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)

PETITION FOR ORIGINAL JURISDICTION
PURSUANT TO SUPREME COURT RULE 11

(MERRIMACK COUNTY SUPERIOR COURT)

BRIEF FOR THE DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE

THE DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE

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(Fifteen-Minute Oral Argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

ISSUES PRESENTED

I. Whether internal pre-employment background investigations are records that are exempt from disclosure under RSA 516:36, II?

II. Whether the superior court erred in granting the Plaintiff, Douglas Trottier's Motion to Compel State Police to produce confidential pre-employment background investigation documents where the Department of Safety, Division of State Police was not a party to the action and the Plaintiff never filed a petition pursuant to the Right-to-Know statute, RSA 91-A, nor served a subpoena upon the Division of State Police?

TEXT OF RELEVANT AUTHORITIES

STATUTES:

RSA 517:4

> The party proposing to take a deposition shall cause a notice in writing, signed by a justice or notary, stating the day, hour, and place of taking the same, to be delivered to the adverse party, or one of them, or to be left at his or her abode, if either of such parties resides in this state, and within 20 miles of the place of taking, or of the party taking the same, a reasonable time before the taking thereof. A party may, at such party's expense, record a video deposition taken under this chapter, provided the party indicates the intent to record the video deposition in the notice.

RSA 516:4

> Any justice or notary may issue such writs for witnesses to appear before himself or any other justice or notary, to give depositions in any matter or cause in which the same may be lawfully taken.

RSA 91-A:4, 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.

RSA 91-A:5:

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,

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.

RSA 91-A:7:

> Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief. In order to satisfy the purposes of this chapter, the courts shall give proceedings under this chapter high priority on the court calendar. Such a petitioner may appear with or without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter, and may be filed by the petitioner or his or her counsel with the clerk of court or any justice thereof. Thereupon the clerk of court or any justice shall order service by copy of the petition on the person or persons charged. Subject to objection by either party, all documents filed with the petition and any response thereto shall be considered as evidence by the court. All documents submitted shall be provided to the opposing party prior to a hearing on the merits. When any justice shall find that time probably is of the essence, he or she may order notice by any reasonable means, and he or she shall have authority to issue an order ex parte when he or she shall reasonably deem such an order necessary to insure compliance with the provisions of this chapter.

RSA 516:36, II:

> All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be admissible in any civil action other than in a disciplinary action between the agency and its officers, agents, or employees. Nothing in this paragraph shall preclude the admissibility of otherwise relevant records of the law enforcement agency which relate to the incident under investigation that are not generated by or part of the internal investigation. For the purposes of this paragraph, “internal investigation” shall include any inquiry conducted by the chief law enforcement officer within a law enforcement agency or authorized by him.

RULES OF THE SUPERIOR COURT:

N.H. Super. Ct. R. 26 (m):

> Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (m) does not preclude a deposition by any other procedure allowed by these rules.

STATEMENT OF THE CASE

On May 22, 2019, the Plaintiff, Douglas Trottier ("Trottier") brought a Complaint against the Defendant, Town of Northfield (the "Town") alleging slander *per se*, common law slander, tortious interference with prospective economic advantage, and breach of contract. PA[1] 5-6. The allegations relate to disclosures the Town allegedly made to the New Hampshire Department of Safety, Division of State Police (the "State Police") during a background investigation conducted pursuant to an application for employment. PA 4.

During the course of the underlying litigation, Trottier and the Town (together "Appellees") requested that State Police—an unnamed party to the Complaint—disclose a copy of Trottier's pre-employment background investigation. State Police denied these requests under the Right-to-Know statute, RSA 91-A, explaining that the documents are not public records. PA 7-8. The Appellees never served a subpoena upon State Police, nor did the Appellees file a petition to enforce the Right-to-Know statute pursuant to RSA 91-A:7.

Instead, on August 21, 2019, Trottier filed an assented-to motion to compel in the underlying case. PA 7-8. The next day, on August 22, 2019, the Superior Court (*Kissinger*, J.) granted the motion in a margin order, stating that the court would "reconsider this order if the State Police file a

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[1] Refers to the record are cited as follows:
"P___" refers to the Petition for original jurisdiction and page number;
"PA___" refers to the appendix to the petition for original jurisdiction and page number;
"SO ___" refers to the documents appended to this brief and page number; and
"SA ___" refers to the appendix to the State's brief and page number.

motion to reconsider and/or objection within 10 days of the receipt of this order." PA 10. The superior court did not instruct the parties to serve nor was State Police served with the order. Rather, on August 27, 2019, Trottier notified State Police of the Order by delivering it to State Police via mail, attached to a request for production of the pre-employment background investigation. SA 4-7.

State Police filed its objection to the assented-to motion to compel and motion for a protective order on September 6, 2019. PA 13-20. State Police argued that RSA 91-A and RSA 516:36, II bar the disclosure of law enforcement pre-employment background investigations. PA 14-17. Further, State Police argued that public policy demands the confidentiality of pre-employment investigative files for law enforcement applicants. PA 17-19.

