THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0146

Petition of the State of New Hampshire

APPEAL PURSUANT TO RULE 11 FROM JUDGMENT
OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 Minute Oral Argument)

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II. Whether the superior court erred when it concluded that police personnel records are presumptively public records under RSA 91-A:4.

III. Whether the superior court unsustainably exercised its discretion when it *sua sponte* transformed routine, non-adversarial, assented-to criminal discovery motions into RSA 91-A proceedings and delayed three criminal cases. RSA 105:13-b, RSA 91-A:4, and precedent from this Court, provided a clear basis to grant the parties' assented-to motions.

The State preserved these issues in the assented-to motions for a protective order and the motions for reconsideration submitted in each of the three cases. SD[1]51-52, 54-59, 61-62, 64-65, 67-72, 75-76, 78-84.

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[1] Citations to the record are as follows:
"SP__" refers to the Petition for Original Jurisdiction and page number.
"SD__" refers to the addendum to the State's brief and page number.
"SA__" refers to the appendix to the State's brief and page number.

TEXT OF RELEVANT AUTHORITIES

Statutes:

RSA 105:13-b, Confidentiality of Personnel Files

I. Exculpatory 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. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.

II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.

III. No personnel file of a police officer who is serving 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. 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 as to 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.

RSA 91-A:4, I: Minutes and Records Available for Public Inspection

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, “to copy” means the reproduction of

original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

RSA 91-A:5, IV: Exemptions

The following governmental records are exempted from the provisions of this chapter:

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.

STATEMENT OF THE CASE AND FACTS

This is a Petition for Original Jurisdiction pursuant to Supreme Court Rule 11 from a ruling of the Merrimack County Superior Court (*Schulman*, J.). The appeal involves a series of orders issued in three criminal cases that involve the same legal issue and the same legal reasoning. In each case, the superior court denied an assented-to motion for a protective order for potentially exculpatory evidence from police officers' personnel files that the State was disclosing as required by *Brady/Laurie*[2] and RSA 105:13-b, I. The court issued a common narrative order in all three cases denying nearly identical motions for reconsideration.[3] The State will first summarize the relevant facts and issues in each case and then provide a brief overview of subsequent procedural developments.

A. Fuchs

In August 2019, Nicholas Fuchs was indicted for a class B felony for violating the Controlled Drug Act, RSA 318-B:2. SA12. On February 24, 2021, the State filed an assented-to motion for a protective order to maintain confidentiality over potentially exculpatory evidence from the personnel file of a named police officer that the State needed to disclose to

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[2] *Brady v. Maryland,* 373 U.S. 83 (1963), *State v. Laurie*, 139 N.H. 325 (1995).

[3] The series also included a denial of a motion to seal the motion for a protective order and to seal the motion for reconsideration and the State originally contested that denial in its Rule 11 Petition. *See* SA5, 15, 17, 35. The trial court subsequently granted the State's request to substitute versions of the unsealed documents that redacted the information that the State sought to keep confidential. SA9, 21, 45. Therefore, as stated in the State's response to the defendants' motion for summary disposal, the State no longer challenges the superior court's denial of the motions to seal because the superior court has now accepted redacted versions of the motions at issue. SA172-74.

defense counsel in order to meet its *Brady*/*Laurie* obligations. SD51-52. *See Brady,* 373 U.S. at 83, *Laurie*, 139 N.H. at 325; RSA 105:13-b, I; *see also N.H. R. Crim. P*. 50(c)(2)(A) (defining "Confidential information" to include "Information that is not public pursuant to state or federal statute, administrative or court rule . . ., or case law"). The State also filed a motion to seal on the basis that the protective order described the confidential and statutorily protected materials. *See N.H. R. Crim. P.* 50(d). SA5. On February 25, 2021, the court denied the motions without prejudice on the basis that "[p]olice personnel records and documents related to police internal personnel practices are presumptively public records under RSA 91-A:4, unless for particularized reasons, the public release of the records would result in an invasion of privacy. *See Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 357 (2020)." SD52. The court invited the State or the witness to argue "that such particularized privacy concerns are present in this case" and stated that if "the court finds that the records are not public records, then the court will comsoder [sic] issuing a protective order of appropriate scope." SD52. The court concluded that "if the records fall within the scope of 91-A:4, meaning that that [sic] any member of the public is entitled to the records upon demand, the court will NOT issue a protective order." SD52.

On March 4, 2021, the State filed a motion for reconsideration arguing that the court had: (1) erred in analyzing the assented-to request for a protective order under 91-A instead of RSA 105:13-b; (2) misinterpreted RSA 105:13-b; (3) misapprehended RSA 105:13-b and RSA 91-A:5, IV when it ruled that "police personnel records . . . are presumptively public records under RSA 91-A:4"; (4) overlooked the unsettled but related

question of law regarding whether the Exculpatory Evidence Schedule ("EES") was subject to disclosure under RSA 91-A:5, IV. SD 54-57. The State also argued that (1) several Freedom of Information Act ("FOIA") exemptions[4] and (2) the law enforcement privilege supported keeping the disclosed documents confidential pre-trial to the broadest extent possible. On March 16, 2021, the court denied the motion by margin order stating a narrative order was forthcoming. SD54.

On March 18, 2021, the court issued its narrative order explaining that because "the court would not ordinarily issue a protective order that gags the parties and counsel from sharing what is otherwise available to the general public upon demand," a protective order "is inappropriate" if the State "provides discovery of documents that are subject to mandatory public disclosure under the Right to Know statute." SD89. The court reasoned that after the 2020 overrule of *Fenniman*,[5] "the practice of willy-nilly issuing protective orders to gag the defense whenever the State provides exculpatory evidence of police misconduct is no longer tenable" and that "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 of lawful speech." SD91. According to the court, nothing in RSA 105:13-b—a statute that requires the State to disclose to the defense exculpatory evidence in the personnel file of a police officer witness—"suggests that such exculpatory evidence, once disclosed, must be kept confidential." SD91. The court asserted that the public has a strong interest

[4] 5 U.S.C. § 552, et seq.

[5] *Union Leader Corp. v Fenniman*, 136 N.H. 624 (1993).

in the disclosure of information related to police misconduct and in allowing members of the defense bar to share information that "casts doubt on the credibility of particular police witnesses." SD93. The court invited the State "to make a fact-specific case that public disclosure of the information would result in an invasion of privacy" but concluded, "the court will not issue gag orders in blank." SD93. The court's narrative order also denied the motion to seal on the basis that "the filings at issue do not contain any factual information from a police personnel file." SD95.

The name and department of the police officer involved became a part of the public record when the court denied the motions to seal because the motions identified the officer. Therefore, on March 22, 2021, the State filed an emergency motion asking the court to reseal the proceedings, redact the officer's name, and stay the proceedings for thirty days to allow the State to decide whether to pursue an appeal. SA6-8. On April 1, 2021, the court granted the motion in part, holding that the discovery at issue did not need to be provided pending appeal, and setting May 17, 2021 as a status conference. SA6. On April 9, 2021 the State filed a motion asking the court to accept redacted copies of the prior filings; the court granted the motion on April 19, 2021. SA9-10, 15.

The court held the status conference on May 17, 2021, and issued an order confirming that the case is stayed pending the State's appeal. SA11.

B. Johnson

In October 2020, Jacob Johnson was charged with two counts of first-degree assault, two counts of criminal threatening with a deadly weapon, and one count of misdemeanor simple assault. SA30. On February

25, 2021, the State filed two assented-to motions for protective orders to maintain the confidentiality of potentially exculpatory evidence from the personnel file of two named police officers that the State needed to disclose to defense counsel to meet its *Brady/Laurie* obligations. SD62-64, 65-68. *See Brady*, 373 U.S. at 87; *Laurie*, 139 N.H. at 327; RSA 105:13-b, I; *N.H. R. Crim. P.* 50(c)(2)(A). The State also filed a motion to seal on the basis that the protective orders described the confidential and statutorily protected materials. SA17; *see N.H. R. Crim. P.* 50(d).

On February 25, 2021, the court issued two margin orders denying the motions. SD61, 64. The court explained:

> Police personnel files may be public records under RSA 91-A:4 and 5 unless there is a particularized concern of invasion of privacy. If the records could be accessed by any member of the public, the court will not issue a protective order. But, the State may renew the motion if it believes the records are not public records under RSA 91-A:4 and 5, as construed by the N.H. Supreme Court in the *Town of Salem* case last year.

SD61 (*citing Town of Salem*, 173 N.H. at 357); *see also* SD64.

The State filed a motion for reconsideration on March 4, 2021 raising the identical arguments that it raised in *Fuchs*. SD67-72. On March 18, 2021, the court denied the motion by a margin order that referenced the same narrative order as issued in *Fuchs*. SD67, 86-96. On March 22, 2021, the State filed an emergency motion seeking a stay pending appeal, and asking the court to reseal pleadings identifying the officers at issue or redact the officer's names. SA18-20. The court granted the emergency motion on April 1, 2021 and stayed the case. SA18. On April 9, 2021 the

State filed a motion asking the court to accept redacted copies of the prior filings; the court granted the motion on May 12, 2021. SA21.

On April 19, 2021, Jacob Johnson, through counsel, filed a motion stating that he wished to "clarify" his position on the protective orders and withdraw his earlier assent to the protective order because he "agrees with the [superior court's] reasoning and analysis in its March 18th Order." SA23-24. The State moved to strike the defendant's pleading on the basis that the defendant had numerous opportunities to clarify his position while the case was before the court, did not do so in a timely manner, and is estopped from changing his position now when the case has been stayed. SA25-29. As of July 12, 2021, the court had not ruled on this issue. SA33-34.

C. Hallock-Saucier

In February 2020, Jeffrey Hallock-Saucier was charged with three class B felonies: one count of criminal threatening, one count of criminal threatening against a person with a deadly weapon, and one count of reckless conduct with a deadly weapon. SA54. On March 5, 2021, the State filed an assented-to motion for a protective order to maintain the confidentiality of potentially exculpatory evidence from the personnel file of a named police officer that the State needed to disclose to defense counsel to meet its *Brady/Laurie* obligations. SD75-77. *See Brady*, 373 U.S. at 87; *Laurie*, 139 N.H. at 325; RSA 105:13-b, I; *N.H. R. Crim. P.* 50(c)(2)(A). The State also filed a motion to seal on the basis that the protective order described the confidential and statutorily protected materials. SA35. *See N.H. R. Crim. P.* 50(d).

On March 9, 2021, defense counsel filed an unsealed motion *in limine* asking to be allowed to inquire whether the officer named in the State's motion for a protective order "is on the *Laurie* list and how and why [he] got there." SA36-44. The State filed a sealed response and asked the court to deny the defendant's motion without prejudice pending his receipt of the potentially exculpatory evidence at issue. On March 16, 2021, the court issued a margin order indicating that it would hear defendant's motion prior to jury selection. SA36. The court noted that the "mere status of being on the so-called *Laurie* list (which (a) is not required by *Laurie* and (b) is not a list) is not something that may be inquired into." SA36.

On March 16, 2021, the court denied the State's motion for a protective order, the motion to seal that motion, and the motion to seal the State's response to the motion *in limine* by margin orders that referenced the narrative order the court issued in *Fuchs* and *Johnson*. SD75, SA35, 36, SD86-96.

On March 22, 2021, the State filed an emergency motion seeking a stay pending appeal, and asking the court to reseal pleadings identifying the officers at issue or redact the officer's names. SA45-47. The defense objected on the basis that jury selection was scheduled for April 20, 2021, that granting a stay was against the public interest, and that granting a stay would violate the defendant's speedy trial right. SA48-53. On March 23, 2021, the court issued an order ruling that the State's motion would be granted if the State appealed. SA45. On March 31, 2021, the court stayed the case pending this appeal. SA58.

The court also held that the State's motions which named the officer could be sealed if the prosecutor filed versions that redacted the officer's

name. SA47. The prosecutor filed the redacted versions. SA57-58 The court denied the State's request to seal or redact the defendant's motion *in limine*, which also included an officer's name. SA57.

On March 29, 2021, the State filed a motion for reconsideration raising the identical arguments raised in the motions for reconsideration in *Fuchs* and *Johnson*. SD78-84. The court denied the motion that same day and stated:

> The court remains willing to make a fact-based determination of whether a sufficiently compelling privacy interest exists to warrant a protective order. But the court will not issue a protective order in blank, sight unseen, merely because the substance of the information has to do with alleged misconduct on the part of a police officer. A blanket, one-sized fits all approach is unwarranted, unsupported by statute, and likely unconstitutional for the reasons set forth in the court's narrative order.

SD78.

D. Subsequent Procedural Developments

On April 13, 2021, the State filed a Rule 11 Petition for Original Jurisdiction asking this Court to review the superior court's denial of the protective orders and motions to seal in all three cases. SA60-110. The State also filed a motion to redact the officers' names and departments in the filed appendix. SA111-14.

In response, the defendants/respondents moved for summary dismissal, or in the alternative summary affirmance. SA115-144. The defendants argued that the State raised the appeal under the wrong appellate vehicle, and urged the court to summarily affirm the superior court based

on the plain language of RSA 105:13-b, and the interaction between the statute and the Right-to-Know Law. SA123-37. The defendants also argued that the court correctly denied the motions to seal. SA137-40. The defendants also filed a limited objection to the State's Motion to redact officers' identifying information. SA145-48.

The State objected to the defendant's motion, arguing that the case presented substantive questions of statutory interpretation that this Court had yet to fully consider or resolve and that the resolution of these questions will have broad implications for criminal discovery and civil right-to-know request throughout the State. SA 164-67, 169-72. The State withdrew its request for this Court to review the superior court's denial of the motions to seal on the basis that the superior court had subsequently granted motions to accept redacted copies of the pleadings. SA172-76.

