

**IN THE EIGHTH DISTRICT COURT OF APPEALS  
CUYAHOGA COUNTY, OHIO**

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IDEASTREAM PUBLIC MEDIA,	:	
Relator,	:	CASE NO.: CA 21 110346
-against-	:	
CUYAHOGA METROPOLITAN HOUSING AUTHORITY,	:	
Respondent.	:	
<hr/>	X	

**BRIEF OF *AMICI CURAIE* CLEVELAND 19 NEWS (WOIO),  
NEWS 5 CLEVELAND (WEWS), *WKYC CHANNEL 3*,  
THE OHIO ASSOCIATION OF BROADCASTERS,  
THE OHIO NEWS MEDIA ASSOCIATION,  
THE SOCIETY OF PROFESSIONAL JOURNALISTS,  
THE NATIONAL ASSOCIATION OF BLACK JOURNALISTS,  
THE NATIONAL PRESS CLUB, AND THE  
NATIONAL PRESS CLUB INSTITUTE  
IN SUPPORT OF RELATOR**

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*Amici* are local Cleveland television news stations which have reported extensively on the officer-involved shooting death of Arthur Keith, as well as First Amendment and journalism advocacy groups dedicated to supporting journalists' efforts to shine light on the actions of government.<sup>1</sup> In support of Relator's effort to obtain the surveillance footage of Mr. Keith's death at issue in this lawsuit, *amici* submit this brief<sup>2</sup> (1) to highlight the importance of proper enforcement of Ohio's Open Records Act, particularly the tenet that release of records is strongly favored and claims of exemption disfavored; (2) to stress the significant public interest in records regarding the conduct of police; and (3) to amplify the reasons why Respondent CHMA's untimely-asserted claim of exemption should fail. In a time of serious tensions amid a national conversation over policing, the surveillance footage at issue here – which would help resolve conflicting reports about what happened – should not be kept secret. "Secrecy . . . can only breed ignorance and distrust," while "free and robust reporting, criticism and debate can contribute to public understanding" of "criminal justice" and "improve the quality" of government systems by "subjecting [them] to the cleansing effects of exposure and public accountability." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

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<sup>1</sup> As set out more fully in the Appendix, *amici* are *Cleveland 19 News* (WOIO), *News 5 Cleveland* (WEWS), *WKYC Channel 3*, the Ohio Association of Broadcasters, the Ohio News Media Association, the Society of Professional Journalists, the National Association of Black Journalists, the National Press Club, and the National Press Club Institute.

<sup>2</sup> Relator has consented to *amici*'s participation. Respondent has stated that it does "not have an objection" to *amici*'s request to submit an *amicus* brief.

## BACKGROUND

On November 13, 2020, a white CHMA officer shot and killed Arthur Keith, a 19-year-old Black man, at the King Kennedy Housing Complex. CHMA Br. at 4-5;<sup>3</sup> *see also* Michelle Nicks, *Father of 19-year-old killed by CMHA police demanding answers after witnesses claim his son was shot in the back*, 19 News WOIO (Nov. 14, 2020), <https://www.cleveland19.com/2020/11/14/father-year-old-killed-by-cmha-police-demanding-answers-after-witnesses-claim-his-son-was-shot-back/> (“Nicks, Nov. 14”); Mark Gillespie, *Autopsy shows man killed by officer was shot in the back*, AP (Mar. 4, 2021), <https://apnews.com/article/shootings-police-cleveland-8a18ce24da8c296e772d563de3b8dfea>. Almost immediately, Mr. Keith’s family, advocacy groups and journalists began raising serious questions about the incident, as witnesses claimed that Mr. Keith had been shot in the back, while CMHA maintained that Mr. Keith pointed a gun at officers:

- Mr. Keith’s family, through their attorney, held a news conference, stating, “Mr. Keith did not pose a threat, Mr. Keith did not brandish a gun and Mr. Keith was attempting to run after being startled and awakened in a car while he was doing nothing but being there. . . . We want answers.” Scott Noll, *Family of teen killed by CMHA police demand answers; says witness accounts contradict police*, News 5 Cleveland WEWS (Nov. 20, 2020), <https://www.news5cleveland.com/news/local-news/cleveland-metro/family-of-teen-killed-by-cmha-police-demands-answers>; *see also* WKYC Staff, *Family of 19-year-old fatally shot by CMHA police holds news conference with attorneys and Black Lives Matter Cleveland*, WKYC (Nov. 20, 2020), <https://www.wkyc.com/article/news/local/cleveland/arthur-keith-press-conference-cleveland-black-lives-matter-cmha/95-ca1cc2f5-3db8-44cc-87e6-e7421e344961>.

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<sup>3</sup> CHMA’s “Memorandum in Support of its Motion for Summary Judgment on Relator’s Complaint for Writ of Mandamus” is referred to herein as “CHMA Br.”

