The State of New Hampshire

MERRIMACK, SS. SUPERIOR COURT

NO. 217-2016-CV-282

STEVEN WELFORD

V.

STATE OF NEW HAMPSHIRE, DIVISION OF STATE POLICE

ORDER

This case is brought under the Right to Know Law and concerns a request that the New Hampshire State Police produce documents "that concern complaints or reports of suspected criminal misconduct, if any," involving a named individual. (State's Memorandum, Exhibit A). The inquiry refers specifically to a police chief's possible transfer to the State Police of a criminal matter concerning the individual.

The State Police replied that it had no documents responsive to the request, but later clarified its answer to say that it had "no documents responsive to this request that are subject to disclosure pursuant to RSA 91-A." As it explained later, the answer was meant as a refusal to either confirm or deny there were such records, because just as disclosing the reports might be an invasion of privacy, so would confirming their existence. *See* State's Memorandum, ¶ 3.

The United States Court of Appeals for the D.C. Circuit calls this answer a *Glomar* response, based on "the CIA's refusal to confirm or deny the existence of records about the *Hughes Glomar Explorer*, a ship used in a classified [CIA] project 'to raise a sunken Soviet submarine from the floor of the Pacific Ocean to recover the missiles, codes, and communications equipment onboard for analysis by United States military and intelligence experts." *People for the Ethical Treatment of Animals (PETA) v. Nat'l Inst. Health*, 745 F.3d 535, 540 (D.C. Cir. 2014) (quotation omitted). This response is justified when "merely acknowledging the existence of responsive records would itself 'cause harm cognizable under'" an exemption. *Id.* (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)) (internal quotation omitted)). Under interpretations of the federal Freedom of Information Act (FOIA) (influential in analyzing the Right to Know Law) "to the extent the circumstances justify a *Glomar* response, the agency need not conduct any search for responsive documents or perform any analysis to identify segregable portions of such documents." *Id.* Mr. Welford does not challenge the categorical nature of the agency response, but he says the documents should be disclosed because the public interest in disclosure outweighs the privacy interest of the person whose records are sought.

"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." *38 Endicott St. N. v. State Fire Marshal*, 163 N.H. 656, 660 (2012) (quotation omitted). An agency may withhold an otherwise public record, but only if disclosure is barred by statute or an exemption in RSA 91-A:5. RSA 91-A:4, I (2013). *See Prof.*

Fire Fighters of New Hampshire v. N.H. Local Government Center, 163 N.H. 613, 614 (2012). The exemptions are construed narrowly, with the burden falling on the agency to show an exemption applies. *CaremarkPCS Health, LLC v. N.H. Dept. of Admin. Servs.*, 167 N.H. 583, 587 (2015).

Law enforcement agency records may come within an exemption for "files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV (2015 supp). In *Lodge v. Knowlton*, 118 N.H. 574, 576 (1978), the State Supreme Court adopted the FOIA exemption in 5 U.S.C. § 552(b)(7) (A)-(F) for records or information compiled for law enforcement purposes, including subpart 7(C),where production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." In order to claim the exemption "an agency need not establish that the materials are investigatory, but need only establish that the records at issue were compiled for law enforcement purposes, and that the material satisfies the requirements of one of the subparts of the test." *Montenegro v. City of Dover*, 162 N.H. 641, 646 (2011) (quotation omitted). Welford does not contest that the records he seeks would have been "compiled for law enforcement purposes." The question then is whether the State Police was justified in neither confirming nor denying that it possessed responsive documents, on the basis that to answer otherwise "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *PETA*, 745 F.3d at 541. *See Murray v. N.H. Division of State Police*, 154 N.H. 579, 582 (2006).

The validity of the agency response is determined by weighing "the public interest in disclosure of the requested information against the government interest in nondisclosure, and in privacy exemption cases, the individual's privacy interest in nondisclosure." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 475 (1996).

