STATE OF NEW HAMPSHIRE

SUPERIOR COURT Hillsborough County South

No. 226-2018-cv-00537

New Hampshire Center for Public Interest Journalism, *et al*

v.

New Hampshire Department of Justice

Memorandum of Law in Support of Objection to Motion to Dismiss

Now comes the Petitioner, the New Hampshire Center for Public Interest Journalism (hereafter, "Center") and respectfully submits this memorandum in support of its Objection to the Motion to Dismiss filed by the New Hampshire Department of Justice (hereafter, "DOJ") on or about October 25, 2021 and contends the pending remand order issued by the New Hampshire Supreme Court should be answered in the negative; that is, weighing the matters at interest and the public's right to know, the Exculpatory Evidence Schedule ("EES") does not constitute a file the release of which would be an invasion of privacy. See New Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice, 173 N.H. 648, 659 (2020).

Introduction

The DOJ has asked the Court to dismiss the pending Right to Know action as moot based upon the passage of a statute, R.S.A. 105:13-d, that allows, but does not require, the DOJ to voluntarily host an EES of officers whose misconduct renders their credibility suspect while also removing the EES from analysis animated by the powerful preamble to R.S.A. ch. 91-A that proclaims that "[o]peness in the conduct of public business is essential to a democratic society…." R.S.A. 91-A:1; and that commits the state to "the greatest possible public access…." *Id.*, in line with Pt. 1, Art. 8 of the New Hampshire Constitution.

R.S.A. 105:13-d

The DOJ bases its entire argument for dismissal upon the passage of R.S.A. 105:13-d which was signed into law by Governor Sununu on August 25, 2021 and that became effective on September 24, 2021. The statute, however, has two frailties[1] that undermine the DOJ's argument that this Court should abandon its role and defer to the legislature in a discretionary exercise of declaring this matter moot. See Sullivan v. Town of Hampton Bd. of Selectmen, 153 N.H. 690, 692 (2006) (quoting Petition of Brooks, 140 N.H. 813, 816 (1996) (dismissal for mootness is a "doctrine of convenience and discretion"). A third shortcoming of the mootness framework suggested by the DOJ is that the department, in its discretion, does not always follow R.S.A. 105:13-d, even after it has become effective. See http://indepthnh.org/2021/11/24/ag-removes-28-names-from-laurie-list-of-dishonest-police-outside-of-new-law/ (last viewed December 2, 2021) (28 names removed pursuant to 2018 protocol and not pursuant to a judicial process pursuant to R.S.A. 105:13-d). The Center discusses the two statutory shortcomings of R.S.A. 105:13-d here and otherwise defers to the DOJ's description of the statute it helped to write.

First, R.S.A. 105:13-d does not require the DOJ to compile or maintain the EES. The very first sentence of the statute reads: "The department of justice may voluntarily maintain an exculpatory evidence schedule." R.S.A. 105:13-d, I. The legislature repeated the voluntary nature of the statute in its concluding section, "Nothing in this section shall require the department of justice to maintain an exculpatory evidence schedule." *Id.* at VI. The DOJ, a party to this litigation. has absolute and complete discretion to maintain the EES or not. The legislature provided no standards for the DOJ to follow in deciding to maintain the EES and

[1] The statute does not define the contents of the EES. The Center assumes the EES referenced in R.S.A. 105:13-d is the exact same as the EES which has been discussed in the instant litigation.

there are no minimum time frames once the EES is adopted. The completely voluntary nature of the statute has two consequences. First, the Court is not really weighing its authority against that of the legislature. The legislature has delegated its entire authority to the agency directly involved in this litigation rendering any protection for the public's right to know completely illusory. Worse, the delegation is standardless and was made at the behest of the litigant, the DOJ, as a way of terminating the litigation. The public's right to know about officers found to have engaged in misconduct could be completely upended, not by the complicated public political process that may result in the repeal of a statute, but at the whim of a single person, the attorney general, whose department must depend on the cooperation of police officers who may be listed on the EES. Second, even if the attorney general chooses to have the DOJ adopt the EES, nothing prevents the DOJ from discontinuing the EES at any time, including on the day after the instant lawsuit is dismissed.

