THE STATE OF NEW HAMPSHIRE
SUPREME COURT

PETITION OF THE STATE OF NEW HAMPSHIRE

Docket No. 2021-0146

Rule 11 Petition For Original Jurisdiction
From Merrimack County Superior Court
Docket Nos. 217-2019-CR-00581; 217-2020-CR-00873;
and 217-2020-CR-0089

BRIEF FOR NICHOLAS FUCHS, JACOB JOHNSON, AND JEFFREY HALLOCK-SAUCIER

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15 Minute Oral Argument Requested

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2. Whether the superior sustainably exercised its discretion in denying a motion for a protective order for discovery that the State was obligated to provide to the defense where no court rule requires that the material be protected.

3. Whether the proposed protective orders violate the First Amendment to the United States Constitution or Part I, Article 22 of the New Hampshire Constitution.

STATEMENT OF FACTS AND OF THE CASE

This petition arises from three criminal cases in Merrimack County Superior Court in which the trial court denied motions for protective orders for exculpatory evidence from police officers' personnel files that the State was constitutionally obligated to produce to defendants under *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 139 N.H. 325 (1995). The proposed protective orders in question would have prohibited Respondents and their counsel—but not the State—"from sharing or further disseminating these confidential documents and the confidential information contained therein with anyone other than Defense Counsel's staff and the Defendant." State Add. 53; 63; 66; 77.

I. Mr. Hallock-Saucier's Case

Mr. Hallock-Saucier was arrested on or about February 3, 2020, and was released on personal recognizance bail on that same day. *See* State

App. 54.[1] Complaints were filed on February 10, 2020, and the next day he waived arraignment and pleaded not guilty. *Id.* 54-55. On March 5, 2021—*over a year after his case had been pending*—the State filed an assented-to Motion for a Protective Order indicating that it had discovered potentially exculpatory evidence from a police officer's personnel file, and a Motion to Seal Motion for a Protective Order. State Add. 75. The State's motion did not explain why the State waited over a year (well past the deadline in the court rules) before seeking the protective order and producing the discovery. The trial court denied both motions in a narrative order issued in all three cases on March 18, 2021 ("the Combined Order").[2] State Add. 86.

On March 22, 2021, the State filed an emergency motion for a stay pending appeal, requesting that all proceedings be stayed and that several pleadings be sealed pending appeal. State App. 45. Mr. Hallock-Saucier objected and asserted his speedy trial rights. State App. 48-53. ("the Defendant's rights to a speedy trial are implicated"). On March 29, 2021, the State filed a motion for reconsideration, which was subsequently denied. State Add. 78. On March 31, 2021, jury selection was cancelled due to this appeal. State App. 58. Nearly 15 months after his original arrest, Mr. Hallock-Saucier still has not received the exculpatory evidence to which he is constitutionally entitled.

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[1] References to the record are as follows:
State App. __ refers to the State's Appendix.
State Add. __ refers to the Addendum to the State's Brief.
Resp. Add.__ refers to the Addendum to this brief.

[2] Mr. Hallock-Saucier had filed a motion *in limine* for permission to examine an officer about alleged misconduct. The State filed a response, and the trial court deferred ruling until jury selection. The Combined Order also denied the State's motion to seal the response to the motion *in limine*.

II. Mr. Fuchs' Case

Mr. Fuchs was charged by complaint on June 18, 2019. State App. 12. On June 20, 2019, he waived his arraignment and pleaded not guilty. State App. 13. He was indicted on August 15, 2019. State App. 12. Trial was twice scheduled and cancelled, in January 2020[3] and April 2020. State App. 13-14. On February 24, 2021—*over a year and a half after Mr. Fuchs was first charged (and after trial had twice been scheduled and cancelled)*—the State filed an assented-to Motion for a Protective Order of Discovery Materials, noting that it had obtained potentially exculpatory evidence in a police officer's personnel file. State Add. 51. That motion, which did not explain why it was filed after the case had been pending for over a year and a half (and after the deadline established by the rules), was denied without prejudice in a margin order which noted that personnel records are presumptively public records under RSA 91-A:4. *Id.* On March 10, 2021, the State moved to reconsider the denial of its motion for a protective order and moved to seal its motion for reconsideration. Both motions were denied by the Combined Order. State Add. 86.

On March 22, 2021, the State filed an Emergency Motion to Stay Proceedings to Allow State's Appeal of Trial Court Ruling, which was granted in part on April 1. State App. 6. Over 22 months after his original arrest, Mr. Fuchs still has not received the exculpatory evidence to which he is constitutionally entitled.

III. Mr. Johnson's Case

Mr. Johnson was charged with several crimes by complaint on October 15, 2020 and pleaded not guilty and waived arraignment that same day. State App. 30-31. On February 25, 2021, the State filed two assented-

[3] The first trial was cancelled when Mr. Fuchs did not appear for the pretrial conference.

to Motions for a Protective Order of Discovery Materials, noting that it had obtained potentially exculpatory evidence in two police officers' personnel files. State Add. 61-62; 54-65. Both motions were denied. On March 4, 2021, the State filed a motion to reconsider the denial of its motions for protective order. State Add. App. 67. This motion denied by the Combined Order.

On April 19, Mr. Johnson filed a Notice to Clarify Position on Protective Orders and Withdraw Assent (the prosecutor then moved to strike that pleading, and the motion to strike remains pending). State App. 23; 25. Over six months after he was charged, Mr. Johnson still has not received the exculpatory evidence to which he is constitutionally entitled.

IV. The Combined Order

The trial court issued a Combined Order addressing motions filed in the three cases discussed above. The order denied a motion for reconsideration and motions to seal in Mr. Johnson's and Mr. Fuchs' cases, a motion for protective order, a motion to seal that motion, and a motion to seal a response *in limine* in the third case. State Add.86-96. The trial court observed the following:

> The State asks the court for two things: First, the State seeks protective orders that would prohibit defense counsel from sharing the information. Second, the State seeks to seal all reference in the court file to (1) the fact that such discovery is being provided, (b) the issuance of a protective order, and (c) all litigation in the matter. Essentially, the State wishes to have the defense gagged and the existence of the gag order kept secret.

Combined Order, p. 2. The trial court further observed that the State did not describe anywhere the substance of the potentially exculpatory evidence. *Id.*

The trial court continued that, while it plainly has the authority to issue protective orders, it only does so "to, *inter alia*, prevent an invasion of

privacy or safeguard a well-grounded expectation of privacy," but "would not ordinarily issue a protective order that gags the parties and counsel from sharing what is otherwise available to the general public on demand." *Id.*, pp. 3-4.

The trial court next observed that, historically, all police department records of internal personnel practices were categorically exempt from the Right-to-Know law under *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993). However, following this Court's decisions last year in *Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020) and *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020), *Fenniman*'s categorical bar on producing such information was replaced with a public interest balancing test, wherein a court must make a fact-specific inquiry that balances the public interest in disclosure against any privacy interests in nondisclosure. *See* Combined Order, p. 5. In light of that development, the trial court held the following: "It is one thing to ask for a case-specific protective order on the grounds that re-disclosure would result in an invasion of privacy. But a knee-jerk protective order based on the provenance rather than the substance of the discovery is unwarranted and could amount to a prior restraint on lawful speech." *Id.*, p. 6.

The trial court next analyzed the State's arguments under RSA 105:13-b. Examining the text of section I of the statute, the court observed that the statute does not make exculpatory evidence confidential, creates no privilege, and has no provision for protective orders. *Id.* The trial court then recounted the strong public interest in seeing how police departments operate and investigate and discipline their own, and held that, "[s]peaking generally, an officer who has been found to have committed such acts has a limited cognizable interest in keeping that fact secret from the public he serves." *Id.*, p. 7. The trial court then invited the State to present a fact-

specific case that public disclosure would result in an invasion of privacy, but noted that "the court will not issue gag orders in blank." *Id.*, p. 8.

The State did not accept this invitation and instead filed a Rule 11 Petition for Original Jurisdiction. In its Response to Respondents' Motion for Summary Dismissal or, in the alternative Summary Affirmance, the State abandoned its challenge to the trial court's orders on the motions to seal.

SUMMARY OF ARGUMENT

This case concerns the statutory interpretation of RSA 105:13-b, as well as the broader question of whether the State can condition its constitutional duty to provide exculpatory information on a defendant being required to keep this information secret. Such a condition is not only constitutionally impermissible, but also it is not mandated by the express terms of RSA 105:13-b. In this case, the trial appropriately exercised its discretion to reject such a condition.

The State is obligated to turn over exculpatory evidence in its possession to a criminal defendant. This obligation exists for all evidence, including evidence that tends to impugn the credibility of a police officer who may be a testifying witness. After all, police officers are professional witnesses whose testimony are especially likely to be viewed as credible by a jury. In each case below, the State identified exculpatory evidence in the files of police officers who may be witnesses. Rather than turning over that evidence outright to the Respondents below, the State sought entry of protective orders that would gag the Respondents and their counsel from discussing the evidence. The State has brought this petition for original jurisdiction challenging the trial court's denial of one-sided protective orders that would prohibit defendants and their counsel (but not the State) from disseminating exculpatory evidence found in police officers' personnel files which the State is constitutionally required to produce.

In a thoughtful and well-reasoned opinion, the trial court observed that nothing in the statute requires that this information be kept confidential, and that, because these are documents which would likely be available to the public anyways, there was no reason for the trial court to exercise its discretion to issue the order in question. The trial court also implicitly observed that the proposed protective orders would impact Respondents' First Amendment and Part I, Article 22 rights. As a result, the trial court declined to issue the requested protective orders.

The State argues that a court, when presented with an assented-to request for a protective order limiting disclosure of documents produced in discovery, ***must*** issue that order. As discussed below, the State is wrong.

First, the trial court's decisions are subject to significant deference. In a Rule 11 petition such as this, this Court exercises its review rarely, and only when a trial court has so exceeded its authority that this Court must exercise its original jurisdiction to prevent substantial injustice. Moreover, a trial court's discretion is at its zenith when managing its docket and discovery.

Second, nothing in the text of RSA 105:13-b, which governs the process by which a prosecutor turns over to the defense exculpatory or potentially exculpatory evidence in a police officer's file, requires confidentiality of exculpatory evidence. Indeed, the text of the statute is clear that only the remainder of a police officer's personnel file—that which is not produced to the defense—is to remain confidential in the criminal case. Nor does the statute require this evidence to be produced subject to a protective order gagging the defense. If there is any further doubt, it is eliminated by former Attorney General Joseph Foster's admission in his March 21, 2017 memorandum concerning the Exculpatory Evidence Schedule ("EES") that RSA 105:13-b "makes an exception to the otherwise confidential nature of police personnel files for direct disclosure

to the defense of exculpatory information in a criminal case." State App. 204. New Hampshire Rule of Criminal Procedure 12(b)(1)(E) similarly imposes no confidentiality requirement, instead requiring the State to produce "[a]ll exculpatory evidence required to be disclosed pursuant to the doctrine of" *Brady* and *Laurie* "within forty-five calendar days after the entry of a not guilty plea." The Rules of Professional Conduct governing prosecutors also require disclosure of exculpatory information without such a condition. *See* N.H. R. Prof. Resp. 3.8(d). As RSA 105:13-b does not require the issuance of a protective order, this ends the matter and this Court need not go any further or address whether principles under RSA ch. 91-A apply.

Third, it is within the trial court's discretion to grant a protective order under the standard established by court rule. The trial court appropriately considered by analogy whether the evidence in question would be available to public inspection under the Right-to-Know law. While criminal discovery is not governed by this statute, the trial court is within its discretion to use RSA ch. 91-A as a relevant factor to consider in determining whether to exercise its discretion in granting a protective order. The trial court correctly concluded that the documents in question would be available for inspection under that statute. Under the three-part public-interest balancing test appropriate for personnel or other files whose disclosure would constitute an invasion of privacy, a court considers the public interest in disclosure, any interests in privacy, and places a thumb on the scales in favor of disclosure. The trial court correctly concluded that the public interest in disclosure of exculpatory evidence found in police files is high. It further gave the State an opportunity to present any particularized evidence of privacy, but the State chose not to present any such evidence.

Fourth, the issuance of the protective order under the circumstances presented in these three cases is unconstitutional under the First

Amendment to the United States Constitution and Part I, Article 22 of the New Hampshire Constitution. As a prior restraint on speech in the context of materials produced in discovery, the State has not met its burden of "good cause" to gag the defense. Moreover, because the proposed protective orders gag only the defense and not the State, they constitute unconstitutional viewpoint and speaker discrimination.

ARGUMENT

Both the United State Constitution and the New Hampshire Constitution require that a prosecutor must provide to a criminal defendant all the exculpatory evidence in the State's possession. *See Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Laurie*, 139 N.H. 325 (1995); *see also United States v. Bagley*, 473 U.S. 667, 683 (1985) ("Favorable evidence includes that which is admissible, likely to lead to the discovery of admissible evidence, or otherwise relevant to the preparation or presentation of the defense."). In the three cases below, and before this Court on appeal, the State seeks to condition the production of constitutionally-required, exculpatory evidence related to the credibility of police officers on the entry of protective orders that would shield the evidence from the public and prohibit defense counsel from discussing the contents of the production with anyone other than counsels' staff and the defendant. In each case, the State filed a motion for a protective order. The trial court correctly determined that there is no statutory requirement under RSA 105:13-b that the exculpatory information be so restricted. Further, the trial court, by analogy, determined that, since this evidence is likely a public record under the Right-to-Know Law, there was no basis for it to exercise its wide discretion to enter the protective order the State requested.

I. The Trial Court's Decisions Are Subject To Significant Deference

In this posture—a Rule 11 Petition from a discovery dispute—this Court applies deferential review. "Certiorari is an extraordinary remedy that is not granted as a matter of right, but rather at the discretion of the court." *Petition of State of N.H.*, 162 N.H. 64, 66 (2011). This Court "exercise[s] [its] power to grant the writ sparingly and only where to do otherwise would result in substantial injustice." *Id.* "Certiorari review is limited to whether the trial court acted illegally with respect to jurisdiction, authority or observance of the law, or unsustainably exercised its discretion or acted arbitrarily, unreasonably, or capriciously." *Id.* Rule 11(1) lists some of the reasons why this Court will exercise original jurisdiction: "When a trial court or administrative agency has decided a question of substance not theretofore determined by this court; or has decided it in a way probably not in accord with applicable decisions of this court; or has so far departed from the accepted or usual course of judicial or administrative agency proceedings as to call for an exercise of this court's power of supervision."

Moreover, in managing discovery, the trial court's discretion is at its zenith. "'The trial court has broad discretion in managing the proceedings before it,' including pretrial discovery." *State v. Larose*, 157 N.H. 28, 39 (2008) *quoting In the Matter of Connor & Connor*, 156 N.H. 250, 252 (2007). This Court "will disturb decisions about pre-trial discovery . . . only if the [party] demonstrates that the decision was clearly unreasonable to the prejudice of [its] case." *Id.*; *see also State v. Emery*, 152 N.H. 783, 789 (2005) ("Decisions relating to pretrial discovery matters are generally within the sound discretion of the trial court . . . Absent unsustainable exercise of discretion, we will not reverse the trial court's decision with respect to alleged discovery violations."). The relevant court rule codifies this broad discretion. *See* N.H. R. Crim. Pro. 12(b)(8) ("Upon a sufficient

showing of good cause, the court *may* at any time order that discovery required hereunder be denied, restricted, or deferred, or make such order as is appropriate.") (emphasis added); *cf.* N.H. R. Crim. Pro. 50(d)(2) ("An agreement of the parties that a document is confidential or contains confidential information is not a sufficient basis alone to seal the record.").

In this case, the trial court correctly determined that RSA 105:13-b does not require confidentiality or that a protective order be issued for "[e]xculpatory evidence in a police personnel life." It then, by analogy, ruled that because the evidence would likely be a public record subject to inspection under RSA ch. 91-A, there was no cause to issue a protective order. As RSA 105:13-b does not require the issuance of a protective order in these cases, this ends the matter.

To be clear, Respondents *are not* arguing that the standard for issuing a protective order is governed by the Right-to-Know Law. Rather, the standard is contained in Rule 12(b)(8) of Criminal Procedure which states "the court *may* at any time order that discovery required here under be denied, restricted, or deferred, or make such other order as is appropriate." (emphasis added). But the trial court *was* within its ample discretion to consider the public's ability to inspect these records when ruling that there was no cause to issue a protective order.

II. RSA 105:13-B Does Not Create Confidentiality For The Portions Of A Police Officer's File Which Are Disclosed As Exculpatory Evidence To A Defendant

The State argues that materials taken directly from a police personnel file and disclosed to a defendant as required by *Brady/Laurie* and RSA 105:13-b, I remain confidential unless, presumably, a judge

determines that the evidence may be presented to a jury.[4] The State is incorrect and ignores the plain language of RSA 105:13-b. Here, the trial court was correct in concluding that nothing in RSA 105:13-b "suggests that such exculpatory evidence, once disclosed, must be kept confidential." *Combined Order*, p.6.

This analysis begins and ends with the text of the statute – text that is plain and straightforward. *See State v. Brouillette*, 166 N.H. 487, 490 (2014) ("We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used."). The court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Casey v. N.H. Secy. Of State*, 173 N.H. 266, 271 (2020). The court "do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole." *Id.* at 271-72.

Here, RSA 105:13-b, I clearly states that "[e]xculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case *shall* be disclosed to the defendant." RSA 105:13-b, I (emphasis added). Similarly, RSA 105:13-b, III states, in part, the following: "…. Only those portions of the file which the judge determines to be relevant in the case shall be released [to the defendant] to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. *The remainder of the file shall be treated as confidential*

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[4] The State argues that suggests that the trial court based its decision on its own policy views. *State's Brief*, p. 42. But it is the State, not the trial court, which is attempting to rewrite RSA 105:13-b and impose its own policy goals of giving the police special secrecy protections that the legislature never contemplated through this statute. If the State disagrees with the law, then it is up to the State to make its case before the legislature rather than unilaterally impose its own policy preference that is inconsistent with RSA 105:13-b's plain terms. In the meantime, this Court should not second guess the legislature's rational behind RSA 105:13-b's plain terms.

and shall be returned to the police department employing the officer." RSA 105:13-b, III (emphasis added). As this language makes clear, exculpatory evidence in an officer's personnel file that is "relevant in the case" "shall be disclosed to the defendant" and is therefore not confidential.[5] Disclosure is required without conditions. Only the non-exculpatory "remainder of the file shall be treated as confidential" in the criminal case. RSA 105:13-b, III.

This interpretation is further confirmed by former Attorney General Joseph Foster's admission in his March 21, 2017 memorandum concerning the Exculpatory Evidence Schedule—a memorandum that is still in effect subject to an update in 2018—that RSA 105:13-b, since its amendment in 2012, "makes an exception to the otherwise confidential nature of police personnel files for direct disclosure to the defense of exculpatory information in a criminal case." State Add. 204. The memorandum adds that "[t]he current version of RSA 105:13-b exempts exculpatory evidence from the confidential status of police personnel files." State Add. 210.

As Attorney General Foster acknowledged in his 2017 memorandum, this interpretation is also consistent with the broader purpose of RSA 105:13-b to ensure that defendants obtain access to exculpatory information. RSA 105:13-b was amended in 2012 with the explicit intention of making it easier for criminal defendants to obtain these records, stating that these records "*shall* be disclosed to the defendant." RSA 105:13-b, I (emphasis added). Indeed, the legislator who added the 2012

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[5] As the trial court recognized, while the prosecutor below described the records as "potentially exculpatory" rather than "exculpatory," the prosecutor also explained that the material should be provided directly to the defense, as contemplated by paragraph I of RSA 105:13-b, rather than submitted to the court for in camera review (which is the process laid out in paragraph II for when the prosecutor cannot determine if material is exculpatory). *Combined Order*, pp. 6-7.

amendment to RSA 105:13-b—Representative Brandon Giuda—informed the *Union Leader* in a 2012 article that "he made changes to RSA 105:13-b because he passionately believes people accused of crimes should be informed if police personnel records contain information that could hurt an officer's credibility as a witness." He added that, if these disclosures are not made, the State will now "be in violation of state law."[6] Further, prior to the 2012 amendment, RSA 105:13-b stated, in part:

> No personnel file on a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination whether it contains evidence relevant to the criminal case ….