- The advocacy group Stop the Pain told *19 News*: “You know we’ve lost another young Black man to the hands of police. A young man that we have heard from numerous witnesses was running away and was shot in the back. This officer became the judge, the jury and his executioner.” Nicks, Nov. 14.
- Boys and Girls Club Director Richard Starr told *Cleveland.com*: “I’m puzzled, and I’m wondering what transpired from the time he got out of the van to the time he collapsed by the tree.” Starr said that he had worked closely with CHMA police “to help highlight and repair issues related to community policing,” but now “he doesn’t feel like that relationship could continue until he knows what happened to Keith. . . . ‘We need justice.’” Olivia Mitchell, “*Why shoot? Children who witnessed CMHA police officer kill Cleveland man tell their story*,” *Cleveland.com* (Nov. 21, 2020), <https://www.cleveland.com/news/2020/11/why-shoot-children-who-witnessed-cmha-police-officer-kill-cleveland-man-tell-their-story.html>.

The witnesses’ accounts appeared to be confirmed in March when the autopsy of Mr. Keith was released, revealing that he had, in fact, been shot in the back. *See, e.g.*, Hope Sloop & January Keaton, “*He was scared, he was running away;*” *Family of Arthur Keith looking for answers following the release of the 19-year-old’s autopsy*, WKYC (Mar. 4, 2021), <https://www.wkyc.com/article/news/local/arthur-keith-autopsy/95-929811c6-9c1b-4075-bc49-cea3423f60ab>; Chris Anderson, *Family: Autopsy shows that Arthur Keith was shot in the back by CMHA police*, 19 News WOIO (Mar. 4, 2021), <https://www.cleveland19.com/2021/03/04/familys-lawyer-autopsy-shows-that-arthur-keith-was-shot-back-by-cmha-police/>.

To try to address these questions, Mr. Keith’s family demanded to see the surveillance footage of the incident recorded by cameras at the King Kennedy Housing Complex. The family sought “total transparency in the ongoing investigation” including specifically by release of “the surveillance video” in order to hold the CMHA police “accountable for their actions.” Ronnie Duncan, *Questions still surround death of Arthur Keith*, 19 News WOIO (Nov. 20, 2020), <https://www.cleveland19.com/2020/11/20/questions-still-surround-death-arthur->

[keith/](#). But CMHA has refused to release any footage. See CMHA Br. at 7-8; see generally *Witness account contradicts police in CMHA police shooting of 19-year-old*, News 5 Cleveland WEWS (Dec. 3, 2020), <https://www.news5cleveland.com/news/local-news/cleveland-metro/witness-account-contradicts-police-in-cmha-police-shooting-of-19-year-old> (quoting family’s attorney stating, “That video would really shed some light on what happened on that day”); Ronnie Duncan, *Family of 19-year-old killed in CMHA Police shooting demand release of surveillance video*, 19 News WOIO (Dec. 3, 2020), <https://www.cleveland19.com/2020/12/03/family-arthur-keith-demand-release-surveillance-video/> (Family “has been waiting and begging authorities to release any video surveillance evidence” of the shooting. They are also becoming “increasingly frustrated with the City of Cleveland’s decision not to release surveillance videos of the night Keith died.”); accord WKYC Staff, *Family demands release of surveillance video connected to 19-year-old man’s shooting death involving CMHA officer* (Dec. 3, 2020), <https://www.wkyc.com/article/news/local/cleveland/arthur-keith-shooting-cleveland/95-e874d34d-cf30-43a7-97b7-8ac43366d9ff>. Community and advocacy groups echoed the family’s concerns. See, e.g., Statement of Boys & Girls Club of Northeast Ohio and Cleveland Peacemakers Alliance (Mar. 4, 2021), available at <https://www.bgcneo.org/articles/2021/03/04/a-joint-statement-from-boys-girls-clubs-of-northeast-ohio-and-cleveland-peacemakers-alliance-on-arthur-keith/> (“We need the video from that tragic day. We need real leadership. We need to have a real assessment, analysis and subsequent plan of action that brings about the change that has been sought for decades.”); Statement of Black Lives Matter Cleveland (@BLM\_216), Twitter

(Dec. 8, 2020), [https://twitter.com/blm\\_216/status/1336404309005783041](https://twitter.com/blm_216/status/1336404309005783041) (calling for release of video footage).

Given the public interest in the matter, particularly in light of the nationwide conversation regarding police shootings of Black people, reignited last summer with the death of George Floyd in Minneapolis, journalists – including Relator in this case, the Cleveland-area public radio station and news site – also started calling for the release of the surveillance footage. *See* Compl. ¶¶ 6, 10; Sara Goldenberg, *More than six months after deadly police shooting, still no answers for family*, 19 News WOIO (May 26, 2021), <https://www.cleveland19.com/2021/05/26/more-than-six-months-after-deadly-police-shooting-still-no-answers-family/> (noting requests by 19 News for footage).

