THE STATE OF NEW HAMPSHIRE
SUPREME COURT

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND THE CONCORD MONITOR

v.

CITY OF CONCORD

Docket No. 2020-0036

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

OPENING BRIEF FOR APPELLANTS/CROSS-APPELLEES AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND THE *CONCORD MONITOR*

Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
(presenting oral argument)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION
18 Low Avenue
Concord, NH 03301
Tel. 603.333.2201
gilles@aclu-nh.org
henry@aclu-nh.org

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15 Minute Oral Argument Requested

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STATEMENT OF FACTS

On May 10, 2019, Concord's City Manager sent a budget proposal to the Mayor and City Council for the 2020 Fiscal year. App. 114. On May 24, 2019, the *Concord Monitor* reported that the City of Concord ("the City") had requested $5,100 for "Covert Communications Equipment" for the Concord Police Department ("Police Department"). App. 29-31. When asked by City Councilor Fred Keach what the money was for, the City Manager replied: "I don't know how to answer that questioning without 'answering it.'" App. 30. The City Manager said the equipment was not body cameras or a drone, and did not describe the equipment further except to say that he had seen it and "we need it." *Id.*

On May 28, 2019, Appellants/Cross-appellees American Civil Liberties Union of New Hampshire ("ACLU-NH") and the *Concord Monitor* (collectively "Appellants") sent Right-to-Know requests to the City in accordance with RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution. App. 33, 36. The ACLU-NH requested (1) "documents sufficient to identify the specific nature of the 'covert communications equipment' sought by the Concord Police Department at a cost of $5,100 in the City's budget"; and (2) "any contracts or agreements between the Concord Police Department or the City of Concord and the vendor providing the 'covert communications equipment'. . . ." App. 33-34. On May 29, 2019, The *Concord Monitor* sent a Right to Know request for "documents related to the $5,100 'covert communications equipment' sought by the Concord Police Department in the fiscal year 2020 proposed budget," including "any contracts or agreements between the Concord Police Department or the City of Concord and the vendor providing the equipment, documents that detail the nature of the equipment and the line items associated with the equipment in the department's budget." App. 36.

The City substantively responded to both the ACLU-NH and *Concord Monitor* on June 10, 2019, with letters stating that it was withholding "confidential information relative to surveillance technology that is exempt from disclosure under the law enforcement exemption set forth in RSA 91-A:4." App. 38-39, App. 41-42; *see Lodge v. Knowlton*, 118 N.H. 574 (1978) (importing law enforcement exemption from the federal Freedom of Information Act to Right-to-Know law). With this letter, the City produced a heavily redacted license and service agreement ("Agreement") dated December 28, 2017, between the City and an unnamed vendor. App. 126-142. The City also produced a Privacy Policy, a Refund Policy, and an Amendment to the Agreement. App. 143-154. All the documents produced were heavily redacted.

In the documents, the City redacted the name of the vendor, the signature block, the choice of law provision, the nature of the services, the types of information the vendor gathers, and what the vendor does with the information it gathers. App. 126-142. The City even redacted the governing law provision in the Agreement. *Id.* The Agreement also troublingly includes a broad nondisclosure agreement prohibiting the City from sharing the existence or nature of the secret equipment from courts, grand juries, and defense counsel. App. 135-36. It says:

> . . . . Licensee shall not (and shall ensure that Licensee Users shall not) disclose Confidential Information to any third party, or allow Confidential Information to be disclosed to any third party without a court order. Without limitation, the foregoing does not allow Confidential Information to be disclosed in . . . court documents or legal filings, judicial or administrative proceedings (including, without limitation, in pre-trial matters, in search warrants or related affidavits, in grand jury proceedings, or in any phase of a criminal or civil trial or

> appeal), or during public forums or proceedings without a court order . . . In no event unless compelled by a court, shall Licensee allow the defense in a criminal proceeding to see the [redacted] name or mark.

Id.

On June 17, 2019, counsel for the ACLU-NH sent an email to the Concord Chief of Police proposing to narrow the scope of ACLU-NH's Right-to-Know request. Counsel wrote: "In an effort to narrow the scope of our Chapter 91-A dispute, we are willing to narrow request No. 1 – while reserving our rights – to documents sufficient to generally describe the communications equipment purchased. To be clear, we are not seeking the item's specifications/capabilities and how the item will be used." App. 83. Appellants narrowed their request to make clear that—unlike the request at issue in *Montenegro v. City of Dover*, 162 N.H. 641 (2011) which sought the substantive details of how surveillance equipment was being used—Appellants were *not* seeking the substantive details concerning how the City was using the covert communications equipment. Counsel's email was not able to resolve the present dispute.

STATEMENT OF THE CASE

On July 23, 2019, Appellants filed this lawsuit by way of a Petition for Access to Public Records ("Complaint") in Merrimack County Superior Court because they believed that the City could not meet its burden of proving that the unredacted documents fall into the "law enforcement" exemptions to the Right-to-Know law identified in *Lodge*. App. 3-21; *see* RSA 91-A:8. The City filed its Answer on August 7, 2019. App. 84-91.

