IN THE SUPREME COURT OF THE STATE OF VERMONT
Docket No. 2011-228

In re Search Warrants

Appealed from the Vermont Superior Court, Criminal Division, Chittenden Unit
No Docket Number Below

Brief Amicus Curiae of the American Civil Liberties Union Foundation of Vermont
in Support of Appellee

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Statement of Issues

page

Table of Contents

Table of Cited Authorities

Cases

Statutes

page

Rules

Interests of Amicus Curiae[1]

The American Civil Liberties Union Foundation of Vermont ("ACLU") is a statewide, nonprofit, nonpartisan organization with more than 3,000 members and supporters dedicated to the principles of liberty and equality embodied in the constitutions and laws of Vermont and the United States. The ACLU strongly believes in the Vermont Constitution's guarantee that all power belong to the people of Vermont, and that the government remain accountable to the people at all times.

Accordingly, the ACLU has consistently advocated for open access to the records of all three branches of government, including those produced or acquired by police or prosecutors. This appeal is of great interest to the ACLU and its members because it offers the Court an opportunity to affirm Vermonters' common law right to see the courts at work, and to affirm that any attempts to curtail that right through the sealing of records will be assessed on a document-by-document basis as it is presently.

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1 No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Statement of the Case

News accounts reveal that two married residents of Essex, Vermont were reported missing on June 9, 2011. SPC 1. The next day, following a visit to the couple's home, the Essex police obtained a search warrant for the home. *Id.* Execution of at least two more search warrants for the home, SPC 11, has turned up evidence that has been sent for DNA analysis, SPC 9, broken glass from a window leading to the home's garage, SPC 8, medication that the couple would need on a daily basis, SPC 3, a computer, SPC 14, and the absence of a firearm believed to be owned by the couple. SPC 7. The police also executed search warrants on June 10th for the couple's car and a dumpster adjacent to the car's parking spot. SPC 11. On July 18th, the police announced that they suspect that a homicide has occurred. SPC 6. They have subsequently announced that they are now searching for bodies, SPC 13, and that tips from the public are drying up. SPC 12.

In all, the police have obtained at least thirteen search warrants and have issued at least eighteen subpoenas since the missing persons report on June 9th. SPC 11. Eleven of the warrants were obtained between June 9th and June 24th, and are therefore now between two and a half and three months old.

In mid-June, newspaper reporter Sam Hemingway tendered written requests to the superior court's Chittenden Unit for copies of the search warrants and associated materials. After initial denials by the court because the returns had not been filed, *see* Vt. R. Pub. Access to Ct. Records 6(b)(15), PC 4-5, the county state's attorney's office moved to seal the warrant returns. On June 21st, the superior court denied the motion, reminding the state's attorney that the court "needs a particularized showing to seal" rather than the tendered "general, it will 'compromise the investigation' to disclose" allegations. PC 6. As it does in this Court, the state's attorney apparently argued to the superior court that *any* information in the materials to be sealed would

reveal things known only to the police. Unimpressed, the superior court wrote that the movant had failed to specifically identify "[w]hat info[rmation] is known only to police [and] the perp[etrator]," or how "disclosure will impede the investigation." *Id.*

The same day, the state's attorney moved for reconsideration. On June 23rd, the superior court denied the motion, holding that the movant had failed to meet the governing standard established by *In re Sealed Documents*, 172 Vt. 152, 161-162, 772 A.2d 518, 527 (2001), by failing to show that substantial harm would flow from release of each individual document that it sought to be excused from normal docketing. PC 2. Undeterred, the state's attorney moved once again for reconsideration, this time requesting a hearing.

The superior court denied the second motion for reconsideration, explaining that the movant "has presented no additional information to indicate why" the court's sealing order "would be changed after a hearing." PC 8. *See, e.g., Brislin v. Wilton*, No. 2009-236, 2010 WL 712556, at *3 (Vt. Feb. 25, 2010) (mem.) ("[M]otions for reconsideration serve to correct manifest errors of judgment or to present *newly discovered* evidence.") (emphasis in original). The state's attorney moved for a stay pending appeal and was denied by a different judge of the superior court, who explained that "the issues raised by the state would apply to any ongoing investigation." PC 9. This appeal followed.

