

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2022-0321

American Civil Liberties Union of New Hampshire

v.

New Hampshire Department of Safety, Division of State Police

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
MERRIMACK SUPERIOR COURT

**BRIEF FOR THE NEW HAMPSHIRE DEPARTMENT OF SAFETY,
DIVISION OF STATE POLICE**

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DIVISION OF STATE POLICE

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(Fifteen-minute oral argument requested)

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
ISSUE PRESENTED	5
TEXT OF RELEVANT AUTHORITIES	6
INTRODUCTION.....	8
STATEMENT OF THE CASE AND FACTS	8
SUMMARY OF THE ARGUMENT.....	11
ARGUMENT	13
I. RSA 105:13-b PREVENTS DISCLOSURE OF POLICE PERSONNEL FILES PURSUANT TO RSA 91-A:4, I.	13
A. RSA 105:13-b’s plain meaning prohibits disclosure of police personnel records in all circumstances except where a criminal defendant’s constitutional right demands disclosure.....	14
B. This Court has long recognized that police personnel records are inaccessible under RSA 105:13-b such that RSA 91-A:4, I, prohibits disclosure.....	19
CONCLUSION	26
CERTIFICATE OF COMPLIANCE	27
CERTIFICATE OF SERVICE.....	28

TABLE OF AUTHORITIES

Cases

<i>Alford v. Superior Ct.</i> , 89 Cal.App.4th 356, 107 Cal. Rptr. 2d 245 (2001).....	16
<i>CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.</i> , 167 N.H. 583 (2015).....	10, 22
<i>Duschesne v. Hillsborough County Attorney</i> , 167 N.H. 774 (2015)....	13, 15, 19, 20
<i>Gantert v. City of Rochester</i> , 168 N.H. 640 (2016)	13, 20
<i>Grafton County Attorney's Office v. Canner</i> , 169 N.H. 319 (2016)	22, 23
<i>John Doe v. Attorney General</i> , __ N.H. __ (July 21, 2022).....	13, 21, 25
<i>Lambert v. Belknap County Convention</i> , 157 N.H. 375 (2008)	14
<i>Mortgage Specialists, Inc. v. Davey</i> , 153 N.H. 764 (2006)	14
<i>New Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice</i> , 173 N.H. 648 (2020)	24
<i>Petition of Poulicakos</i> , 160 N.H. 438 (2010).....	16
<i>Petition of State</i> , 174 N.H. 785 (2022).....	passim
<i>Professional Firefighters of New Hampshire v. Local Government Center, Inc.</i> , 159 N.H. 699 (2010).....	13
<i>Provenza v. Town of Canaan</i> , __ N.H. __ (April 22, 2022)	21, 24, 25
<i>Reid v. New Hampshire Attorney General</i> , 169 N.H. 509 (2016).....	17
<i>Seacoast Newspapers, Inc. v. City of Portsmouth</i> , 173 N.H. 325 (2020) ...	10
<i>State v. Bobola</i> , 168 N.H. 771 (2016)	14

Statutes

RSA 105:13-b	passim
RSA 105:13-b, I.....	11, 14, 23
RSA 105:13-b, II	11, 15, 23
RSA 105:13-b, III.....	11, 15, 24
RSA 651:5	22, 23
RSA 91-A	passim
RSA 91-A:1	13
RSA 91-A:4, I.....	passim
RSA 91-A:5, IV	9, 20

Other Authorities

Black's Law Dictionary (11 th ed. 2019)	24
--	----

Rules

<i>N.H. Admin. R. Per 1501.04</i>	17
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ISSUE PRESENTED

1. Did the Merrimack Superior Court (*Kissinger, J.*) err when it concluded that RSA 105:13-b and RSA 91-A:4, I, did not exempt police personnel files from disclosure under the State's Right to Know law?

Issue preserved by the Division's Response to the Petition for Access to Public Record, JA 225-28.¹

¹ "JA __" refers to the parties' Joint Appendix and page number. Please note that certain birthdates, home addresses, and driver's license numbers which are not material to this Court's review of the record have been redacted from the Joint Appendix upon agreement of the parties.