Seeking an equal opportunity to meaningfully argue to the court below about the applicability of these exemptions to the Right-to-Know law, Appellants served their First Request for Production of Documents on August 8, 2019, asking for unredacted "documents sufficient to identify the

specific nature of the [$5,100] 'covert communications equipment';" "contracts or agreements between the Concord Police Department or the City of Concord and the vendor" of the covert communications equipment; and "copies of the documents produced in response to the [Appellants'] May 28, 2019 Right to Know request." App. 112. Appellants stipulated that all documents requested "may be produced subject to a mutually agreeable protective order." *Id*. In other words, Appellants' request served as a procedural vehicle for Appellants to seek review of the records under a protective order, without disclosure to the public, so Appellants could make meaningful arguments to the court concerning their position as to why the records were not exempt from disclosure.

In response, the City filed an Objection and Motion to Quash Petitioners' First Request for Production of Documents and Incorporated Memorandum of Law on August 23, 2019. App. 92. This pleading relied on an affidavit supplied by Concord Chief of Police Bradley Osgood. App. 156-57. Rather than provide specific evidentiary support to demonstrate the applicability of the asserted exemptions, Chief Osgood's affidavit largely recites legal conclusions, for example stating: "Disclosure of the Agreement in an unredacted format would have a material and significant impact on pending investigations." App. 157. The City also filed a Motion for *Ex Parte* Hearing on August 27, 2019, to "provide an opportunity for the Court to examine a member of the Concord Police Department regarding the specific information redacted in the Agreement." App. 199-200.

The City, with Appellants' assent, also filed a copy of the unredacted documents under seal with the court below on or about August 30, 2019.

Appellants objected to both the Motion for *Ex Parte* Hearing and Motion to Quash on September 13, 2019. App. 201-220, App. 163-188. In their Objection to the Motion to Quash, Appellants affirmed that they were

willing to stipulate to an "attorneys' eyes only" protective order. App. 165. A hearing was held on October 4, 2019. After the hearing and a review of both the unredacted records and Chief Osgood's affidavit, the court below examined the legal framework and observed that the City had not met its burden of establishing that the records were exempt from public disclosure, writing that "the City has thus far failed to demonstrate that release of the records could reasonably endanger the life of physical safety of another," and that "the legality of the City's refusal to disclose the Agreement [under *Lodge*] cannot be established based on the pleadings alone." October 25, 2019 Order, pp. 9, 11. The court below then decided to hold an *ex parte* evidentiary hearing where it would hear testimony from the police chief without Appellants or their counsel present. *Id.*, pp. 11-12. The court below also decided to defer consideration on the Motion to Quash pending the *ex parte* hearing. *Id.*, p. 12.

The *ex parte* hearing was held on November 19, 2019. At that hearing, the court below heard testimony from Chief Osgood. December 20, 2019 Order, p. 3. That testimony was not subject to the rigors of cross-examination, and Appellants did not have an opportunity to test or probe the veracity of his statements. Nonetheless, the court below subsequently found, based solely on his one-sided testimony, that the City had established that the *Lodge* exemptions applied, and that the records were therefore exempt from public disclosure. *Id.* Without additional analysis, the court below also granted the Motion to Quash. *Id.*, p. 8. This appeal followed.

SUMMARY OF ARGUMENT

After a Concord City Council meeting where the Council was presented with a line item in the budget concerning "covert communications equipment," Appellants requested limited documents from the City of Concord concerning the nature of such equipment, including

contracts or agreements between the City and the vendor providing that equipment. Appellants received 29 pages of heavily redacted documents which the City argued were exempt from disclosure under the Right-to-Know law. Appellants then brought this lawsuit.

After reviewing the unredacted documents and an affidavit from Concord Police Chief Osgood, the court below considered whether the documents were exempt from disclosure under three of the law enforcement exemptions expressed in the Freedom of Information Act and imported into our Right-to-Know law by this court in *Lodge v. Knowlton*, 118 N.H. 574, 577 (1978) and *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 583-84 (2006). The court below concluded provisionally that the documents were not exempt from disclosure. The court then, over Appellants' objections, granted the City's motion for an *ex parte* evidentiary hearing. After conducting that hearing where Chief Osgood testified without counsel for Appellants present, the court below determined that the City had successfully demonstrated that the documents were exempt from disclosure and upheld the redactions.

The court below erred in two ways. *First*, the court below erred on the merits when it concluded that the documents were exempt from disclosure. While Appellants have not had the opportunity to review the unredacted documents or Chief Osgood's sealed testimony, they do not believe the City has proven, as it must to avoid to disclosure, that disclosure of the agreement 1) would interfere with enforcement proceedings, 2) would disclose guidelines, techniques, and procedures, or 3) could risk the lives of officers. It is difficult to see, for example, how overruling all the redactions—including the choice of law provision governing the Agreement—could endanger the lives of officers or risk circumvention of the law. Moreover, for each test, the court below had previously concluded that the City had *not* met its burden based on the evidence it had initially

provided. It was *only after* the *ex parte* hearing when the court below concluded that the redactions were supportable.

