

The State of New Hampshire

SUPREME COURT

Case No. 2020-0005

2020 TERM

**PETITION OF THE DEPARTMENT OF SAFETY, DIVISION OF STATE
POLICE (In re: Douglas Trottier v. Town of Northfield Police Department)**

PETITION FOR ORIGINAL JURISDICTION
SUPREME COURT RULE 11

REPLY BRIEF OF DOUGLAS TROTTIER

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QUESTIONS PRESENTED

1. Whether Mr. Trottier's State Police pre-employment background file is a an "internal investigation into the conduct of any officer, employee, or agent of any state, county or municipal law enforcement agency," that NH RSA 516:36, II makes non-admissible in a civil proceeding?
2. Whether NH RSA 516:36, II prohibits the disclosure of the file in a discovery request?
3. Whether it is required by Mr. Trottier to file a Petition pursuant to NH RSA 91-A or to have served a subpoena upon the Department of Safety for the Court to have ordered to disclosure of the pre-employment background file to Mr. Trottier as part of discovery?

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

Douglas Trottier has brought a Civil Complaint against his former employer, the Town of Northfield Police Department alleging that during his application process to become a NH State Trooper that information was provided by members of the Northfield Police Department to the State Police that were slanderous, in breach of a separation contract and that they caused a tortious interference with his prospective economic advantage.

During the litigation, and prior, Mr. Trottier requested to receive, or at a minimum be able to review his pre-employment background file in the possession of the State Police. Those requests were denied.

Mr. Trottier then file an Assented to Motion to Compel the State Police to Disclose the file as part of discovery which was granted by the Superior Court on August 22, 2019. The Superior Court granted the request with the addition that the State Police could Object and Move to Reconsider the Order within 10 days of receiving the Order.

The Order was then sent via US Mail to Attorney Marta Modigliani at the NH Department of Safety and an Objection to the Order was filed by the State Police. After a hearing held on October 25, 2019, the Superior Court issued an order to compel production of the file and imposed a protective order to prevent any improper disclosure.

This appeal follows.

SUMMARY OF ARGUMENT

The Superior Court properly ruled that given the nature of Mr. Trottier's claims in his case, that specifically put at issue statements made to the New Hampshire State Police during the pre-employment process, that the contents of the file should be disclosed in discovery. The State was afforded proper process, in that the Superior Court required the order to be provided to the Department of Safety, and preserved the State's right to object before disclosure, and to have a hearing. Therefore, the Department of Safety received full process of law. The Superior Court also went as far as adding a confidentiality clause to prevent any disclosure of the file contents.

The controlling statute, NH RSA 516:36, II by its own clear language may prevent the admissibility in civil cases investigations into the conduct of any officer or employee, but it (1) does not prevent discovery of such information, and (2) Mr. Trottier was an applicant, and therefore his request for the file is not seeking information into an internal investigation into the conduct of an officer or employee and it should therefore be disclosed.

NH RSA 91-A ("Right to Know Law") does not apply to this type of discovery request. As the Superior Court stated in its order, RSA 91-A:5 would prevent the release of the file under that process and purpose of that statute. Since the Superior Court ruling, the Supreme Court has now applied a more narrow test to the exclusion under 91-A:5. Mr. Trottier is not seeking information in a personnel file, as he was not an employee and the contents of the pre-employment background file do not constitute an invasion of privacy.

Although the Department of Safety argues that it was not afforded proper process as if there been a subpoena and/or a 91-A civil action, the Appellant ignores the fact that the Superior Court

afforded them full, fair and adequate process in this case even as going as far as imposing a confidentiality provision in the Order.

ARGUMENT

I. The plain and unambiguous language of NH RSA 516:36, II does not prevent an order for discovery of Mr. Trottier's pre-employment background file as he is not seeking information relating to an internal investigation into the conduct of a Department of Safety officer or employee.