RSA 105:13-b (Supp. 1993) available at http://www.gencourt.state.nh.us/legislation/1992/HB1359.html *see also* *State v. Ainsworth*, 151 N.H. 691, 694 (2005)[7]. The above cited provision of the statute generally remains in the amended RSA 105:13-b at Paragraph III, though the first sentence was materially changed in the 2012 amendment as follows: "No personnel file of a police officer who is serving

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[6] *See* Nancy West, "Law Intended to Keep Discredited Police From Testifying Draws Fire," *Union Leader* (Nov. 11, 2012), https://www.unionleader.com/news/crime/law-intended-to-keep-discredited-police-from-testifying-draws-re/article_971edcf0-11d0-5430-8a17-55574bb3f21c.html.

[7] Moreover, as the 1992 legislative history of RSA 105:13-b demonstrates, the statute was not drafted to categorically deem police personnel files confidential, but rather to prevent defense attorneys from engaging in unbridled fishing expeditions for non-exculpatory information to which they were not entitled in the criminal case. Resp. Add. 103-146.

as a witness or prosecutor in a criminal case shall be opened for the purposes of *obtaining or reviewing non-exculpatory evidence in* that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case." RSA 105:13-b, III (emphasis added).

By and through this amendment, the legislature made clear that, at most, it *only* intended to deem as confidential in the criminal case "non-exculpatory" information in a police officer's personnel file, not the "exculpatory" information given to defendants. Indeed, nothing in the statute indicates that the exculpatory evidence produced to a defendant must be held as confidential or otherwise protected from further disclosure or dissemination. To the contrary, the statute mandates disclosure of exculpatory information without conditions and protects only the undisclosed remainder of the file in the criminal case.[8]

In its analysis, the State omits the critical word "remainder," which makes clear that the only portions of the officer's personnel file that are confidential in the context of the criminal case are the *remaining* portions of the file that were *not* disclosed to the defendant and that were ultimately returned to the police department. Further, the statute's explicit mention of confidentiality as to those "remaining" portions of the file that are not exculpatory implies that the portions of the file given to the defendant are excluded from such confidentiality. *See Gentry v. Warden, N. N.H. Corr. Facility*, 163 N.H. 280, 282 (2012) ("The familiar doctrine of expressio unius est exclusio alterius ('the mention of one thing excludes another') persuades us that the trial court's interpretation of the statute is correct.").

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[8] Just as these Respondents have had their name and allegations widely disseminated despite being innocent until proven guilty, the officers whose conduct has placed them on the EES face no worse prejudice from dissemination of the exculpatory information from their personnel files.

The State argues that *Gantert v. Rochester*, 168 N.H. 640 (2016) and *Duchesne v. Hillsborough County Att'y.*, 167 N.H. 774 (2015) stand for the proposition that RSA 105:13-b makes police personnel files "generally confidential by statute." *See, e.g., State's Brief*, p. 23. But in each of those cases, any discussion of that statute was dicta. *See Duschesne*, 167 N.H. at 780 ("We agree with the respondent's assertion that RSA 105:13-b is not directly at issue in this case…").

Both *Gantert* and *Duschesne* were due process cases brought by police officers challenging their placement on the Exculpatory Evidence Schedule, then known as the *Laurie* list. In *Duschesne*, this Court reversed the decision of the county attorney to decline to remove the petitioning officers from EES after a neutral fact-finder determined that the allegations of excessive force were unfounded. 167 N.H. at 784. In *Gantert*, this Court upheld placement on EES after an arbitrator found there was "just cause" to discipline an officer but reversed his termination. 168 N.H. at 644. Both cases were about the procedural protections afforded officers placed on EES, and were not cases about whether exculpatory evidence contained in a police officer's file was confidential. This Court accordingly had no occasion to conduct an examination of the text of the statute to determine to what extent, if any, RSA 105:13-b provides for confidentiality of exculpatory evidence contained in a police personnel file. *Cf. Duschesne*, 167 N.H. at 782 ("Consistent with our case law, [RSA 105:13-b, III] prohibits the opening of a police personnel file to examine the same for *non-exculpatory evidence*…") (emphasis added).

Moreover, both *Gantert* and *Duschesne* were decided before this Court issued its opinion in *Seacoast Newspapers*. In that case, the Court considered a Right-to-Know request for the decision of an arbitrator who had examined the dismissal of Portsmouth Police Officer Aaron Goodwin. 173 N.H. at 329-30. The trial court determined that the grievance process

was "conducted internally and was performed for the benefit of Goodwin and his former employer." *Id*. at 330. It determined that it was exempt from inspection as an internal personnel practice. This Court reversed and held that the "internal personnel practice" exemption was too broad because it related "to the conduct of a specific employee, [and] it would be the type of information preserved in an employee's personnel file." *Id.* at 341. The court then remanded to determine "whether the material can be considered a 'personnel file' or part of a 'personnel file'" and whether the disclosure would constitute an invasion of privacy under the three-part public-interest balancing test discussed below in Section III of this brief. *Id.* The case subsequently settled on remand.

In short, *Seacoast Newspapers* did *not* rule that information contained in a police officer's personnel file could never be made public or was unconditionally confidential, as the State urges the Court to pronounce. Instead, it suggested that, at least in the context of a Right-to-Know request, that information is subject to the familiar public interest balancing test, even for non-exculpatory information.

III. The Trial Court Sustainably Exercised Its Discretion in Denying The Protective Order Request

The relevant court rule provides the trial court wide discretion in determining whether to issue a protective order. *See* N.H. R. Crim. Pro. 12(b)(8) ("Upon a sufficient showing of good cause, the court *may* at any time order that discovery required hereunder be denied, restricted, or deferred, or make such order as is appropriate.") (emphasis added). As RSA 105:13-b does not require the entry of a protective order for the reasons described in Section II of this brief, the trial court appropriately looked to whether and, if so, how these documents would be open to public scrutiny. In doing so, the trial court turned to RSA ch. 91-A and decided that the exculpatory evidence from the police personnel files was likely

subject to public inspection under RSA ch. 91-A. This was an appropriate consideration for the trial court in determining whether to exercise its discretion and issue a protective order.

New Hampshire's Right-to-Know Law is designed to create transparency with respect to how the government interacts with its citizens. Consistent with this principle, courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.,* 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode v. N.H. Office of the Legislative Budget Assistant,* 148 N.H. 551, 554 (2002) (citation omitted). "[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a ***heavy burden*** to shift the balance toward nondisclosure." *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581 (2006) (emphasis added).

Last year, this Court considered the *per se* exemption from the Right-to-Know Law for "internal personnel practices" announced in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), and determined that because the *per se* rule is "inconsistent with our historical and current interpretation of the exemption under RSA 91-A:5, IV for 'confidential, commercial, or financial information,'" it is "no more than a remnant of abandoned doctrine." *Salem*, 173 N.H. at 356. On the same day, this Court narrowed the set of documents covered by the "internal personnel practices" exemption to include "only a narrow set of governmental records, namely those pertaining to an agency's internal rules and practices governing operations and employee relations." *Seacoast Newspapers,* 173 N.H. at 329. As a result of these cases, documents related to investigations

of allegations of official misconduct are now analyzed as either "personnel" or "other files" triggering this public interest balancing framework. *See Reid v. N.H. Att'y Gen.*, 169 N.H. 509, 528 (2016) ("[P]ersonnel files are not automatically exempt from disclosure," and explaining that such files are subject to the *Lambert* public interest balancing analysis) (ellipsis and quotations omitted).

Courts engage in a three-step analysis to conduct the public interest balancing and determine whether records are exempt from public disclosure under RSA 91-A:5, IV.[9] *See Lambert v. Belknap Cty. Convention*, 157 N.H. 375, 382 (2008). "First, [courts] evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. . . Second, [courts] assess the public's interest in disclosure . . . Finally, [courts] balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." *Id.* at 383.

A. There Is No Demonstrated Privacy Interest

As to the first factor, police officers have no privacy interest when their actions implicate their official duties. Indeed, in examining the invasion of privacy exemption under RSA 91-A:5, IV, this Court has been careful to distinguish between information concerning private individuals interacting with the government and information concerning the performance of government employees. *Compare, e.g., Lamy v. N.H. Public Utilities Comm'n*, 152 N.H. 106, 111 (2005) ("The central purpose of the Right–to–Know Law is to ensure that the Government's activities be

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[9] While the State argues that "No New Hampshire legal authority has ever determined that materials from a police personnel file are subject to either unreadacted or redacted disclosure under RSA 91-A," *State's Brief*, p. 37, it admits that "records documenting the history or performance of a particular employee fall within the exemption for personnel files, which are guided by the three step public-interest balancing test. *Id.*, pp. 33-34 (quotation and citation omitted).

opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."); *Brent v. Paquette*, 132 N.H. 415, 427 (1989) (government not required to produce records kept by school superintendent containing private students' names and addresses); *N.H. Right to Life v. Director, N.H. Charitable Trusts Unit*, 169 N.H. 95, 114, 120-121 (2016) (protecting identities of private patients and employees at a women's health clinic); *with Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 684 (2011) (holding that the government must disclose the names of retired public employees receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV); *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 709-10 (2010) (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); *Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972) (government must disclose the names and salaries of each public schoolteacher employed by the district).

Here, the trial court specifically invited the State to present evidence of a privacy interest in each case: "All of this is to say that the State is welcome to make a fact-specific case that public disclosure of the information would result in an invasion of privacy…" *Combined Order*, p. 8. The State did not accept this invitation and presented no evidence of a particularized privacy interest.[10]

B. The Public Interest In Disclosure Is Strong And Compelling

Turning to the second factor—the public interest in disclosure—the trial court held that "there is a strong and compelling public interest in

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[10] The State argues that "Personnel Records are Not *Per Se* Available to the Public." *State's Brief*, Section II.C. This is true but obscures the fact that the State declined to participate in developing a record to aid the trial court in conducting the public-interest balancing.

disclosure of information relating to dishonest and assaultive behavior committed by police officers in the course of their official duties." *Combined Order*, p. 8; *see, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Prof'l Firefighters of N.H.*, 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."). As this Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of information pertaining to its government activities." *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003).

Numerous cases outside of New Hampshire have similarly highlighted the public interest in disclosure when the official acts of the police are implicated. *See, e.g., Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.*, 140 N.E.3d 923, 394 (Mass. 2020) ("the public has a vital interest in ensuring transparency where the behavior of these public officials allegedly fails to comport with the heightened standards attendant to their office"); *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) ("As the trial court found, there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct."); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 299 (Conn. App. Ct. 2012) (in public records dispute concerning documents held by a police department implicating an employee's job termination, noting that a public concern existed where the "conduct did implicate his job as a public official"); *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, LLC*, 4 So.3d 807, 809-10, 821 (La. Cir. Ct. App. 2008) ("[t]he public has an interest in learning about the operations of a public agency, the work-related conduct of public employees, in gaining information to evaluate the

expenditure of public funds, and in having information openly available to them so that they can be confident in the operation of their government"); *Burton v. York County Sheriff's Dept.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) ("[i]n the present case, we find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye").

C. The Balancing Of Interests Weighs Heavily In Favor Of Disclosure

The third factor is the balancing of the privacy interests against the public interest in disclosure. When balancing the public and private interests, "the legislature has provided the weight to be given one side of the balance by declaring the purpose of the Right-to-Know Law in the statute itself." *Reid*, 169 N.H. at 532 (citation and quotation omitted). Put another way, even if the evidence were to stand in equipoise—and it does not here—a thumb is placed on the scale in favor of disclosure. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance."); *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540, 546 (1997) (noting that courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents"); *Murray*, 154 N.H. at 581 (emphasis added) (noting the "heavy burden to shift the balance towards nondisclosure").[11]

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[11] The State's reference to the "*Murray* exemption" and FOIA Exemption 7 is inapt, as this exemption only applies to "records or information compiled for law enforcement purposes." *See State's Brief*, p. 36. This exemption does not include "personnel" records impacting administrative or discretionary decisions. *See Providence Journal Co. v. Pine*, C.A., No. 96-6274, 1998 R.I. Super. LEXIS 86, at *32 (Super. Ct. June 24, 1998) ("In the instant matter, the Attorney General has not shown that gun permit

Given the significant public interest in disclosure, the lack of any specific privacy interest, and the weight placed in favor of disclosure, the trial court did not unsustainably exercise its discretion in determining that the documents would likely be public documents under the Right-to-Know Law and, therefore, that a protective order was improper in these criminal cases. This accords with three superior court decisions which have concluded that information concerning police conduct should be released. *See Union Leader Corp. v. Town of Salem*, No. 218-2018-cv-01406, at *27-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (on remand, ordering disclosure of most of the redacted information in an audit report concerning how a police department conducted internal affairs investigations), Resp. Add. 42; *Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that an internal investigation report concerning an allegation that an officer engaged in excessive force is a public document because the public interest in disclosure trumps any privacy interest the officer may have under RSA 91-A:5, IV; currently on appeal at Supreme Court at No. 2020-563), Resp. Add. 72; *Salcetti v. City of Keene*, No. 213-2017-cv-00210, at *5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.) (on remand, holding: "As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their authority, whether the department is

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records are compiled specifically for law enforcement purposes. Instead, the evidence shows that the records are compiled in order to facilitate an administrative and discretionary decision concerning the granting of a gun permit to an applicant. Consequently, gun permit records are not law enforcement records for purposes of the exemption contained in R.I.G.L. § 38-2-2(4)(i)(D)."); *Greenpeace USA, Inc. v. EPA*, 735 F. Supp. 13, 14-15 (D.D.C. 1990) (an investigation into whether an employee violated agency regulations was not compiled for law enforcement purposes).

accounting for complaints seriously, and how many complaints are made. This factor strongly favors unredacted disclosure."), Resp. Add. 93.

IV. The Proposed Protective Orders Violate The First Amendment And Part I, Article 22

In the Combined Order, the trial court recognized that the proposed protective orders the State sought in each case had profound implications on Respondents' free speech rights. *See Combined Order*, p. 2 ("Essentially, the State wishes to have the defense gagged"); p. 4 ("Indeed, such an order would be a prior restraint on speech relating to a matter of public record. It would forbid the defendant, defense counsel and the defense team from speech that literally any other member of the public could make as of right"); p.6 ("But a knee-jerk protective order based on the provenance rather than the substance of the discovery is unwarranted and could amount to a prior restraint on lawful speech"); p. 8 ("the court will not issue gag orders in blank"). The trial court was correct.

As an initial matter, it is true that Respondents assented to the proposed protective orders, although Mr. Johnson subsequently clarified his position on the protective orders and withdrew his assent. In any event, as is obvious, defendants—many of whom are detained pre-trial—will often feel compelled to relinquish their free speech rights in order to timely receive the information to which they are entitled so they can have their day in court. It is inappropriate to condition one constitutional right (receiving exculpatory evidence) on surrendering another (free speech rights to discuss one's case). *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (finding it "intolerable that one constitutional right should have to be surrendered in order to assert another"). This disparity in bargaining power also demonstrates the importance of a trial court carefully scrutinizing requests for gag orders. The State's protective order policy also, as the trial court aptly noted, has the effect of insulating officers from scrutiny and

prohibiting defense attorneys from engaging in collaborative discussions with their colleagues on the nature of their cases. Indeed, the State's position prevents defense attorneys from doing their due diligence and coordinating to assess whether constitutionally required disclosures have been made in prior cases concerning the same officers.

Both the United States Constitution and the New Hampshire Constitution protect the freedom of expression. *See* U.S. Const. Amend. I ("Congress shall make no law . . . abridging the freedom of speech"); N.H. Const. Pt. I, Art. 22 ("Free speech and Liberty of the press are essential to the security of Freedom in a State: They ought, therefore, to be inviolably preserved."). These constitutional protections are important both because they allow Americans to exercise their right to participate in the public square and because they allow the public to know how the criminal legal system works: "[T]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (opinion of *Kennedy*, J.) (ellipsis, quotation and citation omitted). "[T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about the happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system." *Id.* at 1070 (majority opinion). The proposed protective orders violate the constitutional guarantees for two reasons: they are unsupportable prior restraints on speech, and they constitute impermissible viewpoint-based or speaker-based restrictions on speech.

First, the proposed protective orders impermissibly act as a prior restraint on speech. A prior restraint is a judicial order or administrative

system that restricts speech, rather than merely punishing it after the fact. *See Mortgage Specialists v. Implode-Explode Heavy Indus*., 160 N.H. 227, 240 (2010) (invalidating a court injunction prohibiting republication of a loan chart, as the petitioner's interests in protecting its privacy and reputation did not justify this extraordinary remedy of imposing a prior restraint). As this Court has held, "[w]hen a prior restraint takes the form of a court-issued injunction, the risk of infringing speech protected under the First Amendment increases." *Id*. at 241. The danger of a prior restraint is that it has an immediate and irreversible sanction that "freezes" speech at least for the time. Typically, "prior restraints may be issued only in rare and extraordinary circumstances, such as when necessary to prevent the publication of troop movements during time of war, to prevent the publication of obscene material, and to prevent the overthrow of the government." *Id.*

In *Anderson v. Cryovac*¸ 805 F.2d 1, 7 (1st Cir. 1986), the First Circuit considered the First Amendment implications of a protective order limiting dissemination of information received in discovery. Discussing a then-recent Supreme Court case, *Seattle Times Co. v. Rhinehart*¸ 267 U.S. 20 (1984), the *Anderson* Court observed that *Seattle Times* held "protective orders further the important governmental interest of preventing abuse of the pretrial discovery process" and therefore "judicial limitations on a party's ability to disseminate information in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." 805 F.2d at 7 (cleaned up). However, the *Anderson* court continued: "The Supreme Court *did not* hold that the first amendment was not implicated at all when a protective order is issued . . . [it] did not hold that a discovery protective order could never offend the first amendment." *Id.* (emphasis added). Accordingly, a protective order may issue to limit materials

received in discovery subject only upon a showing of "good cause." *Id.; see also United States v. Padilla-Galarza*, 990 F.3d 60, 77 (1st Cir. 2021) (quoting *Anderson* for the proposition that a "finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements.").

In this case, the proposed protective orders would be judicially issued restrictions on speech not supported by "good cause." While "good cause" is a lower threshold to meet than is typically required to justify prior restraints on speech, the State has not met it here. As explained above, the statutory scheme does nothing to make the exculpatory information—such as the information at issue in these cases—confidential. Moreover, the trial court invited the State to submit particularized evidence of any privacy interest that might justify the issuance of a protective order, but the State declined to introduce any such evidence. As it has failed to produce any factual demonstration of potential harm, and instead relies on conclusory statements and an incorrect understanding of RSA 105:13-b, the State has not demonstrated "good cause" sufficient to gag Respondents without abridging their First Amendment and Part I, Article 22 rights.

Second, the proposed protective orders are unconstitutionally one-sided. The proposed protective orders include a provision that "Defense Counsel is prohibited from sharing or further disseminating these confidential documents and the confidential information contained therein with anyone other than Defense Counsel's staff and the Defendant." State Add. 53; 63; 66; 77. There is no reciprocal provision barring the State or its counsel from discussing anything with anyone. *Id.* The language of these proposed orders appears to come from a sample proposed protective order appended to Attorney General Foster's 2017 Law Enforcement Memorandum. State App. 227. Attorney General Foster's memorandum does not explain why the protective order should gag only the defense and

not the prosecution, and it does not address the constitutional infirmities resulting from such an order.[12]

This proposed order is a viewpoint-based restriction on speech because it applies only to the defense and would allow the State to say whatever it wants about the exculpatory evidence in the officers' files, without permitting the same advantages to the defense. The State and the defense go into a criminal trial with different motivations—the State is trying to convince a jury beyond a reasonable doubt that the defendant committed each of the elements of a charged offense. The defense is trying to highlight for the jury the problems with the State's case. An order that prohibits the defense, but not the State, from discussing a particular matter has the effect of discriminating against a pro-acquittal viewpoint.[13]

"The government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019). "Viewpoint discrimination is … an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the

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[12] The memorandum does instruct prosecutors who have reviewed the contents of an officers' personnel file to "maintain the confidentiality" of the material. State App. 211. But the memorandum does not carry the same penalties for violating confidentiality as does the one-sided gag order the memorandum encourages.

