THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2020-0036

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND THE CONCORD MONITOR

v.

CITY OF CONCORD

Rule 7 Mandatory Appeal From Merrimack County Superior Court
Docket No. 217-2019-CV-00462

OPPOSING BRIEF FOR APPELLEE - CITY OF CONCORD

James W. Kennedy, Esquire
NH Bar No. 15849
City Solicitor
41Green Street
Concord, NH 03301
Telephone: (603) 225-8505
jkennedy@concordnh.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Other Authorities

Rules

STATEMENT OF THE CASE

This appeal arises out of the Appellants' request for an unredacted copy of a license and service agreement, dated December 28, 2017, between the City of Concord ("City") and a third party, which relates to equipment that the City's Police Department uses during criminal investigations ("Agreement"). The City produced the entire Agreement in response to Appellants' Right-to-Know request, but redacted the name of the contracting party and the identification of the equipment, as such information would disclose how the equipment is used. The City's Police Chief, Bradley Osgood, notified the Appellants that the foregoing information was redacted because it would disclose investigation techniques and procedures which could risk circumvention of the law, endanger the life or physical safety of individuals, and interfere with pending law enforcement proceedings. In a subsequent email, Appellants made clear that in their request, they were not seeking how the City was using the equipment in the Agreement. This did not resolve the dispute as, releasing the redacted information would disclose how the City uses the equipment.

Appellants brought suit in Merrimack County Superior Court for the unredacted information in the Agreement. During that proceeding, Chief Osgood reiterated in a sworn affidavit that the disclosure of the contracting party and the equipment would interfere with pending law enforcement proceedings and endanger the life or physical safety of individuals. Chief Osgood stated that the disclosure of this information would reveal confidential techniques in investigations because it could "tip off" suspects who are being monitored. Chief Osgood further stated that release of the

redacted information would allow criminal suspects to circumvent the law because they could adjust their behaviors to avoid detection.

Following submission of trial briefs and two hearings, one of which was *ex parte*, the superior court (Kissinger, J.) determined that the City properly redacted information in the Agreement in accordance with the New Hampshire Supreme Court's test for evaluating public access for law enforcement records and dismissed the Appellants' case.

STATEMENT OF THE FACTS

On May 10, 2019, Concord's City Manager sent a budget proposal to the Mayor and City Council for Fiscal Year 2020. Appendix ("App.") 106. The proposed budget included a proposed expenditure of $5,100 for "Covert Communications Equipment" for the City's Police Department ("Police Department"). *Id.*

Approximately two weeks after presenting the budget to the Mayor and City Council, the American Civil Liberties Union of New Hampshire ("ACLU") and the Concord Monitor sent Right-to-Know requests seeking documents sufficient to identify the specific nature of the covert communications equipment, as well as any contracts with the vendor. App. 109, 112. The City responded to both requests stating that it would require approximately fourteen (14) days to respond to the request. App. 114, 116.

On June 10, 2019, the City produced copies of the redacted Agreement. App. 118. The redactions were narrowly limited to the name of the contracting party, information which could be used to identify the name of the contracting party and the specific nature of how the equipment is used by the Police Department in criminal investigations. *Id*. On June 17, 2019, counsel for Appellants sent a subsequent email in which

Appellants clarified that they were not seeking how the City was using the equipment in the Agreement. App. 155. However, this did not resolve the dispute, as releasing the redacted information would disclose how the City uses the equipment.

On July 23, 2019, Appellants filed a lawsuit in Merrimack County Superior Court seeking the unredacted information in the Agreement. App. 3. On August 8, 2020, the Appellants submitted a discovery request for production of documents to the City seeking unredacted copies of the requested documents. App. 101. The request for production of documents stated that the documents "may be produced subject to a mutually agreeable protective order." *Id*. at 104.

On August 23, 2019, the City filed a motion to quash to the request for production of documents. App. 84. The City argued that the request to release the documents subject to a protective order or otherwise was inappropriate in this case due to the grave consequences that may occur in releasing the unredacted information. *Id*. at 92. The City explained that "the more people that know of the unredacted record, the greater the risk of its disclosure, which could occur inadvertently or otherwise." *Id*. In support of the motion to quash, the City submitted Chief Osgood's affidavit further explaining why the redacted information must not be released to the public. App. 148. Among other things, Chief Osgood explained that:

- The Concord Police Department has several pending investigations involving its use of the equipment identified in the Agreement and made available to it under the Agreement.

The equipment is a material and essential part of those investigations.

- Disclosure of this Agreement in an unredacted format could reasonably be expected to interfere with pending enforcement proceedings, as it would disclose the Police Department's guidelines, techniques and procedures for law enforcement investigations, risk circumvention of the law and endanger the life or physical safety of any individual.
- Disclosure of the unredacted Agreement could tip off those persons who are subject to the pending investigations as to the strategy in implementing the specific techniques in the investigations.
- Releasing the Agreement outside the Police Department makes it more susceptible to discovery and interference with enforcement proceedings. The more people that know of the unredacted record, the greater the risk of its disclosure, which could occur inadvertently or otherwise.
- The redacted information in the Agreement is of such substantive detail that it would risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection.
- Disclosure of the Agreement in an unredacted format would have a material and significant impact on pending investigations.

- If the Agreement is released in an unredacted format, such disclosure could risk the lives of officers working the pending investigations and others who are the subject of the investigations.
- The City cannot identify the precise name of the officers whose lives could be at risk, or others, as such disclosure, could endanger the lives of such persons.

Id.

Also on August 23, 2019, in an effort to provide the superior court with a better understanding of the redacted information in the Agreement, the City filed an assented-to motion to file the unredacted Agreement *ex parte* and under seal for the superior court's *in camera* review. App. 156. On August 26, 2019, the superior court granted this motion. *Id*.

On August 27, 2019, the City filed a motion for an *ex parte* hearing to provide the superior court with the opportunity to examine a member of the Police Department regarding the specific information redacted in the Agreement in the event that the court had any questions. App. 158. The Appellants objected to that motion. App. 161. On August 30, 2019, the City filed the Agreement *ex parte* and under seal for the superior court's *in camera* review. App. 160, *See* Sealed Unredacted Agreement on file at the Supreme Court.

On September 13, 2019, Appellants filed their objection to the City's motion to quash. App. 181. On September 18, 2019, the City filed its reply to Appellants' objection to the City's motion to quash, which included an argument that the Agreement is statutorily privileged under the Right-to-

Know Law and not subject to disclosure in accordance with Superior Court Rule 21. App. 207. The City argued that discovery in the underlying lawsuit "should not be used as an end-around to obtaining a document not subject to public disclosure under RSA chapter 91-A or other applicable law." *Id*. at 215.

On October 25, 2019, the superior court issued an order deferring its ruling on the City's motion to quash on the basis that the City had not yet met its burden in withholding the unredacted information in the Agreement. Addendum ("Add.") 43. However, in the same order, the superior court granted the City's motion for an *ex parte* hearing. *Id*. The superior court held that it was "proper for the hearing to be held *ex parte* because the Court does not require the presence of Petitioners to recognize the legal significance of a contract such as the Agreement and because 'there is a danger that' information so sensitive that it could place others' lives at risk 'will be disclosed.'" *Id*. 53. The superior court reasoned that, because of the "sensitive nature of the information in question," it was in the "best interest of potential victims of violent crime to keep disclosure of the information to a minimum." *Id*.

On November 19, 2019, the superior court held the *ex parte* hearing. Add. 55. At the hearing, Chief Osgood specifically explained the need to maintain the confidentiality of the redacted information in the Agreement to avoid: (1) interference with pending enforcement proceedings; (2) disclosure of techniques and procedures for law enforcement investigations or prosecutions; (3) circumvention of the law; and (4) endangerment of the life or physical safety of individuals. *See* Sealed Transcript on file at the Supreme Court.

On December 20, 2019, the superior court granted the City's motion to quash, finding that the City carried its burden that the redacted information in the Agreement was exempt from disclosure. Add. 56. The superior court found that "the City specifically and persuasively laid out that revealing the name of the vendor, the nature of the equipment, how information gathered by the vendor is used, or any portion of the redacted agreement could interfere with law enforcement investigations and put lives at risk." Add. 58. The court also found that "the nature of the equipment is such that, upon discovery of the information redacted, individuals engaged in illegal activity could take measures to circumvent its use." Add. 62. The superior court also dismissed the Appellants' case. Add. 63.

This appeal followed.

SUMMARY OF THE ARGUMENT

The superior court correctly held that the City properly withheld the redacted information in the Agreement in accordance with exemptions A, E, and F of the test to determine whether law enforcement records are subject to disclosure. *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 582 (2006). Disclosure of the Agreement would show how the Police Department uses the equipment, and, as a result: (1) under exemption A, could reasonably be expected to interfere with pending enforcement proceedings; (2) under exemption E, would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; and (3) under exemption F, could reasonably be expected to endanger the life or physical safety of any individual, namely, the officers and the

suspects involved in such investigations. *Murray*, 154 N.H. at 582.

In addition, the superior court's decision to hold the *ex parte* hearing was well within its discretion. *Union Leader Corp. v. City of Nashua,* 141 N.H. 473, 478 (1996). The *ex parte* hearing was appropriate because the court was unable to reach a decision as to whether the City satisfied its burden under the applicable exemptions based upon Chief Osgood's affidavit and its *in camera* review of the unredacted Agreement. The superior court correctly determined that the risks associated with holding a public hearing outweighed the preference to include the Appellants at the hearing. Again, the parties jointly agreed to provide the superior court with the unredacted Agreement for *in camera* review. However, to provide the court further factual information regarding the redacted information in the Agreement, the superior court ordered the *ex parte* hearing. This decision is consistent with precedent from this Court and federal courts. Accordingly, the superior court's decision should be affirmed.

