THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0206

Union Leader Corporation and
The American Civil Liberties Union of New Hampshire
(Petitioners/Appellants)

v.

Town of Salem
(Respondent/Appellee)

Robert Morin, Jr.
(Intervenor Respondent/Appellee)

Salem Police Relief, NEPBA Local 22
(Intervenor Respondent/Appellee)

Rule 7 Mandatory Appeal from the New Hampshire Superior Court, Rockingham County
Case No. 218-2018-cv-01406

OPENING BRIEF FOR PETITIONER/APPELLANT AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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QUESTIONS PRESENTED

1. Should *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), be overruled? *See* Appendix ("APX") I 23-31, 295-97 (Tr. 20:24-22:17); APXII 34. This question is before this Court in two other pending cases in which the ACLU-NH is co-counsel: (i) *Seacoast Newspaper, Inc. v. City of Portsmouth*, No. 2019-0135; and (ii) *New Hampshire Center for Public Interest Journalism et al v. New Hampshire DOJ*, No. 2019-0279.

2. Did the Superior Court err in ruling that portions of the audit report constitute "internal personnel practice" information under RSA 91-A:5, IV where the report was not created for a human resource purpose, but rather was created to determine if the Department was in line with widely-regarded best practices? *See* APXI 20-23; APXII 30-33.

3. If the Audit Report does constitute "internal personnel practice" information that is categorically exempt under RSA 91-A:5, IV, did the Superior Court err in ruling that Part I, Article 8 of the New Hampshire Constitution does not require a public interest/privacy interest balancing analysis? *See* APXI 294-97 (Tr.19:21-22:17); APXII 34-45.

STATEMENT OF THE FACTS AND THE CASE

This lawsuit seeks the release of unredacted copies of the following documents: (i) the 120-page audit report of the Salem Police Department ("Department") dated October 12, 2018 focusing on internal affairs complaint investigations (APXI 34-154, APXII 109-229); (ii) the 15-page addendum focusing on the Department's culture (APXI 155-170, APXII 230-245); (iii) the 42-page audit report of the Department dated September 19, 2018 focusing on time and attendance practices (APXI 171-213, APXII 246-290); (iv) the 14-page response dated November 9, 2018 to these reports (collectively, the "Audit Report") by former Salem Police Chief Paul Donovan (APXI 214-228); and (v) the two-page memorandum from Salem Town Manager Christopher Dillon to Chief Donovan dated October 29, 2018 discussing the Report (APXI 249-50).

The redactions in these documents undermine the purpose of the Audit Report and Chapter 91-A—namely, to promote government accountability. Salem's taxpayers spent $77,000 on the Report that depicts a Department that was poorly serving its citizens. With

only a few exceptions discussed below, the public should have access to this information in full.

In this appeal, Petitioners are not seeking the names of any private citizen witnesses or complainants redacted in the Report. APXI 24. For example, Petitioners are not seeking on appeal the witness names in Chief Donovan's quoted remarks on Page 7 of the addendum concerning the Department's culture (*see* APXII 237) or any witness names that may exist on Pages 7 to 12 of that same addendum (*see* APXII 237-242). *See* Addendum ("ADD") 48 (Page 14, Sections J and K.1(b) and K.4(b)). Petitioners also are not appealing the Superior Court's decision to sustain on "invasion of privacy" grounds the redactions on Pages 93-94 on the internal affairs Report. S*ee* APXII 203-204. ADD 42 (Page 8, Section IV(E)). Accordingly, Petitioners' appeal exclusively focuses on the redactions sustained under RSA 91-A:5, IV's exemption for "internal personnel practices." ADD 40-50 (Section IV (C, D, L, O), Section V (B, C, I, K [except K.1(b) and K.4(b)]), and Section VI (A, C, D)).

I. The Audit Report

The Town of Salem engaged Kroll Inc. to conduct an audit of the Salem Police Department. Salem taxpayers paid approximately $77,000 for the audit. APXI 231. The Town of Salem released a redacted version of the Audit Report on November 21, 2018—the day before Thanksgiving. The Report paints the picture of a police department in New Hampshire's seventh largest municipality that is badly in need of reform. The Report covers three categories summarized below, and is described in more detail at APXI 8-016.

A. The Internal Affairs Audit

The Audit Report reveals the following problems with the Department's handling of internal affairs investigations: (i) treating formal complaints as informal complaints; (ii) closing internal affairs investigations very quickly; (iii) making it difficult and intimidating for citizens to file complaints; (iv) inappropriate reviews of excessive force complaints; (v) failure to interview witnesses; (vi) inadequate documentation; (vii) destruction of materials; (viii) bad attitude toward complainants; and (ix) ignorance of Department policies. APXI 73-125, APXII 148-200 (IA Report 39-91).

In one section of the Report—portions of which the Town has redacted and are at issue on appeal—Kroll reviewed 29 cases from the past five years using documents supplied by Chief Donovan. APXI 73-125, APXII 148-200 (IA Report 39-91). Ten (10) of the cases were found to have been compliant with both Department policy and accepted best practices, but most (at least 16) violated internal policy, failed to meet best practices, or both. *Id*.

Kroll states: "We see a system designed to intimidate members of the public and make them fearful of the consequence of filing a complaint about concerning police conduct." APXI 87, APXII 162 (IA Report 53). For example, a supervisor of the internal affairs program [Respondent Intervenor Deputy Chief Morin] is quoted as saying to Kroll that he wants a complainant to fill out the form "because when she does, and we disprove it — and we will — we're going to charge her; that's why she's not coming in." APXI 150, APXII 225 (IA Report 116); APXII 234 (Culture Add. 4) (identifying Mr. Morin as speaker). The Report states: "This statement and attitude by a senior leader who has oversight for the professionalism of the department is quite concerning and certainly exposes some truth behind comments that the department makes it difficult for the public to submit a formal complaint." APXI 150, APXII 225 (IA Report 116).

In another case, a citizen came to the Department to report a complaint for racial profiling arising out of a stop and search of a vehicle driven by an African-American motorist. APXI 101-107, APXII 176-182 (IA Report 67-73). The citizen said: "I want this documented in case that white cop kills a black guy." APXI 106, APXII 181 (IA Report 72). Supervisor B took "offense to that statement[,] saying, 'Okay, sir, have a nice day. Why don't you move along?'" *Id.* As explained below in Part III of this section below, "Supervisor B" appears to be Mr. Morin. According to the citizen, Supervisor B "told the citizen not to return to Salem and threatened to arrest him if he did not leave the department," effectively throwing him out of the station. APXI 102, 107 APXII 177, 182 (IA Report 68, 73). The Report notes: "It is very concerning to believe a citizen bringing forth an allegation of police misconduct would be treated in such a manner." APXI 102, APXII 177 (IA Report 68). Supervisor B described the complaint to Kroll as "foolishness"

even though he acknowledged that the officer did not have probable cause for the search and seizure. APXI 104, 106, APXII 179, 181 (IA Report 70, 72).

The Audit Report also documents the Department's response to a fight at the Salem ICenter after a youth hockey game on December 2, 2017. APXII 184-198 (IA Report 75-89). The Report concludes that the Department's leadership violated its own policy when it accepted this investigation as complete, despite its failure to investigate facts that could have cast the Department in a negative light.

Moreover, Kroll reviewed the Department's policies and Collective Bargaining Agreement and found several deficiencies. The section entitled "Union Issues" adds that Mr. Morin, who was president of Salem's police union representing those with the title of lieutenant and above, "regularly and vehemently disparaged Kroll's efforts and the Town's decision - in various online and in-person methods - to conduct an audit in what he and the union considered was his role as union president." APXI 144, APXII 219 (IA Report 110).[1]

The substance of Kroll's communications with citizens, particularly at Pages 92, 95-99 of the Internal Affairs Audit Report, are currently redacted and at issue in this appeal. APXI 126, 129-133, APXII 201, 204-208 (IA Report 92, 95-99). Indeed, Page 92 of the Report details a citizen's allegation that a Department officer discouraged her from filing a complaint against "Supervisor B" alleging threats, harassment, and unprofessional behavior. APXI 126, APXII 201 (IA Report 92, No. 1).

B. The Department's Culture Addendum

During its investigation, Kroll found it necessary to, on its own initiative, complete an additional addendum focusing on the Department's culture. APXI 156, APXII 231 (Culture Add. 1). As part of this addendum, Kroll reports that Department officers: (i) disregard Town authority; (ii) post apparently insubordinate statements on social media; (iii) display an "us versus them" mentality between the Department and the Town; (iv) issue disciplinary judgments based on whether officers were viewed to be aligned with

[1] Page 110 of the internal affairs Report appears to continue to omit online statements despite the fact that the Superior Court concluded that characterizations of similar online statements in the Report's culture addendum should be public. APXII 219 (IA Report 110 omitting online statements); ADD 46 (Page 12, Section V(F) (no invasion of personal privacy for online statements).

management or not; and (v) have an adversarial relationship with the Town's human resources department. Kroll notes "the apparent contempt in which administration is held by some members of Salem PD and the apparent deviation from law enforcement best practice." APXI 159, APXII 234 (Culture Add. 4). For example, the addendum includes a screenshot of a Facebook post from Sgt. Michael Verrocchi, who is the union president for sworn personnel, stating: "There comes a point when it's time to say fuck you to politics and I'm there. We need to make decisions, stand by those decisions and not waiver simply to satisfy the court of public opinion." APXI 160, APXII 235 (Culture Add. 5).

The addendum is also critical about the workplace culture instilled by Deputy Chief Morin. As the Town's human resources manager told Kroll, "It's hard because people know that if you go against Deputy Chief Morin, you get on a list, and he comes after you." APXII 236 (Culture Add. 6). Page 5 of this addendum also concludes that several online statements made by Mr. Morin "relative to [Town Manager Christopher Dillon] are not only inaccurate but insubordinate and unbecoming of a Salem, New Hampshire police officer." APXII 235 (Culture Add. 5).

C. The Time and Attendance Audit

The Report further concludes that some officers, including Chief Donovan, worked outside details during their paid shifts. Significant portions of this Time and Attendance Audit are redacted and are at issue in this appeal, including Pages 16, 17, and 26 in their entirety. APXII 262-263, 272.

The Report finds: "[M]embers of the administration are also known to work detail assignments, often during regular working hours. It is Kroll's opinion that these detail assignments may adversely impact the supervisors' ability to properly oversee the department IA program." APXI 152-153, APXII 227-228 (IA Report 118-119; Finding #6 and Recommendation #6). The Town has redacted significant portions of these findings on Pages 118-119 of the Internal Affairs Report. *Id.* This portion of the Report implicates Chief Donovan directly. APXI 153, APXII 228 (IA Report 119).

D. The Widespread Attention Given to, and the Fallout From, the Audit Report

Following the release of the redacted Report on November 21, 2018, Mr. Morin wrote on the public Facebook account of Sgt. Verrocchi that he was "pissed off," and he called the audit a waste of money and a "complete and utter pile of (expletive)." *See* APXI 229-233. On November 24, 2018, Sgt. Verrocchi posted a meme on his Facebook page saying #istandwithsalempd, with the heading "Wolves don't lose sleep over the opinion of sheep." *Id.*

In late November 2018, the Town hired former Andover, Massachusetts Police Chief Brian Pattullo as the Department's civilian administrator. *See* APXI 234-37. Chief Donovan resigned in December 2018. *See* APX 238-241.

Since the November 2018 publication of the redacted Report, the New Hampshire Department of Justice has opened an ongoing criminal investigation of Deputy Chief Morin, Captain Michael Wagner, Sgt. Verrocchi, and Chief Donovan. The Town placed Deputy Chief Morin, Captain Wagner, and Sgt. Verrocchi on paid administrative leave pending this investigation.[2] On June 1, 2019, Mr. Morin retired from the Department.[3]

II. The Superior Court's Order

Petitioner sent separate Chapter 91-A requests to the Town seeking the unredacted Audit Report and related documents. APXI 246-250; APXI 242-245. The Town denied these requests.

