THE STATE OF NEW HAMPSHIRE
SUPREME COURT

SAMUEL PROVENZA

v.

TOWN OF CANAAN

Docket No. 2020-0563

Rule 7 Mandatory Appeal From Grafton County Superior Court
Docket No. 215-2020-CV-00155

REDACTED BRIEF FOR THE VALLEY NEWS

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15 Minute Oral Argument Requested

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QUESTION PRESENTED

In this Right-to-Know dispute over whether the Town of Canaan must produce a report commissioned to investigate allegations that then-Officer Provenza improperly pulled a motorist out of her car by her hair and seriously injured her knee, the trial court issued a thorough and well-reasoned order examining the minimal privacy interests of Provenza and the significant public interest in disclosure. Following this analysis, the trial court determined that the report did not constitute a "personnel" or "other file[] whose disclosure would constitute [an] invasion of privacy" under RSA 91-A:5, IV because the public interest in disclosure outweighed any privacy interests in nondisclosure. Accordingly, the trial court ordered the public disclosure of the report. Did the trial court err in reaching this conclusion?

STATEMENT OF FACTS

Beginning on March 4, 2018, the Valley News, a daily newspaper of general circulation in New Hampshire's Upper Valley, began reporting on a case of alleged excessive force by then-Canaan Police Officer Samuel Provenza. PA.130.[1] According to the paper's reporting, the police were notified on November 30, 2017 that a suspicious vehicle was following a school bus around town. PA 131. Eastman had heard that her eleven year old's school bus driver had a "lead foot" and wanted to follow the bus to see for herself. Provenza responded and pulled over the driver, Crystal Eastman. Provenza asked Eastman for her license and registration. Eastman believed that Provenza already knew who she was and balked at handing over her documents. PA 132. As Eastman's attorney would later write in

[1] References to the record are as follows.
"PA __" refers to Provenza's Appendix.
"VA __" refers to the Appendix to this brief.

court papers, this "created an unexpected standoff." *Id*. Provenza then stuck his head inside Eastman's automobile and, according to Eastman's attorney, his head "was so far into Crystal's automobile that Officer Provenza could have kissed Crystal's lips if he were so inclined." *Id*. Eastman then retrieved her license from her wallet. *Id*. Eastman either pulled her license back from Provenza before he could take it, or Eastman fumbled and unintentionally dropped her license. *Id*.

Provenza then ordered Eastman out of the car, but instead of complying Eastman reached for her cellphone because she was afraid of Provenza's behavior. *Id.* Provenza told Eastman she was under arrest, and opened the driver's door to physically remove Eastman. *Id*. Eastman closed the door on Provenza's hand, but according to the Canaan Police Chief, Provenza was uninjured. PA 132-33. Provenza then pulled Eastman, who is 5 feet 2 inches tall and weighs 115 pounds, out of her car. PA 132. Eastman's attorney said that Provenza pulled her out of the car by her hair, which was in a ponytail, kneed Eastman in the left leg, and then tossed her around. *Id*. She suffered a serious leg injury because of the encounter, which required surgery and extensive physical therapy. PA 134. The encounter required Eastman, a heavy equipment operator with the Department of Transportation, to take time away from her job. *Id*.

Canaan police cruisers were equipped with cameras at the time, but this incident was not recorded on a dashboard camera. The Canaan Town Administrator told the Valley News, "We have video cameras in the cruisers, but on occasion they don't work. It's not an intentional thing." PA 133.

Because of the encounter, Eastman was charged with resisting arrest and disobeying a police officer. PA 134. After a bench trial, the 2nd Circuit—District Division—Lebanon Court found Eastman guilty of disobeying a police officer and not guilty of resisting arrest. PA 152. This

Court affirmed Eastman's conviction on appeal. PA 406-411. Sometime thereafter, the Town of Canaan commissioned a Municipal Resources, Inc. ("MRI") to review the circumstances surrounding Provenza's encounter with Eastman. PA 147. The Town paid at least $6,443 to MRI of taxpayer money for the report. *Id.*

On February 4, 2019 the Valley News, through its columnist Jim Kenyon, requested from the town "all government records . . . pertaining to the report conducted by Mark Myrdek/Municipal Resources, Inc. concerning the Canaan Police Department" pursuant to RSA ch. 91-A. PA 87-88. The request specifically asked for the Report itself, and also for information related to the cost of the report. *Id*. On February 8, 2019, citing "the internal personnel practices" in RSA ch. 91-A and *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), the Town denied the request for the MRI report but did produce bills and payments between the Town and MRI. PA. 90-92.

This Court subsequently overturned *Fenniman*'s categorical exemption for public employee personnel, misconduct, and disciplinary information and, instead, effectively required a public interest balancing test in determining whether such information is exempt from disclosure—a test similarly employed under Exemption 6 of the FOIA and by many other state courts. *See Union Leader Corp. v. Salem*, 173 N.H. 345 (2020); *Seacoast Newspapers, Inc. v. Portsmouth*, 173 N.H. 325 (2020). Following those decisions, on June 9, 2020, the Valley News renewed its RSA ch. 91-A request. PA. 96-97. In response, the Town wrote that it "felt it necessary and proper to make the former Canaan police officer, which is the subject of the report, aware of this Right-to-Know Law request in order to see if he had any objection to same based upon his perceived privacy rights." PA 99.

In all, the Valley News has published nine articles on the encounter between Eastman and Provenza and its efforts through this case to determine what happened. PA 127-155; VA 3-37.

STATEMENT OF THE CASE

On July 2, 2020, Provenza filed a "Verified Petition for Declaratory Judgment, Request for Temporary and Permanent Injunctive and Other Relief" against the Town in Grafton Superior Court, which sought to block release of the MRI Report. PA 4-12. On July 14, 2020, the Valley News moved to intervene. PA 13-21. On August 10, 2020, the trial court granted the Valley News' motion to intervene. *Order On Plaintiff's Petition For Declaratory Judgment and For Preliminary and Permanent Injunctions on Intervenor's Crossclaim* ("*Order*"), p. 1.

On August 14, 2020, the Valley News filed a Complaint-in-Intervention against the Town seeking a copy of the MRI Report. PA 32-54. That filing was subsequently re-docketed by the clerk as a cross-claim pursuant to Superior Court Rule 10. *Order*, p.2, n. 1. That same day, the Valley News filed an Objection to Provenza's motion for a preliminary injunction, along with exhibits and an affidavit of Valley New Columnist Jim Kenyon. PA. 55-155. The Valley News' Objection raised two primary arguments. *First*, the Valley News argued that Provenza could not demonstrate a likelihood of success on the merits because he was not "aggrieved by a violation" of RSA ch. 91-A and therefore did not have a statutory right to bring a lawsuit under RSA ch. 91-A. *See* RSA 91-A:7. The Valley News further contended that Provenza's lawsuit was inappropriate because RSA 91-A:5, IV does not prevent the Town from voluntarily disclosing any records, even if they are exempt. *Second*, the Valley News argued that, under the public-interest balancing test, the MRI Report was not exempt from disclosure under the statute. On August 17, 2020, the Town filed an Answer to Provenza's Complaint. PA 156-161.

The Parties agreed on a Stipulation and Protective Order so that counsel and the trial court could review the MRI Report along with some minor redactions to the report proposed by the Town. PA 162-166.

The trial court held oral argument on September 15, 2020. *Order*, p. 2. At the argument, the Parties agreed that the trial court could issue a final adjudication on the merits, subject to a stay pending appeal. *Id*.

On November 5, 2020, the trial court issued a thorough, well-reasoned decision on the merits. *Id.*, p. 1-21. The trial court determined that "it need not address the merits of [the Valley News's first, statutory] argument in order to rule on the merits of the parties' dispute and the relief each requests." *Id*., p. 10. The trial court assumed, without deciding, that Provenza is a "person aggrieved" within the meaning of RSA 91-A:7, and ruled that he had standing to maintain his challenge. *Id*.

The trial court—in determining whether the Report constituted a "personnel" or "other file[] whose disclosure would constitute [an] invasion of privacy" under RSA 91-A:5, IV—next analyzed the three part balancing test identified in *Union Leader Corp. v. Salem* and *Lambert v. Belknap Cty. Convention*, 157 N.H. 375 (2008). *Id.*, pp. 11-12. The trial court (i) determined that "Provenza's privacy interests in disclosure, if any, are minimal," (ii) observed that "the public has a significant interest in knowing how the police investigate" complaints against officers, and (iii) noted that the legislature has provided weight on the scales for the balancing test in favor of disclosure. *Id.*, pp. 15; 18-19. The trial court *denied* Provenza's petition for declaratory judgment and injunctive relief and *granted* the Valley News' cross-claim.

The parties agreed to a stay in production of the MRI report pending appeal. VA 293-294. This appeal followed.

SUMMARY OF ARGUMENT

The Valley News has been reporting on a case of local interest in the Upper Valley stemming from a roadside encounter between Crystal Eastman and then-Officer Samuel Provenza. Eastman alleged that Provenza pulled her out of her car, and she suffered a serious leg injury in an ensuing scuffle. The Town of Canaan hired a firm to investigate the allegations and produce a report. The Valley News has asked for the Report and has agreed to limited redactions implicating medical information, license plate numbers, and the names of minors. *Order*, p. 21, n. 9. Provenza, however, has objected to disclosure of the Report in its entirety.

