

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Estate of Hagen Esty-Lennon

v.

The State of New Hampshire

No. 217-2015-CV-376

ORDER

On August 5, 2015, the petitioner, the Estate of Hagen Esty-Lennon, filed an emergency petition seeking to enjoin the State of New Hampshire from disclosing four videos relating to the death of Hagen Esty-Lennon (“the decedent”). The Court then granted several parties the right to intervene, including the Haverhill Police Department, the *Valley News*, and the mother of the decedent’s minor children. Following a hearing on August 6, 2015, and review of the videos *in camera*, the Court granted the petitioner’s motion for a preliminary injunction enjoining the release of the videos and stayed its final ruling until the parties more thoroughly briefed the Court on their respective positions. Subsequently, Newspapers of New Hampshire, Inc., substituted for the *Valley News*, moved for post-decision relief. Specifically, Newspapers of New Hampshire, Inc. requests the New Hampshire Attorney General and the Town of Haverhill provide (1) any written transcripts they may have regarding the four videos at issue, (2) the audio of the police officers’ body cameras, and (3) a summary of the images contained in the four videos. Additionally, the Court granted Union Leader, Corp., WMUR-TV, and IndepthNH.org the right to intervene and request access to the videos at issue.

I

As set forth in the Court's order of August 7, 2015, the following facts are pertinent in addressing the petitioner's request. Officers Jarvis and Collins of the Haverhill Police Department shot and fatally wounded the decedent on July 6, 2015. The four videos at issue in this petition were taken from body cameras worn by the two officers during the incident, the dashboard camera of Officer Jarvis's police cruiser, and the body camera of Sergeant Trott, who arrived at the scene moments after the shooting occurred. The videos capture the officers' arrival on the scene, their initial interactions with the decedent, the shooting itself, and the actions of the officers and other responders immediately following the shooting.

Both the Haverhill Police Department and the New Hampshire Attorney General's office have received Right-to-Know requests for the release of the videos in non-redacted form. The petitioner and the mother of the decedent's two minor children argue that releasing the videos could cause irreparable harm to the decedent's family, especially to the children. The State argues for the redaction of the video from the officers' body cameras immediately following the shooting of the decedent until he is taken from the scene, release of Sergeant Trott's body camera video without redaction, release of the dashboard camera without redaction, and release of the full audio from the officers' body cameras. The various intervening media organizations, as well as the American Civil Liberties Union of New Hampshire in its *amicus curiae* brief, argue for full release of all four videos.

II

The purpose of New Hampshire's 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." RSA 91-A:1. Recognizing the conflicting interests to ensure both

the privacy of individuals and “[o]penness in the conduct of public business,” the Right-to-Know Law contains a number of exceptions to the general rule allowing public access to government records, including “files whose disclosure would constitute invasion of privacy.” Id.; RSA 91-A:5.

“To advance the purposes of the Right-to-Know Law, we construe provisions favoring disclosure broadly and exemptions narrowly.” Lamy v. N.H. Pub. Utils. Comm’n, 152 N.H. 106, 108 (2005) (citation omitted). If an exemption is claimed on privacy grounds, the Court examines “the nature of the requested document or material and its relationship to the basic purpose of the Right-to-Know Law. The party resisting disclosure ‘bears a heavy burden to shift the balance toward nondisclosure.’” Union Leader Corp. v. N.H. Hous. Fin. Auth., 142 N.H. 540, 554 (1997) (internal citations omitted). Additionally, “the motivations of . . . any member of the public . . . are irrelevant to the question of access.” Id. (citation omitted).

When determining whether materials are exempt from disclosure on privacy grounds, the Court conducts a three part test:

First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure. Next, we assess the public’s interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, we balance the public interest in disclosure against the government interest in nondisclosure and the individual’s privacy interest in nondisclosure.

Lamy, 152 N.H. at 109 (internal citations omitted). When conducting this three-step analysis, “[b]ecause exemptions under the Right-to-Know Law are similar to those under the federal Freedom of Information Act (FOIA), we often look to federal decisions construing the FOIA for guidance.” Id. at 108 (citations omitted); see also Montenegro v. City of Dover, 162 N.H. 641, 645 (2011) (stating that “in interpreting and applying our own Right-to-Know Law, we ‘look to

the decisions of other jurisdictions, since other similar acts, because they are *in pari materia*, are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved.”) (citation omitted).

The Court must first evaluate whether there is a privacy interest at stake that disclosure of the videos would invade. The extent to which family members have a privacy interest in law enforcement records containing graphic and disturbing images of a decedent’s death appears to be an issue of first impression in New Hampshire. However, other jurisdictions have addressed similar issues. The United States Supreme Court has held that the FOIA “recognizes surviving family members’ right to personal privacy with respect to their close relative’s death-scene images.” Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004); see also Prison Legal News v. Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1246 (10th Cir. 2011) (finding the privacy interest of the decedent’s family to be high where the law enforcement records sought to be obtained depicted “the aftermath of a brutal prison murder and autopsy photographs of the victim”).

