FINDINGS REGARDING RELEASE OF AN INSUFFICIENTLY REDACTED TRANSCRIPT BY THE HOPKINTON POLICE DEPARTMENT

Introduction

In early February 2024, the Middlesex District Attorney's Office ("Middlesex") asked the Northwestern District Attorney's Office ("NWDAO") to review the circumstances under which an insufficiently redacted document was improperly released to the public via the Hopkinton Police Department's "News Blog" (https://hopkintonpdnews.com). The document in question was a transcript of an interview that the Kroll investigative firm ("Kroll") conducted with Hopkinton Police Sergeant Timothy Brennan ("Sergeant Brennan") in February 2023. The document was uploaded to the website on January 19, 2024, and taken down the following day.

Middlesex asked NWDAO to investigate this matter to avoid any appearance of a conflict of interest, given the potential involvement of the Hopkinton Police Department and its current chief, Joseph Bennett ("Chief Bennett"), in the release of the transcript. As the First Assistant District Attorney for NWDAO, I assigned myself this investigation and enlisted the assistance of Massachusetts State Police Captain Jeffrey Cahill, who heads the office's State Police Detective Unit. Our review consisted of obtaining and reviewing relevant documents, interviewing witnesses, and examining the applicable caselaw.

Timeline & Findings

In February 2023, labor counsel[1] for the Town of Hopkinton retained Kroll to investigate possible misconduct within the Hopkinton Police Department; specifically, whether Sergeant Brennan failed to notify his superiors of alleged criminal conduct committed by former Deputy Chief John Porter ("Porter"). Porter is currently under indictment in the Middlesex Superior Court facing three counts of rape of a child in violation of General Laws chapter 265, § 23.[2] The indictments allege that in 2004 and 2005, Porter raped a minor, who was a high school student that he had met in his capacity as the School Resource Officer (SRO). Brennan is alleged to have known about these allegations for years, based on conversations with the victim, without reporting them to his superiors. All the while, Porter continued to rise through the ranks of the Hopkinton Police Department and also served as a youth soccer coach.

Kroll Investigators Daniel Linskey and Monica Monticello interviewed Sergeant Brennan on February 17, 2023, and that interview was later transcribed. Kroll interviewed other witnesses and compiled documents during its investigation. At the conclusion of its investigation, Kroll provided the Town of Hopkinton (through labor counsel) with a 36-page final report in which it made sustained findings of wrongdoing against Sergeant Brennan regarding his failure to promptly notify his superiors of Porter's criminal conduct. Kroll also provided the Town (via labor counsel) with a number of underlying investigative documents, including but not limited to transcripts of its interviews with Sergeant Brennan and Chief Bennett.

Prior to providing the Town with the Brennan transcript, Kroll specifically asked the stenographer to redact from the document any references to the victim's first name and some other highly personal information. Kroll then provided the redacted transcript to the Town, through labor counsel. That transcript consists of: (1) a cover page (1 page); (2) the transcribed interview (81 pages); (3) a certificate of accuracy (1 page); and (4) a keyword index (11 pages). Sixteen (16) redactions were made to the transcript prior to Kroll providing it to the Town: three on page 22; one on page 27; one on page 29; one on page 33; two on page 35; two on page 40; two on page 77; and four in the keyword index (sheets 5, 6 and 8). Unfortunately, two references to the victim's first name were overlooked and left unredacted: one in the interview section, and one in the keyword index. Despite having specifically asked the stenographer to redact any references to the victim's name, Kroll apparently failed to check the transcript to ensure those redactions had, in fact, been made.

Based on Kroll's investigation, Chief Bennett placed Sergeant Brennan on paid administrative leave and later recommended that the Select Board terminate his employment with the Hopkinton Police Department. The Select Board then scheduled a "Loudermill"[3]

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[1] Mirick, O'Connell, DeMallie & Lougee, LLP.

[2] See Middlesex Superior Court docket no. 2381CR00161.

[3] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

hearing to determine what discipline, if any, Sergeant Brennan should face, up to and including termination. At Sergeant Brennan's request, this hearing was held in public rather than within the confines of Executive Session.