First, as a threshold matter—and as an independent basis for affirmance—Provenza's lawsuit is inappropriate and should be dismissed because he is not "aggrieved by a violation" of RSA ch. 91-A. Furthermore, even if the Report is exempt from disclosure under RSA 91-A:5, IV (and it is not), this statute does not create a statutory privilege that Provenza can use to require the Town to withhold this Report from the public.

Second, even if Provenza's lawsuit is appropriate (which it is not), whether the Report is exempt under RSA 91-A:5's "invasion of privacy" exemption—following this Court's decisions in in *Union Leader Corp. v. Salem* and *Seacoast Newspapers, Inc. v. Portsmouth*—is now analyzed under a three step public-interest balancing. Under this test, courts examine any interest in privacy and the interests in public disclosure, and then weigh the interests with a thumb on the scale in favor of disclosure. The trial court issued a thorough order correctly finding (i) that Provenza had a minimal privacy interest in the Report that implicated acts he took while on duty as a serving police officer, and (ii) that the public had a significant interest in knowing whether the Canaan Police Department was capable of fairly and comprehensively investigating its own officers. As a result, the trial court

ruled that the public interest outweighed any privacy interests, and ordered the Report released. As discussed in Section II below, this Court should affirm the trial court's analysis.

Third, Provenza raises a series of sundry arguments, including suggesting—based on an amalgam of cases and statutes in other contexts—that documents related to an unsubstantiated allegation of police misconduct should *never* be subject to inspection under the Right to Know Law. As discussed in Section III of this brief, these arguments are easily rejected.

ARGUMENT

This dispute is, to the Valley News's knowledge, the first case to reach this Court concerning the public interest balancing test as applied to police records since this Court's decisions in *Union Leader Corp. v. Salem*, and *Seacoast Newspapers, Inc. v. Portsmouth*. Though this Court need not even reach this balancing analysis under RSA 91-A:5, IV's "invasion of privacy" exemption because Provenza's Complaint should be summarily dismissed as inappropriate, the balancing test in this case mandates public disclosure.

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

A threshold question is whether the Right-to-Know Law allows Provenza's "reverse RSA ch. 91-A" action where he—as a private party—has filed a lawsuit seeking to raise exemptions in an effort to prevent a government agency from producing records to the public.

Here, Provenza'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—like all Right-to-Know exemptions—does not create a statutory privilege that can be invoked by Provenza to compel the Town 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."). RSA 91-A:5, IV does not prevent the Town from voluntarily disclosing any records, even if they are exempt.[2] 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.[3] As the United States Supreme Court has similarly

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[2] Indeed, the Town is required to take a position on whether the Report is exempt from disclosure, as the Town is the "gatekeeper" of this information as the "public agency" in possession of the records under RSA 91-A:1-a, V. It is inappropriate for a public agency to "punt" on deciding whether information is exempt from disclosure and, instead, delegate that decision to a private person or a court (which requires a requester to incur expenses in going to court). The need for a public agency to make a formal decision on whether information is exempt is especially critical because, if a public agency decides that information is <u>not</u> exempt even where a private party disagrees, the decision of the public agency is entitled to deference. *See McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 215 F. Supp. 2d 200, 204 (D.D.C. 2002), *rev'd in part on other grounds*, 375 F.3d 1182 (D.C. Cir. 2004).

[3] 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

explained in the FOIA context, "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"); *Seacoast Newspapers*, 173 N.H. at 338 ("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").

II. Assuming that Provenza Can Bring This Action (Which He Cannot), The Trial Court Correctly Determined That Public-Interest Balancing Requires Disclosure

New Hampshire's Right-to-Know Law is designed to create transparency with respect to how the government interacts with its citizens. Consistent with this principle, 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 v. N.H. Office of the Legislative Budget*

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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").

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). Here, Provenza effectively brings a "reverse RSA ch. 91-A" action asking a court to issue an order preventing a public agency from releasing information to the Valley News. Accordingly, the "heavy burden" falls on him to demonstrate that RSA 91-A:5, IV's "invasion of privacy" exemption applies.

Last year, this Court considered the *per se* exemption from the Right-to-Know Law for "internal personnel practices" announced in *Union Leader Corp. v. Fenniman*, and determined that because the *per se* rule is "inconsistent with our historical and current interpretation of the exemption under RSA 91-A:5, IV for 'confidential, commercial, or financial information,'" it is "no more than a remnant of abandoned doctrine." *Salem*, 173 N.H. at 356. On the same day, this Court narrowed the set of documents covered by the "internal personnel practices" exemption to include "only a narrow set of governmental records, namely those pertaining to an agency's internal rules and practices governing operations and employee relations." *Seacoast Newspapers,* 173 N.H. at 329. As a result of these cases, documents investigating allegations of official misconduct are now analyzed as either "personnel" or "other files" triggering this public interest balancing framework. *See Reid v. N.H. Att'y Gen.*, 169 N.H. 509, 528 (2016) ("[P]ersonnel files are not automatically exempt from disclosure," and explaining that the such files are subject to the *Lambert* public interest balancing analysis) (ellipsis and quotations omitted).

Courts engage in a three-step analysis to conduct the public interest balancing and determine whether records are exempt from public disclosure

under RSA 91-A:5, IV. *See Lambert*, 157 N.H. at 382. "First, [courts] evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. . . Second, [courts] assess the public's interest in disclosure . . . Finally, [courts] balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." *Id.* at 383.

A. Provenza Has No Privacy Interest In The Report

In examining the individual privacy interest, "[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.* at 382-83.

In this case, as the trial court recognized, "information concerning purely private details about a person who happens to work for the government is very different from facts, such as those detailed in the Report, concerning that individual's conduct in his or her official capacity as a government employee." *Order*, p. 15. The trial court also held, "assuming there is a relevant privacy interest at stake, that interest is minimal because the Report does not reveal intimate details of Officer Provenza's life, but rather information relating to Officer Provenza's conduct as a government employee while performing his official duties and interacting with a member of the public." *Id.* (cleaned up). The trial court was correct.

Police officers have no privacy interest when their actions implicate their official duties. Indeed, in examining the invasion of privacy exemption under RSA 91-A:5, IV, this 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. v. N.H. Retirement Sys.*, 162 N.H. 673, 684 (2011) (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. v. Local Gov't Ctr.*, 159 N.H. 699, 709-10 (2010) (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); *Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972) (government must disclose the names and salaries of each public schoolteacher employed by the district).

This analysis does not change in the context of unfounded or unsustained internal affairs reports. This is because these records directly concern the performance of a police officer and do not implicate private or personal facts. The information sought in this case does not constitute "intimate details … the disclosure of which might harm the individual," *see Mans*, 112 N.H. at 164, or the "kinds of facts [that] are regarded <u>*as personal*</u> 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). The Valley News is not seeking, for example, medical or psychological records in an officer's personnel file. Instead, the Valley News is seeking information in the Report related to the performance of officers' official duties.

For these reasons, as multiple cases outside New Hampshire have held, any privacy interest here is minimal, if not nonexistent. *See Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 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"); *City of 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"); *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"). This conclusion is consistent with the principle that, when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. *See, 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."); *Kroeplin v. Wis. Dep't of Nat. Res.*, 725 N.W.2d 286, 301 (Wis. Ct. App. 2006) ("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."); *see also 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.").

Finally, it should go without saying that information concerning a government official's performance of his or official duties cannot be shielded from public scrutiny because exposure may cause "embarrassment" to that official. 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. Adopting Provenza's view would enable government entities to keep investigations into misconduct from ever seeing the light of day. And there is especially a minimal privacy interest in the form of embarrassment or reputational harm where an investigation determines that allegations are unsubstantiated. As with acquittals in criminal cases that are made public, "unfounded" determinations mitigate any perceived reputational harm while also informing the public as to how a government entity has behaved.

B. The Public Has A Significant Interest In Disclosure

The public interest in disclosure is compelling, especially where the Report directly concerns an officer acting in his official capacity and where the Report concerns potential misconduct. *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Prof'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).

Numerous cases outside of New Hampshire have similarly highlighted the public interest in disclosure when the official acts of the police are implicated. *See, e.g., Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) ("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."); *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"); *City of Baton Rouge/Parish of East Baton*, 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"); *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 v. Freedom of Info. Comm'n*, 46 A.3d 291, 299 (Conn. App. Ct. 2012) (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 here 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.

