

Hillsborough, ss.
(Southern Division)

State of New Hampshire

Superior Court

No. 226-2018-cv-00537

New Hampshire Center for Public Interest Journalism

v.

State of New Hampshire

Objection to Motion for Stay

Now comes the lead petitioner in this matter, the New Hampshire Center for Public Interest Journalism (the “Center”), through counsel, and respectfully objects to the Partially Consented to Motion to Stay Until July 1, 2021 because this is at least the second request for delay after the matter was remanded, the passage of the legislation that is the reason for the delay is uncertain and because the legislation, even if passed, does not strike a proper balance between the interest of the public in disclosure and the privacy concerns of law enforcement officers who may be listed on the Exculpatory Evidence Schedule (“EES”).

1. All the parties in this matter, except the Center, seek a stay that will delay the restart of remand proceedings until at least July 1, 2021. The stated purpose of the delay essentially is that the other parties participated in negotiations to settle this matter after the Supreme Court’s remand of October 30, 2020 and that settlement takes the form of an agreed upon proposal for a statutory amendment to be submitted to the Legislature for its consideration. The settlement does not make provision for the Legislature’s rejection of the proposed legislation. The proposed bill, HB 471, would amend R.S.A. 105 by inserting a new section 13-c. HB 471 was appended to the motion for stay as Exhibit A and is incorporated by reference here. A first committee hearing on the amendment is scheduled for the afternoon of April 15, 2021.

2. Although the Center greatly appreciates the efforts of the other parties in their negotiation, the Center does not concur with committing settlement of this important dispute to the passage of new legislation given the vagaries of passing legislation at any time and given that this legislative session has had a number of its own significant and unique challenges. See, e.g., Cushing v. Packard, ___ F.3d ___ (1st Cir. slip op. issued April 7, 2021)(regarding the application of the Americans with Disabilities Act to the New Hampshire House of Representatives). The Center would find agreement to a standard consent decree a more likely successful means of resolving this dispute short of a final order.

3. Even if the legislation is adopted precisely as drafted, the legislation strikes the wrong balance between the public’s right to know about the functioning of law enforcement officers and departments where serious misconduct allegations exist versus the privacy of individual officers. Under the proposed settlement agreement and legislation, any officer could tie up the release of his or her listing on the EES simply by filing litigation that presents a due process claim and prevent release of the listing until that litigation is completed. This balance, akin to “prior restraint,” see New York Times v. United States, 403 U.S. 713 (1971)(regarding the Pentagon Papers), unduly favors the officer involved and is inconsistent with existing case law.

4. In Gantert v. City of Rochester, 168 N.H. 640 (2016), the Court concluded that due process is satisfied if an officer who contends his listing was improper is given opportunity to challenge that listing *after* the fact where he must show “the placement [is] *clearly shown to be without basis*. Duchesne, 167 N.H. at 784-85.” Gantert, 168 N.H. at 650 (emphasis added).¹

¹ Interestingly, the Gantert Court, in March of 2016, noted the legislature was then taking up issues related to maintenance of the Laurie List. 168 N.H. at 651.

Although the Court has recognized that placement of an officer on the previous versions of the Laurie List did not automatically result in public disclosure of the officer's identity as is the case with the EES, it also recognized that,

placement on the list all but guarantees that information about the officers will be disclosed to trial courts and/or defendants or their counsel any time the officers testify in a criminal case, thus potentially affecting their reputations and professional standing with those with whom they work and interact on a regular basis.

Duchesne v. Hillsborough County Attorney, 167 N.H. 774, 783 (2015).

5. Thus, under existing caselaw, an officer must prove that his or her listing is "clearly shown to be without basis" to succeed on the merits and be removed from the EES. Under the proposed legislation, however, no preliminary showing of likely success on the merits whatsoever must be made for the officer to maintain the secrecy of his or her listing on the EES until the litigation is finally concluded. No other group of litigants is entitled to this automatic protection for the entire course of the litigation. As this Court is aware, the course of litigation is unpredictable and may take years before it reaches conclusion. This case is an example of a matter filed in April 2018 and which most of the parties now seek to delay further.

6. Further, the agreed upon proposed legislation is exceedingly generous to officers who were listed before April 2018, when the Attorney General MacDonald Memo regarding EES was issued. These officers have up to six months to file a lawsuit that then entitles them to secrecy during the pendency of their challenge even though officers as far back as the Attorney General Heed Memo, issued on February 20, 2004, were advised by prosecutors to retain private counsel to protect their own interests. The officers also are entitled to secrecy while they decide to seek removal of their names from the EES.

7. Finally, as if all of the tilting towards the listed officer were not enough, the whole EES list is made completely discretionary. Under the legislation, the Department of Justice need

not maintain the EES at all. This, despite the fact that the Attorney General is the chief law enforcement officer for the state, R.S.A. 21-M:3-b, and constitutionally is charged with the production of exculpatory information, whether the information is personally known to any given prosecutor or not. See Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. U.S., 405 U.S. 150 (1972) and Kyles v. Whitley, 514 U.S. 419 (1995).

WHEREFORE, for the foregoing reasons, the Center requests the Court deny the motion for stay and for such other relief as is just and proper. The Court may conduct a proper analysis for mootness when, and if, legislation is passed.

Respectfully submitted,
The New Hampshire Center for
Public Interest Journalism,
By its counsel,

Date: April 13, 2021

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Certificate of Service

I hereby certify that on April 13, 2021, a copy of the foregoing Objection was electronically filed through the Court's electronic filing system and sent to all parties who have entered electronic service contacts. Copies to all other interested parties will be sent by U.S. Mail, if applicable.

/s/ Andru Volinsky
Andru Volinsky

