THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 05-E-383

Frederick J. Murray

vs.

Special Investigation Unit of the Division of State Police of the New Hampshire Department of Safety; Grafton County Sheriff 's Department; Grafton County Attorney's Office; New Hampshire Attorney General Kelly A. Ayotte; New Hampshire Governor John J. Lynch; Hanover Police Department; Director of the Division of State Police of the New Hampshire Department of Safety; Commander of the State Police Troop F in Twin Mountain; Troop F of the New Hampshire State Police in Twin Mountain; New Hampshire Fish and Game Department Region 2; and Historic Case Unit in Major Crimes of the Division of State Police of the New Hampshire Department of Safety

ORDER ON THE REQUEST FOR PRELIMINARY INJUNCTION

The matter before the Court is Frederick J. Murray's (petitioner) petition for injunctive and other relief under RSA chapter 91-A, the Right-to-Know Law. The petitioner seeks an injunction ordering various New Hampshire law enforcement agencies and officials (collectively the respondents) to disclose records relating to the disappearance of his daughter, Maura Murray (hereinafter "Maura"). The respondents object. After a hearing on the merits on April 13, 2007, the Court finds and rules as follows.

PROCEDURAL BACKGROUND

The Court incorporates by reference the factual background illustrated in its previous Order dated January 15, 2006, (Vaughan, T.), and the Order issued by the New Hampshire Supreme Court in *Murray v. New Hampshire Div. of State Police, Special Investigation Unit,* 913 A.2d 737 (N.H. 2006).

In December 2005, the petitioner filed a petition in the superior court requesting, among other things, a declaration that the respondents' refusals to produce certain

records violated the Right-to-Know Law and Freedom of Information Act (FOIA), as well as an injunction requiring the respondents to release the requested documents. In January 2006, the superior court denied the petitioner's request and ruled that the requested records were investigatory in nature and that disclosure could interfere with law enforcement proceedings. *See* Order dated January 15, 2006, (Vaughan, J.). The petitioner appealed that ruling to the New Hampshire Supreme Court. The New Hampshire Supreme Court vacated and remanded. Before the court is the remanded petition.

DISCUSSION

The petitioner claims that the respondents have each violated the New Hampshire Right-to-Know Law, RSA 91-A, as well as its Federal counterpart, FOIA, by wrongfully denying his request to review and obtain copies of non-privileged records and other information regarding the circumstances relating to the disappearance of Maura.

As the New Hampshire Supreme Court provided,

> [t]he 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. Thus, the Right-to-Know Law helps further our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. While the statute does not provide for unrestricted access to public records, [the court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents. Therefore, [the court] construes provisions favoring disclosure broadly, while construing exemptions narrowly. [The court] also look[s] to the decisions of other jurisdictions, since other similar acts, because they are in *pari materia,* are interpretatively helpful,

> especially in understanding the necessary accommodation of the competing interests involved. Finally, when a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.

Murray v. New Hampshire Div. of State Police, Special Investigation Unit, 913 A.2d 737, 739 -740 (N.H. 2006).

The petitioner seeks access to records which the respondents assert are investigatory in nature. New Hampshire's Right-to-Know Law does not explicitly address requests for police investigative files. *Id.* However, in *Lodge v. Knowlton,* 118 N.H. 574 (1978), the Court adopted the six-prong test under FOIA for evaluating requests for access to police investigative files. *Murray at 740* (citing *Lodge v. Knowlton,* 118 N.H. 574 (1978)). Under FOIA, an agency may exempt from disclosure investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records:

(A) could reasonably be expected to interfere with enforcement proceedings;
(B) would deprive a person of a right to a fair trial or an impartial adjudication;
(C) could reasonably be expected to constitute an unwarranted invasion of privacy;
(D) could reasonably be expected to disclose the identity of a confidential source, and in the case of a record compiled by a law enforcement authority in the course of a criminal investigation, or by any agency conducting a lawful national security investigation, confidential information furnished only by a confidential source;
(E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
(F) could reasonably be expected to endanger the life or physical safety of any individual ....

See Id. at 740. The petitioner concedes that exemption (C) covers some of the requested records. The respondents resist disclosure of the remaining records under exception (A).

In order to properly resist disclosure under that exception (A), the respondents must

show that the requested documents are: (1) investigatory, and (2) compiled for law enforcement purposes. *Id.* The court conducted a hearing in which the State asserted and provided evidence that the records at issue are investigatory records compiled for law enforcement purposes. Petitioner's counsel had an opportunity to question each of the State's witnesses on this issue. After evaluating the evidence presented during the hearing and the subsequent *in camera* offer, the court finds and rules that the records requested are investigatory files as outlined in *Lodge* as exception (A).

Next, the court must determine if exception (A) applies to these records. The key question in the analysis is whether revelation of the documents could reasonably be expected to interfere with enforcement proceedings. *Id.* at 741 (citing *Curran v. Dept. of Justice*, 813 F.2d 473, 474 (1st Cir. 1987)). To make this determination the respondent must show first, that law enforcement proceedings are pending or reasonably anticipated and second, that disclosure of the requested documents could reasonably be expected to interfere with those proceedings. *Id.* at 741.

As to the first requirement, the court finds and rules that the respondents demonstrated through their pleadings and the evidence presented during the hearing as well as *in camera,* that law enforcement proceedings are reasonably anticipated.

