THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0321

The American Civil Liberties Union of New Hampshire
(Petitioner/Appellee)

v.

New Hampshire Department of Safety, Division of State Police
(Respondent/Appellant)

Rule 7 Mandatory Appeal from the New Hampshire Superior Court,
Merrimack County
Case No. 217-2022-cv-00112

RESPONSIVE BRIEF FOR PETITIONER/APPELLEE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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QUESTION PRESENTED

1. Does RSA 105:13-b categorically exempt disciplinary information in police personnel files from disclosure under the Right-to-Know Law without the need to employ a public interest balancing test where RSA 105:13-b states that it applies when a "police officer … is serving as a witness or prosecutor in a criminal case"?

STATEMENT OF THE FACTS

Respondent/Appellant Department of Safety Division of State Police (hereinafter, "State Police") seeks to keep secret records concerning former state trooper Haden Wilber who was terminated on August 9, 2021.

The State Police terminated Mr. Wilber after concluding that he had lied to investigators during its investigation of a female motorist's complaint concerning a February 10, 2017 pretextual stop that led to her being improperly detained for 13 days and subjected to a body cavity search. The State Police also found that Mr. Wilber's actions violated the Fourth Amendment when he inspected the motorist's phone without a warrant. *See* JAII 281.[1] In its August 9, 2021 "Disciplinary Action" report, the State Police added that its investigation "revealed disturbing facts regarding [Mr. Wilber's] investigatory habits and overall integrity as a law enforcement officer." JAII 280.

The State Police added Mr. Wilber to the Exculpatory Evidence Schedule ("EES") around this time, thereby indicating that Mr. Wilber has information in his personnel file reflecting negatively on his trustworthiness or credibility that may need to be disclosed to defendants. *See* JAII 282. The motorist sued Mr. Wilber and others in federal court on October 8, 2019 alleging that he fabricated a crime following this pretextual traffic stop, leading to her improper detention and body cavity search. In September 2021, the State agreed to pay $212,500 to resolve the lawsuit

[1] "JAI __" refers to the first volume of the joint appendix. "JAII __" refers to the second volume.

after the federal court declined to dismiss it. JAII 284-289. The details of Mr. Wilber's conduct are outrageous and are documented in more detail at JAI 29-37.

Mr. Wilber appealed his termination to the Personnel Appeals Boards ("PAB"). While the State Police has refused to produce its August 9, 2021 "Disciplinary Action" report documenting the reasons for its termination, the PAB released this report on January 28, 2022 under the Right-to-Know Law. This report was filed with the PAB as part of Mr. Wilber's appeal of his termination.

Meanwhile, during a December 14, 2021 meeting of the Police Standards and Training Council ("PSTC"), the PSTC declined to take any certification action against Mr. Wilber while his appeal was pending before the PAB.[2] As a result, Mr. Wilber remained employed by the Kingston Police Department, which had re-hired him in August 2021. Mr. Wilber, over the next 10 months, "worked some 285 hours as a part-time officer for the Kingston Police Department, according to payroll records …. Though the vast majority of those hours were outside details—things like monitoring traffic at road-construction sites—he was in uniform at those times, with the same powers to detain and arrest as any other law enforcement officer."[3]

During Mr. Wilber's April 19-20, 2022 PAB hearing, State Police Detective Sgt. Justin Rowe testified that Mr. Wilber's handling of the motorist's case did not meet State Police standards.[4] These failures are

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[2] *See* PSTC Meeting Minutes, at pp. 21-22 (Dec. 14, 2021), https://www.pstc.nh.gov/council/documents/minutes-20211214.pdf.

[3] *See* Paul Cuno-Booth, "How a Fired N.H. State Trooper Kept Working in Law Enforcement," *NHPR* (Sept. 26, 2022), https://www.nhpr.org/nh-news/2022-09-26/how-a-fired-n-h-state-trooper-kept-working-in-law-enforcement.

[4] Paul Cuno-Booth, "N.H. Personnel Appeals Board Upholds State Trooper Firing," *NHPR* (July 7, 2022), https://www.nhpr.org/nh-news/2022-07-

further documented in the State Police's May 27, 2022 Requests for Findings of Fact and Rulings of Law and June 17, 2022 Closing Brief before the PAB. *See* Addendum ("ADD") 115-161.[5]

On July 6, 2022, the PAB upheld the State Police's termination of Mr. Wilber. During the deliberations, the panel chair concluded that "this was not a close case." *See* ADD223 (July 6, 2022 Transcript, at p. 2:18-19). The Chairman added: "[Mr. Wilber] made quite a few admissions, frankly, both in his testimony before the board and in text messages that occurred at the time, which suggested that he was aware that he was violating people's constitutional rights." *Id.* at p. 2:25-3:6. The PAB issued a written decision on August 18, 2022 memorializing its findings. ADD234-245. After the PAB's decision, Mr. Wilber resigned from the Kingston Police Department in July 2022[6] and voluntarily surrendered his police certification.[7]

This is a unique case where the public only knows the nature of Mr. Wilber's misconduct that the State Police is aiming to conceal because Mr. Wilber elected to challenge his termination before the PAB. If the State Police's view of the law is correct—and had Mr. Wilber declined to

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07/nh-board-upholds-state-trooper-firing. The PAB released many of the exhibits from the PAB hearing under the Right-to-Know Law, including the State Police's July 13, 2021 internal investigative report which is at ADD83-114.

[5] This Court can take judicial notice of facts that are "not subject to reasonable dispute" because they are either "generally known" or are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.H. R. Evid. 201(a).

[6] *See* Paul Cuno-Booth, "How a Fired N.H. State Trooper Kept Working in Law Enforcement," *NHPR* (Sept. 26, 2022), https://www.nhpr.org/nh-news/2022-09-26/how-a-fired-n-h-state-trooper-kept-working-in-law-enforcement.

[7] *See* PSTC Meeting Minutes, at pp. 2 (Aug. 23, 2022), https://www.pstc.nh.gov/council/documents/minutes-20220823.pdf.

challenge his termination—the public would know little about the reasons for the termination. Fortunately, as explained below, this is not the law.

