of the statute are not applicable. They are subparts D, E, G, and H, pertaining to searches and arrests.

B. The District's Interim Solution

As noted, the District declined the invitation to fill these gaps by using an additional one-page form. The District also averred that it was not technically possible in the near term to revise its existing systems to add fields for the missing data.

The District's alternative solution was essentially two-fold. First, for RMS stops (those resulting in arrests or searches), MPD would instruct its officers to type the missing data fields into a section of the form called "Internal Narrative." Thus, the officer would be expected to write out in narrative form the ostensible reason for the underlying stop, and how long it lasted; and, if a search was conducted, the reason for it, whether it was consensual, and whether a person or property was searched. Second, for NOI stops (citation or warnings), MPD would rely on other technology to provide the missing information: body-worn cameras, or BWCs. Each officer's camera would record the officer saying, to the person stopped "Per the NEAR Act, as passed by the Council of the District of Columbia, I am required to ask your gender, race or ethnicity, and date of birth." *See* MPD General Order 304.10, at 15 (eff. date November 9, 2018) (attached as Exhibit 1 to Defendants' November 16, 2018, Status Report). Presumably, if the person answers, and if the camera accurately captures the answer, the information will be, literally, recorded.[3] In addition, the officer would be required to say, "You were stopped because of (specific violation indicated here)," thus recording the reason for the stop. *Id.* at 16. Finally, in order to learn the duration of the stop, one will have to watch the recording all the way

[3] The NOI form already asks for the person's gender and date of birth. For race or ethnicity, however, the camera footage would be the only record.

through, measuring the time. This information in the government's view is nevertheless in "record" form.[4]

In the last two weeks, the plaintiffs have filed three supplemental memoranda regarding the practical implementation of the defendants' plan to have body-worn camera footage substitute for written records of key information about NOI stops. On June 13, the plaintiffs reported the results of a FOIA request to MPD for records from November 9, 2018 (the effective date of General Order 304.10, implementing the government's plan) to the date of the search, seeking all records of traffic stops showing the race or ethnicity of the person stopped. The email response from MPD's FOIA officer, attached as Exhibit B to the filing, confirmed (1) that the only records being kept of race and ethnicity are BWC videos; (2) that the requested records consisted of 31,521 individual videos; and (3) that "to process this many videos will take quite some time and effort to complete." In short, to compile understandable data regarding something as fundamental as the race of people stopped but not searched or arrested by MPD officers, over a mere six-month period, requires physically watching more than 31,000 individual videos of individual stops, before then transferring the information to some usable form, video by video.

The plaintiff's second supplemental filing, on June 21, directly addressed an issue also mentioned in the previous filing: cost. The plaintiffs had received an invoice from MPD for processing 1,077 of the 31,521 responsive videos. The invoice was for $310,362. Projected out to all 31,000-plus videos, this would come to more than $9 million, just to receive the videos. Of course, this does not account for the time and expense of then having to view, record, and aggregate whatever actual information can be gleaned from these "records."

[4] The defendants produced a very helpful summary chart of this information at pages 2-4 of their November 15, 2018, Status Report. For each category of stop, the chart shows where each data point required by the NEAR Act is to be collected according to this plan – on an existing form, in a supplemental "internal narrative," or via body-worn camera.

On June 24, the plaintiffs filed a third supplement. They reported that shortly after they filed the second supplement (with its $9 million cost projection), they received an email from MPD's Deputy General Counsel, announcing that the police department was retracting the previous invoice. The email explained that MPD was "exploring whether recently updated technology" might make it possible to process the videos in-house, which might be more economical and efficient.

C. Analysis

1. Likelihood of Success on the Merits. The Court finds, first, that the plaintiffs have adequately demonstrated a likelihood of success on the merits. That success, in this case, would mean that they were entitled both to declaratory and injunctive relief regarding their claim of unreasonable delay.

The Court has already reviewed the defendants' inability, over the past three years, to offer any substantial explanation for their non-action. They have invoked the opaque explanation that altering digital systems takes time. But they have given no reason to believe that, at least before this lawsuit was filed, they had taken anything beyond the most preliminary steps toward accomplishing that modification. The best that they could offer was defendant Donahue's statement to the Judiciary Committee that the District had "sequenced" implementation of the NEAR Act behind other actions. For whatever reason, the government simply had not got around to it.

Moreover, none of this even purported to address why the defendants had given no thought to a low-tech, short-term, temporary measure that could collect the required data, even in non-digital form, while the digital systems were upgraded. Yet in the Fall of 2018, during the hearings on this motion, it became apparent that such solutions could readily be imagined. The

plaintiffs proposed that MPD simply require its officers to fill out a one-page form, and provided an example of what such a form might look like. The defendants responded with their own interim solution, attempting to recruit existing technologies; and whatever the merits of their proposal, it took only a few weeks to accomplish from invention to full implementation. Plainly, temporary interim solutions could have been deployed within weeks of the statute's effective date, had anyone put their mind to it.