Indeed, Cleveland.com published two separate opinion columns questioning why CMHA police were keeping the video secret. Columnist Eric Foster argued that release of the video would shed light on the discrepancies between the story of CMHA and police, on the one hand, and that of witnesses and the autopsy, on the other: “What value does secrecy have in this context? We know who was killed. And we know who the killer is. If there is video of the killing, what value is served by withholding it or its details from the public?” Eric Foster, *If there’s video of CMHA police shooting Arthur Keith, why haven’t we seen it?*, Cleveland.com (Mar. 17, 2021),

<https://www.cleveland.com/opinion/2021/03/if-theres-video-of-cmha-police-shooting-arthur-keith-why-havent-we-seen-it-eric-foster.html>. The claimed need for secrecy, he wrote, is especially “disingenuous, as details have been selectively released by local authorities.” *Id.* In a separate publication, the editorial board likewise expressed frustration with CMHA’s refusal to turn over the video under Ohio’s open records act. *CMHA wrongly relinquished a public record on the killing of Arthur Keith*

– *and needs to get it back*, Cleveland.com (Feb. 17, 2021), <https://www.cleveland.com/opinion/2021/02/cmha-wrongly-relinquished-a-public-record-on-the-killing-of-arthur-keith-and-needs-to-get-it-back.html>. This refusal “leaves the impression, whether rightly or wrongly, that it has something to hide in the death of Arthur Keith.” *Id.* (also noting that transparency required to address concerns of “some King Kennedy residents” who wondered “why police would shoot to kill in front of children, instead of using less-lethal means to subdue Keith”).

Growing increasingly frustrated with the lack of transparency, this past spring the public protested, “demanding justice” for Arthur Keith. *See, e.g.*, Avery Williams, *Protesters gather at Cuyahoga County Justice Center in honor of Arthur Keith*, 19 News WOIO (May 22, 2021), <https://www.cleveland19.com/2021/05/22/protesters-gather-cuyahoga-county-justice-center-honor-arthur-keith/>; Olivia Mitchell, “*This is not going to stand*”: *Father of Arthur Keith and other victims of police brutality rally in Cleveland*,” Cleveland.com (May 1, 2021), <https://www.cleveland.com/news/2021/05/this-is-not-going-to-stand-father-of-arthur-keith-and-other-victims-of-police-brutality-rally-in-cleveland-this-week-in-the-cle-special-episode.html>.

Despite clear public interest, the interests of the Mr. Keith’s family, and the legal requests made by journalists (by the submission of requests under the Open Records Act and the filing of this action by Relator), CMHA has continued to keep this surveillance footage secret for more than seven months through various delay tactics before and during this litigation. *See, e.g.*, Compl. ¶ 14 (noting CHMA’s failure to respond to Relator’s request for video under Ohio Open Records Act); Mot. to Dismiss (Apr. 16, 2021) (CMHA’s unsuccessful motion to dismiss based on technical formality); Mot. to

Refer to Mediation (Apr. 19, 2021) (CHMA’s effort to delay case by mediation opposed by Relator); Br. in Opp. to Mot. to Compel Discovery (Apr. 21, 2021) (CMHA’s opposition to providing any discovery). And CMHA’s purported basis for withholding the footage has shifted over time, making it very difficult for the press and public to evaluate CHMA’s reasoning. *See, e.g.*, CMHA Answer at Aff. Def. Nos. 4 & 6 (asserting that CMHA is not the “custodian” of the footage); *id.* No. 5 (asserting that the “law enforcement” exemption applies, without specifying which subsection); Nos. 7, 8 (despite clear request for “video footage” recorded at a specific place on a specific date, asserting that “CHMA cannot reasonably identify what records are being requested” and that the requests “are overly broad and ambiguous”). Indeed, CHMA did not assert the specific basis it now claims for withholding the footage until it submitted its summary judgment brief earlier this month. At that point, it finally declared that the footage was exempt under R.C. 149.43(A)(2)(a), the exemption for “confidential law enforcement investigatory records,” the disclosure of which “would create a high probability of” identifying “a suspect who has not been charged with the offense to which the record pertains.”

Because the requested footage is neither an “investigatory record” nor “highly” likely to cause the identification of an uncharged suspect, *amici* now submit this brief in support of Relator. Particularly in light of the substantial public interest in this matter and the purposes underlying the Ohio Open Records Act, summary judgment should be denied, disclosure should be ordered, and CMHA should not be permitted to continue to shield its conduct from public scrutiny.

