THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
SOUTHERN DISTRICT **No. 2018-CV-00537**

New Hampshire Center for Public Interest Journalism, et al

v.

New Hampshire Department of Justice

ORDER ON MOTION TO DISMISS

Currently before the Court is petitioners'[1] request under RSA 91-A to access an un-redacted version of the Exculpatory Evidence Schedule ("EES"). The New Hampshire Department of Justice ("DOJ") moves to dismiss, arguing the EES is confidential under RSA 105:13-b and/or exempt from disclosure under RSA 91-A. Petitioners object. The Court held a hearing on February 25, 2019. After review of the pleadings, arguments, and applicable law, the DOJ's motion to dismiss is DENIED.

Factual Background

The New Hampshire Department of Justice ("DOJ") currently maintains a list of police officers who have engaged in sustained misconduct, when such misconduct reflects negatively on their credibility or trustworthiness. Formerly known as the "Laurie List," the list is now called the EES. In its current formation, the EES is a spreadsheet containing five columns: (1) officer's name; (2) department employing said officer; (3) date of incident; (4) date of notification; and (5) category or type of behavior that

[1] Petitioners include: the New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Union Leader Corporation, Newspapers of New England, Inc., through its New Hampshire Properties, Seacoast Newspapers, Inc., Keene Publishing Corporation, and the American Civil Liberties Union of New Hampshire. (Pets.' Pet. p. 1.)

resulted in the officer being placed on the EES. (See Pets.' Appx. p. 1.)

Each petitioner filed a Chapter 91-A request with the DOJ seeking the most recent EES. On each occasion, the DOJ provided petitioners with a version of the EES that redacted any personal identifying information of the officers contained therein. Certain petitioners thereafter submitted 91-A requests seeking an un-redacted version of the EES. These requests excluded information concerning officers that had pending requests or applications before the DOJ in which they sought removal from the EES. The DOJ denied these requests, claiming such disclosures would constitute an invasion of privacy of the officers contained within the EES.

Analysis

As stated above, petitioners seek disclosure of the un-redacted version of the EES pursuant to New Hampshire's Right-to-Know Law. The DOJ objects, arguing: (1) the EES is confidential under RSA 105:13-b; (2) longstanding DOJ practice, coupled with legislative inaction, confirms disclosure of the EES is prohibited by RSA 105:13-b; (3) the EES is *per se* exempt from disclosure as it reflects records of police departments' internal personnel practices; and (4) disclosure of the EES, which constitutes a personnel file under RSA 91-A, would constitute an invasion of privacy of the officers included on the list. (See DOJ's Mot. Dimiss, p. 8–18.) Petitioners dispute these arguments.

I. RSA 105:13-b

As stated above, the DOJ first argues RSA 105:13-b forecloses the disclosure of the EES, as it "holds police personnel files strictly confidential with narrow exception." (Id. at 8.) RSA 105:13-b states, in relevant part:

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

At the outset, the Court is not convinced that RSA 105:13-b governs the petitioners' request. By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file "of a police officer who is serving as a witness in any criminal case." Under this statute, the mandated disclosure is to the defendant in that criminal case. Here, in contrast, there is no testifying officer, pending criminal case, or specific criminal defendant. Rather, petitioners seek disclosure of the EES to the general public. See Reid v. New Hampshire Attorney General, 169 N.H. 509, 528 (2016) ("'[P]ersonnel files' are not automatically exempt from disclosure." (citing RSA 91-A:5, IV)).

Even assuming RSA 105:13-b does apply, the Court finds the EES is not a personnel file within the meaning of the statute. The parties do not dispute that the EES

does not physically reside in any specific police officer's personnel file. Instead, the list is created and maintained by the DOJ for the purpose of identifying police officers "whose personnel files may contain potentially exculpatory evidence." (DOJ's Mot. Dismiss, p. 2.) Despite the foregoing, the DOJ argues that the EES should nevertheless be considered a protected police personnel file because the information contained therein is simultaneously contained in each officer's respective personnel file. The DOJ asserts that the relevant inquiry is whether the substantive information in the EES constitutes information taken from the police personnel files.

