THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

No. 226-2018-CV-00537

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KEENE PUBLISHING CORPORATION
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AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
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v.

NEW HAMPSHIRE DEPARTMENT OF JUSTICE
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Concord, NH 03301

PETITIONERS' OBJECTION TO THE DEPARTMENT OF JUSTICE'S MOTION TO DISMISS

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NOW COME Petitioners the New Hampshire Center for Public Interest Journalism, the Telegraph of Nashua, Union Leader Corporation, Newspapers of New England, Inc. (through its New Hampshire properties), Seacoast Newspapers, Inc., Keene Publishing Corporation, and the American Civil Liberties Union of New Hampshire, and respectfully file this Objection to the Respondent Department of Justice's Motion to Dismiss.

Introduction

The Department currently maintains a secret list of police officers who have engaged in sustained misconduct that reflects negatively on their credibility or trustworthiness. This list is called the Exculpatory Evidence Schedule, or EES List. As of June 1, 2018, 171 New Hampshire law enforcement officers were on the List. As of today (November 29, 2018), 249 officers are on the List.[1] The Department has declined to produce an unredacted version of this List and, instead, has moved to dismiss Petitioners' Petition seeking disclosure. This Court must deny the Department's Motion to Dismiss, grant the Petition, and order the EES List be produced because the List will inform the public of police officer misconduct and provide transparency that will help ensure that prosecutors have been (and are) complying with their obligations to produce exculpatory information to criminal defendants under *Brady*.

As the New Hampshire Supreme Court has repeatedly explained, the public interest in disclosure is great when it will expose government misconduct and inform how law enforcement wield their power. *See, e.g., Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673, 684 (2011); *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 709 (2010); *Reid v. N.H. AG*, 169 N.H. 509, 532 (2016). Here, the misconduct at issue is undoubtedly

[1] *See also* Exhibit SS (Department's letter stating that the "DOJ has added 81 officers to the EES since June 1, 2018"). In this letter, the Department states that it has received 10 removal requests since June 1, 2018. Of these 10 requests, three officers have been removed from the List, three removal requests have been denied, and four removal requests are pending. *Id.* As explained in the Petition, Petitioners are not seeking the names of officers who have

serious, as it relates to police officers' trustworthiness and credibility—traits that go to the core of an officer's ability to perform his or her job effectively. As the Attorney General's March 21, 2017 memorandum explains, this misconduct consists of, for example, (i) a deliberate lie during a court case, (ii) the falsification of records or evidence, (iii) any criminal conduct, (iv) egregious dereliction of duty, and (v) excessive use of force. Moreover, this finding of misconduct—which must be sustained—and the fact that it is exculpatory are not speculative or cursory, but rather have been made by the police chief or County Attorney after an investigation where the officer was given an opportunity to be heard.

The overbreadth of the Department's position to withhold the EES List in its entirety is concerning. Who are the officers protected by the Department's position? They include (i) officers who the State has charged with criminal conduct that resulted in placement on the List, (ii) officers who have been convicted of crimes, (iii) officers who have been terminated as a result of the conduct that led to placement on the List, (iv) officers who have exhausted internal grievance procedures, and (v) officers where there would be no dispute that disclosures would need to be made to defendants in every case in which the officer is a testifying witness. For example, the Department is potentially protecting the identities of Claremont police officers Ian Kibbe and Mark Burch who are alleged to have performed an illegal search and falsified official reports, which caused charges in at least 20 cases to be dropped. *See* Exhibit HH (Jordan Cuddemi, "Arrests Tossed as More Are Reviews," *Valley News* (Apr. 29, 2018)). Both were terminated, and the Department has criminally charged Mr. Kibbe with, among other things, two misdemeanors: one count of unsworn falsification and one count of obstructing government administration. *See* Exhibit II (Jordan Cuddemi, "Former Police Officer Seeks to Have Criminal

Charges Dismissed," *Valley News* (Aug. 2, 2018)).[2] Mr. Kibbe is scheduled to plead guilty to these two misdemeanor charges on December 3, 2018.[3] It is hard to imagine how withholding whether these officers are on the EES List is in the public interest.

Indeed, the fact that disclosure of the EES List will inform the public of police misconduct is not seriously disputed by the Department. Rather, the Department seeks to withhold this information precisely because it will expose such misconduct out of a fear that transparency will somehow negatively impact the criminal justice system. This fear held by the Department—which has the burden in this case—is speculative, lacks any evidentiary support, and has been rejected by the Supreme Court. *See Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551, 556 (2002) ("[T]here is no evidence establishing the likelihood that auditors will refrain from being candid and forthcoming when reporting if such information is subject to public scrutiny.").

Finally, the Department's reliance on RSA 105:13-b is misplaced, as that statute only governs how "police personnel files" are handled in the context of criminal prosecutions. Here, the EES List is not a "personnel file" document because the Department does not employ the officers on the List and the List is not used for human resources purposes. But even if the EES List is a "personnel file" document, RSA 105:13-b does not categorically exempt police personnel information under Chapter 91-A. As the 1992 legislative history of RSA 105:13-b makes clear, the legislature specifically rejected such a blanket Chapter 91-A exemption for police personnel files.

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[2] It is unclear whether former Claremont officers Kibbe and Burch are on the EES List, though it is likely. Pages 2 and 5 of the Department's redacted June 1, 2018 EES List appended to the Petition contain entries for two Claremont officers with the date of notification being March 15, 2018 and the category being "false reports."

[3] *See* Exhibit TT (Jordan Cuddemi, "Change of Plea Hearing Scheduled for Former Claremont Officer Accused of Perjury," *Valley News* (Nov. 29, 2018)).

Simply put, it is the Department, not the legislature, which is unilaterally electing to give the police special, blanket protections concerning their personnel files under Chapter 91-A that are not afforded other government employees. The Department's incorrect interpretation of RSA 105:13-b also provides officers who have committed serious misconduct with special confidentiality rights that the public does not receive. When a police officer charges a citizen with a crime, that person does not receive anonymity. The charge and the person's name are made public, even before the person has received a hint of due process. This information will remain public even if the police later drop the charge or the person is acquitted. With this publicity comes stigma to the accused. But both the New Hampshire and United States Constitutions recognize that secrecy and anonymity would create a greater societal harm because the public would not be able to witness how law enforcement wield their power. Like those who are publicly charged by police officers with crimes, officers on the EES List are similarly not entitled to confidentiality.

For these reasons and the reasons below, the Department's Motion to Dismiss must be denied and the Petition must be granted.

Argument

I. RSA 105:13-b Does Not Apply to the EES List.

A. The EES List is Not a "Police Personnel File" Document Under RSA 105:13-b.

RSA 105:13-b, which must be construed narrowly, does not apply to the EES List because the List is not a "police personnel file" document. *See Goode,* 148 N.H. at 554 (noting that courts construe "provisions favoring disclosure broadly, while construing exemptions narrowly"). This is for two independent reasons.

First, by its express terms, RSA 105:13-b applies only to documents in *police personnel files*. *See* RSA 105:13-b, I (addressing only "[e]xculpatory evidence in a *police personnel file* of a police officer who is serving as a witness in any criminal case") (emphasis added). However, as the Department admits, the EES List is created and maintained outside a police officer's personnel file by the Department, a separate governmental entity that does not employ the officer. Put another way, the EES List is an *external* document. *See Reid*, 169 N.H. at 527 (noting that, for the "personnel file" exemption under RSA 91-A:5, IV to apply, the material must be considered a "personnel file" or part of a "personnel file"). RSA 105:13-b creates a court process, in the context of a criminal prosecution, whereby potentially exculpatory information contained in a police officer's personnel file "shall be disclosed to the defendant" or may be reviewed by a court *in camera* to determine whether disclosure should be made to a defendant. The statute does not apply to external documents like the EES List.

Second, the EES List is not a police "personnel file" document under RSA 105:13-b because it is not human resources related. The Supreme Court, following the United States Supreme Court decision in *Milner v. Dep't of the Navy*, 562 U.S. 562 (2011), has defined "personnel" in the context of RSA 91-A:5, IV's "internal personnel practices" exemption and explained: "[T]h[e] term *refers to human resources matters*. 'Personnel,' in this common parlance, means 'the selection, placement, and training of employees and … the formulation of policies, procedures, and relations with [or involving] employees or their representatives.'" *Reid*, 169 N.H. at 522 (quoting *Milner*, 562 U.S. at 570) (emphasis added). The Court added: "In general, then, the term 'personnel' relates to employment." *Id.*

In interpreting Massachusetts' "personnel file or information" exemption, the Massachusetts Court of Appeals similarly explained that:

> While the precise contours of the legislative term "personnel [file] or information" may require case-by-case articulation, it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee. These constitute the core categories of personnel information that are "*useful in making employment decisions regarding an employee*."

Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5-6 (2003) (quoting *Wakefield Teachers Ass'n v. School Comm*., 431 Mass. 792, 797-98) (2000)) (emphasis added); *see also Md. Dep't of State Police v. Md. State Conference of NAACP Branches*, 190 Md. App. 359, 373, 374-75 (Ct. Special App. Md. 2010) (racial profiling complaints were not personnel records because, in part, they were not disciplinary records stored in the officers' personnel files; noting that, for this exemption to apply, the documents requested must, in part, "directly pertain to employment"), *aff'd on other grounds*, 430 Md. 179 (Ct. App. Md. 2013).

Here, the EES List is maintained by the Department not to make employment or human resources decisions regarding the officer, but rather to ensure that disclosures are made to defendants about officers consistent with *Brady*. The Department admits that there is no employment purpose for the EES List on page 9 of its Memorandum in Support of its Motion to Dismiss, where it states that the EES lists exists "*for the singular purpose* of establishing a reference tool for prosecutors to initiate their inquiry as to the existence of exculpatory evidence as to a particular defendant's criminal matter." (emphasis added). This should end this Court's inquiry.

In any event, the facts of *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester* are informative here. There, the Worcester Telegram newspaper sought disclosure of information relating to a citizen complaint against an officer and the subsequent internal affairs investigation. The sole issue before the Court was the applicability of the "personnel file or

information" exemption to this information under Massachusetts's public records law. The Court held that the officers' reports, witness interview summaries, and an internal affairs report were not "personnel file or information" exempt from disclosure because these documents related to the workings and determinations of the internal affairs process whose quintessential purpose was not human resources related, but rather to inspire public confidence. *See Worcester Telegram & Gazette Corp.*, 58 Mass. App. Ct. at 8-9. This Court must reach the same conclusion here where, as the Department concedes, "the singular purpose" of the EES List is not employment related, but rather to create confidence that prosecutors are complying with their ethical and legal obligation to produce exculpatory information to defendants.

