THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 218-2020-CR-00077

THE STATE OF NEW HAMPSHIRE

v.

MICHAEL VERROCCHI

MOTION OF INTERVENORS ACLU OF NEW HAMPSHIRE AND UNION LEADER CORPORATION TO RECONSIDER THE COURT'S APRIL 9, 2021 ORDER

NOW COME the Intervenors American Civil Liberties Union of New Hampshire ("ACLU-NH") and Union Leader Corporation, by and through their attorneys, and submit this Motion to Reconsider the Court's April 9, 2021 order.

INTRODUCTION

Intervenors respectfully seek reconsideration of the Court's April 9, 2021 order to the extent that it allows to remain sealed Paragraphs 12 through 15 of the arrest warrant affidavit on the ground that these paragraphs "describe and in some instances quote[] the internal investigation involving the defendant." *See* Court's Apr. 9, 2021 Order, at p. 3. Here, this internal investigation involving Defendant Michael Verrocchi led to a finding of *sustained* misconduct in which Mr. Verrocchi accepted responsibility for violating the Salem Police Code of Conduct and was suspended for one day without pay. This investigation also is directly connected to this criminal case and apparently helped inform the decision of the State of New Hampshire to bring charges against Mr. Verrocchi.

As explained below, this Court's April 9, 2021 order overlooked or misapprehended the law in three ways. *First*, the Court's April 9, 2021 order does not use the correct legal standard

governing public access to court records as set forth in *Petition of Keene Sentinel*, 136 N.H. 121 (1992) and N.H. R. Crim. P. 50. *See* Part I, *infra*. *Second*, even assuming *arguendo* that Chapter 91-A principles apply here and assuming that Paragraphs 12 through 15 constitute "personnel … file" information under RSA 91-A:5, IV, the Court's April 9, 2021 order fails to perform the public interest balancing analysis required under recent New Hampshire Supreme Court precedent. *See* Part II, *infra*. *Third*, Intervenors continue to object to not having access to the full legal arguments made by Defendant Verrocchi in support of secrecy at the February 9, 2021 hearing in this matter. Because Intervenors were not given full access to the legal arguments made by Mr. Verrocchi at this hearing, this Court effectively conducted a partial *ex parte* proceeding. *See* Part III, *infra*.

MOTION TO RECONSIDER STANDARD

Pursuant to New Hampshire Rule of Criminal Procedure 43(a), a motion for reconsideration "shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended." *See* N.H. R. Crim. P. 43(a). Further, "[t]o preserve issues for an appeal to the Supreme Court, an appellant must have given the court the opportunity to consider such issues; thus, to the extent that the court, in its decision, addresses matters not previously raised in the case, a party must identify any alleged errors concerning those matters in a motion under this rule to preserve such issues for appeal." *Id.*; *see also State v. Fischer*, No. 219-2010-CR-00127, 2012 N.H. Super. LEXIS 64, at *1 (Strafford Cty. Super. Ct. June 6, 2012) ("To mount a successful motion to reconsider, the Defendant must state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended . . . .") (internal quotations omitted).

ARGUMENT

I. The Court's April 9, 2021 Order Does Not Use the Correct Legal Standard Governing Public Access to Court Records under *Keene Sentinel*.

In its April 9, 2021 order, this Court erred because it did not appear to use the proper legal standard under *Petition of Keene Sentinel*, 136 N.H. 121 (1992) and N.H. R. Crim. P. 50 that governs public access to court records. Instead, this Court used the standard for determining whether a document is exempt from production under the Right-to-Know Law, codified at RSA ch. 91-A. The Right-to-Know Law establishes a statutory scheme whereby any member of the public may make a request to a governmental agency or body covered by the statute, and such body must then evaluate whether the record in question is exempt from disclosure under one of the statute's enumerated exemptions in RSA 91-A:5. A party aggrieved by the agency's determination may then commence a petition in superior court for injunctive relief. *See* RSA 91-A:7, 8.

This framework does not apply in this matter because (1) the judicial branch is not a covered governmental agency for the purpose of the Right-to-Know Law, *see* RSA 91-A:1-a, VI[1], (2) no request for governmental records was made or evaluated by a governmental agency, and (3) this case is not a petition brought by an aggrieved party for injunctive relief. Instead, this is a case where the State of New Hampshire, in a criminal matter, has requested that the Court unseal a court record. As a result, the motion to unseal must be evaluated under the constitutional standards set forth in *Petition of Keene Sentinel*, 136 N.H. 121 (1992) and N.H. R. Crim. P. 50.

