THE STATE OF NEW HAMPSHIRE
SUPREME COURT

John Doe v. New Hampshire Division of State Police, 2022-0214
John Doe v. Commissioner, New Hampshire Department of Safety, 2022-0215
John Doe v. Salem Police Department, 2022-0407
John Doe v. New Hampshire Division of State Police, 2022-0424
John Doe v. City of Manchester, 2022-0448
John Doe v. Town of Hanover Police Department, 2022-0452
John Doe v. New Hampshire Attorney General, 2022-0578
John Doe v. New Hampshire Division of State Police, 2022-0688

PETITION OF AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOR PUBLIC ACCESS TO COURT RECORDS

NOW COMES American Civil Liberties Union of New Hampshire ("ACLU-NH") by and through its attorneys, and moves this Court to unseal all pleadings filed in these cases[1] with appropriate redactions if necessary so that they may be publicly inspected without disclosing information that would identify the officers.

1. These cases appear to be appeals of actions brought in Superior Court under RSA 105:13-d to remove officers from the Exculpatory Evidence Schedule ("EES"). The public has a significant interest in knowing what facts underlie an officer's placement on the EES, as well as the legal arguments that police officers and police departments make as to why or why not an officer should be removed from that schedule. Because the New Hampshire Constitution makes court records presumptively public, because RSA 105:13-d does not make these actions confidential, and because it would chill advocacy to seal these proceedings in their entirety, this Court should permit public inspection of this file with redactions if necessary to protect the officer's name from public disclosure.

[1] We have been advised by the Clerk that a single motion to be filed in these cases is preferred.

ANALYSIS

1. All pleadings in this matters should be unsealed and made available to the public, including the Notice of Appeal and all briefs, with appropriate redactions as explained below. Whether a court record should be sealed or unsealed falls under the principles set forth under Part I, Article 8 of the New Hampshire Constitution and New Hampshire Supreme Court Rule 12.

2. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: "Government … should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.* New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8's language was included upon the recommendation of the Bill of Rights Committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire already had RSA ch. 91-A to address the public's right to access information, the Committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 53 (2d ed. 2015).

3. Applying these constitutional provisions, in *Keene Publ'g Corp. v. Keene District Court*, 117 N.H. 959 (1977), this Court held that the trial court there could not order the closing of a probable cause hearing to protect the defendant from pre-trial publicity. In doing so, the Supreme Court recognized that "in this state the press has been held to have a right, though not unlimited, to gather news so as to effectuate the policy of our constitution that a free press is 'essential to the security of freedom in a state.'" *Id.* at 961 (quoting N.H. CONST. pt. I, art. 22).

4. Subsequently, in *Petition of Keene Sentinel*, 136 N.H. 121 (1992), the Supreme Court held that a trial court, when faced with a petition for access from the press or other members of the public, could not refuse to disclose documents filed in a divorce proceeding absent a specific showing by the party seeking to prevent access that would compel nondisclosure. As the Court explained:

> Under part I, article 8, the public has a right of access to court proceedings and to court records which cannot be "unreasonably restricted." We hold that under the constitutional and decisional law of this State, *there is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records*.

Id. at 128 (emphasis added). The Court then added:

> The petitioner's right of access to the sealed records must be weighed and balanced against privacy interests that are articulated with specificity. In order for this exacting process to be accomplished, the trial judge must review each document to which access is sought and for which a specific right of privacy is claimed to determine if there is a sufficiently compelling reason that would justify preventing public access to that document, with the burden of proof resting on the party seeking nondisclosure. Before a document is ordered sealed, the trial judge must determine that no reasonable alternative to nondisclosure exists. In addition, the trial judge must use the least restrictive means available to accomplish the purposes sought to be achieved.

Id. at 129-130. A court must robustly and independently apply these principles even if all parties agree to the sealing (which may have occurred in some or all of these cases). *See id.* at 129 (noting that "[a]pparently the records were simply sealed at the request of the parties" instead of conducting this inquiry); *id.* at 130-31 ("For example, instead of sealing an

entire document because it has been determined that parts of it should not be accessible to the public, the court should consider if redaction of those parts is the appropriate least restrictive means.").

5. This Court has repeatedly applied this standard with rigor in protecting the public's right of access to court records and proceedings. *See, e.g., State v. Kibby*, 170 N.H. 255, 258 (2017) (holding that the defendant, who had sent letters to the trial court concerning his representation by counsel, had failed to meet his burden of demonstrating with specificity that the letters contained privileged communications sufficient to justify maintaining them under seal); *Associated Press*, 153 N.H. at 138-39 (holding that RSA 458:15-b, III was unconstitutional, in part, because it (i) placed the burden of proof upon the proponent of disclosure, rather than the proponent of nondisclosure, (ii) abrogated entirely the public right of access to a class of court records, (iii) and was is not narrowly tailored to serve the allegedly compelling interest of the State in protecting its citizens from identity theft); *In re N.B.*, 169 N.H. 265, 272-73 (2016) (holding that the portion of the trial court's order which stated that any future lawsuit or the pleadings therein filed by appellant against DCYF and CASA had to be filed under seal constituted a prior restraint on free speech and limited access to the courts in violation of N.H. Const. pt. I, arts. 8 and 22 in that it was overbroad and did not use the least restrictive means available to achieve its purpose).

6. Consistent with these constitutional rules, New Hampshire Supreme Court Rule 12 lays out in detail the procedure for sealing court records. Under Rule 13, the general rule is that "all pleadings, docketed entries, and filings related thereto … shall be available for public inspection." *See* N.H. Sup. Ct. R. 12(1)(a). However, an exception exists for "records of cases that are confidential by statute, administrative or court rule, or court order." *See* N.H. Sup. Ct. R. 12(1)(b)(5). "The burden of

proving that a case record or a portion of a case record should be confidential rests with the party or person seeking confidentiality." *See* N.H. Sup. Ct. R. 12(1)(c).

7. The ACLU-NH does not believe that any party has shown "with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to" the requested court records. *Petition of Keene Sentinel*, 136 N.H. at 128. The public has a right to know how this litigation is being conducted and the claims being made by the litigants, especially where the litigants are public servants and the Court's ultimate decision impacts the due process rights of defendants. Any perceived privacy interest here is, at best, minimal, as these cases implicate police officers who work for the public (in any event, targeted redactions can address any such interests with respect to the officer's identity). *See, e.g., id.* (denying a political candidate's "blanket assertion" that privacy rights in divorce and marital proceedings trump a newspaper's right of access); *see also U.S. ex rel. Callahan v. U.S. Oncology, Inc.*, No. 7:00-CV-00350, 2005 U.S. Dist. LEXIS 31848, at *8 (W.D. Va. Dec. 7, 2005) (denying a request to seal a settlement agreement because "defendants ha[d] not overcome the presumption in favor of public access" by providing "general claims of prejudice"); *State v. Cianci*, 496 A.2d 139, 145 (R.I. 1985) (finding that "blanket statement of potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of discovery documents").

8. In light of this sealing, the public and taxpayers will not be able to evaluate the legal arguments under pinning appellants' request to be removed from the EES, or the legal arguments from the appellees in opposition to that request. Secrecy also prevents the public from fully evaluating the performance of the judiciary in this case. *See Gentile v.*

State Bar of Nevada, 501 U.S. 1030, 1035 (1991) ("[T]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.") (opinion of *Kennedy*, J.) (ellipsis omitted) (quoting *In re Oliver*, 333 U.S. 257, 270-71 (1948)). Secrecy also effectively prevents interested parties like the ACLU-NH from filing informed *amicus* briefs, as the ACLU-NH and criminal defense stakeholders have no idea what the Superior Court held in this case, what the parties are arguing, and the underlying facts of each case. Not only does secrecy bar the public from observing how the Court handles this matter, but interested parties are effectively barred from educating the Court on their perspective concerning how these cases should be handled.

