STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2019-0206

Union Leader Corporation and
The American Civil Liberties Union of New Hampshire

v.

Town of Salem
and
Salem Police Relief, NEPBA Local 22
and
Robert Morin, Jr.

BRIEF OF APPELLEE, TOWN OF SALEM

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM SUPERIOR COURT

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FACTS AND STATEMENT OF THE CASE

Contrary to the description of this lawsuit provided by the Union Leader Corporation ("Union Leader") and American Civil Liberties Union of New Hampshire ("ACLU") in their opening briefs, Appellants do not seek audit reports and addenda from the Salem Police Department. As Appellants begrudgingly acknowledge, the audit reports and addenda have been disclosed. Rather this lawsuit is solely about the redaction of certain names from the reports and addenda, not the findings, analysis, or conclusions in the report. Parsed down, the facts of this case focus on the appropriateness of redacting names under RSA 91-A. This case is not about whether an entire audit report is exempt from disclosure, and it is therefore not an avenue for this court to abandon *Union Leader v. Fenniman*, 136 NH 624 (1993) and is progeny as advocated by appellants.

Audit Report

"Kroll was engaged by the law firm, Drummond & Woodsum, on behalf of the Town of Salem, New Hampshire, to audit operations and efficiencies of the Salem, New Hampshire Police Department (Salem PD), namely relating to the following:

- Time and attendance practices of personnel within the Salem PD, and
- Internal Affairs investigative practices within the Salem PD"

Kroll, "Report of Investigation (Internal Affairs)," ACLU APX I 038. "Kroll received not only complaints where violations were sustained, but also documents

from several unfounded and unsustained complaints." *Id.* at 062. The Kroll Report (Report) is "based on a review of 29 separate complaints." *Id.* at 063.

In addition to reviewing and commenting on specific internal affairs investigation files,

> Kroll was retained by the Town of Salem, New Hampshire ("Salem" or the "Town") to conduct a forensic accounting audit of the daily operations and staffing at the Salem Police Department ("SPD"). More specifically, the Town had become aware of allegations that employees of the SPD were working Outside Details that overlapped with their normal scheduled shifts.

Report, Time and Attendance, Section 2, ACLU APX II 247. As the trial court observed, "the audit report is itself an investigation into internal personnel practices." Brief p. 44 (Order, p. 10). Nevertheless, "the publicly available version of the audit report describes those [operational] concerns, provided the underlying evidence supporting those concerns (with names, dates and places redacted), and includes all of the proposed changes in policy." Brief p. 38 (Order, p. 4).

Upon its completion, the Town of Salem voluntarily released to the public redacted copies of the Report and associated documents, posting the same on its website. The Report was redacted consistent with RSA 91-A:5, IV. All redactions, with a few exceptions, were limited to names, pronouns, and information that would identify individuals. Brief p. 36 (Order, p. 2.) With respect to the substance of the Report, the Town refers the Court to the ACLU's Brief, which provides a detailed analysis of the condition of the Police Department drawn from the Report.

After release of the Report, the Union Leader and ACLU filed suit seeking an unredacted copy. Prior to trial, appellants secured copies of unredacted pages

75-89, and therefore those pages were no longer viewed as being in dispute in this case. *See, Notice of Post Trial Fact*. Similarly, at trial, appellants further limited their appeal by disclaiming any interest in securing access to names of private individuals. Transcript (T), p. 8-9. As they explained, they "sought to narrow the issues to documents and information concerning official police misconduct – police conduct. That's what we're seeking." T. 9. The trial court sustained the redactions dealing with names and identifying information. In upholding the redaction of names, the court commented that the information was properly redacted as a personnel practice, stating it decided to "uphold most of the Town's redactions in this section of the audit" concerning internal affairs practices. Brief, p. 37 (Order p. 3). It also upheld "most, but not all, of the Town's redactions" in the Time and Attendance section of the Report. Brief p. 38 (Order p. 4).

This Appeal ensued.

SUMMARY OF ARGUMENT

If the purpose of the Right-to-Know law is to allow citizens to know "what the government is up to," then that purpose was served when the Town of Salem voluntarily released the Kroll Report, so vividly described by the appellants in their complaint and briefs. Appellants attempt to shift the focus of this appeal to issues that are not, and never have been, in controversy. This case is not about whether the entire Kroll Report is exempt from disclosure under RSA 91-A. Rather, it is about the release of names of employees who have been subjects of the disciplinary process, whether sustained, unsustained or under investigation. Appellants would elevate a mere accusation to a compelling public interest.

The trial court reviewed the report line-by-line, and ensured that only names and identifying information have been redacted. As a consequence, this case does not present an opportunity or rationale for overturning *Fenniman* or *Hounsell*. There has been no request for any investigation files or documents.

There is no public interest served by the release of employee names. While appellants purport to want the release of the names so that the public can hold each employee "accountable," under the law in New Hampshire, hiring, evaluating, investigating, disciplining, and firing employees has never been vested in individual citizens or town meeting.

In the 26 years since disciplinary investigation files were identified as categorically exempt under the "personnel practices" exemption, that conclusion has been repeatedly reaffirmed by this Court, and the legislature has not altered its policy, despite having amended RSA 91-A numerous times. This legislative policy is in distinct contrast to the Freedom of Information Act exemption 2, which by court interpretation has been rendered devoid of content. It is not error on the part of this Court to imbue our exemption with substance. Nor is the Court rendered unable to determine whether documents are properly within the exemption.

ARGUMENT

I. THE REDACTION PROCESS ENGAGED BY THE TOWN WAS TARGETED AND LIMITED, AND FACILITATED THE TRANSPARENCY DESIRED BY THE TOWN.

> *"[W]hile the Town's redactions may prove nettlesome to the taxpayers and voters, for the most part the publicly available, redacted version of the audit report provides the reader with*

a good description of both the individual investigations that the auditors reviewed and the bases for the conclusions."

Brief, p. 38 (Order, p. 4).

Contrary to the appellants' characterization, they do not seek a copy of the Kroll Report. That Report has been released and the redactions reviewed by the trial court. As the court concluded, "[t]he redactions in the publicly available report serve mainly to shield the identity of the affected employees." Brief, p. 49 (Order p. 15). The appellants want the names of employees involved in disciplinary investigations, and nothing more. *See*, ACLU Brief, p. 23. That is all this case is about.

"The Right-to-Know Law does not guarantee the public an unfettered right of access to all governmental workings." *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 707 (2010). Releasing redacted documents is common practice here and across the country. *See, e.g. New Hampshire Right to Life v. Director, New Hampshire Charitable Trust Unit*, 169 N.H. 95 (2016). In *Coleman v. Lappin*, 680 F. Supp. 2d 192, 197 (D.D.C. 2010) (cited approvingly in, *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 532 (2016)), and cases cited therein, the court approved the redaction of individuals' names from investigative reports as a legitimate means of preserving the privacy interests of employees. *See also*, *Direct Action for Rights and Equality v. Gannon,* 713 A.2d 218 (R.I. 1998) (police department records pertaining to civilian complaints of police misconduct released, subject to redaction of names); *Beck v. Dep't of Justice*, 997 F. 2d 1489, 1493 (D.C. Cir. 1993) (identity of two relatively low level government wrongdoers not subject to

disclosure.). In *Department of the Air Force v. Rose*, 425 US 35 (1976), a case very similar to the present one, the Supreme Court ordered release of case summaries of proceedings before the Air Force Academy Honor Committee, with "personal references or other identifying information deleted."

