



VIRTUAL

WORKSHOP

The Right-to-Know Law for Law Enforcement October 15, 2020

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Is it a
governmental
record?

RSA 91-A:1-a

Any information

- created
- accepted, or
- obtained

By, or on behalf of,

- any public body, or a quorum or majority thereof or
- any public agency

in furtherance of its official
function

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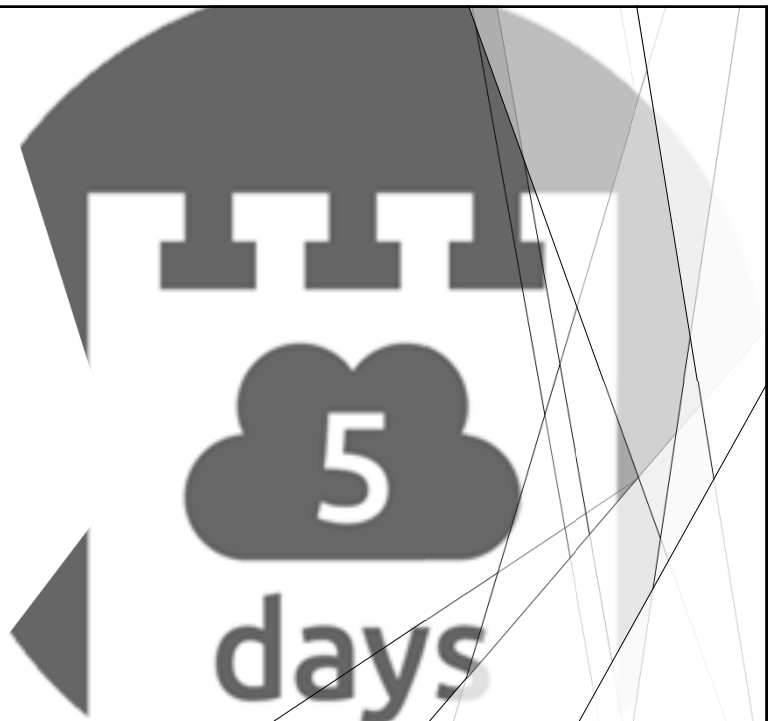
If Not Exempt, Disclose

- ▶ Right to inspect, copy, and make notes of records
- ▶ →Electronic Records, RSA 91-A:4, V
- ▶ Records should be available on regular business premises during regular business hours
- ▶ Record must be reasonably described
- ▶ There is no obligation to compile, cross reference or assemble records
- ▶ Motive is irrelevant

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We have 5
days...

...right?



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“Something” w/in 5 Days

As of Jan. 1, 2020, municipalities must:

- Provide a written statement of time necessary to determine whether request granted or denied; AND
- *Provide a reason for the delay!*
- Amendment to RSA 91-A:4, IV – HB 396 – 2019 NH Laws Chapter 107

NHMA Suggestion for Reason for Delay –

- Need time to determine whether or not record exists;
- Need time to determine whether it is disclosable;
- If disclosable, need time to determine how much time it will take to make the requested records ready for review or copying

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No flat fees!

- ▶ **ONLY**
REASONABLE
FEES ARE
ALLOWED!



- ▶ RSA 91-A:4, IV

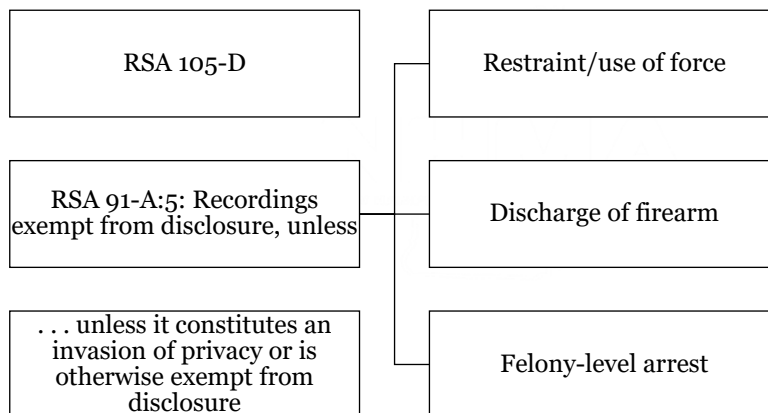
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Exemptions to Disclosure

- ▶ **RSA 91-A:5** provides a list of records exemptions:
 - ▶ Some are categorical exemptions, such as the master jury list or teacher certification records.
 - ▶ Some require detailed analysis, such as “personnel records whose disclosure would constitute invasion of privacy.”
- ▶ **Other statutes and case law** also contain exemptions.
- ▶ The Right-to-Know Law’s purpose is to provide the utmost information to the public about what its government is up to.
- ▶ When a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden.

