

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

BLACK LIVES MATTER D.C., et al.,

Plaintiffs,

v.

MURIEL BOWSER, et al.,

Defendants.

2018 CA 003168 B
Judge John M. Campbell

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF IMMEDIATE
ISSUANCE OF PRELIMINARY INJUNCTION**

Plaintiffs submit this supplemental memorandum to update the Court with new facts showing that the Defendants are continuing their deliberate non-compliance with the NEAR Act while the parties await the preliminary injunction that this Court indicated on November 16, 2018, would be forthcoming.

Defendants have now confirmed that they use only body-worn camera (BWC) footage to satisfy the NEAR Act's requirement that they "keep" records on the race or ethnicity of individuals subjected to traffic stops in the District of Columbia. Defendants have further revealed that the past six months' worth of that data is contained in a set of 31,521 individual videos, each of which would have to be obtained via FOIA and then individually reviewed, before being combined with race/ethnicity data for *non*-traffic stops, in order for Plaintiffs to compile a complete set of data about the race or ethnicity of individuals stopped by MPD. Defendants have not yet provided an invoice with the cost of obtaining the data, but extrapolating from a past invoice for BWC footage, it seems practically assured the bill will likely run into the millions of dollars for such a large trove of videos. A data-collection regime that requires paying exorbitant fees and then watching 31,521

traffic-stop videos to obtain the data falls farcically short of what the Council intended or what the NEAR Act required when it mandated that Defendants keep records of specific information on stops by police in the District of Columbia. It is clearer than ever that MPD will continue to dodge its record-keeping obligation under the NEAR Act until and unless this Court finally steps in and orders compliance. It should do so immediately.

By way of background, the Court made clear at the hearing on November 16, 2018, that the Plaintiffs are likely to succeed on the merits because the District has unreasonably failed to comply with its statutory obligations. Meanwhile, Plaintiffs understand that Defendants have implemented the interim data-collection policy that they proposed in their status report to this Court in October 2018. As Plaintiffs pointed out in response to that status report, the interim solution was plainly inadequate, because it would (1) still fail to collect all the required data; (2) collect some of the required data in a manner (an unstructured “narrative”) that makes complete collection exceedingly unlikely, impedes verification, and undermines attempts to aggregate and analyze the data; and (3) collect some of the required data in a medium (body-worn camera recording) that does not qualify as a “record” under the NEAR Act and that MPD policy does not require it to keep, in most circumstances, for longer than 90 days. The Court likewise expressed concern about several aspects of D.C.’s proposed interim solution, especially the government’s proposal to use officers’ body-worn cameras for collecting some of the required categories of data. Given MPD’s repeated refusal to implement the law over the course of more than two and a half years up to that point, we asked the Court to order that all officers fill out a one-page form to begin collecting the data right away. The parties still await the Court’s ruling.

Nonetheless, because MPD's interim policy has been in effect for several months, Plaintiff ACLU-DC submitted a Freedom of Information Act request to the District in April 2019 for a subset of the NEAR Act data to see whether the District was able to provide it.

Just as Plaintiffs predicted (and as this Court anticipated), MPD has been unable to provide that data in useable form, or in a reasonable time, or at a reasonable cost. The ACLU-DC sought records on one of the data categories that Plaintiffs and the Court had indicated would be inadequately collected under Defendants' interim policy—race. Plaintiffs' FOIA request sought:

for all traffic stops in the District of Columbia from November 9, 2018 to the date of your search, ... all records reflecting the "race or ethnicity of the person stopped," which MPD collected pursuant to D.C. Code § 5-113.01(4B)(J) and/or General Order 304.10. This request includes, but is not limited to:

1. Any Notices of Infraction containing race or ethnicity data for the individual stopped;
2. Any other record, of whatever type, in which MPD has recorded the race or ethnicity of an individual stopped for a traffic violation; and
3. Any summaries, synopses, charts, aggregations, or compilations of race and/or ethnicity data for individuals subjected to traffic stops.

FOIA Request for Data Under New General Order 304.10 (Apr. 26, 2019), at 1 (attached to this memorandum as Exhibit A).

MPD's FOIA Officer responded in writing on June 7 to inform the ACLU-DC that "any responsive records to your request would be in the form of Body Worn Camera (BWC) videos" and that MPD "has identified 31,521 videos that are deemed responsive to your request." *See* Email of V. Parker to M. Perloff, attached as Exhibit B. The FOIA Officer noted that "to process this many videos will take quite some time and effort to complete."

This FOIA response confirms that MPD's poor excuse for a data-collection plan is precisely as inadequate as Plaintiffs and this Court feared it would be. To find data on a BWC recording, one would have to watch the entire recording, which will last as long as the stop did. A

single stop might easily take ten minutes, or more, depending on the circumstances. Compiling a comprehensive data set, of course, requires watching *each* BWC recording of *each* stop. And now we know that obtaining approximately six months of data would require watching 31,521 videos of unknown length and quality. Even making the conservative assumption that a traffic stop lasts, on average, just 5 minutes, watching all the videos would take more than 2,600 hours, or more than 109 days of nonstop, 24-hour-a-day, video viewing.