Pursuant to the procedure established by *In re Sealed Documents*, 172 Vt. at 164-165, 772 A.2d at 528-529 (mandating that "no access to the documents . . . shall be granted until the matter has been finally resolved"), the Court issued a stay withholding the disputed items from docketing until the appeal is decided. Proceeding *pro se*, Mr. Hemingway opposes the state's attorney's effort to seal the records and has filed a letter brief in this Court expressing his views on the matter. On August 11th, the Court gave the ACLU permission to file an amicus curiae brief in support of Mr. Hemingway, and set the matter for argument.

Summary of Argument

I. Information submitted to a court in connection with official business is presumptively available to the public. A litigant seeking to have court records hidden may do so only where it shows with specificity that a substantial threat to law enforcement is posed by each document that its seeks to have sealed, and that the order sought is narrowly tailored. The appellant's lone reason for sealing here – that corroboration of tips would be quicker if the warrant returns at issue were not docketed normally – fails to cross this threshold, and would also fail to do so were it transposed to the analogous areas of privilege law and open records law. The appellant's failure to connect its alleged harm to any specific document in the numerous items at issue here also dooms its attempt under the *Sealed Documents* specificity prong, a conclusion buttressed by comparison to a civil litigant's attempt to prevail in a discovery dispute by claiming a privilege without identifying the privileged material, or a public agency's attempt to prevail in an open records dispute without identifying which records it sought to withhold. II. No basis exists for overruling *Sealed Documents* based upon arbitrary distinctions like the occurrence of arrest or an investigation being "ongoing." Not all active investigations will invariably require information to be sealed, and not all closed investigatory information will invariably fail to merit sealing. Avoiding arbitrary bright lines retains flexibility, avoids putting courts in the business of determining whether an investigation is open or closed, and removes the temptation to claim that an investigation is open in order to avoid disclosure. Further, the public's interest in observing the judiciary at work does not ripen only when the executive deems it to. III. The standard set forth in the Rules for Public Access to Court Records and *Sealed Documents* is the same as that properly applied to investigatory records under Exemption 5 to the Access to Public Records Act, provided that the exemption is read narrowly as permitting withholding only where disclosure would work a concrete harm to law enforcement, as amicus has argued in other pending cases.

Standard of Review

Superior court sealing decisions are discretionary. *Sealed Documents*, 172 Vt. at 163-164, 772 A.2d at 528; *accord Baltimore Sun v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989). Decisions reviewed for abuse of discretion will not be disturbed unless they were rendered "for reasons clearly untenable, or to an extent clearly unreasonable," or represent an error of law. *Spooner v. Town of Topsham*, 2010 VT 71, ¶ 7, 188 Vt. 293, 297, 9 A.3d 672, 675.

Argument

I. The Appellant Has Failed Entirely to Meet its Sealing Burden

In Vermont, a person seeking to keep information submitted to a court sealed from the public docket may do so only by showing with specificity that a substantial threat to law enforcement is posed by each document that its seeks to have sealed, and that the order sought is narrowly tailored. The appellant's lone reason for sealing here – that corroboration of tips would be quicker if the warrant returns at issue were not docketed normally – fails to cross this threshold. Comparison to the analogous areas of federal privilege and open records law confirms that no serious, specific harm to law enforcement is at play in this case. As such, the superior court's decision to deny dealing was entirely reasonable, and should be affirmed.

A. The Appellant Has Failed to Show that Normal Docketing of the Eleven Search Warrant Returns Pose a Substantial Threat to the Interests of Effective Law Enforcement

When a document is submitted to the superior court and reviewed by it, the document becomes subject to the court's control through the docketing statute, *Sealed Documents*, 172 Vt. at 159, 772 A.2d at 525; *State v. Tallman*, 148 Vt. 465, 472, 537 A.2d 422, 426 (1997), the

judiciary's common law "supervisory power over its own records and files," *Sealed Documents*, 172 Vt. at 159, 772 A.2d at 526 (internal quotation omitted), and "rules issued pursuant to the Court's constitutional authority," *i.e.*, the Rules for Public Access to Court Records. *Id.* at 160, 772 A.2d at 525. These sources of authority create a "presumptive right of access to court records, including pre-indictment search warrant materials." *Id.* at 161, 772 A.2d at 526. *See also State v. Whitney*, 2005 VT 102, ¶ 9, 178 Vt. 435, 439, 885 A.2d 1200, 1203 (describing the judiciary's policy that "'all case and administrative records of the Judicial Branch shall be open to any member of the public for inspection or to obtain copies'") (quoting Vt. R. Pub. Access to Ct. Records 4).

