THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2023-0083

Jonathan Stone
(Plaintiff/Appellant)
v.
City of Claremont
(Defendant)

The American Civil Liberties Union of New Hampshire and
Union Leader Corporation
(Intervenors/Appellees)

Rule 7 Mandatory Appeal from the New Hampshire Superior Court,
Sullivan County
Case No. 220-2020-cv-00143

RESPONSIVE BRIEF OF INTERVENORS/APPELLEES AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND UNION LEADER CORPORATION -- REDACTED/PUBLIC BRIEF[1] --

Gilles R. Bissonnette
(N.H. Bar No. 265393)
(presenting oral argument)
Henry R. Klementowicz
(N.H. Bar No. 21177)
American Civil Liberties Union of
New Hampshire Foundation
18 Low Ave. #12
Concord, NH 03301
Tel. (603) 227-6678
gilles@aclu-nh.org
henry@aclu-nh.org

Gregory V. Sullivan, Esq.
(N.H. Bar No. 2471)
Malloy & Sullivan, Lawyers
Professional Corporation
59 Water Street
Hingham, MA 02043
Tel. (781) 749-4141
g.sullivan@mslpc.net

September 5, 2023

[1] An unredacted brief has been filed under seal.

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QUESTIONS PRESENTED

1. Are the purging and confidentiality provisions in the 2007 Stipulated Award enforceable and consistent with public policy in adjudicating the public's right of access to governmental records?

2. Does RSA 91-A allow third parties like Stone to seek relief in court and raise exemptions under the Right-to-Know Law where RSA 91-A:7 states that "[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief"?

3. If the 2007 Stipulated Award is unenforceable under RSA ch. 91-A and, instead, traditional Right-to-Know Law principles apply here, does the public interest in disclosure outweigh any interests in nondisclosure under RSA 91-A:5, IV's "invasion of privacy" exemption and Provenza v. Town of Canaan, 175 N.H. 121 (2022) where the information sought implicates on-duty behavior of a former officer and current elected official?

STATEMENT OF THE 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 other investigatory reports concerning Stone's conduct as an officer from 2000 to 2005. Stone is a Claremont City Councilor, and he currently is a member of the New Hampshire House of Representatives representing District 8 in Sullivan County, having been elected in November 2022. He also unsuccessfully ran for this House seat in November 2020.

Stone filed this lawsuit on September 1, 2020. *See* APPI[2] 78-86. This lawsuit was triggered by the June 6, 2020 Right-to-Know request of non-party independent journalist Damien Fisher. Fisher requested the following from Defendant City of Claremont ("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

[2] "APPI" refers to Volume I of the Appellant's Appendix.

document or statement sent to the New Hampshire Police Standards and Training Council ("PSTC") regarding Stone's "moral turpitude"; and (iv) a copy of any statement received by the Claremont Police Department ("Department") from the PSTC in regards to Stone. *See* APPI 75-77.[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* APPI 109-110. On October 22, 2020, Intervenor Union Leader Corporation submitted a similar Right-to-Know request. *See* APPI 112.[4] 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. APPI 103-112 (Intervenors' motion to intervene), 113-161 (Intervenors' joint statement of interest). The Superior Court granted the Motion to Intervene on December 7, 2020. APPI 103.

Following the City's June 1, 2022 production of responsive records to both the Superior Court (under seal) and the parties (under a protective order), we know that Stone was the subject of approximately 12 incidents, with varying determinations made by the Department. *See* APPI 171-333 (documents in question as presented to the Superior Court on June 1, 2022). These include the following:

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[3] Following Fisher's June 6, 2020 request, the City filed a Complaint in Equity for Declaratory Judgment in Sullivan County Superior Court on July 10, 2020. *See* APPI 4-9. The Superior Court dismissed the lawsuit without prejudice on August 7, 2020, stating that "[t]he 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." APPI 74 (Tucker, J.). Fisher was represented in this first case, and the Intervenors were not parties to this first case.

[4] As the Superior 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]

[redacted]

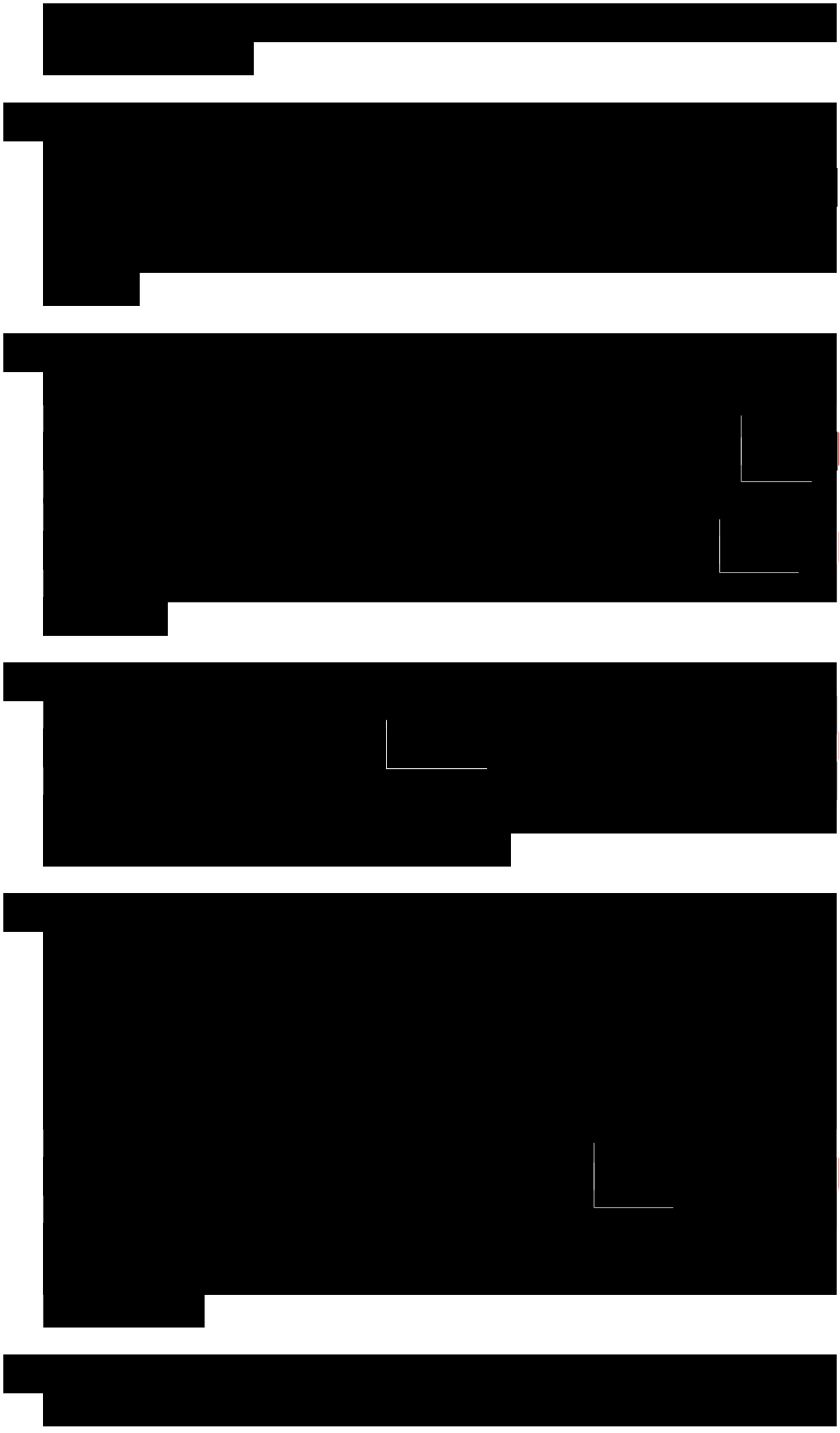
[redacted]

