THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0279

New Hampshire Center for Public Interest Journalism, et al

v.

New Hampshire Department of Justice

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT
SOUTHERN DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minute oral argument)

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1. Did the trial court err in denying the defendant's motion to dismiss and in holding that neither any statute nor exemption precludes disclosure of the Exculpatory Evidence Schedule pursuant to RSA 91-A?

2. Did the trial court err in holding that RSA 105:13-b does not proscribe disclosure of the Exculpatory Evidence Schedule?

3. Did the trial court err in holding that the Exculpatory Evidence Schedule is not categorically exempt from disclosure pursuant to RSA 91-A?

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5. Did the trial court err in failing to conduct a balancing test, as required by this Court's precedent with respect to RSA 91-A, to determine whether disclosure of the Exculpatory Evidence Schedule would constitute an invasion of privacy?

TEXT OF RELEVANT AUTHORITIES

105:13-b Confidentiality of Personnel Files –

I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.

II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.

III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

Source. 1992, 45:1. 2012, 288:4, eff. June 27, 2012.

91-A:4 Minutes and Records Available for Public Inspection. –

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

Source. 1967, 251:1. 1983, 279:2. 1986, 83:5. 1997, 90:2. 2001, 223:2. 2004, 246:2. 2008, 303:4. 2009, 299:1, eff. Sept. 29, 2009. 2016, 283:1, eff. June 21, 2016. 2019, 107:1, eff. Jan. 1, 2020; 163:2, eff. Jan. 1, 2020 at 12:01 a.m.

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.

XI. Records pertaining to information technology systems, including cyber security plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed.

Source. 1967, 251:1. 1986, 83:6. 1989, 184:2. 1990, 134:1. 1993, 79:1. 2002, 222:4. 2004, 147:5; 246:3, 4. 2008, 303:4, eff. July 1, 2008. 2013, 261:9, eff. July 1, 2013. 2016, 322:3, eff. Jan. 1, 2017. 2018, 91:2, eff. July 24, 2018. 2019, 54:1, eff. Aug. 4, 2019.

STATEMENT OF THE CASE AND FACTS

A. Prosecutors' *Brady* obligations

The United States and New Hampshire Constitutions provide criminal defendants the right to any favorable evidence in the prosecutor's possession. *Brady v. Maryland,* 373 U.S. 83, 87 (1963); *State v. Laurie*, 139 N.H. 325, 329-30 (1995). Favorable evidence includes evidence that is exculpatory and information that a defendant could use to impeach the testimony of a prosecution witness. *Giglio v. United States*, 405 U.S. 150, 153-55 (1972). Relevant to this action, favorable or exculpatory evidence owed to a criminal defendant could exist in the personnel files of police officers who are testifying witnesses, and prosecutors are deemed to have knowledge of any such evidence within those files. *Petition of State of N.H. (State v. Theodosopoulos)*, 153 N.H. 318, 320 (2006); *Laurie*, 139 N.H. at 329-30.

B. The Exculpatory Evidence Schedule

The Legislature has established that police personnel files are strictly confidential. RSA 105:13-b. As this Court has recognized, "[b]ecause police personnel files are generally confidential by statute . . . the Attorney General recognized . . . that prosecutors must rely upon police departments to identify *Laurie* issues . . . [and] placed responsibility on county attorneys to compile a confidential, comprehensive list of officers within each county who are subject to possible *Laurie* disclosure . . . ." *Gantert v. City of Rochester*, 168 N.H. 640, 646 (2016) (emphasis added).

Those lists became what is now known as the Exculpatory Evidence Schedule ("EES").

In early 2004, then Attorney General Peter Heed issued a memorandum ("Heed Memo") to all county attorneys and law enforcement agencies that created a "standardized method" of identifying officers whose files potentially contain exculpatory material— *i.e.* "*Laurie* lists" to be maintained by the county attorneys. App. I[1]194 ("The county attorney will be responsible for compiling a comprehensive list of officers within his/her county who are subject to potential *Laurie* disclosure."). The Heed Memo directed law enforcement agencies to notify the pertinent county attorney in writing whenever an officer was found to have engaged in *Laurie*-type conduct. App. I 196.

In keeping with statutory confidentiality, the Heed Memo specified that written notice "should include only the officer's name, department, date of birth, and date of incident that gave rise to the *Laurie* determination." App. I 196-97. The Heed Memo emphasized that: "[t]he county attorney shall make the list, or relevant portions thereof, available to prosecutorial agencies in other counties upon request. The list should otherwise be kept confidential." App. I 197. (Emphasis added). This remained standard practice for the next thirteen years. *See*, *e.g.*, *Gantert*, 168 N.H. at 645-46.

In early 2017, then Attorney General Joseph Foster issued a memorandum ("Foster Memo") to all county attorneys and law

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[1] "App. I ___" refers to volume I of the Appendix to the State's Brief;
"App. II ___" refers to volume II of the Appendix to the State's Brief;
"Add. ___" refers to the Court's April 24, 2018 order attached to this Brief;

enforcement agencies updating the *Laurie* list procedure and creating the state-wide EES maintained by the Department of Justice ("DOJ"). App. I 202. The Foster Memo reiterated that "the imputation of knowledge [to prosecutors] creates tension between the right to confidentiality in a government witness's personnel file and the prosecutor's need to know whether the records contain potentially exculpatory evidence." App. I 201-02. The Foster Memo set forth a process similar to the county *Laurie* lists, except that names to be added to the EES come to the DOJ from police chiefs after review of their officers' personnel files. App. I 202-04; 206-13.

Because the 2012 amendment to RSA 105:13-b required the disclosure of "exculpatory" personnel evidence to a particular criminal defendant, Attorney General Foster explained that in the context of an ongoing criminal matter only, prosecutors may review the personnel file of a witness officer on the EES to determine whether to withhold, disclose, or seek *in camera* review of the personnel records. App. I 208-9. The Foster Memo expressly requires, however, that "[t]he prosecutors who have reviewed the contents of an officer's personnel file shall maintain the confidentiality of the material reviewed." App. I 209. The Foster Memo also emphasizes that the EES itself shall remain confidential. App. I 210.

In early 2018, Attorney General Gordon MacDonald issued a memorandum ("MacDonald Memo") to all county attorneys and law enforcement agencies clarifying certain aspects of the Foster Memo. App. I 221. The MacDonald Memo, referring to this Court's decision in *Gantert v. City of Rochester*, 168 N.H. 640 (2016), reiterated that only "sustained" findings against an officer warrant placement on the EES, App. I 221, and explained that "sustained" means that "the evidence obtained

during an investigation was sufficient to prove that the act occurred." App. I 222.

The MacDonald Memo also introduced a protocol for the removal of an officer from the EES. App. I 224-25. Through union grievance procedures, arbitration or other appeals provided to officers in collective bargaining agreements, the MacDonald Memo understood that an officer may obtain relief from a "sustained finding." *See also Gantert*, 168 N.H. at 650 (recognizing that officers may also pursue judicial relief). In that event, the MacDonald Memo directed that the Attorney General or a designee will review "the order or other determination overturning the disciplinary finding," and, if the previously sustained finding was, in fact, overturned, "the Attorney General's designee shall cause the removal of the officer's name from the EES." App. I 226.

The EES comprises a spreadsheet that contains five columns: "Name;" "Department," (*i.e.* the police department employing the officer at issue); "Date of Incident;" "Date of Notification;" and "Category," which is either blank or contains a succinct, often one-word label capturing at a categorical level the behavior that placed the officer on the EES. *E.g.*, App. I 155. The EES provides no further detail. In particular, the spreadsheet offers no precise information as to the specific conduct of any officer. Instead, the EES functions solely as a reference point, to alert a prosecutor to the need to initiate an inquiry into whether an officer's actual personnel file might contain exculpatory evidence. Throughout their existence, the DOJ has kept the *Laurie* lists and, now, EES, strictly confidential, meaning that the DOJ has not publicly disclosed identifying information on the EES, such as a name or information that might

inadvertently reveal an identity (such as the identity of a police department that is small enough to allow anyone to divine the name of the officer), nor has it ever deemed the counties' former *Laurie* lists as public documents.