## ARGUMENT

### I. COURTS MUST CONSIDER THE PURPOSES OF THE OHIO OPEN RECORDS ACT WHEN EVALUATING CLAIMS OF EXEMPTION

Ohio legislators and courts have long recognized that “[i]n a democratic nation such as ours,” there is a significant “societal interest in keeping governmental records open,” *State ex rel. NBC v. City of Cleveland* (“NBC”), 38 Ohio St.3d 79, 81, 526 N.E.2d 786 (1988), in order “to expose government activity to public scrutiny,” *State ex rel. Office of Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 21. *See also State ex rel. Gannett Satellite Info. Network v. Petro* (“Gannett”), 80 Ohio St.3d 261, 264, 685 N.E.2d 1223 (1997) (“The purpose of Ohio’s Public Records Act . . . is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy.”) Therefore, the rule in Ohio is “that public records are the people’s records and . . . the officials in whose custody they happen to be are merely trustees for the people.” *NBC*, 38 Ohio St.3d at 81, 526 N.E.2d 786 (*quoting Dayton Newspapers v. Dayton*, 45 Ohio St. 2d 107, 109, 341 N.E.2d 576 (1976)). “Anyone . . . may inspect such records at any time, subject only” to limited exceptions. *Id.* And those exceptions must be “narrowly construed and all doubts are to be resolved in favor of disclosure.” *State ex rel. Kinsley v. Berea Bd. of Educ.*, 64 Ohio App.3d 659, 662, 582 N.E.2d 653 (8th Dist. 1990); *see also Gannett*, 80 Ohio St.3d at 264, 685 N.E.2d 1223 (Public Records Act “must be construed liberally in favor of broad access”). These purposes – of promoting transparency in the “people’s records” and subjecting government action to public scrutiny – must be the “starting point of our analysis” of an agency’s claim of exemption. *NBC*, 38 Ohio St.3d at 81, 526 N.E.2d 786.

## II. PUBLIC INTEREST IN POLICE ACTIVITY IS SIGNIFICANT

In addition to considering the purposes underlying the Open Records Act, courts should also consider the specific public interest in the records sought when evaluating an agency's claim of exemption. *See State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 132, 2002-Ohio-7041, ¶ 33 (law enforcement records are “a matter of great public interest” and disclosure provides “public benefit”); *State ex rel. Kesterson v. Kent State Univ.*, 156 Ohio St.3d 22, 26, 2018-Ohio-5110, ¶ 9 (purpose of Act is to “serve[] the public interest”).

Here, as described more fully above, the public interest in this particular matter – involving a white police officer fatally shooting a Black man in the back and the apparent effort by CMHA to disclose as little information about it as possible,<sup>4</sup> during a time of national reckoning over police treatment of Black people – can hardly be overstated. *See supra* at 2-6 (describing extensive news coverage, press conferences and protest).

But even more broadly, information about how the police operate, especially with respect to minority populations, is critical to a functioning society and to developing/maintaining a good relationship between the police and the citizens they are meant to protect, particularly given recent high-profile events. As Chief Justice Burger wrote, “[p]eople in an open society do not demand infallibility from their institutions,

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<sup>4</sup> In addition to giving the news media the run-around, and refusing to provide the surveillance footage at issue here, CMHA also significantly delayed the release of Mr. Keith's autopsy. It was “signed off on December 8, 2020” and not released until March of 2021. Olivia Mitchell, *Autopsy reveals CMHA officer fatally shot 19-year-old Arthur Keith in the back*, Cleveland.com (Mar. 4, 2021), <https://www.cleveland.com/news/2021/03/autopsy-reveals-cmha-officer-fatally-shot-19-year-old-arthur-keith-in-the-back.html>.

but it is difficult for them to accept what they are prohibited from observing.”

*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Keeping a video such as the one at issue here secret does nothing but sow distrust and give the impression that the police have something to hide.<sup>5</sup> Release, on the other hand, helps ensure a more objective record of police interactions in cases of contested narratives (such as here). It may help people to understand why officers acted the way they did. And to the extent that such videos show misconduct by police, they can be a catalyst for positive change. *See, e.g.*, Valecia J. Battle, *Drop the Phone and Step Away from the Weapon: The First Amendment, the Camera Phone*, 60 *How. L.J.* 531, 532–33 (2017) (phenomenon of filming and broadcasting police-community relations “has always been a way to use speech to combat that oppression and contribute to the marketplace of ideas of how our America should be”); Damien Cave and Rochelle Oliver, *The Videos That Are Putting Race and Policing Into Sharp Relief*, *N.Y. Times* (Nov. 24, 2015) <http://nyti.ms/1IMtFWL>. Indeed, history is rife with examples of videos of police (mis)conduct leading to substantive policy changes and increased accountability:

- Publication by KTLA of the video footage of the Rodney King beating in Los Angeles spurred reforms within the LAPD. *See* Paul Pringle and Andrew

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<sup>5</sup> Public doubt is necessarily raised when police departments promptly release footage which is sympathetic to officers, but decline to do so in circumstances that may paint them in a bad or violent light. *See, e.g.*, Jackie Congado, *Officer: “I wanted to be absolutely sure before I used deadly force,”* *WLWT5 Cincinnati* (Apr. 20, 2015), <https://www.wlwt.com/article/officer-i-wanted-to-be-absolutely-sure-before-i-used-deadly-force/3553421> (immediate release of video where officer avoided use of force). Public trust is also undermined by inconsistent decisions regarding release of police video. Why, for example, was footage immediately released, despite an active investigation, in connection with the tragic death of Ma’Khia Bryant in Columbus, but not in the death of Arthur Keith? *See* Mark Ferenchik, *Ma’Khia Bryant: Columbus police release body camera footage in shooting of 16-year-old*, *The Columbus Dispatch* (Apr. 26, 2021), <https://www.dispatch.com/story/news/crime/2021/04/20/one-person-killed-officer-involved-shooting-east-side/7309088002/>.

