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THE STATE OF NEW HAMPSHIRE

SULLIVAN, ss SUPERIOR COURT

No. 220-2020-cv-00143

JONATHAN STONE

v.

CITY OF CLAREMONT

RESPONSE OF INTERVENORS ACLU OF NEW HAMPSHIRE AND UNION LEADER CORPORATION TO THE MEMORANDA OF LAW SUBMITTED BY PLAINTIFF JONATHAN STONE AND DEFENDANT CITY OF CLAREMONT

(*PRIORITY CONSIDERATION REQUESTED UNDER RSA 91-A:7***)**

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NOW COMES Intervenors American Civil Liberties Union of New Hampshire and Union Leader Corporation, by and through their attorneys, and submit this response to the July 15, 2022 memoranda of law submitted by Plaintiff Jonathan Stone ("Stone") and Defendant City of Claremont ("the City"). As this matter is two years old, Intervenors request expedited consideration of this case under the Right-to-Know Law. *See* RSA 91-A:7 ("In order to satisfy the purposes of this chapter, the courts shall give proceedings under this chapter high priority on the court calendar.").

INTRODUCTION AND STATEMENT OF FACTS

Intervenors seek disclosure under the Right-to-Know Law of disciplinary records concerning the actions of former Claremont police officer Jonathan Stone that led to his negotiated resignation on June 9, 2007, as well as internal affairs investigatory reports concerning Stone's conduct as an officer from 2000 to 2006. Stone is a Claremont City Councilor[1], and he currently is running for election to the New Hampshire House of Representatives to represent District 8 in Sullivan County. While this case was pending, he also unsuccessfully ran for this House seat in 2020.[2]

Stone filed this lawsuit on September 1, 2020. This lawsuit was triggered by the June 6, 2020 Right-to-Know request of non-party journalist Damien Fisher. Mr. Fisher requested the following from the City: (i) a copy of any internal investigative report into the conduct of Stone as a Claremont police officer; (ii) a copy of any written communication to Stone from the Claremont Police administration regarding his termination of employment; (iii) a copy of any document or statement sent to the New Hampshire Police Standards and Training Council ("PSTC") regarding

[1] Stone's City Council website advertises his experience in law enforcement for the City of Claremont and the Vermont Department of Corrections. *See* https://jonathanfstone.com/meet-jon-stone/.
[2] *See* Damien Fisher, "Former Cop Hiding Discipline Records Running for State Rep," *InDepthNH* (June 30, 2022), https://indepthnh.org/2022/06/30/former-cop-hiding-discipline-records-running-for-state-rep/.

Stone's "moral turpitude"; and (iv) a copy of any statement received by the Claremont Police Department ("Department") from PSTC in regards to Stone.[3] After Stone filed this case on September 1, 2020, Intervenor ACLU-NH, on October 21, 2020, submitted a Right-to-Know request to the City seeking similar information. *See* Exhibit A.[4] On October 22, 2020, Intervenor Union Leader Corporation submitted a similar Right-to-Know request. *See* Exhibit B.[5] Following these requests, on October 22, 2020, the Intervenors filed a Joint Statement of Interest in this case, as well as a Motion to Intervene. This Court granted the Motion to Intervene on December 7, 2020.

Following the City's July 1, 2022 production of responsive records to both the Court (under seal) and the parties (under a protective order), we know that Stone was the subject of approximately 12 incidents [redacted] These include the following:

[redacted]

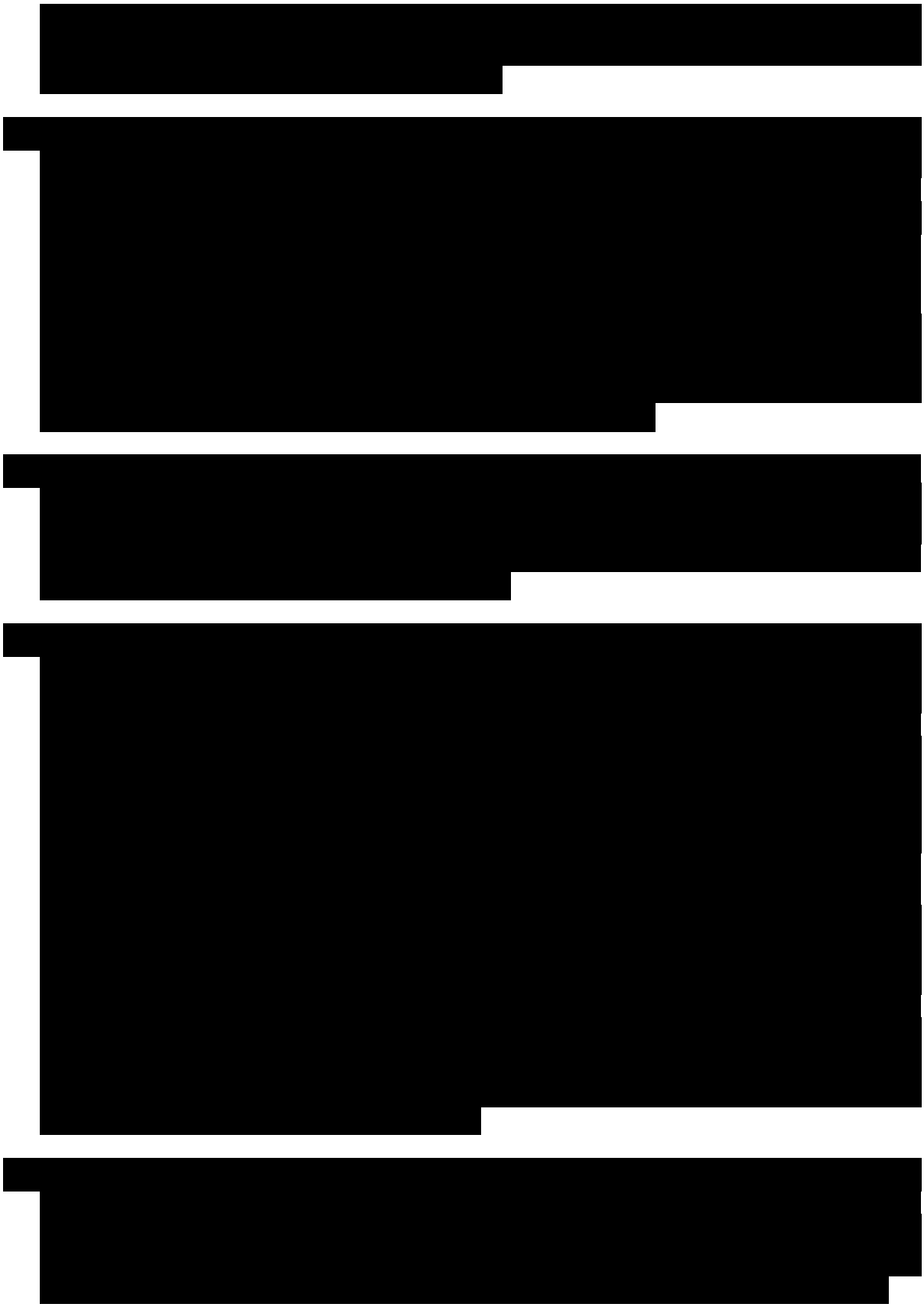
[3] Following Mr. Fisher's June 6, 2020 request under RSA ch. 91-A, the City of Claremont filed a Complaint in Equity for Declaratory Judgment in Sullivan County Superior Court on July 10, 2020. *See In re City of Claremont/City of Claremont v. Jonathan Stone, et al.*, No. 220-2020-cv-107 (Sullivan Cty. Super. Ct., filed July 10, 2020). In that lawsuit, the City asked the Court "to issue an order and guidance on a recent request, pursuant to N.H. R.S.A. § 91-A (the Right-to-Know Law), concerning the contents of any internal affairs investigation(s), by the Claremont Police Department, concerning possible misconduct allegations brought against a former Claremont police officer." After two hearings, on August 7, 2020, the Court dismissed the lawsuit without prejudice, concluding the following: "After due consideration, I find and rule the City should act on the request in the manner prescribed in RSA 91-A:4 (a)-(c). The parties agree that if the City determines a record does not fall within a recognized exemption and should be released, it may notify counsel for the officer prior to disclosing it to the requesting party, in order to give the officer a brief period of time to decide whether to seek an injunction." (Tucker, J.). Mr. Fisher was represented in this first case, and the Intervenors were not parties to this first case. The pending subsequent lawsuit from Stone followed the Sullivan Superior Court's August 7, 2020 decision. Mr. Fisher is not a party to the current case and has not sought leave to intervene to the best of Intervenors' knowledge, though he has viewed some of the hearings in this case as a member of the public.

