THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 218-2021-CV-00026

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

v.

SALEM POLICE DEPARTMENT
9 Veterans Memorial Parkway
Salem, NH 03079

PETITION FOR ACCESS TO PUBLIC RECORDS UNDER THE "RIGHT TO KNOW LAW," RSA CHAPTER 91-A, AND PART I, ARTICLE 8 OF THE NEW HAMPSHIRE CONSTITUTION

(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, pursuant to RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution, information in the possession of Respondent Salem Police Department concerning the sustained misconduct of Sergeant Michael D. Verrocchi. This sustained misconduct led to the related criminal case *State of New Hampshire v. Michael D. Verrocchi*, No. 218-2020-cr-00077 (Rockingham Cty. Super. Ct.), which is pending before Judge Daniel St. Hilaire. In this criminal matter, the State has charged Mr. Verrocchi with one class B felony count of reckless conduct with a deadly weapon (a vehicle) under RSA 631:3, II and one class A misdemeanor count of disobeying an officer while driving a vehicle under RSA 265:4. A scheduling conference in this criminal matter will occur on January 28, 2021.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the ability of the police to police themselves.

This Petition seeks all reports, investigatory files, disciplinary records, and other records concerning the actions of Salem Police Department Sergeant Michael Verrocchi on November 10, 2012 that led to a sustained finding of misconduct with a one-day suspension without pay issued as discipline, and that ultimately led to his criminal prosecution.

On November 10, 2012, Mr. Verrocchi was off duty and operating a Jeep Cherokee on Route 28 in Salem along with another off-duty Salem officer. Mr. Verrocchi exceeded the speed limit (62 MPH in a 30 MPH zone) and failed to stop when signaled to stop by Officer Sean York of the Salem Police Department. Mr. Verrocchi fled from Officer York and proceeded to engage in a high-speed motor vehicle pursuit over a distance of approximately two miles. During the chase, Mr. Verrocchi ran a red light and avoided spike strips placed in the roadway by Officer Kevin Swanson of the Salem Police Department. Mr. Verrocchi continuously failed to stop for Officer York. When the Salem Police Department officer(s) ultimately caught up with Mr. Verrocchi, Mr. Verrocchi was laughing after exiting the vehicle, thinking the whole incident to be a joke. Neither Officer York, Officer Swanson (who still works for the Department), nor any other Department officer arrested Mr. Verrocchi. Mr. Verrocchi and other Department officers have argued that the high-speed chase was a mere prank "gone too far" that veteran Salem police officers often played on rookies.

The Salem Police Department's conduct here is concerning. After this incident occurred, the Department, rather than charge Mr. Verrocchi for this obvious criminal violation, chose to—in collaboration with the Salem Police Relief Union—treat this issue as a private personnel matter where only minor discipline was imposed. After concluding that sustained misconduct occurred

in violation of the Salem Police Code of Conduct, the Salem Police Department, in lieu of criminal prosecution, suspended Mr. Verrocchi for one day without pay. In sum, where the Salem Police Department likely would have charged a private person for evading the police, the Department in this case—with the support of union officials—elected to not charge one of their own officers who evaded the police. In other words, the Salem Police Department and union officials elected to, in secret, protect one of their own rather than do their job and enforce criminal laws.

This incident only became public six years later when the Town of Salem, on November 21, 2018, released a heavily redacted version of an internal audit report completed by Kroll. This report documents problems with the Department's culture and how it handles internal affairs investigations. After the Town of Salem publicly released a redacted version of Kroll's report that, in part, describes this incident concerning Mr. Verrocchi (whose name is not used in describing this incident), the New Hampshire Department of Justice commenced an investigation. Following this investigation, on January 15, 2020, the Department of Justice arrested Mr. Verrocchi and charged him with one class B felony count of reckless conduct with a deadly weapon (here, a vehicle) under RSA 631:3, II and one class A misdemeanor count of disobeying an officer while driving a vehicle under RSA 265:4. This criminal case is still pending. *See State of New Hampshire v. Michael D. Verrocchi*, No. 218-2020-cr-00077 (Rockingham Cty. Super. Ct.).

Respondent Salem Police Department is resisting disclosure of this important information concerning one of its officers who engaged in sustained—and potentially criminal—misconduct. At the outset, the Salem Police Department does not appear to be contesting the fact that there is a public interest in disclosure and that this public interest trumps any purported privacy interests that Mr. Verrocchi may have in nondisclosure. *See Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (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), attached as ***Exhibit 1***; *see also Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.*, 484 Mass. 279, 292 (2020) (holding that there was a substantial public interest in the disclosure of booking photographs and incident reports regarding alleged offenses by police officers and judges that do not result in arraignment; noting the following: "[P]olice officers and members of the judiciary occupy positions of special public trust …. Accordingly, 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."). Indeed, the Salem Police Department's records concerning its investigation of this incident and the apparent history of this "prank" would help the public evaluate the integrity of that investigation and learn why the Department chose to not criminally prosecute one of its own officers. *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").

