STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

No. 217-2015-CV-00376

ESTATE OF HAGEN ESTY-LENNON

v.

STATE OF NEW HAMPSHIRE

AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE'S MEMORANDUM OF LAW IN SUPPORT OF DISCLOSURE TO THE _VALLEY NEWS_, THE UNION LEADER CORPORATION, AND HEARST PROPERTIES, INC.

Amicus curiae American Civil Liberties Union of New Hampshire ("ACLU-NH") hereby submits its memorandum of law in support of the disclosure to the *Valley News*, the Union Leader Corporation, and Hearst Properties, Inc. (including WMUR-TV) of the four (4) videos depicting the events surrounding the fatal police shooting of Hagen Esty-Lennon pursuant to Chapter 91-A.

INTRODUCTION

The issue in this case is whether this Court should order the New Hampshire Attorney General and the Haverhill Police Department to disclose to various media outlets under Chapter 91-A four (4) videos—including three (3) body camera videos and one (1) dash camera video—depicting the events surrounding the fatal shooting by two Haverhill police officers of Hagen Esty-Lennon in the Town of Bath over the privacy objections of Mr. Esty-Lennon's estate. This is the first open records case in the country that the ACLU-NH is aware of where a court has been asked to decide whether body camera footage of a fatal police shooting should be disclosed under a state's open records laws over a family's privacy objections. This is undoubtedly an important question given that, while body camera footage is an invaluable tool in ensuring that

law enforcement are acting properly in interacting with the public, the collection and release of such footage has the real potential to invade privacy.

Here, when balancing these competing interests in the individual circumstances of this case, New Hampshire's Right-to-Know Law (Chapter 91-A) requires disclosure, especially given its broad presumption of transparency. While the privacy interests raised by Mr. Esty-Lennon's family are real and should be carefully balanced by the Court, the public's competing interest in seeing uniquely reliable evidence of the law enforcement response to a person apparently in severe emotional distress, which resulted in the person's death, is stronger. We give few government officials as much authority as the power we give to police to take human life based on split-second judgments. Thus, the public has a correspondingly compelling interest in understanding how the police exercise that authority, particularly when lethal force is used on individuals suffering from mental health crises. The public's interest in disclosure is even more acute where there are, as counsel for Mr. Esty-Lennon's estate has acknowledged, still open questions about the use of force in this case and whether deescalation techniques could have been utilized that would have lessened the need for lethal force. These questions can only be answered through disclosure of the videos in question, especially where the videos appear to be the only neutral evidence available.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of New Hampshire is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with approximately 500,000 members (including over 3,500 New Hampshire members). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under federal and state law, including the right to

freedom of information pursuant to Part 1, Article 8 of the New Hampshire Constitution and New Hampshire's open records law (Chapter 91-A).

The ACLU-NH has a long track record of working specifically on open records issues, both in and out of the courts. The ACLU-NH frequently utilizes the provisions of Chapter 91-A to investigate civil liberties issues and has several public records requests pending. The ACLU-NH has also testified before the New Hampshire legislature on open records issues, including most recently against 2014 House Bill 646—a bill which would have crippled Chapter 91-A by causing requesters to pay, in advance, for estimated labor costs before the government entity even begins collecting responsive documents. The ACLU-NH has also litigated public records cases, including cases that have grappled with the balance between government transparency and privacy. For example, the ACLU-NH litigated *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003), where the New Hampshire Supreme Court weighed the public interest in disclosure and individuals' privacy interests under Chapter 91-A, and held that the Manchester police department was required to disclose to the ACLU-NH photographs taken by the department pursuant to its policy of taking photographs of people who were stopped by the police, but not arrested.

The ACLU-NH is committed to protecting both the right to government transparency and the right to privacy. As its work in *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003) demonstrates, the ACLU-NH has striven to appropriately balance these rights when they conflict. This too is a case where these competing rights conflict. As the debate over whether the police should use body cameras has grown more robust in New Hampshire and throughout the country, the ACLU-NH has strongly encouraged the use of body cameras as a tool to ensure police accountability. But the ACLU-NH has also provided guidance

to local law enforcement agencies as to how these cameras can be used in ways that protect citizens' privacy. For example, in May 2015, the national ACLU was the first organization to publish model legislation designed to assist police departments in how to use body cameras in ways that protect the public's right to know, while also protecting the public's right to privacy. This model legislation suggests that body camera footage should be subject to state open records laws when it depicts the following: (i) any use of force; (ii) events leading up to and including an arrest for a felony-level offense; (iii) events that constitute a felony-level offense; and/or (iv) an encounter about which a complaint has been registered by a subject of the video footage. *See* National ACLU, A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement, at 5 (May 2015), *available at* https://www.aclu.org/files/field_document/aclu_police_body_cameras_model_legislation_may_2015.pdf. As this national ACLU model legislation recognizes, the public interest in law enforcement accountability and transparency is particularly compelling in the context of incidents like officer-involved shootings.