TEXT OF RELEVANT AUTHORITIES

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.

INTRODUCTION

This case arises out of the American Civil Liberties Union of New Hampshire's ("ACLU") request for the personnel records of former New Hampshire State Police Trooper Haden Wilber ("Wilber"). This Court has issued a series of recent decisions interpreting both RSA 105:13-b and RSA 91-A. Those decisions imply, but do not directly hold, that personnel records contained in a police officer's personnel file are exempt from public inspection and disclosure under RSA 91-A. The Department of Safety, Division of State Police (the "Division") holds many police personnel files and needs clarity about whether citizens have a right to disclosure of records contained in police personnel files under RSA 91-A or whether public access to that specific category of records is "otherwise prohibited by statute" under RSA 91-A:4, I, and therefore categorically exempt from public disclosure. By this appeal, the Division seeks a definitive answer to that unresolved question so it may correctly, faithfully, and consistently discharge its legal obligations.

STATEMENT OF THE CASE AND FACTS

Wilber was employed by the Division since 2012 and as a law enforcement officer since 2009. JA 4, 319. Wilber was a member of the Department's Mobile Enforcement Team ("MET"), the primary focus of which is to engage in drug interdiction. *Id.*

On or about October 8, 2019, Robyn White filed a lawsuit in federal court naming Wilber as a defendant, among other State defendants. *Id.* at 3, 59-62. Ms. White alleged that Wilber illegally searched her purse and vehicle, which led to Ms. White's incarceration and subsequent body scans.

Id. at 3, 80-81. Ms. White further alleged that Wilber provided false testimony and/or evidence to secure an additional criminal charge against her, which resulted in increased bail and a physical body cavity examination. *Id.* at 3, 81-82. In November 2021, the State defendants settled the suit for \$212,500 and the case was dismissed. *Id.* at 3, 72, 284-89. The Division terminated Wilber on August 9, 2021. *Id.* at 3, 281.

On August 18, 2021, the ACLU submitted a Right to Know request to the Division for “[a]ll reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden [Wilber] that relate to any adverse employment action.” *Id.* at 8, 144. The Department did not produce the requested information, and the ACLU filed a Petition with the Merrimack County Superior Court under RSA 91-A. *Id.* at 25-52. In objecting to the Petition, the Division asserted that the records were exempt from disclosure pursuant to RSA 105:13-b and RSA 91-A:4, I. *Id.* at 8, 224-28. The Division further asserted that even if RSA 105:13-b did not prevent public disclosure, the records were exempt as personnel files whose disclosure would constitute an invasion of privacy pursuant to RSA 91-A:5, IV. *Id.* at 8, 228-36. The ACLU argued that RSA 105:13-b did not provide a categorical bar to disclosure, and that the privacy balancing test for personnel records pursuant to RSA 91-A:5, IV weighed in favor of disclosure. *Id.* at 8, 243-64.

On May 3, 2022, the Merrimack Superior Court (*Kissinger, J.*) granted the ACLU’s Petition and ordered disclosure of the records subject to redactions as agreed upon by the parties. *Id.* at 23-24. In analyzing RSA 105:13-b, the Superior Court acknowledged that this Court has not yet determined whether the statutory confidentiality of police personnel files

“went so far as to prohibit disclosure of such records in the context of a RSA 91-A request.” *Id.* at 12, 14. The Superior Court recognized that a statute need not reference RSA 91-A in order to provide an exemption from public disclosure, citing this Court’s ruling in *CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Services*, 167 N.H. 583 (2015), which exempted disclosure of trade information made confidential by the Uniform Trade Secrets Act (“UTSA”). *Id.* at 14-15.