STANDARD OF REVIEW

The New Hampshire Supreme Court ultimately decides the interpretation of a statute, including the Right-to-Know Law. *Murray*, 154 N.H. at 582 (quotation omitted). The superior court's legal conclusions and its application of law to fact are ultimately questions for the Supreme Court. Thus, in the absence of disputed facts, the Supreme Court reviews the trial court's ruling *de novo*. *Id.*

ARGUMENT

I. The Superior Court Correctly Concluded That The City Satisfied Its Burden To Support Nondisclosure Of The Redacted Information In The Agreement.

It is well-settled that the "purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." *Montenegro v. City of Dover*, 162 N.H. 641, 645 (2011) (quotation omitted). Likewise, it is well-understood that the Right-to-Know Law "helps further our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. *Id*.; N.H. CONST. Part I, Article 8. The statute does not provide for unrestricted access to public records, but rather, this Court "resolves questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Murray*, 154 N.H. at 581. When "interpreting provisions of the New Hampshire Right–to–Know Law, . . . [this Court] often look[s] to the decisions of other jurisdictions interpreting similar provisions of other statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)." *38 Endicott Street North, LLC v. State Fire Marshal, New Hampshire Division of Safety*, 163 N.H. 656, 660 (2012).

Although the Right-to-Know Law does not explicitly address the treatment of requests for law enforcement records or information, in 1978, this Court adopted the test embodied in exemption 7 of the FOIA at 5

U.S.C. § 552(b)(7) (2006). *Lodge v. Knowlton*, 118 N.H. 574, 576–77 (1978); *Murray*, 154 N.H. at 582; *Montenegro*, 162 N.H. at 645–46; *38 Endicott Street North, LLC*, 163 N.H. at 661. Under the exemption, which this Court has referred to as the *Murray* test/exemption, records or information compiled for law enforcement purposes are exempt from disclosure, but only to the extent that the production of such records or information:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual. . . .

38 Endicott Street North, LLC, 163 N.H. 661 (quoting 5 U.S.C. § 552(b)(7)).

The *Murray* exemption requires a two-part inquiry. *38 Endicott Street North, LLC*, 163 N.H. 661; *see also Montenegro*, 162 N.H. at 646; accord *F.B.I. v. Abramson*, 456 U.S. 615, 622 (1982). First, the entity

seeking to avoid public disclosure must establish that the requested information was "compiled for law enforcement purposes." *Id*. Second, if the entity meets this threshold requirement, it must then show that releasing the information would have one of the six enumerated adverse consequences identified above in exemption 7 of the FOIA, *i.e*., the *Murray* test. *Id*.

With respect to the first inquiry, the Appellants do not challenge on appeal whether the Agreement was "compiled for law enforcement purposes." Appellants' Br. at 18. Instead, Appellants challenge the superior court's determination that the redacted information in the Agreement is exempt from disclosure in accordance with exemptions A, E, and F.[1] Appellants also argue that the superior court erred in conducting the *ex parte* hearing to reach its conclusion that the redacted information in the Agreement is exempt under exemptions A, E and F. The City addresses each of these arguments in turn.

A. The Redacted Information In The Agreement Is Exempt Under Exemption A.

Exemption A requires a government agency to show that "enforcement proceedings are pending or reasonably anticipated and that disclosure of the requested documents could reasonably be expected to interfere with those proceedings." *38 Endicott Street North, LLC*, 163 N.H. at 665 (quoting *Murray*, 154 N.H. at 582–83). In enacting this exemption,

[1] Appellants' first question presented, inquires as to whether the superior court erred "when it ruled that records identifying "covert communications equipment" purchased by the City using taxpayer dollars—but not detailing how that equipment was being used—were exempt from disclosure under RSA ch. 91-A, *Lodge v. Knowlton*, 118 N.H. 574 (1978), and FOIA exemptions 7 (A), (E), and (F) . . . ." Appellants' Br. at 6. However, notwithstanding this question, Appellants make clear in their brief that they are not seeking how the equipment will be used. *Id*. at 23.

"Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 224 (1978)). Courts have recognized that the disclosure of information may interfere with enforcement proceedings by "resulting in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation." *38 Endicott Street North, LLC*, 163 N.H. at 667 (citing *Solar Sources, Inc. v. U.S.*, 142 F.3d 1033, 1039 (7th Cir.1998) (quotations omitted); *Barney v. I.R.S.*, 618 F.2d 1268, 1273 (8th Cir.1980) (explaining that one of the primary purposes of exemption 7 of the FOIA is to prevent harm to the government's case "by not allowing litigants earlier or greater access to agency . . . files than they would otherwise have") (internal quotations omitted)).

To satisfy exemption A, when enforcement proceedings are pending or reasonably anticipated an agency is *not* required to "explain when, where, or by whom charges might arise . . . ." *38 Endicott Street North, LLC*, 163 N.H. at 666. It does not even require, as Appellants incorrectly state, that the agency establish that law enforcement proceedings are a certainty. *Id*. at 583. Rather, this Court has made clear that the exemption "merely requires the agency to demonstrate that law enforcement proceedings are "reasonably anticipated." *Id*. In that regard, the agency must "fairly describe[] the content of the material withheld . . . adequately [state the] grounds for nondisclosure, and [explain why] those grounds are reasonable and consistent with the applicable law." *Id. at 667* (*citing Barney*, 618 F.2d at 1274) (quotation omitted)).

It is undisputed that the Police Department is authorized to utilize

the equipment in its law enforcement investigations, and the superior court correctly determined that the City satisfied the requirements under exemption A. The superior court made this determination after reviewing Chief Osgood's affidavit, the unredacted Agreement submitted *in camera*, and Chief Osgood's testimony at the *ex parte* hearing explaining how disclosure of the redacted information in the Agreement would interfere with enforcement proceedings. Add. 61.

Chief Osgood's affidavit states that there are "several pending investigations involving its use of the equipment identified in the Agreement and made available to it under the Agreement," and that "[t]he equipment is a material and essential part of those investigations." App. 148. In addition, Chief Osgood states that "[d]isclosure of this Agreement in an unredacted format could reasonably be expected to interfere with pending enforcement proceedings, as it would disclose the Police Department's guidelines, techniques and procedures for law enforcement investigations, risk circumvention of the law and endanger the life or physical safety of any individual." *Id*. Chief Osgood adequately states the grounds for nondisclosure. *38 Endicott Street North, LLC*, 163 N.H. at 667.

The City further detailed the ways in which the production of the requested records would interfere with these investigations. In particular, the Chief Osgood explained that "[d]isclosure of the unredacted Agreement could tip off those persons who are subject to the pending investigations as to the strategy in implementing the specific techniques in the investigations." App. 148. Chief Osgood also stated that disclosure would provide "those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection." App. 149. At the *ex*

parte in camera hearing, Chief Osgood responded to specific questions which explained how the release of the redacted information would interfere with enforcement proceedings. *See* Sealed Transcript on file at the Supreme Court.

Appellants assert that the Agreement was "heavily" redacted. However, the record shows that the redactions are narrowly limited to the name of the contracting party (which is information which could be used to identify the equipment and how it is used) and text that disclosed the nature of the equipment. App. 118-146.

The City fairly described the content of the material withheld in compliance with this Court's application of exemption A. *38 Endicott Street North, LLC*, 163 N.H. at 667. Chief Osgood states that the Agreement is a license and service agreement and "contains confidential information relative to the name of the contracting party and the equipment which the Concord Police Department uses in criminal investigations." App. 148.

By way of contrast, in *Murray*, this Court determined that the State Police did not satisfy its burden in withholding the requested investigatory records. 154 N.H. at 584. The Court noted that the State Police did not provide any affidavits, testimony, or other evidence which, for example: (1) identified the categories of withheld documents; (2) explained how disclosure of the information within these categories could interfere with any investigation or enforcement; or (3) explained why there was no reasonably segregable portion of any of the withheld material suitable for release. 154 N.H. at 584; (quoting *Curran*, 813 F.2d at 476 (quotation omitted)). Accordingly, the Court remanded the matter to the superior

court to make these findings. *Id*. Unlike that case, but following the guidance of this Court from that disclosure, the City here has provided substantial information to support its decision to redact the Agreement.

In further support of the City's action, in *38 Endicott Street North, LLC v. State Fire Marshal*, 163 N.H. 656, 659 (2012), the petitioner requested that the State Fire Marshal produce all records, information, and documents related to a September 17th fire at a restaurant, hotel and saloon in Laconia, New Hampshire. *Id*. at 659. After determining that the documents were compiled for law enforcement purposes, this Court found that the Fire Marshal had met its burden in not producing the requested documents because a Fire Marshal investigator provided an affidavit stating that "the fire investigation is open and ongoing and I have a reasonable belief that this investigation will lead to criminal charges." *Id.* at 666. The Court noted that the Fire Marshal did exactly what was required under *Murray*—he provided an affidavit that "fairly describe[d] the content of the material withheld and adequately states the grounds for nondisclosure, and those grounds are reasonable and consistent with the applicable law." *Id*. at 667. The Court also noted that the trial court was "entitled to credit this affidavit." *Id*. The steps taken by the City here are consistent with those taken by the State Fire Marshal's Office in *38 Endicott Street North, LLC*.