Because this case presents important questions about police accountability and public access to information about the operation of police officers, as well as the appropriate balance between accountability and privacy, proper resolution of this matter is of significant concern to the ACLU-NH and its members. The ACLU-NH believes that its experience in the legal issues surrounding the disclosure of information on governments, and police in particular, as well as in the repercussions for decisions on governance of police and police-community relations, will make this brief of service to the Court.

ARGUMENT

Body-worn police cameras offer an immense public benefit by promoting police accountability. Although the ACLU-NH generally takes a dim view of the proliferation of surveillance cameras in American life, police on-body cameras offer a uniquely powerful benefit by serving as a check against the abuse of power by police officers. Historically, there was no documentary evidence of most encounters between police officers and the public, and due to the volatile nature of those encounters this often resulted in radically divergent accounts of incidents. Body cameras have the potential to change this pattern, helping protect the public against police misconduct, and at the same time helping protect police against false accusations of abuse. However, body-worn cameras also have a potential to invade individual privacy wherever they are worn. Police officers enter people's homes and encounter bystanders, suspects, and victims in a wide variety of sometimes stressful and extreme situations. Given these competing interests, the ACLU-NH has provided guidance to law enforcement agencies throughout New Hampshire as to how body cameras can be used to achieve the goal of public transparency without needlessly sacrificing citizens' privacy.

Though there is clearly tension between ensuring police accountability through the dissemination of the four (4) videos at issue in this case and protecting the privacy rights of Hagen Esty-Lennon's family, the scales weigh heavily in favor of disclosure when the specific facts of this case are closely examined.

I. The Purpose of Chapter 91-A, and its Presumption in Favor of Disclosure

New Hampshire's Right-to-Know law under Chapter 91-A is designed to create transparency with respect to how the government interacts with its citizens. As the preamble to the law states: "Openness in the conduct of public business is essential to a democratic society.

The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." *See* RSA 91-A:1. Chapter 91-A also has a basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: "Government … should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.* Thus, the Right-to-Know Law "helps further our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Goode v. N.H. Legis, Budget Assistant*, 148 N.H. 551, 553 (2002). Consistent with these principles, courts resolve questions under Chapter 91-A "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Id.* at 554. Therefore, courts construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Id.*; *see also Scott v. City of Dover*, No. 05-E-170, 2005 N.H. Super. LEXIS 57, at *3-4 (N.H. Super. Ct., Strafford Cty. Oct. 11, 2005) (same) (Fauver, J.).

II. On Balance in these Specific Circumstances, the Public's Interest in Disclosure Outweighs the Right to Privacy

There appear to be two potential exemptions relied upon by the Estate of Hagen Esty-Lennon in arguing that the videos surrounding this fatal police shooting should not be released under Chapter 91-A, each of which deals with privacy interests. Under the first potentially applicable exemption, "records or information compiled for law enforcement purposes" are exempt if their disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See Lodge v. Knowlton*, 118 N.H. 574 (1978); *Murray v. N.H. Div. of State Police*, 154 N.H. 579 (2006). This exemption, which is commonly referred to as Exemption

7(C), emanates from the federal Freedom of Information Act and has been incorporated into Chapter 91-A with respect to police investigatory files by the New Hampshire Supreme Court. *See id.*; *see also* 5 U.S.C. 552(b)(7)(C). The second potentially applicable exemption falls under RSA 91-A:5(IV), which exempts from disclosure "other files whose disclosure would constitute invasion of privacy."

These exemptions pose the classic conflict between the importance of the public's need to know about law enforcement behavior and an individual's right to be free from unnecessary intrusion into his or her private affairs. Through these privacy exemptions, both the legislature and the courts have recognized that these two competing rights must be balanced in each specific case. Only the courts, not the legislature, can weigh the balance in each individual circumstance.

