THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

No. 217-2022-cv-00112

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
18 Low Avenue, #12
Concord, NH 03301

v.

NEW HAMPSHIRE DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE
33 Hazen Drive
Concord, NH 03305

[CORRECTED] PETITION FOR ACCESS TO PUBLIC RECORDS UNDER THE "RIGHT TO KNOW LAW," RSA CH. 91-A, AND PART I, ARTICLE 8 OF THE NEW HAMPSHIRE CONSTITUTION[1]

(PRIORITY HEARING REQUESTED UNDER RSA 91-A:7)

NOW COMES Petitioner American Civil Liberties Union of New Hampshire, by and through its attorneys, and submits this petition seeking relief against the New Hampshire Department of Safety's Division of State Police (hereinafter, Department) pursuant to RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution.

INTRODUCTION

"To the People of New Hampshire: …. The public's right to know what its government is doing is a fundamental part of New Hampshire's democracy."
Joseph A. Foster, New Hampshire Attorney General, March 20, 2015[2]

In this case, the Department of Safety's Division of State Police is trying to keep secret records concerning a former state trooper (i) who the Department terminated on August 9, 2021

[1] Portions of the originally filed version of this Petition misspelled Mr. Haden Wilber's last name as "Wilbur." This version corrects this error. This version also corrects Mr. Wilber's effective termination date, which was August 9, 2021 instead of April 10, 2021 as reflected in *Exhibit I*.

[2] *See* A.G. Cover Letter to A.G. Memo. on New Hampshire's Right-to-Know Law, RSA Chapter 91-A (Mar. 20, 2015), *available at* https://www.doj.nh.gov/civil/documents/right-to-know.pdf.

after 13 years on the force[3], (ii) who was placed on the Exculpatory Evidence Schedule ("EES") in September 2021, thereby indicating that the former trooper has information in his personnel file that would negatively reflect on his trustworthiness or credibility, (iii) who was sued on October 8, 2019 in federal court by a woman alleging that the trooper fabricated a crime in February 2017, leading her to needlessly spend 13 days in jail—during which time she was subjected to body scans and an invasive cavity examination—and (iv) whose alleged conduct led the Department to pay $212,500 in taxpayer funds to resolve the case after the federal court declined to dismiss the lawsuit. In other words, the Department is attempting to keep secret the apparent misconduct of a former trooper.

This Petition seeks "[a]ll reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden [Wilber] that relate to any adverse employment action." This is not a close case. The Department should produce this information immediately. Here, the public interest in disclosure is both compelling and obvious, especially where the Department apparently terminated Mr. Wilber. Indeed, the Department has placed Mr. Wilber on the EES—a list maintained to identify officers who have sustained findings of misconduct concerning credibility and truthfulness in their personnel files that may need to be disclosed to defendants in criminal cases. In other words, Mr. Wilber has potentially engaged in misconduct that pertains to his honesty—a trait that goes to the core of a trooper's ability to do their job. Setting aside Mr. Wilber's potential misconduct and the fact that his actions led to a $212,500 settlement paid by New Hampshire taxpayers, the records also would help the public evaluate how the Department

[3] Mr. Wilber's certification before the Police Standards and Training Council ("PSTC") is presently in "lapse" status under Pol 401.01(a), which states that "[t]he certification of a police, corrections or probation/parole officer shall lapse if the officer terminates employment and is not employed in this state, as a police, corrections or probation/parole officer within a period of 30 days after such termination." *See* Pol 401.01(a), *available at* http://www.gencourt.state.nh.us/rules/state_agencies/pol100-800.html. Under Pol 101.41, "termination" means, in part, "ceasing employment as a police or corrections officer[] … discharge, as defined in Pol 101.17." Under Pol 101.17, "discharge" means "the agency dismissing a police or corrections officer."

managed, investigated, and supervised this trooper. *See, e.g., Reid v. N.H. AG*, 169 N.H. 509, 532 (2016) ("[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate"). The requested records also will help the public evaluate the extent to which Mr. Wilber's misconduct may have negatively affected criminal prosecutions in which he participated. For all we know, Mr. Wilber's apparent misconduct implicating his trustworthiness or credibility may now have to be disclosed in scores of criminal cases, thereby compromising those prosecutions and convictions and, as a result, potentially damaging public safety. Without disclosure, the public will never know if and how this apparent misconduct may have hampered the criminal justice system.

In short, in this historic moment of conversation about police accountability nationally and here in New Hampshire[4], the Department has taken a position of secrecy instead of transparency concerning one of its troopers who apparently engaged in misconduct. In so doing, the Department is not only misapplying the law and protecting an officer who may have engaged in wrongdoing, but also is undermining public confidence in law enforcement more broadly. There is no legal justification for secrecy in this case. The Department must produce this information under the Right-to-Know Law and Part I, Article 8 of the New Hampshire Constitution.[5]

THE PARTIES

1. Petitioner American Civil Liberties Union of New Hampshire ("ACLU-NH") is a non-profit organization with an address of 18 Low Ave #12, Concord, NH 03301. The ACLU-

[4] *See* June 16, 2020 Executive Order 2020-11 Creating the Commission on Law Enforcement Accountability, Community and Transparency (issued by Governor Sununu recognizing a "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance transparency, accountability, and community relations in law enforcement"), *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf.

[5] The ACLU-NH notes that, to 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.