Under the standard for evaluating whether court records should be made available to the public, the public nature of court records can only be overcome by showing "with specificity that

[1] Instead, access to court records is provided by Part I, Articles 8 and 22 of the New Hampshire Constitution as interpreted by judicial decisions. *See Associated Press v. State*, 153 N.H. 120, 124 (2005) ("Court records are governmental records, access to which is governed by the State Constitution.").

there is some overriding consideration or special circumstance … which outweighs the public's right of access to those records." *Keene Sentinel*, 136 N.H. at 128; *see also id.* at 130 ("The court shall determine if there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, that would justify preventing public access to the records."). This standard is of constitutional dimension and is embedded within Part I, Article 8 of the New Hampshire Constitution. *See id.* at 126 ("Although the Keene Sentinel bases its claim on both Federal and State constitutional grounds, our decision today rests solely on our interpretation of the New Hampshire Constitution.").

Memorializing this constitutional standard, New Hampshire Rule of Criminal Procedure 50(a)(1) states the following: "Except as otherwise provided by statute or court rule, ***all*** pleadings, attachment to pleadings, exhibits submitted at hearings or trials, and other docket entries … shall be available for public inspection. This rule shall not apply to confidential or privileged documents submitted to the court for in camera review as required by court rule, statute or case law." *See* N.H. R. Crim. P. 50(a)(1) (emphasis added). This Rule goes on to state that "[t]he burden of proving that a document or a portion of a document should be confidential rests with the party or person seeking confidentiality." *See* N.H. R. Crim. P. 50(a)(2). This Rule also defines "confidential information," in part, as (i) information which, if publicly released, would substantially impair a person's privacy interests or right to a fair adjudication of the case, or (ii) "[i]nformation for which a party can establish a specific and substantial interest in maintaining confidentiality that outweighs ***the strong presumption in favor of public access to court records***." *See* N.H. R. Crim. P. 50(c)(2) (emphasis added). The Rule sets forth a non-exhaustive list of the type of information that should ordinarily be treated as "confidential," none of which apply to Paragraphs 12 through 15 of the arrest warrant affidavit in this case. *See* N.H. R. Crim. P. 50(c)(3);

see also N.H. R. Crim. P. 50(d)(2) ("…. An agreement of the parties that a document is confidential or contains confidential information is not a sufficient basis alone to seal the record."). Finally, when a party seeks to unseal information, any court order determining "that the document or information contained in the document is confidential … shall include findings of fact and rulings of law that support the decision of nondisclosure." *See* N.H. R. Crim. P. 50(e)(4).

Here, the Court erred because it did not apply these heightened standards in *Keene Sentinel* and N.H. R. Crim. P. 50 that are used to determine if court information is "confidential." Instead, this Court relied on the "personnel file" exemption under RSA 91-A:5, IV that applies in the context of a request made under the Right-to-Know Law to a public agency or body. *See* Court's Apr. 9, 2021 Order, at p. 3. As explained on Pages 9 to 14 of the Intervenors' February 5, 2021 Memorandum of Law, Defendant Verrocchi cannot meet the high threshold under *Keene Sentinel* and Rule 50 that is necessary to deprive the public of this information that apparently forms some of the basis of this prosecution. Indeed, in *Keene Sentinel* where arguably private marital information was at issue in the context of a divorce proceeding, the Supreme Court concluded that the litigants "cannot prevail in their claim to keep the records sealed merely by asserting a general privacy interest." *Keene Sentinel*, 136 N.H. at 129. The same is true here where Mr. Verrocchi has only asserted a general privacy interest in "personnel" information. Nor does the general privacy interest in "employee performance and personnel actions," *see* Court's Apr. 9, 2021 Order, at p. 3, mean that this information is "confidential" under Rule 50 or that a "compelling interest" or "special circumstance" exists that "outweighs" public access to this court information under *Keene Sentinel*. This is especially the case where the public interest in disclosure is obvious. The sealed information not only implicates sustained misconduct, but also "support[s] probable cause for the charges filed," *see* Court's Apr. 9, 2021 Order, at p. 1, and at least partially provides the

basis for why the State is using its authority to prosecute Mr. Verrocchi. "[T]he public is generally afforded unfettered access to" court records, and access to the requested information in this case also "is critical to ensure that court proceedings are conducted fairly and impartially, and that the judicial process is open and accountable." *In re Union Leader Corp.*, 147 N.H. 603, 604 (2002) (internal citations omitted).

