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Supreme Court Justices Wrestle with Public Records Act Exemption for Records Dealing with Detection and Investigation of Crime

In 2010, a reporter sought release of records related to an incident in which the Hartford Police Department responded to a report of a possible burglary in progress and used considerable force in restraining the suspect. The alleged burglar turned out to be the homeowner, who was disoriented due to a medical condition. The reporter made a written request for records to the chief of police under the Public Records Act. The chief denied the request on the grounds that the records in question related to a criminal investigation and fell under 1 V.S.A. § 317(c)(5), which exempts from disclosure:

> "records dealing with the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal or disciplinary investigation by any police or professional licensing agency; provided, however, that records relating to management and direction of a law enforcement agency; records reflecting the initial arrest of a person, including any ticket, citation, or complaint issued for a traffic violation, as that term is defined in 23 V.S.A. § 2302; and records reflecting the charge of a person shall be public; ..."

After the town manager affirmed the chief of police's decision, the reporter filed suit, seeking production of the records and an award of costs incurred in bringing the action.

The trial court concluded that the records created by police were exempt from disclosure because they were created during the investigation into suspected criminal activity. However, because the investigation concluded without any resulting criminal charges, the trial court held that any records created after the department's decision that there would be no criminal charges brought against the homeowner had to be disclosed, reasoning that the records revealing the outcome of a criminal investigation are not records "of the investigation," but are its product.

The trial court directed the Town to disclose any post-decision documents, but exempted from disclosure records made *during* the investigation. The Town submitted an index of all records related to the event and the trial court held a second hearing to determine what records should have been disclosed. In its decision, it listed the documents that the Town was required to disclose, which included fire department documents, two witness statements, and the chief of police's narrative report. The trial court concluded that the rest of the documents, including officers' narrative reports and recordings of the events, were part of the investigation and therefore exempt. The reporter objected to this decision and filed an appeal with the Vermont Supreme Court.

In the decision, a plurality of the Supreme Court justices focused on whether the involuntary detention of the homeowner was for a period of time long enough to constitute a de facto arrest,

which would require the Town to release records of the incident. *Galloway v. Town of Hartford*, 2012 VT 61. Under the Public Records Act, records dealing with the detection and investigation of crime are exempt from public inspection and copying, but this exemption does not apply to "records reflecting the initial arrest of a person ... [which] shall be public." 1 V.S.A. § 317(c)(5).

The decision noted that there is no obvious line to distinguish the investigative detention of a criminal suspect from a de facto arrest. In determining whether an arrest has occurred, the custodian must consider a range of factors, including the amount of force used by police, the need for such force, the duration of the detention, the physical treatment of the suspect, and the extent to which the individual's freedom was restrained.

In this case, the homeowner had been pepper-sprayed and struck repeatedly with a baton. His freedom of movement was entirely restrained for 15 minutes and he had been forced to sit handcuffed on the sidewalk. Only after 15 minutes did the police decide there was no basis for criminal charges against the homeowner and remove his handcuffs. According to the plurality, the facts of the case supported a finding of an arrest and disclosure of all of the records generated by the Hartford Police Department as a result of the incident.

Justice Dooley wrote a concurring opinion, agreeing with the outcome of the case but noting that the plurality's decision calls upon a records custodian to apply an eight-factor test to determine whether the detention of a criminal suspect amounts to a de facto arrest under 1 V.S.A. § 317(c)(5). This analysis, according to the Justice, "will likely have to be made by an agency lawyer, not the record-holder, and is likely to lead to more court appeals." Rather than the expeditious review the Public Records Act contemplates, a final decision "may take months, or even years to appear." According to Justice Dooley, "What is sorely needed in this area are simple and predictable rules that can be applied by the custodians of records and, where necessary, trial courts."

Justice Burgess wrote a dissent in which he noted that it could "hardly be clearer that the Legislature intended to withhold information on criminal investigations and investigative detentions not resulting in charges, while mandating disclosure of arrests accompanied by a formal criminal charge." In the opinion of Justice Burgess the issue was clear: since there was no arrest made in this case, there was no obligation under 1 V.S.A. § 317(c)(5) for the Hartford Police Department to disclose the requested records.

Echoing Justice Dooley's concern that the plurality's decision was unworkable, Justice Burgess noted, "Custodians of police records must now puzzle over 'de facto' arrest versus investigative detention not amounting to arrest – a moving target worthy of countless and diverse court decisions. ... No police department can reasonably be expected to respond correctly to [Public Records Act] requests when the answer is so situational and confounding to courts."

The *Galloway* decision stands in stark contrast to another Supreme Court decision published in March addressing the same Public Records Act exemption. In *Rutland Herald v. Vermont State Police and Office of the Attorney General*, 2012 VT 24, the Supreme Court held that records related to a criminal investigation of possession of child pornography by employees of the Criminal Justice Training Council at the Vermont Police Academy were exempt from public inspection and disclosure under 1 V.S.A. § 317(c)(5). In the *Rutland Herald* decision, the Court stated that the exemption of records dealing with the detection and investigation of crime

"reflects the Legislature's intent to permanently and categorically exempt all criminal investigatory records from public disclosure."

So when does the investigation of crime – the records of which are "permanently and categorically" exempt from public disclosure under *Rutland Herald* – morph into a de facto arrest, in which case its records must be promptly produced for public inspection under *Galloway*? Custodians of police records, attorneys, and trial courts will be pondering this question for years – or at least until the Vermont Legislature clears up the language of 1 V.S.A. § 317(c)(5).

Until then, the litigation resulting from requests to inspect police records arising from detention of citizens is likely to take months or years to resolve – hardly a result consistent with the Public Record Act's goal of "free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution." As Justice Dooley aptly stated, "What is sorely needed in this area are simple and predictable rules that can be applied by the custodians of records and, where necessary, trial courts." A copy of the *Galloway* decision is archived at http://info.libraries.vermont.gov/supct/current/op2011-211.html. A copy of the *Rutland Herald* decision is at http://info.libraries.vermont.gov/supct/current/op2010-434.html.

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