**STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS.** **SUPERIOR COURT**
**NORTHERN DISTRICT**

John Does

v.

Manchester Police Department

Docket No. 216-2022-CV-00508

**ORDER**

The plaintiffs have brought this action seeking declaratory and injunctive relief to preclude the disclosure by the Manchester Police Department ("the Department") and the City of Manchester ("the City") of their identities in connection with a Right-to-Know request filed by New Hampshire chapter of the American Civil Liberties Union ("ACLU-NH") and Black Lives Matter-Manchester ("BLM-Manchester"). The ACLU-NH and BLM-Manchester intervened and filed a cross-claim seeking resolution of their Right-to-Know request.[1] The intervenors also moved to dismiss the complaint. By agreement of the parties, the Court held a hearing on both the motion to dismiss and the merits on December 9, 2022. Upon consideration of the pleadings, the parties' arguments, and the applicable law, the Court finds and rules as follows.

[1] Since the filing of plaintiffs' initial complaint, intervenors have narrowed their RSA 91-A request seeking the names of only the two supervisors identified in the Department's reports as having seen the meme at issue in this case. Therefore, references in this order to "the plaintiffs" include only the plaintiff(s) that meet this description where no disclosure is sought with respect to anyone else's name.

## Factual Background

On February 10, 2021, at 6:39 and 6:40 p.m., Detective Christian Horn of the Manchester Police Department sent text messages to two group chats containing approximately ten other members of the Department. The texts consisted of a mock Valentine's Day card depicting an image of George Floyd surrounded by hearts and the words "Black Love" and "You take my breath away." In the first group text, approximately three minutes later, another member said, "Haha." No members of either group chat made any written response to Detective Horn's text.

On February 17, 2021, one of the recipients of the text reported the incident to a captain outside of his chain of command, as he believed he would not get any support from his own chain of command because one of his direct supervisors who also received Detective Horn's text had made no response to it. That officer's report ultimately led to a formal internal investigation of the incident, the primary objectives of which were to, among other things, determine whether the meme was characteristic of Detective Horn's behavior; whether the meme was indicative of systemic problems of racial sensitivity within the Department; and why the supervisor recipients of the meme did not make any response to it. (Intervenor Obj. and Mot. to Dism., Ex. C at 4.) During the investigation, the Department conducted interviews with Detective Horn and the recipients of the text.

The officers interviewed universally viewed the meme as offensive and distasteful, but characterized it as a joke made in poor taste. (Id. at 5–12.) None of the officers believed it was racist or indicative of systemic racism, nor did they view Detective Horn to be racist. (Id.) The Department concluded that the text was grossly inappropriate but not racially motivated. (Id. at 14–15.) With regard to the supervisors who received and

viewed the meme, that report noted that "some would say that . . . those supervisors should be held accountable for neglecting their duties to address the inappropriateness of the meme." (Id. at 16.) However, the report noted that the only supervisor on the text thread of which the initially reporting officer[2] was a member did not see the meme. (Id.) Another supervisor who did see the meme spoke privately with the reporting officer and offered to take action, but was told not to do anything while the officer considered what he wanted to do. (Id.) Finally, the supervisor who commented "haha" after the meme claimed that he was responding to a prior joke in the text thread, and the Department appeared to accept this representation. (Id. at 16–17.)

Ultimately, the Department sustained a finding of Conduct Unbecoming an Officer against Detective Horn and recommended formal discipline. Otherwise, the Department determined that all other allegations of misconduct against Detective Horn or the supervisors in the group chats, all of whom had failed to take any action in response to the text, were unfounded. Detective Horn received a ten-day suspension (seven of which were held in abeyance for one year) following the conclusion of the internal investigation, and was ordered to undergo sensitivity training. No action was taken with respect any of the supervisors, including those who were identified as having seen the meme but failed to report it.

On August 7, 2022, the Union Leader wrote an article about the incident due to the fact that Detective Horn was up for a promotion. On August 8, 2022, the ACLU-NH filed a Right-to-Know request, seeking all records relating to the foregoing investigation. The plaintiffs objected to the release of their names in connection with that report, so the

[2] Because the names are redacted, the Court is making certain assumptions as to the identity of individuals referred to in the report based on context.

Department provided the ACLU-NH with redacted copies, blacking out the names of all recipients of Detective Horn's text. The intervenors now seek to uncover the identifies of the supervisors who saw Detective Horn's text and did not respond or take any action.

**Analysis**

The plaintiffs seek an injunction against the public disclosure of their identities in connection with the release of the Manchester Police Department's internal investigation report. They argue that such a disclosure constitutes an unwarranted invasion of privacy that does not serve a public interest. The intervenors argue that the public has a compelling interest in knowing the identity of the supervisors who received Detective Horn's text and took no action, in order to be able to consider this conduct both now and in conjunction with any future conduct, and be able to hold both the supervisors and the police department accountable in the future.

