SUPERIOR COURT

CHESHIRE, SS 213-2011-CV-00214

CITY OF KEENE

v.

IAN FREEMAN[1]

ORDER ON PETITION FOR DECLARATORY JUDGMENT

The City of Keene ("Petitioner" or "City") petitions for declaratory judgment under RSA 491:22, stemming from the request which Ian Bernard ("Respondent" or "Bernard") submitted to it under RSA 91-A. On July 5, 2011, Bernard requested "[a]ll evidence and documents regarding [the] investigation into the death of Thomas James Ball, who self-immolated on 6/15/11. A copy of your internal document retention policy." Pet. ¶ 8. The City admits to having disclosed to Respondent some but not all of the records in its possession, which Petitioner believes are responsive to his request under RSA 91-A. Id. ¶ 12. The City asserts that disclosure of the remaining

[1] This case is captioned City of Keene v. Ian Freeman because the respondent, Ian Bernard, submitted his RSA 91-A request to the City under the name "Ian Freeman." As the Court has explained in its order dated November 22, 2011 in Docket No. 213-2011-CR-00216, until Bernard legally changes his last name to "Freeman," he shall be referred to as "Ian Bernard."

governmental records will amount to an invasion of an individual privacy interest, and as such is exempt under RSA 91-A:5, IV. Id. ¶ 15. The parties appeared for a hearing on December 21, 2011.

The records which Petitioner represents it has turned over to Respondent are: Keene Police Department receipt dated June 20, 2011 for three CDs of Thomas Ball, evidencing the return of discs containing surveillance videos of the Cheshire County Sheriff's Department (id. ¶ 13); Keene Police Department General Order 8201A – Central Records Administration and 8401I – Property Management (id. ¶ 9 xi-xii); and City of Keene Record Retention Schedule dated May 7, 2010 (id. ¶ 9 xiii). The City acknowledges that "these government records are responsive on point to Respondent's request for a copy of [Keene Police Department's] internal document retention policy and do not trigger a privacy interest." Pet. Memo Law p. 2. At the hearing, Bernard denied having received any records from the City.

The records which the City believes are exempt from disclosure ("disputed records") are: Keene Police Department incident report dated July 11, 2011; narratives of Officer Benjamin E. Nugent, Lieutenant Todd B. Lawrence, Detective Donald W. Lundin, dated June 16, 2011; narrative and supplemental narrative of Lieutenant James P. McLaughlin, dated June 20, 2011; narrative of Secretary I Margo M. Best; supplemental narrative of Det. Lundin dated June 20, 2011; and a compact disc containing photographs of the scene taken on June 15, 2011. Pet. ¶ 9 i-ix. Petitioner

argues that these records are exempt because they "are substantially comprised of Ball's personal and private information, motives and actions, as well as witness information [and] . . . contain specific descriptions of the manner of the individual's suicide." Id. ¶ 18. The City therefore argues that Ball's individual privacy interest is at stake with respect to the disclosure of the disputed records. Second, the City asserts that the insight provided by the disclosure of these records into the City's decision-making is minimal, especially given the heavy media coverage afforded to this incident. Id. ¶ 19. Petitioner also argues that the purpose of increasing public knowledge about how authority – specifically the City and Keene Police Department – operates will not be furthered by the disclosure of the disputed records. Id. ¶¶ 20, 21. Lastly, the City asserts that the interest in non-disclosure outweighs the interest in disclosure. Id. ¶ 22.

Additionally, Petitioner argues that Lundin's supplemental report dated June 20, 2011 is exempt from disclosure as a medical record under RSA 611-B:21, III. Id. ¶ 24. The City therefore asks that the Court review the disputed records *in camera* and determine whether they are exempt from disclosure under RSA 91-A:5, IV in part or in whole. Additionally, the City asks that the Court determine whether Lundin's supplemental report is exempt as a medical record.

By way of response, Bernard states that the City's arguments are frivolous. At the hearing, he argued that no privacy interest is at stake because the public can already access a large amount of private information in the court file on Ball's divorce and

custody dispute. Bernard also argued that Ball wanted the fact, manner, and motivation behind his death to be public, and that disclosure of the disputed records would serve that purpose.

