

Therefore, Anderson has presented evidence of bad faith by the Defendant – that the Defendant has denied Anderson's request because of a concern with public perception, and not a reasonable expectation of interference in an ongoing investigation.

Therefore, the Court should conduct an in-camera review of the Photos and grant Anderson's Motion, in part if not in whole.

II. THE COURT SHOULD GRANT ANDERSON'S MOTION BECAUSE THE DEFENDANT HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING A REASONABLE EXPECTATION OF A PROSECUTION

In order to succeed on the Law Enforcement Exemption, the burden is on the defendant to demonstrate that there is an active and continuing, on-going investigation and that law proceedings are “reasonably anticipated.” See *Dickerson v. Dep't of Justice*, No. 90-60045, 1991 WL 337422 (E.D. Mich. July 31, 1991) (“Dickerson”).

Here, the Defendant has failed to establish that the case is ongoing and that enforcement proceedings are reasonably anticipated. Therefore, the Court should grant the Motion.

1. The Defendant Has Failed to Assert, Let Alone Demonstrate, a “Reasonable Expectation” that the Investigation into Maura Murray’s Disappearance Will Lead to Enforcement Proceedings

The Defendant does not claim that enforcement proceedings are “pending” or “reasonably anticipated.” Instead, the Defendant claims “a reasonable belief that it is possible that this investigation may lead to criminal charges.” See *Strelzin Aff.* ¶ 5.

The multiple qualifications used by the Defendant suggests that any enforcement proceeding is purely speculative. In fact, the Defendant’s statement appears to be triple qualified. Simply put, a claim that “there is a *reasonable belief* that it is *possible* this investigation *may lead*

to criminal charges” does not satisfy the defendant’s burden under Exemption 7(A), which requires a reasonable belief that there *will be* criminal charges. See Dickerson, *infra*.

Moreover, because the defendant makes no claim that a crime was even committed, the proposition that law enforcement proceedings are “pending” or “reasonably anticipated” is purely speculative. The case law is clear that Exemption 7(A) is not applicable when proceedings are only speculative. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (“Robbins”).

Thus, the Defendant has failed to justify nondisclosure.

2. The Defendant Has Failed to Assert, Let Alone Demonstrate, an “Active and Continuing,” Ongoing Investigation

In *Murray v. State Police*, 154 N.H. 579, 582 (2006) (“Murray”), an offer of proof as to what constitutes an “ongoing” investigation was provided in the form of testimony from Attorney Strelzin at the lower court. See *Aff.*, Exh. F. Specifically, testimony was proffered that the case was reviewed daily and that there was a specific detective assigned to the case in Troop F. See *id.*

Here, in contrast, the Defendant has failed to offer any proof or demonstration that the case is active and ongoing.

In *Murray*, and in 2007, Attorney Strelzin testified that there was a seventy-five percent chance of a prosecution resulting from Maura Murray’s disappearance. See *Aff.*, Exh. F.

Notably since that time, Maura’s disappearance has been categorized as a “cold case.” See *Aff.*, Exh. D.

By the Cold Case Unit’s own definition, a case is considered a “cold case” only if “the original investigation did not result in an arrest, and the case remained inactive for more than one year due to a lack of viable or unexplored leads.” See *Aff.*, Exh. C.

Furthermore, the Cold Case Unit further outlined its criteria for prioritizing cases as follows: “[a]mong the factors to be considered is [1] whether the victim has been identified and located, [2] whether the victim’s death was ruled a homicide or undetermined, [3] whether there is a clearly defined suspect.” See Aff., Exh. C.

Given its classification of Maura’s case as a Missing Persons case in which there is no evidence of a crime, and thus no identified victim, manner of death, or clearly identified suspect, Maura’s disappearance would be expected to be met with lower levels of activity. See Aff., Exh. C, D. Of the one-hundred and thirty-seven cases currently listed on the Cold Case Unit’s Victim list, one-hundred and fourteen include suspicious deaths and unsolved homicides that would definitionally take precedent over Maura Murray’s disappearance. See Aff., Exh. C, D.

Moreover, there is reason to question whether the Cold Case Unit has the resources to actively investigate Murray’s disappearance. In testimony before the State’s Judiciary Committee in January of 2019, Attorney General MacDonald stated he had “lost the dedicated focus for cold cases”¹ before making a plea for \$220,000 in additional funding for cold cases. See Aff., Exh. E.