Disclosure will also help the public evaluate the concerning September 22, 2020 decision of the Police Standards and Training Council ("the Council") to not temporarily suspend Mr. Verrocchi's police certification pending the disposition of this serious felony case. During this decertification hearing—which, in this rare occasion, was public at Mr. Verrocchi's request—multiple Salem police and civilian officials rallied to Mr. Verrocchi's defense despite the pendency of his felony criminal case. One retired Salem deputy chief, after being asked whether "he agreed that the events that happened were reckless and a criminal act," even stated "'one hundred percent,' it was egregious putting people's lives in jeopardy that night." *See* PSTC Sept. 22, 2020 Minutes, at p. 12, attached as ***Exhibit 2***. Another retired Salem sergeant acknowledged that Mr. Verrocchi's

actions "had put the public at risk." *Id.* at 13. It is difficult to imagine how the Council's decision to allow an officer to maintain his certification pending a felony criminal case does not undermine public confidence in the criminal justice system. Here, disclosure will help further inform the public on the appropriateness of the Council's concerning decision to not take any temporary action against Mr. Verrocchi.

The Salem Police Department argues that disclosure of the requested information "could reasonably be expected to interfere with [an] enforcement proceeding" under *Murray* Exemption 7(A) and "would deprive [Mr. Verrocchi] of a right to a fair or an impartial adjudication" under *Murray* Exemption 7(B). The Department's position is without basis. Here, the public interest in disclosure is both compelling and obvious, and disclosure would not interfere with Mr. Verrocchi's pending criminal matter or deprive him of a fair trial. The Department has produced no tangible evidence of such interference other than speculation. The likelihood of such interference is also nonexistent where the New Hampshire Department of Justice—which is in charge of Mr. Verrocchi's prosecution—has already published two press releases describing this incident. The Salem Police Department also routinely publishes press releases of those it charges. If these press releases are not prejudicial, then surely the public disclosure of the Salem Police Department's own records concerning this incident would not be prejudicial. Moreover, Mr. Verrocchi himself requested that his September 22, 2020 police decertification proceeding addressing this incident be public, effectively conceding that public disclosure of this information would not prejudice his pending prosecution.

This case highlights the importance of transparency. Without the release of the Kroll report, for example, this incident would never have seen the light of day and, instead, would have remained swept under the rug. Unfortunately, in this historic moment of conversation about police

accountability nationally and here in New Hampshire[1], the Salem Police Department has taken a position of secrecy concerning one of its officers who engaged in sustained misconduct and is being criminally charged. In so doing, that Department is not only misapplying the law and protecting an officer who may have committed a crime, but also is undermining public confidence in law enforcement more broadly. There is no legal justification for secrecy in this case. The Salem Police Department must produce this information under the Right-to-Know Law and Part I, Article 8 of the New Hampshire Constitution.

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-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 open 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.

2. Respondent Salem Police Department is a "department … of [a] … town," and therefore is a public agency that is subject to the Right-to-Know Law under RSA 91-A:1-a, V. Respondent is located at 9 Veterans Memorial Parkway, Salem, NH 03079.

[1] *See* 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.

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 91-A] may petition the superior court for injunctive relief. In order to satisfy the purposes of [RSA 91-A], the courts shall give proceedings under [RSA 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 Respondent is located in Rockingham County.

BACKGROUND

5. Michael D. Verrocchi is a sergeant employed by the Salem Police Department.

6. On November 10, 2012, Mr. Verrocchi was off duty and operating a Jeep Cherokee on Route 28 in Salem along with another off-duty Salem officer. Mr. Verrocchi exceeded the speed limit (62 MPH in a 30 MPH zone) and failed to stop when signaled to stop by Officer Sean York of the Salem Police Department. *See* N.H. D.O.J. Jan. 15, 2020 Press Release, attached as *Exhibit 2*; *see also* N.H. D.O.J. Sept. 17, 2020 Press Release, attached as *Exhibit 3*; Kroll Internal Affairs Report, at p. 41 (REP 042), attached as *Exhibit 4*.

7. Mr. Verrocchi fled from Officer York and proceeded to engage in a high-speed motor vehicle pursuit over a distance of approximately two miles. *Id.*

8. During the chase, Mr. Verrocchi ran a red light and avoided spike strips placed in the roadway by Officer Kevin Swanson of the Salem Police Department. Mr. Verrocchi continuously failed to stop for Officer York. *See* N.H. D.O.J. Jan. 15, 2020 Press Release, attached as *Exhibit 2*.

9. When the Salem Police Department officer(s) ultimately caught up with Mr. Verrocchi, Mr. Verrocchi was laughing after exiting the vehicle, thinking the whole incident to be a joke. *See* Kroll Internal Affairs Report, at p. 41 (REP 042), attached as ***Exhibit 4***.

10. Neither Officer York, Officer Swanson (who still works for the Department), nor any other Department officer arrested Mr. Verrocchi.