On June 10, 2021, this Court accepted the State's petition for original jurisdiction and denied the defendants' motion for summary disposal. SA178. This Court also granted the State's motion to redact police officers' names and departments from documents in the State's appendix. SA179.

SUMMARY OF THE ARGUMENT

Certiorari is an "extraordinary remedy that is not granted as a matter of right, but rather at the court's discretion." *Petition of New Hampshire Division of State Police*, ___ N.H. at ___, ___ A.3d ___, 2021 WL 1152119 (slip op. at 3) (issued Mar. 26, 2021); *see Sup. Ct. R.* 11(1). This court's review of the superior court's decision on a petition filed pursuant to Supreme Court Rule 11 "entails examining whether the 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.*

The superior court decided a question of substance—whether materials taken directly from a police personnel file are "presumptively public documents" or confidential within constitutional limitations—in a manner that overlooks the plain language of RSA 105:13-b, upends long-standing practice in cases involving similar discovery, and transforms an undisputed criminal-discovery request into a fact-specific, highly litigated 91-A case. The court's disagreement with the New Hampshire Legislature's decision to make police personnel files confidential by statute—a matter of public policy—does not give the court the discretion to effectively abrogate RSA 105:13-b and introduce otherwise unnecessary delays and civil legal issues into criminal cases. This Court should exercise its discretion and reverse the superior court's denials of the protective order in each of the three criminal cases.

ARGUMENT

I. THE SUPERIOR COURT ERRED WHEN IT DETERMINED THAT RSA 105:13-b PROVIDES NO CONFIDENTIALITY TO MATERIALS FROM POLICE PERSONNEL FILES ONCE THOSE MATERIALS ARE DISCLOSED IN DISCOVERY.

Although this Court "generally review[s] trial court decisions regarding discovery management and related issues deferentially under [the] unsustainable exercise of discretion standard, where, as here, the court's ruling is based on its construction of a statute, [this Court's] review is *de novo*." *Petition of New Hampshire Division of State Police*, ___ N.H. at ___, 2021 WL 1152119 (slip op. at 7) (quotation omitted).

This Court is the final arbiter of the intent of the Legislature as expressed in the words of a statute considered as a whole. *State v. Proctor*, 171 N.H. 800, 805 (2019). This Court first looks to the language of the statute itself, and, if possible, construes that statutory language according to its plain and ordinary meaning. *Id.* This Court interprets 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.* This Court "must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words." *Id.*

This Court "interpret[s] a statute in the context of the overall statutory scheme and not in isolation." *Id.* This enables the Court "to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Hogan v. Pat's Peak Skiing, LLC*, 168 N.H. 71, 73 (2015). This Court "construe[s] all parts of a statute together to effectuate its overall

purpose and avoid an absurd or unjust result." *Petition of Carrier*, 165 N.H. 719, 721 (2013).

A. The Plain Language of RSA 105:13-b Specifies that Materials from Police Personnel Files Shall be Treated as Confidential.

RSA 105:13-b, titled "Confidentiality of Personnel Files," is "designed to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records." *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774, 780 (2015). RSA 105:13-b makes police personnel files strictly confidential with two narrow exceptions that relate specifically to the discharge of prosecutors' *Brady* and *Laurie* obligations. Beyond those obligations, police personnel file material remains confidential unless a defendant meets a high burden of probable cause that a file contains relevant information. In all other instances, the file remains confidential.

The first paragraph of the statute identifies the first exception: "Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal trial shall be *disclosed to the defendant*." RSA 105:13-b, I (emphasis added).

The third paragraph of the statute delineates the only other exception to police personnel file confidentiality, stating that no police personnel file of an officer serving as a witness in a criminal case will be disclosed unless the "sitting judge makes a specific ruling that probable cause exists to believe the file contains evidence relevant to that criminal case." RSA 105:13-b, III. In that event, "[t]he judge shall examine the file *in camera*

and make a determination whether it contains evidence relevant to the criminal case," and, then, "only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence . . . ." *Id.* The statute closes by reaffirming the strict confidentiality of police personnel files: "The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer." *Id.*

The plain language of the statute, in short, makes police personnel files broadly confidential with limited exceptions to protect a defendant's constitutional right to discovery. This Court's decisional law recognizes this basic principle. *See Gantert v. City of Rochester*, 168 N.H. 640, 646 (2016) (citing RSA 105:13-b for the proposition that "police personnel files are generally confidential by statute"); *see also In re Petition of State*, 153 N.H. 318, 321 (2006) (citing RSA 105:13-b and repeatedly referring to police personnel files as "confidential personnel files").

When RSA 105:13-b, I is read within the context of the statute as a whole, the statutory language and scheme makes plain that a defendant has a right to *receive* exculpatory evidence. The State readily recognizes this right. However, a defendant's right to *receive* potentially exculpatory material as a matter of statute and constitutional law, does not equate to a right to *redistribute* that material, especially when the legislature has explicitly decided to make materials contained in police personnel files confidential. The statute mandates disclosure to the defendant. But the statute does not provide the defendant with an express disclosure right, but instead makes clear that police personnel file material must otherwise remain confidential.

Accordingly, the superior court erred when it denied the assented-to motions for protective orders in each case on the basis that "[n]othing in [RSA 105:13-b, I], or the statute as a whole, suggests that such exculpatory evidence, once disclosed, must be kept confidential." SD91. The court's novel statutory interpretation is erroneous because it does not construe RSA 105:13-b, I, together with the rest of the statute to effectuate the statute's overall purpose. *See Carrier*, 165 N.H. at 721. As this Court explained in *Duchesne*, the Legislature enacted RSA 105:13-b "to balance the rights of criminal defendants against the countervailing interests *of the police and the public in the confidentiality of officer personnel records*." 167 N.H. at 780 (emphasis added). The court's interpretation of RSA 105:13-b, I as "nothing more than a statutory command to the prosecutor to provide discovery," SD91, is therefore erroneous because it overlooks the statute's plain language, statutory purpose, and disregards the context of the statute as a whole. *See Carrier*, 165 N.H. at 721.

The court's interpretation, which allows a defendant to do whatever he or she wants with potentially exculpatory evidence from a police personnel file, also renders an absurd and unjust result. *See id.* It would be absurd if the only people in New Hampshire with the power to undercut the confidentiality that the Legislature elected to extend to police personnel files were criminal defendants who received strictly limited disclosures for the specific purpose of their particular criminal defense. Moreover, it would be unjust if a defendant—who may believe that selective disclosure could assist his case—released confidential information to the public before a trial court has even ruled on its admissibility or

materiality. Such revelations could interfere with the judicial process by tainting the jury pool and interfering with the parties' ability to try the case.

This Court should reverse the superior court's interpretation of RSA 105:13-b and conclude that the statute's plain language and purpose do not give a defendant unbridled discretion to redistribute confidential materials from a police officer's personnel file pretrial.

II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW WHEN IT DENIED THE ASSENTED-TO MOTION ON THE BASIS THAT MATERIALS FROM POLICE PERSONNEL FILES ARE PRESUMPTIVELY PUBLIC RECORDS UNDER THE RIGHT-TO-KNOW LAW.

The superior court erred when it treated the criminal discovery matter as a 91-A request and concluded that police personnel records are presumptively public records under RSA 91-A:4 because it:

(1) misinterpreted the applicability of the Right-to-Know Law to criminal discovery in general;

(2) overlooked the fact that RSA 105:13-b constitutes a specific statutory exemption to 91-A; and,

(3) failed to recognize that even setting aside the statutory exemption, under RSA 91-A:5, "personnel" records are "exempted" from *per se* disclosure and information compiled for law enforcement purposes receives additional protections under the *Murray* exemption. [6]

A. Public Records Laws Like RSA 91-A and FOIA are not Intended to Delay Ongoing Litigation or Enlarge the Scope of Discovery, And So, are Not The Appropriate Framework Through Which To Analyze an Assented-to Protective Order.

The superior court erred as a matter of law when it analyzed the assented-to discovery requests under a 91-A framework instead of the applicable rules of criminal procedure. As this Court held in *New Hampshire Right to Life*, the Right-to-Know Law "should not be used to circumvent . . . discovery rules." *New Hampshire Right to Life v. Dir., New*

[6] *Murray v. New Hampshire Div. of State Police, Special Investigation Unit*, 154 N.H. 579, 582 (2006)

Hampshire Charitable Trusts Unit, 169 N.H. 95, 106 (2016). Federal courts interpreting FOIA, a body of law this Court frequently considers when construing RSA 91-A, have also long-held that public record requests do not extend the scope of discovery permitted under the applicable rules of criminal procedure in pending criminal matters. *See, e.g., N.L.R.B. v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978) (providing that "FOIA was *not* intended to function as a private discovery tool"); *United States v. U.S. Dist. Court, et al*., 717 F.2d 478 (9th Cir. 1983); *Fruehauf Corp. v. Thornton*, 507 F.2d 1253 (6th Cir. 1974); *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978).

The reasoning in *United States*, 717 F.2d at 480-81, as expressed by then Ninth Circuit Court of Appeals Judge Anthony Kennedy is particularly helpful in demonstrating why the orderly and efficient operation of the criminal justice system requires that the Right-to-Know Law not be used to transform otherwise routine, and statutorily-governed criminal discovery. In the Ninth Circuit case, a criminal defendant awaiting trial made a public record request pursuant to FOIA. *Id*. at 479. The prosecutor did not turn over the requested records because they were not "material to the preparation of the defense," which is the standard for discovery established by Fed. R. Crim. P. 16. *Id*. at 480. In the criminal matter, the defendant moved to compel the government to produce the requested FOIA records. *Id*. The superior court conducting the criminal case ordered the United States to release the documents to the court for inspection or file a detailed index of the documents and any claimed FOIA exemptions. *Id.* at 479.

The United States Court of Appeals for the Ninth Circuit held that it was improper for the trial court to order the production of the FOIA records

in the criminal matter, because "in criminal cases the Freedom of Information Act does not extend the scope of discovery permitted under Rule 16." *Id*. at 480. The Ninth Circuit took the unusual step of intervening in the trial court matter because the "necessary consequence of the trial court's ruling would be that, as a routine discovery device in criminal cases within this circuit, counsel would request disclosure under [FOIA], a substantial displacement of the balance established for criminal discovery by Rule 16." *Id*. at 481. The Ninth Circuit explained that the "harm to the Government in allowing FOIA discovery to override Rule 16 would be substantial in this case and in all later criminal cases…compel[ing] [it] to devote its scarce resources to screen and process FOIA material." *Id*. The Court noted that allowing FOIA to supplement criminal discovery would also impose asymmetric burdens on the litigants: "the prosecution, instead of concentrating on the criminal case, would be compelled to devote its scarce resources to screen and process FOIA material" but "[d]efense counsel would not be under a similar burden." *Id.* The Ninth Circuit issued a Writ of Mandamus and directed the district court to vacate the orders requiring the Government to comply with FOIA requests in the middle of a criminal discovery matter. *Id.*

Circuit Courts throughout the country have similarly concluded that public records requests do not alter or expand a criminal defendant's discovery rights beyond those already provided by statute and the Rules of Criminal Procedure. For example, the Fifth Circuit Court of Appeals explained that "[a]lthough information obtained through the FOIA may be useful in a criminal trial, . . . FOIA was not intended as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already

provided by the Federal Rules of Criminal Procedure." *United States v. Murdock*, 548 F.2d 599, 602 (5th Cir. 1977). The United States Court of Appeals for the D.C. Circuit has similarly observed that "FOIA is not a substitute for discovery in criminal cases or in habeas proceedings." *Roth v. U.S. Dep't of Just.*, 642 F.3d 1161, 1177 (D.C. Cir. 2011); *see also United States v. Brooks*, 449 F. App'x 91, 93 (3d Cir. 2011) ("Nor does FOIA otherwise expand the scope of discovery available in a criminal case."); *Fruehauf*, 507 F.2d at 1254 ("We are of the view that the Freedom of Information Act was not intended to serve as a substitute for criminal discovery.").

Here, the superior court—as opposed to the defendants—interjected a right to know analysis in the middle of the criminal case. But the fact that the court, as opposed to the defendant, introduced the inapplicable analysis is of no moment: the principles of substantive law and judicial efficiency that led the Circuit Courts in the cases cited above to reject the application of FOIA into criminal discovery apply with equal force. Just as FOIA was not intended to delay litigation, impose asymmetric burdens during criminal discovery, or enlarge the scope of documents available to a defendant during criminal discovery in federal cases, RSA 91-A was not intended to delay litigation, impose additional pleading burdens on the State, or enlarge a defendant's discretion to disclose confidential documents to the public pending trial.

Furthermore, if this Court affirms the superior court's application of the Right-to-Know framework in this otherwise routine, assented-to discovery request, the harm to the State's orderly and efficient criminal justice operation will be substantial and similar to the disruptions

experienced in the cases cited above. The necessary consequence of such a ruling "would be that, as a routine device in criminal cases . . . counsel would request disclosure under the [Right to Know Law], a substantial displacement of the balance established for criminal discovery." *United States*, 717 F.2d at 481. In the absence of instruction from the Legislature that it intends for rules of criminal procedure and discovery to be replaced by the RSA 91-A framework, this Court conclude find that the superior court erred as a matter of law when it *sua sponte* interjected a RSA 91-A balancing analysis into a criminal discovery matter.