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Body Worn Cameras (BWCs)



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Body Worn Cameras: Record Retention

General rule:

- Permanently destroy/overwrite 30 – 180 days after recording

Exceptions:

- Keep minimum 3 years
 - Deadly force
 - Discharge of firearm
 - Death or serious bodily injury
 - Encounter resulting in complaint
 - Evidence
- Keep for as long as legally required
 - Pending case, court order
 - Retain as training tool

Motor Vehicle Records

- ▶ RSA 260:14, VII, VII-a: Can release accident reports to certain persons:
 - ▶ Owner/Operator
 - ▶ Passenger
 - ▶ Pedestrian Injured
 - ▶ Owner Property Damaged
 - ▶ Insurance Companies
 - ▶ Lawyers
- Can charge reasonable fee
- ▶ RSA 260:14, XI-a: Liability protection for improper release.

Arrest and Prosecution Records after Annulment

- ▶ Records maintained by arresting and prosecuting entities documenting conduct underlying an annulled conviction are not categorically exempt from disclosure under RSA 91-A:4, I, which exempts records otherwise prohibited by statute for public inspection. *Grafton County Attorney's Office v. Canner*, 169 N.H. 319, 328 (2016).
- ▶ Note that *Canner* did not address the issue of whether such records may be exempt under another provision of RSA 91-A, such as the work product or privacy exemption of A:5, IV.
- ▶ The Court did say that an annulment does not “turn the public event of a criminal conviction into a private, secret, or secluded fact” and the public “has a substantial interest in understanding how investigations and alleged crimes are conducted, and how prosecutors exercise their discretion when deciding whether to prosecute, reach a plea agreement, or try cases.”

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Police Personnel Files

- ▶ RSA 105:13-b
 - ▶ No review or obtaining non-exculpatory evidence from personnel files in criminal cases.
- ▶ RSA 516:36
 - ▶ Makes inadmissible in civil cases internal investigation materials & certain related documents

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Executive Order 2020-19

- ▶ Adopts Law Enforcement Accountability, Community and Transparency Commission's recommendations on a wide-range of policing topics.
 - ▶ May impact pending case on Laurie List/EES.
- ▶ Importantly: "Director of PSTC shall take all necessary steps...to develop and deploy a robust database management system [for] maintaining a full record over the course of an officer's career of his or her training completion, any incidents of sustained misconduct, movement from agency to another, and decertification[.]"
- ▶ Director of PTSC also to create policy guidelines on:
 - ▶ Use of Force
 - ▶ Duty to Intervene
 - ▶ Code of Conduct
 - ▶ Duty to Report Misconduct
 - ▶ Prohibition of Chokeholds
 - ▶ Procedures to Guard Against Positional Asphyxia
- ▶ AG to create Public Integrity Unit

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"Internal Personnel Practices" RSA 91-A:5, IV

- ▶ Applies to governmental records that pertain to rules and practices dealing with employee relations or human resources, including hiring and firing, personnel rules, discipline, compensation and benefits.
- ▶ Recent Reinterpretation of Law by N.H. Supreme Court
- ▶ Formerly: "Internal Personnel Practices" was a fairly broad category separate and apart from any privacy balancing test.
 - ▶ Includes: Evaluation sheets for potential employees and answers; investigation reports of investigators hired by employers to investigate employees.
- ▶ Now: "Internal Personnel Practices" is another privacy balancing test.

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Union Leader v. Salem

If governmental records are properly classified as “internal personnel practices” then whether such records are subject to disclosure depends on evaluating whether that disclosure would constitute an invasion of privacy.

- *First, 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.*
- *Second, 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, balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.*

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Rights of Crime Victims

RSA 21-M:8-k, II

To the extent that they can be reasonably guaranteed by the courts and by law enforcement and correctional authorities, and are not inconsistent with the constitutional or statutory rights of the accused, crime victims are entitled to the following rights:

...

(m) The right of confidentiality of the victim's address, place of employment, and other personal information.

