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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0346

IN RE: SEARCH WARRANT FOR 1832 CANDIA ROAD, MANCHESTER, NEW HAMPSHIRE

MANDATORY APPEAL FROM
6th CIRCUIT COURT – DISTRICT DIVISION – CONCORD

BRIEF OF APPELLANT, RICHARD EXLINE

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November 09, 2017

15-minute oral argument requested
To be argued by Attorney Moeckel

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QUESTIONS PRESENTED

1. Whether the trial court erred in granting the state's application for a search warrant?
Preserved: App.¹, p. 4-9.
2. Whether the state's application for a search warrant and supporting affidavit were insufficient on their face?
Preserved: App., p. 4-9.
3. Whether the trial court erred in denying appellant's Motion for Immediate Return of Seized Property?
Preserved: App., p. 1-3.
4. Whether the trial court's denial of appellant's Motion for Immediate Return of Seized Property violated appellant's rights under Part I, Article 19 of the New Hampshire Constitution?
Preserved: App., p. 4, 9
5. Whether the trial court's denial of appellant's Motion for Immediate Return of Seized Property violated RSA 595-A:1?
Preserved: App., p. 4.
6. Whether the trial court's denial of appellant's Motion for Immediate Return of Seized Property violated RSA 595-A:4?
Preserved: App., p. 4.
7. Whether the trial court's denial of appellant's Motion for Immediate Return of Seized Property violated RSA 595-A:6?
Preserved: App., p. 9.
8. Whether the trial court's denial of appellant's Motion for Immediate Return of Seized Property violated appellant's rights under the 4th Amendment of the United States Constitution?
Preserved: App., p. 7-8, 9.
9. Whether the trial court's denial of appellant's Motion for Immediate Return of Seized Property violated appellant's rights under the 14th Amendment of the United States Constitution?
Preserved: App., p. 9.
10. Whether the trial court's denial of appellant's Motion for Immediate Return of Seized Property violated appellant's right to free speech under the United States Constitution?
Preserved: App., p. 4, 9.
11. Whether the affidavit in support of the application for a search warrant set forth factual detail establishing probable cause that appellant had committed violations of the statutes cited in the application for a search warrant?
Preserved: App., p. 4-9.
12. Whether the state's application for a search warrant and supporting affidavit sufficiently alleged that probable cause existed that a crime had committed?
Preserved: App., p. 4-9.
13. Whether the state's application for a search warrant and supporting affidavit sufficiently alleged a causal link between any criminal conduct and appellant?
Preserved: App., p. 4-9.

¹ The Appendix to Appellants' Brief (*App.*) appears at the end of this brief.

14. Whether the state's application for a search warrant and supporting affidavit sufficiently alleged probable cause that the crimes specified therein were committed?

Preserved: App., p. 4-9.

15. Whether the state's application for a search warrant and supporting affidavit sufficiently alleged probable cause that appellant committed the crimes specified therein?

Preserved: App., p. 4-9.

16. Whether the state's application for a search warrant and supporting affidavit sufficiently alleged probable cause that the equipment the state requested to search and seize will assist in determining whether appellant committed the offenses stated in the state's application for a search warrant and supporting affidavit?

Preserved: App., p. 4-9.

TEXT OF RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

N.H. Const. Pt. 1, Art. 19

Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.

595-A:1 Issuance of Search Warrants; Purposes. – A search warrant authorized by this chapter may be issued by any justice, associate justice or special justice of the municipal, district or superior courts to search for and seize any property which is:

- I. Stolen, embezzled or fraudulently obtained;
- II. Designed or intended for use or which is or has been used as the means of committing a criminal offense;
- III. Contraband; or
- IV. Evidence of the crime to which the probable cause upon which the search warrant is issued relates.

Source. 1969, 317:1, eff. Aug. 29, 1969.

595-A:2 Requisites of Warrant. --

Search warrants shall designate or describe the person, building, vessel, or vehicle to be searched and shall particularly describe the property or articles to be searched for. They shall be substantially in the form prescribed in RSA 595-A:3 and shall be directed to a sheriff or his deputy or to a constable or police officer, commanding him to search in the daytime, or if the warrant so directs, in the nighttime, the person, building, vessel, or vehicle where the property or articles for which he is required to search are believed to be concealed, and to bring such property or articles when found, and the persons in whose possession they are found, before any circuit or superior court named therein.

Source. 1969, 317:1. 1971, 255:1, eff. Aug. 22, 1971. 2015, 249:7, eff. Jan. 1, 2016 and as provided by 2015, 249:17.

595-A:3 Form of Warrant. – The warrant shall be in substantially the following form:

The State of New Hampshire
(County), ss. (Name) Court.

To the Sheriffs of our several counties, or their deputies, any State Police Officer, or any Constable or Police Officer of any city or town, within our said State.

Proof by affidavit (supplemented by oral statements under oath) having been made this day before (name of person authorized to issue warrant) by (names of person or persons whose affidavits have been taken) that there is probable cause for believing that (certain property has

been stolen, embezzled, or fraudulently obtained; certain property is intended for use or has been used as the means of committing a crime; contraband; evidence of the crime to which the probable cause upon which the search warrant is issued relates.)

We therefore command you in the daytime (or at any time of the day or night) to make an immediate search of (identify premises) (occupied by A.B.) and (of the person of A.B.) and of any person present who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for the following property: (description of property)

and if you find any such property or any part thereof to bring it and the persons in whose possession it is found before (name of court and location).

Dated at (city or town) this day of, 20.....

Source. 1969, 317:1. 1971, 255:2, eff. Aug. 22, 1971.

595-A:4 Affidavit in Support of Application for Warrant; Contents and Form. – A person seeking a search warrant shall appear personally before a court or justice authorized to issue search warrants in criminal cases and shall give an affidavit in substantially the form hereinafter prescribed. Such affidavit shall contain facts, information, and circumstances upon which such person relies to establish probable cause for the issuance of the warrant and such affidavit may be supplemented by oral statements under oath for the establishment of probable cause. The person issuing the warrant shall retain the affidavit and shall make notes, personally, of the substance, or arrange for a transcript, of any oral statements under oath supplementing the affidavit. The person issuing the search warrant shall deliver the affidavit and the notes or transcript within 3 days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit and the notes or transcript shall be attached to it and shall be filed therewith, and they shall be a public document when the warrant is returned, unless otherwise ordered by a court of record.

The affidavit in support of the application for a search warrant shall be in substantially the following form:

The State of New Hampshire

(County), ss. (Name) Court.

....., 20.....

I, (name of applicant) being duly sworn, depose and say:

1. I am (describe position, assignment, office, etc.).
2. I have information, based upon (describe source, facts indicating reliability of source and nature of information; if based on personal knowledge, so state).
3. Based upon the foregoing reliable information (and upon my personal knowledge) there is probable cause to believe that the property hereinafter described (has been stolen, etc.) and may be found (in the possession of A.B. or any other person) at premises (identify).
4. The property for which I seek the issuance of a search warrant is the following: (here describe the property as particularly as possible).

Wherefore, I request that the court issue a warrant and order of seizure, authorizing the search of (identify premises and the persons to be searched) and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

.....
Name.

Then personally appeared the above named and made oath that the foregoing affidavit by him subscribed is true.

Before me this day of, 20.....

.....
Justice of the Court

Source. 1969, 317:1, eff. Aug. 29, 1969.

595-A:6 Seizure, Custody and Disposition of Articles; Exceptions. – If an officer in the execution of a search warrant, or by some other authorized method, finds property or articles he is empowered to take, he shall seize and safely keep them under the direction of the court or justice so long as necessary to permit them to be produced or used as evidence in any trial. Upon application by a prosecutor, defendant, or civil claimants, the court, prior to trial or upon an appeal after trial, shall, upon notice to a defendant and hearing, and except for good cause shown, order returned to the rightful owners any stolen, embezzled or fraudulently obtained property, or any other property of evidential value, not constituting contraband. This section shall apply regardless of how possession of the property was obtained by the state. Photographs or other identification or analysis made of the returned property shall be admissible at trial as secondary evidence, in lieu of the originals, for all relevant purposes, including ownership. In the case of unknown, unapprehended defendants, or defendants wilfully absent from the jurisdiction, the court shall have discretion to appoint a guardian ad litem to represent the interest of such unknown or absent defendants. The judicial findings on such matters as ownership, identification, chain of possession or value made at such an evidentiary hearing for the restoration of property to the rightful owners shall thereafter be admissible at trial, to be considered with other evidence on the same issues, if any, as may be admitted before the finder of fact. All other property seized in execution of a search warrant or otherwise coming into the hands of the police shall be returned to the owner of the property, or shall be disposed of as the court or justice orders, which may include forfeiture and either sale or destruction as the public interest requires, in the discretion of the court or justice, and in accordance with due process of law. Any property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith.

Source. 1969, 317:1. 1977, 320:1. 1981, 553:9. 1988, 88:3, eff. Jan. 1, 1989.

638:3 Tampering With Public or Private Records. – A person is guilty of a misdemeanor if, knowing he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, public or private, with a purpose to deceive or injure anyone or to conceal any wrongdoing.

Source. 1971, 518:1, eff. Nov. 1, 1973.

638:25 Definitions. – In this subdivision:

I. "Personal identifying information" means any name, number, or information that may be used, alone or in conjunction with any other information, to assume the identity of an individual, including any name, address, telephone number, driver's license number, social security number, employer or place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, credit card number, debit card number, personal identification number, account number, or computer password identification.

II. "Pose" means to falsely represent oneself, directly or indirectly, as another person or persons.

III. "Victim" means any person whose personal identifying information has been unlawfully obtained or recorded or any person or entity that provided money, credit, goods, services, or anything of value and has suffered financial loss as a direct result of the commission or attempted commission of a violation of this subdivision.

Source. 1999, 239:1, eff. Jan. 1, 2000.

638:26 Identity Fraud. –

I. A person is guilty of identity fraud when the person:

(a) Poses as another person with the purpose to defraud in order to obtain money, credit, goods, services, or anything else of value;

(b) Obtains or records personal identifying information about another person without the express authorization of such person, with the intent to pose as such person;

(c) Obtains or records personal identifying information about a person without the express authorization of such person in order to assist another to pose as such person; or

(d) Poses as another person, without the express authorization of such person, with the purpose of obtaining confidential information about such person that is not available to the general public.

II. Identity fraud is a class A felony.

III. A person found guilty of violating any provisions of this section shall, in addition to the penalty under paragraph II, be ordered to make restitution for economic loss sustained by a victim as a result of such violation.

Source. 1999, 239:1. 2004, 233:1, eff. June 11, 2004.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

This case is an appeal of a final decision of the 6th Circuit Court, District Division, Concord, which denied appellant's motion for the return of his seized property. *App.*, p. 1-3.² Specifically, this case is about the return of property, seized by the State of New Hampshire (State) after obtaining a search warrant approved by the 6th Circuit Court, District Division, Concord (*Tenney, J.*) and affirmed by Judge Gordon. *Id.* at 18, 20, 1-3.

The issues in this case arise from a political statement posted on the website craigslist.com and the fuss that post created in the minds of certain employees at the New Hampshire Department of Safety, Division of Motor Vehicles. It is undisputed that appellant, Richard Exline, created the following post on Craigslist:

Vote No William Joseph reappointment at NH DMV

(the "Craigslist Post"). *Id.* at 23. There is no dispute Mr. Exline lawfully created the Craigslist Post. *Id.* at 16, ¶7. William Joseph is the deputy director of the New Hampshire Department of Safety Division of Motor Vehicles. *Id.* at 23. The Craigslist Post made deputy director Joseph "very upset." *Id.* Deputy director Joseph learned of the Craigslist Post from the director of the Division of Motor Vehicles, Elizabeth Bielecki. *Id.* Apparently on Friday, August 5, 2016 at 12:52 p.m., director Bielecki received the following e-mail:

[The remainder of this page is intentionally blank.]

² The Appendix to Appellant's Brief (*App.*) appears at the end of this brief and has its own numbering convention (in blue). In this brief appellee will cite to the May 11, 2017 hearing transcript as "T."

Vote No William Joseph reappointment at NH DMV

<http://nh.craigslist.org/pol/571777604.html>

The email heading was concerning as it stated that the craigslist post had been forwarded by Director Bielecki. The heading was as follows:

From: noreply@craigslist.org
Sent: Friday, August 05, 2016 12:52 PM
To: Bielecki, Elizabeth
Subject: Vote No William Joseph reappointment at

elizabeth.bielecki@dos.nh.gov forwarded you this from craigslist:

Id. at 24. Director Bielecki did not forward herself the Craigslist Post. *Id.* at 24, 26. As articulated by detective sergeant David S. McCormack, the officer whose affidavit supported the application for the underlying search warrant in this case, *id.* at 22, “[t]he significance of the [Craigslist Post] was that Deputy Director Joseph was up for re-appointment as Deputy Director in August 2016. This [Craigslist Post] was sent out in advance of his re-appointment, apparently in an attempt to try to influence the Governor and Executive Council’s decision.” *Id.* at 24.

On Monday, August 8, 2016 at 3:45 p.m., when the State’s investigation was just incipient, deputy director Joseph had already fingered Mr. Exline as the creator of the Craigslist Post. *Id.* at 23. In fact, at that time deputy director Joseph “immediately told [detective sergeant McCormack] that he knew who was responsible for [the Craigslist Post]: Mr. Exline and his friend Suzanne Roy. *Id.* Remarkably, it would take the State two months and a grand jury subpoena to corroborate deputy director Joseph’s seeming prescience as to Mr. Exline. *Compare id. with id.* at 28.

Director Bielecki was not the only person at the Division of Motor Vehicles who received the Craigslist Post. *Id.* at 23. Apparently other staff at the division received the same e-mail, with only the “to” and “from” information being different than that of the e-mail director Bielecki received. *Id.* at 23, 24, 29. All told there were 54 individual e-mail recipients, *id.* at 27, 30, who received an e-mail from Craigslist, the body of which stated the e-mail was sent by his or her own e-mail address (*i.e.* the recipient’s e-mail address) and contained a link to the Craigslist Post. *Id.* at 28. In other words, where “x” is the recipient of the e-mail from Craigslist, each recipient received an e-mail from Craigslist, to his or her e-mail address, and the body of the e-mail read “‘x’ forwarded you this from craigslist.” *Id.* at 24, 29. The result was the appearance in the body of the e-mail that x received an e-mail from x, himself or herself. As will become clearer later, it is these e-mails that formed the basis of the State’s RSA 638:26 Identity Fraud and RSA 638:3 Tampering with Public or Private Records claims. *Id.* at 32.

In the meantime detective sergeant McCormack continued his investigation. He learned that on May 31, 2016, William Hinkle, Communications Director for former Governor Maggie Hassan received a so-called “anonymous e-mail” stating deputy director Joseph should resign. *Id.* at 25. Instead of being anonymous the e-mail was actually sent from the e-mail address foryousales07@gmail.com. *Id.* Like the Craigslist Post and the subsequent e-mails from Craigslist, the May 31, 2016 e-mail from foryousales07@gmail.com garnered much investigative attention. To be sure, Richard Bailey, the Assistant Commissioner at the New Hampshire Department of Safety, traced the foryousales07@gmail.com e-mail address to Cannon Real Estate Company, Inc., located at 1832 Candia, Road, Manchester, New Hampshire. *Id.* at 25, 27. Mr. Exline’s home address is 1832 Candia, Road, Manchester, New Hampshire. *Id.* at 31, 32, 44.