Notwithstanding the presumptive right of public access, the judiciary is "possessed of an inherent authority to deny access to otherwise public court records when necessary to serve overriding public or private interests" by excusing the normal docketing of the records and sealing them. *Sealed Documents*, 172 Vt. at 160, 772 A.2d at 526. Such authority confers upon courts the ability to "seal from public access a record to which the public otherwise has access or may redact information from a record to which the public has access," but only in the instance that both "good cause specific to the case before the judge and exceptional circumstances" exist in support of sealing. Vt. R. Pub. Access to Ct. Records 7(a).

Good cause and exceptional circumstances supporting sealing do not exist unless four criteria are met: (1) the public's "presumptive right of access to court records" has been overcome by the "substantial threat . . . to the interests of effective law enforcement, or individual privacy and safety" posed by normal public access to the record; (2) the substantial threat has been "demonstrated with specificity as to each document" to be sealed rather than by "general allegations of harm"; (3) that the sealing order extend "no further than necessary to protect the interests in confidentiality" provided by the substantial threat; and (4) that any sealing order

"examine each document individually, and make fact-specific findings with regard to why the presumption of access has been overcome." *Id.* at 161-2, 772 A.2d 527 (internal quotations and citations omitted).

When considering a motion to seal pursuant to Rule 7(a), Vermont courts must bear in mind that the sealing authority conferred by the rule "should be exercised by the court only in truly exceptional circumstances and only for good cause," so as to avoid "creat[ing] new categories of records or information that are generally closed to the public." Vt. R. Pub. Access to Ct. Records 7 reporter's notes. In making a sealing determination, the *Sealed Documents* factors are "particularly relevant." *Id. Accord* Vt. R. Pub. Access to Ct. Records 6 reporter's notes (explaining that the enumerated exceptions "do[] not change existing law or practice.").

In support of its effort to seal the thirteen search warrant returns at issue, the appellant advances a single reason: it will be quicker for the police to separate bona fide tipsters and suspects from those with no knowledge of the crime if it is possible to corroborate their stories with the hitherto non-public information contained in the returns. Although this reduction in efficiency is a possible negative consequence of regular docketing, it falls far short of posing a substantial threat to effective law enforcement by inflicting a serious or irreparable harm to the Essex investigation or future investigations using similar investigative techniques.

Few sealing decisions mark the threshold of a substantial threat to effective law enforcement with the basic rigor required by *Sealed Documents*. *See In re Bowman*, 781 A.2d 988, 992 (N.H. 2001) (discussing grand jury secrecy and the destruction of evidence, generally, before concluding that in most cases "the existence of the investigation itself" will permit sealing of warrants); *In re Gee*, No. 4-10-0275, 2010 WL 5143888, at *4 (Ill. App. Ct. Dec. 8, 2010) (flatly explaining, without examination of the warrant return at issue, that "[t]he substantial probability disclosure would comprise . . . an ongoing investigation far outweighs the generalized public

interest in the warrant-application process."). However, the Fourth Circuit has counseled that the resolution of a clash between public access and an alleged impedance to law enforcement does not turn on the relative values of the two competing interests, but should instead "focus on whether the asserted rights are actually compromised." *In re Search Warrant*, 923 F.2d 324, 328 (4th Cir. 1991) (refusing sealing, ordering private voir dire to protect suspect's right to an impartial jury, and explaining that "inconvenience is a small price to pay for a system of criminal justice which is at once open to the public and fair to the accused.").

