

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2019-0206

Union Leader Corporation and  
The American Civil Liberties Union of New Hampshire  
(Petitioners/Appellants)

v.

Town of Salem  
(Respondent/Appellee)

Robert Morin, Jr.  
(Intervenor Respondent/Appellee)

Salem Police Relief, NEPBA Local 22  
(Intervenor Respondent/Appellee)

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Rule 7 Mandatory Appeal from the New Hampshire Superior Court,  
Rockingham County  
Case No. 218-2018-cv-01406

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**OPENING BRIEF FOR UNION LEADER CORPORATION**

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## **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS**

### **CONSTITUTIONAL PROVISIONS**

#### **Constitution of New Hampshire, Part 1, Article 8:**

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings shall not be unreasonably restricted.

### **STATUTORY PROVISIONS AT ISSUE**

#### **N.H. R.S.A. c. 91-A:1 Preamble. -**

Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people

#### **N.H. R.S.A. c. 91-A:5 Exemptions. –**

The following governmental records are exempted from the provisions of this chapter:

I. Records of grand and petit juries.

I-a. The master jury list as defined in RSA 500-A:1, IV.

II. Records of parole and pardon boards.

III. Personal school records of pupils, including the name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the assessment under RSA 193-C:6.

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative

to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.

VI. Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

X. Video and audio recordings made by a law enforcement officer using a body-worn camera pursuant to RSA 105-D except where such recordings depict any of the following:

(a) Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

(b) The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

(c) An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure.

## **QUESTIONS PRESENTED FOR REVIEW**

1. Whether this Court should overrule its holding in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), that “internal personnel practices” under RSA 91-A:5, IV are categorically exempt from disclosure and adopt the balancing test ordinarily applied by the courts in a Right-to-Know case;

This issue was raised and preserved by the Petitioners/Appellants in the trial court. *See* Appendix to Brief, (hereinafter “APX.”), *Vol. I*, pp. 23-31, 295-297 and *APX. Vol. II*, p. 34.

2. Whether the trial court erred, as a matter of law, in finding that redacted portions of an audit report constitute “internal personnel practices” under RSA 91-A:5, IV, thereby triggering the rule in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993);

This issue was raised and preserved by the Petitioners/Appellants in the trial court. *See APX. Vol. I*, pp. 20-23 and *APX. Vol. II*, pp. 30-33.

3. Whether a categorical exemption of “internal personal practices” without a balancing inquiry, taking into account the public’s right to know what the government is up to, is a violation of Article I, Part 8 of the New Hampshire Constitution;

This issue was raised and preserved by the Petitioners/Appellants in the trial Court. *See APX. Vol. I*, pp. 294-297 and *APX. Vol. II*, pp. 34-45.

## **STATEMENT OF THE CASE**

On December 12, 2018, the petitioners/appellants, Union Leader Corporation, (hereinafter “Union Leader”), and the American Civil Liberties Union of New Hampshire, (hereinafter “ACLU of NH”), filed a Petition for Access to Public Records pursuant to the provisions of RSA Ch. 91-A, and Part I, Article 8 of the New Hampshire Constitution in the Rockingham County Superior Court, (hereinafter “Trial Court”). *APX. Vol. I, pp. 5-32*. Union Leader and ACLU of NH sought the release by the Town of Salem, (hereinafter “Salem”), of complete and unredacted<sup>1</sup> copies of a report prepared by Kroll, Inc., (hereinafter “Audit Report”), to audit the operations and efficiencies of the Salem Police Department, (hereinafter “Salem PD”). In addition to the Audit Report the ACLU of NH sought the release of a 14 page response prepared by the Chief of the Salem PD, dated September 19, 2018, and a 2 page memorandum from the Salem Town Manager, dated October 29, 2018. The Audit Report focused upon the Salem PD’s internal affairs investigative practices and time and attendance practices. *APX. Vol I, pp. 35-250*.

