

The State of New Hampshire

MERRIMACK COUNTY

SUPERIOR COURT

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, and
THE CONCORD MONITOR

v.

CITY OF CONCORD

Docket No.: 217-2019-CV-00462

ORDER

The Petitioners, the American Civil Liberties Union (“ACLU”) of New Hampshire and the Concord Monitor, request access to public records pursuant to the Right-to-Know Law and Part I, Article 8 of the New Hampshire Constitution. The Respondent, the City of Concord (“the City”), objects and moves to quash. For the following reasons, the City’s motion to quash the Petitioners’ request for records is GRANTED. Given the Court’s determination that the records are exempt from disclosure, the Court also DISMISSES this case.

I. Background

The City’s May, 2019 budget proposal included a line item expenditure of \$5,100 for “Covert Communications Equipment” that the City has employed in Concord Police investigations since at least 2017. (Pet. Access to Public Rs. ¶¶ 6, 9.) This appropriation caught the Concord Monitor’s attention, and, on May 24, 2019, it published an article entitled, “Concord’s \$66.5M budget proposal has its secrets.” (*Id.* ¶ 9, Ex. B.) Two public records requests ensued pursuant to the Right-to-Know Law, RSA chapter 91-A. On May 28, 2019, the ACLU of New Hampshire sent the City a

request for records revealing “the specific nature” of the equipment and “any contracts or agreements” with “the vendor providing the ‘covert communications equipment.’” (Id. ¶ 10.) On May 29, 2019, the Concord Monitor also sent a records request for “documents related to” the equipment, including “any contracts or agreements . . . [with] the vendor providing the equipment, documents that detail the nature of the equipment[,] and the line items associated with the equipment.” (Id. ¶ 11.)

On June 10, 2019, the Concord Police Department responded to both Right-to-Know requests with a series of records, including twenty-nine pages of redacted documents. (Id. ¶ 12.) The redactions concealed the name of the vendor of the equipment, the “governing law” provision in the City’s Agreement with the vendor, the nature of the equipment, what type of information the vendor gathers, and how the vendor uses that information. (Id. ¶ 14.) Among the information provided, however, is that the vendor offers the City “[a] Website, Applications, or Services,” “optional hardware,” and technical support and maintenance. (Id. ¶ 16.)

On October 4, 2019, the Court held a hearing on the Right-to-Know requests and related motions. In its October 25 Order, the Court found the records were compiled for law enforcement purposes and that Part I, Article 8 of the New Hampshire Constitution does not require the City to disclose the Agreement pursuant to the Right-to-Know statute where the disclosures are exempted under New Hampshire case law exemptions (A), (E), or (F) to the Right-to-Know Law. The Court also granted the City’s motion to conduct an in camera, ex parte review of the records to determine whether any of the disclosures are exempted.

On November 19, 2019, the Court held the in camera, ex parte hearing (the “sealed hearing”) with counsel for the City and Concord Police Chief Bradley Osgood. The Court received in-depth testimony from Chief Osgood on the nature of the equipment and the methods employed in its use. The Court finds the City specifically and persuasively laid out that revealing the name of the vendor, the nature of the equipment, how information gathered by the vendor is used, or any portion of the redacted agreement could interfere with law enforcement investigations and put lives at risk.

I. Standard

Since its enactment, the provisions of the Right-to-Know Law have been broadly construed with an aim to “augment popular control of government” and “encourage agency responsibility.” Society for Protection of N.H. Forests v. Water Supply & Pollution Control Comm'n, 115 N.H. 192, 194 (1975). The Preamble to the Right-to-Know Law recognizes that “openness in the conduct of public business is essential to a democratic society” and describes the purpose of the Right-to-Know Law in part as promoting the accountability of public bodies to “the people.” Carter v. Nashua, 113 N.H. 407, 416 (1973). Accordingly, the Court interprets the statute to demand the “greatest possible public access” to the “records of all public bodies.” Id. “Thus, the Right-to-Know Law helps further our state constitutional requirement that the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006); see N.H. CONST. pt. I, art. 8.

II. Analysis

The Court first considers whether the City has established that it can permissibly withhold the Agreement from the public pursuant to the Right-to-Know statute. The Court looks to federal interpretations of the Freedom of Information Act (“FOIA”) for guidance in interpreting the Right-to-Know Law. N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 104 (2016). Unlike its federal counterpart, the Right-to-Know Law does not explicitly address disclosure exemptions for “records or information compiled for law enforcement purposes.” Murray v. N.H. Div. of State Police, 154 N.H. 579, 582 (2006). However, in Lodge v. Knowlton, 118 N.H. 574 (1978), the New Hampshire Supreme Court adopted the six-prong test under FOIA for evaluating Right-to-Know requests for access to police investigative files. Id. at 577.