To be sure, a criminal defendant—like any member of the public—retains the right to seek information pursuant to Right to Know Laws. *See Morgan v. U.S. Dep't of Just.,* 923 F.2d 195, 198 (D.C. Cir. 1991) (noting that "a defendant's right to obtain information from the government in discovery under the Federal Rules of Criminal Procedure is separate and independent from his right to obtain the information under the FOIA"). However, "the disclosure obligation that *Brady* [and *Laurie*] imposes at a defendant's criminal trial based on constitutional considerations is not the same disclosure obligation imposed under FOIA [and 91-A] by Congress [and the New Hampshire Legislature]." *Boyd v. Crim. Div. of U.S. Dep't of Just.,* 475 F.3d 381, 390 (D.C. Cir. 2007). "In other words, the disclosure requirements are not coextensive." *Id.* A criminal defendant—like any other individual—may make a Right to Know request pursuant to the 91-A statutory scheme and government agencies can respond as they would for any other member of the public. *See U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 771 (1989) (noting that "the identity of the requesting party has no bearing on the merits of his or her FOIA

request"). However, because Right to Know Requests and criminal discovery remain separate and independent legal frameworks, a trial court errs if it conflates the two by applying a public records request analysis to expand or alter criminal discovery. Therefore, this Court should hold that the superior court erred as a matter of law when it conflated an assented-to criminal discovery matter governed by statute and long-standing court practice with RSA 91-A and ordered the parties to treat the assented-to criminal discovery matter as if it were a disputed, civil Right to Know case.

B. Even if the Right to Know Framework Applied in the Context of Criminal Discovery, RSA 105:13-b Constitutes a Statutory Exemption to the Right-to-Know Law, Which Protects Materials in Police Personnel Files from 91-A Disclosure.

The superior court erred when it concluded that police personnel records are presumptively public records because it overlooked the fact that RSA 105:13-b constitutes a statutory exemption to the Right-to-Know Law.

RSA 91-A:4, I, states that citizens may inspect governmental records "except as otherwise prohibited by statute . . . ." RSA 105:13-b is just such a statute. *See New Hampshire Ctr. for Pub. Int. Journalism v. New Hampshire Dep't of Just.*,173 N.H. 648, 656 (2020) (assuming 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").

As stated above, RSA 105:13-b prohibits even a criminal defendant from accessing or inspecting police personnel files outside of the narrow constitutional disclosures required by *Brady/Laurie*. Other than the limited

and narrow disclosure provisions, the statute expressly states that materials from personal files shall remain confidential. RSA 105:13-b, III. The statute establishes, therefore, that the public has no right to access or inspect police personnel files. Had the Legislature intended for members of the public to be able to review a police officer's personnel file under the Right-to-Know law, it would have so stated. Instead, the Legislature placed police personnel files beyond the scope of an RSA 91-A request by enacting a statute that ensured limited disclosure to meet a constitutional requirement to a particular criminal defendant in a particular criminal case. RSA 105:13-b, III. Otherwise, even within the context of that particular criminal case, the file "shall be treated as confidential." RSA 105:13-b, III. Therefore, the court erred when it denied the assented-to protective order for materials taken directly from police personnel files on the basis that these documents "are subject to mandatory public disclosure under the Right to Know statute." SD89.

The court's interpretation of RSA 105:13-b as "nothing more than a statutory command to the prosecutor to provide discovery," SD91, also leads to an absurd result. *State v. Gallagher*, 157 N.H. 421, 423, 951 A.2d 130, 131 (2008) ("We do not presume that the legislature would pass an act leading to an absurd result . . . .") (quotation omitted)). If this Court affirms the superior court's construction of RSA 105:13-b, and interjection of RSA 91-A in the context of criminal discovery, a criminal defendant could circumvent the threshold probable cause requirement in RSA 105:13-b by simply requesting a police officer's entire personnel file under the Right-to-Know Law during the pendency of the criminal discovery process. The absurdity of this result, in which a criminal defendant would have less right

to discovery within the context of his criminal case than as a member of the public seeking the same documents, provides additional evidence that the legislature intended RSA 105:13-b to constitute a statutory exemption to the Right to Know Law. Accordingly, the superior court erred as a matter of law when it disregarded RSA 105:13-b as "nothing more than a statutory command to the prosecutor to provide discovery," SD91, and failed to conclude that RSA 105:13-b constitutes a statutory exemption to the Right to Know law.

C. Within the Context of the Right to Know Law, Personnel Records are Not *Per Se* Available to the Public but are Subject to a Fact and Policy Intensive Balancing Test.

Even if the Legislature had not enacted RSA 105:13-b and statutorily exempted police personnel records from the Right-to-Know law, the Right-to-Know law itself recognizes that personnel records are not—as the superior court claims—"presumptively public records." SD52.

RSA 91-A:4, I, states that citizens may inspect governmental records "except as otherwise prohibited by . . . RSA 91-A:5." RSA 91-A:5 provides that certain government records are exempt from disclosure, including: "[r]ecords pertaining to internal personnel practices; confidential, . . . personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute an invasion of privacy." RSA 91-A:5, IV. In May 2020, this Court affirmed "records documenting the history or performance of a particular employee fall within the exemption for personnel files." *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 340 (2020); RSA 91-A:5, IV.

Personnel records, like the other categories of records in RSA 91-A:5, IV, are not *per se* exempt from disclosure or *per se* available to the public. Rather, personnel records are "sufficiently private" so as to trigger this Court's well-established three-step 91-A analysis. *Reid v. New Hampshire Att'y Gen.,* 169 N.H. 509, 528 (2016). This fact-specific balancing test assesses and balances an individual's privacy interest and the government's interest in nondisclosure against the public interest in disclosure. *Id.* at 528-29. To the State's knowledge, this Court has never concluded that the balance weighs in favor of disclosure in a case involving materials contained *in* a police officer's personnel file. Indeed, it remains an open question of law whether even information that is derived from, but not contained within, a police personnel file is subject to unredacted disclosure under 91-A:5, IV. *See New Hampshire Ctr. for Pub. Int. Journalism*, 173 N.H. at 651 (holding the EES "is neither confidential under RSA 105:13-b nor exempt from disclosure under the Right-to-Know law as an 'internal personnel practice' or a 'personnel file'" but remanding to the trial court to evaluate under the 91-A three-part balancing test).[7] Therefore, even setting aside the statutory protections contained in RSA 105:13-b, police personnel records are not "presumptively public records" because members of the public are not entitled to these documents on demand.[8]

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[7] The New Hampshire Senate and House of Representatives have passed HB 471, which inserts an additional section into RSA 105:13-d which states that "[s]ubject to the provisions of this section, the exculpatory evidence schedule may be maintained by the department of justice and shall be a public record subject to RSA 91-A." SA238-41. As of July 13, 2021, the bill has not been sent to the Governor. SA238-41.

[8] The trial court's narrative order acknowledges that "the court often grants protective orders relating to a witness' medical records," SD89, a category of records that also falls

Federal cases interpreting FOIA provisions similar to the personnel exemption in RSA 91-A also support the proposition that police personnel records are not "presumptively public records" but instead fall within an exemption to a public records request. *Seacoast Newspapers, Inc.*, 173 N.H. at 338. *See, e.g., Reporters Comm. For Freedom of Press*, 489 U.S. at 755-56 (noting "Exemption 3 applies to documents that are specifically exempted from disclosure by another statute. [5 U.S.C.] § 552(b)(3). Exemption 6 protects 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' [5 U.S.C.] § 552(b)(6) Exemption 7(C) excludes records or information compiled for law enforcement purposes, 'but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.' [5 U.S.C.] §552(b)(7)C).").

To the State's knowledge, individuals and entities in New Hampshire have submitted few, if any, Right-to-Know requests for material contained in police personnel files. This procedural reality means that few, if any, trial courts in New Hampshire have had the opportunity to analyze whether RSA 105:13-b constitutes a statutory exemption to RSA 91-A or whether this Court's balancing test weighs in favor of disclosure. This

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within the 91-A:5, IV exemptions. Nevertheless the court contends that it would be "inappropriate" and a "prior restraint on speech relating to a matter of public record" for the court to grant a protective order for personnel files in the absence of a fact-specific 91-A argument. SD89. The 91-A statute treats medical records and personnel records the same: both are "exempted from the provisions of this chapter." RSA 91-A:5. Therefore neither are "presumptively public records" that are *per se* available to any member of the public upon request.

procedural reality also necessarily means that this Court has not had the opportunity to provide guidance on these issues of statutory interpretation and the applicability of other exemptions and privileges. For example, this Court has adopted the *"Murray* exemption" to 91-A requests. *See Murray*, 154 N.H. at 582; *Montenegro v. City of Dover*, 162 N.H. 641, 645 (2011). This exemption mirrors FOIA exemption 7 and exempts "records or information compiled for law enforcement purposes" from disclosure in six circumstances including when production of records would "constitute an unwarranted invasion of personal privacy," "disclose the identity of a confidential source," or "information furnished by a confidential source." *Murray*, 154 N.H. at 582, *see also* 5 U.S.C. 552 (b)(7)(C)(D).

According to Federal Guidance, personnel investigations of government employees fall within this exemption "if they focus on 'specific and potentially unlawful activity by particular employees' of a civil or criminal nature." Freedom of Information Act Guide, 2004 Edition: Exemption 7 published by the United States Department of Justice, *https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7* (quoting *Stern v. FBI*, 737 F.2d 84, 89 (1984)). Although the "line between mere employee monitoring and an investigation of an employee that satisfies the threshold requirement of Exemption 7 is narrow," many courts have concluded that documents identifying a particular employee as having committing wrongdoing, documents detailing investigations into public employees, or documents identifying individuals who provided information about public employees on a confidential basis fall within the exemption. *See,* FOIA Guide, 2004 Edition: Exemption 7 (explaining when the exemption applies and collecting cases in footnotes 42 through 87).

Simply put, appeal of an assented-to criminal discovery request is not the appropriate avenue to resolve the complex, fact-intensive issues of first impression that arise when the parties' assented-to motions are reframed and analyzed as Right-to-Know requests. In a properly raised 91-A request for police personnel records, individual officers, police unions, and other stakeholder groups who believe they would be affected by any court-ordered disclosure could ask the court's permission to join the case or submit amicus briefs on the issues raised therein. The court could then issue a briefing schedule, make findings of fact, and resolve legal questions within the context of a fully litigated case. In addition, the contested, complicated, and likely lengthy civil case could proceed with no deleterious effect on the state's criminal justice system.

The superior court erred when it reframed the assented-to criminal discovery motions as a 91-A case. The court deepened its error when it summarily concluded that police personnel files are presumptively public documents that must be disclosed to the defendant absent a protective order—and thereby to the public—unless the State makes a fact-intensive 91-A argument. No New Hampshire legal authority has ever determined that materials from a police personnel file are subject to either unredacted or redacted disclosure under RSA 91-A. Therefore, this Court should hold that the superior court—in concluding that the Right-to-Know Law applied in the context of the assented-to criminal discovery requests and required the State to make a fact-specific argument as to why documents in police personnel files should not be publically disclosed—erred as a matter of law.

III. THE SUPERIOR COURT UNSUSTAINASBLY EXERCISED ITS DISCRETION WHEN IT *SUA SPONTE* TRANSFORMED ROUTINE, NON-ADVERSARIAL, ASSENTED-TO CRIMINAL DISCOVERY MOTIONS INTO RSA 91-A PROCEEDINGS AND DELAYED THREE CRIMINAL CASES.

The assented-to motions for protective orders in all three cases cited RSA 105:13-b as the basis for the parties' understanding that the materials from the police officers' personnel files are confidential by statute. SD53, 61, 64, 67, 74, 75, 78, 86. The proper and long-standing interpretation of RSA 105:13-b supports the parties' understanding that the documents from police personnel files were confidential by statute. No statute, court practice, or rule prevented the court from granting the assented-to request. To the contrary, prosecutors, criminal defense attorneys, and the courts have uniformly understood RSA 105:13-b as a statutory privacy right for police personnel files and have uniformly granted protective orders in cases involving potentially exculpatory evidence for the last twenty-five years. Unbroken trial court practice of granting protective orders in similar cases, together with several memoranda to State law enforcement agencies illustrate this understanding.

By way of background, in 1996, in response to this Court's decision in *State v. Laurie*, 139 N.H. at 325, then Attorney General Jeffrey Howard distributed a memo to all law enforcement agencies about the disclosure of exculpatory and impeachment evidence. SA180-85. That memo noted that "The New Hampshire Legislature created a statutory privacy right for police personnel files, RSA 105:13-b, that is

similar to the privacy right afforded DCYF child abuse and neglect investigation records." SA181.

In 2004, then Attorney General Peter Heed issued another memorandum establishing standardized guidelines and polices followed throughout the State to identify, manage, and disclose exculpatory evidence contained in police personnel files. SA186. The memo instructed county attorneys and law enforcement agencies to identify officers who were subject to possible *Laurie* disclosures and reiterated that a police officer's "personnel file is confidential by statute," RSA 105:13-b. SA188, *see also* SA193, 198. The memo also included a sample motion that law enforcement could use when asking a trial court to authorize the State to disclose confidential materials to a defendant "subject to a protective order barring the parties from further disclosing the information in any form, or using the information for any purpose other than the pending litigation." SA200-01.

In 2017, in response to changes in RSA 105:13-b and new case law, then Attorney General Joseph Foster issued a law enforcement memorandum which created a state-wide list of officers with exculpatory evidence in their police personnel files. SA203-07. The memo directed that "[i]n compliance with RSA 105:13-b, prosecutors will provide potentially exculpatory evidence *directly to the defense* for any law enforcement witnesses in the case. This disclosure should be done in conjunction with a protective order until it is determined that the information is admissible at trial." SA206. The memo included a sample motion for a protective order and sample protective order. SA224-26, 227.

The assented-to motions for protective filed in the three cases at issue in this appeal followed the standard template and argued:

> Law enforcement personnel files are considered confidential with the exception of production for discovery in an on-going criminal matter. *See* RSA 105:13-b. The proposed protective order is necessary to ensure the confidentiality of the law enforcement officer's personnel records while meeting the State's competing interest in providing exculpatory evidence in a criminal matter, enabling the Defendant and his counsel to review complete discovery and prepare for trial. *See generally, State v. Laurie*, 139 N.H. 325 (1995); *N.H. R. Prof Conduct* 3.8(d).

