RESPONSE

RESISTING DISCLOSURE: PIERCING PRIVACY PRETEXT[†]

MARY D. FAN[*]

ABSTRACT

Transparency through public records disclosure laws is a time-honored tool for checking power and ensuring democratic accountability. Disclosure is also hard-fought and often curtailed or defeated by the invocation of exemptions by governmental actors. Professor Christina Koningisor's Coopting Privacy *illuminates how pretextual claims of privacy are used by the police to try to defeat disclosure and the harms of coopting privacy. This Response tackles a crucial question raised by the diagnosis of the harms of coopting privacy and the call for curtailing police secrecy: when is a claim of privacy protection pretextual cooptation rather than an important measure to protect people captured in police records—often in their worst, most painful, and humiliating moments?*

Addressing the important open question, this Response proposes a four-factor matrix for determining when invocations of privacy to defeat disclosure are likely to be pretextual cooptation. Key factors include: (1) whether there is institutional self-interest in denying disclosure to stifle criticism; (2) the purpose for which disclosure is sought; (3) the nature of the party or parties seeking disclosure; and (4) whether the person(s)—or their family if they died—whose privacy is at stake object to or seek disclosure. Defining key factors to discern potential privacy cooptation is important to guide principled decision-making by courts and agencies in adjudicating disputes and to check the instinct to defer to the government in applying amorphous standards.

[†] An invited response to Christina Koningisor, *Coopting Privacy*, 105 B.U. L. REV. 765 (2025).

[*] Jack R. MacDonald Endowed Chair, University of Washington School of Law. mdfan@uw.edu. Thank you to Cindy Fester for excellent suggestions, Christina Koningisor for important work sparking new ideas, and to Karen Yao, Crystal Hsu, and Hōkū Eggertsen for excellent editing and innovative leadership in inviting responses and inspiring dialogue.

CONTENTS

INTRODUCTION

Consider three examples of police agencies invoking the need to protect the privacy of people recorded on officer-worn cameras to resist disclosure under freedom of information laws, which give the public the right of access to government records.[1]

First: New Jersey's Association of Chiefs of Police is seeking a legal basis to resist requests under the state's Open Public Records Act for videos of young women in police stops by the owner of a YouTube channel who has posted at least 250 such videos.[2] The channel, called "Drive Thru Tours," almost exclusively focuses on airing police footage of young women in stops, often while they are intoxicated, to its more than 86,000 subscribers.[3]

Second: police agencies involved in a fatal shootout during the execution of a high-risk arrest warrant at a busy public park refused to release dash-and-body camera footage of the shootings to the media.[4] Multiple shots were fired around children, one innocent bystander died, and another was shot when the suspect took her hostage.[5] Responding to community outcry, CBS News fought for footage of the shootout for more than half a year.[6] When authorities finally released edited videos, CBS News declined to publish any images "[o]ut of respect for the victims and their families," explaining that "[t]he purpose of fighting for this video is not to air graphic or sensational images, [but rather] is to provide context, clarity, and closure for a traumatized community."[7]

Third: Rochester, New York, officials fought for months against releasing video footage of officers placing a "spit sack" mesh hood on a spitting, naked man named Daniel Prude, who had been yelling he had coronavirus, and pinning him to the ground until he stopped breathing.[8] Though resuscitated at the scene, Prude died a week later from a combination of "[c]omplications of asphyxia in

---

[1] *See* discussion of freedom of information laws *infra* notes 21-25 and accompanying text.

[2] *See, e.g.*, S.P. Sullivan, *'Creepy' YouTuber Preys on Young Women Getting DWIs, N.J. Cops Say. It's Legal for Now.*, NJ.COM, https://www.nj.com/news/2024/02/creepy-youtuber-preys-on-young-women-getting-dwis-nj-cops-say-its-legal-for-now.html [https://perma.cc/RFS3-RHVS] (last updated Feb. 26, 2024, 6:57 AM).