9. Indeed, we have already seen the value of allowing the briefs in EES cases to be filed publicly, as such disclosure has allowed the ACLU-NH and others to articulate their positions in these cases using the developed record, but still without identifying the officers involved. For example, in three other cases at the New Hampshire Supreme Court in which an officer sought removal from EES, redacted pleadings were made available and both the ACLU-NH and New Hampshire Association of Criminal Defense Lawyers were allowed to participate as *Amici*. *See Doe v. Att'y Gen.*, No. 2020-0447, 175 N.H. 349 (2022)[2]; *Doe v. Attorney General*, No.2020-0501 (N.H. Sup. Ct. July 21, 2022); *Doe v. Attorney General*, No. 2020-0444, (N.H. Sup. Ct. July 21, 2022). The redactions in

[2] There, in the context of an officer seeking removal from the EES, this Court explained that the "disclosure requirements under RSA 105:13-b, I, and III"—which includes RSA 105:13-b, III's statement that "[t]he remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer"—"are explicitly tied to a 'particular criminal case.'" *Id.* at *8.

these three cases were performed without disclosing information that would specifically identify the officer—a process that still allowed the public to understand the claims being made. This is the procedure that should be applied in this case.[3] Simply put, categorical secrecy not only prevents the ACLU-NH and others from articulating a meaningful position in this case (which would benefit this Court's adversarial process), but it also insulates this Court from accountability for any decision it makes because the public will have no understanding of the claims and defenses asserted. This is precisely why both the Superior Court rules and New Hampshire require transparency.

10. Moreover, nothing in the newly enacted statute authorizing this action makes these actions confidential. *Cf.* RSA 105:13-d, V (requiring the Department of Justice to make public the case name, number, and jurisdiction of every action brought under this section). When the legislature has chosen to categorically make a category of cases completely confidential, it has done so explicitly. *See* RSA 132:34 (b)("Proceedings

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[3] As *Amici* ACLU-NH and NHACDL argued in these three cases:

> Where the constitutional rights of defendants who have their property and liberty at stake run up against the rights of police officers in employment disputes, the rights of defendants must prevail. Furthermore, in any action by an officer challenging whether misconduct is exculpatory outside a criminal case, the standard that an officer must meet for determining whether information is not exculpatory must be a high one, as it requires a court to conclude that information cannot be exculpatory in any criminal case from now into the future. This must be a difficult standard to meet because whether information is exculpatory is fact specific and can often be dependent on the defenses raised by the defendant. See Gantert, 168 N.H. at 649 ("The government has a great interest in placing on the 'Laurie List' officers whose confidential personnel files may contain exculpatory information.").

See https://www.aclu-nh.org/en/cases/three-officer-john-doe-v-nh-attorney-general-cases.

under this section shall be held in closed court, shall be confidential, and shall ensure the anonymity of the minor.").

11. Every superior court judge to consider this issue on the merits of which we are aware has ruled that cases brought under this section should not be completely sealed, but have instead permitted redactions of identifying information. *See* Order on ACLU Petition for Public Access, *Doe v. Belmont*, 211-2021-CV-257 (Blk. Cty. Super. Ct. April 22, 2022) (*Houran*, J.); Consolidated Order on ACLU Petitions for Public Access, *Doe v. Dover*, 219-2021-CV-381; 219-2021-CV-374 (Straf. Cty. Super. Ct. June 16, 2022) (*Howard*, J.); Court Order on Petition to Unseal, *Doe v. Keene*, 213-2021-CV-185 (Ches. Cty. Super. Ct. August 2, 2022) (*Smith*, J.). Moreover, one court, without the filing of a petition to unseal, denied sealing in their entirety twelve RSA 105-13:d cases pending before a particular judge. See Order on Plaintiff's Motion to Seal, *Doe v. Manchester*, 216-2022-CV-171 (Hills. Cty. Super. Ct. North April 5, 2022) (*Delker*, J.). Each order is included in the addendum to this motion.

12. Even if some of these pleadings do contain confidential information that should be sealed, this Court has made clear that the least restrictive approach is to redact the pleadings as appropriate, rather than sealing all the pleadings in their entirety—including the legal arguments made. *See Petition of Keene Sentinel*, 136 N.H. at 130-31 ("For example, instead of sealing an entire document because it has been determined that parts of it should not be accessible to the public, *the court should consider if redaction of those parts is the appropriate least restrictive means*.") (emphasis added). For example, it may be appropriate to redact the names of the appellants. This is the least restrictive approach in this case. For context, petitions to get off the sex offender registry under RSA 651-B:6, V are typically not sealed, and rather proceed under pseudonyms. There is no reason these cases should not be treated the same way.

WHEREFORE, ACLU-NH respectfully prays that this Honorable Court:

A. Unseal these case files; or

B. Order the parties to file versions of all pleadings which redact the officer's name and personally identifiable information within 14 days of this order and permit public inspection of those pleadings and order parties, going forward, to file public versions of all pleadings; and

C. Award such other relief as may be equitable.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire,

By and through its attorneys,

/s/ Henry Klementowicz

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February 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that a copy of was filed by email to tgudas@courts.state.nh.us with the understanding that the Court would perform service.

/s/ Henry Klementowicz

Henry Klementowicz

STATE OF NEW HAMPSHIRE

BELKNAP COUNTY SUPERIOR COURT

Docket No. 211-2021-CV-257

John Doe
v.
Belmont Police Department, et al.

ORDER ON ACLU PETITION FOR PUBLIC ACCESS

The plaintiff, John Doe, filed a complaint against the Belmont Police Department, the Gilford Police Department, James Leach and Scott Dunn.[1] The plaintiff has amended his complaint to add the N.H. Department of Justice as a party-defendant. The plaintiff seeks a declaratory judgment and injunctive relief to prevent his name from being included on the Exculpatory Evidence Schedule maintained pursuant to RSA 105:13-d, I.

Now pending before the court is the petition filed by the American Civil Liberties Union of New Hampshire (ACLU) requesting that it be permitted to intervene in this case and requesting that, pending the court's ultimate determination concerning inclusion of the officer on the Exculpatory Evidence Schedule, the court unseal all pleadings filed in this case, with appropriate redactions if necessary so that they may be publicly inspected without disclosing information that would identify the officer. The plaintiff objects. The other parties take no position. Hearing, on the record under seal, was held on April 6, 2022. The court grants the request of ACLU to intervene, and further determines and orders as follows.

In order to fulfill the State's responsibility to disclose exculpatory evidence to the defense, the New Hampshire Department of Justice ("DOJ") "maintains a list of police officers who have engaged in misconduct reflecting negatively on their credibility or trustworthiness." *New Hampshire Ctr. for Pub. Int. Journalism v. New Hampshire Dep't of Justice*, 173 N.H. 648, 651 (2020). This document is called the Exculpatory Evidence Schedule, "EES," or sometimes the "Laurie List." *Id*. In 2021, the New Hampshire Legislature enacted RSA 105:13-d, which created a process by which the names of officers on the list could be made public. 2021 Laws of New Hampshire 225:2. That statute provides a time limit, which varies based on when the officer's name was added to the list, within which the officer may file a lawsuit challenging their

[1] Mr. Dunn, the Town Administrator for the Town of Gilford, was later dismissed from the case without objection.

inclusion on the EES. RSA 105:13-d, II(a). If an officer files suit challenging their inclusion on the list, the statute provides that the officer's name shall not be disclosed publicly until there has been a final determination that the officer was properly added to the EES. *See, e.g.*, RSA 105:13-b, II(e). On a quarterly basis, the DOJ must issue a public report which contains certain information about the officers on the EES, including "the number of officers who have filed lawsuits under this section, including the case name, number, jurisdiction, and corresponding field on the redacted exculpatory evidence schedule indicating the officer who has filed the lawsuit . . . ." RSA 105:13-b, V. The statute adds that "[n]othing herein shall preclude the court from taking any necessary step to protect the anonymity of the officer before entry of a final order." *Id.*

The statute further provides that:

> Once the pending action has concluded with a final order, after exhausting any applicable appellate rights, the individual's name and corresponding information will become public unless:
>
> > (1) In a matter in which the department of justice is a party, a court issues an order finding that the underlying misconduct is not potentially exculpatory; or
> > (2) A court issues an order finding that the law enforcement agency erred in recommending that the officer be placed on the exculpatory evidence schedule.