In examining whether information should be disclosed under Chapter 91-A in the face of privacy objections, New Hampshire courts traditionally apply the three-step analysis set forth in *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003) (hereinafter, "*NHCLU*"). *See* 149 N.H. at 440-442. *First*, a court must look to whether "there is a privacy interest at stake that would be invaded by disclosure" of the information sought. *Id.* at 440. If there is no privacy interest at stake, the Right-to-Know Law mandates disclosure. *Id.* *Second*, the court performing the analysis must determine if the public has an interest in the disclosure of this information. *Id.* In order for the public to have an interest in disclosure, a court must find "the requested information [serves] the purpose of informing the public about the conduct and activities of their government." *Id.* *Third*, a court must balance "the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Id.* In cases where this three-step analysis is to be applied, the parties resisting disclosure—here, the estate of Hagen Esty-Lennon, directly, and the Attorney General and

Haverhill Police Department, indirectly—"bear[] a heavy burden to shift the balance towards nondisclosure." *Id.* (citing *Union Leader Corp. v. N.H. Housing Fin. Auth*., 142 N.H. 540, 554 (1997)); *see also Scott*, 2005 N.H. Super. LEXIS 57, at *5-7 (applying three-step analysis when privacy interest raised, and ruling in favor of disclosure of the names, job positions, and the salaries of the City's employees) (Fauver, J.); *Lambert v. Belknap Cty. Convention*, 157 N.H. 375, 382-83 (2008). Applying the three-part *NHCLU* analysis in these specific circumstances, disclosure of the four (4) videos is required under Chapter 91-A.

A. The Public Interest In Disclosure Is Compelling In This Case

The public's interest in disclosure is compelling. Here, the media's desire is not to sensationalize an obviously tragic incident. It is to assist the public in developing an informed understanding of whether the officers in this case, who employed lethal force, acted appropriately. Further, even if the officers acted in a manner consistent with department policies, the details of fatal police encounters can help policymakers devise and implement safer and more effective approaches in law enforcement. Thus, the requested information obviously serves "the purpose of informing the public about the conduct and activities of their government." *See NHCLU*, 149 N.H. at 440; *see also State v. DeCato*, 156 N.H. 570, 577 (2007) ("[I]t is particularly important that the citizens of New Hampshire be able to hold their government accountable for the integrity of proceedings under the [Sexually Violent Predators Act].").

In particular, the public has a right to know how and when law enforcement use lethal force when confronting individuals who have psychiatric disabilities, as may have been the case here. Hundreds of Americans with disabilities die every year in police encounters, and many more are seriously injured. Many of these deaths and injuries are needless, the tragic result of

police failing to use well-established and effective law enforcement practices that take disability into account. Indeed, persons with significant psychiatric disabilities face the greatest risk of injury or death during their encounters with law enforcement. During mental health crises, individuals with psychiatric disabilities are often shot or beaten when they cannot follow the orders of police officers.[1] Tragically, as may be the case here, some even attempt "suicide by cop."[2] While complete data are not available,[3] it is estimated that about half of fatal police encounters involve persons with psychiatric disabilities.[4] This translates to hundreds of deaths

[1] Rachel Aviv, Letter from Albuquerque: Your Son is Deceased, *New Yorker*, Feb. 2, 2015; Alex Emslie & Rachael Bale, More Than Half of Those Killed by San Francisco Police are Mentally Ill, *KQED News* (Sept. 30, 2014), *available at* http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill; Kelley Bouchard, Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed, *Portland Press Herald* (Dec. 9, 2012); Tux Turkel, When Police Pull the Trigger in Crisis, the Mentally Ill Often are the Ones Being Shot, *Portland Press Herald* (Dec. 8, 2012).

[2] *See* Suicide By Cop, *Wikipedia*, *available at* https://en.wikipedia.org/wiki/Suicide_by_cop.

[3] The Death in Custody Reporting Act of 2000, Pub. L. No. 106-297, 114 Stat. 1045, expired in 2006, although the Bureau of Justice Statistics (BJS) continues to collect data on a voluntary basis. The BJS describes arrest-related deaths as "under-reported," and notes that states may use any methodology for measuring arrest-related deaths. *See* Andrea M. Burch, Bureau of Justice Statistics, Dep't of Justice, Arrest-Related Deaths, 2003–2009 - Statistical Tables (2011), *available at* http://www.bjs.gov/content/pub/pdf/ard0309st.pdf. The BJS does not report any disability-related data.