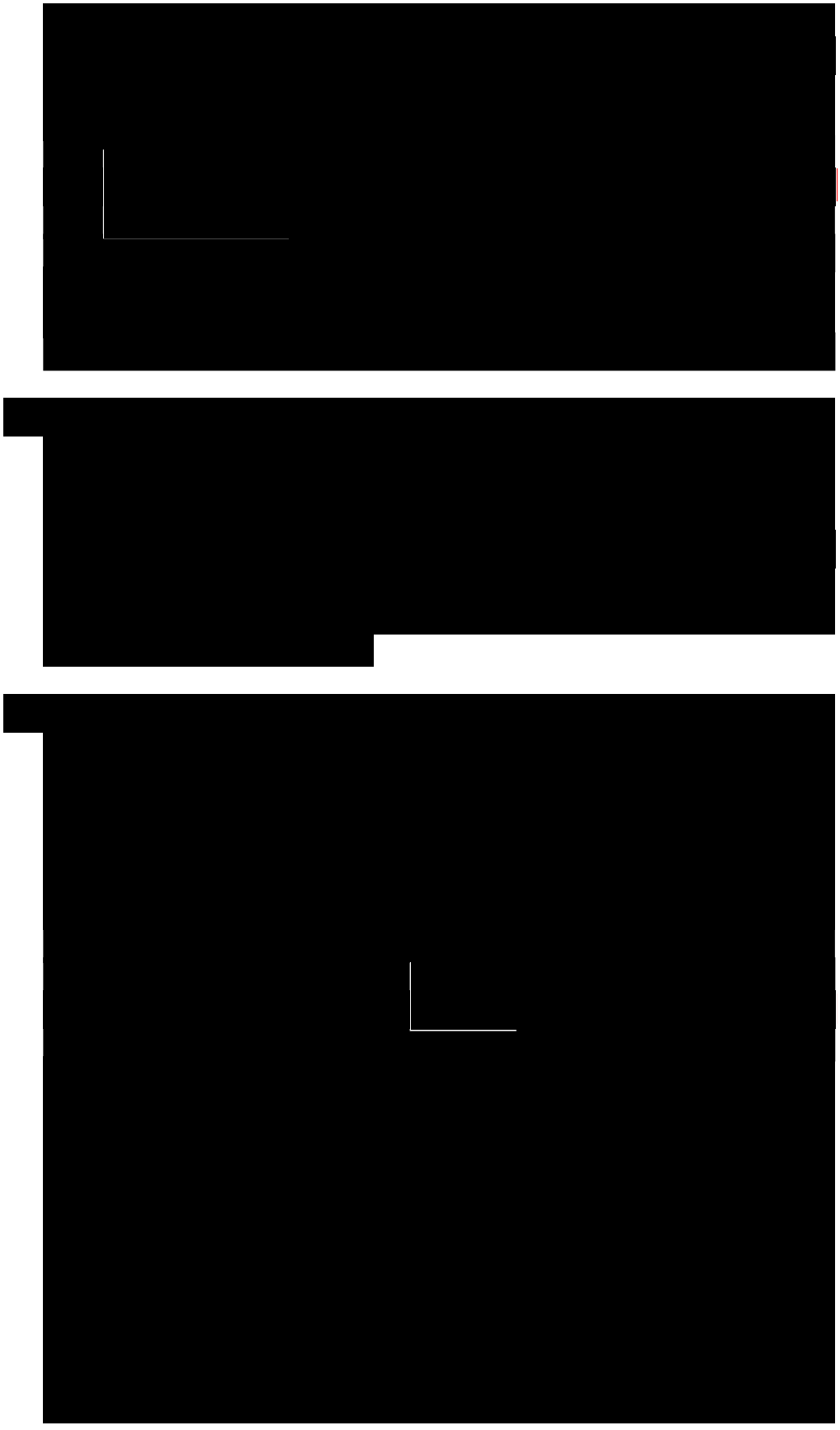
[redacted]

[redacted]

[5] "APPII" refers to Volume II of the Appellant's Appendix.

[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/.





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STATEMENT OF THE CASE AND SCOPE OF THE DISPUTE

On appeal, Stone argues that almost all the records produced by the City on June 1, 2022 to both the Superior Court and the parties, *see* APPI 171-333, should be withheld under RSA ch. 91-A (i) because of a June 9, 2007 Stipulated Award agreed upon by Stone and the City that resolved four grievances and that led to Stone's negotiated resignation, and (ii) seemingly on "invasion of privacy" grounds pursuant to RSA 91-A:5, IV (though this is unclear).

The four grievances at issue in the 2007 Stipulated Award are 2006-NH-31/P-0733-19, 2006-NH-32/P-0733-18, 2006-NH-38/P-0733-19, and 2006-NH-39/P-0733-20. These four grievances appear to relate to the following separate internal investigation reports: (i) IA Reports #12 and 13 (consisting of Report 06-2-IA); (ii) IA Report #10A (consisting of Report 06-3-IA); (iii) IA Reports #10, 11, 13, and 14 (consisting of Report 06-6-IA); (iv) IA Report #8 (consisting of Report 06-7-IA); and (v) IA Report #9 (consisting of Report 06-1-IA). *See* APPI 368-371 (Plaintiff explaining grievances and reports at issue).

Here, however, Stone seeks secrecy not only with respect to IA Reports #8-14 emanating from the four grievances that led to the 2007

Stipulated Award, but also with respect to IA Reports #1-7 that predate 2006 and *have no connection with the Stipulated Award*. *See* APPI 1-3.