After a hearing and in camera review of the unredacted Audit Report, the trial court issued a Final Order, dated April 5, 2019, sustaining numerous redactions made by Salem based upon the internal personnel practices exemption of RSA Ch. 91-A:5, IV. The trial court did not perform a balancing inquiry in reaching its decision. The Trial Court ordered Salem to release the Audit Report with the sustained redactions

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<sup>1</sup> Union Leader and ACLU of NH did not seek the redaction of the names of any private citizens and specifically excluded such information from their Petition. *APX. Vol. I, p. 24*.

within 21 days. *See* Addendum, (hereinafter “ADD”), pp. XX; *APX. Vol. I*, pp. 275 – 347. In sustaining the redactions the Trial Court expressed grave misgivings about the penultimate holdings in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), and its progeny. The trial court reasoned that “you apply the law that you have, not the law you might want” and further stated that “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.” *ADD. p. 29*. Union Leader and ACLU of NH timely appealed the trial court’s April 5, 2019, Final Order, as it relates to the redactions sustained on the basis of the internal personnel practices exemption.



## **STATEMENT OF THE FACTS**

The following salient facts are not in dispute. Salem engaged the services of Kroll, Inc. to conduct the Audit Report. *APX. Vol. I, p. 38*. Salem engaged the services of Kroll, Inc., because it “had received informal complaints from individuals over the years stating that the internal affairs process at the Salem PD was perceived as unfair and incomplete” and that it “was known to discourage citizens from making formal complaints, and when complaints were, in fact, submitted, the investigative actions were insufficient or disregarded entirely.” *APX. Vol. I, p. 41*. The Audit Report focused upon the Salem PD’s internal affairs investigative practices and time and attendance practices.

The auditors, led by Daniel Linsky, former Superintendent-in-Chief of the Boston Police Department, conducted numerous interviews, reviewed department policies and procedures, internal affairs files and use of force and arrest reports. A substantial portion of the Audit Report was dedicated to summarizing 29 separate internal affairs investigative files. The Audit Report revealed, among other things, that in its internal affairs investigations Salem PD was treating formal complaints as informal complaints, closing internal affairs investigations too quickly, making it difficult for citizens to file complaints, failing to interview witnesses, failing to appropriately review excessive force complaints and destroying materials. *APX Vol. I, p. 73-125*. The Audit Report, also found, among other things that, “[s]erious allegations of misconduct were placed in limbo or discarded without a full or fair investigation, which seriously impacted the due process rights of citizens and the personnel of the Salem PD” and

“that citizens were actively dissuaded from filing complaints.” As a result of these revelations and findings the Audit Report recommended a “complete overhaul” of Salem PD’s internal affairs program. *APX. Vol I, pp. 149-150.*

Salem released a redacted version of the Audit Report to the public on November 21, 2018. *APX. Vol. I, p. 8 and APX., Vol. 1, pp. 255-266.* The majority of the redactions made by Salem related to the “names, gender based pronouns, specific dates, and a few other incidental references that would identify the participants in internal affairs proceedings”, the “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 “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...” *ADD., p. 28.* On November 8, 2018, the ACLU-NH submitted a Chapter 91-A request to Salem seeking, among other things, the “complete and unredacted independent audit report by Kroll Inc....”. *APX. Vol. I, p. 18.* On December 11, 2018, Salem stated that “[t]he redacted portions represent confidential personnel records, not subject to disclosure under RSA 91-A:5, IV.” *APX. Vol. I, p. 18-19.* On December 6, 2018, Union Leader reporter, Ryan Lessard, submitted a Chapter 91-A request to Salem seeking the “full, unredacted Kroll audit report.” *APX. Vol. 1, p. 242.* Salem rejected the Union Leader’s request the same day and stated that,

[t]he full, unredacted version of the Kroll audit is not open to a general 91-A request. The town’s attorney has redacted the

exempt portions of the report under 91-A:5. The town has shared what it is able to share.

*APX. Vol. 1, p. 18.* As a result of the Salem's responses, Union Leader and ACLU – NH filed a Petition for Access to Public Records pursuant to the provisions of RSA Ch. 91-A and Part I, Article 8 of the New Hampshire Constitution.

### **SUMMARY OF THE ARGUMENT**

There is one glaring exception to the traditional inquiry employed by the New Hampshire courts when considering Right-to-Know cases. In Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), this Court ruled that internal personnel practices are categorically exempt under RSA 91A-5, IV and eschewing the traditional balancing inquiry. The analysis in Fenniman was not well-reasoned and has been criticized by this Court in recent decisions such as Reid v. N.H. AG, 169 N.H. 509 (2016). The holding in Fenniman is a clear departure from the Right-to-Know law's purpose and presumption in favor of disclosure and should now be expressly overruled. Internal personnel practices should no longer be considered per se exemptions pursuant to RSA 91A-5, IV and the traditional balancing inquiry should be employed by the courts in determining if disclosure is warranted.