Blankstein, *King Case Led to Major LAPD Reforms*, L.A. Times (June 17, 2012), <https://perma.cc/EWF9-GPQD>.

- The Charlotte-Mecklenburg, NC Police Department reevaluated its use-of-force policy after the public’s reaction to released footage of the 2016 shooting death of Keith Lamont Scott. See Joe Marusak & Mark Washburn, *CMPD Releases Full Video of Fatal Keith Lamont Scott Shooting*, Charlotte Observer (Oct. 4, 2016), <http://bit.ly/2z6xmFQ>; Jane Wester & Lavendrick Smith, *After Keith Scott Shooting, CMPD is Reviewing Its Use of Force Policy*, Charlotte Observer (Sept. 15, 2017), <http://bit.ly/2DCARYr>.
- Video released of the killing of Walter Scott led South Carolina to substantially increase the wearing of cameras by police. Jeremy Borden, *Officers with body cameras OK’d, renamed for Walter Scott*, Post and Courier (May 13, 2015), <http://shorturl.at/drL67>.
- The video of George Floyd’s death at the hands of police in Minneapolis has spurred numerous efforts at police reform, including introduction of the George Floyd Justice in Policing Act in Congress,<sup>6</sup> the repeal of anti-transparency laws in New York,<sup>7</sup> and the rethinking of police responsibilities in the San Francisco Bay area,<sup>8</sup> among many other things. See generally Ram Subramanian & Leily Arzi, *State Policing Reforms Since George Floyd’s Murder*, Brennan Center for Justice (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>.

The “public in general . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny.” *Waller v. Georgia*, 467 U.S. 39, 47 (1984); see also, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975)

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<sup>6</sup> See, e.g., Will Weissert and Padmananda Rama (AP), *House passes sweeping police reform bill named after George Floyd*, WKYC (Mar. 3, 2021), <https://www.wkyc.com/article/news/nation-world/house-passes-george-floyd-justice-policing-act/507-dcfcedc8-c261-441d-9196-6c80329d0bd7>.

<sup>7</sup> See, e.g., Stephanie Wykstra, *The fight for transparency in police misconduct, explained*, Vox (June 16, 2020), <https://www.vox.com/2020/6/16/21291595/new-york-section-50-a-police-misconduct>.

<sup>8</sup> See, e.g., Megan Cassidy and Sarah Ravani, *Bay Area cities push for ambitious police reform in wake of George Floyd’s death*, San Francisco Chronicle (May 25, 2021), <https://www.sfchronicle.com/local-politics/article/Bay-Area-police-reform-takes-halting-steps-but-16200566.php>.

(“the citizenry is the final judge of the proper conduct of public business”); *Am. Broad. Cos. v. Las Vegas Metro. Police Dep’t*, No. 17A764030, 2018 WL 1510266 (Nev. Dist. Ct. Mar. 2, 2018) (public interest in release of video footage pertaining to mass shooting in Las Vegas outweighed any detrimental impact to ongoing investigation). And Ohio in specific has made clear, as a matter of public policy, that police officers’ conduct should be subject to public scrutiny. *See, e.g., State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 143, 647 N.E.2d 1374 (1995) (Open Records Act requires that materials concerning the “monitoring and discipline” of Ohio’s police officers must “be disclosed”).

### **III. CMHA’S CLAIM OF EXEMPTION FAILS**

Against this backdrop of (1) Ohio’s commitment to government transparency, as reflected in the Open Records Act, and (2) the legitimate and significant public interest in police violence generally and in this case specifically, CMHA’s claim that the requested footage is a “confidential law enforcement investigatory record” with a “high probability” of disclosing “the identity of a suspect who has not been charged” should fail. The footage is not a law enforcement investigatory record, and CMHA has not met its burden to show that disclosure would identify an uncharged suspect. (And even if it had, CMHA has an obligation to redact identifying information; it may not withhold the footage wholesale.) Moreover, CMHA’s delays and obfuscation should prohibit it from “benefiting” from its eleventh-hour claim of exemption.