Transposing the appellant's proffer of police manual hypotheticals into two analogous areas of the law provides a means of determining whether the possible slower corroboration of tips means that its investigation is actually compromised. Federal discovery and open records law both provide for shielding law enforcement records from production, provided that the holder of the disputed information demonstrates a specific harm will result from public disclosure. The appellant's general objection would merit withholding of the search warrant returns at issue here in neither area of the law, and should therefore be turned aside as failing to rise to the level of a substantial threat to effective law enforcement.

i. Inconvenience Would Fail to Trigger the Law Enforcement Discovery Privilege

From the 1970's, the federal courts have recognized the law enforcement privilege, which permits the shielding of investigatory records in discovery where their disclosure would "impair the functioning of the police department." *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 342 (E.D. Pa. 1973). In order to successfully shield information with the law enforcement privilege, the party asserting it bears the initial burden of showing that the privilege applies to the disputed information, by demonstrating that the information pertains to "law enforcement techniques and procedures, information that would undermine the confidentiality of sources," data that would "endanger witness[es] and law enforcement personnel," information that would violate an

individual's personal privacy, or that would "otherwise . . . interfere with an investigation." *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (internal quotations omitted). *Cf. Frankenhauser*, 59 F.R.D. at 344 (enumerating similar list of factors to be considered).

To meet its initial burden of production, the privilege claimant "must do more to alert the court to the [relevant privilege] or the generalized policies which support it." *MacNamara v. City of New York*, 249 F.R.D. 70, 79 (S.D.N.Y. 2008) (alteration in original). Instead, the claimant must make a "substantial" showing that "specific harms likely to accrue from discovery of specific materials." *Id. Compare id.* at 93 (rejecting defendant's assertion of harm that confirmation of undercover officers are certain types of events "will defeat the element of uncertainty, which itself deters criminal activity" as "conclusory" and "inadequate to meet even the most liberal definition of its burden of proof") (internal quotation and alteration omitted); *Morrissey v. City of New York*, 171 F.R.D. 85, 90 (S.D.N.Y. 1996) (rejecting application of the privilege to internal affairs records about unindicted police officers and civilian witnesses to misconduct) *with id.* (sustaining privilege as to "information relating to the means by which a recording device is secured on an informant" as compromising future investigations); *In re City of New York*, 607 F.3d at 944 (applying privilege to bar production of six hundred pages of detailed undercover officer reports on the basis that the information in the reports could disclose the identities of undercovers and impede future investigations by "provid[ing] additional information about how the NYPD infiltrates organizations").

This Court's application of the privilege mirrors the federal courts' requirement of serious, specific harm as a threshold showing of the privilege's applicability. In *Douglas v. Windham Superior Court*, 157 Vt. 34, 597 A.2d 774 (1991), the Court turned aside the secretary of state's invocation of the law enforcement privilege to shield Board of Nursing records of a misconduct investigations from discovery in a civil suit over a nurse's alleged mistreatment of a patient. As

the basis for his claim, the secretary asserted that nurses would be deterred from complaining about fellow nurses' misconduct if they knew the information would be discoverable, and that revealing investigative reports would "undercut the effectiveness of nursing regulation by revealing investigative techniques." *Id.* at 37, 597 A.2d at 775. The Court was unconvinced, dismissing the secretary's claims as being "based on exactly the sort of conclusory claims" that fall short of meeting the movant's burden. *Id.* 44, 597 A.2d at 780. Without demonstrating precisely "'*how* disclosure . . . would cause the harm, and *how much* harm there would be," the invoker of the privilege does not enable the evaluating court to weigh the claim, and thus fails to demonstrate entitlement to it. *Id.* (quoting *King v. Conde*, 121 F.R.D. 180, 189 (E.D.N.Y. 1988)) (alteration in original) (emphasis in quoted original).

So, too, for the appellant here. Its argument is comprised solely of an allegation that the police might not be able to quickly rule out incorrect information received from the public, but makes no allegation that normal docketing of the search warrant returns would seriously harm the investigation by revealing confidential informants, or jeopardize a suspect's right to a fair trial. The superior court was therefore correct to find the alleged harm insufficient to seal.

ii. The Alleged Impedance Would Not Permit the Warrant Returns to be Withheld Under the Freedom of Information Act's Investigative Records Exemption

A second analogous area of federal law places the appellant's poor showing here in relief. In relevant part, the Freedom of Information Act excuses from production information "compiled for law enforcement purposes" the disclosure of which could wreak one of six enumerated harms, 5 U.S.C. § 552(b)(7), including instances in which release "could reasonably be expected to interfere with enforcement proceedings." *Id.* § 552(b)(7)(A) ("Exemption 7(A)").[2]