At the very least the facts of this case are readily distinguishable from Fenniman. The Audit Report is not an internal personnel practice in the ordinary and customary usage of that term. The Audit Report is for all intents and purposes an investigation into the culture and failings of the

Salem PD. Consequently, the narrow and limited rule articulated in Fenniman is inapplicable to this case.

### **ARGUMENT**

New Hampshire is one of only a few states that enshrines the right of public access in its Constitution. Part I, Article 8 of the New Hampshire Constitution provides that,

[a]ll power residing originally in, and being derived from, the people, all the magistrates and officers of the government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The public also has a right to an orderly, lawful and accountable government....

RSA Ch. 91-A, also known as the Right-to-Know law, supports and compliments New Hampshire's fundamental interest in fostering open and honest government. The preamble to the Right-to-Know law, unambiguously states that,

[o]penness in conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

RSA Ch. 91-A:1. The fundamental purpose of the Right-to-Know law is "...to provide the utmost information to the public about what its government is up to." Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996)(internal quotations omitted). Therefore, the courts traditionally consider the Right-to-Know law,

with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents. Thus, while the statute does not provide for unrestricted access to public records [this Court] broadly construes provisions favoring disclosure and interprets the exemptions restrictively.

Union Leader Corp. v New Hampshire Hous. Fin. Auth., 142 N.H. 540, 546 (1997)(internal citations omitted).

While Part I, Article 8 and the Right-to-Know law do establish rights favoring access to the actions, discussions and records of government bodies such rights are not absolute. RSA 91-A:5, IV exempts the following from disclosure:

Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy....

When an exemption pursuant to RSA 91-A:5, IV is utilized by a public body the court also traditionally engages in a balancing inquiry to determine whether the requested materials should be disclosed. In so doing the court must,

....evaluate whether there is a privacy interest that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know law mandates disclosure. Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations. Next, [the court must] assess the public's interest in disclosure. Disclosure of the requested

information should inform the public about the conduct and activities of their government. Finally, [the court must] balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in non-disclosure.

N.H. Right to Life v. Dir. N.H. Charitable Trusts Unit, 169 N.H. 95, 110-111(2016)(internal citations omitted). The governmental entity claiming an exemption to disclosure “bears a heavy burden to shift the balance towards nondisclosure.” Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996). The interpretation of constitutional and statutory provisions is a question of law, which this Court reviews *de novo*. Ford v. N.H. Dep.t of Transp., 163 N.H. 284, 291 (2012)(citing Billewicz v. Ransmeier, 161N.H. 145, 151 (2010).

**I. FENNIMAN WAS POORLY REASONED AND IS CLEARLY INCONSISTENT WITH THE FUNDAMENTAL PUBLIC INTEREST IN DISCLOSURE AND MUST BE OVERTURNED AT THIS TIME**

Despite its clear reluctance to sustain certain redactions in the Audit Report, the trial court determined that it was “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.” *ADD. p. 30*. In Fenniman the court ultimately determined that records pertaining to internal personnel practices were categorically exempt from disclosure. In so finding the court reasoned that the words ‘internal’, ‘personnel’ and ‘practices’ are quite broad. Therefore, the Fenniman court determined that documents and memorandum compiled during an internal investigation of a police lieutenant “plainly pertain to ‘internal personnel practice’ because

they document procedures leading up to internal personnel discipline, a quintessential example of an internal practice.” In Fenniman the court deviated from the general principle that it “construe[] the right-to-know law to further the statutory objectives of increasing public access to governmental proceedings.” Orford Teachers Assoc. v. Watson, 121 N.H. 118, 120 (1981). This Court recognized the many flaws in the Fenniman analysis in Reid v. New Hampshire Attorney General, 169 N.H. 509 (2016).

Fenniman is critically flawed for many reasons and is an outlier in New Hampshire Right-to-Know jurisprudence. The Fenniman holding does not comport with the ordinary rules of statutory interpretation. For instance, the Court fails to take a narrow construction of the term “internal personnel practices” and fails to consider all of the word and phrases set forth in RSA Ch. 91A-5, IV. Furthermore, the decision fails to consider the term “internal personnel practices” in the context of the whole statute. Had the legislature wanted to make internal personnel practices categorically exempt from disclosure it could have separately enumerated it as an exemption as it did for grand jury proceedings. Rather, the legislature grouped the exception within other categories that are clearly modified by the phrase “whose disclosure would constitute an invasion of privacy”. This Court has expressly recognized that that phrase modifies the words confidential, commercial and financial information in 91A-5, IV. In so doing the Court recognized that,

[a]n expansive construction of these terms must be avoided, since to do otherwise would ‘allow[] the exemption to swallow the rule and is inconsistent with the purposes and objections of [RSA chapter 91-A].