Second, the court below erred by holding an *ex parte* evidentiary hearing without Appellants or their counsel present. Such a procedure is contrary to established norms in New Hampshire practice, was not supported by law or statute, and is fundamentally unfair and unreliable.

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

ARGUMENT

After the Concord City Council was presented with a budget that included a line item for "covert communications equipment," the City Manager refused to substantively answer a City Councilor's request for more information about the nature of the equipment. Appellants ACLU-NH and the *Concord Monitor* served Right-to-Know requests on the city requesting documents related to the covert communications equipment and contracts or agreements between the City and vendor providing the equipment. They did not request specific information as to how the City intended to use the equipment, or tactical decisions or plans for law enforcement operations, unlike the substantive surveillance information sought in *Montenegro v. City of Dover*, 162 N.H. 641 (2011) which this Court concluded was exempt from disclosure. In response, the City produced 29 pages of heavily redacted documents comprised of a License

and Service Agreement, a Privacy Policy, a Refund Policy, and an Amendment to the License & Services Agreement.

For example, the City refused to provide—and instead redacted from the documents—the name of the vendor, the type of equipment acquired, the type of information gathered by the equipment, the name of the person to contact with questions about the vendor's privacy policies, and the law governing the agreement. The documents also, troublingly, revealed a clause that "Confidential Information" could not be placed in court documents, including search warrants and affidavits, grand jury proceedings, or criminal or civil trials. App. 136. It also provides that "[i]n no event, unless compelled by a court, shall Licensee allow the defense in a criminal proceeding to see the [redacted] name or mark," *id*., which raises the troubling possibility that the City has contracted away its obligations to provide exculpatory evidence to a criminal defendant as is required by *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 139 N.H. 325 (1995).

The City has refused to inform the public, including its taxpayers who paid for this equipment, about the nature of the contracts into which it enters, and of the contents of standard legal clauses in such contracts. The City may also have created legal issues by entering into a non-disclosure agreement that would negatively impact its obligation to produce information to defendants in criminal cases. This case demonstrates the importance of the Right-to-Know law and shows why courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode v. N.H. Legis. Budget Assistant*, 148 N.H. 551, 554 (2002) (citation omitted).

The court below reviewed the unredacted documents and a conclusory affidavit submitted by Concord Police Chief Osgood, and initially found that the City had not sustained its burdens in demonstrating

that the unredacted records were exempt from disclosure. However, over Appellants' objection, it held an *ex parte* evidentiary hearing with Chief Osgood, and, on the basis of his sealed testimony alone, concluded that the City's redactions should be sustained.

On appeal, Appellants press two arguments. *First*, the court below erred on the merits when it concluded the records were exempt from disclosure under the law enforcement exemption discussed in *Lodge v. Knowlton*, 118 N.H. 574, 577 (1978) and *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 583-84 (2006). *Second*, the Court below erred when it held an unauthorized *ex parte* evidentiary hearing without Appellants or their counsel present, and when it credited the testimony that had not been subject to the rigors of cross-examination as the sole basis for sustaining the redactions.

I. The Redacted Information Is Not Exempt From Disclosure Under Any Law Enforcement Exemption

The court below erred when it sustained the City's redactions to the documents produced in response to the Right-to-Know requests. In response to the requests, the City produced 29 pages of redacted documents. Throughout the production, the name of the vendor is redacted, as is the vendor's entire signature block on the Amendment to License and Services Agreement. The governing law provision in the License and Services Agreement is also redacted. Other redactions appear throughout the documents concerning the nature of the equipment under contract, what type of information the vendor gathers, and how the vendor uses that information.

Initially, the court below reviewed the unredacted documents and Chief Osgood's affidavit. The court concluded that this affidavit contained "nothing more than conclusory statements of law regarding the potential ramifications of the Agreement's disclosure." October 25, 2019 Order, p.

7. As a result, it held that "[t]he City has failed to provide evidence to support that disclosure 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.* (quotations, citations, and alterations omitted).

Yet after holding an *ex parte* evidentiary hearing where it heard testimony from Chief Osgood, the court below revised its holdings. Solely based on this *ex parte* testimony, the court below declared the City had met its burden in sustaining the redactions, without addressing how individual redactions were supportable. As discussed *infra* in Section II, it was error for the court below to consider this *ex parte* evidence. As discussed in this section, the court below also erred on the merits when it concluded that the law enforcement exemptions to the Right-to-Know law supported the broad redactions to the agreement, including in particular 1) the name of the company with which the City entered into an agreement, 2) the nature of the equipment purchased, and 3) the governing law of the Agreement.

A. The Right-to-Know Law and the Law Enforcement Exemption

New Hampshire's Right-to-Know law under RSA ch. 91-A is designed to create transparency with respect to how the government interacts with its citizens. The preamble to the law states: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. 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." *Goode,* 148 N.H. at 553.