The petitioners counter, arguing RSA 105:13-b's protection is limited to documents contained in a police personnel file or, put another way, is limited to the physical police personnel files that are maintained by the respective police departments. The petitioners assert further that the EES, which is created and maintained by the Attorney General—who does not employ any of the police officers named in the EES—is an external document and does not fall within the scope of RSA 105:13-b's confidentiality.

In Reid, the New Hampshire Supreme Court defined "personnel" within the meaning of RSA 91-A:5's exemption for disclosures of internal personnel practices. 169 N.H. at 528. The Reid Court, relying on the United States Supreme Court's decision in Milner v. Department of Navy, 562 U.S. 562, 569 (2011), held that the term "'personnel,' when used as an adjective, . . . refers to human resources matters." Id. 522. The Supreme Court explained that the word "personnel" concerned "the conditions of employment in a governmental agency, including such matters as hiring and firing, work rules and discipline, compensation and benefits." Clay v. City of Dover, 169 N.H. 681,

686 (2017) (citing Reid, 169 N.H. at 522); see Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 606 (Mass. App. Ct. 2003) (interpreting "personnel file and information" to "include[], at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee . . . . [as] [t]hese constitute the core categories of personnel information that are useful in making employment decisions regarding an employee"). It then summarized that the term "personnel" related to employment. Reid, 169 N.H. at 523.

Applying the foregoing definition of "personnel," the Court finds the EES does not constitute a personnel file within the meaning of RSA 105:13-b. Here, the parties do not dispute that the officers on the EES are not employed by the DOJ, and the DOJ and the officers do not share any of the "usual attributes of an employer-employee relationship, such as the power to set the salary, hire or fire." Reid, 169 N.H. at 525. Moreover, the DOJ did not create and maintain the EES to discipline the officers contained therein, nor is there any evidence suggesting the DOJ has the authority to do so. Cf. Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (holding a report investigating employee harassment that "could have resulted in disciplinary action" constituted a "personnel practice" under RSA 91-A:5); Fenniman, 136 N.H. at 626 (holding "internal police investigatory files," which "document[ed] the procedures leading up to internal discipline," constituted personnel practices). Further, the DOJ concedes that it does not conduct any type of investigation or review—either independently or on behalf of the police departments—of the respective police personnel files of the officers on the EES. (DOJ's Mot. Dismiss, p. 9.) Therefore, because the officers listed on the EES do not

share an employee-employer relationship with the DOJ, and the EES lacks any type of employment or human resources function, the Court finds the EES is not a personnel file under RSA 105:13-b.

Although the DOJ attempts to argue that the information contained in the EES is "personnel information" and should be confidential under RSA 105:13-b, the Court is unpersuaded by this argument. "[The Court] interpret[s] legislative intent from the statute as written, and, therefore, [it] will not consider what the legislature might have said or add words that the legislature did not include." In re Kenick, 156 N.H. 356, 359 (2007). Here, there is no indication the legislature intended to protect information contained in a police personnel file, regardless of its location, when it enacted RSA 105:13-b. To the contrary, the Court finds a plain reading of the statute reflects that the legislature intended to limit RSA 105:13-b's confidentiality to the physical personnel file itself, as it expressly contemplates the personnel file being provided to the Court for *in camera* review and, after examination, the remainder of the file being returned to the police department that employs the police officer. There is no mention of personnel *information* in RSA 105:13-b, let alone an indication the legislature intended to make such information confidential. If the legislature had so intended, it could have used words to effectuate that intent, such as making confidential all "personnel information" or all information contained in a police personnel file.[2] Cf. Mass. Gen. Laws Ann. ch. 4 § 7

[2] Even assuming the EES contains "personnel information," the DOJ offers no authority supporting its contention that this fact would entitle it to confidentiality. In addressing a somewhat similar issue relating to Massachusetts's Right-to-Know law, the Massachusetts Appeal Court reached the opposite conclusion. In Worcester Telegram, 787 N.E.2d at 602, the Appeals Court, in distinguishing the applicability of the personnel file exemption to two separate documents that contained similar information, held "[t]he exemption for 'personnel file or information' is not dependent upon whether the same information may be available, or discernible, through alternative sources . . . . Rather, the nature and character of the document determines whether it is 'personnel file or information.'" 787 N.E.2d at 609. It

(exempting from public records "personnel . . . files or *information*") (emphasis added).