The Department claims that the EES List is "personnel" information because it relates to "police officer discipline," which it asserts is "the same type of information from which the EES [List] is derived." The Department adds that "the EES [List] comprises [of] information that is pulled generally from internal police records of various police departments (i.e., employers) across the state." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 17-18. However, the fact that the EES List may contain information that is also separately reflected in an officer's personnel file maintained by the officer's employer does not mean that the EES List is a "personnel" document. As the *Worcester Telegram & Gazette Corp.* Court correctly explained, the question in this analysis is the "nature and character" of the document and how the document is being used. *See id.* at 10 ("[T]he *nature and character* of the document determines whether it is 'personnel [file] or information.' Put differently, the same information may simultaneously be contained in a public record and in exempt 'personnel [file] or information.'") (emphasis added). And here, once again, the "nature and character" of the EES List is not human resource related.

The State's reliance on RSA 516:36 in interpreting RSA 105:13-b is misplaced. RSA 516:36 has no bearing on this analysis. The Department's claim that this statute renders police personnel files not "discoverable" in civil state court actions is incorrect. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 9. This statute governs *admissibility*, not discoverability, of police internal investigation documents. RSA 516:36, II ("All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be *admissible* in any civil action other than in a disciplinary action between the agency and its officers, agents, or employee ….") (emphasis added). Information, of course, can be *both* inadmissible in court under RSA 516:36 *and* public under Chapter 91-A. As one Superior Court recently explained, RSA 516:36 "provides no basis for withholding records responsive to a Right-to-Know request." *See Salcetti v. City of Keene*, No. 213-2017-CV-00210 (Cheshire Super. Ct. Aug. 29, 2018) (Ruoff, J.), *available at* http://www.orol.org/rtk/rtknh/213-2017-CV-210-2018-08-29.html.[4]

B. Even if the EES List is a "Police Personnel File" Document Under RSA 105:13-b, that Statute Does Not Operate as a Categorical Exemption Under Chapter 91-A. Rather, Chapter 91-A Principles Apply.

Even if the EES List can be viewed as a "police personnel file" document under RSA 105:13-b, this statute does not operate as a categorical exemption barring production of police personnel file information under Chapter 91-A. Rather, Chapter 91-A rules—including the

[4] As the EES List is not a "police personnel file" document, ordering the EES List to be disclosed to the public—which will include members of the criminal defense bar—will not impact RSA 105:13-b's application concerning the dissemination of the contents of police personnel files to defendants in criminal cases. The process under RSA 105:13-b will remain unchanged. Criminal defense attorneys will continue to not have access to the contents of police personnel files subject to the provisions of RSA 105:13-b. However, since both prosecutors and defense attorneys (like other members of the public) will have access to the List, each will know when (i) testifying officers are on the List and (ii) disclosure of the physical personnel file information needs to be produced either to the defendant or to the Court for *in camera* review under RSA 105:13-b.

public interest/privacy interest balancing analysis—apply when citizens request police personnel file information. This is the case for at least three reasons.

First, by its plain terms, nothing in RSA 105:13-b suggests that this statute trumps or abrogates the Right-to-Know Law and its "three-step analysis" with respect to police officers' "personnel files" under RSA 91-A:5, IV. *See Reid*, 169 N.H. at 528 ("We now clarify that … 'personnel … files' are not automatically exempt from disclosure. For those materials, 'th[e] categorical exemption[ ] [in RSA 91-A:5, IV] mean[s] not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure.'") (internal citations omitted). Rather, RSA 105:13-b simply explains how police personnel files are to be disclosed to defendants in the context of criminal prosecutions. If the legislature had intended RSA 105:13-b to completely exempt police personnel files from disclosure under the Right-to-Know Law, it would have said so as it has done in other contexts.[5] *Cf., e.g., Motion Motors, Inc. v. Berwick*, 150 N.H. 771, 774 (2004) ("The statute applies to timber felled on the land of another person. The legislature could have, but did not, provide that it apply when a party fells timber belonging to another person.").

Second, to the extent there is any ambiguity as to whether RSA 105:13-b operates as a categorical exemption for police personnel file information under Chapter 91-A, the legislative history of this statute explicitly refutes the Department's contention that this statute creates such

[5] *See, e.g.*, RSA 659:13, III ("If a voter on the nonpublic checklist executes an affidavit in accordance with subparagraph I(c), the affidavit shall not be subject to RSA 91-A."); RSA 659:95, II ("Ballots, including cast, cancelled, and uncast ballots and successfully challenged and rejected absentee ballots still contained in their envelopes, prepared or preserved in accordance with the election laws shall be exempt from the provisions of RSA 91-A …."); RSA 654:31-a ("All other information on the voter registration form, absentee registration affidavit, qualified voter affidavits, affidavit of religious exemption, and application for absentee ballot shall be treated as confidential information and the records containing this information shall be exempt from the public disclosure provisions of RSA 91-A, except as provided by statutes other than RSA 91-A."); RSA 654:45, VI ("The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31 …."); RSA 193-E:5, I(j) ("Information maintained in the random number generator [regarding unique school pupil information] shall be exempt from the provisions of RSA 91-A."); RSA 169-C:25-a (child abuse medical records received by law enforcement "shall be exempt from disclosure under RSA 91-A.").

a categorical exemption. *See State v. Brouillette*, 166 N.H. 487, 494-95 (2014) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent."). RSA 105:13-b was introduced by the New Hampshire Association of Chiefs of Police in 1992. The focus of the bill was to create a process—which previously had been ad hoc—for how police personnel file information would be disclosed to defendants *in the context of criminal cases*. As the police chief representing the New Hampshire Association of Chiefs of Police stated in testimony: "Attempts to get information from private files of police officers is nothing more than a fishing expedition *on the part of defense attorneys*." *See* Exhibit LL, at LEG006 (Complete 1992 RSA 105:13-b Legislative History) (emphasis added); *see also id*. at LEG037 (Police Chief's Association addressing concern of "potential abuse by *defense attorneys* throughout the state intent on fishing expeditions") (emphasis added).[6] The final version of the statute was meant only to provide rules concerning the disclosure of police personnel files in the context of criminal proceedings, and was not intended to change the law with respect to Chapter 91-A.

The Department's oft-repeated view that the legislature, through RSA 105:13-b, did not "contemplate … the disclosure of police personnel information outside of law enforcement to anyone other than a constitutionally-pertinent criminal defendant" is wrong. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 10. In the first paragraph of the original proposed version of RSA 105:13-b, the statute contained a sentence stating, in part, that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A." *See* Exhibit KK (Excerpts of 1992 RSA 105:13-b Legislative History); Exhibit LL, at LEG 004 (Complete 1992 RSA 105:13-b Legislative History). In January 14,

[6] In considering a motion to dismiss, this Court may consider "documents attached to the plaintiff's pleadings,… documents the authenticity of which are not disputed by the parties[,] official public records[,] or documents sufficiently referred to in the [writ]." *Beane v. Dana S. Beane & Co*., 160 N.H. 708, 711 (2010) (citation, quotation, and ellipses omitted).

1992 testimony before the House Judiciary Committee, Petitioner Union Leader Corporation objected to this blanket exclusion. In his testimony, then Union Leader Managing Editor Charles Perkins explained to the Committee:

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

See Exhibit KK (Excerpts of 1992 RSA 105:13-b Legislative History); *Exhibit LL*, at LEG013-14 (Complete 1992 RSA 105:13-b Legislative History). The Union Leader added that the proposed version of the bill would "knock a gaping hole in the right-to-know law" and that the "right-to-know law does empower the state's judiciary to weigh the sometimes conflicting interests of public employees and of inquiring citizens in determining what records shall be private, and what shall be public." *Id.* The Union Leader concluded:

> The Legislature [under this proposed bill] will be telling the courts that even if the case for release of this information to the public is clear cut, even if it is overwhelmingly in the interest of the police department involved, it can't be done. *The prohibition in the first paragraph of this bill is absolute*.

Id. (emphasis added).

Significantly, following the Union Leader's objection, the legislature amended the bill to delete this categorical exemption for police personnel files under Chapter 91-A. It appears that the Union Leader did not oppose the amended version after this deletion. The legislature's amendment unequivocally establishes that it never intended RSA 105:13-b to act as a blanket exemption to the Right-to-Know law for police officers' personnel files. Instead, once again, the focus was on how police personnel files were to be reviewed and disclosed in the context of criminal prosecutions.

The legislature rejected the idea of RSA 105:13-b as acting a blanket exemption of police officer personnel file information under Chapter 91-A for good reason: doing so would, as the Union leader explained, effectively render disciplinary information in police officer personnel files as *per se* exempt from disclosure—without any public interest balancing analysis—and give the police special protections not afforded to the personnel files of other government employees. The legislature's desire to place police officers on par with other government employees under Chapter 91-A makes intuitive sense: to do otherwise would also give the police special protections concerning sustained misconduct that are not afforded to citizens charged with crimes. Unlike the confidentiality sought here by the Department with respect to officer misconduct, an arrest by the officer of a citizen is not treated as confidential even if the charge is the result of officer misconduct and is dropped. *See* RSA 594:14-a.

In short, the Department cannot hide behind the legislature in support of its position that the police must receive special and categorical protections under Chapter 91-A. The legislature explicitly rejected this position. It is the Department, not Petitioners, which should take its argument to the legislature. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 25.[7]

Third and finally, the Department's reliance on *Gantert* and *Duchesne* and their assumption that "police personnel files are generally confidential by statute" under RSA 105:13-b is misplaced. *See Gantert v. City of Rochester*, 168 N.H. 640, 646 (2016) ("Because police

[7] The Department relies heavily on *Ass'n for L.A. Deputy Sheriffs v. Superior Court*, 13 Cal. App. 5th 413 (2017) in support of its interpretation of RSA 105:13-b. This reliance is misplaced for several reasons. The California statutes at issue there were far broader than RSA 105:13-b. The California statutes, unlike RSA 105:13-b, explicitly operated as a blanket bar to disclosing police personnel file information in any context. Under the California statutes, police officer personnel files were "confidential and shall not be disclosed 'in any criminal or civil proceeding.'" *Id.* at 420. This bar included "information obtained from personnel records," which is broader than RSA 105:13-b. Conversely, as explained above, RSA 105:13-b was <u>not</u> designed to categorically exempt police personnel files from exclusion under Chapter 91-A. There are also multiple California cases where similar information is not categorically barred. *See Commission on Peace Officer Standards & Training v. Superior Court*, 42 Cal.4th 278 (2007) (names of police officers subject to disclosure); *Long Beach Police Officers Assn v. Long Beach*, 59 Cal. 4th 59 (2014) (no particularized showing of harm met, and therefore ordering disclosure of names of officers involved in shooting). California also has no constitutional provision analogous to Part I, Article 8 of the New Hampshire Constitution.

personnel files are generally confidential by statute, see RSA 105:13-b (2013), the Attorney General recognized in the Memo that prosecutors must rely upon police departments to identify Laurie issues."); *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774, 780 (2015) (noting that "the 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."). These cases say nothing about whether the EES List is categorically exempt from disclosure under Chapter 91-A. Indeed, the Court had no occasion in these cases to examine whether it was, in fact, appropriate to treat the EES List as exempt from disclosure under Chapter 91-A. *Gantert* and *Duchesne* were not Chapter 91-A cases. Instead, they concerned police officers challenging their placement on the EES List on due process grounds. The parties in these cases—both the officers and government entities—never questioned the propriety of treating the EES List as confidential under RSA 105:13-b. This is not surprising. The officers challenging placement on the EES List would receive the benefit of such confidentiality, and the adverse prosecuting entities were merely reciting the Attorney General's (erroneous) legal analysis as to why the EES List should be treated as a confidential document. The Court's statements in these cases merely reflected, without any legal analysis, the parties' uncontested and unlitigated positions concerning the confidentiality of the EES List.[8]

[8] Interpreting RSA 105:13-b consistent with the analyses in Part I.A-B is consistent with the doctrine of constitutional avoidance, as failing to construe the statute in such a manner could violate Part I, Article 8 of the New Hampshire Constitution. *See* Part I.D *infra* (addressing constitutional analysis); *see also State v. Paul*, 167 N.H. 39, 44-45 (2014) (explaining that the well-established doctrine of constitutional avoidance "requires [the Court], whenever reasonably possible, to construe a statute so as to avoid bringing it into conflict with the constitution").