In the weeks leading up to the "Loudermill" hearing, town counsel[4] and labor counsel collaborated on compiling a packet of documents to submit to the Select Board in support of the Chief's recommendation to terminate Sergeant Brennan. This packet included the insufficiently redacted Brennan transcript provided by Kroll, which neither town counsel nor labor counsel realized contained two unredacted mentions of the victim's first name. They shared this packet with the Town Manager and Chief Bennett, and once it was finalized and agreed upon, they shared it with the Select Board via email on January 13, 2024. Neither the Town Manager, nor the Chief, nor any Select Board member noticed that the victim's name appeared unredacted in the Brennan transcript.[5]

At the January 19, 2024 "Loudermill" hearing, Chief Bennett delivered remarks in which he explained his reasons for recommending Sergeant Brennan's termination. Because the hearing was open to the public, the exhibits submitted to the Select Board in support of the Chief's recommendation to terminate Sergeant Brennan became subject to the state's public records laws. See General Laws chapter 66, §§ 1-21. Anticipating an onslaught of requests for the exhibits, and in an effort to be proactively transparent, Chief Bennett was a strong proponent of releasing the exhibits through the Town's public relations consultant, John Guilfoil Public Relations, LLC. Others involved in the assembly of the exhibits agreed, and it was decided the exhibits would be uploaded to the Hopkinton Police Department's "News Blog" following the conclusion of the "Loudermill" hearing.

Pursuant to that agreement, the public relations consultant uploaded the exhibits to the "News Blog" after the hearing concluded on the evening of January 19, 2024, accompanied by the following note: "Chief Bennett has released these documents following multiple public records requests and amid significant public interest, inquiry and media reporting on the matter." Chief Bennett did not personally upload the documents to the "News Blog" although he did endorse the idea.

Within 24 hours of the documents being made available to the public, the Town was notified that the transcript of Sergeant Brennan's interview was insufficiently redacted and instructed the Town's public relations consultant to remove it from the "News Blog." Several days later, on January 23, 2024, the town's public relations consultant posted the following "UPDATE" on the "News Blog":

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[4] Harrington Heep, LLP.

[5] In fairness, some of the individuals who were privy to the Brennan transcript prior to the "Loudermill" hearing may not have known the victim's first name when reviewing the proposed exhibits. However, the context in which the victim's name came up during the interview—inadvertently mentioned by Investigator Linsky—should have raised a flag that a redaction was needed.

Hopkinton Police Department Recalls Document from Misconduct Investigation

JANUARY 23, 2024 BY JOHN GUILFOIL

HOPKINTON — The Hopkinton Police Department is recalling the interview transcript between Timothy Brennan and Kroll after the Town of Hopkinton was informed that the version published on Friday evening was missing necessary redactions.

"On behalf of the Town of Hopkinton, I sincerely apologize for the publication of the transcript in that form," said Town Manager Norman Khumalo. "In our effort to be prompt with open and transparent communication with the public about police matters, our efforts fell short of the paramount concern to protect private information in this sensitive matter. We are committed to take whatever further steps are necessary to correct this mistake."

The Town's legal counsel will carefully re-review and re-redact the transcript, and only after that review is complete will the Town republish the transcript on the Hopkinton Police Department blog. The Town must publish a redacted form of the transcript because it is a public document and subject to disclosure under the Massachusetts Public Records Law, however, the unredacted transcript and other unredacted documents will not be published or otherwise produced by the Town.

Legal Analysis

The NWDAO's review of this situation focused on two key issues: (1) who was responsible for the posting of the insufficiently redacted transcript of Sergeant Brennan's interview; and (2) whether anyone bears criminal responsibility for this incident.

With respect to the former, a number of people could have averted the unfortunate release of the insufficiently redacted Brennan transcript. Prior to providing the Town with the transcript, Kroll should have ensured that the specific redactions it asked the stenographer to make had, in fact, been made. Labor counsel and town counsel similarly should have scrutinized the transcript to ensure that, at a minimum, all references to the victim's name had been redacted.[6] Lastly,

[6] Although additional redactions of other personal information about the victim (such as her birthday, what school she attended after high school, and her current profession) could have been made so as to avoid any possibility that she could be indirectly identified, that is beyond the scope of NWDAO's review. In addition, as will be discussed below, the criminal statute that most squarely applies to this case (General Laws chapter 265, § 24C) only requires that a sexual assault victim's *name* remain confidential.

those remaining individuals who were privy to the transcript prior to the "Loudermill" hearing (i.e., the Town Manager, Chief Bennett, and the Select Board) apparently failed to realize the transcript contained the victim's name, perhaps because they assumed all necessary redactions had already been made by counsel (not an unreasonable assumption). Notwithstanding the numerous missed opportunities to avert this mistake, the evidence establishes that this was an unintentional and regrettable oversight, one that understandably caused tremendous distress to the victim.