RSA 105:13-d, II(d).

Read together, the statute as a whole provides that when an officer files suit challenging inclusion on the EES, the officer's "name and corresponding information" will not become public if the court finds that the officer's name should not, for the reasons specific at RSA 105:13-d, II(d)(i) or (ii), be on the EES, and that, until a final decision on that issue is made, the court may take "any necessary step to protect the anonymity of the officer."

The court reads and understands RSA 105:13-d in the context of Part I, Article 8 of the New Hampshire Constitution, which requires that government "should be open, accessible, accountable and responsive," and that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Const. pt. I, art. 8. Court records are presumptively open to the public "absent some overriding consideration or special circumstance." *Petition of Keene Sentinel*, 136 N.H. 121, 126 (1992). The party seeking to maintain court records under seal must demonstrate a "sufficiently compelling interest" that outweighs the public's right of access. *Id*. at 128. Even if there is a compelling interest in sealing court proceedings, the court must still "determine that no reasonable alternative to

nondisclosure exists" and must "use the least restrictive means available to accomplish the purposes sought to be achieved." *Id*. at 129-30; *see also Associated Press v. State*, 153 N.H. 120, 130 (2005).

In the present case, the ACLU acknowledges that the name of the officer may be redacted and replaced with a pseudonym and that identifying information may be redacted, but asserts that the remainder of the court's file should be made public. The plaintiff asserts that RSA 516:36, II, prohibits disclosure of the underlying facts in a civil proceeding such as this,[2] and that, reading that statute together with RSA 105:13-b, II, nothing should be disclosed.

In accord with the principles set out above, the court grants the ACLU's petition for public access to this docket, but only after the court's file is redacted as set out below. This determination is consistent with court's obligation to maintain open court proceedings while at the same time giving meaning to the legislature's determinations concerning officer anonymity while the EES court proceeding is underway. The court concludes that the legislature's determination that officer anonymity be maintained until the issue is resolved establishes a compelling reason to override the public's right to access, but only to the extent necessary to protect that anonymity.

In some cases, redaction of the officer's name and specific individual identifying information may be sufficient to protect the officer's anonymity. In this case, the plaintiff expresses a particularized concern that revealing the underlying facts discussed in the pleadings would likely reveal his name to a reasonably informed member of the public. The Department of Justice echoed this concern at the hearing, expressing its fear that on the circumstances of this case unsealing the factual details may well undermine the plaintiff's anonymity. Upon review of the unredacted pleadings submitted in this case to date, the court determines that this particularized concern is well founded.

Thus, on the circumstances of this case, the least restrictive means available to accomplish disclosure consistent with maintaining anonymity requires redaction not just of the officer's name and unique identifying information but also of the unique factual circumstances presented by this case. This determination does not render public access meaningless. While

[2] Contrary to the plaintiff's assertion, RSA 516:36 is "limited to questions of admissibility," *Provenza v. Town of Canaan*, ___ N.H. ___, ___ (April 22, 2022, slip op. at 8), and accordingly does not aid his argument that the matter should remain sealed from the public.

factual information will not be available to the public while this matter is pending, maintaining public access to the extent possible is nonetheless important both for judicial accountability and for informing the public of the legal arguments being made by the parties in this developing area of New Hampshire law.

The redaction process to be used by the parties in this case is drawn from Superior Court Rules 13B(c)(4)(B), 13B(c)(4)(C)(ii), and 13B(c)(4)(C)(iii).[3] Thus, for any pleading filed in this case going forward, the party filing the pleading or document shall file two versions: First, a version for the public file, clearly identified as such, redacted so as to ensure that the officer's name and any corresponding information, including factual information, which would lead any reasonably informed member of the public to identify the officer is removed or blacked out so as to be illegible. Second, for the court's sealed file, clearly identified as filed under seal, an unredacted original version of the same pleading or document. As to pleadings already filed in this case, within 20 days of the date of the Clerk's notice of this order, the party which filed that pleading shall file a copy of the same pleading, clearly identified as for the public file, redacted so as to ensure that the officer's name and any corresponding information, including factual information, which would lead any reasonably informed member of the public to identify the officer is removed or blacked out so as to be illegible.

All unredacted original pleadings and orders will be maintained under seal. All redacted copies of pleadings and orders will be maintained in a publically-accessible file.[4]

So ordered.

April 22, 2022

Steven M. Houran
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/22/2022

[3] A Rule 13B(c)(4)(C)(i) motion to seal is not required.

[4] Because this order contains neither the officer's name nor any corresponding information, including factual information, which would lead a reasonably informed member of the public to identify the officer, this order will be placed, in unredacted form, in both the sealed file and the publically-accessible file. The record of the April 6, 2022 hearing on the ACLU's petition will remain under seal.

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

John Doe
v.
City of Dover, et al.

Docket No. 219-2021-CV-00381,
219-2021-CV-00374

CONSOLIDATED ORDER ON ACLU PETITIONS FOR PUBLIC ACCESS

The plaintiffs seek declaratory judgment and injunctive relief challenging their inclusion on the Exculpatory Evidence Schedule ("EES") maintained pursuant to RSA 105:13-d, I. The court (J., *Howard*) granted both plaintiffs' motions to seal. On February 14, 2022, the American Civil Liberties Union of New Hampshire ("ACLU") filed a motion to intervene in both dockets and requested that the court, pending the ultimate determination concerning inclusion of the plaintiffs on the EES list, unseal pleadings filed in each case, with any necessary and appropriate redactions so that the documents may be publicly inspected without disclosing information that would identify the officers. The plaintiffs object. The defendants take no position. The court held a sealed hearing on April 21, 2022. Based on the parties' arguments, the relevant facts, and the applicable law, the court finds and rules as follows.

Background on the EES

The EES, formerly known as the "Laurie List," see State v. Laurie, 139 N.H. 325 (1995), is an "informal list of police officers who have been identified as having potentially exculpatory evidence in their personal files or otherwise." See Duchesne v. Hillsborough Cty. Att'y., 167 N.H. 774, 775 (2015). In response to Laurie, "New Hampshire law enforcement authorities began developing 'Laurie Lists' to share information about officer conduct with prosecutors." N.H. Ctr. for Pub. Int. Journalism v. N.H. Dep't of Just., 173 N.H. 648, 653

(2020). The New Hampshire Department of Justice ("DOJ") "maintains a list of police officers who have engaged in misconduct reflecting negatively on their credibility or trustworthiness." Id. at 651. This document is called the Exculpatory Evidence Schedule, "EES," or sometimes the "Laurie List." Id.

As amended in 2012, the Legislature enacted RSA 105:13-b, entitled "Confidentiality of Personnel Files," to clarify and codify Supreme Court precedent on the issue. See State v. Shaw, 173 N.H. 700, 707–08 (2020) ("RSA 105:13-b explicitly codifies the distinction [the Supreme Court has] recognized between exculpatory evidence that must be disclosed to the defendant under the State and Federal Constitutions, and other information contained in a confidential personnel file that may be obtained through the procedure set forth in paragraph III of RSA 105:13-b." (quotations omitted)).[1] To that end, RSA 105:13-b provides:

> I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.
>
> II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.
>
> III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

[1] RSA 105:13-b was first enacted in 1992, before the Supreme Court decided Laurie. See N.H. Ctr. for Pub. Int. Journalism, 173 N.H. at 660, n.2.

RSA 105:13-b; see Petition of State, __ N.H. __, No. 2021-0146, (slip. op. at 4–5) (February 4, 2022).

