THE STATE OF NEW HAMPSHIRE
SUPREME COURT

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND
THE CONCORD MONITOR

v.

CITY OF CONCORD

Docket No. 2020-0036

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

REPLY BRIEF FOR APPELLANTS AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND THE *CONCORD MONITOR*

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15 Minute Oral Argument Requested

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

ARGUMENT 5

I. THE CITY HAS NOT MET ITS BURDEN TO DEMONSTRATE THAT THE REDACTED INFORMATION IS EXEMPT FROM DISCLOSURE 5

II. THE COURT BELOW ERRED WHEN IT GRANTED CITY'S MOTION FOR AN *EX PARTE* HEARING 8

A. The National Security Concerns Present in Federal Cases the City Cites Do Not Justify an Ex Parte *Hearing in This Case* 9

B. The New Hampshire Cases The City Cites Outside the Public Record Context Show The Procedure Employed Here Was Inappropriate 12

C. The Transcriptionist's Error In Releasing the Transcript Did Not Cause Prejudice 13

CONCLUSION 14

STATEMENT OF COMPLIANCE 16

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

CASES

38 Endicott St. N., LLC v. State Fire Marshall, 163 N.H. 656 (2012).....5, 6

Andrews v. Balt. City Police Dep't., No. 18-1953, 2020 U.S. App. LEXIS 9641 (4th Cir. Mar. 27, 2020) 7

Belknap v. State, 426 P.3d 1156 (Alaska Ct. App. 2018.....7

Doyle v. FBI, 722 F.2d 554 (9th Cir. 1983) 11, 12

Elec. Privacy Info v. FBI, 72 F. Supp. 3d. 338 (D. D.C. 2014) 7

Fillmore v. Fillmore, 147 N.H. 283 (2001).....13

In re Morrill, 147 N.H. 116 (2001) 12, 13

Kyllo v. United States, 533 U.S. 27 (2001) 7

Lion Raisins v. U.S. Dept. of Agric., 354 F.3d 1072 (9th Cir. 2004) 11, 12

Murray v. N.H. Div. of State Police, 154 N.H. 579 (2006).....5

N.Y. Times v. FBI, 297 F. Supp. 3d 435 (S.D.N.Y 2017) 10, 12

N.Y. Times v. U.S. Department of Justice, 806 F.3d 682 (2d Cir. 2015) 10

Osiomwan v. United States, ELH-12-0265, 2018 U.S. Dist. LEXIS 200033 (D. Md. Nov. 26, 2018).....7

Pollard v. FBI, 705 F.2d 1151 (9th Cir. 1983).....9, 11

State v. Kibby, 170 N.H. 255 (2017) 13

Stevenson v. IRS, 629 F.2d 1140 (5th Cir. 1980) 11

Union Leader Corp. v. City of Nashua, 141 N.H. 473 (1996) 9

United States v. Estevez, 961 F.3d 519 (2nd Cir. 2020).....7

United States v. Hood, 920 F.3d 87 (1st Cir. 2019) 7

United States v. Morel, 922 F.3d 1 (1st Cir. 2019), ...7

United States v. Patrick, 842 F.3d 540 (7th Cir. 2016).....7

Wilner v. Nat'l Sec. Agency, 592 F.3d 60 (2d Cir. 2009) 11

STATUTES

RSA 173-B:4 13
RSA 173-B:8 13
RSA 604-A:6 13
RSA ch. 91-A 12

ARGUMENT

Appellants submit this reply to respond to two arguments made by the City of Concord ("the City") in its brief. *First*, the City did not meet its burden in showing that the unredacted Agreement is exempt from disclosure under *Murray v. N.H. Div. of State Police*, 154 N.H. 579 (2006). For example, the City does not adequately explain how disclosing the name of the equipment, the identity of the vendor, and the Agreement's choice of law provision would reasonably lead to the severe consequences it foretells. The City's arguments continue to be based on speculative and conclusory assertions that fail to meet its heavy burden in resisting disclosure of this information that the City's taxpayers have paid for.