11. Mr. Verrocchi and other Department officers have argued that the high-speed chase was a mere prank "gone too far" that veteran Salem police officers often played on rookies. *See* PSTC Sept. 22, 2020 Minutes, at pp. 9-16, attached as ***Exhibit 5***; Mark Hayward, "Police 'Prank': Salem Sergeant Keeps His Certification," *Union Leader* (Dec. 1, 2020), attached as ***Exhibit 6***; Sept. 22, 2020 Select Exhibits Produced by PSTC Under Chapter 91-A (Aug. 14, 2020 letter from former Salem deputy chief stating that, under this prank, an off-duty officer in a vehicle would speed "and try[] to trick a fellow on duty Salem Officer into attempting a motor vehicle stop," and then the off-duty officer driving the vehicle would "not stop[] for a short period before pulling over," and then "the on-duty officer [would] realiz[e] he has been fooled"), attached as ***Exhibit 7***

12. After this incident occurred, the Salem Police Department, rather than charge Mr. Verrocchi for this obvious criminal violation, chose to—in collaboration with the Salem Police Relief Union—treat this issue as a private personnel matter where only minor discipline was imposed. *See* Sept. 22, 2020 Select Exhibits Produced by PSTC under Chapter 91-A (Nov. 20, 2012 union correspondence stating that the union "would agree to the following settlement …. [t]he Town agrees that there will be no further action against Officer Verrocchi in regards to the incident in question as far as enforcement into any alleged m/v violations or additional punishment"; Aug. 14, 2020 letter from former Salem deputy chief stating that "[a]t no time did we consider criminal charges"), attached as ***Exhibit 7***. After concluding that sustained misconduct

occurred in violation of the Salem Police Code of Conduct, the Salem Police Department, in lieu of criminal prosecution, suspended Mr. Verrocchi for one day without pay. *See* Kroll Internal Affairs Report, at p. 41 (REP 042), attached as ***Exhibit 4***. In sum, where the Salem Police Department likely would have charged a private person for evading the police, the Department in this case—with the support of union officials—elected to not charge one of their own officers who evaded the police. In other words, the Salem Police Department and union officials elected to, in secret, protect one of their own rather than do their job and enforce criminal laws.

13. The Salem Police Department did not make public this incident, its 2012 internal investigation, or the discipline imposed on Mr. Verrocchi. As the New Hampshire Department of Justice contends, "[t]he incident was not reported to any prosecuting authority outside of the Salem police department …," and then-Salem Police Chief Paul Donovan "failed to notify anyone of the defendant's alleged criminal conduct." *See* State's Apr. 30, 2020 Obj. to Def.'s Mot. to Dismiss, at pp. 2, 3 in *State of New Hampshire v. Michael D. Verrocchi*, No. 218-2020-cr-00077 (Rockingham Cty. Super. Ct.).

14. This incident only became public six years later when the Town of Salem, on November 21, 2018, released a heavily redacted version of an internal audit report completed by Kroll (a less redacted version was released on April 26, 2019 in response to public records litigation). *See* Redacted Kroll Report Released on Apr. 26, 2019, attached as ***Exhibit 4***; *see also* https://www.townofsalemnh.org/home/news/police-audit. This report documents problems with the Department's culture and how it handles internal affairs investigations. The Department's mismanagement with respect to how it handles internal affairs investigations includes, for example, the following: (i) treating formal complaints as informal complaints; (ii) closing internal affairs investigations very quickly; (iii) making it difficult and intimidating for citizens to file

complaints; (iv) inappropriate reviews of excessive force complaints; (v) failure to interview witnesses; (vi) inadequate documentation; (vii) destruction of materials; (viii) bad attitude toward complainants; and (ix) ignorance of Department policies.

15. Moreover, Kroll compiled an addendum describing problems with the Department's culture, including "members of management who either ignore or even encourage an environment where there exists a complete disregard for the Town's authority." *See* Kroll Culture Addendum, at p. 1 (REP 123), attached as ***Exhibit 4***. Kroll's addendum on the Department's culture included a screenshot of a Facebook post from Mr. Verrocchi, who was also the union president for sworn personnel, stating: "There comes a point when it's time to say fuck you to politics and I'm there. We need to make decisions, stand by those decisions and not waiver simply to satisfy the court of public opinion." *See* Kroll Culture Addendum, at p. 5 (REP 127), attached as ***Exhibit 4***.

16. Following the public release of the redacted Kroll report, Mr. Verrocchi, on November 24, 2018, posted a meme on his Facebook page saying #istandwithsalempd, with the heading "Wolves don't lose sleep over the opinion of sheep." *See* Ryan Lessard, "High-ranking Salem police officers take to social media to criticize report," *Union Leader* (Nov. 27, 2018), attached as ***Exhibit 8***.

17. In separate litigation, the Town of Salem has resisted public disclosure of portions of the Kroll internal audit report. *See Union Leader Corp. 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). This litigation is still ongoing on remand before Judge Andrew

Schulman of the Rockingham County Superior Court. *See Union Leader Corp. and ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406 (Rockingham Cty. Super. Ct.).

