

August 18, 2020

The Civilian Complaint Review Board  
100 Church Street  
New York, NY, 10007

Re: *Complaint against One or More Unidentified Members of the NYPD*

To Whom It May Concern:

I submit this letter in support of my complaint against the officer or officers at the NYPD who have refused and are refusing to provide documents and body-worn camera (“BWC”) footage requested by the CCRB in support of its investigation into the death of George Zapantis.

The officer or officers’ refusal to provide the documents and body-worn camera footage constitutes abuse of authority pursuant to Chapter 18-A, § 440(c)(1) of the New York City Charter because it violates the City Charter, the NYPD Patrol Guide, and a recently-issued mayoral directive.

## **I. Factual Background**

### *A. Origins of the Body Worn Camera Program*

The NYPD’s BWC program was forced upon the NYPD by a federal monitor as part of a series of measures ordered to remedy the department’s long-standing policy of racial profiling. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013). One reason the court gave for ordering the NYPD to implement the program was that BWC footage “will diminish the sense on the part of those who file complaints that it is their word against the police, and that the authorities are more likely to believe the police.” *Floyd*, Remedy Order (Doc. 120) at 26–27.

The Federal Monitor who was imposed upon the NYPD by the *Floyd* litigation oversaw the implementation of a pilot BWC program.<sup>1</sup> The NYPD expanded the program; its “roll-out to all uniformed patrol officers in New York City was completed in February of 2019.”<sup>2</sup>

### *B. The NYPD’s Failure to Provide BWC Footage to the CCRB*

From the moment that all uniformed patrol officers were outfitted with BWC, the NYPD has sought to limit the CCRB’s access to the footage produced by these cameras, despite the fact that the Court had specifically mentioned independent investigations when ordering the NYPD to implement the program. *See Floyd*, Remedy Order.

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<sup>1</sup> *See* Interim Briefing on Body-Worn Camera Pilot Program, *Floyd* Doc. 528, available at <http://nypdmonitor.org/wp-content/uploads/2016/10/2016-08-09MonitorsLtrtoJudgeTorresencl3rdReportInterim-Brief.pdf>.

<sup>2</sup> *See* Body-Worn Cameras, NYPD available at <https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page>.

In July of 2019, just months after the program was implemented, out of 2,100 requests for BWC footage issued by the CCRB in 2019, only 1,205 had been fulfilled.<sup>3</sup> Throughout 2019, the NYPD and the CCRB met regarding the NYPD's failure to provide relevant footage to the CCRB. In November 2019, in an effort to resolve the dispute, the CCRB entered into a Memorandum of Understanding with the NYPD.<sup>4</sup>

C. *The Terms and Exceptions of the Memorandum of Understanding*

The MOU requires the CCRB to go through an elaborate, multi-step process to obtain BWC footage from the NYPD. This process requires the CCRB investigator to 1) submit a detailed request to the NYPD (Section II.2), 2) wait for the NYPD to provide pre-edited footage (without copying it), which must be viewed in a secure room to which the investigator has a unique password (Section II.4.a), 3) submit another request for the sections of the pre-edited footage deemed relevant (Section III.1.a). The MOU requires that the NYPD produce footage "except for those investigations being conducted by the Force Investigation Division and other sensitive force investigations not being conducted by FID." (the "FID Exception") (Section III.3.d).

The MOU contains a dispute resolution requiring that if the NYPD and the CCRB have a disagreement regarding the production of BWC footage that provides for independent dispute resolution by the Law Department. (MOU, Section IV) The CCRB has not publicly stated that it has engaged in this dispute resolution process.

D. *The Force Investigative Division*

In 2015, the New York Office of the Inspector General for the NYPD ("OIG-NYPD"), found that the NYPD underreported officers' use of force because it lacked any central database to track force incidents, and recommended that the NYPD require officers to document force incidents and track them in a database.<sup>5</sup> According to reporting from January 2019, FID was created to address this reporting deficiency, and generates "ForceStat," a reporting system akin to CompStat that documents use of force incidents.<sup>6</sup> As First Deputy Commissioner Benjamin Tucker noted in January of last year, "The focus on force and reason tasers and pepper spray exist is to give out officers more tools to use less than lethal force and give them some options on the street [*sic*]."<sup>7</sup>

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<sup>3</sup> See *NYPD Slow to Provide Body-Camera Footage to Watchdog Agency*, Wall Street Journal, July 11, 2019, available at <https://www.wsj.com/articles/nypd-slow-to-provide-body-camera-footage-to-watchdog-agency-11562889613>

<sup>4</sup> The MOU is available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/about\\_pdf/bwc\\_mou.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/bwc_mou.pdf)

