The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

v.

NEW HAMPSHIRE DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE

Docket No.: 217-2022-CV-00112

ORDER ON PETITION FOR ACCESS TO PUBLIC RECORDS

The American Civil Liberties Union of New Hampshire (the "ACLU") brought the instant petition seeking access to public records under New Hampshire's Right-to-Know Law (RSA 91-A). The New Hampshire Department of Safety, Division of State Police (the "State Police") refused to produce the records, and requests dismissal of the petition. The Court held a hearing on this matter on March 31, 2022. For the reasons that follow, the petition for access to public records is GRANTED.

I. Background

This petition arises from a February 2017 incident in which former State Trooper Haden Wilber allegedly fabricated a crime, causing Robyn White, of Maine, to spend thirteen days in jail and to be subjected to multiple body scans and cavity examinations. See Pet., Ex. A, Damien Fisher, Maine Woman Illegally Searched Gets $200K after NH State Police Arrest, IndepthNH.org. Ms. White sued several defendants, including Mr. Wilber and the State of New Hampshire, under 42 U.S.C. § 1983, and settled for $212,500 of taxpayer funds. See id.; see also Pet., Ex. C, Ms. White's Second Am. Compl. ¶¶ 7–11. The State Police terminated Mr. Wilber on August 9, 2021 in

connection with this incident and the subsequent internal investigation. See Pet., Ex. Q, Inter-Department Communication, April 9, 2021.

According to the petition, Mr. Wilber was a New Hampshire State Trooper involved in law enforcement for approximately 13 years. See Am. Pet. ¶ 5. The Petition further states that at the time of the incident, Mr. Wilber was a member of the Department's Mobile Enforcement Team ("MET"), the primary focus of which is to engage in drug interdiction. See id. at ¶ 9.

Ms. White's lawsuit alleged that Mr. Wilber pulled over Ms. White on Interstate 95 for having snow on her rear lights. See Am. Pet., Ex. C ¶ 12. The lawsuit further alleged that Mr. Wilber searched Ms. White's purse "without her consent, and without legal justification. He found heroin residue." See id. ¶ 13. According to the lawsuit, Mr. Wilber contacted the Franklin County, Maine Sherriff's Department (where Ms. White is a resident) and "[a]ccording to Wilber, whoever answered the phone had not heard of Ms. White but told Wilber that in an unrelated case an informant had informed them that a Maine resident in 2016, had secreted oxycodone on their person in New Hampshire. The Franklin County Sheriff's Department has no records, nor any recollection of this call." See id. ¶ 15. The lawsuit alleged that Mr. Wilber, "on this information, and this information alone … 'suspected' White had done the same thing." See id. ¶ 16.

An internal department memorandum (the "memorandum") obtained by the ACLU from the Personnel Appeals Board ("PAB") on January 28, 2022, after the filing of the instant petition, documents how Mr. Wilber illegally searched Ms. White's phone and then gave inconsistent statements about it during the internal investigation into his conduct with respect to this incident. See Am. Pet., Ex. Q at 9–12. Specifically, the

memorandum states that Mr. Wilber said in an initial interview related to the internal investigation that the only manipulation of Ms. White's phone by Mr. Wilber was to put the phone on airplane mode and place it in a bag for evidence. See id. at 9. However, according to the memorandum, when confronted with his own text messages indicating that Mr. Wilber did, in fact, search Ms. White's phone at the time of the stop, he stated that he "was conducting follow up on her phone, I did look at it." See id. The memorandum states that Mr. Wilber said, "[a]s far as me looking through her phone, should I have? No, I agree with you but I did . . . ." See id. at 10. The memorandum further recounts inconsistent statements by Mr. Wilber as to whether he downloaded or "dumped" the contents of Ms. White's phone. See id. at 10–11. When confronted about the illegality of his search of Ms. White's phone, the memorandum states that Mr. Wilber said "how 'we', [Mr. Wilber] and the MET, 'do this all the time,' that is 'dumping phones for Intel.'" See id. at 10.