C. The Department's "Administrative Gloss" Theory of Interpreting RSA 105:13-b as to the EES List Fails

Under the Department's administrative gloss theory, it contends that this Court should simply defer to the Department's view that RSA 105:13-b operates as a blanket bar to disclosure of the EES List under Chapter 91-A because this is how the Department has viewed the law since 2004 when the EES List was created. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 12-16; *see also In re Kalar*, 162 N.H. 314, 321-22 (2011) ("Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its de facto policy, in the absence of legislative action, because to do so would, presumably, violate legislative intent.") (internal quotations and citations omitted).

The Supreme Court has explained that "[l]ack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine." *Id.* As in *Kalar*, the Department's interpretation of RSA 105:13-b fails because, as explained in Part I.A-B *supra*, it is not ambiguous that the statute does not apply to the EES List. Nowhere in the text of the statute is there mention of a record bearing any resemblance to the List. And the EES List is not a "police personnel file" document under RSA 105:13-b's plain terms. As those plain terms and the legislative history demonstrate, all RSA 105:13-b is designed to do is provide a mechanism for judicial review of police personnel files before producing information contained therein to defense counsel *in criminal cases*.[9]

[9] As in the context with *Chevron* deference, under the administrative gloss theory of statutory interpretation, this Court should not "be so star-struck by it that we must defer to the agency at the first sign of uncertainty about the meaning of the words" that the legislature chose. *See Castañeda v. Souza*, 810 F.3d 15, 23 (1st Cir. 2015) (equally divided court discussing *Chevron* deference). Rather, this Court must be mindful that "a statute may foreclose an agency's preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose

The Department's "administrative gloss" theory also fails because it runs counter to statutory construction rules that apply in public records disputes. New Hampshire courts have made clear that, in Chapter 91-A disputes, they are obligated when faced with an ambiguity not to simply defer to an agency interpretation, but rather to independently construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode,* 148 N.H. at 554. The Supreme Court in *Reid* emphasized this interpretive rule when criticizing two prior decisions "that departed from our customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly." *Reid*, 169 N.H. at 519-20, 521. The Court added that it was now "return[ing] to our customary standards for construing the Right-to-Know Law." *Id.* This interpretative rule resolves questions "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.,* 142 N.H. 540, 546 (1997) (citation omitted). This interpretative rule—which cannot be cast aside simply because the Department has adopted an incorrect interpretation of the law for years that no one has had the legal resources, legal expertise, or political will to challenge—is a complete answer to the Department's administrative gloss argument.

The Department also argues as part of its administrative gloss argument that disclosure of the EES List "could chill police chiefs' willingness to designate more borderline personnel issues as so-called 'Brady' or 'Laurie material,' knowing the personal and professional impact that the public reporting would have on the officer." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 15. But, as explained in Part III.B.2, this Court should not credit a speculative fear that is unsupported by evidence. To do so would also ignore the Department's position set forth on

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makes clear what its text leaves opaque." *Id.* (quoting *Council for Urological Interests v. Burwell*, 790 F.3d 212, 221 (D.C. Cir. 2015)).

page 12 of its Memorandum that "[t]he Attorney General … was plainly authorized to create such a procedure [i.e., the List] within the boundaries of established law" and has the concomitant authority to see that those charged with implementing the procedure do so. Police chiefs are, of course, obligated—and have a professional responsibility—to follow whatever reporting and disclosure rules concerning the EES List that the Department mandates. *See Goode*, 148 N.H. at 556 (rejecting argument that auditor reports might be chilled by disclosure because auditors have "an obligation to perform audits and report their findings to the proper governmental entities to which they are accountable").

In sum, this Court cannot, as the Department seeks, abdicate its responsibility to independently interpret statutes by simply deferring to the Department's erroneous 14-year-old legal interpretation. Historical inertia is not a defense to a habitual Chapter 91-A violation, especially where the New Hampshire courts—not the Department—are "the final arbiters of the legislature's intent as expressed in the words of a statute considered as a whole." *In re Kalar*, 162 N.H. at 322. Government decisions to systematically violate Chapter 91-A do not become any less unlawful because they have been done for years. It is the Department, not the legislature, which is obligated to correct its own erroneous legal interpretation, especially in light of the Supreme Court's 2016 *Reid* decision limiting the definition of "personnel" to information relating to employment practices. And if the Department disagrees with the law and its disclosure obligations, then it is the obligation of the Department—not Petitioners—to make its case before the legislature rather than unilaterally impose its own policy preference.

D. Alternatively, if RSA 105:13-b Applies to the EES List and Categorically Exempts It Without a Public Interest/Privacy Interest Balancing Analysis, that Would Violate Part I, Article 8 of the New Hampshire Constitution.

If the Court concludes that RSA 105:13-b categorically bars the disclosure of the EES List without a public interest/privacy interest balancing analysis, then RSA 105:13-b would constitute an "unreasonable restriction" on the public's right of access in violation of Part I, Article 8 to the New Hampshire Constitution.[10]

To the extent strict scrutiny does not apply here, this Court must employ a balancing analysis to address whether RSA 105:13-b violates Part 1, Article 8 as it applies to the EES List. "To determine whether restrictions are reasonable, we balance the public's right of access against the competing *constitutional interests* in the context of the facts of each case. The reasonableness of any restriction on the public's right of access to any governmental proceeding or record must be examined in light of the ability of the public to hold government accountable absent such access." *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 669-70 (2016) (emphasis added) (internal quotations and citations omitted); *see also Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 290 (2005) (same). As *Sumner* makes clear, there must be a "constitutional interest" justifying the legislature's desire to withhold information from the public; a mere policy desire is insufficient.[11]

As explained in Part III.B.3 *infra*, the public's right of access is great. On the other side of the Article 8 equation, the Department raises three "constitutional interests" that it claims justifies RSA 105:13-b's override of the public's right of access to the EES List: (i) the privacy

[10] This Court does not need to reach this constitutional question if it concludes, per the analysis above, that: (i) the EES List is not a "police personnel file" document under RSA 105:13-b, or (ii) RSA 105:13-b does not operative as a categorical exemption and the EES List must be disclosed after balancing the public interest in disclosure against the privacy interest in nondisclosure.

[11] Petitioners are not bringing a facial claim against RSA 105:13-b. Rather, Petitioners are only challenging the constitutionality of applying this statute to the identities of the officers on the EES List.

interests of officers with respect to their personnel file information; (ii) promoting over-inclusiveness as to the placement of officers on the EES List; and (iii) the Attorney General's supervisory authority over all law enforcement. Just as these arguments must be rejected when applying RSA 91-A:5, IV's public interest/privacy interest balancing analysis, *see* Part III.B *infra*, these arguments must be rejected here as part of this constitutional analysis.

Though Petitioners incorporate by reference their arguments in Part III.B *infra* in response to the Department's three "constitutional interests," Petitioners make the following three brief additional points. *First*, the Department's apparent argument that the officers on the EES List have a "constitutional interest" in not being publicly identified is incorrect. As explained in Part III.B.1 *infra*, *Gantert v. City of Rochester*, 168 N.H. 640 (2016) and *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774 (2015) only stand for the proposition that officers have a liberty interest concerning <u>*placement*</u> on the EES List that requires some form of post-deprivation due process. Nothing in those decisions supports the notion that the officers on the EES List have a constitutional interest to anonymity concerning their placement on the List *after* they have received due process.[12]

[12] The Department's reliance on *In re Burling*, 139 N.H. 266 (1994), which rejected a state legislator's request to obtain professional conduct files regarding a deceased attorney, is misplaced. This is so for several reasons. *First*, *Burling* addressed a request to waive confidentiality governed by Supreme Court Rule 37. Unlike *Burling*, the case at bar presents a statutory interpretation question—namely, whether RSA 105:13-b applies to the EES List. *Second*, the *Burling* Court was especially concerned that public disclosure would endanger the interests of those from whom the state has obtained information on a confidential basis. *Id.* at 270. Such concerns do not exist with respect to the EES List. In fact, *Burling* supports Petitioners' position. While the Court in *Burling* rejected the petitioner's effort to obtain the <u>*contents*</u> of disciplinary files, lawyers who commit serious enough offenses can be subject to a <u>*public*</u> censure identifying the lawyer. *See* N.H. Sup. Ct. R. 37(2)(g). Indeed, the names of lawyers who are disciplined are routinely made public. *See* N.H. Attorney Discipline System, *available at* http://www.nhattyreg.org/search.php. Effective April 1, 2000, all records and proceedings relating to a complaint docketed by the attorney discipline system are available for public inspection upon the earliest of the following: (1) when the Attorney Discipline Office general counsel, the complaint screening committee or the professional conduct committee finally disposes of a complaint; (2) when disciplinary counsel issues a notice of charges; (3) when the professional conduct committee files a petition with the supreme court (with some exemptions); or (4) when the respondent attorney, prior to dismissal of a complaint or the issuance of a notice of charges, requests that the matter be public. *See* N.H. Sup. Ct. R. 37(20)(b). Just as disciplined attorneys currently receive little confidentiality, officers on the EES List are similarly not entitled to confidentiality, especially where they have engaged in sustained misconduct and have received due process.