Regarding the second requirement,

> Exemption (A) was designed to eliminate "blanket exemptions" for government records simply because they were found in investigatory files compiled for law enforcement purposes. Put another way, merely because a piece of paper has wended its way into an investigative dossier created in anticipation of enforcement action, an agency ... cannot automatically disdain to disclose it. Since an agency may not rely on a blanket exemption, it must meet

> a minimum threshold of disclosure in order to justify its refusal to disclose. The agency is not required, however, to justify its refusal on a document-by-document basis. When generic determinations are used, the withholding should be justified category-of-document by category-of-document not file-by-file.

Murray at 741 (citations omitted). In support of its position, the respondents provided a list of the categories of records that, if disclosed, could interfere with law enforcement proceedings. This list included the following categories:

A. Phone records
B. Subpoenas
C. Credit card information
D. Criminal records checks
E. Narrative reports by the investigators
F. Witness interviews (tapes and transcripts)
G. Polygraph examinations (tapes and charts)
H. Possessed property reports (referencing all physical evidence seized)
I. Lab reports
J. Police/dispatch call logs
K. Photographs
L. Correspondence (letters and e-mails)
M. Attorney notes
N. One party wiretap memoranda
O. Maps and diagrams
P. Investigative duty assignment logs
Q. Tax records
R. Employment personnel files
S. Medical records
T. Military records

See State's Exhibit A. Additionally, the respondents provided a supplemental

memorandum of law in support of its objection which contained further descriptions of the requested records by category. *See* Resps' Supp. Memo. of Law in Supp. of Obj. to Mot. for Prelim. Inj. The memorandum provides a more comprehensive description of the contents in each category, addresses whether the records have been provided, explains how the disclosure of the specific category could harm the investigation, and provides whether there are segregable records in that particular category. Moreover, the descriptions include which affidavit or exhibit should be referenced if more information regarding the category is needed or if *in camera* review is more appropriate.

At present, the respondents have already disclosed a selection of records to the petitioner. *See* Attachment of Nancy J. Smith. Additionally, during the hearing the petitioner stated that he is no longer pursuing: (C) credit card records, (D) criminal record checks, (G) polygraphs, (Q) tax records, (R) employment records, (S) medical records; or (T) military records.

Therefore, the remaining records for the court to address are as follows: (A) Phone records, (B) Subpoenas, (E) Narrative reports by the investigators, (F) Witness interviews (tapes and transcripts), (H) Possessed property reports (referencing all physical evidence seized), (I) Lab reports, (J) Police/dispatch call logs, (K) Photographs, (L) Correspondence (letters and e-mails), (M) Attorney notes, (N) One party wiretap memoranda, (O) Maps and diagrams, and (P) Investigative duty assignment logs.

During the hearing, the respondents offered the testimony of Officer Todd Landry, now Sergeant, to illustrate how disclosure of the requested records could reasonably be expected to interfere with law enforcement proceedings. Sergeant Landry generally

addressed why the records must not be disclosed. *See also* Respondents' Exhibit B, Affidavit. Subsequently, he addressed the individual categories in turn, and provided specific reasons the disclosure could harm the investigation if made public. Sergeant Landry withheld testimony when the justification for non-disclosure might harm the investigation and provided that testimony to the Court *in camera*. The court finds Sergeant Landry's testimony credible and informative.

Next, the respondents offered the testimony of Senior Assistant Attorney General Jeffery A. Strelzin, Chief of the Homicide Unit. Attorney Strelzin became involved in the investigation in 2004. *See also* Respondents' Exhibit D, Affidavit. He spoke generally of the current investigation, the reasons behind non-disclosure at this time, the frequency of his review of the case, and the likelihood of a prosecution, which he stated was 75%.

Moreover, throughout the hearing, and during an *in camera* review, Senior Assistant Attorney General Nancy J. Smith conducted the direct examinations of the witnesses referenced above. Additionally, she provided the court with her testimony and affidavit regarding the categories and reasons for nondisclosure. Finally, attached to her affidavit is a list of the documents that have already been made public or came from a public source. *See* Exhibit C.

The Court finds credible the testimony of each of the State's witnesses. Accordingly, after considering the testimony, affidavits, and evidence presented during the *in camera* review, the court finds and rules that the respondents met their burden to demonstrate that disclosure of the requested documents could reasonably be expected to interfere with enforcement proceedings. The court is mindful that further analysis of the

evidence presented by the respondent could cause the harm the exception seeks to prevent. See *Curran,* 813 F.2d at 475. Nevertheless, court finds and rules that the categories are distinct enough to allow meaningful judicial review, yet not so distinct as to prematurely "let the cat out of the investigative bag." *Id.* The descriptions of the categories and the reasons for nondisclosures were more than generic determinations and the court finds and rules that the records are not segregable and even partial disclosure could reasonably be expected to interfere with law enforcement proceedings. *See Murray* at 741. The court is satisfied that there are sufficient justifications for nondisclosure under the standards illustrated herein.

Accordingly, the petitioner's request for injunctive relief under RSA 91-A:7 is DENIED. The petitioner's request that the respondents be continually obligated to produce and supply documents as the respondents receive them is DENIED. The petitioner's request for attorney's fees and costs is also DENIED.

SO ORDERED.

SO ORDERED.

June 11, 2007

Timothy J. Vaughan
Presiding Justice