<sup>5</sup> The October 2015 report of the OIG-NYPD addressing this issue is available here: [https://www1.nyc.gov/assets/doi/reports/pdf/2015/2015-10-01-Pr\\_uofrpt.pdf](https://www1.nyc.gov/assets/doi/reports/pdf/2015/2015-10-01-Pr_uofrpt.pdf)

<sup>6</sup> *Inside the NYPD Unit that Studies Use of Force*, Myles Miller, NY1, available at <https://www.ny1.com/nyc/all-boroughs/news/2019/01/30/inside-the-new-nypd-unit-that-studies-use-of-police-force->

<sup>7</sup> *Id.*

*E. The NYPD's Continued Failure to Provide BWC Footage*

In February 27, 2020, the CCRB reported on the “increase in case times and docket sizes” caused by the-then backlog of BWC requests, and optimistically suggested that the process outlined in the MOU would allow for this backlog to be reduced.<sup>8</sup> It has not succeeded.

On July 3, *Gothamist* reported on a memo circulated by two deputy chiefs in the CCRB’s investigative division that stated that the current situation was “untenable.” In May 2020, the agency submitted 212 requests for BWC footage and received just 33 responses.<sup>9</sup> Admirably, Chair Davie stated at the time that “The Board and staff have long believed there should be unfettered access to body-worn camera footage, and I share their concern about the backlog.”<sup>10</sup>

On June 16, Mayor de Blasio announced a new policy stating that all BWC footage will be released when, among other circumstances, “an officer discharges a taser in a way that results in death or substantial bodily harm.”<sup>11</sup>

**II. An Officer or Officers Have Failed to Provide Documents and BWC Footage in the Zapantis Investigation**

*A. The Death of George Zapantis*

On June 21, 2020 George Zapantis died of cardiac arrest after being Tasered by uniformed officers of the NYPD. Independent video footage, aired soon after, suggested that Mr. Zapantis was struck with a taser multiple times while unarmed, at least one of which was for failing to obey the order “Get down, get on the ground.”<sup>12</sup>

*B. The CCRB has Opened an Investigation and Requested Documents and BWC Footage, which the NYPD has Not Provided*

On information and belief, the CCRB opened an investigation into the death of Mr. Zapantis and requested BWC footage and documentary evidence from the NYPD of the incident using the process set forth in the MOU. On information and belief, an officer or officers at the NYPD have refused to provide the documents requested and access to the BWC footage, even in the secure viewing room provided for under the MOU, relying on the FID Exception in the MOU.

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<sup>8</sup> *Strengthening Accountability: The Impact of the NYPD's Body-Worn Camera Program on CCRB Investigations*, CCRB, February 27, 2020, available at [https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy\\_pdf/issue\\_based/20200227\\_BWCReport.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20200227_BWCReport.pdf)

<sup>9</sup> *Memo: NYPD Oversight Investigators' Job Has Become "Untenable" Because of Body Cam Backlog*, Sydney Pereira, *Gothamist*, July 3, 2020, available at <https://gothamist.com/news/memo-nypd-oversight-investigators-job-has-become-untenable-because-body-cam-backlog>

<sup>10</sup> *Id.*

<sup>11</sup> *Mayor de Blasio Announces New Body Camera Footage Policy*, Press Office of the City of New York, June 16, 2020 available at <https://www1.nyc.gov/office-of-the-mayor/news/438-20/mayor-de-blasio-new-body-camera-footage-policy>.

<sup>12</sup> *Bipolar Man with a Sword Dies after being Tasered by NYPD*, Evan Simk-Bednarski CNN, June 25, 2020, available at <https://www.cnn.com/2020/06/25/us/bipolar-man-sword-dies-tased-police/index.html>

On July 12, 2020, Mr. Zapantis's mother, Athanasia Zapantis, reported that she had not been shown any BWC footage of the night of her son's death.<sup>13</sup> On July 21, she stated that she was able to view the footage with an attorney, who stated that based on the footage "It was more than clear that he was unarmed."<sup>14</sup> And while the NYPD has made some of the footage available publicly,<sup>15</sup> it still has not provided CCRB with access to the footage beyond what has been publicly released, and "hasn't shared key records nor has the CCRB been able to interview officers."<sup>16</sup>

C. *The FID Exception Does not Exempt an Officer's Failure to Comply*

On information and belief, the NYPD is relying on the FID Exception in the MOU to refrain from providing the BWC footage that has been requested. It is further applying the FID Exception to refrain from producing documentary evidence, but the MOU does not apply to this evidence and there is no justification under any law to refrain from producing it. The individual officers refusing to process these requests are acting in violation of the City Charter, the Patrol Guide, and the Mayor's June 16, 2020 Body Worn Camera policy.<sup>17</sup> As set forth in greater detail below, the officer or officers' obligation to cooperate with the CCRB cannot be contracted around through the use of an MOU.<sup>18</sup>

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<sup>13</sup> 'Mommy, Come Home': Queens Mother Demands Answers in Death of Son Tased by NYPD Cops, Yoav Gonen, *The City*, July 12, 2020, available at <https://www.thecity.nyc/2020/7/12/21321999/tasered-nypd-video-queens-new-york-city-police>.