However, the Court stated that “RSA 105:13-b, by its text, does not outright prohibit disclosure of police personnel records in the same way the UTSA prohibits disclosure of trade secrets.” *Id.* at 15. As such, the Superior Court held that while RSA 105:13-b recognized the confidentiality of police personnel files, it did not prevent public disclosure. *Id.* at 14. The Superior Court then performed the privacy balancing test for personnel records established in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020). *Id.* at 17-23. The Superior Court found that while “there is at least a minimal privacy interest at stake with respect to [Wilber’s] personnel file,” disclosure of the records would “assist the public in determining whether the investigation into [Wilber’s] conduct was comprehensive and accurate.” *Id.* at 16-21. Thus, the Superior Court ordered that the Division produce the requested records with certain redactions. *Id.* at 23-24. This appeal—pertaining to the narrow question of whether RSA 105:13-b categorically prohibits the public disclosure of records in a police personnel file within the meaning of RSA 91-A:4, I—followed.

SUMMARY OF THE ARGUMENT

RSA 105:13-b treats the records in police personnel files as confidential and permits their release only in accordance with its terms. Specifically, RSA 105:13-b permits disclosure of police personnel records to a defendant in a criminal case only when the police officer is serving as a witness in that criminal case and that officer's personnel file contains exculpatory evidence. RSA 105:13-b, I. In criminal cases where there is uncertainty as to whether certain personnel records constitute exculpatory evidence or where there is probable cause that the file contains relevant evidence, the court must examine the file *in camera* and may only order disclosure of exculpatory or relevant records. RSA 105:13-b, II & III. "The remainder of the file shall be treated as confidential." RSA 105:13-b, III. The statute does more than make police personnel files confidential. The process outlined in the statute functionally prohibits the public from inspecting the records in police personnel files by limiting inspection to certain, enumerated circumstances. Those personnel files are therefore categorically exempt from RSA chapter 91-A under RSA 91-A:4, I.

This Court's case law recognizes that RSA 105:13-b establishes a scheme in which police personnel records may not be disclosed outside the above narrow exceptions. This Court recently found that "further dissemination is neither required nor permitted." *Petition of State*, 174 N.H. 785, 792 (2022). The logical conclusion that follows from the statute and case law construing it is that police personnel files are categorically exempt from inspection under RSA chapter 91-A. To find otherwise would lead to absurd results. Criminal defendants will lack access to records in a police

personnel file in a criminal case that the public may obtain pursuant to a simple Right to Know request. A member of the public may be able to obtain those personnel file records and provide them to a criminal defendant to circumvent RSA 105:13-b. These results are contrary to the legislative directive that records in police personnel files be disclosed only when the circumstances in a criminal case warrant it.

Accordingly, RSA 105:13-b is a statute that “otherwise prohibit[s]” disclosure of certain governmental records pursuant to RSA 91-A:4, I. This Court should reverse the Superior Court and dismiss the Petition.

ARGUMENT

I. RSA 105:13-b PREVENTS DISCLOSURE OF POLICE PERSONNEL FILES PURSUANT TO RSA 91-A:4, I.

While the purpose of New Hampshire’s Right-to-Know law is to “[e]nsure both the greatest possible public access to the actions, discussions, and records of all public bodies, and their accountability to the people” (*see* RSA 91-A:1), the public is not guaranteed unfettered access to every document in the government’s possession. *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 707 (2010). New Hampshire’s Right to Know law guarantees citizens the right to inspect governmental records “except as otherwise prohibited by statute.” RSA 91-A:4, I. RSA 105:13-b constitutes such a prohibition contemplated by RSA 91-A:4, I. *See, e.g., Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 780 (2015) (“[T]he legislature has enacted a statute, RSA 105:13-b, which 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.”); *Gantert v. City of Rochester*, 168 N.H. 640, 646 (2016) (“[P]olice personnel files are generally confidential by statute.”); *Petition of State*, 174 N.H. 785, 792 (2022) (“We conclude that the title evinces the legislature’s intent that police personnel files potentially subject to disclosure under RSA 105:13-b start with a presumption of general confidentiality.”); *John Doe v. Attorney General*, __ N.H. __ (July 21, 2022) (slip op. at 5) (RSA 105:13-b “does not authorize the trial court to review the contents of an officer’s personnel file outside the scope of a particular criminal case.”).