Stone has only agreed to the release of the June 4, 2007 letter from PSTC in the City's 4th Set of PSTC Correspondence (APPI 277). *See* APPI 353.

After a hearing on November 16, 2021, the Superior Court denied Stone's request for a preliminary injunction on December 7, 2021, concluding that the terms of the 2007 Stipulated Award requiring the City to purge Stone's personnel file with respect to certain discipline cannot be enforced against the public because enforcement would run counter to public policy as reflected in RSA ch. 91-A. *See* APPII 504-506 (Tucker, J.); *see also* APPI 2 (2007 Stipulated Award), ¶¶ 4-6, 8. The Superior Court left open the question of whether the records were subject to RSA 91-A:5, IV.

On June 1, 2022, the City produced responsive records to both the Superior Court (under seal) and the parties (under a protective order) so both Intervenors and the Court would have a better understanding of the records in dispute and whether RSA 91-A:5, IV was applicable. *See* APPI 171-333.

Following this June 1, 2022 production, the City took the position before the Superior Court that IA Reports #1-10 and 10(A) should be released with the City's proposed redactions. (Intervenors did not and do not object to any of the City's proposed redactions in IA Reports #1-10 and 10(A).) The City also argued that the PSTC correspondence should be released in their entirety without redaction. However, the City argued before the Superior Court that IA Reports #11-14 should be withheld on "invasion of privacy" grounds pursuant to RSA 91-A:5, IV.

To narrow the scope of this dispute before the Superior Court, Intervenors withdrew without prejudice their request for IA Reports #11 and 12 (APPI 230-235, 236-240), [redacted]. However, Intervenors

objected before the Superior Court to the City's claim that IA Reports #13 and 14 reflected [redacted]

In its October 7, 2022 order, the Superior Court (Honigberg, J.) agreed with Intervenors. The Court ordered the disclosure of IA Reports #1-10 and 10(A) with the agreed-upon redactions made by the City. The Court also ordered the disclosure of IA Reports #13 and 14, with the parties required to negotiate in good faith as to appropriate redactions to these reports.

First, the Superior Court "assume[d] that Plaintiff has standing to make his complaint" given the prior history of the case. *See* Stone Addendum ("Stone Add.") 45 (Superior Court's Oct. 7, 2022 Order, at p. 9).

Second, the Superior Court reiterated that the confidentiality and purging terms of the 2007 Stipulated Award cannot be enforced because enforcement would be contrary to public policy. As to the Award's purging provisions, the Court held the following: "Just as a contract provision barring disclosure of the Plaintiff's records violates public policy when it conflicts with RSA 91-A, so too does a provision requiring destruction of documents …. It is self-evident that destroying any such documents would violate the public policy motivating RSA 91-A, because the public could not access

records that have been destroyed. If, as here, the records have not been destroyed but simply moved, they are subject to [] RSA 91-A regardless of any contract provision." Stone Add. 43-44.

Third, with respect to IA Reports #1-10/10A, 13-14 at issue, the Court concluded that the public interest balancing test mandated by RSA 91-A:5, IV required disclosure. The Court held that "the Plaintiff's privacy interest is not weighty," as the records do not reveal intimate details of Stone's life, but rather concern "information relating to his conduct as a government employee while performing his official duties and interacting with [members] of the public." *Id*. 49 (quoting Provenza v. Town of Canaan, 175 N.H. 121, 130 (2022)). The Court also noted that the public interest in disclosure "weighs heavily," as "[a]ll the IA Records at issue here document instances of misconduct on the part of a police officer and are related to that officer's official duties." *Id.* 50.

In ordering the disclosure of IA Reports #13 and 14 in particular, the Court rejected the claim that these records exclusively implicated Stone's off-duty conduct as a private individual. *Id.* 51. However, in recognition of the privacy interests of third parties in these Reports, the Court ordered the City, within 45 days, to "file either the agreed-upon versions of IA Reports ## 13 and 14, or versions that show the redactions that are agreed and the areas of disagreement." *Id.* 53.

After a dispute emerged about the scope of the proposed redactions to IA Report #13, the Superior Court resolved this dispute in a January 11, 2023 order. *See* Stone Add. 55-56 (Superior Court's Jan. 11, 2023 Order). Intervenors are not appealing this January 11, 2023 order.

The City did not file a notice of appeal or an opening brief as an appellant. Accordingly, to the extent the City seeks to challenge any Superior Court finding in this case—including with respect to IA Reports #13 and 14 that the City believed should be withheld before the Superior

Court—the City has waived any such ability. *See* State v. Blackmer, 149 N.H. 47, 49 (2003) ("An argument that is not raised in a party's notice of appeal is not preserved for appellate review.").

SUMMARY OF ARGUMENT

First, as the Superior Court correctly concluded in its December 7, 2021 and October 7, 2022 orders, the terms of the 2007 Stipulated Award requiring the City to keep confidential and purge Stone's personnel file with respect to certain discipline cannot be enforced against the public under the Right-to-Know Law because enforcement would run counter to public policy. Any effort to countermand RSA ch. 91-A or Part I, Article 8 of the New Hampshire Constitution by contract should be rejected, rather than rewarded through enforcement.

Second, as the 2007 Stipulated Award is irrelevant under RSA ch. 91-A, traditional principles under the Right-to-Know Law apply. However, RSA ch. 91-A does not allow "reverse" Chapter 91-A actions where third parties like Stone seek to invoke exemptions under the Right-to-Know Law to resist public disclosure. Under RSA 91-A:7, 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. Stone's three-year-old lawsuit demonstrates how "reverse" Chapter 91-A actions can hamper timely public access to information.

Third, assuming Stone can raise exemptions under RSA ch. 91-A (which he cannot), the only remaining question is whether, irrespective of the 2007 Stipulated Award, any exemptions—particularly the exemption under RSA 91-A:5, IV for "personnel … and other files whose disclosure would constitute [an] invasion of privacy"—apply. At the outset, as Stone's argument on appeal seems entirely premised on the terms of the 2007 Stipulated Award referenced in Section I of this brief, he has waived any argument on appeal that exemptions enumerated under RSA ch. 91-A apply.

But even if he could raise this "invasion of privacy" exemption, the public interest balancing test used to evaluate this exemption requires disclosure.

The public interest in disclosure is both compelling and obvious. The requested records implicate on-duty behavior as a police officer and portray multiple incidents [redacted]

The public also has a right to know not only how the City supervised, investigated, and disciplined Stone, [redacted]

ARGUMENT

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

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

broadly, while construing exemptions narrowly." Goode v. N.H. Legis., Budget Assistant, 148 N.H. 551, 554 (2002) (citation omitted). "[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a *heavy burden* to shift the balance toward nondisclosure." Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006) (emphasis added).