2 Withholding may also be permissible where the information sought "would deprive a person of a right to a fair trial . . ., could reasonably be expected to constitute an unwarranted invasion of personal privacy, could reasonably be expected to disclose the identity of a confidential source would disclose techniques and procedures for law enforcement investigations or prosecutions . . . or could reasonably be expected to endanger the life or

Exemption 7(A) "is designed to block the disclosure of information that will *genuinely* harm the government's case in an enforcement proceeding or impede an investigation." *North v. Walsh*, 881 F.2d 1088, 1098 (D.C. Cir. 1989) (emphasis added). It "does not authorize automatic or wholesale withholding of records or information simply because the material is related to an enforcement proceeding," but requires a showing that disclosure could reasonably be expected perceptibly to *interfere* with an enforcement proceeding." *Id.* (emphasis in original). To prevail under Exemption 7(A), "the government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." *Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 259 (D.C. Cir. 1982) (reversing judgment for government where affidavits in support of withholding "offer[] not even a slim bill of particulars" in support of contention that 7(A) applied).

The scale of damage that disclosure would wreak in instances in which courts have found Exemption 7(A) genuine harms dwarfs the suggestion of inconvenience that the appellant here has put forward. For example, 7(A) has permitted withholding where a regulatory enforcement target sought the identities of potential witnesses and copies of the agency staff's notes regarding the pending regulatory action, *Swan v. SEC*, 96 F.3d 498, 499 (D.C. Cir. 1996). The same result flowed from a corporation's request for internal documents given to a regulatory agency by whistleblowers, where the narrow focus of the documents would reveal whistleblowing employees' identities and subject them to intimidation against further cooperation with the agency. *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 312 (D.C. Cir. 1988). 7(A) has also blocked the release of requests information about confidential informants, *Boyd v. Criminal Div. of U.S. Dep't of Justice*, 475 F.3d 381, 385 (D.C. Cir. 2007) (exemption properly applied where informant and other investigative targets were all "related [to], controlled [by], or influenced by"

physical safety of any individual." 5 U.S.C. §§ 552(b)(7)(B)-(F). The appellant here has not alleged that any of these potential harms will occur upon normal docketing of the warrant returns at issue.

requester, and thus release would "allow them to destroy or alter evidence[or] fabricate fraudulent alibis") (internal alterations in original), and release of information from one investigation that would compromise another. *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1160, 1165 (3d Cir. 1995) (affirming 7(A) withholding of some records responsive to prisoner's request for "all government documents referring to him" on the basis that the government had sufficiently demonstrated that enforcement proceedings against "other Genovese Crime Family members" like him were in the offing).

The appellant has made no comparable showing that substantial harm will befall its investigation should regular docketing of the disputed returns occur. The superior court was correct to conclude as much.

B. The Appellant Has Failed to Demonstrate that Its Sealing Request is Document-Specific and Narrowly Tailored

The second threshold that a successful sealing motion must cross is the demonstration of a substantial threat to effective law enforcement "with specificity as to *each document*" that the movant seeks to excuse from regular docketing. *Sealed Documents*, 172 Vt. at 162, 772 A.2d at 527 (emphasis in original) (internal quotation omitted). "[G]eneral allegations of harm are insufficient" to carry the sealing movant's burden. *Id.*, 772 A.2d at 527. *Accord* Vt. R. Pub. Access Ct. Records 7(a) (sealing permissible "only upon a finding of good cause specific to the case before the judge"). As the appellant has made no attempt to connect its alleged harm to any of the thirteen search warrant returns and supporting materials at issue here, its motion was properly denied and the judgment of the superior court should be affirmed.

The sealing specificity requirement is a necessary component of any deviation from Vermont courts' public business. "[S]ecrecy should extent no further than necessary to protect" an asserted interest in confidentiality. *Sealed Documents*, 172 Vt. at 162, 772 A.2d at 527. Courts

are therefore required to narrowly tailor sealing orders and examine each document to be sealed "individually" in order to "make fact-specific findings with regard to why the presumption has been overcome," and issue a detailed order setting forth the basis for sealing. *Id.*, 772 A.2d at 527. *See State v. Favreau*, 173 Vt. 636, 639, 800 A.2d 472, 475 (2002) (mem.) (reversing where trial court "made no findings to justify redactions" of contested filings).