C. Prior Proceedings

On October 5, 2018, the petitioners filed a petition challenging the DOJ's determination that RSA 91-A did not compel disclosure to them of the EES. App. I 6. The DOJ moved to dismiss, App. II 21, petitioners objected, App. II 69, and, after a hearing in the Hillsborough County Superior Court (Southern District), the court denied the motion on April 23, 2019, Add. 51.

The court's disposition of the motion effectively decided the issues in the petition. The parties, therefore, negotiated a stipulation pursuant to which the court's disposition of the motion to dismiss became the disposition of the claims in the petition. App. II 25. The DOJ filed this notice of appeal on May 15, 2019.

SUMMARY OF THE ARGUMENT

RSA 91-A creates a statutory right in the public to various governmental records, except as otherwise prohibited by statute. RSA 105:13-b, which, with the exception of the *Brady* obligation, cloaks police officer personnel files in full confidentiality, removes those files from right to know disclosure. RSA 105:13-b applies to the EES because the EES contains information drawn directly from police officer personnel files that is personnel in nature.

RSA 105:13-b imposes the *Brady* disclosure obligation but leaves to prosecutors how to discharge that obligation. Since 2004, at the direction of the Attorney General, the chief law enforcement officer in the state, prosecutors have maintained confidential lists of officers whose personnel files may contain exculpatory information. That longstanding interpretation and implementation of RSA 105:13-b has ripened into the definitive construction through an administrative gloss that may not now, absent legislative action, be changed.

Finally, RSA 91-A itself exempts certain types of governmental records from disclosure, including records relating to internal personnel practices, which garner a categorical exemption, and personnel or other files whose disclosure would constitute an invasion of privacy, which relies on a balancing test of the various interests at stake. Each of these exemptions applies to the EES.

ARGUMENT

I. RSA 105:13-B EXCLUDES POLICE PERSONNEL FILES FROM DISCLOSURE PURSUANT TO RSA 91-A

RSA 91-A:4, I provides that citizens have the right to inspect all governmental records "except as otherwise prohibited by statute." RSA 105:13-b, is just such a statute. Entitled "Confidentiality of Personnel Files," RSA 105:13-b makes police personnel files strictly confidential with two narrow exceptions which relate specifically to the discharge of prosecutors' *Brady* and *Laurie* obligations. The first paragraph of the statute identifies the first exception, that exculpatory evidence within the personnel file of a police officer serving as a witness in a criminal case shall be disclosed "to the defendant." RSA 105:13-b, I.

The third paragraph of the statute delineates the only other exception to police personnel file confidentiality, stating that no police personnel file of an officer serving as a witness in a criminal case will be disclosed unless the "sitting judge makes a specific ruling that probable cause exists to believe the file contains evidence relevant to that criminal case." RSA 105:13-b, III. In that event, "[t]he judge shall examine the file *in camera* and make a determination whether it contains evidence relevant to the criminal case," and, then, "only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence . . . ." *Id.*

The statute closes by reaffirming the strict confidentiality of police personnel files: "The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer." *Id.*

The statute, in short, cloaks police personnel files with the maximum confidentiality that the United States and New Hampshire Constitutions allow. Confidentiality over police personnel files is broad in scope: in addition to limiting disclosure in criminal cases to the level constitutionally permissible, the legislature has made police personnel files inadmissible in civil proceedings through RSA 516:36. During consideration of the bill that became RSA 516:36, Representative Donna Sytek, reporting on behalf of the House Judiciary Committee, confirmed that "[p]rotection for [police personnel] 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) (*quoting N.H.H.R. Jour*. 615-18 (1986) (report of House Judiciary Committee delivered by Representative Sytek).

RSA 105:13-b is a statute that otherwise prohibits disclosure of information within police personnel files pursuant to RSA 91-A.

A. RSA 105:13-b applies to the petitioners' disclosure request

The trial court concluded that RSA 105:13-b does not "govern" the petitioners' request, because the petition did not concern a particular criminal defendant or criminal case, an analysis that reflects a fundamental misunderstanding of the statute. Add. 53. The absence of a particular criminal defendant and case is exactly why the statute governs the petitioners' request, because it is in that one, lone scenario that police personnel information may ever be disclosed. The absence of a particular

criminal defendant and case, therefore, means that no information may be disclosed. *See* RSA 105:13-b, III ("The remainder of the file shall be treated as confidential . . . ."). Not only does RSA 105:13-b "govern" the petitioners' request, it forecloses it.

B. The EES comprises information from police personnel files

The trial court concluded that "the EES is not a personnel file within the meaning of [RSA 105:13-b]" because the EES "does not physically reside in any specific police officer's personnel file." Add. 53-54. While that is technically true, it overlooks the nature and substance of the information on the EES, as well as its source. The information on the EES comes from police chiefs, in response to the Attorney General's instruction to review officers' personnel files and inform the DOJ if anything in those files requires an officer to be added to the EES. *E.g.*, App. I 208-8. The EES, in other words, comprises information residing within police officer personnel files, provided directly to the DOJ by the officers' employers, namely, police chiefs. App. I 210 ("The EES contains information from personnel files which are protected from disclosure under RSA 91-A"); *see ALADS v. Superior Court*, 447 P.3d 234, 247 (CA 2019) ("[I]nformation is no less 'obtained from' confidential records merely because it is abstracted before it is disclosed."). As the EES concerns officer misconduct, moreover, it derives from disciplinary records within police officer personnel files, which this Court has identified as "a quintessential example" of personnel practice." *Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993).

To be sure, the EES itself does not reside in any one police officer's personnel file, and that seems to be part of why the court decided as it did. Add. 53-54. But the physical location of the EES in no way alters the fact that it contains personnel information from the officer's personnel file. *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E. 2d 602, 606 (Mass. App. 2003) ("The custodian's designation of materials as 'personnel [file] or information' is not dispositive of the point any more than the custodian's placement of the material in a repository called a 'personnel file.') (Quotation and citation omitted). To the contrary, the disciplinary nature of the information makes it "a quintessential example" of personnel practice." *Fenniman*, 136 N.H. at 626. Neither the trial court nor the petitioners advanced any authority for the proposition that information must reside in a particular physical file or geographic location in order to qualify as personnel file information.

RSA 105:13-b, I contemplates the transfer of some information from police personnel files to prosecutors, but does not even intimate that disclosure – which necessarily means transmittal of information outside of an actual personnel file – transforms that information into non-personnel file information. *Cf. ATV Watch v. N.H. Dept. of Transp.*, 161 N.H. 746, 760 (2011) ("[W]e reject the petitioners' assumption that disclosure to another agency invalidates the exemption under RSA 91-A:5, IX."). The court's superficial analysis does not consider the substance of the EES information – its nature and character. *Worcester Telegram*, 787 N.E.2d at 608 (emphasizing that the nature of a document as personnel related derives from the nature or character of the document, not from its label or repository). The court's analysis, in fact, would support an argument that,

in order for RSA 105:13-b to protect the EES, the DOJ would have to physically hold and store every police officer personnel file with potentially exculpatory evidence rather than maintain a separate EES that contains information from those personnel files.

C. The absence of an employment relationship does not bear on whether the EES includes personnel file material

The trial court further confused the issue by deciding that the DOJ's lack of an employment relationship with the officers on the EES means that the EES cannot comprise police officer personnel file information. The court referred to decisional law from this Court defining "personnel" as concerning "the conditions of employment in a governmental agency, including such matters as hiring and firing, work rules and discipline, compensation and benefits." Add. 54 citing *Clay v. City of Dover*, 169 N.H. 681, 686 (2017) and *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 522 (2016). Yet that is exactly the information the EES contains: matters relating to a police officer's conduct on the job and disciplinary issues associated with that conduct, which this Court has unequivocally characterized as "a quintessential example of a personnel practice." *Fenniman*, 136 N.H. at 626.