18. As part of its internal affairs investigation, Kroll became aware of this November 10, 2012 incident concerning Mr. Verrocchi and described this incident in its report as part of its internal affairs review (while not naming Mr. Verrocchi and the other Salem officers involved). *See* Kroll Internal Affairs Report, at p. 41 (REP 042), attached as ***Exhibit 4***.[2]

19. When Kroll's review and depiction of this incident became public, the New Hampshire Department of Justice commenced an investigation of Mr. Verrocchi's conduct.

20. After an investigation[3], on January 15, 2020, the Department of Justice arrested Mr. Verrocchi and charged him with one class B felony count of reckless conduct with a deadly weapon (a vehicle) under RSA 631:3, II and one class A misdemeanor count of disobeying an officer while driving a vehicle under RSA 265:4. The New Hampshire Department of Justice ultimately indicted Mr. Verrocchi for the one count of reckless conduct with a deadly weapon. This criminal case is still pending. *See State of New Hampshire v. Michael D. Verrocchi*, No. 218-2020-cr-00077 (Rockingham Cty. Super. Ct.); *see also* N.H. D.O.J. Jan. 15, 2020 Press Release, attached as ***Exhibit 2***; N.H. D.O.J. Sept. 17, 2020 Press Release, attached as ***Exhibit 3***.

21. The New Hampshire Department of Justice issued two press releases concerning this incident, Mr. Verrocchi's arrest, and Mr. Verrocchi's indictment. *See id.*

22. On September 22, 2020, Mr. Verrocchi requested that his police decertification hearing addressing this matter before the Police Standards and Training Council be public. The

[2] Kroll concluded that the Department's 2012 investigation of this incident was compliant with Department policy and did meet best practices for internal reviews. However, Kroll did not opine on the Department's decision to not criminally prosecute Mr. Verrocchi.

[3] The Salem Police Department placed Mr. Verrocchi on administrative leave on or about February 15, 2019 while the New Hampshire Department of Justice's investigation was pending.

question at this hearing was whether Mr. Verrocchi's police certification should be temporarily suspended pending resolution of the criminal charges. At this hearing, six Salem officials—including Acting Salem Police Chief Joel Dolan—publicly testified in support of Mr. Verrocchi. *See* PSTC Sept. 22, 2020 Minutes, at pp. 9-16, attached as *Exhibit 5*; Mark Hayward, "Police 'Prank': Salem Sergeant Keeps His Certification," *Union Leader* (Dec. 1, 2020), attached as *Exhibit 6*.

23. Mr. Verrocchi and Major David G. Parenteau (Ret.) of the Police Standards and Training Council ("Council") also submitted exhibits during this public hearing, some of which the Council subsequently made public under the Right-to-Know Law. *See* Sept. 22, 2020 Select Exhibits Produced by PSTC under Chapter 91-A, attached as *Exhibit 7*.

24. Following this public decertification hearing, the Council decided to not temporarily suspend Mr. Verrocchi's certification after Mr. Verrocchi argued that the high-speed chase was a mere prank "gone too far" that veteran Salem police officers play on rookies. *See* PSTC Sept. 22, 2020 Minutes, at pp. 9-16, attached as *Exhibit 5*; Mark Hayward, "Police 'Prank': Salem Sergeant Keeps His Certification," *Union Leader* (Dec. 1, 2020), attached as *Exhibit 6*.

25. On December 2, 2020, Petitioner ACLU of New Hampshire submitted to Respondent Salem Police Department a request under the Right-to-Know Law seeking "[a]ll reports, investigatory files, and disciplinary records concerning the actions of suspended Salem police Sgt. Michael Verrocchi on November 10, 2012 that led to his criminal prosecution, and that led to a sustained finding of misconduct with a one-day suspension without pay issued as discipline." *See* ACLU-NH Dec. 2, 2020 Chapter 91-A Request, attached as *Exhibit 9*.

26. On December 30, 2020, Respondent Salem Police Department denied the request, arguing that disclosure could reasonably be expected to interfere with an enforcement proceeding

under *Murray* Exemption 7(A) and would deprive Mr. Verrocchi of his right to a fair or an impartial adjudication under *Murray* Exemption 7(B). *See* Salem Police Department Dec. 30, 2020 Chapter 91-A Response, attached as ***Exhibit 10***.

ARGUMENT

27. 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).

28. 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 right of public 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).

29. 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. New Hampshire Hous. 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); *see also Lambert v. Belknap County Convention*, 157 N.H. 375, 379 (2008). "[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).