Part 1, Article 8 of the New Hampshire Constitution states that our 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. The public also has a right to an orderly, lawful, and accountable government." "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) (quoting RSA 91-A:1). 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 Trs. Unit, 169 N.H. 829, 839 (2016). However, "[t]he Right-to-Know

Law does not guarantee the public an unfettered right of access to all governmental workings." Prof'l Firefighters of New Hampshire v. Local Government Center, Inc., 159 N.H. 699, 707 (2010).

The Right-to-Know law exempts several types of documents from the general requirement of disclosure, such as "[r]ecords pertaining to internal personnel practices" and "personnel . . . files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. "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." CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Servs., 167 N.H. 583, 587 (2015). "As a result, [the court] broadly construe[s] provisions favoring disclosure and interpret[s] the exemptions restrictively." Id.

As an initial matter, the intervenors challenge the plaintiffs' standing to bring the instant petition. Pursuant to RSA 91-A:7, "[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief." Ordinarily, "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 toward nondisclosure." New Hampshire Right to Life, 169 N.H. at 839. Here, the public entity—the Manchester Police Department—does not seek to avoid disclosure. Instead, it is the individual plaintiffs who seek to prevent the disclosure of their names. The New Hampshire Supreme Court has "not yet addressed whether RSA 91-A:7 provides a remedy for, and grants standing to, an individual who seeks to prevent disclosure of information pursuant to the Right-to-Know Law." Provenza v. Town of Canaan, 175 N.H. 121, 125 (2022).

Provenza involved a similar procedural posture to this case. There, the plaintiff was a police officer that filed an action to preclude the disclosure of an internal investigation report involving an accusation he used excessive force. 175 N.H. at 123. The publication seeking the report pursuant to RSA chapter 91-A intervened and argued that the plaintiff lacked standing. Id. The trial court assumed without deciding that the plaintiff had standing and issued an order on the merits of both parties' claims, ultimately finding that the report was subject to disclosure. Id. at 124. In doing so, the trial court imposed the burden of demonstrating that the materials should not be disclosed on the plaintiff. Id. On appeal, the New Hampshire Supreme Court held that because the plaintiff was treated as a party in the claim filed by the publication, he was entitled to appeal the order granting the publication's request for disclosure. Id. at 125. As he was able to raise all of his arguments under the Right-to-Know law in his appeal from the grant of the publication's request, the Supreme Court held that it did not need to decide whether the plaintiff was a "person aggrieved" under RSA 91-A:7. Id.

At the hearing in this case, the intervenors argued that, consistent with Provenza, this Court need not address the matter of standing if it orders the disclosure of the plaintiffs' names. The Court agrees. Because the Court, for the reasons set forth below, finds that the plaintiffs' names are subject to disclosure under the Right-to-Know law, it need not determine whether the plaintiffs have standing to independently challenge the disclosure. Therefore, the Court now turns to the merits of the parties' dispute.

As noted above, the plaintiffs argue that disclosure of their names would constitute an invasion of privacy. "When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, [the Court] engage[s] in a three-

step analysis." Prof'l Firefighters of New Hampshire, 159 N.H. at 707. "First, [the Court] evaluate[s] whether there is a privacy interest at stake that would be invaded by the disclosure." Id. "Second, [the Court] assess[es] the public's interest in disclosure." Id. "Third, [the Court] balance[s] the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." Id. "[W]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations." Id.

Here, the plaintiffs argue that "[i]ntimate details of an officer's life, which if revealed might subject that officer to embarrassment, harassment, disgrace, loss of employment or friends are not nor should they be subject to disclosure." (Doc. 28 at 6.) The intervenors, however, are not seeking intimate details of the supervisors' lives. Cf. Provenza, 175 N.H. 132 (finding report did "not reveal intimate details of [the plaintiff's] life, but rather information relating to his conduct as a government employee while performing his official duties and interacting with a member of the public"). In fact, the intervenors do not seek any details of the supervisors' lives at all. Instead, they merely seek the officers' names in connection with the investigative report. It is undisputed here that the plaintiffs received Detective Horn's text and did nothing about it. The only matter up for consideration is the implication of the supervisors' inaction. This is a central purpose of the Right to Know Law: to allow the public to view the information related to a public employee's actions (or inactions) and to be able to assess it. Here, a supervisor's lack of response to another officer's racist or, as described by the investigators, "grossly inappropriate and racially insensitive" text carries minimal, if any, privacy interest.