While seemingly conceding that "founded" police misconduct where discipline is issued should be publicly released, *see Provenza's Brief*, p. 19-20, Provenza argues that the public interest is minimal here because the Report reaches an "unfounded" conclusion. However, this Court has made

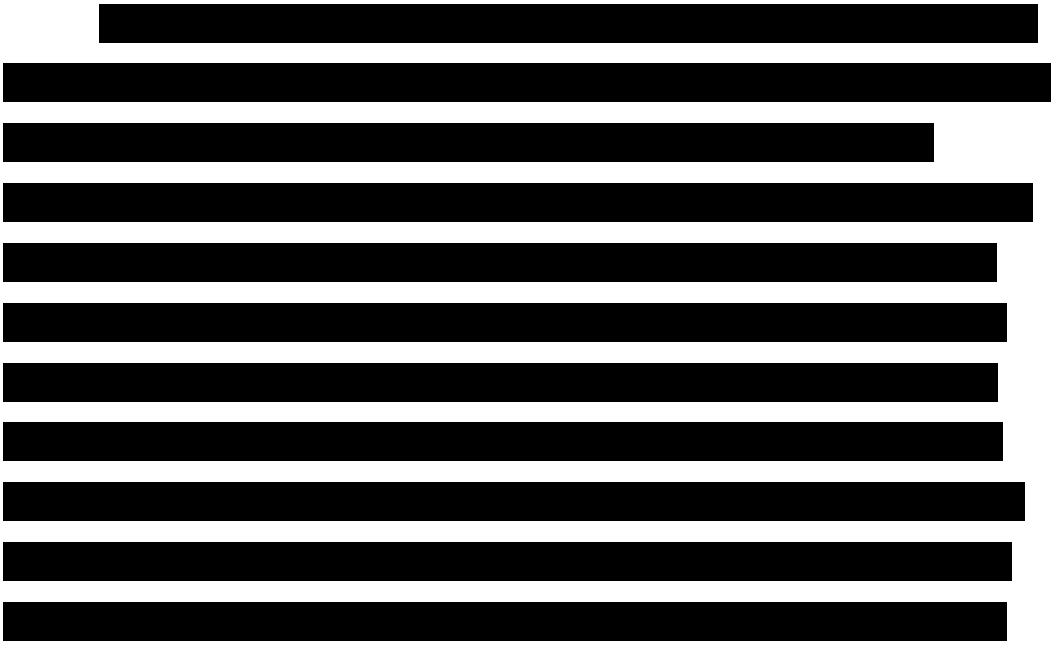
clear that, regardless of outcome, "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." *Reid*, 169 N.H. at 532 (offering guidance on remand to trial court on public interest balancing of allegations of misconduct by sitting county attorney). Here, following *Reid*, the trial court observed that:

> the public has a significant interest in knowing how the police investigate … complaints [such as this] for a number of reasons. First, the public has the right to know that the police take their complaints seriously and that the investigation was comprehensive and accurate. Second, the public similarly has the right to know whether the police officer in question was given a fair investigation aligned with traditional notions of due process. Third, as is evidenced by the national conversation concerning policing in the United States, transparency at all levels of police conduct investigations is fundamentally important to ensure the public's trust and confidence in local police departments.

Order, p. 18 (citations and quotations omitted). The trial court's reasoning is correct. Otherwise, the public will have no ability to evaluate the integrity of any internal investigation and whether the conclusions reached are well founded. Indeed, producing the Report would enable the public to know not just the contours of Provenza's conduct, but also the policies and procedures governing internal affairs investigations and whether they were appropriately followed. In this moment of conversation about police accountability nationally and here in New Hampshire, *see* Executive Order 2020-11 (order 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, it is imperative that the public be able to know whether law

enforcement agencies can be trusted to hold themselves accountable, or if a different system is necessary.

Courts elsewhere have agreed with *Reid* and recognized how important it is for the public to be able to evaluate whether a government investigation is comprehensive and accurate. *See, e.g.*, *Rutland Herald*, 84 at 825-26 (stating that "there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct"); *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 698 A.2d 803, 808 (Conn. 1997) ("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."); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070 (1991) ("[T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about the happenings in the criminal justice system, and, if sufficiently informed about those happening, might wish to make changes in the system.").



[redacted][5]

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[4] [redacted]

[5] Provenza quotes the transcript of the hearing for the proposition that counsel for the Valley News was "satisfied this was a competent investigation." *Provenza's Brief*, p. 35. Undersigned counsel has listened to the recording of the hearing, which was done by Webex and is of a low audio quality. To counsel's recollection, he was speaking rhetorically that some citizens of the Town might read the Report and be so satisfied while some might wonder why the Town spent $6,000 on the Report. *See Transcript*, p. 26, l. 8-14.

C. There is no Governmental Interest in Nondisclosure

There is no governmental interest in nondisclosure in this case, especially where there is no evidence that the Report implicates a complaint of a private citizen "who may wish to remain anonymous." *See Provenza's Brief*, p. 37. Here, Provenza suggests—without significant development—that disclosure would chill police investigations. *Id.* At the outset, the New Hampshire Supreme Court has previously rejected such speculative and conclusory suggestions made without evidence. *See 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 Provenza "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 out of a fear that the public will be evaluating their work, then those officers should not be public servants.

Transparency concerning internal investigation files will help—not harm—the integrity of internal investigations. Secrecy creates an

environment where police departments are not incentivized to engage in robust investigations because the public is not looking over their shoulder. There is real reason to believe that police internal affairs investigations are often not always robust when conducted in private given the inherent conflicts of interest that often exist. Just recently, an internal audit of the Salem Police Department revealed serious deficiencies in how that Department handled internal affairs investigations, including dismissing or discouraging citizen complaints, as well as not fully investigating complaints if they were submitted more than six (6) months after the incident.[6] This internal audit also revealed that, back in 2012, a Salem Police Sergeant who was off duty conducted a "prank" where he went on a high-speed chase in which he evaded other members of his police department. Where a private citizen would have been arrested for such conduct, the Salem Police Department, under a veil of secrecy, swept this incident under the rug until this subsequent audit report publicly exposed this incident six years later.[7] These are only the incidents we know about because police departments still regularly keep this information secret.

D. The Significant Public Interest In Disclosure Outweighs Any Privacy Interests

As the trial court appropriately noted, when balancing the public and private interests, "the legislature has provided the weight to be given one

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[6] *See* Ryan Lessard, "Report Blasts Salem Police for Handling Officer Complaints, Internal Investigations," *Union Leader* (Nov. 23, 2018), https://www.unionleader.com/news/politics/local/report-blasts-salem-police-for-handling-of-officer-complaints-internal-investigations/article_a7b3323c-d6a1-5380-9b46-1f1114c5250e.html.

[7] *See* Mark Hayward, "Police 'Prank': Salem Sergeant Keeps His Certification," *Union Leader* (Dec. 1, 2020), https://www.unionleader.com/news/crime/police-prank-salem-sergeant-keeps-his-certification/article_4b6c5a4b-ccc2-5011-bb00-f2405c54b752.html.

side of the balance by declaring the purpose of the Right-to-Know Law in the statute itself." *Reid*, 169 N.H. at 532 (citation and quotation omitted). Put another way, even if the evidence were to stand in equipoise—and it does not here—a thumb is placed on the scale in favor 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 performing this balancing test, Provenza cannot meet the "heavy burden" required to resist disclosure, as the privacy interest is minimal. Conversely, the substantial public interest in disclosure is the public's right to learn the full nature of the MRI Report's findings and conclusions—a report that cost Canaan taxpayers thousands of dollars. Keeping this Report secret damages public confidence. *See Rutland Herald*, 84 A.3d at 826 ("redacting the employees' names would cast suspicion over the whole department and minimize the hard work and dedication shown by the vast majority of the police department"). As the trial court correctly wrote (quoting another recent Superior Court order), "bad things happen in the dark when the ultimate watchdogs of accountability—i.e., the voters and taxpayers—are viewed as alien rather than integral to the process of policing the police. Democracies die behind closed doors, and through laws, such as the Right-to-Know Law, the people are better able to hold government officials accountable." *Order*, p. 20 (cleaned up).

III. Provenza's Other Arguments Are Easily Rejected

In his brief, Provenza urges upon the Court a number of arguments that this Court should swiftly reject. The Valley News responds to each in turn.

A. The Court Should Decline Provenza's Invitation To Establish A Bright-Line Rule

Provenza argues that this Court should establish a bright-line rule that any report detailing unsustained or unfounded allegations of

misconduct should <u>never</u> be released to the public. *See Provenza's Brief*, p. 26. This argument should be rejected for several reasons.

First, Provenza's argument ignores the fact that, in *Union Leader Corp. v. Salem*, this Court abandoned a similar bright-line test and, instead, opted for a public interest balancing approach more consistent with the text of RSA ch. 91-A that evaluated the unique facts of each case. *Id.* at 353. There is similarly no reason to depart in this case from the general rule that the "invasion of privacy" exemption under RSA 91-A:5, IV is evaluated under the public interest balancing test specifically for files related to unsubstantiated or unfounded police misconduct. Nor is there anything in the text of RSA ch. 91-A to suggest that the legislature intended that unproven allegations of misconduct are categorically exempt from disclosure. Despite Provenza's claim that "the weighing test is unworkable" because it is "subject to the vagaries of human experience," *see Provenza's Brief*, p. 26, this argument is one best left to the legislature that has, to date, rejected such *per se* rules as interpreted by this Court in the *Seacoast Newspapers/Salem* decisions. Moreover, there is no indication that, in the year since *Fenniman* was overruled, trial courts have been unable to conduct the same public interest balancing test that has been used in other contexts for years. The trial court's thoughtful decision in this case proves that Superior Courts are capable of thoughtfully applying this test.

Second, to the extent Provenza argues that there is <u>never</u> a significant public interest in documents related to unfounded complaints of police misconduct, Provenza ignores—as explained in greater detail in Section I.B—the very real public interest in observing governmental investigations of governmental actions to ensure that they are complete, trustworthy, and a good use public funds. *See Reid*, 169 N.H. at 532. Were the Court to adopt the bright-line rule proposed by Provenza, a slapdash

investigation into alleged police misconduct that deemed a complaint unfounded might never see the light of day, even if a more thorough or even-handed investigation would have uncovered sufficient evidence to substantiate the allegations.