[4] On October 27, 2020, the City wrote to the ACLU-NH, stating the following: "The City of Claremont has received your RSA 91-A request. The records that you have requested may be subject to the injunction filed by Jonathan Stone against the City of Claremont. Because of this, we will be awaiting the Court's decision before releasing any documents pertaining to this case."

[5] As this Court (Honigberg, J.) noted in its May 3, 2022 order, "the Union Leader agreed to narrow its request to be coextensive with the existing requests – there are no additional issues that will need to be resolved to adjudicate the Union Leader's claims."

[redacted]

[6] *See* Damien Fisher, "Lawsuit: Councilor Stone Allegedly Assaulted Disabled Man While a Cop in 2000," *InDepthNH* (Oct. 9, 2020), https://indepthnh.org/2020/10/09/lawsuit-councilor-stone-allegedly-assaulted-disabled-man-while-a-cop-in-2003/.



THE SCOPE OF THE DISPUTE

Stone argues that almost all the records produced by the City on July 1, 2022 should be withheld on "invasion of privacy" grounds pursuant to RSA 91-A:5, IV. Stone seeks secrecy not only with respect to IA Reports #1-7, but also with respect to any IA Report emanating from four grievances that culminated in the June 9, 2007 Stipulated Award that led to Stone's negotiated resignation—namely, the grievance of 06-2-IA (IA Reports #12/Stone Exhibit 3 and IA Report #13), the grievance of 06-3-IA (IA Report #10A), the grievance of 06-6-IA (IA Report #10, 11, 13, and 14), and the grievance of 06-7-IA (IA Report #8). Stone has only agreed to the release of IA Report #9 and the June 4, 2007 letter from PSTC in the City's 4th Set of PSTC Correspondence.

The City takes the position that IA Reports #1-10 and 10(A) in its July 1, 2022 production should be released with the City's proposed redactions. However, the City argues that IA Reports #11-14 should be withheld on "invasion of privacy" grounds pursuant to RSA 91-A:5, IV. The City also argues that the PSTC correspondence should be released in their entirety without redaction.

In an effort to narrow the scope of this dispute, Intervenors are no longer seeking IA Report #11 and 12/Stone Exhibit 3 [redacted]. Intervenors are withdrawing their request for these two reports without prejudice. Intervenors also do not object to any of the City's proposed redactions in IA Reports #1-10 and 10(A).

However, Intervenors object to the City's decision to withhold IA Reports #13 and 14 [redacted]

see also Rutland Herald v. City of Rutland, 84 A.3d 821, 825 (Vt. 2013) (ordering disclosure of records concerning several Rutland Police Department employees who were investigated and disciplined for viewing and sending pornography on work computers while on duty; noting that "one cannot reasonably expect a high level of privacy in viewing and sending pornography on work computers while on duty at a public law enforcement agency").

As for IA Report #14,

See Union Leader Corp./ACLU-NH v. Town of Salem, No. 218-2018-cv-01406, at *27-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (on remand, stating: "But there are limits to all general rules and when a police officer's off-duty conduct includes the alleged commission of serious crimes, or actions that endanger public safety, the expectation of privacy is lower and the public interest is higher."), attached as <u>*Exhibit D*</u>.

In sum, both IA Reports #13 and 14 reflect [redacted]. To be clear, with respect to IA Reports #13 and 14, Intervenors do not object to reasonable redactions of the identities of non-governmental witnesses or personal information like email addresses, home addresses, dates of birth, telephone numbers, and medical information. Such redactions would fully respect any privacy rights of private individuals while maximizing the public's right of access.

Accordingly, Intervenors' position is that the records produced by the City on July 1, 2022 should be released as follows for the reasons explained in more detail below:

- IA Reports #1-10 and 10(A) should be released with the City's proposed redactions. The City agrees with this position. Stone disagrees, with the exception of IA Report #9 that Stone agrees can be released;
- Intervenors are no longer seeking IA Reports #11 and 12, which both the City and Stone believe should be withheld;
- IA Reports #13 and 14 should be released with the reasonable redactions explained above. Both the City and Stone disagree with this position; and
- The PSTC Correspondence should be released in their entirety without redaction. The City agrees with this position. Stone disagrees, with the exception of the June 4, 2007 letter from PSTC in the City's 4th Set of PSTC Correspondence that Stone states may be disclosed. *See* Stone Memo. at p. 20, D.

SUMMARY OF ARGUMENT

Any effort to resist disclosure of the requested information is without basis. As a threshold mater, RSA ch. 91-A does not allow "reverse" Chapter 91-A actions like the one brought by Stone. The statute does not create a cause of action for anyone other than a requester who has been "aggrieved by a violation" of RSA ch. 91-A due to a public body's decision to not produce records. *See infra* Section I.