Appellants also challenge the applicability of exemption A by arguing that "Chief Osgood's affidavit points to no specific enforcement proceedings, nor does explain how producing any of the redacted information will place those enforcement proceedings at risk." Appellants' Br. at 20. Exemption A requires that the agency demonstrate that law enforcement proceedings are "reasonably anticipated." *38 Endicott Street*

North, LLC, 163 N.H. at 667. Chief Osgood's affidavit goes well beyond this requirement, stating that "[t]he Concord Police Department has several pending investigations involving its use of the equipment identified in the Agreement and made available to it under the Agreement. The equipment is a "material and essential part of those investigations." App. 148. These are not hypothetical investigations or even possible investigations; instead they are active and ongoing. *Id*. Chief Osgood's affidavit also addresses the grave consequences resulting from the release of the redacted information. *Id*. At the *ex parte* hearing, Chief Osgood explained specifically how disclosure of the information could interfere with pending investigations. *See* Sealed Transcript on file at the Supreme Court. The superior court correctly determined that "there is a high likelihood that disclosure of the technology would, in fact, jeopardize ongoing and future law enforcement proceedings." Add. 61. The superior court's decision that the City met its burden that the redacted information is exempt under exemption A should be affirmed.

B. The Redacted Information In The Agreement Is Exempt Under Exemption E.

Exemption E states that records or information may be withheld if disclosure "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." *Montenegro*, 162 N.H. at 649 (holding that the Dover police department was not required to disclose how it would utilize security cameras in accordance with exemption E). The agency resisting disclosure must "demonstrate logically

how the release of the requested information might create a risk of circumvention of the law." *Blackwell v. F.B.I.*, 646 F.3d 37, 42 (D.C. Cir. 2011). "If an agency record discusses merely the application of a publicly known technique to . . . particular facts, the document is not exempt under [exemption (E)]." *Am. Civil Liberties Union of N. Cal. v. U.S. Dept. of Justice*, 880 F.3d 473, 491 (9th Cir. 2018) (internal quotation omitted). An agency must only provide description of nondisclosed documents in a manner that is sufficient "to allow meaningful judicial review, yet not so distinct as to reveal the nature and scope of the investigation." *Murray*, 154 N.H. at 582.

Appellants state that they "have deliberately not sought the item's specifications or capabilities and how the item will be used (which was deemed exempt from disclosure in *Montenegro*)" Appellants' Br. at 23. However, disclosing the name of the vendor and the equipment would in fact disclose *how* the equipment is used. Chief Osgood explained that "[d]isclosure of this Agreement in an unredacted format could reasonably be expected to interfere with pending enforcement proceedings, as it would disclose the Police Department's guidelines, techniques and procedures for law enforcement investigations, risk circumvention of the law and endanger the life or physical safety of any individual." App. 148. He further states "[d]isclosure of the unredacted Agreement could tip off those persons who are subject to the pending investigations as to the strategy in implementing the specific techniques in the investigations." *Id*. This demonstrates that disclosure of the redacted portions of the Agreement would disclose "techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement

investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." *Montenegro*, 162 N.H. at 649. Chief Osgood also provided additional information about these concerns during the *ex parte in camera* hearing. *See* Sealed Transcript on file at the Supreme Court.

In *Montenegro*, the petitioner requested: (1) the precise locations of Dover's surveillance equipment; (2) the recording capabilities for each piece of equipment; (3) the specific time periods each piece of equipment is operational; (4) the retention time for any recordings; and (5) the job titles of those who monitor the recordings. 162 N.H. at 643. In response, Dover disclosed the general location and buildings where cameras are located, or are proposed to be located, and the number of cameras around each site. *Id*. In addition, Dover disclosed the:

- capability and intent of the Dover Police to monitor cameras from remote locations;
- intent of the Dover Police not to monitor the cameras on a regular basis, but to view them as needed when it would assist in law enforcement;
- cost of the security equipment;
- names of the vendors installing the security equipment;
- contracts for installing the security equipment; and
- date when the equipment was installed.

Id.

However, the *Montenegro* Court did not require Dover to disclose how it would use the cameras. *Id*. at 647. Dover did not disclose the

precise locations of cameras, the type of recording capabilities for each piece of equipment, the specific time periods each piece of equipment is expected to be operational, and the retention time for any recordings.

The *Montenegro* Court held that Dover carried its burden to withhold the requested information because it is "of such substantive detail that it could reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection." *Id*. The Court further concluded that the release of such information "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions" and "such disclosure could reasonably be expected to risk circumvention of the law." *Id*.

The *Montenegro* Court relied on the case *Lewis–Bey v. U.S. Dept. of Justice*, 595 F.Supp.2d 120, 138 (D.D.C .2009), wherein the federal court addressed whether the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") properly withheld under exemption E "details of electronic surveillance techniques, specifically, the circumstances under which the techniques were used, the specific timing of their use, and the specific location where they were employed." 162 N.H at 647. The *Lewis–Bey* federal court accepted ATF's assertion that disclosure "would illustrate the agency's strategy in implementing these specific techniques" and thus "could lead to decreased effectiveness in future investigations by allowing potential subjects to anticipate and identify such techniques as they are being employed." *Id*. (quotations and ellipsis omitted).

Similar to the records that were exempt from disclosure in

Montenegro and *Lewis–Bey*, in this case, the release of the unredacted Agreement would disclose the specific techniques and procedures by which the Police Department conducts certain criminal investigations. App. 148-149. The superior court correctly held that "[i]f discovered, the effectiveness of police investigations in a number of criminal law enforcement settings would be significantly curtailed." Add. 62. The superior court explained in its order that the "City did not merely describe a publicly known technique but, instead, a specific means of deploying a currently confidential technique in law enforcement investigations." *Id.* As a result, the superior court held that redacted portions of the Agreement are exempt from disclosure because if released they would enable "individuals engaged in illegal activity could take measures to circumvent its use." *Id.*

Appellants' reliance on *Am. Civil Liberties Union Found. v. Dept. of Homeland Security*, 243 F. Supp. 3d 393, 402-405 (S.D.N.Y. 2017) is unavailing. That case involved the release of a list of questions that unaccompanied children were asked while detained at the border by the Department of Homeland Security, Division of Customs and Border Protections ("CBP"). *Id.* The questions at issue were asked to more than 500 people, and were also published on a 57-episode television series entitled "Boarder Wars." *Id.* at 404-05. The federal court rejected the CBP's attempt to withhold the list of questions pursuant to exemption E. The court held that "[a]sking well-known law-enforcement arrest questions in a particular order does not amount to a technique . . . ." *Id.* at 404.

Unlike *American Civil Liberties Union Foundation*, the redacted portions of the Agreement do not constitute "well-known" information. Rather, the superior court found that the Agreement related to a confidential

technique used in law enforcement investigations. Add. 62.

Appellants' reliance on *Families for Freedom v. U.S. Customs and Border Protection*, 797 F. Supp. 2d 375 (S.D.N.Y. 2011) is similarly unavailing. In that case, the federal court rejected CBP's attempt to withhold reports relating to the total number of arrests and charge codes within a region of the State of New York. *Id*. at 391. The court determined that such "statistics are neither techniques or procedures nor guidelines, such that they could be properly exempt under 7(E)." *Id*. at 391, 394. The court also noted that CBP has "already released the catalogue of available charge codes" and therefore "it is difficult to imagine how the release of the codes . . . will compromise the security of agency databases or otherwise risk circumvention of the law." *Id*.

The *Families for Freedom* documents are fundamentally different from the redacted information in the Agreement. The number of arrests and certain charge codes are not at issue here. Instead, the redacted information in the Agreement pertains to confidential law enforcement techniques which the superior court found that "[i]f discovered, the effectiveness of police investigations in a number of criminal law enforcement settings would be significantly curtailed." Add. 62.

In contrast to *Am. Civil Liberties Union Found.* and *Families for Freedom*, the federal court in *Bishop v. U.S. Dept. of Homeland Security*, 45 F. Supp. 3d 380 (S.D.N.Y. 2014), sustained the nondisclosure of certain databases which would show how CBP uses technology to determine which airports should require additional screening for travelers. In *Bishop*, two New York Times reporters who had been subjected to screening during international travel flights sent separate FOIA requests "seeking all

information and records in the possession of DHS concerning" them. *Id*. at 383. The petitioners brought suit to gain access to the technology and database containing codes used to target them for additional screening. *Id*. The court held that "[r]equiring the production of this information, which was returned from a query of law enforcement databases, would plainly 'disclose . . . procedures for law enforcement investigations' within the meaning of Exemption 7(E) to anyone who could make sense of the letters or numbers." *Id*. at 388. The court also held that although DHS's screening procedures and techniques are generally known to the public, there is no information in the record to show that the public has "any knowledge of the particular techniques or procedures reflected in the redacted fields—in other words, which databases CBP considers in its targeting process and how such information can lead to the triggering of additional security screening." *Id*. at 391.

Like *Bishop,* the redacted portion of the Agreement would undoubtedly reveal a City Police Department procedure and technique unknown to the public. As the superior court noted in its order following the *ex parte* hearing, "[t]he City did not merely describe a publicly known technique but, instead, a specific means of deploying a currently confidential technique in law enforcement investigations." Add. 62. The superior court also stated, "[t]he nature of the equipment is such that, upon discovery of the information redacted, individuals engaged in illegal activity could take measures to circumvent its use." *Id*.

In sum, the superior court correctly determined that the redacted portions of the Agreement are exempt under exemption E. The superior court's decision should be affirmed.

C. The Redacted Information In The Agreement Is Exempt Under Exemption F.

Under *Murray* exemption F, records or information may be withheld if disclosure "could reasonably be expected to endanger the life or physical safety of any individual." *Murray*, 154 N.H. at 582. A court's consideration of exemption F's scope "begins and ends with its text," which is "expansive" and "broadly stated." *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 777 F.3d 518,523 (D.C. Cir. 2015) (holding that "any individual" does not require the withholding agency to specifically identify the individual to be harmed). The agency must "demonstrate that it reasonably estimated that sensitive information could be misused for nefarious ends." *Public Emples. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 206 (D.C. Cir. 2014).