30. Because the New Hampshire Right-to-Know Law does not explicitly address requests for "records compiled for law enforcement purposes," in *Lodge v. Knowlton*, 118 N.H. 574 (1978) and *Murray v. N.H. Div. of State Police*, 154 N.H. 579 (2006), the New Hampshire Supreme Court used language from Exemption 7 in the Freedom of Information Act (FOIA) to evaluate such a request. Under this exemption, which the New Hampshire Supreme Court has deemed the "*Murray* exemption," "records or information compiled for law enforcement purposes" are exempt from disclosure, but only to the extent that the production of such records or information:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention

> of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . …

Murray, 154 N.H. at 582 (quoting 5 U.S.C. § 552(b)(7)). Thus, the *Murray* exemption requires a two-part inquiry. *See Montenegro v. City of Dover*, 162 N.H. 641, 646 (2011). First, the entity seeking to avoid disclosure must establish that the requested materials were "compiled for law enforcement purposes." *Id.* (quotation omitted). Second, if the entity meets this threshold requirement, then it must show that releasing the material would have one of the six enumerated adverse consequences. *Id.*

31. The Salem Police Department has raised Exemptions 7(A) and 7(B) as a basis to withhold this information. The "heavy burden" in satisfying these exemptions falls squarely on the government entity resisting disclosure. *See Murray*, 154 N.H. at 585 ("[i]t is not the petitioner's responsibility to clarify the respondents' vague categorizations"). For the reasons explained below, Respondent Salem Police Department cannot meet its "heavy burden" of showing that these exemptions apply.

I. The Salem Police Department Has Failed to Show That the Requested Records Were "Compiled for Law Enforcement Purposes," and Therefore Neither Exemption 7(A) Nor Exemption 7(B) Apply.

32. At the outset, the records concerning Mr. Verrocchi's 2012 misconduct and the Salem Police Department's investigation of this incident were not "compiled for law enforcement purposes." Therefore, neither Exemption 7(A) nor Exemption 7(B) apply.

33. Here, the requested records appear to be personnel and disciplinary in nature, as they led to a subsequent one-day suspension and a finding of employee misconduct. Thus, the records likely were ***not*** compiled pursuant to the Salem Police Department's law enforcement functions, but rather as part of the Department's administrative, human resources functions. *See 38 Endicott St. N., LLC v. State Fire Marshal*, 163 N.H. 656, 665 (2012) ("We adopt the approach

taken by most federal courts, under which, as the head of a mixed-function agency, the Fire Marshal can satisfy the threshold requirement by showing that the pertinent records were compiled pursuant to the agency's law enforcement functions, as opposed to administrative functions."); *see also Providence Journal Co. v. Pine, C.A.*, No. 96-6274, 1998 R.I. Super. LEXIS 86, at *32 (Super. Ct. June 24, 1998) ("In the instant matter, the Attorney General has not shown that gun permit records are compiled specifically for law enforcement purposes. Instead, the evidence shows that the records are compiled in order to facilitate an administrative and discretionary decision concerning the granting of a gun permit to an applicant. Consequently, gun permit records are not law enforcement records for purposes of the exemption contained in R.I.G.L. § 38-2-2(4)(i)(D)."); *Greenpeace USA, Inc. v. EPA*, 735 F. Supp. 13, 14-15 (D.D.C. 1990) (an investigation into whether an employee violated agency regulations was not compiled for law enforcement purposes).

34. However, even if the requested records are considered "compiled for law enforcement purposes," neither Exemption 7(A) nor Exemption 7(B) apply for the reasons explained below.

II. Even If the Requested Records Were "Compiled for Law Enforcement Purposes," Exemption 7(A) is Inapplicable.

35. As to Exemption 7(A), the Salem Police Department must show that "enforcement proceedings are pending or reasonably anticipated" and that "disclosure of the requested documents could reasonably be expected to interfere with those proceedings." *38 Endicott St.*, 163 N.H. at 667 (quoting *Murray*, 154 N.H. at 582). This exemption "require[s] specific information about the impact of the disclosures" on an enforcement proceeding. *See Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007).

36. Here, the Department has presented no tangible evidence, beyond speculation, that disclosure could interfere with an enforcement proceeding—here, Mr. Verrocchi's pending

criminal prosecution. *See* Salem Police Department Dec. 30, 2020 Chapter 91-A Response, attached as ***Exhibit 10***. Courts across the country have rejected invocation of the "interference" exemption based on similar conclusory, speculative assertions without particularized supporting facts. *See, e.g.*, *Jane Does v. King Cty.*, 366 P.3d 936, 945 (Wash. Ct. App. 2015) (ordering release of security surveillance footage of a shooting and rejecting conclusory assertion of interference with witnesses or law enforcement; holding that proponents of secrecy "were obligated 'to come forward with specific evidence of chilled witnesses or other evidence of impeded law enforcement'") (citation omitted); *Estate of Fortunato v. I.R.S.*, No. 06-6011 (AET), 2007 WL 4838567, 2007 U.S. Dist. LEXIS 95381, at *4 (D.N.J. Nov. 28, 2007) (noting that, under Exemption 7(A), a "categorical indication of anticipated consequences of disclosure is clearly inadequate") (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987)); *see also State News v. Mich. State Univ.*, 735 N.W.2d 649, 660 (Mich. Ct. App. 2007) ("by failing to find with sufficient particularity that [the party resisting disclosure] specifically justified its claim of exemption, the trial court erred in its determination that [the party] met its statutory burden"), *rev'd in part on other grounds*, 753 N.W.2d 20 (Mich. 2008); *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (the government must prove release of records would "interfere in a palpable, particular way"). In the present case, Respondent has put forth no such specific evidence indicating that disclosure could reasonably be expected to interfere with the State's prosecution of Mr. Verrocchi.