The issue raised on appeal is limited to the interpretation of a statute, which is a question of law that this Court reviews *de novo*. *Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 774 (2006). The ordinary rules of statutory construction apply to this Court's evaluation of the Right to Know law. *Lambert v. Belknap County Convention*, 157 N.H. 375, 378 (2008) (citation omitted). "When examining the language of a statute, [this Court] ascribe[s] the plain and ordinary meaning to the words used." *Id.* (citations and quotations omitted). This Court interprets a statute in the context of the overall statutory scheme and not in isolation. *State v. Bobola*, 168 N.H. 771, 772 (2016). The goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. *Id.* This Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Lambert*, 157 N.H. at 378 (citation omitted).

A. RSA 105:13-b's plain meaning prohibits disclosure of police personnel records in all circumstances except where a criminal defendant's constitutional right demands disclosure.

Entitled "Confidentiality of Personnel Files," RSA 105:13-b makes police personnel files strictly confidential with three narrow exceptions that relate specifically to the discharge of prosecutors' *Brady* and *Laurie* obligations. Paragraph I of the statute identifies the first exception: exculpatory evidence within the personnel file of a police officer serving as a witness in a criminal case shall be disclosed "to the defendant." RSA 105:13-b, I. "The disclosure required under paragraph I is explicitly tied to a particular criminal defendant in a particular criminal case. *No further*

dissemination is either required or permitted.” Petition of State, 174 N.H.at 792 (emphasis added).

Paragraph II instructs prosecutors how to proceed “in situations in which there is uncertainty as to whether evidence contained within police personnel files is, in fact, exculpatory. It directs that, where such uncertainty exists, the evidence at issue is to be submitted to the court for *in camera* review.” *Duchesne*, 167 N.H. at 781 (citation omitted); *see also* RSA 105:13-b, II.

Paragraph III delineates the final exception to police personnel file confidentiality, stating that “[n]o police personnel file of an 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 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.* According to this paragraph, a police personnel file cannot be *opened* unless there is a probable cause finding that relevant evidence exists in the record. “Again, disclosure is tied to a particular criminal case and is for the explicit purpose of being used as evidence. No further dissemination

or other use is either required or permitted.” *Petition of State*, 174 N.H. at 792 (citation and quotation omitted).

In short, the statute prohibits public disclosure of police personnel files to the maximum extent permitted by the United States and New Hampshire Constitutions. RSA 105:13-b mandates the transfer of certain, otherwise confidential personnel information solely for the critical purpose of delivering to criminal defendants the most robust realization of their constitutional right to exculpatory or relevant evidence in a criminal matter. For all other reasons, the police personnel files remain closed to the public.

Thus, by its plain terms, RSA 105:13-b is a statute that “otherwise prohibit[s]” disclosure of government records pursuant to RSA 91-A:4, I. If police personnel files cannot be disclosed in the course of criminal discovery except for in narrow, exculpatory circumstances, disclosing such records pursuant to a public records request would produce an absurd result. *See Petition of Poulicakos*, 160 N.H. 438, 444 (2010) (“whenever possible, a statute will not be construed so as to lead to absurd consequences”) (citation, quotation, and internal ellipsis omitted). Opening police personnel records to public inspection would dismantle the entire statutory scheme of RSA 105:13-b. *See Petition of State*, 174 N.H. at 794 (quoting *Alford v. Superior Ct.*, 89 Cal.App.4th 356, 107 Cal. Rptr. 2d 245, 255 (2001)) (recognizing that to allow defendants to share police personnel records for use in any court “would completely destroy the carefully crafted statutory process by which [such] information is released”). Parties in a criminal case could entirely circumvent the protections afforded by statute and gain access to the records via a simple public records request. The absurdity of this result, in which a criminal defendant may have less right to

access a police personnel file within the context of his criminal case than as a member of the public seeking the same documents under RSA 91-A, defies the plain statutory language of RSA 105:13-b.