Indeed, the Department's position that officers on the EES List who have committed serious misconduct have a constitutional interest in anonymity is deeply troubling, as it grants special constitutional rights to the police that those accused of crimes by the police do not have. As discussed *infra* at Part III.B.1, citizens accused of crimes are not given anonymity by law enforcement, including the Department. Instead, their names are public and the allegations are circulated widely by law enforcement and published in the press, even before the accused have received any due process. They are given no anonymity despite the stigma they face. Instead, the New Hampshire and United States Constitutions require that the public be informed of how the police, prosecutors, and the courts function so the government can be held accountable. This is the tradeoff we make as a transparent, democratic society. Like citizens, police officers on the EES List have no constitutionally-recognized interest in anonymity or privacy when they have committed serious "sustained" misconduct. [13]

Demonstrating the overbreadth of RSA 105:13-b, the Department interprets this statute as *per se* exempting from disclosure police personnel files without any individualized assessment as to whether a privacy interest actually exists in specific cases. *See Associated Press v. State of N.H.*, 153 N.H. 120, 139 (2005) ("RSA 458:15-b, III does not permit the court to make the individualized determinations required by the State Constitution and by *Petition of Keene Sentinel* and its progeny."); *see also Hampton Police Ass'n, Inc. v. Town of Hampton*, 162 N.H. 7, 16 (2011) ("A blanket assertion is generally extremely disfavored, and ordinarily the privilege

[13] There is also no "constitutional interest" in granting police officers a special *per se* exemption from disclosure of personnel file misconduct that reflects adversely on their credibility or truthfulness where such misconduct in the personnel files of other government employees would <u>not</u> be *per se* exempt from disclosure under *Reid*. (Government employee conduct would only be per se exempt if it were compiled as part of an "internal personnel practice" under RSA 91-A:5, IV. *See Reid*, 169 N.H. at 519-522.) The only plausible explanation for this differential treatment is the governmental desire to give law enforcement a special privilege that other public employees (and private citizens) do not have. Such a justification is both illegitimate and irrational where police officers (i) have the power to arrest (unlike other government officials and members of the public) and (ii) where their disciplinary records might have to be produced to a defendant under *Brady*.

must be raised as to each record so that the court can rule with specificity.") (quotations omitted); *In re Keene Sentinel*, 136 N.H. 121, 129 (1992) (a party "cannot prevail in their claim to keep the records sealed merely by asserting a general privacy interest"). As explained in Paragraphs 60 and 61 of the Petition, the Department views RSA 105:13-b as even barring the disclosure of whether an officer is on the EES List (i) where the press has reported that the officer is on the List (e.g., the cases of former Nashua officer John Seusing, former Pelham officer Eugene Stahl, former Weare officer Joseph Kelley[14], former Salem officer Eric Lamb[15], and former Rochester officer John Gantert[16], etc.), (ii) where the officer's misconduct has been made public or reported by the press (e.g., former Manchester Detectives Darren Murphy and Aaron Brown[17], etc.), (iii) where the misconduct has been sustained and led to the officer's termination or other discipline after completion of the grievance process, (iv) and/or where the misconduct has led to public criminal charges (and even conviction) against the officer (e.g., former Claremont police officer Ian Kibbe who has been criminally charged by the Department and is expected to plead guilty to one count of unsworn falsification and one count of obstructing government administration[18], etc.). As is obvious, the officer's privacy interests in such circumstances are nonexistent.

Second, the Department's argument that RSA 105:13-b is necessary to "encourage[] chiefs and prosecutors to be over-inclusive in their decision to come forward with officers that

[14] *See* Exhibit DD (Mark Hayward, "Fired Weare Police Officer May Get More from Suit vs. Town," *Union Leader* (Sept. 27, 2018) (stating that Sgt. Kelley is on the EES list)).
[15] *See* Exhibit BB (Jason Schreiber, "AG Claims Reams Removed Officer's Name from Laurie List," Seacoast Online.com (June 4, 2014) (stating that Sgt. Lamb is on the list)).
[16] *Gantert v. City of Rochester*, 168 N.H. 640 (2016); *see also* Exhibit EE (Nancy West, "Court: Rochester Police Officer Stays on 'Laurie' List," InDepthNH.org (Mar. 25, 2016)).
[17] *See* Exhibit FF (Mark Hayward, "Two Fired Manchester Cops Accused of Rape in Claim Filed With City," *Union Leader* (June 17, 2018)).
[18] *See* Exhibit II (Jordan Cuddemi, "Former Police Officer Seeks to Have Criminal Charges Dismissed," *Valley News* (Aug. 2, 2018)); Exhibit TT (Jordan Cuddemi, "Change of Plea Hearing Scheduled for Former Claremont Officer Accused of Perjury," *Valley News* (Nov. 29, 2018)).

were subject [to] adverse disciplinary findings and include and retain these officers on the EES [List]" cannot be credited. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 36. As the 1992 legislative history of RSA 105:13-b demonstrates, the legislature's focus in enacting this law was not to encourage the discipline of officers or the placement of officers on the EES List, but rather to prevent defense lawyers *in criminal cases* from gaining access to a police officer's personnel file as part of a purported "fishing" expedition. The EES List was not even created until 12 years later in 2004, and the Department apparently took no position on the 1992 bill. This legislation was a policy decision on the part of the legislature to protect the police in criminal cases; it was not done to effectuate any "constitutional interest" that police officers have with respect to their personnel file information. This is because no such "constitutional interest" exists, especially when sustained misconduct of the police is at issue.

Third, the Department argues that it has a constitutional interest in supervising all law enforcement and that "[t]he attorneys general took this action to implement the legislature's intent reflected in RSA 105:13-b in accordance with their 'paramount authority' over all criminal investigations and prosecutions as an essential step to best ensure that justice is served by streamlining the *Brady/Laurie* disclosures required of prosecutors in their charge." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 41. Again, as explained in Part I.A-B above, the Department's argument that its policy of secrecy "implement[s] the legislature's intent reflected in RSA 105:13-b" is incorrect. The Department's interest in overseeing all criminal investigations and prosecutions also does not require this Court to defer to the Department's judgment and abdicate its independent responsibility to apply Part I, Article 8. This is especially the case here where officer misconduct is at issue and where the Department fails to offer any

specific evidence that keeping the EES List secret best effectuates both justice and the transmission of exculpatory information to criminal defendants.

Rather than effectuate the Department's constitutional responsibility to properly administer justice, its policy of secrecy undermines this responsibility. Secrecy damages public confidence in the administration of justice. The Department's position is undercut by common sense and logic: disclosing the EES List would best effectuate this constitutional responsibility, as it would help ensure that (i) prosecutors have made appropriate disclosures in prior cases, and (ii) officers who are found to have engaged in misconduct—like, for example, former Claremont police officer Ian Kibbe, Manchester Detectives Darren Murphy and Aaron Brown, a Salem police officer who fled the police in apparent violation of the law, and a Salem police officer who was involved in an off-duty crash after consuming alcohol and fled the scene—are actually on the EES List.[19] Without disclosure, these interests cannot be accomplished. Transparency does not just help defense lawyers; it helps the public. It will either instill confidence that the system is working correctly and/or shed led light on the fact that disclosures have not been appropriately made, thereby exposing a need for reform.

[19] For example, disclosure of the EES List would help the public assess whether the Salem Police Department has appropriately listed officers on the List. According to an independent October 2018 report, the Salem Police Department demonstrated a pattern of mismanaging internal investigations, ignored or discouraged citizen complaints, failed to keep complete records of internal investigations, and violated department policies regarding complaints and personnel issues. As part of this report, the independent auditor reviewed 29 internal affairs cases. Of those 29 cases, 21 of the cases were sustained. One of the sustained findings concerned a Salem police officer who was off duty and travelling 62 miles per hour in a 30-mile-per-hour zone. When the Salem Police Department attempted to initiate a stop of this off duty police officer, the off duty officer did not pull over. As a result, stop sticks had to be deployed. However, the off duty officer maneuvered around the stop sticks. When the off duty officer was finally pulled over, "he was laughing, thinking the whole incident to be a joke." Though the off duty officer committed a crime of fleeing an officer pursuant to RSA 265:4, I(c), he apparently was not charged, and instead was given a one-day suspension without pay. *See* Oct. 12, 2018 Kroll Internal Affairs Audit, at p. 41, *available at* http://www.townofsalemnh.org/sites/salemnh/files/redacted.ia_.final_.pdf. In another case, an officer was investigated after he was involved in an off-duty traffic crash after consuming alcohol and left the scene of the incident prior to officers' arrival. Two policy violations were sustained. After negotiations with the union, the officer was suspended five working days. *Id.* at 43. It does not appear that this officer was charged with a crime. As of June 1, 2018, four Salem police officers were on the EES List. The public would benefit from knowing whether these two officers, who appear to have committed criminal acts and were found to have engaged in sustained misconduct, are on the List. *See* Exhibit UU (Ryan Lessard "Report Blasts Salem Police for Handling of Officer Complaints, Internal Investigations," *Union Leader* (Nov. 23, 2018).

In essence, the Department's position with respect to the EES List is "trust us accountability," whereas Part I, Article 8 rejects "trust us" and requires "transparency accountability."[20]

II. The "Internal Personnel Practices" Exemption Under RSA 91-A:5, IV Does Not Apply to the EES List.

A. The EES List Does Not Reflect an "Internal Personnel Practice" Under RSA 91-A:5, IV.

RSA 91-A:5, IV, provides, in part, an exemption from disclosure under the Right-to-Know Law for records pertaining to "internal personnel practices." As the Supreme Court recently explained, "we construe 'internal personnel practices," to mean practices that exist[ ] or [are] situated within the limits of employment." *Reid*, 169 N.H. at 523. Put another way, an investigation into employee misconduct relates to "internal personnel practices" when it "take[s] place within the limits of an employment relationship[;] [i]n other words, the investigation must be conducted by, or … on behalf of, the employer of the investigation's target." *Id.* This exemption must also be construed narrowly. *Id.* at 522 (noting that, in applying the "internal personnel practices" exemption, "we return to our customary standards for construing the Right-to-Know Law," which includes interpreting the exemption narrowly). The EES List does not constitute an "internal personnel practice" document for two independent reasons.