The Right-to-Know law has a firm basis in the New Hampshire Constitution. 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 and the press'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).

Consistent with these principles, courts resolve questions under RSA ch. 91-A "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode*, 148 N.H. at 554 (citation omitted); *see also Lambert v. Belknap County Convention*, 157 N.H. 375, 379 (2008). "[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." *Murray*, 154 N.H. at 581.

The "Right-to-Know Law does not explicitly address requests for police investigative files." *Id.* As a result, this Court adopted the law enforcement exemption from the federal Freedom of Information Act. *Id.*, *see also* 5 U.S.C. § 552(b)(7). Under the "*Murray* exemption, 'records or information compiled for law enforcement purposes, are exempt from

disclosure' but only to the extent that" the records falls within one of six categories taken from FOIA. *38 Endicott St. N. v. State Fire Marshall*, 163 N.H. 656, 661 (2012). "Thus, the *Murray* exemption requires a two-part inquiry. First, the entity seeking to avoid disclosure must establish that the requested materials were compiled for law enforcement purposes.[2] Second, if the entity meets this threshold requirement, it must then show that releasing the material would have one of the six enumerated adverse consequences." *Id.* (citations and quotations omitted).

The FOIA and *Murray* exemption categories are records or information compiled for law enforcement purposes whose production:

(A) Could reasonably be expected to interfere with enforcement proceedings;

(B) Would deprive a person of a right to a fair trial or an impartial adjudication;

(C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(D) Could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information of a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(E) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose

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[2] Appellants do not dispute on appeal that the records in question were compiled for law enforcement purposes.

guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(F) Could reasonably be expected to endanger the life or physical safety of an individual.

B. Production of the Records Would Not Interfere With Enforcement Proceedings – Exemption 7(A)

The court below found the unredacted documents exempt from disclosure under exemption 7(A), which exempts documents which "[c]ould reasonably be expected to interfere with enforcement proceedings." This was in error.

The key question in this inquiry is "whether revelation of the data will tend to obstruct, impede, or hinder enforcement proceedings." *Curran v. Dept. of Justice*, 813 F.2d 473, 474 (1st. Cir. 1987). To show that these adverse consequences would result from disclosure, the party resisting disclosure must show (1) that "enforcement proceedings are pending or reasonably anticipated" and (2) that "disclosure of the requested documents could reasonably be expected to interfere with those proceedings." *38 Endicott St. N., LLC*, 163 N.H. at 665 (quoting *Murray*, 154 N.H. at 582–83). This burden falls squarely on the government entity resisting disclosure. *See Murray*, 154 N.H. at 585 ("[i]t is not the petitioner's responsibility to clarify the respondents' vague categorizations."). Put another way, in order to rely on this exception, an agency must be able to point to a *specific* pending or contemplated proceeding. *See Badran v. U.S. Dep't. of Justice*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987) ("[i]f an agency could withhold information whenever it could imagine circumstances where the information might have some bearing on some hypothetical enforcement proceeding, the FOIA would be meaningless."). And the agency must be able to demonstrate that harm will come to the

investigation or enforcement of that specific proceeding to justify non-disclosure under this exception.

Chief Osgood's affidavit points to no specific enforcement proceedings, nor does it explain how producing any of the redacted information will place those enforcement proceedings at risk. The City has produced no evidence available to Appellants in support of its position other than conclusory assertions. For example, the affidavit simply says: "Disclosure of this Agreement in an unredacted format could reasonably be expected to interfere with pending enforcement proceedings, as it would disclose the Police Department's guidelines, techniques and procedures for law enforcement investigations, risk circumvention of the law, and endanger the life or physical safety of any individual." App. 156. Such conclusory assertions are clearly insufficient. To successfully invoke Exemption A, "the government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." *Campbell v. Department of Health & Human Servs.*, 682 F.2d 256, 257 (D.D.C. 1982).

Indeed, courts across the country have uniformly rejected invocation of the "law enforcement" exception based on conclusory, speculative assertions without particularized supporting facts. *See, e.g.*, *Jane Does v. King Cty.*, 366 P.3d 936, 945 (Wash. Ct. App. 2015) (ordering release of security surveillance footage of a shooting and rejecting conclusory assertion of interference with witnesses or law enforcement; holding that proponents of secrecy "were obligated 'to come forward with specific evidence of chilled witnesses or other evidence of impeded law enforcement'") (citation omitted); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (exception "require[s] specific information about the impact of the disclosures" on an enforcement proceeding); *id.* ("[I]t is not sufficient for an agency merely to state that

disclosure would" interfere with a proceeding; "it must rather demonstrate how disclosure" would do so); *Grasso v. I.R.S.*, 785 F.2d 70, 77 (3d Cir. 1986) ("[T]he government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." (citation omitted)); *Estate of Fortunato v. I.R.S.*, No. 06-6011 (AET), 2007 WL 4838567, at *4 (D.N.J. Nov. 30, 2007) (a "categorical indication of anticipated consequences of disclosure is clearly inadequate.") (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987)); *North v. Walsh*, 881 F.2d 1088 (D.C. Cir. 1989) (the government must prove release of records would "interfere in a palpable, particular way"). Here, the City has failed to meet its heavy burden.