On September 23, 2019, the Town filed its reply to the objection to motion to compel, arguing that RSA 516:36, II only applies to misconduct by an officer of the law, not to pre-employment background investigations of law enforcement officials. PA 21-25. Further, the Town contended that RSA 516:36, II restricts only admissibility of the materials sought, not discovery of the documents. PA 23. Finally, the reply asserted that State Police's reliance upon RSA 91-A:5 was misplaced as the parties were not seeking the records under the Right-to-Know statute. PA 23-24. Trottier did not file a reply.

State Police filed a surreply on October 10, 2019, maintaining that RSA 91-A must govern the court's analysis because State Police responded to the Appellees' requests for governmental records and had not been served with a subpoena seeking the production of these records. PA 26-27.

State Police further argued that RSA 516:36, II pertained to "any internal investigation into the conduct of any officer," and accordingly, the statue was not limited solely to instances of misconduct. PA 27–28; *citing* RSA 516:36, II (emphasis in original). Finally, State Police showed that the legislative history of RSA 516:36 reflects the intent of the Legislature to keep investigatory records confidential and prohibited from civil discovery. PA 28-32.

On October 25, 2019, the court held a hearing on the Motion to Compel. On October 30, 2019, the Superior Court (*Kissinger*, J.) issued an order commanding State Police to produce the background investigation file and entering a protective order instructing that the file remain confidential. SO 44-45. The court found that RSA 516:36, II only protects those officers "who are or were employed as police officers [for the agency]—not people who are seeking employment with the agency involved," despite compelling public policy reasons to the contrary. SO 45. The court acknowledged that "pre-employment investigations are exempt from disclosure under the Right to Know statute, RSA 91-A:5," but asserted "that does not end the inquiry into the discoverability of such information." SO 45. The court failed to acknowledge that State Police was never a party to the litigation, nor that Trottier filed a Motion to Compel rather than employ available statutory remedies.

This appeal followed.

STATEMENT OF FACTS

Prior to his resignation in 2002, the plaintiff, Douglas Trottier, served as a police officer in the Town of Northfield for eleven years. PA 4. Trottier alleges that at the time of his separation from that employment, "it was agreed that during future law enforcement background investigations, potential law enforcement employers would be told of the dates of Trottier's employment and that he had 'been a dedicated, competent public servant.'" PA 4.

In 2018, Trottier applied for a position with State Police. PA 4. State Police conditionally offered Trottier employment subject to a background investigation, following its typical protocol. PA 4, 89-90. Law enforcement background checks create detailed dossiers regarding the life of an applicant, and state regulations mandate a background check for each law enforcement officer. Specifically, each municipal or state law enforcement agency is required to "conduct, or cause to be conducted, a background investigation before appointing a person … as a police, corrections or probation/parole officer[.]" *N.H. Admin. R.,* Pol. 301.05(a). The list of information required to be reviewed is extensive. *See N.H. Admin. R.,* Pol. 301.05(b) & (c). Pre-employment background investigations include an in-depth review of an applicant's financial records (including bank account information and evidence of indebtedness), residences, military record, school record, criminal record, and marital and family history. *See N.H. Admin. R.,* Pol. 301.05(b) (1)-(15). Pre-employment background investigations may also include polygraph test questions and results. PA 89–90; *see also In re Waterman*, 154 N.H. 437, 442 (2006) (holding that

State Police's professional conduct standards can require a Division member to take a polygraph examination). Further, the investigations may include mental status examinations conducted by licensed psychologists. *N.H. Admin. R.*, Pol. 301.05(h). Pre-employment background investigations rely on the candor of references, acquaintances, and former employers to provide an unbiased assessment of the applicant. *N.H. Admin. R.*, Pol. 301.05(b)(10).

Trottier alleges that during the course of State Police's background investigation, the Northfield Chief of Police communicated to State Police Sergeant Craig McGinley—who conducted the background investigation—that the Town had a "secret file" on Trottier. PA 4. Trottier alleges that State Police then withdrew its conditional offer and informed him that he would no longer be considered for the position. PA 4.

Trottier brought the above-mentioned Complaint against the defendant, Town of Northfield, without naming State Police as a party. PA 3-6. Appellees both made requests to State Police to disclose a copy of the pre-employment background investigation and State Police denied these requests under the Right-to-Know statute. The Appellees never served State Police with a subpoena, nor did they ever file and serve State Police with a petition to enforce the Right-to-Know statute pursuant to RSA 91-A:7.

SUMMARY OF THE ARGUMENT

The superior court erred in finding that Trottier's pre-employment background investigation was discoverable because the Legislature created a statutory prohibition against disclosure of these documents. The plain meaning of RSA 516:36, II bars the discovery of pre-employment background investigations of officers because these documents fit squarely into each element of the statute: they are (1) investigations; (2) that are internal; and (3) examine the conduct of any officer of any state, county, or municipal law enforcement agency. Further, the legislative history of RSA 516:36, II reveals that the Legislature intended these records to be prohibited from disclosure in discovery. Still more, a bar on discovery comports with public policy. Police agencies need to be encouraged to provide unfiltered information on the past conduct of a police officer in order to promote integrity of the hiring police agency's future operations and to better serve and protect the public. For these reasons, this Court should reverse the lower court's order to produce the pre-employment background investigation.