Union Leader Corp. v. N.H. Housing Fin. Auth. 142 N.H. 540, 552-553 (1997)(quoting Mans v. Lebanon School Bd., 112 N.H. 160, 162 (1972). Similarly, the expansive construction of the term “internal personnel practices” in Fenniman allows the exemption to swallow the rule in favor of disclosure. Federal and state precedent is instructive in defining the term “internal personnel practices” and should be considered in narrowing the exemption as it currently exists in New Hampshire. New Hampshire’s current definition of an internal personnel practice is far too broad and does not comport with the fundamental goals of transparency and disclosure.

The trial court was bound by the principle of *stare decisis* in sustaining the redactions. However, courts are not forever bound by precedent and have the discretion to overturn law under certain circumstances. “[T]he doctrine of *stare decisis* is not one to be rigidly applied or blindly followed.” Ford v. N.H. Dep’t of Transportation, 163 N.H. 284, 290 (2012). When this Court is,

...asked to reconsider a holding, the question is not whether we would decide the issue differently *de novo*, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed.

State v. Quintero, 162 N.H. 526, 539 (2001). Prior to overturning a decision, the Courts consider:

(1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts



have so changed, or come to be seen so differently, as to have robbed the rule of significant application or justification.

Ford v. N.H. Dep't of Transportation, 163 N.H. at 290. Arguably, each of these four factors are present as it relates to the Fenniman ruling.

As discussed above and in Reid, Fenniman is not consistent with the rules of statutory interpretation. It is an anomaly in New Hampshire Right-to-Know jurisprudence and stands in stark contrast to the developments of the law. Public agencies in New Hampshire have routinely relied on the holding in Fenniman and have taken advantage of the categorical gloss placed upon it by this Court. This has meant that local agencies have repeatedly withheld information in which the public has a compelling interest. For instance, in the past several years, this withheld information has included the following:

- An arbitrator's report addressing a Portsmouth police officer who was terminated after receiving an inheritance in excess of \$2 million from an elderly woman with dementia. This case is currently on appeal. *See Seacoast Newspaper, Inc. v. City of Portsmouth*, No. 2019-0135;
- The Exculpatory Evidence Schedule ("EES") listing the names of over 260 police officers who have committed sustained misconduct implicating their credibility and trustworthiness. This case is currently on appeal. *See New Hampshire Center for Public Interest Journalism et al v. New Hampshire Department of Justice*, No. 2019-0279;
- Information from the Manchester police department concerning the termination of former officer Darren Murphy.

It was later disclosed that he was accused of coercing women into sex. Ultimately no criminal charges were brought<sup>2</sup>;

- Information, including a secret New Hampshire Department of Justice report, concerning complaints made against the Governor’s top policy advisor on the opioid crisis who ultimately resigned from his position. Concerns were raised about this advisor’s interactions with providers in the drug prevention field<sup>3</sup>;
- Information concerning the reasons Lincoln’s longtime chief of police was placed on administrative leave<sup>4</sup>, as well as a full 100-page report documenting potential problems with the administrative operations of that police department.<sup>5</sup> Following a lawsuit by the former chief, it was ultimately disclosed that he was terminated over concerns about departmental morale, lack of cooperation with outside agencies, and improper disclosure of information<sup>6</sup>;

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<sup>2</sup> Mark Hayward, “35 of Manchester Ex-Officer’s Cases to be Dropped,” *Union Leader* (Mar. 21, 2018) (Manchester police chief not disclosing information concerning termination and alleged misconduct because “it was a personnel matter” and that he believed that the allegations were not criminal). The Strafford County Attorney’s Office ultimately produced its criminal investigatory file.

<sup>3</sup> Kevin Landrigan, “Sununu’s Advisor on Opioid Issue Resigns After Personnel Report,” *Union Leader* (May 31, 2018) (noting confidential nature of the DOJ’s report and quote from Governor’s office stating that “[a]s with all personnel matters, details of the review are confidential”).

<sup>4</sup> John Koziol, “Lincoln Police Chief Placed on Paid Leave as Town Review Finances, Practices,” *Union Leader* (Aug. 16, 2018) (declining to produce information on basis that it was a “personnel matter”).