Moreover, while New Hampshire courts have not provided a precise definition of "interfere" in this context, they have given a general sense of the severity of interference they consider sufficient to justify withholding information, stating that "disclosure of information may interfere with enforcement proceedings by '[resulting] in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation.'" *38 Endicott St.*, 163 N.H. at 667 (quoting *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998)). None of this criteria has been met here. Before it held the *ex parte* evidentiary hearing, the court below—after reviewing the unredacted documents and Chief Osgood's affidavit—held that "[t]he City has failed to provide evidence to support that disclosure of the agreement would interfere with enforcement proceedings." October 25, 2019 Order, p. 7 (citations, quotations, and alterations omitted). After hearing from Chief Osgood outside the presence of Appellants and their counsel, the court below changed its conclusion solely based on this *ex parte* testimony. While Appellants and their counsel have not been able to review the

unredacted documents and were not permitted to hear Chief Osgood's testimony (let alone participate in the hearing), they nonetheless believe that the court below erred in ruling that the City met its burden in demonstrating that the redactions—including the name of the company, type of services provided, and even the law governing the Agreement—would lead to the interference with law enforcement proceedings.

C. Production of the Documents Would Not Risk Circumvention of the Law – Exemption 7(E)

The court below also erred when it concluded that the unredacted documents were exempt from disclosure because they "[w]ould disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." *See* December 20, 2019 Order, p. 6 (discussing standard).

In *Montenegro*, 162 N.H. at 643, this Court considered the application of Exemption E to a request for "the precise locations of the City's surveillance equipment," "the recording capabilities for each piece of equipment," "the specific time periods each piece of equipment is operational," and "the retention time for any recordings." Significantly, the City had agreed to turn over "the general location and buildings" where the cameras were sited, "the number of cameras in and around each site," "the capability and intent of the Dover Police to monitor cameras from remote locations," the "intent of the Dover Police *not* to monitor the cameras on a regular basis," the "cost of the security equipment," "the names of the vendors installing the security equipment," the contracts for the installation, and when the equipment was installed. *Id.* at 643-44 (citations and quotations omitted). In other words, the City in *Montenegro* produced the very type of information sought in this case—namely, the general nature of

the technology in question, the name of the vendor, and the contract entered into in which the municipality agreed to pay the vendor with taxpayer dollars. The *Montenegro* Court ruled that the withheld information concerning how this surveillance equipment was being used "is of such substantive detail that it could reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection." *Id.* at 648.

Here—and critically—Petitioners are <u>*not*</u> asking for the level of "substantive detail" that could be expected to risk circumvention of the law described in *Montenegro*. Petitioners are only seeking a general description of the equipment, and—unlike in *Montenegro*—have deliberately not sought the item's specifications/capabilities and how the item will be used (which was deemed exempt from disclosure in *Montenegro*). In addition, and significantly, the City here is withholding the vendor name and contract despite the fact that this information was voluntarily produced in *Montenegro*. The redactions in the contract appear to black out the name of the vendor and general descriptions of the type of equipment the City has purchased, which is akin to the type of information voluntarily disclosed in *Montenegro*. Where an agency cannot demonstrate that release of records would cause circumvention, the records must be produced. *See*, *e.g.*, *Am. Civil Lib. Union Found. v. U.S. Dep't. Homel. Sec.*, 243 F. Supp. 3d 393, 402-405 (S.D.N.Y. 2017) (no showing that questions asked of unaccompanied children detained at U.S. border are exempt under this exception); *Families for Freedom v. U.S. Customs and Border Protection*, 797 F. Supp. 2d 375, 391-94 (S.D.N.Y. 2011) (rejecting agency's withholding of border arrest statistics because release would not pose risks of circumvention of the law). Simply put, the information sought in this case is far narrower in scope than the information that was at issue in

Montenegro. If this Court were to conclude that the merely descriptive information sought in this case is exempt, this Court would be broadening *Montenegro* considerably at the expense of government transparency concerning law enforcement activities.

Indeed, based upon Chief Osgood's affidavit—which simply said (and in conclusory fashion) that "[d]isclosure of the unredacted Agreement could tip off those persons who are subject to the pending investigations as to the strategy in implementing the specific techniques in the investigation," App. 156—and its review of the unredacted documents, the court below initially ruled that the City had not met its heavy burden in demonstrating that the records were exempt from public disclosure. Only after hearing from Chief Osgood in secret did the court below rule that the documents need not be produced. The court below erred when it ruled that this exemption applied because the Appellants here are only seeking the type of information that was voluntarily produced in *Montenegro*—i.e. the identity of the company contracting with the City and the general nature of its services. In sum, Appellants are ***not*** asking for the level of "substantive detail" that would prohibit individuals from circumventing the law.

D. Production of the Records Would Not Engager the Life or Safety of Individuals – Exemption 7(F)

Finally, the court below erred when it deemed that the records in question "[c]ould reasonably be expected to endanger the life or physical safety of an individual." *See* December 20, 2019 Order, p. 7 (discussing standard).