[3] *Id.*

[4] Julie Watts, *What Is a Local Law Enforcement Agency Hiding? CBS Sues for Body Camera Footage to Find Out.*, CBS NEWS, https://www.cbsnews.com/amp/sacramento/news/cbs-news-sues-chp-to-release-roseville-park-shooting-video/ [https://perma.cc/5H8R-H3AC] (last updated Mar. 21, 2024, 8:37 AM).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] SPECIAL INVESTIGATIONS & PROSECUTION UNIT, N.Y. STATE OFF. OF THE ATT'Y GEN., REPORT ON THE INVESTIGATION INTO THE DEATH OF DANIEL PRUDE 1-2 (2021) [hereinafter INVESTIGATION INTO THE DEATH OF DANIEL PRUDE]; Michael Gold & Troy Closson, *What We Know About Daniel Prude's Case and Death*, N.Y. TIMES (Apr. 16, 2021), https://www.nytimes.com/article/what-happened-daniel-prude.html.

the setting of physical restraint; [e]xcited delirium; and [a]cute phencyclidine intoxication," according to the autopsy report.[9] Despite calls from Prude's family to release body camera footage and the filing of a Freedom of Information Law ("FOIL") request, the city delayed for nearly two months, claiming release would violate Prude's privacy.[10] The city falsely claimed that the Heath Insurance Portability and Accountability Act of 1996 ("HIPAA") required a signed release before the city could provide access to the footage.[11] Uncovered emails later revealed the real motives for nondisclosure: "I'm wondering if we shouldn't hold back on this for a little while considering what is going on around the country," a police lieutenant wrote.[12] "Can we deny/delay?" asked a city attorney.[13]

Each of the three examples of police efforts to avoid public disclosure shows variation in whether the explicitly or implicitly invoked privacy protection interest is likely to be pretextual or real. Professor Christina Koningisor's article *Coopting Privacy* focuses on cynical refusals to disclose pretextually wrapped in privacy claims, exemplified by the Prude case.[14] Professor Koningisor adapts privacy law scholar Neil Richard's conception of privacy cooptation, meaning "the co-option of privacy rules to serve institutional rather than individual interests."[15] *Coopting Privacy* offers an important map of the arsenal of privacy exemptions under state constitutions and state and federal statutes from which police may draw to defeat disclosure.[16] Professor Koningisor also offers a compelling taxonomy of the harms of coopting privacy.[17]

This Response tackles a crucial question opened by the diagnosis of the harms of coopting privacy: when is a privacy claim by the police to resist disclosure pretextual cooptation, and when is it important to protect the public? I chose the three opening examples to spur consideration of key factors in parsing between pretextual privacy claims and an actual need to protect the public's privacy. Defining relevant factors that can distinguish pathological pretext from needed

[9] INVESTIGATION INTO THE DEATH OF DANIEL PRUDE, *supra* note 8, at 2; Gold & Closson, *supra* note 8.

[10] COUNCIL OF THE CITY OF ROCHESTER, INDEPENDENT INVESTIGATION OF THE CITY OF ROCHESTER'S RESPONSE TO THE DEATH OF DANIEL PRUDE 33 (2021) [hereinafter ROCHESTER'S RESPONSE TO THE DEATH OF DANIEL PRUDE].

[11] *Id.*

[12] Hannah Knowles, Mark Berman & Shayna Jacobs, *Police Are Using the Law to Deny the Release of Records Involving Use of Force, Critics Claim*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/national/police-are-using-the-law-to-deny-the-release-of-records-involving-use-of-force-critics-claim/2020/09/25/6b42e74a-f9c1-11ea-a510-f57d8ce76e11_story.html.

[13] *Id.*

[14] Christina Koningisor, *Coopting Privacy*, 105 B.U. L. REV. 765, 767, 785 (2025).

[15] *Id.* at 784 (quoting Neil Richards, *The GDPR as Privacy Pretext and the Problem of Co-Opting Privacy*, 73 HASTINGS L.J. 1511, 1514 (2022)).

[16] *Id.* at 774-84.