II. Even Assuming *Arguendo* that RSA ch. 91-A Standards Apply and Assuming that Paragraphs 12 Through 15 of the Arrest Warrant Affidavit Constitute "Personnel … File" Information Under RSA 91-A:5, IV, the Court's April 9, 2021 Order Fails to Perform the Public Interest Balancing Analysis Required Under Recent New Hampshire Supreme Court Precedent.

Even assuming *arguendo* that RSA ch. 91-A standards apply in this matter and assuming that Paragraphs 12 to 15 of the arrest warrant affidavit could be considered "personnel … file" information under RSA 91-A:5, IV, the Court erred because it failed to subject this information to a public interest balancing analysis that weighs the public interest in disclosure against any privacy and governmental interests in nondisclosure.[2]

In its April 9, 2021 order, this Court did not address Defendant Verrocchi's fair trial arguments—arguments which were rejected in a similar recent case issued by the Strafford County Superior Court. *See State v. Letendre*, No. 219-2020-cr-0792 (Strafford Cty. Super. Ct. Feb. 4, 2021) (Howard, J.) (rejecting similar fair trial arguments in a criminal case where a defendant police officer sought to have the City of Dover withhold information concerning an internal investigation while the criminal case was pending) (attached as ***Exhibit 15*** to Intervenors' Memo. of Law). Rather, this Court concluded that Paragraphs 12 through 15 of the arrest warrant affidavit

[2] While Chapter 91-A's exemptions do not apply to this request to unseal court records, it does apply to the separate Chapter 91-A action entitled *ACLU-NH v. Town of Salem*, No. 218-2021-cv-00026, where the underlying internal investigation records concerning this 2012 incident are being sought by the ACLU-NH and the Union Leader Corporation from the Salem Police Department. Briefing is complete in this action and, there, this Court will be tasked with engaging in this public interest balancing analysis under RSA 91-A:5, IV's "invasion of privacy" exemption.

should be sealed because these paragraphs "describe and in some instances quote[] the internal investigation involving the defendant." *See* Court's Apr. 9, 2021 Order, at p. 3. The Court noted that these paragraphs "contain[] personnel information of the type that would be consistent with employee performance and personnel actions that the employer may levy as a result of an investigation into an employee's actions." *See* Court's Apr. 9, 2021 Order, at p. 3. This Court then quoted *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 340 (2020) for the proposition that "records documenting the history or performance of a particular employee fall within the exemption for personnel files." *See id.* Relying on this quotation from *Seacoast Newspapers*, the Court then concluded that the information in these paragraphs should be sealed because it references "types of records which are typically maintained in the human resources office and maintained in the defendant's personnel file." *See id.*

In holding that Paragraphs 12 through 15 of the arrest warrant affidavit should remain sealed because they constitute "personnel file" information under RSA 91-A:5, IV, this Court effectively adopted a *per se* rule that the Supreme Court explicitly rejected in recent cases. As the Supreme Court held in *Reid* and *Seacoast Newspapers*, even if records constitute "personnel file" information under RSA 91-A:5, IV, they are not categorically exempt from disclosure, but rather are subject to a public interest balancing analysis. As the Supreme Court stated in *Reid*: "We now clarify that … 'personnel … files' are not automatically exempt from disclosure. RSA 91-A:5, IV. 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." *See Reid v. N.H. AG*, 169 N.H. 509, 528 (2016) (internal quotations omitted). Similarly, affirming this principle from *Reid* four years later, the Supreme Court in *Seacoast Newspapers* explained that the "personnel file" exemption under RSA 91-A:5,

IV requires a "two-part analysis." Under this analysis, the trial court must determine: "(1) whether the material can be considered a 'personnel file' or part of a 'personnel file'; *and (2) whether disclosure of the material would constitute an invasion of privacy*." *Seacoast Newspapers, Inc.*, 173 N.H. at 341 (quoting *Reid*, 169 N.H. at 527) (emphasis added) (remanding for application of public interest balancing test even if arbitration decision constitutes "personnel file" information).[3]

Here, this Court erred because it only engaged in the first part of the *Reid/Seacoast Newspapers* analysis—namely, engaging in a determination of whether the information constitutes "personnel file" information—while failing to engage in the second part of the analysis that requires a public interest balancing analysis to evaluate whether disclosure would violate any purported privacy interests. Such a balancing test was also advocated for by Mr. Verrocchi in his January 21, 2021 Objection to the State's Motion to Unseal. *See* Def.'s Jan. 21, 2021 Obj. to Mot. to Unseal, at pp. 2-3 (¶ 5) ("At a minimum, this Court should conduct the same balancing test ordered by our Supreme Court prior to the dissemination of the internal audit information revealed in the affidavit, information obtained from a personnel file as well as any internal investigative material contained in the affidavit.").