<sup>14</sup> *Family Says Body-Cam Video Counters NYPD Account in Queens Taser Death*, Yoav Gonen, July 21, 2020, available at <https://www.thecity.nyc/2020/7/21/21333559/nypd-body-cam-video-queens-taser-death>.

<sup>15</sup> *See Cops Tased Unarmed Queens Man Seven Times Before He Died, Video Shows*, Yoav Gonen, *The City*, August 11, 2020 available at <https://www.thecity.nyc/2020/8/11/21364522/nypd-cops-tased-unarmed-queens-man-died-video-shows>.

<sup>16</sup> *See The NYPD Is Withholding Evidence From Investigations Into Police Abuse*, Eric Umansky and Mollie Simon, *ProPublica*, August 17, 2020, available at <https://www.propublica.org/article/the-nypd-is-withholding-evidence-from-investigations-into-police-abuse>

<sup>17</sup> *Mayor de Blasio Announces New Body Camera Footage Policy*, Press Office of the City of New York, June 16, 2020 available at <https://www1.nyc.gov/office-of-the-mayor/news/438-20/mayor-de-blasio-new-body-camera-footage-policy>.

<sup>18</sup> And make no mistake, the individual officers who are refusing to comply are violating the Patrol Guide in their individual capacity. The so-called "Superior Orders Defense" (which holds that acting pursuant to orders provides a defense to liability) has been rejected in the United States from the earliest days of the republic. *See Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, J.) (rejecting Superior Orders Defense); *United States v. Bright*, 24 Fed. Cas. 1232 (1809) (same).

### III. The CCRB Should Substantiate Allegations Against the Officer or Officers Who have not Provided the Documents and Footage

#### A. *The CCRB Should Investigate This Complaint Pursuant to Section 1-01 of its Rules*

I am filing this complaint based upon news coverage and my own familiarity with the rules and practices of the CCRB and the NYPD. I therefore qualify as a “Reporting Non-Witness” pursuant to Section 1-01 of the Rules of the CCRB (38-A RCNY, hereinafter “Rules”). This matter therefore “may be investigated at the discretion of the Executive Director or Chair of the Board,” who are in turn required to consider 1) the nature and severity of the alleged misconduct, 2) the availability of evidence and/or witnesses, 3) the ability to identify officers and civilians involved, 4) the practicability of conducting a full investigation before the 18-month statute of limitations expires. These factors all favor investigating this complaint.

**First**, the misconduct at issue—refusing to provide the CCRB critical evidence in a death case—strikes at the heart of the agency’s independence and ability to perform its role. Refusing to provide evidence to the CCRB is such a serious matter that the board recently convened a full “Emergency” board meeting to substantiate allegations against officers who did so. **Second**, the evidence in this case consists principally of materials already in the CCRB’s possession—the document requests that it submitted to the NYPD seeking the footage and the response from the NYPD regarding its refusal. **Third**, the officers or officers who are refusing to provide the footage—and the supervisors directing them to refuse—should be relatively simple to identify, and may even be named in correspondence in the CCRB’s possession. **Fourth**, this complaint addresses *only* the refusal to provide BWC footage in the Zapantis investigation and therefore can be conducted quickly and resolved within the statutory period.

#### B. *The CCRB Can Substantiate Allegations of Failing to Comply with a CCRB Request*

On August 6, 2020, the CCRB held an “Emergency Meeting on Failure of NYPD Members, Unions to Participate in Investigations.”<sup>19</sup> The purpose of the meeting was to vote on whether or not to substantiate allegations against officers who refused to appear for CCRB interviews in violation of Patrol Guide 211-14. Aware that the CCRB was in the right and that the NYPD was in the wrong, and faced with the choice of having to suspend dozens of officers or to sanction plainly illegal conduct, the day before the meeting, the NYPD directed officers to attend the interviews.<sup>20</sup>

The NYPD capitulated on the interview issue because the Board took a firm stand. The NYPD’s refusal to provide BWC footage and documents demands a similarly strong move. The CCRB was prepared to substantiate allegations of misconduct against officers for failing to appear for

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<sup>19</sup> See [https://www1.nyc.gov/assets/ccrb/downloads/pdf/about\\_pdf/news/press-releases/2020/ADV\\_CCRBEmergencyMtg\\_08052020.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/news/press-releases/2020/ADV_CCRBEmergencyMtg_08052020.pdf)

<sup>20</sup> See Social Media Post of Ashley Southall, Police Bureau Chief of the *New York Times*, Aug. 5, 2020. Available at <https://twitter.com/AshleyAtTimes/status/1291082021737988096>.

interviews in violation of PG 211-14.<sup>21</sup> The same provision requires officers to collect and provide documents in response to CCRB requests. *See* PG 211-14(8)–(10) Just as it was appropriate on August 6 to consider substantiating allegations against dozens of officers who refused to participate in interviews, it is appropriate now for the CCRB to substantiate allegations of abuse of authority against the officer or officers who are withholding requested documents and BWC footage in violation of PG 211-14.