In 2021, the Legislature enacted RSA 105:13-d, which created a new cause of action setting forth procedures by which officers can challenge their placement on the EES in Superior Court. RSA 105:13-d; see H.B. No. 471, 2021 Leg., Reg. Sess. (N.H. 2021). The statute, broadly, permits officers to seek removal from the EES, whether their name was on the list prior to the enactment of the statute or will be placed on the EES in the future. RSA 105:13-d, I–III. The statute provides a time limit, which varies based on when the officer's name was added to the list, within which the officer may file a lawsuit challenging their inclusion on the EES. RSA 105:13-d, II(a). For officers, like the plaintiff, whose name was already on the list when the statute went into effect in 2022, the process by which they must follow to remove their name from the list is explained in RSA 105:13-d, II.

On a quarterly basis, the DOJ must issue a public report which contains certain information about the officers on the EES, including "the number of officers who have filed lawsuits under this section, including the case name, number, jurisdiction, and corresponding field on the redacted exculpatory evidence schedule indicating the officer who has filed the lawsuit . . . " RSA 105:13-b, V. The statue provides, in relevant part, that:

> If the officer does challenge through any applicable grievance process the alleged conduct leading to placement on the exculpatory evidence schedule, then the officer's placement on the exculpatory evidence schedule shall become permanent and his or her name and corresponding information on the schedule shall become public only after the completion of the grievance process, and after the officer has exhausted all appellate rights, unless the grievance process determines that the alleged underlying potentially exculpatory misconduct was unfounded, not sustained, or that the officer was exonerated. In this section, the term "grievance process" means any process established by a collective bargaining agreement or by law that provides an employee an opportunity to contest an employment decision made by an employer.

RSA 105:13-d, II(e). Similarly,

> Once the pending action has concluded with a final order, after exhausting any applicable appellate rights, the individual's name and corresponding information will become public unless:
>
> (1) In a matter in which the department of justice is a party, a court issues an order finding that the underlying misconduct is not potentially exculpatory; or
>
> (2) A court issues an order finding that the law enforcement agency erred in recommending that the officer be placed on the exculpatory evidence schedule.

RSA 105:13-d. The statute adds that "[n]othing herein shall preclude the court from taking any necessary step to protect the anonymity of the officer before entry of a final order." RSA 105:13-d, V.

Analysis

The ACLU argues that because these cases involve actions to remove an officer from the EES, the "public has a significant interest in knowing what facts underlie an officer's placement on the EES, as well as the legal arguments that police officers and police departments make as to why or why not an officer should be removed from that schedule." (ACLU's Pet. ¶ 1). And, furthermore, that because the State Constitution makes court records presumptively public, sealing these proceedings in their entirety, particularly when RSA 105:13-d does not make the actions confidential, would "chill advocacy." (Id.). The plaintiffs argue that both RSA 105:13-b and 105:13-d categorically bar disclosure until and unless the officers have exhausted all appellate rights, and it is determined that the conduct underlying their inclusion on the EES is sustained. (See Pl.s' Obj. ¶¶ 8, 10).

I. RSA 105:13-d

The ACLU argues that nothing in the newly enacted statute authorizing lawsuits such as these requires confidentiality. (ACLU's Pet. ¶ 9). Notably, the ACLU concedes that unsealing

the dockets may require the use of a pseudonym or reasonable redactions of pleadings and exhibits to prevent the public from identifying the plaintiffs. (ACLU's Resp. Obj. 2). To that end, the ACLU is not seeking the release of the plaintiffs' names or corresponding information as listed on the EES before the conclusion of litigation. See RSA 105:13-d, II(d) ("[I]ndividuals and corresponding information on the exculpatory evidence schedule shall be made public, except for any individual with a pending legal action regarding the officer's placement on the exculpatory evidence schedule."). The plaintiffs contend that because they have not exhausted their appellate rights, any release of information violates RSA 105:13-d. See RSA 105:13-d, II (e) (. . . his or her name and corresponding information on the schedule shall become public only after the completion of the grievance process, and after the officer has exhausted all appellate rights . . .").

The parties' arguments require the court to engage in statutory interpretation. In interpreting a statute, the court seeks to determine "the intent of the legislature as expressed in the words of the statute considered as a whole." N.H. Ctr. for Pub. Int. Journalism, 173 N.H at 652. To that end, the court must "first examine the language of the statute, and, where possible … ascribe the plain and ordinary meanings to the words used." Id. "When the language of the statute is clear on its face, its meaning is not subject to modification." Id. The court "will neither consider what the legislature might have said nor add words that it did not see fit to include." Id. The court will "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Petition of State, No. 2021-0146 (slip. op. at 4).

"Moreover, [the court] do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole, which enables [the court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to

be advanced by the statutory scheme." Id. If, however, the statutory language is ambiguous, or subject to more than one reasonable interpretation, the court will look to the legislative history to aid its interpretation of the meaning of the language. See Bellevue Properties, Inc. v. Town of Conway, 173 N.H. 510, 515 (2020).

Notably, the statute does require that for any officers who challenge their placement on the EES, the officer's "name and corresponding information on the schedule" becomes "public" only after the completion of the grievance process, and exhaustion of the officer's appellate rights, which sustain the underlying potentially exculpatory misconduct. RSA 105:13-d, II(e). Moreover, the statute states that "[n]othing herein shall preclude the court from taking any necessary step to protect the anonymity of the officer before entry of a final order." See RSA 105:13-d, V. Read together, the statute as a whole provides that when an officer files suit challenging inclusion on the EES, the officer's "name and corresponding information" will not become public if the court finds that the officer's name should not, for the reasons specified at RSA 105:13-d, II(d)(1) or (2), be on the EES, and that, until a final decision on that issue is made, the court may take "any necessary step to protect the anonymity of the officer." The statute demonstrates the legislature's concern for officer anonymity pertaining to information *on the EES* while relevant court proceedings are underway. The statute makes no reference, however, to the pleadings or exhibits within said proceedings.

In comparison, the legislature has on other occasions demonstrated an express intention to mandate secrecy of legal proceedings in their entirety. See, e.g., RSA 132:34 (b)("Proceedings under this section shall be held in closed court, shall be confidential, and shall ensure the anonymity of the minor."); RSA 169-B:39, I ("All case records, as defined in RSA 170-G:8-a, relative to [juvenile] delinquency, shall be confidential and access shall be provided

pursuant to RSA 170-G:8-a."); RSA 169-B:39, II ("Court records of proceedings under this chapter, except for those court records under RSA 169-B:36, II, shall be kept in books and files separate from all other court records. Such records shall be withheld from public inspection but shall be open to inspection by officers of the institution where the minor is committed, juvenile probation and parole officers, a parent, a guardian, a custodian, the minor's attorney, the relevant county, and others entrusted with the corrective treatment of the minor …."); RSA 169-C:25, I(a) (under the Child Protection Act, "The court records of proceedings under this chapter shall be kept in books and files separate from all other court records. Such records shall be withheld from public inspection but shall be open to inspection by the parties, child, parent, grandparent pursuant to subparagraph (b), guardian, custodian, attorney, or other authorized representative of the child."). In RSA 105:13-d, conversely, the legislature made no such command. See RSA 105:13-d, V (requiring the Department of Justice to make public the case name, number, and jurisdiction of every action brought under this section).

Moreover, the court reads and understands RSA 105:13-d in the context of Part I, Article 8 of the New Hampshire Constitution, which provides in part: "Government . . . should be open accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. CONST. pt. 1, art. 8. Accordingly, court records are presumptively open to the public "absent some overriding consideration or special circumstance." Petition of Keene Sentinel, 136 N.H. 121, 126 (1992). The party seeking to maintain court records under seal must demonstrate a "sufficiently compelling interest" that outweighs the public's right of access. Id. at 128. Even if there is a compelling interest in sealing court proceedings, the court must still "determine that no reasonable alternative to nondisclosure exists" and must "use the least restrictive means available

to accomplish the purposes sought to be achieved." Id. at 129-30; see also Associated Press v. State, 153 N.H. 120, 130 (2005).