In the fall of 2016, detective sergeant McCormack's investigation turned to a grand jury subpoena to obtain from Craigslist the IP (internet protocol) address of the creator of the Craigslist Post. *Id.* at 28. The IP address was 73.186.187.254. *Id.* at 29. Armed with the Craigslist Post creator's IP address, detective sergeant McCormack turned his attention to Craigslist. *Id.* From Craigslist detective sergeant McCormack learned that for the Craigslist Post to be forwarded, all one had to do was manually insert a destination e-mail address (to address) and a from address. *Id.* Craigslist cannot identify the person or computer who forwarded the Craigslist Post. *Id.* at 30. Having hit a backstop with Craigslist on the source of the forwarded e-mails detective sergeant McCormack returned to the grand jury for another subpoena, this time to find out who owned the IP address 73.186.187.254. *Id.* at 30-31. With that subpoena detective sergeant McCormack learned from Comcast that Mr. Exline was a Comcast subscriber associated with the IP address 73.186.187.254. All the association of the IP address 73.186.187.254 to Mr. Exline did, however, was confirm what the State already knew: Mr. Exline was the creator of the Craigslist Post. There was nothing illegal about creating the Craigslist Post. Nevertheless the State leapt to the conclusion that because Mr. Exline created the Craigslist Post he must have been the one who forwarded it to the 54 recipients, and did so in violation of RSA 638:3 and 638:26. *Id.* at 32, 19-45. Yet there was not a single fact even suggesting Mr. Exline forwarded the Craigslist Post.

In between the time detective sergeant McCormack's investigation started and ended he learned much about Mr. Exline, Mr. Exline's girlfriend Suzanne Roy, Suzanne Roy's relationship with the division of motor vehicles and its staff, and the clairvoyance of the division's staff. Indeed, detective sergeant McCormack's investigation –and his affidavit in support of the search warrant– reveal how quickly the division and the department of safety

assumed Mr. Exline and Suzanne Roy were linked to the Craigslist Post and how they assumed Mr. Exline and Suzanne Roy were the ones who forwarded the Craigslist e-mails. As stated above, deputy director Joseph “immediately told [detective sergeant McCormack] that he knew who was responsible for [the Craigslist Post]: Mr. Exline and his friend Suzanne Roy. *Id.* at 23. That was when detective sergeant McCormack’s investigation was three days old. Similarly, five days into the investigation Kevin O’Brien, an assistant commissioner at the department of safety stated he was “familiar with the fact that Richard Exline was the boyfriend to [Suzanne Roy]” and that “Suzanne Roy did not like Deputy Director Joseph, due to disciplinary issues that he could not disclose.” *Id.* at 25. By August 31, 2016, Richard Bailey, another assistant commissioner at the department of safety stated he too was aware Suzanne Roy had issues with deputy director Joseph, that Suzann Roy “may be involved in the Craigslist [P]ost,” and that Mr. Exline was her boyfriend. *Id.* at 27. As for Kelly Brudniak, a supervisor who worked with Suzanne Roy, nearly two months after the investigation began Ms. Brudniak said she was familiar with Roy, had worked with her, and that “there was no doubt in her mind that Roy was involved in this Craigslist [P]ost in some way.” *Id.* at 27-28.

Based on all of the above, on March 24, 2017, detective sergeant McCormack applied for and received a search warrant to search Mr. Exline’s home at 1832 Candia Road, Manchester, New Hampshire, and seek and seize:

of the person of <u>Richard Exline DOB: 06/10/1965 and Suzanne Roy DOB: 05/20/1966</u>	
(A.B. and any other identifiable individuals with respect to whom probable cause has been established by the affidavit	
or supplementary testimony.)	for the
following property: (describe property)	
Evidence of the crime of Identity Fraud and Tampering with Public and Private Records / See attached Affidavit	
-	

Id. at 18.

4. The property for which I seek the issuance of a search warrant is the following:
(here described the property as particularly as possible)
any computer, computer system, mobile digital device, camera, router, wi-fi device, cellular telephone, smart phone, commercial software and hardware

Id. at 20. After the search of Mr. Exline's home, detective sergeant David S. McCormack seized the following items:

The following is an inventory of property taken pursuant to the warrant:
4 - CELLULAR TELEPHONES
2 - EXTERNAL USB DRIVES
2 - LAPTOPS
2 - DESK TOPS
1 - TABLET.

Id. at 21.

On April 20, 2017, Mr. Exline, through his attorney, filed a motion for the return of his seized property. *Id.* at 4-15. On April 27, 2017, the State filed an objection to Mr. Exline's motion. *Id.* at 16-17. On May 11, 2017, the court (*Gordon, J.*) held a hearing on Mr. Exline's motion. *T.*, p. 1. On May 17, 2017 (clerk's notice May 18, 2017), the trial court issued its order denying Mr. Exline's motion. *App.*, p. 1, The trial court found:

[*The remainder of this page is intentionally blank.*]

The Court finds that there was probable cause to believe that the crimes specified in the Application for Search Warrant were committed. Based upon the information contained in the Affidavit, the Court also finds that there was probable cause to believe that Mr. Exline committed those offenses. Finally, the Court finds that there was probable cause to believe that the equipment requested and seized by the State as a result of the search will assist in determining whether those offenses have been committed by Mr. Exline.

In conclusion, the Court finds that the Application for Search Warrant did set forth sufficient evidence for the Court to make a finding of probable cause for its issuance.

The Motion for Immediate Return of Seized Property is denied.

Id. at 3. This appeal followed.

SUMMARY OF ARGUMENT

There is no dispute Mr. Exline created the Craiglist Post “Vote No William Joseph reappointment [sic] at NH DMV.” There is no dispute Mr. Exline’s Craiglist Post was lawful. What is in dispute is whether probable cause existed to approve a search warrant for electronic devices purportedly associated with Mr. Exline’s alleged commission of the crimes of Identify Theft (RSA 638:26) and Tampering with Public and Private Records (RSA 638:3). Quite simply the State offered no facts whatsoever to support any violation of either RSA 638:26 or RSA 638:3. Yet, the dispute disappears when one considers that without any facts to support a violation of either of RSA 638:26 or RSA 638:3, there was no probable cause for the trial court to issue the warrant. Without probable cause to support the search warrant, the trial court should have ordered the return of Mr. Exline’s seized property.

ARGUMENT

I. **Part I, Article 19 of the New Hampshire Constitution requires at least some fact to demonstrate probable cause a crime has been committed, irrespective of whether a search warrant seeks to seize property or to arrest.**

A. **Standard of review.**

This court “should pay great deference to a magistrate’s determination of probable cause and should not invalidate a warrant by interpreting the evidence submitted in a hypertechnical sense.” *State v. Fish*, 142 N.H. 524, 528 (1997) (citing *State v. Decoteau*, 137 N.H. 106, 111 (1993) (quotation omitted)). “Accordingly, [this court] ‘interpret[s] the evidence submitted in support of a warrant in a commonsense manner, giving due consideration to the preference to be accorded warrants.’” *Fish*, 142 N.H. at 528 (quoting *State v. Marcotte*, 123 N.H. 245, 248 (1983)). As to the affidavit in support of the search warrant, this court reviews its sufficiency *de novo* when, where as here, there were no “controlling facts determined at the [trial] court level in the first instance.” *Fish*, 142 N.H. at 528 (citing *State v. Johnson*, 140 N.H. 573, 576 (1995)).

As for the search warrant application itself

Part I, Article 19 of the New Hampshire Constitution requires that search warrants be issued only upon a finding of probable cause. Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through the search and will aid in a particular apprehension or conviction. To establish probable cause, the affiant need only *present the magistrate with sufficient facts and circumstances to demonstrate a substantial likelihood that the evidence or contraband sought will be found in the place to be searched*. The affiant need not establish with certainty, or even beyond a reasonable doubt, that the search will lead to the desired result.

State v. Ward, 163 N.H. 156, 159 (2012) (internal citations and quotations omitted) (emphasis added). This court applies “a totality-of-the-circumstances test to review the sufficiency of an affidavit submitted with a warrant application.” *State v. Ball*, 164 N.H. 204, 207 (2012) (citing *Fish*, 142 N.H. at 528).

The task of the issuing district court is to make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before it, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Ball, 164 N.H. 204, 207 (citation, quotes and brackets omitted). This court's "duty as the reviewing court is to ensure that the district court had a substantial basis for concluding that probable cause existed." *Id.* (citations, brackets, and ellipses omitted). Still, this court "may properly conclude that a warrant was invalid because the district court's probable-cause determination reflected an improper analysis of the totality of the circumstances. *Id.* (citation, brackets, and ellipses omitted). "While an affidavit may establish probable cause without the observance of contraband at the location to be searched, to meet constitutional muster, affidavits must establish a sufficient nexus between the illicit objects and the place to be searched." *Id.* (citing *Ward*, 163 N.H. at 160) (internal quotes omitted). This court only considers the information that the police brought to the issuing court's attention (here, the district court). *Ball*, 164 N.H. at 207.

B. The Statutory Scheme.

RSA 595-A:1 permits the issuance of search warrants. RSA 595-A:2 requires search warrants state with particular specificity the property or articles the search warrant seeks. This case does not involve an RSA 595-A:2 deficiency. Instead, this case addresses RSA 595-A:5's requirement that the RSA 595-A:3 affidavit in support of a search warrant "shall contain facts, information, and circumstances upon which such person relies to establish probable cause for the issuance of the warrant and such affidavit may be supplemented by oral statements under oath for the establishment of probable cause." RSA 595-A:6 permits one to request the return of seized property. That is what appellant Mr. Exline did. *App.*, p. 4-7. Because RSA 595-A:5

requires the RSA 595-A:3 be supported by probable cause, the analysis of a search warrant necessarily involves Part I, Article 19 of the New Hampshire Constitution.

II. Part I, Article 19 of the New Hampshire Constitution requires *some evidence* that demonstrates probable cause, which means *some evidence* of the commission of a crime.

Appellant recognizes “probable cause to search is not the same as probable cause to arrest.” *State v. Doe*, 115 N.H. 682, 685 (1975). “Probable cause to arrest exists where the facts and circumstances within the officer’s knowledge or of which he has reasonably trustworthy information would warrant a man of ordinary caution in the belief that the arrestee has committed or is committing a crime.” *Id.* “But the right to search is not dependent upon the right to arrest.” *Id.* “Probable cause to search exists if the man of ordinary caution would be justified in believing that what is sought will be found in the place to be searched and that what is sought, if not contraband or fruits or implements of a crime, will aid in a particular apprehension or conviction. *Id.* citing (*Warden v. Hayden*, 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967)) (internal citations and quotes omitted). The lack of probable cause to arrest is not essential to the issuance of a search warrant. *Id.* “Only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause.” *Doe*, 115 N.H. at 685 (citation, brackets and quotations omitted). Still, the State must provide some evidence – some fact demonstrating, at a minimum– the probability of criminal activity. *Id.*

A. The State’s affidavit in support of its search warrant did not have a single fact evidencing even the probability of criminal activity.

This court consistently requires –and analyzes– a search warrant application and its supporting affidavit for some fact demonstrating, at a minimum, the probability of criminal activity. *Id.*; *State v. Letoile*, 166 N.H. 269 (2014); *Ball*, 164 N.H. at 208-09; *Ward*, 163 N.H. at 160-61; *State v. Dowman*, 151 N.H. 162 (2004); *State v. Cobb*, 143 N.H. 638 (1999); *State v.*

Silvestri, 136 N.H. 522 (1992); *State v. Jaroma*, 128 N.H. 423 (1986); *State v. Kellenbeck*, 124 N.H. 760 (1984). In all of the aforementioned cases this court analyzed whether at least some fact existed demonstrating at least a probability of criminal activity. To be sure, in *Doe*, the evidence showed that Doe was a black man, he was in the vicinity of the victim's apartment on the night of her murder, Doe's fingerprints were on the window of the victim's apartment, body hair of Negroid origin was found on the victim, and the other conceivable suspects had been eliminated. 115 N.H. at 685-86. The facts also revealed Doe had a motive and opportunity to rape and murder the victim. *Id.* at 686. Based on those facts—in the face of the crimes of rape and murder—this court found probable cause existed to justify the search warrant to take from Doe blood samples, saliva samples and hair samples because “there is a sufficient nexus between the evidence sought and the crime under investigation.” *Id.* at 682, 686.

Unlike *Doe*, the facts in detective sergeant McCormack's affidavit in support of the search warrant application do not speak to either Mr. Exline or Ms. Roy engaging in any criminal activity. Instead, and at their core, the facts in detective sergeant McCormack's affidavit show Mr. Exline created the Craigslist Post and, several months earlier, sent an e-mail to William Hinkle, Communications Director for former Governor Maggie Hassan, stating deputy director Joseph should resign. *App.*, p. 23, 25. Those are the only two facts in detective sergeant McCormack's affidavit relating to Mr. Exline's or Ms. Roy's actions. The facts in sergeant detective McCormack's affidavit suggesting the probability of a violation of RSA 638:3 and/or RSA 638:26 were the division's staffer's and the department of safety's *suspicion*. *Id.* at 23, 27-28. In their totality, those suspicions were:

1. On August 8, 2017 deputy director Joseph “immediately told [detective sergeant McCormack] that he knew who was responsible for [the Craigslist Post]: Mr. Exline and his friend Suzanne Roy. *Id.* at 23.

2. By August 31, 2016, Richard Bailey, an Assistant Commissioner at the Department of Safety stated he too was aware Suzanne Roy had issues with Deputy Director Joseph, that Suzanne Roy “may be involved in the Craigslist [P]ost,” and that Mr. Exline was her boyfriend. *Id.* at 27.
3. Kelly Brudniak, a supervisor who worked with Suzanne Roy, nearly two months into the investigation Ms. Brudniak said was familiar with Roy, had worked with her, and that “there was no doubt in her mind that Roy was involved in this Craigslist [P]ost in some way.” *Id.* at 27-28.

Yet, there was nothing illegal about the Craigslist Post. The State conceded that issue at the trial court. *Id.* at 16, ¶7. Demonstrably and noticeably absent from sergeant detective McCormack’s affidavit is any fact that Mr. Exline or Ms. Roy tampered with public or private records (RSA 638:3) or committed identify fraud, *i.e.* obtained or recorded personal identifying information about another person without the express authorization of such person, with the intent to pose as such person; or obtained or recorded personal identifying information about a person without the express authorization of such person in order to assist another to pose as such person. RSA 638:26, I(b) and (c).