[13] Moreover, the one-sided nature of the gag order would unevenly prevent the defense from investigating its case. The State is free to speak with the officer with the exculpatory evidence in his file (or witnesses to the misconduct) to understand better the actions that led to the exculpatory information. If the defense wants to ask the officer about the information so as to be able to highlight to the jury the officer's credibility issues, it must seek leave of court to be relieved from the protective order. This restriction, therefore, also implicates the right to effective assistance of counsel guaranteed every defendant under Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution.

speaker is the rationale for the restriction." *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995); *see also State v. Biondolillo*, 164 N.H. 370, 373 (2012) ("The right of free speech under the State constitution may be subject to reasonable time, place and manner regulations that are *content-neutral*") (citation and quotation omitted, emphasis added). Viewpoint discrimination is subject to either strict scrutiny or *per se* invalidation. *See* Bloom, Jr., Lackland, "The Rise of the Viewpoint-Discrimination Principle," 72 SMU L. Rev. F. 20, 21 (2019) ("As a matter of free speech law, content discrimination is very troublesome, generally giving rise to strict scrutiny. Viewpoint discrimination is significantly worse, often leading to per se invalidation."). Either way, there is no state interest that can justify a one-sided gag order. Neither confidentiality of police records, nor affirming a defendant's right to a fair trial, for example, could provide that justification because the order is not narrowly tailored to advance either aim. A breach of alleged confidentiality of police records (although there is no statutory confidentiality of exculpatory evidence, as discussed in Section II of this brief) is no less prejudicial to an officer because it came from the State. Similarly, avoiding taint to a jury pool from pre-trial publicity cannot be appropriately accomplished by gagging only one of the trial's participants.

Another framework that the Court may consider in evaluating the State's proposed, one-sided protective order is speaker discrimination. "Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *see also* Kagan, Michael, "Speaker Discrimination: The Next Frontier of Free Speech*,"* 42 Fla. St. U. L. Rev. 765 (2015). "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to

establish worth, standing, and respect for the speaker's voice." *Id.* at 340-41. "The First Amendment protects speech and speaker, and the ideas that flow from each." *Id.* at 341; *see also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.").

In *Citizens United*, the Supreme Court considered a federal statute prohibiting corporations and unions from using their general treasury to make independent expenditures for electioneering communications. 558 U.S. at 318. In evaluating the statute, the Court observed, "We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers." *Id.* at 342. The Court also noted that it "has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id* at 343. The Court observed "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity," *id.* at 350, and ruled the regulations unconstitutional. *Id.* at 365.

Under any standard of review,[14] there is no basis for a protective order that gags one side of the case but not the other. In neither this case nor Attorney General Foster's memorandum does the State explain any interest in permitting prosecutors but not defendants or their attorneys to

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[14] *Citizens United* suggested strict scrutiny might be the appropriate framework. 558 U.S. at 340 ("Laws that burden political speech are subject to strict scrutiny… While it might be maintained that political speech cannot be banned or restricted as a categorical matter. . . . [strict scrutiny] provides a sufficient framework for protecting the relevant First Amendment interests in this case.").

discuss an entire category of evidence. As an unconstitutional discrimination on speaker, the proposed protective orders must be rejected.

CONCLUSION

For the reasons discussed above, the decisions of the trial court should be *affirmed*.

REQUEST FOR ORAL ARGUMENT

The Respondents request oral argument before the full Court. Attorney Henry R. Klementowicz will present for the Respondents.

Respectfully submitted,

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Dated: August 13, 2021

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)–(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 9,497 words (including footnotes) from the "Questions Presented" to the "Request for Oral Argument" sections of the brief.

/s/ Henry R. Klementowicz
Henry R. Klementowicz

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on counsel for the other parties through the court's electronic filing system on today's date: Elizabeth Velez, Esq.

Dated: August 13, 2021

/s/ Henry R. Klementowicz
Henry R. Klementowicz

ADDENDUM TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER ON REMAND

This matter is back before the court on remand from the New Hampshire Supreme Court. For the reasons set forth below, this court now concludes that the only redactions to the audit report that are permissible under RSA 91-A:4 and 5 are:

(a) The specific redactions at pages 40 and 92-98 of *Internal Affairs Investigative Practices* section of the audit report (attached as Exhibit A to the Complaint) that are detailed in Section V(D) of this order at pages 28-30 below; and

(b) The specific redactions in the *Time And Attendance* section of the audit report that are detailed in Section IV(C) of this order, at pages 18-19, below.

The balance of the unredacted audit report must be provided to the plaintiffs.

I. Relevant Procedural History And Governing Law

The plaintiffs brought this case under the Right To Know Act, RSA Ch. 91-A, to obtain an unredacted copy of an audit report that was highly critical of the Salem Police Department. The audit report was prepared by an outside vendor retained by the Town of Salem. The Town agreed that the audit report was a government record within the meaning of RSA 91-A:1-a, III.

Government records may be inspected and obtained by the public pursuant to RSA 91-A:4 except to the extent that they fall within a statutory exemptions set forth in RSA 91-A:5. The Town argued that the redacted portions of the audit report are protected from disclosure by virtue of the exemptions in RSA 91-A:5, IV for (a) "[r]ecords pertaining to internal personnel practices" and (b) "personnel . . . and other files whose disclosure would constitute invasion of privacy."

Following an exhaustive, line-by-line, *in camera* comparison of the redacted and unredacted audit reports, this court issued a final order concluding that:

(a) some of the redacted material was not exempt under RSA 91-A:5, and, therefore, must be disclosed;

(b) a few redactions were justified because disclosure would constitute an invasion of privacy; and

(c) a great many more exemptions were justified under Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), which authoritatively construed the exemption for "records pertaining to internal personnel practices."

Fenniman held that the "internal personnel practices" exemption applied broadly to internal affairs and workplace investigations that may lead to internal personnel discipline. Fenniman also held that the exemption was categorical and absolute, in contrast to the other exemptions in RSA 91-A:5, IV which require a case-specific balancing of the benefits of disclosures and nondisclosure. The Supreme Court later expanded Fenniman's categorical exemption to investigations conducted by third parties retained by a government agency for that purpose. Housnell v. North Country Water Precinct, 154 N.H. 1, 6 (2006).

In this case, the audit report described the substance of internal affairs and workplace investigations and thus fell within the scope of the broad, categorical and absolute exemption recognized by Fenniman. The plaintiffs took the position that Fenniman should be overruled. Although this court noted its dissatisfaction with Fenniman, it was nonetheless bound by the precedent and, therefore, ruled the way it did.

The plaintiffs appealed this court's final order to the New Hampshire Supreme Court. The Town did file a cross-appeal.

On appeal, the New Hampshire Supreme Court did what the plaintiffs asked and overruled Fenniman. More particularly, the Court held that the exemption for "internal personnel practices" is now qualified, rather than absolute, and is subject to the same balancing test as the other exemptions in RSA 91-A:5, IV:

> In the future, the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV shall apply to records relating to "internal personnel practices." . . . Determining whether the exemption for records relating to "internal personnel practices" applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy.

Union Leader Corp. v. Town of Salem, 173 N.H. 345, 357 (2020); see generally, Professional Firefighters of New Hampshire v. Local Government Center, Inc., 159 N.H. 699, 707 (2010):

> When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91–A:5, IV, we engage in a three-step analysis. First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Second, we assess the public's interest in disclosure. Third, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. If no privacy interest is at stake, then the Right–to–Know Law mandates disclosure. [citation omitted]. Further,

> whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.

(internal citations, parentheticals, quotations and bracketing omitted).

In a separate case, the Supreme Court further narrowed the breadth of the "internal personnel practices" exemption by holding that it "applies narrowly to records pertaining to internal rules and practices governing an agency's operations and employee relations." Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325, 338 (2020).

The Supreme Court remanded this case for this court to determine—with respect to the redactions that it previously upheld under Fenniman—whether the redacted information falls within either (a) the exemption for of "internal personnel practices" as clarified by the Supreme Court on appeal or (b) the exemption for "personnel files.

II. Nomenclature

In its previous final order this court used the terms "sustained" and "overruled" as shorthand for finding that that particular redactions were justified or unjustified under RSA 91-A:5, IV. As this court noted in its last order, the language is an imperfect match for the concept, but it gets the point across. The court uses the same terms to denote the same concepts in this order.

III. Specific Rulings On Remand With Respect To The Addendum To The Audit Report (i.e., Complaint Ex. B, "*Culture Within The Salem Police Department*")

All of the redactions in the 15 page Addendum to the audit report (attached to the complaint as Exhibit B, and captioned as "*Culture Within The Salem Police Department*") are now overruled. The court's reasoning follows with respect those

redactions that the court previously sustained in its final order. No further analysis is required with respect to the redactions that were previously overruled.

A. The redactions on **pages 1 and 2 of the Addendum** are overruled because the benefits of public disclosure strongly and definitively outweigh any privacy concerns. These redactions relate to the manner in which the former Chief of Police arranged to take vacation leave and FMLA time off from work. Town policy, as made clear by the Town manager, required the former Chief to (a) provide advance notice of multiple days off and (b) obtain advance approval for FMLA leave. Implicit in the policy is that the Chief needed to coordinate his leave days with the Town. The Town manager told the auditors that the Chief instead unilaterally approved his time off and did so without notice to the Town.

This issue cannot be viewed in isolation. Elsewhere in the audit report (in the *Time and Attendance* Section attached to the Complaint as Exhibit C), the auditors raised a related concern. The Chief told the auditors that, (a) his employment contract gave him flexible hours and (b) he sometimes arranged his work week so that he could perform outside details during normal, daytime working hours. However, the Chief did not maintain time cards or other records to document his working hours. Therefore, there was no auditable record of the Chief's hours and the Town was forced to rely on the his say-so. (To be clear: The auditors did <u>not</u> allege that the former Chief worked details for private employers during hours for which he also received compensation from the Town. The auditors said only that due to the Chief's failure to keep records, there was no way to determine what hours he worked for the Town.)

The manner in which the Chief arranged for and documented his vacation, FMLA leave and working hours clearly relates to "internal personnel practices" within the meaning for RSA 91-A:5, IV. Much of the information upon which the auditors relied also falls within the scope of a "personnel file" for the purpose of the statute. However, the redactions must be overruled because the public interest in disclosure outweighs any concerns relating to the Chief's privacy and any reasons for nondisclosure.

The former Chief was the highest ranking manager of the police department. He had the benefit of a written employment contract, as well as statutory protections to ensure his independence from Town politics. See RSA 105:2-a. Yet he was still accountable to the taxpayers, the public and the Town. The manner in which the Chief interacted with Town officials, and the extent to which he complied with Town personnel policies, is a proper matter for public inquiry. Ultimately it is the public, through their representatives, that determines the extent to which the police department is autarkic or, alternatively, integrated into the Town's personnel system. Likewise, it is the public, through those who negotiate on the Town's behalf, who determine not only who the next Chief will be, but also the terms of the next Chief's contract. To do so, the public must be informed and alert to the concerns raised by the Town Manager as reflected in pages 1 and 2 of the Addendum to the audit report.

The court does not see the Chief as having a particularly strong privacy interest in these matters. The audit report does not disclose the reasons for the Chief's use of vacation or FMLA leave. Thus, the report does not provide any details into the Chief's personal or family life. It only discloses information regarding the manner in which he carried out his duties for the Town.

B. The redactions on **pages 7 to 12 of the Addendum** are all overruled because the benefits of public disclosure outweigh the relevant privacy concerns. These redactions relate to internal affairs investigations into conduct by the former Deputy Chief. The auditors opined that these IA investigations were emblematic of an "us versus them" mentality," both with respect to "police department versus town," and with respect to "those aligned with management versus everyone else." Addendum, p. 6. Additionally, the auditors believed that this pro-management bias "result[ed] in a discriminatory application of discipline for some members of the police department, with some being disciplined in one way for an action and other officers, considered aligned with management, receiving a less severe punishment." Id.

The auditors' recounting of the former Chief's comments about one of the investigations is especially salient. The auditors wrote that the former Chief "discredited complaints relative to [the former Deputy Chief] based on his own bias against the complainant.

One of the complaints against the former Deputy Chief was particularly concerning. According to the audit report, the former Deputy Chief flashed a firearm at an individual in a courtroom in Massachusetts. The allegation was that the Deputy Chief acted with the specific purpose of intimidation in violation of Massachusetts law. The Deputy Chief disputed this allegation. The audit report states that a criminal complaint was filed against the Deputy Chief with a Massachusetts police department. There is no suggestion in the audit report that a criminal charge was ever brought. (To be 100% clear: The auditors did not opine on whether the former Deputy Chief intentionally brandished his firearm in a courtroom with the intent to intimidate a civilian.

The auditors reported only that such allegations were the subject of a criminal investigation by a police department in Massachusetts. The Deputy Chief)

According to the auditors, the Town Manager was upset because the former Chief kept Town HR officials in the dark about the undisputed fact that his deputy was under investigation by a Massachusetts criminal justice agency for allegedly using a firearm to threaten a civilian in a courtroom. The auditors opined that the former Chief's silence about the investigation was symptomatic of the more general approach the Chief took in his dealings with the Town.

The redacted materials also reference a widely publicized incident that occurred at a hockey rink. That incident was investigated by the New Hampshire Attorney General and the details of that incident are largely in the public realm.

The court finds that (a) all of the redacted information in pages 7 through 12 that the court previously sustained relates to "internal personnel practices" within the meaning for RSA 91-A:5, IV and (b) the same information arguably falls within the meaning of a "personnel file" within the meaning of the same statute. However, the public interest in disclosure of the information outweighs any privacy concerns on the part of the Chief or Deputy Chief. The public has a compelling interest in overseeing its police department to ensure that the type of dysfunction described by the auditors, if it exists, is remedied. The redactions on pages 7 through 12 unduly occlude the auditors' factual argument, making it impossible for the public to understand why the auditors reached the conclusion they did.

The fact that it was the former Deputy Chief who was the subject of the investigations is critical to the auditors' analysis. After all, the auditors alleged that the

former Chief, the former Deputy Chief and a few other high ranking managers benefited from a culture that gave them greater leeway and less oversight than others. Therefore, the Deputy Chief's rank cannot be redacted without obscuring the substance of the auditor's report.

The court recognizes that the former Deputy Chief has a significant privacy interest. He denied all of the accusations of misconduct and provided plausible innocent explanations. He was never criminally charged and, as best the court can tell from the audit report, was not found to have violated any departmental rules. The disclosure of unproven accusations could cause embarrassment and adversely affect his reputation.

On the other hand, all of the conduct at issue occurred in public and has been the subject of public controversy. During the incident in the Massachusetts courtroom, the former Deputy Chief was wearing his Salem Police Department badge and carrying his Salem Police Department firearm. During the incident at the hockey rink, he was identified as a Salem Police Officer. Thus, the matters at issue relate to the Deputy Chief's interactions with the public under color of the Town's authority. The matters do not relate to what he did in private, or in his home, or with respect to purely private concerns.

C. The redactions on **pages 13 to 15 of the Addendum** are overruled based on balancing the same criteria. Many of the redactions refer to a few allegedly inappropriate social media posts and work place comments by the former Deputy Chief. These were not the subject of internal disciplinary investigations and were not included

in any personnel file. Rather, the auditors obtained the information from witnesses who wanted the auditors to hear their accounts.

The court finds that the information relating to the former Deputy Chief in pages 13 through 15 relates to "internal personnel procedures, but do not fall within the scope of a "personnel file" within the meaning for RSA 91-A:5, IV. The court does not see any privacy concerns regarding the disclosure of this information to the public. The Deputy Chief made social media posts for the world to see and his workplace comments were not made under circumstances suggestive of confidentiality or privacy. The Deputy Chief occupied a high position of public trust and the public has a compelling interest in understanding how his alleged statements and behavior may have had a deleterious effect on police department culture.

Some of the redacted information on page 13 of the addendum relates to an unnamed former dispatcher. The report details some improper comments on the part of the former Deputy Chief regarding the dispatcher's medical condition. However, the identity of the former dispatcher is not disclosed and the year of the incident is not mentioned. The paragraph contains only the most general information regarding the dispatcher. A member of the public would not be able to identify the dispatcher from the text. The court finds that (a) the information relates to a "personnel practice or procedure," (b) the information is not part of a "personnel file," and (c) any privacy interest is far outweighed by the public's interest in disclosure.

IV. Specific Rulings On Remand With Respect To The *"Time And Attendance"* Section Of The Audit Report (i.e., Complaint Ex. C)

The redactions in the *Time And Attendance* section of the audit report (attached to the Complaint as Exhibit C) sustained in part, and overruled in part, as explained Section IV(C) of this order, at pages 18-19, below.

A. Preface Regarding Page References

The *Time and Attendance* section of the audit report is not paginated. Because the court must refer to page numbers in its rulings, it will treat the cover page of the section as page 1. To make sure that the reader is oriented, this means that the following page, which bears the caption "Privileged & Confidential" is page 2.

The court will also refer to the page numbers in the redacted PDF that was attached to the complaint. The PDF page numbers are easy to determine when viewing the exhibit in a PDF reader. However, the PDF document includes several different exhibits and the *Time and Attendance* section of the audit report begins on PDF page 18. Thus, the cover page will be referred to as "page 1 (PDF page 18)."

B. Factual Background And Legal Reasoning

Introduction: The *Time and Attendance* section of the audit report raised disparate concerns relating to four distinct groups of employees:

-The former Chief of Police;

-High ranking officers;

-Rank and file police officers; and

-Civilian employees.

In general terms, the *Time and Attendance* section looked into (a) whether police department employees were paid for hours they did not work and (b) whether the police

department's record-keeping system was adequate to document its employees' attendance and compensation.

To be clear: The auditors did not find a single instance in which any employee, was overpaid or paid for unworked hours. Further, putting Chief's unique situation (addressed below) aside, the auditors did not find a single instance in which an employee even arguably failed to follow department procedures with respect to time-keeping and compensation. The employees mentioned in the audit report played by the rules. That the auditors critiqued those rules should not be misconstrued as an allegation of individual wrongdoing.

The Former Chief: The auditors' concerns about the former Chief had to do with the way he arranged and documented his working hours and leave time. As explained above, the Chief believed his employment contract gave him the flexibility to arrange his work week so that he could work details for private employers during regular business hours. The Town Manager disagreed with this reading of the Chief's employment contract. The Town Manager opined that the Chief needed to use his leave time if he wished to work outside details for private employers during ordinary, weekday business hours.

The auditors were also critical of the former Chief because he did not keep permanent records of his specific working hours. His time cards said only that he worked the requisite total number of 37.5 hours per week. Additionally, the former Chief did not notify the Town, or necessarily others within the department, regarding how he was arranging his hours. However, it bears repeating that the auditors did not allege the Chief short-changed the Town on hours.

The Town redacted the former Chief's name and rank to preserve his privacy. The Town also redacted much of his interview, and the Town Manager's interview to keep the former Chief's identity confidential.

With respect to the former Chief, the *Time and Attendance* section of the audit report relates to "internal personnel practices" and the auditors relied on information obtained from a the Chief's "personnel file." However, the public interest in disclosure far outweighs the Chief's privacy interest.

The public has a strong interest in ensuring that its department heads, who serve as role models for their agencies, turn square corners with respect to time and attendance. Further, the public has a compelling interest in determining the terms of future police chief contracts. In fairness, a police department is a 24 hour a day institution and the Chief no doubt needs a somewhat flexible schedule. Further, there is nothing wrong with the Chief working outside paid details during hours when he or she is not working for the Town. However, the concerns raised by the auditors are not ones that should remain hidden from public view.

Further, the adequacy of the former Chief's record-keeping (and more generally that of the police department) is a matter of public concern. Record-keeping for time and attendance is critical function for any employer. The public has a strong interest in discovering and remedying any deficiencies.

The former Chief's privacy concerns are muted. The facts do not relate to any personal matter (such as a medical condition or family situation) but merely to the manner in which the Chief arranged his working hours. As framed by the audit report, this is a matter of policy and contract rather than personal integrity.

Finally, because the issues are particular to the Chief's position, and because there is only one Chief at a time, it is impossible to disclose the relevant facts without also disclosing the former Chief's identity. Thus, the redacted version of the report does not provide the public with a meaningful understanding of the issues.

Therefore, as specifically detailed in Section IV(C) below, the redactions that serve only to obscure the former Chief's identity are overruled.

High Ranking Officers And Ordinary Police Officers: The issues with respect to both high ranking officers and officers of lower ranks have to do with primarily with paid details and comp time. The auditors' review of selected personnel records suggested the possibility that officers worked private details for outside employers during hours for which they were paid by the Town. After interviewing most of the officers whose records were reviewed, the auditors did not find any chicanery. However, the auditors raised significant concerns about departmental policy and record-keeping.

One concern arose from the fact that the department requires private employers to pay a minimum price for a detail equal to four hours of paid detail time. This means that if an officer shows up for a private detail that lasts half an hour, he receives the equivalent of four hours of detail pay from the private employer. Indeed, as reflected in the audit, if an officer shows up for a detail and is immediately told he is not needed, he is still paid as if he worked for the private employer for four hours.