Third, the legal underpinnings of Provenza's request for secrecy are easily dismissed. *See Provenza's Brief*, p. 27. For example, RSA 516:36 does not create a privacy interest that would make the Report exempt from disclosure because this statute, as the trial court correctly observed, is limited to questions of admissibility, not disclosure. *See In re N.H. Div. of State Police*, No. 2020-0005, 2021 N.H. LEXIS 43, at *17 (N.H. Sup. Ct. Mar. 26, 2021) (declining to address whether "RSA 516:36, II prohibits the discovery of documents as well as their admission into evidence"); *Order*, p. 14 ("RSA 516:36 is also inapplicable because it governs the admissibility and not the discovery of internal police investigation documents and, thus, has no bearing on the Right-to-Know analysis."); *Carney v. Town of Weare*, No. 15-cv-291-LM, 2016 U.S. Dist. LEXIS 8809 (D.N.H. Jan. 26, 2016) ("RSA 516:36, II is an *evidentiary rule* concerning the *admissibility* of certain 'records, reports, letters, memoranda, and other documents.'") (emphasis added); *Moses v. Mele*, No. 10-cv-253-PB, 2011 U.S. Dist. LEXIS 59590, at *16 (D.N.H. June 1, 2011) ("RSA § 516:36, II, does not, by its terms, bar disclosure of police internal investigation files in discovery. The statute states, instead, that police records of internal investigations shall not be 'admissible in any civil action' in a court."); *Provenza's Brief*, p. 29 (noting that Provenza "appreciates that admissibility and disclosure may be different"). Information, of course, can be *both* inadmissible in court under RSA 516:36 *and* public under the Right-to-Know Law.

Provenza's claim that "RSA 105:13-b operates as an exemption to the Right to Know Law"—an issue recently left open by this Court—is also

incorrect. *See Provenza's Brief*, p. 20, 28; *N.H. Ctr. for Public Interest Journalism v. N.H. D.O.J.*, 173 N.H. 648, 656 (2020) ("For the purposes of this appeal, we assume *without deciding* that RSA 105:13-b … applies outside of the context of a specific criminal case in which a police officer is testifying.") (emphasis added). Here, the trial court correctly determined that Provenza's reliance on RSA 105:13-b is "misplaced" because the statute "only applies to situations in which a police officer is serving as a witness in any criminal case." *Order*, p. 13 (cleaned up). Indeed, the text of the statute expressly limits its application to situations where "a police officer ... is serving as a witness in any criminal case." *See* RSA 105:13-b, I. This Court seemingly reached this conclusion in *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015), explaining:

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

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

Following *Duchesne*, four other Superior Court judges—Judges Bornstein Temple, MacLeod, Tucker, and Kissinger—have held that RSA 105:13-b *only* applies in the context of a criminal case. *See, e.g.*, *N.H. Ctr. For Public Interest Journalism, et al v. N.H. Dep't of Justice*, 2018-cv-

00537, at *3, VA 38-49, (Hillsborough Cty. Super. Ct., S. Dist., Apr. 23, 2019) (Temple, J.) ("By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file 'of a police officer who is serving as a witness in any criminal case.'"), *affirmed in part, and vacated and remanded on other grounds in* 173 N.H. 648, 656 (2020); *Officer A.B. v. Grafton County Att'y*, No. 215-2018-cv-00437, at *3-4, ¶¶ 12-15, VA 50-62 (Grafton Cty. Super. Ct. Oct. 12, 2019) (MacLeod, J.) (granting DOJ's motion to dismiss where the DOJ argued that "RSA 105:13-b, by its plain language, applies only to situations in which 'a police officer … is serving as a witness in any criminal case"); *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-250, at *4, VA 63-67, (Merrimack Cty. Super. Ct. Oct. 20, 2020) (Tucker, J.) (officer's reliance of RSA 105:13-b "inapt … as it pertains to whether information in an officer's personnel file qualifies as exculpatory or impeachment evidence *in the context of a specific prosecution*.") (emphasis added) (currently on appeal at Case No. 2020-0501); *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-176, at *7 VA 68-81, (Merrimack Cty. Super. Ct. Aug. 27, 2020) (Kissinger, J.) (holding that "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case'") (currently on appeal at Case No. 2020-447); *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00216, at *8, VA 82-96, (Merrimack Cty. Super. Ct., Aug. 27, 2020) (Kissinger, J.) (same) (currently on appeal at Case No. 2020-448). In sum, as court after court has held, nothing in RSA 105:13-b suggests that this statute applies outside the context of a criminal case or otherwise acts as an exemption under the Right-to-Know Law.

Provenza's interpretation of RSA 105:13-b is also concerning because, if adopted by this Court, it would give the police special, categorical protections for their personnel file information—even if the misconduct is sustained—that are not afforded to other public employees

under RSA ch. 91-A. As this Court has held, the personnel files of public employees (including the files of the police) are subject to a public interest balancing test under RSA ch. 91-A and are not categorically exempt from disclosure. *See Seacoast Newspapers*, 173 N.H. at 341; *Salem*, 173 N.H. at 357. Provenza's position on RSA 105:13-b, if embraced, would effectively carve out police personnel records—and only police personnel records—from the scope of these recent decisions.

Pivero v. Largy, 143 N.H. 187 (1998), also does not demonstrate that there must be a bright-line rule against disclosing unfounded reports. *Pivero* concerned a statute not at issue here, which governed the rights of employees to have access to their own personnel files. Moreover, to the extent that *Pivero* held that "public policy requires that internal investigation files remain confidential," *id.* at 191, it based that holding in part on *Fenniman*, 136 N.H. at 626. As discussed above, *Fenniman* has been overturned by the *Salem*/*Seacoast Newspapers* decisions.

B. Eastman's Discovery Requests Do Not Impact This Case

To the extent Provenza argues that the pending litigation between him and Eastman (now known as Wright) and her husband, *see Provenza's Brief*, p. 29, 33, impacts this case, that suggestion should be rejected. Provenza did not raise this argument in his complaint, so it is not preserved. *See State v. Mouser*, 168 NH. 19, 26 (2015). This argument also fails because it is the Wrights who are engaged in federal litigation with Provenza, <u>not</u> the Valley News. Of course, police misconduct often turns into federal civil rights litigation, and the Valley News (and the public) cannot have their right of public access to documents removed simply because a third party has filed a lawsuit.

C. State Police Personnel Rules Are Irrelevant

Provenza also seems to argue that, because he is currently a State Trooper, he has a heightened right of privacy per N.H. Admin. Rules Per.

1501.04, which only applies to State employees. *See Provenza's Brief*, p. 27. In this case, however, the alleged misconduct occurred while he was a Canaan Police Officer, and the Report itself is in the hands of the Town of Canaan—not the State Police. Furthermore, it would be unworkable if all police departments were required to maintain rosters of all their former employees and respond to Right-to-Know requests differently when the subject of the documents in question subsequently worked for the State.[8]

D. Gantert And Duschesne Do Not Require The Report Be Withheld

Provenza's reliance on *Gantert v. City of Rochester*, 168 N.H. 640 (2016) and *Duchesne v. Hillsborough Cty. Atty.*, is also misplaced. *See Provenza's Brief*, p. 27. These cases say nothing about public disclosure under the Right-to-Know Law. Instead, these cases *only* concerned police officers challenging *their placement* on the Exculpatory Evidence Schedule on due process grounds. It is true that these cases have held that police officers have, for due process purposes, private interests in their "reputation and ability to continue to work unimpeded as a police officer." *Gantert*, 168 N.H. at 648 (quotation omitted). However, these cases implicated these reputational interests *only* in the context of the government's *placement* of officers on the EES. These cases are silent on how public disclosure of information under the Right-to-Know Law can create due process concerns.

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[8] Additionally, Personnel Rule 1501.04—which adopts a *per se* exemption—appears to have been last revised in May of 2015, which was before the *Salem* and *Seacoast Newspapers* decisions were issued reinterpreting RSA 91-A:5, IV to employ a public interest balancing test. This Personnel Rule runs contrary to these Supreme Court decisions and, thus, needs to be revised. It is axiomatic that a rule or regulation cannot conflict with a statute and, if it does so, it is invalid. *See Appeal of Anderson*, 147 N.H. 181, 183 (2001) ("The sixty-day time limit effectively denies benefits to employees who would otherwise be eligible for disability pension retirement benefits under the statute and therefore, as applied in this case, is inconsistent with Laws 1973, 218:7, IV.").

This is not surprising. Any suggestion that police officers have significant privacy and reputational interests that, as a matter of constitutional due process, should limit public disclosure under RSA ch. 91-A of acts done in the course of public duties would be both wrong and troubling. Such a conclusion—which no New Hampshire court has adopted—would conflict with the Right-to-Know Law and the notion that public officials are not private citizens. Rather, they work for us. *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*, 46 A.3d at 297 ("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"). The procedural due process protections in the Fourteenth Amendment and Part I, Article 15 of the New Hampshire Constitution protect individual citizens from the government, not the other way around.

Finally, there is no need to read *Gantert* and *Duchesne* to create a privacy right that must be protected in the public records context because one already exists under the public interest balancing test from *Reid* and *Lambert*. As this Court recently explained in *Salem*, the three-step analysis is used to determine whether the disclosure of personnel or other files would "result[] in an invasion of privacy," and therefore is exempt from disclosure. 173 N.H. at 355. In other words, the public interest balancing test already protects the rights of police officers in the public records context, as this test specifically considers any applicable privacy rights.

