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)

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

REPLY BRIEF FOR UNION LEADER CORPORATION

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November 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Authorities

R.S.A. 91-A:5, Exemptions……sic passim

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.

Pursuant to the relevant provisions of Rule 16 of the Rules of the Supreme Court of the State of New Hampshire the appellant, Union Leader Corporation, (hereinafter "Union Leader"), hereby submits this brief in reply to the briefs of Salem, the New Hampshire Municipal Association and the Salem Police Relief, NEPBA Local 22.

I. THE RELIANCE OF THE APPELLEES' ON THE PUNCTUATION AND THE LEGISLATIVE HISTORY OF RSA 91-A:5, IV IS A RED HERRING

The Fenniman ruling stands in stark contrast to the statutory and constitutional goals of transparency and governmental accountability. In construing the words and phrases of New Hampshire's Right-to-Know law this Court must be mindful of the statute's purpose to ensure the "greatest possible access to the actions…and records of all public bodies…" and the "the public's [constitutional] right of access to governmental proceedings [which] shall not be unreasonably restricted." *See* RSA 91-A:1 and Part I, Article 8 of the New Hampshire Constitution. This Court should overturn the bad precedent set out in Fenniman that deviates from this Court's longstanding and settled practice of resolving questions "with a view to providing the utmost information." Lodge v. Knowlton, 118 N.H. 574, 577 (1978)(quoting Menge v. City of Manchester, 113 N.H. 533, 537 (1973)).

The words and phrases of RSA 93-A:5, VI, legislative history and overall structure clearly reinforces the conclusion that "internal personnel practices" were not meant to be categorically exempt. This Court is "the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." Soraghan v. Mt. Cranmore Ski Resort, Inc.,

152 N.H. 399, 401 (2005)(internal citations). When a question of statutory interpretation is at issue this Court,

> …first examine[s] the language of the statute, and, where possible…[it] ascribe[s] the plain and ordinary meanings to the words used. When statutory language is ambiguous…[it] examine[s] the statute's overall objective and presume[s] that the legislature would not pass an act that would lead to an absurd or illogical result…[The] goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.

Soraghan, 152 N.H. at 401 (internal citations and omitted). Furthermore, "[i]t is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights wherever possible.". State v. Smagula, 117 N.H. 663, 666 (1977). When, as in this case,

> …an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress…[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally

> protected liberties or usurp power constitutionally forbidden it.

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)(internal citations and quotations omitted). In light of these rules of statutory construction this Court's holding in Fenniman that "internal personnel practices" are categorically exempt must be overruled.

New Hampshire is only one of several states that enshrines the right of public access in its Constitution and it's Right-to-Know law. Part I, Article 8 of the New Hampshire Constitution provides, in relevant part that,

> 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.**

(emphasis added). The expansive definition of an "internal personnel practice" not only deviates from this Court's traditional practice of construing provisions of disclosure broadly and exemptions narrowly but it stands in stark contrast to the public's constitutional right that governmental records shall not be unreasonably restricted. The term "internal personnel practices" pertaining to discipline in Fenniman is so broad that in practice public bodies can simply categorize the records as such, instead of as personnel files or confidential information, and preempt disclosure absolutely. Such a result is a direct violation of the constitutional rights housed in Part I, Article 8 of New Hampshire's Constitution. "Additionally, such an expansive construction would justify the criticism that our act, although promising, is 'weak and easily evaded'." Mans v.

Lebanon Sch. Bd., 112 N.H. 160, 162 (1972)(internal citations and omitted). Statutory provisions must be interpreted to avoid conflict with constitutional rights and Fenniman's ultimate holding fails to do that.

The legislative history of RSA 91-A:5, IV before this Court as it pertains to "internal personnel practices" is not truly germane to the issues before this Court. Nowhere in the legislative history is there any indication or debate that "internal personnel practices" are categorically exempt from disclosure. In fact the overall structure of RSA 91-A:5 clearly reinforces the conclusion that the legislature never intended to categorically exempt "internal personnel practices". Records of grand juries, master jury lists, and records of parole and pardon boards, among other records, are specifically enumerated records that are exempt from disclosure under RSA 91-A:5. If the intent of the legislature was to absolutely bar the disclosure of "internal personnel practices" it could have clearly and easily done so by specifically enumerating such records as exempt as it did for other categories of governmental records. Furthermore, the legislative history relied upon in Fenniman in support of its holding is clearly misplaced.

In Fenniman this Court relied heavily upon the statements of Representative Donna Sytek speaking in favor of another statute, RSA 516:36, II. Representative Sytek stated that RSA 516:36, II,

> …provides that proceedings of internal police investigations may not be introduced as evidence in a civil suit other than a disciplinary action. Protection for these files, *which will remain confidential under the Right-to-Know law* will encourage thorough investigation and discipline of dishonest or abusive police officers.