II. Administrative Gloss

The DOJ next argues the Court should defer to its interpretation of RSA 105:13-b because it has independently interpreted that statute for approximately fifteen years to mean that the EES/Laurie List was confidential. The Court disagrees with the DOJ that it is entitled to such deference.

"The doctrine of administrative gloss is a rule of statutory construction." In re Kalar, 152 N.H. 314, 321 (2011). "Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." Id. "If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate the legislative intent." Id. "Lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine." Id. at 322.

Resolution of the parties' dispute regarding RSA 105:13-b turns on the definition of "personnel file," and whether it includes the EES. Although the parties disagree as to the scope of RSA 105:13-b's confidentiality, neither party contends the statute as a whole is ambiguous, and the Court finds it is not. Therefore, the Court finds the administrative gloss doctrine is inapplicable. See State v. Priceline.com, Inc., No. 2017-0674 (N.H. Mar. 8, 2019) ("[T]he administrative gloss doctrine applies only when a statutory provision is ambiguous."); Heron Cove Ass'n v. DVMD Holdings, Inc., 146 N.H.

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concluded that "the same information [could] simultaneously be contained in a public record and in exempt 'personnel file or information.'" Id.

211, 215 (2001) ("If the language is plain and unambiguous, [the Court] need not look beyond the statute for further indications of the legislative intent.").[3]

Although the DOJ relies on Petition of Warden, New Hampshire State Prison (State v. Roberts), 168 N.H. 9 (2015), in asserting its position that the Court should grant deference to its interpretation of RSA 105:13-b, the Court finds that case distinguishable. In Petition of Warden, the issue before the Supreme Court was whether the Adult Parole Board ("APB") had the authority to parole an inmate from one sentence to a consecutive sentence, while still imposing the time remaining/conditions of the first sentence after the inmate had completed the second sentence. 168 N.H. at 9. The APB had "developed an intermediate step in the traditional parole process that allow[ed] prisoners to parole into a consecutive sentence upon completion of the minimum of a prior sentence." Id. "The effect of this practice [was] to restructure the order of sentences by allowing a prisoner to serve time on a consecutive sentence while continuing to serve time on the initial sentence, and thus potentially earn conditional release into the community more quickly." Id.

The Supreme Court first noted that "[t]here is no right to parole in New Hampshire," as "the grant of parole rest[ed] squarely within the discretion of the APB." Id.; see RSA 651-A. It then held that although the APB's "intermediate step" was neither expressly permitted nor prohibited under RSA 651-A, "given the APB's longstanding history of exercising this power, [it] agree[d] with the State that the legitimacy of [that] practice [was] now beyond question." Id.

[3] The Court also notes that the House of Representatives has introduced and passed a bill, HB 155, that would expressly make the EES a public record under RSA 91-A. HB 155 was scheduled to be heard and considered by the Senate Judiciary Committee on April 11, 2019. See Senate Calendar 17A.

Unlike Petition of Warden, where RSA 651-A granted the APB with wide discretion in granting or denying parole, here, RSA 105:13-b does not give the DOJ any discretion in determining what information is to be kept confidential. In fact, RSA 105:13-b does not grant the DOJ any discretion at all. Rather, it mandates disclosure of exculpatory evidence in a police personnel file if that officer is testifying in a criminal case, and lays out a step-by-step process to determine whether evidence in a police personnel file is exculpatory, if such a determination cannot be made by the State. See RSA 105:13-b.

