STATE OF NEW HAMPSHIRE
SUPREME COURT

NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM, ET AL

v.

NEW HAMPSHIRE DEPARTMENT OF JUSTICE

CASE NO. 2019-0279

MEMORANDUM OF LAW OF NEW HAMPSHIRE POLICE ASSOCIATION AND MATTHEW JAJUGA, AMICUS CURIAE

I. INTRODUCTION

NOW COMES, the New Hampshire Police Association, a domestic non-profit corporation and fraternal organization representing active and retired members of the law enforcement community throughout the State of New Hampshire (hereinafter "NHPA") and Matthew Jajuga, in individual sworn police officer employed by the Manchester Police Department and a member of the NHPA (hereinafter "Jajuga") and submits this Memorandum of Law in Support of the Department of Justice to bring to the Court's attention two (2) specific areas of analysis. The Trial Court erred in failing to apply RSA 105-13:b and deprived officers of their constitutional rights. In addition, the Trial Court erred in not applying an RSA 91-A:5 exemption, as the list is categorically exempt and currently incomplete.

II. BACKGROUND

A. Decision Below

The petitioners, New Hampshire Center for Public Interest Journalism; Keene Publishing Corporation; Newspapers of New England, through its New Hampshire Properties, Seacoast Newspapers, Inc.; Telegraph of Nashua; Union Leader Corporation; and the American Civil Liberties Union of New Hampshire (hereinafter "Petitioners") requested access to an un-redacted

version of the exculpatory evidence schedule (hereinafter "EES"). The Department of Justice moved to dismiss the matter as confidential under RSA 105:13-b and/or exempt from disclosure pursuant to RSA 91-A. On April 23, 2019, the Honorable Charles S. Temple, presiding justice, held that the EES was not confidential under RSA 105:13-b and not exempt under RSA 91-A and thereby denying the Department of Justice's Motion to Dismiss. See, Attachment to Notice of Appeal, Order on Motion to Dismiss (dated April 23, 2019) (hereinafter "Order") Thereafter, the parties stipulated to the order as being a final judgment for purposes of pursuing this matter directly on appeal. See, Attachment to Notice of Appeal, Joint Motion for Entry of Stipulation for Entry of Final Judgment.

The Trial Court found that RSA 105:13-b was inapplicable as this was a civil, not criminal matter. See, Order, at 3. Further, the court found that assuming RSA 105:13-b did apply, that the EES was not a "personnel file". The court held that the EES is physically external to the personnel file; that the officers are not employed by the Department of Justice; and that the Department of Justice does not use the EES for employment functions. As such, the EES is not a personnel file. See, Order, at 5-6.

The Trial Court also held that the categorical exemption for "internal personnel practices" pursuant to RSA 91-A:5, IV was inapplicable as the EES was not a "personnel" practice or internal. See, Order, at 10-11. The Department of Justice filed a timely appeal on or about May 15, 2019.

B. Exculpatory Evidence Schedule

The Trial Court found that the New Hampshire Department of Justice currently maintains a list of police officers who have engaged in **sustained** misconduct, when such misconduct reflects negatively on their creditability or trustworthiness. Formerly known as the "Laurie List" the list is now called the Exculpatory Evidence Schedule ("EES"). In its current formation, the

EES is a spreadsheet containing five (5) columns: the officer's name; department employing said agency; date of incident; date of notification; and category or type of behavior that resulted in the officer being placed on the EES. See, Order, at 1-2. The Department of Justice has access to police officer's personnel files and disciplinary history because of the well-recognized proposition that in criminal cases, the State is obligated to disclose information favorable to the defendant that is material to either guilt or punishment. This obligation arises from a defendant's constitutional right to due process of law so as to ensure defendants receive fair trials. See, United States v. Bagley, 473 U.S. 667, 675 (1985) and State v. Laurie, 139 N.H. 325, 329 (1995) see also New Hampshire Constitution, Part I, Article 15. The duty to disclose encompasses both exculpatory information and information that may be used to impeach the State's witnesses. Laurie at 327. The knowledge of exculpatory information is imputed knowledge to the prosecutors and are held to the standard that they are assumed and imputed to have the knowledge of the officers' personnel files. State v. Etienne, 163 N.H. 57, 90-91 (2011).

The New Hampshire Constitution affords defendants greater protections than the federal standard and the Court has held, "upon a showing by the defendant that favorable, exculpatory evidence has been knowingly withheld by the prosecution, the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have been affected by the verdict" Laurie, at 330.