On one side of the ledger is the individual's privacy interest. Just "the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Schrecker v. U.S. Dept. of Justice*, 349 F.3d 657, 666 (D.C. Cir. 2003) (quotation omitted). It follows that persons have an "obvious privacy interest cognizable under [exemption C] in keeping secret the fact that they were subjects of a law enforcement investigation," *Citizens for Resp. and Ethics in Washington*, 746 F.3d at 1091, and "in not being associated unwarrantedly with alleged criminal activity." *N.H. Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 440–41 (2003).

Mr. Welford says the fact that the person whose records he seeks is a public official – a local school board member – reduces the privacy interest. Public officials "may have a somewhat diminished privacy interest," but they "'do not surrender all rights to personal privacy when they accept a public appointment.'" *Citizens for Resp. and Ethics in Washington*, 746 F.3d at 1092 (quotations omitted). "While an individual's official position may enter the 7(C) balance, it does not determine, of its own accord, that the privacy interest is outweighed." *Bast v. U.S. Dept. of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (citation omitted). In fact, to the extent the person is known because of the position he holds, "[t]he

degree of intrusion is . . . potentially augmented." *Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856, 865, (D.C. Cir. 1981). "The disclosure of that information would produce the unwarranted result of placing the named individual[] in the position of having to defend [the] conduct in the public forum outside of the procedural protections normally afforded the accused in criminal proceedings." *Id.* In this case, the privacy interest is not lessened by any appreciable degree simply because the inquiry is for records concerning a person on a local school board.

Weighed against the privacy interest is the public interest in disclosure that lies in "provid[ing] the utmost information to the public about what its government is up to." *Union Leader*, 141 N.H. at 476 (quotation omitted). Matters of law enforcement "are proper subjects of public concern." *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 766 n. 18 (1989). But that interest

> is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed. . . . If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.

N.H. Right to Life v. Director, N.H. Charitable Trusts Unit, 2016 WL 3086734, at *8 (N.H., June 2, 2016) (quotation omitted). So, "the relevant public interest is *not* to find out what [the individual] himself was 'up to' but rather how the [government] carried out [its] . . . statutory duties to investigate and prosecute criminal conduct." *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Justice*, 746 F.3d 1082, 1093 (D.C. Cir. 2014).

Keeping in mind that the public interest at stake is the right of citizens to find out what "the government is up to," *Union Leader*, 141 N.H. at 47, disclosing law enforcement reports on a specified individual would shed direct light on the purported activities of the person, but only provide indirect insight into how the government functions. Still, Welford argues that if reports of criminal activity exist, they would show how various governmental bodies operate – the local school district and SAU with respect to how well they screen employees and volunteers, and the state and local police in terms of how diligently and effectively they investigate crime reports.

The public interest in knowing whether the government is doing its job is a legitimate one. But it would negate the exemption if merely stating this public interest gave it greater or equal weight to the privacy interest. For that reason, the Supreme Court requires

> that, where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

National Archives and Records Admin. v. Favish, 541 U.S. 157, 173–74 (2004). *See PETA*, 745 F.3d at 543 (where "the FOIA request implicated the public interest in shedding light on agency investigatory procedures . . . we have consistently found that interest, without more,

insufficient to justify disclosure when balanced against the substantial privacy interests weighing against revealing the targets of law enforcement investigation.")

As Congress has modified the law enforcement records exemption under FOIA (5 U.S.C. § 552(b)(7)), the State Supreme Court has made corresponding changes to the exemption under state law. *See Montenegro v. City of Dover*, 162 N.H. at 646 (noting adoption of amended test in *Murray v. N.H. Division of State Police*, 154 N.H. at 582). There is good reason to believe the State Supreme Court would adopt the requirement imposed by *Favish*.

On the basis of RSA 91-A, Mr. Welford sought law enforcement records concerning reports of criminal conduct by a particular individual. If the State Police confirmed it had such information, that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The public interest at stake is to allow an understanding of agency investigatory practices, but there is no allegation that an agency performed its duties improperly. Under these circumstances, the privacy interest of the person outweighs the public interest in disclosure, so the *Glomar* response by the Division of State Police was appropriate. For the reasons given, the complaint is DISMISSED.

SO ORDERED.

DATE: SEPTEMBER 22, 2016

BRIAN T. TUCKER
PRESIDING JUSTICE