Ms. White's lawsuit alleged that Mr. Wilber searched her purse without her consent, found heroin residue, and arrested her. See Am. Pet., Ex. C ¶¶ 13, 16. After being transferred to Rockingham County Jail and then to the Strafford County Jail, the lawsuit alleges that Ms. White was "forced . . . to undergo a full-body scan." See id. ¶ 17. The lawsuit further states that another officer claimed to have observed "abnormalities" in one of the body scans, although the booking notes from the Rockingham County Department of Corrections state, in pertinent part, that there were "no foreign objects detected." See id. ¶ 22. In light of these alleged "abnormalities," Mr. Wilber, according to the lawsuit, initiated additional charges for "delivery of articles prohibited"—in other words, charges for transferring drugs to herself in jail. See id. ¶

25. The additional evidence and charge resulted in an increase of Ms. White's bail from $250 to $5,000 and an order for an additional body scan. See id. ¶¶ 25–26.

The lawsuit alleges that evidence fabricated by Mr. Wilber was used to apply for a search warrant requiring Ms. White "to be subjected to a vaginal and rectal exam to search for concealed drugs." See id. ¶ 31. Given the choice between waiting in jail for the search warrant and consenting to the search, according to the lawsuit, Ms. White agreed to the search, but maintained that she had nothing hiding in her person. See id. ¶ 32. Ms. White's lawsuit states that no contraband was found in Ms. White's vagina or anus, and she was released from custody on February 23, 2017. See id. ¶¶ 34–35. Prosecutors nolle prossed some of Ms. White's charges on February 21, 2017, and the final remaining charge was dismissed on May 23, 2017. See Pet., Ex. E, Case Summaries for Ms. White's Criminal Charges. The internal investigation stated that the reason for the final nol pros was because the Rockingham County Attorney's Office "viewed the facts of this case and believed that a suppression of evidence argument would most likely be successful by the defense. They stated that [Mr. Wilber] exceeded the scope of the original traffic stop and did not have reasonable suspicion to search Ms. White's vehicle." See Am. Pet., Ex. Q at 6. News outlets subsequently reported on the incident, Ms. White's lawsuit, and the settlement for more than $200,000. See Pet., Ex. A.

The memorandum from the internal investigation indicates that Mr. Wilber would be placed on the Exculpatory Evidence Schedule ("EES," formerly known as the "Laurie List") as a result of Mr. Wilber's conduct with respect to Ms. White and the subsequent investigation into his conduct. See Am. Pet., Ex. Q at 15. The memorandum states that

"[a]fter being notified of the second amended civil suit on or about February 5, 2020, State Police leadership forwarded Ms. White's complaints to the Attorney General's office for criminal review prior to initiating this administrative internal investigation." See id. at 3. The ACLU provided an email from another police officer, dated April 26, 2017, stating that the officer thought Mr. Wilber's treatment of Ms. White was "complete horseshit, but he and his supervisor don't want to hear that they're doing anything wrong." See Am. Pet., Ex. T.

The memorandum describes that the internal "investigation revealed disturbing facts regarding [Mr. Wilber's] investigatory habits and overall integrity as a law enforcement officer. [Mr. Wilber's] personal conduct as outlined herein reflects negatively upon [Mr. Wilber's] character, the law enforcement profession, and is an embarrassment to [Mr. Wilber], [Mr. Wilber's] colleagues and the Division of State Police." See Am. Pet., Ex. Q at 13. The memorandum continues, stating that Mr. Wilber's "effectiveness as a law enforcement officer and witness has been compromised beyond repair." See id. It further states that Mr. Wilber "exercised poor judgment repeatedly, not only during the original incident but also during this investigation. [Mr. Wilber's] inability to exercise sound judgment, professionalism, accountability, integrity, as well as respect for the law is inexcusable." See id. The ACLU notes that Mr. Wilber is currently challenging his termination before the Personnel Appeals Board. See Am. Pet. ¶ 30.

