The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

v.

SALEM POLICE DEPARTMENT

NO. 218-2021-CV-00026

ORDER ON PETITION FOR ACCESS TO TOWN OF SALEM RECORDS

The American Civil Liberties Union of New Hampshire ("ACLU") brought the instant petition seeking access to public records under New Hampshire's Right-to-Know law (RSA 91-A). See Doc. 1 (Petition). Presently before the Court is the parties' assented-to motion for an *in camera* review of the records sought. See Doc. 18. (Mot. *In Camera* Review). The Court held a hearing on the motion on June 2, 2021. For the reasons that follow, the petition for access to public records is **GRANTED.**

In December 2020, the ACLU submitted a request to the Town of Salem Police Department (the "Town of Salem") for "[a]ll records, investigatory files, and disciplinary records concerning the actions of suspended Salem police sgt. Michael Verrocchi [("Verrocchi")] on November 10, 2012 that led to his criminal prosecution, and that led to a sustained finding of misconduct with a one-day suspension without pay issued as discipline." See Doc. 1 ¶ 25. The Town of Salem did not disclose the records on the ground that such disclosure "could reasonably be expected to interfere with an enforcement proceeding", thus invoking Murray Exemption 7(A). See id.; see generally Murray v. N.H. Div. of State Police, Special Investigation Unit, 154 N.H. 579 (2006).

The Town of Salem further reasoned that disclosure "would deprive [Verrocchi] of a right to a fair or impartial adjudication", thus invoking Murray Exemption 7(B). See Doc. 1 ¶ 25. Verrocchi, who is the defendant in a related criminal matter, intervened and objected to disclosure of the information sought by the ACLU. See Doc. 13 (Mot. Intervene). Verrocchi argues against disclosure on three grounds: first, like the Town of Salem, that Murray exemptions 7(A) and 7(B) preclude disclosure; and second and relatedly third, that the information sought is confidential information and contained within a personnel file and thus exempt from disclosure under RSA 91-A:5, IV. See generally id. The Court will address the parties' arguments in turn.

Together with Part I, Article 8 of the New Hampshire Constitution, the Right-to-Know Law (RSA 91-A) 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 resolves 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).

However, the New Hampshire Supreme Court has recognized that RSA 91-A "does not explicitly address requests for police investigative files." Murray, 154 N.H. at 582 (citing Lodge v. Knowlton, 118 N.H. 574, 576 (1978) (adopting "the six-prong test under [the Freedom of Information Act (FOIA)] for evaluating requests for access to police investigative files)). Accordingly, the Supreme Court adopted the test embodied in exemptions of the FOIA (5 U.S.C. § 552(b)(7)) to resolve requests for access to police investigative files. 38 Endicott St. N., LLC v. State Fire Marshal, N.H. Div. of Fire Safety, 163 N.H. 656, 661 (2012). Commonly referred to as the Murray exemptions, that test provides that "records or information compiled for law enforcement purposes" are exempt from disclosure to the extent the production of such 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

Id.; see also Murray, 154 N.H. at 582. The Supreme Court explained that "the Murray exemption[s] require[ ] a two-part inquiry." 38 Endicott St., 163 N.H. at 661. First, the entity seeking to avoid disclosure must establish that the requested materials were "compiled for law enforcement purposes." Id. (quoting Montenegro v. City of Dover, 162

N.H. 641, 646 (2011)). 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. 38 Endicott St., 163 N.H. at 661.

Assuming without deciding the first prong of the Murray exemptions—that the records or information at issue were "compiled for law enforcement purposes"—the Court finds that neither exemption (A) or (B) applies here. Beginning with exemption (A), "[t]o show that this adverse consequence would result from disclosure, an agency must 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.'" 38 Endicott St., 163 N.H. at 665–66. Although it appears to the Court that enforcement proceedings are pending, see State v. Verrocchi, Docket No. 218-2020-CR-00077, the Court cannot say that either the Town of Salem or Verrocchi have met their burden to demonstrate disclosure of this information can be "reasonably expected to interfere with those proceedings." 38 Endicott St., 163 N.H. at 665–66; Union Leader Corp., 141 N.H. at 476. Specifically, due to the unique nature of this and related matters, as well as other investigations arising out of a singular incident occurring in November 2012, the information now sought was previously disclosed to the public. See e.g., State v. Verrocchi, Rockingham Cnty. Super. Ct., No. 218-2020-CR-00077 (Jun. 17, 2021) (Doc. 79 (Order on Mot. Reconsider)) (St. Hilaire, J.); 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)) (Schulman, J.). As this information is duplicative of information already within the public sphere, the Court finds Murray exemption (A) does not apply here.