The department also permits an officer who leaves a scheduled detail early to immediately start working for the department if the officer is needed. Thus, an officer who works only thirty minutes on a detail can work the rest of the day as a police officer on the Town payroll. Although this may be perceived as a kind of double-dipping, in

reality it has no ill effect on the Town fisc. The Town pays only for the hours that the officer actual works for the Town.

The problem is that the police department records do not adequately reflect the specific hours that officers actually perform detail work. Instead, the relevant records show only the scheduled detail hours and the hours for which Town payroll was paid. Looking only at those records, one would conclude (contrary to fact) that some officers worked outside details during the very same hours that they were supposed to be working for the town.

A second issue arose from the officers' use of comp time. As the court understands the audit, some officers used their comp time so that they could do outside details. The problem was that the department record-keeping system did not properly record their comp time as relating to those particular hours. The officers (or at least those who were interviewed by the auditors) explained that they filed the correct forms and followed the right procedures.

The audit report redacted the officers' names, ranks, pay rates and other information in an effort to shield their identities. The court sustains the redactions of the names but overrules the other redactions based on the balancing test described above. The information clearly relates to "internal personnel practices" and much of it comes directly from "personnel files." The officers have some legitimate privacy concerns:

(a) Although the auditors did not find wrongdoing, they looked for it. A police officer's reputation may be unfairly tarnished by publication of the fact that he or she was investigated for possibly submitting false timesheets. This would be so even if the officer was exonerated.

(b) While some of the officers were interviewed and gave exculpatory accounts, a few were not even interviewed. Thus, they were denied the opportunity to have their accounts included in the audit report.

(c) The auditors did not look at every police officer, or even at every police officer who worked details. Instead, they looked at only a handful of officers. Singling out these officers, while allowing other similarly situated officers to remain anonymous is not fair.

At the same time, the officers' privacy interest is not such that the audit report must be scrubbed of any clue that a sleuth could use to unmask their identities. This is true even with respect to the high ranking officers whose identities may be more easily inferred from their ranks. The auditors focused on high ranking officers because of the large number apparent discrepancies in the department's records. The public interest is particularly acute with respect to the manner in which a Town department accounts for its higher-ups' time, hours and compensation.

Civilian Employees: Because the police department did not properly account for comp time, the auditor's attention was drawn to civilian employees who appeared to be paid for days they used for vacations. The auditors spoke with two civilian employees, and a supervisor who were not identified by name in the audit report. They had posted on social media about their vacations. They used their comp time (i.e. earned time off) for their vacations. None of the employees did anything wrong.

However, while the payroll records for all other Town departments accounted for comp time, the police department's payroll records did not. Instead, for payroll and paystub purposes, comp time was treated as regular time (i.e. as time when the

employee should have been working rather than as earned time off from work). The employees' requests for comp time are presumably stored but not reflected in the database.

The information regarding the civilian employees relates to "internal personnel procedures" and the auditors pulled the information from "personnel files." Nonetheless, the public interest in disclosure outweighs the employees' privacy concerns. The public has an obvious interest in ensuring that comp time (i.e. time off) is properly reflected as in the police department's payroll database.

The employees have a privacy interest because—even though they were exonerated—their reputations might be unfairly tarnished by public disclosure of the fact they were investigated. However, the employees' privacy is substantially protected by the fact that their names are not included in the unredacted audit report. They are referred to by pseudonyms such as "Civilian A."

To further protect the employees' privacy, the court sustains those redactions that obscure (a) the specific travel destination, (b) the type of travel destination (for example, "theme park," "beach," "city," etc.), (c) the means of travel (for example "plane," "car," etc.), (d) the relationships of travelling partners, and (e) the purpose for the trips. These details could be used to unmask the identities of the employees and they add nothing of public interest.

Other redactions—including redactions of the pertinent dates—are overruled. The dates are important to the public's understanding and are unlikely to aid in the unmasking of the identities of the civilian employees.

C. Page-Specific Rulings With Respect To The *Time And Attendance* Section Of The Audit Report

Based on the facts and legal reasoning provided above, the court makes the following page-specific rulings with respect to the *Time and Attendance* section of the audit report:

Page 13 (30 of the PDF)

-The redacted reference to the former chief in the chart at the top of page 13 of the section (i.e. page 30 of the PDF attached to the Complaint) is overruled.

-The references to hourly rates in that chart are also overruled.

-The redacted references in that chart to other individuals' names and ranks are sustained.

-The references to the former chief in the two paragraphs below that chart are overruled.

-The references to other individuals by name and rank in those two paragraphs is sustained.

-The redaction in the first line of the last paragraph on that page is overruled (thereby making the term "higher-ranking" visible).

Page 14 (31 of the PDF)

-The redactions on the topmost (carryover) paragraph on page 14 of the section (i.e., Page 31 of the PDF) are sustained.

-The redactions to the names in the chart on that page are sustained.

-The redactions to the number of instances in that chart are overruled.

-The redaction to the name of the officer in the second to last paragraph of that page (i.e., the paragraph that begins "3. 11 of the 22 Outside Details. . .") is sustained.

-All of the redactions in the last, carryover paragraph on that page are overruled.

Pages 15-18 (32-35 of the PDF)

-All of the redactions on from the top of page 15 through the middle of page 18, (Pages 32-35 of the PDF) are overruled. All of these redactions relate to the former Chief of Police

Pages 18-34 (35-51 of the PDF)

-All of the redactions to individual names and ranks, starting in the middle of page 18 through page 34 (i.e. pages 35-51 of the PDF) are sustained,

-The redaction of so much of the employee's statement, at the top of page 26 (43 of the PDF), that reveals the location and purpose of the intra-state travel is sustained.

-The remaining redactions on pages 18-34 (i.e. 35-52 of the PDF) are overruled.

Pages 35 (52 of the PDF)

-The redactions on page 35 (i.e. 52 of the PDF) are sustained but only with respect to the civilian employees' (a) specific travel destinations, (b) type of travel destination, (c) means of travel, (d) traveling partners, and (e) purposes of travel. The other redactions on page 35 (52 of the PDF), including specific dates, are overruled.

Page 36-42 (53-59 of the PDF

-All of the redactions on pages 36-42 (i.e. 53-59 of the PDF) are overruled).

V. Specific Rulings With Respect To The *Internal Affairs Investigative Practices* Section Of The Audit Report (i.e., Complaint Ex. A)

All of the redactions in the *Internal Affairs Investigative Practices* section of the audit report (attached to the Complaint as Exhibit A) are overruled except for certain redactions on pages 40 and 92-99, as detailed in Section V(D), at pages 28-30 below.

A. Introduction

The *Internal Affairs Investigative Practices* section of the audit report looked at the manner in which the police department investigated, adjudicated and resolved both (a) citizen complaints and (b) internally generated disciplinary complaints against police officers. The unredacted report does not identify any officer, complainant or witness by name. Instead, it uses pseudonyms such as "Officer A" or "Citizen B." However, the report does identify the higher ranking officers who were in charge of the investigations.

With some exceptions, the Town's redactions are as follows:

(a). The Town redacted the names, ranks and pronouns of the higher ranking officers who conducted IA investigations.

(b) The Town also redacted the names, ranks and pronouns of the supervising officers who assigned officers to lead specific IA investigations.

(c) The Town similarly redacted the identities of witnesses or complainants whose identities were not already obscured through the use of pseudonyms.

(d) To prevent unmasking, the Town redacted virtually all of the pertinent dates and many of the specific locations.

(e) To further prevent unmasking, the Town redacted factual details that could be used to deduce the identities of those involved. In many instances, the underlying

facts were stated in the unredacted report in general and abstract terms. In those instances the Town redacted very little beyond names, ranks, pronouns, dates and locations. However, in other instances the auditors provided more factual details, resulting in far more aggressive redactions.

The auditors' sources included (a) IA and related department files, (b) interviews conducted by the auditors with the high ranking officers involved in some particular IA investigations, and (c) input from members of the community who contacted the auditors directly and without solicitation.

B. Classifications Under RSA 91-A:5, IV

Most of the IA investigations relate to alleged misconduct by police officers in the course of their employment. Regardless of whether the alleged misconduct was committed in the workplace or in public, the resulting IA file related to an "internal personnel practice" within the meaning of RSA 91-A:5, IV. The court will also assume, *arguendo* (and to some extent dubitante), that these IA investigations became part of the officers' "personnel files." Finally, the court will treat the auditors' interviews of the participants in these IA investigations as sufficiently grounded in the underlying investigations to qualify for analysis under both the "internal personnel practices" and "personnel files" exemptions.

A few of the IA investigations relate solely to misconduct allegedly committed by police officers when they were off duty and acting as private individuals. For example, one officer was arrested for DUI following a motor vehicle crash that occurred *when he was on his own time and acting as a civilian*. These IA investigations likely do not qualify as "internal personnel practices," as that term has been construed by Seacoast

Newspapers. However, the court will assume that the IA proceedings (and the auditors' related interviews) must be analyzed as components of the officers' personnel files.

As noted above, several members of the community parachuted into the auditors' investigation when they responded to the Town's request for citizen input. The resulting interviews were not part of the police department's "internal personnel practices" and were not part of any officer's "personnel file." Nonetheless, this information comes from "other records" the court must still consider whether public disclosure of the information would result in an unfair invasion of personal privacy. RSA 91-A:5, IV.

Thus, the court must apply the same balancing test to all of the redactions in the Internal Affairs Practices section of the audit report.

C. Balancing

In balancing the public interest in disclosure against the privacy concerns of accused officers, complainants and witnesses, the court makes the following observations:

1. The Presiding Officers' Identities:

Disclosing the identities of the high ranking officers who presided over IA investigations is not invasive of their privacy. By definition, they were not the ones accused of misconduct but rather the ones charged with determining whether misconduct took place. It is one thing to protect the identities of parties and witnesses, and another thing altogether to hide the identity of the presiding officers. Whatever privacy concerns the presiding officers may have are outweighed by the public interest in disclosure. (Thus, to use an analogy, the New Hampshire Supreme Court uses

pseudonyms to protect the privacy of juvenile litigants and witnesses, but will always disclose the identity of the trial judge.)

The redactions of the names and ranks of the presiding officers, as well as the high ranking officers who appointed them are all overruled.

2. Complaints Of Workplace Misconduct

The officers accused of workplace misconduct have the most significant privacy concerns. For the purpose of this order, the court uses the term "workplace misconduct" to mean misconduct that occurs in the course of employment but does not involve any interaction with the public. For example, one officer was accused of showing up for work under influence of prescription drugs. Another was accused of making inappropriate comments to a coworker. These are the type of workplace concerns that are usually addressed confidentially by human resource managers.

The officer who showed up for work under the influence had an apparent substance misuse disorder, i.e., a medical issue. There is no suggestion in the audit report that the officer interacted with the public while impaired or drove while impaired. The officer left the department many years ago. The officer's present privacy interest is palpable.

That said, the public has a strong interest in understanding how workplace misconduct is handled by the police department. Mishandling of workplace complaints could result in expensive litigation (brought either by complaining coworkers or improperly disciplined offers). The public also has a strong interest in ensuring that workplace rules are enforced fairly, without favoritism or bias, and in a manner consonant with the enforcement of workplace rules in other Town departments.

Therefore, the public has the right to know both the auditors' opinions and the factual basis for the auditors' opinions..

Fortunately, the auditors wrote the unredacted report in a way to protect the privacy of (a) the officers who were accused of workplace misconduct and (b) any complainants and witnesses. In all of the specific cases of alleged workplace misconduct, the identities of all officers and civilians were fully obscured through the use of pseudonyms. The facts were stated in general terms. With one exception, the additional redactions of specific dates, timeframes and other information does not provide a measurable increase in protection of privacy.

That one exception is limited to the redacted dates on page 40, relating to specific dates involving the internal investigation of Officer A. These redactions are sustained because Officer A has a heightened privacy interest. Officer A is a former officer who had a substance misuse disorder. Officer A resigned from the department many years ago. Because (a) the former officer has been separated from the department for a long time, (b) the former officer's difficulties were the result of a medical disorder, and (c) there was no allegation that the former officer committed any act of dishonesty or interacted improperly with any member of the public, the court finds that disclosing information that might help identify former officer would result in a potential invasion of privacy. (The court notes that the audit report found that the department handled the investigation relating to the former officer properly.)

All of the other redactions relating to IA investigations of workplace misconduct (as the court has idiosyncratically defined that term of the purpose of this order) are overruled.

3. Alleged Misconduct Towards Members Of The Public Under Color Of Law

The public interest is at its zenith, and the officers' privacy concerns are at their nadir, with respect to accusations of misconduct towards members of the public under color of law. These accusations involve claims of abuse or misuse of government power. The IA investigations at issue include allegations of unjustified assaults (i.e. excessive force), arrests without probable cause, unlawful seizures of vehicles, verbal intimidation and other inappropriate interactions with members of the public. The public has a compelling interest in having such complaints investigated fairly and impartially. The public also has a right to expect (a) that all officers, regardless of rank will receive procedural due process, (b) that founded complaints will result in proportionate and substantively reasonable discipline, and (c) that when an incident reveals a lack of training, rather than misconduct, that adequate training will be provided,

Thus, the public has the right to learn how such complaints are handled by the police department. Are citizen complaints properly logged and vetted? Is it easy or difficult to file a complaint? Are citizen complainants treated with dignity and respect? Are complaints investigated without bias? Are proper officers chosen to preside? Is discipline meted out equally and fairly? Are the accused officers provided with adequate due process? These are the same questions the auditors asked and answered in their report. It is impossible to understand the auditors' conclusions without also understanding the factual basis for those conclusions.

Although, as discussed below, many of the officers have legitimate privacy concerns, those concerns are reduced because the conduct at issue occurred in the public sphere (i.e. in the presence of third parties) and under color of law. Thus, the

officers never had an expectation of privacy with respect to what a third party might disclose. Indeed, most of the IA complaints were made by members of the public and in no case did the complainant specifically ask for confidentiality. Further, because the officers were on-the-job, in most cases, bystanders would have had the First Amendment right to video record the officer and then publish the recording.

Further—and this applies only to a few of the IA investigations—if an officer has been found, following a fair disciplinary proceeding, of committing a serious disciplinary offense against a member of the public (such as excessive force, or an unlawful arrest, or a false report), why should the law hide that finding beneath an veneer of confidentiality? What social value or policy would it serve?

To be sure, even founded cases may become stale through the passage of time and so a justification for confidentiality may accrue over time. Likewise, some founded disciplinary infractions may result from a lack of training rather than a rogue spirit. Here too, confidentiality would serve a benign purpose, even in cases of founded allegations.

Innocent officers have a less controversial privacy interest in their reputations. Public disclosure of an IA complaint could harm an officer's reputation even if the resulting investigation revealed that the officer did nothing wrong. This is especially so today because it is so easy for partial information to be spread widely through social media.

With these thoughts in mind, the court re-reviewed the Internal Affairs Investigation section of the audit report and notes the following:

(a) In some of instances, the facts are stated so generally that the use of the pseudonyms provides adequate protection for the officer's privacy. In these cases,

even when the dates are unredacted, it would be very difficult to unmask the identities of the officers.

(b) In those instances in which the auditors provide greater factual detail, they do so for a reason. The public interest in learning those facts outweighs the potential privacy concerns arising from the marginally greater risk of unmasking. Further, some of the IA investigations that the auditors detail involve facts that have already been placed in the public domain by other means.

(c) Because there are fewer higher ranking officers, they may be more easily identified from their ranks. However, the public has a keen interest in understanding how the police department processed IA complaints against senior officers. In the addendum to the audit report, the auditors opined that the police department treated those in senior management differently from rank and file officers. Because the officers' ranks are necessary to the public's understanding of the audit report, the public interest in disclosing those ranks outweighs the privacy concern.

4. Off Duty Misconduct Not Committed Under Color Of Law

The IA investigations into off duty behavior fall into a middle ground as far as privacy and public interest are concerns. A police officer has a weighty and enforceable expectation of privacy in his or her personal affairs. Furthermore, the public has no legitimate interest in knowing how its officers spend their time off. But there are limits to all general rules and when a police officer's off-duty conduct includes the alleged commission of serious crimes, or actions that endanger public safety, the expectation of privacy is lower and the public interest is higher.

The IA investigations into off-duty misconduct all involved either accusations of criminal conduct or conduct that endangered safety. In one instance an officer was alleged to have committed DUI. In another instance an officer committed a minor motor vehicle infraction but then refused to pull over and led the police on a dangerous chase. Another officer lost track of a department issued firearm which was then found in public. Yet another officer accidentally discharged his department issued firearm. In these instances, the public interest in disclosure is significant, and the officer's privacy interest is at reduced.

D. Ultimate Conclusions And Specific Rulings

The court has re-reviewed the Internal Affairs Investigations section of the audit report. To verbally analyze each specific redaction would require the court to write a voluminous, repetitive and likely turgid order. Such an order would not provide the parties with any further insight into the court's reasoning.

Further, the court notes that while the parties all filed supplemental memoranda of law, none of the parties isolated and provided particularized argument with respect to specific redactions or sets of redactions in the Internal Affairs Investigations section of the audit report. The court presumes that the parties themselves thought that an inch-at-a-time, redaction-by-redaction approach was neither necessary nor good advocacy.

Thus:

Page 40

The redactions on **page 40 of the *Internal Affairs Investigative Practices* section of the audit report,** relating to specific dates are sustained. These specific

redactions relate to the officer who had a substance misuse disorder, as discussed and analyzed above.

Pages 92 Through 99

The redactions on **pages 92 through 99** are sustained in part and overruled in part. More particularly:

(a) the redactions on page 92, starting with the paragraph numbered "1" and continuing through the bottom of the page are sustained;

(b) the redactions on pages 93-97 are sustained;

(c) the redactions on page 98 are sustained, except for the redactions of the bottom carryover paragraph that continues onto page 99;

(d) The redactions on page 99 are overruled.

The redactions on pages 92 through 99 relate to a claim that a police supervisor made gruff and inappropriate comments to his daughter's prom date because he disapproved of him as a potential boyfriend. The supervisor was not on duty and was not acting under color of law. Thus, the public interest is reduced, because (a) the conduct did not allege the misuse of official authority, (b) the conduct did not involve the Town or the police department, and (c) the conduct was not alleged to be either criminal or otherwise a matter of public concerns. Further, the redactions at Pages 92-99 include unsourced information about the civilian. Disclosing this information could prove harmful to the police supervisor, his family, and the young man.

That said, the public does have an interest in the facts set forth on the carryover paragraph on pages 98-99 and the following paragraphs. These paragraphs relate to

the manner in which a police Captain discouraged a civilian witness from complaining about the incident.

Other Redactions

All of the remaining redactions in the Internal Affairs Investigations section of the audit report are overruled. In each instance the court engaged in the balancing required by RSA 91-A:5, IV and by the New Hampshire Supreme Court's order remanding the case.

V. Conclusion

On remand this court sustains only those redactions specified in Sections IV(C) and V(D) of this order at pages 18-19 and 28-30 above, respectively. All other redactions are overruled.

January 21, 2021

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/22/2021

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2020-CV-155

SAMUEL PROVENZA

v.

TOWN OF CANAAN

PUBLIC ORDER ON PLAINTIFF'S PETITION FOR DECLARATORY JUDGMENT AND FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND ON INTERVENOR'S CROSSCLAIM

The following order is issued under seal consistent with this Court's previous rulings. A public, redacted copy of this order will issue after the parties have had an opportunity to review it.

This matter is before the Court on the Plaintiff's Petition for Declaratory Judgment and for Preliminary and Permanent Injunctions. (Index #1.) On November 30, 2017, the plaintiff, Samuel Provenza, formerly a police officer for the Town of Canaan, was involved in a motor vehicle stop that became subject to some media coverage in the Upper Valley. The Plaintiff now petitions the Court to declare that an internal affairs investigation report related to the stop (the "Report") is not subject to disclosure under the New Hampshire Right-to-Know Law, RSA ch. 91-A, and to enjoin the defendant, the Town of Canaan (the "Town"), from disclosing the contents of the Report to the public. Valley News daily newspaper ("Valley News"), filed a motion to intervene, which the Court granted. (Index #4.) Thereafter, Valley News objected to the plaintiff's petition and filed a crossclaim requesting that the Court rule that the Report is subject to disclosure under RSA ch. 91-

A.[1] (Indexes # 10, 11).