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Domestic Violence Victims Addresses

RSA 7:41



Allows victims of domestic violence to designate a substitute mailing address with the AG's office



Substitute mailing address is kept confidential



Must apply to program with AG's office

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Confidentiality of Education Records

RSA 193-D:7



Safe School Zone Statute



Law enforcement and school can exchange only particular information



“Reasonably relates to delinquency or criminal conduct”
– Theft, Destruction, or Violence

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Retention of Police Records, RSA 33- A:3-a

- XCVII. Police, accident files-fatalities: 10 years.
- XCVIII. Police, accident files-hit and run: statute of limitations plus 5 years.
- XCIX. Police, accident files-injury: 6 years.
- C. Police, accident files-involving arrests: 6 years.
- CI. Police, accident files-involving municipality: 6 years.
- CII. Police, accident files-property damage: 6 years.
- CIII. Police, arrest reports: permanently.
- CIV. Police, calls for service/general service reports: 5 years.
- CV. Police, criminal-closed cases: statute of limitations plus 5 years.
- CVI. Police, criminal-open cases: statute of limitations plus 5 years.
- CVII. Police, motor vehicle violation paperwork: 3 years.
- CVIII. Police, non-criminal-internal affairs investigations: as required by attorney general and union contract and town personnel rules.
- CIX. Police, non-criminal-all other files: closure plus 3 years.
- CX. Police, pistol permit applications: expiration of permit plus one year.

Retention of Correspondence RSA 33-A:3-a

- XXV. Correspondence by and to municipality-administrative records: minimum of one year.
- XXVI. Correspondence by and to municipality-policy and program records: follow retention requirement for the record to which it refers.
- XXVII. Correspondence by and to municipality-transitory: retain as needed for reference.

Storing Records in Electronic Format



- ▶ Paper records may be transferred to electronic form
- ▶ Retention 10 years or less: Solely electronically
- ▶ Retention more than 10 years: Transferred to paper or microfilm *or* stored in portable document format/archival (PDF/A)

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- ▶ Records must be provided *only* when they are immediately available for release.
- ▶ RTK *does not* give citizens the right to review records in any quantity and wherever kept immediately upon demand.
- ▶ Requiring appointment to review records permitted

***Brent v. Paquette*, 132 N.H. 415
(1989)**

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- ▶ RTK does not require document compilation.
- ▶ To “compile” is “to collect and assemble (written material or items from various sources) into a document or volume or a series of documents or volumes.
- ▶ The ruling in *Brent v. Paquette* shields agencies from having to create a new document in response to a RTK request, it does not shelter them from having to assemble existing documents in their original form.

***New Hampshire Civil Liberties Union v.
City of Manchester, 149 N.H. 437 (2003)***

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Duty to search for records: The agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents. This burden can be met by producing affidavits that are relatively detailed, nonconclusory, and submitted in good faith. Once the agency meets its burden to show that its search was reasonable, the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith.

***ATV Watch v. NH Dept. of
Transportation, 161 N.H. 746 (2011)***

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General Standards Governing Exemptions - RSA 91-A:5

- ▶ RSA 91-A:5 provides a list of records **categorically exempt** from disclosure; master jury list or teacher certification records.
- ▶ Some statutory exemptions require detailed analysis, such as records whose disclosure would constitute invasion of privacy.
- ▶ The Right-to-Know Law's purpose is to provide the utmost information to the public about what its government is up to. If disclosing the information does not serve this purpose, disclosure may not be required.
- ▶ When a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to avoid nondisclosure

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NH ADOPTS FEDERAL STANDARD FOR DISCLOSURE OF LAW ENFORCEMENT RECORDS - *LODGE V. KNOWLTON* 118 N.H. 574 (1978) *



- ▶ Freedom of Information Act (FOIA) used to govern disclosure of police investigatory files.
- ▶ First, the agency seeking to avoid disclosure must establish that the requested materials were "compiled for law enforcement purposes.
- ▶ 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.
- ▶ *as modified by *Murray v. State Police*, 154 N.H. 579 (2002)

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What is a Law Enforcement Agency?

Was the record gathered for law enforcement purposes?

This exemption not just for agencies that are officially designated as law enforcement agencies.

Applies to all records compiled by any type of agency for law enforcement purposes, including in civil and criminal matters.

What are the authorized activities of the agency involved?

A mixed-function agency encompassing both administrative and law enforcement duties can satisfy the threshold requirement by showing that the pertinent records were compiled pursuant to the agency's law enforcement functions.

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Montenegro v. City of Dover 162 N.H. 641 (2011)

Thus, to withhold materials under the modified test adopted in *Murray*, 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.