Second, the City is wrong when it argues that the *ex parte*, *in camera* hearing following the superior court's initial determination that the City had not met the required burden was appropriate. This hearing—at which the superior court secretly heard evidence, without cross examination, that the court ultimately concluded was dispositive—was both unfair and not in keeping with our adversarial system of justice.

I. The City Has Not Met Its Burden to Demonstrate That the Redacted Information is Exempt from Disclosure

The starting point for determining whether law enforcement records are exempt from the Right-to-Know law is Exemption 7 of the Freedom of Information Act ("FOIA"). *See 38 Endicott St. N., LLC v. State Fire Marshall*, 163 N.H. 656, 660 (2012). The Court "resolve[s] 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[s]." *Murray*, 154 N.H. at 581.

Though true that the City need not "explain when, where, or by whom charges might arise," *38 Endicott St.*, 163 N.H. at 666, it still needs to demonstrate that the records would (i) interfere with enforcement

proceedings (Exemption 7A), (ii) disclose techniques, procedures, guidelines that could reasonably be expected to risk circumvention of the law (Exemption 7E), or (iii) endanger someone's life or physical safety (Exemption 7F). *See id.* at 661.

The City asserts that the redacted information—which includes the names of the equipment, vendor, and choice of law provision—each by themselves would disclose invaluable information, which could threaten investigative integrity and personal safety. *See* App. 156-157.[1] For example, the City argues, but does not explain how, disclosure would "tip off" suspects on how the equipment is used thus creating the opportunity for suspects to evade criminal accountability and endanger lives. *Id*. Indeed, the superior court initially—and correctly—held that the City failed to adequately justify withholding the redacted information. October 25, 2019 Order, p. 7. It was only after hearing the Concord's Chief of Police ("Chief") testimony in secret and without cross examination that the court below reversed its decision.

The City asserts, without evidence in its brief, that the equipment is "unknown to the public" and that its disclosure would reveal similarly unknown procedures and techniques under Exemption 7E. Appellee's Br. at 28. This gives the impression that, according to the City, the equipment and its capabilities are so unique—perhaps singular—that suspects would, upon learning its name, know detailed implementations and strategies used in Concord Police Department's ("CPD") investigations. *See* December 20, 2019 Order, p. 3. Of course, Appellants and their counsel do not know the contents of the unredacted Agreement and so cannot challenge either the City's conclusory argument that disclosing the name of the vendor would automatically put the public on notice of the identity of the equipment or

[1] Citations to "App.___" refer to Appellants' appendix.

the court below's conclusion that the technique is "currently confidential." *Id*. at p. 7.

Setting aside the City's speculative suggestion, there are, however, legal opinions in other contexts that disclose law enforcement equipment, techniques, and strategies, suggesting that the technology in question may not be currently confidential or "unknown to the public." For example, in *Kyllo v. United States*, 533 U.S. 27 (2001), the United States Supreme Court notes the make, model, and functionality of a specific piece of surveillance technology, the Agema Thermovision 210, despite the fact that equipment was "not in general public use" at the time. 533 U.S. at 29-30 ("Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth – black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images."). Likewise, the existence of cell site simulators, or Stingrays, *see United States v. Patrick*, 842 F.3d 540, 542-44 (7th Cir. 2016); *Andrews v. Balt. City Police Dep't.*, No. 18-1953, 2020 U.S. App. LEXIS 9641, at *5-6, 9 (4th Cir. Mar. 27, 2020); *Osiomwan v. United States*, ELH-12-0265, 2018 U.S. Dist. LEXIS 200033, (D. Md. Nov. 26, 2018), IP address tracking, *see United States v. Morel,* 922 F.3d 1, 4-6 (1st Cir. 2019), *United States v. Hood*, 920 F.3d 87 (1st Cir. 2019), and facial recognition equipment, techniques, and strategy, *see United States v. Estevez*, 961 F.3d 519 (2nd Cir. 2020); *Elec. Privacy Info v. FBI*, 72 F. Supp. 3d. 338 (D. D.C. 2014); *Belknap v. State*, 426 P.3d 1156, 1157-58 (Alaska Ct. App. 2018) (SCRAM breath monitor equipped with GPS and facial recognition software) have been described in published court opinions and, thus, are widely known to the public.