The ACLU seeks “[a]ll reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden [Wilber] that relate to any adverse employment action.” JA 8. The Superior Court concluded that “based on the parties’ filings ... the records [at issue] constitute a ‘personnel file’ that is confidential under RSA 105:13-b, and the disclosure of which could constitute an invasion of privacy.” JA 17 (citation omitted). Further, any responsive record would necessarily be contained in Wilber’s personnel file. *See Reid v. New Hampshire Attorney General*, 169 N.H. 509, 523 (2016) (finding that “[i]n general ... the term ‘personnel’ relates to employment” and records generated regarding employee misconduct are personnel records); *see also N.H. Admin. R.* Per 1501.04 (stating that documents generated during the course of an investigation will be kept apart from a State employee’s personnel record “unless included as part of a disciplinary action”).

RSA 91-A:4, I, permits citizens to inspect and copy governmental records “except as otherwise prohibited by statute.” RSA 105:13-b treats police personnel files as confidential and permits disclosure of their contents only in accordance with the specific procedure it contemplates. In this regard, RSA 105:13-b goes beyond just classifying police personnel files as confidential. It also functionally prohibits members of the public from generally inspecting and copying documents in police personnel files by permitting disclosure only in certain, enumerated circumstances. Because the records at issue are part of Wilber’s police personnel file and

those records may not be disclosed unless released through the RSA 105:13-b process, general public disclosure of the records is “otherwise prohibited by statute” pursuant to RSA 91-A:4, I.

B. This Court has long recognized that police personnel records are inaccessible under RSA 105:13-b such that RSA 91-A:4, I, prohibits disclosure.

In case after case, this Court has upheld RSA 105:13-b as a complete bar to disclosure of police personnel records except in limited instances where such records contain exculpatory information.

In *Duschesne v. Hillsborough County Attorney*, Manchester police officers sought injunctive and declaratory relief to remove their names from the then so-called “*Laurie List*.” 167 N.H. at 776. While this Court agreed that RSA 105:13-b was not squarely at issue, it did “think it helpful to discuss the statute and its requirements in order to explain how it affects the ‘*Laurie List*’ as used by prosecutors.” *Id.* at 779-80. This Court outlined the statute, stating:

The current version of RSA 105:13-b addresses three situations that may exist with respect to police officers who appear as witnesses in criminal cases. First, insofar as the personnel files of such officers contain exculpatory evidence, paragraph I requires that such information be disclosed to the defendant. Next, paragraph II covers situations in which there is uncertainty as to whether evidence contained within police personnel files is, in fact, exculpatory. It directs that, where such uncertainty exists, the evidence at issue is to be submitted to the court for *in camera* review.

Finally, paragraph III covers evidence that is non-exculpatory but may nonetheless be relevant to a case in which an officer is a witness. Consistent with our case law, 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. at 781-82 (citations omitted). The Court asserted that “the remainder of the file *must* be treated as confidential and returned to the police department which employs the officer.” *Id.* at 782 (emphasis added). Thus, in 2015, this Court found that the personnel files of police officers must remain confidential except in limited, constitutionally significant circumstances.

In *Gantert v. City of Rochester*, Plaintiff law enforcement officer alleged that he was wrongfully placed on the *Laurie* List. 168 N.H. at 642. There, this Court recognized that because “police personnel files are generally confidential by statute,” prosecutors must rely on local police departments to identify potentially exculpatory evidence. *Id.* at 646.

This Court has further clarified the restricted access to police personnel files in three cases decided this year. In *Petition of State*, this Court examined whether the State could seek protective orders pertaining to the production of potentially exculpatory police personnel files to criminal defendants pursuant to RSA 105:13-b. 174 N.H. at 788. The trial court denied the State’s Motion for a Protective Order, identifying *sua sponte* that the legal landscape regarding public employee personnel records had changed since this Court implemented a balancing test for personnel records under RSA 91-A:5, IV. *Id.* at 789. The trial court found that because personnel records could be open to public inspection, it would not “issue gag orders in blank.” *Id.* This Court reversed the trial court, holding that the policy or purpose advanced by the statutory scheme was to allow police personnel files to enjoy the “presumption of general confidentiality.” *Id.* at 791-92, 796. This Court examined the plain language of the statute and the three circumstances in which personnel files may be disclosed, and

concluded that “no further dissemination *or other use* is either required *or permitted.*” *Id.* at 792 (emphasis added). Further, this Court stated, “read as a whole, the statute details the procedure for turning over to a criminal defendant any exculpatory or relevant evidence found in the personnel files of any police officer testifying in the criminal case while maintaining the confidentiality of those files *for all other purposes.*” *Id.* at 793 (emphasis added).