Turning next to whether anyone bears criminal liability for what happened here, there are two criminal statutes that are potentially implicated by the release of the insufficiently redacted transcript. The first is General Laws chapter 265, § 24C, which states:

> *That portion of the records of a court or any police department of the commonwealth or any of its political subdivisions, which contains the name of the victim in an arrest, investigation or complaint for rape… shall be withheld from public inspection, except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted.*
>
> *Said portion of such court record or police record shall not be deemed to be a public record under the provisions of section seven of chapter four.*
>
> *Except as otherwise provided in this section, it shall be unlawful to publish, disseminate or otherwise disclose the name of any individual identified as an alleged victim of any of the offenses described in the first paragraph. A violation of this section shall be punishable by a fine of not less than two thousand five hundred dollars nor more than ten thousand dollars.*

For purposes of this investigation, I will assume that the transcript of Sergeant Brennan's interview with Kroll qualifies as a "record" that qualifies for protection under § 24C. Although the transcript was not created by the Police Department, nor was it created in furtherance of a criminal investigation,[7] the transcript nevertheless did "contain[] the name of the victim in an arrest, investigation, or complaint for rape...". And once the Police Department came into possession of the transcript, regardless of who created it, the protections of § 24C likely attached.

[7] Kroll was retained by the Town of Hopkinton, rather than the Police Department itself, to conduct the equivalent of an internal affairs investigation into Sergeant Brennan's alleged failure to notify his superiors of a past sexual assault. Kroll's investigation was separate and apart from the criminal investigation conducted by the Massachusetts State Police Detective Unit attached to the Middlesex District Attorney's Office, which led to Porter's indictment.

The second statute that may apply in this situation is General Laws chapter 41, § 97D, which states:

> *All reports of rape and sexual assault or attempts to commit such offenses, all reports of abuse perpetrated by family or household members, as defined in section 1 of chapter 209A, and all communications between police officers and victims of such offenses or abuse shall not be public reports and shall be maintained by the police departments in a manner that shall assure their confidentiality; provided, however, that all such reports shall be accessible at all reasonable times, upon written request, to: (i) the victim, the victim's attorney, others specifically authorized by the victim to obtain such information, prosecutors and (ii) victim-witness advocates as defined in section 1 of chapter 258B, domestic violence victims' counselors as defined in section 20K of chapter 233, sexual assault counselors as defined in section 20J of chapter 233, if such access is necessary in the performance of their duties; and provided further, that all such reports shall be accessible at all reasonable times, upon written, telephonic, facsimile or electronic mail request to law enforcement officers, district attorneys or assistant district attorneys and all persons authorized to admit persons to bail pursuant to section 57 of chapter 276. Communications between police officers and victims of said offenses and abuse may also be shared with the forgoing named persons if such access is necessary in the performance of their duties. A violation of this section shall be punished by imprisonment for not more than 1 year or by a fine of not more than $1,000, or both such fine and imprisonment.*

Of the two statutes that potentially apply in this case, § 97D carries the stiffer penalties, with violations of the statute being punishable by up to one year in jail. But the wording of § 97D suggests it is narrower in scope than § 24C and potentially inapplicable to the Brennan interview transcript. In contrast to § 24C, which speaks broadly in terms of "records", § 97D applies more narrowly to a police department's "reports of rape or sexual assault." As stated above, the Police Department did not create the transcript, nor does it constitute a "report" of a rape or sexual assault. Thus, if the Commonwealth were inclined to pursue criminal charges against those responsible for the release of the insufficiently redacted transcript, it would likely proceed under General Laws chapter 265, § 24C alone.