SD51-52, 61-62, 64-65, 75-76. The proposed protective orders would prohibit defense counsel "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." SD53, 63, 66, 77. The proposed order would also require defense counsel to file a motion with the court before "any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence." SD53, 63, 66, 77.

To the best of the State's knowledge, trial courts in New Hampshire have, without exception, granted protective orders in cases involving pre-trial disclosure of potentially exculpatory evidence contained within a police officer's personnel file. *C.f. Union Leader Corp. v. Town of Salem*, No. 218-2018-CV-01406, at *27-28, (Rockingham Cty. Super. Ct. Jan. 21, 2021) (holding that an Internal Affairs Investigative Report that does not appear to have been contained within any individual officer's personnel file must be disclosed with limited reactions); *Provenza*

v. Town of Canaan, No. 215-2020-CV-155, at *14, DM 139 (Grafton Cty. Super. Ct. Dec 2, 2020) (holding that RSA 105:13-b did not shield public disclosure of an investigative report because "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 making, there is nothing in the records to suggest that the Report is contained in or is a part of the plaintiff's personnel file"); *Salcetti v. City of Keene*, No. 213-2017-CV- 00210, at *4-5, DM 150-51 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (not addressing RSA 105:13-b but ordering unredacted disclosure of a "[c]itizen [c]omplain file[s]" after noting that the "File" is "not a personnel file").

The superior court's order suggests that it reads this Court's opinion in *Town of Salem* as fundamentally changing the law with regard to materials contained within police personnel files. The court's order states that: "the practice of willy-nilly issuing protective orders to gag the defense whenever the State provides exculpatory evidence of police misconduct is no longer tenable" because "the *Town of Salem* case did away with the categorical approach taken in *Fenniman* and replaced it with a fact-specific balancing test." SD90-91; *citing Town of Salem*, 173 N.H. at 347; *see also Fenniman*, 136 N.H. at 624.

This Court's opinion in *Town of Salem* did not change the legal landscape with regard to the proper interpretation of RSA 105:13-b or the applicability of RSA 91-A to materials contained within a police officer's personnel file. Simply put, *Town of Salem* involved: 1) different facts—an audit report of an entire police department that was not contained within an

individual officer's personnel files; 2) a different procedural posture—a properly raised civil Right-to-Know Request as opposed to an assented-to criminal discovery matter; and 3) a different Right-to-Know exemption—the internal personnel practices exemption instead of the personnel practices exemption. Furthermore, because the document in *Town of Salem* was not contained in a police officer's personnel file, the case did not trigger the heightened protections the Legislature extended to police personnel files by enacting RSA 105:13-b. *See New Hampshire Ctr. for Pub. Int. Journalism*, 173 N.H. at 656 (RSA 105:13-b "pertains only to information maintain *in* a police officer's personnel file"). Therefore, this Court's decision in *Town of Salem* does not provide a legal basis for the superior court's unprecedented decision to deny assented-to discovery motions that found ample support in statute and judicial practice.

The superior court plainly believes, as a matter of policy, that police personnel file materials should be available to the public, stating:

> While every case is different, and while there are factual exceptions to every rule, there is a strong and compelling public interest in disclosure of information relating to dishonest and assaultive behavior committed by police officers in the course of their official duties. The public has an interest in seeing how its police department investigates and disciplines its own. After all, it is the public, through its representatives that determines who will serve as police chief and how internal discipline will be monitored. The public interest is also served by preventing precisely what the State's motions would accomplish, i.e. the inability for the defense bar in a particular locality to share information that casts doubt on the credibility of particular police witnesses.

SD93. And:

> [T]he motions for protective orders in these cases touch on public policy concerns that may be addressed in other fora, such as the Legislature, city councils, town select boards and police commissions. The nation as a whole is presently wrestling with the manner in which police misconduct is redressed and prevented. How can the public do ***its*** job if it does not know how the present system is functioning?

SD94 (emphasis in the original). However, this Court has frequently recognized that "[m]atters of public policy are reserved for the legislature." *See, e.g.*, *Doe v. Comm'r of New Hampshire Dep't of Health & Hum. Servs.*, ___ N.H. at ___, ___ A.3d ___, 2021 WL 1883165 (slip op. at 18) (issued May 11, 2021); *CaremarkPCS Health, LLC v. New Hampshire Dep't of Admin. Servs.*, 167 N.H. 583, 591 (2015); *see also Dolbeare v. City of Laconia*, 168 N.H. 52, 56-57 (2015) (holding that to the extent to which a plaintiff relied upon public policy to support her statutory construction, the plaintiff made her argument in the wrong forum).

The judiciary's function "is not to make laws, but to interpret them, [and] any public policy arguments relevant to the wisdom of the statutory scheme and its consequences should be addressed to the General Court." *Appeal of New England Police Benevolent Ass'n, Inc.*, 171 N.H. 490, 497 (2018) (quotation omitted). The legislature, by enacting a specific statute on the issue of the confidentiality of police personnel records, *see* RSA 105:13-b, and including an exemption for medical, personnel, and other confidential records in the Right-to-Know law, *see* RSA 91-A:5, IV, made the policy determination that police personnel records are confidential—not presumptively public.

The superior court may disagree with the Legislature's policy determination, or believe that overriding policy reasons favor disclosure in cases involving police misconduct; however, disagreement on a matter of public policy does not give the court the discretion to disregard the Legislature's choice and effectively amend the statutory scheme as it sees fit. *C.f. Appeal of New England Police Benevolent Ass'n, Inc.*, 171 N.H. at 497 (analyzing a statute under the normal canons of statutory interpretation and noting that "[i]f the legislature disagrees with our interpretation, it is free to amend the statutory scheme as it sees fit"). The Legislature remains responsible for enacting statutes that balance policy considerations and it is currently working to do so on the very matters implicated by these cases.[9]

As both this Court and the United States Supreme Court have observed, the "'adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges to fashion the questions for review.'" *Hodges v. Johnson*, 170 N.H. 470, 490-91 (2017) (*Bassett*, J., dissenting) (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 195 n.4 (1994) (*Stevens*, J., dissenting) (quotations omitted). The superior court unsustainably exercised its discretion when it denied the State's assented-to requests for protective orders—requests supported by statute and long-standing precedent—and

[9] The most recent update from the Commission of Law Enforcement Accountability, Community and Transparency ("LEACT") makes clear that the New Hampshire Legislature has not been idle on these matters of public policy. *See* LEACT Recommendations- June 2021 Monthly Tracking Dashboard (detailing the current implementation status of each of the forty-eight recommendations from the LEACT commission which includes considerable legislation in progress). SA228-36. Also available online at: https://www.governor.nh.gov/sites/g/files/ehbemt336/files/inline-documents/sonh/060921-dashboard.pdf (last visited July 12, 2021).

refashioned the matters into complex, fact-specific, civil Right-to-Know proceedings in order to advance the court's public policy preferences. The superior court's unsustainable exercise of discretion has undermined judicial effectiveness and the adversary process, has delayed discovery in all three criminal cases, and has resulted in a stay in a case that was previously set for jury selection on April 20, 2021. *See* SA45, 58. This Court should reverse the superior court's narrative order, order the court to grant the assented-to requests for a protective order, and remand so that the defendants' criminal cases can proceed.

CONCLUSION

WHEREFORE, the State requests that this Court order the Superior Court to grant the motions for a protective order in each case, and remand so the criminal cases can proceed.

The State requests a fifteen-minute argument.

The appealed decisions are in writing and appended to this brief.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

July 14, 2021

/s/Elizabeth Velez
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CERTIFICATE OF COMPLIANCE

I, Elizabeth C. Velez, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,487 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

July 14, 2021 *<u>/s/Elizabeth Velez</u>*
Elizabeth Velez

CERTIFICATE OF SERVICE

I, Elizabeth C. Velez hereby certify that a copy of the State's brief shall be served on the following parties of record, through the New Hampshire Supreme Court's electronic filing system:

Alexander J. Vitale, Esquire, counsel for Jacob Johnson

Peter R. Decato, Esquire, Henry R. Klementowicz, Esquire, Gilles R. Bissonnette, Esquire, Albert E. Scherr, Esquire, and **Robin D. Melone, Esquire**, counsel for Jeffrey Hallock-Saucier

Carl D. Olson, Esquire, counsel for Nicholas Fuchs

July 14, 2021

/s/Elizabeth Velez
Elizabeth Velez

ADDENDUM TABLE OF CONTENTS

State v. Jeffrey Hallock-Saucier Documents (217-2020-CR-00089)

Common Narrative Order

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

2-25-2021
DENIED WITHOUT PREJUDICE. See margin order below.

Honorable Andrew R. Schulman
February 25, 2021

STATE OF NEW HAMPSHIRE

v.

NICHOLAS FUCHS

217-2019-CR-0581

** FILED UNDER SEAL **

MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS

NOW COMES the State of New Hampshire, by and through the Office of The Merrimack County Attorney and undersigned counsel, and hereby request that the Court issue a Protective Order of Discovery Materials to be provided to Defense Counsel in the above-captioned matter that include materials from a law enforcement officer's personnel file. In further support of this motion, the State says as follows:

1. Pursuant to the State's obligation to provide exculpatory evidence to the defense, the State has obtained potentially exculpatory evidence from the [redacted] Department consisting of materials from [redacted]' s personnel file. [redacted] may be called as a witness for the State in this matter.

2. While the State acknowledges that these materials may be potentially exculpatory, the State does not concede that these materials may be used in open court for impeachment of [redacted]. This will be the subject of a later Motion in Limine in this matter.

3. In the interim, the State is asking that Defense Counsel be prohibited from discussing these materials or providing a copy of the materials from [redacted] personnel file that will be produced in discovery, to anyone other than Defense Counsel and his investigator(s).

4. The Court has the authority to issue this proposed protective order. Indeed, it is well-established that the Court has the inherent authority to exercise its sound discretion in matters concerning pretrial discovery. See State v. Emery, 152 N.H. 783, 789 (2005); State v. Smalley, 148 N.H. 66, 69 (2002); State v. Delong, 136 N.H. 707, 709 (1993). Pursuant to Rule 12 of the New Hampshire Rules of Criminal Procedure, therefore, the Court may at any time restrict or even deny discovery "[u]pon a sufficient showing of good cause." See N.H. R. Crim. P. 12(b)(8).

5. Law enforcement personnel files are considered confidential with the exception of production for discovery in an on-going criminal matter. See RSA 105:13-b. The proposed protective order is necessary to ensure the confidentiality of the law

enforcement officer's personnel records while meeting the State's competing interest in providing potentially exculpatory evidence in a criminal matter, enabling the Defendant and his counsel to review complete discovery and prepare for trial. See generally, State v. Laurie, 139 N.H. 325 (1995); NHR.ProfC. 3.8(d).

6. Counsel for the Defendant, Carl Olson, ASSENTS to the proposed protective order attached hereto.

WHEREFORE, the State respectfully asks that the Court:

C. Grant this motion;

D. Approve the attached proposed protective order; and

E. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

Dated: February 24, 2021

Steven Endres
Assistant Merrimack County Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was forwarded to Carl Olson.

Steven Endres
Assistant Merrimack County Attorney

Honorable Andrew R. Schulman
February 25, 2021

2-25-2021

DENIED WITHOUT PREJUDICE. Police personnel records and documents related to police internal personnel practices are presumptively public records under RSA 91-A:4, unless for particularized reasons, the public release of the records would result in an invasion of privacy. See Union Leader Corp. v. Town of Salem, 173 N.H. 345, 357 (2020). The State (or for that matter the witness) may argue that such particularized privacy concerns are present in this case. If the court finds that the records are not public records, then the court will comsoder issuing a protective order of appropriate scope.

On the other hand, if the records fall within the scope of 91-A:4, meaning that that any member of the public is entitled to the records upon demand, the court will NOT issue a protective order.

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

NICHOLAS FUCHS

217-2019-CR-0581

[PROPOSED]

PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105: 13-b, the State has reviewed the confidential police personnel file of [redacted] for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain documents contained in [redacted] personnel file may be potentially exculpatory in this matter. The documents will be provided to the Defendant's counsel under this protective order.

3. 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.

4. If the Defendant seeks to admit any of the documents or information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

Date: _____

Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

NICHOLAS FUCHS

217-2019-CR-0581

** FILED UNDER SEAL **

3-16-2021
Denied. See narrative order to be issued this day.

Honorable Andrew R. Schulman
March 16, 2021

STATE'S MOTION TO RECONSIDER DENIAL OF STATE'S ASSENTED TO MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS

NOW COMES the State of New Hampshire, by and through the Office of The Merrimack County Attorney and undersigned counsel, and hereby requests that the Court Reconsider its denial of the State's Assented to Motion to issue a Protective Order of Discovery Materials to be provided to Defense Counsel in the above-captioned matter. In further support of this motion, the State says as follows:

1. On February 24, 2021 the State filed an Assented to Motion for a Protective Order of Discovery Materials. Specifically, the State had obtained potentially exculpatory evidence from the personnel file of a police officer regarding that particular police officer which the State sought to disclose to the defense under a protective order.

2. On or about February 25, 2021 the Court (Schulman, J.) denied the motion without prejudice finding that "Police personnel records and documents related to police internal personnel practices are presumptively public records under RSA 91-A:4, unless for particularized reasons the public release of the records would result in an invasion of privacy. See Union Leader Corp. v. Town of Salem, 173 N.H. 345, 347 (2020). The State (or for that matter the witness) may argue that such particularized privacy concerns are present in this case. If the court finds that the records are not public records, then the court will comsoder [sic] issuing a protective order of appropriate scope."