Chief Osgood's affidavit states that there are "several pending investigations involving its use of the equipment identified in the Agreement and made available to it under the Agreement" and that "[t]he equipment is a material and essential part of those investigations." App. 148. In addition, Chief Osgood's affidavit states that "[i]f the Agreement is released in an unredacted format, such disclosure could risk the lives of officers working the pending investigations and others who are the subject of the investigations." App. 149. Further, Chief Osgood's affidavit states that the "City cannot identify the precise name of the officers whose lives could be at risk, or others, as such disclosure, could endanger the lives of such persons." *Id*. On its face, this demonstrates that disclosure of the redacted information in the Agreement "could reasonably be expected to endanger the life or physical safety of any individual." *Murray*, 154 N.H.

at 582.

During the *ex parte* hearing, Chief Osgood further described how the release of the redacted information could risk the lives of officers working the pending investigations and others who are the subject of the investigations. *See* Sealed Transcript on file at the Supreme Court. He also explained why the City could not release the names of the officers or other persons whose lives could be at risk if disclosure occurred. *Id.*

The superior court determined that the information provided during the *ex parte* hearing satisfied the exemption F because "revealing the redacted content could lead to the identification of the equipment used and of the manner it is employed." Add. 63. The superior court further found that disclosing information that might reveal the nature of the technology and the manner of its use in police investigations could "reasonably be expected to endanger the life and safety of police officers and of members of the public." *Id.*

Appellant' reliance on *American Civil Liberties Union v. Dept. of Def.*, 543 F.3d 59, 64 (2d Cir. 2008), cert. granted, judgment vacated, 558 U.S. 1042 (2009) is misplaced as the subject matter in that case is wholly different to the issue presented here. In *Am. Civil Liberties Union*, the plaintiffs sought records related to the treatment and death of prisoners held in United States custody after September 11, 2001. 543 F.3d at 64. In particular, the plaintiffs requested information related to "photographs and other images of detainees at detention facilities in Iraq and Afghanistan, including Abu Ghraib prison." *Id*. at 64. The defendants argued, in part, that the records were "compiled for law enforcement purposes where disclosure could reasonably be expected to endanger the life or physical

safety of any individual." *Id*. According to the defendants, release of the photos could reasonably be expected to "endanger the life or physical safety of United States troops, other Coalition forces, and civilians in Iraq and Afghanistan . . . . because photographs of military members with detainees might endanger "any" individual that serves in the armed forces, which comprises millions of those serving in the armed forces." *Id*. at 67-68. The Second Circuit Court of Appeals held that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." *Id.*

On appeal, the United States Supreme Court vacated the judgment and remanded. 558 U.S. 1042, (2009). Following a long procedural history, in 2018, the Second Circuit Court of Appeals ultimately held that the photos and other documents were not subject to disclosure under FOIA exemption 3, which covers matters "specifically exempted from disclosure by statute . . if that statute . . . (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id*. at 133 (quoting 5 U.S.C. § 552(b)(3)).

Here, if the Agreement is released in an unredacted format, such disclosure could risk the lives of the City Police Officers working the pending criminal investigations and others who are the subject and/or informants pertaining to the investigations. App. 148-149. The Police Department has several pending investigations involving the use of the equipment licensed under the Agreement. *Id*. The equipment is a material and essential part of those investigations. *Id*. The City cannot identify the

precise name of the officers whose lives could be at risk, or others, as such disclosure could endanger the lives of such persons. *Id*.

Unlike *Am. Civil Liberties Union*, the risk of life is not nebulous. There are very real concerns about the risk of the lives of the Police Officers working criminal investigations, as well as others who are participating in and/or the subject of those investigations.

Appellants also cite *Banks v. Dept. of Justice*, 700 F. Supp. 2d 9, 18 (2010) in support of their argument that the City did not meet its burden of nondisclosure under *Murray* exemption F. The *Banks* court denied the Federal Board of Prison's ("BOP") motion for summary judgment without prejudice on the basis that the BOP did not show that the withheld records were compiled for law enforcement purposes and did not "whether there is some nexus between disclosure and possible harm" to such third parties. *Id*. Here, however, Chief Osgood's affidavit makes clear that the lives of officers and suspects involved with pending investigations will be at risk if the redacted information in the Agreement is released. App. 149. The specific details of how this risk could occur with the release of the unredacted information in the Agreement were provided to the superior court at the *ex parte* hearing. *See* Sealed Transcript on file at the Supreme Court.

In further support of the City's position of nondisclosure, in *Elec. Privacy Info. Ctr.*, 777 F.3d 518, 523 (D.C. Cir. 2015), the court held that DHS satisfied its burden in not producing documents under the claim that such disclosure could reasonably be expected to endanger the life or physical safety of any individual. In that case, DHS did not release certain documents that would:

> enable bad actors to insert themselves into the process of shutting down or reactivating wireless networks by appropriating verification methods and then impersonating officials designated for involvement in the verification process. Such bad actors would . . . be able to disable the protocol and freely use wireless networks to activate ... improvised explosive devices . . . so there is a reasonable expectation that disclosure could reasonably endanger individuals' lives or physical safety.

Id. at 521.

In upholding the nondisclosure, the court reasoned that the language of exemption F, which concerns danger to the life or physical safety of any individual, "suggests Congress contemplated protection beyond a particular individual who could be identified before the fact." *Id*. at 525. The court went on to state that in the context of exemption 7(F) the word "any" demands a broad interpretation and that "Congress could have, but did not, enact a limitation on exemption F, such as "any specifically identified individual." *Id*.

The superior court correctly held that the redacted portions of the Agreement are exempt under exemption F. Add. 63. Indeed, the court found that "[k]knowledge of such information could reasonably be misused for 'nefarious ends,' including physical and deadly harm." *Id*. The superior court's decision under exemption F should be affirmed.

II. The Superior Court's Decision To Hold The *Ex Parte* Hearing Was Correct.

The superior court's decision to hold the *ex parte* hearing was well within its discretion. *Union Leader Corp.,* 141 N.H. at 478. In *Union Leader Corp.,* the plaintiff argued that "the trial court erred in conducting

its review of the requested material *in camera* without the presence of counsel." This Court rejected that argument on the grounds that "[a]lthough the procedure should be used cautiously and rarely, *ex parte in camera* review of records whose release may cause an invasion of privacy is plainly appropriate." *Id.* (internal citations omitted). This Court went on to state that "a record must be taken of any hearings that are held, whether counsel for one or both are present." *Id.*

Indeed, this Court has long-instructed superior courts to "require *in camera* review to decide whether there will be total or partial nondisclosure." *Lodge*, 118 N.H. at 577; *Murray*, 154 N.H. at 583 ("*in camera* review . . . may be sufficient to justify an agency's refusal to disclose."). This process safeguards the protected information while, at the same time, allows a court to determine *in camera* whether the government has satisfied its burden. *State v. Gagne*, 136 N.H. 101, 105 (1992).

The Appellants incorrectly argue that *ex parte* review should be limited to matters involving the privacy of an individual, or alternatively, when authorized by statute or rule. That argument fails to recognize the wide range of matters in which confidential material must be reviewed by a court, and is also not supported by case law or statute.

The holding in the *Union Leader Corp.* case is not narrowly limited to protecting privacy interests. In authorizing review of records without counsel present, the Court in *Union Leader Corp*. relied on the case *Pollard v. F.B.I.*, 705 F.2d 1151, 1153–54 (9th Cir.1983) which involved a request for a person's criminal records at the FBI.

In *Pollard*, the FBI disclosed only three pages of documents, and refused to produce other documents based on the statutory exemptions of 5

U.S.C. § 552(b)(1) (national defense or foreign policy secrecy) and § 552(b)(7)(C) & (D) (unwarranted invasion of personal privacy and confidential source secrecy). 705 F.2d at 1152. The district court initially denied the FBI motion for summary judgment as it found "the affidavits to be insufficient for the court to determine whether the national security exemption had been properly claimed." *Id*. However, the court subsequently determined the requested documents were exempt from disclosure "after considering, in camera, the FBI affidavit, the documents themselves, and certain oral statements by [a] FBI Special Agent. . . ." *Id*. Pollard's attorney was not permitted to be present for this review. *Id*. The plaintiff challenged whether the federal district court's *ex parte in camera* proceeding violated common law and FOIA. *Id.* at 1153. The appellate court held that "the practice of *in camera*, *ex parte* review remains appropriate in certain FOIA cases, provided the preferred alternative to *in camera* review—government testimony and detailed affidavits—has first failed to provide a sufficient basis for a decision." *Id.* at 1153-54. The court also held there was no abuse of discretion regarding plaintiff's efforts to depose the FBI agent "concerning the contents of the withheld documents because that was precisely what defendants maintain is exempt from disclosure to plaintiff pursuant to the FOIA." *Id*.

Like *Pollard*, the superior court's *ex parte* hearing was appropriate. The superior court was unable to reach a decision based upon its *in camera* review of the unredacted Agreement. Although Chief Osgood also submitted an affidavit, it was publicly filed thereby limiting the amount of information that could be discussed. The superior court explained in its October 25, 2019 order that it could not determine whether the City had

met its burden with Chief Osgood's affidavit and the unredacted Agreement alone, and therefore, required an *ex parte* hearing to determine whether a *Murray* exemption applies. Add. 53-54. For that reason, the superior court determined that it needed to conduct an *ex parte* hearing to obtain additional information from Chief Osgood. In addition, the potential harms of disclosure in this case go far beyond protecting a person's privacy interests. Chief Osgood's affidavit states that the lives of officers and suspects would be endangered if the redacted information in the Agreement is released. App. 149. Disclosure could also interfere with pending enforcement proceedings and would disclose the Police Department's techniques and procedures for law enforcement investigations. App. 148.