STATEMENT OF THE CASE

According to the State Police's August 9, 2021 "Disciplinary Action" report, the State Police terminated Mr. Wilber for lying to investigators during its investigation of a female motorist's complaint and violating the motorist's Fourth Amendment rights. Mr. Wilber's misconduct culminated in the motorist being improperly detained for 13 days and subjected to a body-cavity search. The report added that Mr. Wilber's "personal conduct … reflects negatively upon [Mr. Wilber's] character, the law enforcement profession, and is an embarrassment to [him], [his] colleagues and the Division of State Police." JAII 280.

On August 18, 2021, Petitioner/Appellee American Civil Liberties Union of New Hampshire ("ACLU-NH" or "Petitioner")—then unaware of the specific reasons for the termination—submitted a request under the Right-to-Know Law to the State Police seeking "[a]ll reports, investigatory files, personnel, and disciplinary records concerning State Police Trooper Haden Wilbur [sic] that relate to any adverse employment action." JAI 37, ¶ 31. The State Police declined to produce this information. As a result, the ACLU-NH filed a Petition in Merrimack County Superior Court on January 18, 2022. JAI 25-52.

Before the Superior Court, the State Police advanced two arguments. First, the State Police argued that RSA 105:13-b categorically prohibits the disclosure of disciplinary information in police personnel files. Second, the State Police argued that, even if RSA 105:13-b does not categorically prohibit disclosure of Mr. Wilber's disciplinary records, these records are exempt as "personnel … files whose disclosure would constitute invasion of privacy" under RSA 91-A:5, IV's public interest balancing test. The Superior Court conducted oral argument on March 31, 2022. *See* ADD45.

In its May 3, 2022 order, the Superior Court (Kissinger, J.) granted the ACLU-NH's petition. As to the State Police's first argument, the Superior Court rejected the theory that RSA 105:13-b "categorically prohibit[s] disclosure of the records at issue in this case." *See* JAI 11, 14. In reaching this holding, the Superior Court noted that, "unlike other statutes, RSA 105:13-b does not specifically reference [an] exemption from RSA 91-A in its text." *See* JAI 14. The Superior Court then went on to read this Court's interpretation of RSA 105:13-b in *In re N.H.*, 174 N.H. 785 (2022), as only creating a "presumption of confidentiality" where the "information remains generally confidential." *See* JAI 15 (quoting *In re N.H.*, 174 N.H. at 792). Because of this Court's use of the phrase "generally confidential," the Superior Court found that "RSA 105:13-b does not operate as a categorical ban to disclosure of records under a Right-to-Know request." *Id.* The Superior Court then recited this Court's well-established precedent that—even if information is "confidential"—this does not, by itself, "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. JAI 16 (quoting *Provenza v. Town of Canaan*, 175 N.H. 121, 129 (2022)). Accordingly, the Superior Court held that the records at issue—even if "generally confidential" or having "a presumption of confidentiality" under RSA 105:13-b—still must be subjected to "the balancing test like other records subject to RSA 91-A:5, IV." *Id.* The Superior Court added that, "[i]f 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"—an outcome that would be "inconsistent with the direction of the New Hampshire State Constitution, pt. 1, art.8, and the very purpose of the Right-to-Know statute." *Id.*

As to the State Police's second argument, the Superior Court then applied the public interest balancing test and concluded that "the State Police has failed to carry its heavy burden to shift the balance in favor of nondisclosure." JAI 23. As to any privacy interests in nondisclosure, the Court found that Mr. Wilber had a privacy interest in any "intimate details" that may exist in the requested records in his personnel file, but that—relying on *Provenza*, 175 N.H. at 130—"no substantial privacy interest [existed] in information relating to the performance of his official duties." JAI 19. As to the public interest in disclosure, the Superior Court—again relying on *Provenza*—concluded that disclosure of Mr. Wilber's personnel file "will assist the public in determining whether the investigation into his conduct was comprehensive and accurate." JAI 21. With respect to Mr. Wilber's illegal search of the motorist's phone and Mr. Wilber's statement that the State Police's Mobile Enforcement Team ("MET") does "this all the time," the Court noted that the "public has an interest in knowing whether the State Police saw fit to document this in his personnel file." *Id.* The Court added that "[t]he public also has an interest in understanding and scrutinizing the timeliness of the government's investigation"—especially where the State Police's investigation began in December 2020, over three years after the February 2017 incident. *Id.*

This appeal followed. The State Police is *only* appealing the Superior Court's first decision rejecting the theory that RSA 105:13-b categorically prohibits disclosure of disciplinary information in police personnel files under RSA ch. 91-A. *See* JAI 9-17.

SUMMARY OF ARGUMENT

The State Police invokes RSA 105:13-b to keep secret the records in Mr. Wilber's personnel file that demonstrate his misconduct and provide details concerning the State Police's investigation. The Superior Court's

May 3, 2022 order requiring disclosure should be affirmed for several independent reasons.

First, RSA 105:13-b does not fall under the exemption in RSA 91-A:4, I for records that are "otherwise prohibited by statute" because RSA 105:13-b does not apply to a request made under the Right-to-Know Law. Rather, RSA 105:13-b only applies to when "a police officer … is serving as a witness in any criminal case." *See* RSA 105:13-b, I; *see infra* Section I.

Second, even if RSA 105:13-b applies to Petitioner's Right-to-Know request (and it does not), any presumption of confidentiality is not categorical, but rather is subject to the public interest balancing test set forth in this Court's recent decisions in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020) and *Union Leader Corp./ACLU-NH v. Town of Salem*, 173 N.H. 345 (2020). This Court has opined that even presumptively "confidential" information is still subject to "the three-step analysis" of the public interest balancing test. *See Provenza*, 175 N.H. at 129; *see infra* Section II.

Third, the State Police claims that RSA 105:13-b categorically "prohibits public disclosure of police personnel files"—and *only* police personnel files—"to the maximum extent permitted by the United States and New Hampshire Constitutions" *even in the face of a compelling public interest in disclosure*. *See* State Police Br. at 16. In so arguing, the State Police effectively seeks to overrule, as to disciplinary information in police personnel files, this Court's *Seacoast Newspapers/Union Leader* decisions that required a public interest balancing test for information concerning the performance of a particular employee. *See infra* Section III.

Fourth, demonstrating the overbreadth of the State Police's position, the State Police seeks to invoke purported categorical secrecy protections in RSA 105:13-b to bar disclosure of disciplinary information in police

personnel files even where, as the Superior Court found, the public interest in disclosure is compelling and outweighs any privacy interest in nondisclosure. *See infra* Section IV.