3. The State is filing this motion to reconsider, believing that the Court may have overlooked or misapprehended the following:

4. The trial court misapprehended the law when it analyzed counsels' assented-to request for a protective order under RSA 91-A instead of RSA 105:13-b. RSA 105:13-b "is designed to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records." Duchesne v. Hillsborough Cty. Attorney, 167 N.H. 774, 780 (2015).

5. Counsel requested the protective order within the specific context of criminal discovery; therefore, the trial court should look to the statute that governs the confidentiality of police personnel records within this specific context.

6. RSA 105:13-b, I, titled "Confidentiality of Personnel Files," states: "Exculpatory 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." If there is uncertainty as to whether evidence contained within the police personnel file is exculpatory, RSA 105:13-b, (II), directs that "the evidence at issue is to be submitted to the court for in camera review." RSA 105:13-b, III covers evidence that is non-exculpatory but may nonetheless be relevant to a case in which an officer is a witness. Duchesne, 167 N.H. at 782 (2015). This paragraph "prohibits the opening of a police personnel file to examine the same for non-exculpatory evidence unless the trial judge makes a specific finding that probable cause exists to believe that the file contains evidence relevant to the particular criminal case." Id. "If the judge does make such a finding, the judge is then directed to review the file in camera and order the release of only those portions of the file which are relevant to the case." Id. (citing RSA 105:13–b, III.) "The remainder of the file must be treated as confidential and returned to the police department which employs the officer." Id.

7. By enacting RSA 105:13-b, the New Hampshire Legislature determined that police personnel files are to be given the highest degree of confidentiality possible within a prosecutor's Brady/Laurie obligation to disclose exculpatory evidence to criminal defendants.

8. Even in the narrow instances when Brady/Laurie and RSA 105:13-b, I, require prosecutors to disclose materials from a police officer's personnel file, the police and the public continue to have a "countervailing interest . . . in the confidentiality of officer personnel records." Duchesne, 167 N.H. at 780.

9. As the State's assented to motion for a protective order states, the case is still in an early phase. Although the disclosed materials "may be potentially exculpatory," the parties have yet to litigate whether the materials "may be used in open court for impeachment." (Motion for a Protective Order). As the case proceeds, it may be that the materials must become public within the context of a criminal trial. However, public disclosure at this stage is premature and thwart the high degree of confidentiality that the Legislature decided to give police personnel files by enacting RSA 105:13-b.

10. Trial courts regularly grant motions for protective orders for discovery materials from police personnel files. Indeed, the State is not aware of any case in which the trial court has not granted an assented-to motion for a protective order for materials that are taken directly from a police officer's personnel file and provided to defense counsel subject to Brady/Laurie and RSA 105:13-b, I, during criminal discovery.

11. The trial court should reconsider its decision to deny counsels' assented to motion for a protective order because RSA 105:13-b requires that a trial court give police personnel files the highest degree of confidentiality possible consistent with a prosecutor's Brady/Laurie obligations.

12. Turning to 91-A, the trial court misapprehended the law when it ruled: "Police personnel records and documents related to police internal personnel practices are presumptively public records under RSA 91-A:4."

13. RSA 91-A:4, I, states that citizens may inspect governmental records "except as otherwise prohibited by statute . . . ." As explained above, RSA 105:13-b prohibits even a criminal defendant from accessing or inspecting police personnel files outside of the narrow disclosures required by Brady/Laurie and RSA 105:13-b, I. Otherwise, materials from police personnel files "shall be treated as confidential." RSA 105:13-b, III.

14. The Legislature, in enacting 105:13-b and limiting disclosure of materials from police personnel files even within the context of ongoing litigation and criminal discovery, implicitly established that the public has no right to access or inspect police personnel files under 91-A:4. If materials from police personnel files are "presumptively public records" as the trial court stated in its order, the Legislature would have had no reason to enact 105:13-b and establish a particular procedure through which a criminal defendant can receive some, but not all, of a police officer's personnel file through criminal discovery. Therefore, the trial court misapprehended the law when it held that the documents are subject to 91-A balancing as "presumptively public records." See 91-A 4, I.

15. The trial court, in holding the materials at issue were "presumptively public records under RSA 91-A:4," misapprehended that pursuant to RSA 91-A:5, IV, "[r]ecords pertaining to internal personnel practices; confidential, . . . personnel, . . . and other files whose disclosure would constitute an invasion of privacy," are "exempted from" the disclosure provisions of 91-A. RSA 91-A:5, IV.

16. In the present case, the information from the Officer's file includes "records documenting the history or performance of a particular employee... and pertain[s] to an employee's work performance and... [is] therefore typically maintained by the personnel department." Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. ___ (decided May 29, 2020). Therefore, this information is properly considered part of the "personnel file" and is not presumptively subject to disclosure.

17. The State is unaware of any case in which the New Hampshire Supreme Court has concluded that documents taken directly from police personnel files are subject to disclosure under 91-A.

18. The trial court also overlooked the fact that New Hampshire courts have yet to resolve whether even information that is derived from, but not contained within, a police personnel file is subject to unredacted disclosure under 91-A:5, IV. In late October 2020, the New Hampshire Supreme Court considered this exact question with regard to the State's "Exculpatory Evidence Schedule" (EES)—a list of police officers who have engaged in misconduct which reflects negatively on their credibility or trustworthiness which does not physically reside in any specific police officer's personnel file but which "functions solely as a reference point, to alert a prosecutor to the need to initiate an inquiry into whether an officer's actual personnel file might contain exculpatory evidence." New Hampshire Ctr. for Pub. Interest Journalism v. New Hampshire Dep't of Justice, No. 2019-0279, 2020 WL 6372970, at *1 (N.H. Oct. 30, 2020). The Court held that the EES list "is not 'confidential' under RSA 105:13-b nor exempt from disclosure under the Right-to-Know Law as an 'internal personnel practice' or a 'personnel file'" in large part because the information was not contained within an individual police personnel file. New Hampshire Ctr. for Pub. Interest Journalism v. New Hampshire Dep't of Justice, No. 2019-0279, 2020 WL 6372970, at *7 (N.H. Oct. 30, 2020), Nevertheless, the Court vacated the trial court's decision and remanded to the trial court to determine in the first instance whether the EES "constitutes an 'other file[] whose disclosure would constitute invasion of privacy.'" Id. (quoting RSA 91-A:5). Although the Court held that the EES list is not itself subject to the heightened protections given "personnel files" under both 105:13-b and 91-A:5, IV, the Court affirmed that police personnel files themselves, and the materials contained therein, are to be afforded heightened statutory protections under both 105:13-b and 91-A:5, IV. Id. at *3-5.

19. In addition, the New Hampshire Supreme Court "often look[s] to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions." Seacoast, 173 N.H. at 338. Several exemptions from FOIA's disclosure requirements apply to the materials contained within the police personnel files and would also exempt them from disclosure under FOIA. See U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 755–56 (1989). (noting "Exemption 3 applies to documents that are specifically exempted from disclosure by another statute. § 552(b)(3)). Exemption 6 protects 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' § 552(b)(6). Exemption 7(C) excludes records or information compiled for law enforcement purposes, 'but only to the extent that the production of such [materials] ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.' §552(b)(7)(C).").

20. In the present case, the materials contained within the police personnel file detail actions taken by the police employee which resulted in an internal investigation. The information may also identify individuals who cooperated or were involved in that investigation.

21. FOIA exemption 7(D) provides protection for "records or information compiled for law enforcement purpose [which] could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." §552(b)(7)(D)."

22. The Freedom of Information Act Guide published by the United States Department of Justice, explains that for purposes of FOIA Exemption 7(D) the term "source" applies to a "broad spectrum of individuals" and that the term "confidential" should be "given a similarly broad construction." *https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7d*, (citing U.S. Dep't of Justice v. Landano, 508 U.S. 165, 174 (1993).

23. Pursuant to this FOIA exemption:

> '[T]he question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential.' Landano, 508 U.S. at 174. And because the applicability of this exemption hinges on the circumstances under which the information is provided, and not on the harm resulting from disclosure (in contrast to under Exemptions 6 and 7(C)), no balancing test is applied under the case law of Exemption 7(D).
>
> *https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7d* (collecting cases).

24. In addition, courts throughout the country have held that information and documents that would undermine the "confidentiality of sources" or "the privacy of individuals involved in an investigation" are protected by a law enforcement privilege even when they might otherwise be subject to discovery in the context of ongoing litigation. See, e.g., In re The City of New York, 607 F.3d 923, 944 (2d Cir. 2010); Commonwealth of Puerto Rico v. United States, 490 F.3d 50, 62 (1st Cir. 2007); In re U.S. Dep't of Homeland Sec., 459 F.3d 565, 570 (5th Cir. 2006); Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997); Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996). The New Hampshire Supreme Court has not issued an opinion addressing whether it would adopt the law enforcement privilege.

25. In denying the State's assented to motion for a protective order, the trial court overlooked the fact that failure to grant the protective order could reveal the identities, or violate the privacy, of those who gave confidential information to the police. Failure to grant the protective order could subject those individuals to stigma, embarrassment, disgrace, and potential loss of employment or friends. Failure to protect these individuals could also chill potential future cooperation with internal police investigations.

26. Therefore, if the trial court concludes that 105:13-b, 91-A, and the applicable FOIA exemptions do not require the trial court to grant the protective order with regard to all of the materials and information sought to be disclosed from [redacted] personnel file, the State asks the trial court to separately consider whether any documents or information that potentially identify a confidential source, or contain information from a confidential source, should be subject to a protective order under 105:13-b, 91-A, the applicable FOIA exemptions, or the law enforcement privilege.

WHEREFORE, the State respectfully asks that the Court:

A. Grant this motion to reconsider; and,

B. Maintain both this motion and the February 24, 2021 "Motion for a Protective Order of Discovery Materials" under seal; and,

C. Approve the attached proposed protective order; and

D. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

Dated: March 4, 2021

Steven Endres
Assistant Merrimack County Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was forwarded to Carl Olson.

Steven Endres
Assistant Merrimack County Attorney

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

NICHOLAS FUCHS

217-2019-CR-0581

[PROPOSED]

PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105: 13-b, the State has reviewed the confidential police personnel file of [redacted] for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain documents contained in [redacted] personnel file may be potentially exculpatory in this matter. The documents will be provided to the Defendant's counsel under this protective order.

3. 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.

4. If the Defendant seeks to admit any of the documents or information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

Date:

_____

Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

3-1-2020
DENIED WITHOUT PREJUDICE. See Union Leader v. Town of Salem, 173 N.H. 343, 357 (2020). Police personnel files may be public recods under RSA 91-A:4 and 5 unless there is a particularized concern of invasion of privacy. If the records could be accessed by any member of the public, the court will not issue a protective order. But, the State may renew the motion if it believes the records are not public records under RSA 91-A:4 and 5, as construed by the N.H. Supreme Court in the Town of Salem case last year.

Honorable Andrew R. Schulman
March 1, 2021

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-873

** FILED UNDER SEAL **

MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS

NOW COMES the State of New Hampshire, by and through the Office of The Merrimack County Attorney and undersigned counsel, and hereby request that the Court issue a Protective Order of Discovery Materials to be provided to Defense Counsel in the above-captioned matter that include materials from a law enforcement officer's personnel file. In further support of this motion, the State says as follows:

1. Pursuant to the State's obligation to provide exculpatory evidence to the defense, the State has obtained potentially exculpatory evidence from the [redacted] Police Department consisting of materials from [redacted] s personnel file. [redacted] may be called as a witness for the State in this matter.

2. While the State acknowledges that these materials may be potentially exculpatory, the State does not concede that these materials may be used in open court for impeachment of [redacted] This will be the subject of a later Motion in Limine in this matter.

3. In the interim, the State is asking that Defense Counsel be prohibited from discussing these materials or providing a copy of the materials from [redacted] s personnel file that will be produced in discovery, to anyone other than Defense Counsel and his investigator(s).

4. The Court has the authority to issue this proposed protective order. Indeed, it is well-established that the Court has the inherent authority to exercise its sound discretion in matters concerning pretrial discovery. See State v. Emery, 152 N.H. 783, 789 (2005); State v. Smalley, 148 N.H. 66, 69 (2002); State v. Delong, 136 N.H. 707, 709 (1993). Pursuant to Rule 12 of the New Hampshire Rules of Criminal Procedure, therefore, the Court may at any time restrict or even deny discovery "[u]pon a sufficient showing of good cause." See N.H. R. Crim. P. 12(b)(8).

5. Law enforcement personnel files are considered confidential with the exception of production for discovery in an on-going criminal matter. See RSA 105:13-b. The proposed protective order is necessary to ensure the confidentiality of the law

enforcement officer's personnel records while meeting the State's competing interest in providing potentially exculpatory evidence in a criminal matter, enabling the Defendant and his counsel to review complete discovery and prepare for trial. See generally, State v. Laurie, 139 N.H. 325 (1995); NHR.ProfC. 3.8(d).

6. Counsel for the Defendant, Alexander Vitale, ASSENTS to the proposed protective order attached hereto.

WHEREFORE, the State respectfully asks that the Court:

A. Grant this motion;

B. Approve the attached proposed protective order; and

C. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

Dated: February 25, 2021

Steven Endres
Assistant Merrimack County Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was forwarded to Alexander Vitale.

Steven Endres
Assistant Merrimack County Attorney

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-873

[PROPOSED]

PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105: 13-b, the State has reviewed the confidential police personnel file of [redacted] for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain documents contained in [redacted]'s personnel file may be potentially exculpatory in this matter. The documents will be provided to the Defendant's counsel under this protective order.

3. 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.

