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)

REPLY 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)

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I. THE SUPERIOR COURT ERRED IN TREATING A PUBLIC RECORD REQUEST AS A FORM OF DISCOVERY.

In this matter, the Merrimack County Superior Court committed a legal error by ordering the discovery of records from a non-party without establishing the jurisdictional basis for such order. "*Parties* may obtain discovery by *one or more of the following methods*: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical or mental examinations; and requests for admission." *Sup. Ct. Civ. R.* 21(a) (emphasis added). It is undisputed that none of the enumerated methods were utilized to obtain discovery from the State Police. And, since State Police was a not a party to the underlying case, the only method to obtain discovery would have been through the use of subpoena *duces tecum*. Here, a document request submitted under RSA 91-A was the sole predicate for the underlying Motion to Compel. There is no dispute that the underlying record request failed to fulfill the statutory requirements for the issuance of a subpoena. *See* RSA 516:1 (Requiring subpoenas to state the place, time, date, a description of the subject matter about which the witness is expected to testify); RSA 516:4; RSA 516:5 (requiring a witness fee and costs for travel expenses). This Court has the opportunity to establish a simple and bright-line rule governing non-party discovery in civil litigation: a motion to compel is not ripe until and unless a subpoena has been served on the non-

party, and that party has objected to some or all of what the subpoena requires to be produced.

The use of a subpoena to obtain third-party discovery affords non-parties all of the procedures and protections conferred by law and the rules of civil procedure. For instance, subpoenas *duces tecum* issued to governmental entities must "describe with reasonable particularity the matters for examination" and affords adequate and advanced notice as to the potential avenue to resolve disputes, and afford meaningful opportunities to be heard—all before a party is subject to an order of the court. *Sup. Ct. Civ. R.* 26(m) (procedure for obtaining discovery from an organization or governmental entity); *see also Sup. Ct. Civ. R.* 29(d) (procedure for issuing a subpoena *duces tecum*); *Sup. Ct. Civ. R.* 30(e) (requiring counsel to attempt to informally resolve any dispute prior to filing a motion to compel). Because no subpoena was issued in this matter the Superior Court lacked jurisdiction to rule on a motion to compel.

Even if RSA 91-A was a proper method of third party discovery, the Superior Court lacked jurisdiction because no petition was ever filed after the record request was made. RSA 91-A sets forth a specific procedure for parties disappointed by the government's response to their records request. The process contemplates a petition that commences a new docket focused just on the RSA 91-A challenge. The statute does not contemplate use of RSA 91-A as a third party discovery method policed by motion practice in that underlying docket.

In similar circumstances, federal courts have long ago established that it is improper to permit public record requests to serve as a discovery tool in pending matters. *See N.L.R.B. v. Robbins Tire & Rubber Co*., 437

U.S. 214, 242 (1978); *United States v. U.S. Dist. Court, et al*., 717 F.2d 478 (9th Cir. 1983); *Fruehauf Corp. v. Thornton*, 507 F.2d 1253 (6th Cir. 1974); *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978). Indeed, the United States Supreme Court has categorically held that record requests made pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, are "*not* intended to function as a private discovery tool." *Robbins Tire & Rubber Co.*, 437 U.S. at 242 (emphasis in original); citing to *Renegotiation Bd. v. Bannercraft Clothing Co*., 415 U.S. 1, 24 (1974) (holding that it is improper to permit a party to use FOIA as a "tool of discovery" when agency regulations provide a procedure for access to records in an adversarial matter.).

The reasoning in *United States v. U.S. Dist. Court, et al*., 717 F.2d 478 (9th Cir. 1983) is particularly helpful to show why establishing a bright line rule is important to the efficient adjudication of cases. In that case, a criminal defendant awaiting trial had made a public record request pursuant to FOIA. *Id*. at 479. The prosecutor did not turn over the requested records because they were not "material to the preparation of the defense," which is the standard for discovery established by Fed. R. Crim. P. 16. *Id*. at 480. In the criminal matter, the defendant moved to compel the government to produce the requested FOIA records. *Id*. The Ninth Circuit Court of Appeals held that it was improper for the trial court to order the production of the FOIA records in the criminal matter, expressly holding that "the Freedom of Information Act does not extend the scope of discovery permitted under Rule 16." *Id*. at 480. The Ninth Circuit intervened in the trial court matter because the "necessary consequence of the trial court's ruling would be that, as a routine discovery device in criminal cases within

this circuit, counsel would request disclosure under [FOIA], a substantial displacement of the balance established for criminal discovery by Rule 16." *Id*. at 481. The Ninth Circuit went on to conclude that the "harm to the Government in allowing FOIA discovery to override Rule 16 would be substantial in this case and in all later criminal cases…compel[ing] [it] to devote its scarce resources to screen and process FOIA material." *Id*.

Here, the Superior Court grossly deviated from both the statutory and civil rules governing discovery by allowing a request under RSA 91-A to serve as the basis to exercise jurisdiction over a third party discovery target. The Superior Court impermissibly expanded the scope of its authority by ruling on a motion to compel without any subpoena having been issued rather than abiding by the statutory appeal procedure RSA 91-A creates. By reviewing a public record request as a non-party discovery request, the Superior Court denied State Police the protections of either process. State Police was left to defend against a court order without the benefits of the well-established subpoena procedures under the Rules of the Superior Court or the safeguards afforded to public agencies, including litigation by petition in a stand-alone docket, by RSA 91-A. State Police was simply left to guess as to which standards applied, thus placing it at a disadvantage with only days to formulate a cogent response to the Court's order on the motion to compel. Furthermore, permitting discovery to be conducted via RSA 91-A would place an extreme burden on public agencies and circumvent established discovery procedures. As such, the Superior Court erred by treating a public record request as an avenue of discovery.