The preamble to the Right-to-Know Law sets forth the statute's aim: to ensure government accountability. "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter 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." RSA 91-A:1. Recognizing the competing interests to ensure both the privacy of citizens and the transparency of government, the statute sets forth a number of exceptions in RSA 91-A:5. "The following governmental records are exempted from the provisions of this chapter: . . . other files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV.

"To advance the purposes of the Right-to-Know Law, we construe provisions favoring disclosure broadly and exemptions narrowly. By so doing, we 'best effectuate the statutory and constitutional objective of facilitating access to all public documents.'" Lamy v. New Hampshire Public Utilities Commission, 152 N.H. 106, 108 (2005) (internal citations omitted).

> When exemption is claimed on privacy grounds, "we examine the nature of the requested document or material and its relationship to the basic purpose of the Right-to-Know Law." The party resisting disclosure "bears a heavy burden to shift the balance toward nondisclosure." Furthermore, "the motivations of . . . any member of the public . . . are irrelevant to the question of access."

The obvious public purpose that may be served by disclosure of the disputed exhibits is to increase public knowledge about how the authority operates.

> "Official information that sheds light on an agency's performance of its statutory duties falls squarely within [the] statutory purpose [of the Right-to-Know Law]. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct."

Union Leader Corp. v. New Hampshire Hous. Fin. Auth., 142 N.H. 540, 554 (1997), quoting Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989) (further citations omitted). "We have noted that disclosure of requested information is not warranted when it 'does not serve the purpose of informing the citizenry about the activities of their government.'" Union Leader Corp. v. N.H. Ret. Sys., 2011 N.H. LEXIS 153 (N.H. Nov. 3, 2011), quoting Union Leader Corp. v. City of Nashua, 141 N.H. 473, 477 (1996).

In order to determine whether materials are exempt from disclosure under the privacy exception, RSA 91-A:5, IV, the Court must conduct a three-step test.

> We engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV. First, we 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. Next, we 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, we balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure.

Lamy, 152 N.H. at 109 (internal citations omitted). The party resisting disclosure bears the burden of persuading the Court in favor of nondisclosure. "Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations, however." Id.

In conducting the three-step analysis prescribed in Lamy, the Court may look to Federal case law for guidance. The Freedom of Information Act ("FOIA"), the Federal counterpart to New Hampshire's Right-to-Know Law, exempts materials, the disclosure of which would constitute an invasion of privacy. "This section does not apply to matters that . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552 (b) (7) (C). The federal privacy exception parallels RSA 91-A:5, IV.

> Because exemptions under the Right-to-Know Law are similar to those under the federal Freedom of Information Act (FOIA), we often look to federal decisions construing the FOIA for guidance. The Right-to-Know Law specifically exempts from disclosure "files whose disclosure would constitute invasion of privacy."

Lamy, 152 N.H. at 108-109 (internal citations omitted). "[I]n interpreting and applying our own Right-to-Know Law, we 'look to the decisions of other jurisdictions, since other similar acts, because they are in pari materia, are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved.'" Montenegro v. City of Dover, 2011 N.H. LEXIS 150, 5-6 (N.H. Nov. 2, 2011) (internal citations omitted).

The first step requires the Court to evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. "The privacy interest at stake concerns the individual's control of information about his or her person." Lamy, 152 N.H. at 110.

> As for the nature of the privacy interest at stake, the "personal privacy" contemplated by Exemption 6, as well as its law-enforcement counterpart, Exemption 7(C), "encompass[es] the individual's control of information concerning his or her person," but it is not limited to just that type of information. See [Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 165 (2004)]
> ("[T]he concept of personal privacy under Exemption 7(C) is not some limited or 'cramped notion' of that idea." (citation omitted)). Favish, for example, held that individuals had privacy rights that would be implicated by releasing the "death-scene photographs" of a family member who had committed suicide. See id. at 164-67. Although emphasizing that the right to privacy under Exemption 7(C) is not coterminous with the common law and the Constitutional conceptions of privacy, see id. at 170, Favish interpreted the term "personal privacy" as reflecting congressional intent to protect "against public intrusions long deemed impermissible under the common law and in our cultural traditions." Id. at 167.

Yonemoto v. Dep't of Veterans Affairs, 648 F.3d 1049, 1060-1061 (9th Cir. Haw. 2011). In fact, Favish, a U.S. Supreme Court case, provides invaluable guidance on the resolution of the present matter.