In *Provenza v. Town of Canaan*, this Court specifically contemplated that RSA 105:13-b may provide a bar to public disclosure, but held that the statute was inapplicable because the record at issue was not in the officer’s personnel file. ___ N.H. ___ (April 22, 2022) (slip op. at 7).

Finally, and most recently, in *John Doe v. Attorney General*, this Court examined a request from a law enforcement officer seeking removal from the Exculpatory Evidence Schedule (“EES”). ___ N.H. at ___ (July 21, 2022) (slip op. at 2). The officer argued that RSA 105:13-b granted the trial court the authority to examine his personnel file and issue an order that his name should be removed from the EES. *Id.* at ___ (slip op. at 3). This Court again examined the statutory language of RSA 105:13-b and, affirming the confidentiality of police personnel files, found that a court could not “review the contents of an officer’s personnel file outside the scope of a particular criminal case.” *Id.* at ___ (slip op. at 4-5).

The above cases demonstrate that RSA 105:13-b creates such robust protection for police personnel files that disclosure is “prohibited by statute” pursuant to RSA 91-A:4, I. To that end, this Court’s decision in *CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Services* is instructive. There, this Court held that the New

Hampshire Department of Administrative Services could not produce Caremark's trade secrets under RSA 91-A because disclosure was "otherwise prohibited by statute." *CaremarkPCS Health, LLC v. New Hampshire Dep't of Admin. Servs.*, 167 N.H. 583, 590 (2015). The Court reasoned that although the Uniform Trade Secrets Act did not expressly prohibit disclosure pursuant to a Right to Know request, the purpose of the UTSA was "to protect trade secrets from being misappropriated and to provide redress in the event of a misappropriation." *Id.* at 589. As such, public disclosure of trade secrets constituted misappropriation under the UTSA and was prohibited pursuant to RSA 91-A:4, I. *Id.*

Like in *Caremark* where the UTSA prevented the release of trade secrets, here, RSA 105:13-b prevents disclosure of police personnel files except in limited, enumerated circumstances, pursuant to a process manifestly different from and in conflict with the right of general public inspection provided in RSA 91-A:4, I. Both cases demonstrate that a statutory scheme can provide such robust protections that general public disclosure is prohibited, even where exemption to the Right to Know statute is not explicitly stated.

This Court's decision in *Grafton County Attorney's Office v. Canner*, 169 N.H. 319 (2016), is also instructive. In that case, this Court was asked "[w]hether records maintained by arresting and prosecuting agencies pertaining to an annulled arrest and the related prosecution are categorically exempt from public inspection under the Right-to-Know Law." *Id.* at 322. In its analysis, this Court interpreted RSA 91-A:4, I and RSA 651:5 together, holding that "records maintained by arresting and prosecuting agencies pertaining to an annulled arrest and the related

prosecution do not fall under the exemption in RSA 91-A:4, I, for records that are ‘otherwise prohibited by statute’ from public inspection.” *Canner*, 169 N.H. at 328.

Part of the reasoning that animated this Court’s holding was that the annulment statute, RSA 651:5, delineated “the responsibilities of various agencies and public bodies that maintain annulled records.” *Canner*, 169 N.H. at 327. RSA 651:5, X(c)-(d) required court records and the records of the state police criminal records unit to be “sealed” or “remove[d].”