I. The Confidentiality and Purging Provisions of the 2007 Stipulated Award are Irrelevant and Unenforceable in Adjudicating the Public's Right of Access Under RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution.

[redacted] Stone is incorrect for multiple reasons.

At the outset, the provisions of the 2007 Stipulated Award, at most, only apply to the events concerning the March 27, 2006 notice of termination and the five reports (numbered 06-1-IA, 06-2-IA, 06-3-IA, 06-6-IA, 06-7-IA) that are related to the four grievances resolved by the Award. These five reports only encompass IA Reports #8-14 as produced to the Superior Court on June 1, 2022 (again, Intervenors are not seeking IA Reports #11 and 12). [redacted] The Award does not address, let alone protect, the incidents from 2000 to 2005 reflected in IA Reports #1-7.

Moreover, even if this Court were to credit the 2007 Stipulated Award as to IA Reports #8-10/10A, 13-14, it does not provide the blanket confidentiality that Stone asserts. [redacted] *See* APPI 2 ¶ 4. In other words, this caveat makes clear that the Right-to-Know Law prevails and may defeat any such secrecy agreement in the face of a public records request.

The Superior Court also correctly concluded that the 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 and Part I, Article 8 of the New Hampshire Constitution, as enforcing the Award's provisions would violate public policy. *See* Appeal of Prof'l Fire Fighters of Hudson, IAFF Local 3154, 167 N.H. 46, 52 (2014) (noting that this Court "will not enforce a contract or contract term that contravenes public policy").

A contractual stipulation cannot override a government entity's legal obligation to disclose existing, responsive information to the public. This is because RSA ch. 91-A does not recognize a contractual provision as a specified exemption to public disclosure. Here, the only operative question under the Right-to-Know Law is whether responsive government records exist at the time of the request. And if they do—as is the case here—they are subject to RSA ch. 91-A and any applicable exemptions specified under the statute. To be sure, if the records were, for whatever reason, not in the City's possession at the time of Intervenors' October 2020 Right-to-Know requests, we would be in a different situation. But that is not the reality. The records currently exist, and thus the clock cannot be "turned back," especially when doing so would be for the express purpose of destroying (and denying the public of) information in contravention of RSA 91-A:9, which prohibits the

knowing destruction of information with the purpose of preventing disclosure under the Right-to-Know Law.

Enforcing these contractual provisions would conflict with RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution, and their dominant public policy in favor of transparency. *See* APPII 504-506 (Tucker, J.). In seeking to invoke the Award's confidentiality and purging provisions, Stone's claim presents the fundamental question of whether a contract can be used to circumvent the public's statutory and constitutional rights of access. It cannot. Regardless of whatever separate damages 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 and Article 8 who were not parties to this contract. To uphold such an agreement would also allow municipalities to habitually violate RSA ch. 91-A by entering into side "confidentiality" agreements with government officials that aim to hide misconduct.

Other courts and officials have reached similar holdings. *See, e.g.,* City of Chicago v. FOP, 181 N.E.3d 18, 31 (Ill. 2020) (affirming vacatur of an arbitration award in the FOP's favor—where the award ordered the city to destroy older records of alleged police misconduct—because the award violated the State's well-defined public policy requiring the preservation of public records); Newspaper Holdings, Inc. v. New Castle Area Sch. Dist., 911 A.2d 644, 649 n.11 (Pa. Commw. Ct. 2006) ("a school district may not contract away the public's right of access to public records because the purpose of access is to keep open the doors of government, to prohibit secrets, to scrutinize the actions of public officials and to make public officials accountable in their use of public funds"; "[a] confidentiality clause contained in a settlement agreement that runs afoul of the [Right to Know Law] violates public policy and is unenforceable"); Friedmann v. Corr. Corp.

of Am., No. M2012-00212-COA-R3-CV, 2013 Tenn. App. LEXIS 150, at *17 (Tenn. Ct. App. Feb. 28, 2013) ("This court in determining whether the City's argument that confidentiality prevented disclosure looked at several cases and opinions and determined that a government agency cannot enter into confidential settlement agreements."); FOP, Chicago Lodge No. 7 v. City of Chicago, 59 N.E.3d 96, 105 (Ill. Ct. App., 1st Dist., 6th Div. 2016) (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.* FOP v. Chicago Police Sergeants Ass'n, 60 N.E.3d 872 (Ill. 2016); Tenn. Atty. Gen. Op. No. 96-144, 1996 Tenn. AG LEXIS 160 (Dec. 3, 1996) ("An agreement by a governmental agency to restrict public access to public records that are not exempt under state law violates public policy and is unenforceable.").

II. As the 2007 Stipulated Award is Irrelevant Under RSA ch. 91-A, Traditional Principles Under the Right-to-Know Law Apply. However, RSA 91-A Does Not Allow Third Parties Like Stone to Seek an Injunction Barring Disclosure Based on Exemptions Under the Right-to-Know Law.

As the 2007 Stipulated Award is irrelevant under RSA ch. 91-A, traditional principles under the Right-to-Know Law apply here. However, a threshold question in this case is whether a third party like Stone can bring a "reverse Chapter 91-A" action raising exemptions under RSA ch. 91-A to prevent a government agency from producing records to the public. While this Court has not resolved this question, *see* Provenza v. Town of Canaan, 175 N.H. 121, 125 (2022) (hereinafter, "Provenza"), such actions are barred.

Here, Stone's effort to raise exemptions under RSA ch. 91-A fails because the statute does not create an independent 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, RSA 91-A:7 strongly suggests that it is 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 seemingly 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."). 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.[8] As the United States Supreme Court has similarly explained in the federal Freedom of Information Act ("FOIA") context—precedent which this Court has repeatedly looked to as a guide[9]—"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*

[8] 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").

[9] *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") (hereinafter, "Seacoast Newspapers").

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.").

This Court need not address the question of whether "reverse Chapter 91-A" actions are permitted if it concludes that the information is otherwise disclosable under the Right-to-Know Law. *See infra* Section III.[10] However, there are important reasons why this Court should resolve this question. These "reverse" actions can significantly delay the public's right of access to government records when a government body, responding to community needs, wishes to promptly produce records to the public. For example, Stone's "reverse Chapter 91-A" action has been pending for nearly three years, thereby delaying the public's access to information concerning an elected representative and former officer. Similarly, in Provenza, the officer's "reverse Chapter 91-A" action delayed public disclosure of the report in question for approximately two years when the town wanted to release this information. *See* Provenza, 175 N.H. at 125. And while the Intervenors may have the resources to intervene to zealously invoke the public's right of access when "reverse Chapter 91-A" actions are brought by third parties in response to their public records requests, the same cannot always be said for someone with less resources who is simply seeking to

[10] *See* Provenza, 175 N.H. at 125 (not resolving this question where the report was not exempt under RSA ch. 91-A).

learn about their government. This case bears out this problem where the original requester—independent journalist Damien Fisher—is not even a party to this action and did not intervene.

