

The State of New Hampshire

MERRIMACK COUNTY

SUPERIOR COURT

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

v.

CITY OF CONCORD

Docket No.: 217-2019-CV-00462

ORDER

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

I. Background

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

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

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

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

II. Standard

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

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

III. Analysis

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

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

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

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

a. Nature of the Agreement

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

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

b. Interference with Enforcement Proceedings Exemption

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

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

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

c. Techniques and Procedures Exemption

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

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

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

d. Danger to Life and Physical Safety Exemption

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

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

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

e. Reasonable Restriction

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

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

B. Ex Parte Review

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

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

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

IV. Conclusion

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

So Ordered.

DATED: 10/25/19



JOHN C. KISSINGER
Presiding Justice

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