On December 21, 2018, Petitioners brought this consolidated Chapter 91-A lawsuit. In response, Respondents raised two exemptions. *First*, Respondents argued that the redacted information in the Report constitutes "internal personnel practice" information that is categorically exempt under RSA 91-A:5, IV. *See* APXII 6-9. *Second*, Respondents argued that the redacted information in the Report constitutes "personnel … and other files

[2] *See* Ryan Lessard, "AG's Criminal Probe Expanded to Include Former Salem Chief Paul Donovan," *Union Leader* (Mar. 11, 2019).
[3] *Id.*

whose disclosure would constitute invasion of privacy" under RSA 91-A:5, IV. *See* APXII 10-20.

In its April 5, 2019 order, the Superior Court rejected in almost all instances the applicability of the "invasion of privacy" exemption raised by the Respondent. In engaging in the required balancing analysis, the Superior Court explained: "A balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors the disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report." ADD 37 (Page 3; emphasis in original). The only redaction sustained by the Superior Court under this privacy exemption was in Pages 93-94 of the internal affairs Audit Report. ADD 42 (Page 8, Section IV(E)); APXI 127-128, APXII 203-204 (IA Report 93-94). Petitioners are not appealing this ruling.

As to the "internal personnel practices" exemption raised by Respondents—which is the sole focus of this appeal—the Superior Court on Pages 5-17 of its order applied this exemption in sustaining some redactions, while overruling others. The Superior Court prefaced its analysis with the statement that it was "bound by the *Fenniman* line of cases and, therefore must, uphold the Town's decision to redact the auditor's descriptions of specific internal affairs investigations." ADD 38 (Page 4). The Superior Court, however, expressed concern with the *Fenniman* line of cases, noting that these cases "construing and applying the 'internal personnel practices' exemption in RSA 91-A:5, IV[] allow a municipality to keep police department internal affairs investigations out of the public eye." ADD 37 (Page 3). The Superior Court noted this Court's criticism of *Fenniman* in *Reid v. N.H. Att'y Gen.*, 169 N.H. 509 (2016) and added that "the audit report proves that bad things happen in the dark when the ultimate watchdogs of accountability—i.e., the voters and the taxpayers—are viewed as alien rather than integral to the process of policing the police." ADD 37-38 (Pages 3-4). The Superior Court strongly suggested that, but for *Fenniman*, it would have released the vast majority of the Report's redactions because there was a compelling public interest in disclosure. ADD 37 (Page 3).

Per the Superior Court's order, on April 26, 2019, the Town released a new, redacted version of the Audit Report, though it contained some newly unredacted information that the Court had deemed public. APXII 109-288. The bulk of the Town's remaining redactions sustained by the Court under the "internal personnel practices" exemption are the subject of Petitioners' appeal. *See* ADD 40-50 (sustained redactions in Section IV(C, D, L, O), Section V (B, C, I, K [except K.1(b) and K.4(b)], and Section VI (A, C, D)).[4]

III. Subsequent Lawsuits Brought by Mr. Morin

Mr. Morin has filed three defamation lawsuits against individuals who spoke to and cooperated with Kroll as part of its investigation, including against a private Salem resident who was engaging in protected petitioning activity. Mr. Morin's lawsuits highlight the compelling interest in disclosure of the Audit Report.

In the first lawsuit, filed on April 25, 2019—the day before the Town was to release a new version of the Report—Mr. Morin sued the Town of Salem, Town Manager Christopher Dillon, and Human Resources Director Anne Fogarty for defamation and other torts, including arising out of Ms. Fogarty's statements made to Kroll. As alleged in the lawsuit, in part: "[T]his action arises out of defendants' contribution to and publication of a confidential Salem Police Department audit that they knew to contain statements that were untrue, false, unreliable and libelous regarding [Plaintiff Mr. Morin] …." *See Robert Morin Jr. v. Town of Salem, et al.*, No. 218-2019-cv-523 (Rockingham Cty. Super. Ct), Am. Compl. ¶¶ 1-2.

In this lawsuit, Mr. Morin alleges defamation as to some of the current redactions in the Report's addendum on the Department's culture, thereby effectively making these redactions public. For example, because of this lawsuit, we now know that this redacted statement to Kroll from Molly McKean—Salem's former human resources director—on Page 12 of the Culture addendum references Mr. Morin:

[4] The Town's April 26, 2019 produced version of the internal affairs Audit Report inexplicably redacts portions of Pages 67-74, 89, and 92 that were *not* redacted in the November 21, 2018 produced version. *Compare* APXI 101-108, 123, 126 (Nov. 21, 2018 IA Report) *with* APXII 176-183, 198, 201 (Apr. 26, 2019 version of IA Report with added redactions). The Town has provided no justification for these new redactions. Many of these new redactions in the April 26 version reference "Supervisor B" which, as explained below in Part III, is likely Mr. Morin.

> [T]he common denominator in a lot of problems and - um - I - this issue in northern Massachusetts was kind-of the icing on the cake for me that there have been - you know - years of receiving kind-of low grade or mid-level grade complaints against him and nothing ever seems to stick. He always has an excuse. The chief certainly had his back and - um - he seems to have just skated along. Now the difficult thing is that [***Plaintiff Morin in Complaint, but redacted in Report***] is well-trained and very bright - um – and certainly he is capable of spinning things, and I think he does that ….

Id. ¶ 48; *see also* APXII 242 (Culture Add. 12). Mr. Morin's defamation lawsuit also reveals that the redactions on Page 14 of the Culture addendum addressing allegedly "hate," "sexist," "racist," and "completely inappropriate" speech on a personal Facebook account refer to Mr. Morin. This speech apparently includes speech about Muslim individuals. Compl. ¶ 49; *see also* APXII 244 (Culture Add. 14). The Superior Court rejected Mr. Morin's effort to seal this complaint, holding that Mr. Morin has likely waived any privilege claim by deciding to use the information in litigation.

In the second lawsuit also filed on April 25, 2019, Mr. Morin sued Ms. McKean for defamation, apparently for her statements to Kroll. *See Robert Morin Jr. v. Marie S. McKean*, No. 218-2019-cv-524 (Rockingham Cty. Super. Ct.).

In the third lawsuit filed on May 10, 2019, Mr. Morin sued Mary-Jo Driggers—a private citizen living in Salem—for defamation based on complaints she made to town officials and Kroll concerning the Department's behavior arising out of an incident occurring on November 23, 2017 involving Ms. Driggers and her son. *See Robert Morin Jr. v. Mary-Jo Driggers*, No. 218-2019-cv-583 (Rockingham Cty. Super. Ct). Kroll discussed these complaints in Pages 101 to 106 of the Audit Report. APXII 210-215, No. 8 (IA Report 101-106).

Mr. Morin's public allegations in his lawsuit against Ms. Driggers reveal that he likely is "Supervisor B" in Pages 101-106 of the Report. APXII 210-215, No. 8 (IA Report 101-106). With this apparent revelation, we know that the Report expresses serious concern with Mr. Morin's behavior. As the Report states:

> Kroll further notes that supervisors' interactions involving members of his family and friends, while reporting as a member of law enforcement, are quite concerning. Kroll is aware of at least four instances in which complaints were made against

> Supervisor B [likely Mr. Morin] alleging inappropriate actions against individuals with his family. One of these interactions resulted in a criminal complaint filed against Supervisor B that led to no administrative action by the Salem PD.

APXII 214-215 (IA Report at 105-106). The Report goes on to suggest that Mr. Morin has received preferential treatment by the Department. APXII 215 (IA Report 106); *see also* APXII 210 (IA Report 101 No. 7; noting complaint by a person who attributed arrest of a family member "to a relationship that the alleged victim had with Supervisor B"). If Mr. Morin is "Supervisor B," then he would also be the officer who Kroll contends was dismissive of the racial profiling complaint described above. APXII 180-182 (IA Report 71-73). Further, Mr. Morin may be the subject of an incident in the heavily redacted Pages 92 and 95-99 of the Internal Affairs Audit Report. APXII 201, 204-208 (IA Report at p. 92, 95-99). There, a complainant alleged that "Supervisor B" engaged in threats, harassment, and unprofessional behavior. APXII 201 (IA Report 92).[5]

SUMMARY OF ARGUMENT

This brief raises three arguments. *First*, in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), this Court used the incorrect test for determining whether a record constitutes exempt "internal personnel practice" information under RSA 91-A:5, IV. This Court should overrule *Fenniman*.

Second, even if this Court does not overrule *Fenniman*, the Audit Report is not "personnel" in nature under the "internal personnel practices" exemption in RSA 91-A:5, IV. As this Court has explained, the term "personnel" "refers to human resources matters." *Reid v. N.H. Att'y Gen.*, 169 N.H. 509, 522 (2016). Applying this test, the Report was not created for a human resources purpose.

Finally, even if the Report constitutes categorically exempt "internal personnel practice" information under RSA 91-A:5, IV, Part I, Article 8 of the New Hampshire Constitution requires that this Court employ a public interest balancing analysis. Under this constitutionally required balancing analysis, the Report must be disclosed.

[5] On July 22, 2019, Ms. Driggers filed a federal Section 1983 lawsuit against Mr. Morin and others arising out of this November 23, 2017 incident. *See Driggers v. Morin et al.*, No. 1:19-cv-00772-LM (D.N.H.).

ARGUMENT

As the legislature has made clear: "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 (emphasis added). 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). Courts, therefore, construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551, 554 (2002). Moreover, an exemption under Chapter 91-A, even if applicable, does not create a privilege that prohibits a government entity from disclosing an otherwise exempt document.

I. In *Fenniman*, this Court Used the Incorrect Test for Determining Whether a Record Constitutes Exempt "Internal Personnel Practice" Information Under RSA 91-A:5, IV by (i) Applying this Exemption to Information Concerning Individual Employees and (ii) Applying this Exemption Categorically Without a Public Interest/Privacy Interest Balancing Analysis.

At least since 1993 in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), this Court has interpreted the "internal personnel practices" exemption incorrectly and, in so doing, has hindered the goal of Chapter 91-A to provide "the greatest possible public access" to information to promote government accountability. *See* RSA 91-A:1. This Court should overrule *Fenniman*.

In *Fenniman*, this Court held that records pertaining to an internal investigation into the conduct of a police lieutenant accused of making harassing phone calls constituted "records pertaining to internal personnel practices" within the meaning of RSA 91-A:5, IV. This Court's decision did not consult case law from other jurisdictions interpreting other open records laws. Rather, this Court simply explained: "These files plainly pertain to internal personnel practices because they document procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice."

Fenniman, 136 N.H. at 626. This Court then concluded that it was unnecessary to weigh competing interests in disclosure, since the legislature had made its own policy judgment and made such records "categorically exempt from disclosure." *Id.* at 627. This Court adhered to this interpretation of "internal personnel practices" in *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006), where it relied on *Fenniman* to hold that records of an investigation of a harassment complaint conducted by outside parties concerned "internal personnel practices."[6]

Ten years later in *Reid v. N.H. Att'y Gen.*, 169 N.H. 509 (2016), this Court called into question whether *Fenniman* and *Hounsell* were correctly decided. The *Reid* Court noted that, in *Fenniman*, it "did not examine whether a broad, categorical interpretation of 'internal personnel practices' might render the exemption for 'personnel … files whose disclosure would constitute invasion of privacy' in any way redundant or superfluous." *Id.* at 520. This Court further noted that, in *Fenniman*, it had failed to consult decisions from other jurisdictions with similar statutes addressing "internal personnel practices," noting that the exemptions contained in the Federal Freedom of Information Act ("FOIA") were similar to those contained in Chapter 91-A. *Id.* The *Reid* Court conceded that its interpretation of the "internal personnel practices" exemption in *Fenniman* and *Hounsell* had been "markedly broader" than the U.S. Supreme Court's interpretation of its federal counterpart in the FOIA's Exemption 2 (*see* 5 U.S.C. § 552(b)(2)), while acknowledging that it had departed from its "customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly and declining to employ a balancing test in determining whether to apply the exemption." *Id.* at 521, 520. Consequently, the *Reid* Court declined

[6] The *Fenniman* Court looked to the 1986 legislative history of another statute, RSA 516:36, to bolster its holding that the "internal personnel practices" exemption under RSA 91-A:5, IV operated as a categorical exemption. *Fenniman*, 136 N.H. at 627. However, this statute sheds no light on the history of RSA 91-A or, in particular, on the 1967 enactment of the "internal personnel practices" exemption in RSA 91-A:5, IV. Any legislative history concerning RSA 516:36, II is off point because that statute is fundamentally different from RSA 91-A:5, IV. RSA 516:36 governs admissibility, not discoverability, of police internal investigation documents. Information, of course, can be both inadmissible in court under RSA 516:36 and public under Chapter 91-A. *See Salcetti v. City of Keene*, No. 213-2017-CV-00210 (Cheshire Super. Ct. Aug. 29, 2018) (rejecting similar argument under RSA 516:36) (Ruoff, J.), *available at* http://www.orol.org/rtk/rtknh/213-2017-CV-210-2018-08-29.html.

to extend *Fenniman* and *Hounsell* beyond their own factual contexts and returned to its "customary standards for construing the Right-to-Know Law." *Id.* at 522.