Finally, if this Court permits "reverse Chapter 91-A" actions allowing third parties to bring suits asserting exemptions under RSA ch. 91-A, then this Court should make clear that these same third parties—like requesters and public bodies—can be subjected to the fee-shifting provisions of RSA 91-A:8, I-II. *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."). "[T]he ability to obtain an award of attorney's fees in a Right-to-Know Law case is critical to securing the rights guaranteed by the statute." *See* Colquhoun v. City of Nashua, 175 N.H. 474, 484 (2022) (internal quotations omitted). Without such fees, 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 that they will be on the hook for their own costly attorneys' fees—even if they win. Additionally, if such actions are permitted, this Court should make clear that requesters are given prompt notice of such "reverse Chapter 91-A" lawsuits and must be permitted to intervene as of right.

III. Even if Stone Can Raise Exemptions Under RSA ch. 91-A (Which He Cannot), the Public Interest in Disclosure Outweighs Any Interests in Nondisclosure Under RSA 91-A:5, IV's "Invasion of Privacy" Exemption.

Because Stone's argument on appeal seems entirely premised on the terms of the 2007 Stipulated Award referenced in Section I *supra* of this brief, he has waived any argument on appeal that exemptions enumerated under RSA ch. 91-A apply. But even if Stone can raise exemptions under

RSA ch. 91-A on appeal (which he cannot for the reasons explained in Section II *supra*), no exemptions apply here.

At the outset, Intervenors are not seeking a "retrospective" application of the Right-to-Know Law in this case. Rather, Intervenors merely ask, in a manner no different than any other Right-to-Know request, that the law in effect at the time of their October 21/22, 2020 requests be applied to records in the possession of the City as of October 21/22, 2020. What the state of the law was (or whether a confidentiality contract existed) when the records were created are irrelevant under RSA 91-A:4, I, which states that "[e]very citizen … has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, …., except as otherwise prohibited by statute or RSA 91-A:5." This Court's recent decisions in Provenza, Seacoast Newspapers, and Union Leader Corp./ACLU-NH v. Town of Salem, 173 N.H. 345 (2020) (hereinafter, "Town of Salem") further evidence this interpretation where, even though the records in question there were created when Fenniman was controlling, they ultimately were released in various forms. And since the May 2020 Town of Salem/Seacoast Newspapers, Inc. decisions, government agencies have often produced documents that were created before these decisions pursuant to the public interest balancing test.[11] Released information has even led to the reversal of one conviction where a defendant was able to establish that documents obtained under RSA ch. 91-A were not produced to him in his criminal case.[12] Moreover, the parties acknowledged that the Award's provisions

[11] *See, e.g.*, 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.

[12] Jim Kenyon, "Long Road to Reversal for Man Convicted of Assaulting Lebanon Cops," *Valley News* (Jan. 14, 2023),

applied [redacted] *See* APPI 2 ¶ 4.

Here, 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." This 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). In applying this test, the burden on the government entity resisting disclosure is a heavy one. *See, e.g.,* Reid v. N.H. AG, 169 N.H. 509, 532 (2016). 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 ….").

A. The Privacy Interest in Nondisclosure is Minimal.

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

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https://www.vnews.com/Judge-Vacates-Strafford-Man-s-Conviction-for-Assaulting-Lebanon-Cop-What-s-Next-49518605.

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). 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. *See also* Provenza, 175 N.H. at 130. Indeed, 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 131 (citing Kroeplin v. Wis. Dep't of Natural Resources, 725 N.W.2d 286, 301 (Wis. App. 2006)). 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); Perkins v. Freedom of Info. Comm'n, 635 A.2d 783, 792 (Conn. 1993).

Stone's arguments in favor of privacy must be rejected. [redacted] *See* Wozniak v. Conry, 236 F.3d 888, 890 (7th Cir. 2001) ("one who has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard").

[redacted]

[redacted] The fact that there were no fully adjudicated findings made in IA Reports #8-14 because of the Award does not erase these documents' existence, or the Department's initial conclusions within their pages. As with annulled arrest records, the Award's provisions do not create a categorical exemption under RSA ch. 91-A, especially insofar as the Award only applies [redacted]" *See* APPI 2 ¶ 4; *see also* Grafton County Attorney's Office v. Canner, 169 N.H. 319, 326 (2016) (noting in an analogous context that an annulment does not expressly turn the public event of a criminal conviction into a private, secret, or secluded fact, and that annulled arrest records are not categorically exempt from disclosure under RSA ch. 91-A). Indeed, this contractual language shows that the expectation of the parties was ***not*** categorical secrecy. Just as criminal charges that are "placed on file without a finding," annulled, or otherwise nol prossed can be accessed by the public, so too should these records be accessible to the public.

[redacted] This Court recently concluded that certain investigatory information concerning misconduct

allegations of a police officer should be released, *including information that was deemed "not sustained*." *See* Provenza, 175 N.H. at 131, *affirming* No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.), located at APPII 530-551. On remand after the Town of Salem decision, one Superior Court similarly rejected such categorical privacy interests for "unproven accusations." *See* Union Leader Corp./ACLU-NH v. Town of Salem, No. 218-2018-cv-01406, at *8-9 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (ordering disclosure, in part, because "the matters at issue relate to the Deputy Chief's interactions with the public under color of the Town's authority"), located at APPII 480-81; *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"), located at APPII 552-567.

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 seem incomplete or one-sided. For example, criminal complaints, indictments, mugshots, police reports, and law enforcement press releases similarly are often 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. [redacted]

Finally, there also is no privacy interest as to the correspondence between the City and the PSTC concerning Stone's conduct in the City's 1st, 2nd, 3rd, and 4th set of PSTC correspondence, *see* APPI 263-277, as these external communications are not "personnel" related. These communications relate to certification, not human resources matters, as the PSTC did not employ Stone. *See* Reid, 169 N.H. at 522 (noting that the term "personnel" "refers to human resources matters"); *see also* N.H. Ctr. for Pub. Interest Journalism v. N.H. DOJ, 173 N.H. 648, 657 (2020) (expressing doubts about the EES implicating the term "personnel file" because "[t]he EES is maintained by the DOJ, not by a police department's personnel office, and, as the DOJ concedes, the DOJ does not employ officers on the EES"). Consistent with these principles, the PSTC has produced to the public under RSA ch. 91-A "Form Bs" received by police departments like those the Department sent to the PSTC concerning Stone.[13] [redacted] *See* Canner, 169 N.H. at 326.[14]

B. The Public Interest in Disclosure is Compelling.

Here, the public interest in disclosure is compelling. *First*, [redacted] This alone justifies disclosure. *See, e.g.,* Union Leader Corp. v. N.H. Ret. Sys., 162 N.H. 673, 684 (2011) (noting that a public interest existed in disclosure where the "Union Leader

[13] *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.