Canner, 169 N.H. at 327. It provided a different directive to arresting and prosecuting agencies: they had to “clearly identify” in their records that “the arrest or conviction and sentence have been annulled.” *Id.* (citing RSA 651:5, X(e)). This Court “agree[d] with the trial court that, had the legislature ‘intended to remove prosecuting and arrest agency records from the public, it could have used language [in RSA 651:5, X(e)] such as that used in RSA 651:5, X(c) [and] (d).” *Id.* (brackets in original).

In this case, the legislature has used the language of confidentiality with respect to records in police personnel files and has set forth a specific process detailing when and under what circumstances release of certain records from those personnel files is permitted, as contemplated by this Court in *Canner*. RSA 105:13-b is titled “Confidentiality of Personnel Files.” It relates solely to police personnel files and requires disclosure of exculpatory evidence in a police personnel file to a defendant in a criminal case if the police officer is serving as a witness in that case. RSA 105:13-b, I. If those with appropriate access to the file cannot determine whether specific records are exculpatory, “an *in camera* review by the court shall be required.” RSA 105:13-b, II. “*In camera*” means “in the judge’s private

chambers” or “in the courtroom with all spectators excluded.” *In camera*, Black’s Law Dictionary (11th ed. 2019). RSA 105:13-b, III prohibits reviewing and obtaining non-exculpatory evidence from police personnel files in a criminal case, “unless the sitting judge makes a specific ruling that probable cause exists to believe the file contains evidence relevant to that criminal case.” If the judge makes that ruling, the judge reviews the file *in camera* and may release only those “portions of the file which the judge determines to be relevant.” *Id.* The remainder of the file “shall be treated as confidential and shall be returned to the police department employing the officer.” *Id.*

This statutory scheme provides for uniform confidential treatment of police personnel files and details the specific process and procedures by which certain records within those personnel files may be released. As such, this Court has strongly implied that records in police personnel files may only be disclosed in accordance with RSA 105:13-b and are therefore exempt from disclosure under RSA 91-A. Specifically, in *New Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice*, this Court explained that “[t]he express focus of RSA 105:13-b is on information maintained in the personnel file of a specific police officer.” 173 N.H. 648, 656 (2020). Thus, because the EES itself did not reside in any one police officer’s personnel file, this Court held that “disclosure of the EES is not governed by RSA 105:13-b.” *Id.* Similarly, in *Provenza*, the trial court found that nothing in the record suggested that the contested Report was contained in or was a part of Provenza’s personnel file. ___ N.H. ___ (April 22, 2022) (slip op. at 7). This Court therefore concluded that “the

Report is not exempt from disclosure under the Right-to-Know Law by RSA 105:13-b.” __ N.H. __ (April 22, 2022) (slip op. at 7).

In this case, the records the petitioner seeks are contained in the Wilber’s police personnel file. RSA 105:13-b establishes that file as confidential and permits release of the records sought only in accordance with the statute’s procedure. *See, e.g., John Doe v. Attorney General*, __ N.H. at __ (slip op. at 5) (“RSA 105:13-b details the procedure for turning over to a defendant any exculpatory or relevant evidence found in the personnel files of any police officer testifying in a criminal case while maintaining the confidentiality of those files for all other purposes.”); *Petition of State*, 174 N.H. at 793 (2022) (explaining with respect to RSA 105:13-b that “[b]y starting with a presumption of confidentiality and then directing limited disclosure to specific persons for specific purposes, the legislature directed that for all other purposes, the information remains generally confidential”). Permitting public access and inspection of the records in a police personnel file under RSA 91-A:4, I, would conflict with, and undermine, this carefully crafted regime and is, therefore, “otherwise prohibited by statute.”

CONCLUSION

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

The State requests a fifteen-minute oral argument.

Respectfully Submitted,

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September 6, 2022

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CERTIFICATE OF COMPLIANCE

I, Jessica A. King, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,233 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.

September 6, 2022

/s/ Jessica A. King
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's brief shall be served on Gilles R. Bissonnette, Esq. and Henry R. Klementowicz, Esq., counsel for the plaintiff, through the New Hampshire Supreme Court's electronic filing system.

September 6, 2022

/s/ Jessica A. King
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