E. Garrity Warnings Do Not Insulate Statements From Disclosure

Provenza next suggests that, because he was read "Garrity Rights" before speaking to MRI, the document should not be made public. *Provenza's Brief*, pp. 31, 33. In so arguing, he conflates the RSA ch. 91-A standard with the limited evidentiary privilege that exists to prevent the use of compelled statements in later criminal prosecutions under *Garrity v. New Jersey*, 385 U.S. 493 (1967).

[redacted]

Moreover, *Garrity* simply means that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in <u>*subsequent criminal proceedings*</u> of statements obtained under threat of removal from office." *Id.* at 500 (emphasis added). This principle only governs admissibility in later criminal cases and does not trump the Right-to-Know Law. As one court correctly concluded in rejecting a police department's attempt to use *Garrity* as a defense to a public records request, "*Garrity* … recognizes no constitutional right to prevent disclosure to the public of such statements under an open-records law." *Chasnoff v. Mokwa*, 466 S.W.3d 571, 578, 582 (Mo. Ct. App. 2015). One Superior Court recently agreed, concluding that "the classification of … purported *Garrity* statements as such does not render them exempt from disclosure in a non-criminal context." *See ACLU-NH v. Salem Police Dep't*, No. 218-2021-cv-00026, at *9-10, VA 97-105, (Rockingham Cty. Super. Ct. July 20, 2021) (St. Hilaire, J.). Of course, if Provenza is ever criminally charged—which has not occurred and seems unlikely—he would still be able to avail himself of his *Garrity* admissibility protections. In the

meantime, any of Provenza's statements as part of the investigation should be public along with the rest of the Report.[9]

F. RSA 105:19 Does Not Make Unsustained Findings Exempt From The Right To Know Law

Finally, Provenza suggests that RSA 105:19—which was enacted by the legislature in 2020 through HB1645 after the murder of George Floyd—makes reports related to unsustained findings of misconduct exempt from mandatory disclosure. *See Provenza's Brief*, pp. 30-31. Not so. RSA 105:19, which became effective on January 1, 2021, does not mention the Right-to-Know Law, let alone implicate an exemption from public disclosure. Rather, RSA 105:19 mandates an investigation into allegations of certain police misconduct. RSA 105:19, IV. This law also mandates that this specified misconduct, if observed by an officer, be reported to the police chief, and then to the Police Standards and Training Council ("the PSTC"). RSA 105:19, II. This statute, by its plain terms, simply has no bearing on this case or RSA ch. 91-A.

Provenza suggests that, because there was a prior version of this legislation ultimately not adopted by the legislature that would have allowed for requests for certain misconduct records from the PSTC, this prior version somehow limits what type of records must be produced under RSA ch. 91-A. *Provenza's Brief*, p. 30. That argument fails for two reasons. *First*, this Court may only examine legislative history when a statute is ambiguous. *See Casey v. N.H. Secy. Of State*, 173 N.H. 266, 271-72 (2020). Again, RSA 105:19 is unambiguously silent on the Right-to-Know Law,

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[9] Bail hearings in criminal cases frequently have contain hearsay or other inadmissible evidence, *see* N.H. R. Evid. 1101(d)(3), but are nonetheless open to the public. The same is true for probable cause hearings despite the "relaxed evidentiary rules." *See Keene Publ'g Corp. v. Keene District Court*, 117 N.H. 959 (1977).

thereby leaving the question of public disclosure to the provisions of RSA ch. 91-A. Thus, this Court may not consider legislative history at all. *Second*, even if this statute and legislative history was somehow relevant to this case (and it is not), the request in this case concerns records in the possession of the Town—not the PSTC—so the language which had been proposed would not have applied. Moreover, the legislature could well have removed that language from RSA 105:19 because it was not germane to the rest of the bill, and/or because it found the language unnecessary, given that misconduct records in police personnel files are *already* governed by RSA ch. 91-A and subject to public interest balancing under the *Seacoast Newspapers/Salem* decisions—decisions which preceded the finalization of RSA 105:19's provisions.

CONCLUSION

For the reasons discussed above, the decision of the trial court should be *affirmed*.

REQUEST FOR ORAL ARGUMENT

The Valley News requests oral argument before the full Court. Attorney Henry R. Klementowicz will present for the Valley News.

RULE 16(3)(i) CERTIFICATION

Counsel hereby certifies that the order being appealed is in writing and is appended to this brief.

Respectfully submitted,

THE VALLEY NEWS

By and through its attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation,

/s/ Henry R. Klementowicz

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Dated: August 2, 2021

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 9,484 words (including footnotes) from the "Question Presented" to the "Request for Oral Argument" sections of the brief.

/s/ Henry R. Klementowicz
Henry R. Klementowicz

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on counsel for the other parties through the court's electronic filing system on today's date: John S. Krupski, Esq., Shawn M. Tanguay, Esq., and Matthew Broadhead, Esq.

Dated: August 2, 2021

/s/ Henry R. Klementowicz
Henry R. Klementowicz

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2020-CV-155

SAMUEL PROVENZA

v.

TOWN OF CANAAN

PUBLIC ORDER ON PLAINTIFF'S PETITION FOR DECLARATORY JUDGMENT AND FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND ON INTERVENOR'S CROSSCLAIM

The following order is issued under seal consistent with this Court's previous rulings. A public, redacted copy of this order will issue after the parties have had an opportunity to review it.

This matter is before the Court on the Plaintiff's Petition for Declaratory Judgment and for Preliminary and Permanent Injunctions. (Index #1.) On November 30, 2017, the plaintiff, Samuel Provenza, formerly a police officer for the Town of Canaan, was involved in a motor vehicle stop that became subject to some media coverage in the Upper Valley. The Plaintiff now petitions the Court to declare that an internal affairs investigation report related to the stop (the "Report") is not subject to disclosure under the New Hampshire Right-to-Know Law, RSA ch. 91-A, and to enjoin the defendant, the Town of Canaan (the "Town"), from disclosing the contents of the Report to the public. Valley News daily newspaper ("Valley News"), filed a motion to intervene, which the Court granted. (Index #4.) Thereafter, Valley News objected to the plaintiff's petition and filed a crossclaim requesting that the Court rule that the Report is subject to disclosure under RSA ch. 91-

Clerk's Notice of Decision
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Grafton Superior Court
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A.[1] (Indexes # 10, 11).

On September 15, 2020, the Court held a hearing at which counsel for the Plaintiff, the Town, and Valley News were present. Prior to the hearing, the Town submitted under seal a copy of the Report with minor redactions of information it contends is not subject to disclosure under RSA ch. 91–A and an unredacted copy of the Report. (Index #15), and the Court approved the parties' Stipulation and Protective Order Regarding Nondisclosure of Subject Investigation Report. (Index #14.) At the hearing, the parties agreed that, subject to a potential order of stay pending appeal, each was amenable to this order acting as a final adjudication on the merits of both the plaintiff's requests for declaratory judgment and for preliminary and permanent injunctions and on the merits of Valley News's crossclaim. After considering the parties pleadings, offers of proof, and arguments, the Court makes the following findings and rulings.

I. Factual Background

a. November 30, 2017 Traffic Stop[2]

On November 30, 2017, Canaan police dispatch received a call about a suspicious vehicle following a town school bus. Officer Provenza responded to the call and traveled to the location provided by dispatch. Officer Provenza did not activate his cruiser camera before responding to the call.[3] Upon arriving at the location of the bus, Provenza observed a white SUV following closely behind the school bus, and he initiated a traffic stop of the

[1] Valley News filed a "Complaint-in-Intervention," but that is not a pleading allowed as a matter of right. See Superior Court Civil Rule 6(a). As a result, the filing was docketed as a crossclaim pursuant to Superior Court Civil Rule 10. No party objected. (Index #17.)

[2] The following facts are taken from the Report and the parties' pleadings.

[3] Canaan Police Chief Frank explained that all police vehicles in Canaan, apart from Officer Provenza's, were equipped with cameras that automatically turn on when the car is turned on. Officer Provenza's cruiser camera, on the other hand, had to be manually activated by pushing a button. Chief Frank did not feel Officer Provenza's failure to activate his cruiser camera was intentional, but rather an oversight given the situation.

white SUV. Officer Provenza approached the vehicle and identified the driver as Crystal Eastman, a resident of Canaan, acknowledged that he recognized her, and asked her "what's going on?" [redacted] Ms. Eastman explained that she was following the bus because her daughter had been having ongoing issues with the driver of the school bus. Officer Provenza described Ms. Eastman's behavior as "nutty and weird," and further noted that, in his opinion, she was "not making sense and . . . was rambling." [redacted]

Officer Provenza, in an attempt to determine if Ms. Eastman was impaired, then moved his head toward the window and sniffed to see if he could detect an odor of alcohol or cannabis. Ms. Eastman claims he "got close enough that he could have kissed her," and she then angrily asked what he was doing. [redacted] Officer Provenza informed Ms. Eastman that he was investigating reports of a suspicious vehicle following a school bus. Officer Provenza asked Ms. Eastman for her license and registration multiple times, with Ms. Eastman responded by asking why he needed them because he knew who she was. Ms. Eastman then proceeded to retrieve her license to give to Officer Provenza, but before she handed it to him, she claims she began to lean across her front seat to retrieve her registration and cell phone, "probably pulling her license back in with her." [redacted] Officer Provenza, on the other hand, claims that as he reached for the license, she "snatched it back out of my fingers." [redacted]

Officer Provenza then informed Ms. Eastman that she was under arrest. Officer Provenza attempted to open the vehicle's door, but Ms. Eastman grabbed the door to prevent Officer Provenza from opening it. Eventually Officer Provenza was able to open the door, but Ms. Eastman wrapped her right arm around the steering wheel to prevent him from removing her from her vehicle. Officer Provenza claims that Ms. Eastman was

attempting to bite his hand whereas Ms. Eastman claims that Officer Provenza grabbed her hair behind her head and tried to pull her out of the car. Ms. Eastman claims to have been screaming for Officer Provenza to stop pulling her hair and to have honked her horn at least once.