[4] Alex Emslie & Rachael Bale, More Than Half of Those Killed by San Francisco Police are Mentally Ill, *KQED News* (Sept. 30, 2014) ("A KQED review of 51 San Francisco officer-involved shootings between 2005 and 2013 found that 58 percent—or 11 people—of the 19 individuals killed by police had a mental illness that was a contributing factor in the incident."), *available at* http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill; Bouchard, Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed, *Portland Press Herald* (Dec. 9, 2012) ("A review of available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems."); id. (noting that, in New Hampshire, seven of nine people (78 percent) shot and killed by police between 2007 and 2012 had mental health issues, according to state attorney general reports; in Syracuse, N.Y., three of five people (60 percent) shot by police in 2011 were mentally ill, according to news reports; in Santa Clara County, officials reported that nine of 22 people (41 percent) shot during a recent five-year period were mentally ill); Turkel, supra note 22 (finding that 42 percent of 57 police shootings in Maine since 2000 involved persons with mental health problems, and that 19 of 33 fatalities (58 percent) were persons with mental health problems); Linda Goldston, Former Cops Changing Way Santa Clara County Deals with Mentally Ill in Crisis, *San Jose Mercury News*, Nov. 4, 2010 (of 22 officer-involved shootings from 2004 to 2009, 10 involved persons with mental illness); Police Exec. Research Forum, Review of Use of Force in the Albuquerque Police Department 13 (2011) (finding that 54 percent of people "whose actions led APD officers to use deadly force" had a confirmed history of mental illness); State of New Mexico, Pub. Defender Dep't, 2012 Annual Report 6 (2012) (reporting that that 75 percent of police shootings in the last two years had a "mental health context"); Memorandum from Christopher Pedrini, S.F. Police Department Risk Management, on Regarding Officer-Involved Shootings to John Crudo, S.F. Police Department Internal Affairs 9 (Jan. 16, 2014), *available at* https://www.scribd.com/doc/242229894/San-Francisco-Police-Department-Officer-Involved-Shootings-Summary-2000-2014.

annually.[5] Given this reality, crisis intervention and deescalation practices have been adopted across the country by police departments.[6]

Here, it appears that Mr. Esty-Lennon was experiencing a mental health crisis at the time he was fatally shot. According to the Attorney General's Report on the July 6, 2015 shooting:

> Given his landlady's observations of his behavior [suggesting that he was having hallucinations] in the weeks before the shooting, it is possible that Esty-Lennon was experiencing mental health issues, trying to harm himself, or trying to commit suicide. That is especially likely in light of the self-inflicted knife wound Esty-Lennon had to his chest.

See Attorney General's Report at 7-8. Before the confrontation, the shooting officers were aware that Mr. Esty-Lennon "appeared to [have] a stab wound to the chest," *see id.* at 2—a fact from which a reasonable officer possibly could have concluded that Mr. Esty-Lennon's was experiencing a mental health crisis. Given Mr. Esty-Lennon's apparent mental health crisis, the videos in question would be especially valuable to the public to determine (i) what additional facts the officers knew that would have led a reasonable officer in such circumstances to conclude that Mr. Esty-Lennon was experiencing a mental health crisis, and (ii) what efforts or accommodations the officers did make or could have made, if any, to deescalate the situation (even if their actions were consistent with internal policy). For example, could the officers have

[5] Between 2003 and 2009, law enforcement agencies reported 4,813 arrest-related deaths, with most—2,931—attributed to homicide by law enforcement personnel. *See* Andrea M. Burch, Bureau of Justice Statistics, Dep't of Justice, Arrest-Related Deaths, 2003–2009 - Statistical Tables (2011), *available at* http://www.bjs.gov/content/pub/pdf/ard0309st.pdf.

[6] Elizabeth Hervey Osborn, Comment, What Happened To "Paul's Law"?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders, 79 U. Colo. L. Rev. 333, 344 (2008); *see also id.* at 368–70 (describing changes made to Denver's use of force policy and training following death of Childs); Press Release, U.S. Dep't of Justice, Court Approves Police Reform Agreement in Portland, Oregon (Aug. 29, 2014), *available at* http://www.justice.gov/opa/pr/court-approves-police-reform-agreement-portland-oregon; Settlement Agreement and Stipulated [Proposed] Order of Resolution at ¶¶ 130–37, *United States v. City of Seattle*, Civil Action No. 12-CV-1282 (W.D. Wash. July 27, 2012) ("SPD will continue to provide Crisis Intervention training as needed to ensure that CI trained officers are available on all shifts to respond to incidents or calls involving individuals known or suspected to have a mental illness, substance abuse, or a behavioral crisis ('individuals in crisis'). . . . SPD's CI training will continue to address field evaluation, suicide intervention, community mental health resources, crisis de-escalation, and scenario exercises," *available at* http://www.justice.gov/crt/about/spl/documents/spd_consentdecree_7-27-12.pdf.

deescalated the situation at any point by using communication, time, patience, or retreat to a safe perimeter? Does the video footage show that the officers took *any* deescalation measures at all? Could Officer Collins have avoided lethal force by using his Taser (which he was holding moments before the fatal shots were fired) to incapacitate Mr. Esty-Lennon rather than his gun? Is the Attorney General's critical (and potentially dispositive) conclusion that "it would have been highly unlikely that the TASER would have deployed successfully, stopping Esty Lennon before he could use deadly force against the officers" accurate? *See* Attorney General's Report at 11-12. Only the videos will shed light on these important questions and confirm (or perhaps not) the veracity of the Attorney General's conclusions. Simply put, the public should know if law enforcement entities are making meaningful efforts to deescalate, rather than exacerbate, confrontations with this vulnerable population who should be, wherever possible, met with medical attention, not deadly force.