Fifth, if this Court were to interpret RSA 105:13-b as a categorical bar to disclosing disciplinary information in police personnel files (and it should not), then the public would be deprived of vital police misconduct information that has been released in New Hampshire since this Court's May 2020 *Seacoast Newspapers/Town of Salem* decisions, including racist conduct. *See infra* Section V.

Finally, if this Court were to interpret RSA 105:13-b as a categorical bar to disclosing disciplinary information in police personnel files (and it should not), applying RSA 105:13-b to bar the disclosure of such misconduct would constitute an "unreasonable restriction" of the public's right of access in violation of Part I, Article 8 of the New Hampshire Constitution. *See infra* Section VI.

ARGUMENT

The preamble to New Hampshire's Right-to-Know 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 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).

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). While New Hampshire already had RSA ch. 91-A to address the public's right to access information, the Bill of Rights Committee to the 1974 constitutional convention 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).

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).

I. RSA 105:13-b Does Not Apply to Petitioner's "Right-to-Know" Request.

The State Police contends that the requested documents "would necessarily be contained in Wilber's personnel file," thereby triggering RSA 105:13-b. *See* State Police Br. at 17, 25; *see also N.H. Ctr. for Pub. Interest Journalism v. N.H. DOJ*, 173 N.H. 648, 656 (2020) ("By its express terms, RSA 105:13-b pertains only to information maintained in a police officer's personnel file."). Accordingly, the State Police argues that RSA 105:13-b falls under the exemption in RSA 91-A:4, I for records that

are "otherwise prohibited by statute." This is because RSA 105:13-b, according to the State Police, "categorically" "prohibits public disclosure of police personnel files," including records that evidence egregious misconduct like those at issue here. *See* State Police Br. at 11, 16. The State Police is incorrect.

A. RSA 105:13-b Only Applies When a Police Officer "is Serving as a Witness in [a] Criminal Case."

The State Police effectively asks this Court to interpret RSA 105:13-b as creating a statutory privilege barring the disclosure of disciplinary information in police personnel files—and only in police personnel files—under RSA ch. 91-A. In evaluating the State Police's argument, this Court must construe RSA 105:13-b narrowly. *See Marceau v. Orange Realty*, 97 N.H. 497, 499 (1952) ("It is well settled that statutory privileges … will be strictly construed."); *see also Goode,* 148 N.H. at 554. It is also important to note that exemptions under RSA ch. 91-A generally do not prevent a public body from voluntarily disclosing exempt information. This is because the exemptions to the Right-to-Know Law, absent explicit language to the contrary, merely provide a license to a public body to withhold information; they do not create an affirmative privilege of secrecy.[8]

Here, RSA 105:13-b does not create a statutory privilege mandating secrecy or a categorical exemption permitting secrecy for disciplinary information in police personnel files. This is because RSA 105:13-b only concerns how "police personnel files" are handled when "a police officer … is serving as a witness in any criminal case." *See* RSA 105:13-b, I. As this Court recently explained in *In re N.H.*, 174 N.H. 785 (2022)—a

[8] *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 293-94 (1979) ("We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA.").

criminal case—RSA 105:13-b and any presumption of confidentiality for police personnel files apply when there is a "police officer testifying in [a] criminal case." *Id.* at 793 ("Thus, read as a whole, the statute details the procedure for turning over *to a criminal defendant* any exculpatory or relevant evidence found in the personnel files of any police officer testifying *in the criminal case* while maintaining the confidentiality of those files for all other purposes.") (emphasis added).[9]

If there is any further doubt that RSA 105:13-b does not create blanket confidentiality outside the context of a criminal case, it is resolved by this Court's decision in *Doe v. Att'y Gen.*, No. 2020-0447, 2022 N.H. LEXIS 90 (N.H. Sup. Ct. July 21, 2022). There, in the context of an officer seeking removal from the EES, this Court explained that the "disclosure requirements under RSA 105:13-b, I, and III"—which includes RSA 105:13-b, III's statement that "[t]he remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer"—"are explicitly tied to a 'particular criminal case.'" *Id.* at *8 (quoting *In re N.H.*, 174 N.H. at 792). The State Police ignores this limitation. This Court added that RSA 105:13-b, II's procedures for reviewing the contents of an officer's personnel file do not apply "outside the scope of a particular criminal case." *Id.* at *9. In other words, RSA 105:13-b is, in essence, a rule of criminal procedure. This Court's decision in *Doe* was consistent with the Department of Justice's position that the procedure in RSA 105:13-b "only applies when a police officer is 'serving as a witness in any criminal case.'" JAII 392-93, at ¶¶ 11, 12 (where the

[9] *See Bhd. Of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528-29 (1947) ("[H]eadings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis.").

officer "is not serving as a witness in a criminal case …. RSA 105:13-b therefore does not apply"); JAII 412-13, ¶¶ 9-10 (same).

This Court also seemingly reached this same conclusion in *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015), explaining:

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

Duchesne, 167 N.H. at 781 (emphasis added); *see also State v. Shaw*, 173 N.H. 700, 708 (2020) (same). One federal court has similarly concluded that this statute only concerns the treatment of "personnel files of police officers *serving as a witness or prosecutors in a criminal case*." *See Hoyt v. Connare*, 202 F.R.D. 71 (D.N.H. 1996) (Muirhead, M.J.) (emphasis added).

Multiple Superior Court judges have agreed that RSA 105:13-b only applies in the context of a criminal case. For example, the Southern District of the Hillsborough County Superior Court held the following in concluding that RSA 105:13-b did not provide a basis to withhold the EES from the public under the Right-to-Know Law:

> By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file "of a police officer who is serving as a witness in any criminal case." Under this statute, the mandated disclosure is to the defendant in that criminal case. Here, in contrast, there is no testifying officer, pending criminal case, or specific criminal defendant. Rather, petitioners seek disclosure of the EES to the general public.