As *Reid* suggested, *Fenniman* misapplied RSA 91-A:5, IV's exemption for "internal personnel practices" in two significant ways that this Court must correct.

A. Consistent with the FOIA's Exemption 2, RSA 91-A:5, IV's "Internal Personnel Practices" Exemption Applies to an Agency's Rules and Practices Dealing with Employee Relations and Human Resources, Not Employment Information Concerning Individual Employees.

Fenniman applied the "internal personnel practices" exemption contrary to how federal courts have interpreted the FOIA's analogous Exemption 2 for records that are "related solely to the internal personnel rules and practices of an agency." *See* 5 U.S.C. § 552(b)(2). As RSA 91-A:5, IV's exemption for "internal personnel practices" is functionally equivalent to Exemption 2, this Court should treat the "internal personnel practices" exemption like how federal courts treat its Exemption 2 counterpart. Thus, like Exemption 2, RSA 91-A:5, IV's "internal personnel practices" exemption should be narrowly construed to include only an agency's internal rules and practices governing employee relations and human resources, not personnel information concerning specific employees. As explained below, personnel information concerning specific employees should—like Exemption 6 of the FOIA which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," *see* 5 U.S.C. § 552(b)(6)—be handled under RSA 91-A:5, IV's separate exemption for "personnel … files whose disclosure would constitute invasion of privacy."

This Court has repeatedly concluded that federal FOIA cases are useful guides in interpreting Chapter 91-A. *See N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit*, 169 N.H. 95, 103 (2016). Indeed, this Court has gone so far as to superimpose within Chapter 91-A the FOIA's Exemption 7 governing information compiled for law enforcement purposes despite the fact that the text of Chapter 91-A contains no exemption for such information. *See Lodge v. Knowlton*, 118 N.H. 574, 577 (1978). Here, as Chapter 91-A's 1967 legislative history demonstrates, the FOIA exemptions at issue in this case are so close to their Chapter 91-A counterparts as to strongly suggest that New Hampshire's

exemptions were modeled after the FOIA exemptions. Exemption 2, as well as Exemption 6, were adopted with Congress's passage of the FOIA in 1966. *Air Force v. Rose*, 425 U.S. 352, 362 (1976). The New Hampshire legislature passed the bill that became the Right-to-Know Law in 1967, and this bill similarly contained exemptions for "[r]ecords pertaining to internal personnel practices" and "personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy" which exist today in RSA 91-A:5, IV. ADD 69 (HB 28 Committee of Conference Report). The New Hampshire language significantly tracked the federal exemptions. Representative Bednar, who sponsored HB 28 (which became the Right-to-Know Law), expressly invoked the federal law in his testimony before the Senate Judiciary Committee in March of 1967. ADD 57 (Page 1 of Mar. 21, 2017 Committee Hearing).

Congress designed the FOIA's Exemption 2 to be narrow and include only an agency's internal rules and practices governing employee relations and human resources. In 1976, the U.S. Supreme Court construed Exemption 2 narrowly as protecting so-called "low 2" information, i.e., internal agency matters so routine or trivial that they could not be "subject to … a genuine and significant public interest." *Rose*, 425 U.S. at 369-70. The Supreme Court declared that Congress intended Exemption 2 to relieve agencies of the burden of assembling and providing access to any "matter in which the public could not reasonably be expected to have an interest." *Id.* The Senate Report ultimately accepted as reliable by the Supreme Court stated: "Examples of [the internal rules and practices of an agency] may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." *Id.* at 363. In the 2011 decision *Milner v. Department of the Navy*, 562 U.S. 562 (2011), the U.S. Supreme Court affirmed the narrow nature of Exemption 2. It explained: "An agency's 'personnel rules and practices' are its *rules and practices dealing with employee relations or human resources* …. [A]ll the rules and practices in Exemption 2 share a critical feature: They concern the conditions of employment in federal agencies – such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id.* at 570 (emphasis added); *see also Reid*, 169 N.H. at 523. By applying RSA 91-A:5, IV's "internal personnel practices"

exemption to individual employee discipline, *Fenniman* adopted a rule that is far broader than Exemption 2's narrow exemption for an agency's internal rules and practices governing employee relations. As *Reid* suggested, the correct interpretation is to construe RSA 91-A:5, IV's "internal personnel practices" exemption consistent with how federal courts have interpreted Exemption 2 given that the language of each is similar and given that the New Hampshire legislature intended to use the FOIA as a guide.

Congress was not thinking of "personnel" information related to particular employees when it adopted Exemption 2 addressing "internal rules and practices of an agency." Rather, Congress intended such individualized employment information to fall under Exemption 6 of the FOIA, which addresses "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." *See* 5 U.S.C. § 552(b)(6). The Supreme Court in *Milner* defined "personnel file" as "the file 'showing, for example, where [an employee] was born, the names of his parents, where he has lived from time to time, his … school records, results of examinations, [and] evaluations of his work performance.'" *Milner*, 562 U.S. at 570 (citing *Rose*, 425 U.S. at 377). RSA 91-A:5, IV's exemption for "personnel … files whose disclosure would constitute invasion of privacy" is functionally identical to Exemption 6, and this Court should treat it as such. Under both Exemption 6 and RSA 91-A:5, IV, this "personnel file" exemption is not categorical in nature, but rather is subject to a public interest balancing analysis. *See Rose*, 425 U.S. at 371-373; *Reid*, 169 N.H. at 528.

Relatedly, *Fenniman*'s treatment of individual employee personnel file information as categorically exempt "internal personnel practice" information under RSA 91-A:5, IV is incorrect because this interpretation would render superfluous RSA 91-A:5, IV's separate exemption for "personnel … file[] [information] whose disclosure would constitute an invasion of privacy." *See Reid*, 169 N.H. at 520. This is because, under *Fenniman*'s incorrect interpretation, these two exemptions would effectively capture the same "personnel" information of individual employees. However, these exemptions must mean different things. *See Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 525-26 (2002) ("we must give effect to all words in [the] statute and presume that the

legislature did not enact superfluous or redundant words"). Of course, if the legislature had intended "personnel ***practices***" to mean "***individual*** personnel ***matters***," it could have said so.

In applying the "internal personnel practices" test under RSA 91-A:5, IV that is used under Exemption 2 in *Milner*, the Report does not satisfy this test and therefore is not exempt. As the Superior Court explained, the bulk of the redactions in the Report address individual employee information (including names and dates) in the context of Kroll's investigation into individual internal affairs and time/attendance issues, *see* ADD 36 (Page 2), as opposed to established agency rules and policies.

B. RSA 91-A:5, IV's "Internal Personnel Practices" Exemption Requires a Public Interest/Privacy Interest Balancing Analysis.

Fenniman was incorrect in another way. In *Fenniman*, this Court incorrectly deemed "internal personnel practice" information as categorically exempt without balancing the public interest in disclosure against the privacy and governmental interest in nondisclosure. Such a balancing analysis is consistent with Chapter 91-A's presumption of providing the "greatest possible public access" to information. *See* RSA 91-A:1. This balancing analysis is required for two additional reasons.

First, requiring a balancing analysis is consistent with RSA 91-A:5, IV's text. This provision exempts: "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." RSA 91-A:5, IV. Here, the phrase "whose disclosure would constitute invasion of privacy" modifies all the preceding categories of information in this sentence, thereby rendering information satisfying each category exempt only after an analysis of whether disclosure "would constitute [an] invasion of privacy." Consistent with this textual interpretation, this Court has repeatedly found that a balancing analysis is required for "confidential, commercial, or financial information" in this sentence. *See Union Leader Corp.*, 142 N.H. at 553 (public

interest balancing applies to "confidential, commercial, or financial information" in RSA 91-A:5, IV); *Union Leader Corp. v. N.H. Ret. Sys.*, 162 N.H. 673, 679 (2011) (same); *Mans v. Lebanon School Board*, 112 N.H. 160, 162 (1972) (same). It would be internally inconsistent for this Court to reject such a public interest balancing analysis with respect to "internal personnel practices," while requiring such a balancing analysis as to "confidential, commercial, or financial information" which are listed in the same sentence of RSA 91-A:5, IV. The statute provides no basis to treat these items differently.

Viewing the "internal personnel practices" exemption as categorical, while subjecting the "personnel file" exemption to a balancing test, would also run the risk of rendering the "personnel file" exemption a nullity. This is because—especially if these two exemptions encompass the same type of information—a government agency could skirt the public interest balancing analysis required for "personnel file" information by simply asserting the categorical "internal personnel practices" exemption, thus leaving the "personnel file" exemption without effect. This is occurring in this case, and *Reid* highlighted this problematic reality. *See Shapiro v. United States DOJ*, 153 F. Supp. 3d 253, 280 (D.D.C. 2016) (noting in the FOIA context that Exemption 2 must contain a public interest test because, otherwise, Exemption 6 "would have little purpose [since] agencies could simply invoke Exemption 2 to protect any records that are used only for 'personnel'-related purposes"); *Reid*, 169 N.H. at 520 (quoting *Shapiro*).

<u>*Second*</u>, employing a balancing analysis to "internal personnel practices" under RSA 91-A:5, IV it is consistent with how Exemption 2 is handled under the FOIA. *See* 5 U.S.C. § 552(b)(2). As one federal judge recently ruled, "the Supreme Court's holding in *Rose* [concerning Exemption 2] continues to bind this Court. That holding … includes the 'genuine and significant public interest' test …." *Shapiro*, 153 F. Supp. 3d at 279-80.

When applying this public interest balancing analysis (but only if the Report constitutes "internal personnel practice" information under RSA 91-A:5, IV), the Audit Report must be produced consistent with the Superior Court's finding. ADD 37 (page 3).

1. The Public Interest in Disclosure is Compelling.

The public interest in disclosing the Report is compelling. The Report exposes the very type of misconduct that Chapter 91-A is designed to uncover. *See, e.g., Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 709 (2010) ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."). As this Court has explained 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 New Hampshire also highlight the public interest in disclosure of records that implicate police officers' official acts.[7] Simply put, disclosure here will educate the public on "the official acts of those officers in dealing with the public they are entrusted with serving." *Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 507-08 (N.M. Ct. App. 2010) (citizen complaints regarding an officer's conduct while performing official duties are public documents).