Soon thereafter Officer Provenza was able to handcuff Ms. Eastman's left wrist. Officer Provenza again attempted to pull Ms. Eastman out of the vehicle to cuff her right wrist. While Officer Provenza was attempting to handcuff Ms. Eastman, Ms. Eastman claims her knee was hit, "she heard it pop," and she yelled that Officer Provenza had broken her leg. [redacted] Officer Provenza finished handcuffing Ms. Eastman and called for backup. Ms. Eastman claims that she did not see Officer Provenza hit her leg but she "felt it." [redacted].

Chief Frank arrived on the scene shortly thereafter.[4] Chief Frank assisted Ms. Eastman to the rear of her vehicle and attempted to calm her down. Ms. Eastman was still complaining that her leg was injured. Ms. Eastman was then transported to Dartmouth-Hitchcock Medical Center. Ms. Eastman claims that she did not bite or kick Officer Provenza during the altercation. Officer Provenza claims he did not pull Ms. Eastman's hair or "put any part of his body on her legs." [redacted]

b. Ms. Eastman's Subsequent Trial and News Coverage

Ms. Eastman was subsequently charged with resisting arrest and disobeying a police officer. At trial, Ms. Eastman was acquitted of the resisting arrest charge and

[4] Chief Frank later interviewed a number of witnesses and followed up with these witnesses.

convicted of disobeying a police officer, and that conviction was upheld on appeal. On February 8, 2018, Ms. Eastman filed a formal complaint against Officer Provenza. In response to Ms. Eastman's complaint, the Town commissioned Municipal Resources, Inc. ("MRI") to conduct an internal investigation into the excessive force complaint.

As [redacted] the November 30, 2017 traffic stop and Ms. Eastman's subsequent trial, the Valley News began to cover the story.[5] On February 4, 2019, Valley News reporter Jim Kenyon requested a copy of the Report, all government records related to it, and all information concerning the cost of the report pursuant to RSA ch. 91-A. On February 8, 2019, the Town denied Valley News's request for the Report based on the "internal personnel practices" exemption set forth in RSA 91–A:5, IV, and specifically citing Union Leader Corp. v. Finneman, 136 N.H. 624 (2007). (Valley News's Obj. ¶ 17, Ex. 3.) The Town did, however, provide redacted documentation related to the cost of the Report. On June 9, 2020, Valley News renewed its request for the Report following the New Hampshire Supreme Court's decisions in Union Leader Corporation & a. v. Town of Salem, 173 N.H. __ (May 29, 2020) and Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. __ (May 29, 2020) which overruled certain key holdings of Finneman.

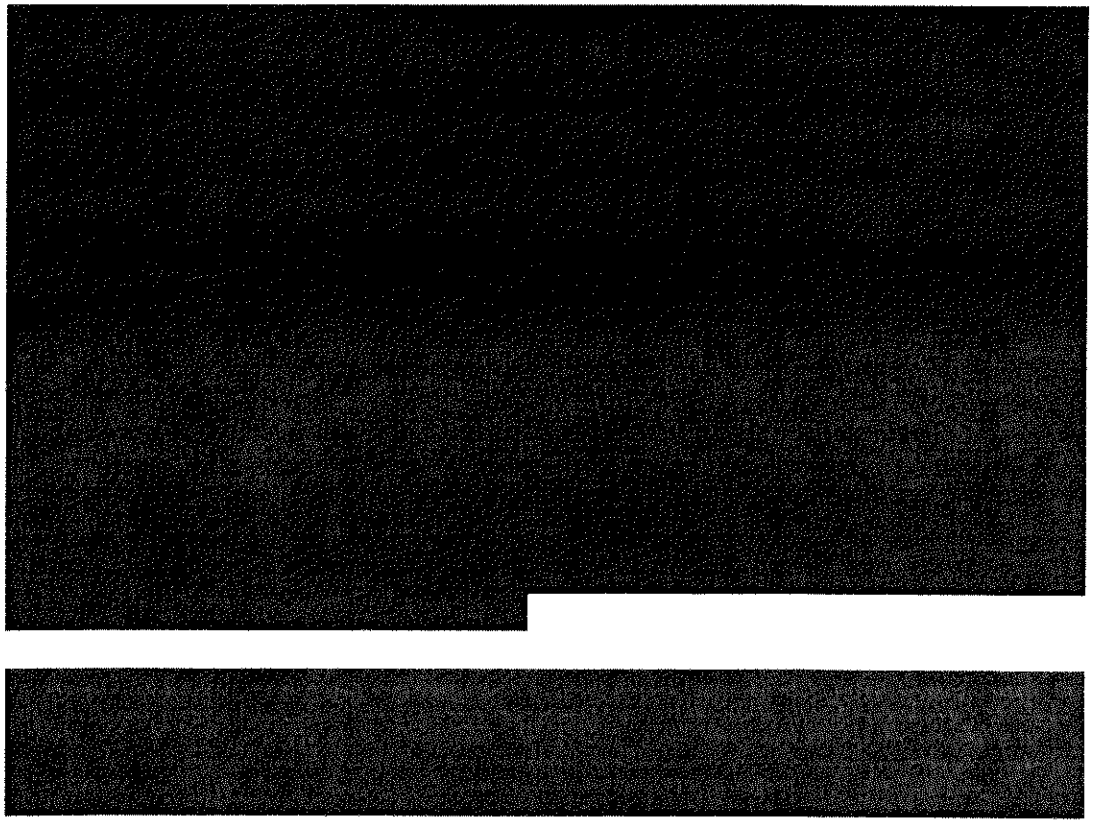
In response to Valley News's renewed request for the Report, the Town made Officer Provenza aware of the request. Officer Provenza then filed this lawsuit seeking to enjoin the Town from releasing the Report. Valley News filed a motion to intervene, which

[5] Before the plaintiff instituted this action, the Valley News had published five stories related to traffic stop and trial–"Jim Kenyon: Canaan Mom Injured by Police Officer Cries Foul" on March 4, 2018; "Jim Kenyon: In Canaan, Police Transparency Not a Priority" on August 12, 2018; "Jim Kenyon: Canaan report about police excessive force case remains a secret" on February 29, 2019; "Jim Kenyon: Judge finds Canaan woman not guilty of resisting arrest" on June 4, 2019; "Jim Kenyon: Plenty of question marks follow Canaan woman's sentence" on July 20, 2019.(Kenyon Aff., Index #12.)

this Court granted. Valley News then filed an objection to Officer Provenza's suit for injunctive relief and a crossclaim seeking disclosure of the Report.

c. Findings of the Report

The Town commissioned MRI to conduct an internal investigation into the excessive force complaint filed by Ms. Eastman. The purpose of its investigation was "to determine if the level of force used by Officer Provenza when he arrested Crystal Eastman was justified, given the circumstances." (Report at 13.) MRI conducted interviews of Officer Provenza, Ms. Eastman, Chief Frank, Ms. Eastman's supervisor, and several eyewitnesses[6], and it also reviewed police reports, medical documentation, and other relevant evidence. MRI released its Report in July 2018. The investigator summarized his conclusions as follows:



[6] As discussed below, infra. fn. 9, the eyewitnesses are all minors and their privacy interests require the Court to keep their names anonymous.

(Id. at 14–15.)

II. Analysis

Officer Provenza now petitions the Court to enjoin the Town from disseminating the Report to the public and to declare the Report exempt from public access under the Right-to-Know Law, pursuant to RSA 91-A:5, IV. (Pl.'s Pet. ¶¶ 1, 22.) Specifically, Officer Provenza argues that "his privacy interests in an unfounded internal affairs investigation outweighs the request for disclosure to the public." (Id. ¶ 2.) Valley News objects and asserts that the Report is "a public record that must be made available for inspection" to Valley News and the public a large, pursuant to RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution. (Valley News's Crossclaim ¶ 32, prayer A.) Valley News contends that the Report is subject to disclosure because: 1) "the public interest in disclosure is compelling"; 2) "the privacy interests in nondisclosure are nonexistent"; and 3) "the public interest trumps any nonexistent privacy interest." (Id. ¶ 32.)

With respect to Officer Provenza's petition for injunctive relief, "[t]he issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." New Hampshire Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). An injunction should not issue unless the petitioner shows: (1) that he is likely to succeed on the merits; (2) that he has no adequate remedy at law; (3) that he will suffer immediate

irreparable harm if the injunctive relief is not granted; and (4) that the public interest will not be adversely affected if the injunction is granted. Id.; UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13–15 (1987); see also Kukene v. Genualdo, 145 N.H. 1, 4 (2000) ("injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted"). "The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." DuPont, 167 N.H. at 434.