Furthermore, this Court has already concluded—in denying Stone's request for a preliminary injunction on December 7, 2021—that the terms of the June 9, 2007 Stipulated Award

requiring the City to "purge" Stone's personnel file with respect to certain discipline cannot be enforced against the public because it would run counter to public policy as reflected in RSA ch. 91-A. *See Stone v. Claremont*, No. 220-2020-cv-00143 (Sullivan Cty. Super. Ct. Dec. 7, 2021) (Tucker, J.) (holding that "the plaintiff is unlikely to succeed on the merits of the question of whether a confidentiality agreement may supplant the statute" in part, because "[c]ontracts, such as the stipulation here, are not enforced if counter to public policy."), attached as *Exhibit E*. This decision is the law of the case. Any effort to countermand RSA ch. 91-A by contract—whether it be through a Stipulated Award or a collective bargaining agreement—should be rejected, rather than rewarded through enforcement. *See infra* Section II.

Thus, the only remaining question is whether, irrespective of the 2007 Stipulated Award or any collective bargaining agreement, any exemptions under RSA ch. 91-A require the withholding of this information from the public—particularly, the exemption under RSA 91-A:5, IV for "personnel … and other files whose disclosure would constitute [an] invasion of privacy." Under the public interest balancing test that is used to evaluate this "invasion of privacy" exemption under RSA 91-A:5, IV, disclosure is required. *See infra* Section III.

The public interest in disclosure is both compelling and obvious. The requested records implicate on-duty behavior and portray multiple incidents [redacted]. This case is even stronger than the New Hampshire Supreme Court's recent decision in *Provenza v. Town of Canaan* where disclosure was required for an investigatory report where allegations of excessive force were deemed "*not sustained*." *See Provenza v. Town of Canaan*, No. 2020-0563, 2022 N.H. LEXIS 46 (N.H. Sup. Ct. Apr. 22, 2022). Citing one court, the *Provenza* Court noted 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)). [redacted]

Prompt resolution of this matter is vital, as the public has a right to know this information as it decides during the 2022 election whether Stone should be a member of the House of Representatives. The public also has a right to know not only how the City supervised, investigated, and disciplined Stone [redacted] The New Hampshire Supreme Court has made clear that "[t]he public has a substantial

[7] One unknown current or former Claremont Police Department officer is appealing placement on the EES in the matter 220-2021-cv-00113 pending in Sullivan County Superior Court. *See* July 5, 2022 Report, at p. 7, *available at* https://www.doj.nh.gov/exculpatory-evidence-schedule/documents/20220705-ees-compliance-report.pdf.

interest in information about what its government is up to, as well as in knowing whether a government investigation is comprehensive and accurate." *See Provenza*, 2022 N.H. LEXIS 46, at *18. [redacted] Though it is unclear, this arrangement may have enabled Stone to later be hired by the Vermont Department of Corrections.[8] We also know that, whether deliberate or by chance, the "negotiated resignation" arrangement between the City and Stone effectively prevented the PSTC from taking any certification action against Stone under PSTC's then-existing rules.

This is not a close case. In this historic moment of conversation about police accountability nationally and here in New Hampshire,[9] this information should be released immediately. In addition, all the pleadings and exhibits in this case should be immediately unsealed.

ARGUMENT

New Hampshire's Right-to-Know Law, 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).

[8] Stone does not currently work for the Vermont Department of Corrections.
[9] *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.

The Right-to-Know Law has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: "Government … should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.* New Hampshire is one of the few states that explicitly enshrines the public's right of access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8's language was included upon the recommendation of the Bill of Rights Committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire already had RSA ch. 91-A to address the public's right to access information, the Committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 53 (2d ed. 2015).

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).

As explained below, the requested records concerning Stone should be released.

I. RSA 91-A Only Allows Aggrieved Requesters to Seek Relief in Court. Accordingly, Stone's Lawsuit Seeking an Injunction Barring Disclosure Under the Right-to-Know Law Should Be Dismissed.

A threshold question in this case is whether the Right-to-Know Law allows Stone's "reverse RSA ch. 91-A" action where he has filed a lawsuit seeking to raise exemptions to prevent a government agency from producing records to the public. The New Hampshire Supreme Court has not addressed this question. *See Provenza v. Town of Canaan*, No. 2020-0563, 2022 N.H. LEXIS 46, at *7-8 (N.H. Sup. Ct. Apr. 22, 2022) ("We have not yet addressed whether RSA 91-A:7 provides a remedy for, and grants standing to, an individual who seeks to prevent disclosure of information pursuant to the Right-to-Know Law. The legislature may wish to consider whether clarification as to who is entitled to seek relief under RSA 91-A:7 is warranted.") (internal citations omitted).

Here, Stone's claim fails because the statute does not create a cause of action for anyone other than a requester who has been "aggrieved by a violation" of RSA ch. 91-A due to a public body's decision to not produce records. *See* RSA 91-A:7 ("Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief."). As a textual matter, this strongly suggests that it is the public agency—and only the public agency—that is tasked with making disclosure decisions under RSA ch. 91-A.

Similarly, the "invasion of privacy" exemption in RSA 91-A:5, IV raised by Stone—like all Right-to-Know exemptions—does not create a statutory privilege that can be invoked by a person to compel a public body to withhold the requested information. *See Marceau v. Orange Realty*, 97 N.H. 497, 499 (1952) ("It is well settled that statutory privileges … will be strictly construed."). In other words, RSA 91-A:5, IV does not prevent the City from voluntarily disclosing any records, even if they are exempt. This is because the exemptions to the Right-to-

Know Law merely provide a license to a public body to withhold information; they do not create an affirmative privilege of confidentiality.[10] As the United States Supreme Court has similarly explained in the federal Freedom of Information Act ("FOIA") context—precedent which is persuasive here[11]—"Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin agency disclosure." *See 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. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure."); *see also Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997) (declaring that the "mere fact that information falls within a FOIA exemption does not of itself bar an agency from disclosing the information"); *R.I Federation of Teachers v. Sundlun*, 595 A.2d 799, 803 (R.I. 1991) ("Our statute, like the Federal FOIA statute, is directed solely toward requiring disclosure by public agencies and does not provide a reverse remedy to prevent disclosure.").

Finally, it should go without saying that, if "reverse-Chapter 91-A" actions exist in New Hampshire allowing third parties to bring suits asserting exemptions under RSA ch. 91-A (and they do not), then these same third parties could be subjected to the fee-shifting provisions of RSA 91-A:8. *See also Carlsbad Police Officers Ass'n v. City of Carlsbad*, 49 Cal. App. 5th 135, 135 (2020) ("It is now well established that a successful intervener seeking records disclosure in a reverse-PRA action is entitled to recover attorney's fees under section 1021.5."). Fee shifting is

[10] By contrast, where the legislature has chosen to make records confidential—and thus completely prohibited from public disclosure—it has done so more forcefully. *See, e.g.*, RSA 654:45, VI (the statewide voter database "shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31, nor shall it or any of the information contained therein be disclosed pursuant to a subpoena or civil litigation discovery request"); RSA 170-G:8-a ("The case records of the department [involving juvenile delinquency proceedings] shall be confidential").