Here, the Town's redactions are limited and targeted. Names of employees that were subjects of investigations are redacted. Brief, pp. 39-47 (Order pp. 5-13). In addition, identifying information, such as gender, dates, the identity of interviewees, names of investigators, references to location (vacation) and other information necessary to preserving the anonymity of the employee is redacted. *Id.* At times, the simple expedient of redacting a name or a pronoun was sufficient to eliminate identifying information. At other points it was necessary to redact an interview or more extensive information. The trial court generally agreed. "The court reviewed the un-redacted audit report *in camera* and compared it, line by line, to the redacted version that was released to the public. What this laborious process proved was that – with a few glaring exceptions – the Town's redactions were limited to" identifying information of employees. Brief p. 36 (Order p. 2).

Appellants' complaint and briefs broadly support this proposition. After offering the opinion the Report is "scathing," the Complaint extensively references its substance. See, e.g., Complaint, ¶¶20-37; T. 24 ("Given the fact that the Kroll Report concluded, in substantial detail, that the Salem Police Department is mismanaged..."); ACLU Brief, p. 7 ("The Report paints the picture of a police department in New Hampshire's 7th largest municipality that is badly in need of reform."); ACLU Brief pp 8-11

(containing detailed quotes and analysis of Report). "The reasonableness of any restriction on the public's right of access to any governmental proceeding or record must be examined in light of the ability of the public to hold government accountable absent such access." *Associated Press v. State*, 153 N.H. 120, 125(2005) If the purpose of the Right-to-Know Law is to allow the citizens to know "what the government is up to," *Union Leader Corp*, 141 N.H. at 476, the redacted Report made available to the public and appellants, serves that purpose. The Salem town government has been held accountable.[1]

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1 Katherine Underwood, "2 More Salem, NH Police Officers Named in AG Probe," *NECN* (Feb 18, 2019);

Madeline Hughes, "Crash Helped Spark Salem Police Audit and AG's Investigation," *Eagle Tribune* (Jun 17, 2019);

Breanna Edelstein, "Dillon Says Little About Salem Police Audit," Eagle Tribune (Nov 27, 2018);

Kristen Carosa, "Former Deputy Police Chief Files Defamation Lawsuit Against Salem," *WMUR.com* (May 31, 2019);

Cheryl Fiandaca, "I-Team: FBI Investigates Salem, NH Police After Controversial Arrests," *https://boston.cbslocal.com/2018/12/03/salem-new-hampshire-police-arrests-hockey-coach-wbz-tv-i-team-cheryl-fiandaca/* (Dec 3, 2018);

Breanna Edelstein, "New Version of Police Audit Includes Names, New Details Little New in Less-Redacted Version Ordered by Judge," *Eagle Tribune.com* (Apr 26, 2019);

Ryan Lessard,"Report Blasts Salem Police for Handling of Officer Complaints, Internal Investigations," *Union Leader* (Nov 23, 2018);

Stephen Owsinski, "Salem NH Police Bump Heads with Town Leaders, Chief Goes Off Grid Before Resigning," *OpsLens Content Manager and Contributor* (Dec 15, 2018);

Ryan Lessard, "Salem Police Chief Announces Resignation Under Cloud of Critical Audit, Allegations of Wrongdoing," *Union Leader* (Dec 6, 2018);

Breanna Edelstein, "Salem Sued for Unredacted Police Audit," *Eagle Tribune* (Dec 28, 2018);

Paul Donovan, "Salem, NH Police Chief Resigns After Audit," *WBZ-4 Boston* (Dec 6, 2018).

The ability to redact identifying information facilitated the release of the Report.

II. THIS CASE DOES NOT PROVIDE AN OPPORTUNITY OR BASIS FOR OVERRULING EXISTING LAW.

This is a case about limited redactions, targeted at anonymizing information regarding employee disciplinary matters in order to make available to the public information regarding the performance of its government. There has been no request for underlying files or documents. Instead, appellants ask this Court to strip the anonymity from the reported disciplinary investigations and Time and Attendance investigation.

The redacted information must be withheld because it represents either "internal personnel practices," which are categorically exempt from disclosure, or "personnel...and other files whose disclosure would constitute invasion of privacy," under RSA 91-A:5, IV. Appellants claim that it is neither, and further argue the cases of *Union Leader v. Fenniman*, 136 NH 624 (1993) and *Hounsell v. N. Conway Water Precinct*, 154 N.H. 1 (2006), which construed the "personnel practices" exemption, were wrongly decided and choose this case as the vehicle to have them overruled.

"The doctrine of *stare decisis* demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." *State v. Balch*, 167 N.H. 329, 344 (2015). In *Fenniman* at 627, decided in 1993, this Court observed:

> Although we have often applied a balancing test to judge whether the benefits of nondisclosure outweigh the benefits

> of disclosure, such an analysis is inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt.

(Citations omitted). The Court recognized this to be a policy decision of the legislature. *See*, *State v. Balch*, 167 N.H. at 333-34 ("The wisdom and reasonableness of the legislative scheme are for the legislature, not the courts, to determine, and disputes regarding such should be addressed to the General Court."); *see also*, T. 61 (plaintiffs seeking legislative changes under House Bill 153). In 1997, this Court affirmed *Fenniman*, noting a "balancing test [is] inappropriate where [the] legislature has plainly determined that certain documents are categorically exempt under RSA 91-A:5,IV" and distinguishing that case from the case at bar, which required the application of a balancing test. *Union Leader Corporation v. N.H. Housing Finance Authority,* 142 N.H. 540, 553(1997). Thirteen years later, an entirely new *banc* of the Court reaffirmed *Fenniman* in *Hounsell*. And although RSA 91-A has been amended numerous times since 1993, the legislature has not sought to alter the Court's conclusion regarding the legislature's intent in any way. Appellants ask this Court to engage in an exercise of judicial will.

None of the four factors employed by this Court to determine whether a prior decision has come to be seen as clear error are satisfied in this case. *State v. Balch*, 167 N.H. at 334. Certainly there is no basis for arguing existing law defies practical workability. *Id.* It has been applied on numerous occasions in a rational and meaningful way. Indeed, the opposite is true. Volunteer, local officials would be called upon to apply a subtle and elusive test in the face of the looming threat of attorney's fees,

fines and remedial training if they are wrong. "The first factor weighs against overruling when a rule is easy to apply and understand." *Id.*

No statute of limitations applies to RSA 91-A requests. Such requests are not limited in scope or time. Thousands of employees at every level of government, retired and currently employed, have come to rely on *Fenniman*, which has been the law for 26 years. Overturning *Fenniman* would reopen untold numbers of requests previously denied. In each case, society has come to rely upon the established law.

The existing rule is not vestigial. At the time this Court established the rule in *Fenniman* it was well aware that the Court "often applied a balancing test," but eschewed its application under the category of "personnel practices," based on legislative policy.

The facts have not changed. The Union Leader brought suit in *Fenniman* and returns to exactly the same issue here.

III. THE REDACTED INFORMATION WAS PROPERLY EXCLUDED FROM DISCLOSURE AS "INTERNAL PERSONNEL PRACTICES"

The Town agrees that the ACLU fairly characterizes the matter at issue as "personnel practices information." ACLU Brief, p. 11. There are two separate provisions of RSA 91-A:5, IV which bear upon the disclosure of personnel related information. *Clay v. City of Dover*, 169 N.H.681, 685 (2017). First, there are files related to "internal personnel practices." RSA 91-A:5, IV. Second, RSA 91-A, IV exempts from disclosure "personnel... or...other files whose disclosure would constitute invasion of privacy." The two exemption categories are not amenable to rigid definition, which would deprive courts flexibility to deal with new facts and issues as may be

presented in the future. Basic statutory construction rules require that "all of the words of a statute must be given effect and that the legislature is presumed not to use superfluous or redundant words." *Appeal of Derry Educ. Assoc.*, 130 N.H. 69, 71 (1993) (quotation omitted). Contrary to appellants' argument, *ACLU* Brief, pp. 16-22, the redacted information in the Kroll report is properly considered an "internal personnel practice" under RSA 91-A:5, IV, and categorically exempt from disclosure.