[17] *Id.* at 809-27.

privacy protection is important to better frame limits on privacy exemptions to the disclosure of public records and to guide principled decision-making.[18] This Response offers a four-factor decisional matrix to evaluate when invocations of privacy to defeat disclosure are likely to be pretextual, and when there is a need for privacy protection that outweighs the public's right to disclosure. Key factors to consider include: (1) whether there is institutional self-interest in denying disclosure to stifle criticism; (2) the purpose for which disclosure is sought; (3) the nature of the party or parties seeking disclosure; and (4) whether the person(s)—or their family if they died—whose privacy is at stake object to or seek disclosure.[19]

This Response proceeds in three parts. Part I discusses two key open questions inspired by Professor Koningisor's important diagnosis of the pathologies of pretextual claims of privacy to defeat disclosure.[20] The first question is how to define the line between privacy cooptation and the legitimate need for privacy protection. The second related question is how to better define limits to privacy exemptions to winnow out pretextual misuse of privacy exemptions while still protecting important privacy interests. Part II proposes four factors to define when invocations of privacy to defeat disclosure are likely to be pretextual cooptation. Part III proposes using the four-factor decisional matrix to guide principled decision-making regarding whether police resistance to disclosure is likely to constitute privacy cooptation or protection.

I. THE BLURRY LINE BETWEEN PRIVACY PROTECTION AND COOPTATION IN REFUSAL TO DISCLOSE POLICE RECORDS

A tool of democratic governance in the United States and across the world, freedom of information laws give people the right of access to government records to facilitate accountability and safeguard against abuse of power.[21] At the federal level in the United States, the disclosure law is the famous Freedom of Information Act ("FOIA"), enacted in response to 1960s-era calls for open government and records access by the press and public.[22] Every state today also has a state freedom of information law that gives people access to the records of state and local governments, including police agencies, subject to exemptions.[23]

[18] *See* discussion *infra* Part I.

[19] *See* discussion *infra* Part III.

[20] *See, e.g.*, Koningisor, *supra* note 14, at 774-84.

[21] For a survey of such laws around the world, see DAVID BANISAR, FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT INFORMATION LAWS (2006), https://freedominfo.org/documents/global_survey2006.pdf.

[22] *See* Freedom of Information Act of 1966, 5 U.S.C. § 522 (2013) (requiring federal agencies to maintain and disclose records and carving out exemptions); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 650-54 (1984) (giving history of FOIA).

[23] *See, e.g.*, SOPHIE WINKLER & JACQUELINE BYERS, NAT'L ASS'N OF CNTYS., OPEN RECORDS LAWS: A STATE BY STATE REPORT (2010).

These government disclosure laws, also called open records and sunshine laws, operationalize Justice Louis Brandeis's famous paean to the power of transparency to protect against governmental malfeasance: "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[24]

Federal and state freedom of information laws contain broad exemptions to disclosure for various classes of police records.[25] Professor Christina Koningisor has produced important work excavating the complex web of laws that produce law enforcement exceptionalism in transparency regimes.[26] Her most recent work, *Coopting Privacy*, focuses on how broadly construed privacy exemptions to disclosure laws can shield potential wrongdoing.[27] Police often frame refusals to disclose as necessary to protect the privacy of community members.[28] A second category of privacy-related bases for nondisclosure pertains to the protection of law enforcement personnel records.[29] There is a substantial valuable literature on how the failure to disclose police disciplinary records wreaks harm in failing to protect the public from problematic officers.[30] Another important vein of literature focuses on the powerful role of police unions in negotiating such shields to disclosure.[31] Scholars also have illuminated how limits on access to law enforcement personnel records can transgress the constitutional right of the defense to potentially exculpatory material under

[24] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914); *see also* Adriana S. Cordis & Patrick L. Warren, *Sunshine as Disinfectant: The Effect of State Freedom of Information Act Laws on Public Corruption*, 115 J. PUB. ECON. 18, 23-24, 35 (2014) (discussing impact of state sunshine laws on preventing public corruption).

[25] Christina Koningisor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615, 638-45 (2023).