Turning to Murray exemption (B), the New Hampshire Supreme Court has yet to examine this exemption. Accordingly, the Court looks to federal case law for guidance. See Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325, 338 (2020) ("[W]e often look to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions"). "Exemption (b)(7)(5) is rarely invoked. 3 James T. O'Reilly, Fed. Info. Discl. § 17:55 (2021); see also Washington Post Co. v. U.S. Dep't of Just., 863 F.2d 96, 101 (D.C. Cir. 1988) ("The few cases that have addressed (7)(B) as a ground for withholding documents have rejected it as inapplicable because one or another threshold element was not established."). However, the D.C. Circuit has delineated a two-part test to determine the applicability of exemption (7)(B). "[T]o withstand a challenge to the applicability of (7)(B) the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings. Washington Post Co., 863 F.2d at 102. "Congress made the threshold higher for (7)(B) than for most of the other exemptions concerning law enforcement material. Whereas (7)(A), (C), (D) and (F) permit records to be withheld if release 'could reasonably be expected to' cause a particular evil, (7)(B) requires a showing that the release 'would' deprive a person of fair adjudication." Washington Post Co., 863 F.2d at 102 (citing 5 U.S.C. § 552(b)(7)(A)–(F)).

Upon review, the Court finds Murray exemption (B) inapplicable. Although the first prong of the applicable test is satisfied, the second is not. To begin, jury selection in the related matter of State v. Verrocchi, Docket No. 218-2020-CR-00077, is set to

occur in September 2021. Thus, that adjudication is both pending and truly imminent. See Washington Post Co., 863 F.2d at 102. As to the second prong, however, the release of the information sought is not certain to deprive Verrocchi of a fair adjudication in that pending criminal matter. See id. It has been recognized that "harm to an individual's right to a fair trial could result from dissemination of information about the alleged offense." Supra § 17:55 (emphasis added). However, the sparse case law on this exemption suggests there exist a "narrow range of situations to which (7)(B) applies." Washington Post Co., 863 F.2d at 102.

Here, Verrocchi suggests that because New Hampshire is a small state, jurors will have this information, if released, in the back of their minds during his upcoming trial. Verrocchi contends this is a bell that cannot be "unrung" and that this potential issue cannot be cured through voir dire. The Court disagrees. As the Court (Howard, J.) recently held, "[t]o the extent that pretrial publicity leads to any potential juror prejudice, voir dire of the jurors during selection is a sufficient safeguard." State v. Letendre, Strafford Cnty. Super. Ct., No. 219-2020-CR-00792, at *9 (Feb. 4, 2021) (citing State v. Anderson Rockingham Cnty. Super. Ct., No. 218-2018-CR-00241 (Aug. 31, 2018) (Schulman, J.)). Moreover, as the Court noted above, this information is already within the public sphere—a fact which is likely to dissipate the effect of any additional publicity on the subsequent adjudication. Finally, Verrocchi's contentions as to how the disclosure of this information may affect his criminal adjudication are speculative. See Letendre, No. 219-2020-CR-00792, at *8; see also Washington Post Co., 863 F.2d at 101 (noting that "merely conclusory statements" are insufficient to demonstrate the applicability of exemption 7(B)). Thus, the Court finds neither

Verrocchi nor the Town of Salem has demonstrated a sufficient risk of actual prejudice to Verrocchi's rights to a fair and impartial jury or adjudication. See id. Accordingly, the Court finds Murray exemption 7(B) also does not apply here.