First, the EES List is not an "internal" document for all the reasons explained in Part I.A *supra*. As the Court explained in *Reid*, "internal" is defined to mean "existing or situated within

[20] This Court need not be concerned that, if the EES List is a "personnel file" document under RSA 105:13-b entitled to a statutory categorical exemption (which it is not as explained in Part I.A-B *supra*), an "as applied" holding addressing the EES List could have a bearing on the discoverability of the underlying personnel file documents addressing the misconduct that led to placement on the List. Such a question is not currently before this Court given the limited and narrow relief requested in this case. Such questions should be left for future cases where a public interest/privacy interest balancing analysis can be conducted under RSA 91-A:5, IV and *Sumner* based on the unique "context of the facts of each case" after a review of the individual personnel file documents in question. *See Sumner*, 168 N.H. at 669-70 ("To determine whether restrictions are reasonable, we balance the public's right of access *against the competing constitutional interests in the context of the facts of each case*.") (emphasis added).

the limits … of something." *Id.* at 523. In a 2017 decision, the Supreme Court also looked to Freedom of Information of Act principles in explaining that, for information to be deemed "internal," "the agency must typically keep the records to itself for its own use." *Clay v. City of Dover*, 169 N.H. 681, 687 (2017) (quoting *Milner*, 562 U.S. at 570-71). The EES List is maintained externally by the Department, and thus is *not* maintained by officers' employers for their own use. The Department does not employ these officers. This case is identical to *Reid* where the Supreme Court held that documents concerning the Attorney General's investigation of the Rockingham County Attorney were not "internal" because the Attorney General was not the employer of a County Attorney, as their relationship did not have the attributes of an employer-employee relationship such as to ability to set a salary and to hire and fire. *Reid*, 169 N.H. at 525.

The cases *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and *Clay v. City of Dover*, 169 N.H. 681 (2017) are distinguishable because, unlike the EES List, the documents at issue there were compiled, maintained, and used *by the employer* for its own use. In *Fenniman*, the Court deemed categorically exempt investigatory documents under the control of the Dover Police Department compiled during an internal investigation of a department lieutenant accused of making harassing phone calls. In *Clay*, the Court followed *Fenniman* and held that completed rubric forms used to evaluate applicants for the position of school superintendent pertained to "internal personnel practices" because the forms were filled out by members of the school board's superintendent search committee on behalf of the school board, which was the entity that employs the superintendent. Again, unlike the documents in *Fenniman* and *Clay*, the EES List is maintained outside the control of the police department employing the officers on the EES List. This distinction is important, as the *Reid* Court concluded that *Fenniman*'s application of a

categorical exemption was limited to its facts. *Reid*, 169 N.H. at 522 ("we decline to extend *Fenniman* and *Hounsell* beyond their own factual context").

Second, the EES List is not a "personnel" document for all the reasons explained in Part I.A *supra*. The Supreme Court has made clear that "personnel" in the context of this exemption "refers to human resources matters." *Id.* The EES List—like the investigatory files in *Reid*—is maintained by the Department not for any "human resource matter," especially given the absence of an employer/employee relationship between the Department and the officers on the List. The EES List does not constitute an investigation into employee misconduct that would subject the officers to discipline or termination. The Department concedes that the EES Lists exists "for the singular purpose of establishing a reference tool for prosecutors to initiate their inquiry as to the existence of exculpatory evidence as to a particular defendant's criminal matter." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 9. For this reason, this case is not controlled by *Fenniman* and *Clay*.

B. Even if the EES List Does Reflect an "Internal Personnel Practice" Under RSA 91-A:5, IV, This Court Must Weigh the Public Interest in Disclosure Against the Privacy Interest in Nondisclosure. Because the Public Interest in Disclosure Far Outweighs Any Privacy Interest in Nondisclosure, the EES List Must Be Disclosed.

Even if the EES List somehow fits the definition of an "internal personnel practice," this Court must still engage in a balancing analysis where the privacy interest that would be invaded by disclosure is balanced against the public's interest in disclosure. This is because the Supreme Court decisions in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006), creating a categorical exemption for "internal personnel practices" under RSA 91-A:5, IV were wrongly decided.

The Supreme Court in *Reid* looked at the *Fenniman* and *Hounsell* cases and their decision to create a blanket exemption without a public interest/privacy interest balancing analysis with disfavor. As the *Reid* Court explained:

> As the foregoing demonstrates, in interpreting the "internal personnel practices" exemption in *Fenniman*, *we twice departed from our customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly and declining to employ a balancing test in determining whether to apply the exemption*. In addition, *we did not interpret the portion of RSA 91-A:5, IV at issue in the context of the remainder of the statutory language — in particular, the language exempting "personnel ... and other files whose disclosure would constitute invasion of privacy."* RSA 91-A:5, IV; *see Appeal of Cover*, 168 N.H. 614, 618, 134 A.3d 433 (2016) (noting that when interpreting a statute, "we do not consider words and phrases in isolation, but rather within the context of the statute as a whole" (quotation omitted)). Thus, *we did not examine whether a broad, categorical interpretation of "internal personnel practices" might render the exemption for "personnel ... files whose disclosure would constitute invasion of privacy" in any way redundant or superfluous*. *See Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 525-26, 809 A.2d 1270 (2002) (noting that "[w]hen construing a statute, we must give effect to all words in [the] statute and presume that the legislature did not enact superfluous or redundant words"); cf. *Shapiro v. U.S. Dept. of Justice*, 153 F. Supp. 3d 253, 280 (D.D.C. 2016) (noting that "Exemption 6 [of the federal Freedom of Information Act], which shields 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal [privacy]' … would have little purpose if agencies could simply invoke Exemption 2 [which shields, inter alia, records that relate solely to internal personnel rules and practices] to protect any records that are used only for 'personnel'-related purposes").
>
> *Moreover, although the practice of consulting decisions from other jurisdictions interpreting similar statutes is common in our Right-to-Know Law jurisprudence, we did not conduct such an inquiry in Fenniman*. *See, e.g., Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581, 913 A.2d 737 (2006) (noting that in interpreting the Right-to-Know Law, "[w]e also look to the decisions of other jurisdictions, since other similar acts, because they are in pari materia, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved" (quotation omitted)). Specifically, we have looked to federal law, *see, e.g., Montenegro v. City of Dover*, 162 N.H. 641, 650, 34 A.3d 717 (2011), having noted that "[t]he exemption provisions of our right-to-know law, RSA 91-A:5, IV (supp.), are similar to the Federal Freedom of Information Act, 5 U.S.C.A. [§] 552(b)(2), (4) and (6)," *Mans v. Lebanon School Bd*., 112 N.H. 160, 162-63, 290 A.2d 866 (1972).
>
> The Freedom of Information Act (FOIA) exemption contained in 5 U.S.C. § 552(b)(2) is worded similarly to the portion of RSA 91-A:5, IV at issue here; specifically, it exempts from disclosure under the FOIA matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2) (2012). *Nevertheless, our construction of*

> *the "internal personnel practices" exemption in RSA 91-A:5, IV is markedly broader than the United States Supreme Court's interpretation of that exemption's federal counterpart. See Dept. of Air Force v. Rose*, 425 U.S. 352, 369-70, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976) (noting that "the general thrust of the [5 U.S.C. § 552(b)(2)] exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest"); M*ilner v. Department of Navy*, 562 U.S. 562, 566, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) (reaffirming the narrow scope of Exemption 2 by rejecting a line of federal cases recognizing a so-called "High 2" exemption for "any predominantly internal materials whose disclosure would significantly risk circumvention of agency regulations or statutes" (quotations, citation, footnote and brackets omitted)).

Reid, 169 N.H. at 519-21 (emphasis added). As a result, though the *Reid* Court elected to not reconsider *Fenniman* or *Hounsell* sua sponte because no party had made such a request, the Court "decline[d] to extend *Fenniman* and *Hounsell* beyond their own factual contexts." *Id.* at 522.

For the same reasons articulated in *Reid*, *Fenniman*[21] and *Hounsell*'s categorical exemption for "internal personnel practices" must be reconsidered and overruled, and disclosure of the EES List should be subjected to a public interest/privacy interest balancing analysis.[22] As

[21] The Supreme Court in *Fenniman* did not address Part I, Article 8 of the New Hampshire Constitution. Instead, this decision was based solely on how to interpret RSA 91-A:5, IV. The Court in *Fenniman* also did not address RSA 105:13-b.

[22] As the Supreme Court has explained: "[W]e will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Ford v. N.H. Dep't of Transp*., 163 N.H. 284, 290 (2012). *First*, the failure of the Supreme Court in *Fenniman* and *Hounsell* to apply a public interest/privacy interest balancing analysis to "internal personnel practices" is unworkable and incomprehensible because, as *Reid* explained, all the other exemptions in the same sentence of RSA 91-A:5, IV textually require courts to engage in such balancing. As *Reid* suggested, all these exemptions should be read "in the context of the remainder of the statutory language — in particular, the language exempting "personnel … and other files whose disclosure would constitute invasion of privacy." *Reid*, 169 N.H. at 519. It makes no sense for Right-to-Know law jurisprudence to reject such balancing with respect to "internal personnel practices," while requiring a balancing analysis as to the remaining exemptions covered by the same language in the same sentence. *Second*, given *Reid*'s forewarning, reliance should be given little, if any, weight. Whatever reliance police officers might have concerning their privacy can be assessed as part of the balancing analysis required under Chapter 91-A. Referring to the third factor, as *Reid* makes clear, the law has developed so as to have narrowed the prior holdings of *Fenniman* and *Hounsell* to their facts. Those decisions' holdings to create a categorical exemption were incorrect then, and they are incorrect now. A balancing analysis must be employed. Otherwise, information meeting the definition of "internal personnel practices" that is in the public interest will never see the light of day. As to the fourth factor, here too *Reid*'s forewarning states why *Fenniman* and *Hounsell*

explained below in Part III.B *infra*, the public interest in disclosure far outweighs any privacy interest in nondisclosure and, thus, the EES List must be produced. Finally, even if RSA 91-A:5, IV's "internal personnel practices" exemption does not, by its terms, require a public interest/privacy interest balancing analysis, such a balancing analysis would still be required under Part I, Article 8 to the New Hampshire Constitution for the reasons explained in Part I.D, *supra*.

III. The "Personnel" File Exemption Under RSA 91-A:5, IV Does Not Apply to the EES List.

RSA 91-A:5, IV provides, in part, an exemption from disclosure under the Right-to-Know Law for "personnel" file information. This exemption must also be applied narrowly. *See Goode,* 148 N.H. at 554. If a "personnel" file document is implicated, this Court must still balance the public's interest in disclosure against the privacy interest in nondisclosure. *See Reid*, 169 N.H. at 528 ("We now clarify that … 'personnel … files' are not automatically exempt from disclosure. For those materials, 'th[e] categorical exemption[ ] [in RSA 91-A:5, IV] mean[s] not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure.'") (internal citations omitted).

A. The EES List is Not a "Personnel" File Document Under RSA 91-A:5, IV.

As explained in Parts I.A and II.A *supra*, the EES List is not a "personnel" file document because it is not maintained by the Department for any employment or human resources purpose.

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were poorly reasoned and cannot be squared with the text of the exemption. They must be overruled. *See also Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (holding that the provision of the Illinois Public Labor Relations Act which forced public employees to subsidize a union, even if they chose not to join and strongly objected to the positions the union took in collective bargaining and related activities, violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern; holding that the Court's decision in *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), was poorly reasoned, had led to practical problems and abuse, was inconsistent with other First Amendment cases and had been undermined by more recent decisions, and was overruled).