[14] The PSTC, itself, has declined to remove a Form B from an officer's PSTC file in similar circumstances. *See* APPII 585 (Oct. 26, 2021, PSTC Meeting Minutes, at p. 11).

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 this 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. 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); Burton v. York Cty. Sheriff's Dep't, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004); Tompkins v. Freedom of Info. Comm'n, 46 A.3d 291, 299 (Conn. App. Ct. 2012).

Second, [redacted] disclosure of the requested records will help the public evaluate how the Claremont Police Department managed, investigated, and supervised Stone[redacted] This 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, 175 N.H. at 131. Superior Courts in New Hampshire have agreed. *See, e.g.,* John Does v. City of Manchester, No. 216-2022-CV-00508, at *10 (Hillsborough Cty. Super. Ct., N. Dist., Jan. 26, 2023) (Messer, J.), located at INTERVENOR ADDENDUM 41; 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.), located at APPII 552-567; Salcetti v. City of Keene, No. 213-2017-cv-00210, at *5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.), located at APPII 591-601; State of New

Hampshire v. Marsach, No. 216-2021-cr-00046, at *5-9 (Hillsborough Cty. North Super. Ct., Feb. 25, 2022) (Delker, J.)), located at APPII 602-624.

Third, the public has a right to know the efforts Stone and the City employed [redacted] Here, following his negotiated resignation, Stone continued his career in law enforcement and began work with the Vermont Department of Correction.[16] We know of at least one similar agreement in 2021 concerning a Merrimack Police Department officer. *See* APPII 625-632 (Jan. 2021 Merrimack Police Department Separation Agreement and Release, with relevant provisions highlighted).[17] And we know of at least two incidents of terminated New

[15] Regardless of the outcome of this case, the 2007 Stipulated Award should be immediately released under RSA 91-A:4, VI, especially where the City [redacted] Stone has filed the Award under seal in this case.

[16] Stone does not currently work for the Vermont Department of Corrections.

[17] *See also* APPII 633-639 (Sept. 2020 Hancock Agreement, stating that, with certain exceptions, the terms of the officer's departure "are otherwise confidential").

Hampshire officers being rehired elsewhere.[18] This problem of "wandering officers" fired from one department, and then being rehired at another, has garnered national attention.[19] [redacted]

Fourth, Stone's suggestion [redacted] is legally incorrect because the age of the requested records is not an exemption under RSA ch. 91-A. Simply because time has elapsed does not change (i) the nature of the conduct, (ii) the fact that it was committed on duty while the City was paying Stone, and (iii) the fact that it will reveal valuable information about both Stone and the Department. [redacted]

[18] *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; 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/.

[19] *See* Ben Grunwald & John Rappaport, The Wandering Officer, 129 YALE L.J. 1676, 1680 (2020); 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/.

[redacted] This reality is reflected in the City's 4th set of PSTC records, where the PSTC acknowledges in a June 4, 2007 letter that, because "a negotiated resignation … does not fall under the purview of the Council pursuant to Pol 402.02(a)(5) … we are, therefore, not able to pursue a decertification action on this matter." *See* APPI 277. [redacted] The PSTC's June 4, 2007 letter further states that, following this negotiated resignation, "the internal investigation reports may contain relevant information for [the PSTC] to consider under Pol. 301.05 *in the event that Mr. Stone seeks employment with another law enforcement agency*." *See* APPI 277 (emphasis added). However, N.H. Code Admin. R. Pol 301.05's current background investigation requirements apply to a "hiring authority" of a New Hampshire law enforcement agency that is subject to PSTC's jurisdiction. Though unclear, perhaps this is why Stone elected to work in law enforcement in

[20] 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* N.H. Code Admin. R. Pol 402.02(a)(5), *available at* http://www.gencourt.state.nh.us/rules/state_agencies/pol100-800.html.

Vermont after his negotiated resignation. Disclosure will help the public ask and answer these important questions.

C. There is No Governmental Interest in Nondisclosure.

Stone makes no developed argument on appeal that disclosing these records would impede any government interest, including chilling future arbitrations and future negotiations. And even if he did, any allegation of harmful "chill" would be speculative, especially where the City makes no such argument here. *See* Provenza, 175 N.H. at 131; Goode, 148 N.H. at 556.

CONCLUSION

This Court should affirm the Superior Court's October 7, 2022, and January 11, 2023 decisions.

All the records made available to the Superior Court on June 1, 2022—excluding IA Reports #11 and #12 which are not being sought—should be released. Production should include the redactions proposed by the City as to IA Reports #1-10 and 10(A), as well as the redactions to IA Reports #13 and 14 ordered by the Superior Court on January 11, 2023.

REQUEST FOR ORAL ARGUMENT

Intervenors/Appellees request oral argument before the full Court. Attorney Gilles Bissonnette will present for Intervenors/Appellees.

Respectfully Submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE,

By its attorneys,

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Ave. # 12
Concord, NH 03301
Tel. (603) 227-6678
gilles@aclu-nh.org
henry@aclu-nh.org

UNION LEADER CORPORATION,

by its attorney,

/s/ Gregory V. Sullivan
Gregory V. Sullivan, Esq. (N.H. Bar No. 2471)
Malloy & Sullivan, Lawyers Professional Corporation
59 Water Street
Hingham, MA 02043
Tel. (781) 749-4141
g.sullivan@mslpc.net

Dated: September 5, 2023

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 9,469 words (including footnotes) from the "Questions Presented" to the "Request for Oral Argument" sections of the brief.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 5th day of September 2023 through the electronic-filing system on all counsel of record.

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

ADDENDUM

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

John Does

v.

Manchester Police Department

Docket No. 216-2022-CV-00508

ORDER

The plaintiffs have brought this action seeking declaratory and injunctive relief to preclude the disclosure by the Manchester Police Department ("the Department") and the City of Manchester ("the City") of their identities in connection with a Right-to-Know request filed by New Hampshire chapter of the American Civil Liberties Union ("ACLU-NH") and Black Lives Matter-Manchester ("BLM-Manchester"). The ACLU-NH and BLM-Manchester intervened and filed a cross-claim seeking resolution of their Right-to-Know request.[1] The intervenors also moved to dismiss the complaint. By agreement of the parties, the Court held a hearing on both the motion to dismiss and the merits on December 9, 2022. Upon consideration of the pleadings, the parties' arguments, and the applicable law, the Court finds and rules as follows.

