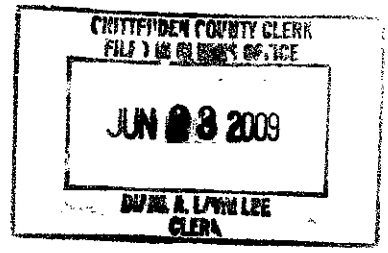
STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
DOCKET NO. S0007-09 CnC

WILLIAM RASCH

v.

CITY OF BURLINGTON



DECISION AND FINAL ORDER

This is an action under the Vermont Public Records Act, 1 V.S.A. § 315 *et seq.*, for access to, and disclosure of all City records and documents relating to the investigation, and discipline of former city employee Adam Cate, formerly the "Waterfront Manager" within the City's Department of Parks and Recreation.[1] Plaintiff is a steward, or other ranking member of the union representing certain City employees, including non-supervisory employees of the Parks Department. Plaintiff duly made several record requests of the City for the above-described records, which were denied. Plaintiff then filed this action under 1 V.S.A. § 319(a) to compel disclosure. In this court, which hears and determines the entire matter on a *de novo* basis, *id.*, the City urges only two bases for exemption and non-disclosure of the requested records: (1) a general contention that all documents and records used, or relied on by a public body which has properly gone into executive session pursuant to 1 V.S.A. § 313(a), thereby become exempt from disclosure;[2] and (2) the exemption for "personal documents relating to an individual," 1 V.S.A. § 317(c)(7). It is the court's understanding that all requested documents and records which the City believes are responsive to Plaintiff's various requests, have been submitted to, and are now before the court for *in camera* inspection, *see* § 319(a), including those additional records implicated by the Amended Complaint. *See infra* & fn. 9.

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[1] At the time this action was filed, and at time of the court's hearing on the merits on February 27, 2009, Mr. Cate had been restored to employment, albeit on probationary status. Since that time, Mr. Cate's City employment was again terminated. *See, e.g.*, Amended Complaint, ¶ 5 (filed May 22, 2009). Although the City "denied as framed" the assertion that Mr. Cate was more recently terminated for the reasons alleged, the court takes it as essentially a concession to the fact of termination, while demurring to the other subjective characterizations in the allegations "as framed." *See* VRCP 8(b). Plaintiff's motion to amend the complaint is **granted**.

[2] The City's position is probably more nuanced than that general statement; at argument and the final hearing, counsel did seem to advance (or at least acknowledge) a distinction between records already in existence, and those specifically created for purposes of, or as a direct result of the Commission's executive session.

General principles the court must apply in any public records access case are now well-established. Plaintiff's motivation, if any, for requesting the records is irrelevant, *Finberg v. Murnane,* 159 Vt. 431 (1992), although the context in which the request has arisen may re-enter the discussion as part of the "public interest" balancing analysis which the court must engage in under § 317(c)(7). *See infra* & fn. 10. There is an over-arching public policy in favor of disclosure and availability of all public records, subject only to limited, and specific exemptions set out in § 317(c) which must be strictly construed in favor of disclosure and against withholding by the public agency. 1 V.S.A. § 315; *see, e.g., Trombley v. Bellows Falls Union H.S.,* 160 Vt. 101, 106-07 (1993). The exemptions provided by § 317(c) do not require the governmental body to withhold such documents, as the City argues here, but instead merely provide a safe harbor to do so if the agency or municipality so elects and the chosen exemption in fact applies. The withholding public body has the "burden of showing that a record fits within an exception, and it must discharge this burden by a specific factual showing, not merely by conclusory claims." *Trombley, supra,* at 109 (cit. omitted).