Here, portions of the officers’ body camera videos depict up-close and graphic images of the officers shooting the decedent, the decedent bleeding profusely while lying on the ground, the officers turning over the decedent to secure him in handcuffs, the officers removing the decedent’s knife from his reach, and medical responders placing the decedent on a stretcher and into an ambulance. The Court finds that the decedent’s family has a strong privacy interest in preventing the release of these disturbing death-scene images. Using the “minute:second” counters of the videos, these images are displayed between 2:44 and 6:31 on Officer Collins’s body camera and between 00:40 and 4:25 of Officer Jarvis’s body camera. Although there is a heightened privacy interest during these points in the videos, the privacy interest held by the

decedent's family is lessened regarding the audio of the videos because it does not contain the graphic visual images of the decedent during his final moments, nor can the decedent be heard on the audio recording during that time. Additionally, the privacy interest is also lessened regarding the dashboard camera of Officer Jarvis's police cruiser as the images contained in the video are from a distance and do not contain graphic or up-close depictions of the decedent. Furthermore, the video from Sergeant Trott's body camera also shows the decedent from a distance; thus, the privacy interest is lessened as to Sergeant Trott's body camera footage.

The Court must next assess the public's interest in disclosure under the second step of the Lamy test. "Openness in the conduct of public business is essential to a democratic society." 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." Lamy, 152 N.H. at 111 (citation omitted). Here, release of the videos will help inform the public regarding whether the police action surrounding the death of the decedent was justified. As a result, "[d]isclosure of the requested information should inform the public about the conduct and activities of their government." Id. at 109.

Finally, the Court must "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." Id. The decedent's family's strong privacy interest in nondisclosure of the graphic videos from Officer Collins's body camera between 2:44 and 6:31, and between 00:40 and 4:25 of Officer Jarvis's body camera outweighs any interest in disclosure. These portions of the body camera videos depicting up-close images of the decedent lying in his own blood do not advance the public interest in assessing the police conduct surrounding the decedent's death. However, the public's interest in disclosure of the full audio from all four videos as well as the footage from the dashboard camera and Sergeant Trott's body camera, both of which show the decedent from a

distance, outweighs the privacy interest in nondisclosure. The full audio from all four videos, the dashboard video, and Sergeant Trott's body camera video inform the public of the government's actions throughout the entire incident without publically disclosing graphic images of the decedent's death-scene. This redaction of the officers' videos, combined with the full disclosure of the audio and the two other videos, substantially satisfies the public's right-to-know while protecting the privacy interests of the decedent's family.

Based on the foregoing, the Court rules as follows. The images from Officer Collins's body camera between 2:44 and 6:31 shall be redacted and the remainder of the video shall be released. The images from Officer Jarvis's body camera between 00:40 and 4:25 shall be redacted and the remainder of the video shall be released. Sergeant Trott's body camera video shall be released without redaction. Officer Jarvis's dashboard camera video shall be released without redaction. The full audio from all four cameras shall be released without redaction. The Attorney General's office shall oversee the redaction of the videos in accordance with this order. Given the possible variances with the timing of the video copies, the Attorney General's office shall submit the proposed redacted versions of the videos to the Court by September 14, 2015. Absent further order, the videos and audio shall then be released on September 21, 2015 with the redactions set forth herein. Accordingly, the Estate of Hagen Esty-Lennon's petition to enjoin the release of the videos is GRANTED, in part, and DENIED, in part.

III

The Court next turns to the motion for post-decision relief. In its motion, *Valley News*, now Newspapers of New Hampshire, Inc., requests the Attorney General and the Town of Haverhill provide (1) any written transcripts they may have regarding the four videos at issue, (2) the audio of the officers' body cameras, and (3) a summary of the images from all four videos to


serve the purpose of the “category-of-document” requirement of Murray v. N.H. Div. of State Police, 154 N.H. 579 (2006).

Both the Attorney General’s office and the Town of Haverhill allege they never made a transcript of the four videos. Therefore, there are no transcripts to provide. Next, as discussed above, the full audio of all four videos is to be released. Finally, a summary of the videos has already been provided through the Attorney General’s report attached as Exhibit 1 to the motion for post-decision relief and the State’s representations in Court on August 6, 2015. Thus, neither the Attorney General nor the Town of Haverhill must provide a summary of the images contained in the videos.

As a result, the motion for post-decision relief is GRANTED, in part, and DENIED, in part.

So ordered.

9-4-15
Date



Peter H. Fauver
Presiding Justice