Here, the redacted information concerns the ability of the public to hold accountable specific officers listed in the Report. The public's ability to learn what the "government is up to" under Chapter 91-A includes not just the actions of the government, *see Union Leader Corp. v. City of Nashua*, 141 N.H. 472, 477 (1996), but *who* engaged in such actions on behalf of the government. After all, without knowing *who* engaged in actions on behalf of the government, how can the public hold specific officers and Department leaders accountable? This likely is why this Court has demanded that the government produce the names of government employees—rather than mere titles—along with their salary information. *See e.g.*, *Union Leader Corp.*, 162 N.H. at 684; *Mans*, 112 N.H. at 162. If salary information is in the public interest and must be made public, then surely the time

[7] *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."); *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) (finding disclosure of internal affairs investigation records proper where police officers were investigated and punished for brutality and excessive force); *Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (finding disclosure of disciplinary records and suspension records of sheriff's deputies was proper where the deputies had been investigated for sexual activity in patrol cars; noting "the manner in which the employees of the Sheriff's Department prosecute their duties [is] a large and vital public interest that outweighs their desire to remain out of the public eye").

and attendance report addressing how officers were compensated must also be made public. Moreover, what if the same officer conducted many of the internal investigations criticized in the Report? Disclosure would help inform the public that this particular officer may be part of the Department's problem concerning internal affairs investigations. Similarly, Pages 7 through 9 of the Report's culture addendum reference troubling behavior of at least one unknown officer. APXII 237-242 (Culture Add. 7-12). Disclosure of this officer would help the public learn whether the Department has taken appropriate action against this officer. Right now, the Town has left the public in the dark as to this information, which "cast[s] suspicion over the whole department." *Rutland Herald*, 84 A.3d at 824.

As courts have routinely ruled, where records concern facts that are the subject of significant media attention and would show if and how the government is both holding specific employees accountable and conducting internal investigations, the public interest in disclosure must prevail. *See, e.g., CASA de Maryland, Inc. v. DHS*, 409 F. App'x 697 (4th Cir. 2011) (per curiam) (applying Exemption 6, and affirming district court's decision ordering disclosure of names contained in an internal investigation report authored by DHS's Office of Professional Responsibility in light of evidence produced by plaintiff indicating that agency impropriety might have occurred); *Schmidt v. U.S. Air Force*, No. 06-3069, 2007 U.S. Dist. LEXIS 69584, at *31-32 (C.D. Ill. Sept. 20, 2007) (finding that, although Air Force officer had a privacy interest in keeping information about his discipline confidential, competing public interest in deadly friendly-fire incident with international effects outweighed that privacy interest and shed light on how the United States government was holding its pilot accountable).

2. There is No Privacy Interest in Nondisclosure.

Police officers have no privacy interest when their actions implicate their official duties, especially when there is credible evidence of wrongdoing. Cases have routinely rejected the proposition that such a privacy interest exists, including in the context of internal investigations of citizen complaints.[8] Indeed, shielding the identity of the officers

[8] *See, e.g., City of Baton Rouge*., 4 So.3d at 809-10, 821 ("[t]hese investigations [into officers' use of excessive force] were not related to private facts; the investigations concerned public employees' alleged improper activities in the

would only reinforce notions that the police are above accountability. And, to be clear, the information sought here in the Report does not constitute information about officers' private lives, "*intimate* details … the disclosure of which might harm the individual," *see Mans*, 112 N.H. at 164 (emphasis added), or the "kinds of facts [that] are regarded *as personal* because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*, 169 N.H. at 530 (emphasis added).

The Town's apparent position that the police have privacy interests with respect to their official acts is concerning because it bestows upon the police special secrecy rights that those accused of crimes by the police do not enjoy. Of course, law enforcement does not give anonymity to citizens accused of and charged with crimes despite the stigma these citizens face. The names of the accused are public, even if there is later a dismissal or acquittal. Law enforcement often circulate criminal allegations and mug shots to the press even before the accused have received any due process.[9] This transparency, despite the risk of stigma, is important to maintain accountability so the public can learn how the government uses its police, prosecutorial, and judicial power. This is the tradeoff we make as a democratic society. Police officers should be held to a higher standard than regular citizens—not a lesser standard—especially given that police officers act in the name of the public, are professional witnesses funded by taxpayers, and have the unique ability to use force and deprive persons of their liberty. *See also Denver Policemen's Protective Asso. v. Lichtenstein*, 660 F.2d 432, 436-37 (10th Cir. 1981) (rejecting officers' claim of privacy, and noting that "[i]t is ironic … that the Association asserts that its right to privacy is the same as a citizen's, no greater or no less, while at the same time asserting that SIB files

workplace"); *Burton*, 594 S.E.2d at 895-896 (noting that "the right of an individual's performance of his public duties to be free from public scrutiny" is not a constitutionally recognized right to privacy); *Cox*, 242 P.3d at 507 (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"); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 297 (Conn. App. Ct. 2012) ("the personal privacy interest protected by the fourth and fourteenth amendments is very different from that protected by the statutory exemption from disclosure of materials").

[9] New Hampshire law also makes available to the public disposed-of complaints concerning lawyers and judges (including those that are unfounded). *See* N.H. Sup. Ct. R. 37(20)(b)(1); N.H. Sup. Ct. R. 40(3)(b).

should be afforded greater protection than citizens' 'rap' sheets, which it concedes are routinely discoverable").

3. There is No Governmental Interest in Nondisclosure.

Respondents have presented no evidence indicating that there is a credible governmental interest in nondisclosure. *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."). The Supreme Court has emphasized that, in Chapter 91-A disputes, courts must reject assertions that are "speculative at best given the meager evidence presented in support." *See, e.g.*, *Union Leader Corp.*, 162 N.H. at 679. Here, disclosure will improve the criminal justice system and police accountability, not hinder it. Disclosing this information will not only expose misconduct, but it also will ensure that the public has the complete picture concerning the Audit's findings and how it was conducted.

C. *Stare Decisis* Does Not Support Leaving *Fenniman*'s Badly-Reasoned Holding in Place.

Even when considering *stare decisis*, overruling *Fenniman* is not only justified, but also necessary to comply with Chapter 91-A's presumption in favor of government transparency. "[W]e will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Ford v. N.H. Dep't of Transp.*, 163 N.H. 284, 290 (2012).

In this case, the Court's interpretation of "internal personnel practices" has proven unworkable because it has created confusion surrounding the distinction between this exemption and the exemption for "personnel ... and other files whose disclosure would constitute invasion of privacy" under RSA 91-A:5, IV. Consequently, public agencies have routinely relied on the former exemption in protecting "personnel files" and taken

advantage of the categorical gloss placed upon it by this Court, thereby rendering the latter exemption redundant. Petitioner Union Leader Corporation has documented in its brief many instances in which agencies have repeatedly withheld information in which the public has an obvious compelling interest. *Fenniman*'s holding has also rendered RSA 91-A:5, IV unworkable and contradictory by, without any textual justification, treating "internal personnel practice" information as categorically exempt while subjecting "confidential, commercial, or financial information" to a public/privacy interest balancing analysis. This is nonsensical.

The second factor enumerated in *Ford*, i.e., whether or not overruling *Fenniman* would create a "special hardship" due to past reliance on them, is inapplicable. Undoubtedly, overruling *Fenniman* will require government agencies in New Hampshire to adjust. However, as the U.S. Supreme Court similarly noted in *Milner* when it overturned three decades of federal government practice relying on how Exemption 2 was interpreted in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F. 2d 1051 (D.C. Cir. 1981), such an adjustment does not constitute a special hardship where this adjustment is required to correct court decisions that have deviated from RSA 91-A:5, IV's text and intent. *See Milner*, 562 U.S. at 576. There is also minimal hardship because local government agencies are capable of employing a public interest balancing test to protect private employee information, as agencies already are obligated to apply this test to "personnel file" information and "confidential, commercial, or financial information" under RSA 91-A:5, IV. Of course, if the privacy interest in nondisclosure outweighs the public interest in disclosure, then private information concerning employees will not be disclosed. As to the third factor identified in *Ford*, the law has already developed—as *Reid* makes clear—to limit the holdings of *Fenniman* and *Hounsell* to their facts.

Most importantly, as to the last factor, Petitioners and this Court in *Reid* have demonstrated that *Fenniman* was based on an unsupported interpretation of the two exemptions in question. If this Court is convinced that Chapter 91-A has been misinterpreted, then there is nothing to be gained by perpetuating this misinterpretation for decades to come.

II. Even if this Court Does Not Overrule *Fenniman*, the Superior Court Erred in Ruling that Portions of the Audit Report Constitute Exempt "Internal Personnel Practice" Information Under RSA 91-A:5, IV Because the Report Was Not Created for a Human Resource Purpose, But Rather was Created to Determine if the Department Was In Line With Widely-Regarded Best Practices.

Even if *Fenniman* is not overruled, the Audit Report is not "personnel" in nature under the "internal personnel practices" exemption in RSA 91-A:5, IV. As this Court has explained, the term "personnel" "refers to human resources matters." *Reid*, 169 N.H. at 522. The Massachusetts Court of Appeals has similarly explained that "personnel" means documents "useful in making employment decisions regarding an employee." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 8 (2003). The focus of this inquiry is not on whether the documents in question exist in a "personnel file," but rather whether they meet this definition of "personnel." Indeed, the definition of "personnel" as established by this Court and other courts focuses on the specific "nature and character" of the withheld document[10], including whether the record was "generated in the course of an investigation of claimed employee misconduct." *See Hounsell*, 154 N.H. at 4.

Applying this test, the Audit Report and related documents are not "personnel" related because they were not created for an employment or human resources purpose. As the Report itself states, its scope "was not … to conduct[] an independent review of facts or circumstances surrounding individual complaints filed against Salem PD personnel." APXI 38; APXII 113 (IA Report 4) (emphasis in original). Rather, these documents—unlike the documents in *Fenniman* and *Hounsell* that were created in the context of employee investigation and discipline—were designed to audit the Department. The Report's focus was not to discipline individual employees, but rather to "review the [internal affairs] process, in its entirety and make a determination as to its fairness and

[10] *See Worcester Telegram*, 58 Mass. App. Ct. at 10 ("[T]he nature and character of the document determines whether it is 'personnel [file] or information.'").

comprehensiveness, and whether it is in line with widely-regarded law enforcement best practices." APXI 38; APXII 113 (IA Report 4).

Worcester Telegram is instructive. There, the documents at issue concerned, in part, an "internal affairs report" that related to the "ultimate decision by the chief to discipline or to exonerate [the officer in question] based upon the investigation." *Worcester Telegram*, 58 Mass. App. Ct. at 7. Nonetheless, the Massachusetts Appeals Court concluded that these documents were not "personnel" related because they concerned an internal affairs process "whose quintessential purpose is to inspire public confidence." *Id.* at 9; *see also id.* at 7. As that Court explained, information may confidentially exist in a personnel file for employment purposes, but that same information may exist elsewhere in a document that has no employment purpose and therefore is a public record. *Id.* at 10; *see also Cox*, 242 P.3d at 507 ("While citizen complaints may lead DPS to investigate the officer's job performance and could eventually result in disciplinary action, this fact by itself does not transmute such records into 'matters of opinion in personnel files.'"). This case is no different. *See* APXI 38-39; APXII 113-114 (IA Report 4-5) (noting that IA process is necessary to establish "trust and confidence").[11]

III. If the Audit Report Constitutes an "Internal Personnel Practice," Then Applying this Exemption Categorically under RSA 91-A:5, IV Without a Public Interest/Privacy Interest Balancing Analysis Violates Part I, Article 8 of the New Hampshire Constitution.

In 1976, the people amended Part 1, Article 8 of the New Hampshire Constitution to provide as follows: "Government … should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Const., pt. I, art. 8; *see also Associated Press v. State*, 153 N.H. 120, 128 (2005). While New Hampshire already had the Right-to-Know Law to address the public and the press's right to access information, the Bill of Rights Committee to the 1974 Constitutional Convention argued that the right was

[11] Unlike the documents at issue in *Clay v. City of Dover*, 169 N.H. 681 (2017)—and *Fenniman* and *Hounsell*—the Audit Report was <u>*not*</u> created for an employment purpose.

"extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 53 (2d ed. 2015).