Further, even if RSA 516:36, II does not prohibit disclosure of a pre-employment background investigation, the lower court had no jurisdiction over State Police to order production of documents. State Police was not served with a subpoena nor a petition pursuant to RSA 91-A:7. State Police was not given notice as to which statutory avenue controlled the records request. If RSA 91-A controls, the case must be remanded for an analysis pursuant to the Court's recent orders issued May 29, 2020. *See Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. __ (decided May 29,

2020) (slip op. at 4-5); *Union Leader Corp. v. Town of Salem*, 173 N.H. __ (decided May 29, 2020) (slip op. at 11). If the records are sought pursuant to a subpoena *duces tecum*, the superior court had no jurisdiction over State Police and this matter must be remanded for the issuance of a subpoena and an analysis of discoverability under *Marceau v. Orange Realty*, 97 N.H. 497 (1952).[2] Thus, even should the Court find that RSA 516:36, II does not categorically bar disclosure, the Court should reverse and remand for further proceedings.

[2] Holding that records are discoverable in a judicial action absent a clear legislative mandate. *Id*. at 499-500.

STANDARD OF REVIEW

Although the Court "generally review[s] trial court decisions regarding discovery management and related issues deferentially under [an] unsustainable exercise of discretion standard," where the trial court's ruling is based upon its construction of a statute, the Supreme Court will review *de novo*. *Petition of New Hampshire Secretary of State*, 171 N.H. 728, 734 (2019).

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THE PRE-EMPLOYMENT INVESTIGATION DOCUMENTS ARE DISCOVERABLE.

A. The Legislature is empowered to create statutory prohibitions on the discovery of certain categories of documents.

The New Hampshire Legislature is empowered to create the statutory privilege found in RSA 516:36. *See N.H. R. Ev*. 501 ("Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has the privilege to: … (2) Refuse to disclose any matter; (3) Refuse to produce any object or writing…") (emphasis added). The Reporter's Note to the New Hampshire Rules of Evidence states that "[a]lthough the principal statutory privilege provisions have been embodied in the Rules, the saving for statutory privileges recognizes the inherent right of the legislature to deal with such matters." *N.H. R. Ev*. 501 Reporter's Notes (emphasis added). Importantly, the Reporter's note to Rule 501 explicitly cites RSA 516:36, II as creating such a statutory privilege against disclosure. *Id*. "The essence of a privilege is to prohibit disclosure, and thus also discovery." *Commonwealth v. Chauvin*, 316 S.W.3d 279, 287 (Ky. 2010). As explained below, because the requested pre-employment background investigation is an internal law enforcement investigation, the Legislature has created a statutory exemption from discovery.

B. The plain meaning of RSA 516:36, II bars the discovery of pre-employment background investigations of law enforcement officials.

RSA 516:36, II clearly prohibits the production of documents relating to internal investigations of law enforcement officials. The statute states:

> All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be admissible in any civil action other than in a disciplinary action between the agency and its officers, agents, or employees.

RSA 516:36, II (emphasis added). The statute broadly defines internal investigation to "include any inquiry conducted by the chief law enforcement officer within a law enforcement agency or authorized by him." *Id*. Thus, the requested investigation is protected from disclosure in any civil action except certain disciplinary cases if it: (1) is an investigation; (2) that is internal; and (3) examines the conduct of any officer of any state, county, or municipal law enforcement agency. The documents the court ordered State Police to produce fall easily within the category of documents RSA 516:36, II protects. Here, the parties seek discovery of an inadmissible and confidential internal pre-employment background investigation, requiring an examination of each of the elements of RSA 516:36's protections.

First, the pre-employment investigation file is a record of an "internal investigation." When construing a statute, the Court "first look[s] to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *Anderson v. Robitaille*, 172

N.H. 20, 22 (2019). The statute very broadly defines internal investigation to "include any inquiry conducted by the chief law enforcement officer within a law enforcement agency or authorized by him." RSA 516:36, II (emphasis added). The plain meaning of the term "investigate" means "[t]o inquire systematically" and to "[t]o make an official inquiry." *Black's Law Dictionary*, p. 844 (8th Ed.). Pre-employment background investigations are required by law, per the administrative rules of the New Hampshire Police Standards and Training Council—the legislatively created body responsible for establishing the minimum hiring standards for police officers. The administrative rules set forth a systematic method to examine an extensive list of information. *See N.H. Admin. R.*, Pol. 301.05(b) & (c).

The pre-employment background investigation includes an in-depth and extensive review of an applicant's history, financial records (including bank account information and evidence of indebtedness), residences, military record, school record, criminal record, marital and family history. *See N.H. Admin. R.*, Pol. 301.05(b)(1)-(15). Such investigatory files may include polygraph test questions and results, which may be a condition of obtaining or maintaining employment with State Police. *See In re Waterman*, 154 N.H. 437, 442 (2006) (holding that State Police's professional conduct standards can require a Division member to take a polygraph examination). Further, the investigation may include mental status examinations conducted by licensed psychologists. *N.H. Admin. R.*, Pol. 301.05(h). Finally, the background investigation relies on the candor of references, acquaintances, and former employers to provide an unbiased assessment of the applicant. *N.H. Admin. R.*, Pol. 301.05(b)(10).