[11] *See 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").

critical to ensuring that the public's right of access to government records is properly enforced. And fees are just as critical in "reverse-Chapter 91-A" actions to the extent such actions are recognized in New Hampshire. Financially strapped news organizations and members of the public would be less likely to intervene in such cases to fight for the public's right to access records knowing they will be on the hook for their own costly attorneys' fees—even if they win. In the event of a favorable order, Intervenors reserve their right to seek attorneys' fees in this case.

II. As a Threshold Matter—and as This Court Previously Decided—the "Purging" and "Confidentiality" Provisions of the 2007 Stipulated Award are Irrelevant and Unenforceable in Adjudicating the Public's Right of Access Under RSA ch. 91-A. The Same Is True for Any Secrecy Provisions in Any Collective Bargaining Agreement.

Stone argues that, under the June 9, 2007 Stipulated Award agreed upon by the City and Stone, the City should have—but did not—"purge" many of the requested records from Stone's personnel file. [redacted] In effect, Stone effectively asks this Court to enforce the 2007 Stipulated Award and its "purging" provisions even though the records in question exist and are responsive. Stone is wrong for several independent reasons.

First, the "purging" provisions of the 2007 Stipulated Award, at best, only apply to the events [redacted]

Second, in denying Stone's request for a preliminary injunction on December 7, 2021, this Court has already concluded that any 2007 Stipulated Award requiring the City to "purge" Stone's personnel file with respect to certain conduct is irrelevant and unenforceable as to the public's

rights under RSA ch. 91-A. This is because a contractual stipulation cannot override a government entity's obligation to disclose existing, responsive information to the public under the Right-to-Know Law. *See Stone v. Claremont*, No. 220-2020-cv-00143 (Sullivan Cty. Super. Ct. Dec. 7, 2021) (Tucker, J.) (holding that "the plaintiff is unlikely to succeed on the merits of the question of whether a confidentiality agreement may supplant the statute" in part, because "[c]ontracts, such as the stipulation here, are not enforced if counter to public policy."), attached as *Exhibit E*; *see also Fraternal Order of Police, Chicago Lodge No. 7 v. City of Chicago*, 59 N.E.3d 96, 106 ¶¶ 35, 38 (Ill. Ct. App., 1st Dist., 6th Div. 2016) ("In light of these public policy considerations and the purpose of the FOIA to open governmental records to the light of public scrutiny, an award in the pending arbitration proceedings would be unenforceable if it circumvented the City's required compliance with the FOIA requests at issue."; further holding that "an arbitration order directing the destruction of the requested records as a result of a breach of section 8.4 of the CBA would be unenforceable to the extent it would prevent disclosure under the FOIA," and therefore "there was no legal basis … to enjoin defendants from releasing the requested records in order to allow plaintiff to pursue a legally unenforceable remedy at arbitration"), *appeal denied sub nom. Fraternal Order of Police v. Chicago Police Sergeants Ass'n*, 60 N.E.3d 872 (Ill. 2016).[12] This decision is the law of this case.

While Stone ponders [redacted], the real question here is whether a contract can be used to circumvent the public's rights under the Right-to-Know Law. It cannot. Regardless of whatever separate

[12] Here, as this Court suggested in its December 7, 2021 order—and as in *Fraternal Order of Police*—this Court cannot enforce any agreement between Stone and the City to purge governmental records—thereby depriving Intervenors of the requested information that is in the City's possession—because doing so would conflict with RSA ch. 91-A, its dominant public policy in favor of transparency, and its applicability to *all* existing records in a public body's possession under RSA 91-A:1-a, III.

breach of contract claim Stone may have against the City for failing to purge certain records under the 2007 Stipulated Award, this contract has no bearing on the rights of the public and Intervenors under RSA ch. 91-A who were not parties to this contract. Furthermore, contractual language deeming certain records in a government agency's possession as "confidential" does not constitute a recognized exemption under RSA 91-A:5. To uphold such an agreement would not only violate public policy, but it also would allow municipalities to habitually violate RSA ch. 91-A by entering into side "confidentiality" agreements with government officials that hides misconduct.

Any agreements or understandings of secrecy outside of the 2007 Stipulated Award are similarly unenforceable—including, [redacted][13] [redacted] Indeed, where a record is located—including whether it is located in a "personnel file" or not—is immaterial to the analysis under RSA ch. 91-A.[14] All that matters is that the record exists. Here, the records exist and therefore should be produced.

Finally, even if this Court were to credit the 2007 Stipulated Award, it does not provide the blanket confidentiality that Stone asserts. [redacted]

[13] The terms of this collective bargaining agreement are not part of the record of this case.

[14] The Massachusetts Court of Appeals has similarly explained that "personnel" means documents "useful in making employment decisions regarding an employee." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 8 (2003). Whether a record satisfies the definition of "personnel" is not dependent on its location; rather, the focus is on the "nature and character" of the document. *Id*. at 5, 7; *see also Reid v. N.H. AG*, 169 N.H. 509, 522 (2016) ("In construing the term 'personnel' as used in the FOIA, the Supreme Court noted that '[w]hen used as an adjective, … th[e] term refers to human resources matters ….'").

[redacted] In other words, this caveat makes clear that the Right-to-Know Law prevails and defeats any such secrecy agreement in the face of a public records request.

III. Under RSA 91-A:5, IV's "Invasion of Privacy" Exemption, the Public Interest in Disclosure Outweighs Any Interests in Nondisclosure.

At the outset, it cannot be seriously disputed that the records in question are "government records," which consist of "any information created, accepted, or obtained by, or on behalf of, any public body … or any public agency in furtherance of its official function." *See* RSA 91-A:1-a, III. And even if Stone can raise exemptions under RSA ch. 91-A (which he cannot for the reasons explained in Section I *supra*), the exemption cited does not apply.

RSA 91-A:5, IV exempts, among other things, "[r]ecords pertaining to … personnel … and other files whose disclosure would constitute [an] invasion of privacy." Even assuming that the requested records here constitute "personnel files" under RSA 91-A:5, IV, this is not a categorical exemption. Rather, such "personnel file" records—like "other files" under the exemption—are subjected to a balancing test that evaluates the public interest in disclosure against any privacy and governmental interests in nondisclosure. *See Reid v. N.H. AG*, 169 N.H. 509, 527-28 (2016) ("[W]e now hold that the determination of whether material is subject to the exemption for 'personnel … files whose disclosure would constitute invasion of privacy,' RSA 91-A:5, IV, also requires a two-part analysis of: (1) whether the material can be considered a 'personnel file' or part of a 'personnel file'; *and (2) whether disclosure of the material would constitute an invasion of privacy*.") (emphasis added).