In the present case, the ACLU acknowledges that the name of the officer may be redacted and replaced with a pseudonym and that identifying information may be redacted, but asserts that the remainder of the court's file should be made public. Contrary to the plaintiffs' assertions, and for the reasons discussed above, RSA 105-13:d does not provide a basis for which to seal the records in their entirety. The court concludes that the legislature's desire that officer anonymity be maintained until the issue is resolved establishes a compelling reason to override the public's right to access, but only to the extent necessary to protect that anonymity. This determination is consistent with the court's obligation to maintain open court proceedings while at the same time giving meaning to the legislature's determinations concerning officer anonymity while the EES court proceeding is underway.

II. RSA 105:13-b

The plaintiffs further argue that, pursuant to RSA 105:13-b, the court should issue a protective order keeping these matters confidential. (Pl.s' Obj. ¶ 18). The plaintiffs point to the New Hampshire Supreme Court's recent decision in Petition of State, __ N.H. __ (February 4, 2022), which held that police personnel records are strictly confidential in all circumstances except for those set forth in RSA 105:13-b; therefore, the plaintiffs argue, the statute prohibits disclosure of such records. (See id.). The ACLU argues that neither the plain language of RSA 105:13-b nor the New Hampshire Supreme Court's interpretation of the statute in Petition of State support application of the statute outside of the context of a police officer serving as a witness in a criminal case. (ACLU's Pet. 7-10).

In Petition of State, the Court considered whether police personnel file information is confidential under RSA 105:13-b such that the State was entitled to protective orders preventing defense counsel from further disseminating police personnel files provided initially to the defense as potentially exculpatory information. Petition of State, __ N.H. at __ (Feb. 4, 2022). The Court stated that "[b]y starting with a presumption of confidentiality and then directing limited disclosure to specific persons for specific purposes, the legislature directed that for all other purposes, the information remains generally confidential." Id. at 7. The Court held that, "given the confidentiality accorded police personnel files by RSA 105:13-b, the State has shown good cause, as a matter of law, for the issuance of protective orders in the cases now before us." Id. at 8. Notably, the Court assessed police personnel file information shared pursuant to a prosecutor's duty to disclose, and not as pleadings within actions brought under RSA 105:13-d.

More recently, in Provenza v. Town of Canaan, the Court concluded that RSA 105:13-b did not apply to a report investigating an allegation that an officer engaged in excessive force because the statute "pertains only to information maintained in a police officer's personnel file," and "there is nothing in the record to suggest that the Report is contained in or is a part of [Provenza's] personnel file." Provenza v. Town of Canaan, __ N.H. __ (April 22, 2022) (slip op. at 7). In Provenza, the Town of Canaan denied a Right-to-Know Law request by the Valley News seeking a report concerning a police officer's possible misconduct, citing the "internal personnel practices" exemption under RSA 91-A:5, IV and Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993). Id. at 2. The Valley News renewed its request and Provenza "filed this lawsuit against the Town seeking declaratory and injunctive relief under a variety of theories to prevent the Town from releasing the Report." Id. at 2. The Court concluded that the information at issue was not contained in a "personnel file," but instead was a report entirely

separate from such files. Id. at 7. Accordingly, RSA 105:13-b did not apply because the statute "pertains only to information maintained in a police officer's personnel file." Id. (emphasis included in original). Even so, "[e]stablishing that records are 'confidential' by itself does not result in their being exempt from disclosure under the Right-to-Know Law — rather, that determination involves the three-step analysis that the trial court undertook in this case." Id. at 8. "[N]o longer are [internal investigation] files categorically exempt from disclosure under the Right-to-Know Law." Id.

The Provenza court assessed whether RSA 105:13-b prohibited disclosure under the Right-to-Know Law; however, its reasoning provides guidance to the issues at hand. The plaintiffs argue that RSA 105:13-b requires confidentiality of these proceedings in their entirety, however, that statute "pertains only to information maintained in a police officer's personnel file." See id. at 7; N.H. Ctr. for Pub. Interest Journalism, 173 N.H. at 656. "[H]ad the legislature intended RSA 105:13-b to apply more broadly to personnel information, regardless of where it is maintained, it would have so stated." Provenza, __ N.H. at __ (slip op. at 7). Moreover, the statute does not contemplate civil proceedings challenging an officer's placement on the EES, nor does RSA 105:13-d reference or incorporate language from RSA 105:13-b. See State v. Shaw, 173 N.H. 700, 707–08 (2020) ("RSA 105:13-b explicitly codifies the distinction [the Supreme Court has] recognized between exculpatory evidence that must be disclosed to the defendant under the State and Federal Constitutions, and other information contained in a confidential personnel file that may be obtained through the procedure set forth in paragraph III of RSA 105:13-b." (quotations omitted)).

For those reasons, the court concludes that RSA 105:13-b applies only to information within the officer's personnel file, not to the proceedings at issue here, and neither party has

presented evidence that confidential, personnel file information is currently at issue. Accordingly, the court finds that neither RSA 105:13-b, nor RSA 105:13-d, requires categorical concealment of the record in these matters. Indeed, the Provenza court gave recognition to the weighty public interest in these issues: "As for the public interest in disclosure, we conclude that it is significant. The public has a substantial interest in information about what its government is up to, as well as in knowing whether a government investigation is comprehensive and accurate." __ N.H. at __ (slip op. at 10).

Conclusion

For the foregoing reasons, the court's orders on the plaintiffs' motions to seal are VACATED and the ACLU's petitions for public access are GRANTED, subject to any necessary use of pseudonyms, redactions of corresponding information in the EES, and reasonable redactions of information in pleadings and exhibits to prevent the identification of the plaintiffs while these matters are pending. Such information includes factual information which may lead a reasonably informed member of the public to identify the officer.

SO ORDERED.

Date: June 16, 2022

Mark E. Howard
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/16/2022

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS. **SUPERIOR COURT**

No. 213-2021-CV-00185

John Doe

v.

City of Keene Police Department, et al.

ORDER ON PETITION TO UNSEAL

The Plaintiff, John Doe, sued the City of Keene Police Department, the City of Keene, and the New Hampshire Attorney General's Office ("AGO") under RSA 105:13-d. See Court Index #2 (Compl.). The American Civil Liberties Union of New Hampshire ("ACLU") moved to intervene, see Court Index #7 (Mot. Intervene), and petitioned for public access to court records, see Court Index #8 (Pet.). The City of Keene and Doe object to the ACLU's petition. See Court Index # 13 (Obj.) and #16 (same). The AGO takes no position. See Court Index #20. For the reasons that follow, the court GRANTS the ACLU's petition.

BACKGROUND

In 2018, the Keene Police Department recommended the AGO add Doe's name to the Exculpatory Evidence Schedule ("EES") (formerly known as the "Laurie List") because of misconduct during Doe's time as a police officer for the Keene Police Department. See Court Index #2.

Doe filed this lawsuit on December 7, 2021, seeking: (1) a declaratory judgment pursuant to RSA 105:13-d finding Doe's conduct is not potentially exculpatory evidence; (2) a permanent injunction ordering the AGO to remove Doe's name from the list; and (3) a ruling that the proceedings that resulted in his inclusion on the EES violated his right to due process. Id.

In conjunction with his complaint, Doe filed a motion to seal, which the court granted. See Court Index #1. Then, on February 14, 2022, the ACLU filed a motion to intervene along with a petition for public access to court records, see Court Index #7 and #8, respectively.

The court held a hearing on both motions on June 7, 2022. At the hearing, the court first address the ACLU's motion to intervene. Relying on In re Keene Sentinel, the court found that the ACLU was not required to file a motion to intervene in order to petition for access to court records. 136 N.H. 121, 125 (1992) (noting newspaper should not have moved to intervene but should have petitioned for access to sealed records). Accordingly, the court marked the motion to intervene "moot" and turned to the substance of the ACLU's petition. See Court Index #7.