[26] *See* Mary Fan, *Police Secrecy and Transparency Laws*, JOTWELL (Apr. 18, 2024), https://crim.jotwell.com/police-secrecy-and-transparency-laws/ [https://perma.cc/PW54-6F42] (praising Professor Koningisor's work mapping police secrecy carve-outs).

[27] Koningisor, *supra* note 14, at 784-809.

[28] *Id.* at 791.

[29] *Id.* at 782-83.

[30] *See, e.g.*, Ash Gautam, Note, *Balancing Interests in Public Access to Police Disciplinary Records*, 100 TEX. L. REV. 1405, 1407 (2022); Cynthia Conti-Cook, *Digging Out from Under Section 50-A: The Initial Impact of Public Access to Police Misconduct Records in New York State*, 18 U. SAINT THOMAS L.J. 43, 49-50 (2022); Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237, 1244-46 (2021).

[31] *See, e.g.*, Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 112 (2017); Cynthia H. Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 189 (2019).

Brady v. Maryland[32] and material needed to impeach testifying witnesses under *Giglio v. United States*.[33]

Less examined is the cooptation of the public's interest in privacy to defeat the public's interest in records disclosure. This Response proposes a workable framework for defining the blurred line between privacy protection and privacy cooption in police resistance to disclosure of records. Any discussion of privacy exemptions should begin with the understanding that there are real substantial potential privacy harms in the release of certain police records, especially in the era of a deluge of police-generated videos.[34] Because of the exponential uptake of police-worn body cameras, more people than ever are being recorded in their worst, most painful, frightened, and embarrassing moments.[35] Routine but brutal or humiliating moments, such as calls to stop familial violence, public intoxication, and myriad other stressful events are now recorded along with the intimate details that people tell the police about custody arrangements, ruptured intimate relationships, and more.[36] There is a substantial privacy price paid for regulation by transparency.[37]

So, what constitutes cooptation of privacy claims to serve departmental self-interest rather than the genuine need to protect the public?[38] Proving cooptation is challenging, Professor Koningisor writes, so she relies on "[c]ontextual clues, such as discrepancies between the government's stated justifications and the actual substance of the underlying records."[39] The paradigmatic example and

[32] 373 U.S. 83 (1963).

[33] 405 U.S. 150 (1972); *see also* Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 326 (2019) (noting how *Brady* violations may arise because "law enforcement disciplinary records, a prime source of *Brady* material, may remain shielded from disclosure by state laws"); Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745 (2015) ("[T]here is a critical source of *Brady* material that even well-meaning prosecutors are often unable to discover or disclose: evidence of police misconduct contained in police personnel files.").

[34] *See, e.g.*, MARY D. FAN, CAMERA POWER: PROOF, POLICING, PRIVACY, AND AUDIOVISUAL BIG DATA 3 (2019) (detailing how body-worn cameras capture "people in some of their most terrifying, painful, embarrassing moments," such as "[d]ying moments, crying moments, scared silent and unresponsive moments," as well as "everyday travails" such as "[w]arring neighbors, exes, family members").

[35] Mary D. Fan, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 399 (2016).

[36] *Id.* at 397-99.

[37] *See id.* at 399; *see also* FAN, *supra* note 34, at 159.

[38] *See* Koningisor, *supra* note 14, at 784 (quoting Neil Richards, *The GDPR as Privacy Pretext and the Problem of Co-Opting Privacy*, 73 HASTINGS L.J. 1511, 1514 (2022)) (adapting Professor Neil Richards's conception of privacy cooptation to signify law enforcement invocation of privacy exemptions to serve police departmental self-interest rather than public interest).

[39] *Id.* at 786.

recurrent motif in *Coopting Privacy* is the death on camera of Daniel Prude.[40] Rarely will there be such egregious smoking-gun emails nakedly revealing the intentional delay to avoid a conflagration in public opinion—especially when other departments see the outrage such emails elicit after the national coverage of the Prude case.[41] At the time, the Rochester Police Department did not even have policies in place regarding disclosure in case of critical incidents such as deaths in police custody.[42]

Moreover, many cases are not as clear as the cynical stonewalling in withholding the recordings of Prude's death, where the family persisted in pleading for disclosure. For example, some families of people killed by police seek the opposite—asking for nondisclosure of body camera videos, such as the family of Justin Robinson, a twenty-six-year-old man, who was shot and killed by D.C. police officers.[43] In cases without such revealing emails and family demanding disclosure, how should courts parse invocations of privacy and pierce potential pretext? The next Part proposes a four-factor decisional matrix for parsing privacy pretext and cooptation from the genuine need to protect the privacy of the public.