A. REDACTIONS FROM THE KROLL REPORT ARE "INTERNAL PERSONNEL PRACTICES" INFORMATION

i. The Work Undertaken by Kroll Was an "Internal" Investigation of Employee Conduct and Contained Confidential Information from Disciplinary Investigations

Where, as here, the investigators are performing the investigation on behalf of the employer, and the targeted individual is an employee, the resulting investigation is an "internal" personnel practice. "*Hounsell* involved a Right-to-Know Law request for an investigative report prepared for defendant North Conway Water Precinct by outside investigators." *Reid v. New Hampshire Attorney General,* 169 N.H. at 521. The Court "rejected the petitioner's contention that 'the investigation lost its 'internal status' because among other things, 'the Precinct contracted with outside investigators.'" *Id.* As with the report in *Hounsell,* the Kroll Report represents an "internal" investigation. It was performed on behalf of the Town, discusses disciplinary investigations and investigates employees with respect to time and attendance. It is a quintessential example of an

internal personnel practice, and therefore is categorically exempt from disclosure under 91-A:5,IV and *Clay*.

It does not matter where these personnel records are maintained. *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 601 (1982) (stating broadly construing the terms 'similar files' in FOIA's exemption 6, that "information about an individual should not lose the protection of exemption 6 merely because it is stored by an agency in records other than 'personnel' or 'medical files'"). Indeed, "[u]ntil the investigation produces information that results in the initiation of disciplinary process, public policy requires that internal investigation files remain confidential, see RSA 516:36,II (1997), and separate from personnel files." (citation omitted) *Pivero v. Largy*, 143 N.H.187, 191(1998). "A substantial portion of the redacted information in the Audit Report was gleaned from the Salem PD's own internal affairs investigations." Union Leader Brief, p.22. The identifying information in the Report is drawn from disciplinary files, and did not lose its confidential character when the investigative files were summarized.

ii. Internal Disciplinary Investigations are "Personnel Practices," Consistent with the Statute's Language and the Legislature's Policy

"When construing a statute, the Court first examines the language found in the statute and where possible, ascribes the plain and ordinary meaning to words used." *Appeal of Garrison Place Real Estate Inv. Trust*, 159, N.H. 539, 542 (2009). "Records Pertaining to Internal Personnel Practices" includes "'the condition of employment' in a governmental agency, **including such matters as hiring and firing, work rules and**

discipline, compensation and benefits." (emphasis added) *Clay*, 169 N.H. at 686 (*quoting Milner v. The Department of the Navy*, 562 U.S. 562, 569 (2011)). "'Personnel'..., when used as an adjective,...refers to human resources matters." *Reid*, 169 N.H. at 522. The ordinary meaning of the word "practice" is "the actual application or use of an idea, belief, or method, as opposed to theories relating to it; to apply an action." https://www.oxforddictionaries.com. Disciplinary investigations are "a quintessential example of an internal personnel practice." *Fenniman*, 136 N.H. at 626. Completed Rubric forms relate to hiring, "which is a classic human resource function," as they "pertain to 'personnel practices' **as that term is used in the Right-to-Know Law**." (emphasis added). *Clay*, 169 N.H. at 686; *see also*, *Montenegro v. City of Dover*, 162 N.H. 641, 650 (2011) (concluding that job titles of persons who monitor city surveillance equipment did not pertain to a personnel practice because job titles "are not akin to such matters as hiring, firing, work rules, or discipline." (quoting *Clay* at 686-687)). "The Time and Attendance audit was an archetypical workplace investigation into personnel issues. It is the very paradigm, the Platonic Ideal, of a record pertaining to 'internal personnel practices.'" Brief, p. 49 (Order p. 15).

Further, the Court does not construe statutes in isolation, but instead "will attempt to do so in harmony with the overall statutory scheme." *Soraghan v. Mt. Cranmore Ski Resort, Inc.*, 152 N.H. 399, 405 (2005). Under RSA 91-A:3, II(a), boards may categorically meet in non-public session to consider the "disciplining" of an employee "or the investigation of any charges against him or her." It would be an odd public policy indeed

that permits a board to undertake and discuss a disciplinary investigation in confidence, but if it is placed in writing it loses its confidential character.

Appellant's textual interpretation of the statute is grammatically incorrect. A semicolon is used to identify independent clauses connected without a conjunction. *See* Merriam-Webster (defining semicolon as "used chiefly in a coordinating function between major sentence elements (such as independent clauses of a compound sentence)."). The last adjectival clause in RSA 91-A:5, IV ("whose disclosure would constitute invasion of privacy") applies only to the final clause ("files"). The word "files" distributes the invasion of privacy clause to all the adjectives set off by commas (personnel files, medical files, etc.). All of the clauses are related as they are exemptions, but they remain independent.

While this Court has considered federal rulings under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for "guidance," *Clay v. City of Dover*, 169 N.H. at 685, it has never abdicated its role as "the final arbiter of the legislature's intent." *Id.* According to the U.S. Supreme Court FOIA's exemption 2, 5 U.S.C.552(b)(2), is intended "to relieve agencies of the burden of assembling and maintaining for public inspection matters in which the public could not reasonably be expected to have an interest." *Rose*, 425 U.S. at 369-370. This Court has never set a floor below which the public may not ask for a document. Nor has the legislature seen fit to so limit public access. *See*, RSA 91-A:1-a, III (broadly defining governmental records). Rather, this Court has chosen to imbue the "internal personnel practices" exemption with substance, in contrast to federal law.

FOIA's exemption 2 "relate[s] **solely** to the internal personnel rules and practices of an agency."(emphasis added). Significantly, the New

Hampshire Legislature has chosen not to so limit our personnel practices exemption. Nor does it mention "rules." It follows the two laws should be interpreted differently. *Reid,* 160 N.H.at 521 ("our construction of the 'internal personnel practices' exemption in RSA 91-A:5, IV is markedly broader than the United States Supreme Court's interpretation of that exemption's federal counterpart.").

Appellant's further reliance on the Massachusetts Court of Appeals' decision in *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester* is misplaced. First, in *Worcester Telegram*, the city argued "all" material in the file "is categorically exempt . . . [as] it is part of a disciplinary report." 787 N.E.2d 602, 605 (Mass. App. 2003). The material the city withheld "consisted of police reports, incident reports, cards reflecting police details and rosters, arrest logs, commercial phone book listings, [] a computer printout from a hockey league website . . . memorandum from the chief . . . about the incident, . . . witness interviews, a report and supplemental report, and . . . the results of the internal affairs investigation." *Id.* at 606. Worcester's attempt to withhold an entire investigative file from the public's view stands in direct contrast to the narrowly tailored identifying information redacted by Salem. Second, *Worcester Telegram* held certain information fell within the Commonwealth's categorical exemption. *Id.* at 609 (Legislature "intended that the bricks and mortar of the investigation . . .fall outside the exemption," but "the actual order and notice of disciplinary action issued as a personnel matter . . . [is] to be exempt."). Finally, and most notably, *Worcester Telegram* expressly stated it was not addressing whether "the proper names and other identifying information of the complainant, the

witnesses, and police officers should be redacted" because it was not an issue on appeal. *Id.*at 2003. Simply put, the precise issue facing this Court (whether identifying information should be redacted) was expressly not addressed by the Massachusetts Court of Appeals in *Worcester Telegram.*

Moreover, the ACLU's citation to legislative history promises more than it delivers. Representative Bednar merely refers to the fact that "[t]he Federal Government enacted a right-to-know act," and at the same time noted that two states in New England have not. ACLU ADD 57. There was no discussion of RSA 91-A:5 or its exemptions.