NH is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with approximately 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under federal and state law, including the right to freedom of information pursuant to Part 1, Article 8 of the New Hampshire Constitution and New Hampshire's public records law (RSA ch. 91-A). The ACLU-NH has a long track record of working on open records issues both in and out of the courts. *See, e.g., Union Leader Corp. and ACLU-NH v. Town of Salem*, 173 N.H. 345 (2020) (overruling 1993 *Fenniman* decision in holding that the public's interest in disclosure must be balanced in determining whether the "internal personnel practices" exemption under RSA 91-A:5, IV applies to requested records); *N.H. Ctr. for Pub. Interest Journalism, et al./ACLU-NH v. N.H. D.O.J.*, 173 N.H. 648 (2020) (holding that a list of over 275 New Hampshire police officers who have engaged in misconduct that negatively reflects on their credibility or trustworthiness is not exempt from disclosure under RSA 105:13-b or the "internal personnel practices" and "personnel file" exemptions at RSA 91-A:5, IV).

2. Respondent Department of Safety, and the Division of State Police within it (collectively, "Department"), are public agencies of the State of New Hampshire and, as such, are subject to the Right-to-Know Law under RSA 91-A:1-a, V. The Department is located at 33 Hazen Drive, Concord, NH 03305.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to RSA 91-A:7. "Any person aggrieved by a violation of [RSA ch. 91-A] may petition the superior court for injunctive relief. In order to satisfy the purposes of [RSA ch. 91-A], the courts shall give proceedings under [RSA

ch. 91-A] high priority on the court calendar. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter ….” RSA 91-A:7.

4. Venue is proper in this Court pursuant to RSA 507:9 because both Petitioner ACLU-NH and the Respondent Department are located in Merrimack County.

FACTS

5. Until August 9, 2021, Haden Wilber was a state trooper, and he had been in law enforcement for approximately 13 years. *See Exhibit A* (Damien Fisher, Maine Woman Illegally Searched Gets $200K after NH State Police Arrest, IndepthNH.org (Dec. 31, 2021) (“Wilber was discharged from the New Hampshire State Police in August [2021] after 13 years in law enforcement.”)).

6. On October 8, 2019, plaintiff Robyn White filed a lawsuit against Mr. Wilber in federal court arising out of a February 2017 incident in which Mr. Wilber allegedly fabricated a crime, leading Ms. White to needlessly spend 13 days in jail—during which time she was subjected to body scans and an invasive cavity examination. *See Exhibit B* (Federal Case Docket and Dismissal Order).[6] Ms. White’s allegations against Mr. Wilber are outrageous and reflect both a gross miscarriage of justice and a complete breakdown of the criminal justice system at every level.

7. According to the lawsuit, Mr. Wilber stopped Ms. White on February 10, 2017 on I-95 as she was traveling north in Portsmouth. The lawsuit suggests that the stop was pretextual where Mr. Wilber stopped Ms. White for having “snow on her rear lights,” but the real reason was

[6] *See also* Kyle Stucker, Woman’s Suit Alleges Illegal Cavity Search by State Police, Jails,” *Foster’s Daily Democrat* (Oct. 23, 2019), https://www.fosters.com/story/news/crime/2019/10/23/womans-suit-alleges-illegal-cavity-search-by-state-police-jails/2463208007/.

drug interdiction. *See* *Exhibit B* (Case Docket and Dismissal Order); *Exhibit C* (Second Amended Complaint, at ¶ 12).

8. A pretextual stop is a traffic stop that an officer says was made for one reason (like a minor traffic or vehicle equipment violation), but where this reason is pretextual because the officer made the stop for a different reason that would not provide a lawful basis for the stop (like finding the driver's race, location, sex, car or record "suspicious").

9. Ms. White's allegation that the stop was pretextual is unsurprising. At the time of the stop, Mr. Wilber was a member of the Department's Mobile Enforcement Team ("MET"). The primary job of the MET is not to enforce traffic laws, but rather to engage in drug interdiction.[7] The MET has a pattern and practice of engaging in pretextual stops and using alleged motor vehicle offenses for the purposes of drug interdiction. *See, e.g., State of New Hampshire v. Perez*, No. 218-2018-cr-334, at *2-3, 6-7 (Rockingham Cty. Super Ct. Oct. 4, 2019) (Schulman, J.) (in the context of a I-95 pretextual stop in March 2018, citing MET's practice of pretextual stops, and noting that the State Police had a "*de jure* department policy of detaining citizens for purely pretextual reasons"; explaining that trooper followed a vehicle for being "suspicious" simply because the driver was "reclined back in his seat," had his hands on "ten and two" as drivers are trained to do, and did not look in the trooper's direction despite the trooper being in an unmarked cruiser while it was dark outside), attached as *Exhibit D*; *United States v. Hernandez*, 470 F. Supp. 3d 114, 124 n.5 (D.N.H. July 9, 2019) (McCafferty, J.) (noting that the MET trooper was parked near the tolls on I-95 on March 26, 2018 and decided to stop a vehicle that had a license plate

[7] *See* Amy Coveno, "Mobile Enforcement Team Aims to Interrupt State's 'Drug Pipeline,'" *WMUR* (May 3, 2019), https://www.wmur.com/article/mobile-enforcement-team-aims-to-interrupt-states-drug-pipeline/27349016# (indicating that Mr. Wilber is a member of the MET; further explaining the use of pretextual stops: "Usually, that's how the stop begins, with a motor vehicle infraction, whether it's defective equipment, whether it's speed, following too closely.").