See N.H. Ctr. for Public Interest Journalism v. N.H. D.O.J., No. 2018-cv-00537, at *3 (Hillsborough Cty. Super. Ct., S. Dist., Apr. 23, 2019) (Temple, J.), at JAII 359, *affirmed in part, and vacated and remanded on other grounds in* 173 N.H. 648, 656 (2020) ("For the purposes of this appeal, we assume without deciding that RSA 105:13-b … applies outside of the context of a specific criminal case in which a police officer is testifying."). The Grafton County Superior Court reached the same conclusion in a case under the Right-to-Know Law concerning whether a report investigating an excessive force allegation should be disclosed to the public. *See 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'"), at JAI 195, *aff'd on other grounds*, 175 N.H. 121 (2022).[10]

As RSA 105:13-b's terms and these cases reflect, nothing in RSA 105:13-b suggests that this statute trumps or abrogates the Right-to-Know

[10] Later affirmed in *Doe v. Att'y Gen.*, No. 2020-0447, 2022 N.H. LEXIS 90 (N.H. Sup. Ct. July 21, 2022), several Superior Court decisions have reached the same conclusion where police officers have attempted to invoke RSA 105:13-b in seeking removal from the EES. *See Officer A.B. v. Grafton County Att'y*, No. 215-2018-cv-00437, at *3-4, ¶¶ 12-15 (Grafton Cty. Super. Ct. Oct. 12, 2019) (MacLeod, J.), at JAII 372-73; *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-250, at *4 (Merrimack Cty. Super. Ct. Oct. 20, 2020) (Tucker, J.), at JAII 387, *aff'd in part, vacated in part, and remanded in* No. 2020-0501 (N.H. Sup. Ct. July 21, 2022); *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-176, at *7 (Merrimack Cty. Super. Ct. Aug. 27, 2020) (Kissinger, J.), at JAII 348, *aff'd in part, vacated in part, and remanded in* No. 2020-0447, 2022 N.H. LEXIS 90, at *1 (N.H. Sup. Ct. July 21, 2022); *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00216, at *8 (Merrimack Cty. Super. Ct., Aug. 27, 2020) (Kissinger, J.), at JAII 333, *aff'd in part, vacated in part, and remanded in* No. 2020-0448 (N.H. Sup. Ct. July 21, 2022).

Law and its three-step public interest analysis with respect to disciplinary information in police officers' personnel files. Rather, RSA 105:13-b simply explains how police personnel files are to be disclosed to defendants in the context of criminal prosecutions. If the legislature had intended RSA 105:13-b to completely exempt police personnel files from disclosure under the Right-to-Know Law and outside the context of a criminal proceeding, it could have done so explicitly as it has done in other contexts.[11] But this Court should not "add language that the legislature did not see fit to include." *See In re Estate of McCarty*, 166 N.H. 548, 551 (2014).

Indeed, in the absence of specific statutory language, this Court has been hesitant—even in the face of genuine privacy interests—to interpret statutory language to create an exemption categorically barring public access to information, especially given this Court's obligation to construe exemptions narrowly. *See Grafton Cty. Attorney's Office v. Canner*, 169 N.H. 319, 327 (2016) (in annulment context, stating that "[w]e agree with the trial court that, had the legislature 'intended to remove prosecuting and arrest agency records from the public, it could have used language [in RSA 651:5, X(e)] such as that used in RSA 651:5, X(c) [and] (d)'"); *Prof. Firefighters of N.H. v. HealthTrust, Inc.*, 151 N.H. 501, 505-06 (2004)

[11] *See, e.g.*, RSA 659:13, III ("If a voter on the nonpublic checklist executes an affidavit in accordance with subparagraph I(c), the affidavit shall not be subject to RSA 91-A."); RSA 659:95, II (various ballot information "shall be exempt from the provisions of RSA 91-A …."); RSA 654:31-a (various voter information "shall be treated as confidential information and the records containing this information shall be exempt from the public disclosure provisions of RSA 91-A, except as provided by statutes other than RSA 91-A"); RSA 654:45, VI ("The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31 …."); RSA 193-E:5, I(j) ("Information maintained in the random number generator [regarding unique school pupil information] shall be exempt from the provisions of RSA 91-A."); RSA 169-C:25-a, IV (child abuse medical records received by law enforcement "shall be exempt from disclosure under RSA 91-A").

("Indeed, unlike other specific exemptions . . . nothing in RSA chapter 5–B specifically exempts HealthTrust from RSA chapter 91–A.").

As the Superior Court correctly explained, "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." JAI 16. And this Court should not second guess the legislature's decision to limit RSA 105:13-b's application to criminal cases, while allowing police disciplinary records in personnel files to be publicly accessible subject to a public interest balancing test. *See Boehner v. State*, 122 N.H. 79, 85 (1982) ("our task is not to second-guess the legislature or question the factors which went into its decision"). As explained below, this distinction created by the legislature does not lead to "absurd results." Nor does it "dismantle" or "circumvent" "the entire statutory regime scheme of RSA 105:13-b," or cause "access to records" in every case. *See* State Police Br. at 11, 16-17. Rather, the legislature specifically created this distinction to avoid giving the police special, categorical secrecy protections under RSA ch. 91-A that do not exist for other public employees.[12]

B. RSA 105:13-b's 1992 Legislative History Supports the Conclusion That This Statute Does Not Act as a Right-to-Know Exemption.

To the extent that RSA 105:13-b is textually ambiguous (and it is not), the 1992 legislative history of RSA 105:13-b refutes the State Police's contention that this statute applies outside the context of a criminal case, including as a categorical exemption to the Right-to-Know Law. *See State v. Brouillette*, 166 N.H. 487, 494-95 (2014) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent.");

[12] *Alford v. Superior Court* is inapposite. *See* 89 Cal. App. 4th 356 (Cal. Ct. App. 2001), *rev'd*, 29 Cal. 4th 1033 (Cal. 2003). *Alford* is not a public records case, but rather interpreted California Evidence Code Section 1045(e), which explicitly required a court to issue a protective order.

State v. Folds, 172 N.H. 513, 526 (2019) ("Where legislative history plainly supports a particular construction of the statute, we will adopt that construction, since our task in interpreting the statutes is to determine legislative intent.") (citation and quotation omitted).

The New Hampshire Association of Chiefs of Police ("NHACP") introduced RSA 105:13-b in 1992. The focus of the bill was to create a process—which previously had been *ad hoc*—for how police personnel file information would be disclosed to defendants in the context of criminal cases. As the police chief representing the NHACP testified after the bill was amended, the bill would address "potential abuse *by defense attorneys* throughout the state intent on fishing expeditions." *See* JAII 486, at LEG037 (Complete 1992 RSA 105:13-b Legislative History) (emphasis added).