Even if the Audit Report constitutes exempt "internal personnel practice" information under RSA 91-A:5, IV and that exemption remains categorical under *Fenniman*, Part I, Article 8 of the New Hampshire Constitution requires that this Court employ a public interest balancing analysis to information that meets the statutory definition of an "internal personnel practice." Otherwise, RSA 91-A:5, IV's creation of a *per se* exemption for "internal personnel practices" would constitute an "unreasonable restriction" on the public's right of access in violation of Part I, Article 8. As a result, the Superior Court erred when it effectively concluded on Pages 4-5 of its April 5, 2019 order that Article 8 of the New Hampshire Constitution was coextensive with the "internal personnel practice" exemption in RSA 91-A:5, IV. ADD 38-39 (Pages 4-5). The Superior Court's holding effectively renders Article 8 a nullity and presumes that the legislature and the people, when they approved of Article 8, enacted a superfluous provision. *See Winnacunnet*, 148 N.H. at 525-26 (we presume that the legislature did not enact superfluous or redundant words).

"To determine whether restrictions are reasonable [under Part I, Article 8], we balance the public's right of access against the competing constitutional interests in the context of the facts of each case. The reasonableness of any restriction on the public's right of access to any governmental proceeding or record must be examined in light of the ability of the public to hold government accountable absent such access." *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 669-70 (2016) (internal quotations and citations omitted). As *Sumner* explains, there must be a "constitutional interest" justifying the legislature's desire to withhold information from the public; a mere policy desire is insufficient.

Applying *Sumner*'s constitutionally required balancing analysis, this Court should order the Audit Report produced. As explained in Part I.B.1 of this section *supra*, the public's right of access is great. On the other side of the Article 8 equation, and as explained in Part I.B.2 of this section *supra*, Respondents raise no interest of

"constitutional" dimension that justifies RSA 91-A:5, IV's purported categorical override of the public's right of access to this vital information.

CONCLUSION

This Court should reverse the Superior Court's April 5, 2019 order applying the "internal practices" exemption, including the following: Section IV (C, D, L, O), Section V (B, C, I, K [except K.1(b) and K.4(b)]), and Section VI (A, C, D). This Court should order the release of the Audit Report and related documents (*see* APXII 109-288, APXI 214-228, and 249-250) with the exception of the following: (i) the names of private citizens not sought by Petitioners, including the witness names in Chief Donovan's quoted remarks on Page 7 of the Audit Report's culture addendum (*see* APXII 237) and witness names that may exist on Pages 7 to 12 of this addendum (*see* APXII 237-242), and (ii) the redactions on Pages 93-94 on the Audit Report governing internal affairs (*see* APXII 203-204).

REQUEST FOR ORAL ARGUMENT

The ACLU-NH believes that oral argument would assist this Court, especially given that Petitioners have asked this Court to consider overruling its prior precedent.

RULE 16(3)(i) CERTIFICATION

Counsel hereby certifies that the appealed decisions are in writing and are hereto appended to this brief.

Respectfully Submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION,

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Dated: August 15, 2019

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 9,500 words (including footnotes) from the "Question Presented" to the "Request for Oral Argument" sections of the brief.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 15th day of August 2019 through the electronic-filing system on counsel for the Respondent/Appellee Town of Salem (Barton L. Mayer Esq.), Intervenor Respondent/Appellee Robert Morin, Jr. (Andrea N. Amodeo-Vickery, Esq.), Intervenor Respondent/Appellee Salem Police Relief, NEPBA Local 22 (Peter J. Perroni, Esq.), and Petitioner/Appellant Union Leader Corporation.

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

ADDENDUM

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER

I. Introduction

The plaintiffs brought this case under the Right To Know Act, RSA Ch. 91-A, to obtain an unredacted copy of an audit report that is highly critical of the Salem Police Department. The audit was performed by a nationally recognized consulting firm retained by the Town of Salem's outside counsel at the Town's request. The audit looked at only two aspects of the police department's operations, i.e., its internal affairs investigative practices and its employee time and attendance practices. The audit report also includes an addendum that is critical of the culture within the police department and the role that senior police department managers have played in promoting that culture.

The Town has already released a redacted copy of the audit report to the public. The Town admits that the audit report is a governmental record that must be made available to the public in its entirety absent a specific statutory exemption. RSA 91-A:1-a,III; RSA 91-A:4,I and RSA 91-A:5. The Town argues that the redacted portions of the audit report fall within two such exemptions, namely those for "[r]ecords pertaining to internal personnel practices" and "personnel . . . and other files whose disclosure would

constitute invasion of privacy." RSA 91-A:5. The Town has not cited any other statutory exemptions.

The plaintiffs do not merely dispute the applicability of these exemptions, they also argue that the exemptions cannot be applied without violating their State constitutional right to access public records. N.H. Constitution, Part 1, Article 8. The Town disagrees, arguing that it honored its constitutional obligation by releasing the redacted report.

II. The Court's Review

The court reviewed the unredacted audit report *in camera* and compared it, line by line, to the redacted version that was released to the public. What this laborious process proved was that—with a few glaring exceptions—the Town's redactions were limited to:

(A) names, gender based pronouns, specific dates, and a few other incidental references that would identify the participants in internal affairs proceedings;

(B) names, dates and other identifying information relating to specific instances in which employees were paid for details they worked while they were also simultaneously paid for their shifts; and

(C) the name and specific instances in which a very senior police manager worked paid outside details during his regular working hours and purportedly, but without documentation, did so through the use of flex time rather than vacation or other leave time, contrary to Town policy.

III. Governing Law

To paraphrase the famous quote, you apply the law that you have, not the law you might want.[1] A balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report. Yet, New Hampshire law construing the "internal personnel practices" exemption forbids the court from making this balance and requires the court to uphold most of the Town's redactions in this section of the audit. Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993); see also Hounsell v. North Conway Water Precinct, 154 N.H. 1 (2006); Clay v. City of Dover, 169 N.H. 681 (2017).

The holdings in Fenniman, Hounsell and Clay, construing and applying the "internal personnel practices" exemption in RSA 91-A:5,IV, allow a municipality to keep police department internal affairs investigations out of the public eye. Indeed, Fenniman was grounded in part on legislative history suggesting that confidentiality (i.e. secrecy) would "encourage thorough investigation and discipline of dishonest or abusive police officers." Fenniman, 136 N.H. at 627.

Notwithstanding that sentiment, the audit report proves that 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. Reasonable judges—including all five justices of the New Hampshire Supreme Court, joining together in a published opinion—have criticized the Fenniman line of cases.

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[1] "You go to war with the army you have, not the army you might want[.]," Donald Rumsfeld, December 8, 2004, (*Troops Put Rumsfeld In The Hot Seat*, available at www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html).

Reid v. New Hampshire Attorney General, 169 N.H. 509 (2016) (severely criticizing, but conspicuously not overruling Fenniman and Hounsell). Consistent with this criticism, reasonable judges in other states have read nearly identical statutory language 180 degrees opposite from the way Fenniman construed RSA 91-A:5,IV. See, e.g., Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003).

However, this court is bound by the Fenniman line of cases and must, therefore, uphold the Town's decision to redact the auditor's descriptions of specific internal affairs investigations. That said, as recounted below, while the Town's redactions may prove nettlesome to the taxpayers and voters, for the most part the publicly available, redacted version of the audit report provides the reader with a good description of both the individual investigations that the auditors reviewed and the bases for the auditor's conclusions.

The Time and Attendance audit is a more classical "internal personnel practices" record. To be sure, the Time and Attendance section of the audit report reveals operational concerns and suggests remedial policies. However, the publicly available version of the audit report describes those concerns, provides the underlying evidence supporting those concerns (with names, dates and places redacted), and includes all of the proposed changes in policy. Accordingly, the court must uphold most, but not all, of the Town's redactions in this section of the audit report.

With respect to plaintiff's constitutional argument concerning the "internal personnel practices" exemption, the New Hampshire Supreme Court has never suggested that the right of public access established by Part 1, Article 8 is any broader

than that established by the Legislature. See generally, Sumner v. New Hampshire Secretary of State, 168 N.H. 667, 669 (2016) (finding that a statutory exemption to Chapter 91-A for cast ballots is constitutional, and noting that such statutory exemptions are presumed to be constitutional and will not be held otherwise absent "a clear and substantial conflict" with the constitution).

With respect to plaintiff's constitutional argument concerning the "invasion of privacy" exemption, the court finds that the constitution requires no more than what the statute demands.

IV. Specific Rulings With Respect To The Internal Affairs Practices Section Of The Audit Report (i.e., Complaint Ex. A)

Arguably, the entire Internal Affairs Practices section of the audit report could be squeezed into the "internal personnel practices" exemption. However, because the Town released a redacted version of the report, the court looked at each specific redact in light of what has already been disclosed. The court then determined which redactions could be justified under the "internal personnel practices" exemption or the "invasion of privacy" exemption.

The court's rulings are set forth in page order. Although the terminology does not fit exactly, for the sake of clarity the court either "sustained" (i.e. approved) or "overruled" (i.e. disapproved) each redaction as follows:

A. The redactions on **page 7** are overruled. These redactions do not fall within either claimed exemption. The relevant paragraph describes a conversation between the Town director of recreation and a police supervisor. It was not part of an internal affairs investigation or disciplinary proceeding. The audit report does not even name

the supervisor. It just refers to him or her as "a supervisor." The Town apparently redacted the reference to "a supervisor" to avoid embarrassment: The gist of the passage was that a police supervisor condoned the use of force as form of street justice, contrary to both civil and criminal law. The supervisor told the auditor, "Well, if you are going to make us run, you are going to pay the price." The public has a right to know that a *supervisor* believes that it is appropriate for police officers to use force as a form of extra-judicial punishment.

B. The redactions on **page 36** are overruled. These redactions do not fall within either exception. They simply refer to the facts that (a) a lieutenant was caught drunk driving, (b) an officer left a rifle in a car and (c) there was an event at an ice center. There is no reference to any named individual or to anything specific about any investigation. In today's parlance, the discussion on page 36 is just too meta to fall within either exemption.

C. The redactions on **Page 38** are sustained because they fall within the "internal personnel practices" exemption. They reference the pseudonym of the involved officer and provide the date of the investigation.

D. With the exceptions set forth below, all of the redactions in **Section 5 (pp. 39-91)** are sustained because they fall within the "internal personnel practices" exemption. The audit report does not identify the subject of any internal affairs investigation. Instead it uses pseudonyms such as "Officer A," "Lieutenant B," "Supervisor C," etc. The Town redacted (a) the names of the internal affairs investigators, (b) the names of the individuals who assigned the investigators to each case, (c) in some cases the gender of one or more persons (i.e. the pronouns "he," "she," "his," "her" etc.), (d) the

dates of the alleged incidents of misconduct, (e) the dates of the investigations. All of this was done to protect the identity of the participants in specific internal affairs investigations. This is permissible. The Town also redacted a few locations, as well as other specific facts that might identify a participant. For example, the Town redacted the fact that one individual was a K9 handler, presumably because the Town had specific reasons for believing that information would unmask one or more of the participants. The court finds that this was permissible.

That said, a few of the redactions in Section 5 cannot withstand scrutiny, and are, therefore, overruled, i.e.

- **Page 46-47** was over-redacted. The supervisor should be identified as a supervisor. The employee should be identified as such. Doing so would not intrude upon their anonymity. To this extent the redactions are overruled.

-**Page 58** was over-redacted. It should be made clear that the individual did not take a photograph of the injury. The redaction changes the substantive meaning of the sentence. To this extent the redactions are overruled.

-The term "supervisor" on **page 66** should not have been redacted. The term "supervisor" was redacted from a sentence describing Kroll's (i.e. the outsider auditor's) "grave concern that a Salem PD **supervisor** expressed contempt towards complainants, ignored the policy requiring fair and thorough investigations and has an attitude that this department is not under any obligation to make efforts to prove or disprove complaints against his officers, especially one involving alleged physical abuse while in custody." Why should that "grave concern" not be shared with the public? This redaction is overruled.

-The reference to Red Roof Inn on **pages 67 and 72**, as a place that has seen its share of illicit activity, should not have been redacted. This reference does nothing to identity any participant in an investigation. Public disclosure of the reference might be deemed impolitic, but there is no exemption for impolitic opinions. This redaction is overruled.