II. Analysis

On August 18, 2021, the ACLU submitted a Right-to-Know Law request to the State Police for "[a]ll reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden [Wilber] that relate to any adverse employment action." See Pet., Ex. K, the ACLU's request.[1] The State Police resists disclosure, arguing that the disclosure of the requested records is prohibited by statute under RSA 105:13-b and RSA 91-A:4, I. See State Police's Resp. at 3. The State Police further contends that even if those statutes do not present a categorical bar, the records are exempt from disclosure under RSA 91-A:5, IV and the balancing test discussed in Reid and Prof'l Firefighters of N.H. as they are "personnel . . . files whose disclosure would constitute and invasion of privacy." See id; see also RSA 91-A:5, IV; Reid v. N.H. Att'y General, 169 N.H. 509, 528–29 (2016); Prof'l Firefighters of N.H. v. Loc. Gov't Ctr., Inc., 159 N.H. 699, 707 (2010). The ACLU disagrees. It contends that RSA 105:13-b does not present a categorical bar to disclosure of police personnel files under the Right-to-Know Law, and that the balancing test discussed in Reid and Prof'l Firefighters of N.H. weighs in favor of disclosure. See ACLU Reply at 4, 13.

Part 1, Article 8 of the New Hampshire Constitution provides, in part: "Government ... should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Const. pt. 1, art. 8. "The purpose of the Right-to-Know

[1] The Court notes that the parties' arguments appear to be limited to Mr. Wilber's personnel file, although the ACLU's request could be read broadly to include a number of other documents. See generally, Am. Pet., State Police's Resp.; see also Pet., Ex. K. The State Police asserts that "any responsive records to the request would constitute 'personnel . . . files whose disclosure would constitute an invasion of privacy." See State Police's Resp. at 3.

Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." 38 Endicott St. N. v. State Fire Marshal, 163 N.H. 656, 660 (2012).

"Although the statute does not provide for unrestricted access to public records, we resolve questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. "As a result, we broadly construe provisions favoring disclosure and interpret the exemptions restrictively." Ettinger v. Town of Madison Planning Bd., 162 N.H. 785, 788 (2011). "[W]hen a public entity seeks to avoid disclosure under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006).

1. RSA 105:13-b

The State Police contends that "RSA 105:13-b creates a statutory exemption for law enforcement personnel records." See State Police's Resp. at 3. In essence, the State Police argues that the Supreme Court's recent decision in Petition of State, __ N.H. __ (February 4, 2022), held that police personnel records are strictly confidential in all circumstances except for those set forth in RSA 105:13-b, and thus disclosure of such records is prohibited by RSA 105:13-b. See State Police's Resp. at 3–6. Therefore, according to the State Police, the records are exempt from disclosure under RSA 91-A:4, I. Id.

RSA 91-A:4, I, provides:

> Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the

> possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5.

RSA 91-A:4, I (emphasis added). The State Police likens this case to CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs., where the New Hampshire Supreme Court held that disclosure of certain documents containing trade secrets was prohibited by the Uniform Trade Secrets Act ("UTSA") and therefore exempt under RSA 91-A:4, I. CaremarkPCS Health, LLC v. Dep't of Admin. Servs., 167 N.H. 583, 590 (2015). The Supreme Court reasoned that, as the UTSA prohibits misappropriation of trade secrets, disclosure of trade secrets constituted misappropriation. Id. The State Police assert that, "[l]ike in Caremark where the UTSA prevented the release of trade secrets, here, RSA 105:13-b is designed to prevent disclosure of police personnel files and thus exempts police personnel files from the requirements of RSA 91-A." State Police's Resp. at 5.

The ACLU disagrees, arguing that neither the plain language of RSA 105:13-b nor the New Hampshire Supreme Court's interpretation of that statute in Petition of State support the statute's application outside the context of a police officer serving as a witness in a criminal case. See ACLU Reply at 4. In further support, the ACLU points to numerous New Hampshire Superior Court cases observing that the application of RSA 105:13-b is limited to where there is an officer testifying in a particular criminal case. See id. (citing, e.g., Provenza v. Town of Canaan, No. 215-2020-cv-155, at *13 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that the police officer's reliance on RSA 105:13-b was "misplaced" because that statute, "by its plain language, applies only to situations in which 'a police officer ... is serving as a witness in any

criminal case'"; aff'd by No. 2020-0563, April 22, 2022)). Further, the ACLU notes that unlike RSA 105:13-b, several other statutes explicitly exempt certain records from RSA 91-A, for example RSA 659:13, III provides, "[i]f 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." ACLU Reply at 9, n.12. The Court finds RSA 105:13-b does not categorically prohibit disclosure of the records at issue in this case under RSA 91-A:4, I.