It is incumbent upon an agency seeking to withhold production under this exemption to demonstrate that there is a nexus between the production of the records and risk of harm. *See Banks v. U.S. Dep't. of Justice*, 700 F. Supp. 2d. 9, 18 (D.D.C. 2010) (ruling that agency's declaration did not explain 'whether there is some nexus between

disclosure and possible harm.'"). In addition, the agency must show an increased risk of danger to specific individuals. *See Am. Civil Lib. Union v. U.S. Dep't. of Defense*, 543 F.3d 59, 70-71 (2nd Cir. 2008) (rejecting government's contention that photographs showing abuse of detainees at Abu Ghraib facility could be exempted from disclosure because of increased risk to United States forces in Afghanistan generally: "the defendants do not identify a single person and say that the release of the Army photos could reasonably be expected to endanger that person's life or physical safety; the threat to any one person is far too speculative. . . It is plainly insufficient to claim that releasing documents could reasonably be expected to endanger some unspecified member of a group so fast as to encompass all United States troops. . ."*)* *overturned by statute as recognized by Am. Civil Lib. Union v. U.S. Dep't. of Defense*, 901 F.3d 125 (2nd Cir. 2018).

The City cannot demonstrate that producing the name of the company supplying this equipment or the nature of the data collected by the vender would pose an increased risk to the lives and safety of the operators of this equipment. As with the other exemptions considered, after reviewing the unredacted documents and Chief Osgood's affidavit—which said only that "[i]f the Agreement is released in an unredacted format, such disclosure could risk the lives of officers working the pending investigations and others who are the subject of the investigations," App. 157—the court below initially agreed that the City had not met its burden. When the court below reversed itself after hearing the *ex parte* evidence, it should not have concluded that overruling the redactions would put lives at risk. The court below did not explain, for example, how releasing the identity of a company that the City has contracted with—or even the governing law of the contract governing the arraignment—would put anybody's life or safety at risk.

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

The court below erred when it granted the City's motion for an *ex parte* evidentiary hearing on the purported risks arising from public disclosure of the unredacted documents. This is because there is no rule or statute authorizing a deviation from the standard requirement that all evidence and argument presented to a judge should be presented to opposing counsel as well. Moreover, conducting an *ex parte* evidentiary hearing is fundamentally unfair and unreliable, as it does not give Appellants or their counsel the opportunity to probe the testimony through cross-examination and highlight inconsistencies or shortcomings in the evidence.

It is axiomatic in the United States that *ex parte* proceedings are appropriate only in limited circumstances. Moreover, the statute authorizing this lawsuit, RSA 91-A:7, specifically contemplates that both parties to a Right-to-Know suit will have equal access to information: "Subject to objection by either party, all documents filed with the petition and any response thereto shall be considered as evidence by the court. *All documents submitted shall be provided to the opposing party prior to a hearing on the merits*." (emphasis added). In New Hampshire, *ex parte* proceedings are rare and typically authorized by statute or rule. *See, e.g.*, RSA 595-A:4 (procedure for search warrants); RSA 511-A:8 (procedure governing *ex parte* attachments); N.H. R. Crim. Pro. 3(b) (procedure for arrest warrants). The Rules of Civil Procedure contemplate that all written information presented to the court be done in the presence of all parties' counsel to ensure that legal disputes are adjudicated fully, fairly, and consistent with the adversarial process. *See* N.H. R. Super. Ct. 3(a) ("Copies of all pleadings filed and communications addressed to the court shall be furnished forthwith to all other counsel and any self-represented

party. All such pleadings and communications shall contain a statement of compliance herewith."). Similarly, Rule 2.9 of the Code of Judicial Conduct bars most *ex parte* communications on substantive matters between a judge and a litigant. *See* N.H. Sup. Ct. R. 38, Rule 2.9(A) (noting that "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter …."). As Comment 1 to this Rule makes clear, "[t]o the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge." The court below did not identify any rule or statute that authorized the *ex parte* evidentiary hearing, and the Appellants are unaware of any such authority.

This Court has also held that due process rights are implicated by *ex parte* proceedings. *See Asmussen v. Commissioner,*145 N.H. 578, 594 (2000) (due process requires a quasi-judicial officer to refrain from *ex parte* communications but does not prohibit communications which do not concern adjudicatory facts). Other courts have also held, in a variety of contexts, that *ex parte* proceedings raise questions of fundamental fairness and process. *See Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986)("It is a hallmark of our adversary system that we safeguard party access to the evidence. . . It is [] the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions."); *United States v. Thompson*, 827 F. 2d 1255, 1258-59 (9th Cir.1987) ("Absent such compelling justification, ex parte proceedings are anathema in our system of justice."); *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1070 (9th Cir. 1995) (holding that Due Process Clause prohibited use of ex parte material in legalization proceedings, and finding that "undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary

circumstances could support one-sided process"); *Lynn v. Regents of Univ. of California,* 656 F.2d 1337, 1346 (9th Cir. 1981) (finding court's ex parte review of plaintiff's tenure file for purposes of making factual determinations, rather than deciding whether file was privileged, "violated principles of due process upon which our judicial system depends to resolve disputes fairly and accurately."); *Guenther v. C.I.R.*, 939 F.2d 758, 760-61 (9th Cir. 1991) (holding Due Process barred tax court from allowing government to submit ex parte trial memorandum). For example, in *Vermont Nat'l Bank v. Taylor*, 122 N.H. 442, 446 (1982), this Court held that "the use of an ex parte capias writ to initiate collection or civil contempt proceedings before the debtor has been given an opportunity to appear voluntarily for a hearing concerning his reasons for nonpayment and his present ability to pay violates the defendant's procedural due process rights." *See also Appeal of Public Serv. Co.*, 122 N.H. 1062, 1074 (1982) ("Due process requires members of the PUC to refrain from *ex parte* communications if such an agency is not only to be, but also to appear to be, impartial.").

In granting the City's motion for an *ex parte* evidentiary hearing, the court below observed that, "[a]lthough rarely done, the Court may hold '*ex parte*, *in camera* review of records' requested pursuant to the Right-to-Know Law." October 25, 2019 Order, p. 11 (quoting *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 478 (1996)). But *Union Leader Corp.* noted that the procedure where a trial court reviews material *in camera* without the presence of counsel should be used "cautiously and rarely" and that such a procedure is appropriate when the records reviewed "may cause an invasion of privacy." *Id.; see also State v. Gagne*, 136 N.H. 101, 105-106 (1992) (where privacy interests of those speaking to authorities is at issue in a criminal case, *in camera* review of child protection records without counsel present is an appropriate "intermediate step between full disclosure

and total nondisclosure," but material "essential and reasonably necessary to the defense" must be disclosed to defendant).

Union Leader Corp. is distinguishable in two ways. *First, Union Leader Corp*. only approved of a procedure for the trial court to review records *in camera* without counsel where the production of such documents would constitute an invasion of privacy. Here, by contrast, the records at issue—namely, a government contract funded by taxpayer dollars—do not implicate any privacy interests. To the contrary, the City seeks to preclude disclosure under the law enforcement exemptions identified in *Murray*, 154 N.H. at 582—namely, that disclosure here could "reasonably be expected to interfere with enforcement proceedings, . . . would disclose techniques or procedures for law enforcement investigations or prosecutions, or [] could reasonably be expected to endanger the life or physical safety of any individual." An invasion of privacy—such as that prevented by *Union Leader Corp.*—occurs when the information is private to a person and where disclosure even to opposing counsel would infringe upon that person's right to privacy. By contrast, the harms from disclosure contemplated by the *Murray* line of cases occur when the information over which disclosure is sought makes its way to those who would use it to evade the law or endanger law enforcement officials. In other words, *Union Leader Corp.* permitted a trial court to "cautiously and rarely" review documents *without counsel present* because to do otherwise would invade the privacy of the person discussed in the records—something that is not at issue here. Moreover, had the court below heard testimony from the Chief of Police in a closed courtroom instead, with counsel for Appellants present and subject to a protective order, there would be no risk to law enforcement because there is no reason to believe that Appellants' counsel, who are officers of the court, would disregard their ethical obligations and share the information learned with those interested in subverting the law.

Second¸ Union Leader Corp. only permitted a court to review *records* without counsel present. It did not bless an *ex parte* procedure whereby testimony was submitted without the rigors of cross examination. As the United States Supreme Court has repeatedly explained, absent competent opposing counsel—who will ensure that the proceedings constitute a "crucible of meaningful adversarial testing"—there can be no guarantee that the adversarial system will function properly to produce just and reliable results. *United States v. Cronic*, 466 U.S. 648, 656 (1984). The very premise of our adversarial system is that partisan advocacy on both sides of a case will best promote the ultimate objective of justice. *Herring v. New York*, 422 U.S. 853, 862 (1975); *see also Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.") (internal quotations omitted). This Court has echoed those sentiments. *See In re Nathan L.*, 146 N.H. 614, 619 (2001) (noting that our system is premised on "an 'adversarial system of justice' and on the 'public policy of allowing trial counsel to conduct the case according to his or her own strategy'") (internal quotations omitted).

The Merrimack County Superior Court has also rejected a prior effort of a litigant to submit information and argument on an *ex parte* basis. In the 2014 litigation addressing the New Hampshire Department of Justice's suspension of then-Rockingham County Attorney James Reams, the DOJ submitted to the Superior Court *ex parte* a summary of its investigation of Attorney Reams. *See Rockingham County James Reams v. Attorney General Joseph A. Foster*, No. 217-2013-cv-00653, at pp. 5-6. n.3 (N.H. Super Ct., Merrimack Cty. Apr. 2, 2014) at App. 213-14. The *Reams* Superior Court rejected this *ex parte* filing, explaining that "the Attorney

General cited no authority for this proposition, and the Court did not find any authority that would authorize such a procedure." *Id*. It continued: "[T]he Court believe[s] that in camera review would not satisfy Attorney Reams' rights." *Id.* Accordingly, the Superior Court did not review the *ex parte* filing and returned it to the Department of Justice. *Id.* As in the *Reams* case, this Court should summarily reject any attempt to countenance the provision of evidence on an *ex parte* basis.