registered to a car rental company—because he opined that rental cars are frequently used for drug trafficking—so he caught up with the vehicle and then noticed that it was speeding and travelling too close to the next vehicle, thereby providing the trooper with grounds to make the stop; holding that the trooper's scope of the stop exceeded its mission); *United States v. Garcia*, 53 F. Supp. 3d 502, 514 (D.N.H. 2014) (McAuliffe, J.) (a MET trooper, who was parked on I-95 on August 13, 2013, followed a vehicle on a "hunch," and stayed within the driver's blind spot for three miles, until the vehicle's tires partially transgressed the dotted lane line and then corrected by touching the white fog line, whereupon the trooper stopped the vehicle; holding that, "once Trooper Gacek gave the driver an appropriate sanction — a warning — 19 minutes into the stop, the purpose of the traffic stop was completed," and "[t]he defendants should have been released," but instead the trooper "impermissibly and measurably extended the traffic stop by approximately 17 more minutes, persisting in his earlier attempts to develop reasonable suspicion before he ran his drug dog").[8]

10. Indeed, Judge Andrew Schulman in *Perez* posed the question of whether the MET's "de jure" policy of pretextual stops was constitutional: "Query … whether *Whren* and *McBreairty*

[8] Some state courts have expressed concerns with pretextual stops under their respective state constitutions. *See, e.g.*, *State v. Ochoa*, 206 P.3d 143, 148 (N.M. Ct. App. 2008) (finding the *Whren* decision incompatible with New Mexico's "distinctively protective standards for searches and seizures of automobiles" because, under the New Mexico Constitution, individuals do not have a lower expectation of privacy when they are in a vehicle); *but see State v. McBreairty*, 142 N.H. 12, 13 (1997) (following *Whren* under the New Hampshire Constitution). These stops can lead to racial disparities in policing and racial profiling. *See, e.g.*, Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 640 (2021) (examining Washington state police data of over 8 million stops after state court decision easing restrictions on pretextual stops, and concluding that the "decision is associated with a statistically significant increase in traffic stops of drivers of color relative to white drivers"; also explaining that "we find this increase in traffic stops of drivers of color is concentrated during daytime hours, when officers can more easily ascertain a driver's race through visual observation"); *see also* Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 Nature Human Behavior 736 (2020) (based on data from nearly 100 million stops nationwide, concluding that "black drivers were less likely to be stopped after sunset, when a 'veil of darkness' masks one's race, suggesting bias in stop decisions," and "the bar for searching black and Hispanic drivers was lower than that for searching white drivers"), *available at* https://www.nature.com/articles/s41562-020-0858-1; Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651, 666-67 (2002) (finding racial disparities in stops and searches based on three years of data from Maryland State Police).

foreclose the possibility that a sufficiently *de jure* departmental policy of detaining citizens for purely pretextual reasons could be found to be inconsistent with Fourth Amendment and Article 19 'reasonableness.'" *State of New Hampshire v. Perez*, No. 218-2018-cr-334, at *7 (Rockingham Cty. Super Ct. Oct. 4, 2019) (Schulman, J.), attached as Exhibit D. He left this question for another day, but added: "The State police have taken the shield that *Whren* and *McBreairty* extended to individual traffic stops and turned it into a sword to allow them to get as close to spot checks as possible." *Id.* Ms. White's case highlights this very concern raised by Judge Schulman.

11. As alleged in Ms. White's lawsuit, during this pretextual stop, Mr. Wilber illegally searched Ms. White's handbag, allegedly finding heroin residue. Mr. Wilber then called the Franklin County Maine Sheriff's Department to check for warrants on Ms. White, as she is from Avon, Maine. *See* Exhibit C (Second Amended Complaint, at ¶¶ 13-14).

12. During the conversation with the unnamed dispatcher, the dispatcher told Mr. Wilber that, in an unrelated case, an informant told law enforcement that an unknown woman in Maine, in 2016, "had secreted oxycodone on their person in New Hampshire." As alleged in the lawsuit: "[Mr. Wilber] 'suspected' White had done the same thing," though Ms. White denied hiding drugs on her person and there was no evidence to confirm this "hunch." Mr. Wilber then arrested Ms. White on the heroin residue charge, and she eventually was brought to the Rockingham County Department of Corrections. *See* Exhibit C (Second Amended Complaint, at ¶¶ 15-17).

13. According to the lawsuit, Ms. White was then taken from the Rockingham County Department of Corrections to the Strafford County Department of Corrections where she was given a body scan from the jail's x-ray scanner. That scan found no drugs, but a jail employee "claimed

to see two 'abnormalities' in White's intestinal region."[9] Though Ms. White "adamantly denied having any drugs in her," she "was returned to the Rockingham County Jail where she was held waiting for something to 'pass.'" *See* Exhibit C (Second Amended Complaint, at ¶¶ 17-19).

14. Ms. White was kept at the Rockingham County Department of Corrections for five days—until February 15, 2017—and no drugs came out of her body. *See* Exhibit C (Second Amended Complaint, at ¶¶ 19-20).

15. On February 15, 2017, Ms. White was transferred to the Valley Street Jail in Manchester where she was forced to take a drug test. It was negative. As alleged in the lawsuit, "[d]espite her negative drug test results, White was forced to wait at Valley Street Jail for something to 'pass.' Again, White adamantly denied having any drugs in her, and nothing 'passed.'" *See* Exhibit C (Second Amended Complaint, at ¶¶ 20-21).

16. Ms. White was initially charged with "possession of a controlled drug" and "transporting drugs in a motor vehicle." Her bail was set at $250 on February 10, 2017. *See* Exhibit C (Second Amended Complaint, at ¶ 25); *see also* Exhibit E (Case Summaries for Two Original Charges in No. 470-2017-CR-00287 and 218-2017-CR-00192 indicating $250 bail).