To the extent the information now sought also includes Garrity statements which were not previously within the public sphere, those statements concern the same underlying information and facts already disclosed. The Court concludes that public access to the purported Garrity statements will not interfere with the pending criminal proceedings. See 38 Endicott St., 163 N.H. at 665–66. Indeed, the exclusive purpose of the Garrity jurisprudence is to preclude the use of a public employee's "compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." State v. Burris, 170 N.H. 802, 811 (2018) (emphasis added). The disclosure of the statements at issue has no effect on their admissibility in State v. Verrocchi, Docket No. 218-2020-CV-00026. Nor does the release of the information sought here dilute Verrocchi's Garrity protections in the related adjudication. Based on the foregoing, the Court disagrees with Verrocchi's suggestion that public disclosure of such information will remove any possibility of a fair trial.

The Court now turns to the parties' arguments regarding whether the information and records sought are subject to disclosure as either confidential information or information within personnel files under RSA 91-A:5. RSA 91-A:5, IV exempts from disclosure certain types of information, including confidential information and information within personnel files. However, neither type of information is per se exempt from disclosure. Reid v. New Hampshire Att'y Gen., 169 N.H. 509, 527 (2016). Rather, if the information is "sufficiently private," that privacy interest must be "balanced

Reid, 169 N.H. at 527; Pro. Firefighters, 159 N.H. at 707. Thus, the Court turns to the balancing test. With respect to the information sought which does not constitute purported Garrity statements, the Court previously determined that Verrocchi's privacy interest in such information has been weakened by prior disclosures. See State v. Verrocchi, No. 218-2020-CR-00077 (Order on Mot. Reconsider); see also Union Leader Corporation, 218-2018-CV-01406 (Final Order on Remand) (Schulman, J.). The Court, however, also acknowledged Verrocchi "generally has a privacy interest in his personal affairs, including but not limited to off-duty actions not performed under color of law." Id. The Court reiterates this privacy interest as it relates to the information sought here, but reaches the same conclusion in light of the duplicative nature of the information. In other words, Verrocchi has a privacy interest in this information, but that interest has been weakened by prior disclosures. See id.; see also Union Leader Corp., 141 N.H. at 478 ("The balance between the public's interest in disclosure and a private citizen's interest in privacy will never be easy to strike."). As a result, the scales of the Right-to-Know balancing test favor disclosure of the information sought which does not include purported Garrity statements. See Reid, 169 N.H. at 529–30.

As it relates to the purported Garrity statements contained within the information sought, the Court finds that the balancing test likewise favors disclosure. See Reid, 169 N.H. at 528–29. Again, the Court acknowledges Verrocchi's privacy interest not only in the facts underlying his Garrity statements but also the Garrity statements themselves. However, that interest is attenuated, at best, based on this information already being within the public sphere. Moreover, and as the Court acknowledged above, the classification of these purported Garrity statements as such does not render them

exempt from disclosure in a non-criminal context. Nor does the disclosure of those statements here have any effect on the inadmissibility of those statements in the criminal proceeding. See supra at 7. Thus, the scales of the balancing test also favor disclosure of that portion of the information sought which contains purported Garrity statements. See Reid, 169 N.H. at 529–30.

Consistent with the foregoing, the ACLU's request for release of the above-described records is **GRANTED**.

Before concluding, the Court must address the ACLU's request for attorney's fees as provided in RSA 91-A:8. Pursuant to that provision, an agency "shall be liable for reasonable attorney's fees and costs incurred" if: (1) the agency violated any provision of RSA chapter 91-A; (2) the lawsuit "was necessary in order to make the information available"; and (3) the agency knew or should have known that the conduct engaged in was a violation of RSA chapter 91-A. 38 Endicott St., 163 N.H. at 669; RSA 91-A:8, I. Here, the Court finds no evidence the Town of Salem knew or should have known its conduct violated the statute. Accordingly, the ACLU is not entitled to attorney's fees pursuant to RSA 91-A:8, and their request for those fees is **DENIED**.

Conclusion

For the reasons set forth above, the ACLU's petition for release of certain records in the Town of Salem's possession, as described in the petition, see Doc. 1, is **GRANTED**, but the ACLU's related request for an award of fees is **DENIED**.

Date: July 16, 2021

Judge Daniel I. St. Hilaire

10 Clerk's Notice of Decision Document Sent to Parties on 07/20/2021