The specificity requirement fulfills a second important function in the judiciary's management of its own records: conservation of scarce judicial resources. The requirement that a litigant seeking to have some information sealed identify it with precision obviates the need for a judge to do so in camera, and removes the possibility that a busy judge will make a generalized determination instead of examining each putatively sealed record. *Cf. Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (requiring privilege logs during FOIA disputes, in part because "the burden of determining the justifiability of a government claim of exemption currently falls on the court system . . . [i]f the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore disclosable sections, and persuade the court that the entire mass is exempt"). Under *Sealed Documents*, the burden is on the party moving to seal, not the court.

In its papers, the appellant alleges simply that "[t]he significant and detailed information" in the materials that it seeks to have sealed "provides ample support" for its motion, without elaboration. This does not come within haling distance of what *Sealed Documents* requires, because it is exceedingly unlikely that every line of each document that it seeks to excuse from normal docketing presents a substantial threat to effective law enforcement. *Cf. In re Search Warrant*, 923 F.2d at 329 ("It cannot be that pretrial publication of affidavits in support of search warrants is altogether forbidden as a matter of law."); *Vaughn*, 484 F.2d at 828-829 ("[I]t is preposterous to contend that all of the information is equally exempt . . . some portions may fit

under one exemption, . . . while still other segments are not exempt at all and should be disclosed.").

It is not as if the specificity requirement represents a novel or burdensome element of proof for a user of the courts to establish. A civil litigant, for example, could not reasonably expect to carry its burden of demonstrating entitlement to withhold discovery responses on the basis of a privilege by simply asserting that all responsive documents are privileged. Instead, it must "make the claim expressly and shall describe the nature of the documents . . . not produced . . . in a manner that . . . will enable other parties to assess the applicability of the privilege." Vt. R. Civ. P. 26(b)(5)(A). *Cf. Eureka Fin. Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 182 (E.D. Cal. 1991) ("Whether a responding party states a general objection to an entire discovery document on the basis of privilege . . . the resulting blanket objection is decidedly improper. This fact should no longer be news to a responding party.") (construing nearly identical Fed. R. Civ. P. 26(b)(5)(A)) (internal quotation omitted). *See also Grenier v. Jonas*, No. 09-cv-121, 2011 WL 1791093, at *1 (D. Vt. May 10, 2011) (denying Vermont state trooper's blanket invocation of law enforcement privilege and ordering in camera inspection where, "[o]ther than reciting the standards for the privilege . . . Defendant's submissions do not go any further in elucidating the basis for the claim of privilege."). Parties to criminal litigation bear the same responsibility. *E.g., State v. Sweet*, 142 Vt. 238, 239, 453 A.2d 1131, 1132 (1982) (one asserting privilege must "prov[e] first, that the privilege exists, and second, that the material sought to be protected was in fact privileged").

Similarly, a public agency claiming the ability to withhold information under the Access to Public Records Act is responsible for making a specific showing as to each document or portion thereof that it asserts should be withheld. *Finberg v. Murnane*, 159 Vt. 431, 434, 623 A.2d 979, 981 (1992) (public agencies "cannot discharge" their APRA burden "by conclusory claims or

pleadings"); *Herald Ass'n v. Dean*, 174 Vt. 350, 358, 816 A.2d 469, 476-477 (2002) (rejecting governor's claims of executive privilege over entire daily schedule and remanding for entry-by-entry examination of items claimed to be exempt). *Cf.* Vt. Stat. Ann. tit. 1, § 318(e) (2011) ("A public agency shall not withhold any record in its entirety on the basis that it contains some exempt content . . . instead, [it] shall redact the information it considers to be exempt and produce the record accompanied by an explanation of the basis for denial of the redacted information.").

Finally, the appellant's footnoted offer of redaction is insufficient to meet the specificity requirement of our law. *See* Appellant's Br. at 20 n.16 (suggesting redaction of everything in the thirteen returns and supporting materials save "[i]nformation that was already in the public domain"). Restricting redaction to the information that appellant has decided not to disclose reverses the common law guarantee of open courts and creates an unwarranted presumption that the public is entitled to see only judicial business that the executive branch deems in its own interest. Moreover, the mere suggestion that all non-public information should be sealed says nothing about whether the information that the executive has not chosen to publicize meets the requisite showing of harm as to each remaining portion that it seeks to have sealed. Given its utter failure to comport with the specificity requirement, the appellant's motion to seal was meritless, and the superior court's order saying so should be affirmed.