The City also speculatively asserts that revealing the vendor's name would disclose not just the specific piece of equipment, but also the

apparently extremely limited ways it is used. The Agreement's language, however, expresses the opposite. *See* App. 126-54. The Agreement states that the vendor "offers *various* technical *products* and *services* to law enforcement agencies," and that CPD "desires to use certain *products* and *services* offered by [vendor]." *Id*. (emphasis added). Even with the redactions, the Agreement suggests that the vendor is not a one-item merchant. *Id*. If the vendor offers various products, services, websites, and applications, then producing the vendor's name and of one of its *various* products is not as likely to cause the extreme harms as the City argues.

Especially confounding is the City's decision to redact the choice of law provision from the Agreement. *Id*. The City fails to cite any legal authority to support this claim. Appellants cannot see how the contractually agreed upon jurisdiction for any future litigation is information that would be subject to Exemptions 7A, 7E, or 7F. With respect to this redaction, the City has not even tried to meet its burden.

In sum, the City has the burden to demonstrate why this redacted information is exempt, and has failed to meet this burden by making only speculative and conclusory assertions.

II. The Court Below Erred When It Granted City's Motion for an *Ex Parte* Hearing

As explained in Appellants' Opening Brief, the court below erred when it held an *ex parte* hearing to receive testimony from the Chief without Appellants or their counsel present. Prior to that hearing, the court below held that the Chief's affidavit provided "nothing more than conclusory statements of law regarding the potential ramifications of the Agreement's disclosure." October 25, 2019 Order p.7. Moreover, the City withdrew its cross-appeal challenging this initial determination. In supporting its redactions, the City relies solely on an *ex parte*, *in camera*

hearing where Appellants were unfairly denied the opportunity to verify the accuracy or challenge any of the Chief's prognostications.

A. The National Security Concerns Present in Federal Cases the City Cites Do Not Justify an Ex Parte *Hearing in This Case*

In defending the superior court's erroneous granting of an *ex parte*, *in camera* hearing the City cites a string of FOIA cases. While some of these cases permit *ex parte* presentations, the federal courts warn of the dangers of *ex parte* procedures and caution that they should be used judiciously. *See also Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 478 (1996) (*ex parte* procedures should be used "cautiously and rarely"). As the City acknowledges, many of the cases it relies on concern records which could severely threaten national security—specifically from terrorist activity. This case is a far cry from such terrorist concerns.

For example, the information sought in *Pollard v. FBI*, 705 F.2d 1151 (9th Cir. 1983), included reports on specific targets of a national security investigation—a level of secrecy that is not implicated in this case. 705 F.2d at 1153. The court explained that "*in camera* proceedings, *particularly in FOIA cases involving classified documents*, are usually non-adversarial, with the party who is seeking the documents denied even this limited access to the documents he seeks to obtain." *Id*. (emphasis added). However, the court continued: "Indeed, it is the *ex parte*, non-adversarial nature of *in camera* review that has prompted courts to proceed with caution in endorsing *in camera* review of documents in FOIA cases." *Id.*

The *Pollard* court reasoned that an *ex parte*, *in camera* review is appropriate when "government testimony and detailed affidavits [ ] has *first* failed to provide a sufficient basis for a decision." *Id.* at 1154 (emphasis added). Here, while the court below found that it "needs further information before reaching a decision," it also found that the City had "failed to demonstrate that the release of the records could reasonably endanger the

life or physical safety of another." October 25, 2019 Order, pp. 9, 11. The City, in withdrawing its cross appeal to the initial ruling, essentially concedes that the superior court did have a sufficient basis for its *first* determination.