Turning first to the City's general contention relating to executive session, some additional background is helpful. After the City, acting through its then-Director of the Parks Department,[3] had taken its initial disciplinary action regarding Mr. Cate, he elected to appeal to the Commission which oversees the Department. There appears to be no dispute that the Commission had full authority to review, and affirm, reverse, or modify any disciplinary sanction meted out by the City. There is also no real dispute that the Commission did properly elect to go into executive session, on October 1, 2008 (for a "Predetermination Hearing") and November 14, 2008 (for the final hearing on Cate's appeal), under 1 V.S.A. § 313(a)(4).[4] Mr. Cate, as he had the right to do, chose not to have the proceedings be public. 1 V.S.A. § 313(a)(4). In connection therewith, the parties – Mr. Cate, and the City – submitted various documents, records and memoranda to the Commission (*see* Tabs 8 and 9 to Volume I of the Defendant's documents filed under seal), and the Commission

[3] The court takes judicial notice, VREv 201, that Wayne Gross, who held the position of Parks Department Director during all relevant times of concern here, was recently not re-appointed by the Mayor, the only such City officer or Department head not retained by the current City administration following the most recent March 2009 election.

[4] CD recordings of those two hearings have been included in the "sealed" record submitted by the City. As discussed in the principal text, these recordings of the actual executive sessions themselves, similar to (and a more extensive, indeed verbatim version of) "minutes" of the executive sessions, are clearly, and expressly exempt from disclosure. 1 V.S.A. § 313(a). Accordingly, the two CDs shall remain "sealed" in the court's record, and are not available for public inspection. VRPACR, § 7(a); *In Re Sealed Documents,* 172 Vt. 152, 160-65 (2001).

itself issued certain pre-hearing orders and decisions, and a more detailed 8-page decision, with findings, to support and explain its final action regarding Mr. Cate's employment (*see* Tabs 7 and 10 to Vol. I of the City's "sealed" submission), in addition to the separate 1-page "Notice of Decision" (dated November 20, 2008) which formally embodied its final action, *see* § 313(a), and is already a matter of public record, *see* Exhibit to 1/23/09 Affidavit of Wayne Gross.

It is no accident that the General Assembly separately addressed the confidentiality of public meetings and proceedings, and access to all public records, in wholly distinct statutory provisions. If the Legislature had intended to make (or keep) secret the records and documents used and relied upon in the course of otherwise confidential proceedings, it certainly could have done so, either in § 313 (e.g., the specific reference to minutes of any executive session), or as an explicit records exemption under § 317. There is no such provision in the statutes. The respective declarations of public policy in §§ 311(a) and 315, as repeatedly endorsed and explained by the Vermont Supreme Court, make clear that, except to the extent a specific exemption or other express provision exists allowing governmental confidentiality, full and complete public access to "specific information" about "the conduct of the people's business" which is "needed to review the action[s] of [ ] government officer[s]" is the default setting which must control the machinery of all governmental bodies. The sometimes evident impulse to the contrary, to look for ways to say "No" instead of "Yes," and to sometimes stretch the limits of applicable exemptions, is contrary not only to the law itself but its abiding spirit. *Cf.* sunlight, disinfectant, and all that.

Our High Court has more than once stated its "reluctance to allow agencies to avoid disclosure by the simple act of placing a document in a personnel or similar file." *Trombley, supra,*160 Vt. at 108 (cits. omitted); *Kade v. Smith,* 2006 VT 44, ¶ 8, 180 Vt. 554, 557 (mem.). The repository, or place where public records may be found, is not determinative; access is to be determined on a record-by-record basis as to whether the record itself is exempt under § 317(c). *Id.; cf. e.g., Caledonian-Record Pub. Co. v. Vermont State College,* 2003 VT 78, ¶s 9-13, 175 Vt. 438, 442-44 (specific exemption under § 317(c)(11) was controlling, in the context of disciplinary proceeding held in executive session).[5] Thus the fact that documents were submitted to the Commission in connection with an executive session, and they now reside in the Commission's file(s), does not make them exempt unless those records are themselves exempt. *Cf., e.g., Herald Assn., Inc. v. Judicial Conduct Bd.,* 149 Vt. 233, 238 (1988)

[5] In *Caledonian-Record,* the specific exemption was categorical, if not absolute, and did not allow for any balancing of public interest vs. confidentiality, unlike the "personal records" exemption at issue here under § 317(c)(7), *see* discussion *infra.*

(suggesting that presumptive confidentiality of documents at issue might have been overcome if they had actually been submitted in connection with, and used during the quasi-judicial proceedings themselves). The City's records at Tabs 8 and 9 of its Volume I binder are not exempt under this general rule (i.e., in connection with any executive session) advocated by Defendant.