The absence of a fact –any fact– showing at least the probability of the criminal activity RSA 638:3 and RSA 638:26 make illegal is fatal to the State’s search warrant application. *State v. Kellenbeck*, 124 N.H. 760 (1984) is illustrative. In *Kellenbeck*, this court held that merely because two different safes at two different locations had been burglarized, fourth months apart, and law enforcement found two similar shoe prints at both locations, the State had not provided a fact linking the defendant to either crime. 124 at 765. As to the grand jury indictment of *Kellenbeck*, the factual basis of which the trial court did not know, it was insufficient to support probable cause. *Id.* This was so because the trial judge is required to make an independent, objective determination of probable cause. *Id.* Similar to *Kellenbeck*, then, are the unfounded suspicions of the Division’s staffer’s and the Department of Safety’s unfounded assumptions in this case. At issue in *Kellenbeck* was also *Kellenbeck*’s past burglary conviction. *Id.* Yet, that

past conviction alone was not enough to support probable cause to issue the warrant for search of Kellenbeck's home. *Id.* "Probable cause to believe that a person is guilty of a crime does not always constitute probable cause to search any property belonging to him." *Id.* at 766. *C.f. State v. Jaroma*, 128 N.H. 423, 429-30 (1986) (past *criminal activity* that was corroborated by defendant to an informant was sufficient fact for probable cause). Here, there was no fact or allegation either Mr. Exline or Ms. Roy had engaged in any past criminal activity –let alone the actions RSA 638:3 and RSA 638:26 make illegal. Thus, the State's affidavit in support of its search warrant application lacked any fact suggesting Mr. Exline or Ms. Roy corroborated any alleged past or present criminal activities or convictions, and in particular any alleged past or present criminal activities or convictions of RSA 638:3 or RSA 638:25. *C.f. Jaroma*, 128 N.H. at 429-30.

B. The State's affidavit in support of its search warrant did not have a single fact evidencing even the probability of criminal activity at Mr. Exline's residence.

The lack of a nexus between Mr. Exline's Craigslist Post and his May 31, 2016 e-mail to William Hinkle, and the acts RSA 638:3 and RSA 638:26 prohibit demonstrate there was a lack of probable cause to issue the search warrant the State sought. In *Silvestri*, 136 N.H. at 527, this court held that even in face of facts demonstrating criminal activity (the sale of marijuana), the State's affidavit failed to present any fact showing the probability of the sale of marijuana at defendant's residence. *Id.* This was so because as this court stated "we have consistently required some nexus between the defendant's resident and drug-dealing activities to establish probable cause to search the residence." *Id.*

In this case, the facts the State averred linking Mr. Exline's Craigslist Post to his residence was the IP address 73.186.187.254. *App.*, p. 29, 30-31. All that the IP address 73.186.187.254 did, however, was confirm what the State already knew: Mr. Exline was the

creator of the Craigslist Post. *Id.* at 28. There was nothing illegal about creating the Craigslist Post. Identically, there was nothing illegal about the May 31, 2016 e-mail from foryousales07@gmail.com (the e-mail address of Cannon Real Estate Company, Inc., located at Mr. Exline's residence at 1832 Candia, Road) to William Hinkle stating deputy director Joseph should resign. *Id.* at 25, 27. Thus, the State presented not a single fact demonstrating the probability of criminal activity at Mr. Exline's residence. Additionally, although the State did link the IP address 73.186.187.254 and the foryousales07@gmail.com e-mail to Mr. Exline's home, the State's affidavit offered no fact of criminal activity at Mr. Exline's residence. *C.f. Id.; Ward*, 163 N.H. at 160-61; *Ball*, 164 N.H. at 209. Which is to say, there were no "other circumstances" that would support an inference of criminal activity either by Mr. Exline or Ms. Roy, or an inference of criminal activity at Mr. Exline's residence. Consequently, here there was no occasion for the trial court make any commonsensical and common knowledge inferences and conclude a fair probability existed that criminal activity would be found at Mr. Exline's residence and on the devices the State sought to seize. *See State v. Letoile*, 166 N.H. 269, 273-74 (2014) (distinction between pornographic images existing on website versus the same images existing on defendant's computer properly resolved with judicial common-sense inferences). This case is also unlike *Letiole*, 166 N.H. at 273-74, where the defendant's wife saw pornographic images of minors and adults on her husband's computer, and *Ball*, 164 N.H. at 206, 208-09, where the victim saw the defendant use his cell phone to take, and the defendant's cell phone was identified as containing, sexually explicit pictures of children. In those two cases, this court held those facts supported the fair probability that evidence of criminal activity would be found on the devices sought. *Letiole*, 166 N.H. at 274; *Ball*, 164 N.H. at 607. In this case, the State's affidavit in support of its search warrant contained no fact whatsoever that the devices it

sought had ever been used for criminal activity. Rather, the State's affidavit showed that Mr. Exline used the IP Address 73.186.187.254 to create the Craigslist Post, *App.*, p. 28, to send the May 31, 2016 e-mail to William Hinkle. *Id.* at 25, 27. Again, both of those acts were lawful.

III. A technical look at the alleged violations.

It is true the probable cause analysis eschews a hypertechnical review of the *evidence* in favor of a commonsense approach. *Fish*, 142 N.H. at 528. That wisdom, however, does not prevent an inquiry into the commonsensical questions of what is the underlying crime and whether the State's affidavit offers any fact to support the alleged criminal activity. *Doe*, 115 N.H. at 685-86; *but see State v. Cobb*, 143 N.H. 638, 652 (1999) (assuming, without deciding, that the police were required to present evidence of attempted kidnapping, court held that the facts contained in the search warrant application supported a finding of probable cause). Here, the State alleged violations of RSA 638:3 and 638:26. RSA 638:3 is titled "Tampering With Public or Private Records" and states:

A person is guilty of a misdemeanor if, knowing he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, public or private, with a purpose to deceive or injure anyone or to conceal any wrongdoing.

Broken down into its elements one violates RSA 638:3 when "knowing he has no privilege to do so, he:

1. falsifies;
 2. destroys,
 3. removes; or
 4. conceals,
- any writing or record, public or private with a purpose to
1. deceive or injure anyone; or
 2. to conceal any wrongdoing.

Analyzing the State's theory and the facts in the search warrant affidavit supporting the State's theory of RSA 638:3 criminal activity, one would expect facts suggesting Mr.

Exline and Ms. Roy used electronic devices to falsify, destroy, remove or conceal a public or private writing or record. Yet, those facts were not alleged. The e-mails that forwarded the Craigslist Post did not falsify, destroy, remove or conceal Craigslist Post, assuming the Craigslist Post was a writing or record. Rather, the e-mails forwarding the Craigslist Post did just that: they forwarded them to various individuals. Furthermore, the trial court overlooked the glaring white elephant in the State's affidavit: the e-mails claimed as unlawful demonstrated that they were not from the recipients. To be sure, the e-mail director Bielecki received, which was identical to the other 53 e-mails staff received, showed it was not sent from the recipient of the e-mail, but instead sent from noreply@craigslist.org:

Vote No William Joseph reappointment at NH DMV

<http://nh.craigslist.org/pol/571777604.html>

The email heading was concerning as it stated that the craigslist post had been forwarded by Director Bielecki. The heading was as follows:

From: noreply@craigslist.org
Sent: Friday, August 05, 2016 12:52 PM
To: Bielecki, Elizabeth
Subject: Vote No William Joseph reappointment at

elizabeth.bielecki@dos.nh.gov forwarded you this from craigslist:

App., p. 24. Plainly enough, the e-mail shows it was sent “**From noreply@craigslist.org.**” True, the body of the e-mail goes on to say it was forwarded by the recipient of the e-mail. But the distinction of an e-mail's sender's identity appearing in the “From” field as opposed to being in the body of the e-mail itself is equally within the permissible realm of judicial

common sense inference. *Accord Letoile*, 166 N.H. at 273-74 (trial judge properly and sustainably “drew upon common knowledge about the manner in which computers retain files and images” to distinguish and discern that the viewing of computer images viewed from a website are contemporaneously downloaded onto the computer itself). Thus, if a trial judge is capable of apprehending how computers handle and store images viewed on a website it is reasonable to conclude trial judges are and should be equally capable of apprehending that the “From field” on an e-mail is the sender of an e-mail, and not the arbitrary name appearing in the body of the e-mail itself. This last point brings the discussion to e-mails and identity fraud.

RSA 638:26 is captioned “Identity Fraud” and makes a felony identity fraud, which is defined when a person:

- (a) Poses as another person with the purpose to defraud in order to obtain money, credit, goods, services, or anything else of value;
- (b) Obtains or records personal identifying information about another person without the express authorization of such person, with the intent to pose as such person;
- (c) Obtains or records personal identifying information about a person without the express authorization of such person in order to assist another to pose as such person; or
- (d) Poses as another person, without the express authorization of such person, with the purpose of obtaining confidential information about such person that is not available to the general public.

Under the facts appearing in the affidavit supporting the State’s search warrant it is plain there are no allegations relating to Mr. Exline or Ms. Roy obtaining, or seeking to obtain money, credit, goods, services, or anything else of value, or information that is not available to the general public, or confidential information about such person that is not available to the general public. RSA 638:26, I(a) and (d). That leaves subparagraphs (b) and (c), above. As demonstrated in Mr. Exline’s motion for the return of his property, the e-mail addresses of state

employees are available online. *App.*, p. 11-15 (appellant recognizes that those five pages are the search results only for those employee's whose first name is "William"). Thus, one is left to discern whether the division's employees' e-mail addresses are "personal identifying information" about them. The division's employee e-mail addresses, like almost all state employees' e-mail addresses are available on-line. *App.*, p. 11-15. The publication and availability of the e-mail addresses is the authorization for their use.

The definitions applicable to RSA 638:26 also provide the conclusion that e-mail addresses do not qualify as "personal identifying information." RSA 638:25, I, defines "personal identifying information" as

any name, number, or information that may be used, alone or in conjunction with any other information, to assume the identity of an individual, including any name, address, telephone number, driver's license number, social security number, employer or place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, credit card number, debit card number, personal identification number, account number, or computer password identification.

(emphasis added). Absent from the definition of "personal identifying information" is e-mail. E-mail is not one of the items the Legislature included in the exhaustive list of "personal identifying information." *Accord State v. Washington*, 168 N.H. 689, 692-93 (2016) (declining to broadly construe the term "including" in RSA 625:11 in conjunction with 638:26, I(b) to include items not in the RSA 625:11 list). The absence of e-mail from the definition of RSA 638:25, I is no mistake.

The Legislature expressly declined to include e-mails from the purview of RSA 638:26. *Compare* Laws 1999 Chpt. 239:1 (enactment of RSA 638:25 and :26) *with* Laws 1999 Chpt. 141:1 (amendment of RSA 644:4). Instead, and as the product of the legislative process, the original inclusion of harassing e-mail in HB687-FN was deleted and relegated to HB 345-FN

(RSA 644:4 – Harassment).³ The legislative history on that score is clear. As introduced in 1999, HB 687-FN included provisions and a specific definition for harassment, by electronic means.⁴ The House amended HB687-FN in the effort to reconcile the harassment provisions of that bill with HB345-FN.⁵ HB345-FN amended RSA 644:4, II, to add to the definition of “communicates” “electronic transmissions generated or communicated via a computer.”⁶ The purpose of HB345-FN was to “add the internet” to RSA 644:4 harassment.⁷ While HB345-FN wound its way through the Legislature in 1999, so did HB687-FN. A week after the Senate Judiciary Committee heard HB345-FN, it heard HB647-FN.⁸ At the hearing on HB647-FN the chair of the Senate Judiciary Committee, Senator Pignatelli confirmed that HB647-FN (soon to become RSA 638:25 and :26) was not about harassing e-mails, it was about identity fraud, and that HB345-FN addressed harassment e-mails.⁹ HB647-FN’s sponsor, Representative Hunt stated that the purpose of the bill:

[The remainder of this page is intentionally blank.]

³ HB687-FN (1999) enacted Laws 1999 Chpt. Chpt. 239:1, which in turn became RSA 638:25 and :26. The New Hampshire House and Senate action on that HB687-FN is available at:

House Action: http://gencourt.state.nh.us/SofS_Archives/1999/house/HB687H.pdf

Senate Action: http://gencourt.state.nh.us/SofS_Archives/1999/senate/HB687S.pdf

⁴ http://gencourt.state.nh.us/SofS_Archives/1999/house/HB687H.pdf, p. 3-4, 6-7 of 27.

⁵ *Id.* at p., 10, of 27;

http://gencourt.state.nh.us/SofS_Archives/1999/senate/HB687S.pdf, p. 2, 8-10 of 27 (Senate Judiciary Committee Meeting Minutes of May 26, 1999) (reconcile page 7 of 27 with pages 22 and 27 of 27).

⁶ http://gencourt.state.nh.us/SofS_Archives/1999/house/HB345H.pdf, p. 2-6 of 30;
http://gencourt.state.nh.us/SofS_Archives/1999/senate/HB345S.pdf, p. 3, 6, 23 of 23.

⁷ http://gencourt.state.nh.us/SofS_Archives/1999/house/HB345H.pdf, p. 12 of 30 (Representative Dolan, HB345-FN’s co-sponsor, testifying before the House Criminal Justice and Public Safety Committee (February 9, 1999)).

⁸ Compare http://gencourt.state.nh.us/SofS_Archives/1999/senate/HB345S.pdf, p. 8 of 23, with http://gencourt.state.nh.us/SofS_Archives/1999/senate/HB687S.pdf, p. 7, 22, 27 of 27).

⁹ http://gencourt.state.nh.us/SofS_Archives/1999/senate/HB687S.pdf, p. 8-10 of 27.

Senator Katherine W. Wheeler, D. 21: The reason I – thank you. May I have a follow-up question please?

Senator Debora B. Pignatelli, D. 13: Sure.

Senator Katherine W. Wheeler, D. 21: Thank you Representative Hunt. The reason I asked you this we had another bill in this Committee about – and I had to leave in the middle of the hearing so I'm not sure how it turned out but the internet fraud with a person using mail and using a person's identity over the internet and sending mail in that person's name. Would that –

Senator Debora B. Pignatelli, D. 13: That was harassment.

Senator Katherine W. Wheeler, D. 21: That was harassment? Wouldn't that also be identity fraud if you're sending mail out in somebody else's name?

Senator Rick A. Trombly, D. 7: No.

Senator Katherine W. Wheeler, D. 21: It's not?

Senator Rick A. Trombly, D. 7: That bill didn't deal with it that way.

Senator Katherine W. Wheeler, D. 21: Ok. Thank you. I'm sorry I didn't give you a chance to answer that.

Representative Hunt: I'm not familiar with that bill but from what you've said you might be perceived that way but I think harassment in this is definitely different. You're not trying to harass somebody, you're trying to basically steal money or you're trying to get something because you're posing as someone else.

Senator Katherine W. Wheeler, D. 21: Thank you.

¹⁰ The Senate Judiciary's discussion regarding the distinction between identify fraud and harassing e-mails continued:

[The remainder of this page is intentionally blank.]

¹⁰ http://gencourt.state.nh.us/SofS_Archives/1999/senate/HB687S.pdf, p. 9 of 27.

Senator Debora B. Pignatelli, D. 13: Senator Wheeler, at least in my case that person tried to pose as me in sending out e-mail, not for money.

Senator Rick A. Trombly, D. 7: It was the money...trying to gain money.

Senator Katherine W. Wheeler, D. 21: If I may ask one more thing?