<sup>5</sup> John Koziol, “Fired Lincoln Police Chief Sues to Get His Job Back,” *Union Leader* (Mar. 10, 2019).

<sup>6</sup> *Id.*

- Information concerning the reasons Epsom’s police chief was suspended.<sup>7</sup> It was later disclosed following a Department of Labor decision that the suspension was due to the chief accessing a police database to find information about a local attorney<sup>8</sup>;
- Information concerning the suspension of Salem’s former police chief. However, witnesses told the *Union Leader* that the chief was suspended after becoming visibly upset and shouting at a Selectman during a budget meeting<sup>9</sup>;
- Information concerning the reasons Bristol’s police chief was placed on administrative leave.<sup>10</sup> The chief subsequently resigned and was indicted for theft, sexual assault and simple assault by a Grafton County grand jury. He allegedly exercised unauthorized control over town funds by knowingly claiming he worked overtime details that he had not<sup>11</sup>; and
- A report on the Gilford Department of Public Works that may address allegations of harassment and a hostile work environment.<sup>12</sup>

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<sup>7</sup> Melissa Proulx, “Epsom Police Chief on Unpaid Leave,” *Union Leader* (Jan. 6, 2018) (Selectmen stating that he could not go into the details because “it was a personnel matter”).

<sup>8</sup> Todd Feathers, “Epsom Chief Under Investigation for Improper Use of Police Data,” *Union Leader* (Dec. 2, 2018).

<sup>9</sup> April Guilmet, “Salem Officials Mum on Police Chief Suspension; Selectman Alleges Vulgar Insult at Meeting,” *Union Leader* (Sept. 25, 2014) (sealing records related to suspension under “internal personnel practices” exemption).

<sup>10</sup> Bea Lewis, “Bristol Police Chief Resigns Following Paid Administrative Leave,” *Union Leader* (Oct. 8, 2017) (not commenting on resignation because it is a “personnel matter”).

<sup>11</sup> Bea Lewis, “Ex-Bristol Chief Facing Felonies for Allegedly Paying Himself Bogus OT With Federal Grants,” *Union Leader* (June 20, 2018).

<sup>12</sup> Thomas P. Caldwell, “Gilford Board Keeps DPW Report Secret,” *Laconia Daily Sun* (June 13, 2019) (stating that town’s attorney advised that report must remain confidential).

This Court's holding in Fenniman has also rendered RSA 91-A:5, IV unworkable and contradictory by, without any textual justification, treating "internal personnel practice" information as categorically exempt while subjecting "personnel file" information and "confidential, commercial, or financial information" to a public interest balancing analysis.

Overruling Fenniman would also not lend a special hardship to the courts that are already well versed in the balancing inquiry traditionally employed in Right-to-Know cases. Furthermore, overruling Fenniman would not affect the rights or interests of individuals because the balancing inquiry would still apply. Therefore, this Court should reverse Fenniman.

## **II. THE AUDIT REPORT IS NOT AN INTERNAL PERSONNEL PRACTICE SUBJECT TO CATEGORICAL EXEMPTION**

In this case Salem asserts that the redacted information falls under the exemption of an internal personnel practice. The terms "internal personnel practice" or "personnel file" are not defined for the purposes of RSA 91-A: 5, IV. The nature and character of the Audit Report, particularly the circumstances giving rise to the Audit Report, demonstrate that it is not an internal personnel practice in the usually and ordinary sense. Salem commissioned Kroll Inc., to prepare the Audit Report after red flags were raised about the performance of the Salem PD. The Audit Report is readily distinguishable from the disciplinary investigation and subsequent disciplinary action taken against a particular officer in Fenniman. Rather, this case is more akin to the facts and analysis of Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1 (2003).

In Worcester Telegram the Massachusetts Appeals Court upheld the trial court's judgment requiring the release of an unredacted internal affairs file with some minor exceptions. In so finding the Massachusetts Appeals Court determined that,

....materials in an internal affairs investigation are different in kind from the ordinary evaluations, performance assessments and disciplinary determinations encompassed in the public records exemption 'for personnel [file] or information'...