Moreover, the pre-employment background investigations do not merely recite a factual timeline of events from a prospective employee's history, the investigation report also makes credibility assessments and conveys recommendations of an individual's capacity and fitness for the particular position. The investigation report ultimately culminates in a recommendation as to whether or not to hire an individual. Therefore, the pre-employment background investigation carries all of the hallmarks of any other investigation, i.e. there is fact gathering through document collection, witness interviews, a conclusion and recommendation as to the next course of action. This is clearly an "investigation"—one including highly sensitive and personal information and multifaceted examination of the history of conduct of a potential trooper.[3]

Second, the investigation qualifies as "internal." No party disputes that the investigation was ordered by the chief law enforcement officer of State Police: the Colonel. The rules of the New Hampshire Police Standards and Training Council require "the appointing authority" of each municipal or state police agency to "conduct, or cause to be conducted, a background investigation before appointing a person … as a police, corrections or probation/parole officer[.]" *N.H. Admin. R.*, Pol. 301.05(a). The Colonel is the director and appointing authority of the New Hampshire State Police. *See N.H. Admin. R.*, Saf-C 102.04 & Saf-C 102.09. As such, the Colonel is tasked with determining the quality of an applicant's character, reliability,

[3] *See State v. Woodbury*, 172 N.H. 358, 365-66 (2019) (holding that the word investigation "should be given its plain and ordinary meaning").

and honesty. A pre-employment background investigation is clearly an "inquiry" authorized by the chief law enforcement officer of State Police.

Further, the investigation is internal because it is "within a law enforcement agency." RSA 516:36, II. To be internal, an "investigation must take place within the limits of an employment relationship. In other words, the investigation must be conducted by, or … on behalf of, the employer of the investigation's target." *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 523 (2016) (citation omitted). This Court has previously determined that pre-employment applications and scoring rubrics are internal because "information provided by the applicants to the … search committee [is] gathered in the course of the hiring process, a process that [is] internal to the search committee and conducted on behalf of the [vacant position's] employer." *Clay v. City of Dover*, 169 N.H. 681, 688 (2017).[4] In *Clay*, this Court expressly rejected the argument that an employment application is external because the applicant is not yet an employee. The Court held, "Because this case involves hiring and not investigation into misconduct, it is immaterial that there is no employment relationship between the applicants and the City. The information provided

[4] The Court recently released two orders partially overruling *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and its progeny. *See Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. __ (decided May 29, 2020) (slip op. at 4-5); *Union Leader Corp. v. Town of Salem*, 173 N.H. __ (decided May 29, 2020) (slip op. at 11) ("[W]e now overrule *Fenniman* to the extent that it adopted a *per se* rule of exemption for records relating to 'internal personnel practices' and overrule its progeny to the extent that they applied that *per se* rule of exemption."). While *Clay* relied on *Fenniman* in deciding whether or not a document was exempt from RSA 91-A, the Court's recent cases do not overturn the ruling in *Clay* that pre-employment applications and scoring rubrics are "internal." *See Seacoast Newspapers* at __ (slip op. at 5).

by the applicants to the superintendent search committee was gathered in the course of the hiring process, a process that was internal to the search committee and conducted on behalf of the superintendent's employer." *Id.* at 162. Here, the investigators are law enforcement officers employed by State Police who conduct an internal inquiry into whether a candidate is suitable for hire on behalf of the Colonel of State Police. The pre-employment background record is created for the sole benefit of State Police in determining whether or not to hire an officer and cannot be shared with other agencies. Therefore, these records are necessarily internal to State Police. The pre-employment background investigation is nothing more than a more thorough version of the internal scoring rubrics at issue in *Clay*. Because the pre-employment background investigation is authorized by the Colonel and remains within State Police, it is an internal investigation.

Finally, the statute requires the inquiry to pertain to "the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency." RSA 516:36, II (emphasis added). Trottier meets this condition in two ways: (1) he was formerly a law enforcement officer with the Town of Northfield; and (2) he is currently a Police Standards & Training Council-certified law enforcement officer.[5] First, it is undisputed that Trottier was a former law enforcement official with the Town of Northfield. PA 4. RSA 516:36, II does not limit itself temporally. Further, the pre-employment background investigation naturally examines the

[5] *See* RSA 188-F:27, IV (requiring Police Standards and Training to "[c]ertify persons as being qualified under the provisions of this subdivision to be police officers").

applicant's conduct as a former law enforcement official. *See N.H. Admin. R.*, Pol. 301.05(a) ("The hiring authority shall conduct, or cause to be conducted, a background investigation before appointing a person or investing with authority any person elected as a police … officer, notwithstanding that the officer may already be employed by another hiring authority or is already a certified police … officer."). Because any pre-employment background investigation of Trottier would necessarily include an examination of his history as an officer with the Town of Northfield, the investigation pertains to "the conduct of <u>any</u> officer." Second, Trottier represented at the hearing on this matter that he is a current law enforcement officer at the Barnstead Police Department. Thus, at the time of the pre-employment background investigation, Trottier was certified by the Police Standards and Training Council as a police officer and by the plain meaning of the statute, the records clearly pertain to "the conduct of <u>any</u> officer."

