The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

STATE OF NEW HAMPSHIRE

v.

MICHAEL VERROCCHI

NO. 218-2020-CR-00077

ORDER ON MOTION TO RECONSIDER

The defendant Michael Verrocchi is charged with one count of Reckless Conduct and one count of Disobeying a Police Officer arising out of an incident occurring on November 12, 2012. On January 23, 2020 the State filed an arrest warrant and supporting affidavit to support probable cause for those charges. See Doc. 6 (Affidavit); Doc. 7 (Arrest Warrant). Thereafter, the State filed a motion to unseal those documents, see Doc. 52, and the defendant objected, see Doc. 54. In addition, the American Civil Liberties Union of New Hampshire ("ACLU") and the Union Leader ("UL") filed a joint memorandum in support of the State's motion to unseal.[1] See Doc. 60. Following a February 9, 2021 hearing, the Court partially granted the State's motion. See Doc. 70 (Omnibus Order). The ACLU and the UL now move the Court to reconsider its decision to maintain paragraphs 12 through 15 of the affidavit under seal. See Doc. 72. For the reasons that follow, the motion to reconsider is **GRANTED IN PART** and **DENIED IN PART**.

[1] The ACLU and UL also requested to participate in the hearing. See Doc. 60. The Court granted this request and allowed argument from the parties following the State and the defendant's respective presentations.

Analysis

As noted, the Court partially granted the State's motion to unseal, but left paragraphs 12–15 of the affidavit sealed on the grounds that such paragraphs were exempt from disclosure as "personnel files" under RSA 91-A:5, IV. See Doc. 70. The ACLU and UL seek reconsideration of the Court's decision to leave those four paragraphs sealed. See generally Doc. 72. In support of this request, they first argue the Court should have applied the standard for public access to court records articulated in Petition of Keene Sentinel, 136 N.H. 121, 128 (1992). Doc. 72 § I. In the alternative, they argue that if the Court finds the motion to unseal is governed by New Hampshire's Right-to-Know law (RSA chapter 91-A) and related jurisprudence, the Court failed to and should conduct the balancing test articulated in Seacoast Newspapers. Id. § II. In addition, the ACLU and UL renew their objection to being precluded from a certain portion of the February 9, 2021 hearing. Id. § III.

A party moving for reconsideration shall "state with particular clarity, points of law or fact that the court has overlooked or misapprehended and [the motion] shall contain such argument in support of the motion as the movant desires to present." N.H. R. Crim. P. 43(a). Given the unique factual underpinning of this matter, and the fact that additional information regarding this matter has become public since the Court issued its Omnibus Order, see Doc. 70, the Court finds it appropriate to reconsider that Order.

As an initial matter, the Court notes that the RSA 91-A test for disclosure and the test articulated in Petition of Keene Sentinel both involve balancing public and private interests. Compare Reid v. New Hampshire Att'y Gen., 169 N.H. 509, 527 (2016) and Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325, 338 (2020) with

Petition of Keene Sentinel, 136 N.H. at 128. Despite the similarities of these two balancing tests, the parties appear to agree, and it appears to the Court, that the Keene Sentinel test requires a heightened showing by the party opposing disclosure. See 136 N.H. at 128 (requiring the party opposing disclosure to "demonstrate with specificity . . . a compelling interest, which outweighs the public's right of access to those records"); see also Doc. 54 ¶ 5; Doc. 72 § I. For the reasons set forth below, the Court concludes that the defendant cannot satisfy his burden to defeat disclosure under the more favorable standard applicable to RSA 91-A requests. Accordingly, the Court need not determine whether the more stringent standard set forth in Keene Sentinel applies in this context.

Together with Part I, Article 8 of the New Hampshire Constitution, the Right-to-Know Law is the crown jewel of government transparency in New Hampshire. Part I, Article 8 provides:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

The preamble of the Right-to-Know Law contains a similar principle, stating, in part, that "[t]he 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 purpose of the Right-to-Know Law is to "provide the utmost information to the public about what its government is up to." Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325, 338 (2020) (quoting Goode v. N.H. Legis. Budget Assistant, 148 N.H. 551, 555 (2002))).

Accordingly, the statute furthers "our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Id. (quoting Clay v. city of Dover, 169 N.H. 681, 685 (2017)). The Court therefore resolve questions regarding the Right-to-Know Law with a view to providing the utmost information, broadly construing its provisions in favor of disclosure and interpreting its exemptions restrictively. Seacoast Newspapers, 172 N.H. at 338. Thus, the party resisting disclosure "bears a heavy burden to shift the balance toward non-disclosure." Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996).