Finally, the solution that the defendants did finally proffer as a supposedly compliant and effective interim measure was fatally flawed. The basic proposition is that, for NOI stops, it is sufficient to purport to collect "records" about essential data points – race, ostensible reason for stop, and duration of stop – in the form of body-camera video footage. To find the "data" on a single video, one has to watch the entire recording, lasting 5-10 minutes or longer, and then has to do this for every stop, simply in order to compile a meaningful data set. One also has to pay for this privilege, because MPD requires FOIA requesters to pay for the process of redacting the faces of uninvolved individuals and then reproducing the video. As noted above, this could run to the millions of dollars for even six months of video footage, barring some unspecified "updated technology" that might lessen the cost. Having to pay huge sums to receive the videos on all stops, and then to spend countless hours viewing the videos and recording the pertinent information, puts this data, such as it is, effectively out of reach of the community and of organizations like the plaintiffs. This undercuts the statute's important purposes to promote transparency, police accountability, and community involvement.[5] The District's "plan" in the

[5] The plaintiffs also argued, as to "non-NOI" stops – resulting in arrests or searches – that having officers resort to writing a narrative about key required facts was cumbersome and inherently unreliable, creating unpredictable and un-normed responses that would be extremely difficult to aggregate and analyze. Instead of looking to see whether a box on a form was checked or not, a member of the public would have to wade through paragraphs of prose in order to extract the needed data. The plaintiffs conceded that this aspect of the plan might conceivably be

Fall of 2018 was in fact an improvisation, cobbled together on the spur of the moment from existing technologies in the hope of forestalling judicial action while making no real changes to existing systems or practices. It was not what the community, or the City Council, might reasonably have expected even much earlier in the preceding two and a half years: namely, a considered, short-term, plan to comply with the statute while computer systems were being updated.

The lack of an acceptable explanation for the long delay before the lawsuit was filed; the lack of a known timetable for full implementation; the apparent fact that plausible short-term solutions could have been put in place virtually immediately after the statute was enacted; and the inadequacies of the interim solutions that the defendants eventually did adopt: all testify to the unreasonableness of the delay here.

2. Irreparable Harm. As noted earlier, the Court considers the crux of this matter to be the second factor: whether the plaintiffs are likely to suffer irreparable harm in the absence of an injunction. The defendants have conceded that they have not permanently implemented the NEAR Act's data requirements. They contend, however, that they intend to do so in the relatively near future ("end of summer" 2019), and that in the meantime their interim plan fills the gap sufficiently to make an injunction unnecessary.

Every day that data required by the statute is not collected, or is collected in a format so inaccessible and fragmentary as to make its collection useless in a practical sense, that data is lost. Either it can never be retrieved because it was never captured, or it is walled off from public access by technical and financial obstacles. The Court agrees with the plaintiffs that this harm is comparable to the destruction of records that do exist and that would otherwise be

---

technically compliant with the law, assuming that the data were in fact collected, but that it seemed designed to thwart the statute's goals.

responsive to a FOIA request. *Landmark Legal Found v. E.P.A.*, 910 F. Supp 270, 280 (D.D.C. 2012). This harm is compounded by the fact that the data at issue is not information that might come into existence simply as an incidental product of MPD's ordinary functioning. The whole purpose of this provision of the NEAR Act is to cause this data to exist and to be accessible; the failure to collect it undermines the entire statutory provision. The plaintiffs have demonstrated, further, that they are the very types of entities that have a legitimate interest in the data. The Court, finally, rejects the argument that there is any significance to the fact that at some point in the past the plaintiffs abandoned what were obviously futile efforts to obtain data through FOIA, after they were informed that it did not exist. The plaintiffs have, in any event, renewed that effort.

In sum, information at the heart of the NEAR Act's "open data" purposes, information that is not only mandated by the Act but that is absolutely essential to a full public understanding of police stops in the District, is not being collected in a comprehensible, accessible, usable form. It is no answer to say that the information is somewhere on a video clip, of which there are tens of thousands, ready to viewed. The idea of collecting data has meaning only in the aggregate. You cannot know how the police are interacting with citizens until you have aggregated information about all such interactions, and you cannot reasonably aggregate it if doing so requires paying for and watching thousands and thousands of videos. Even this assumes that the information actually is on the video – that is, that the camera was on and functioning properly, that the officer asked the required questions, and that the person who was stopped answered them. Second, the defendants have provided no record evidence showing any specific timeline or timetable for implementing a permanent modification to the digital systems that MPD uses. In any event, regardless of MPD's future plans, at present data that is required by law to be

collected is not being recorded in a usable form. The Court is satisfied that this harm is, in practical terms, irreparable.