Consistent with this Court's determination of when *ex parte in camera* review is appropriate, federal courts routinely conduct such hearings to determine whether federal agencies have met their burden of nondisclosure under the FOIA law enforcement exemption. *See, e.g.*, *New York Times Co. v. U.S. Dept. of Justice*, 806 F.3d 682, 683-84, 689 (2d Cir. 2015) (utilizing *ex parte* and *in camera* proceedings and filings because of national security concerns in context of FOIA request for documents related to drone strikes); *New York Times Co. v. F.B.I.*, 297 F. Supp. 3d 435, 442-43, 451 (S.D.N.Y. 2017) (conducting two *ex parte* hearings, an *ex parte* conference, and multiple *ex parte* written declarations in FOIA litigation due to national security concerns); *Truthout v. Dept. of Justice*, 20 F. Supp. 760, 766-68 (E.D. Cal. 2014) (conducting *ex parte in camera* examination under Exemption 7(E) where particularized explanation of the harm generated by disclosure would force the agency to reveal the information contained in the withheld documents); *Doyle v. F.B.I.*, 722 F.2d 554, 556

(1983) (reliance on *ex parte*, *in camera* review of government affidavits to determine whether the government met its burden under Exemption 7 is appropriate).

By way of further information, *ex parte in camera* proceedings are also routinely used in New Hampshire state courts for a variety of cases. *In re Morrill*, 147 N.H. 116 (2001) (*ex parte* domestic violence petition under RSA 173-B:3); *Filmore v. Filmore*, 147 N.H. 283, 285 (2001) (finding insufficient factual allegations of imminent danger to support *ex parte* domestic violence T.R.O.); *State v. Kibby*, 170 N.H. 255, 260 (2017) (ordering documents provided to court on *ex parte* basis be unsealed when defendant failed to show that unsealing the documents related to relations to defendant's counsel would compromise his defense).

In fact, in criminal cases, it is not uncommon for a court to conduct an *ex parte in camera* review of confidential records to determine the applicability of such records to the defendant's defense. *Gagne*, 136 N.H. at 106. In those circumstances, courts balance the "State's interest in protecting confidential information against the defendant's interest in obtaining potentially helpful evidence." *Id*. at 105. As result, the *in camera* review process serves the defendant's interest without destroying the State's need to protect the confidentiality of the confidential records. *Id*. (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 40 (1987)).

While it is agreed that a court should use *ex parte in camera* review cautiously, *Union Leader Corp.*, 141 N.H. at 478, the facts presented in this case support the superior court's decision to employ *ex parte* review. In ordering the *ex parte* review hearing, the superior court acknowledged its duty to safeguard the judicial process and the adversarial system of justice,

but also observed that "[t]he values of the adversary system should not trump the need for a fair and just result." Add. 53. The court also made clear that it "is more than a passive participant" and will ensure that "proper legal principles are applied to the facts." *Id.* The court further noted that Appellants' counsel was not necessary for it to recognize the "legal significance of the documents and 'where there is a danger that' particularly sensitive information 'will be disclosed.'" *Id.*

Appellants nonetheless argue that the *ex parte* procedure employed by the superior court was "unfair" and "unreliable." Appellants' Br. at 31. Appellants attempt to support that argument by referencing rules of evidence, criminal and civil statutory procedures and a code of judicial conduct rule. *See* Appellants' Br. at 26. While the rules of evidence and procedure demonstrate that *ex parte* proceedings are rare and should be used cautiously, they do not provide a basis to reverse the superior court's decision to conduct the *ex parte* hearing in this case. Moreover, Appellants fail to recognize that Judicial Conduct Rule 2.9(A)(5) states that "[a] judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so." As set forth above, this Court has authorized the use of *ex parte* hearing procedures in a number of proceedings.

Appellants also provide a string of citations for the assertion that the superior court incorrectly conducted the *ex parte* hearing. Appellants' Br. at 32. However, upon review, it is clear that Appellants have failed to cite any case which stands for the proposition that it is appropriate to share highly confidential law enforcement information with Appellants or their counsel which could endanger the lives of Police Officers and suspects in

pending investigations, disclose techniques or procedures of those pending investigations, and otherwise could materially interfere with those pending investigations. Those cases do not exist.

Moreover, it is well-understood that the superior court has a duty to protect the integrity of the judiciary. *See* Rule 1.2 Code of Jud. Conduct. Indeed, the superior court's participation in the *ex parte* hearing protects the integrity of the legal system. *Id*. Had the superior court determined that there was any doubt as to the applicability of exemptions A, E and/or F, it could have scheduled a hearing with Appellants' counsel present to cross examination of Chief Osgood. That did not occur.

While a protective order authorizing opposing counsel to review the redacted information in the Agreement may be appropriate for releasing certain types of confidential information, for the reasons set forth in Chief Osgood's affidavit, there is no basis to do so here. Also, there is no basis to provide the Appellants with precisely what the City maintains is exempt from disclosure pursuant to the Right-to-Know Law. *Pollard*, 705 F.2d at 1154. Indeed, releasing the Agreement outside the Police Department to the Appellants, or to any other party who may have filed a lawsuit seeking the unredacted Agreement, makes it more susceptible to discovery by third parties, which could occur inadvertently or otherwise. Even on appeal in this case, where appropriate security measures were taken to protect disclosure of the sealed transcript of the November 19, 2019 *ex parte* hearing, it was inadvertently disclosed to Appellants counsel when eScribers emailed the sealed transcript to Appellants' counsel in error. App. 217. This error occurred notwithstanding this Court's unambiguous order stating, "[t]**he transcript of the sealed ex parte proceeding on**

November 19, 2019, will be provided electronically through a PDF file to the defendant only, and not to the plaintiffs." Add. 64. The point is, mistakes happen, and every reasonable effort must be taken to avoid mistakes and inadvertent disclosure of sensitive information, such as the unredacted information in the Agreement here. The superior court was clearly correct in taking such precaution.

Further, it should be noted that Appellants do not gain right to review confidential information in a governmental record simply by filing a lawsuit against the governmental entity. *Union Leader Corp*, 141 N.H. at 478. In other words, the filing of a lawsuit does not authorize a petitioner or its legal counsel to circumvent the Right-to-Know Law exemptions through discovery. *Pollard*, 705 F.2d at 1154.[2]

CONCLUSION

In sum, the superior court was correct in determining that the City satisfied its burden of nondisclosure under exemptions A, E and F. The superior court was also correct in conducting the *ex parte in camera* hearing, as it was unable to reach a decision as to whether the City satisfied its burden under the applicable exemptions based upon Chief Osgood's affidavit and the unredacted Agreement. The superior court correctly determined that the risks associated with holding a public hearing outweighed the preference to include the Appellants at the hearing. Again, the parties jointly agreed to provide the superior court with the unredacted

[2] Discovery requests are subject to New Hampshire Superior Court Rule 21 and New Hampshire Rule of Evidence 501. In accordance with these Rules, the Agreement is not subject to disclosure. Super. Ct. R. 21. The Agreement is statutorily privileged under the Right-to-Know Law. The Reporter's Notes to N.H. Rule of Evidence 501 identifies governmental records exempted under RSA 91-A:5 as statutorily privileged.

Agreement for *in camera* review. However, to provide the court further factual information regarding the redacted information in the Agreement, the superior court ordered the *ex parte* hearing. This was not a hearing for the City to present argument, but instead, was hearing to present factual information from Chief Osgood regarding the redacted information in the Agreement and its application to the A, E and F exemptions. Accordingly, the superior court's decision should be affirmed.

REQUEST FOR ORAL ARGUMENT

The City of Concord requests 15 minutes for oral argument.

RULE 16(3)(i) CERTIFICATION

The City of Concord hereby certifies that the orders being appealed or reviewed are in writing and are appended to this brief.

CERTIFICATION OF WORD COUNT

The City of Concord hereby certifies that this brief contains 9,493 words.

Respectfully submitted,

CITY OF CONCORD

By its attorney,

September 17, 2020 By: /s/ James W. Kennedy

James W. Kennedy, Bar No. 15849
City Solicitor
41 Green Street
Concord, NH 03301
(603) 230-8550
jkennedy@concordnh.gov

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been provided electronically to all counsel and parties of record through the Court's e-filing and service system.

September 17, 2020 By: /s/ James W. Kennedy
James W. Kennedy, Bar No. 15849

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, and
THE CONCORD MONITOR

v.

CITY OF CONCORD

Docket No.: 217-2019-CV-00462

ORDER

On October 4, 2019, the Court held a hearing on pending motions. The Petitioners, the American Civil Liberties Union ("ACLU") of New Hampshire and the Concord Monitor, request access to public records pursuant to the Right-to-Know Law and Part I, Article 8 of the New Hampshire Constitution. The Respondent, City of Concord, filed an assented-to motion to file documents ex parte and under seal. The City now moves to hold an in camera ex parte hearing and to quash the Petitioners' Right-to-Know request. The Petitioners object to both motions. The Court finds it needs further information before reaching a decision on whether to grant the Petitioners' Right-to-Know request and, therefore, defers consideration of the City's motion to quash. For the following reasons, the City's motion to hold an in camera ex parte hearing is GRANTED.

I. Background

On May 10, 2019, Concord's City Manager submitted a budget proposal for Fiscal Year 2020 to the Mayor and to the Concord City Council. (Pet. Access to Public Rs. ("Pet.") ¶ 6.) The proposal included a line item expenditure of $5,100 for "Covert

Communications Equipment." (Id.) The City has used the equipment since at least 2017 but the Concord Monitor became interested in May, 2019. (Id. ¶ 9.) On May 24, 2019, the Concord Monitor published an article entitled, "Concord's $66.5M budget proposal has its secrets." (Id., Ex. B.) On May 28, 2019, the ACLU of New Hampshire sent the City a Right-to-Know request seeking documents revealing "the specific nature" of the equipment and "any contracts or agreements" with "the vendor providing the 'covert communications equipment.'" (Id. ¶ 10.) On May 29, 2019, the Concord Monitor sent its own Right-to-Know request seeking "documents related to" the equipment, including "any contracts or agreements . . . [with] the vendor providing the equipment, documents that detail the nature of the equipment[,] and the line items associated with the equipment." (Id. ¶ 11.)