On September 15, 2020, the Court held a hearing at which counsel for the Plaintiff, the Town, and Valley News were present. Prior to the hearing, the Town submitted under seal a copy of the Report with minor redactions of information it contends is not subject to disclosure under RSA ch. 91–A and an unredacted copy of the Report. (Index #15), and the Court approved the parties' Stipulation and Protective Order Regarding Nondisclosure of Subject Investigation Report. (Index #14.) At the hearing, the parties agreed that, subject to a potential order of stay pending appeal, each was amenable to this order acting as a final adjudication on the merits of both the plaintiff's requests for declaratory judgment and for preliminary and permanent injunctions and on the merits of Valley News's crossclaim. After considering the parties pleadings, offers of proof, and arguments, the Court makes the following findings and rulings.

I. Factual Background

a. November 30, 2017 Traffic Stop[2]

On November 30, 2017, Canaan police dispatch received a call about a suspicious vehicle following a town school bus. Officer Provenza responded to the call and traveled to the location provided by dispatch. Officer Provenza did not activate his cruiser camera before responding to the call.[3] Upon arriving at the location of the bus, Provenza observed a white SUV following closely behind the school bus, and he initiated a traffic stop of the

[1] Valley News filed a "Complaint-in-Intervention," but that is not a pleading allowed as a matter of right. See Superior Court Civil Rule 6(a). As a result, the filing was docketed as a crossclaim pursuant to Superior Court Civil Rule 10. No party objected. (Index #17.)

[2] The following facts are taken from the Report and the parties' pleadings.

[3] Canaan Police Chief Frank explained that all police vehicles in Canaan, apart from Officer Provenza's, were equipped with cameras that automatically turn on when the car is turned on. Officer Provenza's cruiser camera, on the other hand, had to be manually activated by pushing a button. Chief Frank did not feel Officer Provenza's failure to activate his cruiser camera was intentional, but rather an oversight given the situation.

white SUV. Officer Provenza approached the vehicle and identified the driver as Crystal Eastman, a resident of Canaan, acknowledged that he recognized her, and asked her "what's going on?" [redacted] Ms. Eastman explained that she was following the bus because her daughter had been having ongoing issues with the driver of the school bus. Officer Provenza described Ms. Eastman's behavior as "nutty and weird," and further noted that, in his opinion, she was "not making sense and . . . was rambling." [redacted]

Officer Provenza, in an attempt to determine if Ms. Eastman was impaired, then moved his head toward the window and sniffed to see if he could detect an odor of alcohol or cannabis. Ms. Eastman claims he "got close enough that he could have kissed her," and she then angrily asked what he was doing. [redacted] Officer Provenza informed Ms. Eastman that he was investigating reports of a suspicious vehicle following a school bus. Officer Provenza asked Ms. Eastman for her license and registration multiple times, with Ms. Eastman responded by asking why he needed them because he knew who she was. Ms. Eastman then proceeded to retrieve her license to give to Officer Provenza, but before she handed it to him, she claims she began to lean across her front seat to retrieve her registration and cell phone, "probably pulling her license back in with her." [redacted] Officer Provenza, on the other hand, claims that as he reached for the license, she "snatched it back out of my fingers." [redacted]

Officer Provenza then informed Ms. Eastman that she was under arrest. Officer Provenza attempted to open the vehicle's door, but Ms. Eastman grabbed the door to prevent Officer Provenza from opening it. Eventually Officer Provenza was able to open the door, but Ms. Eastman wrapped her right arm around the steering wheel to prevent him from removing her from her vehicle. Officer Provenza claims that Ms. Eastman was

attempting to bite his hand whereas Ms. Eastman claims that Officer Provenza grabbed her hair behind her head and tried to pull her out of the car. Ms. Eastman claims to have been screaming for Officer Provenza to stop pulling her hair and to have honked her horn at least once.

Soon thereafter Officer Provenza was able to handcuff Ms. Eastman's left wrist. Officer Provenza again attempted to pull Ms. Eastman out of the vehicle to cuff her right wrist. While Officer Provenza was attempting to handcuff Ms. Eastman, Ms. Eastman claims her knee was hit, "she heard it pop," and she yelled that Officer Provenza had broken her leg. [redacted] Officer Provenza finished handcuffing Ms. Eastman and called for backup. Ms. Eastman claims that she did not see Officer Provenza hit her leg but she "felt it." [redacted]

Chief Frank arrived on the scene shortly thereafter.[4] Chief Frank assisted Ms. Eastman to the rear of her vehicle and attempted to calm her down. Ms. Eastman was still complaining that her leg was injured. Ms. Eastman was then transported to Dartmouth-Hitchcock Medical Center. Ms. Eastman claims that she did not bite or kick Officer Provenza during the altercation. Officer Provenza claims he did not pull Ms. Eastman's hair or "put any part of his body on her legs." [redacted]

b. Ms. Eastman's Subsequent Trial and News Coverage

Ms. Eastman was subsequently charged with resisting arrest and disobeying a police officer. At trial, Ms. Eastman was acquitted of the resisting arrest charge and

[4] Chief Frank later interviewed a number of witnesses and followed up with these witnesses.

convicted of disobeying a police officer, and that conviction was upheld on appeal. On February 8, 2018, Ms. Eastman filed a formal complaint against Officer Provenza. In response to Ms. Eastman's complaint, the Town commissioned Municipal Resources, Inc. ("MRI") to conduct an internal investigation into the excessive force complaint.

As [redacted] the November 30, 2017 traffic stop and Ms. Eastman's subsequent trial, the Valley News began to cover the story.[5] On February 4, 2019, Valley News reporter Jim Kenyon requested a copy of the Report, all government records related to it, and all information concerning the cost of the report pursuant to RSA ch. 91-A. On February 8, 2019, the Town denied Valley News's request for the Report based on the "internal personnel practices" exemption set forth in RSA 91–A:5, IV, and specifically citing Union Leader Corp. v. Finneman, 136 N.H. 624 (2007). (Valley News's Obj. ¶ 17, Ex. 3.) The Town did, however, provide redacted documentation related to the cost of the Report. On June 9, 2020, Valley News renewed its request for the Report following the New Hampshire Supreme Court's decisions in Union Leader Corporation & a. v. Town of Salem, 173 N.H. __ (May 29, 2020) and Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. __ (May 29, 2020) which overruled certain key holdings of Finneman.

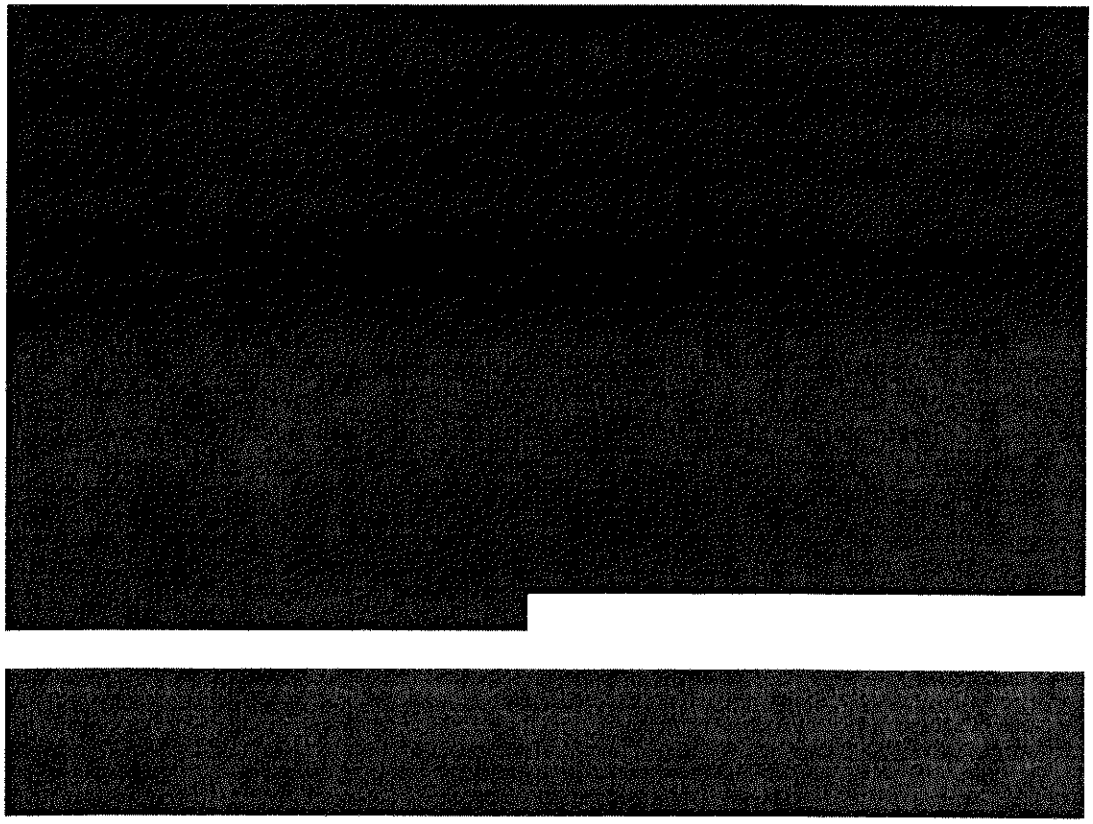
In response to Valley News's renewed request for the Report, the Town made Officer Provenza aware of the request. Officer Provenza then filed this lawsuit seeking to enjoin the Town from releasing the Report. Valley News filed a motion to intervene, which

[5] Before the plaintiff instituted this action, the Valley News had published five stories related to traffic stop and trial–"Jim Kenyon: Canaan Mom Injured by Police Officer Cries Foul" on March 4, 2018; "Jim Kenyon: In Canaan, Police Transparency Not a Priority" on August 12, 2018; "Jim Kenyon: Canaan report about police excessive force case remains a secret" on February 29, 2019; "Jim Kenyon: Judge finds Canaan woman not guilty of resisting arrest" on June 4, 2019; "Jim Kenyon: Plenty of question marks follow Canaan woman's sentence" on July 20, 2019.(Kenyon Aff., Index #12.)

this Court granted. Valley News then filed an objection to Officer Provenza's suit for injunctive relief and a crossclaim seeking disclosure of the Report.

c. Findings of the Report

The Town commissioned MRI to conduct an internal investigation into the excessive force complaint filed by Ms. Eastman. The purpose of its investigation was "to determine if the level of force used by Officer Provenza when he arrested Crystal Eastman was justified, given the circumstances." (Report at 13.) MRI conducted interviews of Officer Provenza, Ms. Eastman, Chief Frank, Ms. Eastman's supervisor, and several eyewitnesses[6], and it also reviewed police reports, medical documentation, and other relevant evidence. MRI released its Report in July 2018. The investigator summarized his conclusions as follows:



[6] As discussed below, infra. fn. 9, the eyewitnesses are all minors and their privacy interests require the Court to keep their names anonymous.

(Id. at 14–15.)

II. Analysis

Officer Provenza now petitions the Court to enjoin the Town from disseminating the Report to the public and to declare the Report exempt from public access under the Right-to-Know Law, pursuant to RSA 91-A:5, IV. (Pl.'s Pet. ¶¶ 1, 22.) Specifically, Officer Provenza argues that "his privacy interests in an unfounded internal affairs investigation outweighs the request for disclosure to the public." (Id. ¶ 2.) Valley News objects and asserts that the Report is "a public record that must be made available for inspection" to Valley News and the public a large, pursuant to RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution. (Valley News's Crossclaim ¶ 32, prayer A.) Valley News contends that the Report is subject to disclosure because: 1) "the public interest in disclosure is compelling"; 2) "the privacy interests in nondisclosure are nonexistent"; and 3) "the public interest trumps any nonexistent privacy interest." (Id. ¶ 32.)

With respect to Officer Provenza's petition for injunctive relief, "[t]he issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." New Hampshire Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). An injunction should not issue unless the petitioner shows: (1) that he is likely to succeed on the merits; (2) that he has no adequate remedy at law; (3) that he will suffer immediate

irreparable harm if the injunctive relief is not granted; and (4) that the public interest will not be adversely affected if the injunction is granted. Id.; UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13–15 (1987); see also Kukene v. Genualdo, 145 N.H. 1, 4 (2000) ("injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted"). "The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." DuPont, 167 N.H. at 434.

As to the likelihood of success on the merits, Officer Provenza argues that he is likely to succeed on the merits "based on the balance of the probabilities as there is a clear privacy interest recognized by the public policy of the State of New Hampshire." (Pl.'s Pet. ¶ 34.) Essentially, Officer Provenza asserts that, as a matter of public policy, the Report is exempt from disclosure under the Right-to-Know Law. He maintains that "[t]he public interest would not be adversely affected but rather promoted" by granting injunctive relief "as the public policy requires that personnel matters be held confidential pursuant to statute and that matters and allegations not be indiscriminately disseminated by individuals." (Id. ¶ 35.) Valley News disagrees and contends that Provenza's request for injunctive relief should fail because: 1) RSA 91-A:5, IV "does not create a statutory right of action for government officials seeking to have documents withheld, nor does it create a statutory privilege that can be invoked by Provenza to compel the Town to withhold the [Report]"; and 2) under RSA 91-A:5, IV the "public interest balancing analysis compels its disclosure." (Valley News's Obj. ¶15.)

Turning first to the parties' statutory arguments, generally, "[t]he ordinary rules of statutory construction apply to [the Court's] review of the Right-to-Know Law." Censabella v. Hillsborough Cty. Attorney, 171 N.H. 424, 426 (2018) (citing N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 102–03 (2016)). "When examining the language of a statute, [the Court] ascribe[s] the plain and ordinary meaning to the words used." Id. at 103. "[The Court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "[The Court] also interpret[s] a statute in the context of the overall statutory scheme and not in isolation." Id.

The purpose of the Right-to-Know Law "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." (RSA 91-A:1 (2013); N.H. Right to Life, 169 N.H. at 103. "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Censabella, 171 N.H. at 426; see also N.H. Const. pt. 1, art. 8 ("the public's right of access to governmental proceedings and records shall not be unreasonably restricted.") (emphasis added). The Right-to-Know Law provides "[e]very citizen" with a "right to inspect and copy all government records . . . except as otherwise prohibited by statute." RSA 91-A:4, I. RSA 91-A:4, IV requires public bodies and agencies to make such government records available for inspection and copying upon request. The statute allows "[a]ny person aggrieved by a violation of this chapter" to petition for injunctive relief. RSA 91-A:7; Censabella, 171 N.H. at 427.

Valley News first argues that "[t]o the extent Provenza bases his request for declaratory and injunctive relief pursuant to a Right- to-Know exemption, his claim fails because the statute does not create a cause of action for anyone other than a requester who has been "aggrieved by a violation" of a government entity . . . who has declined to produce documents pursuant to an applicable exemption." (Valley News's Obj. ¶ 16.) In short, Valley News maintains that because "Provenza is not an aggrieved requester, he has no statutory right of action under the Right-to-Know Law." (Id.) The Court concludes that it need not address the merits of this argument in order to rule on the merits of the parties' dispute and the relief each requests. For purposes of this order, the Court assumes without deciding that the plaintiff is a "person aggrieved" within the meaning of RSA 91–A:7. In addition, the Court further rules that the plaintiff has standing to maintain this action under RSA 491:22 and RSA 498:1.

The Court next considers the parties' arguments regarding to the balancing of public and private interests relating to disclosure of the Report. The Right-to-Know Law carves out exemptions from the general rule providing citizen access to governmental records. See RSA 91-A:5. RSA 91-A:5 provides, in pertinent part, that "[t]he following governmental records are exempted from the provisions of" the Right-to-Know Law:

> 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, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

Id. While it is true that "the statute does not provide for unfettered access to public records," New Hampshire courts "broadly construe provisions in favor of disclosure and interpret the exemptions restrictively." Seacoast Newspapers, Inc., 173 N.H. at __ (slip op. at 3.)

As noted above, Union Leader Corp. and Seacoast Newspapers, Inc., overruled key holdings in Fenniman relating to RSA 91-A:5, IV. Specifically, Seacoast Newspapers, Inc. "overrule[d] Fenniman to the extent that it broadly interpreted the "internal personnel practices" exemption and its progeny to the extent that they relied on that broad interpretation." 173 N.H. at __ (slip op. at 9). Similarly, Union Leader Corp. "overrule[d] Fenniman to the extent that it adopted a per se rule of exemption for records relating to 'internal personnel practices.'" 173 N.H. at __ (slip op. at 11). The Court clarified that "[i]n the future, the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV shall apply to records relating to 'internal personnel practices.'" Id. (citing Prof'l Firefighters of N.H., 159 N.H. 699, 707 (2010)) (setting forth the three-step analysis required to determine whether disclosure will result in an invasion of privacy). Furthermore, "[d]etermining whether the exemption for records relating to 'internal personnel practices' applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy." Id. (citing N.H. Housing Fin. Auth., 142 N.H. at 552).

New Hampshire Courts "engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91–A:5, IV." Lambert v. Belknap Cty. Convention, 157 N.H. 375, 382–83 (2008). This balancing test applies to all categories of records enumerated in RSA 91–A:5, IV. New

Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice ___ N.H. ___ , ___ (October 30, 2020) (slip op. at 10); Union Leader Corp., 173 N.H. at ___ (slip op. at 11). "First, [the Court] evaluates whether there is a privacy interest at stake that would be invaded by the disclosure." Lambert, 157 N.H. at 382. "Second, [the Court] assess[es] the public's interest in disclosure." Id. at 383. "Finally, [the Court] balance[s] the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." Id.

As to the first factor, the individual privacy interest, "[w]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations." Id. at 382–83. "If no privacy interest is at stake, the Right–to–Know Law mandates disclosure." Id. at 383. Generally, "[a] clear privacy interest exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available." Reid, 169 N.H. at 531.

Officer Provenza asserts that "[i]n New Hampshire, a police officer has a substantial privacy interest in [an] unfounded or unsustained internal affairs report which precludes the disclosure to the public because it outweighs the public's right to know." (Pl.'s Pet. ¶ 25.) To support his assertion of the heightened privacy interest of police officers, Officer Provenza also urges the Court to consider RSA 105:13-b, RSA 516:36, and Pivero v. Largy, 143 N.H. 187, 191 (1998). (Pl.'s Pet. ¶¶ 26–28.) Officer Provenza further argues that "the publication of baseless allegations deprives a police officer of his/her constitutionally protected liberty and property interests" pursuant to Part 1, Article 15 of the New Hampshire Constitution. (Id. ¶ 27.)

Valley News contends that Officer "Provenza's privacy interest in disclosure in nonexistent." (Valley News's Obj. ¶ 31.) It asserts that the plaintiff's reliance on RSA 105:13–b, RSA 516:36, and Pivero is misplaced. (Valley News's Obj. ¶¶ 34–36.) Valley News points to numerous cases from other jurisdictions that stand for the proposition that courts routinely reject the argument that police officers have a privacy interest when their actions implicate their official duties, including in the context of internal investigation of citizen complaints. (Valley News's Obj. ¶ 31, fn.7.) To rebut Officer Provenza's constitutional argument, Valley News posits that "the procedural due process and privacy protections in . . . Part I, Article 15 of the New Hampshire Constitution protect individual citizens from government officials, not the other way around." (Id. ¶ 37.)[7]

The Court first addresses the plaintiff's invocations of RSA 105:13–b, RSA 516:36, and Pivero. The Court agrees that the plaintiff's reliance thereon is misplaced. RSA 105:13–b concerns the disclosure of evidence in a "police personnel file." RSA 105:13–b, I. In this case, however, the Town initially denied Valley News's request for a copy of the Report based on the "internal personnel practices" exemption, not the exemption for "personnel . . . files," in RSA 91–A:5, IV. (Valley News's Obj., Ex. 3.) Moreover, RSA 105:13–b, by its plain language, applies only to situations in which "a police officer . . . is serving as a witness in any criminal case." John Doe v. Gordon J. MacDonald, Merrimack Super. Ct., No. 217-2020-CV-176 (August 27, 2020) (Order, Kissinger, J.); see Duchesne v. Hillsborough County Attorney, 167 N.H. 774, 781 (2015) (observing that the "current

[7] To bolster this position, Valley News cites to Tompkins v. Freedom of Info. Comm'n, 46 A.3d 291 (Conn. App. Ct. 2012), which noted that "the personal privacy interest protected by the fourth and fourteenth amendments is very different from that protected by the statutory exemption from disclosure of materials." 46 A.3d at 297.

version of RSA 105:13–b addresses three situations that may exist with respect to police officers who appear as witnesses in criminal cases"). Finally, even if the Court was to "assume without deciding that RSA 105:13-b constitutes an exception to the Right-to-Know Law and that it applies outside of the context of a specific criminal case in which a police officer is testifying," an argument the plaintiff does not make, there is nothing in the record to suggest that the Report is contained in or is a part of the plaintiff's personnel file. New Hampshire Center for Public Interest Journalism, __ N.H. at __ (slip op. at 7–9); see Reid, 169 N.H. at 528 (discussing the personnel files exemption in RSA 91–A:5, IV). RSA 516:36 is also inapplicable because it governs the admissibility and not the discoverability of internal police investigation documents and, thus, has no bearing on the Right-to-Know analysis. Similarly, Pivero v. Largy is unpersuasive because that case did not concern the Right-to-Know Law and relied on a holding in Fenniman that has since been overruled.