The Supreme Court has explained this three-step balancing analysis for "personnel file" records and "other files" as follows under RSA 91-A:5, IV:

> First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Second, we assess the public's interest in disclosure. Third, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. Further, [w]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.

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

A. The Privacy Interest in Nondisclosure is Nonexistent.

Police officers have no privacy interest in records implicating the performance of their official duties, especially when [redacted]. The information sought here does not constitute "intimate details … the disclosure of which might harm the individual," *see Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972), or the "kinds of facts [that] are regarded *as personal* because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*, 169 N.H. at 530 (emphasis added). Intervenors are not seeking, for example, medical or psychological records in an officer's personnel file. Instead, Intervenors are seeking information

about on-duty conduct that relates to the ability of an officer to perform his official duties. Thus, any privacy interest here is minimal, if not nonexistent.

In examining the invasion of privacy exemption under RSA 91-A:5, IV, the New Hampshire Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government and information concerning the performance of government employees. *Compare, e.g.*, *Lamy v. N.H. Public Utilities Comm'n*, 152 N.H. 106, 111 (2005) ("The central purpose of the Right–to–Know Law is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."); *Brent v. Paquette*, 132 N.H. 415, 427 (1989) (government not required to produce records kept by school superintendent containing private students' names and addresses); *N.H. Right to Life v. Director, N.H. Charitable Trusts Unit*, 169 N.H. 95, 114, 120-121 (2016) (protecting identities of private patients and employees at a women's health clinic); with *Union Leader Corp.*, 162 N.H. at 684 (holding that the government must disclose the names of retired public employees receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV); *Prof'l Firefighters of N.H.*, 159 N.H. at 709-10 (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); *Mans*, 112 N.H. at 164 (government must disclose the names and salaries of each public schoolteacher employed by the district).

When individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. The New Hampshire Supreme Court has cited one case for the proposition 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." *Provenza*, 2022 N.H. LEXIS 46, at *17 (citing *Kroeplin v. Wis. Dep't of Natural*

Resources, 725 N.W.2d 286, 301 (Wis. App. 2006)); *see also ACLU-NH v. Dep't of Safety*, No. 217-2022-cv-00112, at *17 (Merrimack Super Ct. May 3, 2022) (Kissinger, J.) (pages 7-14 on appeal at N.H. Sup. Ct. No. 2022-0321) (holding that there is "no substantial privacy interest in information relating to the performance of [a trooper's] official duties"), attached as Exhibit F.

Other courts outside of New Hampshire have agreed. *See also, e.g., State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252, 261-62 (Wis. 1983) ("By accepting his public position [the police chief] has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official. The police chief cannot thwart the public's interest in his official conduct by claiming that he expects the same kind of protection of reputation accorded an ordinary citizen."); *Perkins v. Freedom of Info. Comm'n*, 635 A.2d 783, 792 (Conn. 1993) ("Finally, we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties."); *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 698 A.2d 803, 808 (Conn. 1997) (in upholding the trial court's judgment requiring disclosure of an internal affairs investigation report exonerating a state trooper of police brutality, concluding: "Like the trial court, we are persuaded that the fact of exoneration is not presumptively sufficient to overcome the public's legitimate concern for the fairness of the investigation leading to that exoneration. This legitimate public concern outweighs the department's undocumented assertion that any disclosure of investigative proceedings may lead to a proliferation of spurious claims of misconduct.").[15]

[15] *See also, e.g., Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 809-10, 821 (La. Ct. App. 1st Cir. 2008) ("[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501,

Stone's arguments in favor of privacy can be rejected. [redacted] The New Hampshire Superior Court recently concluded that certain investigatory information concerning misconduct allegations of a police officer, *including information that was deemed "not sustained,"* should be released because "[t]he public has a substantial interest in information about

507 (N.M. Ct. App. 2010) (finding that police officer "does not have a reasonable expectation of privacy in a citizen complaint because the citizen making the complaint remains free to distribute or publish the information in the complaint in any manner the citizen chooses"); *Denver Policemen's Protective Assoc. v. Lichtenstein*, 660 F.2d 432, 436-37 (10th Cir. 1981) (rejecting officers' claim of privacy); *Burton v. York County Sheriff's Dep't*., 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure, in part, because the requested documents did not concern "the off-duty sexual activities of the deputies involved").

what its government is up to." *See Provenza*, 2022 N.H. LEXIS 46, at *18, *affirming* No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (attached as *Exhibit G*). One Superior Court has similarly rejected such purported privacy interests. *See Union Leader Corp./ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406, at *8 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.), attached as *Exhibit D*. There, after remand by the Supreme Court in *Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020), a former Deputy Chief argued under the balancing test that the disclosure of redacted portions of Salem's internal audit report would be prejudicial because it presented a one-sided version of an external auditor. The Superior Court disagreed. The Superior Court recognized "that the Former Deputy Chief has a significant privacy interest" because he "denied all of the accusations of misconduct and provided plausible innocent explanations," and that "[t]he disclosure of unproven accusations could cause embarrassment and adversely affect his reputation." *Id.* at *8. However, the Superior Court ordered disclosure because "the matters at issue relate to the Deputy Chief's interactions with the public under color of the Town's authority" and "do not relate to what he did in private, or in his home, or with respect to purely private concerns." *Id.*; *see also 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.) (noting, for charges that were not sustained by an arbitrator, that "[t]he point is that even though the accusations … were reviewed by [the PSTC], … [the] privacy interest in the matter is substantially outweighed by the public interest in disclosure"), attached as *Exhibit H*. The same is the case here.

As both *Provenza* and *Town of Salem* confirm, the presumption under RSA ch. 91-A is that the public is aided by transparency, not harmed by it—even where the information may be incomplete or one-sided. *See also Union Leader Corp.*, 141 N.H. at 476 ("The legislature has

provided the weight to be given one side of the balance …."). The Right-to-Know Law presumes that the public is to be informed and trusted, even where the requested records implicate disputes as to what transpired. For example, criminal complaints, indictments, mugshots, police reports, and law enforcement press releases similarly are [redacted] and often are misleading because they do not necessarily tell the story of the accused. But this does not mean that these records are any less public under RSA ch. 91-A. There surely is a lot of information that government officials would like to withhold from the public or press because they feel that the information is misleading or does not tell the full story. But the correct response is not for the government to suppress information it finds misleading—a response that, if permitted, would give the government awesome power to withhold information from its citizens. [redacted]

Furthermore, information concerning a government official's performance of their official duties cannot be shielded from public scrutiny because exposure may cause "embarrassment" to that official and others. [redacted] But such public scrutiny for official acts is the

price that a government official must pay. This is because that official, including a police officer, works for the public, not themselves. They are not private citizens.

