

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

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Nancy West
Publisher, In Depth NH
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Re: Right-to-Know Request
Exculpatory Evidence Schedule

Dear Ms. West:

The Office of the Attorney General is in receipt of your request dated April 25, 2019, under RSA chapter 91-A, for an unredacted copy of the Exculpatory Evidence Schedule (EES).

As you may know, litigation concerning whether the EES is subject to public disclosure is currently ongoing. On April 24, 2019, the Hillsborough County Superior Court—Southern District (*Temple, J.*) issued an order, in the matter of *New Hampshire Center for Public Interest Journalism, et al v. New Hampshire Department of Justice*, docket no. 226-2018-CV-00537, which denied the Department of Justice's motion to dismiss. The Court did not order the immediate production of an unredacted EES. Further, the Court's order is not a final order in the case. Therefore, as with all previous requests for an unredacted copy of the EES, your request must also be denied.

Under the United States and New Hampshire Constitutions, prosecutors have an affirmative duty to disclose to a criminal defendant evidence that is favorable to that defendant. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963). Favorable evidence includes evidence that is exculpatory and information that could be used to impeach the testimony of a prosecution witness. *Giglio v. United States*, 405 U.S. 150 (1972). Under well-developed case law, even if such information is not in a prosecutor's file, prosecutors are imputed to have the knowledge of those acting on the government's behalf, including the police.

Such evidence could exist in police personnel files. However, under long-existing New Hampshire law, those personnel files are confidential. RSA 105:13-b. The EES and the so-called "Laurie List," were developed as a facilitative device for prosecutors to meet their constitutional obligations in light of the legislative determination that police personnel files are confidential. Thus, the EES was not created for public informational purposes, and, as such, the spreadsheet was not developed in a manner that substantively identifies, or provides context to,

the conduct of the individual officer that resulted in his or her placement on the list. Rather, the list functions solely as a reference point for the prosecutor to enable that individual to initiate an inquiry as to potential exculpatory evidence that is of a personnel nature.

Under RSA 105:13-b, the only exception to the confidentiality of police personnel files is for “exculpatory evidence.” The disclosure of such evidence is statutorily restricted to the pertinent criminal defendant. *See* RSA 105:13-b, I (“Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant.”).

As stated, the EES is intended to facilitate prosecutors’ compliance with their constitutional obligations under the limited authorization set forth under RSA 105:13-b, I. Therefore, the question of public disclosure of the EES must be examined within the context of RSA 105:13-b as a whole. Because that statute maintains the confidentiality of officer personnel records until either a prosecutor or judge makes a legal determination that the information is “exculpatory,” public disclosure of the identities of officers whose personnel files may contain exculpatory evidence as to a particular criminal defendant runs contrary to the statute.

Specifically, public disclosure of the EES would contradict the Legislature’s apparent intent (via RSA 105:13-b) to afford officers significant privacy interests in their personnel-related information. This incongruity with the framework of RSA 105:13-b demonstrates that officers have a meaningful privacy interest in the confidentiality of the EES.

Therefore, although a public interest does exist in the listed officers’ identities, this does not alter the fact that disclosure of the EES itself does not inform the public as to the substance or context of the officers’ underlying conduct. Rather, publication of the EES would operate largely to label particular officers as generally not credible, regardless of other relevant circumstances that may, upon prosecutorial or in camera review, render that officer’s personnel information not “exculpatory” as to particular criminal cases, and, therefore, confidential, even as to a defendant in whose case the officer may have been engaged. *See* RSA 105:13-b, II. This is not the function of the list in the prosecutorial setting for which it was designed, nor is it the intent.

As explained, in that setting the criminal defendant does not access the EES itself. Rather, if a prosecutor—or judge following in camera review—deems the personnel material “exculpatory” within the context of a particular criminal matter, that defendant is provided with the substantive (and otherwise confidential) information regarding that officer’s past actions. In such cases, the personnel records are typically provided subject to the terms of a protective order. The EES spreadsheet itself, therefore, does not communicate anything other than the mere potential for exculpatory evidence as to a specific criminal matter.

Thus, if disclosed, the EES does little to “inform the public about the conduct and activities of their government[.]” *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 528 (2016). And, again, due to the concision of the spreadsheet, its disclosure would unfairly and most likely prejudicially contravene the significant privacy interests that law enforcement officers are provided in their personnel information by law. Therefore, on balance, those privacy

interests, including those granted by RSA 105:13-b, outweigh the public's interest in the viewing the EES list in unredacted form.

Sincerely,



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GWG/gww

Copy to: Kate Spiner, Director of Communications