With respect to the plaintiff's contention that disclosure of the Report to the public would deprive him of his "protected liberty and property interests" under Part 1, Article 15 of the New Hampshire Constitution (Pl.'s Pet. ¶ 27), the Court finds that the plaintiff has not sufficiently developed this argument for judicial review and deems it waived. See Guy v. Town of Temple, 157 N.H. 642, 658 (2008) (stating that "judicial review is not warranted for complaints . . . without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration") (brackets, quotations and citation omitted); State v. Chick, 141 N.H. 503, 504 (1996) (considering waived

defendant's undeveloped Part 1, Article 15 argument upon which he did "not further elaborate").

The Court agrees with Valley News that Officer Provenza's privacy interests in disclosure, if any, are minimal. First, "the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Censabella, 171 N.H. at 426. Second, information concerning purely private details about a person who happens to work for the government is very different from facts, such as those detailed in the Report, concerning that individual's conduct in his or her official capacity as a government employee. See Lamy v. N.H. Public Utilities Comm'n, 152 N.H. 106, 113 (2005) (observing that "the central purpose of the Right–to–Know Law is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed") (quotations and citation omitted). Therefore, even "[a]ssuming there is a relevant privacy interest at stake, that interest is minimal because the [Report] do[es] not reveal intimate details of [Officer Provenza's] life," but rather information relating to Officer Provenza's conduct as a government employee while performing his official duties and interacting with a member of the public. See New Hampshire Civil Liberties Union, 149 N.H. at 441.

As to the second factor, the public's interest in the information, "[d]isclosure of the requested information should inform the public about the conduct and activities of their government." Lambert, 157 N.H. at 383. Indeed, "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." Reid, 169 N.H. at 532 (quotations and citation omitted). "The legitimacy of the public's interest in

disclosure, however, is tied to the Right-to-Know Law's purpose, which is 'to provide the utmost information to the public about what its government is up to.'" Id. (citing N.H. Right to Life, 169 N.H. at 111). "If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." Id. (citing Lamy, 152 N.H. at 111) (quotations omitted). "Conversely, 'an individual's motives in seeking disclosure are irrelevant to the question of access.'" Id. (citing Lambert, 157 N.H. at 383).

Officer Provenza argues that, because the Report ultimately concluded that the excessive force allegation against him was determined to be "not sustained," the public interest in the Report is insignificant. Officer Provenza further contends that nondisclosure of the Report actually promotes the public interest in two regards: firstly, "public policy requires that personnel matters be held confidential pursuant to statute and that matters and allegations not be indiscriminately disseminated by individuals," and, secondly, the public's interest in public safety is undermined if police are worried about dissemination of unfounded complaints, which would have a chilling effect on policing in the State. (Pl.'s Pet. ¶¶ 28, 31, 35.)

Valley News asserts that the "public interest in disclosure is strong." (Valley News's Obj. ¶ 28.) Specifically, Valley News argues that "[p]roducing the full report would enable the public to know not just the contours of Provenza's conduct, but also the policies and procedures governing internal affairs investigations and whether they were appropriately followed in this case." (Id. ¶ 29.) Valley News notes that this case occurs "[i]n this moment of conversation about police accountability nationally and here in New Hampshire"[8] and,

[8] Valley News directs the Court to Governor Sununu's Executive Order 2020-11, which recognized the "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance

as such, "it is imperative that the public be able to know whether law enforcement agencies can be trusted to hold themselves accountable, or if a different system is necessary." (Id.) Valley News posits that "setting aside the obvious public interest in allowing the public to evaluate the findings of MRI and the completeness of its investigation, there is a compelling public interest in enabling the public to use the MRI report to evaluate the integrity of the Canaan Police Department's internal affairs investigation of this incident." (Id. ¶ 30)

Valley News relies heavily on, and the Court finds persuasive, a Vermont Supreme Court case, Rutland Herald v. City of Rutland, 84 A.3d 821 (Vt. 2013), for the proposition that "there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct." Id. at 825. The Rutland Herald court reasoned that "the internal investigation records and related material will allow the public to gauge the police department's responsiveness to specific instances of misconduct; assess whether the agency is accountable to itself internally, whether it challenges its own assumptions regularly in a way designed to expose systemic infirmity in management oversight and control; the absence of which may result in patterns of inappropriate workplace conduct." Id. (quotations omitted).

Indeed, the public has a significant interest in knowing how the police investigate such complaints for a number of reasons. First, the public has the right to know that the police take their complaints seriously and that the investigation was "comprehensive and accurate." See Reid, 169 N.H. at 532 (in reference to an investigation of the New Hampshire Attorney General's office, the Court noted "[t]he public has a significant

transparency, accountability, and community relations in law enforcement." https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf.

interest in knowing that a government investigation is comprehensive and accurate") (quotations omitted); N.H. Civil Liberties Union, 149 N.H. at 441 ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know Law") (quotations and citation omitted). Second, the public similarly has the right to know whether the police officer in question was given a fair investigation aligned with traditional notions of due process. Third, as is evidenced by the national conversation concerning policing in the United States, transparency at all levels of police conduct investigations is fundamentally important to ensure the public's confidence and trust in local police departments. See RSA 91-A:1 (The purpose of the Right-to-Know Law "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.") (emphasis added); Prof'l Firefighters of N.H., 159 N.H. at 709 (noting that "knowing how a public body is spending taxpayer money in conducting public business is essential to the transparency of government, the very purpose underlying the Right-to-Know Law").

Moreover, the New Hampshire Supreme Court's overruling of Fenniman reinforces the importance of transparency in government. See Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 9) ("An overly broad construction of the 'internal personnel practices' exemption has proven to be an unwarranted constraint on a transparent government."); see e.g., Salcetti v. City of Keene, (unpublished order, decided June 3, 2020), (slip op. at 7, 9–10) (where the Supreme Court vacated and remanded a superior court decision denying a petition concerning "any and all citizen complaints, logs, calls, and emails regarding charges of excessive police force and/or police brutality" in light of its recent decisions in Union Leader Corp. and Seacoast Newspapers, Inc.).

As to the third factor, the balancing of the private and public interests, "'the legislature has provided the weight to be given one side of the balance by declaring the purpose of the Right-to-Know Law in' the statute itself." Reid, 169 N.H. at 532 (brackets omitted) (quoting Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996)). Specifically, the preamble to RSA chapter 91–A provides: "Openness in the conduct of public business is essential to a democratic society. 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." RSA 91–A:1. "Thus, when a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." Reid, 169 N.H. at 532 (quotations and brackets omitted). Here, although Officer Provenza is not a public entity, as the party opposing disclosure he bears the same "heavy burden." See id.

Officer Provenza calls for a bright-line rule to the effect that if an internal police investigation concludes that the complaint against the officer is unfounded or not sustained, then the officer's privacy interest outweighs the public interest. (Pl.'s Pet. ¶¶ 25, 28.) This proposition, however, contravenes the purposes of the Right-to-Know Law — ensuring maximum public access to governmental proceedings and records, and promoting accountability of public officials to the citizens of New Hampshire. See RSA 91–A:1. The people of New Hampshire have the constitutionally rooted right to access public information and hold those in power accountable for their actions, a right "essential to a democratic society." Id.; N.H. Const. pt. 1, art. 8. To apply the bright-line rule that Officer Provenza urges the Court to adopt would be to acknowledge that the people of New Hampshire merely have the right to access information concerning founded

misconduct of police officers and not, among other things, whether an investigation resulting in a finding that the misconduct complaint was not sustained was "comprehensive and accurate." See Reid, 169 N.H. at 532. In the absence of Fenniman and its progeny, Officer Provenza cannot meet his "heavy burden" to shift the balance towards nondisclosure. Reid, 169 N.H. at 532. The Court concludes that the balancing test overwhelmingly favors the public's interest in disclosure of the report in the name of transparency and accountability. See RSA 91–A:1.

As the trial court in Union Leader Corp. noted, "bad things happen in the dark when the ultimate watchdogs of accountability—i.e, the voters and taxpayers— are viewed as alien rather than integral to the process of policing the police." Union Leader Corp. v. Town of Salem, No. 218-2018-CV-01406, 2019 WL 3820631, at *2 (N.H.Super. Apr. 05, 2019) (vacated and remanded by Union Leader Corp.,173 N.H. at ___). "Democracies die behind closed doors," and through laws, such as the Right-to-Know Law, the people are better able to hold government officials accountable. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

For the reasons articulated above, the Court rules that the Report is subject to disclosure. The Right-to-Know Law provides "[e]very citizen" with a right to inspect and copy government records except as otherwise prohibited by statute" and "requires public bodies and agencies to make such government records available upon request." RSA 91-A:4, I; RSA 91-A:4, IV. Here, because the Report is not exempt under RSA 91-A:5, IV, the Town must comply with the statute by disclosing the Report.[9]

[9] At the September 15, 2020 hearing, the Town requested that certain information–specifically medical information, license plate numbers, and the names of minors–be redacted from the Report. Valley News does not object to the proposed redactions. (Index #19.) The Court agrees that the privacy interest in this information outweighs any public interest in it. Reid, 169 N.H. at 531.

III. Conclusion

For the foregoing reasons, the plaintiff's petition for declaratory judgment and for preliminary and permanent injunctions is **DENIED,** and Valley News's crossclaim for declaratory relief is **GRANTED**.

The Court requests that the parties review the redacted copy of this order, attached hereto, and if they believe further redaction is necessary, to so inform the Court by motion filed within seven (7) days of the date of the clerk's notice of decision. Thereafter, the redacted version will be issued publicly.

So Ordered.

Date: 12/2/2020

Hon. Peter H. Bornstein
Presiding Justice

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS.

Marianne Salcetti, et al.

v.

City of Keene

No. 213-2017-CV-00210

ORDER ON RELEASE OF IN CAMERA MATERIALS

Marianne Salcetti, a journalism professor at Keene State College, brought this petition against the City of Keene ("the City"), alleging the City has violated RSA Chapter 91-A, New Hampshire's Right-to-Know law, when it denied several requests made by five of her students. Ultimately, the Court sided with the City on most of its claims. However, on appeal the final order in this case was vacated by the Supreme Court and remanded for evaluation, in part, in light of more recent jurisprudence interpreting RSA 91-A exemptions applicable to this case. As explained below with respect to the internal investigation materials, the Court has concluded that unredacted copies of the statistical summaries be released, and that redacted copies of the substantive reports that support the summaries be released. The redaction made by the Court are minor and apply to personal identifiable information (PII). The Court is providing both sets of material, *ex parte*, to the City for review. The Court will release them to the Plaintiff in 45 days unless the City takes an appeal of this order.

Issues before the Court

Currently before the Court are three issues: first, the parties disagree about certain arrest summaries; second, the parties disagree about the documents held in camera for review. And third, the parties disagree about attorney's fees.

The parties first disagree about arrest summaries for Alex Flemming and Abbygail Vassas. The arrest summaries contain a variety of identifiable information regarding arrestees.[1] The parties agree that the person's name can be disclosed, but the City wants to redact the address, cell phone number, SSN, DOB, etc. Ms. Salcetti argues that such information is in the public domain and should be unredacted. Both parties submitted memoranda which will be discussed below. The Court notes, however, that the City's spreadsheet differs from what its counsel identified at the hearing. The spreadsheet does not mention SSNs, but at the hearing it was discussed.

The parties next disagree about the police misconduct reports held *in camera*. The *in camera* review contains two parts: 1) statistical summaries, and 2) substantive documents of the internal investigations of the citizen complaints. The statistical summaries contain charts listing the types and number of complaints as well as charts listing officer names, the complaint type, and the finding. There is also the issue of the extent to which citizen complaints about police misconduct may be redacted by the Court if released; but Ms. Salcetti conceded that the City may redact personal identifying information of the complainants in those complaints.

[1] The spreadsheet provided by the City also indicates that some of the reports list the victim and any suspects.

Ms. Salcetti also asked for attorney's fees under RSA 91-A arguing that the City has "dragged its feet" on the document requests. The City objected.

Legal Standard – Citizen Complaints and In Camera Materials

RSA 91-A exempts personnel files and confidential information from disclosure. In the past, the Supreme Court ruled that all "personnel files" were exempt from disclosure. See Union Leader Corp. v. Fenniman, 136 N.H. 624, 627 (1993). However, recently, the Court substantially overruled Fenniman. It concluded that the broad interpretation – creating a categorical per se exemption -of the "internal personnel practices" under RSA 91-A should be (much) narrower. See Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. ___ (decided May 29, 2020); Union Leader Corporation & a. v. Town of Salem, 173 N.H. ___ (decided May 29, 2020). Union Leader Corporation & a. v. Town of Salem, established that trial courts must conduct a three part balancing test to determine whether withheld records qualify for the exemption. Of course, this analysis also addresses whether certain information in the records should be redacted because redacted information is considered "withheld" even if the substantive document is disclosed.[2]

Analysis

The balancing test has three prongs. First, the Court evaluates whether there is a privacy interest at stake that would be invaded by the disclosure. Second, the Court assess the public's interest in disclosure. Third, the Court balances the public interest in

[2] Under the Seacoast Newspapers, Inc. v. City of Portsmouth interpretation of the exemption, the summaries and substantive internal investigative reports are clearly not exempt because they do not "relate to the personnel rules or practices" of the City of Keene. Seacoast Newspapers, Inc. v. City of Portsmouth, slip op at 12.

disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. Importantly, "[i]f no privacy interest is at stake, then the Right-to-Know Law mandates disclosure." Union Leader Corporation & a. v. Town of Salem, slip op at 9. As to the assessment of a privacy interest, the Court uses an objective expectation rather than a subjective one. Id. (cleaned up).

Upon review of the summaries and substantive reports in this case, the Court concludes that they are disclosable but the substantive reports must be subjected to minor redactions to protect privacy concerns.

The Summaries

The summaries invoke one minor privacy interest: the identity of the officer and the administrative "finding" about the claim of misconduct. The documents are essentially tallies of spreadsheets, with some brief narrative explanations. They are authored by the Chief and are issued to "File" – based on the context of these forms and the corresponding underlying investigations, the Court finds that the "File" is the department's Citizen Complaint file, not a personnel file. They simply identify the fact that a complaint was made against a particular "member," the member's last name, the name of the investigator, the nature of the complaint, and the finding. Thus, any privacy interest is nominal. This balances in favor of disclosure without redaction.

Second, the public has an elevated interest in the disclosure given the nature of the work the department performs. Law Enforcement officers, in contrast to those who work at the State Library, are vested with considerable power and authority. They are authorized to use deadly force when necessary. They are routinely critical witnesses in

criminal cases. As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their authority, whether the department is accounting for complaints seriously, and how many complaints are made. This factor strongly favors unredacted disclosure.

Third, balancing the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure, the Court finds public interest in disclosure is compelling. The City has not articulated any compelling interest in non-disclosure. Lastly, given the *de minimus* privacy interest involved, the public interest in unredacted disclosure carries the day.

The Substantive Reports[3]

The in camera material also contain substantive reports of interviews and conclusions conducted in response to the Citizen Complaints. They all follow the same format: the cover sheet identifies the nature of the complaint, the date and time received, the name of the officer(s) subject to the complaint, and the personal identifying information of the complainant. The report is copied, via an email distribution list, to the Captain, Supervisor and the Officer(s). The following pages in the reports contain narrative interviews of any witnesses and the officer. Many of the reports contain the underlying arrest reports, correspondence with attorneys involved in the underlying criminal case, and some photographs.[4] Upon review of the reports, it is not always clear who conducts the investigative interviews. The narrative is followed by a

[3] The Court notes that there is currently a legislative proposal to specifically exempt internal investigations from disclosure under RSA 91-A. See SB39.

[4] The substantive reports, are, in the Court's review, very detailed and well-documented.

conclusion from the Chief, and a letter to the complainant letting him/her know the outcome of the investigation.

Applying the balancing test factors discussed above, the Court finds the substantive reports are to be disclosed subject to the following redactions: personally identifiable "victim" information must be redacted, any reference to personnel action taken (if any) against the officer; and any discussion of internal personnel practices or procedures, if any, within the City. The Court will provided a redacted copy of what it intends to release to the City, but delay disclosure to the plaintiff for 45 days to allow the City to determine whether to take an appeal.

The Court finds that any privacy interest is minor in the records, and that victim information must be redacted by virtue of RSA 21-M:8-k II (m) Rights of Crime Victims (right of confidentiality of personal information). The Court cannot discern any privacy interest vested in an officer against whom a citizen has filed a complaint.

Second, the Court finds that the nature of police work invokes a very significant public interest in disclosure. Because law enforcement officers are entrusted with significant authority, granted additional protection for the use of force, and are mandated to act with honesty and integrity, the public has a heightened interest in knowing of the content of the investigation of such complaints.[5] This weighs in heavy favor of disclosure. Additionally, upon review,

[5] See RSA 105:19 (mandating that police investigate complaints of police misconduct).

much of the information contained in the reports is contained in arrest reports that are subject to disclosure, or interviews with civilian witnesses (and complainants) none of whom are bound by any confidentiality. In other words, the "facts" that they convey to the interviewer are not subject to any confidentiality. The Court finding on this prong also dictates the result of the third prong of the balancing test.

Legal Standard – Arrest Records

There is scant authority regarding the redaction or disclosure of arrest records under RSA 91-A. RSA 594:14-a notes that arrest records are "governmental records as defined in RSA 91-A and subject to disclosure in accordance with that chapter, with the exception noted in RSA 106-B:14." RSA 594:14-a then specifies what an arrest record must contain: the identity of the arrestee, the identity of the arresting officer, a statement of reasons why/how the arrest was made, the alleged crime, and whether the arrest was made pursuant to a warrant. RSA 106-B:14 notes that "[a]ny person may, for a fee, obtain the public criminal history record information on another person." (emphasis added). Neither party has identified whether "public criminal history records" includes records in which a person was arrested but not convicted of an offense. It is the Court's belief that the public portion of criminal records obtainable under RSA 106-B:14 contains only records of arrests that are accompanied by convictions. Compare RSA 106-B,II (defining "confidential criminal history record") with RSA-B,XI (defining "public criminal history record"). But even though RSA 594:14-a allows for disclosure of arrest records as "governmental records" under RSA 91-A, it doesn't mention if they fall under an exemption. Moreover, RSA 594:14-a qualifies that disclosure of arrestee information

is “subject to the exception in RSA 106-B:14” which appears to limit public disclosure (by the State Police) to arrest records that result on a conviction. Obviously, local law enforcement routinely issue press releases and report arrest records publicly. However, the issue is whether RSA 91-A mandates disclosure or whether it is confidential information.

Federal case law provides some helpful examples. A federal district court dealing with similar facts noted that “[s]ince an individual's right of privacy is essentially a protection relating to his or her private life, this right becomes limited and qualified for arrested or indicted individuals, who are essentially public personages.” Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318, 1321 (M.D. Tenn.1975). However, the court warned that “this decision does not provide the plaintiffs with a license to obtain from the defendants any type and amount of information about an arrested or indicted individual which they desire to publish.” Id. Other federal cases have similarly struck that balance. See Ctr. for Investigative Reporting v. United States Immigration & Customs Enf't, 2019 U.S. Dist. LEXIS 207840 at *13 (finding that even though an ICE detainee’s name and country of origin can be found online, other more personal information held by ICE carried a “significant privacy interest.”); see also United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 764 (1989) (“there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”)

A secondary source, the 2015 Attorney General RSA 91-A Law Enforcement Memorandum, addresses the issue of what should be redacted from law enforcement

records due to privacy interests (though it does not provide citations). The AG recommends always redacting items like SSNs, DOBs, driver's license numbers, criminal records[6], and many other less-relevant items. The AG then recommends generally redacting addresses and telephone numbers but also suggests doing a privacy analysis on those items.[7]

In light of the foregoing analysis, the Court finds that the City may redact from the disclosure of arrest records in its possession, aside from the arrestee's name, any PII from the arrest records, specifically the arrestees': street address, date of birth, social security number; and any other information protected by federal law. The Court finds that the limitation to conviction-only arrest records under RSA 106-B:14 applies to the records maintained by the City. By its express terms, members of the general public may make a request of records, but the request is limited to "public criminal history record[s]." The court construes this limitation as "the exception noted in RSA 106-B:14" carved out in RSA 91-A.