The second shortcoming of the statute is its challenge provisions. Officers who were listed before R.S.A. 105:13-d was enacted and who wish to challenge their listing on the EES, may file suit within 90 or 180 days of their receipt of notice, depending on when they were first listed. *Id.* at II(a). Section II(c) of the statute directs that the law enforcement agency that recommended listing the officer shall be the defending party. The DOJ is given the right to intervene, but is not required to do so. *Id.* Nothing in the statute, or elsewhere, provides any funding for local town departments to defend against de-listing suits which may include extensive trial work and appellate review by the Supreme Court. Nothing in the statute, or elsewhere, requires a town to defend a de-listing suit. Again, ultimately, when an officer from a cash-starved small rural town or an officer who is one of many backed by his/her union in a large city department files suit, it is a party to this litigation, the DOJ, that enjoys absolute discretion to

step in and take over the defense of the de-listing suit or to let the matter be defaulted because there are more pressing needs.

Listings added to the EES after the enactment of R.S.A. 105:13-d are subject to the recommending agency's grievance process without any standards for those grievance processes and, again, without any funding for the agencies that must defend against an internal grievance that may result in an arbitration or a court appeal. See R.S.A. 105:13-d, III. R.S.A. 105:13-d's reliance on internal grievance systems was adopted even though some internal affairs systems in New Hampshire are reported to be very lax. See https://www.concordmonitor.com/In-NH-internal-affairs-investigations-come-before-police-misconduct-is-reported-to-the-state-34596737 (last viewed Nov. 17, 2021) ("Last year there were several troubling reports about lax internal affairs investigations. In Salem, New Hampshire an audit of the police department revealed 'a pattern of inadequate internal affairs, frequently ignored or discouraged complaints, incomplete records and a culture that chafed against town oversight.'").

Parenthetically, one thing that, however, is clear is that the legislature and the DOJ, by supporting R.S.A. 105:13-d. have unequivocally answered the question the Supreme Court posed on remand. "Subject to the provisions of this section, the exculpatory evidence schedule may be maintained by the department of justice and shall be a public record subject to R.S.A. 91-A." *Id.* at I (emphasis added).[2] Both the executive and legislative branches have admitted the careful

[2] The referenced "provisions of this section" are closely related to protecting the due process rights of a listed officer. None of the provisions undermine the clear concession that the public's right to know outweighs the officer's interest in keeping private his/her name, the date of the offensive conduct, and a brief description of the type of conduct.

balancing required to determine an invasion of privacy tips heavily in favor of the public's right to know and in support of disclosure.[3]

One last point should be made in this section as the DOJ has attempted to characterize the instant suit as now being an attack on R.S.A. 105:13-d which they claim must occur in a separate, newly filed suit. The strawman effort is misguided. The Center takes no position on the constitutionality of R.S.A. 105:13-d, whether on its face or as applied. The reason the Center provides the foregoing analysis of the statute is to refute the claim that the pending suit is rendered moot by the passage of R.S.A. 105:13-d. To the contrary, the Center believes that the Court should not exercise its discretion to dismiss this action based upon such a toothless effort to defer to the DOJ and the attorney general. The only relevance of R.S.A. 105:13-d to this matter at this juncture is whether its enactment justifies dismissal. It does not.

The Balancing Test to Determine an Invasion of Privacy

The test to determine whether the EES constitutes a file the release of which would be an invasion of privacy is well known and well-rehearsed. The Supreme Court set out the three-part test in footnote 1 of its opinion in this matter. The test requires the Court to determine if there is a privacy interest at stake, and, if so, to then determine the public's interest in disclosure, and, finally to balance the two competing interests. New Hampshire Center, 173 N.H. at 659-60. See also New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437 (2003). The party resisting disclosure bears a heavy burden to shift the balance towards nondisclosure. *Id.*, 149 N.H. at 440.

A. There is either no interest or nothing more than a *de minimis* privacy interest at stake.

[3] It would be a violation analogous to judicial estoppel for the DOJ to now switch and claim that disclosure of the EES constitutes an invasion of privacy. See generally, Pike v. Mullikin, 158 N.H. 267 (2009).

The only EES produced to date is a heavily redacted list that leaves the Center unable to identify the officers listed. The DOJ's litigation position in this case gives the illusion that there is a strong privacy interest with clear boundaries that is vigorously protected by the DOJ. Such is not the case.