17. However, according to the lawsuit, Mr. Wilber—without any evidence—brought an enhanced "delivery of contraband" charge for the phantom drugs in Ms. White's body, and bail was then increased to $5,000 on or about February 13, 2017. *See also* Exhibit F (Wilber Feb. 13, 2017 Gernstein Affidavit conveying a belief, without any tangible evidence, that Ms. White was "possessing contraband on her person"). The lawsuit alleges: "This charge, initiated by Wilber,

[9] Despite the jail employee's assertion that "abnormalities" existed, the lawsuit asserts that the booking notes from Rockingham County Department of Corrections state the following: "FILE UPDATE: FOR PURPOSES OF SATISFYING ORDERS AND CONDITIONS OF BAIL – INMAYE [sic] WAS SCANNED @ SCDOC [Strafford County Department of Corrections] ON 02/10/2017 @ 18.27 – *NO FOREIGN OBJECTS DETECTED*." *See* Exhibit C (Second Amended Complaint, at ¶¶ 22) (emphasis added).

alleged that White delivered drugs to herself in jail. This charge was supposedly based upon White's alleged secretion of drugs in her vagina when she was brought to jail. This charge was alleged by Wilber despite the fact that no drugs were ever discovered." *See* Exhibit C (Second Amended Complaint, at ¶ 25).

18. The lawsuit further contends the following: "Defendant Wilber fabricated evidence of White's additional drug offense. This fabricated evidence was conveyed to the prosecutor. The prosecutor then used that evidence to convince the judge to raise the bail, and order a body scan." *See* Exhibit C (Second Amended Complaint, at ¶ 26); *see also* Exhibit G (Case Summary for Enhanced Charge in No. 435-2017-CR-00245 indicating $5,000 bail amount for enhanced "delivery of contraband" charge).

19. According to the lawsuit, police then brought Ms. White back to the Rockingham County Department of Corrections on February 16, 2017 where she was held because she could not afford the $5,000 bail. She stayed there until February 23, 2017, and still no drugs came out of her body. *See* Exhibit C (Second Amended Complaint, at ¶¶ 27-35).

20. On February 21, 2017, after 11 days of no drugs "passing," prosecutors *nolle prossed* the enhanced "delivery of contraband" charge. *See* Exhibit G (Case Summary for Enhanced Charge in No. 435-2017-CR-00245 indicating Feb. 21, 2017 dismissal of enhanced "delivery of contraband" charge). That day, prosecutors also appear to have *nolle prossed* the original "transporting drugs in a motor vehicle" charge. Ms. White's bail was then reduced back to $250 for the original, remaining "possession of a controlled drug" charge. *See* Exhibit E (Case Summaries for Two Original Charges in No. 470-2017-CR-00287 and 218-2017-CR-00192 indicating $250 bail and Feb. 21, 2017 dismissal of original "transporting drugs in a motor vehicle"

charge); *see also* Exhibit C (Second Amended Complaint, at ¶ 28) (indicating dismissal of enhanced "delivery of articles prohibited" charge).

21. However, Ms. White still was not free to go even though she could afford the $250 bail. On approximately February 21, 2017, Judge Sawako Gardner—"based upon the manufactured evidence" of Mr. Wilber as alleged in Ms. White's lawsuit—set a bail condition that Ms. White undergo yet another body scan before being released. *See* Exhibit C (Second Amended Complaint, at ¶ 29).

22. Ms. White complied with this second scan, but she still was not free to go. The lawsuit then alleges that Ms. White was transferred to the Rockingham County Department of Corrections "where she was taken into a small room where" an unidentified state trooper "was waiting for her." The trooper told Ms. White that she was being held while police obtained a warrant for a vaginal and rectal examination to look for the concealed drugs that had—with no evidence that they even existed in her body in the first place—stayed hidden despite 11 days in jail. *See* Exhibit C (Second Amended Complaint, at ¶¶ 30-31).

23. The lawsuit alleges: "This warrant was based on evidence fabricated by Wilber. [The unidentified trooper] told White she could either wait for the warrant, which would take considerable time, or consent to the invasive search." *See* Exhibit C (Second Amended Complaint, at ¶ 31).

24. Ms. White then agreed to go to Wentworth-Douglass Hospital on February 23, 2017—13 days after her arrest—despite "still insist[ing] that she had nothing hiding in her person." She was then given the invasive rectal and vaginal examinations, and still no drugs were found. *See* Exhibit C (Second Amended Complaint, at ¶¶ 32-34).

25. On February 23, 2017, Ms. White was released from police custody on the original, remaining simple "possession of a controlled drug" charge—a charge that was later dismissed on May 23, 2017. As explained in the lawsuit: "On a simple possession charge, White would have been released on day one," especially without two body scans, a drug test, and an invasive rectal and vaginal examination. *See* Exhibit C (Second Amended Complaint, at ¶¶ 35, 37); *see also* Exhibit E (Case Summaries for Two Original Charges in No. 470-2017-CR-00287 and 218-2017-CR-00192 indicating May 23, 2017 dismissal of original "possession of a controlled drug" charge).

26. On July 17, 2020, Judge Steven J. McAuliffe denied the motion to dismiss filed by Mr. Wilber—who was represented by Department of Justice lawyers that typically represent the Department of Safety. *See White v. Roe*, No. 19-cv-1059-SM, 2020 DNH 124, 2020 U.S. Dist. LEXIS 125779 (D.N.H. July 17, 2020), attached as Exhibit H. The Court held that Ms. White's allegations "plainly set forth viable and plausible claims that Trooper Wilber violated her constitutionally protected rights," including for searching Ms. White's purse and fabricating evidence. *Id.* at *2, 9-12.