How police officers engage individuals with mental illness is also of legal significance. Under the Americans with Disabilities Act ("ADA"), public agencies must ensure even-handed treatment and equal opportunity. To provide such equality, the ADA requires government agencies, including law enforcement, to take disability into account by making reasonable modifications of their policies and practices where needed. *See* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7) (2014). As Justice Ruth Bader Ginsburg wrote in her concurring opinion in *Tennessee v. Lane*: "Including individuals with disabilities among people who count in composing 'We the People,' Congress understood …. would sometimes require not blind-folded equality, but responsiveness to difference; not indifference, but accommodation." *Lane*, 541 U.S. 509, 536 (2004). The regulations and guidance of the U.S. Department of Justice confirm that the requirement that practices be modified to take disability into account applies to arrest

and detention.[7] Accordingly, in the context of a person with a known psychiatric disability who is in crisis, the ADA requires that police employ widely-accepted policing practices that use containment, coordination, communication, and time to seek safe resolutions.[8] Given the ADA's applicability to law enforcement, the videos will be useful for the public to determine (i) whether the officers were required to take into account any mental disability in their interactions with Mr. Esty-Lennon, and (ii) if so, what accommodations, if any, the officers should have taken in their interactions with Mr. Esty-Lennon in lieu of lethal force.

The importance of the videos is also magnified by the fact that there is little other neutral evidence as to how the shooting transpired. Indeed, the Attorney General's overwhelming reliance on the video evidence in this case to determine the propriety of the officers' actions underscores its value to the public. *See, e.g.,* Attorney General's Report at 7 n.10 ("This is corroborated by the officers' body camera videos …"), 12 ("the footage from the body cameras shows that Esty-Lennon was running toward the officers …"). Mr. Esty-Lennon, tragically, is deceased. The police officers are obviously interested parties in the case. And there was only one witness to the shooting whose observations were, according to the Attorney General, "contradicted by the video" (and presumably also inconsistent with some aspects of the officers'

[7] House Comm. Judiciary, H.R. Rep. No. 101-485, pt. 3, at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 473 ("In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures."); House. Comm. Educ. & Labor, H.R. Rep. No. 101-485, pt. 2, at 39, 85 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 321, 367 ("[I]n one case in San Diego, California, a deaf woman died of a heart attack because the police did not respond when her husband tried to use his TDD to call 911[.]"); *accord* 136 Cong. Rec. 11,461 (1990) (statement of Rep. Mel Levine) ("Regretfully, it is not rare for persons with disabilities to be mistreated by the police. Sometimes this is due to persistent myths and stereotypes about disabled people. At other times, it is actually due to mistaken conclusions drawn by the police officer witnessing a disabled person's behavior. . . . Although I have no doubt that police officers in these circumstances are acting in good faith, these mistakes are avoidable and should be considered illegal under the Americans with Disabilities Act …. One way to cut down on these incidents is for police officers to receive training about various disabilities.").

[8] The fact that officers are subject to the ADA does not prevent police agencies from safely and effectively doing their work. Modifications to take account of disability are not required where there is a direct threat to the safety of officers or to members of the public. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 288 (1987); 28 C.F.R. §§ 35.104, 35.139.

version of events). *See* Attorney General's Report at 5 n.8. Thus, the release of these videos is critical to determining what exactly occurred given the scarcity of other independent evidence.

Disclosure in this case is also vital to maintaining responsible, accountable police departments. We give few government officials as much authority as the power we give to police to take human life based on split-second judgments. Thus, the public has a correspondingly strong interest in understanding how the police exercise that authority, particularly when lethal force is used on individuals suffering from mental health crises. *See Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal. 4th 59, 74 (Cal. 2014) ("In a case such as this one, which concerns officer-involved shootings, the public's interest in the conduct of its peace officers is particularly great because such shootings often lead to severe injury or death."). First-hand evidence of police actions, like the videos in question here, directly illuminates how police operate, helps identify potential misconduct by individual officers and poor policies or training by agencies, and allows the public to hold civic leaders accountable for problems. On multiple occasions, videos of police shootings have not only shed light on how and when police elect to use force, but also on police misconduct. For example:

- In late July 2015, two police officers who supported the apparently false narrative given by University of Cincinnati police officer Ray Tensing to justify his fatal shooting of unarmed black motorist Sam DuBose were placed on paid administrative leave after two new videos surfaced that appeared to undermine all three officers' original accounts of the shooting. *See* Jeremy Stahl, New Body Cam Videos Show Cops Coalescing Around False Narrative of Sam DuBose Killing, *Slate*, July 30, 2015, *available at* "http://www.slate.com/blogs/the_slatest/2015/07/30/sam_dubose_murder_phillip_kidd_and_david_lindenschmidt_suspended_after_backing.html.

- In April 2015, North Charleston (South Carolina) Police Department police officer Michael Slager shot Walter Scott in the back and then appeared to toss a Taser near his prone, handcuffed body. A video depicting this incident was clearly inconsistent with Officer Slager's claim that Scott had tried to take the officer's Taser before being shot. Officer Slager was quickly arrested and charged with murder. *See* David Feige, Brutal Reality: When Police Wear Body Cameras, Citizens Are Much Safer,

Slate (Apr. 10, 2015), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/police_body_cameras_cops_commit_less_violence_and_complaints_are_real.html; Michael S. Schmidt and Matt Apuzzo, South Carolina Officer Is Charged With Murder of Walter Scott, *N.Y. Times* (Apr. 7, 2015), *available at* http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

- In April 2015, body camera footage depicted the fatal shooting of an unarmed black man by an Oklahoma sheriff's deputy who said he unintentionally shot the suspect when he, instead, intended to taser the suspect. *See* Oklahoma Man Eric Harris Fatally Shot by Deputy Who Meant to Fire Taser, *NBC News* (Apr. 12, 2015), *available at* http://www.nbcnews.com/news/us-news/oklahoma-man-eric-harris-fatally-shot-police-accident-instead-tased-n340116.

- In November 2014, Cleveland police officers fatally shot a 12-year-old boy outside a recreation center when he reached for a fake pistol. Video of the shooting suggested that officers' statements about the shooting may have been inaccurate. *See* Emma G. Fitzsimmons, 12-Year-Old Boy Dies After Police in Cleveland Shoot Him, *N.Y. Times* (Nov. 23, 2014), *available at* http://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html; Elahe Izadi and Peter Holley, Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice Within Seconds, *Washington Post* (Nov. 26, 2014), *available a*t http://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/.

- On July 17, 2014, Eric Garner died in Staten Island, New York City after a police officer put him in what has been described as a "chokehold" for about 15 to 19 seconds during an arrest. A video depicting this incident led to a national outcry and debate over race and the police use of force. *See* Alissa Scheller & Jan Diehm, The Chokehold Is Banned By NYPD, But Complaints About Its Use Persist, *Huffington Post* (Dec. 5, 2014), *available at* http://www.huffingtonpost.com/2014/12/05/nyc-police-chokeholds_n_6272000.html.

These incidents and others demonstrate that law enforcement's accountability to the public often depends on the public's access to video depicting the police conduct in question. Absent video footage, the public may never be able to hold law enforcement accountable for the results of poor policies or bad judgment, and deter similar mistakes in the future. Public access to information on how police use deadly force also can play a critical role in police reform

efforts and in fostering a relationship of trust between the public and police. As the California Supreme Court observed,

> The public's legitimate interest in the identity and activities of police officers is even greater than its interest in those of the average public servant. Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers … The abuse of a patrolman's office can have great potentiality for social harm.

Comm'n on Peace Officer Standards & Training v. Superior Court, 42 Cal. 4th 278, 297-98 (Cal. 2007).

In a number of recent investigations, the U.S. Department of Justice ("DOJ") has highlighted the importance of transparency and public scrutiny concerning how police use deadly force. For example, in its letter about the Miami Police Department, the DOJ found not only that "substantive deficiencies in deadly force investigations" "led to a heightened risk that MPD officers would use force, including deadly force, excessively," but also that "the significant decrease in the number of shootings in 2012 while under increased public scrutiny indicates that MPD may be capable of addressing this problem, [and] underscores that the previous spike in officer-involved shootings may have been avoidable." *See* DOJ Findings Letter re: Miami Police Department, at 1, 3, 5 (July 9, 2013)[9]; *see also* DOJ Findings Letter re: Cleveland Division of Police, at 46 (Dec. 4, 2014) (observing that "officers believe that high publicity events are treated differently in terms of discipline by CDP than uses of force that no one is watching").[10]

Of course, most police officers perform their duties with distinction. Here, the video footage may very well exonerate the two Haverhill police officers who killed Mr. Esty-Lennon. This was the conclusion of the Attorney General and, if it is accurate, disclosure may even

[9] *Available at* http://www.justice.gov/crt/about/spl/documents/miami_findings_7-9-13.pdf (last visited Aug. 28, 2015).