RSA 105:13-b provides:

> **Confidentiality of Personnel Files.**
>
> I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.
>
> II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.
>
> III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

RSA 105:13-b.

"As amended in 2012, RSA 105:13-b explicitly codifies the distinction... between exculpatory evidence that must be disclosed to the defendant under the State and Federal Constitutions, and other information contained in a confidential personnel file that may be

obtained through the procedure set forth in paragraph III of RSA 105:13-b." State v. Shaw, 173 N.H. 700, 707–08 (2020) (internal quotation mark and citations omitted).

In their pleadings, the parties discuss at length the Supreme Court's recent decision in Petition of State. There, the Supreme Court considered whether police personnel file information is confidential under RSA 105:13-b such that the State was entitled to protective orders preventing defense counsel from further disseminating police personnel files provided initially to the defense as potentially exculpatory information. Petition of State, __ N.H. at __(slip op. at 2). The Supreme Court stated "[b]y starting with a presumption of confidentiality and then directing limited disclosure to specific persons for specific purposes, the legislature directed that for all other purposes, the information remains generally confidential." Petition of State, __ N.H. at __(slip op. at 7). The Supreme Court held, "[g]iven the confidentiality accorded police personnel files by RSA 105:13-b, we hold that the State has shown good cause, as a matter of law, for the issuance of protective orders in the cases now before us." Id. (slip op. at 8). However, the Supreme Court in Petition of State did not analyze disclosure of documents under the Right-to-Know Law. Thus, while the Supreme Court found police personnel records to be "generally confidential" under RSA 105:13-b, they did not have occasion to decide whether this confidentiality went so far as to prohibit disclosure of such records in the context of a RSA 91-A request.

The Supreme Court's more recent decision in Provenza v. Town of Canaan, decided after the parties submitted their filings in the instant case, sheds some light on the interplay between RSA 105:13-b and the Right-to-Know Law. Provenza v. Town of Canaan, __ N.H. __ (April 22, 2022). In Provenza, the Town of Canaan denied a Right-

to-Know Law request by the Valley News seeking a report concerning a police officer's possible misconduct, citing the "internal personnel practices" exemption under RSA 91-A:5, IV and Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993). Id. (slip op. at 2). Following the Supreme Court's decisions in Union Leader Corp. v. Town of Salem and Seacoast Newspapers v. City of Portsmouth overruling Fenniman's categorical approach to nondisclosure in favor of a balancing test, the Valley News renewed its request. Id. "The Town informed Provenza of the request and then he filed this lawsuit against the Town seeking declaratory and injunctive relief . . . to prevent the Town from releasing the Report." Id. The Valley News intervened. Id.

The trial court analyzed whether disclosure of the report would constitute an invasion of privacy under RSA 91-A:5, IV. Id. (slip op. at 3). The trial court ordered that the report at issue be disclosed under the Right-to-Know Law, subject to redactions for "certain medical information, license plate numbers, and the names of minors." Id.

On appeal, Provenza argued, among other things, that "RSA 105:13-b bars disclosure." Id. (slip op. at 5). The Supreme Court first concluded that the information at issue was not contained in a "personnel file," but instead was a report entirely separate from such files. Id. (slip op. at 7). The Supreme Court reasoned that RSA 105:13-b therefore did not apply because "RSA 105:13-b pertains only to information maintained in a police officer's personnel file." Id. However, the Supreme Court went on to discuss the practical effect of a finding that certain records are "confidential." Id. (slip op. at 7–8). "Establishing that records are 'confidential' by itself does not result in their being exempt from disclosure under the Right-to-Know Law—rather, that determination involves the three-step analysis that the trial court undertook in this case."