The Court did not commit an error in its construction of the statute in *Fenniman* and *Hounsell.* Placing "quintessential," *Fenniman*, and "classic human resources function," *Clay*, employment proceedings under the personnel practices exemption does no damage to independent consideration of other documents in a personnel file, such as an employee's compensation. *See*, *Montenegro v City of Dover*, *supra*. *Mans* and *Fenniman* can coexist comfortably.

B. The Categorical Exemption Applied to "Personnel Practices" is Consistent with the Statute's Language and the Legislature's Policy

Appellants argue that the Court erred when it applied a categorical exemption, rather than a balancing test, to "records pertaining to internal personnel practices." However, it was the Legislature, and not the Court, which established this policy. This conclusion is supported by the legislative history, structure of the statute, and over two decades of precedent from this Court.

In *Fenniman* 136 N.H. at 626, the Court considered the legislative history of RSA 516:36, II, which "revealed" "[t]he legislature's intent with regard to RSA 91-A:5, IV." At the same time the legislature was considering passage of what is now RSA 516:36, II, it was overhauling RSA 91-A. The Court stated the legislative history and remarks of Representative Sytek "indicate an assumption that RSA 91-A exempted police internal investigatory files from public disclosure." *Id.* at 627(Representative Sytek: "Protection for these files, which will remain confidential under the Right-to-Know law, will encourage thorough investigation and discipline of dishonest or abusive officers."). Moreover, the second sentence of paragraph IV makes express the legislature's policy that "investigative files" are "confidential": "**Without otherwise compromising the confidentiality of** the files, nothing in this paragraph shall prohibit a public body from releasing information relative to health or safety from **investigative files** on a limited basis to persons whose health or safety may be affected." (emphasis added).

Appellants' argument that RSA 516:36 is not relevant as it deals with admissibility, rather than disclosure, is unavailing. Reference to the statute in *Fenniman* was directed at the Legislature's policy, not admissibility. Furthermore, in *Perras v. Clements*, 127 N.H. 603(1986), the Court denied the plaintiff's request for the disclosure of certain appraisal reports under RSA 91-A, observing "the most relevant portion of the information sought by the plaintiff is available through the normal discovery process." *Id* at 605. The requested documents were admissible, but not subject to disclosure under RSA 91-A.

Similarly, in *Pivero v. Largy*, 143 N.H. 187(1998) a police officer's demand for copies of investigative files which related to him was denied on public policy grounds. He argued they were part of his personnel file, and the trial court agreed, noting RSA 91-A:5 applied to public access, not the right of access of an employee to a copy of the personnel file. This Court disagreed: "Until an internal investigation produces information that results in the initiation of disciplinary process, **public policy requires the internal investigation files remain confidential**, and **separate** from the personnel file." (emphasis added). *Id* at 191. Here the Report includes unsustained investigations, as well as a direct investigation of Time and Attendance issues that have not yet made it to the disciplinary stage. Yet appellants demand the names of the employees, regardless.

Nothing has occurred in the last 26 years that would suggest the Legislature has changed its policy. Although the Legislature has amended RSA 91-A multiple times in this period, it has never reproached the categorical exemption applied in *Fenniman* and *Hounsell*. "The wisdom and reasonableness of the legislative scheme are for the legislature, not the courts, to decide." *Blackthorne Group v. Pines of Newmarket*, 150 N.H. 804 (2004). "[T]he legislature is institutionally better equipped to determine what any such changes should be." *Polonsky v. Town of Bedford,* 171 N.H. 89, 97 (2018); *cf. In re Grand Jury Subpoena (issued July 10, 2006)*, 155 N.H. 557, 562 (2007) (stating that legislature is institutionally better equipped to decide whether adopting new privilege is in society's best interests).

Plaintiffs' reliance upon *Mans v. Lebanon School Board*, 112 N.H. 160, 162 (1972) and *Union Leader Corp. v. NH Housing Authority*, 142

N.H. 540 (1997) is likewise misplaced. Both of these cases construed the exemption governing "confidential, commercial, or financial information." Unlike the present case, where the legislature has provided two exemptions governing personnel information, the "confidential, commercial or financial" information exemption has no counterpart in RSA 91-A:5, IV. If the same test is applied to both exemptions, one would expect a consistent result. It follows there would be no purpose in the legislature having provided two exemptions.

Furthermore, in *Mans*, the word "confidential" was construed to require a balancing test. *Id.* at 553 **("to determine whether [records]...are confidential,** the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government." (emphasis added) (Quoting *Chambers v. Gregg,* 135 N.H. 478, 481 (1992)). *Cf. Grafton County Attorney's Office v. Canner*, 169 N.H. 319, 324(2016) (describing RSA 91-A:5, IV as "exempting from disclosure 'confidential... information' and 'files whose disclosure would constitute invasion of privacy.'"). The word "confidential" does not apply to the "internal personnel practices" exemption. Additionally, in deciding both *NH Housing Authority* (1997) and *Fenniman* (1993) the Court was well aware of the *Mans* balancing test first articulated in 1972. *Mans*' holding regarding confidential information has never been applied to the "personnel practices" exemption. In fact, in *NH Housing Authority* the Court expressly acknowledged the Legislature has determined a categorical, non-balancing exemption applies for "internal personnel practices." 142 N.H. at 553 (citing *Fenniman*, 136 N.H. at 627).

Appellants' remedy lies with the Legislature. And that is why they have been lobbying the Legislature (unsuccessfully) to change the law. Transcript ("T") p. 61 ("and then the Petitioners are – yesterday were at the statehouse testifying on behalf of a bill that would change that interpretation; House Bill 153. Dealing with this very issue...").

V. A BALANCING TEST IS NOT BEFORE THE COURT, AND WHILE THE PUBLIC HAS A RIGHT TO KNOW WHAT THE GOVERNMENT IS UP TO, THERE IS NO PUBLIC INTEREST IN THE NAMES OF EMPLOYEES INVOLVED IN DISCIPLINARY INVESTIGATIONS

"The Trial Court did not perform a balancing inquiry in reaching its decision." Union Leader Brief p. 7. It did not discuss any privacy interest. It did not discuss any public interest. And it did not discuss any balancing of the competing interests. In its Order the court expressly stated it was not engaging in a balancing test, as it was "forbidden" from doing so:

> To paraphrase the famous quote, you apply the law that you have, not the law you might want. A balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report. Yet, New Hampshire law construing the "internal personnel practices" exemption forbids the court from making this balance and requires the court to uphold most of the Town's redactions in this section of the audit.

Brief, p. 37 (Order p. 3). Any discussion regarding balancing by the trial court was, at most, *dicta*. *See Tyler v. Hannaford Bros.*, 161 N.H. 242, 247 (2010) ("ancillary observation[s] . . . [are] akin to dicta . . ."). Analysis and discussion about what the trial court might or should do as part of a

balancing test is not properly included as part of this appeal. *See Marshall v. Burke*, 162 N.H. 560, 565 (2011) (Court does not review dicta where "the point now at issue was not fully debated," and does not review "a point of law where the holding is only implicit or assumed in the decision but is not announced."). Despite this posture, the ACLU analyzes whether the sustained redactions to the Kroll Report should be disclosed on balance. ACLU Brief, pp. 22-26.

To be sure, no analysis regarding a balancing test is needed because the information at issue is categorically exempt. This policy is based on the sound and well-supported reasoning of the Legislature. However, the subject is addressed here as the appellants argue in their briefs for a balancing test.