Significantly, the legislature specifically rejected any notion that this statute would apply as an exemption under the Right-to-Know Law or categorically bar police personal information from public disclosure. In the first paragraph of the original 1992 proposed version of RSA 105:13-b, the bill contained a sentence stating, in part, that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A." *See* JAII 453, at LEG004. In January 14, 1992 testimony before the House Judiciary Committee, the Union Leader Corporation objected to this blanket exemption, arguing that it would provide police with special, categorical secrecy protections:

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

> citizens from learning of misconduct by a police officer ….
> [I]t will knock a gaping hole in the right-to-know law.

See JAII 462-63, at LEG013-14. The Union Leader added that this proposed exemption would upend the public interest balancing test under the Right-to-Know Law, but only for police personnel records. The Union Leader correctly explained that this balancing test is not "an open-door policy," but rather is "a sensible rule" that is "fair, and flexible," and "allows a Superior Court judge to determine if the limited release of information about an employee is or is not in the public interest." *See* JAII 462, at LEG013. But, as the Union Leader noted, this proposed exemption, if adopted, would "tie the hands of our judges" and destroy this balancing test by "telling the courts that even if the case for release of this information to the public is clearcut, …it can't be done. The prohibition in the first paragraph is absolute." *See* JAII 463, at LEG014.

Following this objection, the legislature amended the bill to delete this categorical exemption for police personnel files under RSA ch. 91-A, thus preserving the public interest balancing test for this information under the Right-to-Know Law. *See* JAII 464, at LEG015. With this amendment, the title of the bill was changed to make it relative "to the confidentiality of police personnel files *in criminal cases*." *Id.* (emphasis added); *see also* JAII 475, 477-81, 484-85 at LEG026, 28-31, 34-35. The amended analysis of the bill similarly explained that the "bill permits the personnel file *of a police officer serving as a witness or prosecutor in a criminal case* to be opened for purposes of that case under certain conditions." JAII 465, 476-77, 480, 484 at LEG016, 27-28, 30, 34 (emphasis added). The amendment to delete the exemption language was apparently a compromise that involved the support of multiple stakeholders, including the Union Leader Corporation that opposed the original bill. JAII 489, at LEG040 (noting support of stakeholders for amended version); *see also* JAII 486, at

LEG037 (NHACP representative acknowledging, following the amendment, that "[f]rankly, I would like to see an absolute prohibition [on disclosure of police personnel files], but since I realized the tooth fairy died some time ago, that is not going to happen").

In sum, there is no evidence that the legislature intended RSA 105:13-b to upset the public interest balancing test that had existed up to that point under RSA ch. 91-A for disciplinary information in police personnel files. To the contrary, this rejected amendment establishes that the legislature wished to preserve this balancing test, and never intended RSA 105:13-b to categorically bar the public disclosure of this information.

II. As the Superior Court Correctly Concluded, Even if RSA 105:13-b Applies to Petitioner's "Right-to-Know" Request (And it Does Not), Any Presumption of Confidentiality is Not Categorical, But Rather is Subject to the Public Interest Balancing Test.

As the Superior Court held, even if RSA 105:13-b applies to Petitioner's Right-to-Know request (and it does not for the reasons explained above), any presumption of confidentiality under this statute is not categorical, but rather is subject to the public interest balancing test set forth in the *Seacoast Newspapers/Town of Salem/Provenza* decisions.

This Court's holding in *In re N.H.*, 174 N.H. 785 (2022), makes clear that RSA 105:13-b only creates a "presumption of confidentiality" where the "information remains generally confidential." *Id.* at 792. Given this Court's use of the phrase "generally confidential," RSA 105:13-b does not operate as a categorical bar to disclosure of police personnel file records under a Right-to-Know request.[13] Furthermore, this Court has opined

[13] The State Police's reliance on *CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583 (2015), is to no avail. *See* State Police Br. at 22. As the Superior Court correctly explained, unlike the statute at issue in *Caremark*, "RSA 105:13-b, by its text, does not outright prohibit

that—even if information is "confidential"—this does not, by itself, "result in their being exempt from disclosure under the Right-to-Know Law." *Provenza v. Town of Canaan*, 175 N.H. 121, 129 (2022). "[R]ather, that determination still involves the three-step analysis" of the public interest balancing test—a test that considers officer privacy and does not mandate public disclosure in all cases. *Id.*; *see also, e.g.*, *Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 354-55 (2020) (same); *Union Leader Corp. v. N.H. Housing Fin. Auth.,* 142 N.H. 540, 553 (1997) (same); *Union Leader Corp. v. N.H. Ret. Sys.*, 162 N.H. 673, 679 (2011) (same); *Mans v. Lebanon School Board*, 112 N.H. 160, 162 (1972) (same). For this reason, even if the requested personnel file records are "generally confidential" or have "a presumption of confidentiality" under RSA 105:13-b, they still must be subjected to the balancing test like other government employee personnel records subject to RSA 91-A:5, IV's "invasion of privacy" exemption.

III. The State Police's Interpretation of RSA 105:13-b Conflicts With Recent Supreme and Superior Court Decisions Employing a Public Interest Balancing Test For Similar Police Disciplinary Information.

This case does not present, as the State Police suggests, a "narrow question." *See* State Police Br. at 10. Rather, the State Police's interpretation of RSA 105:13-b would, if adopted, provide police officers with special, categorical secrecy rights concerning disciplinary information in their personnel files—secrecy rights that no other public employee has. This is because disciplinary information in the personnel files of other public employees does not receive such categorical secrecy under RSA ch. 91-A, but rather is subject to the public interest balancing test set forth by

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disclosure of police personnel records in the same way the [Uniform Trade Secrets Act] prohibits disclosure of trade secrets." JAI 15.

this Court. *See Reid v. N.H. AG*, 169 N.H. 509, 528 (2016) ("We now clarify that … 'personnel … files' are not automatically exempt from disclosure. For those materials, 'th[e] categorical exemption[ ] [in RSA 91-A:5, IV] mean[s] not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure.'") (internal citations omitted).[14] However, the State Police's interpretation of RSA 105:13-b would, if adopted, effectively overrule this Court's recent decisions in the context of disciplinary information in police personnel files.