An additional problem is cost. When a FOIA requester seeks BWC footage, MPD requires the requester to pay fees associated with redacting identifying images from the footage. Although MPD has not informed Plaintiffs how much it will charge in redaction fees before disclosing the videos at issue here, MPD provided undersigned counsel an invoice for redaction fees for a previous FOIA filed by Plaintiff ACLU-DC in 2018. That invoice (attached as Exhibit C) charged redaction fees at a rate of \$23 per minute of video. Multiplying the \$23 rate by 5 minutes for each of the 31,521 videos yields the astronomical fee of \$3,624,915. And this is for just six months of traffic stops. Even though this figure is an estimate, the notion that the D.C. Council, which passed the NEAR Act to increase police transparency to the community, would have intended that community members and non-profit organizations pay bills in the millions of dollars (or, indeed, bills of any significant amount at all) to obtain the NEAR Act data is singularly implausible.

These shocking costs, combined with the time required to review BWC records, demonstrate the unlawfulness of MPD's current data-collection practice. To deem a BWC video a "record" for purposes of the NEAR Act is to believe that the Council was content to permit MPD to send would-be consumers of the NEAR Act data on a treasure hunt through thousands of hours of video footage, after paying millions of dollars, in search of data that the Council intended MPD

to collect and make publicly available. In light of the NEAR Act's goals of transparency and accountability, that hypothesis is absurd on its face.

MPD's response to the Plaintiff's most recent FOIA request thus confirms what Plaintiffs and this Court predicted: without an injunction, MPD will remain badly out of compliance with the NEAR Act's data-collection requirement.

Accordingly, the need for an injunction from this Court has taken on an even greater urgency. Data that the Council intended MPD to collect is being lost every day, thereby pushing further into the future the date at which the Plaintiffs and all the residents of the District can finally learn what MPD has gone to great lengths to avoid disclosing: which D.C. residents the police are stopping and why.

Relatedly, MPD continues to resist discovery in this case. Plaintiffs propounded discovery requests on November 21, 2018. The requests sought information about the District's data-collection practices and capacity, for the purpose of determining what *permanent* relief Plaintiffs might ultimately ask this Court to grant in order to resolve this litigation. Plaintiffs agreed to a thirty-day extension of the Defendants' discovery deadline to January 22, 2019. Plaintiffs heard nothing further from Defendants until the morning of the new deadline, January 22, when Defendants contacted undersigned counsel to seek a further, indefinite stay of discovery. Plaintiffs refused to accede to this additional delay on Defendants' part. Defendants moved this Court for a stay on January 22, and Plaintiff filed their opposition the following day, January 23, asking this Court to order immediate compliance with Defendants' discovery obligations. Defendants' discovery-stay motion, like Plaintiffs' motion for a preliminary injunction, remains pending. Although this Court has not granted Defendants a stay, Defendants have not, to date, responded to Plaintiffs' discovery requests.

If judicial review in this case is to be meaningful at all, the Court must now act in the face of Defendants' intransigence. The Court should order Defendants to begin collection and retention of all the NEAR Act-required data for all stops in the District of Columbia, using Plaintiffs' proposed form, within 14 days. The Court should also deny Defendants' motion for a stay of discovery and order Defendants to respond within 14 days to the discovery requests that Plaintiffs propounded more than six months ago.

June 13, 2019

Respectfully submitted,

/s/ Scott Michelman

Scott Michelman (D.C. Bar No. 1006945)

Arthur B. Spitzer (D.C. Bar No. 235960)

Michael Perloff*

American Civil Liberties Union Foundation
of the District of Columbia

915 15th Street NW, Second Floor

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(202) 457-0800

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Counsel for Plaintiffs

* Admitted to practice in New York. Practicing in D.C. under supervision of a D.C. Bar member while awaiting admission to D.C. Bar, pursuant to D.C. Ct. App. R. 49(c)(8).

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June 2019, a copy of PLAINTIFFS' SUPPLEMENTAL MEMORANDUM (along with its attached exhibits) was served on counsel for Defendants through CaseFileXpress.

/s/ Scott Michelman

Scott Michelman (D.C. Bar No. 1006945)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street, NW, Second Floor
Washington, D.C. 20005
(202) 457-0800
smichelman@acludc.org

Exhibit A

April 26, 2019

Via Public FOIA Portal

Vendette Parker
Metropolitan Police Department
300 Indiana Avenue NW
Room 4153
Washington, D.C. 20001

Re: FOIA Request –Data Under New General Order 304.10

Dear Inspector Parker:

This is a request under the D.C. Freedom of Information Act (FOIA), D.C. Code § 2-531 *et seq.*, on behalf of the American Civil Liberties Union of the District of Columbia (ACLU-DC). We request certain data collected regarding traffic stops following the implementation of revised General Order 304.10 on November 9, 2018.