[redacted]

[redacted] Setting aside the undeveloped nature of this argument, any suggestion that police officers have significant privacy and reputational interests that, as a matter of constitutional due process, should act as a limitation on the public's right of access under RSA ch. 91-A or Part I, Article 8 is without merit. The New Hampshire Supreme Court has summarily rejected this argument. *Provenza*, 2022 N.H. LEXIS 46, at *19 ("Provenza argues that disclosure of the Report will violate his right to procedural due process. We conclude that this argument lacks merit, and warrants no further discussion."). Indeed, the recognition of any constitutionally-enshrined liberty interest in the public records context would conflict with the Right-to-Know Law, Part I, Article 8, and the notion that public officials must be subjected to public scrutiny. *See, e.g., Burton*, 594 S.E.2d at 895-96 ("By raising this constitutional argument, the Sheriff's Department urges this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual's performance of his public duties to be free from public scrutiny. We find this would be ill-advised."); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 297 (Conn. App. Ct. 2012) ("the personal privacy interest protected by the fourth and fourteenth amendments is very different from that protected by the statutory exemption from disclosure of materials").[16]

[16] *See also In re AG Law Enf't Directive Nos. 2020-5 & 2020-6*, Nos. A-3950-19T4, A-3975-19T4, A-3985-19T4, A-3987-19T4, A-4002-19T4, 2020 N.J. Super. LEXIS 221, at *56 (Super. Ct. App. Div. Oct. 16, 2020) (in evaluating substantive due process claim of officer resisting disclosure, holding: "Simply stated, appellants cannot show they have a constitutionally protected reasonable expectation of privacy in their disciplinary records that is not outweighed by the government's interest in public disclosure, in light of prior case law establishing their diminished expectation of privacy in those records, and the clear statement in every IAPP issued since 2000 that the Attorney General could order the release of the records.").

[redacted] Courts are clear that "one who has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard." *See Wozniak v. Conry*, 236 F.3d 888, 890 (7th Cir. 2001); *see also Lamontagne v. Town of Derry, et al.*, No. 2018-2019-CV-00338, at *4 (Rockingham Cty. Super. Ct. Apr. 27, 2020) (Schulman, J.) (holding that an officer who possessed unauthorized study materials while at the Police Academy received sufficient due process concerning his placement on the EES List; noting that the officer was "given an opportunity for a due process hearing to determine factual disputes, but he expressly waived that opportunity by instead entering into a settlement agreement"), attached as <u>*Exhibit I*</u>.

<u>*Third*</u>, as explained in Section II *supra*, the 2007 Stipulated Award provides no such privacy interest for Stone. [redacted] New Hampshire courts have made clear that any expectation of privacy is governed by an objective standard and not a party's subjective expectations (whether it be by agreement or otherwise). *See, e.g., Prof'l Firefighters of N.H.*, 159 N.H. at 707. Here, not only did the 2007 Stipulated Award make clear that it did <u>*not*</u> conflict with existing law (including RSA ch. 91-A), but New Hampshire law also objectively states that personnel file information is subjected to a public interest balancing analysis and is not categorically secret. And, as explained above, an officer cannot reasonably and objectively believe that information concerning the

[17] *See, e.g., Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 ("[A]t a minimum [due process] require[s] ... notice and opportunity for hearing appropriate to the nature of the case."); *Dietchweiler by Dietchweiler v. Lucas*, 827 F. 3d 622, 628 (7th Cir. 2016) (informing student of charges against him in presence of his parents and where student signed a written suspension notice acknowledging he had been given an opportunity to provide his version of events); *Harris ex rel. Harris v. Pontotoc County Sch. Dist.*, 635 F.3d 685, 691-92 (5th Cir. 2011) (student subject to suspension received all due process required when he received the charges against him on the day he was suspended and his parents had opportunities to meet with school officials and explain and respond).

performance of official duties is categorically private information, especially when it implicates misconduct. In other words, where a police officer's misconduct is at issue, there is simply no objective expectation of privacy.

Finally, there is especially no privacy interest as to the correspondence between the City and PSTC concerning Stone's conduct in the City's 1st, 2nd, 3rd, and 4th set of PSTC correspondence, as these are external communications. [redacted] Here, these records also cannot possibly be viewed as "personnel" in nature. As the New Hampshire Supreme Court has explained, the term "personnel" "refers to human resources matters." *Reid*, 169 N.H. at 522. The Massachusetts Court of Appeals has similarly noted that "personnel" means documents "useful in making employment decisions regarding an employee." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 8 (2003). The focus of this inquiry is not on whether the documents in question exist in a "personnel file," but rather whether they meet this definition of "personnel." Applying this test, the PSTC communications are not "personnel" related that would implicate any privacy interest, as these communications are not related to Stone's employment, but rather are independently related to his certification by the PSTC. Consistent with these principles, the PSTC consistently produces to the public under RSA ch. 91-A Form Bs received by police departments like those the Department sent to PSTC concerning Stone in this case.[18] [redacted]

[18] *See* Mark Hayward, "Seven police officers arrested in 2021; 36 had certification issues," *Union Leader* (Feb. 2, 2022), https://www.unionleader.com/news/crime/seven-police-officers-arrested-in-2021-36-had-certification-issues/article_4d2d51b8-9d86-55f6-af87-e31948d8ee32.html.

[redacted] [19]

B. The Public Interest in Disclosure is Compelling.

Here, the public interest in disclosure is obvious and prevails for several reasons. This cannot be seriously disputed, especially where [redacted] Stone is a Claremont city councilor, and he is running for a seat in the New Hampshire House of Representatives.

First, [redacted] This alone justifies disclosure [redacted] *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Prof'l Firefighters of N.H.*, 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."). As the Supreme Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of information pertaining to its government activities." *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003). Here, secrecy with respect to this information will only erode public trust and confidence in law enforcement, including in the Claremont Police Department. [redacted] *See ACLU-NH*

[19] The PSTC, itself, has declined to remove a Form B from an officer's PSTC file in similar circumstances. On October 26, 2021, the PSTC declined to act on a request by both a town and police officer to remove a Form B from an officer's PSTC file pursuant to a settlement agreement when that form was "accurate at the time of filing." *See* Oct. 26, 2021, PSTC Meeting Minutes, at p. 11, attached at *Exhibit J*.

v. Dep't of Safety, No. 217-2022-cv-00112, at *20 (Kissinger, J.) (Merrimack Super Ct. May 3, 2022) (Kissinger, J.) (pages 7-14 on appeal at N.H. Sup. Ct. No. 2022-0321) ("The Court finds that the public has a very strong and compelling interest in knowing whether Mr. Wilber's personnel file documents any misconduct prior to the filing of Ms. White's lawsuit."), attached as Exhibit F.