#### **A. THE VIDEO IS NOT A LAW ENFORCEMENT “INVESTIGATORY RECORD”**

Law enforcement investigatory records are generally those “prepared by attorneys or other law enforcement officials.” *State ex. Rel. Cincinnati Enquirer v.*

*Hamilton Cty.*, 75 Ohio St.3d 374, 378, 662 N.E.2d 334 (1996). In contrast, records that pre-exist an investigation are not investigatory records. *Id.* (emphasis added). Accordingly, records such as 911 tapes are not “law enforcement investigatory records” because they were not created *for the purpose* of a law enforcement investigation. *Id.* (“The moment the tapes were made as a result of the calls . . . to the 911 number, the tapes became public records.”); accord *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor’s Office*, 105 Ohio St.3d 172, 2005-Ohio-685; *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 396, 2015-Ohio-974, ¶ 17. Nor are records of “routine monitoring,” as opposed to records of monitoring undertaken in response to a “specific suspicion of criminal wrongdoing.” *NBC*, 38 Ohio St.3d at 83, 526 N.E.2d 786; accord *Snowden*, 72 Ohio St.3d at 143, 647 N.E.2d 1374. Moreover, even initial incident reports, which reflect officers’ “narrative statements” about specific incidents, do not qualify as “law enforcement investigatory records.” See *State ex rel. Beacon Journal Publ’g Co. v. Maurer*, 91 Ohio St.3d 54, 56, 741 N.E.2d 511 (2001).

The surveillance footage at issue here is just like the 911 tapes in *Hamilton County*. The footage was not created for the purpose of investigating any specific wrongdoing – it reflects “routine monitoring” that is always ongoing at the King Kennedy Housing Complex. See Aff. of G. Drew in Support of Mot. for Summ. Judgment (“Drew Aff.”) ¶¶ 10-11. The footage is even more akin to a non-exempt “incident report” – a document that is meant to describe and provide information about the “incident” which may lead to a subsequent investigation. Surveillance footage of an “incident” is simply a more objective version of such a report. It documents the “incident,” not the “investigation.” And the fact that the footage may later come “into the possession and/or control of . . . law enforcement officials” – here, Cleveland Police –

“has no significance.” *Hamilton Cty.*, 75 Ohio St.3d at 378, 662 N.E.2d 334 (emphasis added). “Once clothed with the public records cloak, the records cannot be defrocked of their status.” *Id.*; see also, e.g., *Gannett*, 80 Ohio St.3d at 267 (non-exempt records “do not become exempt simply because they are placed in a prosecutor’s file”).

For these reasons – and in light of the significant public interest in this matter as well as the Ohio Supreme Court’s admonition that the Public Records Act “must be construed liberally in favor of broad access,” *Gannett*, 80 Ohio St.3d at 264 – the requested surveillance footage<sup>9</sup> is not a “law enforcement investigatory record,” and thus should be immediately produced.<sup>10</sup>

**B. CMHA HAS NOT SHOWN “HIGH PROBABILITY OF DISCLOSURE OF UNCHARGED SUSPECT”**

Where, as here, material does not qualify as a “law enforcement investigatory record” in the first place, its “particular content . . . is irrelevant,” and “it does not matter that release . . . might reveal the identity of an uncharged suspect.” *Hamilton Cty.*, 75

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<sup>9</sup> Indeed, security footage is routinely required to be released under open records laws, including in Ohio. See, e.g., *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111 (requiring release of security footage of “use of force event” involving prison officer); *Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office*, --- N.E.3d ----, 2020-Ohio-5371 (security footage of shootings taken outside courthouse required to be released); see also *Easton Area School Dist. v. Miller*, 232 A.3d 716 (Pa. 2020) (requiring release of security footage); *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578 (D.C. Cir. 2020) (same); *City of Riverdale v. Diercks*, 806 N.W.2d 643 (Iowa 2011) (same); *Jane Does v. King Cty.*, 366 P.3d 936 (Wash. App. 2015) (same).

<sup>10</sup> CMHA is also not entitled to assert the “law enforcement” exemption for the additional reason that it is not the entity investigating the shooting – the Cleveland Police Department is doing that. See, e.g., *Sage*, 142 Ohio St.3d at 397, 2015-Ohio-974 (exemption does not apply where record held by non-investigating agency); *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 157-58, 684 N.E.2d 1239 (1997) (same); see also *Smith v. Chicago Police Dep’t*, 2015 CH 11780 (Ill. Cir. Ct. Cook Cty. Nov. 19, 2015) (Chicago Police required to disclose video of the fatal shooting of Laquan McDonald where CPD was not the agency investigating the incident).

Ohio St.3d at 378, 662 N.E.2d 334; *see also Maurer*, 91 Ohio St.3d at 57, 741 N.E.2d 511 (incident reports are not “law enforcement investigatory records” and thus may not be withheld “despite the risk that the report may disclose the identity of an uncharged suspect”). But even if the surveillance footage *were* a “law enforcement investigatory record,” the exemption contained in Ohio R.C. 149.43(A)(2)(a) still would not apply because CMHA has not met its burden of showing that release of the footage “would create a high probability” of disclosing the “identity of a suspect who has not been charged.” *Id.* This burden is significant, requiring “the records custodian to *prove* that the requested records fall squarely within the exception.” *Rogers*, 155 Ohio St.3d 545, 548, 2018-Ohio-5111 (emphasis added); *see also id.* (“Exceptions to the Public Records Act must be strictly construed against the public-records custodian.”) (citation omitted).