On June 10, 2019, the Concord Police Department responded to both Right-to-Know requests with an identical communication stating, in part, that it was withholding "confidential information relative to surveillance technology that is exempt from disclosure" under state law. (Id. ¶ 12.) It also provided the Petitioners with 29 pages of redacted documents, including a license and service agreement ("Agreement") and a privacy policy. (Id. ¶ 13.) The Agreement shows the vendor offers the City "[a] Website, Applications, or Services," "optional hardware," and technical support and maintenance. (Id. ¶ 16.) In addition, the privacy policy states the vendor collects a "wide variety of" information at the police's discretion. (Id. ¶ 18.) The redaction concealed the name of the vendor, the "governing law" provision in the Agreement, the nature of the equipment, what type of information the vendor gathers, and how the vendor uses that information. (Id. ¶ 14.)

On July 23, 2019, the Petitioners requested relief from the Court pursuant to the Right-to-Know Law. (Pet.) As part of its response, the City submitted an affidavit by Concord Police Chief Bradley C. Osgood. (Resp't's Obj. and Mot. Quash Pet'rs' First Req. for Produc. of Docs. and Incorporated Mem. L. ("Respt's Obj."), Ex. 8.) The affidavit suggests that revealing any more information to the Petitioners would put lives at risk and enable suspects of criminal investigations to take countermeasures to avoid detection. (Id. ¶ 8, 10.) On August, 23, 2019, the City filed an assented-to motion to file the unredacted Agreement under seal and ex parte for the Court's in camera review. (Resp't's Assented-to Mot.) On August 26, 2019, the Court granted the motion and, shortly thereafter, reviewed the documents. On August 28, 2019, the City further moved for an ex parte hearing in camera to address any concerns of the Court. (Resp't's Mot. Ex Parte Hearing.) On September 18, 2019, the Petitioners objected to the motion. (Pet'rs' Obj. to Resp't's Mot. Ex Parte Hearing.)

II. Standard

Since its enactment, the provisions of the Right-to-Know Law have been broadly construed with an aim to "augment popular control of government" and "encourage agency responsibility." Society for Protection of N.H. Forests v. Water Supply & Pollution Control Comm'n, 115 N.H. 192, 194 (1975). The Preamble to the Right-to-Know Law recognizes that "openness in the conduct of public business is essential to a democratic society" and describes the purpose of the Right-to-Know Law in part as promoting the accountability of public bodies to "the people". Carter v. Nashua, 113 N.H. 407, 416 (1973). Accordingly, the Court interprets the statute to demand the "greatest possible public access" to the "records of all public bodies." Id. "Thus, the

Right-to-Know Law helps further our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006); see N.H. CONST. pt. I, art. 8.

III. Analysis

The Petitioners argue they are entitled to the City's records concerning the covert communications equipment pursuant to the Right-to-Know Law and Part I, Article 8 of the New Hampshire Constitution. (Pet.) They contend that the records were not compiled for law enforcement purposes, that the City cannot show adverse consequences, that the records would not risk circumvention of the law, and that the records would not put lives at risk. (Id.) The City replies that the Agreement is, in fact, a law enforcement record compiled for law enforcement purposes. (Respt's Obj.) In particular, the City contends that the Agreement could be reasonably expected to interfere with enforcement proceedings, would disclose techniques and procedures for law enforcement investigations, and can be reasonably expected to endanger the life or physical safety of individuals. (Id.)

A. Applicability of the Right-to-Know Law and Part I, Article 8

The Court first considers whether the City has established that it can permissibly withhold the Agreement from the public pursuant to the Right-to-Know statute and Part I, Art. 8 of the New Hampshire Constitution. The Court looks to federal interpretations of the Freedom of Information Act ("FOIA") for guidance in interpreting the Right-to-Know Law. N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 104 (2016). Unlike its federal counterpart, the Right-to-Know Law does not explicitly

address disclosure exemptions for "records or information compiled for law enforcement purposes." Murray v. N.H. Div. of State Police, 154 N.H. 579, 582 (2006). However, in Murray, the New Hampshire Supreme Court adopted federal exemptions for records compiled for law enforcement purposes in certain circumstances, including where the records "(A) could reasonably be expected to interfere with enforcement proceedings," "(E) would disclose techniques and procedures for law enforcement investigations or prosecutions. . . if such disclosure could reasonably be expected to risk circumvention of the law" or "(F) could reasonably be expected to endanger the life or physical safety of any individual." Murray, 154 N.H. at 582 (quoting 5 U.S.C. § 552(b)(7) (2002)).

a. Nature of the Agreement

Before examining the circumstances under which these records are exempt, it is first necessary to determine whether they have been compiled for law enforcement purposes. In making this determination the Court adheres to several "overarching principles" that demand "careful analysis of the authorized activities of the agency involved." 38 Endicott St. N., LLC v. State Fire Marshal, 163 N.H. 656, 663 (2012). One principle in this analysis is that a mixed-function agency bears a higher burden than a law-enforcement agency. Id. at 662. (An agency is deemed a "mixed-function agency" if it "clearly has some law enforcement functions" but is not "primarily a law-enforcement agency.") Id. at 665. To show that government records were "compiled for law enforcement purposes," a mixed-function agency claiming a Murray exemption from the requirements of the Right-to-Know law must establish that it compiled the relevant records pursuant to its law enforcement functions rather than its administrative functions. Id.

The City of Concord engages in law enforcement functions through the Concord Police Department, but it also oversees a range of administrative functions—providing local development assistance, managing public libraries, and maintaining vital records—making it a "mixed-function agency." 38 Endicott, 163 N.H. at 665. The Agreement is a record compiled pursuant to the City's law-enforcement functions because it was entered into in order to aid Concord Police in "investigation[s] into potential criminal wrongdoing." Id. Chief Osgood testified that "the City entered into the [Agreement]" specifically "to provide the Concord Police Department with equipment to use in criminal investigations." (Respt's Obj., Ex. 7 ¶ 1.) In addition, the Agreement itself specifies the vendor is engaged in the business of "offer[ing] various technical products and services to law enforcement agencies." (Respt's Obj., Ex. 8.) This evidence meets the higher burden for a mixed-function agency to show that the record was not compiled pursuant to the City's administrative functions. 38 Endicott, 163 N.H. at 665.

b. Interference with Enforcement Proceedings Exemption

Where disclosure of government records compiled for law enforcement purposes could reasonably be expected to "interfere with enforcement proceedings," the records fall under exemption (A) to the Right-to-Know Law. Murray, 154 N.H. at 582. "Exemption (A) was designed to eliminate 'blanket exemptions' for government records simply because they were found in investigatory files compiled for law enforcement purposes." Id. at 583. To establish interference with enforcement proceedings, the agency resisting disclosure must "fairly describe the content of the material withheld and adequately [state the] grounds for nondisclosure, and [explain why] those grounds are reasonable and consistent with the applicable law." 38 Endicott, 163 N.H. at 667. The

agency has the burden to "show that 'enforcement proceedings are pending or reasonably anticipated' and that 'disclosure of the requested documents could reasonably be expected to interfere with those proceedings.'" Id. at 665.

Pending information to be discovered at the in camera ex parte hearing, the City cannot withhold the Agreement pursuant to Exemption (A). While the City has fairly described the content of the Agreement by providing an unredacted copy to the Court, it does not "adequately state the grounds for nondisclosure" under the exemption, let alone "explain why" the grounds are reasonable. Id. at 667. Instead, the City repeatedly cites to Chief Osgood's affidavit to support its claims, which provides nothing more than conclusory statements of law regarding the potential ramifications of the Agreement's disclosure. (Respt's Obj., Ex. 8.) The City has failed to provide evidence to support that "[d]isclosure of the agreement. . . [would] interfere with enforcement proceedings" (Exemption (A)), that "it would disclose. . . guidelines, techniques, and procedures" (Exemption (E)), and that it "could risk the lives of officers" (Exemption (F)). Id.; see Murray, 154 N.H. at 582.

c. Techniques and Procedures Exemption

Government records compiled for law enforcement are also exempted if they (1) "would disclose techniques and procedures for law enforcement investigations or prosecutions" and (2) "such disclosure could reasonably be expected to risk circumvention of the law." Murray, 154 N.H. at 582. The New Hampshire Supreme Court has not specifically addressed exemption (E), so the Court looks to federal law for guidance. N.H. Right to Life, 169 N.H. at 104. The agency resisting disclosure must "demonstrate logically how the release of the requested information might create a risk

of circumvention of the law." Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011). "If an agency record discusses merely "the application of a publicly known technique to. . . particular facts, the document is not exempt" under exemption (E). ACLU of N. Cal. v. United States DOJ, 880 F.3d 473, 491 (9th Cir. 2018). On the other hand, where the record "describes a specific means. . . rather than an application of deploying a particular investigative technique, the record is exempt from disclosure." Id. (emphasis in original).