B. Even if the EES List is a "Personnel" File Document Under RSA 91-A:5, IV, the List Needs to be Disclosed Because the Public Interest in Disclosure Far Outweighs Any Privacy Interest in Nondisclosure.

As the Supreme Court has explained:

> When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, we engage in a three-step analysis. First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Second, we assess the public's interest in disclosure. Third, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. Further, [w]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.

Prof'l Firefighters of N.H., 159 N.H. at 707 (citations and internal quotations omitted); *see also Union Leader Corp.*, 162 N.H. at 679 (same).

1. The Officers on the EES List Have No Privacy Interest That Would Be Invaded By Disclosure.

As explained in Paragraphs 30 to 38 of the Petition, the privacy interests are minimal where the EES List reflects the misconduct of police officers employed by the government, especially where the misconduct implicates the ability of officers to do their jobs effectively. Police officers perform vital functions on behalf of the public, and their misconduct creates the potential for considerable social harm. *See Everitt v. Gen. Elec. Co.,* 156 N.H. 207, 217-18 (2007) ("Police officers are trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety. This essential and inherently governmental task is not shared with the private sector.").

Petitioners are not seeking information about private individuals that courts—including this Court in *Jane Doe v. N.H. Lottery Commission*, No. 2018-cv-00036 (Hillsborough Cty., Southern Dist., Mar. 12, 2018)—have frequently protected. Nor are Petitioners seeking private facts about officers' private lives. In examining the privacy exemption under RSA 91-A:5, IV,

the Supreme Court and this Court have been careful to distinguish between information concerning private individuals interacting with the government—which often has been withheld on privacy grounds depending on the circumstances—and information concerning the performance of government employees—which it generally has ordered to be disclosed. *Compare, e.g., Lamy v. New Hampshire Public Utilities Com'n*, 152 N.H. 106, 111 (2005) (the names and addresses of *private utilities customers* can be withheld on privacy grounds under RSA 91-A:5, IV; "The public interest that the Right–to–Know Law was intended to serve concerns "informing the citizenry about the activities of their government … The central purpose of the Right–to–Know Law 'is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.'") (emphasis in original); *Brent v. Paquette*, 132 N.H. 415 (1989) (government not required to produce records kept by school superintendent containing *private students' names and addresses*); *New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit*, 169 N.H. 95 (2016) (protecting identities of *private patients* at a women's health clinic); *Jane Doe v. N.H. Lottery Commission*, No. 2018-cv-00036 (Hillsborough Cty., Southern Dist., Mar. 12, 2018) (protecting identity of *private lottery winner* who bought lottery ticket from government agency); *with Union Leader Corp.*, 162 N.H. at 684 (holding that the government must disclose the names of retired *public employees* receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV); *Professional Firefighters of N.H.*, 159 N.H. at 709 (holding that the government must disclose specific salary information of *public firefighters* notwithstanding RSA 91-A:5, IV); *Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972) (government must disclose the names and salaries of each *public schoolteacher*

employed by the district); and *Lambert*, 157 N.H. at 383-85 (applications for county sheriff must be disclosed).

Courts outside of New Hampshire have also roundly rejected the concept of police officers having a privacy interest with respect to their own misconduct. *See City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press*, L.L.C., 4 So.3d 807, 809-10, 821 (La. Ct. App. 1st Cir. 2008) (holding the public interest in records of investigation into police officers' use of excessive force trumps officers' privacy interest; "[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *Md. Dep't of State Police v. Md. State Conference of NAACP Branches*, 190 Md. App. 359, 368 (Ct. Special App. Md. 2010) ("Racial profiling complaints against Maryland State Troopers do not involve private matters concerning intimate details of the trooper's private life …. *A State Trooper does not have a reasonable expectation of privacy as to such records*.") (emphasis added), *aff'd on other grounds*, 430 Md. 179 (Ct. App. Md. 2013); *Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure, in part, because the requested documents did not concern "the off-duty sexual activities of the deputies involved"). These cases are instructive here. *See Union Leader Corp.*, 142 N.H. at 546 (noting that "[w]e also look to the decisions of other jurisdictions" in interpreting Chapter 91-A).

The Department is incorrect when it argues that "[n]othing about [officers' internal grievance' process[es] would lead an officer to reasonably expect any [placement on the List] to become public." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 22. The EES List is a document maintained externally for reasons unrelated to employment. Officers on the List should have no expectation of privacy concerning their placement on the List since the List

functions is to ensure constitutionally-required *disclosure*. Further, even if the EES List bears some nexus to employment (which it does not), any subjective belief of privacy police officers might have would be irrelevant. *Prof'l Firefighters of N.H.*, 159 N.H. at 707 ("Whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations."). The cases cited above reject the notion that officers objectively have privacy rights with respect to their own misconduct.

The Department further argues that *Gantert v. City of Rochester*, 168 N.H. 640 (2016) and *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774 (2015) support the concept that police officers on the EES List are entitled to privacy with respect to their identities. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 21-22, 38-39. This Department misreads those decisions. These cases only stand for the proposition that officers have a liberty interest concerning *placement* on the EES List that requires some form of post-deprivation due process, including notice and an opportunity to be heard. Such process is necessary because, as the Court explained, placement on the EES List can create a "stigma" for police officers. *See Duchesne*, 167 N.H. at 783. But, apart from requiring due process, these decisions say nothing about officers receiving confidentiality after placement on the List and after receiving appropriate due process.

The officers on the EES List are entitled to no more confidentiality rights than the citizens whom they regularly charge with crimes, especially where citizens have a greater liberty interest at stake. Citizens accused of crimes do not receive confidentiality. Yet they suffer considerable stigma from being publicly accused of and charged with crimes by police officers, even before they have received any form of due process. Their names and the nature of the allegations are published in the press. Mug shots of the accused are routinely published in newspapers. The Department regularly publishes press releases when it charges individuals with

crimes. *See* Exhibit MM (D.O.J. 2018 Press Release Website). There are often negative consequences that fall on the accused as a result of this publicity, like job loss and estrangement from friends or family. However, the government's disclosure of this information concerning citizens who have not been convicted, and the press's publication of it, is both entirely appropriate and vital under both the First Amendment and Part I, Articles 8 and 22 of the New Hampshire Constitution.[23] This information helps the public understand how the government is wielding its immense law enforcement power. Like citizens who are publicly charged by officers with crimes, police officers on the EES List—though entitled to due process—are similarly not constitutionally entitled to confidentiality. Whatever the stigma that results from being put on the EES List is a consequence of our constitutional commitment to accountability: the public's right to know how the government—here, law enforcement—functions and whether *Brady* obligations have been complied with.

2. There is No Public Interest in Nondisclosure

The Department argues that there is a public interest in nondisclosure on the theory that "disclosure creates the possibility of chilling police chiefs' initial identification of officers for the EES due to the magnitude of stigma associated with such a placement." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 21-22, 35-37. This argument must be rejected for several reasons.

First, the Supreme Court has rejected a nearly identical argument. *See Goode*, 148 N.H. at 555-56 (rejecting LBA argument that disclosing the interview materials will harm the audit process because (i) auditors are regulated by statute and have an obligation to perform audits and report their findings to the proper governmental entities to which they are accountable, and (ii) there is no evidence establishing the likelihood that auditors will refrain from being candid and

[23] *See Associated Press v. State of N.H.*, 153 N.H. 120, 129 (2005) ("Such access [to courtrooms] is critical to ensure that court proceedings are conducted fairly and impartially and that the judicial process is open and accountable.").

forthcoming when reporting if such information is subject to public scrutiny). And even if the Department's fear was somehow credible (which it is not), Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution have already dictated where the balance tips when government misconduct is implicated—transparency. The presumption under these provisions is that the public is not harmed by transparency, but rather is aided by it because it gives the public the tools to hold the government accountable. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance ….").

Second, the Department's fear that, if the EES List is produced, police chiefs will not make necessary *Brady/Laurie* designations is speculative. The Department acknowledges repeatedly that this "chill" is only a "possibility." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 15, 23. However, this Court, as well as the Supreme Court, has emphasized that, in Chapter 91-A disputes, courts must reject assertions that are "speculative at best given the meager evidence presented in support." *See, e.g., Jane Doe v. N.H. Lottery Commission*, No. 2018-cv-00036, at *15 (Hillsborough Cty., Southern Dist., Mar. 12, 2018) (Temple, J.) (quoting *Union Leader Corp.*, 162 N.H. at 679). This Court cannot credit speculative concerns not borne out by evidence, especially where the Department "has the burden of demonstrating that the designated information is exempt from disclosure under the Right-to-Know Law." *CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 587 (2015); *see also Nash v. Whitman*, 05-cv-4500, 2005 WL 5168322 (Dist. Ct. of Colo., City of Denver, Denver Cty. Dec. 2005) (ordering that the bulk of internal affairs police files be produced, in part, because the department's concern that disclosure would chill cooperation of civilian and officer witnesses "did not find significant support in the evidence"); *Soto v. City of Concord*, 162 F.R.D.

603, 614 (N.D. Cal. 1995) (in declining to apply the self-critical analysis privilege, noting that the City's "general claim that disclosure would harm their internal investigatory system is not sufficient"). A hypothetical fear of "chill" has also not hindered other police departments from producing similar lists. For example, following a lawsuit, the Philadelphia District Attorney's Office released a secret list of 26 current and former police officers whom prosecutors have sought to keep off the witness stand.[24] Seattle makes a similar list of 214 officers publicly available.[25] If the large cities of Philadelphia and Seattle can manage the public disclosure of similar information, then surely can the Department.[26]

Disclosure will improve the criminal justice system, not hinder it. Disclosing the EES List will help ensure that (i) prosecutors have made appropriate disclosures, and (ii) the right officers are on the EES List. Conversely, keeping this process secret creates an environment where police chiefs and prosecutors may not be incentivized to make appropriate disclosures because there is no public accountability. If the EES List is public, police chiefs will be *more* likely to comply with their obligations to place on the EES List officers who have committed clear EES misconduct—for example, former Claremont police officer Ian Kibbe who performed

[24] *See* Exhibit NN (Mark Fazlollah, et al., "Under Court Order, District Attorney Krasner Releases List of Tainted Police," *Philadelphia Inquirer* (Mar. 6, 2018)). The motion filed is attached as Exhibit OO.

[25] *See* Exhibit NN (Mark Fazlollah, et al., "Under Court Order, District Attorney Krasner Releases List of Tainted Police," *Philadelphia Inquirer* (Mar. 6, 2018) ("In Seattle and 39 other towns in King County, Wash., with a total population of 2.5 million, prosecutors have made public such lists of officers for more than a decade. Mark Larson, a top King County prosecutor, said the public at any time can request a copy of its list, which contains the names of 214 former or current officers.")).