Id. (slip op. at 7). Indeed, "no longer are [internal investigation] files categorically exempt from disclosure under the Right-to-Know Law." Id.

Given this legal landscape, the Court is not persuaded that RSA 105:13-b prohibits disclosure of the records at issue in this case[2], thereby exempting the records from RSA 91-A. RSA 91-A:4, I. At the outset, that the Supreme Court in Provenza analyzed this issue militates against the ACLU's position that the application of RSA 105:13-b is limited to solely where there is an officer testifying in a particular criminal case. See Provenza, __ N.H. at __(slip op. at 7–8). The issue of whether RSA 105:13-b prohibits disclosure of police personnel records in the context of a Right-to-Know request is unsettled as the Supreme Court in Provenza decided the report in that case did not implicate RSA 105:13-b. See Provenza, __ N.H. at __(slip op. at 7); see also New Hampshire Ctr. for Pub. Int. Journalism v. New Hampshire Dep't of Just., 173 N.H. 648, 656 (2020) (concluding the "disclosure of the [Exculpatory Evidence Schedule] is not governed by RSA 105:13-b" therefore the Supreme Court did not decide whether RSA 105:13-b constitutes an exception to the Right-to-Know Law and whether "it applies outside of the context of a specific criminal case in which a police officer is testifying.") Thus, this Court analyzes the issue.

To begin, unlike other statutes, RSA 105:13-b does not specifically reference exemption from RSA 91-A in its text. Cf. 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

[2] The Court notes that Mr. Wilber was terminated from his employment with the State Police (See Am. Pet. Ex. Q.) Because the parties appear to assume that a former police officer's personnel file falls within the ambit of RSA 105:13-b, the Court assumes the same for the purposes of this Order.

laws shall be exempt from the provisions of RSA 91-A . . . ."). Further, while the statute at issue in Caremark also did not specifically reference exemption from RSA 91-A in its text, the Supreme Court's holding was guided by the statute's definition of "misappropriation" which plainly stated "disclosure" to be a critical element of what the statute prohibited, i.e., that disclosure of trade secrets amounted to misappropriation prohibited by the statute. Caremark, 167 N.H. at 588–90. RSA 105:13-b, on the other hand, "details the procedure for turning over to a criminal defendant any exculpatory or relevant evidence found in the personnel files of any police officer testifying in the criminal case while maintaining the confidentiality of those files for all other purposes." Petition of State, __ N.H. at __(slip op. at 6). RSA 105:13-b, by its text, does not outright prohibit disclosure of police personnel records in the same way the UTSA prohibits disclosure of trade secrets.

It is noteworthy that Petition of State stated police personnel files are confidential "for all other purposes." Id. Petition of State also analyzed each paragraph of RSA 105:13-b noting that dissemination is permitted under paragraphs I and III but "[n]o further dissemination or other use is either required or permitted." Id. However, the Supreme Court went on to state that "[b]y starting with a presumption of confidentiality and then directing limited disclosure to specific persons for specific purposes, the legislature directed that for all other purposes, the information remains generally confidential." Id. at __(slip op. at 7) (emphasis added). This Court reads the phrase "generally confidential" to suggest that RSA 105:13-b does not operate as a categorical ban to disclosure of records under a Right-to-Know Request.

Further, "[e]stablishing that records are 'confidential' by itself does not result in

their being exempt from disclosure under the Right-to-Know Law—rather, that determination involves the three-step analysis" of the public interest balancing test. Provenza, __ N.H. at __ (slip op. at 8). Thus, Provenza suggests that although police personnel records are "generally confidential" under RSA 105:13-b, the statute does not go so far as to categorically prohibit disclosure under RSA 91-A.