Representative Hunt: Try to discredit you. Someone tries to discredit you by saying that they were you, e-mailing something out saying they were you but that obviously they weren't trying to gain economic....

Senator Debora B. Pignatelli, D. 13: Senator Wheeler?

Senator Katherine W. Wheeler, D. 21: Thank you. Representative Hunt, in line 18, 19 and 20 with all the things a person might be trying to obtain it includes *evidence of such person's identity* does that mean that you always have to be trying to get something of monetary value when you're posing or is the mere act of posing as another person....

Representative Hunt: What did you do with that bill, that harassment bill?

Senator Rick A. Trombly, D. 7: We passed it. We're making everything a felony.

Representative Hunt: You could roll the two of them together but this – the attempt that I was going after was clearly credit fraud, stealing someone's for economic benefit but that you could – there is a fine line. I don't know. Again I don't know too much about criminal law so I don't know how that goes with...

Senator Katherine W. Wheeler, D. 21: I was not trying to.... but that answered my question about the harassment issue for a different gain. I like this bill. I'm not trying to criticize it at all and I think that posing as another person without their authorization might as well be a felony.

¹¹ Rather than include harassing e-mails, HB687-FN specifically addressed economic identity fraud. The Senate expressly recognized harassing e-mails were addressed by HB345-FN and its amendments to RSA 644:4. Therefore, to the extent the plain reading of RSA 638:25, I, is ambiguous as to whether "personal identifying information" includes e-mail, the legislative history of both HB345-FN and HB687-FN resolve that ambiguity in favor of the plain language. Therefore, whoever forwarded the Craigslist Post did not engage in what the Legislature identified as "identity fraud" under RSA 638:26.


CONCLUSION

This is not a case where the appellant argues the State's affidavit in support of its search warrant lacked "*conclusive proof*" of criminal activity. Rather, this is a case where appellant argues the State's affidavit in support of its search warrant lacked *any proof* of criminal activity. For that reason there was no probable cause on which the trial court could properly grant the State's application for search warrant; there was no occasion for the trial court to positively determine that there was a "fair probability" contraband would be found at 1832 Candia Road, Manchester, New Hampshire. Therefore, the trial court should have granted appellant's motion for the return of this property. For these reasons and those articulated in this brief Richard Exline respectfully requests this Court to reverse and vacate the trial court's decision.

Respectfully submitted,

Richard Exline
By his attorneys,
Tarbell & Brodich Professional Association

Dated: November 09, 2017

By: 
Friedrich K. Moeckel, Esquire
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¹¹ *Id.* at 10 of 27.

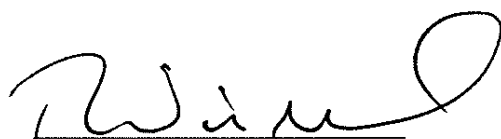
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Richard Exline requests that his attorney Friedrich K. Moeckel be allowed 15 minutes for oral argument.

I hereby certify that on November 09, 2017 two copies of the foregoing Brief and Appendix to Brief were forwarded to counsel for Appellant:

Elizabeth C. Woodcock, Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, New Hampshire 03301

Dated: November 09, 2017



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APPENDIX

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

MAY 22 2017

6th Circuit - District Division - Concord
32 Clinton Street
Concord NH 03301

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NOTICE OF DECISION

**NICHOLAS BRODICH, ESQ
TARBELL & BRODICH PA
45 CENTRE STREET
CONCORD NH 03301**

Case Name: **In re: 1832 Candia Rd. Manch. Exline/Roy**
Case Number: **429-2017-CR-01138**

Enclosed please find a copy of the Court's Order dated May 17, 2017 relative to:

**Order issued re: Motion for Immediate Return of Seized
Property**

May 18, 2017

(429445)

C: NHSP Troop G

Theresa A. McCafferty
Theresa A. McCafferty
Clerk of Court

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

MERRIMACK COUNTY

6TH CIRCUIT – DISTRICT DIVISION – CONCORD

In Re:
Search Warrant for 1832 Candia Road – Manchester, New Hampshire
Docket No. 429-2017-CR-01138

ORDER

On May 11, 2017, a hearing was held on the Motion for Immediate Return of Seized Property filed by Richard Exline, seeking the return of property seized when the Warrant, which was issued by the Court on March 24, 2017, was executed, including four cellphones, two laptops, two desktops, one tablet, and two external hard-drives. In his Motion, Mr. Exline argues that the Application for Search Warrant should not have been granted because it lacked probable cause in two respects. First, he alleges that the facts set forth in the Application for Search Warrant do not constitute a crime. Second, he alleges that the information provided in the Application for Search Warrant was insufficient to show a causal link between any criminal conduct and Mr. Exline. The State filed an Objection to the Motion. Richard Exline was represented at the hearing by his counsel, Attorney Nicholas Brodich. The State was represented at the hearing by its counsel, Attorney Carley Ahern. Also attending and represented by her counsel, Attorney Wade Harwood, was Susanne Roy in support of Mr. Exline. A recording was made of the proceeding.

Attorney Brodich noted that the Application for Search Warrant specified two possible offenses, stating that there was probable cause to believe that they had been committed by Mr. Exline; identity fraud, as set forth in RSA 638:26, and tampering with public or private records as set forth in RSA 638:3. Attorney Brodich argued that the facts alleged in the Application for Search Warrant do not satisfy the probable cause standard.

Attorney Brodich stated that there is evidence that Mr. Exline created a Craig's List ad. However, the State has failed to provide sufficient evidence to show that he is responsible for forwarding that ad to others, or that he used the equipment which has been confiscated from him pursuant to the Search Warrant to do the forwarding. Furthermore, even if he did, the speech is

protected because it is clearly political in nature. In reviewing the criminal offenses specified in the Application for Search Warrant, Attorney Brodich argued that neither statute applies in this case as the elements cannot be proven.

The Court notes that probable cause exists if a person of ordinary caution would be justified in believing that what is sought would be found in the place to be searched and that what is sought, if not contraband or fruits or implements of crime, will aid in the particular apprehension or conviction. State v. Doe, 115 N.H. 682 (1975). Having considered the facts set forth in the Application for Search Warrant, the Court finds them to be sufficient to justify a person of caution to believe that evidence of a crime would be found in the computer equipment possessed by Mr. Exline. In reviewing the elements of the specified offenses, the Court need not determine Mr. Exline's guilt at this time or consider his defenses. All that is required is probable cause to believe he committed those offenses.

The Court finds that there was probable cause to believe that the crimes specified in the Application for Search Warrant were committed. Based upon the information contained in the Affidavit, the Court also finds that there was probable cause to believe that Mr. Exline committed those offenses. Finally, the Court finds that there was probable cause to believe that the equipment requested and seized by the State as a result of the search will assist in determining whether those offenses have been committed by Mr. Exline.

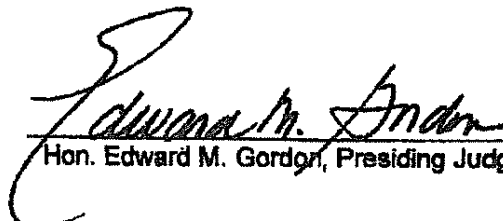
In conclusion, the Court finds that the Application for Search Warrant did set forth sufficient evidence for the Court to make a finding of probable cause for its issuance.

The Motion for Immediate Return of Seized Property is denied.

So Ordered.

Date

5-17-17


Hon. Edward M. Gordon, Presiding Judge

2

In Re:

Search Warrant for 1832 Candia Road - Manchester, New Hampshire
Docket No. 429-2017-CR-01138

Order

THE STATE OF NEW HAMPSHIRE

6TH CIRCUIT COURT

DISTRICT DIVISION – CONCORD

IN RE: SEARCH WARRANT FOR 1832 CANDIA ROAD, MANCHESTER, NH

Docket No. 429-2017-CR-1138

MOTION FOR IMMEDIATE RETURN OF SEIZED PROPERTY

NOW COMES the affected party, Richard Exline, by and through his attorney, Nicholas Brodich, Esq., and files this Motion for Immediate Return of Seized Property and in support thereof states the following:

A. INTRODUCTION

1. Richard Exline resides at 1832 Candia Road, Manchester, New Hampshire. His business offices are also at this same address. On March 24, 2017, the police applied for and were granted a warrant to search these premises.
2. The search warrant purportedly allowed the State to search for evidence of violations of *RSA 638:26* (Identity Fraud) and *RSA 638:3* (Tampering of Public or Private Records).
3. The search warrant was executed on March 27, 2017. As part of their entry and search of Mr. Exline's home and business, Police seized numerous computers, laptops, cell phones, hard drives, thumb drives, etc.
4. A review of the affidavit in support of the search warrant shows a glaring lack of probable cause, both with respect to whether the acts alleged even constitute a crime, as well as any causal link between the alleged crime and Mr. Exline or his home/office.

5. At best, the affidavit facially establishes that Mr. Exline may have created and posted a Craigslist political advertisement that stated simply, "Vote No William Joseph reappointment at NH DMV." Upon information and belief, William Joseph is a deputy director at the DMV. The affidavit goes on to allege that this Craigslist political ad was forwarded to a number of employees of the Department of Safety by an unknown party, to their public, work email addresses, using the same forwarding email addresses as that of the recipients.

6. The affidavit then blankly concludes, "Based on the foregoing, there is probably cause to believe that NH RSA 638:26 Identity Fraud and NH RSA 638:3 Tampering of Public or Private Records has been violated..." This is the sum total of the legal analysis in the affidavit. The affidavit does not contain even an attempt to apply the statutes to the facts alleged in an attempt to justify that a crime had actually been committed.

7. Assuming that the creation of the Craigslist ad at issue is political free speech that is protected by the First Amendment, one can only assume that it is the forwarding of the Craigslist political ad that is cause of the ruckus. However, the affidavit contains *no information whatsoever* pertaining to the forwarding of the advertisement other than the fact it had been forwarded and the forwarding was purportedly from the recipients address. Despite this lack of information, the affidavit goes on to blankly conclude that "Based on the foregoing, there is probably cause to believe that...evidence, fruits and instrumentalities of the offense will be found at [Mr. Exline's residence/business property]."

8. The State's affidavit failed to establish anything beyond the allegation that a Craigslist ad was created and posted by an email address connected to one of Mr. Exline's many business ventures. This assertion fails to establish that any crime has been committed and fails to establish any link between the forwarding of the advertisement and Mr. Exline or his property.

B. FACTS¹

9. On or about August 5th, 2016, Assistant Commissioner Kevin O'Brien reported the forwarding of a political post on Craigslist to employees at the New Hampshire Department of Safety (DOS) concerning Deputy Director William Joseph. The post stated: "Vote No William Joseph reappointment at NH DMV."

10. The Craigslist ad was forwarded using Craigslist's own forwarding tool which asks a user to provide who the ad is to be forwarded "to" and who the ad has been forwarded "from." The ad was forwarded via this tool to several people at the DOS with the forwarded ad stating that it had been sent by the recipient.

11. The affidavit in support of the search warrant states that 54 employees of the DMV were forwarded the ad. Upon information and belief, all emails were sent to publicly available, work email addresses of the various employees (*see attached*).

12. Assistant Commissioner O'Brien believed the ad had a connection to an earlier email sent to Communications Director William Hinkle by 'foryousales07@gmail.com' concerning the resignation of Deputy Director Joseph. The email was traced to Cannon Real Estate Company, Inc. whose chairman is Richard Exline.

13. On or about November 3, 2016 Detective McCormack received information regarding the origins of the Craigslist ad from Craigslist. The information provided included the poster's email address (foryousales07@gmail.com) and the poster's IP address (73.186.187.254).

14. Detective McCormack interviewed William C. Powell from Craigslist's legal team who stated that they could identify the original ad poster's Internet Protocol Address² but could not provide any information regarding who forwarded the post to the 54 recipients at the DOS.

¹ Unless otherwise noted, all alleged facts have been taken from the narrative set in the affidavit of support of the search warrant.

15. On or about January 26, 2017 Detective McCormack received information from Comcast regarding the subscriber page of the IP address listed above for the original poster of the ad. The information included identifying information for the subscriber, Richard Exline. However, neither Comcast nor its representatives had any information regarding the forwarding of the Craigslist ad.

16. Despite this glaring lack of probable cause, on or about March 24, 2017 Detective McCormack applied for and executed a search warrant of Richard Exline's home and vehicle. The warrant was successful in obtaining four cellphones, 2 laptops, 2 desktops, 1 tablet, and 2 external hard drives.

C. LAW

17. *RSA 595-A:1* allows the state to search for and seize any property which is (1) fraudulently obtained, (2) designed for the use of committing a crime, (3) contraband, or (4) "evidence of the crime to which the probable cause upon which the search warrant is issued relates." Said property shall be returned to its owner provided it's not contraband. *Id.* All warrants must be accompanied by an affidavit of support establishing probable cause for the issuance. *Constitution of New Hampshire Part I, Article 19; RSA 595—A:4.* Therefore, a warrant that is not supported by probable cause is unconstitutional and the Courts have generally moved to invalidate the warrant and as a result suppress the evidence obtained. *State v. Silvestri*, 136 N.H. 522 (1992). Furthermore, under the federal rules of criminal procedure a person may motion for the return of their property if they have been "aggrieved by an unlawful search and seizure." *Fed. Rules of Crim. Procedure 41(g)*. Under Part I, Article 19 of the New Hampshire Constitution, our Supreme Court's interpretations thereof, The Fourth Amendment to the United

² An IP address (abbreviation of internet Protocol address) is an identifier assigned to each computer and other device (e.g., printer, router, mobile device, etc.) connected to a TCP/IP network that is used to locate and identify the node in communications with other nodes on the network. See Wikipedia.

States Constitution, as well as under the Federal Rules of Criminal procedure, it would be illegal for the State to be allowed to retain possession of Mr. Exline's property as they failed to show probable cause that a crime had been committed, specifically including Identity Fraud (*RSA 638:26*) or Tampering of Public or Private Records (*RSA 641:7*). Likewise, the State has failed to show that probable cause supported that evidence of some theoretical crime would be found at Mr. Exline's property.

I. No Evidence to support Identity Fraud violation of RSA 638:26

18. Though the State saw fit to attach a complete copy of *RSA 638:26*, Identity Fraud, as an attachment to their affidavit, no attempt was made to specify which of the many varieties of Identity Fraud was allegedly committed in this case. Such application of the facts to the law would have been helpful to a diligent quest to determine whether or not a crime had actually been committed. However, any attempt at such specificity in this case would have been fatal to the cause, for none of the ten or more variants of Identity Fraud apply to the alleged facts of this case.

II. No evidence to prove tampering of public or private records

19. In order to justify the search, the State also alleged that the facts support the crime of Tampering with Public or Private Records under *NH RSA 638:3*. To violate this statute, a person must (1) falsify, destroy, remove, or conceal (2) any writing or recording, public or private, (3) with a purpose to deceive or injure or to conceal any wrongdoing (4) while knowing he has no privilege to do so. (*NH RSA 638:3*) The State has failed to show probable cause that Mr. Exline's property contains any evidence committed the crime listed under *RSA 638:3*.