"The public has a substantial interest in information about what its government is up to, as well as in knowing whether a government investigation is comprehensive and accurate." Provenza, 175 N.H. at 131. Moreover, "when an individual becomes a law enforcement officer, that individual should expect that his or her conduct will be subject to greater scrutiny. That is the nature of the job." Id. (quoting Kroeplin v. Wis. Dep't of Nat. Res., 725 N.W.2d 286, 301 (Wis. Ct. App. 2006)). The plaintiffs concede that the privacy of a police officer, when acting in his or her official capacity, is subject to greater scrutiny than that of a civilian. Nevertheless, the plaintiffs maintain that their privacy interest in this case is heightened because they received Detective Horn's text on their personal devices while off duty, had no obligation to take official action because they were not Detective Horn's direct supervisors, and did not violate any laws or regulations. The Court is unpersuaded.

There is nothing in any of the established law in this area that suggests an officer's conduct must be unlawful or violate some regulation in order to be fit for public disclosure. To the contrary, the New Hampshire Supreme Court has ordered disclosure even where conduct is deemed "not sustained," see id., and recognizes the important interest to the public in knowing a government investigation is comprehensive and accurate, Reid v. New Hampshire Attorney General, 169 N.H. 509, 532 (2016). Moreover, the supervisors' use of personal devices is irrelevant, as the group texts were used to communicate with numerous police officers, both on and off duty at the time. Indeed, Detective Horn sent the texts in question while he was on duty. By blurring the line between personal and work-related communications, the participants in the group texts cannot claim a privacy interest in those communications. Finally, despite receiving the texts while off duty, the

supervisors were still formally investigated by the Department. It is absurd to suggest that a police supervisor may, without repercussion, turn a blind eye to obvious misconduct they personally witnessed because they were off duty at the time or were not the direct supervisor of the bad actor. Even assuming such inaction was not unlawful or in violation of police procedure, the public has a right to be aware of such inaction by officers in supervisory roles, as it directly relates to the overall operation of the police department. See id.

The plaintiffs concede that the public has an interest in knowing and understanding how their local police department operates, but argue that the redacted report satisfies that interest. The Court disagrees. While the report ultimately concluded that Detective Horn's text was not racist but merely "racially insensitive" and "a joke made in poor taste," the public is entitled to disagree with that conclusion. The public is similarly entitled to disagree with the conclusion that the supervisors did nothing wrong when they failed to take official action. While the investigators did not identify Detective Horn's text as racism, they did recognize that "[i]t is understandable how someone could see the sending of this meme by Det. Horn a sign of systemic racial insensitivity, or even outright racism within the Special Enforcement Division and the Manchester Police Department." (Intervenor Obj. and Mot. to Dism., Ex. C, 14.) Indeed, the report indicates that the initially reporting officer interpreted the supervisors' silence "as tacit approval of the meme." (Id. at 15.) That is the point of the transparency required by RSA 91-A: to allow the public to know what their government officials are doing and determine for themselves what they think about it, to weigh in, and to have a voice in their government. By way of example, as the intervenors note, the public would have no way of knowing whether to speak out for or

against a future promotion of one of the supervisors in question if all of their conduct is hidden from scrutiny.

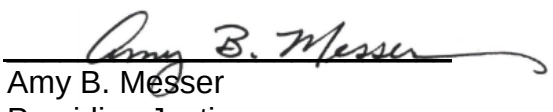
Balancing the public's interest against the individual plaintiffs' privacy interest, the facts of this case strongly favor disclosure of the supervisors' names. At issue is an assessment of how the public perceives the Manchester Police Department as well as the public's opinion of how the police themselves view this incident. The plaintiffs are public servants and have voluntarily submitted to greater public scrutiny; the supervisors even more so. The public has a strong interest in knowing the types of individuals that are in leadership roles within the police force. Whether the supervisors' inaction in response to Detective Horn's text constitutes acceptance or tacit support of racist or "grossly inappropriate and racially insensitive" behavior, or is emblematic of systemic racism within the Manchester Police Department, is a matter fit for public discourse. As the New Hampshire Supreme Court very recently reiterated, "[r]acial bias implicates unique historical, constitutional, and institutional concerns and is a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." Mallard v. Warden, No. 2021-0357 at 8 (N.H. Sup. Ct. Jan. 4, 2023) (quoting Pena-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017)). The plaintiffs are not entitled to unilaterally prevent the public from being able to reach its own conclusion on the matter.

Based on the foregoing, the intervenors' cross-claim is GRANTED, the plaintiffs' motion for declaratory and injunctive relief is DENIED, and the motion to dismiss is deemed moot in light of the Court's order on the merits.[3]

[3] The Court notes that Intervenors' cross claim seeks attorneys' fees against both the plaintiffs and defendants in this matter. Intervenors have not, however, briefed the issue in their pleadings or sought this relief in any prayers for relief other than the initial cross claim petition. The Court therefore declines to

**SO ORDERED.**

January 26, 2023
Date



Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/26/2023

address the issue of fees in this order. If fees are sought, intervenors shall file a pleading and brief the issue within 20 days of the Notice of Decision on this Order.