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Law enforcement records FOIA Exemption Factors



- ▶ Factor A: Interfere with law enforcement proceedings
- ▶ Factor B: Interfere with fair trial
- ▶ Factor C: Invasion of privacy
- ▶ Factor D: Confidential sources
- ▶ Factor E: Disclosing investigative techniques and procedures
- ▶ Factor F: Endangering life or safety

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Factor A: Reasonably Expected to Interfere with Law Enforcement Proceedings



Two step analysis:

- (1) Whether a law enforcement proceeding is **pending** or **prospective**, and
- (2) Whether release of information about it could **reasonably** be expected to cause some articulable harm.

- Pending Investigations: Exempt
- Dormant/Prospective: Exempt, as long as prospective investigation is “concrete”

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The *Murray* cases



- ▶ Car accident victim not present at the scene when police arrived. Three years since her disappearance, numerous agencies and individuals have attempted to locate her without success.
- ▶ Father requested investigatory files
- ▶ State had to provide refined categories describing the records and describe how they would interfere with law enforcement proceedings
- ▶ Investigation was “reasonably anticipated” even though it may have been dormant

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Factor B: Deprive a Person of Right to Fair Trial or Impartial Adjudication

Two-part test:

- (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.



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What types of information might cause prejudice?

- ▶ Statements about the guilt or innocence of a defendant;
- ▶ The character or reputation of a suspect;
- ▶ Examinations or tests which the defendant may have taken or have refused to take
- ▶ Gratuitous references to a defendant; for example, a reference to the defendant as “a dope peddler;”
- ▶ The existence of a confession, admission or statement by an accused person, or the absence of such;
- ▶ The possibility of a plea of guilty to the offense charged or a lesser offense;
- ▶ The identity, credibility or testimony of prospective witnesses;
- ▶ Any information of a purely speculative nature; and
- ▶ Any opinion as to the merits of the case or the evidence in the case.

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- ▶ Information that would lead to embarrassment, harassment, disgrace, loss of employment or friends .
- ▶ Guards the privacy interests of a broad range of individuals, including government agents, personnel, confidential sources, and investigatory targets.
- ▶ Protects a broad notion of personal privacy, including an individual's interest in avoiding disclosure of personal matters.
- ▶ Notion of privacy encompasses the individual's control of information concerning his or her person, and when, how, and to what extent information about them is communicated to others.

Factor C: Could Reasonably Be Expected to Constitute an Unwarranted Invasion of Privacy

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- First, 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.
- Second, 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, balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure

Privacy Balancing Test

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- ▶ Persons have an obvious privacy interest cognizable under exemption C in keeping secret the fact that they were subjects of a law enforcement investigation.
- ▶ 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.
- ▶ Where there is a privacy interest protected by Exemption 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.

Welford v. State Police

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- ▶ Mentioning persons not targets of investigations
- ▶ Identities of federal, state, and local law enforcement personnel
- ▶ Identities of both clerical personnel and investigators
- ▶ Names of witnesses and their home and business addresses
- ▶ Trial testimony does not eliminate Exemption 7(C) protection
- ▶ Individuals identified as potential witnesses
- ▶ Passage of time will not ordinarily diminish the privacy protection. The passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge, but has faded from memory

Generally Exempt Under Factor C to Protect Privacy

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Examples of information that may implicate a privacy interest

- ▶ Legitimacy of children;
- ▶ Sexual orientation;
- ▶ Medical or mental health conditions;
- ▶ Welfare recipient;
- ▶ Consumption of alcohol or a controlled substance;
- ▶ Domestic disturbances and disputes;
- ▶ Names of witnesses who cooperated by providing information to authorities and the information provided by them;
- ▶ Names of subjects of investigation;
- ▶ Names of children;
- ▶ Marital status;
- ▶ Dates of birth;
- ▶ Financial information;
- ▶ Employment information; and
- ▶ The existence of a criminal investigation that does not result in charges against a specific individual.

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EXEMPTION 7 (D) RECORDS WHICH COULD REASONABLY BE EXPECTED TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL SOURCE

Exemption 7(D) is comprised of two distinct clauses:

- ▶ 1st clause protects identity of confidential sources
- ▶ 2nd clause protects all information obtained from the source.

▶ Was the source given express promise of confidentiality?

OR

▶ Can an assurance of confidentiality be inferred from the circumstances surrounding receipt of the information?

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WHAT CONFIDENTIAL INFORMANT INFORMATION IS PROTECTED?