D. Conclusion and Request for Relief

20. The State's affidavit of support for the search warrant fails to show probable cause that a crime has been committed. The affidavit only establishes that that a Craigslist political advertisement was made using an email address that is connected to one of Mr. Exline's business ventures and nothing more. The poster of the Craigslist ad appropriately used his First Amendment right to free speech to voice concerns over the reappointment of a public servant. No information regarding the origin of the forwarding of the ad appears in the State's affidavit of support for the search warrant. The State would like us to illogically conclude that the only person that can forward a craigslist ad is its poster. Such a conclusion belies the very mechanism Craigslist uses to facilitate and encourage the public's forwarding of ads of interest. The State has failed in showing probable cause that a crime was even committed. Likewise, the State has failed to link any supposed crime committed by the forwarding of the political ad to Mr. Exile, or his property.

WHEREFORE, the affected party, Richard Exline, for the reasons stated above and pursuant the Part I, Article 19 of the New Hampshire Constitution, the 4th and 14th Amendments to the United States Constitution, and New Hampshire RSA 595-A:6, respectfully requests this Honorable Court:

- a) Grant this Motion and immediately return the property that was illegally seized from Mr. Exline; and,
- b) Grant any such other relief as may be just.

Respectfully submitted,

Dated: April 20, 2017

By:



Nicholas Brodich, Esq. #5630
Tarbell & Brodich Professional Association
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603.226.3900

CERTIFICATE OF SERVICE

I, Nicholas Brodich, counsel for the affected party, Richard Exline, in the above-entitled matter, do hereby certify that a true copy of the foregoing *Motion for Immediate Return of Seized Property* was forwarded on this 20th day of April, 2017 by first-class mail, postage prepaid, to Carley Ahern, Esq.

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STAATS, WILLIAM W.	FISH AND GAME COMMISSION	WILDLIFE PROGRAM	BIOLOGIST II	(603) 788-3164 william.staats@wildlife.nh.gov
TAYLOR, WILLIAM R.	TRANSPORTATION DEPT OF	PROJECT DEVELOPMENT	ENGINEERING TECHNICIAN III	(603) 271-2571 wtaylor@dot.state.nh.us
THOMAS, WILLIAM A.	ENVIRONMENTAL SERV DEPT OF	WATER POLLUTION DIVISION	ENVIRONMENTALIST IV	(603) 271-4197 william.thomas@des.nh.gov
TORPEY, WILLIAM L.	HHS: HUMAN SERVICES	CHILD SUPPORT SERVICES	CHILD SUPPORT OFFICER	(603) 579-9413
WALVER, WILLIAM L.	LIQUOR COMMISSION	MARKETING AND MERCHANDISING	LABORER	(603) 345-1374
WARR, WILLIAM G.	ENVIRONMENTAL SERV DEPT OF	WASTE MANAGEMENT DIVISION	ENVIRONMENTALIST IV	(603) 271-2891 william.warr@des.nh.gov
WATSON JR, WILLIAM E.	TRANSPORTATION DEPT OF	PROJECT DEVELOPMENT	TRANSPORTATION BUREAU ADMIN	(603) 271-3344 bwatson@dot.state.nh.us
WEEKS, WILLIAM B.	INFORMATION TECHNOLOGY DEPT OF	INFORMATION TECHNOLOGY DEPT OF	TECHNICAL SUPPORT SPEC VI	(603) 228-4066 william.weeks@dot.nh.gov
WHITMAN, WILLIAM W.	HHS: COMMISSIONER	OFFICE OF THE COMMISSIONER	STOCK CLERK III	(603) 271-9006 william.whitman@dhhs.state.nh.us
WINDLER, WILLIAM	HHS: HUMAN SERVICES	SUNUNU YOUTH SERVICE CENTER	NONCLASSIFIED JUVENILE JUSTICE	(603) 625-5471
WOOD, WILLIAM A.	TRANSPORTATION DEPT OF	OPS DIVISION HIGHWAY	HIGHWAY PATROL FOREMAN	(603) 352-2302 wwoods@dot.state.nh.us
WOOD III, WILLIAM H.	SAFETY DEPT OF	FIRE STANDARDS - TRNG - EMS	EMS REGIONAL COORDINATOR I	(603) 223-4200 william.wood@des.nh.gov
WOODWARD, WILLIAM E.	CORRECTIONS DEPT OF	STATE PRISON FOR MEN	ELECTRONIC TECHNICIAN II	(603) 271-1877 william.woodward@doc.nh.gov
WRENN JR, WILLIAM L.	CORRECTIONS DEPT OF	OFFICE OF THE COMMISSIONER	COMMISSIONER (DEPT OF CORRECTI	(603) 271-5603 william.wrenn@nhdoc.state.nh.us

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MAY 03 2017

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

6th CIRCUIT- DISTRICT DIVISION- CONCORD
FILED UNDER SEAL

In Re: Search Warrant for 1832 Candia Road, Manchester, NH
429-2017-CR-1138

OBJECTION TO MOTION FOR IMMEDIATE RETURN OF SEIZED PROPERTY

NOW COMES the State of New Hampshire, by and through Carley Ahern, Assistant Merrimack County Attorney, and objects to the Motion for Immediate Return of Seized Property in the above-captioned matters and states as follows:

1. The search warrant, reviewed and signed by Judge Tenney, was supported by probable cause.
2. Probable cause to search exists if the man of ordinary caution would be justified in believing that what is sought will be found in the place to be searched and that what is sought, if not contraband or fruits or implements of crime, will aid in a particular apprehension or conviction. State v. Doe, 115 NH 682, 685 (1975).
3. To satisfy this standard, the facts and circumstances need not be sufficient to prove guilty beyond a reasonable doubt, to make out a prima facie case, or even to establish that guilt is more probable than not. State v. Marcotte, 123 N.H. 245 (1983).
4. The New Hampshire Supreme Court has suggested that the degree of probable cause for a magistrate to issue a search warrant may be slightly less than that required to support a warrantless search. State v. Stearns, 130 N.H. 475 (1988).
5. Having these principals of law in mind, the State asserts that in reviewing the four corners of the search warrant, including the attached statutes, there was sufficient probable cause to support the granting of the warrant and the seizure of the property.
6. Notably, the warrant itself lays out the facts and potential motive linking the defendant to the crimes of Identity Fraud and Tampering with a Private or Public Record being investigated by the New Hampshire State Police.
7. The defense attorney's focus on the protected first amendment speech is misleading and a distraction from the legal analysis at hand. The protected speech is not the focus of the criminal investigation. Had the defendant limited his "Craiglist" activity to posting the political speech this matter would not be before the Court. This matter is before the Court to determine who sent the emails and filled the intended recipient's name into the sender's box on the emails.

8. Even having this in mind, no higher standard of probable cause is required for an application for a warrant to seize materials presumptively protected by the first amendment. New York v. PJ Video, Inc., 475 U.S. 868 (1986).
9. The search warrant supports that a "man of ordinary caution would be justified in believing that" evidence of who filled in the recipient's email address in the sender's location will affirmatively be linked to the defendant's seized property.
10. Arguably, such conduct is a violation of RSA 638:26, I (b) and RSA 638:3, specifically if a person "knowing he has no privilege to do so ... falsifies ... any writing or record, public or private, with a purpose to deceive or conceal any wrongdoing". Both of these sections of the criminal statute were included in the search warrant document submitted to the Court.
11. As such, the search warrant was sufficiently supported by probable cause and the defendant's motion should be denied.


WHEREFORE, the State respectfully requests this Honorable Court:

- A. Deny the defendant's motion without a hearing as the information contained within four corners of the search warrant satisfy the probable cause requirements for a search warrant; and
- B. Enter such other relief as is just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By:


Carley Ahern,
NH Bar # 17134
Assistant Merrimack County Attorney
4 Court Street
Concord, New Hampshire 03301
(603) 228-0529

April 27, 2017

CERTIFICATION

I hereby certify that a copy of the foregoing Motion has this day been forwarded to Attorney Nick Brodich.

April 27, 2017


Carley Ahern
Assistant Merrimack County Attorney

WARRANT
The State of New Hampshire

Merrimack, SS 6th Circuit Concord Court
To the Sheriffs of our several counties, or their deputies, any State Police Officer, or any Constable or Police Officer of any city or town, within our State.

Proof by affidavit (supplemented by oral statements under oath) having been made this day before

Edward B. Tenney by
(name of person authorized to issue warrant)

Detective Sergeant David S. McCormack, New Hampshire State Police that there is
(names of person or persons whose affidavits have been taken)

probable cause for believing that:
(certain property which has been stolen, embezzled, or fraudulently obtained; OR is intended for use or has been used as the means of committing a crime; OR is contraband; OR is evidence of the crime to which the probable cause upon which this search warrant is issued relates.)
Evidence of the crime of Identity Fraud and Tampering with Public and Private Records / See attached Affidavit

may be found in the possession of Richard Exline DOB: 06/10/1965 and Suzanne Roy DOB: 05/20/1966
(Identify)

at premises located at 1832 Candia Road, Manchester, NH

We therefore command you ^{at or before of day or night} to make an immediate search

of 1832 Candia Road, Manchester, NH
(Identify premises)

Richard Exline DOB: 06/10/1965 and Suzanne Roy DOB: 05/20/1966 and
(occupied by A.B.)

of the person of Richard Exline DOB: 06/10/1965 and Suzanne Roy DOB: 05/20/1966
(A.B. and any other identifiable individuals with respect to whom probable cause has been established by the affidavit

or supplementary testimony.) for the

following property: (describe property)
Evidence of the crime of Identity Fraud and Tampering with Public and Private Records / See attached Affidavit

and if you find any such property or any part thereof to bring it and the person in whose possession it is found before Merrimack County Superior Court at
(court having jurisdiction)

Concord NH
(location)
Dated at Concord this 29th day of March 2017
(city or town) (Day) (Month / Year)

(court seal)

Edward B. Tenney

APPLICATION FOR SEARCH WARRANT and SUPPORTING AFFIDAVIT

(This application and affidavit to be detached by Justice issuing warrant and filed separately with the court to which the warrant is returnable.)

Instructions: A person seeking a search warrant shall appear personally before any justice, associate justice or special justice of the municipal, district or superior court and shall give an affidavit in substantially the form hereinafter prescribed. The affidavit shall contain facts, information, and circumstances upon which such person relies to establish probable cause for the issuance of the warrant and the affidavit may be supplemented by oral statements under oath for the establishment of probable cause. The person issuing the warrant shall retain the affidavit and shall make notes personally of the substance of any oral statements under oath supplementing the affidavit or arrange for a transcript to be made of such oral statements. The person issuing the search warrant shall deliver the affidavit and the notes or transcript within three days after the issuance of the warrant to the court to which the warrant is returnable. Upon the return of said warrant, the affidavit and the notes or transcript shall be attached to it and shall be filed therewith, and they shall be a public document when the warrant is returned, unless otherwise ordered by a court of record.

THE STATE OF NEW HAMPSHIRE

Merrimack , SS
(county)

6th Circuit Concord Court
3-24 17
(Month / Day) (Year)

I, Detective Sergeant David S. McCormack being duly sworn, depose and say:
(Name of applicant)

1. I am Detective Sergeant with the New Hampshire State Police / Troop G / DMV Task Force
(describe position, assignment, office, etc.)

2. I have information, based upon:
(describe source, facts indicating reliability and credibility of source and nature of information; if based on personal knowledge, so state)

See attached affidavit.

(Use this additional sheet for Item No. 2, if necessary)

[Empty rectangular box for additional information]

3. Based upon the foregoing information (and upon my personal knowledge) there is probable cause to believe that the (strike out if not applicable)

property hereinafter described Has been utilized to commit Identity Fraud and or Tampering with Public and Private Records. (has been stolen, etc.)

and may be found In the possession of Richard Exline DOB: 06/10/1965 and Suzanne Roy DOB: 05/20/1966 (in the possession of A.B. or any other person)

at premises 1832 Candia Road, Manchester, NH

(identify)

4. The property for which I seek the issuance of a search warrant is the following:

(here described the property as particularly as possible)

any computer, computer system, mobile digital device, camera, router, wi-fi device, cellular telephone, smart phone, commercial software and hardware

Wherefore, I request that the court issue a warrant and order of seizure, authorizing the search of, 1832 Candia Road,

Manchester, NH, Richard Exline DOB: 06/10/1965 and Suzanne Roy DOB: 05/20/1966

(identify premises and the persons to be searched)

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court together with such other and further relief that the court may deem proper.

Det. S. McCormack
(Name)

Then personally appeared the above named Detective Sergeant David S. McCormack

and made oath that the foregoing affidavit by him subscribed is true.

Before me this

29th

(Day)

day of

March 2017

(Month / Year)

[Signature]
Edward L. Towler, Judge
6th Circuit Court - Concord

Justice of the

Court

RETURN

I received the attached search warrant on 3/24/17 and have
(Month / Day) (Year)

executed it as follows:

On 3/27/17 at 1700 o'clock P M, I
(Month / Day) (Year)

searched 1832 Candia Rd, RICHARD EXLINE, SUZANNE ROY described in the warrant and I
(the persons and the premises searched)

left a copy of the warrant with RICHARD EXLINE / SUZANNE ROY
(names of persons searched and occupant if not a person searched; describe the premises searched if occupant

not present.)

at 1832 CANDIA ROAD, MANCHESTER, NH together with a receipt for the items seized.
(the premises searched)

The following is an inventory of property taken pursuant to the warrant:

- 4 - CELLULAR TELEPHONES
- 2 - EXTERNAL USB DRIVES
- 2 - LAPTOPS
- 2 - DESK TOPS
- 1 - TABLET

This inventory was made in the presence of V. Tompo Hennessy
and TEC Kelly Wardner

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

(Signature)

Subscribed and sworn to and returned before me this _____ day
(Day)

of _____
(Month / Year)

Justice of the Peace

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

6th CIRCUIT COURT-CONCORD

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

I, Detective Sergeant David S. McCormack, being duly sworn, depose and say the following:

I am a Detective Sergeant with the New Hampshire State Police assigned to Troop- G and the Division of Motor Vehicles Task Force. I have been so employed with the State of New Hampshire since July 1994. I have been a member of the State Police Collision Analysis and Reconstruction Unit (CAR) since 1997. Prior to joining the New Hampshire State Police, I was a full time police officer for the City of Laconia, New Hampshire. While employed with the Laconia Police Department, I was assigned to the Criminal Investigations Bureau as a Detective. I have been a full time certified officer since 1988. I am a graduate of the 83rd New Hampshire Police Academy, where I received training in criminal and motor vehicle laws, as well as criminal investigations. Prior to joining the Laconia Police Department, I was a member of the US Army, Military Police Corps, where I received training in criminal investigations and military laws.