[10] *Available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf (last visited Aug. 28, 2015).

alleviate any public uncertainty as to whether the shooting officers are fit for duty. But the press and the public are not required to simply defer to the Attorney General's judgment. Instead, the press and the public are entitled to independently vet the conclusions reached by the Attorney General, especially when the conclusions concern a lethal use of force against someone who may have been in desperate need of help. This is why the press exists: to monitor the administration of justice on behalf of the public and be its "eyes and ears" into the criminal justice system. *See United States v. Brown*, 218 F.3d 415, 427 (5th Cir. 2000). Indeed, counsel for the estate of Mr. Esty-Lennon has publicly acknowledged that there still are "a lot of questions" concerning the shooting in this case, including (i) whether the police "should [have been] aware" that Mr. Esty-Lennon may have been in "shock" or had "a brain injury" after the motor vehicle accident, and (ii) whether this shooting demonstrates "a pattern of overaggressive polic[ing]."[11] *See* John Koziol, Attorney General Says Bath Fatal Shooting By Police Was Justified, *Union Leader* (July 31, 2014) (counsel for Esty-Lennon's estate stated that "he and Esty 'still have a lot of questions' about why Esty-Lennon was fatally shot but said that they will consider next steps after seeing video of the incident"; also stating that the family "may ask for an independent grand jury investigation"), *available at* http://www.unionleader.com/article/20150731/NEWS07/150809985; *see also* Jeremy Blackman, Judge Considers Whether to Release "Violent, Bloody" Video of Police Shooting in Bath, *Concord Monitor* (Aug. 6, 2015) (counsel reiterating "that the family plans to challenge the state's conclusions in court"), *available at* www.concordmonitor.com/home/18076726-95/judge-considers-whether-to-release-violent-bloody-video-of-police-shooting-in-bath.

[11] For example, the Town of Weare agreed to pay $300,000 to the family of a 35-year-old man killed in 2013 by a police officer during a drug sting that was sharply criticized by the New Hampshire Attorney General's office. *See* "Weare Settles With Family of Man Killed in Botched Police Sting," *WMUR* (June 22, 2014), *available at* http://www.wmur.com/news/weare-settles-with-family-of-man-killed-in-botched-police-sting/26609428.

These questions raised by Mr. Esty-Lennon's family are obviously of public import. And these questions can only be answered through public disclosure of the videos upon which the Attorney General relied. Moreover, the public interest here is far stronger than the public interest in *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004), where pictures were sought depicting the scene of death and the decedent's body *after* a suicide took place in order to determine whether the government engaged in misfeasance in investigating the death *after it occurred*. Unlike in *Favish*, the videos here do not deal with post-incident footage designed to determine whether the government investigation of the incident was appropriate, but rather depict a fatal law enforcement incident *as it happened*.

For these reasons, the public's interest in disclosure is compelling.

B. The Privacy Interests Are Outweighed By the Compelling Public Interest in Disclosure

As explained above, the ACLU-NH has raised concerns about the implications of police body cameras for privacy of both officers and civilians. Because, all too often, members of the public only interact with police during difficult circumstances, police body cameras will inevitably capture footage of victims of crimes, witnesses or even suspects in traumatic or sensitive situations, and may capture such footage in private places such as homes or offices. Accordingly, the national ACLU's model legislation addressing body cameras requires officers to, for example, offer to discontinue the use of a body camera when they enter a home without a warrant or in non-exigent circumstances, or when they interact with a person who wishes to anonymously report a crime. *See* National ACLU, A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement, at 1-2 (May 2015), *available at* https://www.aclu.org/files/field_document/aclu_police_body_cameras_model_legislation_may_2015.pdf.

The ACLU-NH does not dispute that Mr. Esty-Lennon's two children have genuine privacy interests that this Court should recognize and examine. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) (the privacy protections under FOIA Exemption 7(C) extend to the family of decedents). However, in this case, disclosure is required because the privacy rights of Mr. Esty-Lennon's family are outweighed by the public's compelling interest in disclosure.