A. The Public Has An Interest in What The Government Is Up To, But Not The Names of Individual Employees

"The public has a strong interest in disclosure of information pertaining to its government's activities." *NH ACLU v. City of Manchester*, 149 N.H. 437, 442 (2003). "Conversely, if disclosure of the requested information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted even though the public may nevertheless prefer, albeit for other reasons, that the information be released." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 477 (1996). That is why the Town released the Report voluntarily. The public deserved to know the analysis of the investigations referenced in the Report. But Appellants have no interest in what the government is up to. Rather they seek the names redacted from the Report. ACLU Brief at 23. The public interest in disclosure is nil.

Appellants argue that they want "the public to hold accountable specific officers listed in the Report." *Id.* Recall that the information in the Report included unfounded investigations, as well as mere allegations in the Time and Attendance section, which have yet to be considered by the Town. No doubt plaintiffs seek public disclosure in order to "subject the person…to embarrassment, harassment, disgrace, loss of employment or friends," the very reason why this information has been characterized as private by this Court. *Reid*, 160 N.H. at 530 (*quoting Brown v. Federal Bureau of Investigation*, 658 F.2d 71, 75 (2nd Cir. 1981)). Neither individual citizens nor town meetings have ever played a role in the management or disciplining of employees of a town.

Appellants' reliance on such cases as *Mans v. Lebanon School Board* and *Union Leader Corp. v. NH Retirement System*, 162 N.H. 673 (2011) is misplaced. Revealing one's salary received from the government is a considerable distance from being associated with misconduct. There is no "disgrace" or "embarrassment" associated with such disclosure. As the Court explained, "salaries of public officials and employees, both state and municipal, had been commonly published in different venues 'without significant damage to individual dignity or the efficient management of the State system.'" *Professional Firefighters of NH v. Local Government Center*, 159 N.H. 699, 708 (2010). Furthermore, citizens convened at town meeting are well aware of, debate and vote on labor contracts on a regular basis. *Mans* at p. 164. Indeed they are voting on cost items, which include salaries and retirement payments. *See generally, Appeal of Sanborn Regional School Board*, 133 N.H. 513 (1990). Neither the citizens nor the town meetings are involved in the employment process. They do not hire

or fire. *See, e.g.*, RSA 41:48 (board of selectmen may terminate employment of police officers only for cause and following a hearing). They do not perform any disciplinary function, and disciplinary hearings are considered in nonpublic session. They do not evaluate. In sum, they exercise no authority with respect to the management and control of employees. Beyond platitudes about holding employees accountable, appellants offer no law in support of their conclusory statement. On the other hand, the release of names would be contrary to the public interest. How should a citizen hold a police officer accountable? In the event of a traffic stop, should the citizen engage in a confrontation with the officer or show disrespect? Creating a confrontation is not the goal of the Right-to-Know Law. Perhaps this is why so many courts have declined to release names, while at the same time ordering the release of investigation summaries.

Appellants' efforts to criminalize the disciplinary process notwithstanding, it is not yet a crime to be disciplined at work. Nor is it the way of a "democratic society" to single out and subject individual employees to obloquy. If the conduct is criminal, it may be handled as such, and the employee will be subject to the same process as every other citizen.

"The public has a significant interest in knowing that a government investigation is comprehensive and accurate." *Reid v. New Hampshire Attorney General*, 169 N.H. at 532. "Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism." *Professional Firefighters of N.H. v. Local Government Center, Inc.*, 159 N.H. 699, 709 (2010). On the other hand, "a *public* interest in non-disclosure has been

noted where records relate to the investigation of alleged wrongdoing by public employees." *Reid,* 169 N.H. at 509 (emphasis in original). As the Court observed in *Hounsell*, 154 N.H. at 5, there may be other reasons for withholding investigatory files or parts thereof:

> public policy supports the investigation of complaints of misconduct by *all* public employees so that public bodies and agencies can take appropriate remedial action, especially where such a complaint alleges harassment or intimidation of another employee. It argues that the disclosure of records underlying, or arising from, internal personnel investigations would deter the reporting of misconduct by public employees, or participation in such investigations, for fear of public embarrassment, humiliation, or even retaliation. We find that the disclosure of the Hunt-Alfano report would implicate policy concerns similar to those underlying the disclosure of an "internal police investigatory file."

Providing identifying information of individuals involved in disciplinary investigations, unsustained, sustained, and under review, will add nothing to the public's knowledge of what the "government is up to," but will surely stigmatize the individual employees.

B. There is a Privacy Interest at Stake

Appellants are unequivocal in their position: "the department and its officers have no privacy or confidentiality interests." Complaint, p. 20, ¶A. Appellants argue this absolute position must be extended to all public employees, as appellants also seek to overrule *Hounsell*. This Court has resolved the question to the contrary, finding there is a privacy interest at stake in information contained in a disciplinary investigation. For the "personnel files" exemption: "the categorical exemption of RSA 91-A:5, IV

means...that it is sufficiently private, that it must be balanced against public interest and disclosure." *Reid*, 169 N.H. at 528 (brackets omitted). In other words, the information at issue meets the threshold of implicating the employees' privacy interests.

As the court succinctly stated in *Coleman*, 680 F.Supp. 2d at 199, "even a federal government employee maintains some privacy interest in records regarding her employment." The 4th Circuit observed:

> One who serves this state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.

Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978).

Even under FOIA's exemption 6, 5 U.S.C. 552(b)(6), the names associated with disciplinary investigations have been redacted. Relying in part on *Rose*, *supra*, the court in *Hunt v Federal Bureau of Investigation*, 972 F2d 286, 288 (9th Cir. 1992) concluded, "[a] government employee generally has a privacy interest in any file that reports on an investigation that could lead to the employee's discipline or censure." In *Beck v Department of Justice*, 997 F2d 1489, 1493(D.C. Cir. 1993), the court concluded, "the identity of one or two individual relatively low-level government wrongdoers, released in isolation, does not provide information about the agency's own conduct." *See also*, *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (explaining *Rose*, the Court observed:"[T]he names of the particular cadets

were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code."). Importantly, the Court concluded that because there is nothing in such information that would in itself shed light on the employer agency's actions, there is no public interest in its release. *Id.* at 773-74.

While these cases may have involved FOIA's exemption 6, to date New Hampshire's "personnel practices" exemption applies to the very same material. "[T]he FOIA's exemption 6 has been held to apply to the 'kind of facts [that] are regarded as personal because their public disclosure would subject a person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *Reid*, 160 N.H. at 530 (*quoting Brown* 658 F.2d at 71-75). "Thus in determining whether any privacy interests are at stake in disputed materials, the trial court should consider whether disclosure would subject the individual to a kind of embarrassment or reputational harm described above." *Id.*

Here, there are several privacy interests at stake. The Report reviewed seven internal investigations where the charges were not sustained. Kroll Report (Internal Affairs), ACLU APX I 073. In the Time and Attendance portion of the Report, there are detailed documents addressing the investigation into employees' work schedules. The police chief's response indicates: "two incidents _____ referred to in the Kroll Report are open and ongoing matters." Police Chief response, ACLU APX I 221. There are discussions of an employee's vacation. This information reveals not only personnel information, but also personal information. The plaintiffs "would elevate a mere accusation to a compelling public interest." *Beck* 997 F.2d at 1492.

Can there be any argument that personalized revelation of the information already made available would lead to embarrassment and disgrace? An employee has a privacy interest in not being associated with an investigation of his or her conduct. *Cf.*, *Union Leader Corp. v. City of Nashua*, at 477 ("individuals have strong interest in not being associated unwarrantedly with alleged criminal activity [and] protection of his privacy interest is the primary purpose of the FOIA Exemptions."); *Hunt*, 972 F.2d at 288. In today's super-charged social media environment, can anyone claim the employees would not suffer harassment?