As to the likelihood of success on the merits, Officer Provenza argues that he is likely to succeed on the merits "based on the balance of the probabilities as there is a clear privacy interest recognized by the public policy of the State of New Hampshire." (Pl.'s Pet. ¶ 34.) Essentially, Officer Provenza asserts that, as a matter of public policy, the Report is exempt from disclosure under the Right-to-Know Law. He maintains that "[t]he public interest would not be adversely affected but rather promoted" by granting injunctive relief "as the public policy requires that personnel matters be held confidential pursuant to statute and that matters and allegations not be indiscriminately disseminated by individuals." (Id. ¶ 35.) Valley News disagrees and contends that Provenza's request for injunctive relief should fail because: 1) RSA 91-A:5, IV "does not create a statutory right of action for government officials seeking to have documents withheld, nor does it create a statutory privilege that can be invoked by Provenza to compel the Town to withhold the [Report]"; and 2) under RSA 91-A:5, IV the "public interest balancing analysis compels its disclosure." (Valley News's Obj. ¶15.)

Turning first to the parties' statutory arguments, generally, "[t]he ordinary rules of statutory construction apply to [the Court's] review of the Right-to-Know Law." Censabella v. Hillsborough Cty. Attorney, 171 N.H. 424, 426 (2018) (citing N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 102–03 (2016)). "When examining the language of a statute, [the Court] ascribe[s] the plain and ordinary meaning to the words used." Id. at 103. "[The Court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "[The Court] also interpret[s] a statute in the context of the overall statutory scheme and not in isolation." Id.

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." (RSA 91-A:1 (2013); N.H. Right to Life, 169 N.H. at 103. "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Censabella, 171 N.H. at 426; see also N.H. Const. pt. 1, art. 8 ("the public's right of access to governmental proceedings and records shall not be unreasonably restricted.") (emphasis added). The Right-to-Know Law provides "[e]very citizen" with a "right to inspect and copy all government records . . . except as otherwise prohibited by statute." RSA 91-A:4, I. RSA 91-A:4, IV requires public bodies and agencies to make such government records available for inspection and copying upon request. The statute allows "[a]ny person aggrieved by a violation of this chapter" to petition for injunctive relief. RSA 91-A:7; Censabella, 171 N.H. at 427.

Valley News first argues that "[t]o the extent Provenza bases his request for declaratory and injunctive relief pursuant to a Right- to-Know exemption, his 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 a government entity . . . who has declined to produce documents pursuant to an applicable exemption." (Valley News's Obj. ¶ 16.) In short, Valley News maintains that because "Provenza is not an aggrieved requester, he has no statutory right of action under the Right-to-Know Law." (Id.) The Court concludes that it need not address the merits of this argument in order to rule on the merits of the parties' dispute and the relief each requests. For purposes of this order, the Court assumes without deciding that the plaintiff is a "person aggrieved" within the meaning of RSA 91–A:7. In addition, the Court further rules that the plaintiff has standing to maintain this action under RSA 491:22 and RSA 498:1.

The Court next considers the parties' arguments regarding to the balancing of public and private interests relating to disclosure of the Report. The Right-to-Know Law carves out exemptions from the general rule providing citizen access to governmental records. See RSA 91-A:5. RSA 91-A:5 provides, in pertinent part, that "[t]he following governmental records are exempted from the provisions of" the Right-to-Know Law:

> IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

Id. While it is true that "the statute does not provide for unfettered access to public records," New Hampshire courts "broadly construe provisions in favor of disclosure and interpret the exemptions restrictively." Seacoast Newspapers, Inc., 173 N.H. at __ (slip op. at 3.)

As noted above, Union Leader Corp. and Seacoast Newspapers, Inc., overruled key holdings in Fenniman relating to RSA 91-A:5, IV. Specifically, Seacoast Newspapers, Inc. "overrule[d] Fenniman to the extent that it broadly interpreted the "internal personnel practices" exemption and its progeny to the extent that they relied on that broad interpretation." 173 N.H. at __ (slip op. at 9). Similarly, Union Leader Corp. "overrule[d] Fenniman to the extent that it adopted a per se rule of exemption for records relating to 'internal personnel practices.'" 173 N.H. at __ (slip op. at 11). The Court clarified that "[i]n the future, the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV shall apply to records relating to 'internal personnel practices.'" Id. (citing Prof'l Firefighters of N.H., 159 N.H. 699, 707 (2010)) (setting forth the three-step analysis required to determine whether disclosure will result in an invasion of privacy). Furthermore, "[d]etermining whether the exemption for records relating to 'internal personnel practices' applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy." Id. (citing N.H. Housing Fin. Auth., 142 N.H. at 552).

New Hampshire Courts "engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91–A:5, IV." Lambert v. Belknap Cty. Convention, 157 N.H. 375, 382–83 (2008). This balancing test applies to all categories of records enumerated in RSA 91–A:5, IV. New

Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice ___ N.H. ___ , ___ (October 30, 2020) (slip op. at 10); Union Leader Corp., 173 N.H. at ___ (slip op. at 11). "First, [the Court] evaluates whether there is a privacy interest at stake that would be invaded by the disclosure." Lambert, 157 N.H. at 382. "Second, [the Court] assess[es] the public's interest in disclosure." Id. at 383. "Finally, [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.

As to the first factor, the individual privacy interest, "[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. at 382–83. "If no privacy interest is at stake, the Right–to–Know Law mandates disclosure." Id. at 383. Generally, "[a] clear privacy interest exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available." Reid, 169 N.H. at 531.

Officer Provenza asserts that "[i]n New Hampshire, a police officer has a substantial privacy interest in [an] unfounded or unsustained internal affairs report which precludes the disclosure to the public because it outweighs the public's right to know." (Pl.'s Pet. ¶ 25.) To support his assertion of the heightened privacy interest of police officers, Officer Provenza also urges the Court to consider RSA 105:13-b, RSA 516:36, and Pivero v. Largy, 143 N.H. 187, 191 (1998). (Pl.'s Pet. ¶¶ 26–28.) Officer Provenza further argues that "the publication of baseless allegations deprives a police officer of his/her constitutionally protected liberty and property interests" pursuant to Part 1, Article 15 of the New Hampshire Constitution. (Id. ¶ 27.)

Valley News contends that Officer "Provenza's privacy interest in disclosure in nonexistent." (Valley News's Obj. ¶ 31.) It asserts that the plaintiff's reliance on RSA 105:13–b, RSA 516:36, and Pivero is misplaced. (Valley News's Obj. ¶¶ 34–36.) Valley News points to numerous cases from other jurisdictions that stand for the proposition that courts routinely reject the argument that police officers have a privacy interest when their actions implicate their official duties, including in the context of internal investigation of citizen complaints. (Valley News's Obj. ¶ 31, fn.7.) To rebut Officer Provenza's constitutional argument, Valley News posits that "the procedural due process and privacy protections in . . . Part I, Article 15 of the New Hampshire Constitution protect individual citizens from government officials, not the other way around." (Id. ¶ 37.)[7]

The Court first addresses the plaintiff's invocations of RSA 105:13–b, RSA 516:36, and Pivero. The Court agrees that the plaintiff's reliance thereon is misplaced. RSA 105:13–b concerns the disclosure of evidence in a "police personnel file." RSA 105:13–b, I. In this case, however, the Town initially denied Valley News's request for a copy of the Report based on the "internal personnel practices" exemption, not the exemption for "personnel . . . files," in RSA 91–A:5, IV. (Valley News's Obj., Ex. 3.) Moreover, RSA 105:13–b, by its plain language, applies only to situations in which "a police officer . . . is serving as a witness in any criminal case." John Doe v. Gordon J. MacDonald, Merrimack Super. Ct., No. 217-2020-CV-176 (August 27, 2020) (Order, Kissinger, J.); see Duchesne v. Hillsborough County Attorney, 167 N.H. 774, 781 (2015) (observing that the "current

[7] To bolster this position, Valley News cites to Tompkins v. Freedom of Info. Comm'n, 46 A.3d 291 (Conn. App. Ct. 2012), which noted that "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." 46 A.3d at 297.

version of RSA 105:13–b addresses three situations that may exist with respect to police officers who appear as witnesses in criminal cases"). Finally, even if the Court was to "assume without deciding that RSA 105:13-b constitutes an exception to the Right-to-Know Law and that it applies outside of the context of a specific criminal case in which a police officer is testifying," an argument the plaintiff does not make, there is nothing in the record to suggest that the Report is contained in or is a part of the plaintiff's personnel file. New Hampshire Center for Public Interest Journalism, __ N.H. at __ (slip op. at 7–9); see Reid, 169 N.H. at 528 (discussing the personnel files exemption in RSA 91–A:5, IV). RSA 516:36 is also inapplicable because it governs the admissibility and not the discoverability of internal police investigation documents and, thus, has no bearing on the Right-to-Know analysis. Similarly, Pivero v. Largy is unpersuasive because that case did not concern the Right-to-Know Law and relied on a holding in Fenniman that has since been overruled.