Accordingly, because RSA 105:13-b is clear and unambiguous and does not grant the State any discretion in its administration, the Court declines to give deference to the DOJ's interpretation of the statute under the administrative gloss doctrine.

III. RSA 91-A

The DOJ also argues the EES is categorically exempt from disclosure under RSA 91-A:5 as an "internal personnel practice." See Fenniman, 136 N.H. at 624. Petitioners dispute the EES is exempt under 91-A:5, arguing it is neither an "internal" nor a "personnel" document.

"The purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003); see RSA 91-A:1 ("Openness in the conduct of public business is essential to a democratic society."). Thus, the law "furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire Right to Life v.

Director, New Hampshire Charitable Trusts Unit, 169 N.H. 95, 103 (2016). "Although the statute does not provide for unrestricted access to public records, [the Court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. "As a result, [the Court] broadly construe[s] provisions favoring disclosure and interpret[s] exemptions restrictively." Id. "When 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 towards nondisclosure." Id.

With respect to the "internal personnel practices" exemption, the Supreme Court has noted that the terms "internal" and "personnel" modify the word "practices," "thereby circumscribing the provision's scope." Reid, 169 N.H. at 522. Looking to guidance from federal case law analyzing the Freedom of Information Act, the Supreme Court has determined that the term "personnel" "general[ly] . . . relates to employment," specifically "rules and practices dealing with employee relations or human resources . . . [including] such matters as hiring and firing, work rules and discipline, compensation and benefits." Id. at 523. The Court also defined "internal" as "existing or situated within the limits . . . of something." Id. (citing Webster's Third New International Dictionary 1180 (unabridged ed. 2002)). Therefore, "[e]mploying the foregoing definitions, [the Supreme Court] construe[d] 'internal personnel practices' to mean practices that 'exist[] or [are] situated within the limits' of employment." Id. Personnel practices are also considered "internal" if carried out by someone other than the employer if it is done on the employer's behalf. Id. (citing Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (finding police internal affairs investigation report authored by outside

investigators that were hired by the precinct constituted "internal personnel practices")).

For the same reasons the Court found the EES was not a personnel file within the meaning of RSA 105:13-b, it finds the EES is not a personnel practice within the meaning of RSA 91-A:5. Moreover, the Court finds the EES is not an "internal" document. As stated previously, the EES is created and maintained by the Attorney General, who does not employ any of the police officers contained therein. Unlike the outside investigators in Hounsell, who were hired by the police department to perform an internal investigation of one of its employees, 169 N.H. at 521, here, the Attorney General was not hired by any individual police department to generate the EES. Rather, the "singular purpose" of the EES is to alert prosecutors "to the existence of exculpatory evidence as to a particular defendant's criminal matter." (DOJ's Mot. Dismiss, p. 9.) Thus, given that the creation of the list did not arise out of an agency relationship between the Attorney General and any police department, and the character and purpose of the list does not relate to or occur within the limits of the officers' employment, the Court finds it is not an internal personnel practice within the meaning of RSA 91-A:5.

Finally the DOJ argues that, in the alternative, even if the EES does not fall within the internal personnel practice exemption, it is still a "personnel file" under RSA 91-A:5 and it should not be disclosed because its disclosure would amount to an invasion of privacy of the officers contained therein. For the reasons previously discussed in this order, the Court finds the EES is not a "personnel file" within the meaning of RSA 91-A:5. As a result, the Court need not conduct a 91-A balancing test to determine

whether an invasion of privacy would result from disclosure of the EES.[4]

Accordingly, because the EES is not confidential under RSA 105:13-b and not exempt under RSA 91-A, the DOJ's motion to dismiss is DENIED.

So ordered.

Date: April 23, 2019

Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/24/2019

[4] If a document or file is considered a "personnel file" under RSA 91-A, the Court then must determine whether disclosure of the material "would constitute an invasion of privacy," which is done by applying the "customary balancing test" set forth in Reid. 169 N.H. at 528.