In Favish, an individual filed a FOIA request for, among other things, the death-scene photographs of the body of Vincent Foster, Jr., deputy counsel to President Clinton. Mr. Favish was skeptical about the government investigators' conclusion that Foster had committed suicide. The U.S. Supreme Court held that disclosure of the photographs would constitute an unwarranted invasion of Foster's family's privacy.

> [W]e think it proper to conclude from Congress' use of the term "personal privacy" that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions. This does not mean that the family is in the same position as the individual who is the subject of the disclosure. We have little difficulty, however, in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes. . . . In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law.

Favish, 541 U.S. at 167-168. The Court quoted from Schuyler v. Curtis, 147 N.Y. 434, 447 (1895).

> It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.

Id. at 168-169. The Court recognized the family's privacy interest in protecting the memory of the deceased and held, specifically with respect to the death scene photographs, "that FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images." Id. at 170.

The family's privacy interest is even stronger in withholding images of a mutilated body.

> The photographs depict close-up views of the injuries to Estrella's body and the first portion of the video prominently features Estrella's body on

> the floor of the prison cell. If anything, the privacy interest in these images is higher than the privacy interest in the photographs at issue in Favish. The photographs in Favish depicted the victim of an apparent suicide, but the images did not involve *grotesque and degrading depiction of corpse mutilation* as do the images at issue here. Additionally, the images in Favish were all still photographs, whereas the video at issue here depicts corpse mutilation as it occurs. *The privacy interest of the victim's family in images of this nature is high.*

Prison Legal News v. Exec. Office for United States Attys., 628 F.3d 1243, 1248 (10th Cir. Colo. 2011) (emphasis added). Ball's family appeared at the hearing and has submitted a letter requesting that the disputed records, including the death scene photographs, not be disclosed. The family asserts that disclosure will sensationalize Ball's death and cause more painful and invasive media exposure, thereby prolonging the family's suffering.

The Court may safely surmise that Bernard seeks the disputed records, especially the photographs, in order to post them online. In fact, all the motions which Respondent has filed in this matter and other cases before this Court bear the following notation: "****NOTICE: All correspondence is subject to being posted on FreeKeene.com****" The potential for online disclosure certainly implicates the privacy of Ball's family. In fact, the family represents to the Court that it would be harmed precisely by this kind of publicity and exposure.

> [The sister of the deceased] opposed the disclosure of the disputed pictures . . . . Once again my family would be the focus of conceivably unsavory and distasteful media coverage." "[R]eleasing any photographs," Sheila Foster Anthony continued, "would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's

privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family."

Favish, 541 U.S. at 167.

Under the second step of the Lamy test, the Court must assess the public's interest in disclosure insofar as it relates to informing the public about the activities of government. It bears noting that in contrast to Favish, Bernard provides no explanation for requesting these photographs, such as skepticism about Ball's cause of death. While it is true that Bernard's private motivation is irrelevant to his right to disclosure (Union Leader Corp. v. New Hampshire Hous. Fin. Auth., 142 N.H. at 554), even a perfunctory effort on his part to connect the disclosure of all the disputed records, including the photographs, to the purpose of the Right-to-Know Law would assist the Court in conducting the second step of the three-prong inquiry. Instead, Bernard dismisses the City's argument out of hand as frivolous. See AP v. United States DOD, 554 F.3d 274, 289 (2d Cir. N.Y. 2009) ("AP has produced no evidence that DOD responded differently to allegations of abuse depending on the nationalities or religions of the detainees involved. Because there is no evidence of government impropriety in that regard, we cannot find that the public interest would be furthered based on a rationale grounded in disclosure of an individual's religion or nationality.")

The disclosure of the disputed materials does not relate to and would do nothing to promulgate transparency in government. Bernard argued at the hearing that Ball committed suicide as an act of protest against the New Hampshire court system. By

choosing an especially grotesque manner of committing suicide, Ball communicated his opinion of and frustration with the courts. The City is correct that many newspapers published the letter which Ball sent the day before his death, containing a lengthy and detailed explanation of his opinion and motivation. Even assuming Bernard is correct that Ball's criticism relates to transparency in government, descriptions of a dying man and photographs of a mutilated corpse do not communicate Ball's opinion of the courts.