[26] The Department also cites *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006) for the proposition that disclosure of internal personnel investigations would deter the reporting of misconduct by public employees. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 16. First, *Hounsell* does nothing to contradict the principle that speculative assertions unsupported by evidence cannot be credited. Here, once again, the Department's claim of chill is speculative and unsupported. Second, the Supreme Court has criticized *Hounsell* for not following customary Chapter 91-A principles under RSA 91-A:5, IV, which include the application of a public interest/privacy interest balancing test. *Reid,* 169 N.H. at 519-20. Indeed, the Court in *Reid* explicitly rejected the applicability of RSA 91-A:5, IV's "internal personnel practices" exception in the context of an investigation of a county attorney where a similar "chill" was implicated.

an illegal search and falsified official reports resulting in his imminent conviction.[27] This is because the public will be able to look over their shoulders. This is precisely how open and transparent government is supposed to work. But, as it now stands, the public is left in the dark.

Third, the Department's fear of "chill" does not trust police chiefs to do their jobs. Police chiefs, as sworn officers, are expected to follow the law and direction from the Attorney General's Office concerning *Brady*. Though transparency will provide important accountability, we, as a society, nonetheless expect police chiefs to obey the law and directives from the Attorney General's Office, even where there are internal and external pressures not to. The loyalties of police chiefs must, of course, lie not with their fellow employees, but to the criminal justice system as a whole. And, here, the Department's fear cannot be reconciled with the institutional incentives police chiefs have to make appropriate *Brady/Laurie* designations. If a police chief fails to make necessary disclosures and a defendant is convicted, that conviction is likely to be reversed. *See State v. Laurie*, 139 N.H. 325, 326 (1995) (reversing conviction and allowing new trial where the prosecution failed to disclose evidence in the employment records of the detective who was in charge of the investigation and whose testimony at trial was crucial). The Department's fear of "chill" is also minimized by the fact that, whether the case is borderline or not, the officer implicated by the designation has the right to challenge this placement decision, and the placement decision—as the Attorney General's 2017 and 2018 memoranda recognize—can be reversed if subsequent proceedings find that the placement was in error. Given this process provided to officers placed on the List, any fear of "chill" is speculative.

[27] *See* Exhibit HH (Jordan Cuddemi, "Arrests Tossed as More Are Reviews," *Valley News* (Apr. 29, 2018)); Exhibit TT (Jordan Cuddemi, "Change of Plea Hearing Scheduled for Former Claremont Officer Accused of Perjury," *Valley News* (Nov. 29, 2018)).

3. The Public Interest in Disclosure is Compelling.

As explained in Paragraphs 39 to 48 of the Petition, the public interest in disclosing the names of the officers on the EES List is compelling. This is for several reasons.

First, the EES List identifies officers who have engaged in misconduct impacting their official duties. This reality, by itself, would require disclosure under the Right-to-Know Law regardless of whether the information is potentially exculpatory under *Brady*. Uncovering the misconduct of government officials is not a manufactured or "subjective" public interest as the Department argues; rather, uncovering government misconduct has been repeatedly embraced by New Hampshire courts as a paramount interest that Chapter 91-A aims to accomplish. *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Professional Firefighters of N.H.*, 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."); *Reid*, 169 N.H. at 532 ("The public has a significant interest in knowing that a government investigation is comprehensive and accurate. We also note that the rank of the official being investigated and the seriousness of the alleged misconduct will bear upon the strength of the public interest.") (internal quotations and citation omitted; citing *Coleman v. Lappin*, 680 F. Supp. 2d 192, 199 (D.D.C. 2010) (stating that "[t]he Court ordinarily considers, when balancing the public interest in disclosure against the private interest in exemption, the rank of the public official involved and the seriousness of the misconduct alleged")).

Courts outside of New Hampshire have similarly recognized the obvious public interest that exists when police misconduct is implicated. *See City of Baton Rouge/Parish of East Baton Rouge*, 4 So.3d at 809-10, 821 (holding the public interest in records of investigation into police

officers' use of excessive force trumps officers' privacy interest; noting that "[t]he public has an interest in learning about the operations of a public agency, the work-related conduct of public employees, in gaining information to evaluate the expenditure of public funds, and in having information openly available to them so that they can be confident in the operation of their government"); *Md. Dep't of State Police*, 190 Md. App. at 368 (noting public interest in disclosing racial profiling complaints of police, as "the files at issue concern public actions by agents of the State concerning affairs of government, which are exactly the types of material the Act was designed to allow the public to see"), *aff'd on other grounds*, 430 Md. 179 (Ct. App. Md. 2013); *Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure, in part, because "[i]n the present case, we find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye"); *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) ("As the trial court found, there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct."); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 299 (Conn. App. Ct. 2012) (in public records dispute concerning documents held by a police department implicating an employee's job termination, noting that a public concern existed where the "conduct did implicate his job as a public official"). Here, the Department does not seriously dispute—because it cannot—that revealing this information will expose government misconduct. After all, the point of the EES List is to identify for prosecutors the names of officers who have committed serious misconduct.

The public interest is even greater in this case because the EES List (i) reflects officers who have engaged in misconduct that impacts their credibility or truthfulness, and (ii) indicates that information concerning these officers may need to be disclosed to defendants under *Brady*. As the Department explained in its March 21, 2017 memorandum, "EES conduct" constitutes, for example: (i) a deliberate lie during a court case; (ii) the falsification of records or evidence; (iii) any criminal conduct; (iv) egregious dereliction of duty; and (v) excessive use of force. *See* Exhibit V (Joseph A. Foster Mar. 21, 2017 Protocol, at p. 2). This is undoubtedly serious conduct. Regardless of whether this information is exculpatory under *Brady*, such misconduct goes to the core of an officer's integrity and performance.

There is clear value to the public in knowing the identities of the officers on the EES List. The public will learn if any of these officers funded by taxpayer dollars are currently patrolling the streets and, if so, who they are and generally what they did. The public, armed with this information, can then ask the important question of why these individuals are still employed. For example, in Manchester and Nashua, there are two officers in each department who are on the List. It is of significant value for the public to learn who these officers are and the nature of the misconduct so the citizens of these communities can hold these departments accountable for their decision-making funded by taxpayer dollars. *See, e.g., Professional Firefighters of N.H.*, 159 N.H. at 709 (discussing the importance of public scrutiny). With the names of these officers secret, the citizens of these cities are left to speculate that any officer they encounter in Nashua or Manchester may be on the List and may have an issue concerning their credibility or trustworthiness. This hurts public confidence in policing, rather than fostering it. *See Rutland Herald*, 84 A.3d at 826 ("redacting the employees' names would cast suspicion over the whole department and minimize the hard work and dedication shown by the vast majority of the police

department"). And, for those on the List who are no longer in law enforcement, these names should still be disclosed because (i) these officers could still be testifying witnesses, and (ii) this information could be used by the public can evaluate whether departments are in need of reform.

Second, the public interest in disclosure is further enhanced by the fact that the Department views the EES list as a critical tool that aids it in fulfilling its constitutional obligation to produce exculpatory information to defendants. *See* Exhibit V (Joseph A. Foster Mar. 21, 2017 Memo., at p. 3). If it is important enough for the Attorney General to create this List and write three memoranda on this issue so the Department can ensure that disclosures are being made in every case, then it is important for the public and defense attorneys to have this List to evaluate whether prosecutors are making (and have made) appropriate disclosures. *See Reid*, 169 N.H. at 532 (noting obvious public interest in how Attorney General's Office conducts investigations); *Nash v. Whitman*, 05-cv-4500, 2005 WL 5168322 (Dist. Ct. of Colo, City of Denver, Denver Cty. Dec. 2005) ("Weighing in favor of disclosure is the public's strong interest in knowing how DPD handles IAB investigations of citizen complaints in general and how it handled these investigations in particular."). The Department even acknowledges that "the government has a powerful interest in its prosecutors['] most thorough ability to discharge their constitutional exculpatory obligations." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 24. But this interest will be best served by disclosing this List, not by keeping the List secret. We know that the current system requires defendants to simply trust that they have obtained all the *Brady* disclosures to which they are entitled. And we know that, because this system operates completely in the dark, this system has broken down on multiple occasions as explained in Paragraphs 44-46 of the Petition. As a result, disclosing the EES List will provide greater assurance that disclosures to defendants will be made in the future concerning officers on the

EES List because defense attorneys can cross check the List with the list of testifying officers they receive in individual cases.

Disclosure will also allow defense attorneys to forensically examine past cases to ensure that disclosures were made in those cases. If disclosures were not made, then these defendants may be entitled to have their convictions reversed under *Laurie*. The Department ignores this obvious public benefit. Instead, the Department focuses on a strawman by arguing that that disclosure of the EES List "would not do anything to ensure that local police chiefs are more diligent in their future identification of officers with adverse disciplinary findings, or in their reporting of these officers to the county attorney's offices and the DOJ." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 21-22. This misses the point, even setting aside the fact that there is no evidence that disclosure of the EES List will chill police chiefs from placing officers on the List in the future. Disclosure of the EES List allows defense attorneys, the press, and the public to verify whether disclosures have been made as to officers actually on the List. Such verification will hold prosecutors accountable—accountability that goes to the core of Chapter 91-A's mission. Indeed, because we know that disclosures have not been made in some past cases, it is plausible that, when the EES List is disclosed, it will be uncovered that disclosures were not made in prior cases concerning officers on the EES List, especially cases that occurred in the Circuit Court system that are often prosecuted by non-lawyer police prosecutors. Then again, such a forensic review may disclose that the system has operated fine in secret. But that is precisely why disclosure is so essential here. It creates transparency "so that [the public] can be confident in the operation of their government." *City of Baton Rouge/Parish of East Baton Rouge*, 4 So.3d at 809-10, 821.

Third, the public interest in disclosure is significant because officers are placed on the EES List only after a sustained finding of misconduct. The Department is wrong when it suggests that such placement is "cursory." *See* D.O.J. Memo. in Support of Mot. to Dismiss at 29. Due process for officers on the List has existed since the List's inception in 2004. When the List was established in 2004, the Attorney General recommended a "Sample Policy" that included officers receiving notice and an opportunity to be heard before being placed on the List. In *Gantert v. City of Rochester*, 168 N.H. 640 (2016), the Court discussed the 2004 "'sample policy' and procedure," noting that if an "incident constitutes a Laurie issue … the chief notifies the officer involved, who may request a meeting with the chief to present facts or evidence." *Id.* at 646; *see also* Exhibit PP, at Procedure G (2004 Heed Memo.). The Department's March 21, 2018 and April 30, 2018 memoranda further explain that officers placed on the list must obtain due process. Under the April 30, 2018 memorandum, for example, (i) there must be an investigation into the officer's conduct, (ii) the allegations against the officer must be sustained after the investigation, and (iii) the head of the law enforcement agency must make a finding that the conduct at issue is "EES conduct" after giving the officer an opportunity to be heard. *See* Exhibit W (Gordon J. MacDonald Apr. 30, 2018 Memo., at p. 1); Exhibit VV (signed version of Apr. 30, 2018 Memo. with EES notification).