-The entirety of **pages 75 through the top portion of page 89**, relating to a December 2, 2017 incident at a hockey rink was already made public. Those pages were originally heavily redacted. However, the unredacted pages were provided to a criminal defendant as discovery and the Town responded by making those pages public.

E. The redactions on **pages 93-94** are sustained because they fall within the "invasion of privacy exemption." These redactions do not relate to an internal affairs investigation. Essentially, a police supervisor spoke gruffly to his daughter's would-be prom date because he disapproved of him as a prospective boyfriend. The supervisor's comments did not relate or refer to his position. The supervisor's comments had nothing to do with the Salem Police Department. The prom date's mother was dissuaded from filing a formal complaint over the gruff comments. The redactions protect the privacy of the supervisor's (presumably) teenage daughter and her young friend. The public interest in the redacted passages is minimal, and is made even more minimal by the fact that most of the audit report has been made public already.

F. The redactions on **Page 99** are overruled. An individual contacted Kroll to explain that he spoke with Deputy Chief Morin and Chief Dolan about a complaint that he had. The individual was pleased with Morin's and Dolan's professionalism. He

decided not to file a complaint. The Town redacted Moran's and Dolan's names and ranks. These redactions do not relate to an internal affairs investigation because there was none. The redactions do not further any privacy interest.

G. The redactions on **page 100** are overruled because they do not fall within either exemption. The redactions do not relate to an internal affairs investigation. Rather, a resident contacted Kroll to complain that the Salem PD allegedly failed to enforce a restraining order. The phrase "restraining order" was redacted, for no apparent reason. No individual officer is identified, even by pseudonym.

H. The redactions on **page 101**, **item 6** are overruled because they do not fall within either exemption. Kroll was contacted by somebody who opined that complaints against supervisors were not taken seriously. No specific complaint or supervisor was discussed. The Town redacted the fact that the person who contacted Kroll was a former member of the Salem PD. The redaction serves no purpose and does not fall within either of the claimed exemptions.

I. The redactions on **page 101, item 7** are overruled. Kroll was contacted by a person who claimed that the Salem PD arrested a family member without probable cause. The Town redacted the portion of the passage that states the family member believed that the alleged victim in the case had a relationship with a supervisor. There was no internal affairs investigation. No individual is mentioned by name. The redaction does not fall within either of the claimed exceptions.

J. The redactions on **page 101-106, Item 8** are overruled. The redactions relate to statements that a town resident made to Kroll. These are not "internal personnel

practices" and there is no "invasion of privacy." An investigation was performed by the Attorney General's office, but this was an *"internal* personnel practice." See Reid.

K. The redactions on **pages 107 and 108** are all overruled because they do not fall within either claimed exemption. The Town redacted the names of individuals who called Kroll. These calls were not part of an "internal personnel practice." The callers did not ask for anonymity. They were coming forward. There is no invasion of privacy. Additionally, the redacted reference to the Red Roof Inn has nothing to do with personnel practices or personal privacy.

L. The redaction on **Page 109** is sustained. The pertinent paragraph refers to an internal affairs investigation described at pages 40-41. The same information is the subject of an earlier redaction.

M. The redactions on **Page 110** are overruled. They do not fall within either claimed exemption. The redactions related to Deputy Chief Morin's dual roles as (a) a senior manager and (b) a union president responsible.

N. The redactions on **Page 118, first full paragraph** are overruled. They do not relate to an internal affairs investigation or any other sort of personnel practice.

O. The redactions on **Page 118-119**, carryover paragraph are sustained. These relate to an individual employee's scheduling of outside details and time off. Those are classic "internal personnel practices" concerns. Although there is no indication as to whether the same facts are reflected in a formal personnel file, the audit report is itself an investigation into internal personnel practices. Therefore, under Fenniman, the court cannot engage in a balancing analysis but must instead sustain the redaction.

V. Specific Rulings With Respect To The Addendum To The Audit Report (i.e., Complaint Ex. B, "*Culture Within The Salem Police Department*")

A. The redactions on the **first two sentences of the third paragraph on Page 1**[2] of the Addendum are overruled. Essentially, the redacted material explains that it was the Chief who took "an extended absence" and "the rest of the week off. This is just a fact, not an "internal personnel practice," or a matter of personal privacy.

B. The remaining redactions in the **third paragraph on Page 1** of the addendum are sustained. Those redactions relate to the manner in which an employee arranged to take vacation leave and other time off from work. This is a classic internal personnel matter.

C. The redactions on the **carryover paragraph on Pages 1 – 2** are sustained for the same reason.

D. The **remainder of the redactions on Page 2** (i.e. those below the carryover paragraph) are overruled. Those redactions relate to operational concerns rather than "internal personnel practices." To be sure, the Chief is identified by name as being personally responsible for the Police Department's lack of cooperation with the Town Manager and Board of Selectmen. However, this was a Departmental policy or practice and the Chief was necessarily essential to the implementation of this policy or practice. The redactions do not fall within either of the claimed exemptions.

E. The redactions on **Page 4** are overruled. The redacted passages relate to comments made by Deputy Chief Morin concerning (a) his opinion of the Town

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[2]The original document was not paginated. **The page numbers refers to the Bates stamped numbers at the bottom of each page of Exhibit B to the Complaint (i.e. the redacted, publicly available document).**

Manager's credibility and (b) his thoughts as to why the outside auditor was hired. Morin makes reference to a citizen's complaint that the Town Manager referred to the Police Department. However, there is no reference to (a) the substance or nature of the complaint, (b) the year or month of the complaint, or (c) any subsequent investigation. There is no reference to an internal affairs investigation or any personnel proceeding. The redactions indicate that (a) Morin was a subject of the complaint and (b) the complaining party was female. The fact that a citizen made a complaint to the Town Manager is not, in and of itself, an "internal personnel practice." The redactions are not necessary to prevent an invasion of personal privacy.

F. The redactions on **Pages 5** are overruled. The Town redacted the outside auditor's opinions regarding statements that Deputy Chief Morin made on Facebook about the Town Manager. Those statements were disclosed in the publicly available, redacted copy of the report. The only thing that was kept from the public was the characterization of the statements by the auditors. Thus, the redactions do not relate to facts or to any sort of investigation, proceeding or personnel practice. Further, because Morin placed his comments on Facebook, (albeit in a closed group for Town residents), the auditor's opinions about those comments is not an invasion of Morin's personal privacy.

G. The redaction on **Page 6, on the carryover paragraph from Page 5,** is overruled. This redaction relates to post-hoc opinions that "human resources" gave to the auditors relating to Morin's statements on Facebook. However, there was no "internal personnel practice" or proceeding that flowed from Morin's statements. The

Town does not argue that any such practice or proceeding may be forthcoming. The made-for-the-audit opinion does not fall within either of the claimed exemptions.

H. The balance of the redactions on **Page 6** are overruled. Most of these redactions relate to comments about the workplace culture instilled by the Chief and Deputy Chief. Thus, they relate to operational issues, i.e. to the manner in which the department is operated and to the top executives' management style. To be sure, the comments are highly critical of the Chief and Deputy Chief, but not every alleged misstep or every problematic approach to managing a police department is an "internal personnel practice." The line between an operational critique and an "internal personnel practice" is sometimes blurry. In this case, there is no suggestion of a pending, impending or probable internal affairs investigation, disciplinary proceeding or informal rebuke. The information in the auditor's report does not come from a personnel file or from any document that should be in a personnel file. The court finds that the redactions do not fit within either of the claimed exemptions.

The other redactions on **Page 6** relate to the month and year that (a) an unidentified officer was cited for DUI and (b) an unidentified second officer left the scene of an accident without an alcohol concentration test. These facts are not "internal personnel practices." The officer's identities are not disclosed. The redactions do not fall within either claimed exemption and, therefore, they are overruled.

I. The redactions on **the first full paragraph of Page 7** are sustained. These redactions relate to "internal personnel practices." The redactions protect the identity of the participants in the investigation (i.e. the subject and the investigator).

J. The redactions in the **quoted remarks of Chief Donovan on Page 7** are sustained for the same reason. The redactions protect the identity of the witnesses in the internal affairs investigation.

K. The redactions on **the balance of Page 7 and on Pages 8-12** are sustained in part and overruled in part. These redactions relate to two internal affairs investigations involving the same police department employee. However, instead of simply redacting the names of the participants, the Town redacted six pages of facts and analysis. This is a marked departure from how the Town redacted virtually all of the other discussions of internal affairs matters. The court finds that:

1. The only IA participants who are referenced in the audit report are (a) the subject of the investigation and (b) a witness whose name appears on pp.10 and 11. Those individual's names were properly redacted.

2. The other named individuals were not involved in the IA investigation and, therefore, their names should not be redacted.

3. The tension between the Police Chief and the Town concerning the reporting of these matters to the Town authorities is an operational concern, not an "internal personnel practice."

4. The Chief's comments about the matters need not be redacted, except that the references to (a) the individual who was the subject of the investigation, (b) the witness in the investigation and (c) the dates of occurrences may be redacted.

VI. Specific Rulings With Respect To The Time And Attendance Section Of The Audit Report (Complaint Ex. B)

The redacted, publicly available version of the Time and Attendance section of the audit report indicates that a number of police employees (including twelve out of fifteen high ranking officers) were paid for outside details during hours for which they were also receiving their regular pay. To be fair, the audit report does not suggest chicanery or ill-motive. Apparently, the companies that paid for the details would pay for a set number of hours even when the details lasted for a shorter duration and even when the officers returned to work thereafter.

The publicly available version of the audit report also indicates that a very high ranking employee acted contrary to Town policy by working details during business hours and then making up the hours with flex time, rather than leave time.

The Time and Attendance audit was an archetypical workplace investigation into personnel issues. It is the very paradigm, the Platonic Ideal, of a record relating to "internal personnel practices." Nonetheless, the Town has made the bulk of this document public. The redactions in the publicly available report serve mainly to shield the identity of the affected employees.

A. Except to the limited extend described below, all of the redactions of employee names are sustained under the "internal personnel practices" exemption.

B. The dates of the outside work details and the identities of the outside parties that contracted for the details were unnecessarily redacted. Nobody could determine the identity of the affected employees from this information. Therefore, in light of what has already been released to the public, these redactions cannot be justified under

either of the claimed exemptions. The redactions of dates and outside contracting parties are overruled.

C. The court reluctantly sustains the redactions to the interviews of police department employees. These were investigative interviews that focused not only on operational issues but also on potential personnel infractions by the interviewees.

D. The court sustains the redactions to the interview of the former Town Manager for the same reason.

E. The reference to "higher-ranking" officers on **Page 15** of the report is overruled because the same information already appears elsewhere in the publicly available report.

F. The court overrules the redactions on **the last paragraph of Page 40** (relating to a finding with respect to the SPD detail assignment program). This paragraph discusses an operational concern and does not relate to any particular employee's alleged conduct. Therefore, these redactions do not fall within either of the claimed exemptions.

G. The court overrules the redactions on **Page 42.** The redactions do not apply to any specific individual. The issue was presented as an operational concern going forward rather than a personnel matter. The redactions do not fall within either of the claimed exemptions.

VII. Order

Within 21 days, the Town shall provide the plaintiff's with a copy of the audit report that contains only those redactions that have been sustained by this court. The

court will stay this order pending the filing of a notice of appeal upon motion by the Town.

April 5, 2019

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/05/2019

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

UNION LEADER CORP., ET AL

v.

TOWN OF SALEM

DOCKET #218-2018-CV-01406

INTERVENOR'S MOTION FOR RECONSIDERATION

NOW COMES the Intervenor, Robert Morin, Jr., by and through his attorneys, Andrea Amodeo-Vickery, Esquire, and Borofsky, Amodeo-Vickery and Bandazian, PA, and, pursuant to Rule 12(e) of the New Hampshire Rules of Civil Procedure, respectfully moves the Court for reconsideration of its Order dated April 5, 2019 in the above-captioned case. In support of its Motion for Reconsideration, Intervenor states as follows:

1. On April 5, 2019, this Court issued its decision on the merits sustaining and overruling Respondent Town of Salem's redaction of numerous sections of the subject audit report. With regard to the overruled redaction of information, the Court ruled that the information could not be redacted under the "internal personnel practices" exemption or the "invasion of privacy" exemption. See RSA 91-A:5.