3. Remaining Factors. The defendants did not directly address the third and fourth factors determining an award of injunctive relief – whether the balance of harms weighs in favor of granting the relief, and whether doing so would serve the public interest. To the extent the defendants suggested in court that they would be harmed by having to require officers to fill out another form, the Court is unpersuaded either that this is in fact a significant burden or that it in any way compares to the harm caused by losing mandated data. It is a reality of life as a police officer that the job requires paperwork. The Court does not discount that even one more short form adds in some measure to the officer's workload; but if this is the price of collecting information that the City Council has determined is necessary to an effort to improve transparency, accountability, and community trust, then the cost is slight. Finally, the Court thinks it is beyond debate that requiring the defendants to comply with this statute, immediately, is in the public interest, if only because "excessive delay saps the public's confidence in an agency's ability to discharge its responsibilities." *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1034 (D.C. Cir. 1983). Here, there is more – the delay robs the community of essential information about the interactions of its police officers with its citizens.

## IV. The Remedy

From the start, the Court has expressed its reluctance to grant injunctive relief, in effect telling any agency of a coordinate branch not simply to do its job, but specifying what exactly it must do. As the Court had made clear, it was satisfied that it held the authority to do this; the question has been whether it was prudent and appropriate to exercise it. Frankly, the Court has

delayed making a final decision in the hope that the defendants, having seen the writing on the wall, as it were, during last Fall's hearings, would modify their interim solution in order to comply fully with the Act in the near term. It appears, however, that this hope was not well-founded, and that judicial intervention is now both warranted and necessary.

Preliminarily, the Court does not agree with the plaintiffs that collecting required data on the RMS form's "internal narrative" section fails to comply with the statute. Clearly, the plaintiffs are correct that calling for data to be narrated by the officer is unwieldy, and is likely to yield inconsistent and difficult-to-collate results. But it is recognizably a "record" that can be obtained, and with some effort, transferred to a more usable data set. The Court declines to conclude that it contravenes the NEAR Act to follow this protocol as an interim measure.

The Court reaches a different conclusion regarding data being collected through body camera footage. The particular data points ostensibly being collected by body camera videos for NOI stops – the person's race; the supposed reason for the stop; and how long the person was stopped – in some ways form the very core of what the NEAR Act intends to make transparent and publicly available. It takes no leap of imagination and no resort to extra-record sources to understand that this Act aims to address questions and suspicions that vex many citizens: whether the police are targeting or profiling members of certain racial groups, and thus whether the heavy weight of police action falls disproportionately on those groups. The City Council concluded that the best way to combat mistrust or suspicion of the police, and to improve accountability, is through transparency – through facts, data. But if some of that data either is not collected or is collected in a form practically unusable by the public, then the law becomes hollow. For the reasons discussed at length above, the Court concludes that the data collected

solely by body camera does not constitute a "record" within the particular meaning of the NEAR Act, and that the defendants continue not to be in compliance with the statute.

The Court concludes that it must order the defendants to comply with the NEAR Act immediately, and that it specifically must order them to do so in a way that collects the information discussed above, which is currently being collected for NOI stops solely by body camera, on a written form. The simplest and least intrusive way to do this, as far as the Court is informed, is by means of the one-page form produced by the plaintiffs, attached as an exhibit to their October 26, 2018, response to defendant's status report, and attached also to this Order.

Accordingly, it is this 27th day of June 2019

**ORDERED**, that the plaintiff's motion for a preliminary injunction is GRANTED; and it is further

**ORDERED**, that Defendants shall within 28 days of the date of this Order cause all officers of the Metropolitan Police Department to being collecting data required by D.C. Code §5-113.01(a)(4B), by filling out – completely and for each person "stopped" (i.e., halted or forced to move or take action by the application of physical force by law enforcement or by submission to a show of authority) by any officer of Metropolitan Police Department – one copy of the form attached as an appendix to this Order; and it is further

**ORDERED**, that Defendants shall, beginning no later than 28 days from the date of this Order, keep and maintain the data collected under this Order, either by retaining physical or electronic copies of all completed forms or by entering the data from all fields of every completed form into a computer database; and it is further

**ORDERED**, that Defendants may apply for modification of this Order upon a showing that they have instituted policies and procedures to ensure ongoing future compliance with D.C. Code §5-113.01(a)(4B).

**John M. Campbell**
Associate Judge

Copies to:

Shana Knizhnik, Esq.
Scott Michelman, Esq.
Arthur Spitzer, Esq.
Jessica Krupke, Esq.
Amanda Montee, Esq.
Fernando Amarillas, Esq.
*Via CaseFileXpress*