With respect to the plaintiff's contention that disclosure of the Report to the public would deprive him of his "protected liberty and property interests" under Part 1, Article 15 of the New Hampshire Constitution (Pl.'s Pet. ¶ 27), the Court finds that the plaintiff has not sufficiently developed this argument for judicial review and deems it waived. See Guy v. Town of Temple, 157 N.H. 642, 658 (2008) (stating that "judicial review is not warranted for complaints . . . without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration") (brackets, quotations and citation omitted); State v. Chick, 141 N.H. 503, 504 (1996) (considering waived

defendant's undeveloped Part 1, Article 15 argument upon which he did "not further elaborate").

The Court agrees with Valley News that Officer Provenza's privacy interests in disclosure, if any, are minimal. First, "the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Censabella, 171 N.H. at 426. Second, information concerning purely private details about a person who happens to work for the government is very different from facts, such as those detailed in the Report, concerning that individual's conduct in his or her official capacity as a government employee. See Lamy v. N.H. Public Utilities Comm'n, 152 N.H. 106, 113 (2005) (observing that "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") (quotations and citation omitted). Therefore, even "[a]ssuming there is a relevant privacy interest at stake, that interest is minimal because the [Report] do[es] not reveal intimate details of [Officer Provenza's] life," but rather information relating to Officer Provenza's conduct as a government employee while performing his official duties and interacting with a member of the public. See New Hampshire Civil Liberties Union, 149 N.H. at 441.

As to the second factor, the public's interest in the information, "[d]isclosure of the requested information should inform the public about the conduct and activities of their government." Lambert, 157 N.H. at 383. Indeed, "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." Reid, 169 N.H. at 532 (quotations and citation omitted). "The legitimacy of the public's interest in

disclosure, however, is tied to the Right-to-Know Law's purpose, which is 'to provide the utmost information to the public about what its government is up to.'" Id. (citing N.H. Right to Life, 169 N.H. at 111). "If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." Id. (citing Lamy, 152 N.H. at 111) (quotations omitted). "Conversely, 'an individual's motives in seeking disclosure are irrelevant to the question of access.'" Id. (citing Lambert, 157 N.H. at 383).

Officer Provenza argues that, because the Report ultimately concluded that the excessive force allegation against him was determined to be "not sustained," the public interest in the Report is insignificant. Officer Provenza further contends that nondisclosure of the Report actually promotes the public interest in two regards: firstly, "public policy requires that personnel matters be held confidential pursuant to statute and that matters and allegations not be indiscriminately disseminated by individuals," and, secondly, the public's interest in public safety is undermined if police are worried about dissemination of unfounded complaints, which would have a chilling effect on policing in the State. (Pl.'s Pet. ¶¶ 28, 31, 35.)

Valley News asserts that the "public interest in disclosure is strong." (Valley News's Obj. ¶ 28.) Specifically, Valley News argues that "[p]roducing the full report would enable the public to know not just the contours of Provenza's conduct, but also the policies and procedures governing internal affairs investigations and whether they were appropriately followed in this case." (Id. ¶ 29.) Valley News notes that this case occurs "[i]n this moment of conversation about police accountability nationally and here in New Hampshire"[8] and,

[8] Valley News directs the Court to Governor Sununu's Executive Order 2020-11, which recognized the "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance

as such, "it is imperative that the public be able to know whether law enforcement agencies can be trusted to hold themselves accountable, or if a different system is necessary." (Id.) Valley News posits that "setting aside the obvious public interest in allowing the public to evaluate the findings of MRI and the completeness of its investigation, there is a compelling public interest in enabling the public to use the MRI report to evaluate the integrity of the Canaan Police Department's internal affairs investigation of this incident." (Id. ¶ 30)

Valley News relies heavily on, and the Court finds persuasive, a Vermont Supreme Court case, Rutland Herald v. City of Rutland, 84 A.3d 821 (Vt. 2013), for the proposition that "there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct." Id. at 825. The Rutland Herald court reasoned that "the internal investigation records and related material will allow the public to gauge the police department's responsiveness to specific instances of misconduct; assess whether the agency is accountable to itself internally, whether it challenges its own assumptions regularly in a way designed to expose systemic infirmity in management oversight and control; the absence of which may result in patterns of inappropriate workplace conduct." Id. (quotations omitted).

Indeed, the public has a significant interest in knowing how the police investigate such complaints for a number of reasons. First, the public has the right to know that the police take their complaints seriously and that the investigation was "comprehensive and accurate." See Reid, 169 N.H. at 532 (in reference to an investigation of the New Hampshire Attorney General's office, the Court noted "[t]he public has a significant

transparency, accountability, and community relations in law enforcement." https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf.

interest in knowing that a government investigation is comprehensive and accurate") (quotations omitted); N.H. Civil Liberties Union, 149 N.H. at 441 ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know Law") (quotations and citation omitted). Second, the public similarly has the right to know whether the police officer in question was given a fair investigation aligned with traditional notions of due process. Third, as is evidenced by the national conversation concerning policing in the United States, transparency at all levels of police conduct investigations is fundamentally important to ensure the public's confidence and trust in local police departments. See RSA 91-A:1 (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.") (emphasis added); Prof'l Firefighters of N.H., 159 N.H. at 709 (noting that "knowing how a public body is spending taxpayer money in conducting public business is essential to the transparency of government, the very purpose underlying the Right-to-Know Law").

Moreover, the New Hampshire Supreme Court's overruling of Fenniman reinforces the importance of transparency in government. See Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 9) ("An overly broad construction of the 'internal personnel practices' exemption has proven to be an unwarranted constraint on a transparent government."); see e.g., Salcetti v. City of Keene, (unpublished order, decided June 3, 2020), (slip op. at 7, 9–10) (where the Supreme Court vacated and remanded a superior court decision denying a petition concerning "any and all citizen complaints, logs, calls, and emails regarding charges of excessive police force and/or police brutality" in light of its recent decisions in Union Leader Corp. and Seacoast Newspapers, Inc.).

As to the third factor, the balancing of the private and public interests, "'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." Reid, 169 N.H. at 532 (brackets omitted) (quoting Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996)). Specifically, the preamble to RSA chapter 91–A provides: "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. "Thus, 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." Reid, 169 N.H. at 532 (quotations and brackets omitted). Here, although Officer Provenza is not a public entity, as the party opposing disclosure he bears the same "heavy burden." See id.

Officer Provenza calls for a bright-line rule to the effect that if an internal police investigation concludes that the complaint against the officer is unfounded or not sustained, then the officer's privacy interest outweighs the public interest. (Pl.'s Pet. ¶¶ 25, 28.) This proposition, however, contravenes the purposes of the Right-to-Know Law — ensuring maximum public access to governmental proceedings and records, and promoting accountability of public officials to the citizens of New Hampshire. See RSA 91–A:1. The people of New Hampshire have the constitutionally rooted right to access public information and hold those in power accountable for their actions, a right "essential to a democratic society." Id.; N.H. Const. pt. 1, art. 8. To apply the bright-line rule that Officer Provenza urges the Court to adopt would be to acknowledge that the people of New Hampshire merely have the right to access information concerning founded

misconduct of police officers and not, among other things, whether an investigation resulting in a finding that the misconduct complaint was not sustained was "comprehensive and accurate." See Reid, 169 N.H. at 532. In the absence of Fenniman and its progeny, Officer Provenza cannot meet his "heavy burden" to shift the balance towards nondisclosure. Reid, 169 N.H. at 532. The Court concludes that the balancing test overwhelmingly favors the public's interest in disclosure of the report in the name of transparency and accountability. See RSA 91–A:1.

As the trial court in Union Leader Corp. noted, "bad things happen in the dark when the ultimate watchdogs of accountability—i.e, the voters and taxpayers— are viewed as alien rather than integral to the process of policing the police." Union Leader Corp. v. Town of Salem, No. 218-2018-CV-01406, 2019 WL 3820631, at *2 (N.H.Super. Apr. 05, 2019) (vacated and remanded by Union Leader Corp.,173 N.H. at ___). "Democracies die behind closed doors," and through laws, such as the Right-to-Know Law, the people are better able to hold government officials accountable. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

For the reasons articulated above, the Court rules that the Report is subject to disclosure. The Right-to-Know Law provides "[e]very citizen" with a right to inspect and copy government records except as otherwise prohibited by statute" and "requires public bodies and agencies to make such government records available upon request." RSA 91-A:4, I; RSA 91-A:4, IV. Here, because the Report is not exempt under RSA 91-A:5, IV, the Town must comply with the statute by disclosing the Report.[9]

[9] At the September 15, 2020 hearing, the Town requested that certain information–specifically medical information, license plate numbers, and the names of minors–be redacted from the Report. Valley News does not object to the proposed redactions. (Index #19.) The Court agrees that the privacy interest in this information outweighs any public interest in it. Reid, 169 N.H. at 531.

III. Conclusion

For the foregoing reasons, the plaintiff's petition for declaratory judgment and for preliminary and permanent injunctions is **DENIED,** and Valley News's crossclaim for declaratory relief is **GRANTED**.

The Court requests that the parties review the redacted copy of this order, attached hereto, and if they believe further redaction is necessary, to so inform the Court by motion filed within seven (7) days of the date of the clerk's notice of decision. Thereafter, the redacted version will be issued publicly.

So Ordered.

Date: 12/2/2020

Hon. Peter H. Bornstein
Presiding Justice