II. A FOUR-FACTOR MATRIX TO DEFINE THE LINE BETWEEN PRIVACY PRETEXT AND PROTECTION IN REFUSALS TO DISCLOSE RECORDS

Courts adjudicate disclosure disputes when parties seeking public disclosure are stonewalled by government agencies, including police departments.[44] In determining whether privacy exemptions apply, courts typically apply balancing tests of public interest in disclosure against the need to protect privacy.[45] How can parties prove privacy pretext? More precise factors are needed because an "I know it when I see it" approach to recognizing privacy cooptation risks preserving the status quo of courts deferring to the government in applying such amorphous balancing tests.[46]

---

[40] *See supra* notes 8-14 and accompanying text.

[41] *See supra* notes 12-13 and accompanying text.

[42] *See* ROCHESTER'S RESPONSE TO THE DEATH OF DANIEL PRUDE, *supra* note 10, at 50-51.

[43] Sana Azem, *Family of Man Killed by DC Police Request Bodycam Footage Not to Be Released*, ABC7 NEWS, https://wjla.com/news/local/man-shot-killed-officer-involved-shooting-violence-interrupter-justin-robinson-body-camera-footage-release-metropolitan-police-department-investigation-mcdonalds-chief-pamela-smith [https://perma.cc/U3L3-3PC9] (last updated Sept. 4, 2024, 8:05 PM).

[44] *See, e.g.*, Brown v. FBI, 658 F.2d 71, 75 (2d Cir. 1981) (refusing to consider personal interest in balancing against privacy interests); Hartford v. Freedom of Info. Comm'n, 518 A.2d 49, 53 (Conn. 1986).

[45] *See, e.g.*, *Brown*, 658 F.2d at 75; Crim. Just. Comm'n v. Freedom of Info. Comm'n, 585 A.2d 96, 99 (Conn. 1991); Stilley v. McBride, 965 S.W.2d 125, 126-27 (Ark. 1998) (quoting Young v. Rice, 826 S.W.2d 252, 255 (Ark. 1992)).

[46] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (famously framing "I know it when I see it" standard for obscenity after explaining it is difficult to

Deference to law enforcement aside, our intuitions about what is likely to be a legitimate need to protect privacy and what is likely pretextual are actually informed by a "thin slice" consideration of the circumstances.[47] Behavioral psychologists developed the concept of thin-slicing to explain how we form impressions of others based on intuitions informed by quick impressions.[48] Research from evolutionary psychology and social cognition indicates that we are "hard-wired" to make automatic judgments based on "tacit implicit knowledge" relying on an efficient intuitive process.[49] While quick impressions, particularly under stressful situations, such as facing a potential shooter, can be prone to biases that can lead our intuitions astray, thin-slicing also can be surprisingly accurate in many situations, especially when our cognitive resources are not so taxed.[50]

Refer back to the examples summarized at the outset of the Response.[51] What factors give rise to a sense of a genuine need to protect privacy and what makes us suspect potential pretext? Recall the first example of the "Drive Thru Tours" requester seeking videos of largely intoxicated young women to post on YouTube for the viewing pleasure (and likely mockery) of subscribers.[52] We can distill the key salient factors that rouse the intuitive sense that that there is a need for privacy protection. One of the most salient factors is what will be done with the disclosed videos—the purpose of the request. The idea that young women recorded without their consent in their worst moments will be posted on a stranger's YouTube channel for the exploitative amusement of subscribers is certainly concerning. Second, and relatedly, the nature of the requester is problematic—a stranger with no connection to the case nor any news media credentials. Third, the apparent lack of consent—and likely nonconsent—of the people depicted on the video also rouse concern. Fourth, there is not an

intelligibly define obscene materials); Koningisor, *supra* note 25, at 653 (discussing how courts analyze amorphous disclosure exemptions broadly in favor of government's refusal to release).