The fact that such records have been designated as confidential by the legislature means that there must be a significant and sufficiently compelling justification for disclosure, not that any disclosure has been completely barred. Instead, the records are properly treated as confidential records subject to potential disclosure under the balancing test like other records subject to RSA 91-A:5, IV. See Union Leader Corp. v. Town of Salem, 173 N.H. 345, 357 (2020) ("the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV shall apply to records relating to 'internal personnel practices.'"). If the logic of the State Police were to be followed to its conclusion, any record placed into the personnel file of a police officer would be wholly unavailable for public review. Such a position is inconsistent with the direction of the New Hampshire State Constitution, pt.1, art. 8, and the very purpose of the Right-to-Know statute. 38 Endicott St. N. v. Fire Marshall, 163 N.H. at 660. This Court finds that the legislature did not intend such a sweeping foreclosure of public access to records documenting the serious alleged misconduct of a police officer such as in this case. Accordingly, the Court proceeds to the three-step public interest balancing test. Provenza, __ N.H. at ___(slip op. at 8).

2. The Balancing Test

Although the Court does not have the benefit of reviewing the records at issue here, the Court nonetheless concludes based on the parties' filings that the records constitute a "personnel file" that is confidential under RSA 105:13-b, and the disclosure of which could constitute an invasion of privacy. See Reid, 169 N.H. at 527. When evaluating whether the disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, courts engage in a three-step analysis. See Union Leader, 173 N.H. at 355.

> 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, whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations. Thus, determining whether the exemption for "confidential, commercial, or financial information" applies require[s] analysis of both whether the information sought is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy.

Id. The Court addresses each element in turn.

A. Whether there is a privacy interest at stake that would be invaded by the disclosure

The ACLU argues that Mr. Wilber has no privacy interest in his personnel file. In support, it contends that the information sought does not include "intimate details . . . the disclosure of which might harm the individual . . . or the kinds of facts that are regarded as personal because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." See Am. Pet. ¶ 40 (citing Mans v. Lebanon School Bd., 112 N.H. 160, 164 (1972));

Reid, 169 N.H. at 530. The ACLU distinguishes between information concerning private individuals interacting with the government and information concerning the performance of government employees. See id. ¶ 41. The ACLU further contends that there is no privacy interest where, as here, the subject of the records in question is already in the public sphere. See ACLU Reply at 16.

The State Police responds, pointing to federal FOIA cases in support of the proposition that government employees, particularly low-level ones, enjoy a general privacy interest in their employment records. See State Police's Resp. at 7–9 (citing, e.g., Dunkelberger v. Dep't of Justice, 906 F.2d 779, 781 (D.C.Cir. 1990); Stern v. F.B.I., 737 F.3d 84, 91 (D.C.Cir. 1984). The State Police also cites N.H. Const. pt. I, art. 2-b, RSA 105:13-b, RSA 516:36, and state administrative rules to show the legislature's recognition of such a privacy interest. See id. at 9. The State Police does not appear to argue that the Government has an interest in nondisclosure here.

The Court concludes that there is at least a minimal privacy interest at stake with respect to Mr. Wilber's personnel file. "[T]he 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." Lamy v. N.H. Public Utilities Comm'n 152 N.H. 106, 113 (2005) (emphasis in original). However, "when an individual becomes a law enforcement officer, that individual should expect that his or her conduct will be subject to greater scrutiny. That is the nature of the job." Provenza, No. 2020-0563 at *9 (quoting Kroeplin v. Wis. Dep't of Natural Resources, 725 N.W.2d 286, 301 (Wis. App. 2006)). In Provenza, the Supreme Court concluded that a police officer's privacy

interest in a report concerning his alleged misconduct was "not weighty." Id. at *9. The Supreme Court reasoned that the report did "not reveal intimate details of Povenza's life . . . but rather information relating to his conduct as a government employee while performing his official duties and interacting with a member of the public." Id. (citing N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 411 (2003)). Unlike the report at issue in Provenza, the scope of which was limited to official misconduct, an officer's personnel file likely contains at least some "intimate details" of an officer's life.[3] Thus, the Court concludes that Mr. Wilber has a privacy interest in those "intimate details," but no substantial privacy interest in information relating to the performance of his official duties.