2. Relevant to the instant motion, the Court made several rulings with respect to the culture addendum of the audit report in which the Court ruled that "the redactions on the balance of Page 7 and on Pages 8-12 are sustained in part and overruled in part." Union Leader Corp. et al. v. Town of Salem, No. 218-2018-CV-01406, *14 (N.H.Super. April 5, 2019) (emphasis omitted).

3. The Court specifically held that:

   a. "The only IA participants who are referenced in the audit report are (a) the subject of the investigation and (b) a witness whose name appears on pp. 10 and 11. Those individual's names were properly redacted."

   b. "The other named individuals were not involved in the IA investigation and, therefore, their names should not be redacted." Id.

4. Unfortunately, the Court's reasoning was in error. As a result of the Court's

holding, inferences can be drawn from the un-redacted portions of the report that reveal the identities of the individuals who were the subject of the IA investigation;

5. "[A]n investigation into alleged misconduct constitute[s] 'internal personnel practices' . . . when the investigation is 'conducted on behalf of the employer of the investigation's target.'" Clay v. City of Dover, 169 N.H. 681, 688 (2017).

6. This means that "the investigation must take place within the limits of an employment relationship." Reid v. New Hampshire Attorney Gen., 169 N.H. 509, 523 (2016).

7. Moreover, personnel files "plainly 'pertain[ ] to internal personnel practices' because they document procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice." Union Leader Corp. v. Fenniman, 136 N.H. 624, 626 (1993).

8. As noted by the Court, the Court "is bound by the Fenniman line of cases and" therefore was required to uphold the majority of the redactions in the audit. Union Leader Corp. et al., No. 218-2018-CV-01406, *4.

9. The Court sustained Respondent's redactions to prevent the identification of "the subject of any internal affair investigation," Union Leader Corp. et al., No. 218-2018-CV-01406, explicitly upholding the redaction of any facts that would lead to the identification of a participant.

10. The Court also sustained redactions "on the first full paragraph of Page 7" on the grounds that the redactions protected the identity of the participants in the investigation. Id. at 14 (emphasis omitted).

11. Unfortunately, contrary to the Court's above mentioned reasoning, there is information that the Court ordered to be un-redacted at pages 7-12 of the subject report could unintentionally lead to identification of the participants in the investigation.

12. The un-redacting by the Court of other named individuals who were not involved in the IA investigation on page 9-10 permits the identification of the subject of the investigation.

13. Moreover, the information un-redacted on the bottom of page 7 to page 9 and the bottom of page 11 to the top of page 12 provides an incomplete, inaccurate and false account of the events it purports to describe.

14. Accordingly, due to the information soon to be unintentionally revealed as a result of the Court's Order as it now stands, Intervenor requests that the Court

reconsider its ruling, so that its Order complies with the law and does not inadvertently reveal participants of investigations and or false information.

WHEREFORE your Intervenor respectfully requests that this Honorable Court:

A. SCHEDULE a hearing on the Motion for Reconsideration;

B. GRANT the Motion for Reconsideration; and

C. GRANT such other and further relief as justice may require.

Respectfully Submitted

Date: 04-15-19

Robert Morin, Jr., Plaintiff
By His Attorneys
BOROFSKY, AMODEO-VICKERY &
BANDAZIAN, P.A.

Date: 4-15-19

Andrea Amodeo-Vickery, Esquire
NH Bar #404
708 Pine Street
Manchester, NH 03104
(603) 625-6441

STATE OF NEW HAMPSHIRE
COUNTY OF ROCKINGHAM

Subscribed and sworn and acknowledged to by Robert Morin, Jr. before me this 15th day of April, 2019.

Notary Public/Justice of the Peace
My commission expires:

VICKIE L. LANE
MY COMMISSION EXPIRES OCT. 3, 2023
NOTARY PUBLIC
NEW HAMPSHIRE

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing was this day as required by the rules of the Superior Court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case. I am mailing or hand-delivering copies to all other interested parties.

Date: April 15, 2019

/s/ Andrea Amodeo-Vickery
Andrea Amodeo-Vickery, Esquire

Clerk's Notice of Decision
Document Sent to Parties
on 04/22/2019

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4-22-19. Intervenor Morin's motion for reconsideration is GRANTED IN PART and DENIED IN PART. The court sustains the redactions of (a) the name of the complainant first identified on Page 9, and (b) the name of the "girlfriend" first mentioned towards the bottom of Page 9. Those names were properly redacted on pp. 9-10 (and possibly thereafter) because those individuals were participants in an internal affairs investigation. The court does not sustain any additional redactions.

Honorable Andrew R. Schulman
April 22, 2019

1967 Chapter 91-A Legislative History

HB 28 Hearing Held Mar. 21, 1967 before Senate Judiciary Committee

HB 28, permitting freedom of access to public records and proceedings.

Hearing held before the Senate Judiciary Committee on Tuesday, March 21, 1967, with Senator Koromilas, Chairman, presiding.

Committee members present: Senators Koromilas, English, Chandler, Riley, and Foley

Proponents:
Rep. Bednar, sponsor
Rep. Frizzell
Barry Mines, Executive Vice-President of the New Hampshire Taxpayers Association
Thomas W. Gerber, General Manager, Concord Daily Monitor
Senator Harry Spanos
James Ewing, Keene Sentinel
Conrad Quimby, Derry News, and President of the N. H. Weekly Newspapers Association
Edward deCourcy, Argus-Champion, Newport
Rep. Brungot
Rep. Scott-Craig

No opposition

Sen. Koromilas: This committee is now in session and the Chair will recognize Rep. Bednar.

Rep. Bednar: My name is John Bednar from the town of Hudson and I am also a selectman in Hudson. I feel it is important to know what is going on in the house of government. This would bring the people of a community into partnership with government. I feel very strongly that where persons are elected to public office, they become the servants of the people. This is the philosophy which I have. Many persons at the legislative level feel it is sometimes embarrassing for officials to identify themselves with action in connection with what is happening. The federal government enacted a right-to-know act. As far as the questions that have been raised time and time again, certainly there are abuses. If you get involved in this, the principle is the same, whether it is a minor matter or a major one. I feel this bill is a good beginning, and I recommend two particular changes. One is to delete the word "any" in 91-A:2 and 91-A:4 and 2) is to add a sentence in paragraph 1 of 91-A:3 regarding executive sessions. I don't know what the reason was in omitting this. If you don't have it in, I feel we will be negating things. There is a loose phraseology . Any time action is taken, it could possibly be as much as ten days before the final analysis was made. I believe just 2 states in the New England area, Rhode Island and New Hampshire, do not have right-to-know laws. I think we need such a law. People should be informed. I certainly believe that secrecy has no place in government.

Sen. Foley: Are you satisfied with the house amendment or do you feel it is watered down?

Mr. Bednar: It's the first time the House has passed a bill of this nature.

I will say this. I think the word "any" is dangerous and also the section where there is no particular enforcement of the provision as to when a decision should be made after an executive session. If these were plugged, I think it would be a reasonable law. I think the bill would be worthless without these changes.

Sen. Koromilas: In the orignal bill, there was a declaration of public policy with respect to open meetings. What do you think of that being deleted?

Mr. Bednar: The only thing is that somebody might argue that it opens the gates to everything. If we say as a general declaration that all meetings should be open and then you sort of put a questionable onus on that particular phraseology when you come up with all these exceptions. I think the policy is excellent but if you start off and then water it down with amendments to make the law pliable------

Sen. Koromilas: Assuming that the changes that you recommend to the House version were made and if we were to take on the declaration of public policy, wouldn't that make a pretty strong bill?

Mr. Bednar: Maybe, but you won't get it through the House. If you can have a declaration of policy which will reflect what the sub-committee did, I think it would be excellent, but I think you have to phrase the preamble to make concessions on both sides.

Sen. Koromilas: Have you looked at the federal law of public disclosure to determine whether it also has a declaration of policy?

Mr. Bednar: No, I haven't.

Sen. Koromilas: How about the other New England states?

Mr. Bednar: We can't go all out on the first trip. I am very sincere about that because I think we have to have a beginning. I believe this law has to stand the test of time. We all like to do it perfectly but I think we must prove it first. It isn't going to hurt anybody. They wonder what it is going to do at the local level.

Sen. Koromilas: Any questions from the committee? Thank you, Mr. Bednar. The Chair will recognize another proponent.

Rep. Frizzell: We held our hearing and had quite a number of suggestions. We incorporated every suggestion. Back in 1963, we worked hard on this bill. We tried this time to bring in something we could pass. This is the first time this bill has passed the House. The vote in committee was 8 to 6. I had a very good sub-committee which was unanimous on the amendments. The most important thing we did was to allow executive sessions but in a back-handed way we provided that records of decisions must be made, and promptly made, available to the public. That is new. That is something in itself if we can get that. I will think we have accomplished something. Many boards of selectmen do not keep records. We had some discussion over the word 'promptly'. I am not sure that striking out any does what Mr. Bednar hopes it will do. I might cite an example of this letting the press into executive sessions. We have a school board composed of rather young people, naive young people, and they thought it would be wonderful to have the press present. There was only one newspaper represented and the reporter had to leave in the middle of the meeting to get his material in. As a result, the report was half-baked. The board finally

did away with that because they were being so misrepresented but if you have the minutes properly kept and made available, it won't be half-baked. I don't mean to make any threats, but I think if you want a right-to-know bill, you had better not change this.

Sen. Koromilas: You feel that the change that is recommended by Representative Bednar with respect to executive sessions should not be included?

Rep. Frizzell: No. One of the reasons is that you get these half-baked things. People don't stay all through the meeting. Also, I feel that when you are thrashing out a problem, you say things that you may want to change as the discussion goes on. I think you can discuss much more freely if it is just the board. It is the decision that is important.

Sen. Koromilas: Don't you think the public should know what their representatives do?

Rep. Frizzell: I don't think they should be in the meeting.

Sen. Koromilas: Why not?

Rep. Frizzell: Because of these half-baked reports.

Sen. Chandler: Couldn't the press give a half-baked report even if they were there for the whole meeting?

Rep. Frizzell: I didn't say that, Senator, you did.

Sen. English: Maybe I don't read this right but I would understand it to say that it shall be finally approved in executive session. Wouldn't this permit the discussion to go on until they are indeed ready to vote?

Rep. Frizzell: I think they could go into executive session whenever they wanted to. A lot of discussions aren't easy. I don't think the public should necessarily know all of the particulars.

Sen. Koromilas: Why not?

Rep. Frizzell: People would not want to serve and I don't think you would have free discussion.

Sen. Koromilas: Aren't the people entitled to know how they come to their conclusions?

Rep. Frizzell: Not necessarily all the devious methods.

Sen. Koromilas: I feel that the Senate and the House are equal bodies. I feel that the Senate should proceed with a real disclosure bill.

Rep. Frizzell: You should do just as you like but I did warn you of the outcome.

Mr. Mines: I have been laid up and didn't make the House hearing and haven't read the proposed amendment. I have listened to Mr. Bednar, and I feel perfectly safe in putting the federation (N. H. Taxpayers Assn.) on record as favoring this bill.

Mr. Gerber: (See attached testimony)

Sen. Koromilas: Any questions from the committee?

Sen. Koromilas: Mr. Gerber, you are familiar, I am sure, with the original version. I asked Mr. Bednar what he thought of the declaration of policy. How do you feel?

Mr. Gerber: When we saw the amended version and saw that the declaration of policy had been excluded, I must say we gave a groan of dismay. We think it should be included. I agree that it appears somewhat contradictory but I think it would be extremely valuable, particularly in the event of a later court test. We would like to see it included.

Sen. Koromilas: Thank you, Mr. Gerber. Senator Spanos?

