

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2020-0005

Petition of the Department of Safety, Division of State Police  
(In re: Douglas Trottier v. Town of Northfield Police Department)

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PETITION FOR ORIGINAL JURISDICTION  
PURSUANT TO SUPREME COURT RULE 99  
(MERRIMACK COUNTY SUPERIOR COURT)

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**BRIEF OF TOWN OF NORTHFIELD POLICE DEPARTMENT**

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### **STATEMENT OF THE CASE**

The Statement of the Case as presented by the Appellant is chronologically accurate. The Town does not accept the Appellant's characterization of the underlying pleadings, but agrees that after the Superior Court initially ordered the production of the requested materials, that Court provided the State with an opportunity to be heard both in writing and orally, and that the State took advantage of both, fully briefing the matter to the Superior Court and appearing through counsel to argue against the Order at a duly noticed hearing.

The Appellant omits from its Statement the following:

On November 12, 2019, the State filed a Motion to Reconsider the Order requiring production of the State Police investigative file. P.A. 83 Plaintiff objected on November 14, 2019. P.A. 91. The Court denied the Motion to Reconsider on December 12, 2019. P.A. 94. The Parties assented to the State's subsequent Motion to Stay the Order pending this appeal.

### **STATEMENT OF THE FACTS**

The underlying litigation was commenced on May 22, 2019 with the filing of a Complaint by former Northfield employee Douglas Trottier. *See* Complaint, P.A. 3. Trottier alleged therein that in connection with his

separation from the Town in 2002, the Town agreed to a scripted response to any inquiries about his employment. Complaint ¶¶5-6. He alleged that in 2018, when he applied for a position with the State Police, the Town violated that agreement by informing the State Police investigator that the Town had a “secret” or “sealed” file concerning him. Complaint ¶10. Plaintiff asserted that after the alleged disclosure, the State Police informed him that he was no longer under consideration for employment. Complaint ¶11. Based thereon, Plaintiff brought four Counts against the Town, including Slander, Tortious Interference with Economic Relations, and Breach of Contract. ¶¶15-25. He claimed damages to include economic losses from lost opportunities, to wit: his failure to obtain employment with the State Police. Complaint ¶25.

Recognizing that Plaintiff’s damages claims rested entirely on the existence of evidence that any purported statement by the Town was the direct and proximate cause of the State Police decision not to hire Plaintiff, Counsel for both parties sought records of the State Police background investigation through requests pursuant to RSA 91-A. Failing to get a satisfactory response, Plaintiff sought to compel the production in the existing Superior Court action, with Defendant’s support. The Court

granted the Motion, but permitted the State to file an Objection or Motion to Reconsider. The State timely objected.

The State had an opportunity to be heard and was indeed heard at a full hearing where it was represented by counsel. After careful consideration of the arguments, the Superior Court ordered production of the investigative file but conditioned its publication on further notice and opportunity to be heard by the State. Order at 2. The Superior Court denied a subsequent Motion for Reconsideration, and this Appeal followed.

#### **SUMMARY OF ARGUMENT**

The Town takes no position on the application of RSA 91-A to the requested materials. The State's argument that either RSA 516:36 or asserted deficiencies in the process warrant reversal of the Superior Court Order, however, should be rejected. The plain language of the statute – a rule of statutory interpretation first touted and then abandoned by the State – clearly demonstrates that the legislature chose only to limit admissibility, not discovery, of internal investigative materials. Thus, even if the subject materials were governed by the statute, the statute would not preclude their discovery.

As to the process by which the order was obtained, the State asks this Court to elevate form over substance to hold that Plaintiff should have issued a subpoena rather than framing the request as a motion to compel. Adopting such a position will not advance the case: The parties will simply have to issue a subpoena on remand, the State will make exactly the same arguments in opposition with the exact same opportunity to be heard, and presumably the Superior Court will reach the same conclusion. The matter will then be right back before this Court on the merits. Thus, this Court should reject the procedural arguments and permit discovery of the records at this time.

### **ARGUMENT**

#### **I. RSA 516:36 PLAINLY DOES NOT PROHIBIT DISCOVERY OF THE REQUESTED MATERIALS.**

The State correctly observes that RSA 516:36 limits the admissibility of documents related to internal investigations. State Brief p. 21. The problem for the State, however, is two-fold. First, as the Superior Court correctly observed, the investigation of Mr. Trottier by the State Police was not an internal investigation as contemplated by the statute. Second, even if applicable, the statute only concerns admissibility, not

discovery, of the records. The statute simply does not bar the discovery of the materials sought.