B. The public's interest in disclosure

The ACLU argues that there is a "compelling" public interest in disclosure. First, the ACLU contends that "the requested information likely implicates potential misconduct" during the course of Mr. Wilber's performance of his official duties. See Am. Pet. ¶ 46. Second, the ACLU notes that the fact that Mr. Wilber has been placed on the EES could affect other criminal prosecutions in which he participated. See id. ¶ 49. Third, the ACLU contends that "disclosure of the requested records will help the public evaluate how the Department managed, investigated, and supervised Mr. Wilber." See Am. Pet. ¶ 50. The ACLU points to several cases outside of this

[3] Recognizing this possibility, the ACLU states that it is amenable to certain redactions. Specifically, the ACLU states:

> Petitioner is not seeking, for example, medical or psychological records in an officer's personnel file. ... [T]o the extent any of the requested records contain the identities of non-governmental witnesses or personal information like email addresses, home addresses, dates of birth, telephone numbers, and medical information, Petitioner is amenable to negotiating with the Department the scope of appropriate redactions to accommodate any privacy interests with respect to this specific information.

See Am. Pet. ¶ 40.

jurisdiction where courts have ordered disclosure in similar circumstances. See id. ¶ 52.

To the contrary, the State Police argues that there is a public interest against disclosure. The State Police cite Fenniman and Reid in support of this position, stating that "[p]rotection of [police internal investigation] files . . . will encourage thorough investigation and discipline of dishonest or abusive police officers." See State Police's Resp. at 10, quoting Fenniman, 136 N.H. 624, 627 (1993). It further contends that information related to Mr. Wilber's official misconduct is available to the public through the EES and through the Police Standards and Training Council hearings, which "lessens the public interest in its release." See id. at 10–12. The State Police states that concerns by other criminal defendants as to Mr. Wilber's placement on the EES and his involvement in other criminal prosecutions is not a "public" interest but an interest of specific criminal defendants whose due process rights are sufficiently protected through the State's Brady and Laurie obligations and through RSA 105:13-b. See State Police's Resp. at 12. The State Police concedes "that there is a public interest in knowing that a government investigation is comprehensive and accurate," but maintains that disclosure of Mr. Wilber's personnel file does not serve that purpose. See id. at 12–13.

"The public has a substantial interest in information about what its government is up to ... as well as in knowing whether a government investigation is comprehensive and accurate." Provenza, No. 2020-0563 at *10 (citing Lamy, 152 N.H. at 111; Reid, 169 N.H. at 532). "Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism." Prof'l Firefighters of N.H., 159 N.H. at 709.

Between the ACLU's filing of its petition and its reply brief before this Court, the

ACLU obtained an inter-department memorandum detailing the department's findings with respect to the internal investigation concluding with Mr. Wilber's termination. See Am. Pet., Ex. Q. This memorandum details "disturbing facts regarding [Mr. Wilber's] investigatory habits and overall integrity as a law enforcement officer," and concludes that Mr. Wilber's "effectiveness as a law enforcement officer and witness has been compromised beyond repair." See id. at 13. The ACLU therefore queries the practices and supervision of MET officers like Mr. Wilber, and whether, how, and at what time allegations of his misconduct were investigated. See ACLU Reply at 14–15.

Disclosure of Mr. Wilber's personnel file will assist the public in determining whether the investigation into his conduct was comprehensive and accurate. In addition to what is reflected in the personnel file, especially given the strong condemnation of Mr. Wilber's conduct outlined in the memorandum, the public may also have an interest in what is not reflected in his personnel file. Beyond Mr. Wilber's own misconduct, the disclosure of Mr. Wilber's personnel file could assist the public in scrutinizing the State Police's effectiveness in supervising its employees.

Regarding his illegal search of Ms. White's phone, Mr. Wilber stated that he and the MET "do this all the time." See Ex. Q at 10. The public has an interest in knowing whether the State Police saw fit to document this in his personnel file.