[47] *See* Nalini Ambady, Frank J. Bernieri & Jennifer A. Richeson, *Toward a Histology of Social Behavior: Judgmental Accuracy from Thin Slices of the Behavioral Stream*, 32 EXPERIMENTAL PSYCH. 201, 208-14 (2000) (offering meta-analysis finding surprising accuracy when people thin-slice situation to inform their intuitions about people).

[48] *Id.* at 203-05.

[49] Nalini Ambady, *The Perils of Pondering: Intuition and Thin Slice Judgments*, 21 PSYCH. INQUIRY 271, 271-72 (2010).

[50] *See id.*; *cf.* Mary D. Fan, *Constitutionalizing Informational Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 958 (2012) (discussing how cognitive biases such as confirmation bias can lead our moral intuitions astray); Paul Slovic, *Affect, Reason, and Mere Hunches*, 4 J.L. ECON. & POL'Y 191, 200-01 (2007) (discussing how fast judgments under time, fear and stress, such as when faced with potential active shooter, can lead our cognitive processing astray).

[51] *See* discussion *supra* notes 2-13.

[52] *See* discussion *supra* notes 2-3.

institutional self-interest of the police agency to deny disclosure for "cover your ass" ("CYA") purposes to avoid criticism of agency conduct.[53]

Consider the second example of the delayed disclosure of the videos showing the arrest warrant execution at a busy public park that ended with the fatal shooting of an innocent bystander and the shooting of another bystander taken hostage by the suspect.[54] Here, one of the most salient factors that rouses potential suspicion is the public outcry and criticism of the police agency's decision to arrest a known high-risk suspect at a busy public park over spring break, when it was particularly likely to be packed with families.[55] Institutional self-interest to avoid scrutiny—the CYA instinct—is likely particularly strong. The purpose of the request and identity of the requester also tilt toward concern about potential privacy cooptation because a credentialed news organization was pursuing the videos to address public concerns. Moreover, the news organization had such an ethos of responsibility that even when it received the videos, it did not air images of the victims to avoid exploitation of fear and pain.[56]

Yet, a fourth factor weighs against reaching a conclusion that the claim of privacy to defeat disclosure is entirely pretextual in this case. There is no indication that the family members of the people depicted want disclosure. Indeed, common sense—and the news organization's decision not to show the victims out of respect—indicate that they did not want their most traumatic moments aired on the news with their anguished faces. The wishes of the people depicted, or their surviving family, constitute another important factor that informs our judgments. I picked this example to show that cases may have a mix of factors. On balance, three of the four key factors counsel for a finding of potential privacy cooptation—but a fourth factor shows there are real privacy concerns and potential objections by impacted people. In messy reality, there may often be competing considerations.

At the other extreme is the refusal to release the video of Daniel Prude. The most salient factors all counsel toward a finding of privacy cooptation. First, the Prude family's pleading for disclosure and the denial in the name of the privacy of the deceased both reveal the height of cynical cooptation of privacy as pretext. The identity of the requesters—Prude's surviving family—their apparent consent, and their desire for disclosure for the purpose of police accountability, all underscore the pretext. The CYA institutional self-interest in using privacy as pretext is strong and apparent.

---

[53] *See* Thijs Jeursen, "*Cover Your Ass": Individual Accountability, Visual Documentation, and Everyday Policing in Miami*, 45 POL. & LEGAL ANTHROPOLOGY REV. 186, 187-88 (2022) (exploring ethnography of "cover your ass" mentality among police officers).

[54] *See* discussion *supra* notes 4-7.

[55] *See* Watts, *supra* note 4 (discussing public outcry and concerns around decision to execute high-risk arrest warrant over spring break at busy park with kids subject to bullets flying around them).