First, given the constitutional nature of exculpatory evidence, about which the EES gives inquiry notice, some of the identities of listed officers are bound to be already known to the public. These are officers who were questioned in public criminal trials about their bad conduct or had their bad conduct revealed in post-conviction or other criminally-related investigations. See, e.g., Complaint at paragraphs 45 and 46 (revelations about former Nashua Police Chief John Seusing, former Pelham Master Patrolman Eugene Stahl and Salem Police Sargent Eric Lamb). There is no privacy interest at stake for a listed officer whose identity and bad conduct have been made public. See New Hampshire Civil Liberties Union, 149 N.H. at 440.

Second, the DOJ does not work to protect the identity of officers on the EES in a consistent fashion. Former Keene Police Officer Jillian Decker was the subject of a reinstatement hearing before the Police Standards and Training Council on August 24, 2021—while this remand proceeding was pending. https://www.pstc.nh.gov/council/documents/minutes-20210828.pdf (last viewed November 18, 2021). Officer Decker was fired by the Keene Police Department for, among other things, lying about a personal relationship during an internal investigation. *Id.* The Hinsdale Police Department, sometime later, sought guidance from the Council on whether it could hire Officer Decker. Two members of the Council moved to take up the matter in non-public session, but the motion was voted down. *Id.* at 9. Deputy Attorney General Jane Young is a member of the Police Standards and Training Council. Not only didn't she advise the Council that the listing of

an officer on the EES is confidential, Deputy Attorney General Young voted against having the hearing in a non-public session. *Id.* The Center can only assume that Deputy Attorney General Young favored transparency in the matter, but her rationale for voting against a confidential proceeding is not part of the record. The chief of the Hinsdale Police Department revealed that Officer Decker is a listed EES officer. *Id.* at 11. The details of her transgressions were fully aired in public. *Id.* at 9-12.[4] While the Center contends the actions of the second in command of the DOJ constitute a waiver that should result in the release of the EES, the DOJ must concede that its own department takes official action inconsistent with the positions it asserts in this matter. At the very least, this is an indication that the DOJ does not value, or always recognize the privacy interest at stake.

Moreover, the boundaries of purportedly protected conduct are arbitrary--further undermining the claim that release of a sanitized EES list presents serious problems for law enforcement. At the same Council meeting of August 24, 2021, the Council took up the question of whether it should shorten the period of debarment imposed upon police recruit Brian Jaezcko who was involved in a cheating scandal at the Police Academy. All of the details of his lying were discussed in public—and his period of debarment was shortened from two years to one year. *Id.* at 7-8. No effort was made to keep any of this information confidential. Presumably, as Recruit Jaezcko went through the trouble to seek a reduction in his period of debarment, he will pursue an interest in becoming a certified police officer someday. Cheating and lying about cheating are likely exculpatory *Brady* information that should result in an EES listing. One

[4] By analogy, it is worth considering that the definition of a "trade secret" includes that the purported secret "is the subject of efforts that are reasonable under the circumstances to maintain secrecy." R.S.A. 350-B:1, IV.

wonders if the DOJ will recommend confidentiality protection of a listing for Mr. Jaezko after he becomes a police officer, even though his transgressions are now public.

None of the already disclosed officers have any privacy interests to be protected. "Absent a privacy interest, the Right-to-Know Law mandates disclosure of their names and addresses. *See* New Hampshire Civil Liberties Union, 149 N.H. at 440." Lamy v. New Hampshire Public Utilities Commission, 152 N.H. 106, 109-10 (N.H. 2005).[5]

The Center assumes there are some officers on the EES whose identities have not been disclosed and who, therefore, may have a privacy interest at stake. The Center contends that this Court cannot determine the nature of that privacy interest without considering the basis for the EES in the first place--and law enforcement's knowledge that their bad conduct must be disclosed in certain circumstances. The EES is a successor to what were called Laurie lists, after the case of State v. Laurie, 139 N.H. 325 (1995). Laurie, in turn, was the progeny of Brady v. Maryland, 373 U.S. 83 (1963), United States v. Agurs, 427 U.S. 97 (1976) and United States v. Bagley, 473 U.S. 667 (1985). See Laurie, 139 N.H. at 327. Thus, at least since Brady in 1963, prosecutors have had a duty to disclose the personnel records of police officers found to have engaged in misconduct when those officers testify in a criminal matter and are subject to impeachment or other challenge. Every police officer for the last almost 60 years should reasonably know that his or her bad conduct is subject to disclosure to criminal defense counsel for use in a public trial. These disclosure circumstances are not limited to lead detectives who coordinate the investigation of a crime, as was the case in Laurie. The circumstances may