The plain statutory language allows only for the conclusion that the pre-employment background investigation is an internal investigation contemplated by RSA 516:36, II. It is axiomatic that "courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include." *Brown v. Brown*, 133 N.H. 442, 445 (1990). The superior court erred by holding that the "statute clearly refers to internal investigations of people who are or were employed as police officers [with the agency]—not people seeking employment with the agency involved." PA 82. This interpretation ignores the plain language of the statute and seeks to add the words "current or former" to the Legislature's words. The plain language of the statute bars the discovery of

"any internal investigation into the conduct of any officer." RSA 516:36, II (emphasis added). By interpreting the term "any officer" as applying to only "current or former" officers with the agency, the superior court failed to give full effect to the term "any." *See Brown*, 133 N.H. at 445 (holding that the Legislature's use of the term 'in all respects' in the annulment statute … "cannot be read out of the statute or interpreted to encompass any less than the word 'all' requires.").

For all the foregoing reasons, the pre-employment background investigation is privileged from disclosure in a civil suit by the plain meaning of RSA 516:36, II.

C. The plain language and legislative history of RSA 516:36, II reveals that the Legislature intended these records to be prohibited from disclosure in civil discovery.

Internal investigation records "shall not be admissible in any civil actions other than in a disciplinary action between the agency and its officers." RSA 516:36, II. The terms "admissible" and "civil actions" are not defined in RSA 516:36, II. Under the rules of statutory construction, "undefined language [is interpreted according to] its plain and ordinary meaning," however, courts "must keep in mind the intent of the legislation, which is determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases found therein." *Cross v. Brown*, 148 N.H. 485, 486 (2002). Appellees argue that RSA 516:36, II restricts only the admissibility of the requested documents in a court proceeding, not the discovery of such documents. Appellees'

narrow interpretation contradicts the plain meaning of the words used in the statute and is contrary to the legislative intent of the statute.

A "civil action" is a "judicial proceeding…by which one party prosecutes another party for the enforcement or protection of a right." *Black's Law Dictionary*, p. 31 (8th Ed.). An action is "defined as any judicial proceeding, which if conducted to a determination, will result in a judgment or decree." *Id*. The statute does not restrict admissibility to only trial or at public hearings. Rather, the Legislature's use of the term "civil action" intended a broader protection. A reasonable construction of RSA 516:36, II, therefore, is that the records may not be produced at any stage of the "civil action," including discovery. Moreover, this interpretation would be consistent with the statutory scheme governing investigatory personnel records held by the State. *See N.H. Admin R.*, Per. 1501.04 (a) ("Documents obtained or generated during the course of any investigation involving an employee shall … be confidential."); RSA 105:13-b (police personnel files are confidential except in criminal cases where they may be reviewed for exculpatory evidence).

The Court must interpret statutory provisions in a manner that is "consistent with the spirit and objectives of the legislation as a whole." *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 1102 (1982) (quotation omitted). Although the unambiguous plain language of RSA 516:36, II itself confirms that the pre-employment investigation documents are not discoverable, the legislative history behind the internal personnel practices exemption in RSA 91-A:5 buttresses this conclusion. *See generally* Legislative History of RSA 516:36, PA 35–80. When HB 269 (1986) was introduced and referred to the House Judiciary Committee, the express

intent of the bill was to "create[ ] a privilege for written policy directives and internal investigation communications between law enforcement agencies and police officers and investigators." PA 60 (emphasis added). As originally introduced in the House, Section II of the bill (now RSA 516:36, II), originally provided that investigatory records were to be "confidential and shall not be admissible in any civil action." PA 62 (emphasis added). Concern was raised in the committee that the term "confidential" was too expansive, but there was no disagreement that the records should be barred from use in a civil action. *See* PA 54. The House Judiciary Committee amended the bill by completely removing Section II. PA 66.

When the bill was pending before the Senate, there was a discussion about adding Section II back into the bill. PA 71-72. Representative Hollingsworth later explained the committee's reasoning for removing the language, but also stated that the committee "felt that perhaps without the word 'confidential' it would be more acceptable[.]" PA 72. The Senate adopted a floor amendment that added section II back into the bill, removed the word "confidential," and added the following language:

> Nothing in this paragraph shall preclude the admissibility of otherwise relevant records of the law enforcement agency which relate to the incident under investigation that are not generated by or part of the internal investigation.

PA 48-49. The sponsor of the bill explained that this language was intended to "simply say that information that's already available would not be excluded … [and] would be available to attorneys if it were previously made public." PA 48. Importantly, the floor amendment added back the

original language in the bill which stated that the investigation records "shall not be admissible in any civil action." PA 48. The floor amendment was adopted and the bill then passed both the Senate and the House in this form. PA 49; 42 (respectively).

Since the phrase "shall not be admissible in a civil action" was both contained in the original bill and then purposefully added back into the bill by the Senate, it is important to look to the legislative testimony in both houses to uncover what the Legislature's intended purpose of this phrase. Testifying on the original bill before the House Judicial Committee, an Assistant County Attorney for Cheshire County testified that "under the second part of the bill interrogatories and depositions would be shielded." PA 53-56 (emphasis added). This is a strong indication that the language considered by the Legislature was intended to exempt the files from civil discovery, not just at trial. The majority report in the House stated that RSA 516:36, II investigatory records "may not be introduced as evidence in a civil suit other than a disciplinary action." PA 39 (emphasis added). The intent here was clearly to prohibit civil litigants from "introducing" it as evidence, i.e. through impeachment inquires, let alone seeking to admit it. The majority report continued: "Protection for these files, which would remain confidential under the Right-to-Know law will encourage thorough investigation and discipline of dishonest and abusive police officers. PA 39. The minority report lamented that Section II of the bill "sets up a system that denies victims of information that may be necessary in any civil actions dealing with a law enforcement agency." PA 39. All of these statements indicate that the term "shall not be admissible" was intended to bar discovery of the records.