4. If the Defendant seeks to admit any of the documents or information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

Date: _____

Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

3-1-2021
DENIED WITHOUT PREJUDICE.
See Union Leader v. Town of Salem (2020). Police personnel records relating to discipline may be public records absent specific reason to believe that disclosure would result in an invasion of privacy. The State has not made a fact-specific argument in this motion.

Honorable Andrew R. Schulman
March 1, 2021

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-873

** FILED UNDER SEAL **

MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS

NOW COMES the State of New Hampshire, by and through the Office of The Merrimack County Attorney and undersigned counsel, and hereby request that the Court issue a Protective Order of Discovery Materials to be provided to Defense Counsel in the above-captioned matter that include materials from a law enforcement officer's personnel file. In further support of this motion, the State says as follows:

1. Pursuant to the State's obligation to provide exculpatory evidence to the defense, the State has obtained potentially exculpatory evidence from the [redacted] Police Department consisting of materials from [redacted]'s personnel file. [redacted] may be called as a witness for the State in this matter.

2. While the State acknowledges that these materials may be potentially exculpatory, the State does not concede that these materials may be used in open court for impeachment of [redacted] This will be the subject of a later Motion in Limine in this matter.

3. In the interim, the State is asking that Defense Counsel be prohibited from discussing these materials or providing a copy of the materials from [redacted]'s personnel file that will be produced in discovery, to anyone other than Defense Counsel and his investigator(s).

4. The Court has the authority to issue this proposed protective order. Indeed, it is well-established that the Court has the inherent authority to exercise its sound discretion in matters concerning pretrial discovery. See State v. Emery, 152 N.H. 783, 789 (2005); State v. Smalley, 148 N.H. 66, 69 (2002); State v. Delong, 136 N.H. 707, 709 (1993). Pursuant to Rule 12 of the New Hampshire Rules of Criminal Procedure, therefore, the Court may at any time restrict or even deny discovery "[u]pon a sufficient showing of good cause." See N.H. R. Crim. P. 12(b)(8).

5. Law enforcement personnel files are considered confidential with the exception of production for discovery in an on-going criminal matter. See RSA 105:13-b. The proposed protective order is necessary to ensure the confidentiality of the law

enforcement officer's personnel records while meeting the State's competing interest in providing potentially exculpatory evidence in a criminal matter, enabling the Defendant and his counsel to review complete discovery and prepare for trial. See generally, State v. Laurie, 139 N.H. 325 (1995); NHR.ProfC. 3.8(d).

6. Counsel for the Defendant, Alexander Vitale, ASSENTS to the proposed protective order attached hereto.

WHEREFORE, the State respectfully asks that the Court:

A. Grant this motion;

B. Approve the attached proposed protective order; and

C. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

Dated: February 25, 2021

Steven Endres
Assistant Merrimack County Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was forwarded to Alexander Vitale.

Steven Endres
Assistant Merrimack County Attorney

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-873

[PROPOSED]

PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105: 13-b, the State has reviewed the confidential police personnel file of [redacted] for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain documents contained in [redacted]s personnel file may be potentially exculpatory in this matter. The documents will be provided to the Defendant's counsel under this protective order.

3. 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.

4. If the Defendant seeks to admit any of the documents or information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

Date: _____

Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-0873

** FILED UNDER SEAL **

STATE'S MOTION TO RECONSIDER DENIAL OF STATES ASSENTED TO "MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS"

NOW COMES the State of New Hampshire, by and through the Office of The Merrimack County Attorney and undersigned counsel, and hereby requests that the Court Reconsider its denial of the States Assented to Motions to issue Protective Orders of Discovery Materials to be provided to Defense Counsel in the above-captioned matter. In further support of this motion, the State says as follows:

1. On both February 24, 2021 and February 25, 2021 the State filed Assented to Motions for a Protective Order of Discovery Materials. Specifically, the State had obtained potentially exculpatory evidence from the personnel files of two police officers regarding their individual conduct which the State sought to disclose to the defense under a protective order.

2. On or about March 1, 2021 the Court (Schulman, J.) denied each of the motions without prejudice finding that police personnel files or records relating to discipline may be public records absent a specific reason to believe disclosure would result in an invasion of privacy. The Court referenced Union Leader Corp. v. Town of Salem, 173 N.H. 345, 347 (2020) in both orders.

3. The State is filing this motion to reconsider, believing that the Court may have overlooked or misapprehended the following:

4. The trial court misapprehended the law when it analyzed counsels' assented-to requests for protective orders under RSA 91-A instead of RSA 105:13-b. RSA 105:13-b "is designed to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records." Duchesne v. Hillsborough Cty. Attorney, 167 N.H. 774, 780 (2015).

5. Counsel requested the protective orders within the specific context of criminal discovery; therefore, the trial court should look to the statute that governs the confidentiality of police personnel records within this specific context.

6. RSA 105:13-b, I, titled "Confidentiality of Personnel Files," states: "Exculpatory 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." If there is uncertainty as to whether evidence contained within the police personnel file is exculpatory, RSA 105:13-b, (II), directs that "the evidence at issue is to be submitted to the court for in camera review." RSA 105:13-b, III covers evidence that is non-exculpatory but may nonetheless be relevant to a case in which an officer is a witness. Duchesne, 167 N.H. at 782 (2015). This paragraph "prohibits the opening of a police personnel file to examine the same for non-exculpatory evidence unless the trial judge makes a specific finding that probable cause exists to believe that the file contains evidence relevant to the particular criminal case." Id. "If the judge does make such a finding, the judge is then directed to review the file in camera and order the release of only those portions of the file which are relevant to the case." Id. (citing RSA 105:13–b, III.) "The remainder of the file must be treated as confidential and returned to the police department which employs the officer." Id.

7. By enacting RSA 105:13-b, the New Hampshire Legislature determined that police personnel files are to be given the highest degree of confidentiality possible within a prosecutor's Brady/Laurie obligation to disclose exculpatory evidence to criminal defendants.

8. Even in the narrow instances when Brady/Laurie and RSA 105:13-b, I, require prosecutors to disclose materials from a police officer's personnel file, the police and the public continue to have a "countervailing interest . . . in the confidentiality of officer personnel records." Duchesne, 167 N.H. at 780.

9. As the State's assented to motions for protective orders state, the case is still in an early phase. Although the disclosed materials "may be potentially exculpatory," the parties have yet to litigate whether the materials "may be used in open court for impeachment." (Motion for a Protective Order). As the case proceeds, it may be that the materials must become public within the context of a criminal trial. However, public disclosure at this stage is premature and thwart the high degree of confidentiality that the Legislature decided to give police personnel files by enacting RSA 105:13-b.

10. Trial courts regularly grant motions for protective orders for discovery materials from police personnel files. Indeed, the State is not aware of any case in which the trial court has not granted an assented-to motion for a protective order for materials that are taken directly from a police officer's personnel file and provided to defense counsel subject to Brady/Laurie and RSA 105:13-b, I, during criminal discovery.

11. The trial court should reconsider its decision to deny counsels' assented to motions for protective orders because RSA 105:13-b requires that a trial court give police personnel files the highest degree of confidentiality possible consistent with a prosecutor's Brady/Laurie obligations.

12. Turning to 91-A, the trial court misapprehended the law when it ruled that police personnel records may be public records under 91-A.

13. RSA 91-A:4, I, states that citizens may inspect governmental records "except as otherwise prohibited by statute . . . ." As explained above, RSA 105:13-b prohibits even a criminal defendant from accessing or inspecting police personnel files outside of the narrow disclosures required by Brady/Laurie and RSA 105:13-b, I. Otherwise, materials from police personnel files "shall be treated as confidential." RSA 105:13-b, III.

14. The Legislature, in enacting 105:13-b and limiting disclosure of materials from police personnel files even within the context of ongoing litigation and criminal discovery, implicitly established that the public has no right to access or inspect police personnel files under 91-A:4. If materials from police personnel files are "presumptively public records" as the trial court stated in its order, the Legislature would have had no reason to enact 105:13-b and establish a particular procedure through which a criminal defendant can receive some, but not all, of a police officer's personnel file through criminal discovery. Therefore, the trial court misapprehended the law when it held that the documents are subject to 91-A balancing as public records. See 91-A 4, I.

15. The trial court, in holding the materials at issue may be public records under RSA 91-A:4, misapprehended that pursuant to RSA 91-A:5, IV, "[r]ecords pertaining to internal personnel practices; confidential, . . . personnel, . . . and other files whose disclosure would constitute an invasion of privacy," are "exempted from" the disclosure provisions of 91-A. RSA 91-A:5, IV.

16. In the present case, the information from the Officers' files includes "records documenting the history or performance of a particular employee… and pertain[s] to an employee's work performance and… [is] therefore typically maintained by the personnel department." Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. ___ (decided May 29, 2020). Therefore, this information is properly considered part of the "personnel file" and is not presumptively subject to disclosure.

17. The State is unaware of any case in which the New Hampshire Supreme Court has concluded that documents taken directly from police personnel files are subject to disclosure under 91-A.

18. The trial court also overlooked the fact that New Hampshire courts have yet to resolve whether even information that is derived from, but not contained within, a police

personnel file is subject to unredacted disclosure under 91-A:5, IV. In late October 2020, the New Hampshire Supreme Court considered this exact question with regard to the State's "Exculpatory Evidence Schedule" (EES)—a list of police officers who have engaged in misconduct which reflects negatively on their credibility or trustworthiness which does not physically reside in any specific police officer's personnel file but which "functions solely as a reference point, to alert a prosecutor to the need to initiate an inquiry into whether an officer's actual personnel file might contain exculpatory evidence." New Hampshire Ctr. for Pub. Interest Journalism v. New Hampshire Dep't of Justice, No. 2019-0279, 2020 WL 6372970, at *1 (N.H. Oct. 30, 2020). The Court held that the EES list "is not 'confidential' under RSA 105:13-b nor exempt from disclosure under the Right-to-Know Law as an 'internal personnel practice' or a 'personnel file'" in large part because the information was not contained within an individual police personnel file. New Hampshire Ctr. for Pub. Interest Journalism v. New Hampshire Dep't of Justice, No. 2019-0279, 2020 WL 6372970, at *7 (N.H. Oct. 30, 2020), Nevertheless, the Court vacated the trial court's decision and remanded to the trial court to determine in the first instance whether the EES "constitutes an 'other file[] whose disclosure would constitute invasion of privacy.'" Id. (quoting RSA 91-A:5). Although the Court held that the EES list is not itself subject to the heightened protections given "personnel files" under both 105:13-b and 91-A:5, IV, the Court affirmed that police personnel files themselves, and the materials contained therein, are to be afforded heightened statutory protections under both 105:13-b and 91-A:5, IV. Id. at *3-5.

19. In addition, the New Hampshire Supreme Court "often look[s] to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions." Seacoast, 173 N.H. at 338. Several exemptions from FOIA's disclosure requirements apply to the materials contained within the police personnel files and would also exempt them from disclosure under FOIA. See U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 755–56 (1989). (noting "Exemption 3 applies to documents that are specifically exempted from disclosure by another statute. § 552(b)(3)). Exemption 6 protects 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' § 552(b)(6). Exemption 7(C) excludes records or information compiled for law enforcement purposes, 'but only to the extent that the production of such [materials] ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.' §552(b)(7)(C).").

20. In the present case, the materials contained within the police personnel files detail actions taken by police employees which resulted in internal investigations. The information may also identify individuals who cooperated or were involved in that investigation.

21. FOIA exemption 7(D) provides protection for "records or information compiled for law enforcement purpose [which] could reasonably be expected to disclose the identity of a

confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." §552(b)(7)(D)."

22. The Freedom of Information Act Guide published by the United States Department of Justice, explains that for purposes of FOIA Exemption 7(D) the term "source" applies to a "broad spectrum of individuals" and that the term "confidential" should be "given a similarly broad construction." *https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7d*, (citing U.S. Dep't of Justice v. Landano, 508 U.S. 165, 174 (1993)).

23. Pursuant to this FOIA exemption:

> '[T]he question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential.' Landano, 508 U.S. at 174. And because the applicability of this exemption hinges on the circumstances under which the information is provided, and not on the harm resulting from disclosure (in contrast to under Exemptions 6 and 7(C)), no balancing test is applied under the case law of Exemption 7(D).
>
> *https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7d* (collecting cases).

24. In addition, courts throughout the country have held that information and documents that would undermine the "confidentiality of sources" or "the privacy of individuals involved in an investigation" are protected by a law enforcement privilege even when they might otherwise be subject to discovery in the context of ongoing litigation. See, e.g., In re The City of New York, 607 F.3d 923, 944 (2d Cir. 2010); Commonwealth of Puerto Rico v. United States, 490 F.3d 50, 62 (1st Cir. 2007); In re U.S. Dep't of Homeland Sec., 459 F.3d 565, 570 (5th Cir. 2006); Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997); Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996). The New Hampshire Supreme Court has not issued an opinion addressing whether it would adopt the law enforcement privilege.

25. In denying the State's assented to motions for protective orders, the trial court overlooked the fact that failure to grant the protective orders could reveal the identities, or violate the privacy, of those who gave confidential information to the police. Failure to grant the protective order could subject those individuals to stigma, embarrassment, disgrace, and potential loss of employment or friends. Failure to protect these individuals could also chill potential future cooperation with internal police investigations.

26. Therefore, if the trial court concludes that 105:13-b, 91-A, and the applicable FOIA exemptions do not require the trial court to grant protective orders with regard to all of

the materials and information sought to be disclosed from [redacted] and [redacted] personnel files, the State asks the trial court to separately consider whether any documents or information that potentially identify a confidential source, or contain information from a confidential source, should be subject to a protective order under 105:13-b, 91-A, the applicable FOIA exemptions, or the law enforcement privilege.