Next, the City turns to *N.Y. Times v. U.S. Department of Justice*, 806 F.3d 682 (2d Cir. 2015), where the court was faced with a FOIA request for documents from the United States Office of Legal Counsel concerning an executive order and its opinion considering the lawfulness of targeted killings of specific targets thought to be terrorist threats using military drones. 806 F.3d at 683-84. There, the Second Circuit held an *ex parte* review of the documents and found that non-disclosure was appropriate because the DOJ properly invoked Exemption 1 (documents classified by executive order), Exemption 3 (intelligence sources and methods protected by statute), and Exemption 5 (document protected by the deliberative process or attorney-clients privilege) of FOIA. *Id.* at 684. Secrecy which may be appropriate when documents are withheld from the public because of national security is not warranted here.

Similarly, in *N.Y. Times v. FBI,* 297 F. Supp. 3d 435 (S.D.N.Y 2017), the FBI sought to withhold summaries of its interviews with Umar Farouk Abdulmutallab—the Underwear Bomber. 297 F. Supp. 3d at 438-39. The summaries from those, at least eighteen, interviews "detailed information related to ongoing investigations of terrorist networks, the FBI's investigative techniques, intelligence activities, sources, and methods, and the identities of unwitting third parties." *Id*. at 439, 441 (internal quotations omitted). Of note, the *N.Y. Times* Court explains that its analysis is occurring in the context of international terrorism and risks to national security. 297 F. Supp. 3d at 444, 448, 449. By contrast, the instant case is not a "case involving international terrorism," nor "terrorist-related

surveillance records." *Id*. at 444 (citing *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 76 (2d Cir. 2009)).

Other cases the City cites come with stark warnings about the dangers of holding *ex parte* hearings. *Lion Raisins v. U.S. Dept. of Agric.*, 354 F.3d 1072 (9th Cir. 2004), *overruled on other grounds by Animal Legal Def. Fund. v. U.S. Food and Drug Admin.*, 836 F.3d 987, 989-90 (9th Cir. 2016) is particularly instructive here. There, the Ninth Circuit reversed the district court because of the lower court's "reliance on *in camera* review of the sealed declaration as the *sole basis* for its decision." 354 F.3d at 1082 (emphasis added). The Ninth Circuit then remanded, ordering "the district court [to] require [the government] to submit detailed public declarations, testimony, or other material in support of its invocation of the . . . exemption and afford [plaintiff] an opportunity to advocate for the release of the reports." *Id.* at 1085. Ultimately, the Ninth Circuit held that, "the district court must require the government to justify FOIA withholdings in as much detail as possible on the public record before resorting to *in camera* review." *Id.* at 1084. Such a remedy would be appropriate here in the event this Court does not reach the merits of this case. Likewise, in *Doyle v. FBI*, 722 F.2d 554 (9th Cir. 1983), the Ninth Circuit warns that a lower court could be "led astray in its determinations by factual conclusions founded in an affidavit which described the withheld documents in fairly detailed but generic terms." 722 F.2d at 556 (quoting *Stevenson v. IRS,* 629 F.2d 1140, 1145 (5th Cir. 1980)).

The City goes too far in attempting to equate the disclosure of the name of a piece of equipment paid for by city taxpayers, the vendor who received the taxpayers' money, and the choice of law in the Agreement with federal records which would threaten national security by disclosing the names of individual targets of a conspiracy network investigation, *Pollard*, 705 F.3d at 1153, interview records of a failed terrorist martyr—

the Underwear Bomber, *N.Y. Times*, 297 F. Supp. 3d at 438, and the targets of coordinated military drone strikes, *N.Y. Times v. DOJ*, 806 F.3d 683-84. In granting the City's request, the superior court made real the concern over *ex parte* hearings that the *Lions Raisons* and *Doyle* courts warned against.

In sum, this is not a case where the documents Appellants seek are classified or could pose a threat to national security. Appellants are not seeking sensitive information about notorious international terrorists; rather, they are simply seeking the contract and related documents between the state's third most populous city and a vendor for services. Moreover, the redacted information at issue—the name of the vendor, name of equipment, description of services, and choice of law provision—do not present the type of concerns that would justify a deviation from the standard procedure that when evidence is presented to a judge, it is done so in the presence of counsel for all parties and is subject to the rigors of cross-examination.