Specifically, for all traffic stops in the District of Columbia from November 9, 2018 to the date of your search, we request all records reflecting the “race or ethnicity of the person stopped,” which MPD collected pursuant to D.C. Code § 5-113.01(4B)(J) and/or General Order 304.10. This request includes, but is not limited to:

1. Any Notices of Infraction containing race or ethnicity data for the individual stopped;
2. Any other record, of whatever type, in which MPD has recorded the race or ethnicity of an individual stopped for a traffic violation; and
3. Any summaries, synopses, charts, aggregations, or compilations of race and/or ethnicity data for individuals subjected to traffic stops.

Please note that we do *not* seek personally identifying information such as complainant or suspect names, home addresses, dates of birth, drivers’ license numbers, etc. Any such information may be redacted.



**District
of Columbia**

915 15th St. NW, 2nd Floor
Washington, D.C. 20005
(202) 457-0800
acludc.org

If you determine that some or all of the records are exempt, you must provide a written explanation including a reference to the specific statutory exemption on which you rely. D.C. Code § 2-533(a). If a segregable portion of any record is not exempt, you must provide those portions along with your explanation of the exemption. D.C. Code § 2-534(b). We reserve the right to appeal any such decision.

We request a fee waiver pursuant to D.C. Code § 2-532(b), which permits you to waive or reduce any fee for searching and reproducing records if “furnishing the information can be considered as primarily benefiting the general public.” The ACLU-DC is a nonprofit public interest organization with limited resources, dedicated to the protection of civil rights and civil liberties. The primary beneficiary of the ACLU-DC’s work is the public, which we serve by using information to promote reform through litigation, legislative advocacy, and publication. It is on this ground that federal and state agencies, as well as courts, generally grant waivers of fees for ACLU FOIA requests. The present request should be granted as well.

If you determine no waiver is appropriate, and if the proposed fee is greater than \$25.00, we ask that you notify us prior to fulfilling the above requests.

Please furnish all applicable records to Michael Perloff, 915 15th Street NW, Second Floor, Washington, DC 20005 or mperloff@acludc.org. If you have questions, please contact me at 202-601-4278 or mperloff@acludc.org.

We look forward to your reply to this records request within 15 business days, as required by D.C. Code § 2-532(c)(1). Thank you for your prompt attention to this matter.

Sincerely,

/s/Michael Perloff

Michael Perloff*, Harvard Law School Public Service Venture Fund Fellow
ACLU Foundation of the District of Columbia

* Admitted to practice in New York but not D.C. Practicing in D.C. under supervision of a D.C. Bar member while application to D.C. Bar under consideration, pursuant to D.C. Ct. App. R. 49(e)(8).

Exhibit B

From: [Parker, Vendette \(MPD\)](#)
To: [Michael Perloff](#)
Subject: 2019-BWC-00166
Date: Friday, June 7, 2019 3:40:08 PM

Good Afternoon Mr. Perloff,

This email is in response to your Freedom of Information Act (FOIA) request for the following:

Specifically, for all traffic stops in the District of Columbia from November 9, 2018 to the date of your search, we request all records reflecting the “race or ethnicity of the person stopped,” which MPD collected pursuant to D.C. Code § 5-113.01(4B)(J) and/or General Order 304.10. This request includes, but is not limited to:

- 1. Any Notices of Infraction containing race or ethnicity data for the individual stopped;*
- 2. Any other record, of whatever type, in which MPD has recorded the race or ethnicity of an individual stopped for a traffic violation; and*
- 3. Any summaries, synopses, charts, aggregations, or compilations of race and/or ethnicity data for individuals subjected to traffic stops.*

As I advised you in our last conversation, any responsive records to your request would be in the form of Body Worn Camera (BWC) videos. The Metropolitan Police Department (MPD) has identified 31,521 videos that are deemed responsive to your request. As you can imagine, to process this many videos will take quite some time and effort to complete. Given the enormity of this task, would you deem your request satisfied if MPD provided you with examples of the responsive videos?

If you have any additional questions or concerns, please feel free to contact me.

Inspector Vendette T. Parker
Freedom of Information Act (FOIA) Officer
Metropolitan Police Department
[300 Indiana Avenue, NW Suite 4153](#)
[Washington, DC 20001](#)
Office [202.724.4264](#)
vendette.parker@dc.gov

We are here to help

Join Mayor Bowser at DC DHCD's Housing Expo, June 15, 10-3 at the Convention Center. Home-buying & rental housing programs, remodeling tips, get free credit reports & counseling & a \$4,800 living room furniture giveaway, all in one place. [Register today!](#) #JuneHousingBloom

Exhibit C