Worcester Telegram, 58 Mass. App. Ct. at 1. The court further opined that,

[a]n internal affairs investigation is a formalized citizen complaint procedure, separate and independent from ordinary employment evaluation and assessment. Unlike other evaluations and assessments, the internal affairs process exists specifically to address complaints of police corruption (theft, bribery, acceptance of gratuities), misconduct (verbal and physical abuse, unlawful arrest, harassment), and other criminal acts that would undermine the relationship of trust and confidence between the police and the citizenry that is essential to law enforcement. The internal affairs procedure fosters the public's trust and confidence in the integrity of the police department, its employees, and its processes for investigating complaints because the department has the integrity to discipline itself. A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights. Disciplinary action is but one possible outcome; exoneration and protection of the officer and the department from unwarranted criticism is another.

Id. at 7-8. Finally, the Massachusetts Appeals Court reasoned that "[i]t would be odd, indeed, to shield from the light of public scrutiny as 'personnel [file] or information' the workings and determinations of a

process whose quintessential purpose is to inspire public confidence.” *Id.* at 8-9. As articulated by the Massachusetts Appeals Court in Worcester Telegram the judicious approach to decisions involving “personnel” files and information should not adopt rigid or precise definitions but rather a case-specific balancing analysis. *Id.* at 8. A substantial portion of the redacted information in the Audit Report was gleaned from the Salem PD’s own internal affairs investigations. That information is outside of the scope of an internal personnel practice, and personnel file, since it exists for the very purpose of addressing complaints of potential police corruption, misconduct or other criminal behavior. The trial court clearly erred as a matter of law when it ruled that the sustained redactions pertained to internal personnel practices of the Salem PD.

### **III. THE PUBLIC INTEREST IN DISCLOSURE CLEARLY OUTWEIGHS ANY GOVERNMENT INTEREST IN NONDISCLOSURE AND ANY PURPORTED PRIVACY INTEREST**

The clear policy underlying RSA 91-A favors disclosure so that the citizenry can know what it’s government is up to. Part I, Article 8 of the New Hampshire Constitution guarantees that the public’s right of access shall not be unreasonably restricted. The categorical per se exemption of “internal personnel practices” without a balancing test stands in stark contrast to these fundamental statutory and constitutional rights. And is in fact an unreasonable restriction on public access in violation of Part I, Article 8 of the New Hampshire Constitution.

There is no doubt that “there is a significant public interest in knowing how the police department supervises its employees and responds

to allegations of misconduct.” Rutland Herald v. City of Rutland, 84 A.3d 821, 823 (2013). “[T]he public nature of the office and the awesome powers exercised by police create a compelling need for public oversight and review of a police department’s internal investigations.” Worcester at 6. The ability of the public to access and assess information pertaining to the performance of its police is essential to developing the confidence and trust requisite for effective law enforcement. Keeping secret documents and information that would otherwise provide insight and evaluation of a police department undermines the public’s relationship with its sworn officers. The light of public scrutiny correspondingly highlights quality and exemplary police conduct and foster’s the public’s trust and confidence in its police force. Public confidence and trust in its police force is, and should be, an important governmental interest. In this case the public interest in disclosure clearly outweighs any purported privacy interest or governmental interest in non-disclosure.

As the trial court correctly noted in its decision “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.” *ADD p. 29*. Failure to balance the public’s right to know what it’s government is up to against any privacy interests and governmental interest in non-disclosure can lead to, among other things, police corruption, abuse of power, false arrest and excessive force, and other violations of citizens’ constitutional due process rights.

## **CONCLUSION**

The ability of public officials and agencies to rely on this Court's prior holding in Fenniman, and its progeny, defeats the public's ability to access the actions and records of municipal police agencies, thereby blocking their accountability to the people. The public's interest in the performance of its police agencies and officers clearly outweighs any claimed privacy interest of any public servant or agent. Granting categorical exemption status to "internal personnel practice" information of police departments without providing for a public interest balancing analysis runs contrary to the mandate of Part I, Article 8 of the New Hampshire Constitution that government should be open, accessible, accountable and responsive to the citizenry of New Hampshire. Union Leader hereby requests that this Honorable Court expressly overrule Fenniman and that the Trial Court's ruling regarding redactions based upon internal personnel practices be reversed.



### **REQUEST FOR ORAL ARGUMENT**

Union Leader hereby requests fifteen (15) minutes of oral argument to be presented before the full Court by undersigned counsel, Gregory V. Sullivan.

### **RULE 16(3)(1) CERTIFICATION**

Counsel hereby certifies that the appealed decisions are in writing and are appended to this brief.