The question may be closer with respect to documents and records generated by the Commission itself, to the extent they are directly in connection with, or the actual product of any executive session, but the result is still the same. The pre-hearing decisions and orders, at Tab 7 of Vol. I, do not meet even that prerequisite; they appear to have been issued irrespective of any executive session on either 10/1/08 or 11/14/08. Those records are not exempt under this general principle urged by Defendant. Lastly, the final, 8-page detailed findings and decision of the Commission may have ultimately resulted from the adversarial disciplinary hearing(s) held in executive session, but it is not the actual record of the executive session(s) themselves, unlike any minutes or the verbatim CD recordings of those sessions.[6] It is difficult for this court, which must constantly explain its decisions on the open record with detailed findings, which are often if not typically in writing, to accept the proposition that a similar decision of a public body acting in a clearly quasi-judicial fashion is entitled to have that fuller explanation remain secret, or even that it would want to.[7]

Given the overriding premise that all exceptions to public access and disclosure must be strictly construed against exemption, and the conclusion that prohibiting access to the Commission's full decision would frustrate the fundamental public policies set out in §§ 311(a) and 315, *supra*, the court is not inclined to fashion, or recognize any implied exemption under § 313(a)(4) applicable to the Commission's 8-page detailed findings and decision. *Cf. Katz v. So. Burlington Sch. Dist.*, 2009 VT 6, ¶ 7 & fn. 2 (Jan. 20, 2009) (settlement agreement with public official resigning under disputed circumstances was clearly public). The materials at Tab 10 to Vol. I of the City's binder are not generally exempt.

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[6] As previously noted, the court does find the CDs themselves to be exempt from public access and review. *See* fn. 4 above. In that regard *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977), on which the city heavily relies on this point, is not apposite or persuasive. At issue there was a tape recording (note 30-year old technology) of the executive session itself; continued confidentiality of the two CDs here is essentially the same result.

[7] It may well be there is some daylight between what the members of the Commission might actually desire in this respect, and the position taken by the City, which is the actual Defendant here.

Whether any records, or parts of documents, are nonetheless exempt from disclosure under 1 V.S.A. § 317(c)(7), as "personal documents relating to an individual," must still be examined by the court, and that includes those just discussed which are related to the Commission's proceedings. The Vermont Supreme Court has grappled with the "personal records" exemption several times, perhaps more than any other exception under § 317(c), and the first principle that might be drawn from those opinions is that the preferred, if not required approach from this court is to conduct an *in camera* review of all the tendered records.[8] *Kade v. Smith, supra,* ¶s 12-14, 180 Vt. at 559-60; *Norman v. Vermont Office of Court Administrator,* 2004 VT 13, ¶s 9-10, 176 Vt. 593, 595 (mem.); *Trombley, supra.* The court now turns to those decisions to ascertain the substantive rules which govern the necessary *in camera* review of all the records submitted by the City, in Volumes I – III.[9]

For purposes of 1 V.S.A. § 317(c)(7), the "term 'personal documents' . . . appl[ies] only when the personal privacy of the individual is involved. Thus, it covers personal documents only if they reveal 'intimate details of a person' s life, including any information that might subject the person to embarrassment, harassment, disgrace, or loss of employment or friends'." *Trombley, supra,*160 Vt. at 110 (cits. omitted); *Norman, supra,* ¶ 8, 176 Vt. at 595; *Katz v. So. Burlington Sch. Dist.,* 2009 VT 6, ¶ 7 & fn. 2 (exemption is "narrowly construed" to "apply only to documents that reveal 'intimate details' of a person's life") (Jan. 20, 2009). However, even when such countervailing interests have been identified, the Court "require[s] a balancing of the public interest in disclosure against the harm to the individual." *Id.* at 109 (cits. omitted). Accordingly, it is generally considered that § 317(c)(7) exempts from disclosure only those public records which would result in an unwarranted "invasion of personal privacy." In some instances, if the public interest component is sufficiently compelling, the records should be made public even if it results in some infringement of a particular person's privacy.