The public also has an interest in understanding and scrutinizing the timeliness of the government's investigation. Prosecutors nolle prossed some of Ms. White's charges on February 21, 2017, and the final remaining charge was dismissed on May 23, 2017. See Pet., Ex. E, Case Summaries for Ms. White's Criminal Charges. The internal investigation stated that the reason for the final nol pros was because the

Rockingham County Attorney's Office "viewed the facts of this case and believed that a suppression of evidence argument would most likely be successful by the defense. They stated that [Mr. Wilber] exceeded the scope of the original traffic stop and did not have reasonable suspicion to search Ms. White's vehicle." See Am. Pet., Ex. Q at 6. On April 27, 2017, a police supervisor wrote in an email that she thought Mr. Wilber's treatment of Ms. White was "complete horseshit, but he and his supervisor don't want to hear that they're doing anything wrong." See id., Ex. T. However, the memorandum reflects that the internal investigation into Mr. Wilber's conduct did not begin until the filing of Ms. White's second amended complaint on February 5, 2020. See id. at 3.

The Court finds the public has a very strong and compelling interest in knowing whether Mr. Wilber's personnel file documents any misconduct prior to the filing of Ms. White's lawsuit. Whether it does or not, the public will gain insight into the State Police's practices and effectiveness in supervising its officers and employees. Likewise, the public has an interest in knowing whether his personnel file contains other instances of misconduct. The Court therefore concludes that the public's interest in the disclosure of Mr. Wilber's personnel file is substantial.

C. Balancing the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure

Although the State Police has not argued that the government has an interest in nondisclosure, this Court recognizes that the legislature has expressly identified police personnel records as confidential. Nevertheless, as noted above, that designation must be viewed in the context of the overriding public interest in records documenting alleged serious misconduct by police officers. Moreover, as also discussed above, in this case,

Mr. Wilber's privacy interest is minimal. The Court therefore concludes that the State Police has failed to carry its heavy burden to shift the balance in favor of nondisclosure with respect to the records at issue. See Murray,154 N.H. at 581.

3. Attorneys' Fees

The ACLU requests attorneys' fees as provided in RSA 91-A:8. Pursuant to that provision, an agency "shall be liable for reasonable attorney's fees and costs incurred" if: (1) the agency violated any provision of RSA chapter 91-A; (2) the lawsuit "was necessary in order to make the information available"; and (3) the agency knew or should have known that the conduct engaged in was a violation of RSA chapter 91-A. 38 Endicott St., 163 N.H. at 669; RSA 91-A:8, I. Here, the Court finds no evidence that the State Police knew or should have known that its conduct violated the statute.[4] Accordingly, the ACLU is not entitled to attorney's fees pursuant to RSA 91-A:8, and their request for said fees is DENIED.

III. Conclusion

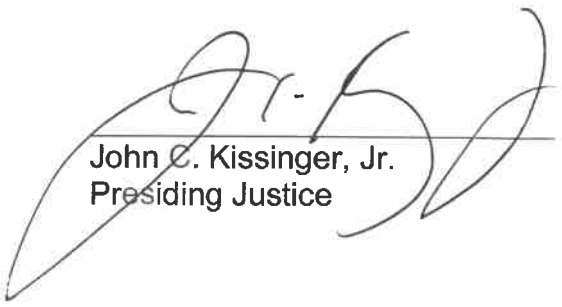
For the foregoing reasons, the ACLU's petition is GRANTED. The Court further concludes that the redactions suggested by the ACLU are appropriate here (such redactions include medical or psychological information, the identities of non-governmental witnesses, and personal information such as email and home addresses, dates of birth, and telephone and social security numbers). The State Police is therefore ordered to submit to the ACLU any responsive documents consistent with this Order. In the first instance, the State Police is directed to provide documents with

[4] The Court notes that the New Hampshire Supreme Court decided both Petition of State and Provenza in the time between the ACLU's records request and the issuing of this Order. The Court has considered this fact and nonetheless concludes that attorneys' fees are not warranted here.

redactions along with an explanation of any proposed redactions. To the extent the ACLU challenges any such redactions, it should confer with the State Police in an effort to resolve any disputes. Should any disputes remain regarding the scope of redactions, the Court will resolve them.

SO ORDERED.

DATED: 5/3/2022



John C. Kissinger, Jr.
Presiding Justice