Moreover, Bernard's desire to disseminate Ball's opinion fails to outweigh the family's privacy interest. The third prong of the Lamy test requires the Court to balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. Lamy, 152 N.H. at 109. The City does not assert any government interest in nondisclosure. Accordingly, the Court must balance the public interest in disclosure, i.e. learning about Ball's criticism of the courts, against the family's privacy interest in nondisclosure. For the following reasons, the Court finds the latter more compelling.

Descriptions and depictions of a gruesome death are no more communicative of Ball's viewpoint than the fact that he committed suicide in a gruesome fashion. This fact, together with a detailed explanation of Ball's grievances, has already been widely publicized. The Court finds that the family's privacy interest in not disclosing Ball's death scene photographs is both clear and compelling. *In camera* review of the photographs indicates that they are grotesque and degrading depictions of a mutilated

corpse. Bernard is mistaken that disclosing these photographs is at all comparable to accessing, through the court files, the names and addresses of Ball's children and former spouse. To the extent that Bernard is concerned with furthering Ball's purpose of publicizing his death, this argument fails to address, detract from, or outweigh the family's privacy interest. Accordingly, the compact disc containing photographs of the scene taken on June 15, 2011 is exempt from disclosure. The photographs contained on this disc shall be withheld, with the exception of 14 images: IMG_0037.JPG through IMG_0047.JPG (11 images) and IMG_0333.JPG through IMG_0335.JPG (3 images). These 14 images do not implicate Ball's family's privacy because they contain no depictions of his body, but rather of Ball's car and possessions, as well as the street on which he died.

The Court turns next to the remaining disputed records. The narratives of Ofc. Nugent, Lt. McLaughlin, Lt. Lawrence, and Det. Lundin contain certain personal information implicating the privacy of the deceased and his family. "The writings of a detainee in the days leading up to her suicide are likely to contain personal information, which sensibly should be withheld for personal privacy reasons." ACLU v. United States Dep't of Homeland Sec., 738 F. Supp. 2d 93, 117 (D.D.C. 2010), citing Favish, 541 U.S. at 165, 167, 170. Descriptions of the body implicate the privacy interests of the deceased and his family. "We [] reject Appellant's argument that two items implicate only *de minimis* privacy interests under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), since the autopsy photograph of the hand and a written description of the body involve

the same privacy interests at issue in National Park Service." Accuracy in Media, Inc. v. Office of the Indep. Counsel, 61 Fed. Appx. 712, 713 (D.C. Cir. 2003), citing Accuracy in Media v. National Park Serv., 194 F.3d 120, 123 (D.C. Cir. 1999) ("[T]he release of photos of the decedent at the scene of his death and autopsy qualifies as [] an invasion [of privacy].") Descriptions of Ball's death and corpse shall be redacted from these records, as will references to Ball's family and communications between them and police.

The Keene Police Department incident report dated July 11, 2011 contains the names and personal information of witnesses: this information shall be redacted in view of a reasonable likelihood that these individuals will be harassed or embarrassed. "[D]isclosure of the names and addresses of persons who gave statements might subject those persons to harassment or embarrassment even though the subject of the investigation is deceased." 37A Am. Jur. 2d Freedom of Information Acts § 311.

> Plaintiff argues the public interest at stake is the right of the public to know how the shootings occurred and whether they could have been avoided. As defendants argue, the identities of witnesses and third parties do not provide information about the conduct of the government. There is no proof disclosure of any of the interview information would establish that defendants could have prevented the incident. At most, plaintiff makes a broad, unsupported statement of possible neglect by defendants. Furthermore, any slight interest the public may have in knowing the background and details of the shooting is outweighed by the reasonable likelihood of harassment and embarrassment of the witnesses and other persons.

KTVY-TV v. United States, 919 F.2d 1465, 1470 (10th Cir. Okla. 1990) (internal citations omitted); see also Valdez v. United States DOJ, 474 F. Supp. 2d 128, 132 (D.D.C. 2007)

("Individuals have a 'strong interest in not being associated unwarrantedly with alleged criminal activity.' For this reason, the names of and identifying information about third parties who are mentioned in law enforcement records routinely are withheld." Internal citation omitted.) Considering Bernard's express intention of posting "all correspondence" online, the disclosure of witnesses' names and personal information is reasonably likely to cause embarrassment and harassment.