Next, there is no question that the Town "published, disseminated or otherwise disclosed" the Brennan transcript by virtue of uploading it to the "News Blog" where any visitor to the website could download a PDF version of the transcript without payment or password.[8]

What is not so clear, however, is the type of intent that is required to violate these two statutes. The statutes themselves do not specify whether a person must act knowingly, intentionally, maliciously, recklessly, or with some other form of "mens rea" before criminal liability will attach. The Supreme Judicial Court has noted that "[w]e generally presume that criminal liability will not be imposed without some level of mens rea." Commonwealth v. Kelly, 484 Mass. 53, 58 (2020). My review of the Kelly case and related caselaw leads to the conclusion that if a criminal statute is silent as to intent, courts generally impute a "knowing" requirement before a violation can be found.

Here, although the release of the Brennan transcript was done knowingly through the collective efforts of several persons, no one involved in the process realized (until it was too late) that two necessary redactions had been missed. In other words, even though the overall release of the entire transcript was done knowingly, the specific disclosure of the victim's name within the transcript was not done knowingly. As stated earlier, this was an unintentional oversight attributable to negligence rather than recklessness or malice. In my estimation, it would not be possible to prove (regardless of whether the legal standard were mere probable cause or the higher "beyond a reasonable doubt" standard) that anyone knowingly or intentionally violated either of the statutes cited above.

I also considered the possibility that these two statutes contain no intent requirement because the Legislature may have intended to impose strict liability for anyone who violates them, regardless of their knowledge or intent.[9] The Legislature often does so with respect to "public welfare offenses" that carry light penalties such as fines or short jail sentences. Kelly, 484 Mass. at 59. Even if that were the case, I would nevertheless decline to pursue criminal charges against those responsible for redacting and uploading the transcript. "In the context of criminal prosecutions, the executive power affords prosecutors wide discretion in deciding whether to prosecute a particular defendant; and that discretion is exclusive to them." Commonwealth v. Cheney, 440 Mass. 568, 574 (2003). "The prosecutor's sole authority to determine which cases to prosecute, and when not to pursue a prosecution, has been affirmed repeatedly by [the Supreme Judicial Court] since the beginning of the nineteenth century." Commonwealth v. Wheeler, 2 Mass. 172, 174 (1806). Without overlooking or minimizing the

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[8] The same cannot be said for private individuals who may have subsequently shared the insufficiently redacted transcript released by the Town, or those who merely highlighted the fact that the document was available on the Police Department's "News Blog." The two criminal statutes in question impose a duty upon courts and police departments to maintain the confidentiality of certain reports and records in their custody; my reading of the statutes lead me to conclude they do not apply to private citizens who come into possession of the records through lawful means. Such a broad application of the statute would, among other things, raise serious First Amendment concerns. Regardless, this question is beyond the limited scope of the review NWDAO was asked to conduct.

[9] See Kelly, supra, for an extensive discussion on strict liability statutes.

harm that was caused by the public release of the victim's first name, I do not believe criminal prosecution, conviction, and the imposition of fines (and up to 12 months behind bars, if § 97D applies) is an appropriate or proportional response to what the evidence indicates is an extremely distressing but unintentional failure to act by several individuals.[10,11]

Conclusion

The public release of the Brennan transcript without all necessary redactions of the victim's name was both avoidable and regrettable. Ideally the Town of Hopkinton and its counsel will implement precautionary measures to ensure this sort of mistake does not repeat itself. However, for the reasons set forth above, I find that criminal prosecution of those involved in the transcript's release is not warranted.

Steven E. Gagne
First Assistant District Attorney
Northwestern District

Dated: April 17, 2024

[10] I offer no opinion as to whether anyone may face civil liability for their involvement in the release of the Brennan transcript.

[11] Anecdotally, within the legal profession, it is far too common an occurrence for a party to inadvertently include a sexual assault victim's actual name in a legal pleading, including but not limited to appellate briefs. In those instances, courts typically strike the pleading and provide the party with an opportunity to file a replacement pleading using a pseudonym. In my 22 years of experience as a prosecutor, I am not aware of a single instance when an inadvertent violation of either of the two criminal statutes cited above was referred to a district attorney's office for criminal prosecution. That is likely why there is little to no caselaw interpreting these two statutes.