WHEREFORE, the State respectfully asks that the Court:

A. Grant this motion to reconsider; and,

B. Maintain this motion, the February 24, 2021 and the February 25, 2021 motions titled "Motion for a Protective Order of Discovery Materials," under seal; and,

C. Approve the attached proposed protective orders; and

D. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

Dated: March 4, 2021

Steven Endres
Assistant Merrimack County Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was forwarded to Alexander Vitale.

Steven Endres
Assistant Merrimack County Attorney

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-0873

[PROPOSED]

PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105: 13-b, the State has reviewed the confidential police personnel file of [redacted] for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain documents contained in [redacted] personnel file may be potentially exculpatory in this matter. The documents will be provided to the Defendant's counsel under this protective order.

3. 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.

4. If the Defendant seeks to admit any of the documents or information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

Date: _____

Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-0873

[PROPOSED]

PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105: 13-b, the State has reviewed the confidential police personnel file of [redacted] for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain documents contained in [redacted] personnel file may be potentially exculpatory in this matter. The documents will be provided to the Defendant's counsel under this protective order.

3. 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.

4. If the Defendant seeks to admit any of the documents or information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

Date:

_____

Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

3-16-2021
Denied. See separate narrative order to be issued within the day.

Honorable Andrew R. Schulman
March 16, 2021

STATE OF NEW HAMPSHIRE

v.

JEFFREY HALLOCK-SAUCIER

217-2020-CR-0089

** FILED UNDER SEAL **

MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS

NOW COMES the State of New Hampshire, by and through the Office of The Merrimack County Attorney and undersigned counsel, and hereby request that the Court issue a Protective Order of Discovery Materials to be provided to Defense Counsel in the above-captioned matter that include information from a law enforcement officer's personnel file. In further support of this motion, the State says as follows:

1. Pursuant to the State's obligation to provide exculpatory evidence to the defense, the State has obtained potentially exculpatory evidence from the [redacted] Police consisting of information from [redacted] s personnel file. [redacted] is a potential witness in this matter.

2. While the State acknowledges that this information may be potentially exculpatory, the State does not concede that the information may be used in open court for impeachment of [redacted]. This will be the subject of a later Motion in Limine in this matter.

3. In the interim, the State is asking that Defense Counsel be prohibited from discussing the information or providing a copy of the disclosure from [redacted] s personnel file that will be produced in discovery, to anyone other than Defense Counsel and his investigator(s).

4. The Court has the authority to issue this proposed protective order. Indeed, it is well-established that the Court has the inherent authority to exercise its sound discretion in matters concerning pretrial discovery. See State v. Emery, 152 N.H. 783, 789 (2005); State v. Smalley, 148 N.H. 66, 69 (2002); State v. Delong, 136 N.H. 707, 709 (1993). Pursuant to Rule 12 of the New Hampshire Rules of Criminal Procedure, therefore, the Court may at any time restrict or even deny discovery "[u]pon a sufficient showing of good cause." See N.H. R. Crim. P. 12(b)(8).

5. Law enforcement personnel files are considered confidential with the exception of production for discovery in an on-going criminal matter. See RSA 105:13-b. The proposed protective order is necessary to ensure the confidentiality of the law

enforcement officer's personnel records while meeting the State's competing interest in providing potentially exculpatory evidence in a criminal matter, enabling the Defendant and his counsel to review complete discovery and prepare for trial. See generally, State v. Laurie, 139 N.H. 325 (1995); NHR.ProfC. 3.8(d).

6. Furthermore, this information is exempt from public disclosure under RSA 91-A, which states that citizens may inspect governmental records "except as otherwise prohibited by statute . . . ." As explained above, RSA 105:13-b prohibits even a criminal defendant from accessing or inspecting police personnel files outside of the narrow disclosures required by Brady/Laurie and RSA 105:13-b, I. Otherwise, materials from police personnel files "shall be treated as confidential." RSA 105:13-b, III.

7. Counsel for the Defendant, Peter Decato, ASSENTS to the proposed protective order attached hereto.

WHEREFORE, the State respectfully asks that the Court:

A. Grant this motion;

B. Approve the attached proposed protective order; and

C. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

Dated: March 5, 2021

Steven Endres
Assistant Merrimack County Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was forwarded to Peter Decato.

Steven Endres
Assistant Merrimack County Attorney

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JEFFREY HALLOCK-SAUCIER

217-2020-CR-0089

[PROPOSED]

PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105: 13-b, the State has reviewed the confidential police personnel file of [redacted] for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain information contained in [redacted] personnel file may be potentially exculpatory in this matter. The information will be provided to the Defendant's counsel under this protective order.

3. Defense Counsel is prohibited from sharing or further disseminating this confidential information contained therein with anyone other than Defense Counsel's staff and the Defendant.

4. If the Defendant seeks to admit any of the information contained within these materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the information contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

Date: _____

Presiding Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JEFFREY HALLOCK-SAUCIER

217-2020-CR-0089

** FILED UNDER SEAL **

3-29-2020. The court agrees with the State that this motion was timely filed. That said, the court denies this motion on the merits for the reasons set forth in its narrative order. The court remains willing to make a fact-based determination of whether a sufficiently compelling privacy interest exists to warrant a protective order. But the court will not issue a protective order in blank, sight unseen, merely because the substance of the information has to do with alleged misconduct on the part of a police officer. A blanket, one-sized fits all approach is unwarranted, unsupported by statute, and likely unconsitutional for the reasons set forth in the court's narrative order.

Honorable Andrew R. Schulman
March 29, 2021

STATE'S MOTION TO RECONSIDER DENIAL OF "STATE'S ASSENTED TO MOTION FOR A PROTECTIVE ORDER OF DISCOVERY MATERIALS"

NOW COMES the State of New Hampshire, by and through the Office of The Merrimack County Attorney and undersigned counsel, and hereby requests that the Court Reconsider its denial of the State's Assented to Motion to issue a Protective Order of Discovery Materials to be provided to Defense Counsel in the above-captioned matter. In further support of this motion, the State says as follows:

1. On March 5, 2021 the State filed as Assented to Motion for a Protective Order of Discovery Materials. Specifically, the State had obtained potentially exculpatory evidence from the personnel file of a police officer regarding that officer's prior conduct which the State sought to disclose to the defense under a protective order. Accompanying the pleading was a Motion to Seal.

2. On or about March 16, 2021 the Court (Schulman, J.) denied each of the motions indicating a "narrative" order would be released later in the day. On March 19, 2021 undersigned counsel received the "narrative" order dated March 18, 2021.

3. The "narrative order" addresses the denial of the State's Assented to Motion for a Protective Order of Discovery Materials in this case, as well as denials of the State's Motion(s) to Reconsider the Denial of the State's Assented to Motions for Protective Orders of Discovery Materials in both State v. Jacob Johnson (217-2020-CR-00873) and State v. Nicholas Fuchs (217-2019-CR-00581).

4. After consulting with the New Hampshire Attorney General's Office regarding a potential appeal, on March 22, 2021 the State filed a motion to stay in this case, as well as Fuchs and Johnson referenced above.

5. The State is now filing a motion to reconsider in this case pursuant to the NH Rules of Criminal Procedure Rule 43 to properly preserve issues for appeal. The motion is being timely filed within 10 days of the Court's "narrative order." Under the NH Rules of

Criminal Procedure Rule 35(f), the calculation period does not include the day of the Court's action and if the 10th day would be on a Saturday, Sunday, or Holiday, Rule 35(f) extends the time period to the next business day. The State believes that the Court may have overlooked or misapprehended the following:

6. The trial court misapprehended the law when it analyzed counsels' assented-to request for a protective order under RSA 91-A instead of RSA 105:13-b. RSA 105:13-b "is designed to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records." Duchesne v. Hillsborough Cty. Attorney, 167 N.H. 774, 780 (2015).

7. Counsel requested the protective order within the specific context of criminal discovery; therefore, the trial court should look to the statute that governs the confidentiality of police personnel records within this specific context.

8. RSA 105:13-b, I, titled "Confidentiality of Personnel Files," states: "Exculpatory 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." If there is uncertainty as to whether evidence contained within the police personnel file is exculpatory, RSA 105:13-b, (II), directs that "the evidence at issue is to be submitted to the court for in camera review." RSA 105:13-b, III covers evidence that is non-exculpatory but may nonetheless be relevant to a case in which an officer is a witness. Duchesne, 167 N.H. at 782 (2015). This paragraph "prohibits the opening of a police personnel file to examine the same for non-exculpatory evidence unless the trial judge makes a specific finding that probable cause exists to believe that the file contains evidence relevant to the particular criminal case." Id. "If the judge does make such a finding, the judge is then directed to review the file in camera and order the release of only those portions of the file which are relevant to the case." Id. (citing RSA 105:13–b, III.) "The remainder of the file must be treated as confidential and returned to the police department which employs the officer." Id.

9. By enacting RSA 105:13-b, the New Hampshire Legislature determined that police personnel files are to be given the highest degree of confidentiality possible within a prosecutor's Brady/Laurie obligation to disclose exculpatory evidence to criminal defendants.

10. Even in the narrow instances when Brady/Laurie and RSA 105:13-b, I, require prosecutors to disclose materials from a police officer's personnel file, the police and the public continue to have a "countervailing interest . . . in the confidentiality of officer personnel records." Duchesne, 167 N.H. at 780.

11. As the State's assented to motion for a protective order states, the case is still in an early phase in the sense that although the disclosed materials "may be potentially exculpatory," the parties have yet to litigate whether the materials "may be used in open court for

impeachment." (Motion for a Protective Order). As the case proceeds, it may be that the materials must become public within the context of a criminal trial. However, public disclosure at this stage is premature and thwarts the high degree of confidentiality that the Legislature decided to give police personnel files by enacting RSA 105:13-b.

12. Trial courts regularly grant motions for protective orders for discovery materials from police personnel files. Indeed, the State is not aware of any case in which the trial court has not granted an assented-to motion for a protective order for materials that are taken directly from a police officer's personnel file and provided to defense counsel subject to Brady/Laurie and RSA 105:13-b, I, during criminal discovery.

13. The Court should reconsider its decision to deny counsels' assented to motions for protective orders because RSA 105:13-b requires that a trial court give police personnel files the highest degree of confidentiality possible consistent with a prosecutor's Brady/Laurie obligations.

14. Turning to 91-A, the Court misapprehended the law when it ruled that police personnel records and documents related to police internal personnel practices are presumptively public records under RSA 91-A:4.

15. RSA 91-A:4, I, states that citizens may inspect governmental records "except as otherwise prohibited by statute . . . ." As explained above, RSA 105:13-b prohibits even a criminal defendant from accessing or inspecting police personnel files outside of the narrow disclosures required by Brady/Laurie and RSA 105:13-b, I. Otherwise, materials from police personnel files "shall be treated as confidential." RSA 105:13-b, III.

16. The Legislature, in enacting 105:13-b and limiting disclosure of materials from police personnel files even within the context of ongoing litigation and criminal discovery, implicitly established that the public has no right to access or inspect police personnel files under 91-A:4. If materials from police personnel files are "presumptively public records" as the trial court stated in its order, the Legislature would have had no reason to enact 105:13-b and establish a particular procedure through which a criminal defendant can receive some, but not all, of a police officer's personnel file through criminal discovery. Therefore, the trial court misapprehended the law when it held that the documents are subject to 91-A balancing as public records. See 91-A 4, I.

17. The Court, in holding the materials at issue may be public records under RSA 91-A:4, misapprehended that pursuant to RSA 91-A:5, IV, "[r]ecords pertaining to internal personnel practices; confidential, . . . personnel, . . . and other files whose disclosure would constitute an invasion of privacy," are "exempted from" the disclosure provisions of 91-A. RSA 91-A:5, IV.

18. In the present case, the information from the Officers' files includes "records documenting the history or performance of a particular employee… and pertain[s] to an employee's work performance and… [is] therefore typically maintained by the personnel department." Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. ___ (decided May 29, 2020). Therefore, this information is properly considered part of the "personnel file" and is not presumptively subject to disclosure.

19. The State is unaware of any case in which the New Hampshire Supreme Court has concluded that documents taken directly from police personnel files are subject to disclosure under 91-A.

20. The trial court also overlooked the fact that New Hampshire courts have yet to resolve whether even information that is derived from, but not contained within, a police personnel file is subject to unredacted disclosure under 91-A:5, IV. In late October 2020, the New Hampshire Supreme Court considered this exact question with regard to the State's "Exculpatory Evidence Schedule" (EES)—a list of police officers who have engaged in misconduct which reflects negatively on their credibility or trustworthiness which does not physically reside in any specific police officer's personnel file but which "functions solely as a reference point, to alert a prosecutor to the need to initiate an inquiry into whether an officer's actual personnel file might contain exculpatory evidence." New Hampshire Ctr. for Pub. Interest Journalism v. New Hampshire Dep't of Justice, No. 2019-0279, 2020 WL 6372970, at *1 (N.H. Oct. 30, 2020). The Court held that the EES list "is not 'confidential' under RSA 105:13-b nor exempt from disclosure under the Right-to-Know Law as an 'internal personnel practice' or a 'personnel file'" in large part because the information was not contained within an individual police personnel file. New Hampshire Ctr. for Pub. Interest Journalism v. New Hampshire Dep't of Justice, No. 2019-0279, 2020 WL 6372970, at *7 (N.H. Oct. 30, 2020), Nevertheless, the Court vacated the trial court's decision and remanded to the trial court to determine in the first instance whether the EES "constitutes an 'other file[] whose disclosure would constitute invasion of privacy.'" Id. (quoting RSA 91-A:5). Although the Court held that the EES list is not itself subject to the heightened protections given "personnel files" under both 105:13-b and 91-A:5, IV, the Court affirmed that police personnel files themselves, and the materials contained therein, are to be afforded heightened statutory protections under both 105:13-b and 91-A:5, IV. Id. at *3-5.