II. No Sound Basis Exists for Overruling *Sealed Documents* and Curtailing the Public's Right of Access Based Upon Arbitrary, Overly Broad Distinctions

In addition to seeking reversal in this case, the appellant invites the Court to alter all future cases by overruling *Sealed Documents* and replacing it with an unrebuttable presumption that court records relating to criminal investigations are sealed prior to arrest or indictment.[3] Three

3 The Fifth Amendment's grand jury clause has not been incorporated against the States, *e.g., LanFranco v. Murray*, 313 F.3d 112, 118 (2d Cir. 2002), and Vermont law does not contain such a requirement, *see State v. Barr*, 126 Vt. 112, 116-117, 223 A.2d 462, 466 (1966); Vt. R. Crim. P. 7(a); hence, prosecution upon indictment

considerations put paid to its request.

As an initial matter, neither the arrest of a suspect nor the executive branch's claim that an investigation is "ongoing" or "active" provides a meaningful bright line between the common law presumption of open courts and the executive branch's preference for sealed files. There is no general need for secrecy in all investigations, as the appellant's meager showing here demonstrates. Indeed, investigations often take place in full view of the public, with the police, as here, actively apprising the public of the investigation's progress. Conversely, the potential need for sealing certain information does not automatically dissipate after an arrest is made or an investigation is closed. Select information contained in post-arrest search warrant return materials – such as bank account numbers – could very well merit redaction, as could the names of confidential informants in a closed investigation.[4]

"The balance . . . must be carefully struck in each case; it does not invariably fall on one side or the other," *In re Search Warrant*, 923 F.2d at 329, and the *Sealed Documents* case-by-case analysis for determining public access notwithstanding an investigation being open or closed reflects that balance. The analogous areas of public records and law enforcement privilege law confirm that courts are capable of protecting both interests without resorting to arbitrary bright lines that will be overly broad in most cases. *Compare Stolt-Nielsen Transp. Group Ltd. v. United States*, 534 F.3d 728, 733-734 (D.C. Cir. 2008) (ordering FOIA release of all federal antitrust enforcement amnesty agreements subject to redaction of corporations' names); *Aguilar v. Immigration and Customs Enforcement Div.*, 259 F.R.D. 51, 59-64 (S.D.N.Y. 2009) (denying complete withholding under law enforcement privilege of spreadsheets designating immigration

is an optional rarity in our state judicial system.

4 Moreover, arrest does not end the need for search warrants: co-conspirators may be sought following the arrest of a suspect, and the police bear a federal constitutional duty to avoid holding an arrestee who is exculpated by available information. *Russo v. City of Bridgeport*, 479 F.3d 196, 208 (2d Cir. 2007). The facts of *Sealed Documents* confirm this observation. There, the prosecution applied for, and moved to seal, a search warrant "based upon information developed by Vermont law enforcement authorities" five days after the suspects' arrest. Brief of Appellee, SPC 21, *In re Sealed Documents*, 172 Vt. 152, 772 A.2d 518 (2001) (No. 2001-103).

raid targets, but permitting production in redacted form) *with Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1160, 1165 (3d Cir. 1995) (affirming FOIA withholding of some records in closed investigation where government demonstrated that prosecutions of fellow organized crime members were imminent); *MacNamara*, 249 F.R.D. at 90 (permitting law enforcement privilege withholding of selected paragraphs of internal legal memoranda that would "likely reveal . . . NYPD communications and intelligence gathering strategies, and therefore, jeopardize future criminal investigations relying on those or similar techniques" in litigation over long-past mass arrests). There is no reason to rob Vermont court records law of its identical flexibility.