VI. CATEGORICAL EXEMPTIONS UNDER RSA 91-A:5 ARE NOT INHERENTLY UNCONSTITUTIONAL

The New Hampshire Constitution provides that "the public's right of access to governmental proceedings and records shall not be **unreasonably** restricted." New Hampshire Constitution, Pt 1, Art 8 (emphasis added). This Court has never suggested the right of public access established under the Constitution is any broader than that established by the Legislature. The constitutional right of access to government records must yield to reasonable restrictions. *Sumner v. New Hampshire Secretary of State*, 168 N.H. 667 (2016) (finding statutory exemption to RSA 91-A for cast ballots is constitutional). There is nothing unreasonable about withholding the identities of employees who have been involved in disciplinary matters, as previously explained. Moreover, a categorical exemption is not in and of itself unconstitutional. *See, e.g.* RSA 91-A:5, I (records of Grand and Petit Juries) and II and VII (School Records and Pupil Identification).

The citizens of New Hampshire have also weighed in on their concern regarding privacy. In 2018, the following Constitutional amendment was enacted by an 81% majority:

> Article 2-b [Right to Privacy]
>
> An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.

This Court has yet to consider the parameters of this amendment. It is noteworthy that the amendment uses the word "individual," which does not exclude government employees. But it is clear the citizens are concerned about the increasingly intrusive nature of government, in all its aspects.

CONCLUSION

For the foregoing reasons, the trial court's decision should be affirmed and the appellants' appeals should be dismissed.

REQUEST FOR ORAL ARGUMENT

Town of Salem requests the opportunity to present oral argument, not to exceed 15 minutes, to be presented by Barton L. Mayer, Esquire.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26(7) and contains 7,466 words, excluding cover page, table of contents, table of authorities, statutes, rules and appendix.

Respectfully submitted
TOWN OF SALEM
By Their Attorneys
UPTON & HATFIELD, LLP

Dated: October 1, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this date forwarded to Giles Bissonnette, Esquire, Henry Klementowicz, Esquire, Richard Lehmann, Esquire, Charles Douglas, Esquire, Gregory V. Sullivan, Esquire, Steven Buckley, Esquire and Peter Perroni, Esquire.

/s/ Barton L. Mayer
Barton L. Mayer

TRIAL COURT ORDER

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER

I. Introduction

The plaintiffs brought this case under the Right To Know Act, RSA Ch. 91-A, to obtain an unredacted copy of an audit report that is highly critical of the Salem Police Department. The audit was performed by a nationally recognized consulting firm retained by the Town of Salem's outside counsel at the Town's request. The audit looked at only two aspects of the police department's operations, i.e., its internal affairs investigative practices and its employee time and attendance practices. The audit report also includes an addendum that is critical of the culture within the police department and the role that senior police department managers have played in promoting that culture.

The Town has already released a redacted copy of the audit report to the public. The Town admits that the audit report is a governmental record that must be made available to the public in its entirety absent a specific statutory exemption. RSA 91-A:1-a,III; RSA 91-A:4,I and RSA 91-A:5. The Town argues that the redacted portions of the audit report fall within two such exemptions, namely those for "[r]ecords pertaining to internal personnel practices" and "personnel . . . and other files whose disclosure would

constitute invasion of privacy." RSA 91-A:5. The Town has not cited any other statutory exemptions.

The plaintiffs do not merely dispute the applicability of these exemptions, they also argue that the exemptions cannot be applied without violating their State constitutional right to access public records. N.H. Constitution, Part 1, Article 8. The Town disagrees, arguing that it honored its constitutional obligation by releasing the redacted report.

II. The Court's Review

The court reviewed the unredacted audit report *in camera* and compared it, line by line, to the redacted version that was released to the public. What this laborious process proved was that—with a few glaring exceptions—the Town's redactions were limited to:

(A) names, gender based pronouns, specific dates, and a few other incidental references that would identify the participants in internal affairs proceedings;

(B) names, dates and other identifying information relating to specific instances in which employees were paid for details they worked while they were also simultaneously paid for their shifts; and

(C) the name and specific instances in which a very senior police manager worked paid outside details during his regular working hours and purportedly, but without documentation, did so through the use of flex time rather than vacation or other leave time, contrary to Town policy.

III. Governing Law

To paraphrase the famous quote, you apply the law that you have, not the law you might want.[1] A balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report. Yet, New Hampshire law construing the "internal personnel practices" exemption forbids the court from making this balance and requires the court to uphold most of the Town's redactions in this section of the audit. Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993); see also Hounsell v. North Conway Water Precinct, 154 N.H. 1 (2006); Clay v. City of Dover, 169 N.H. 681 (2017).

The holdings in Fenniman, Hounsell and Clay, construing and applying the "internal personnel practices" exemption in RSA 91-A:5,IV, allow a municipality to keep police department internal affairs investigations out of the public eye. Indeed, Fenniman was grounded in part on legislative history suggesting that confidentiality (i.e. secrecy) would "encourage thorough investigation and discipline of dishonest or abusive police officers." Fenniman, 136 N.H. at 627.

Notwithstanding that sentiment, the audit report proves that bad things happen in the dark when the ultimate watchdogs of accountability—i.e. the voters and taxpayers—are viewed as alien rather than integral to the process of policing the police. Reasonable judges—including all five justices of the New Hampshire Supreme Court, joining together in a published opinion—have criticized the Fenniman line of cases.

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[1] "You go to war with the army you have, not the army you might want[.]," Donald Rumsfeld, December 8, 2004, (*Troops Put Rumsfeld In The Hot Seat*, available at www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html).

Reid v. New Hampshire Attorney General, 169 N.H. 509 (2016) (severely criticizing, but conspicuously not overruling Fenniman and Hounsell). Consistent with this criticism, reasonable judges in other states have read nearly identical statutory language 180 degrees opposite from the way Fenniman construed RSA 91-A:5,IV. See, e.g., Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003).

However, this court is bound by the Fenniman line of cases and must, therefore, uphold the Town's decision to redact the auditor's descriptions of specific internal affairs investigations. That said, as recounted below, while the Town's redactions may prove nettlesome to the taxpayers and voters, for the most part the publicly available, redacted version of the audit report provides the reader with a good description of both the individual investigations that the auditors reviewed and the bases for the auditor's conclusions.

The Time and Attendance audit is a more classical "internal personnel practices" record. To be sure, the Time and Attendance section of the audit report reveals operational concerns and suggests remedial policies. However, the publicly available version of the audit report describes those concerns, provides the underlying evidence supporting those concerns (with names, dates and places redacted), and includes all of the proposed changes in policy. Accordingly, the court must uphold most, but not all, of the Town's redactions in this section of the audit report.

With respect to plaintiff's constitutional argument concerning the "internal personnel practices" exemption, the New Hampshire Supreme Court has never suggested that the right of public access established by Part 1, Article 8 is any broader

than that established by the Legislature. See generally, Sumner v. New Hampshire Secretary of State, 168 N.H. 667, 669 (2016) (finding that a statutory exemption to Chapter 91-A for cast ballots is constitutional, and noting that such statutory exemptions are presumed to be constitutional and will not be held otherwise absent "a clear and substantial conflict" with the constitution).

With respect to plaintiff's constitutional argument concerning the "invasion of privacy" exemption, the court finds that the constitution requires no more than what the statute demands.