37. While New Hampshire courts have not provided a precise definition of "interfere" in this Chapter 91-A context, they have given a general sense of the severity of interference they consider sufficient to justify withholding information, stating that "disclosure of information may interfere with enforcement proceedings by '[resulting] in destruction of evidence, chilling and

intimidation of witnesses, and revelation of the scope and nature of the Government's investigation.'" *38 Endicott St.*, 163 N.H. at 667 (quoting *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998)); *see also Estate of Robert C. Fortunato*, 2007 U.S. Dist. LEXIS 95381, at *8-9 ("Typically, Exemption 7(A) is invoked where release of the documents may result in witness intimidation, have a chilling effect on potential witnesses and other sources of information, or undermine a witness's confidentiality."). None of these considerations apply here.

38. In sum, the Salem Police Department has not pointed to any specific potential interference, especially where there appears to be no pending criminal investigation concerning Mr. Verrocchi. The New Hampshire Department of Justice's criminal investigation concerning Mr. Verrocchi's 2012 actions appears to be complete, and there has been a decision to prosecute. The Salem Police Department also cannot meet this burden of establishing interference where it must acknowledge that the facts and circumstances of Mr. Verrocchi's prosecution will be adjudicated as part of a public trial that will be open and available to the public and press. There can also be no interference where information on this incident has already been made widely available, including by the State through press releases (*see* *Exhibits 2 and 3*) and by Mr. Verrocchi himself who requested that his September 22, 2020 decertification hearing be public (*see* *Exhibits 5-7*). As there was no interference with the disclosure of this information, there will be no interference with disclosure of the requested information here. In short, it is inappropriate to blanketly view something as "interfering with an enforcement proceeding" simply because there is a criminal case pending.

39. If this Court were to adopt the Salem Police Department's broad interpretation of "interference," it would justify the withholding of records underlying pending criminal cases in practically every criminal case, including cases where public officials are the defendants and there

is a compelling public interest in disclosure. That view of the law is unsupported and would damage public accountability. To create a "blanket exemption for police files" without requiring the government agency to show how release would pose "concrete risk of harm to the agency," "would turn on its head [the] basic presumption of openness." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 850 (Ky. 2013); *see also Jefferson v. Reno*, 1997 WL 135723, 1997 U.S. Dist. LEXIS 3064, *9–11 (D.D.C. Mar. 14, 1997) (rejecting government's decision to withhold records on grounds that they were "maintained in a case file that pertains to a criminal prosecution" because the government could not "describe[] how the release of any or all responsive documents could reasonably be expected to interfere with these enforcement proceedings"; rejecting government's generalized statement that "the release of such information would severely compromise the United States Attorney's Office in its ability to effectively carry out its functions in" the pending criminal actions, and concluding that the government's position "would result in a 'blanket exemption' for all documents contained in pending criminal files"). Indeed, subsection (7)(A) was designed to eliminate "'blanket exemptions' for government records simply because they were found in investigatory files compiled for law enforcement purposes." *Campbell v. Dep't of Health & Human Servs.*, 682 F.2d 256, 263 (1982) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978)); *see also Murray*, 154 N.H. at 583.

40. Also troubling is the Salem Police Department's implicit assumption that public access necessarily "interferes with" law enforcement proceedings. Setting aside the fact that this position is inconsistent with the Salem Police Department's practice of routinely publishing press releases concerning the individuals it charges with crimes, *see* Salem Police Department Press Releases, attached as *Exhibit 11*, the United States Supreme Court has recognized for decades that public access to court proceedings ensures basic fairness and the appearance of fairness in the

proceedings, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"), fosters public confidence in the judicial process and acceptance of its results, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 507–08 (1984) ("*Press-Enterprise I*"), acts as a necessary check on the judiciary, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980), and allows the public to participate in government, *id.* at 587–88 (Brennan, J., concurring).

41. In conclusion, release of the records concerning Mr. Verrocchi's 2012 sustained misconduct could not reasonably be expected to interfere with enforcement proceedings. For these reasons, Exemption 7(A) does not apply.

III. Even If the Requested Records Were "Compiled for Law Enforcement Purposes," Exemption 7(B) is Inapplicable.

42. Exemption 7(B) only applies if disclosure "***would*** deprive a person of a right to a fair or an impartial adjudication." 5 U.S.C. § 552(b)(7) (emphasis added).

43. Though the New Hampshire Supreme Court has not directly addressed the contours of Exemption 7(B), the D.C. Circuit Court of Appeals has established a test, which states that "to withstand a challenge to the applicability of (7)(B) the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Wash. Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988); *see also Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 338 (2020) ("we often look to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions").