As a result, the Court required that prosecutors and law enforcement agencies needed to share information regarding any potential sustained findings of misconduct by an officer that could implicate exculpatory information.[1] One tool created was the so-called "Laurie List".

[1] The court erroneously limited the EES to misconduct that would reflect negatively on the creditability or trustworthiness. However, the Laurie List contains many other aspects, including use of force. See, Duchesne v. Hillsborough County Attorney, 167 N.H. 774 (2015).

When the State, or County Attorney, is informed that a police officer has potentially exculpatory information in their personnel file, the officers are immediately added to the list out of an abundance of caution, due to the constitutional magnitude of the obligation.

The EES is the basis for making a threshold determination of whether there is potential exculpatory information that should be submitted to the Court for review. "The consequence of paradigm appears to be that, acting out of an abundance of caution in order to preclude the prospect of being found to have failed in their prosecutorial obligation, once an officer's name is placed on the "Laurie List" prosecutors routinely cause the officer's personnel file to be submitted to the court to determine whether it contains exculpatory information that must be turned over to the defense." Duchesne, at 782.

III. ARGUMENT

A. The Trial Court erred in failing to apply RSA 105:13-b

The Trial Court ignored the clear and unambiguous language of the statute in not applying RSA 105:13-b. The language of RSA 105:13-b is as follows:

> **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.** (emphasis supplied)

"The interpretation and application of a statute present questions of law, which we review *de novo*. Babiarz v. Town of Grafton, 155 N.H. 757, 759 (2007). In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. *Id.* When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used. *Id.* We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id." Upton v Town of Hopkinton,157 N.H. 115, 118-119 (2008).

The clear and unambiguous language of the statute references the confidentiality of police files. The statute only allows for a narrow exception to the disclosure of police personnel and investigatory files. The disclosures are allowed in cases where the files contain exculpatory information (RSA 105:13-b (I)) and in limited circumstances for non-exculpatory information (RSA 105:13-b (III)). In ALL other instances the police files remain confidential.

The public policy of confidentiality of police personnel files have been recognized in common law and statute for a significant period of time. See, RSA 105:13-b above; Gantert v. City of Rochester, 168 N.H. 640, 646 (2016) (finding Police officer personnel files confidential by statute and EES list confidential); Duchesne v. Hillsborough County Attorney, 156 N.H. 774, 780-782 (Discussion of EES list and interplay of 105:13-b extensively)[2]; Pivero v. Largy, 143

[2] Court found RSA 105:13-b not directly on point as the offensive material had been removed from the officers personnel file by order of an arbitrator. Ultimately the Petitioners were required to be removed from the list as there was no basis for the EES designation.

N.H 187, 191 (1998) (Subject police officer not entitled to investigative file until initiation of Disciplinary process) see also RSA 516:36 (denying admissibility for police investigatory files in civil proceedings) and Per 1501.02-1501.04 (Law enforcement disciplinary records and investigations for individuals employed by the State are confidential).

Further, the Trial Court erred in attempting to claim that the EES was not part of a "personnel file" See, Order, at 3. However, this defies reason and common sense. It is agreed and undisputed that only "sustained" findings of misconduct allow for an individual to be placed on the EES list. See, Order, at 1. A sustained finding naturally implies an investigation and disciplinary action A personnel file contains these records. See, RSA 275:56 and LAB 802.08. The EES list is simply a compilation of a series of disciplinary conclusions. In fact, the Department of Justice is statutorily authorized to compile the EES list based upon the access granted to the prosecutors under RSA 105:13-b. The exclusion of an analysis under 105:13-b was legal error.

B. The failure to apply RSA 105:13-b deprives officers of their Constitutional Rights

Mathew Jajuga and the NHPA implore this Honorable Court to require the Trial Court to recognize the confidentiality required by RSA 105:13-b. If not for this Honorable Court's analysis of 105:13-b Mr. Jajuga would still be on the EES list inappropriately. Jajuga was removed from the EES List because this Court emphasized the important role that the RSA 105-13:b plays in the balancing of rights for the police officers. The Court found,

> Although the prosecutorial duty that spawned the creation and use of "Laurie Lists" is of constitutional magnitude, 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." Duchesne at 780.

The Court further found,

> we have recognized between exculpatory evidence that must be disclosed to the defendant under the State and Federal Constitutions, and other information contained in a confidential personnel file that may be obtained through the procedure set forth in [paragraph III of] RSA 105:13-b." *Id.* at 321; *compare* RSA 105:13-b, I and II, *with* RSA 105:13-b, III." Duchesne at 781.