IV. Specific Rulings With Respect To The Internal Affairs Practices Section Of The Audit Report (i.e., Complaint Ex. A)

Arguably, the entire Internal Affairs Practices section of the audit report could be squeezed into the "internal personnel practices" exemption. However, because the Town released a redacted version of the report, the court looked at each specific redact in light of what has already been disclosed. The court then determined which redactions could be justified under the "internal personnel practices" exemption or the "invasion of privacy" exemption.

The court's rulings are set forth in page order. Although the terminology does not fit exactly, for the sake of clarity the court either "sustained" (i.e. approved) or "overruled" (i.e. disapproved) each redaction as follows:

A. The redactions on **page 7** are overruled. These redactions do not fall within either claimed exemption. The relevant paragraph describes a conversation between the Town director of recreation and a police supervisor. It was not part of an internal affairs investigation or disciplinary proceeding. The audit report does not even name

the supervisor. It just refers to him or her as "a supervisor." The Town apparently redacted the reference to "a supervisor" to avoid embarrassment: The gist of the passage was that a police supervisor condoned the use of force as form of street justice, contrary to both civil and criminal law. The supervisor told the auditor, "Well, if you are going to make us run, you are going to pay the price." The public has a right to know that a *supervisor* believes that it is appropriate for police officers to use force as a form of extra-judicial punishment.

B. The redactions on **page 36** are overruled. These redactions do not fall within either exception. They simply refer to the facts that (a) a lieutenant was caught drunk driving, (b) an officer left a rifle in a car and (c) there was an event at an ice center. There is no reference to any named individual or to anything specific about any investigation. In today's parlance, the discussion on page 36 is just too meta to fall within either exemption.

C. The redactions on **Page 38** are sustained because they fall within the "internal personnel practices" exemption. They reference the pseudonym of the involved officer and provide the date of the investigation.

D. With the exceptions set forth below, all of the redactions in **Section 5 (pp. 39-91)** are sustained because they fall within the "internal personnel practices" exemption. The audit report does not identify the subject of any internal affairs investigation. Instead it uses pseudonyms such as "Officer A," "Lieutenant B," "Supervisor C," etc. The Town redacted (a) the names of the internal affairs investigators, (b) the names of the individuals who assigned the investigators to each case, (c) in some cases the gender of one or more persons (i.e. the pronouns "he," "she," "his," "her" etc.), (d) the

dates of the alleged incidents of misconduct, (e) the dates of the investigations. All of this was done to protect the identity of the participants in specific internal affairs investigations. This is permissible. The Town also redacted a few locations, as well as other specific facts that might identify a participant. For example, the Town redacted the fact that one individual was a K9 handler, presumably because the Town had specific reasons for believing that information would unmask one or more of the participants. The court finds that this was permissible.

That said, a few of the redactions in Section 5 cannot withstand scrutiny, and are, therefore, overruled, i.e.

- **Page 46-47** was over-redacted. The supervisor should be identified as a supervisor. The employee should be identified as such. Doing so would not intrude upon their anonymity. To this extent the redactions are overruled.

-**Page 58** was over-redacted. It should be made clear that the individual did not take a photograph of the injury. The redaction changes the substantive meaning of the sentence. To this extent the redactions are overruled.

-The term "supervisor" on **page 66** should not have been redacted. The term "supervisor" was redacted from a sentence describing Kroll's (i.e. the outsider auditor's) "grave concern that a Salem PD **supervisor** expressed contempt towards complainants, ignored the policy requiring fair and thorough investigations and has an attitude that this department is not under any obligation to make efforts to prove or disprove complaints against his officers, especially one involving alleged physical abuse while in custody." Why should that "grave concern" not be shared with the public? This redaction is overruled.

-The reference to Red Roof Inn on **pages 67 and 72**, as a place that has seen its share of illicit activity, should not have been redacted. This reference does nothing to identity any participant in an investigation. Public disclosure of the reference might be deemed impolitic, but there is no exemption for impolitic opinions. This redaction is overruled.

-The entirety of **pages 75 through the top portion of page 89**, relating to a December 2, 2017 incident at a hockey rink was already made public. Those pages were originally heavily redacted. However, the unredacted pages were provided to a criminal defendant as discovery and the Town responded by making those pages public.

E. The redactions on **pages 93-94** are sustained because they fall within the "invasion of privacy exemption." These redactions do not relate to an internal affairs investigation. Essentially, a police supervisor spoke gruffly to his daughter's would-be prom date because he disapproved of him as a prospective boyfriend. The supervisor's comments did not relate or refer to his position. The supervisor's comments had nothing to do with the Salem Police Department. The prom date's mother was dissuaded from filing a formal complaint over the gruff comments. The redactions protect the privacy of the supervisor's (presumably) teenage daughter and her young friend. The public interest in the redacted passages is minimal, and is made even more minimal by the fact that most of the audit report has been made public already.

F. The redactions on **Page 99** are overruled. An individual contacted Kroll to explain that he spoke with Deputy Chief Morin and Chief Dolan about a complaint that he had. The individual was pleased with Morin's and Dolan's professionalism. He

decided not to file a complaint. The Town redacted Moran's and Dolan's names and ranks. These redactions do not relate to an internal affairs investigation because there was none. The redactions do not further any privacy interest.

G. The redactions on **page 100** are overruled because they do not fall within either exemption. The redactions do not relate to an internal affairs investigation. Rather, a resident contacted Kroll to complain that the Salem PD allegedly failed to enforce a restraining order. The phrase "restraining order" was redacted, for no apparent reason. No individual officer is identified, even by pseudonym.

H. The redactions on **page 101, item 6** are overruled because they do not fall within either exemption. Kroll was contacted by somebody who opined that complaints against supervisors were not taken seriously. No specific complaint or supervisor was discussed. The Town redacted the fact that the person who contacted Kroll was a former member of the Salem PD. The redaction serves no purpose and does not fall within either of the claimed exemptions.

I. The redactions on **page 101, item 7** are overruled. Kroll was contacted by a person who claimed that the Salem PD arrested a family member without probable cause. The Town redacted the portion of the passage that states the family member believed that the alleged victim in the case had a relationship with a supervisor. There was no internal affairs investigation. No individual is mentioned by name. The redaction does not fall within either of the claimed exceptions.

J. The redactions on **page 101-106, Item 8** are overruled. The redactions relate to statements that a town resident made to Kroll. These are not "internal personnel

practices" and there is no "invasion of privacy." An investigation was performed by the Attorney General's office, but this was an *"internal* personnel practice." See Reid.

K. The redactions on **pages 107 and 108** are all overruled because they do not fall within either claimed exemption. The Town redacted the names of individuals who called Kroll. These calls were not part of an "internal personnel practice." The callers did not ask for anonymity. They were coming forward. There is no invasion of privacy. Additionally, the redacted reference to the Red Roof Inn has nothing to do with personnel practices or personal privacy.

L. The redaction on **Page 109** is sustained. The pertinent paragraph refers to an internal affairs investigation described at pages 40-41. The same information is the subject of an earlier redaction.

M. The redactions on **Page 110** are overruled. They do not fall within either claimed exemption. The redactions related to Deputy Chief Morin's dual roles as (a) a senior manager and (b) a union president responsible.

N. The redactions on **Page 118, first full paragraph** are overruled. They do not relate to an internal affairs investigation or any other sort of personnel practice.

O. The redactions on **Page 118-119**, carryover paragraph are sustained. These relate to an individual employee's scheduling of outside details and time off. Those are classic "internal personnel practices" concerns. Although there is no indication as to whether the same facts are reflected in a formal personnel file, the audit report is itself an investigation into internal personnel practices. Therefore, under Fenniman, the court cannot engage in a balancing analysis but must instead sustain the redaction.