The procedure employed by the court below did not permit counsel for Appellants to cross-examine the representative of the Concord Police Department regarding the redactions to the underlying report. As a result, the procedure was not only unfair, but unreliable. *See* N.H. R. Evid. 611(a) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth); 611(b) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."). Consistent with the well-established traditions of our adversarial system, cross-examination is a critical tool to help ensure a just outcome. Cross-examination is, in the eyes of the law, "the greatest legal engine ever invented for the discovery of the truth." *California v. Green*, 399 U.S. 149, 158 (1970) (quotation omitted).

Cross examination is critical in this case. Concord Police Chief Bradley C. Osgood submitted an affidavit making conclusory assertions, without any actual evidence, that production of the withheld information (1) could reasonably be expected to interfere with pending enforcement proceedings, (2) could tip off persons who are the subject of pending investigations, (3) would risk circumvention of the law, and (4) could risk the lives of officers. *See* App. 156-57. Cross examination is necessary to test these speculative assertions as well as any information he provided at the *ex parte* hearing. As courts have repeatedly noted, conclusory

allegations like these are insufficient to satisfy a government agency's heavy burden to withheld information from the public. *See, e.g. Murray*, 154 N.H. at 585 ("[i]t is not the petitioner's responsibility to clarify the respondents' vague categorizations."); *Campbell v. Department of Health & Human Servs.*, 682 F.2d 256, 259 (D.D.C. 1982) ("the government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding"); *Jane Does v. King Cty.*, 366 P.3d 936, 945 (Wash. Ct. App. 2015) (ordering release of security surveillance footage of a shooting and rejecting conclusory assertion of interference with witnesses or law enforcement; holding that proponents of secrecy "were obligated 'to come forward with specific evidence of chilled witnesses or other evidence of impeded law enforcement'") (citation omitted); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (exception "require[s] specific information about the impact of the disclosures" on an enforcement proceeding); *id.* ("[I]t is not sufficient for an agency merely to state that disclosure would" interfere with a proceeding; "it must rather demonstrate how disclosure" would do so); *Grasso v. I.R.S.*, 785 F.2d 70, 77 (3d Cir. 1986) ("[T]he government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." (citation omitted)); *Estate of Fortunato v. I.R.S.*, No. 06-6011 (AET), 2007 WL 4838567, at *4 (D.N.J. Nov. 30, 2007) (a "categorical indication of anticipated consequences of disclosure is clearly inadequate.") (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987)); *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (the government must prove release of records would "interfere in a palpable, particular way").

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

Appellants request 15 minutes for oral argument. Attorney Henry R. Klementowicz will present for Appellants.

RULE 16(3)(i) CERTIFICATION

Counsel hereby certifies that the orders being appealed are in writing and are appended to this brief.

Respectfully submitted,

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

By and through their attorneys[3] affiliated with the American Civil Liberties Union of New Hampshire Foundation,

/s/ Henry R. Klementowicz
Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION
18 Low Avenue
Concord, NH 03301
Tel.: 603.333.2201
gilles@aclu-nh.org
henry@aclu-nh.org

Dated: July 17, 2020

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

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)–(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 8,135 words (including footnotes) from the "Question Presented" to the "Request for Oral Argument" sections of the brief.

/s/ Henry R. Klementowicz
Henry R. Klementowicz

CERTIFICATE OF SERVICE

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

Dated: July 17, 2020 */s/ Henry R. Klementowicz*
Henry R. Klementowicz

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

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

v.

CITY OF CONCORD

Docket No.: 217-2019-CV-00462

ORDER

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

I. Background

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

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

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

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

II. Standard

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

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

III. Analysis

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

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

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

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

a. Nature of the Agreement

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

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

b. Interference with Enforcement Proceedings Exemption

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

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

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

c. Techniques and Procedures Exemption

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

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

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

d. Danger to Life and Physical Safety Exemption

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

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

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

e. Reasonable Restriction

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

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

B. Ex Parte Review

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

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

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

IV. Conclusion

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

So Ordered.

DATED: 10/25/19

JOHN C. KISSINGER
Presiding Justice

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

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

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

v.

CITY OF CONCORD

Docket No.: 217-2019-CV-00462

ORDER

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

I. Background

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

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

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

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

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

I. Standard

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

II. Analysis

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

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

5 U.S.C. § 522(b)(7).

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

a. Interference with Enforcement Proceedings Exemption

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

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

b. Techniques and Procedures Exemption

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

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

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

c. Danger to Life and Physical Safety Exemption

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

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

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

III. Conclusion

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

So Ordered.

DATED: 12/20/19

JOHN C. KISSINGER
Presiding Justice

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