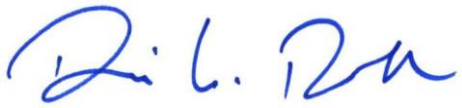
Attorney's Fees

Under RSA 91-A, the statute "requires two findings by the superior court: (1) that the plaintiff's lawsuit was necessary to make the information available; and (2) that the defendant knew or should have known that its conduct violated the statute." N.H. Challenge v. Commissioner, N.H. Dep't of Educ., 142 N.H. 246 (1997).

[6] From the central repository. I think that is different from arrest summaries.
[7] The Court notes that prior to the AG memo, and after RSA 91-A was enacted societal concerns about personally identifiable information (PII) have escalated. It is beyond dispute that "data breaches," "data mining," and the fraudulent use of PII are of great societal concern.

In this case, the court finds that there is no evidence that the City knew or should have known that its conduct violated the statute. Thus, an award of fees is not warranted under the statute. In light of this finding, it follows that the plaintiff is not entitled to a common law award of fees. Therefore, the request for attorney's fees is denied.

SO ORDERED.



Date: January 22, 2021

Hon. David W. Ruoff

Clerk's Notice of Decision
Document Sent to Parties
on 01/22/2021

HOUSE

1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT requiring confidentiality of personnel files of local police officers except in certain criminal cases.

ANALYSIS

This bill declares that the personnel files of local police officers are to remain confidential except in certain criminal cases.

- -

EXPLANATION: Matter added appears in ***bold italics***.
Matter removed appears in [brackets].
Matter which is repealed and reenacted or all new appears in regular type.

3732L
92-2419
09

HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-two

AN ACT

requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Confidentiality of Police Personnel Files. Amend RSA 105 by inserting after section 13-a the following new section:

105:13-b Confidentiality of Personnel Files.

I. Except as provided in paragraph II, the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A.

II. No personnel file on a police officer shall be opened in a criminal matter involving the subject officer unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence pertinent to the criminal case. If a judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera, with the prosecutor and the defense counsel present, and make a determination whether it contains evidence pertinent to the criminal case. Only those portions of the file which the judge determines may be admissible as evidence in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as

confidential and shall be returned to the police department employing the officer.

2 Effective Date. This act shall take effect January 1, 1993.

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING on HB 1359

BILL TITLE: Requiring confidentiality of personnel files of local police officers except in certain criminal cases.

DATE: January 14, 1992

LOB ROOM: 208 **Time Public Hearing Called to Order:** 10:30 AM

(please circle if absent)

Committee Members: Reps. Martling, Lown, Jacobson, C. Johnson, Lozeau, Moore, N. Ford, Lockwood, Bickford, Hultgren, Record, R. Campbell, Nielsen, Dwyer, D. Healy, Burling, Baldizar, D. Cote, Wall and DePecol

Bill Sponsors: Rep. Burling, Sullivan District 1; Rep. Record, Hillsborough District 23

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

REP. ALICE RECORD, Hillsborough District 23, Co-Sponsor: Spoke in support of bill. This bill is submitted at the request of a chief of police. It is a problem for police departments. Files of police officers should be maintained in confidentiality unless so directed for release by a judge. Currently attorneys can request and obtain these files.

*CHIEF OF POLICE DAVID BARRETT, NH Association of Chiefs of Police: Spoke in support of this bill. In a case he had recently, the judge allowed a defense attorney to obtain the personnel file of a police officer because he did not think the police officer was creditable. RSA 91:a specifically forbids this type of disclosure. It is an abuse. Since that case, 60 or 70 cases have come up in violation of our state laws. Attempts to get information from private files of police officers is nothing more than a fishing expedition on the part of defense attorneys. These files go into great depth on the police officers, including psuchological evaluations and many, many things that are not appropriate to be seen by the public.

NINA GARDNER, NH Judicial Council: Spoke in support of the bill. This bill guarantees that the privacy of the personnel file of the police employee be maintained.

EDWARD KELLEY, Manchester Police Patrolmen's Association: Spoke in favor of this bill. He has seen cases of defense counsel requesting the file of a police officer to be able to discredit the police officer's testimony. Information from this file goes through the entire life of the officer, and much of this information is not germaine to the case. Yet this information is used by defense attorneys to discredit the officer. This is inappropriate, and in violation of the privacy of personal information. There are reprimands

in these files, there are psychological evaluations and other items of a private nature that should not be in the hands of an attorney.

JIM McGONIGLE, JR., NH Police Association: Spoke in favor of this bill. The right of privacy of the police officers' files are already protected by RSA 91:a; however, there are many abuses of this statute by defense counsel. He feels a judge should review the file in camera alone. If the judge finds there is reason to give the file to defense, then he would do so. Mr. McGonigle does not like the idea of so many persons seeing a confidential file. He prefers this method of file examination if it is not constitutionally denied.

CLAIRE EBEL, NH Civil Liberties Union: Spoke in favor of the bill because the rights of privacy of police officers are already protected by law.

*CHARLES PERKINS, "The Union Leader": Spoke opposing the bill. This bill gives special privileges and rights to police. The public's right to know outweighs certain rights of the police officer's right to privacy. The prohibition in this bill takes away the public's right to know.

APPEARING IN SUPPORT OF THE BILL, BUT NOT TESTIFYING:
LOUIS COPPONI, NH Troopers Association
MATT SOCHALSKI, NH Association of Fire Chiefs
DOUG PATCH, NH Department of Safety

Respectfully submitted,

C. William Johnson

C. William Johnson, Clerk

26149

Public hearing Judiciary Committee January 14, 1992 10 30 AM
HB 1359, requiring confidentiality of personnel files of local police officers except in certain Criminal Cases.
Sponsors: Rep. P. Burling Sull. 1 Rep. A. Record Hills. 23

Sponsor Rep. Alice Record in support of bill. This bill put in at request of a Chief of Police. It is a problem for for Police departments. Files of Police officers should be maintained in confidentiality unless so directed for release by a judge. Currently attorneys can request and obtain these files.

Chief of Police David Barrett, N.H. Association of Chiefs of Police in support of this bill. In a case he had recently the judge allowed a defense attorney ~~to~~ obtain the personnel file of a police officer because he did not think the police officer was creditable. RSA 91:a specifically forbids this type of disclosure It is an abuse. Since that case 60 or 70 cases have come up in violation of our state laws. Attempts to get information from private files of Police Officers is nothing more than a fishing expedition on the part of defense attorneys. These files go into great depth on the police officers including psychologic evaluations and many, many things that are not appropriate to be seen by the Public. (See file for additional written testimony.)

Nina Gardner N.H. Judicial Council in support of the bill. This bill guarantees the privacy of the personnel file of the police employee be maintained.

Edward Kelley, Manchester Police Patrolmans Assoc in favor of this bill. He has seen cases of defense Council requesting the file of a police officer to be able to discredit the police officers testimony. Information from this file goes through the entire life of the officer and [redacted] much of this information is not germane to the case and yet this information is used by defense attorney's to discredit the officer. This is inappropriate and in violation of the privacy of personal information. There are reprimands in these files, there are psychological evaluations and other items of a private nature that should not be in the hands of an attorney.

Jim McGonigle Jr. N.H Police association in favor of this bill. The right of privacy of the police officers' files are already protected by RSA. 91a, however, there are many abuses of this statute by defense Council. He feels judge should review the file in camera alone. If he finds there is reason to give the file to defense then he would do so. He does not like the idea of so many persons seeing a confidential file. He prefers this method of file examination if it is not Constitutionally denied.

Claire Ebel, N.H. Civil Liberties Union. In favor of the bill because rights of privacy of police officers are already protected by law.

Charles Perkins, "The Union Leader" in opposition of the bill. This bill gives special privileges and rights to police. (See written notes for testimony) The publics right to know outweigh certain right of the police officers right to privacy. The prohibition in this bill takes away the [redacted] publics right to know.

HB 1359

Appearing in support of the bill but not testifying

Louis Copponi, N. H. Troopers Association
Matt Sochalski, N. H. Association of Fire Chiefs
Doug Patch, ~~Dr~~ N. H. Department of Safety.

Respectfully Submitted
Rep. C. William Johnson
Clerk -

HB1359 N.H. Assoc. of Chiefs of Police Testimony Chief David Barrett

On the surface, this case appears to be reasonably innocuous. As such, I have absolute respect for your Honor's discretion and judgment. However, history has shown us time and time again that reasonably insignificant and narrowly focused decisions have a habit of replicating themselves in a broader fashion. In fact, how many times have we in this room asked ourselves "How did we get to this point? Could this have been the intent when the original decision was rendered? Or for that matter, when the Constitution was penned?"

Defense Counsel have an obligation to zealously represent their clients and to insure the preservation of their Constitutional rights. But what about the rights of the police officer or employee and his or her family? Frankly, it strikes me as particularly abhorrent that a police officer who is hired and charged with the responsibility of keeping the peace, preserving the rights of the citizens, and occasionally apprehending offenders, should have to expose his personnel file for merely doing his or her job.

I believe this decision opens the door to potential abuse by defense attorneys throughout the State intent on fishing expeditions. It strikes me that, absent any facts to show that the personnel file might contain legitimate foundation for an attack on an officer's credibility and veracity, this Defendant's Motion is meant to do nothing more than embarrass this officer and invade his privacy.

Without sounding like I have read too much George Orwell, would it be fair for me to conclude that, given the potential for abuse, in six months, two years or five years, we as police managers will be reluctant to discipline employees for fear that, as a matter of routine, any time a defense attorney gets a tickle that an arresting officer may have been subjected to a disciplinary action, that, upon review, that action can be so broadly construed so as to impugn that officer's credibility?

Conversely, could this situation manifest to such a degree that an employee who might normally accept a disciplinary action, create an additional burden on the hiring authority by grieving and appealing any disciplinary action for fear it may become a public record?

When an offer of employment is made, there is an expectation on the part of the employee that we, the employer, will maintain the privacy and confidentiality of personal financial, psychological and physical matters. At what point are the Constitutional rights of the Defendant of more import than that of the rights of an employee who has done no wrong.

Police Officers, as a class of employees, have become viewed by the State of New Hampshire as second class citizens. The Supreme Court has said that we do not have the right of civil redress. The Legislature has voted against bills for enhanced penalties for assaulting a police officer. Now we are addressing the Court on the issue of their right to privacy. All of these are rights guaranteed to every citizen of this State yet denied to us the minute we assume our professional roles. Am I to assume that an officer, acting in his or her appointed capacity, has deemed to have given up his or her Constitutional rights? With all due respect to your decision in this matter, the slightest broadening of this decision by others down the road can only lead to the further erosion of the Constitutional rights of police employees.

I would like to request of this Court that, since I have personally generated the majority of the material contained in this personnel file, it be willing to accept my word and representation that there is absolutely nothing in this file that could impugn the integrity or credibility of Officer Jaillet. Beyond that, it is my opinion that I am merely the keeper of the file, and the contents therein are the property of the employee. I would like this Court to know that I have a signed letter by Mr. Jaillet dated May 6, 1991 asking that I not release his file. Since, however, the Court has Ordered me to do so under threat of contempt, I am hereby surrendering former Officer Jaillet's personnel file.

Respectfully Submitted

_____

David T. Barrett
Chief of Police
Jaffrey, N.H.

HB 1359 COB 208 HB 1359 10/1m

testimony of Charles Perkins "Union Leader newspaper"

TOP OF STORY<
Good morning. My name is Charles Perkins. I am the managing editor of The Union Leader and the New Hampshire Sunday News.<EOP>

This morning we are discussing a bill that would not reinforce the existing protection of the privacy of New Hampshire's police, but instead would give them extraordinary status as men and women above the laws that apply to others. It would establish our police as a special class of public servants who are less accountable than any other municipal employees to the taxpayers and common citizens of our state. It would arbitrarily strip our judges of their powers to release information that is clearly in the public benefit. It would keep citizens from learning of serious misconduct by a police officer.<EOP>

Such a change in state law is not in the best interests of the state at large, nor is it in the best interest of the state's police.<EOP>

While the intent of this bill may be benign, if enacted it would prove divisive. By giving special privileges and protections to New Hampshire's police, it will invite other groups of municipal employees to demand equal treatment. It will unnecessarily endanger the high regard in which New Hampshire residents hold their police officers. And it will knock a gaping hole in the right-to-know law.<EOP>

The New Hampshire right-to-know law is not a statute which strips police or public employees of their privacy. It is not a law which allows pesky reporters or busybodies to rummage through the personnel files of police officers at will. Instead, it effectively and properly keeps confidential the vast majority of public employee personnel files and protects the privacy of law enforcement officers. As written by the Legislature and as interpreted by the state's highest court in the past quarter-century, the right-to-know law does empower the state's judiciary to weigh the sometimes conflicting interests of public employees and of inquiring citizens in determining what records shall be private, and what shall be public.<EOP>

In the precedent-setting Mans v. Lebanon School Board case of 1972, the New Hampshire Supreme Court ruled that in right-to-know cases involving personnel records of public employees, the trial court must balance the benefits of disclosure to the public against the benefits of nondisclosure.<EOP>

That isn't an open-door policy. It is a sensible rule. It is not arbitrary. It works, because it is fair, and flexible. It allows a Superior Court judge to determine if the limited release of information about an employee is or is not in the public interest. Should the judge's decision be unacceptable to the employee, he or she can appeal. This system is a carefully crafted test that has served the state well for twenty years.<EOP>

In practice, police already have special treatment from judges in New Hampshire to shield their personnel records. As an example, in the continuing case of Union Leader Corporation v. Dover Police Department, Judge Michael Sullivan refused this newspaper's request for schedules and pay records, citing Chief William Fenneman's testimony about the risks that release of that information would pose to his officers and to public safety. That was a request for special treatment for police officers. The current law allows it. The system worked.<EOP>

In that case, which is now on appeal to the state Supreme Court, Judge Sullivan did order the release of an internal investigation and of disciplinary action taken against one officer, ruling that the public's right to know outweighs that officer's wish to keep his violation secret.<EOP>

The judge applied a balancing test. He found that some information should be protected, due to the nature of police work. He found that other information should be released to the public.<EOP>

If House Bill 1359 passes, the Legislature will be telling Judge Sullivan

scrutiny in all but a handful of criminal cases is preferable to a system in which the public's right to know is weighed against an officer's right to privacy. The Legislature will be telling the courts that even if the case for release of this information to the public is clearcut, even if it is overwhelmingly in the interest of the police department involved, it can't be done. The prohibition in the first paragraph of this bill is absolute.<EOP>

That is not good public policy. Don't tie the hands of our judges with this bill. I urge you to consider the full impact of this legislation, because I believe that once you do, you will vote to kill it.

Records at req. of one police chief

• secured by request of an attorney.

Chief ~~David~~ Barrett – Taffrey   5/91 decision opened door to defense fishing expedition.

felony DWI in motion – def counsel req officer's personnel file

"rumor on the street not the standard of the inv. of privacy"

setting dangerous precedent – would start to see pattern

60/70 times since – req to relinquish personnel files. Kaplan standard.

request to view personnel file for violation. –

Amendment to HB 1359

Amend the title of the bill by replacing it with the following:

AN ACT

relative to the confidentiality of police personnel files in criminal cases.

Amend RSA 105:13-b as inserted by section 1 of the bill by replacing it with the following:

105:13-b Confidentiality of Personnel Files. No personnel file on a police officer or fire ~~officer~~ chief or designee who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department or fire department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

4648L

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

HOUSE COMMITTEE JUDICIARY

Public Hearing on (HB)/SB # (please circle one): 1359

Bill Title:

Date:

L.O.B. Room #: 208 Time Public Hearing Called to Order: 10 30/A.

(please circle if absent)

Committee Members: Reps. Martling, (Lown,) Johnson, (Jacobson,) (Lozeau,) Ford, (Bickford,) Record, Nielsen, (Healy,) Cote, (Wall,) (Moore,) Lockwood, Hultgren, Campbell, (Dwyer,) (Burling,) Baldizar, (DePecol.)

Bill sponsors:

Testimony

* Use asterisk if written testimony and/or amendments are submitted.

Speaker and Comments:

HOUSE COMMITTEE JUDICIARY

Executive Session on (HB)/SB # (please circle one): 1359

Bill Title:

Date: 2/5/92

L.O.B. Room #: 208

(please cirlce, if absent)

Committee Members: Reps. Martling, Lown, Johnson, Jacobson, Lozeau, Ford, Bickford, Record, Nielsen, Healy, Cote, (Wall) Moore, Lockwood, Hultgren, Campbell, Dwyer, Burling, Baldizar, (DePecol)

OTP, (OTP/A), ITL, Re-refer - (please circle one)

Motion:

Moved by Rep. Burling

Seconded by Rep. Lockwood

Vote: 17-1 (Please attach record of roll call vote)

Motion:

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote)

HOUSE COMMITTEE: JUDICIARY

Executive Session on HB/SB # (please circle one): 1359

Date: 2/5/92

Consent Calendar: Yes ✓ Vote: 18-0 No ____ Vote: ____

(requires unanimous vote)

Committee Report: (please fill out committee report slip in duplicate)

Respectfully submitted,

Rep. G. William Johnson, Clerk

JUDICIARY 1991-1992 SESSION

HB Bill # 1359

Public Hearings 1/14/92 Executive Session 2/5/92

COMMITTEE REPORT: OTP/A

	YEAS	NAYS
Martling, W. Kent, Ch.	✓	
Lown, Elizabeth D., V. Ch.	✓	
Jacobson, Alf E.	✓	
Johnson, C. William	✓	
Lozeau, Donnalee M.	✓	
Moore, Elizabeth A.	✓	
Ford, Nancy M.	✓	
Lockwood, Robert A.	✓	
Bickford, Drucilla	✓	
Hultgren, David D.	✓	
Record, Alice B.	✓	
Campbell, Richard H., Jr.	✓	
Nielson, Niels F., Jr.	✓	
Dwyer, Patricia R.	✓	
Healy, Daniel J.	✓	
Burling, Peter H.	✓	
Baldizar, Barbara J.	✓	
Cote, David E.		✓
Wall, Janet G.		
DePecol, Benjamin J.		
TOTAL VOTE	17	1

Appeared in Favor

Appeared in Opposition

20659
0775T

COMMITTEE REPORT

COMMITTEE: Judiciary

BILL NUMBER: 1359

DATE: 2/5/92 CONSENT CALENDAR: YES ✓ NO ____

OUGHT TO PASS ____

OUGHT TO PASS WITH AMENDMENT ✓ 17-1

INEXPEDIENT TO LEGISLATE ____

RE-REFER TO COMMITTEE (1st year session) ____

REFER FOR INTERIM STUDY (2nd year session) ____

VOTE: 17-1

STATEMENT OF INTENT

This bill was submitted in response to growing evidence that police personnel files are being used for "fishing expeditions" in the course of criminal trials, the purpose of the fishing expedition being to deter or delay criminal prosecutions. The bill as amended by the committee provides an effective and appropriate standard for court review of personnel files, and preserves the important confidentiality which police personnel files require.

The FN calls for state expenditures of $ ____ in FY '91 and

$ ~ in FY '92. The Committee amendment

increases/decreases House expenditures.

Elizabeth D. Cowan
Signature

Original: House Clerk
cc: Committee bill file

LEG021

USE ANOTHER FORM FOR MINORITY REPORT

144 1/5/02

HOUSE BILL 1359

Judiciary
Committee

for the Committee

Committee

for the Committee

CHAIRMAN'S COPY

GRESS CHART

BY H DATE FEB 12 1992 FLOOR ACTION TAKEN OPP W/A COMMITTEE Judic AMENDMENT DOCUMENT# 4648 ASST. CLERK'S INITIALS

BY S DATE 3-26-92 FLOOR ACTION TAKEN OTP COMMITTEE Judic AMENDMENT DOCUMENT# - ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

LEG022

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

CHAIRMAN'S COPY

AN ACT requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Due Date: 2/26/92

ANALYSIS

This bill declares that the personnel files of local police officers are to remain confidential except in certain criminal cases.