Respectfully submitted,  
Union Leader Corporation,  
by its attorney,  
*/s/ Gregory V. Sullivan*  
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August 15, 2019

## **ADDENDUM**

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.<sup>1</sup> 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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<sup>1</sup>“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](http://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 identify 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<sup>2</sup>** 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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<sup>2</sup>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

A handwritten signature in black ink, appearing to read "Andrew Schulman", written over a horizontal line.

Andrew R. Schulman,  
Presiding Justice

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

STATE OF NEW HAMPSHIRE  
ROCKINGHAM, SS SUPERIOR COURT  
UNION LEADER CORP., ET AL  
v.  
TOWN OF SALEM  
DOCKET #218-2018-CV-01406

**INTERVENOR'S MOTION FOR RECONSIDERATION**

NOW COMES the Intervenor, Robert Morin, Jr., by and through his attorneys, Andrea Amodeo-Vickery, Esquire, and Borofsky, Amodeo-Vickery and Bandazian, PA, and, pursuant to Rule 12(e) of the New Hampshire Rules of Civil Procedure, respectfully moves the Court for reconsideration of its Order dated April 5, 2019 in the above-captioned case. In support of its Motion for Reconsideration, Intervenor states as follows:

1. On April 5, 2019, this Court issued its decision on the merits sustaining and overruling Respondent Town of Salem's redaction of numerous sections of the subject audit report. With regard to the overruled redaction of information, the Court ruled that the information could not be redacted under the "internal personnel practices" exemption or the "invasion of privacy" exemption. See RSA 91-A:5.
2. Relevant to the instant motion, the Court made several rulings with respect to the culture addendum of the audit report in which the Court ruled that "the redactions on the balance of Page 7 and on Pages 8-12 are sustained in part and overruled in part." Union Leader Corp. et al. v. Town of Salem, No. 218-2018-CV-01406, \*14 (N.H.Super. April 5, 2019) (emphasis omitted).
3. The Court specifically held that:
  - a. "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."
  - b. "The other named individuals were not involved in the IA investigation and, therefore, their names should not be redacted." Id.
4. Unfortunately, the Court's reasoning was in error. As a result of the Court's

holding, inferences can be drawn from the un-redacted portions of the report that reveal the identities of the individuals who were the subject of the IA investigation;

5. “[A]n investigation into alleged misconduct constitute[s] ‘internal personnel practices’ . . . when the investigation is ‘conducted on behalf of the employer of the investigation’s target.’” Clay v. City of Dover, 169 N.H. 681, 688 (2017).
6. This means that “the investigation must take place within the limits of an employment relationship.” Reid v. New Hampshire Attorney Gen., 169 N.H. 509, 523 (2016).
7. Moreover, personnel files “plainly ‘pertain[ ] to internal personnel practices’ because they document procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice.” Union Leader Corp. v. Fenniman, 136 N.H. 624, 626 (1993).
8. As noted by the Court, the Court “is bound by the Fenniman line of cases and” therefore was required to uphold the majority of the redactions in the audit. Union Leader Corp. et al., No. 218-2018-CV-01406, \*4.
9. The Court sustained Respondent’s redactions to prevent the identification of “the subject of any internal affair investigation,” Union Leader Corp. et al., No. 218-2018-CV-01406, explicitly upholding the redaction of any facts that would lead to the identification of a participant.
10. The Court also sustained redactions “on the first full paragraph of Page 7” on the grounds that the redactions protected the identity of the participants in the investigation. Id. at 14 (emphasis omitted).
11. Unfortunately, contrary to the Court’s above mentioned reasoning, there is information that the Court ordered to be un-redacted at pages 7-12 of the subject report could unintentionally lead to identification of the participants in the investigation.
12. The un-redacting by the Court of other named individuals who were not involved in the IA investigation on page 9-10 permits the identification of the subject of the investigation.
13. Moreover, the information un-redacted on the bottom of page 7 to page 9 and the bottom of page 11 to the top of page 12 provides an incomplete, inaccurate and false account of the events it purports to describe.
14. Accordingly, due to the information soon to be unintentionally revealed as a result of the Court’s Order as it now stands, Intervenor requests that the Court

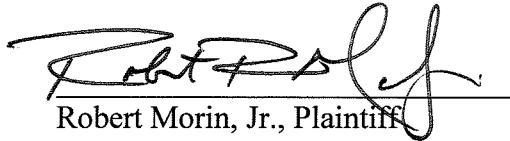
reconsider its ruling, so that its Order complies with the law and does not inadvertently reveal participants of investigations and or false information.