Here, CMHA baldly asserts that release of the footage “would create a high probability of disclosure of an uncharged suspect from both” an *earlier* shooting on November 9, 2020, “and the officer-involved shooting at the same housing complex four days later,” citing generally to the Drew Affidavit. CMHA Br. at 12. But the Drew Affidavit notably does *not* state or otherwise supply any facts to suggest that release of the video “would create a high probability of disclosure of . . . the *identity*” of an uncharged suspect, as the statute requires for the exemption to apply. Ohio R.C. 149.43(A)(2)(a) (emphasis added); *see also NBC*, 38 Ohio St.3d at 82, 526 N.E.2d 786 (“Under Ohio law, a person asserting an exception is required to prove facts warranting such an exception.”). Rather, he merely states that the video “contains images” of an uncharged suspect, Drew Aff. ¶ 25; he does not suggest that those images are sufficiently clear that release “would create a high probability” of being able to “identify” the “suspect.” *See also id.* ¶ 15 (release “*could* have the probability of disclosing the identify

of an uncharged suspect) (emphasis added); *id.* ¶ 21 (release “*could* reveal the identity of uncharged suspects”) (emphasis added). This type of overbroad interpretation of the exemption is precisely what the Open Records Act and the Ohio Supreme Court prohibit. *See, e.g., Rogers*, 2018-Ohio-5111, 155 Ohio St.3d at 548; *Gannett*, 80 Ohio St.3d at 264, 685 N.E.2d 1223; *Kinsley*, 64 Ohio App.3d at 662, 582 N.E.2d 653. CHMA plainly has not met its burden, and thus the exemption may not apply. *See State ex rel. NBC v. Cleveland*, 82 Ohio App. 3d 202, 208, 611 N.E.2d 838 (8th Dist. 1992) (rejecting City’s claim of “uncharged suspect” exemption where City failed to meet its “burden of proving that records are excepted from disclosure”).

And even if there was a “high probability” that disclosure would reveal the “identity” of an uncharged suspect,<sup>11</sup> the solution is *redaction* (or, in the case of video, “blurring”) not the wholesale withholding of the record. *See, e.g., Welsh-Huggins*, 2020-Ohio-5371, --- N.E.3d ----, ¶ 29 (to the extent that requested “records contain excepted information, this information must be redacted and any remaining information must be released”); *id.* ¶ 73 (“If a video is not exempt in its entirety, those portions that are exempt may be withheld by redaction, but the remainder must be released”); *see also Evans*, 951 F.3d at 587 (if teenagers can insert “cat faces over the visages of humans” in videos, then government agents surely should be able to employ video blurring technology).

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<sup>11</sup> CMHA has not made clear what crime the unidentified “uncharged subject” might have committed. It does not appear that the “uncharged suspect” CMHA is concerned about “identifying” is the officer involved in the November 13 shooting, since it indicates that the suspect was involved in *both* the November 9 and November 13 events. CMHA Br. at 12. Nor could the “uncharged suspect” be Mr. Keith, as someone who is deceased will obviously never be “charged.”

**C. THE COURT SHOULD DECLINE TO CONSIDER THE CLAIMED EXEMPTION IN LIGHT OF ITS UNTIMELY INVOCATION**

The Ohio Public Records Act is intended to provide requestors – such as the news media – access to government records “within a reasonable period of time.” *Rogers*, 2018-Ohio-5111, 155 Ohio St.3d 545, ¶ 6; *see also* Ohio R.C. 149.43(B)(1) (“records . . . shall be promptly prepared”). To the extent that “a request is ultimately denied,” the responding agency “shall provide the requester with an explanation, including legal authority, setting forth why the request was denied.” *Id.* (B)(3). The requirement that agencies act promptly allows the press to do its job of providing timely reporting on matters of public interest. As the United States Supreme Court has observed, “[d]elays imposed by governmental authority” in making information available are inconsistent with the press’s “traditional function of bringing news to the public promptly.” *Neb. Press Ass’n*, 427 U.S. at 560–61; *id.* at 609 (Brennan, J., concurring) (noting that “delay . . . could itself destroy the contemporary news value of the information the press seeks to disseminate.”); *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) (“[t]he peculiar value of news is in the spreading of it while it is fresh”). Delays likewise prevent the media from fulfilling its constitutional role of “bar[ing] the secrets of government and inform[ing] the people.” *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

Here, instead of providing the prompt responses the Open Record Act requires, CMHA has repeatedly delayed, obfuscated, and otherwise played “hide the ball.” As explained *supra* at 7, CMHA failed to provide any reason for withholding the footage until it filed its summary judgment brief. It certainly did not provide Relator with a prompt “explanation, including legal authority, setting forth why the request was

denied.” Ohio R.C. 149.43(B)(3). It tried to claim that it was not the custodian of its own footage; it argued that Relator should instead seek the records from the police department; it brought a motion against Relator on an easily curable technicality; it insisted on mediation it knew would be futile, over Relator’s objection; it sought a further extension of summary judgment briefing. *See supra* at 7.