1. CASE SPECIFICS

On August 5th, 2016, at 1515 hours, I was working and assigned as a Detective Sergeant for:

**NH State Police / Troop G – DMV Task Force
91 Airport Road
Concord, NH 03301.**

I received an email from:

**Assistant Commissioner Kevin O'Brien
New Hampshire Department of Safety.**

The email I received was as follows:

From: O'Brien, Kevin
Sent: Friday, August 05, 2016 3:15 PM
To: McCormack, David
Cc: Haynes, William; Bielecki, Elizabeth
Subject: FW: Vote No William Joseph reappointment at NH DMV

Hi Dave...Can you call me on Monday...We have had a little bit of a cyber-attack with these attached emails being spoofed to multiple addresses....we are going to want to assign an investigator to look into this and you may end up being the point person....Please call me on Monday

KOB

2017 MAR 24 P 2:32

NH CIRCUIT COURT

On August 8th, at approximately 1545 hours, I met with:

**Deputy Director William Joseph
New Hampshire Department of Safety
Division of Motor Vehicles
23 Hazen Drive
Concord, NH 03301**

in his office. I had learned that the cyber issue involved a Craigslist Post concerning Deputy Director Joseph. We spoke about the Craigslist Post that was as follows:

Vote No William Joseph reappointment at NH DMV

Deputy Director Joseph was very upset about this post, as he was going up for re-appointment to his position. He immediately told me that he knew who was responsible for this post. Deputy Director Joseph explained that in his position he had to deal with personnel issues. He has had disciplinary issues with an employee, he identified as:

Suzanne Roy.

Deputy Director Joseph said that this Craigslist post more than likely involved Roy and her boyfriend, he identified as:

Richard Exline.

Deputy Director Joseph said he had spoken to:

**Director Elizabeth Bielecki
New Hampshire Department of Safety
Division of Motor Vehicles
23 Hazen Drive
Concord, NH 03301**

as Director Bielecki had received this Craigslist Post by email. Deputy Director Joseph said that the email received by Director Bielecki indicated it had been forwarded by her. He was concerned with the fact that someone had made it appear that the email had been forwarded by Director Bielecki. Deputy Director Joseph asked if I had been made aware of this issue and I told him that I had and an investigation was started. Deputy Director Joseph said that other staff at NH DMV had received the email as well and their email addresses also appeared as having forwarded the post.

On August 9, 2016, at approximately 1407 hours, I met with Assistant Commissioner O'Brien in his office. We spoke about emails that were sent to multiple addresses within the NH Department of Safety and to members of the New Hampshire Executive Council. The following is an email that was received by Director Bielecki:

Vote No William Joseph reappointment at NH DMV

<http://nh.craigslist.org/pol/571777604.html>

The email heading was concerning as it stated that the craigslist post had been forwarded by Director Bielecki. The heading was as follows:

From: noreply@craigslist.org
Sent: Friday, August 05, 2016 12:52 PM
To: Bielecki, Elizabeth
Subject: Vote No William Joseph reappointment at

elizabeth.bielecki@dos.nh.gov forwarded you this from craigslist:

Assistant Commissioner O'Brien confirmed that the email had not been forwarded by Director Bielecki. He was very concerned that the craigslist post contained the email address for Director Bielecki, which she did not authorize. Assistant Commissioner O'Brien indicated that a list of all the recipients of this particular craigslist post could be obtained through:

Donald Gerow
New Hampshire Department of Safety
Division of Information Technology.

The significance of the above post was that Deputy Director Joseph was up for re-appointment as Deputy Director in August 2016. This post was sent out in advance of his re-appointment, apparently in an attempt to try to influence the Governor and Executive Council's decision.

I asked Assistant Commissioner O'Brien if he had any ideas as to who may have been involved in this craigslist post and subsequent forwarding of these emails. He said on May 31, 2016, an anonymous email (complaint) had been received by:

**William Hinkle, Communications Director
Office of Governor Maggie Hassan,**

about Deputy Director Joseph. The email indicated that Deputy Director Joseph should resign his position, due to poor work performance. Assistant Commissioner O'Brien said that the email was sent from the following email address:

forvousales07@gmail.com

Assistant Commissioner O'Brien said that:

**Assistant Commissioner Richard Bailey
New Hampshire Department of Safety**

had completed some follow up when this email was received and traced the above email address to a business. The business was identified as:

***Cannon Real Estate Company Inc.
1832 Candia Road
Manchester, NH 03109
Chairman: Richard Exline.***

Assistant Commissioner O'Brien said that he was familiar with the fact that Richard Exline was the boyfriend to an employee at the Division of Motor Vehicles. He identified the employee as:

**Suzanne Roy
New Hampshire Department of Safety
Division of Motor Vehicles.**

Assistant Commissioner O'Brien said that Suzanne Roy did not like Deputy Director Joseph, due to disciplinary issues that he could not disclose. He asked that I follow up with Assistant Commissioner Bailey when he returned from vacation. Assistant Commissioner O'Brien also asked that I contact Donald Gerow at DOIT for further assistance.

On August 11, 2016, I forwarded a preservation letter to:

Craigslist

ATTN: Custodian of Records

1381 9th Ave.

San Francisco, CA 94122 legal@craigslist.org

LE Contacts: (415) 566-6394 x 5115 clint@craigslist.org

RE: <http://nh.craigslist.org/pol/5717777604.html>

requesting that any and all records pertaining to the above craigslist post be preserved as I was conducting an Identity Fraud investigation.

On August 10, 2016, at approximately 1250 hours, I met with Director Bielecki in her office. She was concerned about the Craigslist post and confirmed that she had not forwarded the post or authorized anyone to utilize her email address. Director Bielecki explained that she was very concerned about these posts and the fact that she had no idea where these emails had been forwarded with her email address. I informed her that I had started an investigation into the posts and the use of other person(s) email addresses. Director Bielecki said that other members of her staff had received the email post as well and in each circumstance the email addresses were fraudulent. At 1300 hours, I spoke to:

Jeffrey Oberdank
Supervisor of Driver Licensing
New Hampshire Department of Safety
Division of Motor Vehicles.

Oberdank confirmed that he had received the above post by email and that it contained his email address as having forwarded the post. Oberdank said he did not forward the post and did not authorize anyone to use his address.

On August 11, 2016, I spoke to:

Donald Gerow
DOB: 10/20/1953
NH Department of Information Technology
27 Hazen Drive
Concord, NH 03301.

Gerow said that he would be forwarding me an email regarding this investigation. At 0954 hours, I received an email from Gerow. The email contained information specific to the

craigslist post "Vote No William Joseph reappointment at NH DMV." The email also included a recipient list for those that received the email post. Gerow's email was as follows:

From: Gerow, Donald <Donald.Gerow@doit.nh.gov>
Sent: Thursday, August 11, 2016 9:54 AM
To: McCormack, David
Cc: O'Brien, Kevin; Sally Gallerani; Eric Allen; Xie, Xiaofen
Subject: DOS Craigslist Information
Attachments: Craigslist website information - Aug 2016.docx

David,

The email with the subject "Vote No William Joseph reappointment at NH DMV" was sent from the sending address bounce-saf@craigslist.org. It was noted that the Sender Host/Sender IP addresses used to send these 54 emails to DOS personnel are valid host/ip addresses servicing Craigslist.

Upon completion of getting the information for the attachment, I searched the Craigslist website for the subject "Vote No William Joseph reappointment at NH DMV" and found the below posting still out there:

<http://nh.craigslist.org/search/ccc?sort=rel&query=vote%20no%20william%20joseph%20reapointment%20at%20nh%20dmv>

On August 31, 2016, I met with Assistant Commissioner Bailey in his office. He provided me with copies of material he had gathered off the internet. Assistant Commissioner Bailey said that he had traced the:

foryousales07@gmail.com

to:

***Cannon Real Estate Company Inc.
1832 Candia Road
Manchester, NH 03109
Chairman: Richard Exline.***

Assistant Commissioner Bailey provided me with web pages from that company. Assistant Commissioner Bailey was also aware that Suzanne Roy had issues with Deputy Director Joseph and may be involved in the Craigslist post. He also confirmed that Richard Exline was a boyfriend to Roy.

On September 29, 2016, at approximately 1251 hours, I met with:

***Kelly Brudniak
Supervisor IV, Bureau of Operations
New Hampshire Department of Safety
Division of Motor Vehicles***

in her office. Brudniak had gathered emails received by her staff at NH DMV that contained the above post. I asked Brudniak if she was familiar with Roy and she said "yes." She said she had worked with Roy and there was no doubt in her mind that Roy was involved in this Craigslist

6

post in some way. I asked Brudniak if she was familiar with Rick's boyfriend, she said "yes, his name is Ricky Exline." Brudniak also voiced her concerns to me that emails received by her staff had fraudulent email addresses as well. Each email gave the appearance that it was forwarded from Craigslist by the recipient. Brudniak later forwarded me an email that contained all the information she gathered.

On September 30, 2016, at approximately 1110 hours, I met with:

**George A. Stewart, Assistant County Attorney
Merrimack County Attorney Office
4 Court Street
Concord, NH 03301
(603) 228-0529**

regarding this case. I explained the case to Attorney Stewart and provided copies of the Craigslist post in question. I also advised Attorney Stewart that I was investigating this as an Identity Fraud, due to email addresses being utilized in the post that were not authorized by the actual owners of the addresses. I asked Attorney Stewart if he would complete a Grand Jury Subpoena to obtain the IP Address or any information related to this case from Craigslist. Attorney Stewart indicated that he would prepare a subpoena in advance of the Grand Jury that would convene in October.

On October 19, 2016, I testified in front of the Merrimack County Grand Jury for the subpoena. The Grand Jury issued a subpoena for Craigslist to provide the information described.

On November 3, 2016, at 1101 hours, I received an email from Attorney Stewart, which contained information provided by Craigslist on this case. The following is an information page obtained from Craigslist providing details of where the post in question originated:

```
----- DATABASE ENTRY NUMBER 1 -----  
posting_id: 5717777604  
poster_email: Foryousales07@gmail.com  
user_id: 256372740  
poster_ip: 73.186.187.254  
auth_user_phone: 6033611161  
auth_user_phone_modify: Sat Jun 27 2015 10:02:32 AM (Pacific)  
record_created: Fri Aug 05 2016 09:30:40 AM (Pacific)  
posted_date: Fri Aug 05 2016 09:46:40 AM (Pacific)  
posting_renewal_dates: n/a  
record_modified: Wed Aug 31 2016 10:20:42 AM (Pacific)  
area_description: new hampshire  
subarea_description: n/a  
neighborhood: n/a  
geographic_area: Concord  
category_description: politics  
category_type: community
```

price/age: n/a
invoice_item_id: n/a
privacy: anonymized email address
posted_state: free post self deleted or paid posting deleted by staff
posting_title: Vote No William Joseph reappointment at NH DMV

The IP address associated with this post was 73.186.187.254. In addition, attached to the IP address information was a:

Certification of Business Records,

completed by:

**William C. Powell, Director
Law Enforcement and Government Relations
Craigslisat Legal
Email: legal@craigslisat.org.**

I spoke directly to Powell regarding the emails that were sent and the original post. Powell confirmed that for the post to have been sent to different email addresses, the person sending the emails would have to manually input each email address. Powell explained that when someone wants to forward a post from Craigslisat, they need to choose "email a friend" at the bottom of the post. A second screen appears and asks that the person forwarding the post provide who the email is "to" and who the email is "from". I utilized the email that Director Bielecki had received as an example and explained to Powell that Director Bielecki had not forwarded the email from Craigslisat. Powell said that the person sending the email to Director Bielecki would have had to enter her email address both in the "to" and "from" sections. Powell explained that Craigslisat policy dictates that person(s) participating in any process on Craigslisat provide accurate and true information. The Craigslisat policy is as follows:

Prohibited

Users must comply with all applicable laws, the CL terms of use, and all posted site rules.

Here is a partial list of goods, services, and content prohibited on craigslisat:

- weapons; firearms/guns and components; BB/pellet, stun, and spear guns; etc
- ammunition, clips, cartridges, reloading materials, gunpowder, fireworks, explosives

- recalled items; hazardous materials; body parts/fluids; unsanitized bedding/clothing
- prescription drugs, medical devices; controlled substances and related items
- alcohol or tobacco; unpackaged or adulterated food or cosmetics
- child pornography; bestiality; offers or solicitation of illegal prostitution
- pet sales (re-homing with small adoption fee ok), animal parts, stud service
- endangered, imperiled and/or protected species and any parts thereof, e.g. ivory
- false, misleading, deceptive, or fraudulent content; bait and switch; keyword spam
- offensive, obscene, defamatory, threatening, or malicious postings or email
- anyone's personal, identifying, confidential or proprietary information
- food stamps, WIC vouchers, SNAP or WIC goods, governmental assistance
- stolen property, property with serial number removed/altered, burglary tools, etc
- ID cards, licenses, police insignia, government documents, birth certificates, etc
- US military items not demilitarized in accord with Defense Department policy
- counterfeit, replica, or pirated items; tickets or gift cards that restrict transfer
- lottery or raffle tickets, sweepstakes entries, slot machines, gambling items
- spam; miscategorized, overposted, cross-posted, or nonlocal content
- postings or email the primary purpose of which is to drive traffic to a website
- postings or email offering, promoting, or linking to unsolicited products or services
- affiliate marketing; network, or multi-level marketing; pyramid schemes
- any good, service, or content that violates the law or legal rights of others

The two sections of the Craigslist policy that stand out in this investigation are:

- **false, misleading, deceptive, or fraudulent content; bait and switch; keyword spam**
- **anyone's personal, identifying, confidential or proprietary information**

Powell said that the applicable laws for fraud in the State of New Hampshire would have to be utilized. Powell said that Craigslist could identify the IP address for the creator of the post in question, however could not provide documentation on who sent the post to the 54 recipients. Powell indicated that information could possibly be obtained from the source computer that sent the emails.

Utilizing the following IP Domain program online:

Domain Dossier

I discovered that the IP address provided by Craigslist was a:

Comcast.Net

account.

On January 20, 2017, I appeared in front of the Merrimack County Grand Jury with Attorney George Stewart. I testified regarding obtaining Comcast.net account information for the IP address listed above. The Grand Jury issued a subpoena for the Comcast.net records.

On January 26, 2017, [redacted] received information from Attorney Stewart provided by Comcast in response to the subpoena. The information provided by Comcast was a confidential subscriber page and a:

Business Certification of Records

page from:

**Kathleen Loughrin, Legal Analyst
Comcast Legal Response Center
650 Centeron Road
Moorestown, New Jersey 08057
(866) 947-8572.**

These documents are attached to and made part of this affidavit. The subscriber information and email user ID's for this account is as follows:

The Subpoena received on 1/20/2017 with respect to the above-referenced matter has been forwarded to the Legal Response Center for a reply. The Subpoena requests Comcast to produce certain subscriber records pertaining to the following IP address: 73.186.187.254 assigned on 8/05/2016 at 09:30:40 PDT (UTC-7) (08/05/2016 at 16:30:40 UTC (PDT+7)).

Based on the information provided pursuant to the Subpoena, the subscriber information obtained has been provided below:

Subscriber Name: RICHARD E EXLINE
Service Address: 1832 CANDIA RD
MANCHESTER, NH 03109-5700
Telephone #: 603-361-4766
Type of Service: High Speed Internet Service
Account Number: 8773201800135180
Start of Service: Unknown
Account Status: Active
IP Assignment: Dynamically Assigned
E-mail User Ids: rexline, suzeroy
(the above user ID(s) end in @comcast.net)

WARRANT TIME FRAME

The logistics in executing a search warrant in this type of investigation requires detailed coordination between New Hampshire State Police investigators and also the New Hampshire State Police Forensic Laboratory that have specialized knowledge, expertise and equipment. Therefore I request this Honorable Court authorize the full seven (7) days from the date of issuance, for the service and return of this search warrant as allowed under RSA 595-A:7.