The Department did not receive the requested funds and since that time, nine additional cases have been assigned to the Cold Case Unit. See id.

The Aff. outlines one instance in which it took a full two-and-a-half years for one tip to be followed up on, and that was only after a State Senator was compelled to intervene. See Aff. ¶ 24.

¹ <https://www.nhpr.org/post/families-murder-victims-ask-lawmakers-strengthen-cold-case-unit#stream/0>

Yearly status reports that are required by law to be filed annually by the Cold Case Unit appear have not been completed since 2017.²

Given the status of Maura Murray's disappearance as categorically of lower priority than over one hundred other cases currently under the purview of the Cold Case Unit, and given the widely publicized budgetary constraints the Cold Case Unit is currently operating under, and examples of instances in which the detectives have been woefully slow to respond to tips from the public, the only reasonable conclusion to be drawn from any alleged claim that Maura's case is "ongoing and actively being investigated" is without merit and, perhaps, made in bad faith.

Therefore, the Court should grant Anderson's Motion, in part if not in whole.

III. THE COURT SHOULD GRANT ANDERSON'S MOTION BECAUSE THE DEFENDANT HAS FAILED TO MEET ITS BURDEN OF ESTABLISHING A REASONABLE EXPECTATION OF INTERFERENCE

The Defendant has failed to meet its burden of establishing a reasonable expectation of interference because all pertinent visual details are already in the public domain and because no released photograph has ever been altered as part of a false tip.

Accordingly, the Court should grant Anderson's Motion, in part if not in whole.

1. The Defendant Has Failed to Meet Its Burden of Establishing A Reasonable Expectation Of Interference Because All Pertinent Visual Details Are Already In The Public Domain

Anderson asserted in the Motion that all visual details of the crash site and Maura's car are already in the public domain. See *The Plaintiff, Joseph Anderson's, Affidavit in Support of his Petition for Injunctive Relief*, Exhs. C & D to Exh. A.

² See <https://www.doj.nh.gov/criminal/cold-case/>

To further support that assertion, Anderson asks this Court to consider additional photographs of Maura Murray's car that have become public since Anderson filed his Motion. See Aff. at Exh. A.

Additionally, the Court now has an opportunity to reconsider Anderson's Motion in light of descriptions of all seven photographs that are at issue in Anderson's Motion. See Aff., ¶¶ 7-13.

Accordingly, because all visual details of the crash site and Maura's car are already in the public domain, the Court should grant Anderson's Motion, in part if not in whole.

2. The Defendant Has Failed to Meet Its Burden Of Establishing A Reasonable Expectation Of Interference Because It Has Not Alleged That Any Released Photograph Has Ever Been Altered As Part Of A False Tip

In denying Anderson's Motion, the Court ruled: "Detective West's affidavit discusses how computer-generated alterations to released photographs could exacerbate the diversion of law enforcement resources to tracking down leads based on falsified photographs or deter actual witnesses from coming forward if their recollections do not match altered public photographic evidence. West Aff. ¶ 9(H), (I)."

However, in making that ruling, the Court lacked the opportunity to review the actual false tip that was sent to investigators because Anderson did not have access to the false tip when he filed the Motion.

Presently, the false tip emailed to investigators is before the Court. See Aff. at Exh. B. The false tip emailed to investigators does not include any released photos that were subjected to computer generated alterations. Instead, the false tip emailed to investigators consists of an image that purports to be a handwritten confession to Maura Murray's murder. See id.

Considering that clarification, that the false tip emailed to investigators does not include any released photos that were subjected to computer generated alterations, the Court should reconsider its decision to the extent that the denial of Anderson's Motion depended on that rationale.

Simply put, there is no allegation on this record that there has ever been a false tip sent to investigators that consisted of released photos that were subjected to computer generated alterations. In fact, it is unclear whether the Defendant made that argument. To the extent that the Defendant does, in fact, make that argument, the Court should reject such an argument as speculative. The Court should reject such an argument because any released photo that has been altered can easily be spotted as such by a comparison to the original photo; the Defendant has indicated that it can distinguish altered photos from unaltered photos.