*C. There is no “DA Hold” in the Zapantis Matter*

Traditionally, in order to avoid parallel investigations, the CCRB has instituted a “DA Hold” on an investigations at the request of a prosecutor conducting a criminal probe. The CCRB placed DA Holds on prior investigations when federal or state prosecutors requested it. But Mayor de Blasio recently changed that policy. He stated that placing a DA Hold over the Eric Garner case had been a “mistake” and implemented a city policy that the CCRB should not institute DA Holds except at the family’s request.<sup>22</sup>

Suspending an investigation during a prosecution is not required by any law; it is a courtesy that the CCRB has, in the past, afforded to prosecutors. Moreover, there is not and cannot be a DA Hold on a case while the NYPD conducts an investigation through the FID. The FID is not a prosecutor. Created as a data processing unit, FID now threatens to supplant CCRB and eliminate civilian oversight for cases that the NYPD chooses to investigate itself. This thwarts the core purpose of the 1993 enabling legislation, which was to give civilians—rather than officers themselves—the power to investigate the police.<sup>23</sup>

*D. The FID Exception to the MOU Does Not Exempt the Subject Officer or Officers From Liability*

Chapter 18(A) Section 440(d)(1) of the New York City Charter requires the NYPD to cooperate fully with any “reasonable request” of the CCRB, as follows:

(d) Cooperation of police department. 1. It shall be the duty of the police department to provide such assistance as the board may reasonably request, to cooperate fully with investigations by the board, and to provide to the board upon request records and other materials which are necessary for the investigation of complaints

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<sup>21</sup> NYPD Patrol Guide Section 211-14, Investigations by Civilian Complaint Review Board, *available at* [https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations\\_pdf/pg211-14-investigations-by-ccrb.pdf](https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg211-14-investigations-by-ccrb.pdf)

<sup>22</sup> *See* Statement from Mayor de Blasio on Department of Justice Decision Regarding the Death of Eric Garner, July 16, 2019, <https://www1.nyc.gov/office-of-the-mayor/news/350-19/statement-mayor-de-blasio-department-justice-decision-the-death-eric-garner>. *See also* Mayor de Blasio announces new policy on police-involved deaths following federal DOJ Garner decision, Staten Island Live, July 16, 2019, *available at* <https://www.silive.com/news/2019/07/mayor-de-blasio-announces-new-policy-on-police-involved-deaths-following-federal-doj-garner-decision.html>.

<sup>23</sup> *Officers Rally And Dinkins Is Their Target*, James C. McKinley Jr., *New York Times*, Sept. 17, 1992 *available at* <https://www.nytimes.com/1992/09/17/nyregion/officers-rally-and-dinkins-is-their-target.html>

submitted pursuant to this section, except such records or materials that cannot be disclosed by law.

The NYPD's interpretation of the FID Exception directly contradicts this provision. When an MOU contradicts statutory authority, the MOU is unenforceable. *See Samuelson v. New York City Transit Authority*, 101 A.D. 3d 537 (1st Dep't 2012) (MOU between Transit Workers Union and the New York City Transit Authority is unenforceable because it contradicts the Public Authorities Law). The NYPD has an obligation to provide "records and other materials which are necessary for the investigation of complaints." 18(A) N.Y.C. Charter § 440(d)(1). To the extent that the NYPD believes that the MOU relieves it of this obligation, the MOU is void. As applied to documents other than BWC, the MOU has no relevance in any event.

Likewise, the Patrol Guide provision requiring the NYPD to provide relevant records contains a list of exceptions that does not include any reference to BWC footage withheld pursuant to the MOU, or any exception relevant to the documents requested in the Zapantis matter. *See* PG 211-14(10)(a)–(h). The officers who are refusing to provide the BWC footage requested by the CCRB in the Zapantis matter are therefore violating the Patrol Guide as well as the City Charter.

Therefore, the officer or officers who have refused to provide documents and BWC footage in response to the CCRB's request for relevant footage pursuant to its investigation have abused their authority and the CCRB should substantiate the allegation against them.

#### **IV. Conclusion**

For the reasons stated above, the CCRB should conduct a full investigation and substantiate allegations against the officer or officers who have refused to provide the documents and BWC footage requested by the CCRB pursuant to its investigation into the death of George Zapanits.

Sincerely,



Andrew Case