27. In approximately November 2021, the Department settled the case on Mr. Wilber's behalf by agreeing to pay Ms. White $212,500 of taxpayer funds in exchange for dismissal of the lawsuit. *See* Exhibit A (Damien Fisher, Maine Woman Illegally Searched Gets $200K after NH State Police Arrest, IndepthNH.org (Dec. 31, 2021)); Exhibit B (Case Docket and Dismissal Order, indicating Nov. 30, 2021 Stipulation of Dismissal).

28. Meanwhile, on approximately August 9, 2021, the Department fired Mr. Wilber, though the reasons for the termination are unclear and are the subject of this Petition. *See* Exhibit I (Aug. 10, 2021 Form B).

29. Further, in approximately September 2021, the Department placed Mr. Wilber on the Exculpatory Evidence Schedule. *See* Exhibit J (Sept. 16, 2021 EES Disclosure). The reasons for this placement are also unclear and are the subject of this Petition.

30. It appears that Mr. Wilber is challenging his termination before the Personnel Appeals Board, and a pre-hearing conference was held on December 15, 2021.[10] The Personnel Appeals Board hears appeals of a variety of employment actions. *See* RSA 21-I:45-47; RSA 21-I:58. The decisions and hearings of the Personnel Appeals Board are public.[11]

THE PETITIONER ACLU-NH'S AUGUST 18, 2021 RIGHT-TO-KNOW REQUEST, AND THE DEPARTMENT'S EFFECTIVE DENIAL

31. After Mr. Wilber's August 9, 2021 termination, the ACLU-NH, on August 18, 2021, submitted a request under the Right-to-Know Law to the Respondent Department of Safety asking for the following: "All reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden [Wilber] that relate to any adverse employment action." *See* Exhibit K (ACLU-NH Aug. 18, 2021 RSA ch. 91-A Request). This request includes records concerning Mr. Wilber's termination, as well as the credibility issue that led to Mr. Wilber's placement on the Exculpatory Evidence Schedule.

32. In the hope of resolving this matter without litigation, the ACLU-NH wrote a letter to the Department on November 10, 2021 providing detailed reasons why the requested information (i) should be released and (ii) was not exempt from disclosure under RSA ch. 91-A. The ACLU-NH also explained that it "would be open to reasonable redactions of the names of

[10] *See Haden Wilber*, #2022-T-002-DOS, Personnel Appeals Board (indicating Dec. 15, 2021 prehearing conference), https://das.nh.gov/hr/pab/PreHearingConf/PreHearingConf_2021/Prehearing_Conf_12-15-2021.pdf; https://das.nh.gov/hr/pab/documents/meetingnotes/2021/PAB_Meeting_Agenda_12-15-2021.pdf.

[11] *See* Personnel Appeals Board Termination Decisions, https://apps.das.nh.gov/pab/viewAppealsByCategory.aspx?type=termination.

private citizens or any private medical information." *See* Exhibit L (ACLU-NH Nov. 10, 2021 Letter).

33. However, the Department has not produced the requested information, and it seems that the Department has no intention of doing so in the future. It also appears based on discussions among counsel that the Department is relying on the exemption in RSA 91-A:5, IV for records that, if disclosed, "would constitute [an] invasion of privacy." *See* RSA 91-A:5, IV.

ARGUMENT

I. Right-to-Know Law Principles.

34. New Hampshire's Right-to-Know Law under RSA ch. 91-A is designed to create transparency with respect to how the government interacts with its citizens. The preamble to the law states: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. The Right-to-Know Law "helps further our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 553 (2002).

35. The Right-to-Know Law has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: "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." *Id.* New Hampshire is one of the few states that explicitly enshrines the public's right of access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8's language was included upon the recommendation of the Bill of Rights Committee to the 1974 constitutional

convention and adopted in 1976. While New Hampshire already had RSA ch. 91-A to address the public's right to access information, the Committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 53 (2d ed. 2015).

36. Consistent with these principles, courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.,* 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode,* 148 N.H. at 554 (citation omitted). "[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a *heavy burden* to shift the balance toward nondisclosure." *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581 (2006) (emphasis added).

37. As explained below, the requested records concerning Mr. Wilber's termination should be released. Under the balancing test applied under RSA 91-A:5, IV's "invasion of privacy" exemption, the public interest in disclosure trumps any privacy interest in nondisclosure, especially where these records may implicate potential misconduct.

II. The "Invasion of Privacy" Exemption under RSA 91-A:5, IV Requires Disclosure Because the Public Interest in Disclosure Outweighs Any Privacy Interest in Nondisclosure.

38. RSA 91-A:5, IV exempts, among other things, "[r]ecords pertaining to … personnel … and other files whose disclosure would constitute [an] invasion of privacy." Even assuming that the requested records here constitute "personnel files" under RSA 91-A:5, IV, this is not a categorical exemption. Again, such records are subjected to a public interest balancing test that evaluates the public interest in disclosure against any privacy and governmental interests in

nondisclosure. *See Reid v. N.H. AG*, 169 N.H. 509, 527-28 (2016) ("[W]e now hold that the determination of whether material is subject to the exemption for 'personnel … files whose disclosure would constitute invasion of privacy,' RSA 91-A:5, IV, also requires a two-part analysis of: (1) whether the material can be considered a 'personnel file' or part of a 'personnel file'; *and (2) whether disclosure of the material would constitute an invasion of privacy*.") (emphasis added).