The trial court correctly observed that "personnel" concerns "human resources" matters. Add. 54 (quoting *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 522-23 (2016). Or, as this Court has succinctly defined it: "[t]he term "personnel relates to employment." *Reid*, 169 N.H. at 523. However, the *Reid* decision does not support the proposition that

information can only be personnel information in the hands of the subject's employer. In fact, the next decision in the *Fenniman/Reid* chain included within the category of "personnel" documents about individuals not in an employment relationship with the agency. *Clay v. City of Dover*, 169 N.H. 681, 683 (describing documents) & 688 (applying exemption).

Reid concerned a petitioner's request pursuant to RSA 91-A for the Attorney General's files of a criminal investigation it conducted of the Rockingham County Attorney's Office. The Attorney General opposed the request on the basis of an exemption (discussed in detail below) for records of "internal personnel practices." *Reid*, 169 N.H. at 517; *see* RSA 91-A:5, IV. *Reid* arose, in other words, with respect to different records under a different statute.

Examining the exemption in RSA 91-A:5 for documents concerning "internal personnel practices," this Court observed that the documents the plaintiff sought came from an investigation the Attorney General launched on its own, not as an agent to the Rockingham County Attorneys Office, and concluded that the lack of an employment relationship took the Attorney General's documents outside of the realm of "internal personnel" documents. *Id.* at 525. This Court contrasted the situation in *Reid* with that in *Hounsell v. North Country Water Precinct*, 154 N.H 1 (2006), explaining that the investigatory report in the latter decision took on personnel status because the investigation was "conducted on behalf of the employer of the investigation's target." *Id.* at 526. This Court "clarif[ied] that the investigation must take place within the limits of employment." *Id.* at 523 (quotation and citation omitted).

The trial court interpreted *Reid* as requiring the DOJ to have an employment relationship with the officers on the EES in order for the EES to contain personnel file information. Add. 55-56. But within weeks of *Reid* and after supplemental briefing in light of *Reid*, this Court in *Clay* held that notes of employment candidate interviews – for candidates never hired – constituted documents relating to internal personnel practices. *Clay*, 169 N.H. at 688. *Clay* makes clear that an employment relationship with the holder of documents is not the touchstone to whether those documents are personnel in nature.

Additionally, the EES is not the product of a DOJ investigation. It is exactly what *Reid* protects: the results of an investigation that took place within the limits of the employment relationship. *Reid*, 169 N.H. at 523. The EES is a summary or abstract of police officer misconduct findings, after investigation not by the DOJ, but by officers' own departments. The EES comprises personnel information reported to the DOJ by individual police chiefs who have reviewed their officers' personnel files. Whatever investigation resulted in the addition to an officer's personnel file of potentially exculpatory information occurred conclusively at the police department level, without any input or participation from the DOJ, before the officer was ever listed on the EES. App. I 221-222, 224. It is therefore immaterial whether the DOJ employs the officers.

Both the trial court and petitioners relied on the Massachusetts Appeals Court decision in *Worcester Telegram & Gazette v. Chief of Police of Worcester*, 787 N.E.2d 602 (MA. App. 2003), which further explains why the EES reflects personnel file material. Similar to *Reid*, *Worcester Telegram* arose when a newspaper sought, pursuant to the Massachusetts

right to know statute, documents relating to a police department's investigation of one of its own officers. 787 N.E.2d at 603-04. The police department resisted based on a statutory exemption in Massachusetts' right to know statute for "personnel file or information." *Id.* at 605. The court explained that "[a]n internal affairs investigation is a formalized citizen complaint procedure, separate and independent from ordinary employment evaluation and assessment." *Id.* at 607. As a result, parsing through the categories of documents within the investigative file, the court found some within and some without the realm of "personnel." Particularly germane to this appeal, however, the *Worcester Telegram* Court held that a memo from the chief to the target officer about the outcome of the investigation fell within "personnel" and would not be disclosed. According to the court, "[t]he nature and character of this document makes it part of the core category of personnel information," because it reflected the final determination and outcome of the investigation *Id.* at 609 (quotation and citation omitted).

The EES is precisely the type of document that the *Worcester Telegram* Court would hold confidential. The EES reflects the result of the internal police department investigation and the department's final determination of an officer's misconduct. The EES is not part of the investigation along the way; it, similar to the memo exempted in *Worcester Telegram*, reflects the outcome of the investigation, the conclusion and final results. To the extent, therefore, that *Worcester Telegram* bears on this Court's construction of RSA 105:13-b (or, as discussed below, RSA

91-A:5), that court's analysis compels the protection of the EES as confidential and not subject to disclosure.[2]

While the EES is not a full personnel file, it nonetheless contains information directly from police officer personnel files, that reflects conclusions, after whatever internal investigation or process occurred in the department, of an officer's misconduct that may be exculpatory. The nature and character of the information on the EES, and not the DOJ's relationship with the officers listed, is what matters to the inquiry. The petitioners' argument would require this Court to hold that if anyone other than an employer possesses police personnel file information, that information is no longer personnel in nature.

[2] The trial court misconstrued the DOJ's argument that the EES contains personnel file information. Add. 56. The court determined that the statute makes no mention of "personnel information," implying that the DOJ characterized the EES as something other than personnel file information. However, the DOJ argued throughout that the information on the EES came from police officer personnel files. App. II 32-34, 41, 42-43. The DOJ did not argue that the EES comprises non-personnel file information. More importantly, the trial court again operated under an overly narrow definition of "personnel file," keying on the physical location and employment relationship rather than the nature and substance of the information at issue.

II. LONGSTANDING DOJ PRACTICE COUPLED WITH LEGISLATIVE INACTION CONFIRMS THAT DISCLOSURE IS OTHERWISE PROHIBITED BY RSA 105:13-B.

The DOJ's maintenance of the EES as confidential is nothing new. Since the formalization of the practice in 2004, the DOJ has publicly stated that the EES will remain confidential. App. I 197 ("The list should otherwise be kept confidential."); App. I 210 ("The EES is a confidential, attorney work product document, not subject to public disclosure."). The decisional law from this Court has recognized the DOJ's position. *Gantert*, 168 N.H. at 646 ("Because police personnel files are generally confidential by statute . . . [the attorney general] placed responsibility on county attorneys to compile a confidential and comprehensive list . . . .") (Emphasis added).

These attorneys general and the *Gantert* Court acknowledged the statutory confidentiality of police personnel files, as well as the need to meet constitutional exculpatory evidence obligations. *See*, *e.g.*, App. I 196 ("[B]ecause police personnel files and internal investigative files are confidential by statute, prosecutors must rely on a police officer or police department to inform them if *Laurie* material exists in a particular officer's file."); App. I 202 ("[RSA 105:13-b] now makes an exception to the otherwise confidential nature of police personnel files for direct disclosure to the defense of exculpatory evidence in a criminal case.") (Emphasis added). For fifteen years, the DOJ has very publicly categorized the EES as confidential, police chiefs have relied on that confidentiality in agreeing

to place officers on the list, and officers themselves have relied on that confidentiality when placed on the list.

RSA 105:13-b mandates the transfer of certain, otherwise confidential personnel information, for the critical purpose of delivering to criminal defendants the most robust realization of their constitutional right to exculpatory evidence. The legislature, however, provided no method to ensure the disclosure the statute requires. The Attorney General, as the constitutional officer who is "ultimately responsible for the investigation of crime in New Hampshire," was left to implement the statute's requirements. 1 McNamara, *New Hampshire Practice Series: Criminal Practice and Procedure* § 2.01. The DOJ, as the superintendent of prosecution in the State of New Hampshire, was statutorily required to include confidentiality over the EES in order to implement the statute while abiding its confidential dictate. RSA 7:6; RSA 21-M.

In the almost fifteen years since, the legislature has not altered the DOJ's implementation, despite regularly taking up issues related to the EES/*Laurie* list. *See*, *e.g.*, SB 493 (2018) (bill to establish committee to "to study whether or not to codify the exculpatory evidence schedule, formerly known as the 'Laurie list'. . . ."); SB 249 (2017) (bill "relative to procedures related to disclosure of exculpatory evidence"); SB 402 (2016) (same). The combination of longstanding practice and lack of legislative interference comprises an "administrative gloss" on the statute. *See Petition of Warden*, *N.H. State Prison*, 168 N.H. 9, 13 (2015) ("…given the APB's longstanding history of exercising this power, we agree with the State that the legitimacy of this practice is now beyond question."); *cf. Bovaird v. N.H. Dep't. of Admin. Serv's*, 166 N.H. 755, 762 (2014)

(Administrative gloss is a rule of statutory construction; "If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent.") (Emphasis added).