RSA 91-A:5, IV exempts from disclosure certain types of information, including personnel files. However, personnel files are not per se exempt from disclosure. Reid, 169 N.H. at 527. Rather, if the information is "sufficiently private," that privacy interest must be "balanced against the public's interest in disclosure." Id. The Supreme Court has delineated a two-part test to determine whether information falls within the exemption provision contained in RSA 91-A:5, IV. See Seacoast Newspapers, 172 N.H. at 338. First, the Court looks to whether the material can be considered a "personnel file" or part of a "personnel file." Reid, 169 N.H. at 527. If the material can be considered as such, the Court then looks to whether the disclosure of such material would constitute an invasion of privacy. Id.

To determine whether the disclosure of certain material would constitute an invasion of privacy, the Court engages in a three-step balancing test analysis. Id. at 528. First, the Court evaluates whether there is a privacy interest at stake that would be invaded by the disclosure. Id. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure. Id. Second, the Court assesses the public's interest in

disclosure. Id. at 529. Disclosure of the requested information should inform the public about the conduct and activities of its government. Id. Finally, the Court balances the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. Id. (citing Lambert v. Belknap County Convention, 157 N.H. 375, 382–83 (2008)). The determination of whether certain information is exempt from disclosure per the balancing test recently reiterated in Seacoast Newspapers, is made on a case-by-case basis. See 172 N.H. at 338; Reid, 169 N.H. at 529.

To begin, and as the Court found in its original omnibus Order, the material at issue in paragraphs 12–15 constitutes personnel information which would be found within an individual's personnel file. See Seacoast Newspapers, 172 N.H. at 339–40 ("[R]ecords documenting the history or performance of a particular employee fall within the exemption for personnel files.") As the material at issue can be considered part of a "personnel file", the Court must determine whether the disclosure of such information constitutes an invasion of privacy. See Reid, 169 N.H. at 527. Looking first to whether there is a privacy interest at stake in the material at issue, the defendant asserts that he has a "constitutional right to privacy . . . to live free from governmental intrusion into private and personal information" and that he has a right to a fair trial which would be prejudiced by the release of this information. See Docs. 54, 63.

While the Court agrees that the defendant generally has a privacy interest in his personal affairs, including but not limited to off-duty actions not performed under color of law, see Union Leader Corporation, et al v. Town of Salem, Rockingham Cnty. Super. Ct., 218-2018-CV-01406 (Jan. 21, 2021) (Doc. 64 ("Final Order on Remand")), in this

case the defendant's privacy interest is weakened by prior disclosures of the material at issue. See e.g., Reid, 169 N.H. at 529–30 (noting that, in determining whether an individual has a privacy interest in certain material, the trial court should consider whether the disclosure would subject an individual to "embarrassment, harassment, disgrace, loss of employment or friends"). Specifically, the defendant's privacy interest has been attenuated by: (1) the fact that most, if not all, of the information contained in paragraphs 13–15 was previously disclosed at the defendant's public police certification hearing, see Doc. 64 ¶ (g); and (2) the recent re-release[2] of the Kroll Report stemming from the Town of Salem Police Audit which shows the fact of the defendant's employment consequences as a result of the off-duty conduct at issue. See Town of Salem Police Audit Kroll Report, at 41.[3] As any privacy interest in the material at issue is attenuated, at best, the scales of the Right-to-Know balancing test favor disclosure of paragraphs 12–15 of the probable cause affidavit. See Union Leader Corp. v. City of Nashua, 141 N.H. 473, 478 (1996) ("The balance between the public's interest in disclosure and a private citizen's interest in privacy will never be easy to strike."). For the same reasons, the Court finds the defendant would not be prejudiced by the Court's decision to unseal the affidavit in its entirety because the information is already in the public domain.

Accordingly, the Court **GRANTS** the State's Motion to Unseal the Affidavit in its entirety. See Doc. 52. The Court clarifies that its finding as to the defendant's

[2] The Kroll report was re-released in a less-redacted form following and pursuant to this Court's (Schulman, J.) Final Order on Remand in Union Leader. See generally, Doc. 64 in docket number 218-2018-CV-01406.

[3] The report can be accessed at: **Error! Hyperlink reference not valid.**https://www.townofsalemnh.org/sites/g/files/vyhlif3761/f/news/scanned_court_ordered_ia_report.pdf.

dissipated privacy interest in the material contained within his personnel file is limited to this unique factual scenario in which the material at issue has already been disclosed in other ways. This holding does not have broader application.

Lastly, to the extent the ACLU and the UL move to reconsider their exclusion from a portion of the February 9, 2021 hearing, that aspect of their motion to reconsider is **DENIED** because the Court finds the ACLU and UL have made an insufficient showing in this regard. See N.H. R. Crim. P. 43(a).

Conclusion

For the foregoing reasons, the above-described motion to reconsider is **GRANTED IN PART** and **DENIED IN PART**, consistent with the above.

Date: June 17, 2021

Daniel St. Hilaire
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/25/2021