CONCLUSION

Based on the foregoing, there is probable cause to believe that NH RSA 638:26 Identity Fraud and NH RSA 638:3 Tampering with Public or Private Records, has been violated, and that evidence, fruits and instrumentalities of the offense and will be found at the locations described. Due to the mobility of cellular telephones or other portable electronic devices, I respectfully request that this Court issue a search warrant authorizing the seizure and search of the items described in the locations listed.

Based on the information obtained, I am requesting the following three separate search warrants:

- a) 1832 Candia Road, Manchester, NH (See attached photographs)
- b) NH Registration 8022, 1996 Chevrolet Pick-up color green / NH Registration 3947557 1999 Chevrolet S10 Pick-up color red / NH Registration 1711, 2011 Toyota Camry color black
- c) Richard E. Exline DOB: 06/10/1965 / Suzanne Roy 05/20/1966

The property I seek includes evidence related to identity fraud and tampering with public or private records. Areas to be searched include all parts of the residence including, but not limited to, the bedroom, closet, common hallways, kitchen, dining room, laundry room, closets, basement, attic, storage areas, out buildings, curtilage, and the vehicles as listed above under the control of Richard Exline DOB: 06/10/1965 and Suzanne Roy DOB: 05/20/1966. This search is to also include any locked, sealed or secured containers within those locations where evidence may be found.

STATE OF NEW HAMPSHIRE
MERRIMACK, SS

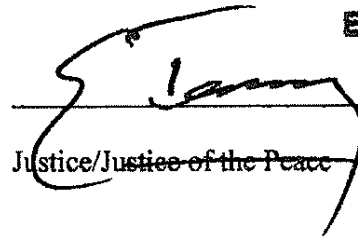
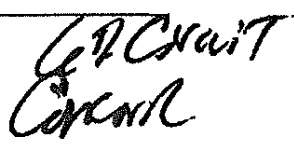
Personally appeared the above-named Detective Sergeant David S. McCormack, and provided oath that the factual allegations contained in the above affidavit are true to the best of his knowledge and belief. Before me,


Detective Sergeant David S. McCormack

Sworn to before me by Det Sgt McCormack on March 24, 2017 at

approximately 2 AM/PM

Edward B. Tenney


Justice/Justice of the Peace 

Date:

ATTACHMENT A

RELEVANT STATUTES

This investigation concerns alleged violations of:

638:26 Identity Fraud. –

I. A person is guilty of identity fraud when the person:

(a) Poses as another person with the purpose to defraud in order to obtain money, credit, goods, services, or anything else of value;

(b) Obtains or records personal identifying information about another person without the express authorization of such person, with the intent to pose as such person;

(c) Obtains or records personal identifying information about a person without the express authorization of such person in order to assist another to pose as such person; or

(d) Poses as another person, without the express authorization of such person, with the purpose of obtaining confidential information about such person that is not available to the general public.

II. Identity fraud is a class A felony.

III. A person found guilty of violating any provisions of this section shall, in addition to the penalty under paragraph II, be ordered to make restitution for economic loss sustained by a victim as a result of such violation.

638:3 Tampering With Public or Private Records. – A person is guilty of a misdemeanor if, knowing he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, public or private, with a purpose to deceive or injure anyone or to conceal any wrongdoing.

638:19 Venue. –

I. In any prosecution for a violation of RSA 638:17 the offense shall be deemed to have been committed in the town in which the act occurred or in which the computer system or part thereof involved in the violation was located.

II. In any prosecution for a violation of RSA 638:17 based upon more than one act in violation thereof, the offense shall be deemed to have been committed in any of the towns in which any of the acts occurred or in which a computer system or part thereof involved in a violation was located.

III. If any act performed in furtherance of the offenses prohibited by RSA 638:17 occurs in this state or if any computer system or part thereof accessed in violation of RSA 638:17 is located in this state, the offense shall be deemed to have occurred in this state.

DEFINITIONS OF TECHNICAL TERMS USED IN THIS AFFIDAVIT

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The following definitions may or may not apply to this Affidavit:

638:16 Computer Crime; Definitions. -- For the purpose of this subdivision:

I. "Access" means to instruct, communicate with, store data in, retrieve data from, intercept data from, or otherwise make use of any computer, computer network, computer program, computer software, computer data, or other computer resources.

II. "Authorization" means the express or implied consent given by a person to another to access or use said person's computer, computer network, computer program, computer software, password, identifying code, or personal identification number.

III. "Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communication facility directly related to or operating in conjunction with such device. The term "computer" includes any connected or directly-related device, equipment, or facility which enables the computer to store, retrieve, or communicate computer programs, computer data, or the results of computer operations to or from a person, another computer, or another device, but such term does not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.

IV. "Computer contaminant" means any set of computer instructions that are designed to modify, damage, destroy, record, or transmit information within a computer, computer system, or computer network without the authorization of the owner of the information. They include, but are not limited to, a group of computer instructions commonly called viruses or worms, that are self-replicating or self-propagating and are designed to contaminate other computer programs or computer data, consume computer resources, modify, destroy, record, or transmit data, or in some other fashion usurp the normal operation of the computer, computer program, computer operations, computer services, or computer network.

V. "Computer data" means any representation of knowledge, facts, concepts, instruction, or other information computed, classified, processed, transmitted, received, retrieved, originated, stored, manifested, measured, detected, recorded, reproduced, handled, or utilized by a computer, computer network, computer program, or computer software, and may be in any medium, including, but not limited to, computer print-outs, microfilm, microfiche, magnetic storage media, optical storage media, punch paper tape, or punch cards, or it may be stored internally in read-only memory or random access memory of a computer or any other peripheral device.

VI. "Computer network" means a set of connected devices and communication facilities, including more than one computer, with the capability to transmit computer data among them through such communication facilities.

VII. "Computer operations" means arithmetic, logical, storage, display, monitoring, or retrieval functions or any combination thereof, and includes, but is not limited to, communication with, storage of data in or to, or retrieval of data from any device and the human manual manipulation of electronic magnetic impulses. A "computer operation" for a particular computer shall also mean any function for

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which that computer was designed.

VIII. "Computer program" means an ordered set of computer data representing instructions or statements, in a form readable by a computer, which controls, directs, or otherwise influences the functioning of a computer or computer network.

IX. "Computer software" means one or more computer programs, existing in any form, or any associated operational procedures, manuals, or other documentation.

X. "Computer services" means computer access time, computer data processing, or computer data storage, and the computer data processed or stored in connection therewith.

XI. "Computer supplies" means punch cards, paper tape, magnetic tape, magnetic disks or diskette optical disks or diskettes, disk or diskette packs, paper, microfilm, and any other tangible input, output, or storage medium used in connection with a computer, computer network, computer data, computer software, or computer program.

XII. "Computer resources" includes, but is not limited to, information retrieval, computer data processing, transmission and storage, and any other functions performed, in whole or in part, by the use of a computer, computer network, computer software, or computer program.

XIII. "Financial instrument" includes, but is not limited to, any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction authorization mechanism, marketable security, or any computerized representation thereof.

XIV. "Owner" means any person who owns or leases or is a licensee of a computer, computer network, computer data, computer program, computer software, computer resources, or computer supplies.

XV. "Person" means any natural person, general partnership, limited partnership, trust, association, corporation, joint venture, or any state, county, or municipal government and any subdivision, branch, department, or agency thereof.

XVI. "Property" includes:

- (a) Real property;
 - (b) Computers and computer networks;
 - (c) Financial instruments, computer data, computer programs, computer software and all other personal property regardless of whether they are:
 - (1) Tangible or intangible;
 - (2) In a format readable by humans or by a computer;
 - (3) In transit between computers or within a computer network or between any devices which comprise a computer; or
 - (4) Located on any paper or in any device on which it is stored by a computer or by a human;
- and
- (d) Computer services.

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Source. 1985, 139:1. 2002, 261:1, eff. Jan. 1, 2003.

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“Internet” refers to a global network of computers and other electronic devices that communicate with each other. Due to the structure of the Internet, connections between devices on the Internet often cross state and international borders, even when the devices communicating with each other are in the same state.

“Internet Company” references business entities that exist on the internet, and may or may not have a brick and mortar facility. The company(s) may provide free or fee based services. Any internet company is capable of offering methods of online communications (ie. messaging, email, chat room, etc) and file transfer capabilities between users.

“Internet Service Providers” (ISPs), as used herein, are commercial organizations that are in business to provide individuals and businesses access to the Internet. ISPs provide a range of functions for their customers including access to the Internet, web hosting, e-mail, remote storage, and co-location of computers and other communications equipment. ISPs can offer a range of options in providing access to the Internet including telephone based dial-up, broadband based access via digital subscriber line (DSL) or cable television, dedicated circuits, or satellite based subscription. ISPs typically charge a fee based upon the type of connection and volume of data, called bandwidth, which the connection supports. Many ISPs assign each subscriber an account name – a user name or screen name, an “e-mail address,” an e-mail mailbox, and a personal password selected by the subscriber. By using a computer equipped with a modem, the subscriber can establish communication with an ISP over a telephone line, through a cable system or via satellite, and can access the Internet by using his or her account name and personal password.

“Internet Protocol address” or **“IP address”** refers to a unique number used by a computer to access the Internet. IP addresses can be dynamic, meaning that the Internet Service Provider (ISP) assigns a different unique number to a computer every time it accesses the Internet. IP addresses might also be static, if an ISP assigns a user’s computer a particular IP address which is used each time the computer accesses the Internet. IP addresses are also used by computer servers, including web servers, to communicate with other computers. Each IP address is unique to an individual user or computer at time of use; meaning no two accounts can share the same IP address at any given time. ISPs have the ability to identify the assigned location of an IP address under their control at any given date and time.

“Mobile devices” (*“laptops,” “digital storage devices,” “cellular phones,” “iPods,” “tablets,” “mobile gaming systems,” and others*) have the capability to take and store digital images, video, and text documents; and electronically transmit such files to other digital devices. The contents of most digital devices can be easily moved from place to place either electronically or physically by moving the device itself. It is common knowledge that due to the

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mobility of these devices, users often carry them in daily life activities such as to work, school, recreation and while driving a motor vehicle.

“**Website**” consists of textual pages of information and associated graphic images. The textual information is stored in a specific format known as Hyper-Text Mark-up Language (HTML) and is transmitted from web servers to various web clients via Hyper-Text Transport Protocol (HTTP).

PROCEDURE FOR SEIZED COMPUTERS AND RELATED DEVICES:

This search warrant covers and controls the procedure for searching: (1) electronic or computer devices, related equipment or media which has been authorized to be seized pursuant to this warrant on the basis that it is contraband or a direct instrumentality used to commit the crime, and (2) electronic or computer devices, related equipment or media for which seizure has not been specifically authorized. Law enforcement is authorized to seize and remove from the premises such electronic or computer device, including computer system input/output (I/O) peripheral devices, software and media so that a qualified personnel can accurately search for and retrieve the data in a laboratory or other controlled environment in order to search and retrieve the data or information authorized to be searched for and seized pursuant to this warrant.

Law enforcement and qualified personnel working with law enforcement are authorized to seize the relevant system software (operating systems, interfaces and hardware drivers), any applications software which may have been used to create the data (whether stored on hard drives or on external media), as well as all related instruction manuals or other documentation and data security devices (including but not limited to passwords, keycards and dongles) in order to facilitate the authorized search. In addition, if necessary for data retrieval, they are authorized to reconfigure the system in order to accurately search for and retrieve the evidence stored therein. If, after inspecting the input/output (I/O) devices, software, documentation and data security devices, the analyst determines that these items are no longer necessary to search for, retrieve and preserve the data, and if the software, documentation and devices have not been seized pursuant to the warrant as contraband or instrumentalities of the crime, the items shall be returned to the owner.

In regard to the search and inspection of an electronic or computer device, and any related equipment or media for seizure of information or data which is authorized to be seized, law enforcement is directed to analyze the electronically stored data, whether on-site or off-site in a laboratory or other controlled environment, by using techniques which serve to keep the search within the authorization of this warrant, such as: (a) surveying various file “directories” and the individual files they contain in order to locate evidence and instrumentalities authorized for seizure by the warrant; (b) “opening” or reading the first few “pages” of such files in order to determine their precise contents; (c) “scanning” storage areas to discover and possibly recover recently deleted data, and “scanning” storage areas for deliberately hidden files; and (d)

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performing electronic "keyword" searches through all electronic storage areas to determine whether occurrences of language contained in such storage areas exist that are intimately related to the subject matter of the investigation.

This search is to include all areas of the digital media, whether password protected or encrypted, including, but not limited to hidden partitions, directories, and files, erased files, deleted files, files marked for deletion, slack space, and unallocated space on the drive and other electronic storage devices and media.

This warrant specifically authorizes the creation of a "duplicate image" or "bit for bit image" of a device, drive or media for use in an off-site search. In general, imaging is the taking of a complete electronic picture of the devices or media, including all hidden sectors and deleted files, to obtain an exact copy of the device, drive or media's stored data without actually making physical changes to the device, drive or media. Law enforcement or qualified personnel will then conduct a search for information or data described in the warrant from the "duplicate image" copy.

JUSTIFICATION FOR OFF-SITE SEARCH:

Searching electronic or computer devices for criminal evidence can be a highly technical process requiring specialized skills and a properly controlled environment. The vast array of electronic and computer hardware and software extant may require a computer expert who specializes in specific systems and applications, all of which may be impossible to ascertain before the search. Moreover, data search protocols are exacting scientific procedures designed to protect the integrity of the evidence and to recover even hidden, erased, compressed, password-protected or encrypted files.

Because electronic and computer evidence is vulnerable to inadvertent or intentional modification or destruction (both from external sources and from destructive code imbedded in the system as a 'bobby trap'), a controlled environment may be necessary to complete an accurate analysis. Consequently, this warrant authorizes the temporary seizure of electronic or computer devices and their I/O peripheral devices, related software, documentation, data security devices (including passwords) and media so that a qualified personnel can accurately retrieve the data in a laboratory or other controlled environment.

When an electronic or computer device, hardware, equipment, software or media has been seized for off-site search and analysis, law enforcement shall prepare an inventory of all the property and items seized by them pursuant to the warrant. This inventory will identify each electronic or computer device, related equipment or media which will be subject to off-site search for additional information. A copy of the inventory will be provided to the suspect or left at the scene of the seizure. An additional copy will be provided to the court with the return of warrant service.

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INFORMATION TO BE SEIZED

Instrumentalities, fruits, and evidence of the aforementioned criminal violations located at:

**1832 Candia Road
Manchester, NH 03109.**

Photographs of the above described location are attached to and made part of this addendum. In addition to the residence above and the mobility of certain electronic devices (cellular telephones, iPad, laptops) it is requested that the person(s) identified as authorized users and or vehicles listed to such person(s) as described are locations of where such evidence may be located.