The trial court refused to apply an administrative gloss due to the court's determination that no statutory ambiguity allowed for it. But if this Court determines that the trial court's definition of personnel – requiring information to occupy a particular physical location and the holder of the information about an officer to employ that officer – is plausible, then the DOJ's definition – that the information on the EES is drawn directly from police personnel files and is by nature and substance employment related and therefore remains personnel file information – is at least equally plausible. When a statutory provision is susceptible to more than one interpretation, that provision as a matter of law is ambiguous. *Bovaird,* at 761.

The DOJ's interpretation and implementation of RSA 105:13-b is entitled to deference. As mentioned, the statute requires exculpatory evidence to be disclosed, but provides no mechanism for compliance with that directive. Instead, the legislature left the development of that mechanism up to the prosecution. The DOJ serves as the chief law enforcement officer for the State of New Hampshire and exercises supervisory authority over law enforcement and prosecutors state-wide. RSA 7:6; RSA 21-M. The right that RSA 105:13-b seeks to deliver is of constitutional magnitude, placing it among the most important of available rights, but also a constitutional obligation on prosecutors whom the DOJ

oversees. Yet RSA 105:13-b makes police personnel files strictly confidential. In the absence of any statutory direction on how to ensure compliance with the legislative mandate to disclose exculpatory evidence while simultaneously complying with the legislative directive that police personnel files remain confidential, the DOJ implemented the EES, and the *Laurie* lists before it, by way of implementing RSA 105:13-b. The DOJ, in short, did just what the legislature implicitly expected and what this Court should encourage.

The Attorney General's interpretation and implementation of RSA 105:13-b, including confidentiality over the police personnel file information on the EES, therefore, is entitled to deference, especially since it does not conflict with RSA 105:13-b's language. *New Hampshire Retirement System v. Sununu*, 126 N.H. 104, 108 (1985) ("when the meaning of a statute is in doubt, the long-standing, practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to legislative intent.") (quotation and citation omitted); *see In re Town of Seabrook*, 163 N.H. 635, 644 (2012); *Appeal of Salem Regional Medical Center*, 134 N.H. 207, 219 (1991); *cf. Cuozzo Speed Technologies LLC v. Lee*, 136 S.Ct. 2131 (2016) (where a statute leaves a gap or is ambiguous, agency has deference to interpret and implement it); *Santos-Quiroa v. Lynch*, 816 F.3d 160, 167 (First Cir. 2016); *Elien v. Ashcroft*, 364 F.3d 392, 397 (2004) ("When a statute is silent or ambiguous, therefore, we uphold the implementing agency's statutory interpretation, provided it is "reasonable" and consistent with the statute."); *Penobscot Air Services Ltd. V. FAA*, 164 F.3d 713, 719 (1999). Deference

is all the more appropriate in light of the Attorney General's unique role to interpret the law and provide legal opinions when requested, and in light of the judgment allowed to law enforcement in which to operate. RSA 7:7; S*tate v. Porelle*, 149 N.H. 423-24 (2003) ("Although the legislature must establish minimal guidelines to govern law enforcement, . . . , enforcement requires the exercise of some degree of police judgment.") (Quotation and citation omitted).

Confidentiality has remained a core feature of the DOJ's implementation of RSA 105:13-b since 2004. In the fifteen years since, the legislature has not seen fit to amend the statute or in any other way alter the DOJ's implementation. Indeed, when the legislature did amend RSA 105:13-b in 2012, it did not change, or even address, the existing state-wide procedure of county *Laurie* lists (formally in place since 2004). *State v. Rand*, 2014 WL 11485797 at *5 (N.H. Dec. 4, 2014) (concluding 2012 amendment to RSA 105:13-b did not require prosecutors to follow any particular procedure in order to fulfill command that defendants receive exculpatory personnel evidence). Barring legislative action, the DOJ's longstanding interpretation of RSA 105:13-b has ripened into the controlling interpretation of RSA 105:13-b. *Bovaird*, 166 N.H. at 761-62 (doctrine of administrative gloss is a rule of statutory construction, and, as such, the agency may not change is *de facto* policy in the absence of legislative action).

III. THE TRIAL COURT ERRED IN HOLDING THAT THE EXCULPATORY EVIDENCE SCHEDULE IS NOT EXEMPT FROM DISCLOSURE PURSUANT TO RSA 91-A.

The same flawed reasoning – that the EES does not comprise information from police personnel files – infected the trial court's analysis of the relevant disclosure exemptions in the right to know statute, RSA 91-A:5, IV. On its conclusion that the EES is neither a personnel nor internal document, the court found that RSA 91-A did not categorically exempt the EES from disclosure. For those same reasons, the trial court declined altogether to separately analyze the EES as "a personnel or . . . other file whose disclosure might constitute an invasion of privacy." RSA 91-A:5, IV. As set forth below, the court erred in each of these determinations.

A. The EES is *per se* exempt from disclosure as it reflects records of police departments' internal personnel practices.

RSA 91-A:5 categorically exempts disclosure of "records pertaining to internal personnel practices." RSA 91-A:5, IV. Even if, therefore, RSA 105:13-b does not unilaterally foreclose EES disclosure, the EES enjoys a categorical exemption, meaning an exemption without any balancing of interests, from right to know disclosure. *Union Leader Corporation v. Fenniman,* 136 N.H. 624 (1993).

A trio of this Court's decisions establish the categorical exemption for the EES: *Union Leader Corporation v. Fenniman*, 136 N.H. 624 (1993); *Reid v. New Hampshire Attorney General*, 169 N.H. 509 (2016); and *Clay v. City of Dover*, 169 N.H. 681 (2017), all three of which

examined the disclosure exemption in RSA 91-A:5 for "[r]ecords pertaining to internal personnel practices." *Fenniman* concerned a newspaper's RSA 91-A request for documents relating to police officer discipline, the same type of information that populates the EES. Specifically, the Union Leader sought disclosure of a memorandum and other records compiled during a police department's investigation of an officer for misconduct. This court identified documents relating to police officer disciplinary findings as "a quintessential example of internal personnel practices," and held the records *per se* exempt from disclosure pursuant to RSA 91-A:5, IV. *Fenniman,* 136 N.H. at 626. This Court observed that the standard RSA 91-A balancing test "is inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt." *Id*. at 627.

In *Reid*, described above, the plaintiff sought documents relating to an independent, criminal investigation the Attorney General conducted of the Rockingham County Attorney's Office. This Court observed that the Attorney General neither employed the investigation targets nor conducted its investigation at the county attorney's request or as an agent of the county attorney. *Reid*, 169 N.H. at 525. As a result, this Court concluded that the documents sought could not find protection in an exemption for documents relating to internal personnel practices. *Id*.

Within a month of *Reid*, and after supplemental briefing in light of *Reid*, this Court in *Clay* relied on *Fenniman* to find that notes of employee candidate interviews, even for candidates not hired, fell within the categorical exemption for internal personnel practices. *Clay*, 169 N.H. at 686-88. The *Clay* Court applied the categorical exemption even though the

documents related to job interviews of candidates who never became employees. *See id.*

Fenniman, *Reid*, and *Clay* all confirm that records relating to "internal personnel practices"—of which officer discipline is a "quintessential example"—remain categorically exempt from disclosure under RSA 91-A:5, IV.[3] All three, moreover, affirm the strict confidentiality that RSA 91-A:5, IV expressly provides to those personnel records. Because the EES reflects a cataloging of the very type of information the *Fenniman* Court found *per se* confidential, the document is categorically exempt under RSA 91-A:5, IV. This is the case regardless of whether the DOJ employs the officers on the EES. *Clay*, 169 N.H. at 686-88.