At this stage, the City has not pleaded evidence sufficient to resist a Right-to-Know request pursuant to Exemption (E). The City satisfied its burden to show that disclosure would reveal "techniques and procedures for law enforcement prosecution" by presenting the Court with the Agreement, which describes "technical products and services" designed for "law enforcement agencies," and with an affidavit by the Chief of Police stating that the City entered into the Agreement for equipment to "use in criminal investigations." (Respt's Obj., Ex. 7-8.); Murray, 154 N.H. at 582. However, the City does not satisfy its burden to show that disclosure could reasonably be expected to risk circumvention of the law because it does not allege any "specific means" by which disclosure could result in circumvention of the law. ACLU of N. Cal., 880 F.3d 491. In the absence of such a showing, the City cannot demonstrate how disclosure of the Agreement could logically result in circumvention of the law. Blackwell v. FBI, 646 F.3d at 42. Unless the City provides the Court with sufficient evidence at the ex parte review hearing, it cannot withhold the agreement pursuant to Exemption (E).

d. Danger to Life and Physical Safety Exemption

Pursuant to exemption (F), government records compiled for law enforcement purposes are exempted from disclosure under the Right-to-Know Law where they "could reasonably be expected to endanger the life or physical safety of any individual." Murray, 154 N.H. at 582. Because the New Hampshire Supreme Court has not specifically addressed this prong, the Court looks to federal law for guidance. N.H. Right to Life, 169 N.H. at 104. The Court's consideration of Exemption (F)'s scope "begins and ends with its text," which is "expansive" and "broadly stated." Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec., 777 F.3d 518, 523 (D.C. Cir. 2015) (holding that "any individual" does not require the withholding agency to specifically identify the individual to be harmed). The Court employs a certain measure of trust where an agency files "a sufficiently specific sworn declaration by a knowledgeable official." Id. at 526. However, the agency must "demonstrate that it reasonably estimated that sensitive information could be misused for nefarious ends." Public Emples. for Envtl. Responsibility v. United States Section, Int'l Boundary & Water Comm'n, 740 F.3d 195, 206 (D.C. Cir. 2014).

Subject to further submissions at the ex parte hearing, the City has thus far failed to demonstrate that release of the records could reasonably endanger the life or physical safety of another. It is undisputed that Chief Osgood's affidavit is a "sworn declaration" made by a "knowledgeable official" but the Court cannot defer to its allegations because they are not "sufficiently specific." Elec. Privacy Info. Ctr., 777 F.3d at 526. Neither the affidavit nor any other evidence presented by the City alleges facts to support a conclusion that the information could be "misused for nefarious ends."

Public Emples. for Envtl. Responsibility, 740 F.3d at 206. As a result, given the state of the evidence present before the Court, though "expansive" and "broadly stated" the text of Exemption (F) provides the City no safe harbor from its disclosure obligations under the Right-to-Know Law.

e. Reasonable Restriction

Part I, Article 8 provides that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. CONST. pt. I, art. 8 (emphasis added). The New Hampshire Supreme Court made clear in Montenegro that there is "no conflict between [Exemption (E)] and Part I, Article 8 of the New Hampshire Constitution." Montenegro v. City of Dover, 162 N.H. 641, 649 (2011). Application of the exemption is constitutional because it serves to prevent a reasonably expected risk of "circumvention of the law," which is not an "unreasonable restriction on public access to governmental records." Id. (emphasis in original).

Exemptions (A) and (F) are constitutional under Part I, Article 8 on the same grounds as Exemption (E). Just as Exemption (E) is constitutional to the extent withholding "techniques and procedures" prevents "circumvention of the law," Exemption (A) is constitutional to the extent interference with enforcement proceedings prevents the same. See Montenegro,162 N.H. at 649. Similarly, as with Exemption (E), Exemption (F) serves to directly prevent a risk of "circumvention of the law" by averting unlawful harm to another's life or physical safety. Id. Consequently, Part I, Article 8 does not require the City to disclose the Agreement pursuant to the Right-to-Know statute where any of the three exemptions applies.

B. Ex Parte Review

The Court next considers whether it is appropriate to conduct an in camera ex parte hearing in this case. "[O]urs is an adversarial system of justice," and it is the state's public policy to "allo[w] trial counsel to conduct [each] case according to his or her own strategy." See In re Nathan L., 146 N.H. 614, 619 (2001) (citations omitted). However, "[t]he values of the adversary system should not trump the need for a fair and just result" and the Court "is more than a passive participant" in ensuring that "proper legal principles are applied to the facts." Id. at 619-620. "[A]n in camera review. . . may be sufficient to justify an agency's refusal to disclose." Murray, 154 N.H. at 583. Although rarely done, the Court may hold "ex parte, in camera review of records" requested pursuant to the Right-to-Know Law. Union Leader Corp. v. City of Nashua, 141 N.H. 473, 478 (holding that "ex parte in camera review of records whose release may cause an invasion of privacy is plainly appropriate."). Ex parte in camera review may be appropriate where counsel for the party seeking release of the documents "need not be present to assist the trial court in recognizing" the legal significance of the documents and where "there is a danger that" particularly sensitive information "will be disclosed." See State v. Gagne, 136 N.H. 101, 106 (1992).

As discussed above, the legality of the City's refusal to disclose the Agreement pursuant to Murray Exemptions (A), (E), and (F) cannot be established based on the pleadings alone. However, because the City alleges releasing the Agreement could result in bodily harm and even death, the Court cannot deliver a "proper" or "fair and just result" without learning more about the nature of Agreement and the covert communications equipment. In re Nathan L., 146 N.H. at 619. An in camera review

hearing is an appropriate means for the Court to determine whether a Murray exemption applies. Murray, 154 N.H. at 583. It is proper for the hearing to be ex parte because the Court does not require the presence of the Petitioners to recognize the legal significance of a contract such as the Agreement and because "there is a danger that" information so sensitive that it could place others' lives at risk "will be disclosed." See Gagne, at 106. The Court does not question the ability of the Petitioners' counsel to maintain the confidentiality of the information. To the contrary, the Court has great confidence that they would make every effort to fully comply with their obligations as officers of the Court. Nevertheless, the Court recognizes that the sensitive nature of the information in question may be such that it is in the best interests of potential victims of violent harm to keep disclosure of the information to a minimum.

IV. Conclusion

For the foregoing reasons, the City's motion to hold an in camera review hearing ex parte is GRANTED. The Court will have a full record of the proceeding which will be placed under seal to be available for appellate review. The Court will further address the pending Motion to Quash following the ex parte hearing.

So Ordered.

DATED: 10/25/19

JOHN C. KISSINGER
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/25/2019

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
5 Court Street
Concord NH 03301

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF HEARING

FILE COPY

Case Name: **American Civil Liberties Union of New Hampshire, et al v City of Concord**
Case Number: **217-2019-CV-00462**

The above referenced case(s) has/have been scheduled for: **Hearing**

Date: November 19, 2019
Time: 10:00 AM
Time Allotted: 1 Hour

5 Court Street
Concord NH 03301
Location:

In Camera Ex Parte Hearing

If you do not appear at this hearing, the Court may consider you to be in default and may make orders against you without your input. If you are the defendant and do not appear, the Court may find for the plaintiff(s) and proceed immediately to the assessment of damages or a hearing on the relief sought. If you are the plaintiff and do not appear, the Court may dismiss the case.

Multiple cases are scheduled during this session. Please notify the court immediately if your hearing is expected to last longer than the allotted time, as the Court cannot guarantee that additional time will be available.

If you will need an interpreter or other accommodations for this hearing, please contact the Court immediately.

Please be advised (and/or advise clients, witnesses, and others) that it is a Class B felony to carry a firearm or other deadly weapon as defined in RSA 625:11, V in a courtroom or area used by a court.

October 25, 2019

Catherine J. Ruffle
Clerk of Court

(003)
C: Henry R. Klementowicz, ESQ; Gilles R. Bissonnette, ESQ; James W. Kennedy, III, ESQ

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, and
THE CONCORD MONITOR

v.

CITY OF CONCORD

Docket No.: 217-2019-CV-00462

ORDER

The Petitioners, the American Civil Liberties Union ("ACLU") of New Hampshire and the Concord Monitor, request access to public records pursuant to the Right-to-Know Law and Part I, Article 8 of the New Hampshire Constitution. The Respondent, the City of Concord ("the City"), objects and moves to quash. For the following reasons, the City's motion to quash the Petitioners' request for records is GRANTED. Given the Court's determination that the records are exempt from disclosure, the Court also DISMISSES this case.

I. Background

The City's May, 2019 budget proposal included a line item expenditure of $5,100 for "Covert Communications Equipment" that the City has employed in Concord Police investigations since at least 2017. (Pet. Access to Public Rs. ¶¶ 6, 9.) This appropriation caught the Concord Monitor's attention, and, on May 24, 2019, it published an article entitled, "Concord's $66.5M budget proposal has its secrets." (Id. ¶ 9, Ex. B.) Two public records requests ensued pursuant to the Right-to-Know Law, RSA chapter 91-A. On May 28, 2019, the ACLU of New Hampshire sent the City a

request for records revealing "the specific nature" of the equipment and "any contracts or agreements" with "the vendor providing the 'covert communications equipment.'" (Id. ¶ 10.) On May 29, 2019, the Concord Monitor also sent a records request for "documents related to" the equipment, including "any contracts or agreements . . . [with] the vendor providing the equipment, documents that detail the nature of the equipment[,] and the line items associated with the equipment." (Id. ¶ 11.)

On June 10, 2019, the Concord Police Department responded to both Right-to-Know requests with a series of records, including twenty-nine pages of redacted documents. (Id. ¶ 12.) The redactions concealed the name of the vendor of the equipment, the "governing law" provision in the City's Agreement with the vendor, the nature of the equipment, what type of information the vendor gathers, and how the vendor uses that information. (Id. ¶ 14.) Among the information provided, however, is that the vendor offers the City "[a] Website, Applications, or Services," "optional hardware," and technical support and maintenance. (Id. ¶ 16.)

On October 4, 2019, the Court held a hearing on the Right-to-Know requests and related motions. In its October 25 Order, the Court found the records were compiled for law enforcement purposes and that Part I, Article 8 of the New Hampshire Constitution does not require the City to disclose the Agreement pursuant to the Right-to-Know statute where the disclosures are exempted under New Hampshire case law exemptions (A), (E), or (F) to the Right-to-Know Law. The Court also granted the City's motion to conduct an in camera, ex parte review of the records to determine whether any of the disclosures are exempted.