39. The Supreme Court has explained this three-step balancing analysis as follows under RSA 91-A:5, IV:

> 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. v. Local Gov't Ctr., 159 N.H. 699, 707 (2010) (citations and internal quotations omitted); *see also Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 679 (2011) (same). In applying this test, the burden on the government entity resisting disclosure is a heavy one. *See, e.g., Reid*, 169 N.H. at 532. Even if the public interest in disclosure and privacy interest in nondisclosure appear equal, this Court must air on the side of disclosure. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance ….") . In this case, this balancing analysis requires disclosure.

A. The Privacy Interest in Nondisclosure is Nonexistent.

40. Police officers have no privacy interest in records implicating the performance of their official duties, especially when—as is the case here—there is an indication of misconduct. The information sought here does not constitute "intimate details … the disclosure of which might

harm the individual," *see Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972), 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 Reid*, 169 N.H. at 530 (emphasis added). Petitioner is not seeking, for example, medical or psychological records in an officer's personnel file. Instead, Petitioner is seeking information that relates to the ability of a trooper to perform his official duties. Thus, any privacy interest here is minimal, if not nonexistent. (Again, to 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.)

41. In examining the invasion of privacy exemption under RSA 91-A:5, IV, the New Hampshire Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government and information concerning the performance of government employees. *Compare, e.g.*, *Lamy v. N.H. Public Utilities Comm'n*, 152 N.H. 106, 111 (2005) ("The central purpose of the Right–to–Know Law is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."); *Brent v. Paquette*, 132 N.H. 415, 427 (1989) (government not required to produce records kept by school superintendent containing private students' names and addresses); *N.H. Right to Life v. Director, N.H. Charitable Trusts Unit*, 169 N.H. 95, 114, 120-121 (2016) (protecting identities of private patients and employees at a women's health clinic); with *Union Leader Corp.*, 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); *Prof'l Firefighters of N.H.*, 159 N.H. at 709-10 (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); *Mans*, 112 N.H. at 164 (government must disclose the names and salaries of each public schoolteacher employed by the district).

42. Courts outside of New Hampshire similarly have rejected the notion of police officers having a significant privacy or reputational interest with respect to information implicating their public duties. This is because, when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. *See, e.g., 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) ("[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 507 (N.M. Ct. App. 2010) (finding that police officer "does not have a reasonable expectation of privacy in a citizen complaint because the citizen making the complaint remains free to distribute or publish the information in the complaint in any manner the citizen chooses"); *Denver Policemen's Protective Asso. v. Lichtenstein*, 660 F.2d 432, 436-37 (10th Cir. 1981) (rejecting officers' claim of privacy); *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").

43. This conclusion is consistent with the principle that, when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. *See, e.g., State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252, 261-62 (Wis. 1983) ("By accepting his public position [the police chief] has, to a large extent, relinquished his

right to keep confidential activities directly relating to his employment as a public law enforcement official. The police chief cannot thwart the public's interest in his official conduct by claiming that he expects the same kind of protection of reputation accorded an ordinary citizen."); *Kroeplin v. Wis. Dep't of Nat. Res.*, 725 N.W.2d 286, 301 (Wis. Ct. App. 2006) ("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."); *see also Perkins v. Freedom of Info. Comm'n*, 635 A.2d 783, 792 (Conn. 1993) ("Finally, we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties."); *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 698 A.2d 803, 808 (Conn. 1997) (in upholding the trial court's judgment requiring disclosure of an internal affairs investigation report exonerating a state trooper of police brutality, concluding: "Like the trial court, we are persuaded that the fact of exoneration is not presumptively sufficient to overcome the public's legitimate concern for the fairness of the investigation leading to that exoneration. This legitimate public concern outweighs the department's undocumented assertion that any disclosure of investigative proceedings may lead to a proliferation of spurious claims of misconduct.").

44. Indeed, state troopers and police officers are not low-level administrative or clerical employees. They have a badge and a gun, can deprive people of their liberty based on their word alone, and can use lethal force. Mr. Wilber's actions exemplify this unique power held by the police. Mr. Wilber's affidavit testimony led to Ms. White being unlawfully detained for 13 days. And Mr. Wilber has also previously used lethal force.[12] With these immense powers, Mr. Wilber

[12] *See* "Officer Involved Shooting Incident in Rochester, New Hampshire, August 20, 2018," N.H. Dep't of Justice, *available at* https://www.doj.nh.gov/multimedia/documents/20181004-rochester-report.pdf.

and police officers like him have no reasonable expectation of privacy with respect to conduct implicating their ability to perform their duties.

B. The Public Interest in Disclosure is Compelling.

45. Here, the public interest in disclosure is obvious and prevails. This is for several reasons.

46. *First*, the requested information likely implicates potential misconduct. The Department terminated Trooper Wilber on or about August 9, 2021. *See Exhibit I* (Aug. 10, 2021 Form B). A federal civil rights lawsuit was also filed against Mr. Wilber alleging egregious misconduct, including an unlawful search and the fabrication of evidence that unconscionably led a woman to be jailed for 13 days and subjected to a body cavity search. *See Exhibit C* (Second Amended Complaint). Judge Steven McAuliffe declined to dismiss this lawsuit. *See White v. Roe*, No. 19-cv-1059-SM, 2020 DNH 124, 2020 U.S. Dist. LEXIS 125779 (D.N.H. July 17, 2020), attached as *Exhibit H*. To settle these allegations, the Department agreed to pay $212,500 of taxpayer funds on Mr. Wilber's behalf. *See Exhibit A* (Damien Fisher, Maine Woman Illegally Searched Gets $200K after NH State Police Arrest, IndepthNH.org (Dec. 31, 2021)).