Finally, the State's construction of RSA 516:36, II advanced here comports with both public policy and fulfills the primary objective of the statute, which is to protect the confidentiality of investigations into police conduct. A potential law enforcement officer provides highly private and personal information during the course of the pre-employment background investigation. State Police require potential officers to be truthful in order to make an accurate determination about whether the applicant is fit to serve the public and will succeed in potentially highly stressful and dangerous situations. State Police depend on confidentiality to encourage complete candor from those who provide input into the investigation.

The New Hampshire Supreme Court has held that public policy supports maintaining the confidentiality of information contained in internal investigative files for current law enforcement officers unless that investigation resulted in the initiation of disciplinary process. *See Pivero v. Largy*, 143 N.H. 187, 191 (1998). The Court stated that "these policy considerations include instilling confidence in the public to report, without fear of reprisal, incidents of police misconduct to internal affairs." *Id*. The *Pivero* Court explained that "disclosure of confidential internal affairs matters could seriously hinder an ongoing investigation or future law enforcement efforts." *Id*. The same policy considerations that apply to internal investigations of current law enforcement officials must also apply to pre-employment background investigations of potential law enforcement officials. References, friends, and former employers must be encouraged to be candid to background investigators without fear of reprisal, lest the investigation obtain incomplete information. Police agencies should be encouraged to provide unfiltered information on the past conduct of a

police officer to protect the integrity of the hiring police agency's future operations and to better protect the public. The applicants are men and women serving the public in their most vulnerable moments. In order to properly vet these candidates, State Police investigators require truthful and complete answers from all sources.

If the pre-employment background investigation is subject to discovery, the effect would be extremely chilling. Allowing pre-employment background investigations to be public would almost certainly result in under-reporting of prior police misconduct to a hiring agency. This, in turn, would facilitate the re-hiring by another agency an officer that may have engaged in prior misconduct. For instance, in this case, Trottier has brought suit against the Town of Northfield for potential "untruthful information provided to background investigators made during his law enforcement pre-employment background investigations." PA 10. If police departments and other sources of information across the State know that their opinions of potential law enforcement officers could subject then to suit any time they provide information to a background investigation, then the negative effect on information gathering would be monumental. State Police requires the confidentiality of these pre-employment background investigations so that they may employ the best candidates for these public servant positions. Thus, the pre-employment background investigations must remain privileged from discovery and this Court should reverse the superior court's order.

II. STATE POLICE WAS NOT SERVED WITH A PETITION PURSUANT TO RSA 91-A:7 NOR A SUBPOENA, AND THEREFORE THE COURT ERRED IN ORDERING THE PRODUCTION OF THE PRE-EMPLOYMENT BACKGROUND INVESTIGATION FILE.

To the extent this Court rules that the records are not categorically exempt from discovery per RSA 516:36, the superior court's order to produce was nonetheless improper because State Police was not served with a subpoena nor a petition pursuant to RSA 91-A:7, and as such, the court had no jurisdiction to enforce its order. The superior court committed a legal error in that its order lacked sufficient process. The State should have been served with process if a subpoena was issued or if a RSA 91-A complaint had been filed. Here, had the State not objected or failed to timely respond to the Court's order, it could have been subjected to serious sanctions including a contempt or enforcement order without ever having been served with process in the first instance. *See N.H. Sup. Ct. Civ. R.* 52.

The reason for process is to afford a party fair notice of the issue pending before the Court and which party carries the respective burden of proof. The State ultimately carries the burden of proof in order to resist disclosure under RSA 91-A. *See* . *Taylor v. Sch. Admin. Unit #55,* 170 N.H. 322, 326 (2017) ("A public entity seeking to avoid disclosure under the Right-to-Know Law bears a heavy burden to shift the balance toward nondisclosure"). By contrast, in civil actions, the discovery of documents entails a burden shifting approach. The party seeking records by subpoena must make an initial showing that the documents are relevant under *N.H. Sup. Ct. Civ. R.* 21(b) and are "reasonably calculated to lead to the discovery of admissible evidence." *Kukesh v. Mutrie*, 168 N.H. 76, 80

(2015). If a party asserts a claim of privilege, the burden then shifts to the party seeking nondisclosure. *See Douglas v. Douglas*, 146 N.H. 205, 208 (2001); *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 24 (1st Cir. 2011) ("The party invoking the privilege must show both that it applies and that it has not been waived."