On November 19, 2019, the Court held the in camera, ex parte hearing (the "sealed hearing") with counsel for the City and Concord Police Chief Bradley Osgood. The Court received in-depth testimony from Chief Osgood on the nature of the equipment and the methods employed in its use. The Court finds the City specifically and persuasively laid out that revealing the name of the vendor, the nature of the equipment, how information gathered by the vendor is used, or any portion of the redacted agreement could interfere with law enforcement investigations and put lives at risk.

I. Standard

Since its enactment, the provisions of the Right-to-Know Law have been broadly construed with an aim to "augment popular control of government" and "encourage agency responsibility." Society for Protection of N.H. Forests v. Water Supply & Pollution Control Comm'n, 115 N.H. 192, 194 (1975). The Preamble to the Right-to-Know Law recognizes that "openness in the conduct of public business is essential to a democratic society" and describes the purpose of the Right-to-Know Law in part as promoting the accountability of public bodies to "the people." Carter v. Nashua, 113 N.H. 407, 416 (1973). Accordingly, the Court interprets the statute to demand the "greatest possible public access" to the "records of all public bodies." Id. "Thus, the Right-to-Know Law helps further our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006); see N.H. CONST. pt. I, art. 8.

II. Analysis

The Court first considers whether the City has established that it can permissibly withhold the Agreement from the public pursuant to the Right-to-Know statute. The Court looks to federal interpretations of the Freedom of Information Act ("FOIA") for guidance in interpreting the Right-to-Know Law. N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 104 (2016). Unlike its federal counterpart, the Right-to-Know Law does not explicitly address disclosure exemptions for "records or information compiled for law enforcement purposes." Murray v. N.H. Div. of State Police, 154 N.H. 579, 582 (2006). However, in Lodge v. Knowlton, 118 N.H. 574 (1978), the New Hampshire Supreme Court adopted the six-prong test under FOIA for evaluating Right-to-Know requests for access to police investigative files. Id. at 577. Under FOIA, an agency may exempt from disclosure:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . . .

5 U.S.C. § 522(b)(7).

The relevant exemptions here are exemption (A), exemption (E), and exemption (F). The Petitioners contend that that the City cannot show adverse consequences, that the records would not risk circumvention of the law, and that the records would not put lives at risk. (Pet. Access to Public Rs.) The City replies that the Agreement could be reasonably expected to interfere with enforcement proceedings, would disclose techniques and procedures for law enforcement investigations, and can be reasonably expected to endanger the life or physical safety of individuals. (Resp.'s Obj. and Mot. Quash.)

a. Interference with Enforcement Proceedings Exemption

Where disclosure of government records compiled for law enforcement purposes could reasonably be expected to "interfere with enforcement proceedings," the records fall under Exemption A. Murray, 154 N.H. at 582. "Exemption (A) was designed to eliminate 'blanket exemptions' for government records simply because they were found in investigatory files compiled for law enforcement purposes." Id. at 583 (quoting Curran v. Dept. of Justice, 813 F.2d 473, 474 (1st Cir. 1987)). To establish interference with enforcement proceedings, the agency resisting disclosure must "fairly describe the content of the material withheld and adequately [state the] grounds for nondisclosure, and [explain why] those grounds are reasonable and consistent with the applicable law." 38 Endicott St. N., LLC v. State Fire Marshal, 163 N.H. 656, 667 (2012). The agency has the burden to "show that 'enforcement proceedings are pending or reasonably anticipated' and that 'disclosure of the requested documents could reasonably be expected to interfere with those proceedings.'" Id. at 665 (quoting Murray, 154 N.H. at 582–83).

Based on the testimony the Court received at sealed hearing, the Court is now persuaded that the City has met its burden to show disclosure of the redacted information risks interference with enforcement proceedings. During the sealed hearing, the City fairly described, in detail, the content of the material sought for disclosure, that enforcement proceedings are reasonably anticipated, and how disclosure of the redacted content would interfere with those proceedings. The Court finds use of the technology is reasonable and consistent with applicable law, id. at 667, and that there is a high likelihood that disclosure of the technology would, in fact, jeopardize ongoing and future law enforcement proceedings, Murray, 154 N.H. at 582.

b. Techniques and Procedures Exemption

Government records compiled for law enforcement are also exempted if they (1) "would disclose techniques and procedures for law enforcement investigations or prosecutions" and (2) "such disclosure could reasonably be expected to risk circumvention of the law." Id. The New Hampshire Supreme Court has not specifically addressed exemption (E), so the Court looks to federal law for guidance. N.H. Right to Life, 169 N.H. at 104. The agency resisting disclosure must "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011). "If an agency record discusses merely the application of a publicly known technique to. . . particular facts, the document is not exempt under [exemption (E)]. ACLU of N. Cal. v. United States DOJ, 880 F.3d 473, 491 (9th Cir. 2018) (internal quotation omitted). On the other hand, where the record "describes a specific means. . . rather than an application of deploying a

particular investigative technique, the record is exempt from disclosure . . . ." Id. (emphasis in original) (internal quotation omitted).

On the basis of the testimony received during the sealed hearing, the Court is satisfied that the redacted information is protected from disclosure under exemption (E). The nature of the equipment is such that, upon discovery of the information redacted, individuals engaged in illegal activity could take measures to circumvent its use. Blackwell, 646 F.3d at 42. If discovered, the effectiveness of police investigations in a number of criminal law enforcement settings would be significantly curtailed. The City did not merely describe a publicly known technique but, instead, a specific means of deploying a currently confidential technique in law enforcement investigations. ACLU of N. Cal., 880 F.3d at 491.

c. Danger to Life and Physical Safety Exemption

Pursuant to exemption (F), government records compiled for law enforcement purposes are exempted from disclosure under the Right-to-Know Law where they "could reasonably be expected to endanger the life or physical safety of any individual." Murray, 154 N.H. at 582. Because the New Hampshire Supreme Court has not specifically addressed this prong, the Court again looks to federal law for guidance. N.H. Right to Life, 169 N.H. at 104. The Court's consideration of exemption (F)'s scope "begins and ends with its text," which is "expansive" and "broadly stated." Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec., 777 F.3d 518, 523 (D.C. Cir. 2015) (holding that "any individual" does not require the withholding agency to specifically identify the individual to be harmed). However, the agency must "demonstrate that it reasonably estimated that sensitive information could be misused for nefarious ends."

Public Emples. for Envtl. Responsibility v. United States Section, Int'l Boundary & Water Comm'n, 740 F.3d 195, 206 (D.C. Cir. 2014).

The City has also met its burden of showing that revealing the information sought by Petitioners falls within the purview of exemption (F). During the sealed hearing, the City demonstrated that revealing the redacted content could lead to the identification of the equipment used and of the manner in which it is employed. Knowledge of such information could reasonably be misused for "nefarious ends," including physical and deadly harm. Public Emples. for Envtl. Responsibility, 740 F.3d at 206. By reference to the text of the exemption, the Court finds that disclosing information that might reveal the nature of the technology and the manner of its use in police investigations could "reasonably be expected to endanger the life [and]. . . safety" of police officers and of members of the public.

III. Conclusion

For the foregoing reasons, the City's motion to Quash the Petitioners' request for records is GRANTED. Given the conclusions set out in this Order, the Court has found the records are exempt from disclosure. As a result, this case is DISMISSED. The Court's record of the proceedings, including the sealed in camera, ex parte hearing, will be available for appellate review.

So Ordered.

DATED: 12/20/19

JOHN C. KISSINGER
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 12/20/2019

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2020-0036, American Civil Liberties Union of New Hampshire & a. v. City of Concord, the clerk of court on April 2, 2020, issued the following order:

No response having been received to the clerk's order of February 20, 2020, regarding appellate mediation, the case will proceed to the preparation of the transcript.

On or before April 17, 2020, the plaintiffs and the defendant shall each pay a deposit in the amount of $103.13 for preparing the transcript of the October 4, 2019 proceeding. In addition, the plaintiffs shall pay a deposit in the amount of $137.50 (for a total plaintiffs' deposit of $240.63) for preparing the transcript of the sealed ex parte proceeding on November 19, 2019. Failure to pay the required deposits will result in dismissal of the appeal and/or cross-appeal, as applicable. Refer to Rule 15. The deposits should be sent to eScribers (formerly known as AVTranz), 7227 North 16th Street, Suite 207, Phoenix, Arizona 85020. Checks or money orders should be made payable to eScribers. To arrange for payment by credit card, contact eScribers at (800) 257-0885, ext. 8, or www.escribers.net.

Upon receipt of the deposits, eScribers shall prepare the transcript as outlined on the transcript order form in the plaintiffs' notice of appeal. If eScribers does not timely receive the required deposits, eScribers shall so notify the clerk of the superior court and the clerk of the supreme court. A copy of the plaintiffs' transcript order form is being forwarded to eScribers with this order.

The transcript of the October 4, 2019 proceeding will be provided to the parties electronically through a PDF file. **The transcript of the sealed ex parte proceeding on November 19, 2019, will be provided electronically through a PDF file to the defendant only, and not to the plaintiffs.** Any party wishing to order copies of the October 4, 2019 transcript in another form, such as paper, should contact eScribers directly. If the defendant wishes to order copies of the November 19, 2019 transcript in another form, such as paper, the defendant should contact eScribers directly.

NOTE: The deposits listed above are an estimate of the transcript cost. If the deposits are insufficient to cover the full cost of the transcript, each party responsible for payment will be required to pay an additional deposit. Any amount paid as a deposit in excess

of the final cost will be refunded equally to each paying party. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

This order is entered pursuant to Rule 21(8).

Timothy A. Gudas,
Clerk

Distribution:
Clerk, Merrimack County Superior Court, 217-2019-CV-00462
eScribers w/attachments
Gilles R. Bissonnette, Esquire
Henry R. Klementowicz, Esquire
James W. Kennedy, III, Esquire
Transcript Recorder, Supreme Court
File