47. Here, this apparent misconduct is neither speculative nor constitutes a bare allegation. In addition to Mr. Wilber's termination, the Department also placed him on the Exculpatory Evidence Schedule ("EES"). *See Exhibit J* (Sept. 16, 2021 EES Disclosure). The EES is a list of police officers who have engaged in sustained misconduct that negatively reflects on their credibility or trustworthiness. The Department of Justice maintains the EES as a matter of policy, in part, to ensure that prosecutors can easily identify testifying officers who may have information in their personnel files relating to their credibility or truthfulness that needs to be disclosed to defendants. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (a prosecutor's

suppression of evidence favorable to an accused violates the Fourteenth Amendment's due process protections where the evidence is material to guilt or punishment, regardless of the State's good or bad faith); *State v. Laurie*, 139 N.H. 325, 329-330 (1995) (criminal defendants have an explicit right "to produce all proofs that may be favorable to [them]" under Part I, Article 15 to the New Hampshire Constitution, including information that would negatively reflect on an officer's character or credibility). As the Department of Justice explained in its March 21, 2017 memorandum concerning EES procedures, "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.[13] This is undoubtedly serious conduct, and the Department of Justice's April 30, 2018 addendum explains that placement should only occur when this conduct is "sustained."[14] Here, the interest in disclosure is especially compelling because, as acknowledged by the EES placement, this is not just any potential misconduct engaged in by Mr. Wilber; rather, this potential misconduct implicates trustworthiness and credibility that go to the core of an officer's integrity.

48. As case after case confirms, the public interest in disclosure is compelling where the requested information could implicate potential misconduct. *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Prof'l Firefighters of N.H.*, 159 N.H. at 709 (noting that "[p]ublic scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism"). As the New Hampshire Supreme Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of

[13] Joseph Foster, Mar. 21, 2017 EES Memo., *available at* https://www.doj.nh.gov/criminal/documents/exculpatory-evidence-20170321.pdf (Page 2 of Protocol).

[14] Gordon MacDonald, Apr. 30, 2018 EES Addendum, *available at* https://www.doj.nh.gov/criminal/documents/exculpatory-evidence-20180430.pdf (Page 1).

information pertaining to its government activities." *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003). As one New Hampshire Court Judge similarly ruled in releasing a video of an arrest at a library, "[t]he public has a broad interest in the manner in which public employees are carrying out their functions." *See, e.g., Union Leader Corp. v. van Zanten*, No, 216-2019-cv-00009 (Hillsborough Cty. Super. Ct., Norther Dist., Jan. 24, 2019) (Smuckler, J.). Here, secrecy with respect to this information will only erode public trust and confidence in law enforcement, including in the State Police.

49. *Second*, as Mr. Wilber has been placed on the EES, the requested records will also help the public evaluate the extent to which Mr. Wilber's misconduct may have negatively affected criminal prosecutions in which he participated. For all we know, Mr. Wilber's apparent misconduct implicating his trustworthiness or credibility may now have to be disclosed in scores of past and present criminal cases, thereby compromising those prosecutions and convictions and, as a result, potentially damaging public safety. Furthermore, if Mr. Wilber was placed on the EES in late 2021—perhaps years after the credibility incident occurred that ultimately triggered placement—then who knows how many criminal cases may be implicated in the intervening years where disclosures may not have been properly made to defendants in violation of their due process rights.

50. *Third*, disclosure of the requested records will help the public evaluate how the Department managed, investigated, and supervised Mr. Wilber. The Supreme Court has explained that "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." *Reid*, 169 N.H. at 532 (quotations omitted). Though it is unclear, these records perhaps may also inform the public on the practices of the State Police's Mobile

Enforcement Team—a team of which Mr. Wilber was a member and, as Judge Schulman noted in *Perez*, has a "de jure" practice of engaging in pretextual stops.

51. Consistent with this analysis, three superior courts have recently concluded that certain requested information concerning police conduct should be released. *See Union Leader Corp./ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406, at *23, 26-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (on remand in case where ACLU-NH is co-counsel, ordering disclosure of most of the redacted information in an audit report concerning how a police department conducted internal affairs investigations; noting that "the public has a strong interest in understanding how workplace misconduct is handled by the police department"), attached as Exhibit M; *Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (in case where ACLU-NH is counsel, holding that an internal investigation report concerning an allegation that an officer engaged in excessive force is a public document because the public interest in disclosure trumps any privacy interest the officer may have under RSA 91-A:5, IV; currently on appeal at Supreme Court at No. 2020-563 and argued on October 20, 2021), attached as Exhibit N; *Salcetti v. City of Keene*, No. 213-2017-cv-00210, at *5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.) (on remand, holding: "As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their authority, whether the department is accounting for complaints seriously, and how many complaints are made. This factor strongly favors unredacted disclosure."), attached as Exhibit O.

52. Numerous cases outside of New Hampshire have similarly highlighted the public interest in disclosure in similar circumstances. *See, e.g., 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.");

Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs., 484 Mass. 279, 292 (2020) ("the public has a vital interest in ensuring transparency where the behavior of these public officials allegedly fails to comport with the heightened standards attendant to their office"); *City of Baton Rouge,*, 4 So.3d at 809-10, 821 ("[t]he public has an interest in learning about the operations of a public agency, the work-related conduct of public employees, in gaining information to evaluate the expenditure of public funds, and in having information openly available to them so that they can be confident in the operation of their government"); *Burton*, 594 S.E.2d at 895 ("[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"); *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, disclosure will educate the public on "the official acts of those officers in dealing with the public they are entrusted with serving." *Cox*, 242 P.3d at 507; *see also Kroeplin*, 725 N.W.2d at 303 ("[t]he public has a particularly strong interest in being informed about public officials who have been derelict in [their] duty") (quotations omitted).