Union Leader Corp. v. Fenniman, 136 N.H. 624, 627 (1993). The Court relied upon the remarks above in finding "an assumption that RSA chapter 91-A exempted police internal investigatory files from public disclosure." Id. Here it is important to note that Representative Sytek did not state that the 'internal police investigations' would remain exempt under the Right-to-Know law. Rather, Representative Sytek stated that they would remain 'confidential'. There is clear legal distinction between exempt documents and confidential documents under New Hampshire's Right-to-Know law. Records of grand juries and parole and pardon board are examples of records that are clearly exempt from disclosure. Whereas, confidential, commercial or financial information is only exempt from disclosure if, after a balancing inquiry, the privacy interest outweighs the public's interest in disclosure.

Finally, the fact that the legislature has not amended RSA 91-A:5, IV since Fenniman does not mean that "the legislature has assuredly spoken". Long ago the Supreme Court of the United States made clear that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law…". Girouard v. United States, 328 U.S. 61, 69 (1946). Rather, this Court, is the final arbiter of the intent of the legislature based upon the words of the statute and must be mindful of the potential constitutional ramifications thereof. Given the words and phrases of RSA 93-A:5, VI, its legislative history and its overall structure it is clear that "internal personnel practices" were not meant to be categorically exempt. Consequently, Fenniman must be overruled.

II. A POLICE OFFICER'S PRIVACY INTEREST IN THIS CASE IS, AT BEST DE MINIMUS, AND DOES NOT OUTWEIGHT THE PUBLIC'S INTERESTS IN DISCLOSURE

New Hampshire's Right-to-Know law is modeled after Freedom of Information Act, which was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1975)(internal citations and quotations omitted). Under New Hampshire's Right-to -Know law the "disclosure of the requested information should serve the purpose of informing the public about the conduct and activities of their government." N.H. Civ. Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003). And "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know law." Union Leader Corp. v. New Hampshire Hous. Fin. Auth., 142 N.H. 540, 554 (1997)(quoting Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989)). While disclosure of the name of a police officer ordinarily will not reveal anything about the operation of the police department, in this particular case the redacted names will reveal pertinent information about the Salem Police Department and will serve the public interest. It is impossible for the public to know, without the names of the police officer or officers, if the Salem Police Department has in fact held itself accountable for its officers' past acts of misfeasance and malfeasance.

There can be no debate that the public has an overriding and compelling interest in how its police department responds to serious

allegations of misconduct and supervises its public servants. The United States Supreme Court has reasoned that the military,

> ….constitutes a specialized community governed by a separate discipline from that of a civilian in which the internal law of command and obedience invests the military officer with a particular position of responsibility. Within this discipline, the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior. The importance of these considerations to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military. Moreover, the same essential integrity is critical to the military's relationship with its civilian direction.

Dep't of the Air Force, 425 U.S. at 367-368 (internal citations and quotations omitted). Just like the military, the police play a vital and unique role in a democratic society. "[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 Telegram & Gazette Corp., v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 6 (2003). Police officers take an oath to protect and serve the public. A level of trust, respect and confidence is absolutely essential to the relationship between the public and its police force. The release of the names of the police officers will not only serve the public interest in knowing that the investigation was comprehensive and

accurate and that remedial steps were adequate but will also rebuild the public's confidence, trust and respect in its police force. The release of the name, or names of the police officers, will lift the shadow of suspicion and exonerate the majority of the Salem Police officers that have honored their oath to protect and serve with integrity. The release of the names of the police officers will not subject them to the harassment and embarrassment contemplated by the law. The de minimis privacy interests of the police officers in the release of their names is greatly outweighed by these compelling public interests in disclosure.

CONCLUSION

For the reasons addressed above and articulated in its opening brief and the briefs of the New Hampshire Civil Liberties Union, Union Leader respectfully requests that this Honorable Court overturn the holding in Fenniman, reverse the Trial Court's order and order Salem to produce an unredacted version of the Kroll Report.

Respectfully submitted,
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November 5, 2019

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this reply 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 reply brief shall exceed 3,000 words. Counsel hereby certifies that this brief contains 1,944 words, (including footnotes), from the Argument section to the Conclusion of this brief.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that Union Leader Corporation's Reply Brief was served on November 5, 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.), Amicus Curiae New Hampshire Municipal Association, (Cordell Johnston, Esq., Stephen C. Buckley, Esq., Natch Greyes, Esq.), and Petitioner/Appellant The American Civil Liberties Union of New Hampshire (Gilles Bissonette, Esq. and Richard J. Lehman, Esq.).

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