This is not a cursory process, nor is it speculative that the officers on the List committed acts that are exculpatory. Under the Department's own April 30, 2018 memoranda, a law enforcement agency head must have formally determined that "EES conduct" occurred before placing an officer on the EES list. *Id.* ("[I]f the conclusion is that the allegation is 'sustained,' *the head of the law enforcement agency will determine whether the conduct at issue is EES conduct*") (emphasis added). Given this finding by the law enforcement head that "EES

Conduct" occurred, it is likely that, as to every officer on the List, disclosures would need to be made to defendants where the officer is a testifying witness. Demonstrating the overbreadth of the Department's position, the Department is even withholding names of officers on the List where there would be no dispute that the officer's name and misconduct would need to be disclosed in *every* case in which that officer was a witness.

At the October 18, 2018 hearing in this case, the Department stated that the EES List is "fallible" because the EES List might include officers who have not been given their due process right to challenge their inclusion on the List. Fallible or not, this document is being used by the Department to assist it in performing its *Brady* obligations. Therefore, there is a public interest in disclosure. The fact that the List may be continuously revised also does not make it any less public under Chapter 91-A. Moreover, due process rights for officers on the EES List are not a new creation; again, they have existed since the creation of the List in 2004. The Department has presented no evidence suggesting that any of the officers currently on the EES List (i) do not now know that they are on the List and/or (ii) are unaware of the due process rights they have been provided concerning their placement on the List. The Department also has had, since the publication of its memoranda of March 21, 2017 and April 30, 2018, ample time to ensure that the individual officers on the List it maintains have received due process under these memoranda. The Department has, in fact, engaged in extensive notification and trainings concerning the procedures in these memoranda. *See, e.g.*, *Exhibit SS* (DOJ Nov. 15, 2018 Ltr.) (noting that, between May and July 2017, the Department conducted EES trainings in all 10 countries consistent with the March 21, 2017 memorandum); *see also Exhibit RR* (Petitioners' Nov. 2, 2018 Ltr. to DOJ). And the Department has also acknowledged that *all* officers added to

the EES List since March 21, 2017 "were added in conformance with the 2017 EES process"—a process that explicitly requires notice to the individual officer. *See* Exhibit SS.[28]

If the Department is willing to go through the process of maintaining the EES List, creating a due process mechanism through three memoranda concerning placement on and removal from the EES List, and make public statements concerning the creation of this process[29], then the Department should have taken steps to ensure compliance with this process, especially since the filing of this lawsuit which raised the prospect of the List being publicly released. The public should not be deprived of important public records because the Department may have failed to exercise diligence in ensuring that its memoranda's due process protections are being complied with. There has also been significant media attention in this case where police officers on the List have been put on notice that the List may be disclosed[30]; these officers have had ample opportunity to exercise their due process rights concerning their placement on the List.

Fourth, the Department's fear that the unredacted EES List "would, in most cases, simply operate to publicly name an officer, and then label him or her as having a problem with 'credibility,' without any regard for the actual substance or context involved" does not provide a

[28] The Department contends in its November 15, 2018 letter to Petitioners' counsel that "the example EES notification letter attached to the April 30, 2018 memorandum [that the Department receives] does not require any certification that the named officer received due process or was notified of the finding." *See* Exhibit SS; *see also* Exhibit VV (signed Apr. 2018 Memo; the version at Exhibit W is not signed and does not contain the EES notification document). However, the certification process under the Department's policies *do* provide due process assurances to officers on the List. The sample certificate of compliance attached to the Department's March 21, 2017 memorandum located at Exhibit V states that (i) the police chief has reviewed the personnel files of its officers "in compliance with the guidance provided by the Attorney General's Memorandum" (which included due process protections), and (ii) "*I have notified every officer whose name was placed on the EES of such placement in writing*." (emphasis added). Currently, 69% of departments (166 out of 239) have complied with this certification process. Further, nothing would prohibit the Department from adding to the sample certificate of compliance additional language ensuring that police chiefs have provided due process consistent with the Department's guidance.

[29] *See* Exhibit QQ (Press Release, "New Hampshire Updates Guidance Concerning the Exculpatory Evidence Schedule (EES)" (Apr. 30, 2018)).

[30] *See, e.g.*, Todd Bookman, "Judge Hears Arguments Over Secret List of Police With Potential Credibility Issues," *NHPR* (Oct. 18, 2018), *available at* http://www.nhpr.org/post/judge-hears-arguments-over-secret-list-police-potential-credibility-issues#stream/0; Andy Hershberger, "ACLU Seeks Release of List of Officers with Credibility Issues," *WMUR* (Oct. 18, 2018), *available at* https://www.wmur.com/article/aclu-seeks-release-of-list-of-officers-with-credibility-issues/23901272.

basis for treating the EES list as confidential. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 26, 29. The government's belief that a requested document is "incomplete" obviously does not create a defense to disclosure under Chapter 91-A. For example, criminal complaints, indictments, and police reports could be viewed as "incomplete" because they are one-sided and do not necessarily tell the story of the accused. But this does not mean that these documents are any less public under Chapter 91-A. As explained in Paragraph 48 of the Petition, there is undoubtedly a lot of information that the government would like to withhold from the public or press because it feels that the information is incomplete, misleading, or does not tell the full story. However, the correct response is not for the government to suppress this information; rather, the correct response is to be more transparent. Here, the Department could, of course, release the EES List accompanied with an explanation as to how the government believes the public or press should interpret its contents. This could include the very explanation on Page 26 of the Department's Memorandum in Support of its Motion to Dismiss where it argues that this information does not tell the full story of the nature of why the officers are on the List.[31]

4. The Compelling Public Interest in Disclosure Trumps the Officers' Nonexistent Privacy Interests.

Once the private and governmental interests in nondisclosure and public interest in disclosure have been assessed, courts "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Union Leader Corp.*, 162 N.H. at 679. In performing this balancing test with respect to the EES List, any privacy interest is dwarfed by the compelling public interest in disclosure.

[31] For example, when the Department issues a press release announcing an indictment, it recognizes that the public might misinterpret the release to be a legal conclusion of guilt, rather than an announcement of charges. The Department addresses this concern by adding a statement that an indictment is merely an accusation and that a defendant is presumed innocent unless and until proven guilty. A similar statement could be issued when the EES List is released.

As explained in the Petition, the substantial public interest in disclosure is the public's right to know the names of officers who have had sustained findings against them concerning their credibility or trustworthiness. Police officers are public servants who appear as professional witnesses in criminal cases, and, as such, do not have the same privacy rights as regular citizens or even other public employees. *See State v. Hunter*, No. 73252-8-I, 2016 Wash. App. LEXIS 1470, at *5 (Ct. App. June 20, 2016) (noting that a police officer is "a professional witness"). As explained above, this public interest is further enhanced by the facts that (i) there is a constitutional obligation for exculpatory information about officers to be produced to defendants, and (ii) the misconduct that puts officers on the EES List occurs only after they were given the opportunity to contest whether their conduct constituted exculpatory information. Further, criminal defendants must be assured that they will be notified of possible exculpatory evidence.

Conversely, the 249 officers on the EES List have little privacy interest in information on the List. Their names are placed on the List only after a sustained finding of misconduct that negatively impacts their credibility or trustworthiness. Disclosure of the List will also not impact ongoing investigations or divulge the identities of witnesses or confidential informants.

The Supreme Court has consistently stated that this balancing test should be heavily weighted in favor of disclosure, even where the public and privacy interests appear equal. *See, e.g., Reid*, 169 N.H. at 532 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.") (citations omitted)); *see also Union Leader Corp.*, 141 N.H. at 476.

When performing this balancing test, the Supreme Court has also often looked to the decisions of other jurisdictions. *See Union Leader Corp.*, 142 N.H. at 546. A number of courts

in other states have held that police officers' privacy interests are not sufficient to prevent disclosure of law enforcement disciplinary reports. *See, e.g.*, *Rutland Herald*, 84 A.3d at 826 (affirming that police disciplinary records must be disclosed); *Tompkins*, 46 A.3d at 299 (affirming that a police officer's termination records must be disclosed); *City of Baton Rouge/Parish of East Baton Rouge,* 4 So.3d at 809-10, 821 (holding the public interest in records of investigation into police officers' use of excessive force trumps officers' privacy interest; "[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace").

When balancing these factors, the EES List must be disclosed.

IV. The Privacy Exemption Under RSA 91-A:5, IV Does Not Apply to the EES List Because The Public Interest in Disclosure Far Outweighs Any Privacy Interest in Nondisclosure.

The Department also raises the exemption under RSA 91-A:5, IV concerning "other files whose disclosure would constitute invasion of privacy." In evaluating this exemption, courts apply the same three-step analysis. As explained in Part III.B *supra*, when applying this three-step analysis, the public interest in disclosure far outweighs any privacy interests implicated. Thus, the privacy exemption under RSA 91-A:5, IV does not apply to the EES List.

V. Petitioners Are Entitled to Costs and Attorneys' Fees.

Petitioners' counsel are entitled to their costs if they are successful, as this "lawsuit was necessary in order to enforce compliance with the provisions of" Chapter 91-A. *See* RSA 91-A:8. Also, in light of the foregoing, the Department knew or should have known that its conduct in withholding the EES List was in violation of Chapter 91-A. *See* RSA 91-A:8, I. Therefore, Petitioners are entitled to reasonable attorneys' fees.

Conclusion

WHEREFORE, Petitioners respectfully pray that this Honorable Court:

A. Deny Respondent Department of Justice's Motion to Dismiss;

B. Grant Petitioners' Petition;

C. Rule that the unredacted EES list requested by Petitioners is a public record that must be made public under RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution;

D. Pursuant to RSA 91-A:8, I, grant Petitioners reasonable attorneys' fees and costs as this lawsuit was necessary in order to enforce compliance with the provisions of RSA Chapter 91-A or to address a purposeful violation of Chapter 91-A. Fees are appropriate because Respondent knew or should have known that the conduct engaged in was in violation of RSA Chapter 91-A; and

E. Award such other relief as may be equitable.

Respectfully submitted,

THE NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM, TELEGRAPH OF NASHUA, NEWSPAPERS OF NEW ENGLAND, INC. (THROUGH ITS NEW HAMPSHIRE PROPERTIES), SEACOAST NEWSPAPERS, INC., and KEENE PUBLISHING CORPORATION,

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Date: November 29, 2018

Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel of record pursuant to the State's court's e-filing system.

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November 29, 2018