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[8] Although the City has provided an index to the three volumes of documents it has produced under seal, it is not the kind of detailed "Vaughn index" describing each particular document by which the court might be able to avoid the tedium of page by page, if not line by line review, at least to determine in the first instance whether the exemption applies at all. *See Kade v. Smith, supra,* ¶s 10-11, 180 Vt. at 558-59.

[9] Volume III of the City's documents were submitted to the court under seal on June 5, 2009, in response to the Amended Complaint, in conjunction with the City's answer. The contents have been moved by the court to, and made a part of the second binder, which originally included Volume II of the disputed records.

Disclosure of records relating to a public employee's performance evaluations, and the impact of potential disciplinary proceedings, was at issue in both *Norman* and *Kade.* In the latter case, the Supreme Court reiterated the basic standard that only "highly personal, embarrassing information [is] exempt from disclosure," *id.,* ¶ 9, 180 Vt. at 558, i.e., "highly sensitive or invasive information." *Id.* In *Kade* the requested records included performance evaluations of a prison facility superintendent, and the Court was careful to emphasize the "unique context of a prison facility" and the likelihood that "disclosure of sensitive information cannot help but expose that official to potentially embarrassing comment among the prison population." *Id.,* ¶ 11, 180 Vt. at 559. Thus, in performing the second part of the "personal records" analysis, which requires the balancing of the public interest against disclosure of otherwise private information, this court "must consider not only the relevance, if any, of the records to the public interest for which they are sought, but any other factors that may affect the balance, including: the significance of the public interest asserted;[10] the nature, gravity, and potential consequences of the invasion of privacy occasioned by the disclosure; and the availability of alternative sources for the requested information." *Id.,* ¶ 14, 180 Vt. at 560 (cit. omitted).

Especially viewed through the lens of subsequent events – i.e., the Mayor's recent decision not to re-appoint long-time Parks Director Wayne Gross, who made the original disciplinary decision regarding Mr. Cate, which was then reviewed, and modified by the Parks Commission after an evidentiary hearing in executive session – there is a significant public interest of the citizens of the City in gaining further information about, and insight into the administration of City business regarding supervisory policies and practices;[11] the issue of adequate controls over

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[10] In *Kade* the Court thought it significant that the records request was apparently prompted, at least in part, by a "charge of governmental impropriety [that] . . . had advanced . . . well beyond mere speculation," and had already resulted in an "independent investigation" which had "identified [specific] instances" impacting on important issues of management and oversight of the public's business. Here the Commission's independent review, and ultimately detailed 8-page decision regarding Mr. Cate serves essentially the same purpose, of verifying there are legitimate issues of public concern which go beyond any parochial concerns which may have been Plaintiff's primary, and original motivation in pursuing these records and launching this case. The court's own *in camera* review of all the materials has persuaded it that genuine issues of public concern are implicated here, such that these matters rise above the mere level of general curiosity, or a diffuse desire simply to access "'information for its own sake'," *Kade,* ¶ 12, 180 Vt. at 559 (cit. omitted).

[11] The publicly reported comments of another Director of a different City Department, which were quite animated and thus fairly extraordinary in context, lend further support to the premise that a legitimate public interest in City administrative practices and policies is implicated here.