LAW/ANALYSIS

The ACLU petitions for public access and requests the Court unseal all pleadings filed in the case, with appropriate redactions. See generally Court Index #8. It argues that Part I, Article 8 of the New Hampshire Constitution requires this case be public because Doe and the City have not shown a sufficiently compelling interest which would outweigh the public's right of access. Id. Doe and the City object. See Court Index #13 and #16. They argue that RSA 105:13-d contemplates closed proceedings and records until the court determines whether the officer's conduct constitutes potentially exculpatory evidence. See id. They further assert that redactions in this case will not suffice because Doe's status in the law enforcement community is such that someone could discover his identity even with little information. Id.

New Hampshire is "one of only a handful of States with a constitutional provision that explicitly protects the public's right of access to governmental proceedings and documents." Assoc. Press v. State, 153 N.H. 120, 128 (2005) (citation omitted). Those provisions are found

in Part I, Articles 7, 8, and 22 of the New Hampshire Constitution. Id. at 124-25, 28. Article 7 provides that "the people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state." N.H. CONST. pt. I, art. 7. Article 8 then establishes that "[g]overnment [] should be open, accessible, accountable, and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. CONST. pt. I, art. 8. Taken together, Articles 7 and 8 "express the American theory of government that the government is ultimately accountable to the people." State v. DeCato, 156 N.H. 570, 574 (2007) (citing Opinion of the Justices, 111 N.H. 175, 177 (1971)).

The public's right to access court records and proceedings is not a new right: it is an "almost universal rule dating from the earliest times." Thomson v. Cash, 117 N.H. 653, 654 (1977). New Hampshire courts "have always considered their records to be public, absent some overriding consideration or special circumstance." Id. Though the right to access court records and proceedings is not mentioned explicitly in the New Hampshire Constitution, the Supreme Court has recognized many times that the right is grounded in Part I, Article 22 which protects free speech and liberty of the press. See Assoc. Press, 153 N.H. at 128.

If a case or set of court documents are sealed, non-parties may petition the court for access. Keene Sentinel, 136 N.H. at 128. In challenging such a petition, the burden of proof rests with the party resisting disclosure to demonstrate "with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." Id. Even when the court finds that such a compelling interest is at issue, the trial judge must also determine that "no reasonable

alternative to nondisclosure exists" and "must use the least restrictive means available to accomplish the purposes sought to be achieved." Id. at 130.

I. Right of Public Access to Court Records and Proceedings

The New Hampshire Supreme Court has adopted the United States Supreme Court's "experience and logic test" to determine whether a public right of access attaches to judicial proceedings and documents. See Assoc. Press, 153 N.H. at 133; see also Decato, 156 N.H. at 575. That test requires a court to determine: (1) "whether the place and process have historically been open to the press and general public"; and, (2) "whether public access plays a significant positive role in the functioning of the particular process in question." State v. DeCato, 156 N.H. 570, 575 (2007). The Court will address both in turn.

A. Experience

Doe argues EES proceedings have historically been closed proceedings by pointing to RSA 105:13-b. The ACLU disagrees, arguing RSA 105:13-b only applies to criminal proceedings.

RSA 105-13-b requires that prosecutors disclose to a criminal defendant potentially exculpatory evidence contained in an officer's personnel file of a "police officer who is serving as a witness in any criminal case" RSA 105:13-b, I. If the prosecutor cannot determine the exculpatory nature of the information, the trial court must conduct an *in camera* review of an officer's police personnel file to make such determination. RSA 105:13-b, II. Importantly, however, the statute mandates that an officer's personnel file shall not be opened "for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case" unless the court finds the file contains relevant evidence. RSA 105:13-b. III. Also, only "those portions of the file which the judge determines to be relevant in the case shall be released to be used as

evidence . . . ." Id. "The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer." Id.

Recently, the New Hampshire Supreme Court has had several opportunities to interpret this statute and, while it emphasized the confidentiality of police personnel files under RSA 105:13-b, it limited the law's application to the context of disclosure of information from a particular personnel file in a particular criminal case. In Petition of State, the supreme court considered the extent of confidentiality protections police personnel files under RSA 105:13-b. 174 N.H. 785 (2022). There, the supreme court concluded the trial court erred when it refused to issue a protective order over evidence from the officers' personnel files. Id. at 794. The Court stated that under RSA 105:13-b, the information contained within the personnel file "remains generally confidential" except for the "limited disclosure to specific persons for specific purposes." Id. at 793-94. The court stated that such disclosure of information under RSA 105:13-b is "tied to a particular criminal case and is for the explicit purpose of 'be[ing] used as evidence.'" Id. at 792 (quoting RSA 105:13-b, III).

Similarly, in Provensa v. Town of Canaan, the supreme court was asked whether a report not contained within a police personnel file was subject to RSA 91-A and, additionally, whether RSA 105:13-b nonetheless prohibited its disclosure. __ N.H. __, 2022 N.H. Lexis 46 (decided April 22, 2022). Regarding the latter, the supreme court emphasized that RSA 105:13-b "'pertains only to information maintained *in* a police officer's personnel file' and 'had the legislature intended RSA 105:13-b to apply more broadly to personnel *information* … it would have so stated.'" 2022 N.H. Lexis 46 at *12 (emphasis in original) (quoting N.H. Ctr. For Pub. Interest Journalism v. N.H. DOJ, 173 N.H. 648, 656 (2020)).

On July 21, 2022, the New Hampshire Supreme Court declined to extend RSA 105:13-b's protection of police personnel files outside the context of a criminal case. See Doe v. Attorney General, ___ N.H. ___, 2022 N.H. Lexis 90 (Decided July 21, 2022). In that case, Doe filed a declaratory judgment action and request for injunctive relief challenging his placement on the EES and seeking his removal from the list. See id. at *2-3. The supreme court was, in effect, asked to find that 105:13-b, II, allowed the trial court to conduct an *in camera* review of his personnel file, in the context of the civil lawsuit, to determine whether it contained potentially exculpatory information. See id., *8-9. The court said that RSA 105:13-b "does not authorize the trial court to review the contents of an officer's personnel file outside the scope of a particular criminal case." Id. *9.

These recent decisions combined with the plain language of RSA 105:13-b make clear that the statute only applies to a police officer's personnel file in the context of a specific criminal case in which the officer serves as a witness. The court therefore finds it provisions inapplicable to the case at bar.

The question then becomes whether RSA 105:13-d contemplate that all records and proceedings in a suit under its provisions will remain entirely confidential while such case is pending. The court finds it does not.

Pursuant to RSA 105:13-d, officers who were placed on the EES prior to the statute's enactment may file suit in superior court challenging their placement on the list. RSA 105:13-d, II. Once the lawsuit has concluded and the officer has exhausted any appellate rights, the officer's "name and corresponding information will become public unless" the court issues an order either finding the questioned conduct is not potentially exculpatory evidence or that the law enforcement agency erred in recommending the officer be placed on the schedule. RSA 105:13-

d, II(d). Further, the statute provides that nothing "herein shall preclude the court from taking any necessary steps to protect the anonymity of the officer before entry of a final order." RSA 105:13-d, V.

Doe and the City argue the phrase "name and corresponding information" effectively means the entire case must be confidential until the court issues a final order. The ACLU disagrees, arguing that "name and corresponding information" only refers to the officer's identity, not court records.

The phrase "corresponding information" follows the word "name[,]" and thus it is clear that "corresponding information" means, in effect, identifying information, like an individual's rank (if notable), badge number, and address. In fact, that interpretation runs harmoniously with section V of the statute, which allows the court take such actions as it deems necessary to protect "the anonymity of the officer before entry of a final order." RSA 105:13-d, V. Read as a whole, RSA 105:13-d does not mandate absolute secrecy.

By contrast, where court proceedings must be confidential, statutes plainly and unambiguously say so. See RSA 132:34 (b) ("Proceedings under this section shall be held in closed court, shall be confidential, and shall ensure the anonymity of the minor."); RSA 169-B:39, I ("All case records, as defined in RSA 170-G:8-a, relative to [juvenile] delinquency, shall be confidential and access shall be provided pursuant to RSA 170-G:8-a."); RSA 169-B:39, II (noting court records of proceedings under chapter shall be generally "withheld from public inspection"); RSA 169-C:25, I(a) (same). The legislature could have but did not mandates the records or proceedings under RSA 105:13-d be closed to the public or confidential.