The State's own Brief contains all the rules of statutory construction necessary to support this conclusion. The State correctly concedes that "[W]hen construing a statute, the Court 'first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning.'" State Brief p.21 (quoting *Anderson v. Robitaille*, 172 N.H. 20, 22 (2019)). The State, however, promptly ignores that rule, arguing in essence that "internal" can mean "external" and that "admissible" means "discoverable." The plain language is incontrovertible.

In an attempt to define the background check as an "internal investigation" subject to the statute the State relies principally on *Reid v. New Hampshire Attorney General*, 169 N.H. 509 (2016) and *Clay v. City of Dover*, 169 N.H. 681 (2017). State Brief p.24. Neither advances the State's argument. Most importantly, both were decisions rendered in the context of a request for records under RSA 91-A interpreting "internal personnel policies" not "internal investigations." In *Reid* this Court concluded that the Attorney General's investigation at issue was not of its own employee and, as such, the investigation was not "internal." 169 N.H.



at 519. The *Clay* court merely determined that a rubric used to make employment decision concerned “internal personnel practices” for purposes of RSA 91-A. 156 N.H. at 688. *Clay* has no bearing on whether the background investigative materials at issue in this case are protected under RSA 536:16.

Here, as in *Reid*, the documents sought are not those of an internal investigation into an employee of the State Police; they relate to a background investigation of an external applicant for employment. Nothing in *Reid* or *Clay* indicates that such an investigation is internal. Indeed, were it otherwise, all investigations by police – including all criminal investigations – could be construed as “internal” investigations. Moreover, the legislative history – were its review required – does not support the broad definition promoted by the State: Rep. Donna Sytek expressed her support of RSA 516:36 by noting that protection of the information “will encourage thorough investigation and discipline of dishonest or abusive police officers.” *See* State Objection at p.5 (P.A. 17). The background investigation on a potential hire has no such purpose.

The State’s further contention that because the term “admissible” is not defined the Court must look to the “intent of the legislation,” State Brief

at p.27, stands the plain meaning rule on its head. This Court (and the State) knows full well what “admissible” and “discoverable” mean. Indeed, the Court regularly uses the terms without requiring a legislative deep dive. For example, Super. Ct. R. 21(b) permits discovery of materials that may “lead to the discovery of admissible evidence.” Applying the State’s proposed interchangeable definition, the Rule could be read as permitting “admissibility” of admissible evidence or “discoverability” of discoverable evidence. Had the Legislature intended to limit the discoverability of the records, it could – and would – have done so.

**II. THE COURT SHOULD NOT REQUIRE THE PARTIES TO REPEAT THE PROCESS BELOW THROUGH THE ISSUANCE OF A SUBPOENA.**

The State’s second argument is that Superior Court should have required Plaintiff to subpoena the records rather than moving to compel them. The Town does not dispute that the subpoena process is a proper method of bringing matter before the Superior Court. The State does not, however, identify any prejudice it suffered as a result of the process followed in this case. Just as it would have if served with a subpoena, the State had an opportunity to object to producing the records, to craft an argument in support of its position, and to argue the matter with counsel at

a hearing before the Superior Court judge. This process more than adequately provided the State with due process protections it would have received under a subpoena process. (Indeed, the Superior Court was not even required to entertain oral argument.) The State's complaint on form may be well taken, but the claim of prejudice is hollow. Should this Court require remand simply to have a subpoena issue, the Parties will of course comply, but the result will merely be further delay without benefit to the State, the Parties, or the courts.

### **CONCLUSION**

The State investigative records are critical not only to confirming what may have been disclosed by third parties, as Plaintiff desires, but establishing whether those statements were the direct and proximate cause of the State's decision not to hire Plaintiff. They are critical to the underlying claims and defenses and – particularly with respect to the impact of any statements – unavailable from any other source. RSA 536:16 clearly does not preclude their discovery. The Court should reject the State's procedural objection and affirm the Superior Court Order.

**TOWN OF NORTHFIELD  
POLICE DEPARTMENT**

By its attorneys

**CULLENCOLLIMORE, PLLC**

Dated: July 24, 2020

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**CERTIFICATE OF SERVICE**

I certify that a copy of this filing was served via the Court's ECF filing system upon counsel of record.

Dated: July 24, 2020

/s/ Brian J.S. Cullen  
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