[5] The DOJ should be compelled to identify which officers' identities have been disclosed and these entries should be made public forthwith. To the extent the DOJ does not currently know which officers have been previously disclosed, the DOJ should be required to make appropriate inquiry and report back to the Court and the Center.

include patrol officers who happen onto a crime scene or to whom a suspect makes his first statement. The circumstances may include an officer merely in a chain of custody for an important piece of evidence.

In New Hampshire, police officers are required to take an oath of office. R.S.A. 105:2. The Stratham police department's oath of office is typical. It provides:

> Members of the Stratham Police Department do solemnly swear that we will faithfully and impartially discharge and perform all the duties incumbent upon us as Police Officers according to the best of our abilities, agreeable to the rules and regulations of the Constitution, the laws of the State of New Hampshire and the ordinances of the Town of Stratham.

https://www.strathamnh.gov/stratham-police-department/pages/oath-office (last viewed November 18, 2021).

The right of an officer that this Court is to weigh against the public's constitutionally protected right to know, discussed *infra,* may thus be characterized as the right to hide bad conduct committed in violation of an officer's sworn oath of faithfulness to the law that he reasonably should know is subject to eventual disclosure consistent with a criminal defendant's constitutional right to discover exculpatory evidence.[6] Worse yet, for the bad conduct to be exculpatory, it pretty much had to have been intentional.[7]

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[6] By prior agreement, this case also only concerns the listing of officers where their bad conduct has been "founded" by their employing agency.

[7] It is worth noting that the identity of a person arrested for a criminal charge that is dismissed or who is found not guilty is readily subject to disclosure and publication, even though the arrested person was presumed innocent. Further, the annulment statute is an indication itself of how little privacy the legislature attaches to the modest disclosure of information that may be of a public safety concern. A person acquitted of a crime, or a person arrested but not prosecuted, may petition a court for an annulment and the court may grant the annulment, but only if, "in the opinion of the court, the annulment will assist in the petitioner's rehabilitation and will be consistent with the public welfare…." R.S.A. 651:5, I. That is, pursuant to the law, a presumed innocent person who was found innocent may only have his or her arrest annulled if certain criteria is met. Annulment is not automatic.

Finally, in evaluating the privacy interest at stake, the nature of the information contained in the EES lists is important to consider. As this Court is aware, the EES does not recount the specific details of prior misconduct. Only an abbreviated phrase or word giving the nature of the bad conduct is provided. This further diminishes the privacy interest at stake with the EES. The Center believes that the identity of officers, with a quick abbreviation of their intentional bad conduct that may be subject to public disclosure anyway in a criminal trial, creates a privacy right that is *de minimis*, at best, and requests the Court so rule.[8]

B. What is the public's interest in disclosure?

If the Court finds there is a privacy interest at stake, the determination of whether release of the EES constitutes an invasion of privacy requires the Court to carefully balance that privacy interest against the public's right to know. New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437 (2003). The party resisting disclosure bears a heavy burden to shift the balance towards nondisclosure. *Id.*, 149 N.H. at 440. But, who is the public?

The Center acknowledges that this Court may not consider its special interests in gaining access to the EES as a basis for investigative reporting, but neither may the Court exclude the interests of investigative journalists as they are members of the public, and so are their readers and supporters. So are all the members of the public who believe there is value in competent investigative reporting about how the government conducts itself because it reduces cynicism and enhances the legitimacy of well run and fair governmental operations, particularly those related to law enforcement. This is particularly true in the age of George Floyd and Ahmed Arbery.

[8] The EES does not include the details of the bad conduct. Nor, does the EES include an officer's home address, which is a potentially protected privacy interest. Brent v. Paquette, 132 N.H. 415, 428 (1989).