The *Sealed Documents* approach has a further advantage in its avoidance of arbitrary court records withholding. By examining whether each document to be sealed presents a significant threat to effective law enforcement, it removes the executive branch temptation to artificially designate investigations as "open" in order to avoid disclosing documents. *See, e.g., Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 570-573 (4th Cir. 2004) (turning aside effort to seal allegedly active investigatory files pertaining to twenty-two year old murder following pardon of wrongfully convicted suspect); *Floyd v. City of New York*, 739 F. Supp. 2d 376, 380 (S.D.N.Y. 2010) (explaining that, for purposes of the law enforcement privilege, "that an investigation is open does not guarantee protection from disclosure; otherwise, a party could simply keep an investigation open during the pendency of a lawsuit in order to avoid disclosure.") (internal footnote omitted). The case-by-case approach additionally avoids placing more work on courts' dockets in the form of refereeing disputes over whether an investigation is, in fact, closed. *See, e.g., Blythe v. State*, 870 A.2d 1246, 1285 (Md. Ct. Spec. App. 2005) (determining that for purposes of Maryland open records law that a criminal case is no longer pending when the defendant has been convicted and has exhausted his direct appeal right, and explaining that if the "mere possibility that a post-conviction petition might be filed compelled

the conclusion that the criminal case was still pending, no criminal case would ever be final").

Lastly, the democratic benefits provided by open courts do not shift in accordance with whether an arrest has been made or an investigation has been closed. The public's interest in an open judiciary is not limited to the prevention of "unjust conviction, excessive punishment, or the unwarranted taint of criminality." *In re Search Warrants*, 2011 VT 88, ¶ 2, __ Vt. __, __ A.3d __. The public's interest is broader. As an independent branch of government not subject to direct election, the judiciary must "have a measure of accountability," and thus, "public monitoring is an essential feature of democratic control." *United States v. Amadeo*, 71 F.3d 1044, 1048 (2d Cir. 1995). "Without monitoring . . . the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used" in the judicial process. *Id.* *See also Leucadia v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) ("[T]he very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness."). The collective nature of criminal prosecution augments these interests. "The nature of criminal law is such that it punishes offenses against the collective public," and the public therefore deserves "to be assured that offenses perpetrated against them are dealt with in a manner that is fair to their interests." *Commonwealth v. Fenstermaker*, 530 A.2d 414, 417 (Pa. 1987) (recognizing common law right of access to executed arrest warrant materials). Moreover, the public "has legitimate concerns about methods and techniques of police investigation: for example, whether they are outmoded or effective, and whether they are unnecessarily brutal." *In re Search Warrant*, 923 F.3d at 331. The appellant here has not presented any substantive reason to draw an arbitrary line in the criminal process as the point before which these public interests must be shortchanged, and its request to overrule *Sealed Documents* must accordingly be declined.

III. Exemption 5 to the Access to Public Records Act and *Sealed Documents* Express Equivalent Standards: Absent Concrete Harm, Disclosure is Required

Lastly, the ACLU believes that the sealing standard set forth in the Rules for Public Access to Court Records and *Sealed Documents* is the same as that properly applied to investigatory records under Exemption 5 to the Access to Public Records Act, codified at Vt. Stat. Ann. tit. 1, § 317(c)(5). As the ACLU has presented to the Court in two cases ripe for decision[5] and one case just fully briefed,[6] APRA Exemption 5 cannot be interpreted as a blanket prohibition against public access to investigatory records. Instead, it must be read narrowly as permitting withholding only where disclosure would work a concrete harm to law enforcement. Given the volume of paper that the ACLU has recently devoted to the subject in this Court, it will trust the Court's familiarity with the argument and not reproduce it here.

IV. Conclusion

Because the appellant has failed to demonstrate that normal docketing of each search warrant return at issue will cause substantial harm to law enforcement, and because it has failed to provide sufficient bases for overruling controlling law, its motion to seal was properly denied by the superior court and that court's ruling should be affirmed.

Respectfully submitted,

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September 6, 2011

5 *Bain v. Clark*, No. 2009-468; *Rutland Herald v. Vermont State Police*, No. 2010-434 (both as amicus curiae in support of appellant).

6 *Galloway v. Town of Hartford, Vermont*, No. 2011-211 (as counsel for appellant).

Certificate of Compliance

I hereby certify that this brief totals 6,256 words, excluding the statement of issues, table of contents, table of authorities, signature blocks, and this certificate as permitted by Vt. R. App. 32. I have relied upon the word processor used to produce this brief, OpenOffice 3.3.0, to calculate the word count.

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