Recent precedent rebuts the State Police's contention that this Court "has long recognized that police personnel records are inaccessible." *See* State Police Br. at 19.[15] This Court—consistent with federal FOIA and the laws of many other states—has rejected any categorical rule mandating blanket secrecy for disciplinary "information concerning the performance of a particular employee," including for the police. *See Seacoast Newspapers, Inc.*, 173 N.H. at 339 (overruling *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), in holding that the "internal personnel practices" exemption only narrowly covers "records pertaining to the internal rules and practices governing an agency's operations and employee relations, *not information concerning the performance of a particular employee*") (emphasis added). To the contrary, this Court concluded that "records documenting the history or performance of a particular employee

[14] Effective August 13, 2021, the State's formal policy states that "personnel records [of State employees] are subject to a balancing test, weighing the public's right to know against the privacy interest at stake." *See* JAII 446-448.

[15] Many of the cases by the State Police—like *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015), and *Gantert v. City of Rochester*, 168 N.H. 640 (2016)—were not Right-to-Know cases, nor is there any indication in those cases that the scope and interpretation of RSA 105:13-b was challenged in the context of public disclosure.

fall within the exemption for personnel files" and, thus, are subjected to the public interest balancing test. *Id.* at 340; *see also Town of Salem*, 173 N.H. at 355 (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). In particular, *Seacoast Newspapers* addressed an arbitrator's report concerning the termination of a police officer who was fired during a dispute over his $2 million inheritance from an elderly resident—information which would have been in the officer's personnel file. But this Court rejected categorical secrecy, and this information was later voluntarily released.[16]

And in this Court's first application of the balancing test since the *Seacoast Newspapers/Town of Salem* decisions, this Court ordered the disclosure of a report investigating allegations that an officer, while on duty, engaged in excessive force. Even though the findings were "not sustained," this Court—consistent with the findings of multiple other courts, *see* JAI 42-43 (¶¶ 42-43), 47-48 (¶ 52) (citing cases)—concluded that "[t]he 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*, 175 N.H. at 131 (internal citations omitted). Citing one court, this Court added that, 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." *Id.* at *17 (citing *Kroeplin v. Wis. Dep't of Natural Resources*, 725 N.W.2d 286, 301 (Wis. App. 2006)). Indeed, when police

[16] Elizabeth Dinan, "Ruling: Portsmouth Officer Fired Improperly Over $2M Inheritance, Owed 2 Years Pay," *Seacoast Newspapers* (Sept. 28, 2020), https://www.seacoastonline.com/story/news/2020/09/28/ruling-portsmouth-officer-fired-improperly-over-2m-inheritance-owed-2-years-pay/114157858/.

misconduct information is kept secret given their immense power, such secrecy "cast[s] suspicion over the whole department and minimize[s] the hard work and dedication shown by the vast majority of the police department." *See Rutland Herald v. City of Rutland*, 84 A.3d 821, 825-26 (Vt. 2013). The State Police's position in this case would, if adopted, upend *Provenza*'s balancing analysis as applied to misconduct information in police officers' personnel files.

A ruling in favor of the State Police would also run contrary to at least four Superior Court decisions since *Seacoast Newspapers/Town of Salem* that have generally ordered disclosure of police conduct information in employing the public interest balancing test, even where the records were personnel related. These include the following:

- *Stone v. City of Claremont*, No. 220-2020-cv-00143, at *14 (Sullivan Cty. Super. Ct. Oct. 7, 2022) (Honigberg, J.) (relying on *Provenza*, holding that the "public's interest in disclosure … weighs heavily" where the police records "document instances of misconduct"), at ADD260.

- *Union Leader Corp./ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406, at *9, 23, 26-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (on remand, ordering disclosure of police internal affairs report where "the public has a strong interest in understanding how workplace misconduct is handled by the police department"), at JAI 151-181.

- *Union Leader Corp. v. N.H. Police Standards and Training Council.*, No. 217-2020-cv-613, at *7 (Merrimack Cty. Super. Ct. Dec. 6, 2021) (Schulman, J.) (balancing test favored disclosure of unfounded allegations concerning an officer because "the public has a vital and compelling interest in seeing how the Manchester Police Department and its Chief responded"), at ADD272.

- *Salcetti v. City of Keene*, No. 213-2017-cv-00210, at *5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.) (on remand, holding that "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"), JAI 204-214.

The State Police ignore these decisions, seek to overrule the benefit of transparency that they have provided since *Seacoast Newspapers/Town of Salem*, and aim to reinvigorate *Fenniman*'s categorical secrecy protections—but only for the police—that existed from 1993 to 2020.

IV. Highlighting the Overbreadth of the State Police's Position That RSA 105:13-b Categorically Bars Production of Disciplinary Information in Police Personnel Files, the State Police is Not Appealing the Superior Court's Finding That the Public Interest in Disclosure Favors Production of the Requested Records.

The State Police contends that RSA 105:13-b provides "robust protections" barring disclosure of police personnel file information to the public. *See* State Police Br. at 22. But what exactly is being "protected" from public disclosure? Police officer misconduct. Here, reflecting the overbreadth of the State Police's position, the State Police seeks to invoke purported categorical secrecy protections in RSA 105:13-b to bar disclosure of police disciplinary information even where, as the Superior Court found in this case, the public interest in disclosure outweighs any privacy interest in nondisclosure. Significantly, the State Police is not appealing the Superior Court's application of the balancing test in favor of disclosure in this case. This is not a hard case when applying this balancing test.

A. The Public Interest in Disclosure is Compelling.

Here, the public interest in disclosure is compelling. The State Police's own August 9, 2021 disciplinary report highlights that the requested information implicates egregious misconduct. *See* JAII 280-281. As case after case in New Hampshire 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. Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 709 (2010) (noting that "[p]ublic scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism"). This Court has also concluded—as did the Superior Court below—that "there is a public interest in knowing that a government investigation is comprehensive and accurate." *See Reid*, 169 N.H. at 532 (the "public has a significant interest in knowing that a government investigation is comprehensive and accurate"); *Provenza*, 175 N.H. at 131 (same).