Similar to the records at issue in *Fenniman* and *Clay*, and unlike the records at issue in *Reid*, the EES comprises information directly from police officer personnel files, transmitted from police chiefs to the DOJ. App. I 210 ("The EES contains information from personnel files which are protected from disclosure under RSA 91-A."). The DOJ neither creates the information nor analyzes it; the DOJ simply accepts what is transmitted without further investigation or question. Police chiefs transmit the information after they have reviewed their officer personnel files and determined that information within them might be exculpatory. The EES

[3] To the extent the trial court construed "internal" as a term separate from "personnel practices," Add. 61, the court misunderstands the scope of that particular exemption. The trial court construed "internal" as requiring either the DOJ's employment of the officers or police department employment of the DOJ (as in, for example, the *Hounsell* scenario in which a department hired an outside firm to conduct an internal investigation. The court offered no basis for that definition of "internal."

does not contain information independently supplied or created by the DOJ, nor that results from a DOJ investigation.

The trial court only went so far as to declare the EES, for largely the same reasons that controlled the court's RSA 105:13-b analysis, as not relating to internal personnel practices, rendering the exemption inapplicable. Add. 61. As discussed above, unlike the Attorney General's investigative materials in *Reid*, the EES contains the results of internal investigations conducted by the officers' employers, in which the DOJ was never involved. The EES, therefore, consists of what the *Fenniman* Court characterized as "a quintessential example of internal personnel practice." *Fenniman*, 136 N.H. at 626.

B. If the EES is not categorically exempt, the trial court erred in not characterizing the EES as a personnel file or other file whose disclosure would constitute an invasion of privacy and after conducting a balancing test concluding that, the EES is exempt from disclosure.

The trial court concluded that "[f]or the reasons previously discussed in this order . . . the EES is not a 'personnel file' within the meaning of RSA 91-A:5," and, "[a]s a result, the Court need not conduct a 91-A balancing test to determine whether an invasion of privacy would result from disclosure of the EES." Add. 65-66. The court never separately considered whether the EES is an "other file whose disclosure would constitute an invasion of privacy." RSA 91-A:5, IV. For the reasons articulated above, the court erred in construing "personnel" so as not to capture the EES, and, if not categorically exempted, compounded the error

by not conducting a balancing test. As set forth below, even if the EES lacks "personnel" characteristics, the court never considered at all whether the EES might fall into the category of "other files whose disclosure would constitute an invasion of privacy." RSA 91-A:5, IV. A proper balancing leaves no conclusion other than that, even if not personnel file information, the EES would still be exempt.

The RSA 91-A:5 exemptions separate into two, analytically distinct buckets: documents relating to internal personnel practices, the first clause of the statute, which, as discussed, are categorically exempt from disclosure; and documents in the remaining categories, which are not categorically exempt from disclosure, but which might be exempt depending on the outcome of a balancing test that weighs the various interests in privacy and disclosure at stake. *Fenniman*, 136 N.H. at 627 ("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.").

Records falling into the non-categorically exempt categories include "personnel files" and "other files" "whose disclosure would constitute an invasion of privacy." RSA 91-A:5, IV. Disclosure of documents in these categories hinges on a balancing of the public's interest in the records against the government's and the individuals' interests in nondisclosure. *See Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 679 (2011).

This Court describes the balancing test as follows:

> First, [the court] evaluate[s] whether there is a privacy interest at stake that would be invaded by the disclosure. . . . If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.
>
> Second, [the court] assess[es] 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] balance[es] the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.

Id. at 528-29 (citation omitted) (emphasis added).

1. Police officers have a privacy interest at stake that would be invaded by the disclosure of the EES.

Viewed as personnel file information or as "other files," officers on the EES have a strong privacy interest in that information because it is wholly derived from statutorily-protected personnel investigations undertaken by their police department employers, and, more specifically, the results of those investigations. This Court has recognized that the legislature, through RSA 105:13-b, has enshrined the interests of police officers and the public in the confidentiality of police officer personnel files. *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 780 (2015) ("…the legislature has enacted a statute, RSA 105:13-b, which is designed to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records.") (Emphasis added). Furthermore, this Court

has identified a constitutional property interest police officers have in their "reputation[s] and ability to continue to work unimpeded as a police officer." *Gantert*, 168 N.H. at 648 ("We have held that an interest in one's reputation, particularly in one's profession, is significant and that governmental actions affecting it require due process."); *See Duchesne*, 167 N.H. at 783-84; *State v. Veale*, 158 N.H. 632, 639 (2009) ("[w]e find ample support in our jurisprudence for the proposition that reputational stigma can, by itself, constitute a deprivation of liberty deserving due process."). Whether viewed as a personnel file or other file, police officers plainly have privacy interests, as defined by statute and constitution, that disclosure of the EES would invade.

Petitioners argued below that because: (1) the officers were placed on the EES following a personnel investigation/determination by their department; and (2) an officer may petition the DOJ to have her name removed from the list, those officers remaining on the list cannot reasonably expect the EES to remain confidential. *See*, *e.g.*, App. I 25 (Petition at ¶ 38: "The subjects of the EES are public officials whose behavior can reasonably be expected to become public when it concerns a sustained finding of misconduct implicating an officer's credibility or truthfulness."). This argument ignores the history of the EES/*Laurie* lists' confidentiality including the DOJ's longstanding, public pronouncement of confidentiality, the statutory landscape in which these prosecutorial procedures developed, and the fact that an officer cannot petition the DOJ for removal from the EES until he or she has fully exhausted internal processes, which could continue on long after his or her EES designation. RSA 105:13-b; App. I 222, 224-25.

Although officers now receive some degree of process prior to being placed on the EES, the disciplinary process itself is private, typically not in open court, but within the various police departments. *Cf.* RSA 91-A:3, II (allowing discussion of employee personnel issues, including "the disciplining of" an employee to occur in nonpublic session). Nothing about that internal process would lead an officer to reasonably expect any of it to become public, especially in light of RSA 105:13-b and the Attorney General memoranda, which expressly confirm the contrary.

This Court, on several occasions, has acknowledged the deep impact that placement on the EES effects on officers and the significant interests that result. *See Gantert*, 168 N.H. at 648 ("Although the '*Laurie* List' is not available to members of the public generally, placement on the list all but guarantees that information about the officers will be disclosed to trial courts and/or defendants or their counsel any time the officers testify in a criminal case, thus potentially affecting their reputations and professional standing . . . .") (Emphasis added). This, combined with the facts that the legislature has: (1) statutorily deemed police personnel files confidential; (2) declared internal police disciplinary investigations inadmissible in civil actions; and (3) expressly included right-to-know law exemptions for personnel materials—such as "records related to internal personnel practices" and "personnel files"— and directed public bodies to address personnel-related issues in nonpublic session, leads inescapably to the conclusion that officers have strong privacy rights in the EES because it is made up of their personnel disciplinary information. RSA 105:13-b; RSA 516:36, II; RSA 91-A:3, II; RSA 91-A:5, IV.

Adoption of petitioners' assertion that no privacy interest exists requires this Court to ignore multiple legislative and judicial pronouncements as well as the common sense notion that information deriving from personnel discipline and misconduct investigations is generally private. *See*, *e.g.*, *Union Leader Corp.*, 162 N.H. at 679 (2011); *cf. Whittingham v. Amherst Coll*., 164 F.R.D. 124, 127 (D. Mass. 1995) ("[P]ersonnel files contain perhaps the most private information about an employee within the possession of an employer"). The officers' privacy interests can hardly be overstated.

2. The public's interest in disclosure of the EES is minimal.

Contrary to the petitioners' strenuous assertions, the public's interest in disclosure of the EES is non-existent, or, at best, minimal. As this Court has emphasized, the legislature has identified, and enshrined, a public interest in favor of police personnel file confidentiality through RSA 105:13-b and RSA 516:36. This Court recognizes that, through these statutes, the legislature has balanced "the rights of criminal defendants against the countervailing interests of the police and *the public* in the confidentiality of officer personnel records." *Duchesne*, 167 N.H. at 780 (emphasis added). While the petitioners offer many suppositions – none grounded in statements of the legislature or this Court – why they believe that the public interest in disclosure is high, they cannot surmount the reality that the legislature has definitively articulated a contrary public interest – one in confidentiality of police personnel information - that this Court has recognized.