Numerous cases outside of New Hampshire have similarly highlighted the public interest in revealing misconduct. *See, e.g., Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs*., 484 Mass. 279, 292 (2020) ("the public has a vital interest in ensuring transparency where the behavior of these public officials allegedly fails to comport with the heightened standards attendant to their office"); *Burton*, 594 S.E.2d at 895 ("[i]n the present case, we find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye"); *Tompkins*, 46 A.3d at 299 (in public records dispute concerning documents held by a police department implicating an employee's job termination, noting that a public concern existed where the "conduct did implicate his job as a public official"). Here, disclosure will educate the public on "the official acts of those officers in dealing with the public they are entrusted with serving." *Cox*, 242 P.3d at 507; *see also Kroeplin*, 725 N.W.2d at 303 ("[t]he public has a particularly strong interest in being informed about public officials who have been derelict in [their] duty") (quotations omitted).

Second, [redacted] disclosure of the requested records will help the public evaluate how the Claremont Police Department managed, investigated, and supervised Stone[redacted] The New Hampshire Supreme Court has made clear 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." *See Provenza*, 2022 N.H. LEXIS 46, at *18; *see also Reid*, 169 N.H. at 532 ("[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate"); *Rutland Herald*, 84 A.3d at 825 ("As the trial court found, there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct."); *City of Baton Rouge,*, 4 So.3d at 809-10, 821 ("[t]he public has an interest in learning about the operations of a public agency, the work-related conduct of public employees, in gaining information to evaluate the expenditure of public funds, and in having information openly available to them so that they can be confident in the operation of their government").

Superior Courts in New Hampshire have agreed. *See, e.g., ACLU-NH v. Dep't of Safety*, No. 217-2022-cv-00112, at *19 (Merrimack Super Ct. May 3, 2022) (pages 7-14 on appeal at N.H. Sup. Ct. No. 2022-0321) ("Disclosure of Mr. Wilber's personnel file will assist the public in determining whether the investigation into his conduct was comprehensive and accurate."), attached as Exhibit F; *Union Leader Corp./ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406, at *23, 26-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (on remand, holding that "the public has a strong interest in understanding how workplace misconduct is handled by the police department"), attached as Exhibit D; *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 because "the public has a vital and compelling interest in seeing how the Manchester Police Department and its Chief responded"), attached as Exhibit H; *Salcetti v. City of Keene*, No. 213-2017-cv-00210, at *5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.) (on remand, holding: "As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their

authority, whether the department is accounting for complaints seriously, and how many complaints are made. This factor strongly favors unredacted disclosure."), attached as *Exhibit K*; *State of New Hampshire v. Marsach*, No. 216-2021-cr-00046, at *5-9 (Hillsborough Cty. North Super. Ct., Feb. 25, 2022) (Delker, J.) (in employing public interest balancing test for Hillsborough County Attorney materials, concluding that public interest balancing analysis favors disclosure of employee information in court filings) (attached as *Exhibit L*).

Third, the public also has a right to know the efforts Stone and the City to [redacted] Here, following his negotiated resignation, Stone continued his career in law enforcement and began work with the Vermont Department of Correction. We know of at least one similar agreement in 2021 where the Merrimack Police Department agreed, after finding that a department violation occurred and stipulating to a negotiated resignation, (i) to "remove any references to the Internal Affairs Investigation from the [officer's] personnel file" (though it would

[20] *See* RSA 91-A:4, VI ("Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, *or other claim*, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.") (emphasis added).

be kept in a separate file) and (ii) to, unless required by law, only provide the officer's "dates of employment, rate(s) of pay, and position(s) held with the Town during his employment" if a post-employment inquiry is made. *See* Exhibit M (Jan. 2021 Merrimack Police Department Separation Agreement and Release, with relevant provisions highlighted).[21] And we know of at least two incidents of terminated officers being rehired elsewhere.[22] This problem of "wandering officers" fired from one department, and then being rehired at another, has garnered national attention.[23]

[redacted]

[21] *See also* Exhibit N (Sept. 2020 Hancock Separation Agreement and Release, stating that, subject to certain exceptions, the terms and conditions of the officer's departure "are otherwise confidential").

[22] Killian Kondrup, who was terminated from his position in the Dover Police Department in April 2021 for lying by omission about his involvement in a fatal car chase, was rehired by the Lee Police Department until his PSTC certification was revoked in January 2022. *See* Todd Bookman, et al, "How a police officer who was fired in Dover got a new job as a police officer in Lee," *NHPR* (Feb. 1, 2022), https://www.nhpr.org/nh-news/2022-02-01/how-a-police-officer-who-was-fired-in-dover-got-a-new-job-as-a-police-officer-in-lee. Similarly, Haden Wilber was terminated by the State Police in August 2021 for lying to investigators and violating the Fourth Amendment for inspecting a woman's phone without a warrant, only to be hired in a part-time capacity by the Kingston Police Department (his termination from the State Police was upheld by the Personnel Appeals Board in July 2022). *See* Damien Fisher, "Fired State Trooper Still Holds Police Certification" *InDepthNH* (July 7, 2022), https://indepthnh.org/2022/07/07/fired-state-trooper-still-holds-police-certification/.

[23] The scope of this practice is difficult to determine in New Hampshire where terminations and resignations are rarely publicly volunteered by police departments and where, until recently, police departments regularly withheld this information from the public under the now-overruled *Fenniman* decision. However, we do know that this practice has occurred nationally. *See* Ben Grunwald & John Rappaport, The Wandering Officer, 129 YALE L.J. 1676, 1680 (2020) ("in any given year during our study, an average of just under 1,100 officers who were previously fired--three percent of all officers in the State--worked for Florida agencies"); Dorothy Moses Schulz, "Wandering Cops: How States Can Keep Rogue Officers from Slipping Through the Cracks," *Manhattan Institute* (Mar 16. 2022) ("Investigative reporting from Colorado and Texas, however, has shown that a significant portion of fired cops are able to find a job in another police department. Research has also shown that they stay mostly within their states and are hired primarily by smaller, poorer departments than those they left."); Peter Cameron, "Nearly 200 Wisconsin police officers are back on the job after being fired or forced out," *Milwaukee Journal Sentinel* (Sept. 9, 2021), https://www.jsonline.com/story/news/local/wisconsin/2021/09/08/nearly-200-wisconsin-police-officers-hired-elsewhere-after-being-fired/5715691001/; Nikita Lalwani and Mitchell Johnstone, "What happens when a police officer gets fired? Very often another police agency hires them," *Washington Post* (June 16, 2020), https://www.washingtonpost.com/politics/2020/06/16/what-happens-when-police-officer-gets-fired-very-often-another-police-agency-hires-them/; 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/ (noting that officer that murdered Tamir Rice in 2014 and was fired from the Cleveland Police Department in 2017 for lying on his job application was hired as a police officer in a small Pennsylvania town). This case will help shed light on this potential practice in New Hampshire.