Under FOIA, an agency may exempt from disclosure:

[R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement 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, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual

5 U.S.C. § 522(b)(7).

The relevant exemptions here are exemption (A), exemption (E), and exemption (F). The Petitioners contend that that the City cannot show adverse consequences, that the records would not risk circumvention of the law, and that the records would not put lives at risk. (Pet. Access to Public Rs.) The City replies that the Agreement could be reasonably expected to interfere with enforcement proceedings, would disclose techniques and procedures for law enforcement investigations, and can be reasonably expected to endanger the life or physical safety of individuals. (Resp.'s Obj. and Mot. Quash.)

a. Interference with Enforcement Proceedings Exemption

Where disclosure of government records compiled for law enforcement purposes could reasonably be expected to “interfere with enforcement proceedings,” the records fall under Exemption A. Murray, 154 N.H. at 582. “Exemption (A) was designed to eliminate ‘blanket exemptions’ for government records simply because they were found in investigatory files compiled for law enforcement purposes.” Id. at 583 (quoting Curran v. Dept. of Justice, 813 F.2d 473, 474 (1st Cir. 1987)). To establish interference with enforcement proceedings, the agency resisting disclosure must “fairly describe the content of the material withheld and adequately [state the] grounds for nondisclosure, and [explain why] those grounds are reasonable and consistent with the applicable law.” 38 Endicott St. N., LLC v. State Fire Marshal, 163 N.H. 656, 667 (2012). The agency has the burden to “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.’” Id. at 665 (quoting Murray, 154 N.H. at 582–83).

Based on the testimony the Court received at sealed hearing, the Court is now persuaded that the City has met its burden to show disclosure of the redacted information risks interference with enforcement proceedings. During the sealed hearing, the City fairly described, in detail, the content of the material sought for disclosure, that enforcement proceedings are reasonably anticipated, and how disclosure of the redacted content would interfere with those proceedings. The Court finds use of the technology is reasonable and consistent with applicable law, *id.* at 667, and that there is a high likelihood that disclosure of the technology would, in fact, jeopardize ongoing and future law enforcement proceedings, *Murray*, 154 N.H. at 582.

b. Techniques and Procedures Exemption

Government records compiled for law enforcement are also exempted if they (1) “would disclose techniques and procedures for law enforcement investigations or prosecutions” and (2) “such disclosure could reasonably be expected to risk circumvention of the law.” *Id.* The New Hampshire Supreme Court has not specifically addressed exemption (E), so the Court looks to federal law for guidance. *N.H. Right to Life*, 169 N.H. at 104. The agency resisting disclosure must “demonstrate logically how the release of the requested information might create a risk of circumvention of the law.” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). “If an agency record discusses merely the application of a publicly known technique to. . . particular facts, the document is not exempt under [exemption (E)].” *ACLU of N. Cal. v. United States DOJ*, 880 F.3d 473, 491 (9th Cir. 2018) (internal quotation omitted). On the other hand, where the record “describes a specific means. . . rather than an application of deploying a

particular investigative technique, the record is exempt from disclosure” Id.
(emphasis in original) (internal quotation omitted).

On the basis of the testimony received during the sealed hearing, the Court is satisfied that the redacted information is protected from disclosure under exemption (E). The nature of the equipment is such that, upon discovery of the information redacted, individuals engaged in illegal activity could take measures to circumvent its use. Blackwell, 646 F.3d at 42. If discovered, the effectiveness of police investigations in a number of criminal law enforcement settings would be significantly curtailed. The City did not merely describe a publicly known technique but, instead, a specific means of deploying a currently confidential technique in law enforcement investigations. ACLU of N. Cal., 880 F.3d at 491.

c. Danger to Life and Physical Safety Exemption

Pursuant to exemption (F), government records compiled for law enforcement purposes are exempted from disclosure under the Right-to-Know Law where they “could reasonably be expected to endanger the life or physical safety of any individual.” Murray, 154 N.H. at 582. Because the New Hampshire Supreme Court has not specifically addressed this prong, the Court again looks to federal law for guidance. N.H. Right to Life, 169 N.H. at 104. The Court’s consideration of exemption (F)’s scope “begins and ends with its text,” which is “expansive” and “broadly stated.” Elec. Privacy Info. Ctr. v. United States Dep’t of Homeland Sec., 777 F.3d 518, 523 (D.C. Cir. 2015) (holding that “any individual” does not require the withholding agency to specifically identify the individual to be harmed). However, the agency must “demonstrate that it reasonably estimated that sensitive information could be misused for nefarious ends.”

Public Emples. for Env'tl. Responsibility v. United States Section, Int'l Boundary & Water Comm'n, 740 F.3d 195, 206 (D.C. Cir. 2014).

The City has also met its burden of showing that revealing the information sought by Petitioners falls within the purview of exemption (F). During the sealed hearing, the City demonstrated that revealing the redacted content could lead to the identification of the equipment used and of the manner in which it is employed. Knowledge of such information could reasonably be misused for “nefarious ends,” including physical and deadly harm. Public Emples. for Env'tl. Responsibility, 740 F.3d at 206. By reference to the text of the exemption, the Court finds that disclosing information that might reveal the nature of the technology and the manner of its use in police investigations could “reasonably be expected to endanger the life [and]. . . safety” of police officers and of members of the public.

III. Conclusion

For the foregoing reasons, the City's motion to Quash the Petitioners' request for records is GRANTED. Given the conclusions set out in this Order, the Court has found the records are exempt from disclosure. As a result, this case is DISMISSED. The Court's record of the proceedings, including the sealed in camera, ex parte hearing, will be available for appellate review.

So Ordered.

DATED: _____

12/20/19



JOHN C. KISSINGER
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 12/20/2019