*Amici* recognize that, in Ohio, a public agency does not necessarily waive an exemption by failure to invoke it in response to a records request (as CMHA did here) or even by failure to assert it as an affirmative defense (as CMHA also did here). *See State ex rel. Plain Dealer Publ’g Co. v. City of Cleveland*, 75 Ohio St.3d 31, 33-34, 661 N.E.2d 187 (1996). But even where a finding of waiver is not *required*, a court may still decline to consider untimely-raised claims of exemption. *Id.* Courts “retain[] the discretion to find that . . . an untimely assertion [of exemption] has been forfeited,” in the interest of “fairness, efficiency and finality.” *Shapiro v. DOJ*, No. 13-cv-555, 2016 WL 3023980, at \*4 (D.D.C. May 25, 2016); *see also Plain Dealer*, 75 Ohio St.3d at 34, 661 N.E.2d 187 (explaining that that Ohio law is “consistent” with federal open records law as regards waiver of exemptions). This Court should emphatically reject CMHA’s conduct in responding to a news organization’s effort to discover the objective truth about a matter of significant public interest involving public officers.

An agency’s refusal to explain itself makes it very difficult for news organizations, like *amici*, to evaluate whether the agency’s claim of exemption may be valid or, instead, warrants challenge in litigation. And journalists and newsrooms are already “disincentiv[ized] [from] challenging open record request denials” because of the significant monetary costs of litigation, especially for local news organizations, and the fact that any post-litigation release of documents likely would not come until long after a

controversy has disappeared from public consciousness. See Heath Hooper & Charles N. Davis, *A Tiger with No Teeth: The Case for Fee Shifting State Public Records Law*, 79 Mo. L. Rev. 949, 953, 964, 968 (2014) (also noting that the “disincentives” newsrooms face serve as “incentives” for agencies to deny records requests). The kind of posturing CMHA has exhibited here only serves to exacerbate the problems faced by news organizations in trying to hold government agencies accountable and serve the public interest. It should not be tolerated by courts. See, e.g., *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 186, 648 N.E.2d 808 (1995) (“public officials and public agencies” have a “duty” to “release records” which “clearly belong to the public,” and should not engage in “obfuscation, cunctation, [or] delay” in carrying out this duty). The Court should reject CMHA’s invocation of the exemption for “confidential law enforcement investigatory records” for this reason as well.

### CONCLUSION

For the foregoing reasons, and for the reasons articulated by Relator, *amici* respectfully request that this court deny CMHA’s motion for summary judgment and require the prompt release of the requested records.

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Respectfully submitted,

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## APPENDIX

### *AMICI:*

**Cleveland 19 News (WOIO)**, is Cleveland's CBS-affiliated television news station. It is dedicated to providing comprehensive news coverage on air, online, and through digital platforms. It is owned by Gray Television, Inc.

**News 5 Cleveland (WEWS)** is the oldest television station in the state of Ohio. It has long been recognized for its dedication to journalism, winning numerous Emmys, including for News Excellence. It is affiliated with ABC and is owned by the E.W. Scripps Company.

**WKYC Channel 3**, a division of WKYC-TV, LLC, is a trusted source of news and information serving Cleveland and Northeast Ohio. WKYC has been affiliated with NBC since its founding in 1948 and operates [www.wkyc.com](http://www.wkyc.com). It is owned by TEGNA, Inc.

**The Ohio Association of Broadcasters (OAB)**, established in 1937, is the trade association of over-the-air radio and television stations in Ohio. With more than three hundred commercial and non-commercial member stations, the OAB works to protect the ability of local stations to operate their businesses and serve their communities.

**The Ohio News Media Association (ONMA)** is the state trade association representing all of Ohio's daily newspapers and many of its weeklies. Among other services, ONMA provides resources and training to journalists on public records requests and other matters to enable them to report on the activities of government.

**The Society of Professional Journalists (SPJ)** is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating

high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

**The National Association of Black Journalists** is a 501(c)3 nonprofit organization that provides innovative, quality programs and services to its members. The organization advocates on behalf of Black journalists and media professionals in the U.S. and worldwide. NABJ's membership is more than 4,000 strong and includes emerging journalists, professional journalists, student journalists, journalism educators and media professionals of all kinds.

**The National Press Club** is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

**The National Press Club Journalism Institute** is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.