Fourth, Stone's suggestion [redacted] is legally incorrect because (i) the old age of the requested records is not an exemption under RSA ch. 91-A and (ii) a requester's motives are irrelevant.[24] [redacted] Indeed, we would not even know of the 2007 Stipulated Award were it not for an enterprising journalist who inquired into Stone's behavior. [redacted]

[24] *See Union Leader Corp.*, 141 N.H. at 476 ("In Right-to-Know Law cases, the plaintiff's motives for seeking disclosure are irrelevant.").

[redacted] Disclosure will help the public ask and answer these important questions.

In sum, transparency is essential for the public to fully vet not only the conduct at issue, but also the investigation and decision making of the Claremont Police Department concerning

[25] Fortunately, it appears that PSTC's rules were later changed to fix this loophole and allow for decertification actions even if there is a "negotiated resignation." *See* Pol. 402.02(a)(5) ("The council shall, unless it has just cause to do otherwise as provided in (e) below, order the suspension or revocation of the certification of any police or corrections officer for any of the following reasons …. (5) The officer's discharge has become final or he or she has been allowed to resign in lieu of discharge, has resigned during an internal investigation, *or resigned through a negotiated resignation*, from police or corrections employment in this or any other state, country, or territory for reasons of: a. A lack of moral character as defined in Pol 101.28 or Pol 402.02 (l); b. Moral turpitude as defined in Pol 101.29; or c. For acts or omissions of conduct which would cause a reasonable person to have doubts about the individual's honesty, fairness, and respect for the rights of others and for the laws of the state or nation.") (emphasis added), *available at* http://www.gencourt.state.nh.us/rules/state_agencies/pol100-800.html.

Stone's behavior. Keeping this information secret "cast[s] suspicion over the whole department and minimize[s] the hard work and dedication shown by the vast majority of the" Department. *See Rutland Herald*, 84 A.3d at 825-26.

C. There is No Governmental Interest in Nondisclosure.

[redacted] Fortunately, however, RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution deem such transparency, scrutiny, and accountability as virtues, not flaws of our democratic society. It is for these same reasons why criminal judicial proceedings are held out in the open, even in the face of significant stigma often placed on the accused.

In any event, any allegation of harmful "chill" is speculative. The City has not raised this governmental interest, and the New Hampshire Supreme Court has previously rejected such speculative and conclusory suggestions made without evidence. *See Provenza*, 2022 N.H. LEXIS 46, at *18 ("To the extent that Provenza argues that the government has an interest in nondisclosure because disclosure will have a chilling effect on future investigations, we agree with the Valley News that Provenza has not carried his burden of demonstrating that disclosure, in light of the facts of this case, is likely to have any such chilling effect."); *Goode*, 148 N.H. at 556 ("[T]here is no evidence establishing the likelihood that auditors will refrain from being candid and forthcoming when reporting if such information is subject to public scrutiny."); *Union Leader Corp.*, 162 N.H. at 681 (rejecting withholding rationale that was "speculative at best given the meager evidence presented in its support"). This Court cannot credit speculative concerns of "chill" not borne out

by evidence, especially where Stone "has the burden of demonstrating that the designated information is exempt from disclosure under the Right-to-Know Law." *CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 587 (2015); *see also Nash v. Whitman*, 05-cv-4500, 2005 WL 5168322 (Dist. Ct. of Colo., City of Denver, Denver Cty. Dec. 2005) (ordering that the bulk of internal affairs police files be produced because fear of chilling witnesses "did not find significant support in the evidence"); *Kroeplin*, 725 N.W.2d at 303 ("Kroeplin fails to point to any evidence that disclosing records created in the course of investigating employee misconduct and of the subsequent disciplinary action taken would have or has the effect he predicts [of chilling investigations]."). Of course, if police officers are unwilling to conduct robust internal investigations and arbitrations out of a fear that the public will be evaluating their work, then those officers should not be public servants.

Here, transparency concerning internal investigation files will help—not harm—the integrity of internal investigations and the arbitration process. Secrecy creates an environment where police departments and arbitrators are not incentivized to engage in robust investigations because the public is not looking over their shoulder.

D. The Public Interest Outweighs Any Interests in Nondisclosure.

Once the interests in nondisclosure and public interest in disclosure have been assessed, courts "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Union Leader Corp.*, 162 N.H. at 679. The Supreme Court has consistently stated that this balancing test should be heavily weighted in favor of disclosure, even where the public and privacy interests appear equal. As the Court has noted, "the legislature has provided the weight to be given one side of the balance by declaring the purpose of the Right-to-Know Law in the statute itself." *See, e.g., Reid*, 169 N.H. at 532 (citation

and quotation omitted); *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (same); *see also WMUR v. N.H. Dep't of Fish and Game*, 154 N.H. 46, 48 (2006) (noting that courts must "resolve questions regarding the Right-to-Know Law with a view providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents").

Here, for the reasons explained above, Stone and the City cannot meet their heavy burden to show that any privacy interest dwarfs the compelling public interest in disclosure. Accordingly, disclosure is required. Indeed, following *Provenza* and other cases, several municipalities have similarly produced information concerning the police in recognition of the value of being transparent to the citizenry. The City of Manchester publicly released some information concerning the sustained misconduct of Aaron Brown, who engaged in racist speech using a department phone.[26] The Dover Police Department similarly released its internal investigation into a fired officer who the State subsequently criminally charged.[27] Finally, in June 2021, the City of Lebanon released information concerning Richard Smolenski who had been charged with using fictitious online accounts to stalk a former girlfriend and threaten to release details about their sexual encounters.[28] The same should occur here.

CONCLUSION

In sum, the only relevant questions under the Right-to-Know Law in this case are (i) whether records exist (yes), (ii) whether such records are responsive (yes), and (iii) whether such

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

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

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

records are exempt from disclosure under the exemptions set forth under RSA ch. 91-A (no). These records should be released.

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

A. Dismiss Jonathan Stone's lawsuit because RSA ch. 91-A does not create a cause of action for anyone other than a requester who has been "aggrieved by a violation" of RSA ch. 91-A due to a public body's decision to not produce records;

B. Rule that all the records made available to this Court on July 1, 2022 and requested by the ACLU-NH and the Union Leader Corporation (as reflected in Damien Fisher's June 6, 2020 request)—excluding IA Reports #11 and #12—are public records under RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution. Production should include the redactions proposed by the City as to IA Reports #1-10 and 10(A), and the parties should work collaboratively on proposed redactions to IA Report #13 and 14;

C. Unseal all the filings, pleadings, exhibits, and orders in this case, including the 2007 Stipulated Award, but excluding references to IA Reports #11 and 12 (which can remain sealed), information redacted by the City in IA Reports #1-10, 10(A), and information to be redacted in IA Reports #13-14; and

D. Award such other relief as may be equitable.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

by its attorneys,

/s/ Gilles Bissonnette

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Date: September 1, 2022

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
Gilles Bissonnette

September 1, 2022