[1] Since the filing of plaintiffs' initial complaint, intervenors have narrowed their RSA 91-A request seeking the names of only the two supervisors identified in the Department's reports as having seen the meme at issue in this case. Therefore, references in this order to "the plaintiffs" include only the plaintiff(s) that meet this description where no disclosure is sought with respect to anyone else's name.

Factual Background

On February 10, 2021, at 6:39 and 6:40 p.m., Detective Christian Horn of the Manchester Police Department sent text messages to two group chats containing approximately ten other members of the Department. The texts consisted of a mock Valentine's Day card depicting an image of George Floyd surrounded by hearts and the words "Black Love" and "You take my breath away." In the first group text, approximately three minutes later, another member said, "Haha." No members of either group chat made any written response to Detective Horn's text.

On February 17, 2021, one of the recipients of the text reported the incident to a captain outside of his chain of command, as he believed he would not get any support from his own chain of command because one of his direct supervisors who also received Detective Horn's text had made no response to it. That officer's report ultimately led to a formal internal investigation of the incident, the primary objectives of which were to, among other things, determine whether the meme was characteristic of Detective Horn's behavior; whether the meme was indicative of systemic problems of racial sensitivity within the Department; and why the supervisor recipients of the meme did not make any response to it. (Intervenor Obj. and Mot. to Dism., Ex. C at 4.) During the investigation, the Department conducted interviews with Detective Horn and the recipients of the text.

The officers interviewed universally viewed the meme as offensive and distasteful, but characterized it as a joke made in poor taste. (Id. at 5–12.) None of the officers believed it was racist or indicative of systemic racism, nor did they view Detective Horn to be racist. (Id.) The Department concluded that the text was grossly inappropriate but not racially motivated. (Id. at 14–15.) With regard to the supervisors who received and

viewed the meme, that report noted that "some would say that . . . those supervisors should be held accountable for neglecting their duties to address the inappropriateness of the meme." (Id. at 16.) However, the report noted that the only supervisor on the text thread of which the initially reporting officer[2] was a member did not see the meme. (Id.) Another supervisor who did see the meme spoke privately with the reporting officer and offered to take action, but was told not to do anything while the officer considered what he wanted to do. (Id.) Finally, the supervisor who commented "haha" after the meme claimed that he was responding to a prior joke in the text thread, and the Department appeared to accept this representation. (Id. at 16–17.)

Ultimately, the Department sustained a finding of Conduct Unbecoming an Officer against Detective Horn and recommended formal discipline. Otherwise, the Department determined that all other allegations of misconduct against Detective Horn or the supervisors in the group chats, all of whom had failed to take any action in response to the text, were unfounded. Detective Horn received a ten-day suspension (seven of which were held in abeyance for one year) following the conclusion of the internal investigation, and was ordered to undergo sensitivity training. No action was taken with respect any of the supervisors, including those who were identified as having seen the meme but failed to report it.

On August 7, 2022, the Union Leader wrote an article about the incident due to the fact that Detective Horn was up for a promotion. On August 8, 2022, the ACLU-NH filed a Right-to-Know request, seeking all records relating to the foregoing investigation. The plaintiffs objected to the release of their names in connection with that report, so the

[2] Because the names are redacted, the Court is making certain assumptions as to the identity of individuals referred to in the report based on context.

Department provided the ACLU-NH with redacted copies, blacking out the names of all recipients of Detective Horn's text. The intervenors now seek to uncover the identifies of the supervisors who saw Detective Horn's text and did not respond or take any action.

Analysis

The plaintiffs seek an injunction against the public disclosure of their identities in connection with the release of the Manchester Police Department's internal investigation report. They argue that such a disclosure constitutes an unwarranted invasion of privacy that does not serve a public interest. The intervenors argue that the public has a compelling interest in knowing the identity of the supervisors who received Detective Horn's text and took no action, in order to be able to consider this conduct both now and in conjunction with any future conduct, and be able to hold both the supervisors and the police department accountable in the future.

Part 1, Article 8 of the New Hampshire Constitution states that our 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. The public also has a right to an orderly, lawful, and accountable government." "The purpose of the Right-to-Know Law 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.'" New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003) (quoting RSA 91-A:1). The law "furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire Right to Life v. Director, New Hampshire Charitable Trs. Unit, 169 N.H. 829, 839 (2016). However, "[t]he Right-to-Know

Law does not guarantee the public an unfettered right of access to all governmental workings." Prof'l Firefighters of New Hampshire v. Local Government Center, Inc., 159 N.H. 699, 707 (2010).

The Right-to-Know law exempts several types of documents from the general requirement of disclosure, such as "[r]ecords pertaining to internal personnel practices" and "personnel . . . files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. "Although the statute does not provide for unrestricted access to public records, [the court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Servs., 167 N.H. 583, 587 (2015). "As a result, [the court] broadly construe[s] provisions favoring disclosure and interpret[s] the exemptions restrictively." Id.

As an initial matter, the intervenors challenge the plaintiffs' standing to bring the instant petition. Pursuant to RSA 91-A:7, "[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief." Ordinarily, "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." New Hampshire Right to Life, 169 N.H. at 839. Here, the public entity—the Manchester Police Department—does not seek to avoid disclosure. Instead, it is the individual plaintiffs who seek to prevent the disclosure of their names. The New Hampshire Supreme Court has "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." Provenza v. Town of Canaan, 175 N.H. 121, 125 (2022).

Provenza involved a similar procedural posture to this case. There, the plaintiff was a police officer that filed an action to preclude the disclosure of an internal investigation report involving an accusation he used excessive force. 175 N.H. at 123. The publication seeking the report pursuant to RSA chapter 91-A intervened and argued that the plaintiff lacked standing. Id. The trial court assumed without deciding that the plaintiff had standing and issued an order on the merits of both parties' claims, ultimately finding that the report was subject to disclosure. Id. at 124. In doing so, the trial court imposed the burden of demonstrating that the materials should not be disclosed on the plaintiff. Id. On appeal, the New Hampshire Supreme Court held that because the plaintiff was treated as a party in the claim filed by the publication, he was entitled to appeal the order granting the publication's request for disclosure. Id. at 125. As he was able to raise all of his arguments under the Right-to-Know law in his appeal from the grant of the publication's request, the Supreme Court held that it did not need to decide whether the plaintiff was a "person aggrieved" under RSA 91-A:7. Id.