As explained in Pages 15 to 21 of the Intervenors' February 5, 2021 Memorandum of Law, to the extent that this public interest balancing test under the "personnel file" exemption of RSA 91-A:5, IV has any relevance to this request for court records under the *Keene Sentinel* constitutional standard, this balancing test favors public disclosure of Paragraphs 12 through 15 of the arrest warrant affidavit. Indeed, since *Seacoast Newspapers*, three Superior Courts have

[3] The same public interest balancing test applies even if information can be considered "confidential" under RSA 91-A:5, IV. *See Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 354-55 (2020) ("[W]e have construed the fact that 'confidential, commercial, or financial information' is separate from the other categories of information enumerated in RSA 91-A:5, IV as meaning 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 quotations omitted).

concluded that similar information should be released. *See Union Leader Corp. v. Town of Salem*, No. 218-2018-cv-01406, at *27-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) ("In another instance an officer [likely Mr. Verrocchi] committed a minor vehicle infraction but then refused to pull over and led the police on a dangerous chase …. In these instances, the public interest in disclosure is significant, and the officer's privacy interest is … reduced."), attached as *Exhibit 13* Intervenors' Memo. of Law[4]; *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* Intervenors' Memo. of Law; *Salcetti v. City of Keene*, No. 213-2017-cv-00210, at *5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) ("As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their authority, whether the department is accounting for complaints seriously, and how many complaints are made. This factor strongly favors unredacted disclosure.") (Ruoff, J.), attached as *Exhibit 14* to Intervenors' Memo. of Law.

III. Intervenors Continue to Object to Not Having Access to the Full Legal Arguments Made By Defendant Verrocchi In Support of Secrecy.

Finally, the Intervenors renew their objection that they have not been provided access to the full legal arguments made by Defendant Verrocchi in support of maintaining the secrecy of

[4] In the *Town of Salem* matter, on January 29, 2021, Intervenor former Deputy Chief Robert Morin filed a limited motion for partial reconsideration seeking to have the Court sustain the redactions referenced on Page 8 of the Court's January 21, 2021 Final Order on Remand addressing an "incident that occurred at a hockey rink" as reflected on Pages 8-9 in Kroll's Culture Addendum. *See* Culture Addendum, at p. 8-9 (REP 130-31), attached as *Exhibit 4* to Intervenors' Memo. of Law. This motion is still pending and has delayed release of the information ordered disclosed by the Court. Mr. Morin's motion for partial reconsideration does *not* implicate the overruled redactions concerning Mr. Verrocchi and the 2012 incident in Kroll's internal affairs audit report. Intervenors anticipate that when Mr. Morin's motion for reconsideration is resolved, the information ordered released by Judge Schulman will immediately be made available to the public, including this information concerning Mr. Verrocchi. The Town of Salem has publicly indicated that it has no plans to appeal the order.

Paragraphs 12 through 15 in the arrest warrant affidavit. At the February 9, 2021 oral argument in this matter, Intervenors were excluded from hearing the legal argument presented by Mr. Verrocchi in support of sealing this information. Because Intervenors were not given access to the full legal arguments made by Mr. Verrocchi at this hearing, this Court effectively conducted a partial *ex parte* proceeding. *See* Sup. Ct. R. 38, Rule 2.9(A)("A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter …."); *see also Keene Sentinel*, 136 N.H. at 130 ("The court shall separately examine each document in question in camera (in chambers with only counsel for the parties *and for the petitioner present*) on the record.") (emphasis added).[5] Moreover, to the extent Mr. Verrocchi's February 19, 2021 proposed order and the State's February 24, 2021 response address legal arguments concerning whether Paragraphs 12 through 15 of the arrest warrant affidavit should become public, Intervenors object on the same grounds, as these pleadings were sealed and not made available to Intervenors.

WHEREFORE, the ACLU-NH and Union Leader Corporation respectfully pray that this Honorable Court:

A. Grant this Motion for Reconsideration;

B. Order released Paragraphs 12 through 15 in the arrest warrant affidavit; and

C. Award such other relief as may be equitable.

[5] Intervenors believe that the February 9, 2021 hearing could have been conducted in such a way where Intervenors had access to the full legal arguments being made by Mr. Verrocchi without the specific contents of Paragraphs 12 through 15 being disclosed.

Respectfully submitted,

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Dated: April 14, 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.

/s/ Gilles Bissonnette
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April 14, 2021