On March 3, 2010, Mathew Jajuga was involved in an off-duty incident in Manchester, New Hampshire. It was alleged that he had used excessive force and he was illegally suspended for a period of time. On August 2, 2010, the Chief of the department informed the Hillsborough County Attorney that Jajuga engaged in misconduct that might require his inclusion on the EES list. The County placed him on the confidential EES list. Duchesne at 774.

This Honorable Court has recognized that the placement on the EES list was professionally harmful to Jajuga. The Court found,

> ...given the respondent's acknowledgment in the trial court that inclusion on the "Laurie List" carries a stigma, police officers have a weighty countervailing interest in insuring that their names are not placed on the list when there are no proper grounds for doing so. As this case demonstrates, in accommodating these competing interests, basic fairness demands that courts not invariably defer to the judgment of prosecutors with respect even to the threshold issue of what kind of adverse information should result in an officer's placement on a "Laurie List." Duchsene at 782-783.

and

> ...The respondent acknowledged during the hearing before the trial court that "the *Laurie* list is considered a kind of a death list" for the officers on it or "is given that stigma." 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 with those with whom they work and interact on a regular basis. *Cf.* State v. Veale, 158 N.H. 632, 639, 972 A.2d 1009 (2009)" Duchesne at 783.

After a hearing on the merits before an independent arbitrator, the decision of the Chief was overturned and Jajuga was exonerated and provided full back pay and the information was removed from his personnel file. Duchesne at 775-776. The Department of Justice also provided

and conducted an investigation of the incident and found that the actions of Jajuga were justified under New Hampshire Law. On January 2, 2012, the Chief of the Department requested that Jajuga be removed from the Laurie List by the Hillsborough County Attorney office and this was refused by the County. Id. at 776. Jajuga was forced to file a petition in Superior Court and Appeal to the Supreme Court before his name was finally removed from the list.

This Honorable Court held,

> although the petitioners were initially disciplined by the police chief for their alleged excessive use of force, the chief's decision was overturned by an arbitrator, a neutral factfinder, following a full hearing conducted pursuant to procedures agreed to in the CBA. After an investigation, the attorney general also concluded that the petitioners' use of force in the incident was justified. As a result of these determinations, references to the incident have now been removed from the petitioners' personnel files. Given that the original allegation of excessive force has been determined to be unfounded, there is no sustained basis for the petitioners' placement on the "Laurie List." It makes no sense that the threshold determination — that something was thought to be *potentially* exculpatory and worthy of an *in camera* review by the court, but has now been shown not to be of that character — should follow the petitioners every time they appear as witnesses." Id. 784-785.

This process took approximately five (5) years to accomplish and in the absence of the analysis of this court of RSA 105:13-b, Jajuga would still be on the list.

The Court, in a subsequent case, also determined since the officers had a liberty and property interest in their reputation and career that placement on the EES list required both a pre-deprivation process followed by a more thorough post deprivation process. The private interest affected, as the Trial Court found, was the plaintiff's "reputation and ability to continue to work unimpeded as a police officer." Gantert 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 with those with whom they work and interact on a regular basis. Duchesne, 167 N.H. at 783.
>
> 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* *Veale*, 158 N.H. at 638-39; *Petition of Bagley*, 128 N.H. 275, 284, 513 A.2d 331 (1986) ("The general rule is that a person's liberty may be impaired when governmental action seriously damages his standing and associations in the community."); *cf.* *Clark v. Manchester*, 113 N.H. 270, 274, 305 A.2d 668 (1973) (holding that an employee was not entitled to due process, in part, because he failed to show "that the governmental conduct likely will … seriously damage his standing and associations in this community … [or] impose a stigma upon the employee that will foreclose future opportunities to practice his chosen profession" (quotation omitted)). Here, we agree that the private interest is significant. Gantert v. City of Rochester, 168 N.H. 640, 648 (2016).

The Court found that the interest of the officer was protected by Part 1 Article 15 of the New Hampshire constitution but that he had received all of the process that he was due under law. The Court also acknowledged that the EES and personnel files were confidential by Statute, i.e. RSA 105:13-b. Gantert at 646.

Thus, the process that is due an officer has been based upon the confidentiality of the personnel files and the EES. If the EES is no longer confidential and the public has access to the EES the risk of erroneous deprivation is greatly increased and additional safeguards must be instituted beyond that laid forth in the currently existing Memos issued by the Department of Justice. In determining the amount of process due, the Court considers three factors,

> To determine what process is due, we balance three factors: (1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements. Doe, 167 N.H. at 414. The requirements of due process are flexible and call for such procedural protections as the particular situation demands. Id. (quotation omitted) Gantert at 647-648.