II. TROTTIER WAS BOTH AN "OFFICER" AND "EMPLOYEE" SUBJECT TO AN "INTERNAL INVESTIGATION" FOR THE PURPOSES OF RSA 516:36, II.

Documents that relate "to any internal investigation into the conduct of any officer, employee or agent of any state, county, or municipal law enforcement agency … shall not be admissible in any civil action." RSA 516:36, II. Although Trottier acknowledges that he was an applicant for employment with the New Hampshire State Police (Trottier Brief, p. 5), he argues that, as an applicant, he cannot also be considered either an "officer" or "employee" for the purposes of RSA 516:36, II (Trottier Brief, p. 7). This rigid analysis ignores both the plain meaning and purpose behind RSA 516:36, II and therefore is inconsistent with the rules of statutory construction. *See Soraghan v. Mt. Cranmore Ski Resort, Inc.,* 152 N.H. 399, 401 (2005) (The Court examines statutes according to their plain meaning and "in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.").

Trottier does not contest that he was a certified law enforcement officer at the time that he sought a position with State Police. (Trottier Brief, p. 6-7). He also does not contest that he was previously employed as an officer by the Town of Northfield Police Department. (Trottier Brief, p. 4). As such, he was an "officer" within the meaning of the statute. *See* State Police Brief at pp. 25-26.

Next, Trottier's argument fails to give proper weight to *Clay v. City of Dover*, 169 N.H. 681, 688 (2017), where the Court held that pre-

employment applications and scoring rubrics are a necessary and inherent part of an employer's internal employment practices. In other words, all employees begin their employment relationship as an "applicant."

Adopting Trottier's construction of RSA 516:36, II—that "applicants" are not "employees"—would lead to an absurd result where the confidentiality protections of the statute would only to apply to those employees that are ultimately hired, while permitting access to those who are not. There is no basis in the law or in policy that would justify such disparate treatment.

III. RSA 516:36 CREATES A PRIVILEGE FROM DISCOVERY, NOT A MERE RESTRICTION ON ADMISSIBILITY AT TRIAL.

RSA 516:36, II creates a privilege against internal police investigations being disclosed in "any civil action," not solely from admissibility at trial. The plain meaning of the statute requires a bar on discovery of this material. The only case that has specifically addressed the scope of RSA 516:36, II with respect to civil discovery is *Hoyt v. Connare*, 202 F.R.D. 71, 74 (D.N.H. 1996). In *Hoyt,* the U.S. District Court affirmed the State Police's present position in this matter that RSA 516:36, II creates a privilege from discovery and is not solely a restriction on admissibility at trial. In *Hoyt,* the Court acknowledged that "[t]he records and reports of police officers relating to any internal investigation into the conduct of any officer of any state law enforcement agency are ... *protected from discovery* by New Hampshire RSA 516:36, II." *Id*. (emphasis added) *citing to Topp v. Wolkowski,* No. 90–496–S (D.N.H. November 12, 1992) (unpublished). The Court in *Hoyt* did nevertheless permit discovery of the records in the matter pending before it, because Fed. R. Evid. 501 provides that state law *privileges* only apply to claims arising under state law, not federal claims raised under 42 U.S.C. § 1983. *Hoyt,* 202 F.R.D. at 75.[1]

[1] The *Hoyt* court added "a tangential but relevant aside" that even if the privilege established by RSA 516:36 did apply, the privilege may not be absolute and that the Court should engage in a balancing test that weighs "whether the benefits of disclosure outweigh the benefits of nondisclosure." *Hoyt*, 202 F.R.D. at 75 (1996). This test appears to be the same test articulated in *Marceau v. Orange Realty, Inc*., 97 N.H. 497 (1952).

State Police asserts that RSA 516:36, II creates a statutory privilege and therefore can only be pierced under the standard established by *Marceau v. Orange Realty, Inc*., 97 N.H. 497 (1952). "Statutory privileges [prevent discovery if it] plainly appear[s] that the benefits of secrecy were thought to outweigh the need for the correct disposal of litigation." *Id.* at 499. Here, the Superior Court never reached a decision on whether this test applied to RSA 516:36, II, because it held that it was inapplicable to applicants seeking employment. In any event, because no subpoena was ever issued, the court lacked jurisdiction to entertain the question. Accordingly, should this Court rule that RSA 516:36, II is applicable, and if it does not create an absolute bar on discovery, this matter should be remanded for the issuance of a subpoena *duces tecum*, and to conduct the balancing test set forth above governing the discoverability of the records.

CONCLUSION

For the foregoing reasons and the reasons stated in the State Police's Brief, State Police respectfully requests that this Honorable Court vacate the judgment below.

Respectfully Submitted,

NEW HAMPSHIRE DEPARTMENT
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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 1,978 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.

August 26, 2020 */s/Matthew T. Broadhead*
Matthew T. Broadhead

CERTIFICATE OF SERVICE

I, Matthew T. Broadhead, hereby certify that a copy of the State's reply brief and appendices shall be served on the following parties of record through the New Hampshire Supreme Court's electronic filing system:

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