Mr. Wilber's misconduct also directly calls into question the practices and supervision of the State Police's MET, including its use of pretextual stops. Mr. Wilber stopped the female motorist on February 10, 2017 for failing to clear snow off her vehicle trunk and rear bumper, *see* JAI 119, but where Mr. Wilber's true intent was to investigate the suspected transportation of drugs. ADD117 (State Police's May 27, 2022 Requests for Findings of Fact, at p. 2). During his April 19-20, 2022 PAB hearing, Mr. Wilber could not recall what it was about the motorist that raised suspicion, but it simply could have been because she had a Maine license plate. Mr. Wilber's chief defense during his hearing was that he was acting consistent with MET's culture. As reported in the press, Mr. Wilber argued "that the MET was encouraged to make pretextual stops, calling them the 'bread and butter of drug interdictions.' During the internal investigation, [Wilber] told [State Police Detective Sgt. Justin] Rowe that the MET's supervisor, Mark Hall, who is now a State Police captain, wanted troopers to 'push the envelope' and get as many drug cases as possible."[17] In his May 27, 2022 closing brief before the PAB, Mr. Wilber

[17] *See* Paul Cuno-Booth, "Fired State Trooper Haden Wilber Says He Became Scapegoat for his Department's Aggressive Tactics," *Concord*

blamed systems and supervisory failures within the MET, and he argued that he "was under tremendous pressure to" engage in drug enforcement, which caused him to "cut corners on the reports that he believed to be insignificant." ADD163-64, 178, 185-86 (Wilber May 27, 2022 PAB Closing Brief, at pp. 1-2, 16, 23-24). With respect to Mr. Wilber's treatment of the motorist's phone, Mr. Wilber also told investigators that he and the MET "do this all [the] time"—that is, "dumping phones for Intel." JAII 277. As one State Police supervisor made clear in an April 26, 2017 email, Mr. Wilber's conduct leading to the motorist's "body cavity search[]" "was complete horseshit," but Mr. Wilber's "supervisor [didn't] want to hear that they're doing anything wrong." JAII 324.

This all comes against the backdrop of multiple successful suppression motions following arrests by the MET troopers (including Mr. Wilber[18]), with one Superior Court (Schulman, J.) concluding that the State Police had a "*de jure* department policy of detaining citizens for purely pretextual reasons." JA 30, ¶ 9 (citing cases); *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, 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

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Monitor (Apr. 20, 2022), https://www.concordmonitor.com/hayden-wilbur-hearing-46029495.

[18] *See* Sept. 21, 2020 Suppression Motion in *United States v. Dance*, No. 1:19-cr-00185-LM (D.N.H. 2019) (following the filing of this suppression motion that stemmed from Mr. Wilber's conduct in monitoring a car, in part, "due to how clean it was" and it being "in great condition," charges were dismissed by the Government before the suppression hearing), at JAII 495-514.

outside), at JA 85-111.[19] Perhaps for this reason, the Rockingham County Attorney's Office was apparently "regularly declining to prosecute many of MET's cases." ADD177 (Wilber May 27, 2022 PAB Closing Brief, at p. 15). According to a press report, "[s]ince 2016, judges have thrown out evidence from at least 10 Mobile Enforcement Team vehicle stops because of issues related to illegal searches and seizures."[20] On October 19, 2022, Mr. Wilber, other MET officers, and the State Police were also sued in a lawsuit alleging that an August 23, 2019 pretextual stop and seizure of a Latino man from Texas that yielded no drugs was improper and the product of racial profiling. ADD281 (*Ramirez v. State of N.H., Div. of State Police*, No. 217-2022-cv-00896 (Hillsborough Cty. Super. Ct., Complaint filed Oct. 19, 2022).[21] Disclosure here would highlight one of the many problems with pretextual stops and how they can go awry, especially when combined with an alleged lack of supervision and culture of engaging in hasty arrests.[22]

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[19] *See also United States v. Hernandez*, 470 F. Supp. 3d 114, 124 n.5 (D.N.H. 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 registered to a car rental company because he opined that rental cars are frequently used for drug trafficking); *United States v. Garcia*, 53 F. Supp. 3d 502, 514 (D.N.H. 2014) (McAuliffe, J.) (a 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 a motor vehicle violation).

[20] *See* Paul Cuno-Booth, "Lawsuit Alleges NH State Trooper Profiled Latino Driver in 2019 Stop," *Seacoast Online* (Oct. 20, 2022), https://www.seacoastonline.com/story/news/2022/10/20/lawsuit-alleges-nh-state-trooper-profiled-latino-driver-2019-stop/10542568002/.

[21] *See also id.*

[22] For example, "the limited data suggests the Mobile Enforcement Team has disproportionately stopped Black and Latino drivers for certain minor infractions used as pretexts." *See* Paul Cuno-Booth, "How Pretextual Traffic Stops by N.H. Police Disproportionately Affect Black and Latino Drivers," *NHPR* (May 17, 2022), https://www.nhpr.org/nh-news/2022-05-17/pretextual-traffic-police-stops-racial-disparities-black-latino-drivers-nh.

Another compelling public interest in disclosure is to give the public the ability to track whether terminated officers are rehired by other police departments, thereby allowing the public to better hold departments accountable. The scope of this practice where "wandering officers" are fired by one department, and then rehired at another, has garnered national attention.[23] Here, Mr. Wilber was fired by the State Police in August 2021 only to be rehired by the Kingston Police Department later that month.[24] Disclosure will help the public learn about what the Kingston Police Department knew or should have known when it decided to rehire Mr. Wilber.

B. There Is No Privacy Interest in Nondisclosure.

In this case, there is no privacy interest because the misconduct implicates acts done in an official capacity. *See Provenza*, 175 N.H. at 130 (no privacy interest where the information relates to an officer's "conduct as a government employee while performing his official duties and

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National data has raised the specter that pretextual stops lead to 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) (finding racial disparities examining Washington state police data of over 8 million stops after state court decision easing restrictions on pretextual stops); Emma Pierson et al., A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States, 4 Nature Human Behavior 736 (2020), *available* at https://www.nature.com/articles/s41562-020-0858-1.

[23] *See* Ben Grunwald & John Rappaport, The Wandering Officer, 129 YALE L.J. 1676, 1680 (2020); Timothy Bella and James Bikales, "Officer Who Killed Tamir Rice Resigns Two Days Into New Police Job, *Washington Post* (July 7, 2022), https://www.washingtonpost.com/nation/2022/07/07/tamir-rice-timothy-loehmann-officer-hired/.