44. As to the first prong, Mr. Verrocchi's trial is not "pending or truly imminent." As this Court is aware, criminal trials in Rockingham County have been delayed due to the COVID-19 pandemic and are scheduled to recommence in January 2021. Mr. Verrocchi's trial is not

currently scheduled. A scheduling conference is scheduled in Mr. Verrocchi's criminal case on January 28, 2021. *See State of New Hampshire v. Michael D. Verrocchi*, No. 218-cr-00077 (Rockingham Cty. Super. Ct.); *see also People v. DeBeer*, 774 N.Y.S.2d 314, 316 (N.Y. Cty. Ct., Ontario Cty. 2004) ("This lengthy interval between disclosure and trial will serve to allow public attention to subside.").

45. As to the second prong, the Department's apparent contention that disclosure of information concerning this 2012 incident "would" deprive Mr. Verrocchi of his ability to obtain a fair trial is speculative. The Department has only raised this exemption using conclusory statements that are insufficient to justify withholding this information from the public under Exemption 7(B). *See* Salem Police Department Dec. 30, 2020 Chapter 91-A Response, attached as ***Exhibit 10***. For example, the Respondent obviously does not know what the ACLU-NH and other requesters would do with this information, if and how they would publish it, or how many people would read this information. The burden of proof for invoking Exemption 7(B) cannot be met by "merely conclusory statements." *Wash. Post Co.*, 863 F.2d at 101. Even if a party is faced with litigation, "it [does] not automatically follow that disclosure . . . would deprive [that party] of a fair trial." *Id.* at 102. The resisting party "must show how release of the particular material would have the adverse consequence that [FOIA] seeks to guard against." *Id.* at 101. The Respondent has not met this burden here. *See also, e.g., Playboy Enterprises, Inc. v. United States Dep't of Justice*, 516 F. Supp. 233, 246 (D.D.C. 1981) (denying 7(B) exemption because "the degree of publicity that might come about as a result of the disclosure . . . [was] speculative at best"); *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 174–75 (C.D. Cal 2003) (denying 7(B) exemption, in part, because "defendant has failed to demonstrate that disclosure . . . would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial").

46. To the contrary, the facts indicate that disclosure will *not* deprive Mr. Verrocchi of his ability to obtain a fair trial. Here, the New Hampshire Department of Justice—which is in charge of Mr. Verrocchi's prosecution—has already published two press releases about this incident. *See* N.H. D.O.J. Jan. 15, 2020 Press Release, attached as *Exhibit 2*; N.H. D.O.J. Sept. 17, 2020 Press Release, attached as *Exhibit 3*. If the Department of Justice's press releases are not prejudicial, then surely the public disclosure of the Salem Police Department's own records concerning this incident would not be prejudicial. Moreover, the Salem Police Department routinely publishes press releases describing when it has charged citizens of crimes. *See* Salem Police Department Press Releases, attached as *Exhibit 11*. If disclosing this information is appropriate when the Salem Police Department charges private citizens of crimes, then disclosure of similar information is appropriate when one of Salem's own officers is charged with a crime.

47. Significantly, Mr. Verrocchi himself requested that his September 22, 2020 police decertification proceeding addressing this incident be public, effectively conceding that public disclosure of this information would not prejudice his right to a fair trial. *See* PSTC Sept. 22, 2020 Minutes, at pp. 9-16, attached as *Exhibit 5*. At this public hearing, six Salem officials—including Acting Salem Police Chief Joel Dolan—publicly testified on this incident. *See* Mark Hayward, "Police 'Prank': Salem Sergeant Keeps His Certification," *Union Leader* (Dec. 1, 2020), attached as *Exhibit 6*. Mr. Verrocchi and the Police Standards and Training Council also submitted exhibits during this public hearing, some of which the Council subsequently made public under the Right-to-Know Law. *See* Sept. 22, 2020 Select Exhibits Produced by PSTC under Chapter 91-A, attached as *Exhibit 7*. If Mr. Verrocchi believes that publicly disclosing this information as part of his decertification hearing would not be prejudicial to his criminal case, then surely the public

disclosure of the Salem Police Department's own records concerning this incident would not be prejudicial.

48. Of course, all criminal prosecutions involve information that is unflattering, prejudicial, and sometimes inflammatory, but "pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). Hypothetical prejudice alone has never been sufficient under the First Amendment or the common law to deny the public access to records. If the law were otherwise, no negative information about a criminal defendant would ever be released—a rule that would undoubtedly hurt victims who, like the public, are entitled to information concerning the prosecution of criminal cases. Numerous other courts have agreed in various contexts, including the New Hampshire Supreme Court. *See In re Keene Sentinel*, 136 N.H. 121, 128 (1992) (denying a political candidate's "blanket assertion" that privacy rights in divorce and marital proceedings trump a newspaper's right of access); *U.S. ex rel. Callahan v. U.S. Oncology, Inc.*, No. 7:00-CV-00350, 2005 U.S. Dist. LEXIS 31848, at *8 (W.D. Va. Dec. 7, 2005) (in the context of a motion to seal documents, finding that "defendants ha[d] not overcome the presumption in favor of public access" by providing "general claims of prejudice"); *State v. Cianci*, 496 A.2d 139, 145 (R.I. 1985) (finding that "blanket statement of potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of discovery documents"). Indeed, "Exemption 7(B) is not a tool to protect reputation and privacy interests unless the damage disclosure might pose to such interests is likely to impact the ultimate fairness of a trial." *Chiquita Brands Int'l, Inc. v. SEC*, 805 F.3d 289, 299 (D.C. Cir. 2015).