City monies; and adequate controls over City personal property, including cell phones and laptop computers issued to City employees.[12] There may also be genuine public interest in the issue of how, and under what circumstances the Commission can trump the disciplinary decisions of the employer, i.e., the City administration. *Cf., e.g., In Re Grievance of Dennis Jewett,* 2009 VT 67, ¶s 1, 23-24 (June 19, 2009) (Vermont Labor Relations Board overstepped its authority in reversing decision by Department of Corrections to terminate employee for unprofessional conduct). The documents and records submitted to the Commission, and its thorough, and thoughtful synthesis of all that information in its full decision, are the principal (if not only) available sources of credible, and non-speculative information on these issues; the bits and pieces that have already been "leaked" to the press or public[13] simply confuse the issues, lead to innuendo rather than knowledge, and detract from a fuller public understanding of the matters raised.

Some personal information regarding Mr. Cate and the circumstances leading to his employment dispute with the City will inevitably be released, but the information – with a few exceptions which the court has redacted from the records to be released herewith, *see Kade,* ¶ 14, 180 Vt. at 560[14] – is not so "highly sensitive or invasive" that it is likely to be unduly embarrassing. His side and explanation of the events is ably, if not repeatedly stressed in many of the materials which the City seeks to withhold. Given the circumstances, disclosure will not lead to the loss of his employment, that having already occurred for other reasons not at issue here. The other "potential consequences" to Mr. Cate, if any, appear to be substantially outweighed by the genuine issues of public concern which are presented, and the fact that public understanding of this entire matter can only be achieved through a

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[12] The fact that the Mayor saw the need to respond to the City Council's request for more information, in a multi-page detailed report, most of which was public but some of which was itself presented in an executive session of the Council, further indicates the issues raised are substantial, and serious, and not just the result of frivolous curiosity.

[13] The court expressly declines to address, or consider that particular charge, except to note that a redacted version of a 14-page summary of the original investigation of the Burlington Police Department, dated August 26, 2008, is already a matter of "public record." *See* Plaintiff's Exhibit A (admitted at final hearing on 2/27/09).

[14] In addition to redaction of specific words or phrases which cross the "personal embarrassment" threshold, the court has also removed from the records to be released all of Mr. Cate's personnel file and performance evaluations, at Tab 8 of Vol. I of the City's binder, except for his most recent (12/13/07) evaluation, which sets a baseline against which the 2008 events (and each side's characterization thereof) can be assessed. Even though the earlier materials are almost entirely favorable to Mr. Cate, still highly personal details should not be disclosed unless the public interest demands it. *See Kade,* ¶ 9, 180 Vt. at 558; *Norman, supra,* ¶ 9, 176 Vt. at 595.

complete airing of all the information, and release of all the records submitted by the City.

In these circumstances the court is bound by the "express, over-arching legislative principle that the 'right to privacy . . . ought to be protected unless the specific information is needed to review the action of a governmental officer." *Kade, supra,* ¶ 9 & fn. 5, quoting 1 V.S.A. § 315. Finally, the court has redacted names of, or references to other City employees who were inadvertently, and involuntarily swept up in these events, at least where those employees appear to have been non-supervisory "front line" employees with no discretionary or management involvement.[15]

Accordingly, for the reasons discussed herein, **final judgment shall enter which directs the release and disclosure of all records, documents and materials contained in Volumes I – III of the two binders submitted by Defendant under seal, except to the extent the court has redacted or withheld certain records as stated**, and to which extent continued sealing and confidentiality of such documents is granted. VRPACR § 7(a). The unredacted, and full compilation of any records which are excepted, shall be maintained by the court under seal in its file.

Finally, pursuant to VRCP 62(a)(2), (d)(2), and on the court's own motion, **the final judgment to be entered herewith is stayed for a period of fifteen (15) days from the date of entry,** to allow any party, or any interested person to the extent otherwise allowed, to seek whatever remedies that party or person deems advisable. If no further stay or other contrary order is entered before the expiration of that 15-day period, the referenced binders shall be available from the court for inspection and copying.

IT IS SO ORDERED, at Burlington, Vermont, this **23rd** day of June, 2009.

Dennis R. Pearson, Presiding Judge

[15] A further exception is that Plaintiff, having self-identified himself by bringing this case, and any employee who voluntarily testified at the 2/27/09 final hearing, are deemed to have "waived" any protection from disclosure they might otherwise have enjoyed.