WHEREFORE your Intervenor respectfully requests that this Honorable Court:

- A. SCHEDULE a hearing on the Motion for Reconsideration;
- B. GRANT the Motion for Reconsideration; and
- C. GRANT such other and further relief as justice may require.

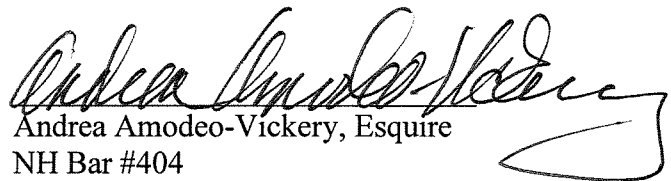
Respectfully Submitted

Date: 04-15-19



Robert Morin, Jr., Plaintiff  
By His Attorneys  
BOROFSKY, AMODEO-VICKERY &  
BANDAZIAN, P.A.

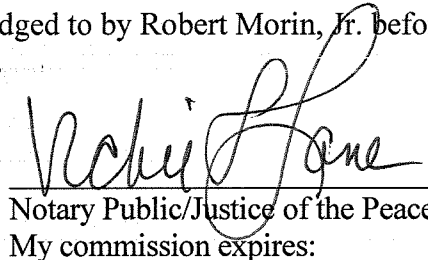
Date: 4-15-19

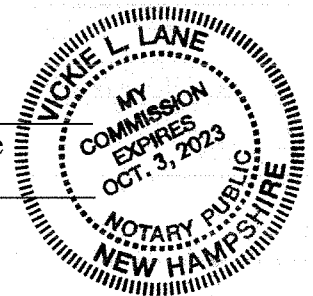


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STATE OF NEW HAMPSHIRE  
COUNTY OF ROCKINGHAM

15<sup>th</sup> day of April, 2019. Subscribed and sworn and acknowledged to by Robert Morin, Jr. before me this

  
Notary Public/Justice of the Peace  
My commission expires: \_\_\_\_\_



**CERTIFICATE OF SERVICE**

I HEREBY certify that a copy of the foregoing was this day as required by the rules of the Superior Court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case. I am mailing or hand-delivering copies to all other interested parties.

Date: April 15, 2019


/s/ Andrea Amodeo-Vickery  
Andrea Amodeo-Vickery, Esquire

Clerk's Notice of Decision  
Document Sent to Parties

on 04/22/2019

F:\Clients\Morin, Robert Jr\Emp. 1\Plead\04-15-2019 Motion for Reconsideration.doc

4-22-19. Intervenor Morin's motion for reconsideration is GRANTED IN PART and DENIED IN PART. The court sustains the redactions of (a) the name of the complainant first identified on Page 9, and (b) the name of the "girlfriend" first mentioned towards the bottom of Page 9. Those names were properly redacted on pp. 9-10 (and possibly thereafter) because those individuals were participants in an internal affairs investigation. The court does not sustain any additional redactions.

  
Honorable Andrew R. Schulman  
April 22, 2019

### **CERTIFICATE OF COMPLIANCE**

Undersigned counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with the provisions of New Hampshire Supreme Court Rule 26(2)-(4). Counsel hereby certifies that this brief complies with New Hampshire Supreme Court Rule 16(11) that provides that “no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, table of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other matters.” Counsel hereby certifies that this brief contains 4,732 words, (including footnotes), from the “Questions Presented for Review” to the “Rule 16(3)(1) Certification”.

/s/ Gregory V. Sullivan

Gregory V. Sullivan N.H. Bar No. 2471



### **CERTIFICATE OF SERVICE**

Undersigned counsel hereby certifies that Union Leader Corporation's Opening Brief was served on August 15, 2019, through the electronic-filing system upon counsel for the Respondent/Appellee Town of Salem (Barton L. Mayer, Esq.), Intervenor Respondent Robert Morin, Jr., (Andrea N. Amodea-Vickery, Esq.), Intervenor Respondent/Appellee Salem Police Relief, NEPBA Local 22 (Peter J. Perroni, Esq.), and Petitioner/Appellant The American Civil Liberties Union of New Hampshire (Gilles Bissonette, Esq. and Richard J. Lehman, Esq.).

/s/ Gregory V. Sullivan

Gregory V. Sullivan N.H. Bar No. 2471