49. It is also important to note that "the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible

abuse of judicial power. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (ellipsis omitted) (Kennedy, J.) (quoting *In re Oliver*, 333 U.S. 257, 270-71 (1948)). "[T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about the happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system." *Id.* at 1070. (Rehnquist, C.J.).

50. Finally, even if public disclosure of this information concerning Mr. Verrocchi was potentially prejudicial, the proper and least restrictive means of mitigating that prejudice is not by restricting the public's access, but rather through voir dire. *See Keene Publ'g Corp. v. Keene Dist. Ct.*, 117 N.H. 959, 962-63 (1977) ("Much that has been written about empirical studies of pretrial publicity indicates that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. Appropriate tools are available to the trial court as outlined in the draft ABA standard to exclude jury prejudice.") (internal quotations omitted). Courts across the country have repeatedly endorsed voir dire as effective at ensuring a fair and impartial jury, as well as rejected the notion that jurors are "nothing more than malleable and mindless creations of pretrial publicity." *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 330 (4th Cir. 1991). As the Fourth Circuit explained:

> The reason that fair trials can coexist with media coverage is because there are ways to minimize prejudice to defendants without withholding information from public view. *With respect to the potential prejudice of pretrial publicity, . . . [v]oir dire is of course the preferred safeguard against this particular threat to fair trial rights . . . [and] can serve in almost all cases as a reliable protection against juror bias however induced.*

Id. at 329 (internal quotation marks omitted; alterations and second ellipsis in original; emphasis added); *see also, e.g., Press-Enterprise II*, 478 U.S. at 15 ("Through voir dire, cumbersome as it

is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict."); *United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984) ("'[T]esting' by voir dire remains a preferred and effective means of determining a juror's impartiality and assuring the accused a fair trial.") (internal quotation marks omitted); *State v. Schaefer*, 599 A.2d 337, 345 (Vt. 1991) ("As a basic principle, voir dire is the normal and preferred method of combating any effects of pretrial publicity."); *DeBeer*, 774 N.Y.S.2d at 316 (noting that "comprehensive and searching voir dire can serve to protect the defendant"). Judge Andrew Schulman recently decided a similar issue, where he vacated a "gag order," which subsequently allowed the disclosure under the Right-to-Know Law of police reports in the possession of the Salem Police Department during the pendency of a criminal case. *See State v. Andersen*, No. 218-2018-cr-00241 (Rockingham Cty. Super. Ct. Aug. 31, 2018), attached as *Exhibit 12*. There, Judge Schulman noted that "[e]xposure to media coverage can be adequately addressed through routine voir dire." *Id.* at *2. The same is true in this case.

51. In conclusion, release of the records concerning Mr. Verrocchi's 2012 sustained misconduct will not deny Mr. Verrocchi of his right to a fair trial or an impartial adjudication. For these reasons, Exemption 7(B) does not apply.

COUNT I

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

52. All prior paragraphs are incorporated.

53. Petitioner has requested all reports, investigatory files, and disciplinary records concerning the actions of Salem Police Department Sergeant Michael Verrocchi on November 10, 2012 that led to his criminal prosecution, and that led to a sustained finding of misconduct with a one-day suspension without pay issued as discipline.

54. Respondent has declined to produce this information to Petitioner.

55. Respondent'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.

56. The exemptions cited by Respondent are inapplicable.

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

WHEREFORE, Petitioner respectfully prays that this Honorable Court:

A. Rule that all reports, investigatory files, disciplinary records, and other records concerning the actions of Salem Police Department Sergeant Michael Verrocchi on November 10, 2012 that led to his criminal prosecution, and that led to a sustained finding of misconduct with a one-day suspension without pay issued as discipline 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 in order 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 Respondent 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,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION,

By its attorneys,

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Dated: January 10, 2021

Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel or record pursuant to the Court's electronic filing system. Also served were the following parties in the matter *State of New Hampshire v. Michael D. Verrocchi*, No. 218-cr-00077 (Rockingham Cty. Super. Ct.):

- Counsel for Defendant Michael D. Verrocchi (Peter Perroni, Esq. [peter@nolanperroni.com] and Andrew F. Cotrupi, Esq. [andrew@cotrupilaw.com]); and

- Counsel for the State (Nicole Clay, Esq. [Nicole.Clay@doj.nh.gov] and Joshua L. Speicher, Esq. [Joshua.Speicher@doj.nh.gov]).

/s/ Gilles Bissonnette
Gilles Bissonnette

January 10, 2021