53. In sum, transparency is essential for the public to fully vet not only the potential misconduct at issue and its impact on the criminal justice system, but also the investigation and decision making of the Department concerning Mr. Wilber's behavior. Keeping this information secret "cast[s] suspicion over the whole department and minimize[s] the hard work and dedication shown by the vast majority of the" State Police. *See Rutland Herald*, 84 A.3d at 825-26.

C. The Public Interest Trumps Any Nonexistent Privacy Interest.

54. Once the privacy 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. 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) (emphasis added); *Union Leader Corp.*, 141 N.H. at 476; *see also WMUR v. N.H. Dep't of Fish and Game*, 154 N.H. 46, 48 (2006) (noting that courts must "resolve questions regarding the Right-to-Know Law with a view providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents").

55. Here, for the reasons explained above, any privacy interest is dwarfed by the compelling public interest in disclosure. Accordingly, disclosure is required.

56. Apparently recognizing how the release of misconduct information can foster trust and confidence in law enforcement, the State Police previously released information concerning former trooper James Callahan under RSA ch. 91-A where trooper Callahan "had made false statements in a portion of his official report" concerning an investigation in Madison, New Hampshire. As a result, Trooper Callahan resigned, forfeited his certification, and agreed to placement on the EES. *See* ***Exhibit P*** (Records Explaining Callahan Conduct and Oct. 15, 2020 Production Email).[15]

[15] *See also* News Release, "Investigation Into Criminal Allegations Against Former New Hampshire State Police Trooper James Callahan Results in Mr. Callahan's Resignation and Forfeiture of Police Certification," *N.H. Dept. of Justice* (July 27, 2020), https://www.doj.nh.gov/news/2020/20200727-callahan-investigation.htm.

57. Following *Provenza* and other cases, several municipalities have similarly produced information concerning the police in recognition of case law and the value of being transparent to the citizenry.[16] The City of Manchester publicly released some information concerning the sustained misconduct of Aaron Brown, who engaged in racist speech using a department phone.[17] The Dover Police Department similarly released its internal investigation into a fired officer who the State subsequently criminally charged.[18] Finally, in June 2021, the City of Lebanon released information concerning Richard Smolenski who had been charged with using fictitious online accounts to stalk a former girlfriend and threaten to release details about their sexual encounters.[19]

58. Despite similar information being released by other police departments—including the Department in the prior *Callahan* matter—and despite the overwhelming precedent in favor of disclosure, the Department has taken a position of secrecy in this case.

COUNT I
FAILURE TO PRODUCE DOCUMENTS PURSUANT TO RSA CH. 91-A AND PART I, ARTICLE 8 OF THE NEW HAMPSHIRE CONSTITUTION

59. All prior paragraphs are incorporated.

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[16] *See* N.H. Municipal Association, "Police Department Internal Affairs Reports Required to be Disclosed Under the Right-to-Know Law Even When the Underlying Allegations of Police Officer Misconduct are Unfounded," *available at* https://www.nhmunicipal.org/court-updates/police-department-internal-affairs-reports-required-be-disclosed-under-right-know-law (after *Provenza* superior court decision, noting "practice pointer" that "[a]n internal investigative report about the conduct of a police officer during the performance of his official duties would likely be subject to disclosure under the Right-to-Know Law, even if the allegations that brought about the investigation are unfounded").

[17] *See* Mark Hayward, "Fired Cop Aaron Brown: I Might be Prejudiced, But Not Racist," *Union Leader* (Oct. 27, 2020), https://www.unionleader.com/news/safety/fired-cop-aaron-brown-i-might-be-prejudiced-but-not-racist/article_25d480f3-4a45-5c35-823e-8485dc0028e4.html.

[18] *See* Kimberly Haas, "Dover Released Review of Investigation Into Fired Officer," *Union Leader* (Oct. 29, 2020), https://www.unionleader.com/news/safety/dover-releases-review-of-investigation-into-fired-officer/article_1f13e35e-d774-5f1e-b2d8-4f22d5b3a191.html.

[19] *See* Anna Merriman, "Lebanon Police Lieutenant Charged with Stalking Ex-Girlfriend," *Valley News* (May 7, 2021), https://www.vnews.com/Lebanon-police-officer-charged-with-stalking-ex-girlfriend-40357816.

60. Petitioner ACLU-NH has requested "[a]ll reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden Wilber that relate to any adverse employment action."

61. The Department has declined to produce this information, which includes information concerning Mr. Wilber's termination and placement on the Exculpatory Evidence Schedule.

62. The Department's refusal to produce this information fails to comply with the dictates of RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution.

63. The exemption cited by the Department is inapplicable.

64. Accordingly, the requested records are public documents under RSA ch. 91-A and should be produced immediately.

WHEREFORE, Petitioner ACLU-NH respectfully prays that this Honorable Court:

A. Rule that all reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden Wilber that relate to any adverse employment action (including discharge and placement on the Exculpatory Evidence Schedule) are public records that must be made available for inspection by Petitioner and members of the public under RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution;

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

C. Give this action "priority on the Court calendar" as required by RSA 91-A:7, by issuing Orders of Notice forthwith and scheduling a hearing on the relief Petitioner seeks; and

D. Award such other relief as may be equitable.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

By its attorneys,

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