Here, the only privacy interest that appears to be asserted is the need to protect Mr. Esty-Lennon's two minor children (and potentially other relatives) from seeing the videos. The ACLU-NH does not discount the possibility that the videos may be seen by Mr. Esty-Lennon's children, and the ACLU-NH is sympathetic to the prospect that such images could be deeply disturbing to them. But the interest in protecting two children—who, with appropriate supervision, can be shielded from seeing these videos by their guardian—should not trump the public's right to obtain information that is important to evaluate the propriety of police officers' use of lethal force and the adequacy of the Attorney General's investigation. While the ACLU-NH acknowledges that an effort by the guardian of these children to have them "avert their eyes" may be an imperfect solution, this is a far more narrowly tailored approach than, in sweeping fashion, depriving the public of this valuable information. *See United States v. Playboy Ent"t Group*, 529 U.S. 803, 813 (2000) ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'") (*quoting Cohen v. California*, 403 U.S. 15, 21 (1971)).

In short, two minor children should not have veto rights over the disclosure of information that is critical to understanding police behavior of this magnitude.

Again, if the videos, for example, depicted images in a home or only depicted gratuitous images of Mr. Esty-Lennon's body well after the shooting took place, the public's interest in disclosure would be less weighty. *See Favish*, 541 U.S. 157 (recognizing privacy interest but in the context of post-incident death scene images of decedent); *Prison Legal News v. Exec. Office for United States Attys.*, 628 F.3d 1243, 1248 (10th Cir. 2011) (addressing privacy interests in context of post-murder autopsy photographs and images of decedent); *see Catsouras v. Department of California Highway Patrol*, 181 Cal. App. 4th 856, 857 (Cal. App. 4th Dist. 2010) (addressing nine gruesome death images of the decedent disseminated for pure shock value). But this is not this case. The videos in this case depict images of officers' actions toward a civilian <u>*as it happened*</u> in a public space. *See Estate of Rodriguez v. City of Fort Wayne*, No. 1:08-CV-0267, 2009 U.S. Dist. LEXIS 12380, at *13 (N.D. Ind. Feb. 18, 2009) (denying protective order sought by defendant police department over plaintiff's objections concerning dash camera video of fatal police shooting because "the dashboard video recordings in this case simply record an event that occurred on a public street, involving an incident that will also be described by eye-witnesses"). Because the videos in this case are not limited to the narrow, post-incident death scenes that were addressed in *Favish* and *Prison Legal News*, the privacy interests in this case are not outweighed by the public's compelling interest in disclosure.

Nonetheless, even if Mr. Esty-Lennon's estate can successfully demonstrate a compelling privacy justification for not disclosing some specific portion of the four (4) videos in question—which it cannot based on the current record—that would not warrant a blanket order prohibiting disclosure of all the videos in their entirety. Instead, Chapter 91-A requires that a court use the

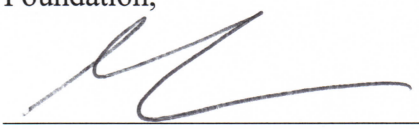
least restrictive means in withholding information from the public. *See In re Keene Sentinel*, 136 N.H. 121, 131 (1992) ("[I]nstead of sealing an entire document because it has been determined that parts of it should not be accessible to the public, the court should consider if redaction of those parts is the appropriate least restrictive means."); *Lambert v. Belknap Cty. Convention*, 157 N.H. 375, 386 (2008) (remanding for determination as to whether personal information should be redacted). Here, in order to mitigate any privacy concerns this Court may have in light of *Favish*, the Court could consider ordering redaction through blurring technology of any post-incident death scene images that include salacious details of the aftermath of Mr. Esty-Lennon's death, and that do not provide meaningful oversight of law enforcement's actions. This would be a far more narrowly tailored approach than withholding all four (4) videos in their entirety. Having not seen the videos, the ACLU-NH takes no position on whether redaction would be appropriate here, and the ACLU-NH is, in fact, concerned that any redactions in this case could mask relevant information that may shed light on important law enforcement behavior. In any event, if redactions are used, they should only be used in narrow circumstances and should not blur images that would be helpful in assisting the public in understanding what exactly occurred during this tragic event.

CONCLUSION

For the foregoing reasons based on the facts and circumstances of this particular case, the four (4) videos at issue should be produced to the *Valley News*, the Union Leader Corporation, and Hearst Properties, Inc. (including WMUR-TV) pursuant to Chapter 91-A.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire Foundation,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded to the following on this 1st day of September 2015:

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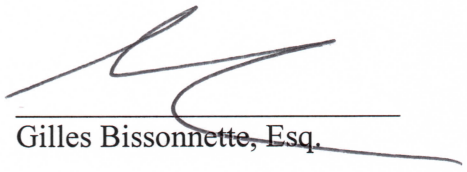

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