[56] *See id.*

Articulating the key factors behind our intuitions is an important step toward more consistent, even-handed application across cases. Illustrated by the analyses of the three cases, I propose four major factors for determining whether agency claims of protecting the privacy of the public to resist disclosure is pretextual cooptation:

Institutional Self-Interest (the "CYA" Factor). This factor asks whether there is reason to believe that the agency has an institutional self-interest to deny disclosure to avoid criticism. I call this the CYA factor for "cover your ass," which ethnographic studies of police officers have documented is a mindset among police officers to avoid criticism and potential discipline or sanctions for their conduct.[57]

Requester's Purpose for Disclosure. The purpose for disclosure can also further support a sense that refusals to disclose are for CYA purposes—or conversely support a strong inference of an important privacy interest. If the requester is seeking police accountability, then this further supports the CYA factor—the sense of institutional self-interest in trying to coopt exemptions to defeat accountability. If the requester is trying to find clickbait content or rack up video views and followers by exploiting people depicted in their worst moments, this strongly counsels for a finding of a strong interest in protecting privacy rather than cooptation.

Identity of the Requester. Relatedly, the identity of the requester can inform the judgment of whether claims of the need to protect privacy are pretextual or based on a real need. Refusal to release records to individuals personally impacted by the contents of the records, or their families if they are deceased, strongly counsels toward a finding of privacy cooptation at its most cynical—claiming the privacy of impacted persons to deny disclosure to the persons impacted who seek disclosure. In general, where requesters are strangers to the events and people depicted, there is more reason to believe that there are legitimate privacy concerns—unless the requester is credentialed news media reporting on matters of public concern.

Consent of Impacted Persons. Finally, when the impacted person(s) are the parties seeking disclosure, or consent to and support disclosure, then there is a strong potential case for privacy cooptation. When there is no indication of consent to disclosure by the impacted persons—and common-sense reasons to infer that impacted parties would be adversely affected by disclosure—then there is a substantial privacy concern, not just pretext.

III. APPLYING THE FOUR FACTORS TO LIMIT PRIVACY PRETEXT IN RESISTING DISCLOSURE

The four factors can be operationalized into a decisional matrix to parse claims of privacy cooptation in disputes over the proper balance of the public's

[57] *Cf.* Jeursen, *supra* note 53, at 187-88.

interest in disclosure with the need to protect the privacy of people. The advantage of a four-factor matrix instead of an expansive constellation of factors is that it is less amorphous and malleable. Articulating the analysis with a readily applied four-factor decisional matrix is important to more principled decision-making and reason-giving across cases. Where a majority of the four factors counsel for a finding of cooptation, this can check the instinct to just defer to government claims so prevalent in disclosure disputes with amorphous standards.[58]

The messiness of life does not always present the clearest case where every factor screams privacy cooptation like the saga of Daniel Prude's long struggle for disclosure to secure police accountability. Some cases may have mixed motives—and the factors may even be in equipoise. The figures below summarize how the four-factor decisional matrix operates in each of the case examples.

Figure 1. "Drive Thru Tours" YouTube Poster Request.

	Potential Cooptation	Privacy Need
CYA Agency Self-Interest		X
Purpose of Request		X
Identity of Requester		X
Consent of Impacted Persons		X

Figure 2. CBS News Request of Public Park Shootings.

	Potential Cooptation	Privacy Need
CYA Agency Self-Interest	X	
Purpose of Request	X	
Identity of Requester	X	
Consent of Impacted Persons		X

Figure 3. Failure to Disclose the Recorded Death of Daniel Prude.

	Potential Cooptation	Privacy Need
CYA Agency Self-Interest	X	
Purpose of Request	X	
Identity of Requester	X	
Consent of Impacted Persons	X	

The virtue of defining privacy cooptation with the decisional matrix that this Response proposes is that it is readily implementable by courts and agencies

[58] *See supra* text accompanying notes 45-46.