Each of the clearly delineated processes for seeking access to records under RSA 91-A or under civil discovery methods has different standards of review. Discovery orders are reviewed by the Supreme Court under a "unsustainable exercise of discretion" standard of review, which requires a showing that "the trial court's ruling was clearly untenable or unreasonable to the prejudice of their case." *Kukesh v. Mutrie*, 168 N.H. at 80. By contrast, the Supreme Court conducts a *de novo* review of statutory interpretations of the Right-to-Know law applying the ordinary rules of statutory construction and broadly construing provisions in favor of disclosure while interpreting exceptions narrowly. *Union Leader Corp. v. Town of Salem*, 173 N.H. __ (decided May 29, 2020) (slip op. at 3). In light of the differing procedures and standards of review, State Police should have been entitled to know at the outset of the record request whether it is governed by RSA 91-A or civil discovery in order to marshal an effective response. Instead, State Police was simply left to guess as to what process was invoked.

Short of bringing a civil action against an agency outright and seeking records through discovery, there are only two avenues through which a party may obtain governmental records: (1) a request pursuant to RSA 91-A; and (2) third-party discovery tools established by statute and by Superior Court Civil Rules. Each avenue has its own parameters and

standards, and each applies a unique analysis to determine whether and under what circumstances government documents must be produced. Each also establishes clear procedures that provide a government agency with notice and an opportunity to adequately respond to requests or civil discovery, and, more importantly, to be heard in court prior to a judicial order compelling the government to take any action. The court did not adhere to either process in compelling State Police to produce documents.

A. The action to obtain the records at issue did not conform to the process set forth in RSA 91-A:7 despite it being a request for records from a governmental agency.

State Police interpreted the informal requests for documents by Appellees as Right-to-Know requests, and the parties appear not to disagree. PA 7-8. The superior court's analysis, therefore, was necessarily governed by RSA 91-A, which sets forth citizens' rights to public records, exemptions for records deemed nonpublic, and remedy mechanisms for any party disappointed with the government's response. To that end, RSA 91-A provides that "[e]very citizen during the regular or business hours of all public bodies or agencies … has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies … except as otherwise prohibited by statute or RSA 91-A:5." RSA 91-A:4, I. And, should the government violate RSA 91-A, "[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief." RSA 91-A:7. Once a petition is filed, the clerk of the court directs the governmental agency to be served a copy of the petition. *Id*. Such petitions are given a "high priority on the court calendar."

Id. The superior court erred both by accepting the motion to compel when the statute requires a petition be served upon the government, and by not ending its analysis at its conclusion that the records sought are not public documents and exempt from production pursuant to RSA 91-A.

A party disappointed by the government's response to an RSA 91-A request has a specific, statutory remedy that consists of a petition—in essence a complaint—that party can file and must serve upon the government. The filing and service of the petition commence a civil action, a process in which the respondent government agency gets notice and an opportunity to be heard prior to being subjected to an order from the court. RSA 91-A:7. Trottier failed to follow the statutory requirements for relief pursuant to RSA 91-A by filing a motion to compel rather than a petition. The motion Trottier filed runs directly contrary to the remedies the Legislature has afforded him in RSA 91-A. Further, filing a motion to compel in a case in which the State is a non-party completely negates the statutory scheme created in RSA 91-A. Courts circumvent the established exceptions to RSA 91-A and this Court's RSA 91-A jurisprudence when they order production of governmental records outside the established RSA 91-A:7 process. If such orders continue, the RSA 91-A statutory scheme is rendered ineffective and futile. Parties must follow the process established in RSA 91-A so that public entities may discern the applicable standard of review and precedence. If RSA 516:36, II does not govern these documents, RSA 91-A certainly does. Because State Police received nothing more than informal requests for documents from the Appellees, the superior court must only view the records through a Right-to-Know lens.

B. Third party discovery tools were not utilized, and as such, the superior court had no jurisdiction to issue an order to compel.

Had the parties wished to obtain the documents through third party discovery, they could have served subpoenas upon State Police. Service of a subpoena, and whether the government must produce documents pursuant to it, rests on a different analysis, but one that also ensures notice and an opportunity to be heard. Subpoenas must be issued by either a justice or a notary public. RSA 516:4. A subpoena may be served on a witness "by reading [it] to him, or by giving to him in hand an attested copy[.]" A subpoena must be dated, contain a description of the time and place of the deposition, and describe the subject of the testimony. RSA 516:1. "If a subpoena *duces tecum* is to be served on the deponent, the notice to the adverse party must be served before service of the subpoena, and the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment." *N.H. Super. Ct. Civ. R.* 26(d). When serving such a notice or subpoena on a governmental agency, the serving party "must describe with reasonable particularity the matters for examination." *N.H. Super. Ct. Civ. R.* 26(m). Once this is done, a state agency "must then designate one or more officers … or other persons who consent to testify on its behalf; and [the agency] may set out the matters on which each person designated will testify." *Id*. A subpoena under this rule "must advise a nonparty organization of its duty to make this designation." *Id*. For a subpoena *duces tecum*, a serving party may withdraw the deposition notice, in writing, if documents are provided in advance. *See* RSA 517:12.