Furthermore, the petitioners never grapple with why the legislature's public interest in non-disclosure makes sense: as this Court quoted her, Representative Sytek summed it up: "[p]rotection of [police internal investigation] files, which will remain confidential under the right to know law, will encourage thorough investigation and discipline of dishonest or abusive police officers." *Fenniman*, 136 N.H. at 627 (quoting Representative Sytek's report of the House Judiciary Committee, *N.H.H.R. Jour.* 621 (1986)).

If this Court's and the legislature's pronouncements leave room for the assertion of any public interest in disclosure of police personnel file information as reflected in the EES, the nature of the EES itself further minimizes that interest. The EES contains little more than a summary level description of a few words or less of the conduct for which the officer is listed. Details of that conduct remain in police personnel files, which themselves remain confidential pursuant to RSA 105:13-b. At most, disclosure will mislead the public and undermine public confidence in law enforcement.

Petitioners contend that the "central purpose" of this action is to permit the public "to know what police officers are up to so that the public can hold them accountable[,]" App. 8 (emphasis added), but disclosure of the EES, standing alone, actually threatens informed accountability by encouraging wild speculation as to the precise nature of confidential personnel findings.

These considerations apply with equal force in the event that the EES is analyzed merely as an "other file" whose disclosure would constitute an invasion of privacy. RSA 91-A:5, IV. This Court's and the

legislature's identification of a public interest in the confidentiality of the information on the EES preclude a finding of any significant public interest in disclosure even if the EES is not formally a "personnel file."

3. The government has a "great interest" in maintaining the confidentiality of the EES.

This Court has recognized that "[t]he government has a *great interest* in placing on the '*Laurie* list' officers whose *confidential* personnel files may contain exculpatory information." *Gantert*, 168 N.H. at 649 (emphasis added). This is because "the prosecutorial duty that spawned the creation and use of '*Laurie* lists' is of constitutional magnitude." *Id.* Confidentiality, as Representative Sytek emphasized, "will encourage thorough investigation and discipline of dishonest or abusive police officers." *Fenniman*, 136 N.H. at 627. These themes align into a strong governmental interest against disclosure of the EES. Confidentiality of police personnel file information ensures (1) robust investigation of officer misconduct, and (2) robust realization for criminal defendants of the constitutional right to exculpatory evidence. Each of these standing alone is an important governmental interest; combined they form a mighty governmental interest.

4. The balance of the interests necessarily falls against disclosure of the EES and in favor of the government's interest and the officers' statutorily-protected privacy interests.

As this Court has recognized, police officers, the public and the government all have an interest in maintaining the confidentiality of police

officer personnel information. That interest extends to the EES, whether viewed as information from a personnel file or an "other" file. Those aligned interests, moreover, spring from definitive and identifiable sources, such as the legislature's or this Court's pronouncements; they are grounded in actual, articulated legislative and judicial words. That makes this the unusual case in which there is little to balance. All three interests align in favor of exempting the EES from disclosure pursuant to RSA 91-A:5, IV.

The DOJ has maintained the confidentiality of the identifying information of the officers on the EES, and its predecessor the "*Laurie* lists" since their creation. Maintaining that status makes sense for several reasons, including that police chiefs and officers have relied on the promise of confidentiality for fifteen years, that the EES contains statutorily-confidential personnel information, and that the DOJ designed the EES solely to function as a jumping-off point in fulfilling prosecutors' constitutional duties, not as a definitive list of anything, and of meaning only to those who have a constitutional obligation to disclose exculpatory evidence, and not the general public who will not be able to decipher the circumstances that led to any particular officer's listing.

Overlooking for a moment that this Court has identified a public interest in confidentiality and accepting that the petitioners' arguments have a recognized public policy grounding; petitioners' arguments do not truly support the benefits they claim would accrue to the public through disclosure of the EES. First, Petitioners mistakenly perceive that the EES is the next best thing to actual personnel records. It is not. When balancing the privacy rights of individual governmental employees, the court must assess exactly how disclosure would "inform the public about the conduct

and activities of their government[.]" *Reid*, 169 N.H. at 528-29. As discussed above, the EES will far more likely mislead than inform the public. At best, public disclosure of the EES will not allow, as the petitioners argue, the public to hold anyone accountable, but, most likely, will have the effect of eroding confidence in law enforcement, and, by extension, government. Without good, public policy based reasons, that outcome augurs strongly in favor of exemption.

Second, many of the arguments petitioners advanced below do not actually articulate a public interest or benefit in disclosure, but, rather, are calibrated toward criminal defendants. *See*, *e.g.*, App. I 28 (Petition at ¶ 44: "[P]ublic interest in disclosure is great given the fact that the current system provides defendants with no ability to verify that they have received all the information to which they are constitutionally entitled.") (Emphasis added); App. I 26 (Petition at ¶ 42 "[T]he public interest is further enhanced by the fact that the Department views the EES as a critical tool . . . to produce exculpatory information to defendants.") (Emphasis added). Petitioners' arguments revolve around interests other than the public and do not account for the fact that the statutory scheme already provides individual criminal defendants the sole exception to police personnel file confidentiality, RSA 105:13-b, I, as well as a constitutional right and a panoply of remedies in the event of a deprivation.

Petitioners emphasize fears about *Brady*-related deficiencies that pertain to the identification of individual officers for initial placement on the EES. App. I 43. For instance, Petitioners argue:

> [D]efendants simply have to trust that the system has worked perfectly. For this system to work as intended, multiple

> events need to occur: (i) the police chief needs to become aware of a credibility/exculpatory issue concerning an officer; (ii) the police chief needs to determine that the issue warrants placement on the EES list; (iii) the police chief needs to inform the county attorney of the decision to place the officer on the EES list; (iv) the county attorney needs to conduct his or her own review and determine whether EES placement is warranted, and then place the officer on the list . . . .

App. I 43.

These arguments miss the mark because: a) some are not even true, such as argument iv; b) they expressly pertain to hypothetical defendants as opposed to the public; and c) disclosure of the DOJ's current EES would do nothing to ensure that local police chiefs are more diligent in their future identification of officers with adverse disciplinary findings, or in their reporting of these officers to the DOJ. As discussed above, this Court cannot overlook the possibility that disclosure of the spreadsheet may result in hesitation to place officers on the EES due to the public nature of the designation. *Petition of Union Leader*, 147 N.H. 603, 605 (2002) ("If the suggested access were permitted . . . candor among government officials [might become] stifled."); *Fenniman*, 136 N.H. at 627 (quoting Representative Sytek that confidentiality "will encourage thorough investigation and discipline of dishonest or abusive police officers.").

Against a weak public interest, the invasion of the officers' privacy is significant because RSA 105:13-b grants police officers significant protection, including the possibility of *in camera* review, before personnel materials are provided to a particular criminal defendant, and otherwise complete confidentiality. Although Petitioners may disagree with that process as a matter of policy, it is the current state of the law, and,

therefore, changes to the manner in which police personnel file material is disclosed must come from the legislature. This highlights perhaps the core flaw in petitioners' positions: to the extent that Petitioners seek broader public access to the officer disciplinary findings contained in personnel files, they present policy arguments to be made to the legislature, and not in this Court, which must apply the law as it exists and not as petitioners wish it existed.

Therefore, even if this Court were to retreat from its recognition of a public interest in the confidentiality of police personnel information, *Duchesne*, 167 N.H. at 780, the balancing test that governs the personnel and other file exemption compels exemption from disclosure under RSA 91-A for the EES. The government's and the individual officers' interests in nondisclosure outweigh the public's interest in accessing the limited contents of the EES.

In short, the trial court erred by not conducting a balancing test, and any balancing test compels the conclusion that the EES is a personnel or other file whose disclosure would constitute an invasion of privacy.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests oral argument.

