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VIA ELECTRONIC MAIL

Patricia Conway, Esq.
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Dear Attorney Conway:

Following up on our conversations, I am writing on behalf of my client, Phillips Exeter Academy (PEA), regarding the recent public disclosure of documents by the Rockingham County Attorney's Office (RCAO) concerning its investigation of PEA and several of its current and former staff members. These documents, produced to various individuals and media outlets pursuant to RSA Chapter 91-A, contain highly-sensitive information—the names and other identifying information of student complainants, student victims, and minor students and PEA employees alleged to have engaged in uncharged misconduct—that does not appear to be subject to disclosure under Chapter 91-A. Indeed, the public disclosure of this information constitutes a significant invasion of individual privacy that is almost certain to cause embarrassment and, in some cases, significant and long-lasting reputational harm to the named individuals. On behalf of PEA and in light of the well-established standards described in this letter, I encourage you to carefully review and exempt from disclosure these and other sensitive student- and employee-related materials.

As you are aware, RSA 91-A:5 exempts from disclosure files and information that is considered "confidential" or "whose disclosure would constitute an invasion of privacy." RSA 91-A:5, IV; *see Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 475 (1996). In order to determine whether this exemption applies, the disclosing entity (or, as the case may be, a reviewing court) must balance "the public interest in disclosure of the requested information against … the individual's privacy interest in nondisclosure." *City of Nashua*, 141 N.H. at 475-76 (citing cases). "[I]f the disclosure of the requested information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." *Id.* at 477.

Several of the files disclosed by the RCAO contain the names and other identifying information of PEA students who reported instances of misconduct on campus, who were witnesses to

alleged misconduct, or who were the victims of alleged misconduct. There is no question that these student reporters, witnesses and victims have a significant privacy interest in keeping their identities and their involvement in alleged misconduct strictly confidential. *See Reid v. New Hampshire Attorney General*, 169 N.H. 509, 529 (2016) (citing cases). To be sure, "[a] witness recounting his experiences with, and opinion of, a person who is the subject of a[n] … investigation could feel embarrassed about his or her identity being made public." *Fine v. U.S. Dept. of Energy*, 823 F. Supp. 888, 898 (D. N.M. 1993).

The materials disclosed by the RCAO also contain the names of students and PEA employees alleged (often times without any corroborating information or evidence) to have engaged in misconduct that never resulted in a criminal charge. Similarly, these individuals—the subjects of a complaint or an investigation that did not result in formal charges—have a manifest privacy interest in maintaining the confidentiality of their involvement in the investigation or complaint. *See City of Nashua*, 141 N.H. at 477 ("[I]ndividuals have a strong interest in not being associated unwarrantedly with alleged criminal activity."); *Senate of the Comm. of Puerto Rico v. U.S. Dept. of Justice,* 823 F.2d 574, 583 (D.C. Cir. 1987) (noting that the privacy interests of the target of an investigation are "substantial"). Perhaps even more so than mere witnesses, "disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment or potentially more serious reputational harm." *Senate of the Comm. of Puerto Rico*, 823 F.2d at 588. Considering a request made under the Freedom of Information Act (which contains an exemption similar to RSA 91-A for information that, if disclosed, would cause an invasion of privacy), at least one court has remarked that "[t]here can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of an … investigation." *Baez v. Department of Justice*, 648 F.2d 1328, 1338 (D.C. Cir. 1980); see also *Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856, 863-65 (D.C. Cir. 1978) (revelation that an individual was an investigation subject represents a "significant intrusion" on privacy).

Whether it be a reporter, a witness, a victim, or the subject of an investigation, it is overwhelmingly clear that each of these individuals has a *significant* private interest in maintaining the confidentiality of their identity. Conversely, disclosing the names and other identifying information of these individuals does little to inform the general public of the activities of the RCAO and, in particular, its investigation of PEA. Indeed, the names of students and PEA employees involved in the investigation or who are otherwise named in the disclosed materials fall squarely within the category of "information [exempt from disclosure] about private citizens that is accumulated in various governmental files but that reveals nothing about an agency's own conduct." *City of Nashua*, 141 N.H. at 477 (internal quotations omitted) (*quoting U.S. Dept. of Justice v. Reporters Committee*, 109 S.Ct. 1468, 1481 (1989); *see also Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005) (the names and addresses of residential utility customers not subject to disclosure under 91-A). The private interest of these students in maintaining their confidentiality, their dignity and, in some instances, their personal and professional reputations, therefore, substantially outweighs the public's scant interest in disclosure.

The adverse impact associated with the public disclosure of student and employee identifying information is apparent, particularly for minor students whose identity New Hampshire law *requires* be kept confidential in all proceedings initiated under RSA Chapter 169-C. Not only that, but disclosing the identity of student reporters, witnesses and victims—many of whom came forward believing their identifies would remain strictly confidential—without their knowledge or consent will also discourage other students from coming forward and reporting suspected instances of misconduct. This is precisely the type of collateral consequence that Chapter 91-A seeks to avoid by protecting from disclosure information that, if publically known, would constitute an invasion of privacy. Protecting privacy, on the other hand, will encourage future reporting by students and faculty alike. To be clear, PEA does not oppose the RCAO's disclosure of its investigative files; rather, PEA believes that careful redaction of the files could protect the privacy of reporters, witnesses, victims and subjects, while still providing insight into the workings of government and satisfying the public's right to know.

Thank you for your continued sensitivity to this important matter. Please contact me at any time if you have questions or concerns.

Sincerely,

David A. Vicinanzo

David A. Vicinanzo
Partner