B. The New Hampshire Cases The City Cites Outside the Public Record Context Show The Procedure Employed Here Was Inappropriate

The City cites a string of New Hampshire cases to show that "*ex parte in camera* proceedings are also routinely used in New Hampshire state courts for a variety of cases." Appellee's Br. at 37. But in most of these cases, *ex parte* proceedings are appropriate because, unlike in a petition under RSA ch. 91-A, they are explicitly authorized by statute. They also do not create a regime whereby a litigant can keep relevant facts confidential through a final decision on the merits.

In *In re Morrill,* 147, N.H. 116 (2001), for example, the court granted a temporary restraining order ("TRO") after an *ex parte* domestic violence petition. 147 N.H. at 117. That *ex parte* petition, unlike the *ex parte* hearing granted to the City, was authorized by state statute. *See* RSA

173-B:4. In other words, the hearing in *Morrill* was proper because of a statutory provision set in place to protect the safety of domestic violence victims. 147 N.H. at 117; *see also Fillmore v. Fillmore*, 147 N.H. 283, 284 (2001) (same).

Moreover, the same statute that authorizes *ex parte* petitions for a TRO requires that the defendant be given "[n]otice of the pendency of the action and of the facts alleged against" and prompt notice of temporary orders. RSA 173-B:8, II ("[t]emporary orders shall be promptly served on the defendant by a peace officer."). The facts brought up at the type of *ex parte* proceedings in *Morrill* and *Fillmore* cannot be kept confidential for any prolonged period, let alone permanently. By contrast, here, the procedure employed by the court below does not eventually give Appellants' counsel access to the facts elucidated at the *ex parte* hearing.

State v. Kibby, 170 N.H. 255 (2017), is similar. In *Kibby*, the defendant filed an *ex parte* motion to obtain funds for services other than counsel. 170 N.H. at 256. The *ex parte* motion in *Kibby* is appropriate because it is expressly allowed by statute when a defendant applies for said funds. *See* RSA 604-A:6. Moreover, the statute in *Kibby* only allows the application for funds to be confidential. If the services of an expert or investigator applied for are material to the defense, the retained person must testify publically and be subject to the rigors of cross-examination.

C. The Transcriptionist's Error In Releasing the Transcript Did Not Cause Prejudice

Lastly, the City describes the accidental sending of the sealed *ex parte* proceeding's transcript to Appellants' counsel by the transcriptionist as a reason to permit *ex parte* hearings. Appellee' Br. at 39-40. Setting aside the irrelevancy of a third-party's error, Appellants' counsel, upon receiving notification that the transcript was erroneously sent, immediately deleted the transcripts without opening or reviewing them and so notified

the City's counsel. This was done to in keeping with counsels' professional responsibility. Appellants' counsels' willingness to promptly delete this information only demonstrates that, as officers of the court, these attorneys can be expected to abide by protective orders. It also demonstrates that the City suffered no prejudice from this third party's error.

CONCLUSION

The judgment of the Superior Court that the records are exempt from disclosure under the Right-to-Know law should be *reversed*, and this Court should order their production. In the alternative, the order granting the motion for an *ex parte* evidentiary hearing should be *reversed*, the December 20, 2019 order should be *vacated*, and the case *remanded* for a non-public evidentiary hearing in which Appellants' counsel is permitted to participate and cross-examine the City's witnesses pursuant to a protective order.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND THE *CONCORD MONITOR*

By and through their attorneys[2] affiliated with the American Civil Liberties Union of New Hampshire Foundation,

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[2] Appellants and their counsel wish to acknowledge the contributions to this brief of Adrián Coss, a University of New Hampshire law student and legal extern with the American Civil Liberties Union of New Hampshire.

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)–(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "Except by permission of the court received in advance, no reply brief (or response thereto) shall exceed 3,000 words." Counsel certifies that the brief contains 2,978 words (including footnotes) from the "Argument" to the "Conclusion" sections of the brief.

/s/ Henry R. Klementowicz
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on counsel for Appellee through the court's electronic filing system on today's date: James Kennedy, Esq., 41 Green Street, Concord, NH 03301.

Dated: October 22, 2020 */s/ Henry R. Klementowicz*
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