1. Mr. Trottier was an applicant to the New Hampshire State Police, so he is not seeking information into the conduct of an officer or employee of the Department of Safety.
2. The pre-employment background file in the possession of the NH State Police is not documentation relating to an internal investigation into the conduct of any officer, employee or agent of any state, county or municipal law enforcement agency. Mr. Trottier was merely an applicant, and never received an offer of employment, not did he become an employee of the State Police.
3. Therefore, he is seeking the information contained in the background investigation into an "applicant," and not an officer or employee.
4. If the legislature meant that applicant information and/or pre-employment files of non-hired officers was to be protected from disclosure, they could have easily stated so in the statute.
5. The language of the statute cannot be meant to protect or shield those providing false or tortious information about an applicant.
6. The Court is to uphold the trial court's findings of fact unless clearly erroneous or unsupported by the evidence. See *Pivero v. Largy*, 143 N.H. 187, 722 A.2d 461, (N.H. 1998).
7. The State argues that although Mr. Trottier was a certified police officer with a different municipality at the time of his application to the State Police, the he was "an officer" and

therefore he fits the statutory definition of the conduct of “any officer.” This would lead to an absurd result as that interpretation would mean that a non-certified applicant’s file would be disclosed yet a certified officer applicant’s file would not.

8. When interpreting a statute, the court examines the language of the statute and ascribes the “plain and ordinary meaning of the words used.” *State v. Farrington*, 161 N.H. 440, 446 (2011). The court interprets “legislative intent from the statute as written and will neither consider what the legislature might have said nor add language that the legislature did not see fit to include.” *Id.* While legislative history may be helpful in the interpretation of an ambiguous statute, it will not be consulted when the statutory language is plain.” *In re Walker*, 138 N.H. 471, 474 (1994).
9. The language of the statute is clear, the legislature intended to prohibit disclosure of “internal investigations” into the “conduct” of any “officer or employee” of the agency. Mr. Trottier was an applicant, not an officer or employee of the State Police and therefore the Superior Court Order was proper.

II. NH RSA 516:36, II prohibits the admissibility in any civil action internal investigation files of an officer or employees conduct, not the discovery of its contents.

10. The Statute clearly reads that internal investigation records “shall not be admissible in any civil actions...” The Order of the Superior Court was for the discoverability of the contents of the file and the Superior Court issued a protective order to prevent any contents from being disclosed. More specifically the Court’s order reads that “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.”
11. The Court did not indicate any relevant information from the file was admissible, simply that it was discoverable.

12. If the legislature had intended to prevent such information from being discoverable, it could have so stated in the statute. The legislature has done just that in other statutes.
13. For example, NH RSA 654:45, VI regarding disclosure of voter databases, the statute reads that such “databases shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31, *nor shall it or any of the information contained therein be disclosed pursuant to a subpoena or civil litigation discovery request.*” As cited in *Petition of the New Hampshire Secretary of State*, 171 N.H. 728, 734 (2019).
14. The statute at hand, NH RSA 516:36 speaks to admissibility and indicates no prohibition as to disclosure in discovery.
15. Mr. Trottier is simply seeking information provided by third parties to the State Police that he believes to be tortious and support his claims. This is not about disclosing information about an internal investigation into the conduct of any State Police officer or employee that could be freely shared.
16. “Discovery has been regarded as a proper procedural aid for the parties to prepare their case in advance of trial and a logical method of preventing surprise and permitting both court and counsel to have an intelligent grasp of the issues to be litigated and knowledge of the facts underlying them. *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 220 A.2d 751, (N.H. 1966)
17. The Court’s protective order provides the protection that the State is concerned about and affords Mr. Trottier a proper method for seeking information to support his claims.

III. A Petition under NH RSA 91-A would not apply in this case, nor would it proper as the information would be excluded under 91-A:5 and/or is not a request that would constitute an invasion of privacy.

18. NH RSA 91-A:1 clearly describes that “The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” Mr. Trottier is seeking to review the contents of his pre-employment background file in order to examine any statements made by third

parties to the State Police interviewer. The request to the Court for an Order to be able to review his file was reasonably calculated to lead to admissible evidence. He is not seeking access to governmental records in order to hold the government accountable to the people. This is not a public access request.