[24] *See* Paul Cuno-Booth, "How a Fired N.H. State Trooper Kept Working in Law Enforcement," *NHPR* (Sept. 26, 2022), https://www.nhpr.org/nh-news/2022-09-26/how-a-fired-n-h-state-trooper-kept-working-in-law-enforcement.

interacting with a member of the public"). Here, the information sought does not constitute "intimate details … the disclosure of which might harm the individual," *see Mans*, 112 N.H. at 164, 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). After all, police officers work for the public, not themselves. *See Kroeplin*, 725 N.W.2d at 301; *Provenza*, 175 N.H. at 131.

V. Interpreting RSA 105:13-b As Creating Special Categorical Secrecy Protections for Disciplinary Information in Police Personnel Files (Which it Does Not Create) Would Deprive the Public of Misconduct Information That Has Been Released in New Hampshire Since May 2020, Including Examples of Racist Conduct.

This Court's decisions in *Town of Salem* and *Seacoast Newspapers, Inc.* were issued on May 29, 2020—four days after the murder of George Floyd that sparked racial justice protests and reform efforts across the country and in New Hampshire.[25] These protests demanded improved police transparency and accountability. It is not an understatement to say that the *Town of Salem* and *Seacoast Newspapers* decisions have, consistent with the legislature's intent, helped ensure that the promise of New Hampshire's Right-to-Know Law is more fully realized, particularly in the context of police transparency.

As detailed in the *amicus* brief of the Union Leader Corporation and the New England First Amendment Coalition, since May 29, 2020, the public

[25] *See* Tony Schinella, "Nearly 2,000 March Against Racism In Concord: Watch," *Patch.com* (June 6, 2020), https://patch.com/new-hampshire/concord-nh/nearly-2-000-march-against-racism-concord-watch; Executive Order 2020-11 (June 16, 2020) Creating the Commission on Law Enforcement Accountability, Community and Transparency, *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf.

and press are now obtaining access to police misconduct information previously unavailable during the 1993-2020 *Fenniman* era. This includes two examples of racist behavior of New Hampshire officers[26], in addition to information ordered disclosed by Superior Courts in Section III *supra*. And as *amicus curiae* Black Lives Matter Manchester explains in its *amicus* brief, transparency is integral to establishing community trust, especially with communities of color.

For example, after Derek Chauvin's murder of George Floyd, it was revealed that Mr. Chauvin was involved in multiple shootings, was the subject of at least 17 civilian complaints—some involving allegations of neck restraints and excessive force—and received two letters of reprimand.[27] But under the State Police's view of the law, how police departments respond to these types of complaints as reflected in police personnel files should be secret. In addition to being inconsistent with RSA 105:13-b's plain terms, the harms presented by the State Police's view to government accountability and the public's confidence in law enforcement are obvious.

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[26] *See* Mark Hayward, "Cops Who Received Floyd Text Want Their Names Kept Secret," *Union Leader* (Sept. 9, 2022), https://www.unionleader.com/news/courts/cops-who-received-floyd-text-want-their-names-kept-secret/article_55e05f59-3542-5269-864f-9745355c6c5f.html; 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.

[27] Janell Ross, "Derek Chauvin Was Just Sentenced to 22 and a Half Years. But America's Law-Enforcement System Still Isn't Set Up for Accountability," *Time* (June 27, 2021), https://time.com/6075908/derek-chauvin-sentence/?amp=true.

VI. Interpreting RSA 105:13-b As Creating Special Categorical Secrecy Protections for Disciplinary Information in Police Personnel Files (Which it Does Not Create) Would Constitute an "Unreasonable Restriction" on the Public's Right of Access in Violation of Part I, Article 8 of the New Hampshire Constitution.

Finally, if this Court were to interpret RSA 105:13-b as a categorical bar to disclosing disciplinary information in police personnel files (and it should not), applying RSA 105:13-b to bar the disclosure of such misconduct would constitute an "unreasonable restriction" of the public's right of access in violation of Part I, Article 8 to the New Hampshire Constitution.

Part I, Article 8 states the following: "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, 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. "To determine whether restrictions are reasonable [under Part I, Article 8], we balance the public's right of access against the competing constitutional interests in the context of the facts of each case. The reasonableness of any restriction on the public's right of access to any governmental proceeding or record must be examined in light of the ability of the public to hold government accountable absent such access." *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 669-70 (2016) (internal quotations and citations omitted). As *Sumner* explains, there must be a "constitutional interest" justifying the legislature's desire to withhold information from the public; a mere policy desire is insufficient.

Applying *Sumner*'s constitutionally-required balancing analysis—and as explained in Section IV *supra*—the public's right of access is great. Furthermore, the State Police raises no interest—privacy or otherwise—of

"constitutional" dimension that justifies RSA 105:13-b's purported categorical override of the public's right of access to this vital information, particularly where the misconduct addresses an officer's performance of their official duties. Here, the State Police is *not* appealing the Superior Court's finding that the public interest in disclosure outweighs any privacy interests in nondisclosure. The overbreadth of the State Police's position where it seeks categorical secrecy even where the balancing test favors disclosure should inform this Court's interpretation of RSA 105:13-b under the doctrine of constitutional avoidance, including whether the statute should be narrowed to include a public interest balancing test to avoid the serious constitutional questions any categorical interpretation would raise. *See Doe v. Comm'r, N.H. Dep't of Health & Human Servs.*, 174 N.H. 239, 251 (2021) ("Under that doctrine [of constitutional avoidance], we will construe a statute "to avoid conflict with constitutional rights wherever reasonably possible.").

CONCLUSION

For these reasons, this Court should affirm the May 3, 2022 order of the Superior Court (Kissinger, J.) granting the Petitioner's January 18, 2022 Petition for Public Access.

REQUEST FOR ORAL ARGUMENT

Petitioner/Appellee ACLU-NH requests oral argument before the full Court. Attorney Gilles Bissonnette will present for Petitioner/Appellee.

Respectfully Submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE,

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Dated: November 4, 2022

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 9,489 words (including footnotes) from the "Question Presented" to the "Request for Oral Argument" sections of the brief.

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 4th day of November 2022 through the electronic-filing system on all counsel of record.

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.