- -

EXPLANATION: Matter added appears in ***bold italics***.
Matter removed appears in [brackets].
Matter which is repealed and reenacted or all new appears in regular type.

HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-two

AN ACT

requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Confidentiality of Police Personnel Files. Amend RSA 105 by inserting after section 13-a the following new section:

105:13-b Confidentiality of Personnel Files.

I. Except as provided in paragraph II, the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A.

II. No personnel file on a police officer shall be opened in a criminal matter involving the subject officer unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence pertinent to the criminal case. If a judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera, with the prosecutor and the defense counsel present, and make a determination whether it contains evidence pertinent to the criminal case. Only those portions of the file which the judge determines may be admissible as evidence in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as

confidential and shall be returned to the police department employing the officer.

2 Effective Date. This act shall take effect January 1, 1993.

Amendment to HB 1359

Amend the title of the bill by replacing it with the following:

AN ACT

relative to the confidentiality of police personnel files in criminal cases.

Amend RSA 105:13-b as inserted by section 1 of the bill by replacing it with the following:

105:13-b Confidentiality of Personnel Files. No personnel file on a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

4648L

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

HOUSE BILL AMENDED BY THE HOUSE

1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT relative to the confidentiality of police personnel files in criminal cases.

AMENDED ANALYSIS

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3732L
92-2419
09

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STATE OF NEW HAMPSHIRE
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AN ACT
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2 Effective Date. This act shall take effect January 1, 1993.

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09

HOUSE BILL - FINAL VERSION

1992 SESSION

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT relative to the confidentiality of police personnel files in criminal cases.

AMENDED ANALYSIS

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HOUSE BILL - FINAL VERSION

HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand nine hundred and ninety-two

AN ACT

relative to the confidentiality of police personnel files in criminal cases.

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2 Effective Date. This act shall take effect January 1, 1993.

SENATE

1992 HB 1359

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A-045-09

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HOUSE BILL AMENDED BY THE HOUSE

1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

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HB 1359

HOUSE BILL AMENDED BY THE HOUSE

- 1 -

3732L
92-2419
09

HB 1359

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In the year of Our Lord one thousand
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AN ACT
relative to the confidentiality of police personnel
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2 Effective Date. This act shall take effect January 1, 1993.

DATE: March 11, 1992
TIME: 11:36 a.m.
ROOM: 103, LOB

The Senate Committee on Judiciary held a hearing on the following:

HB 1359: relative to confidentiality of police personnel files in criminal cases.

Committee members present:

Senator Podles, Chairman
Senator Hollingworth, Vice Chairman
Senator Colantuono
Senator Nelson
Senator Russman

Senator Podles opened the hearing.

Rep. Alice Record, Hills D 23: This is something that has proved to be very much of a problem to the police around. In opening the files of somebody who is to testify, the information that is in the police files on their special officers, or people who work for the different police departments who have to come out as a witness, testify to an arrest or what have you. It seems that we already do have on the books that says they shall not open these files, but the judges have said it is not explicit enough. So therefore they are opening the files on the police officers. The information included in the files of the personal life of these men is very different than it is in a company. Sanders Associates, or Digital or any of those have a file that has color, race, creed, and those things have been eliminated that they can no longer have too. But in the police files, they have a total record of these men who have been hired by the police department. And it is something that is very dangerous in my estimation of their opening these files. This allows for the judge to open the file in camera and decide whether there is anything in the file contradictory to testimony that might be given by a police officer. And if there is nothing relevant to a particular case, he orders the files closed again, but it does not become public property. Peter and I feel very strongly about this. And we put this in on behalf of Chief Barrett. There have been different problems within the police departments. I would be happy to answer any questions.

Chief Barrett, Police Chief, Jaffrey: I am here as the legislative representative and chair of the New Hampshire Association of Chiefs' of Police. As Representative Record pointed out, we, the Chief's Association, came to her and Representative Burling. First we explained our problem and then we asked if they might be willing to sponsor a bill which they gladly did after we explained the nature and the kinds of problems that we have had. This has come up as a result of some actions that have taken place in certain district and particularly superior courts throughout the state in the last year. I think the case that I had personally was the one that kind of set the wheels rolling. I was concerned at the time that it might do that if I put up much of a stink, which I did. Of course, it ultimately came down to a test of will and the fellow with the black robe won as he appropriately should. But I would like to share with you some of my testimony before the court that day

and explain to you some of the things that subsequently took place. On the surface, that case appeared to be reasonable innocuous. However, history has shown us time and time again that reasonable insignificant and narrowly focused decisions from the bench have a habit of replicating themselves in much broader fashion. In fact, how many times have we, in this very room, asked ourselves how did we get to this point. Could this have been the intent when the original decision was rendered, for that matter, when the constitution was penned. Defense council has, and I would defend their right to do so, an obligation to zealously represent their clients and to insure preservation of their client's constitutional rights. But what about the rights of a police officer who are employed and his or her family. Frankly, it strikes me as particularly abhorrent that a police officer who is hired and charged with keeping the peace, preserving the rights of the citizens and occasionally apprehending the offender should have to expose his personnel file for merely doing his job. That is what happened in that case. I believe the decision opens the door to potential abuse by defense attorneys throughout the state intent on fishing expeditions. It strikes me that absent any facts to show that a personnel file might contain legitimate foundation for an attack on the officer's credibility and voracity, that a defendant's motion is meant to do nothing more than embarrass an officer and invade his privacy. I would like to point out that subsequent to the case that I am making reference to, as I had foreseen, this matter has come up 38 times in less than a year. We have even seen it come up in the district court for violations. Fortunately, the two courts that it has come up in the district court level, the judges have ruled appropriately that it is not their perview. But, it seems to us that it is pretty clear that since the door got opened, this has become a regular course of conduct. I should point out to you that in the case that brought this all to light, the court ruled that a sufficient showing existed that there may be some concern about the office who was merely testifying about an arrest that he made, of the officer's credibility and voracity. I accepted that on the surface, but in open court, I found out the standard that was set was, as it was represented by defense council, that in the case at hand that created this, rumor on the street and it is straight from the transcript (and I have the transcript) constituted enough for the court to rule in favor of viewing this officer's personnel file. I submit, if we could get search warrants based on rumor on the street, we would be doing 50 or 60 of them a week. It seems to me that an officer, or any police employee, who has taken his responsibility seriously, has agreed to go through the kind of selection process that is required today to become a police officer, and once he raises his hand and is sworn in to protect the citizens of this state and enforce the laws appropriately that at no time should he be expected to have given consent to abrogate his rights under the constitution of the United States or the state of New Hampshire. And that is what has happened in this case. I submit to this committee that no one in no other walk of life would have to open up their personnel files for any reason such as doing their job. And that is what happened in this case. The officer did nothing but his job. By the way, I would like to report to you that in the case at hand which started this whole ball rolling, the judge ruled there was nothing in the file. We offered that. We said there was nothing in the file, but they had to go see for themselves. At any rate, this does set up some rules and some parameters. Frankly, I would like to see an absolute prohibition, but since I realized the tooth fairy died some time ago, that is not going to happen. But this does at least set some parameters. I spoke to Representative Burling, and because of vacation, he is unable to be here. I do have a copy of the letter he sent to the Chair, and I think it pretty well

outlines that. I would like to also share with you, without belaboring the point, some of the things that you might find in a personnel file. If the police agency is doing their job, like I would like to believe most of us do, you are going to find initial written test scores, physical agility exams, you are going to find psychological profiles in there. And I don't frankly think that is something that should be shared with many people. You are going to find financial documents and records, because we do credit checks on our prospective employees. You are going to find counseling, you are going to find family matters that have come up and created some kind of interference with their performance and if we as good police administrators are doing our job, we will in fact have that material in there because we have to insure the credibility and the performance of our employees. You are going to find the kinds of things that you won't find in the average working person's file. I don't know many occupations that require psychological profiles. Those things are all contained in a personnel file. And it seems to me that the average person should expect some privacy on those issues. I could go on because obviously I feel very strongly about this, but I will defer to any questions.

Senator Thomas Colantuono, D. 14: I am just curious how you envision this working. It says the sitting judge has to make a specific ruling that probable cause to exist. How does the judge make that ruling? What constitutes probable cause and could rumor on the street be enough?

Chief Barrett: Certainly in my view it wouldn't and I would hope in yours as an attorney that that doesn't make the standard of probable cause. But what happened absent this, in the case that started this, is there was no requisite of probable cause. Sufficient showing was the dialog that was used. Probable cause, as we know - those of us who operate in the system, is a standard that has to be met. I always liken it to the early days in my career that if you have 100 percent, you have to have at least 51 percent to meet the probable cause standard if you were going to break it up into percentages of all these things put together. The totality of those issues that may be raised, you would have to at least be 51 percent. Certainly, I would like to believe that rumor on the street does not constitute anybody's interpretation of probable cause. I am told from the Judicial Council, one of the reasons they like the concept is because it sets some rules which didn't exist before. I would say that we are going to have to rely on the judiciary to appropriately deal with what constitutes probable cause.

Senator Thomas Colantuono, D. 14: Where you might get most of these cases is on assault situations, where someone is charged by a police officer and the defense is going to be "I was just defending myself, he hit me first." And whether it is rumor on the street or just well known in the community that that police officer has had two or three internal investigations for abusing citizens, that is highly relevant. That is my question. How do you get that in front of a judge so that a judge can say, "I think we should look at that."?

Chief Barrett: I don't have an answer for you, but I would say, however, that the instance of cases that have come up since this was started, only 1 of them was an assault case. This one was on a felony DWI case, which had nothing to do with assault.

Senator Mary S. Nelson, D. 13: I just want to follow up on Senator Colantuono's question. I was thinking the same thing, contains relevant

evidence, how is the judge going to determine that there is evidence relevant to the criminal case. And how is an attorney going to get that before the judge? How are you going to do it? Are you going to go to the judge, write him a letter, petition him?

Chief Barrett: Are you talking about defense counsel? How are they going to do it?

Senator Mary S. Nelson, D. 13: Any lawyer that wanted to get this information, I don't know what you call it, but you want to go before the judge and you want them to. How do they do it now?

Chief Barrett: They would file a motion. They would make some offer of proof so far as they understand it and the judge is either going to say this meets the standard or it doesn't.

Senator Mary S. Nelson, D. 13: And if this law is passed, they can do that?

Chief Barrett: They should be able to do that.

Senator Mary S. Nelson, D. 13: What would stop them from doing that? Is there anything in this statute that prevents them from doing that?

Chief Barrett: Not that I am aware of. They can file a motion. What this does is set some rules that you have to at least follow before that happens. Before we just arbitrarily say I want to look at this guy's file.

Senator Mary S. Nelson, D. 13: I don't see what the rules are?

Chief Barrett: The rule says that it has to be the matter at hand, and it has to meet some probable cause standard. Absent this legislation, we have found that there was no standard and if you don't meet any standard it can be at will. Like in the case we had where rumor on the street met the standard. I don't think rumor on the street should be the standard.

Senator Mary S. Nelson, D. 13: So particular piece of legislation would help in preventing rumor on the street?

Chief Barrett: Absolutely. I don't know of any legal mind that would say that constitutes probable cause. If it is, as I said, we would be doing search warrants every day of the week, if that is all you have to do to meet a probable cause standard.

Senator Beverly Hollingworth, D. 23: Probably the standard of probable cause would answer this but I am thinking of the Cushing case, where the police officer killed Mr. Cushing and all the records indicated they had a hard time getting those records. But when they were released, then it became known that he had problems. In that case, under this, perhaps his record would be able to be achieved because they could prove that there was cause.

Chief Barrett: It would be incumbent on the prosecutor to meet a probable cause standard. Whoever wants the records has to meet some standard and they have to say this constitutes probable cause. Ultimately the decision is the judge's. That is the way it always is on everything. The judge is going to rule whether that standard has been met or not. Some judges are going to, in

their practice or application, their standard may be higher than another judge. We know that is true in every case we take before the court. Some courts see the standards for anything different than others. I am sure counsel will both agree to that. They all have their own way of viewing it. That is going to vary from court to court because you are still leaving it up to the bench to decide when you have met that threshold. When you have passed the threshold and have met the probable cause standard. Would this correct that problem? I don't want to say yes or no. It certainly would have set some standard in that case which doesn't exist now. That judge may have seen that as a much higher threshold to meet than the one I had.

Senator Beverly Hollingworth, D. 23: One of the things it says is "only those portions of the file which the judge determines to be relevant." That bothers me a little bit, because again it means their discretion.

Chief Barrett: Yes. That is discretion on the part of the bench. Do you want to expose the whole file? I don't think you should, personally. I would think you have to consider the kind of material that is in a personnel file. Are officers financial records germane on an assault case, for instance. I don't think so. They might be germane on a theft case. It would depend on the issue. I don't think you should be getting into people's personnel files unless you have really demonstrated a need to do so. I fall back on my argument before we got into specifics that was as a class of employees where does it say you abrogate your rights, the rights that you have, the rights that the guy who works for General Electric has, or the guy who works for the state highway department has. We should be entitled to the same rights. Granted, we do something a little differently, and that is why this is at least allowing some access if you have met a standard. But, if we didn't do that, I would say we have every constitutional right to keep that matter private. I can't go to my local school board and say I disagree with one of the teachers and I would like to see their personnel file because it is my understanding they whatever. They say "yeah, right." And that wouldn't happen. I wouldn't have access to it. Well I am not sure that we should be found in a different class or put in a different category, as law enforcement people. Again, I don't know that we should be expected to have abrogated our rights under the constitution by merely raising our hand and accepting the responsibility of our position.

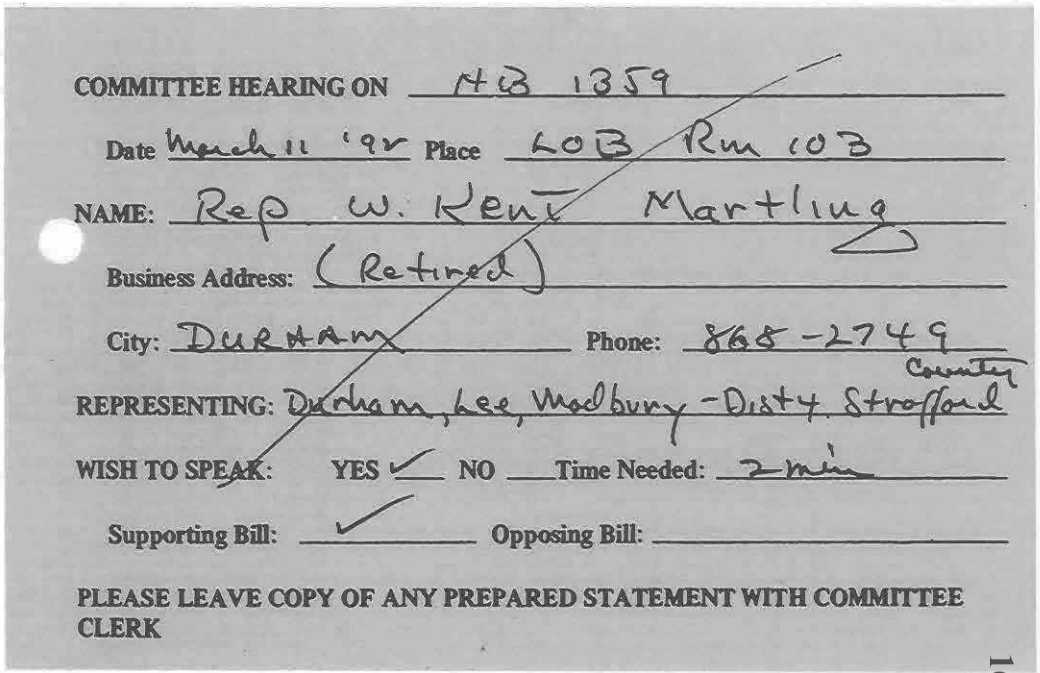
Rep. Kent Martling, Straf D 4: I am here for one reason I knew that Peter was going to be away but I understand he has written you letter, and as chairman of Judiciary in the House, I just wanted to report that we had a hearing that consisted of Nina Gardner, Chief Barrett, Ed Kelly - Administrative Judge of the Courts, Jim McGonigle, Claire Ebel - Civil Liberties Union, and even a person from the Union Leader. They all came in support of the bill. There was no opposition. Our civil subcommittee voted ought to pass with the amendment 5-0 and it came out of the committee 17 to 1. It was on the consent calendar. I would like to point out one thing which you might take up if this goes to subcommittee or however you work this. I looked this over last night, and in the original bill, before it was amended, it start out as new section "confidentiality of police personnel files" amend RSA 105 by inserting after section 13-A the following new section. That was 105:13-B. Then they had roman one, except as provided in paragraph 2, contents of any personnel file of a police officer shall be confidential and shall not be treated as a public record, pursuant to RSA 91:A. Then it went on and gave number 2, which was substantially the amendment. That was changed by a

sentence or two. Now, speaking to Chief Barrett and Jim McGonigle before the hearing this morning, there is a question that one word maybe was left out. So I would like to have this checked into. Otherwise, that takes care of my testimony and I will be happy to answer any questions.

Doug Patch; Assistant Commissioner, Department of Safety: I am here to appear in support of this bill. I won't reiterate what Chief Barrett has said, other than to say that I really think on behalf of the state police, the highway enforcement officers, the marine patrol officers, and our gaming enforcement officers who are all police officers who work for our department, I think this is a reasonable compromise. I think it provides some standards for a court to use. It may not be perfect, but I think it is a good step in the right direction. I agree with what the Chief said. There is a need to protect a police officer from an unreasonable intrusion into that individuals privacy. I think that is really what we are asking you to do here. At the same time, I think the bill is reasonable because it is providing a mechanism for a defendant to be able to get to know relevant information. So I think it is a good bill in its current form.

Nina Gardner; Judicial Council: The Judicial Council looked at this piece of legislation and voted to come in and support the legislation. As was testified earlier, the Judicial Council has looked at it. We had a unique perspective on the bill because the judges who are familiar with this problem and had seen it played out in court and some of the other members of the council were familiar with the issues. We felt that by establishing this standard that has been alluded to, and that is the probable cause standard, that there would be something that the judge would need to look at. The judges were concerned that the defense counsels, without a limit, can simply go on a fishing expedition. I think everybody has to know that the other part of my job involves defense council of the state. I discussed this with some of the attorneys in the public defenders office. Of course, they would prefer to see no standard and have that access unlimitedly to the issues that may be relevant for their client. However, they felt that this standard was an appropriate standard. It is a recognized standard and would give the judges something to look to. They also agree with what Chief Barrett said. You are going to have judges with varying degrees of discretion and varying interpretation of what that standard is. However, absent that, you do expose the whole issue to open exploration and that is what this attempts to deal with. I would be glad to answer any questions that you might have.

Hearing closed at 12:02



COMMITTEE HEARING ON HB 1359

Date March 11 '97 Place LOB Rm 103

NAME: Rep W. Kent Martling

Business Address: (Retired)

City: DURHAM Phone: 865-2749

REPRESENTING: Durham, Lee, Madbury - Dist 4. Strafford County

WISH TO SPEAK: YES ✓ NO Time Needed: 2 min

Supporting Bill: ✓ Opposing Bill:

PLEASE LEAVE COPY OF ANY PREPARED STATEMENT WITH COMMITTEE CLERK

Date March 11, 1992 Time 11:00 a.m.

SENATE JUDICIARY COMMITTEE

PUBLIC HEARING

ON

HB 1359: relative to the confidentiality of police personnel files in criminal cases.

APPEARING IN FAVOR (Please Print)

NAME	ADDRESS	REPRESENTING
✓ Rep. Alice B. Record		Constituency - Dist. 23
✓ CHIEF DAVID BARRETT	11 RIVER ST. JAFFREY	N.H. ASSOC. OF CHIEFS OF POLIC
✓ DOUG PATCH	10 Hazen Dr.	D.O.S.
✓ Jim McConigle Jr	21 LAKE ST Concord	NH Police Association DO NOT WISH TO SPEAK
✓ Nina Gardner	Rm 410 State House Annex	Judic Council

APPEARING IN OPPOSITION: (Please Print)

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF COMMITTEE

DATE: March 26, 1992

THE COMMITTEE ON JUDICIARY

To which was referred House Bill 1359

AN ACT relative to confidentiality of police personnel files in criminal cases.

VOTE: 5-0

Having considered the same, report the same without amendment and recommend that the bill: **OUGHT TO PASS.**

Senator Hollingworth
For the Committee