evaluating the applicability of privacy exemptions.[59] Change does not need to wait for a major transformation of our current political situation.[60] Professor Koningisor advocates for limiting the amount of private information that the police may gather by shrinking police funding and roles and banning some surveillance technologies, such as facial recognition technology in police-worn body cameras.[61] She suggests creating an independent police records processing unit insulated from the budgetary and decisional control of law enforcement.[62] Another approach would be amending privacy exemptions to give survivors of police violence and their families control over police records pertaining to the incident, including body camera footage, photos, and autopsy records.[63] She also suggests curtailing overly expansive privacy-related police records exemptions that may overlap with other privacy exemptions in state and federal public records law.[64] These are important reforms, but they depend on a political will that is currently hostage to terrifying ferocity and the destruction of improved governance.[65] Courts are an important bulwark against political stalemate, regression, and destructive tendencies, and can operationalize readily implementable analytical frameworks.[66]

CONCLUSION

Disclosure is a time-honored tool in a democracy to hold the powerful accountable—or to any accounting at all.[67] Perhaps unsurprisingly, the powerful

[59] *See supra* text accompanying notes 44-45.

[60] *Cf.* Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 308-12 (2008) (noting critiques of normative theories and proposals as "utopian" and "pie in the sky," and how "constitutional second best" approaches recognize some options are "outside the set of choices that are feasible or possible" and consider "states of the world").

[61] Koningisor, *supra* note 14, at 828-32.

[62] *Id.* at 833.

[63] *Id.*

[64] *Id.*

[65] *Cf.* Nicholas Kristof, Opinion, *Not Quite a Unified Theory of Trumpism, but Still an Alarming Pattern*, N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/opinion/trump-authoritarian-china.html (drawing parallels between current political regime and other authoritarian regimes, such as destruction of checks and balances and civil society institutions, and noting stranglehold of power is abetted by "adoring cheerleaders" among legislators).

[66] *Cf.* Gabler v. Crime Victims Rts. Bd., 897 N.W.2d 384, 386 (Wis. 2017) (noting vital role of judiciary as "a bulwark protecting the people against tyranny"); League of Women Voters Minn. v. Ritchie, 819 N.W.2d 636, 675 (Minn. 2012) (Anderson, J., dissenting) ("When the judiciary faithfully performs its duty, it serves as a bulwark against potential tyranny by either the legislative or the executive branch.").

[67] *Cf.* Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 621 (2010) ("Transparency thus serves as more than a mere technical concept that provides the basis for constitutional, legislative, and regulatory rules. It also acts as a powerful metaphor that drives and shapes the desire for a more perfect democratic order.").

try to evade disclosure through gaps in the law or by leveraging exemptions.[68] Professor Koningisor's diagnosis and categorization of the harms of privacy cooptation by the police to resist records disclosure is an important contribution. The open question this Response addresses is how to define the line between privacy cooptation and the need to protect people increasingly captured in their worst, humiliating, painful moments in police records.[69] The privacy price paid for regulating the police by transparency is particularly severe in an era of pervasive recording by police-worn body cameras and other surveillance methods.[70] The Response offers a four-factor decisional matrix that can guide principled decision-making and reason-giving and check the instinct to defer to the government in applying amorphous standards.[71]

[68] *Cf.* Theodore Schleifer & Eric Lipton, *Elon Musk's Financial Disclosure Will Not Be Made Public*, N.Y. TIMES (Feb. 11, 2025), https://www.nytimes.com/2025/02/11/us/politics/elon-musk-finances.html (discussing how world's richest bureaucrat—head of new Department of Government Efficiency ("DOGE")—has used status as unpaid "special government employee" to avoid disclosure and how White House has not responded to media efforts to obtain disclosure of ethics waiver for him though his companies have billions at stake in oversight, investigations, and contracting with federal agencies that he is decimating).

[69] *See* discussion *supra* Part I.

[70] *See* Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 929-34 (2017) (discussing major shift wrought by turn to police body cameras and recording of most everyday law enforcement encounters between police and public); Mary D. Fan, *Smarter Early Intervention Systems for Police in an Era of Pervasive Recording*, 2018 U. ILL. L. REV. 1705, 1710-11 (discussing current state of toutveillance in era of pervasive recording of police encounters, in which "I could be recording you, you could be recording me, and the police and other private and public surveillance devices are recording us too").

[71] *See* discussion *supra* Parts I, II.