By merely making a request for governmental records and then filing an assented-to motion to compel in a matter in which State Police was not a party, the agency was deprived of an opportunity to make any designation under *N.H. Super. Ct. Civ. R.* 26(m), or to undertake a *Marceau* analysis, produce the records, or seek to quash any portion or all of the subpoena. *See Marceau v. Orange Realty*, 97 N.H. 497 (1952). Further, the Appellees were not required to prove a subpoena was necessary to obtain the privileged records. *See In re Grand Jury Subpoena for Medical Records of Payne*, 150 N.H. 436, 441-42 (2004) ("Our case law supports disclosure of privileged and relevant medical records when: (1) a statute specifically authorizes disclosure; (2) a sufficiently compelling countervailing consideration is identified; or (3) disclosure is essential under the specific circumstances of the case.") (citations omitted). Absent a subpoena, the superior court could not exercise jurisdiction to order a non-party to produce records in a civil matter. *See Yidi, L.L.C. v. JHB Hotel, L.L.C.*, 70 N.E.3d 1231, 1238 (Ohio App. 8th Dist. 2016) ("For the purposes of pretrial discovery, trial courts possess jurisdiction over nonparties through the issuance of a subpoena.").[6] By contrast, a subpoena would have put into motion all of the protections of formal process, including the ability to properly object against a clearly articulated request, and respond as necessary. By the time State Police had an opportunity to be heard—which occurred largely due to the fiat of an envelope finding its way to someone

[6] *See also Iskander v. Melcone*, 52 A.D.2d 592, 592, 382 N.Y.S.2d 117, 118 (NY Supreme Court Appellate Division 1976) ("However, since the nonparty witnesses have not been served with subpoenas, we lack the jurisdiction to compel their examination before trial.").

who knew to deal with it at all—the process was over. The motion had been granted, subject only to what most closely approximates a reconsideration process of some kind. The issue of the discoverability of State Police's document was not properly before the Court.

This is not the first time the Department of Safety has been ordered to produce governmental records in litigation matters where it is not a party without being served with either a petition to enforce RSA 91-A or a third party subpoena. See SA 8-35. This is a situation that is likely to recur. In ruling on this matter, the Court has an opportunity to establish a bright line governing requests such as the one in this case in order to give meaning to the rules and statutes governing discovery and to provide fair notice as to the governing standard to governmental entities such as State Police.

State Police respectfully requests the Court to vacate the Order because, absent the service of a third party subpoena, the superior court simply had no jurisdiction over State Police.

CONCLUSION

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

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

NEW HAMPSHIRE DEPARTMENT
OF SAFETY
DIVISION OF STATE POLICE

By its Attorneys,

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June 10, 2020

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CERTIFICATE OF COMPLIANCE

I, Matthew T. Broadhead hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,166 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.

June 10, 2020 *<u>/s/Matthew T. Broadhead</u>*
Matthew T. Broadhead

CERTIFICATE OF SERVICE

I, Matthew T. Broadhead, hereby certify that a copy of the State's brief and appendices shall be served on Brad C. Davis, Esquire, counsel for Douglas Trottier, and Brian J.S. Cullen, Esquire and Nathan C. Midolo, Esquire, counsel for the Town of Northfield Police Department, through the New Hampshire Supreme Court's electronic filing system.

June 10, 2020 */s/Matthew T. Broadhead*
Matthew T. Broadhead

APPENDIX TABLE OF CONTENTS

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

DOUGLAS TROTTIER

v.

TOWN OF NORTHFIELD POLICE DEPARTMENT

Docket No.: 217-2019-CV-324

ORDER

The Plaintiff, Douglas Trottier, moves to compel the New Hampshire State Police to disclose his pre-employment investigative file. The defendant, Town of Northfield Police Department, does not object. The New Hampshire Department of Safety, Division of State Police, opposes the motion to compel citing the Right to Know statute, RSA 91-A:5, protections from discovery in RSA 516:36, II, and public policy concerns. A hearing was held on October 25, 2019. For the reasons that follow, the Court GRANTS the motion to compel, but imposes a protective order.

In this action, Mr. Trottier has alleged that he was seeking employment as a State Trooper and the Chief of the Northfield police department made an untrue statement about him to the State Police in connection with its pre-employment background investigation of him. Specifically, Mr. Trottier alleges that the Northfield Chief told an investigator from the State Police that there was a "secret file" concerning Mr. Trottier. The Town denies that allegation

The State Police argues that the pre-employment investigative file is protected from disclosure under RSA 516:36 because it involves an internal investigation of a law

enforcement agency. That statute provides that all records and other documents "relating to any internal investigation into the conduct of any officer, employee, or agent" of any law enforcement agency shall not be admissible in any civil action other than a disciplinary action between the agency and its officers, agents, or employees. RSA 516:36, II. The statute clearly refers to internal investigations of people who are or were employed as police officers -- not people who are seeking employment with the agency involved. While the State argues that there are compelling public policy reasons to treat background investigations of those seeking employment the same (and the Court agrees), nothing in the text of the statute supports such an extension. Similarly, the cases cited by the State involve internal investigations of current officers or employees. See Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993); Pivero v. Largy, 143 N.H. 187 (1998).

While the Court agrees with the State Police that pre-employment investigations are exempt from disclosure under the Right to Know statute, RSA 91-A:5, that does not end the inquiry into the discoverability of such information. Given the nature of the claim in this case which directly puts at issue statements allegedly made during the background investigation, the Court orders the State Police to produce the background file. However, the file shall be kept by both parties as confidential and no portion of the file shall be disclosed in any public court filing or in open court absent approval by the Court in advance, with notice to the State Police through its counsel.

So Ordered.

DATED: 10/29/19

JOHN C. KISSINGER
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/30/2019