The supplemental narrative of Det. McLaughlin is exempt from disclosure: it contains the text of a handwritten note left by Ball for his brother and family. Under New York Times Co. v. National Aeronautics & Space Admin., 782 F. Supp. 628, 631 (D.D.C. 1991), the family of the deceased holds a substantial privacy interest in the last words of the deceased. As with the photographs, the family holds a compelling privacy interest in nondisclosure, while disclosure of this disputed record is completely unrelated to government accountability and transparency.

The supplemental narrative of Det. Lundin does not fall within the privacy exception, RSA 91-A:5, IV. This disputed record recites the contents of the Cause of Death Report, which the Keene Police Department received from the Office of the Chief Medical Examiner. It does not contain autopsy photographs or a description of the body. Compare with Accuracy in Media, Inc. v. Office of the Indep. Counsel, 61 Fed. Appx. at 713 (autopsy photograph and description of the body); Accuracy in Media v.

National Park Serv., 194 F.3d at 123 (autopsy photographs); Katz v. National Archives & Records Admin., 862 F. Supp. 476, 482 (D.D.C. 1994) (autopsy X-rays and photographs).

The City argues that Det. Lundin's supplemental narrative, insofar as it recites the contents of the Cause of Death Report, is exempt from disclosure as a confidential medical record under RSA 611-B:21, III.

> Except as provided otherwise by law and in rules adopted by the chief medical examiner pursuant to RSA 541-A, autopsy reports, investigative reports, and supporting documentation are confidential medical records and, as such, are exempt from the provisions of RSA 91-A. Copies of such documents may be made available to the next of kin, a law enforcement, prosecutorial, or other governmental agency involved in the investigation of the death, the decedent's treating physician, and a medical or scientific body or university or similar organization for educational or research purposes. Autopsy reports, investigative reports, and supporting documents shall not otherwise be released without the authorization of next of kin.

RSA 611-B:21, III. First, Det. Lundin's supplemental narrative is not an autopsy report, but a verbatim recitation of the Cause of Death Report. Second, the only arguably confidential medical information contained in it is the cause of death (self-immolation) and manner of death (suicide). Ball's public suicide, not to mention the letter which he mailed to and which was printed in several local newspapers, certainly waived confidentiality with respect to the fact that he committed suicide by self-immolation.

Det. Lundin's supplemental narrative is also not an investigative report. "'Death investigation;' means an investigation conducted by a medical examiner pursuant to this chapter, which may involve one or more of the following: a telephone consultation,

investigation of the scene of death, or post-mortem examination." RSA 611-B:1, IV. The supplemental narrative is a report prepared in the course of the Keene Police Department's, not the medical examiner's, investigation; it is thus not an investigative report subject to the strictures of RSA 611-B:21, III. Lastly, the five-word narrative of Secretary I Margo Best bears no relation to Ball's or his family's privacy interest. Although the City acknowledges that this document is responsive to Bernard's request, it has offered no basis for withholding it.

For the foregoing reasons, declaratory judgment is entered as follows. In view of his representation that he has not received any records from the City, Petitioner shall re-submit to Bernard records which the City acknowledges are responsive to his request and which it states it has already turned over to him (Pet. ¶¶ 9 x-xiii; ¶ 12). Additionally, the City shall turn over, in their entirety, the supplemental narrative of Det. Lundin (id. ¶ 9 viii) and the narrative of Secretary I Margo Best (id. ¶ 9 vii). The following records are exempt from disclosure: compact disc containing photographs of the scene taken on June 15, 2011 (id. ¶ 9 ix), with the exception of 14 images listed above; and the supplemental narrative of Lt. McLaughlin (id. ¶ 9 vi). The following records shall be disclosed, subject to redaction: Keene Police Department incident report, dated July 11, 2011 (id. ¶ 9 i); narrative of Ofc. Nugent, dated June 16, 2011 (id. ¶ 9 ii); narrative of Lt. Lawrence, dated June 16, 2011 (id. ¶ 9 iii), narrative of Det. Lundin,

dated June 16, 2011 (id. ¶ 9 iv); and narrative of Lt. McLaughlin, dated June 20, 2011 (id. ¶ 9 v).

SO ORDERED.

Order issued telephonically by Justice John P. Arnold at 9:15 AM on January 19, 2012

James L. Peale, Clerk
Pursuant to Superior Court Administrative Rule 1-7

Date

John P. Arnold
Presiding Justice