21. In addition, the New Hampshire Supreme Court "often look[s] to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions." Seacoast, 173 N.H. at 338. Several exemptions from FOIA's disclosure requirements apply to the materials contained within the police personnel files and would also exempt them from disclosure under FOIA. See U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 755–56 (1989). (noting "Exemption 3 applies to documents that are specifically exempted from disclosure by another statute. §

552(b)(3)). Exemption 6 protects 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' § 552(b)(6). Exemption 7(C) excludes records or information compiled for law enforcement purposes, 'but only to the extent that the production of such [materials] ... could reasonably be expected to constitute an unwarranted invasion of personal privacy.' §552(b)(7)(C).").

22. In the present case, the materials contained within the police personnel file reference actions taken by police employees which resulted in an internal investigation. The information may also identify individuals who cooperated or were involved in that investigation.

23. FOIA exemption 7(D) provides protection for "records or information compiled for law enforcement purpose [which] could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." §552(b)(7)(D)."

24. The Freedom of Information Act Guide published by the United States Department of Justice, explains that for purposes of FOIA Exemption 7(D) the term "source" applies to a "broad spectrum of individuals" and that the term "confidential" should be "given a similarly broad construction." *https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7d*, (citing U.S. Dep't of Justice v. Landano, 508 U.S. 165, 174 (1993).

25. Pursuant to this FOIA exemption:

> '[T]he question is not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential.' Landano, 508 U.S. at 174. And because the applicability of this exemption hinges on the circumstances under which the information is provided, and not on the harm resulting from disclosure (in contrast to under Exemptions 6 and 7(C)), no balancing test is applied under the case law of Exemption 7(D). *https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7d* (collecting cases).

26. In addition, courts throughout the country have held that information and documents that would undermine the "confidentiality of sources" or "the privacy of individuals involved in an investigation" are protected by a law enforcement privilege even when they might otherwise be subject to discovery in the context of ongoing litigation. See, e.g., In re The City of New York, 607 F.3d 923, 944 (2d Cir. 2010); Commonwealth of Puerto Rico v. United States, 490 F.3d 50, 62 (1st Cir. 2007); In re U.S. Dep't of Homeland Sec., 459

F.3d 565, 570 (5th Cir. 2006); Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997); Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996). The New Hampshire Supreme Court has not issued an opinion addressing whether it would adopt the law enforcement privilege.

27. In denying the State's assented to motion for a protective order, the court overlooked the fact that failure to grant the protective orders could reveal the identities, or violate the privacy, of those who gave confidential information to the police. Failure to grant the protective order could subject those individuals to stigma, embarrassment, disgrace, and potential loss of employment or friends. Failure to protect these individuals could also chill potential future cooperation with internal police investigations.

28. Therefore, if the trial court concludes that 105:13-b, 91-A, and the applicable FOIA exemptions do not require the trial court to grant protective orders with regard to all of the materials and information sought to be disclosed from the Officer's personnel file, the State asks the trial court to separately consider whether any documents or information that potentially identify a confidential source, or contain information from a confidential source, should be subject to a protective order under 105:13-b, 91-A, the applicable FOIA exemptions, or the law enforcement privilege.

WHEREFORE, the State respectfully asks that the Court:

A. Grant this motion to reconsider; and,

B. Maintain this motion, and the March 5, 2021 motion titled "Motion for a Protective Order of Discovery Materials," under seal; and,

C. Approve the attached proposed protective order; and

D. Grant any additional relief that the Court deems just and proper.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

Dated: March 29, 2021

Steven Endres
Assistant Merrimack County Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion was forwarded to Peter Decato through the use of the Court's electronic filing system.

Steven Endres
Assistant Merrimack County Attorney

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

STATE OF NEW HAMPSHIRE

v.

JEFFREY HALLOCK-SAUCIER

217-2020-CR-0089

[PROPOSED]

PROTECTIVE ORDER

The Court hereby enters the following Order with respect to discovery in the above captioned matter:

1. Pursuant to the State's obligation to provide potentially exculpatory evidence and the provisions of RSA 105: 13-b, the State has reviewed the confidential police personnel file of an Officer who is a potential witness for relevant and potentially exculpatory evidence in this matter.

2. Following its review, the State has determined that certain information contained in the Officer's personnel file may be potentially exculpatory in this matter. The information will be provided to the Defendant's counsel under this protective order.

3. Defense Counsel is prohibited from sharing or further disseminating this confidential information or documents with anyone other than Defense Counsel's staff and the Defendant.

4. If the Defense seeks to admit any of the information or documents contained within the materials, for substantive or impeachment purposes, it must first file a motion or pleading referencing the documents or the information under seal. Only upon this Court's further Order will any of the materials or information contained within the personnel file be discussed in open court or used in this matter as evidence.

So Ordered.

Date:

_____

Presiding Justice

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Merrimack, ss

STATE OF NEW HAMPSHIRE

v.

JEFFREY HALLOCK-SAUCIER

217-2020-CR-0089

STATE OF NEW HAMPSHIRE

v.

JACOB JOHNSON

217-2020-CR-00873

STATE OF NEW HAMPSHRIE

v.

NICHOLAS FUCHS

217-2019-CR-00581

ORDER

The State's motions for protective orders, motions to seal and motions for reconsideration all DENIED.

I. Background

In these three cases the State has made the determination that it must provide the defense with information from a police officer's personnel file because that information is potentially

exculpatory. See, e.g., State v. Laurie, 139 N.H. 325 (1999); Kyles v. Whitley, 514 U.S. 419, 437 (1994); RSA 105:13-b,I.

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 (a) the fact that such discovery is being provided, (b) the issuance of a protective order, and (c) all litigation regarding the matter. Essentially, the State wishes to have the defense gagged and the existence of the gag order kept secret.

Notably, the State has not described the substance of the potentially exculpatory evidence. It say only that (a) the evidence is potentially exculpatory, (b) the evidence must be disclosed to the defendant as a constitutional imperative, (c) because the source of the evidence is a police personnel file it must be kept secret on pain of contempt, and (d) even the request to keep the information secret must itself be kept secret.

In two of the above-captioned cases, State v. Johnson and State v. Fuchs, the motions before the court are (a) motions for reconsideration of the denial (without prejudice) of protective orders and (b) motions to seal. None of these motions describe the substance of potential the exculpatory evidence at issue.

All that the State is willing to say is that the evidence comes from a police personnel file.

In the remaining case, State v. Hallock-Saucier, the motions before the court are (a) a motion for a protective order, (b) a motion to seal that motion and (c) a motion to seal the State's response to a motion in limine.[1] Once again, the State has declined to describe the substance of the potential exculpatory evidence.

II. Protective Orders

The court clearly has the authority to supervise discovery in criminal cases through the issuance of protective orders. N.H.R.Crim.P 12(b)(8); cf State v. Larose, 157 N.H. 28, 39 (2008) ("The trial court has broad discretion in managing the proceedings before it . . . including pre-trial discovery[.]" (internal citation omitted)). Such orders may forbid the recipients of even constitutionally required discovery from re-disclosing what they receive when necessary to, *inter alia*, prevent an invasion of privacy or safeguard a well-grounded expectation of confidentiality. Thus, for example, the court routinely grants protective orders forbidding the publication of

[1]The defendant's motion in limine in Hallock-Saucier seeks permission to cross-examine a police officer about the reasons why he is on the so-called exculpatory evidence schedule, a/k/a the Laurie list. The motion was premature because the defense has not yet learned that reason.

videotaped CAC interviews of child victims of alleged sexual assault. Also, for example, the court often grants protective orders relating to a witness' medical records.

However, the court would not ordinarily issue a protective order that gags the parties and counsel from sharing what is otherwise available to the general public upon demand. Thus, if the State provides discovery of documents that are subject to mandatory public disclosure under the Right To Know statute, RSA 91-A:4, a protective order is inappropriate. 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.

Until recently, all police department records relating to "internal personnel practices" were *per se* exempt from public disclosure. This was the result of the New Hampshire Supreme Court's decision in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993). Fenniman authoritatively construed the "internal personnel practices" exemption to the general rule that all government records may be accessed by the public. See RSA 91-A:4 (stating the general rule); RSA 91-A:5, IV (establishing the exemption). During Fenniman's long reign, all police department records relating to police officer discipline and misconduct were categorically shielded from public view.

While Fenniman was good law, New Hampshire trial courts routinely granted protective orders restricting the re-disclosure of police department records relating to officer discipline and misconduct. Fenniman did not actually require the issuance of protective orders; it did no more than construe an exemption to the Right To Know statute. No other Supreme Court decision required protective orders. No statute required protective orders. But nonetheless, Fenniman fostered a culture of confidentiality with respect to internal police misconduct and discipline records.

Fenniman was overruled last year by Union Leader Corporation v. Town of Salem, 13 N.H. 345, 357 (2020). In the Town of Salem case, the New Hampshire Supreme Court held that a balancing test must be applied in order to determine whether records relating to "internal personnel practices" and police officer discipline must be made available to the public. This balancing test requires the court to determine whether the release of the records would constitute an invasion of privacy. In making this determination, the court must make a fact-specific inquiry into (a) the extent of the privacy interest at stake and (b) the extent of the public interest in disclosure. In short, the Town of Salem case did away with the categorical approach taken by Fenniman and replaced it with a fact-specific balancing test.

Thus, the practice of willy-nilly issuing protective orders to gag the defense whenever the State provides exculpatory evidence of police misconduct is no longer tenable. 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.

The State reliance on RSA 105:13-b is misplaced. That statute consists of three paragraphs. Paragraph I requires the State to disclose to the defense any exculpatory evidence in a police officer's file if the officer will be a witness:

> Exculpatory 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. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.

Nothing in that paragraph, or the statute as a whole, suggests that such exculpatory evidence, once disclosed, must be kept confidential. The statute makes no provision for a protective order. It does not create a privilege. It is nothing more than a statutory command to the prosecutor to provide discovery.

The records at issue in these cases appear to fall into this category. To be sure, the prosecutor described the records as "potentially exculpatory" rather than "exculpatory."

However, he indicated that they must be provided directly to the defense. Thus, the court presumes that the prosecutor was proceeding under paragraph I.

Paragraphs II and III of RSA 105:13-b require an *in camera* review when either (a) the prosecutor cannot determine whether the material is exculpatory or (b) the material is not exculpatory but is otherwise material to the case. These two paragraphs essentially forbid courts from ordering discovery of those portions of a police officer's personnel file which are neither (a) exculpatory nor (b) otherwise relevant and material. But when the court engages in an *in camera* review for this purpose it is not sitting to decide, in the first instance, whether any portion of the file is exempt from public disclosure.

In any event, the issue in this case is not whether the records are discoverable--the State concedes that they are--but rather whether the court must issue a sight unseen gag order, without first determining whether disclosure of the records would result in an invasion of privacy.

Based on the parties' filings, it would appear that the records in question likely relate to the grounds for placing an officer on the exculpatory evidence schedule. Assuming that the placement was made in accordance with the Attorney General's guidance, there would be a finding, following an investigation,

and possibly following a hearing, that the officer committed either acts of dishonesty or used excessive force. While every case is different, and while there are factual exceptions to every rule, there is a strong and compelling public interest in disclosure of information relating to dishonest and assaultive behavior committed by police officers in the course of their official duties. The public has an interest in seeing how its police department investigates and disciplines its own. After all, it is the public, through its representatives that determines who will serve as police chief and how internal discipline will be monitored. The public interest is also served by preventing precisely what the State's motions would accomplish, i.e. the inability for the defense bar in a particular locality to share information that casts doubt on the credibility of particular police witnesses. Speaking 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.

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, but the court will not issue gag orders in blank.

III. Sealed Filings

A motion to seal court filings implicates Part 1, Articles 8 and 22 of the New Hampshire Constitution. Associated Press v. State, 153 N.H. 120, 127 (2005); In re State (Bowman Search Warrants), 146 N.H. 621, 630 (2001); Petition of Keene Sentinel, 136 N.H. 121, 129-30(1992). The public has a constitutionally grounded to access the records of **its** courts. Pubic transparency is once means of keeping the courts, and more generally the government as a whole, accountable to the people.

For example, the motions for protective orders in these cases touch on public policy concerns that may be addressed in other fora, such as the Legislature, city councils, town select boards and police commissions. The nation as a whole is presently wrestling with the manner in which police misconduct is redressed and prevented. How can the public do **its** job if it does not know how the present system is functioning?

"There is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public's right of access to those records." Associated Press, 153 N.H. at 129 (quoting Douglas v. Douglas, 146 N.H. 205, 208 (2001)). See also N.H.R.Crim.P. 50(a) placing

the burden of proof on the party seeking to seal a document or portion of a document.

To be sure, the presumption of openness may be rebutted by proof that the information in a filing is confidential by virtue of statute. N.H.R.Crim.P. 50(c)(2)(A). However, as explained above, there is no longer a rule of *per se* confidentiality for police personnel files. More important, the filings at issue do not contain any factual information from a police personnel file. As noted above, the State has assiduously declined to describe the substance of what it refers to as "potentially exculpatory evidence."

The presumption of openness may also be rebutted by proof that the public disclosure of information in a filing would "substantially impair . . . the privacy interests of an individual." N.H.R.Crim.P. 50(c)(2)(B)(i). However, because the present filings do not describe the substance of what is in the police personnel file, they may remain publicly filed without any impairment of the officer's privacy.

IV. Conclusion

The State's motions for reconsideration are DENIED.

The State's motions to seal are DENIED.

The State's motions for protective orders are DENIED.

However, the State may renew its motions for protective order if it can show that the re-disclosure of specific factual information will result in an invasion of privacy.

March 18, 2021

Andrew R. Schulman,
Presiding Justice