People who pay taxes in New Hampshire to fund local and state law enforcement agencies are members of the public. They have an interest in knowing if the law enforcement agencies they financially support have problems with officers who lack credibility. Conversely, they also have interest in supporting departments without any or with only a relatively few officers who are listed. Information about the number of listed officers from particular departments may directly affect funding decisions and speak to the operations of the departments in question. These decisions may be particularly acute with respect to police officers in schools. See, e.g., https://www.vnews.com/Residents-petition-to-do-away-with-school-police-position-38319845 (last viewed November 18, 2021).

The public also has the right to know how common it is for law enforcement officers to lie, cheat, steal, or use excessive force and how common it is for agencies to continue to employ those officers who engaged in this bad conduct. The state of New Hampshire has acknowledged the need for improved transparency in this age of all too frequent police shootings. Governor Sununu expressly proclaimed in Executive Order 2020-11, dated June 16, 2020, "in the wake of the tragic murder of George Floyd in Minneapolis, MN, our country is engaged in a nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance transparency, accountability, and community relations in law enforcement…the State of New Hampshire has an obligation to participate in the national conversation and engage in self-examination to identify any opportunities to improve the state of our law enforcement and the relationship between law enforcement and the communities they serve…." https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf (last viewed November 18, 2021).

Parents who must counsel their children on whether they can trust law enforcement are members of the public. The willingness to be transparent, in even the tiny respect provided by the EES, can build trust; just as the refusal to be transparent contributes to cynicism.

Those who believe in law and order, including police officers, are members of the public. It is not always possible to predict which police officer will be assigned to perform what tasks in any case. The public has a right to be sure that a department, and its leadership, will not risk that an officer with a history of lying or cheating has a key responsibility in an important case. It is in the interest of the law abiding public to know which departments are willing to risk that the "wrong" officer might be transporting a suspect when the suspect purports to confess or that the "wrong" officer is the first to arrive at the scene of a crime and must preserve the integrity of key pieces of evidence. Police officers who do not lie, cheat or use excessive force are also members of the public who deserve to have their unblemished careers noted.

Prisoners and persons who have been convicted and served their sentences are members of the public and they directly have interest in learning who is on the EES to determine if their convictions are constitutional. As important, the members of the public who believe in a just society have an interest in ensuring that people are not wrongfully convicted because exculpatory evidence was withheld from them.

Finally, let's return to Officer Jillian Decker who was the subject of the Police Standards and Training Council's minutes. The public has a right to know that its law enforcement agencies do not act in a discriminatory manner. The pattern of discipline evidenced by the EES may show that female officers are disciplined at a disproportionately high rate. Other characteristics of the officers discernable once their identities are known may also help the public know that discipline is discriminatory or, to the contrary, that discrimination is not apparent.

Whether discrimination through the imposition of discipline is apparent or is not apparent speaks directly to the operations of governmental agencies and is subject to the public's right to know.

In summary, the concept of "public" is multi-faceted and, with this, the public's interest is also broad. The public's interest ranges from the financial concern that tax revenues are well spent, to questions of trust and personal safety, to the interest in maintaining a trusted judicial system that is successful in prosecuting those who should be prosecuted, and not those who shouldn't be prosecuted, to ensuring that law enforcement agencies do not engage in employment discrimination. All of these interests are served by transparency and disserved by the cynicism that comes with opacity.

C. How should the Court weigh an officer's *de minimis* privacy interest against the public's exceedingly strong interest in disclosure?

Mindful of R.S.A. ch. 91-A's strong presumption in favor of transparency and disclosure, the DOJ's admissions contained in its reliance on R.S.A. 105:13-d, the Governor's executive order, the haphazard way in which leadership of the DOJ protects the secrecy of the EES; the Center contends that any privacy interest that may be found is vastly outweighed by the public's right to know and the presumption that favors disclosure.

Conclusion

For all the foregoing reasons, the Center requests the Court deny the motion to dismiss and respond to the Supreme Court's inquiry in the negative; that is, that there are no privacy interests at stake for some listed officers and that for others, any privacy interest at stake is outweighed by the public's right to know. The Court should order the release of the EES.

Respectfully submitted,

/s/ *Andru Volinsky,* Andru Volinsky, No. 2634

Certificate of Service

I hereby certify that this pleading has been electronically filed and service effected on the other litigants through the Court's electronic filing system this 3rd day of December, 2021.

/s/Andru Volinsky, Andru Volinsky, No. 2634