The warrant specifically includes all outbuildings and structures located on the property to include, but not limited to, any and all rooms, closets, shelves, cabinets, dressers, drawers, storage areas, trash receptacles, boxes, dumpsters, compartments, purses, wallets, clothing, and safes, whether open, closed, sealed, locked or unlocked, vehicles that Richard Exline DOB: 06/10/1965 and Suzanne Roy DOB: 05/20/1966 has access to.

The items specifically sought include:

- a. any computer, computer system, mobile digital device, camera, commercial software and hardware, computer disks, disk drives, monitors, computer printers, modems, data disks, system disk operating systems, magnetic media floppy disks, hardware and software operating manuals, hard drive and other computer related operation equipment, photographs and other visual depictions of such graphic interchange formats (JPG, GIF, TIF, AVI, and MPEG), electronic data storage devices (hardware, software, diskettes, backup tapes, CDs, DVD, flash memory devices, thumb drives, and other storage media); and any input/output peripheral devices, passwords, data security devices, and related security documentation;

For any computer or storage medium whose seizure is otherwise authorized by this warrant, and any computer or storage medium that contains or in which is stored records or information that is otherwise called for by this warrant:

- b. evidence of who used, owned, or controlled the computer, electronic devices and cellular telephones at the time the things described in this warrant were created, edited, or deleted, such as logs, registry entries, configuration files, saved usernames and passwords, documents, browsing history, user profiles, email, email contacts, "chat," instant messaging logs, photographs, and correspondence;
- c. evidence of software that would allow others to control the computer, electronic devices and cellular telephones, such as viruses, Trojan horses, and other forms of malicious software, as well as evidence of the presence or absence of security software designed to detect malicious software;

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- d. evidence of the lack of such malicious software;
- e. evidence of the attachment to the computer , electronic devices and cellular telephones of other storage devices or similar containers for electronic evidence;
- f. evidence of counter-forensic programs (and associated data) that are designed to eliminate data from the computer , electronic devices and cellular telephones
- g. evidence of the times the computer , electronic devices and cellular telephones was used;
- h. passwords, encryption keys, and other access devices that may be necessary to access the computer , electronic devices and cellular telephones
- i. documentation and manuals that may be necessary to access the computer , electronic devices and cellular telephones or to conduct a forensic examination of the computer , electronic devices and cellular telephones;
- j. records of or information about Internet Protocol addresses used by the computer , electronic devices and cellular telephones ;
- k. records of or information about the computer , electronic devices and cellular telephones Internet activity: firewall logs, caches, browser history and cookies, "bookmarked" or "favorite" web pages, search terms that the user entered into any Internet search engine, and records of user-typed web addresses; and
- l. contextual information necessary to understand the evidence described in this attachment.
- m. Routers, modems, and network equipment used to connect the computer , electronic devices and cellular telephones to the Internet
- n. Any and all records, documents, invoices, notes and materials that pertain to accounts with any Internet Service Provider, as well as any and all records relating to the ownership or use the computer , electronic devices and cellular telephones found in the residence;
- o. Documents and records regarding the ownership and/or possession of the searched premises;
- p. Credit card information, bills, and payment records
- q. Any correspondence/records indicating the true identity of any member or user of Comcast account #8773201800135180 – E-mail User Ids: rexline and suzeroy, which end in @comcast.net

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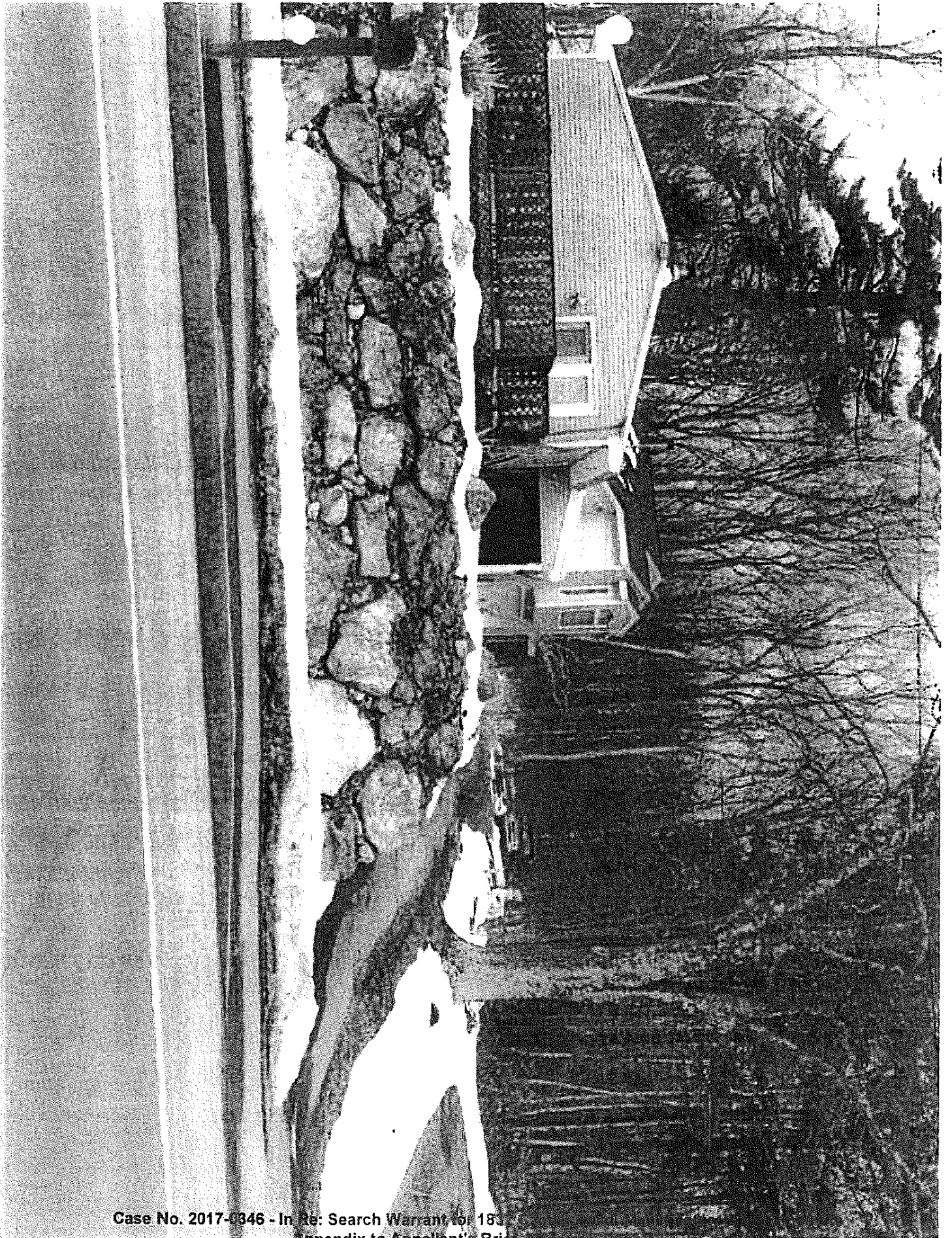
As used above, the terms "records" and "information" refer to all forms of creation or storage, any form of computer or electronic storage (such as hard disks or other media that can store data); any handmade form (such as writing); any mechanical form (such as printing or typing); and any photographic form (such as prints, videotapes, motion pictures, or photocopies).

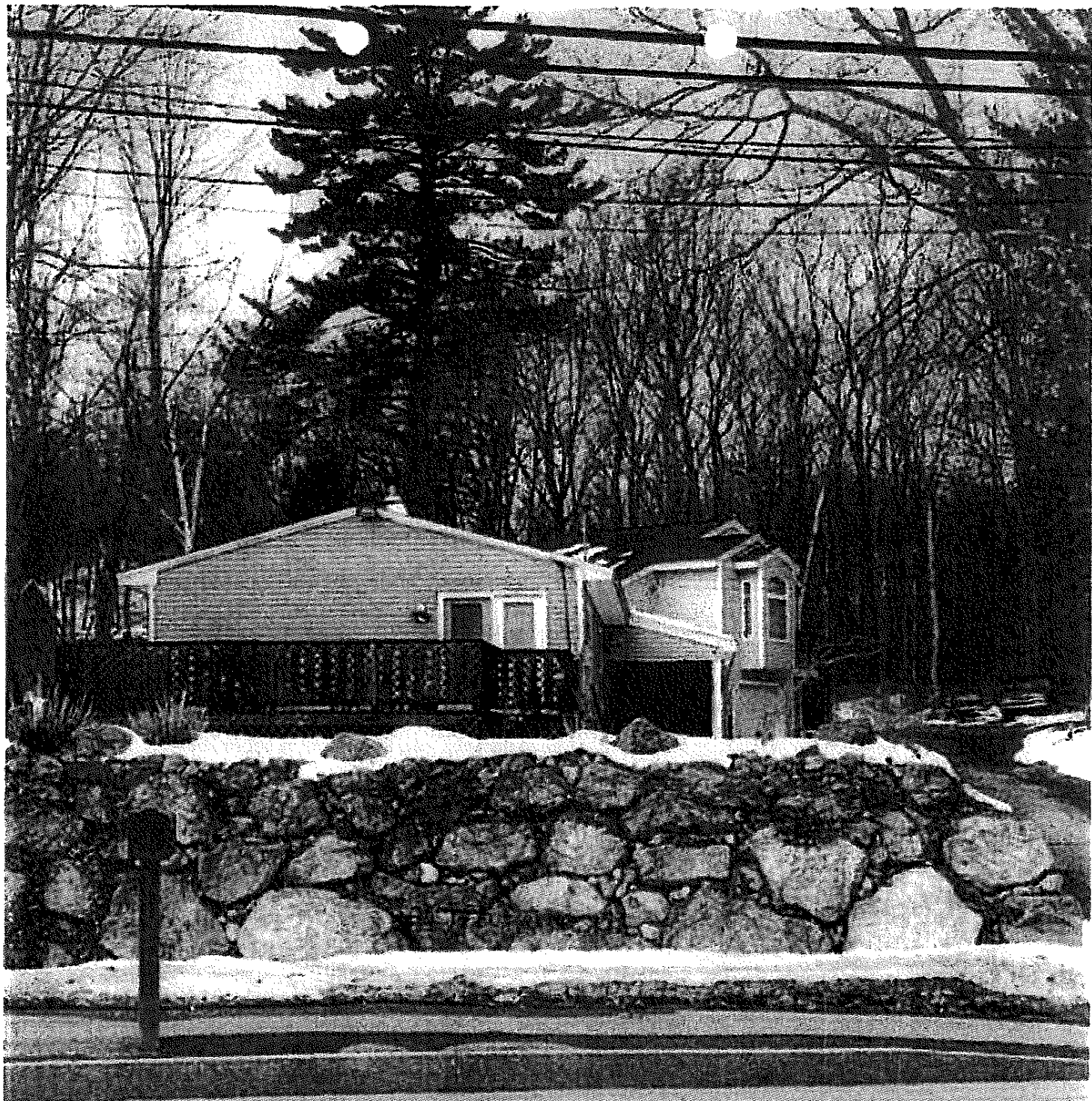
The term "computer" refers to all types of electronic, magnetic, optical, electrochemical, or other high speed data processing devices performing logical, arithmetic, or storage functions: desktop computers, notebook computers, mobile phones, tablets, server computers, smart phones, and network hardware.

The term "storage medium" refers to any physical object upon which computer data can be recorded. Examples are hard disks, RAM, floppy disks, flash memory, CD-ROMs, and other magnetic or optical media.

During the course of the search, photographs of the searched premises may also be taken to record the condition thereof and/or the location of items therein.

Wherefore, I request that the court issue a warrant and order of seizure of the property described above and, further, that the court authorize said property to be examined by qualified personnel employed by the New Hampshire State Police, the New Hampshire State Police Forensic Laboratory or under direction of the New Hampshire State Police, any other law enforcement agency possessing the ability to conduct electronic based forensic or technical analysis, and/or any other private or public sector individual or business possessing the ability to conduct electronic based forensic or technical analysis, on any or all portions of the seized property within a controlled environment.







Legal Response Center
650 Centerton Road
Moorestown, NJ 08057
866-947-8572 Tel
866-947-5587 Fax

CONFIDENTIAL

January 23, 2017

VIA E-DELIVERY

George A. Stewart, Assistant County Attorney
Office of the Merrimack County Attorney
4 Court Street
Concord, NH 03301
Fax: (603) 226-4447

Re: Subpoena
Comcast File #: 800089

Dear Mr. Stewart:

The Subpoena received on 1/20/2017 with respect to the above-referenced matter has been forwarded to the Legal Response Center for a reply. The Subpoena requests Comcast to produce certain subscriber records pertaining to the following IP address: 73.186.187.254 assigned on 8/05/2016 at 09:30:40 PDT (UTC-7) (08/05/2016 at 16:30:40 UTC (PDT+7)).

Based on the information provided pursuant to the Subpoena, the subscriber information obtained has been provided below:

Subscriber Name: RICHARD E EXLINE
Service Address: 1832 CANDIA RD
MANCHESTER, NH 03109-5700
Telephone #: 603-361-4766
Type of Service: High Speed Internet Service
Account Number: 8773201800135180
Start of Service: Unknown
Account Status: Active
IP Assignment: Dynamically Assigned
E-mail User Ids: rexline, suzeroy
(the above user ID(s) end in @comcast.net)

If you have any questions regarding this matter, please feel free to call 866-947-8572.

Very Truly Yours,

Comcast Legal Response Center



Legal Response Center
650 Centerton Road
Moorestown, NJ 08057
866-947-8572 Tel
866-947-5587 Fax

BUSINESS CERTIFICATION OF RECORDS

Comcast File #: 800089

I, Kathleen Loughrin, as the legal analyst for Comcast Legal Response Center, located at 650 Centerton Road, Moorestown, NJ, do hereby certify under penalties of perjury that I am the custodian of records for Comcast Cable Communications, Inc. and the attached documents are true and accurate copies of our business records, made, maintained, and/or prepared by our company in the course of regularly conducted business activity.

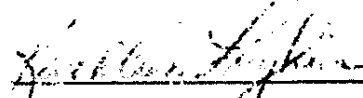
These records were made by the Comcast Legal Response Center who has knowledge of the matters contained in the records.

It is further certified that the records were made at or near the time of the occurrence of the matters set forth, by a person with knowledge or from information transmitted by a person with knowledge of those matters. The records were made and kept in course of regularly conducted business activity and it is a regular practice of our company to make and keep such records.

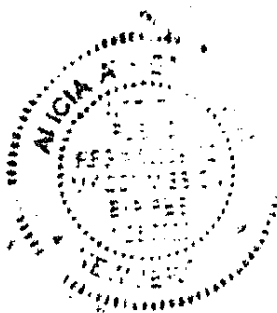
The attached documents: Comcast's response to a request for subscriber records.

January 23, 2017

Date


Kathleen Loughrin, Legal Analyst
Comcast Legal Response Center
650 Centerton Road
Moorestown, New Jersey 08057
(866) 947-8572

SWORN TO AND SUBSCRIBED before me on the 23rd day of January 2017




Notary Public in and for the State of New Jersey

Alicia Kettinger
Notary Public's name and date commission expires:

GB

My Commission Expires
January 26, 2020