At the hearing in this case, the intervenors argued that, consistent with Provenza, this Court need not address the matter of standing if it orders the disclosure of the plaintiffs' names. The Court agrees. Because the Court, for the reasons set forth below, finds that the plaintiffs' names are subject to disclosure under the Right-to-Know law, it need not determine whether the plaintiffs have standing to independently challenge the disclosure. Therefore, the Court now turns to the merits of the parties' dispute.

As noted above, the plaintiffs argue that disclosure of their names would constitute an invasion of privacy. "When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, [the Court] engage[s] in a three-

step analysis." Prof'l Firefighters of New Hampshire, 159 N.H. at 707. "First, [the Court] evaluate[s] whether there is a privacy interest at stake that would be invaded by the disclosure." Id. "Second, [the Court] assess[es] the public's interest in disclosure." Id. "Third, [the Court] balance[s] the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." Id. "[W]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations." Id.

Here, the plaintiffs argue that "[i]ntimate details of an officer's life, which if revealed might subject that officer to embarrassment, harassment, disgrace, loss of employment or friends are not nor should they be subject to disclosure." (Doc. 28 at 6.) The intervenors, however, are not seeking intimate details of the supervisors' lives. Cf. Provenza, 175 N.H. 132 (finding report did "not reveal intimate details of [the plaintiff's] life, but rather information relating to his conduct as a government employee while performing his official duties and interacting with a member of the public"). In fact, the intervenors do not seek any details of the supervisors' lives at all. Instead, they merely seek the officers' names in connection with the investigative report. It is undisputed here that the plaintiffs received Detective Horn's text and did nothing about it. The only matter up for consideration is the implication of the supervisors' inaction. This is a central purpose of the Right to Know Law: to allow the public to view the information related to a public employee's actions (or inactions) and to be able to assess it. Here, a supervisor's lack of response to another officer's racist or, as described by the investigators, "grossly inappropriate and racially insensitive" text carries minimal, if any, privacy interest.

"The public has a substantial interest in information about what its government is up to, as well as in knowing whether a government investigation is comprehensive and accurate." Provenza, 175 N.H. at 131. Moreover, "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. (quoting Kroeplin v. Wis. Dep't of Nat. Res., 725 N.W.2d 286, 301 (Wis. Ct. App. 2006)). The plaintiffs concede that the privacy of a police officer, when acting in his or her official capacity, is subject to greater scrutiny than that of a civilian. Nevertheless, the plaintiffs maintain that their privacy interest in this case is heightened because they received Detective Horn's text on their personal devices while off duty, had no obligation to take official action because they were not Detective Horn's direct supervisors, and did not violate any laws or regulations. The Court is unpersuaded.

There is nothing in any of the established law in this area that suggests an officer's conduct must be unlawful or violate some regulation in order to be fit for public disclosure. To the contrary, the New Hampshire Supreme Court has ordered disclosure even where conduct is deemed "not sustained," see id., and recognizes the important interest to the public in knowing a government investigation is comprehensive and accurate, Reid v. New Hampshire Attorney General, 169 N.H. 509, 532 (2016). Moreover, the supervisors' use of personal devices is irrelevant, as the group texts were used to communicate with numerous police officers, both on and off duty at the time. Indeed, Detective Horn sent the texts in question while he was on duty. By blurring the line between personal and work-related communications, the participants in the group texts cannot claim a privacy interest in those communications. Finally, despite receiving the texts while off duty, the

supervisors were still formally investigated by the Department. It is absurd to suggest that a police supervisor may, without repercussion, turn a blind eye to obvious misconduct they personally witnessed because they were off duty at the time or were not the direct supervisor of the bad actor. Even assuming such inaction was not unlawful or in violation of police procedure, the public has a right to be aware of such inaction by officers in supervisory roles, as it directly relates to the overall operation of the police department. See id.

The plaintiffs concede that the public has an interest in knowing and understanding how their local police department operates, but argue that the redacted report satisfies that interest. The Court disagrees. While the report ultimately concluded that Detective Horn's text was not racist but merely "racially insensitive" and "a joke made in poor taste," the public is entitled to disagree with that conclusion. The public is similarly entitled to disagree with the conclusion that the supervisors did nothing wrong when they failed to take official action. While the investigators did not identify Detective Horn's text as racism, they did recognize that "[i]t is understandable how someone could see the sending of this meme by Det. Horn a sign of systemic racial insensitivity, or even outright racism within the Special Enforcement Division and the Manchester Police Department." (Intervenor Obj. and Mot. to Dism., Ex. C, 14.) Indeed, the report indicates that the initially reporting officer interpreted the supervisors' silence "as tacit approval of the meme." (Id. at 15.) That is the point of the transparency required by RSA 91-A: to allow the public to know what their government officials are doing and determine for themselves what they think about it, to weigh in, and to have a voice in their government. By way of example, as the intervenors note, the public would have no way of knowing whether to speak out for or

against a future promotion of one of the supervisors in question if all of their conduct is hidden from scrutiny.

Balancing the public's interest against the individual plaintiffs' privacy interest, the facts of this case strongly favor disclosure of the supervisors' names. At issue is an assessment of how the public perceives the Manchester Police Department as well as the public's opinion of how the police themselves view this incident. The plaintiffs are public servants and have voluntarily submitted to greater public scrutiny; the supervisors even more so. The public has a strong interest in knowing the types of individuals that are in leadership roles within the police force. Whether the supervisors' inaction in response to Detective Horn's text constitutes acceptance or tacit support of racist or "grossly inappropriate and racially insensitive" behavior, or is emblematic of systemic racism within the Manchester Police Department, is a matter fit for public discourse. As the New Hampshire Supreme Court very recently reiterated, "[r]acial bias implicates unique historical, constitutional, and institutional concerns and is a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." Mallard v. Warden, No. 2021-0357 at 8 (N.H. Sup. Ct. Jan. 4, 2023) (quoting Pena-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017)). The plaintiffs are not entitled to unilaterally prevent the public from being able to reach its own conclusion on the matter.

Based on the foregoing, the intervenors' cross-claim is GRANTED, the plaintiffs' motion for declaratory and injunctive relief is DENIED, and the motion to dismiss is deemed moot in light of the Court's order on the merits.[3]

[3] The Court notes that Intervenors' cross claim seeks attorneys' fees against both the plaintiffs and defendants in this matter. Intervenors have not, however, briefed the issue in their pleadings or sought this relief in any prayers for relief other than the initial cross claim petition. The Court therefore declines to

SO ORDERED.

January 26, 2023
Date

Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/26/2023

address the issue of fees in this order. If fees are sought, intervenors shall file a pleading and brief the issue within 20 days of the Notice of Decision on this Order.