Finally, history suggests EES proceedings are public. Prior to the enactment of RSA 105:13-d, at least two "Laurie list" cases, Duchesne v. Hillsborough County Atty., 167 N.H. 774

(2015) and Gantert v. City of Rochester, 168 N.H. 640 (2016) were, apparently, completely open to the public. While it seems that the issue of whether such matters should or must be confidential was not raised in those cases, even the officers' names were included in the case names and were a matter of public record. In addition, opinions and decisions pertaining to the EES have been made public, albeit using a pseudonym, thus further demonstrating that these cases were not considered to be confidential proceedings. See e.g., Doe v. Attorney General, 2022 N.H. Lexis 90 (2020-447) (addressing issue of officer's placement on EES prior to enactment of RSA 105:13-d); Doe v. Attorney General, 2022 N.H. Lexis 92 (2020-501) (also addressing issue of officer's placement on EES prior to enactment of RSA 105:13-d); and In re Doe, 2020 N.H. Lexis 132 (2019-705) (same).

Because the court finds that the plain language of statute does not require confidential proceedings and history suggests EES proceedings were public, the court finds that experience demonstrates that the records and proceedings under RSA 105:13-d are public.

B. Logic

Under this prong, the court must consider both whether public access would play a positive role and whether it would have a negative effect on functioning of the proceeding. See DeCato, 156 N.H. 570, 575; Assoc. Press v. State, 153 N.H. 120, 132 (2005).

Today, the public has great interest in proceedings related to the conduct of law enforcement officers. Public access to EES proceedings under RSA 105:13-d would allow the public to better understand the process, and would serve to provide the public with information as to how and why the government either holds officers accountable or exonerates them. To conduct secret proceedings on police misconduct would undoubtedly foster distrust in the government and, specifically, the judiciary. This Nation was founded with a specific interest in

avoiding secret, proceedings common with the English Court of Star Chamber, during the Spanish Inquisition, or with the French monarch's use of lettres de cachet. See U.S. ex rel Bennett v. Rundle, 419 F.2d 599, 606 (3rd Cir. 1969) (stating concerns for "abuse of judicial power" and other inherently corrupt acts); Schultz v. Medina Valley Independent Sch. Dist., Civil Action No. SA-11-CA-422-FB, 2011 WL 13234886, at *2 (W.D. Tex. Dec. 6, 2011) ("While early Americans came to the United States for freedom from government imposed religion, they also came to escape the star chamber of secret trials."). Public proceedings will promote public perception of fairness in the process and will serve to demonstrate there is no corruption in the process. See Assoc. Press, 153 N.H. at 133 (quoting Globe Newspaper v. Superior Court, 457 U.S. 596, 606 (1982)).

Neither Doe nor the City state grounds to conclude that public access would frustrate the functioning of the proceedings, and the court finds none.

On balance, the Court finds Doe and the City cannot meet the experience and logic test. Accordingly, the Court finds a constitutionally protected right of public access to EES cases brought under RSA 105:13-d.

II. Doe's Compelling Interest does not Outweigh Pubic Right of Access

The court now turns to the question of whether Doe has "some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." Keene Sentinel, 136 N.H. at 128. Doe and the City have pointed to the compelling interest that public exposure of otherwise private matters may affect the officer's reputational interests. Assuming *arguendo* this is a compelling interest, the court finds that there is a reasonable alternative to nondisclosure contained in the statute's plain language,

which allows the court to take any necessary steps to protect an officer's anonymity. RSA 105:13-d, III.

Therefore, the court turns to its obligation to "use the least restrictive means available to accomplish the purposes to be achieved." Keene Sentinel, 136 N.H. 121, 129-30. Here, that is the officer's anonymity and, specifically, protection of his "name and corresponding information." RSA 105:13-d, II (d) and V. The Court finds that the least restrictive means of protecting the Doe's anonymity is to require both the use of a pseudonym and redaction of pleading pursuant to the court rules.

As noted above, other cases demonstrate the practice of protecting a litigant's identity through use of a pseudonym. See e.g., Doe v. Attorney General, 2022 N.H. Lexis 90 (2020-447) (addressing issue of officer's placement on EES prior to enactment of RSA 105:13-d); Doe v. Attorney General, 2022 N.H. Lexis 92 (2020-501) (also addressing issue of officer's placement on EES prior to enactment of RSA 105:13-d); In re Doe, 2020 N.H. Lexis 132 (2019-705) (same); Doe v. Dep't Safety, 2021 N.H. Lexis 30 (2020-243) (challenging being placed on sex offender registry). The court has use a pseudonym thus far, will continue to do so, and will require the parties to this case to do so, going forward.

New Hampshire Superior Court Civil Rule 13B (c) sets out the method by which the parties may submit confidential information in pleadings or other documents filed in a case. As applicable here, it requires parties to file a redacted version for inclusion in the public file, as well as an un-redacted version with a motion to seal the un-redacted version. See NH Civ. R. 13B (c) (4) (C). Doe and the City argue the court cannot meaningfully redact the records without exposing Doe's identity and Doe asserts that it could be possible to "reverse engineer" otherwise innocuous information to obtain an officers' identity. The court disagrees.

The extent of redactions will undoubtedly vary from case to case, depending on factors such as (1) the size of the department; (2) the publicity of the conduct or the officer; or (3) the uniqueness of the circumstances. The court recognizes that Doe included a significant amount of factual information in his pleadings, particularly in his complaint, that must be redacted to protect his anonymity. In circumstances such as these, the court will allow for fairly liberal redactions of factual information that could lead to discovery of the Doe's identity.

Accordingly, the court orders Doe, the City, and the AGO to propose redactions of each of their respective pleadings within 14 days. The Court will not unseal the case until said redactions have been approved. Once such redactions are approved, the redacted pleading will be made part of the public record and the unredacted pleadings will remain sealed.

CONCLUSION

For the reasons noted above, the court finds and rules that Doe and the City have failed to meet their burden of showing a sufficiently compelling interest which outweighs the public's right of access to those records. Keene Sentinel, 136 N.H. at 128. Accordingly, the court GRANTS the ACLU's petition for public access. Doe, the City, and the AGO shall propose redactions within 14 days. Once approved, the case will be unsealed.

SO ORDERED.

August 2, 2022

Jacki A. Smith
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/03/2022

The State of New Hampshire
Superior Court

Hillsborough-North, S.S.

JOHN DOE

v.

CITY OF MANCHESTER, *ET AL.*

No. 216-2022-CV-00171

ORDER ON PLAINTIFF'S MOTION TO SEAL

The plaintiff filed a complaint against the City of Manchester, the Manchester Police Department, and the N.H. Department of Justice, seeking declaratory judgment and injunctive relief to remove his name from the Exculpatory Evidence Schedule ("EES") pursuant to RSA 105:13-d. Compl. (Doc. 1).[1] At the same time, the plaintiff filed a Motion to Seal (Doc. 2) requesting "the petition, any accompanying documents, and all subsequent proceedings be placed under seal." Doc. 2 ¶ 1. The plaintiff did not seek the assent of the defendants to the motion to seal. Id. at ¶ 10.

The failure of the opposing party to object to a motion does not mean the Court must automatically grant the relief proposed. N.H. R. Civ. P. 13B(d)(2). The Court must still evaluate the merits of the moving party's request. See Hilario v. Reardon, 158 N.H. 56, 59–60 (2008) (trial court's order granting motion based only on the lack of objection was plain error).

[1] After the initial citation, the Court will reference all pleadings and orders by the index number of the document in the court file.

One of the fundamental precepts of a democracy is that public officials must be accountable to the citizens. This concept has been codified in the New Hampshire Constitution since 1784. Part I, Article 8 provides: "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive." N.H. Const. pt. I, art. 8. To accomplish this end, the Constitution states: "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Id. Nowhere in state government is this principle more firmly established than in the court system. Associated Press v. State, 153 N.H. 120, 125 (2005).