- Once a source has been deemed confidential, the identity of the source, and in certain circumstances, all of the information obtained by the source would be exempt from disclosure.
- The exemption safeguards not only such obviously identifying information as an informant's name and address, but also all information that would "tend to reveal" the source's identity.

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EXAMPLES OF PROTECTED SOURCES

- ▶ crime victims
- ▶ citizens providing unsolicited allegations of misconduct
- ▶ citizens responding to inquiries from law enforcement agencies
- ▶ private employees responding to OSHA investigators
- ▶ employees providing information about their employers and co-workers
- ▶ prisoners
- ▶ mental healthcare facilities
- ▶ medical personnel
- ▶ commercial or financial institutions and their employees

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EXEMPTION 7(E) - DISCLOSURE WOULD REVEAL TECHNIQUES AND PROCEDURES FOR LAW ENFORCEMENT, OR, WOULD DISCLOSE GUIDELINES FOR LAW ENFORCEMENT INVESTIGATIONS OR PROSECUTIONS IF SUCH DISCLOSURE COULD REASONABLY BE EXPECTED TO

RISK CIRCUMVENTION OF THE LAW.

- Probably provides "categorical" protection for law enforcement techniques and procedures. . . . FOIA sets a "relatively low bar" for withholding under this exemption.
- Courts have uniformly required that the technique or procedure must not be well known to the public.
- "guidelines" = means by which agencies allocate resources for law enforcement investigations (whether to investigate)
- "techniques and procedures" = the means by which agencies conduct investigations (how to investigate).

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Exemption 7(E) encompasses withholding wide range of techniques and procedures, including:

- Immigration enforcement techniques
- Information about databases used for law enforcement purposes
- Surveillance tactics and methods
- Portions of a law enforcement agency's investigations and operations manual
- Funds expended in furtherance of an investigation
- Law enforcement codes, and techniques used to uncover tax fraud
- Techniques and procedures pertaining to the forensic analysis of firearms and computers
- Details of the status of investigatory efforts
- Search and arrest warrant execution techniques
- Suspect threat detection techniques
- Law enforcement checkpoints

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▶City refused to disclose information about covert communications equipment used by Police Department

▶The Court was 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.

▶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 v. Concord

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EXEMPTION 7(F) "COULD REASONABLY BE EXPECTED TO ENDANGER THE LIFE OR PHYSICAL SAFETY OF ANY INDIVIDUAL."

- Originally only protected law enforcement personnel, but was later amended and now protects the safety of any individual.
- Exemption 7(F) can protect the names and identifying information of:
 - non-law enforcement federal employees
 - local law enforcement personnel
 - other third persons in connection with law enforcement matters such as:
 - ✓ names of and identifying information about inmates
 - ✓ private security contractor companies
 - ✓ identities of medical personnel who prepared requester's mental health records would endanger their safety
 - ✓ identifying information about individuals who provided information about alleged criminal activities

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7 (F) CAN ALSO PROTECT ANY TYPE OF INFORMATION THAT CREATES A RISK OF HARM OR RETALIATION TO AN INDIVIDUAL, NOT JUST IDENTIFYING INFORMATION, SUCH AS:



- ▶ Inundation maps because they show which areas downstream from dams are at risk for flooding in the event a dam collapse
- ▶ The details of the physical structure and security plans of a Federal Bureau of Prisons facility because of the risks to prison security that would be created by disclosure.
- ▶ The description of a home-made machine gun in an FBI laboratory report because its disclosure would create the real possibility that law enforcement officers would have to face individuals armed with home-made devices constructed from the expertise of other law enforcement people

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- City refused to disclose information about covert communications equipment used by Police Department
- Relying on Exemption F, 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.
- The Court found that by disclosing the 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 members of the public.

ACLU v. Concord

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- Could it be concluded that public disclosure of Use of Force protocols, or standard operating procedures, would reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behavior in an effort to avoid detection?
- Using the information in a Use of Force Policy, would those engaging in criminal acts be able to adjust their behavior by disguising their movements and then strike out violently before the officer can appropriately respond?

Requests for Use of Force Policy

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OTHER INFORMATION SOURCES

NH Attorney General's Right to Know Memorandum:
<https://www.doj.nh.gov/civil/documents/right-to-know.pdf>

U.S. Department of Justice Guide to the Freedom of Information Act:
<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

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WORKSHOP

VIRTUAL

*THANK YOU for attending our
Right-to-Know Law workshop!*

The New Hampshire Municipal Association is a nonprofit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.

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