As the due process that was deemed sufficient was based on the assumption that the EES and investigatory files were confidential the current list cannot be disclosed to the public until the officers on the list are vetted to assure that they received sufficient due process before placement on the list. The public disclosure should not be made until after the officer has been entitled to his post deprivation review. This is due to the fact that once a list is made public the harm is done to the reputation and career. The fact that an individual is subsequently vindicated and taken off the list does not mean that the list in which he was originally received placement will not still be circulated. Once the information is published on the internet it is there permanently. This offends basic fairness.

C. The Trial Court erred in not applying the RSA 91-A:5 exemption as the list is not a final product

The NHPA and Jajuga agree and join with the Department of Justice that the personnel files of police officers and the EES should be categorically exempt from disclosure under RSA 91-A:5, IV. See, Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) and Hounsell v. North Conway Water Precinct, 154 N.H. 1 (2006).

The information that constitutes the EES is provided exclusively from the law enforcement individual's employer concerning disciplinary records in a personnel file. The information contained therein is the conclusion of an investigation into alleged misconduct. As a result, it is a personnel file. The Trial Court erred as it failed to apply the balancing test provided in Reid of whether the disclosure of the material would constitute an invasion of privacy. The NHPA and Matthew Jajuga also agree with the position of the Department of Justice that in the event that the EES is not categorically exempt, Trial Court erred in not applying the balancing test required of whether disclosure would amount to a "invasion of privacy" See, Reid v. NH Attorney General, 169 N.H. 509 (2016).

The EES list is a dynamic document that is always changing and individuals are added or removed, based on the circumstance of their particular matter. The petitioners acknowledge that certain individuals currently on the EES should not be included in public disclosures. The Trial Court found that, "certain petitioners thereafter submitted a 91-A request 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". Order, at 2. The EES should be considered a "draft" and not subject to disclosure under RSA 91-A. See, RSA 91-A:5, IX.

In fact, the EES is merely a snapshot in time, in which depending on the period that you review the document, an individual may be included or not, based on the particular circumstances. By way of illustration, Matthew Jajuga took approximately five (5) years from the time he was placed on the "Laurie List"/EES, from August 2, 2010, until his removal from the list in June of 2015. Even considering a shorter timeframe of the request by the Chief to remove Jajuga from the EES on January 31, 2012 was almost two (2) years after the event actually occurred in which he was mistakenly alleged to have committed misconduct. Thus, in this circumstance, he would have been on the list for a period of almost two (2) years prior to being removed. At any point in time during that two-year period, if the Trial Court's decision stands, could have gained access and distributed this information around indiscriminately as a "public record".

This result is fundamentally unfair to any police officer who has not had their matter completely and fully vetted through the processes that exist, either under arbitration pursuant to a collective bargaining agreement (see RSA 273-A:4); the Personnel Rules of the PAB (see RSA 21-I:58); a hearing before the Board of Selectmen for chiefs (see RSA 105:2-a); a hearing before the Board of Selectman (see RSA 41:48); hearing before the County Commissioners (see RSA

28:10-a); or any other appeal procedure allowed by policy, statute or other law. It is fundamentally unfair to disclose individual's names on a public document, provided they had committed misconduct when the individual had not yet had the opportunity to be heard and exhausted their review rights.

The Trial Court should be hesitant to upset the status quo of the confidentiality of the EES and police officer's personnel files, given that this Honorable Court has provided that the legislature, rather than the court, is the proper body to regulate the use of "Laurie Lists" including the development of procedures for placement of police officer on, and their removal from such lists. See, Gantert at 651.

IV. CONCLUSION

Based on the forgoing, the New Hampshire Police Association and Matthew Jajuga, Amicus Curiae, join the New Hampshire Department of Justice request for relief.

Respectfully submitted,

New Hampshire Police Association
and Matthew Jajuga
By and through its attorney,
MILNER & KRUPSKI, PLLC

November 14, 2019

By: */s/ John S. Krupski*
John S. Krupski, Esq. (NH Bar # 11309)
109 North State Street, Suite 9
Concord, NH 03301
(603) 410-6011
jake@milnerkrupski.com

CERTIFICATE OF SERVICE

I hereby certify that the forgoing was forwarded this same day, via the New Hampshire Supreme Court E-Filing, to Giles Bissonnette, Esq.; William Chapman, Esq.; and Gregory V. Sullivan, Esq.

/s/ John S. Krupski