Court records are presumptively open to the public "absent some overriding consideration or special circumstance." Petition of Keene Sentinel, 136 N.H. 121, 126 (1992). The party seeking to maintain court records under seal must demonstrate a "sufficiently compelling interest" that outweighs the public's right of access. Id. at 128. A blanket or generic assertion of privacy is insufficient to justify sealing court records. Id. Even if there is a compelling interest in secrecy, the Court must still "determine that no reasonable alternative to nondisclosure exists" and "use the least restrictive means available to accomplish the purposes sought to be achieved." Id. at 129-30; see also Associated Press v. State, 153 N.H. 120, 130 (2005).

"The constitutional right of access to judicial proceedings and records, under either the State or Federal Constitution, is not absolute." Id. at 129. The New Hampshire Supreme Court has "adopted the 'experience and logic test' of the United States Supreme Court" to determine whether particular court proceedings are presumptive open to the public. State v. DeCato, 156 N.H. 570, 575 (2007). "Under this test, a court must

evaluate: (1) 'whether the place and process have historically been open to the press and general public,' and (2) 'whether public access plays a significant positive role in the functioning of the particular process in question.' If the proceeding at issue meets both prongs of the test, then the right of public access attaches." Id. (quoting Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) (Press-Enterprise II), and citing Associated Press, 153 N.H. at 131).

"Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would totally be frustrated if conducted openly." Id. at 577 (quoting Press-Enterprise II, 478 U.S. at 8-9). "The highest level of judicial scrutiny attaches to a request to seal an actual civil trial. Because trials are subject to the First Amendment right of public access to judicial proceedings, a request to bar access to a civil trial "is ... evaluated under strict scrutiny." Dobson v. Milton Hershey Sch., 434 F. Supp. 3d 224, 232 (M.D. Pa. 2020). Nonetheless, the New Hampshire Supreme Court has "left open the possibility that 'under the experience and logic test, there may well be certain types of civil proceedings to which the constitutional right of access will not attach.'" DeCato, 156 N.H. at 577 (quoting Associated Press, 153 N.H. at 133).

In order to fulfill its responsibility to disclose exculpatory evidence to the defense, the New Hampshire Department of Justice ("DOJ") "maintains a list of police officers who have engaged in misconduct reflecting negatively on their credibility or trustworthiness." New Hampshire Ctr. for Pub. Int. Journalism v. New Hampshire Dep't of Just., 173 N.H. 648, 651 (2020). This document is called and Exculpatory Evidence Schedule, EES, or the "Laurie List." Id. In 2021, the New Hampshire Legislature enacted RSA 105:13-d, which created a process by which the names of officers on the list could be made public.

2021 N.H. Laws 225:2. Depending on when the officer's name was added to the list, the officer has a certain amount of time to file a lawsuit challenging his or her inclusion on the EES. RSA 105:13-d, II(a). If an officer files suit challenging his or her inclusion on the list, the law provides that the officer's name shall not be disclosed publicly until a court has made a final determination that the officer was properly added to the EES. See, e.g., RSA 105:13-b, II(e). On a quarterly basis, DOJ must issue a public report which contains certain information about the officials on the EES, including "the number of officers who have filed lawsuits under this section, including the case name, number, jurisdiction, and corresponding field on the redacted exculpatory evidence schedule indicating the officer who has filed the lawsuit . . . ." RSA 105:13-b, V. The statute concludes "[n]othing herein shall preclude the court from taking any necessary step to protect the anonymity of the officer before entry of a final order." Id.

The plaintiff has not argued that this is the type of case that is not openly litigated under the "experience and logic" test. Moreover, the Court is not convinced that the relief requested by the plaintiff's motion to seal is the narrowest means available to preserve the confidentiality of the officer's identity pending the final outcome of the case. New Hampshire Rule of Civil Procedure 13B(c)(4)(C) sets forth a process by which a party must file a pleading with confidential information redacted as part of the public file. At that same time, that rule requires the party to file an unredacted version of the pleading for the Court's consideration. Id. The unredacted pleading must be accompanied by a motion to seal setting for the basis for claim of confidentiality or privilege. Id.

Other cases illustrate that this is not the type of case that must be litigated entirely out of the public eye. When the New Hampshire Supreme Court has released decisions relating to EES material, it has issued a public opinion referring to the officer by the

pseudonym “John Doe” without analyzing any of the particular facts that might disclose the identity of the officer. See generally Petition of Doe, No. 2019-0705, 2020 WL 4547436, at *1 (N.H. Aug. 6, 2020). Indeed, in one published decision in which the Supreme Court ruled that officers were improperly included on the EES, the Court identified the officers by name. Duchesne v. Hillsborough Cty. Att'y, 167 N.H. 774, 775 (2015). Those decisions do not address the question of sealing the file. It is unknown whether that issue was litigated in either of those cases before the matters were heard on appeal. At a minimum, however, Petition of Doe illustrates that a case can be litigated in public without jeopardizing the identity of the officer. In fact, it is common practice in this state to use a pseudonym such as “John Doe,” “Richard Roe,” “Jane Doe,” or the like to preserve the anonymity of the litigant in matters of equal (if not greater) sensitivity. See, e.g., State v. Roe, 118 N.H. 690, 691 (1978) (challenge to denial of annulment); Doe v. State Farm Fire & Cas. Co., No. 2015-0136, 2015 WL 11083311, at *1 (N.H. Sept. 21, 2015) (appeal of summary judgment ruling on whether a sexually communicable disease is covered by insurance). The motion to seal offers no explanation for why that is not a viable alternative in the case at bar.

Furthermore, a review of the complaint indicates that there are many allegations that are either already a matter of public record or are merely assertions of law that do not disclose, even indirectly, the identity of the plaintiff. The plaintiff is required to name the police department in the lawsuit per RSA 105:13-d, II(c). As noted above, RSA 105:13-d, V requires DOJ to issue a public report, including the case name and docket number. In order to maintain the anonymity of the officer, the Court automatically assigns a pseudonym to the plaintiff. At the time the case is filed, court staff lock the case in the Odyssey case management system so that no member of the public can access any

information about the case (or even know that the case exists). This policy was adopted to avoid the inadvertent disclosure of the officer's identity as a result of being affiliated with a particular department. As noted, RSA 105:13-d, V requires DOJ to publicly disclose the case name. The law enforcement agency or agencies which have been sued as defendants are part of the case name. Therefore, some information about the case is inherently public in order to comply with the statutory mandate. It is conceivable that in some rare case the public could discern the identity of the officer by the case name. For example, if the only female officer in a small police department filed an EES lawsuit, the fact that a "Jane Doe" pseudonym was used might reveal her identity. Sealing the existence of the case in its entirety, however, does not seem to be the most narrowly tailored means to address this rare circumstance. Rather, the plaintiff could request that a non-gendered pseudonym be used for the case caption.

For the foregoing reasons, the Court denies the Motion to Seal without prejudice to file a renewed request within 10 days of this order. Any new motion must address the standards set forth above and request relief that is narrowly tailored to meet a compelling interest in privacy. If the Court does not receive a timely renewed motion to seal, the case will be unsealed in its entirety and all pleadings will automatically be made part of the public record in unredacted form.

On this same date, the Court has issued substantively identical orders in other cases recently filed. See Docket Nos. 216-2022-CV-00151, -00152, -00154, -00155, -00164, -00169, and 217-2022-CV-00459. The Court is also aware that virtually identical motions to seal have been granted by margin order and without substantive analysis. See Docket Nos. 216-2021-CV-00766; No. 216-2022-CV-00071; 216-2022-CV-00076; 216-

2022-CV-00147. The orders to seal in those cases will be vacated today and a substantially similar order to this one will issue in each of those matters.

SO ORDERED.

April 5, 2022
_____
DATE

N. William Delker
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/06/2022