The State certifies that the appealed decision is in writing and is appended to this brief.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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November 14, 2019

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CERTIFICATE OF COMPLIANCE

I, Daniel E. Will, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,062 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

November 14, 2019 /s/*Daniel E. Will*
Daniel E. Will

CERTIFICATE OF SERVICE

I, Daniel E. Will, hereby certify that a copy of the State's brief and appendix shall be served on the following parties of record**,** through the New Hampshire Supreme Court's electronic filing system:

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November 14, 2019 /s/*Daniel E. Will*
Daniel E. Will

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THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2018-CV-00537

New Hampshire Center for Public Interest Journalism, et al

v.

New Hampshire Department of Justice

ORDER ON MOTION TO DISMISS

Currently before the Court is petitioners'[1] request under RSA 91-A to access an un-redacted version of the Exculpatory Evidence Schedule ("EES"). The New Hampshire Department of Justice ("DOJ") moves to dismiss, arguing the EES is confidential under RSA 105:13-b and/or exempt from disclosure under RSA 91-A. Petitioners object. The Court held a hearing on February 25, 2019. After review of the pleadings, arguments, and applicable law, the DOJ's motion to dismiss is DENIED.

Factual Background

The New Hampshire Department of Justice ("DOJ") currently maintains a list of police officers who have engaged in sustained misconduct, when such misconduct reflects negatively on their credibility or trustworthiness. Formerly known as the "Laurie List," the list is now called the EES. In its current formation, the EES is a spreadsheet containing five columns: (1) officer's name; (2) department employing said officer; (3) date of incident; (4) date of notification; and (5) category or type of behavior that

[1] Petitioners include: the New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Union Leader Corporation, Newspapers of New England, Inc., through its New Hampshire Properties, Seacoast Newspapers, Inc., Keene Publishing Corporation, and the American Civil Liberties Union of New Hampshire. (Pets.' Pet. p. 1.)

resulted in the officer being placed on the EES. (See Pets.' Appx. p. 1.)

Each petitioner filed a Chapter 91-A request with the DOJ seeking the most recent EES. On each occasion, the DOJ provided petitioners with a version of the EES that redacted any personal identifying information of the officers contained therein. Certain petitioners thereafter submitted 91-A requests seeking an un-redacted version of the EES. These requests excluded information concerning officers that had pending requests or applications before the DOJ in which they sought removal from the EES. The DOJ denied these requests, claiming such disclosures would constitute an invasion of privacy of the officers contained within the EES.

Analysis

As stated above, petitioners seek disclosure of the un-redacted version of the EES pursuant to New Hampshire's Right-to-Know Law. The DOJ objects, arguing: (1) the EES is confidential under RSA 105:13-b; (2) longstanding DOJ practice, coupled with legislative inaction, confirms disclosure of the EES is prohibited by RSA 105:13-b; (3) the EES is *per se* exempt from disclosure as it reflects records of police departments' internal personnel practices; and (4) disclosure of the EES, which constitutes a personnel file under RSA 91-A, would constitute an invasion of privacy of the officers included on the list. (See DOJ's Mot. Dimiss, p. 8–18.) Petitioners dispute these arguments.

I. RSA 105:13-b

As stated above, the DOJ first argues RSA 105:13-b forecloses the disclosure of the EES, as it "holds police personnel files strictly confidential with narrow exception." (Id. at 8.) RSA 105:13-b states, in relevant part:

> I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.
>
> II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.
>
> III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

At the outset, the Court is not convinced that RSA 105:13-b governs the petitioners' request. By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file "of a police officer who is serving as a witness in any criminal case." Under this statute, the mandated disclosure is to the defendant in that criminal case. Here, in contrast, there is no testifying officer, pending criminal case, or specific criminal defendant. Rather, petitioners seek disclosure of the EES to the general public. See Reid v. New Hampshire Attorney General, 169 N.H. 509, 528 (2016) ("'[P]ersonnel files' are not automatically exempt from disclosure." (citing RSA 91-A:5, IV)).

Even assuming RSA 105:13-b does apply, the Court finds the EES is not a personnel file within the meaning of the statute. The parties do not dispute that the EES

does not physically reside in any specific police officer's personnel file. Instead, the list is created and maintained by the DOJ for the purpose of identifying police officers "whose personnel files may contain potentially exculpatory evidence." (DOJ's Mot. Dismiss, p. 2.) Despite the foregoing, the DOJ argues that the EES should nevertheless be considered a protected police personnel file because the information contained therein is simultaneously contained in each officer's respective personnel file. The DOJ asserts that the relevant inquiry is whether the substantive information in the EES constitutes information taken from the police personnel files.

The petitioners counter, arguing RSA 105:13-b's protection is limited to documents contained in a police personnel file or, put another way, is limited to the physical police personnel files that are maintained by the respective police departments. The petitioners assert further that the EES, which is created and maintained by the Attorney General—who does not employ any of the police officers named in the EES—is an external document and does not fall within the scope of RSA 105:13-b's confidentiality.

In Reid, the New Hampshire Supreme Court defined "personnel" within the meaning of RSA 91-A:5's exemption for disclosures of internal personnel practices. 169 N.H. at 528. The Reid Court, relying on the United States Supreme Court's decision in Milner v. Department of Navy, 562 U.S. 562, 569 (2011), held that the term "'personnel,' when used as an adjective, . . . refers to human resources matters." Id. 522. The Supreme Court explained that the word "personnel" concerned "the conditions of employment in a governmental agency, including such matters as hiring and firing, work rules and discipline, compensation and benefits." Clay v. City of Dover, 169 N.H. 681,

686 (2017) (citing Reid, 169 N.H. at 522); see Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 606 (Mass. App. Ct. 2003) (interpreting "personnel file and information" to "include[], at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee . . . . [as] [t]hese constitute the core categories of personnel information that are useful in making employment decisions regarding an employee"). It then summarized that the term "personnel" related to employment. Reid, 169 N.H. at 523.

Applying the foregoing definition of "personnel," the Court finds the EES does not constitute a personnel file within the meaning of RSA 105:13-b. Here, the parties do not dispute that the officers on the EES are not employed by the DOJ, and the DOJ and the officers do not share any of the "usual attributes of an employer-employee relationship, such as the power to set the salary, hire or fire." Reid, 169 N.H. at 525. Moreover, the DOJ did not create and maintain the EES to discipline the officers contained therein, nor is there any evidence suggesting the DOJ has the authority to do so. Cf. Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (holding a report investigating employee harassment that "could have resulted in disciplinary action" constituted a "personnel practice" under RSA 91-A:5); Fenniman, 136 N.H. at 626 (holding "internal police investigatory files," which "document[ed] the procedures leading up to internal discipline," constituted personnel practices). Further, the DOJ concedes that it does not conduct any type of investigation or review—either independently or on behalf of the police departments—of the respective police personnel files of the officers on the EES. (DOJ's Mot. Dismiss, p. 9.) Therefore, because the officers listed on the EES do not

share an employee-employer relationship with the DOJ, and the EES lacks any type of employment or human resources function, the Court finds the EES is not a personnel file under RSA 105:13-b.

Although the DOJ attempts to argue that the information contained in the EES is "personnel information" and should be confidential under RSA 105:13-b, the Court is unpersuaded by this argument. "[The Court] interpret[s] legislative intent from the statute as written, and, therefore, [it] will not consider what the legislature might have said or add words that the legislature did not include." In re Kenick, 156 N.H. 356, 359 (2007). Here, there is no indication the legislature intended to protect information contained in a police personnel file, regardless of its location, when it enacted RSA 105:13-b. To the contrary, the Court finds a plain reading of the statute reflects that the legislature intended to limit RSA 105:13-b's confidentiality to the physical personnel file itself, as it expressly contemplates the personnel file being provided to the Court for *in camera* review and, after examination, the remainder of the file being returned to the police department that employs the police officer. There is no mention of personnel *information* in RSA 105:13-b, let alone an indication the legislature intended to make such information confidential. If the legislature had so intended, it could have used words to effectuate that intent, such as making confidential all "personnel information" or all information contained in a police personnel file.[2] Cf. Mass. Gen. Laws Ann. ch. 4 § 7

[2] Even assuming the EES contains "personnel information," the DOJ offers no authority supporting its contention that this fact would entitle it to confidentiality. In addressing a somewhat similar issue relating to Massachusetts's Right-to-Know law, the Massachusetts Appeal Court reached the opposite conclusion. In Worcester Telegram, 787 N.E.2d at 602, the Appeals Court, in distinguishing the applicability of the personnel file exemption to two separate documents that contained similar information, held "[t]he exemption for 'personnel file or information' is not dependent upon whether the same information may be available, or discernible, through alternative sources . . . . Rather, the nature and character of the document determines whether it is 'personnel file or information.'" 787 N.E.2d at 609. It

(exempting from public records "personnel . . . files or *information*") (emphasis added).