IV. THE COURT SHOULD GRANT ANDERSON'S MOTION BECAUSE THE DEFENDANT HAS FAILED TO ALLEGE A "SUFFICIENTLY COMPELLING INTEREST" TO WARRANT NONDISCLOSURE IN LIGHT OF THE UNIQUELY COMPELLING INTEREST OF DISCLOSURE IN THIS CASE

The Defendant has failed to meet its burden of establishing a sufficiently compelling interest to withhold the photographs in light of the heightened interest of releasing the photographs in this case.

The New Hampshire Supreme Court held that exceptions to RSA Chapter 91-A are narrowly construed and provisions favoring disclosure are broadly construed, and that a "sufficiently compelling interest" is necessary to warrant nondisclosure. See *In re State (Bowman Search Warrants)*, 146 N.H. 621, 625 (2001).

The Defendant has observed that questions surrounding police conduct in the Maura Murray disappearance have been a matter of wide public interest "on blogs, podcasts, or other public forums." See New Hampshire Department of Safety's Objection to Petitioner Joseph Anderson's Complaint for Relief Under RSA 91-A (the "Objection"), at pg. 8.

In the 2017 documentary series, *The Disappearance of Maura Murray*, which aired on the national cable television network Oxygen, questions were raised about the prospect of police involvement Murray's disappearance, and, as observed by the Defendant, those questions have continued to proliferate in the various public forums. See The Plaintiff, Joseph Anderson's, Affidavit in Support of his Petition for Injunctive Relief at Exh. B (the "Transcript").

During a March 27, 2017 interview for *The Disappearance of Maura Murray*, Sergeant Cecil Smith, when asked if he had been able to "get the [] doors of [Maura's car] open that night," responded, "I did not, no." See id.

Several of the Photos appeared to show the driver's side door of Maura's vehicle to be open, and for the photos to have been taken from inside the car. See Aff., ¶¶ 10, 11.

Additionally, Susan Champy, who was a resident of Haverhill, NH in 2004 and a witness to Maura's accident scene, has provided her affidavit. See Aff., Exh. F. There, Champy states that she had also observed the driver's side door of Maura's car being open. She also observed what she described as a police officer "rummaging" through the car. See Aff., Exh. F, ¶ 2.

Both the source's description of the Photos and the witness's statement attest to the driver's side door of Maura's car being open, See Aff., ¶ 11; Exh. F, ¶ 2, which tends to contradict Sergeant Smith's statement that he was unable to get the doors of the vehicle open the evening of February 9, 2004 when the Photos were taken. See Transcript, *infra*.

It bears repeating that in the months and years following Maura's disappearance, the State has maintained that at the accident scene, there was no evidence of foul play, and no signs of any struggle, or any other evidence, which would indicate that a crime had been committed.

Thus, the proposition that such a discrepancy could be due to strategic investigatory methods or tactics, if raised, would be a dubious claim.

Moreover, when asked why he had declined to release the Photos, Charles West, an agent of the Defendant, replied: “the more we give the more they are going to want and the more they pick apart. Absolutely pick apart. And this is why we're not releasing any of the photographs of the accident scene, because of perception, because of how it will be perceived.” See Aff. ¶ 18.

Seeking to avoid scrutiny or the public “perception” of wrongdoing, incompetence, contradiction, or error, is not a justification for warranting nondisclosure; if anything, those issues, where implicated, support disclosure.

The Defendant accurately notes the high-profile nature of Maura’s case and the wide degree of public interest in her case.

Importantly, courts have found the public interest in disclosure to be strong when requested information could inform the public on matters concerning potential violations of public trust. See, e.g., *Columbia Packing Co. v. United States Department of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977).

The salutary purpose of the New Hampshire Right-to-Know Law, NH RSA 91-A 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.” Releasing the Photos would shed light on one aspect of the investigation and allow the public oversight that is critical and necessary for holding government officials accountable and maintaining public trust.

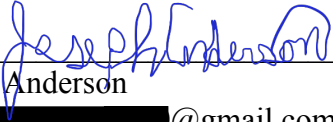
Accordingly, the Court should grant Anderson's Motion, in part if not in whole.

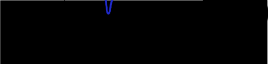
IV. CONCLUSION

For reasons stated, the Court should reconsider Anderson's Motion, and grant it, in part if not in whole.

Respectfully submitted,
On December 21, 2020,

Joseph Anderson,



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