19. NH RSA 91-A:5 exempts from a “right to know request” records pertaining to internal personnel practices...financial information; test scores, scoring keys...and examination for employment. All matters which would likely be present in a pre-employment background file.
20. Should the Court remand the case to follow the procedure under NH RSA 91-A, the State would clearly object to any disclosure under that provision. In fact, the Superior Court stated in its order “that pre-employment investigations are exempt from disclosure under the Right to know statute, RSA 91-A:5...”
21. Therefore a “right to know” request would have not been proper, and Mr. Trottier is not seeking access to the governmental records for transparency or to hold the government accountable to the people, he is seeking information about himself made by third-parties that is reasonably calculated to lead to admissible evidence in his case.
22. The Superior Court also protected the process afforded to the Department of Safety by clearly indicating in its order, that after having been provided a copy of the order, the State could object within 10 days of receipt; therefore, the State did not lack sufficient process.
23. The process under the Superior Court Order provided fair notice (when the order was provided to the Department of Safety), preserved its right to be heard (by allow an objection to be filed within 10 days of receipt) and an opportunity to carry its burden of proof to argue against disclosure (by affording a hearing on the objection).
24. The States primary argument that a subpoena should have been served, would have been to “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.”

Appellant Brief, p.38.

25. The State was afforded all of these protections under the Superior Court Order and the Department of Safety took full advantage of those through an Objection, a hearing, a Motion to Reconsider, and now an Appeal.
26. The Superior Court did find the records would have been exempt from 91-A; however, under the discovery process and reviewing NH RSA 516:3, the records were discoverable and the Court included the confidentiality language to further protect the State from any improper disclosure.
27. Although this Court recently overruled the broad interpretation of the exclusion under the “internal personnel practices” exemption under the Right-to-Know Law, (*See Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993)), by now applying a narrow interpretation of the exclusion, and directing a new test laid out in *Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135 (May 29, 2020). Under the *Seacoast Test*, a RSA 91-A request or complaint would still not be proper.
28. The test laid out by the Court in the *Seacoast Newspapers* case directs a trial court to determine (1) whether the material can be considered a “personnel file” or part of a personnel file; and (2) whether disclosure of the material would constitute an invasion of privacy. *Id.*
29. As Mr. Trottier was not an employee of the Department of Safety, his pre-employment background file would not be a “personnel file.” Even if it were determined to be a personnel file, disclosure of the contents would not be an “invasion of privacy,” at any level. Mr. Trottier is seeking information provided to the Department of Safety about himself made by third parties.

CONCLUSION

The Superior Court Order for the Department of Safety to disclose the contents of Mr. Trottier’s pre-employment background file was proper. The request to review the contents of the file is reasonably calculated to lead to admissible evidence, evidence which is central to

Mr. Trottier's claims in the underlying Civil Action.

The Department of Safety was afforded process to protect its rights to be heard on the issue for which it took full advantage of and the Superior Court issued a confidentiality Order to prevent disclosure of the file.

NH RSA 516:36 is the controlling statute in this case and the statute has no prohibition for the discovery of the file, and, Mr. Trottier is not seeking information related to an internal investigation of a Department of Safety officer or employee that the statute would prohibit from disclosure.

For all these reasons the Court should affirm the Order of the Superior Court directing the Department of Safety to disclose the contents of Mr. Trottier's pre-employment background file.

Respectfully submitted,
Douglas Trottier
By his Attorney,

Dated: July 22, 2020

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

I, Brad Davis, Counsel for Douglas Trottier, request 15 minutes for oral argument as may be helpful to the Court in making its determination.

I hereby certify that on July 22, 2020, copies of the foregoing were forwarded to Matthew Broadhead at the N.H. Attorney General's Office, Brian J.S. Cullen, Esq. and Nathan C. Midolo, Esq. via the Court's electronic service system.

Dated: July 22, 2020

/s/ Brad Davis
Brad Davis, Esq.