II. Administrative Gloss

The DOJ next argues the Court should defer to its interpretation of RSA 105:13-b because it has independently interpreted that statute for approximately fifteen years to mean that the EES/Laurie List was confidential. The Court disagrees with the DOJ that it is entitled to such deference.

"The doctrine of administrative gloss is a rule of statutory construction." In re Kalar, 152 N.H. 314, 321 (2011). "Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." Id. "If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate the legislative intent." Id. "Lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine." Id. at 322.

Resolution of the parties' dispute regarding RSA 105:13-b turns on the definition of "personnel file," and whether it includes the EES. Although the parties disagree as to the scope of RSA 105:13-b's confidentiality, neither party contends the statute as a whole is ambiguous, and the Court finds it is not. Therefore, the Court finds the administrative gloss doctrine is inapplicable. See State v. Priceline.com, Inc., No. 2017-0674 (N.H. Mar. 8, 2019) ("[T]he administrative gloss doctrine applies only when a statutory provision is ambiguous."); Heron Cove Ass'n v. DVMD Holdings, Inc., 146 N.H.

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concluded that "the same information [could] simultaneously be contained in a public record and in exempt 'personnel file or information.'" Id.

211, 215 (2001) ("If the language is plain and unambiguous, [the Court] need not look beyond the statute for further indications of the legislative intent.").[3]

Although the DOJ relies on Petition of Warden, New Hampshire State Prison (State v. Roberts), 168 N.H. 9 (2015), in asserting its position that the Court should grant deference to its interpretation of RSA 105:13-b, the Court finds that case distinguishable. In Petition of Warden, the issue before the Supreme Court was whether the Adult Parole Board ("APB") had the authority to parole an inmate from one sentence to a consecutive sentence, while still imposing the time remaining/conditions of the first sentence after the inmate had completed the second sentence. 168 N.H. at 9. The APB had "developed an intermediate step in the traditional parole process that allow[ed] prisoners to parole into a consecutive sentence upon completion of the minimum of a prior sentence." Id. "The effect of this practice [was] to restructure the order of sentences by allowing a prisoner to serve time on a consecutive sentence while continuing to serve time on the initial sentence, and thus potentially earn conditional release into the community more quickly." Id.

The Supreme Court first noted that "[t]here is no right to parole in New Hampshire," as "the grant of parole rest[ed] squarely within the discretion of the APB." Id.; see RSA 651-A. It then held that although the APB's "intermediate step" was neither expressly permitted nor prohibited under RSA 651-A, "given the APB's longstanding history of exercising this power, [it] agree[d] with the State that the legitimacy of [that] practice [was] now beyond question." Id.

[3] The Court also notes that the House of Representatives has introduced and passed a bill, HB 155, that would expressly make the EES a public record under RSA 91-A. HB 155 was scheduled to be heard and considered by the Senate Judiciary Committee on April 11, 2019. See Senate Calendar 17A.

Unlike Petition of Warden, where RSA 651-A granted the APB with wide discretion in granting or denying parole, here, RSA 105:13-b does not give the DOJ any discretion in determining what information is to be kept confidential. In fact, RSA 105:13-b does not grant the DOJ any discretion at all. Rather, it mandates disclosure of exculpatory evidence in a police personnel file if that officer is testifying in a criminal case, and lays out a step-by-step process to determine whether evidence in a police personnel file is exculpatory, if such a determination cannot be made by the State. See RSA 105:13-b.

Accordingly, because RSA 105:13-b is clear and unambiguous and does not grant the State any discretion in its administration, the Court declines to give deference to the DOJ's interpretation of the statute under the administrative gloss doctrine.

III. RSA 91-A

The DOJ also argues the EES is categorically exempt from disclosure under RSA 91-A:5 as an "internal personnel practice." See Fenniman, 136 N.H. at 624. Petitioners dispute the EES is exempt under 91-A:5, arguing it is neither an "internal" nor a "personnel" document.

"The purpose of the Right-to-Know Law 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." New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003); see RSA 91-A:1 ("Openness in the conduct of public business is essential to a democratic society."). Thus, the law "furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire Right to Life v.

Director, New Hampshire Charitable Trusts Unit, 169 N.H. 95, 103 (2016). "Although the statute does not provide for unrestricted access to public records, [the Court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. "As a result, [the Court] broadly construe[s] provisions favoring disclosure and interpret[s] exemptions restrictively." Id. "When a public entity seeks to avoid disclosure of material under the Right-to-Know law, that entity bears a heavy burden to shift the balance towards nondisclosure." Id.

With respect to the "internal personnel practices" exemption, the Supreme Court has noted that the terms "internal" and "personnel" modify the word "practices," "thereby circumscribing the provision's scope." Reid, 169 N.H. at 522. Looking to guidance from federal case law analyzing the Freedom of Information Act, the Supreme Court has determined that the term "personnel" "general[ly] . . . relates to employment," specifically "rules and practices dealing with employee relations or human resources . . . [including] such matters as hiring and firing, work rules and discipline, compensation and benefits." Id. at 523. The Court also defined "internal" as "existing or situated within the limits . . . of something." Id. (citing Webster's Third New International Dictionary 1180 (unabridged ed. 2002)). Therefore, "[e]mploying the foregoing definitions, [the Supreme Court] construe[d] 'internal personnel practices' to mean practices that 'exist[] or [are] situated within the limits' of employment." Id. Personnel practices are also considered "internal" if carried out by someone other than the employer if it is done on the employer's behalf. Id. (citing Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (finding police internal affairs investigation report authored by outside

investigators that were hired by the precinct constituted "internal personnel practices")).

For the same reasons the Court found the EES was not a personnel file within the meaning of RSA 105:13-b, it finds the EES is not a personnel practice within the meaning of RSA 91-A:5. Moreover, the Court finds the EES is not an "internal" document. As stated previously, the EES is created and maintained by the Attorney General, who does not employ any of the police officers contained therein. Unlike the outside investigators in Hounsell, who were hired by the police department to perform an internal investigation of one of its employees, 169 N.H. at 521, here, the Attorney General was not hired by any individual police department to generate the EES. Rather, the "singular purpose" of the EES is to alert prosecutors "to the existence of exculpatory evidence as to a particular defendant's criminal matter." (DOJ's Mot. Dismiss, p. 9.) Thus, given that the creation of the list did not arise out of an agency relationship between the Attorney General and any police department, and the character and purpose of the list does not relate to or occur within the limits of the officers' employment, the Court finds it is not an internal personnel practice within the meaning of RSA 91-A:5.

Finally the DOJ argues that, in the alternative, even if the EES does not fall within the internal personnel practice exemption, it is still a "personnel file" under RSA 91-A:5 and it should not be disclosed because its disclosure would amount to an invasion of privacy of the officers contained therein. For the reasons previously discussed in this order, the Court finds the EES is not a "personnel file" within the meaning of RSA 91-A:5. As a result, the Court need not conduct a 91-A balancing test to determine

whether an invasion of privacy would result from disclosure of the EES.[4]

Accordingly, because the EES is not confidential under RSA 105:13-b and not exempt under RSA 91-A, the DOJ's motion to dismiss is DENIED.

So ordered.

Date: April 23, 2019

Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/24/2019

[4] If a document or file is considered a "personnel file" under RSA 91-A, the Court then must determine whether disclosure of the material "would constitute an invasion of privacy," which is done by applying the "customary balancing test" set forth in Reid. 169 N.H. at 528.