V. Specific Rulings With Respect To The Addendum To The Audit Report (i.e., Complaint Ex. B, "*Culture Within The Salem Police Department*")

A. The redactions on the **first two sentences of the third paragraph on Page 1**[2] of the Addendum are overruled. Essentially, the redacted material explains that it was the Chief who took "an extended absence" and "the rest of the week off. This is just a fact, not an "internal personnel practice," or a matter of personal privacy.

B. The remaining redactions in the **third paragraph on Page 1** of the addendum are sustained. Those redactions relate to the manner in which an employee arranged to take vacation leave and other time off from work. This is a classic internal personnel matter.

C. The redactions on the **carryover paragraph on Pages 1 – 2** are sustained for the same reason.

D. The **remainder of the redactions on Page 2** (i.e. those below the carryover paragraph) are overruled. Those redactions relate to operational concerns rather than "internal personnel practices." To be sure, the Chief is identified by name as being personally responsible for the Police Department's lack of cooperation with the Town Manager and Board of Selectmen. However, this was a Departmental policy or practice and the Chief was necessarily essential to the implementation of this policy or practice. The redactions do not fall within either of the claimed exemptions.

E. The redactions on **Page 4** are overruled. The redacted passages relate to comments made by Deputy Chief Morin concerning (a) his opinion of the Town

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[2]The original document was not paginated. **The page numbers refers to the Bates stamped numbers at the bottom of each page of Exhibit B to the Complaint (i.e. the redacted, publicly available document).**

Manager's credibility and (b) his thoughts as to why the outside auditor was hired. Morin makes reference to a citizen's complaint that the Town Manager referred to the Police Department. However, there is no reference to (a) the substance or nature of the complaint, (b) the year or month of the complaint, or (c) any subsequent investigation. There is no reference to an internal affairs investigation or any personnel proceeding. The redactions indicate that (a) Morin was a subject of the complaint and (b) the complaining party was female. The fact that a citizen made a complaint to the Town Manager is not, in and of itself, an "internal personnel practice." The redactions are not necessary to prevent an invasion of personal privacy.

F. The redactions on **Pages 5** are overruled. The Town redacted the outside auditor's opinions regarding statements that Deputy Chief Morin made on Facebook about the Town Manager. Those statements were disclosed in the publicly available, redacted copy of the report. The only thing that was kept from the public was the characterization of the statements by the auditors. Thus, the redactions do not relate to facts or to any sort of investigation, proceeding or personnel practice. Further, because Morin placed his comments on Facebook, (albeit in a closed group for Town residents), the auditor's opinions about those comments is not an invasion of Morin's personal privacy.

G. The redaction on **Page 6, on the carryover paragraph from Page 5,** is overruled. This redaction relates to post-hoc opinions that "human resources" gave to the auditors relating to Morin's statements on Facebook. However, there was no "internal personnel practice" or proceeding that flowed from Morin's statements. The

Town does not argue that any such practice or proceeding may be forthcoming. The made-for-the-audit opinion does not fall within either of the claimed exemptions.

H. The balance of the redactions on **Page 6** are overruled. Most of these redactions relate to comments about the workplace culture instilled by the Chief and Deputy Chief. Thus, they relate to operational issues, i.e. to the manner in which the department is operated and to the top executives' management style. To be sure, the comments are highly critical of the Chief and Deputy Chief, but not every alleged misstep or every problematic approach to managing a police department is an "internal personnel practice." The line between an operational critique and an "internal personnel practice" is sometimes blurry. In this case, there is no suggestion of a pending, impending or probable internal affairs investigation, disciplinary proceeding or informal rebuke. The information in the auditor's report does not come from a personnel file or from any document that should be in a personnel file. The court finds that the redactions do not fit within either of the claimed exemptions.

The other redactions on **Page 6** relate to the month and year that (a) an unidentified officer was cited for DUI and (b) an unidentified second officer left the scene of an accident without an alcohol concentration test. These facts are not "internal personnel practices." The officer's identities are not disclosed. The redactions do not fall within either claimed exemption and, therefore, they are overruled.

I. The redactions on **the first full paragraph of Page 7** are sustained. These redactions relate to "internal personnel practices." The redactions protect the identity of the participants in the investigation (i.e. the subject and the investigator).

J. The redactions in the **quoted remarks of Chief Donovan on Page 7** are sustained for the same reason. The redactions protect the identity of the witnesses in the internal affairs investigation.

K. The redactions on **the balance of Page 7 and on Pages 8-12** are sustained in part and overruled in part. These redactions relate to two internal affairs investigations involving the same police department employee. However, instead of simply redacting the names of the participants, the Town redacted six pages of facts and analysis. This is a marked departure from how the Town redacted virtually all of the other discussions of internal affairs matters. The court finds that:

1. The only IA participants who are referenced in the audit report are (a) the subject of the investigation and (b) a witness whose name appears on pp.10 and 11. Those individual's names were properly redacted.

2. The other named individuals were not involved in the IA investigation and, therefore, their names should not be redacted.

3. The tension between the Police Chief and the Town concerning the reporting of these matters to the Town authorities is an operational concern, not an "internal personnel practice."

4. The Chief's comments about the matters need not be redacted, except that the references to (a) the individual who was the subject of the investigation, (b) the witness in the investigation and (c) the dates of occurrences may be redacted.

VI. Specific Rulings With Respect To The Time And Attendance Section Of The Audit Report (Complaint Ex. B)

The redacted, publicly available version of the Time and Attendance section of the audit report indicates that a number of police employees (including twelve out of fifteen high ranking officers) were paid for outside details during hours for which they were also receiving their regular pay. To be fair, the audit report does not suggest chicanery or ill-motive. Apparently, the companies that paid for the details would pay for a set number of hours even when the details lasted for a shorter duration and even when the officers returned to work thereafter.

The publicly available version of the audit report also indicates that a very high ranking employee acted contrary to Town policy by working details during business hours and then making up the hours with flex time, rather than leave time.

The Time and Attendance audit was an archetypical workplace investigation into personnel issues. It is the very paradigm, the Platonic Ideal, of a record relating to "internal personnel practices." Nonetheless, the Town has made the bulk of this document public. The redactions in the publicly available report serve mainly to shield the identity of the affected employees.

A. Except to the limited extend described below, all of the redactions of employee names are sustained under the "internal personnel practices" exemption.

B. The dates of the outside work details and the identities of the outside parties that contracted for the details were unnecessarily redacted. Nobody could determine the identity of the affected employees from this information. Therefore, in light of what has already been released to the public, these redactions cannot be justified under

either of the claimed exemptions. The redactions of dates and outside contracting parties are overruled.

C. The court reluctantly sustains the redactions to the interviews of police department employees. These were investigative interviews that focused not only on operational issues but also on potential personnel infractions by the interviewees.

D. The court sustains the redactions to the interview of the former Town Manager for the same reason.

E. The reference to "higher-ranking" officers on **Page 15** of the report is overruled because the same information already appears elsewhere in the publicly available report.

F. The court overrules the redactions on **the last paragraph of Page 40** (relating to a finding with respect to the SPD detail assignment program). This paragraph discusses an operational concern and does not relate to any particular employee's alleged conduct. Therefore, these redactions do not fall within either of the claimed exemptions.

G. The court overrules the redactions on **Page 42.** The redactions do not apply to any specific individual. The issue was presented as an operational concern going forward rather than a personnel matter. The redactions do not fall within either of the claimed exemptions.

VII. Order

Within 21 days, the Town shall provide the plaintiff's with a copy of the audit report that contains only those redactions that have been sustained by this court. The

court will stay this order pending the filing of a notice of appeal upon motion by the Town.

April 5, 2019

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/05/2019