Sen. Spanos: Originally, I voted against this two sessions ago. I think one reason was I had a mania about newspapers. I have concluded since that time that the real garbling and the inaccuracies come when they don't have the records of the meeting. It is when they have to ferret them out. I feel strongly that this bill is in order at this time. I must admit that if you talk about this right to know law, we must talk in terms of compromise. I would like to say that the Democratic party has adopted a plank calling for the support of a right to know bill on page 425 of the Red Book. The Governor has also indicated his strong feeling about this law. I think the only issue is whether the people who favor this want that principle negated. I think that will be in the Committee of Conference, whether or not the right to know is going to be carried out by this bill and its amendments. I don't often quote members of the opposition, but Mr. Cobleigh said that this is a compromise between the right to know and the right of privacy.

Sen. Koromilas: How can you compromise the people's right to know?

Sen. Spanos: You will be giving the people far more under this bill than you would if you have the bill defeated. As you probably know, the principle of political activity is on this very basis. All of our good legislation is normally the result of compromise and what you may believe to be a basic principle, many times you have to compromise in order to get what you really want. I have for two sessions sponsored the abolishment of capital punishment bill. It has been defeated. This time I am sponsored a Senate Bill which calls for the abolishment with three exceptions, and these are the ones which the House members are opposed to. I don't really think you are compromising your principles when you get something to start the ball rolling. It is easy to defeat a bill. It is hard to get a bill passed. If you can get it passed, it is easier to get it amended.

Sen. Koromilas: Do you favor the changes that have been indicated or are you in favor of the bill as reported in from the House?

Sen. Spanos: I prefer the bill as amended in the House. I don't say this is the policy of the Democratic party and the Governor's office. I think that if we can find a way , the basic principle is not negated.

Sen. Leonard: I would like to ask Mrs. Frizzell a question. Mr. Gerber recommended a change in the executive sessions section. Do you think that would have a good change of passing the House?

Rep. Frizzell: I doubt it.

Sen. Foley: Mrs. Frizzell, if the bill as amended went through the House easily, why do you think there was an 8 to 6 ought to pass vote in committee? Do you think the 8 to 6 vote wasn't important but that the whole group in the House was?

Rep. Frizzell: The opposition was dead set against any right to know bill. We managed to whittle it down so we could get it to 8-6.

Sen. Foley: Was there a minority report?

Rep. Frizzell: No, they didn't go that far.

Sen. Koromilas: Mrs. Frizzell, do you think the House version is a right to know bill in its present form?

Rep. Frizzell: Yes, I do. It goes as far as I think we can go at this time.

Sen. Koromilas: Does it go anywhere? I don't see how it does. Executive sessions can be held and decisions can be made.

Rep. Frizzell: Yes. Vermont had a reporter who refused to leave when a legislative committee wanted to go into executive session. He was evicted. The Attorney General ruled he had the right to stay.

Sen. Chandler: In the amended form, you allow executive sessions to take some action. Under the proposal by Mr. Bednar, he would allow executive session to discuss things but would take action at a public meeting. Would this mean that if a legislative committee had an executive session, they would have to take their vote at a public meeting?

Rep. Frizzell: I presume we would not claim rights for ourselves that we do not extend to school boards. The same thing may be true in a school board as in a legislative committee. We discuss one bill and vote. Then another. Are we going to go in and out of executive session?

Sen. Chandler: That is what I am asking you.

Rep. Frizzell: I think it would be clumsy. I think Mr. Bednar's problem is that he doesn't trust them to keep records and make them available. We have accomplished something if we force these boards of selectmen to keep records.

Sen. Chandler: Do you think that the majority of selectmen would obey the law? Do you think they would keep records?

Rep. Frizzell: Of course we do have a provision in 91-A:7.

Sen. Koromilas: Is there any other person to speak in favor of this bill?

Mr. Ewing: I represent the Keene Sentinel and am also the co-owner of two other newspapers in the state. The bill as introduced in the House, these principles were reflected in the platforms of both parties. There is an area for argument. It is my feeling that as the bill passed the House, it not only doesn't broaden it, it narrows it. The suggested amendments today aim to put back the strength. I think there has been some misunderstanding. The proposals don't eliminate

executive sessions. They would simply say that final action couldn't be taken in executive session. I would hate to see a situation where a school board could pass a budget in executive session and the only requirement was that they report it later in the form of minutes. I urge you to accept the amendments that have been proposed.

Sen. English: As presented here by Mr. Gerber, you have no changes in the proposal by him?

Mr. Ewing: The ones Mr. Gerber has proposed I would endorse.

Sen. Koromilas: How do you feel about the declaration of policy?

Mr. Ewing: I am strongly in favor, but I recognize the practical problems that have been outlined. Without regard to the practical problems, I am strongly in favor and I find it difficult to see how anyone could argue it.

Sen. Riley: How would you people feel about an amendment that would allow any public official equal column space if something has been published against him?

Mr. Gerber: This is an old story. It is set forth in the FCC regulations. This used to be a very real problem. I think it is decreasing now. I think it would be difficult to enact such a thing and difficult to sustain because of the First Amendment. I know a few newspapers who won't allow space to answer a charge that it brought up. This gets into something that is very fractious. Quite often, a newspaper will quote accurately or report accurately on a particular action by a public official that is not particularly savory. A lot of people don't like the public to know what they are doing. I think the public is adequately protected by the laws of libel and slander. We are extremely cautious in dealing with these things so that we don't push into these areas. We give our staff extensive training in the laws of libel and slander. I think the main solution is for professional newspapermen to undertake the same watchdog attitude towards a person's individual rights as some members of the legal profession have done.

Sen. Riley: In other words, you feel the coverage is such that it doesn't try to mold public opinion?

Mr. Gerber: I would hate to generalize on that.

Sen. English: On this libel and slander, have there been any cases in recent times of any individual taking action against a newspaper?

Mr. Gerber: I know of two suits pending now, one against the Concord Monitor and one against the Portsmouth Herald. The Rosenblatt case against the Laconia Citizen went to the Supreme Court.

Sen. Chandler: I have a question to ask Senator Spanos. Do you feel that the penalty clause is sufficient?

Sen. Spanos: I forgot to mention that. I would say confidentially that 98:A-7 is not strong enough. I amafraid that the procedure for injunctive relief will not solve the problem. I don't believe it will solve the problem of the people we expect to help. I think there should actually be a penalty so that they would realize that they do stand to be penalized. They know 99 out of a hundred won't take them in.

Sen. Chandler: I would like to ask Mrs. Frizzell how she feels.

Rep. Frizzell: We took that just as it was in the original bill. Maybe it does need to be stronger.

Sen. Chandler: Mr. Gerber, how do you feel about that?

Mr. Gerber: I was quite satisfied with the injunctive relief because the experience in other states where they have had as much as $500 fine and a year in jail has proved very ineffective. We don't want to make this a crime. We are getting into an area where it epitomizes the difference between Mrs. Frizzell and myself. It is a matter of interpretation. They are not acting in a criminal manner. I think the injunctive relief is very reasonable.

Sen. Chandler: Mr. Gerber, you have had considerable experience with injunctive relief. How expensive is it? Beyond the reach of the average man?

Mr. Gerber: Our experience with injunctive relief is limited; our experience in court cases is not. In the past, the Monitor has been represented by distinguished members of the bar, pro bono publico. The legal fees have really been low.

Sen. Chandler: Do you think a distinguished attorney would do that for an average citizen?

Mr. Gerber: I think they do.

Sen. Koromilas: I have a message that Rep. Scott-Craig was unable to attend this meeting but if she testified, it would be in favor of a stronger right to know bill.

Mr. Quimby: I am Conrad Quimby of the Derry News and President of the N. H. Weekly Newspaper Association. We do think that this is a good bill, well intended, and tends to protect the operation of good government. It helps to insure that officials continue to perform responsibly.

Mr. deCourcy: I am in favor of the amendments. I think the bill may be misconstrued as a bill for newspaper people. Most newspaper men are trained and know how to get information even without the bill. This bill is really to protect the right of the individual who might not have this training. Beyond that, I think if we assume that the legislative intent is to create better government, I think the bill will do that. I think this is a matter of public trust; not whether the officials are trusted by the people but whether they trust the people. I think this is basic to our whole American principle. I support the bill.

Sen. Koromilas: Is there anyone here who would like to appear in opposition? If not, is there someone else who would like to speak?

Rep. Frizzell: Rep. Hilda Brungot asked to be recorded in favor.

Rep. Bednar: I can predict the outcome if we make this too strong a law. It is not only the press that is involved. The object of the injunctive relief is that sometimes, fines are ignored. One thing I would like is to have injunctive relief take precendence on the court calendar. I think it is an important issue. It should stay in there. I don't think it infringes on the court because the budget has this in.

I think this executive session amendment should be cleared up. I believe that an ordinary group of individuals may take up 7 items in executive session . The amendment intends to make it so that when you are through, you just come out and make your decision known. I am not interested in the bickering of the committee. I think the people have a right to know how they voted. A time delay would defeat this particular bill.If the amendment is not satisfactory to the committee, certainly there should be some area that would eliminate all possibility of doubt as to what we mean. It has nothing to do with deliberations. I agree we would like a lot but I have seen this three times. This time I think we are on the right track, and I think for the good of the state we should come up with something that is reasonable. I wish you would consider something that is workable and is not offensive to people at all levels.

Sen. English: What you seem to be saying is quite different from the way I read this section. The executive session takes place and then they appear and announce the decision. This seems to say that they must make their final vote before the public. Which do you think is important? You would accept that the selectmen come out and announce that they have decided?

Rep. Bednar: There seems to be a question as to whether or not we are encroaching on executive sessions. It could be given in the form of a vote. There's always a maverick who goes out and gives information.

Sen. English: All I wanted to know was what you had in mind.

Rep. Bednar: What do you mean?

Sen. English: The final vote is taken before the public? You mean just an announcement of their action?

Rep. Bednar: I think you are splitting hairs. Either way would be acceptable.

Sen. Koromilas: Mr. Gerber, what is your estimation of the bill as passed in the House? Would you call it a right to know bill?

Mr. Gerber: No, sir, I would not. I would call it a partial open records bill.

Sen. Koromilas: Mr. Quimby, what is your view?

Mr. Quimby: It doesn't seem to be what it purports to be. I am discouraged that a member of my community worked on this. As one who covers town meetings, I know how much of a temptation there is to do business behind closed doors. It is difficult to find out what happened. The amendments would tend to correct this feature which I think is in the best interest of insuring that representatives continue to operate responsibly and perhaps more important, that the public be fully informed about the affairs of their community so that they have faith and respect for the conduct of business in their towns. This is the most important feature, keeping public affairs before the public. When a committee operates behind closed doors, the people begin to lose faith and respect and fail to support the work being done.

Sen. Koromilas: Mr. Ewing, do you think this is a right to know bill?

Mr. Ewing: I think it is an anti-right to know measure.

Sen. Koromilas: Mr. deCourcy, what do you think?

Mr. deCourcy: I think the bill passed by the House guarantees the committees can meet in secret. The public can be trusted with information.

Sen. Koromilas: Are there any questions from members of the committee? Any persons who wish to speak for or against or who wish to speak a second time? If not, the hearing is closed.

1967 Chapter 91-A Legislative History

HB 28 Committee of Conference Report – House Journal

other prosecutions, informations and indictments, including prosecutions under the provisions of RSA 282, except for treason, murder, rape, arson, robbery or burglary, shall be commenced, filed or found within six years after the offense is committed; but the time during which the party charged was not usually and publicly resident within this state shall not be reckoned as part of the time aforesaid.

2 Effective Date. This act shall take effect sixty days after its passage.

James Koromilas
Richard W. Leonard
Conferees on the part of the Senate

Armand Capistran
Donald H. Spitzli
Margaret A. Griffin
Conferees on the part of the House

Report adopted by vv.

COMMITTEE OF CONFERENCE REPORT

HB 28

The committee of conference to whom was referred House Bill No. 28, An Act permitting freedom of access to public records and proceedings, having considered the same report the same with the following recommendations.

That the Senate recede from its adoption of its amendments to said bill, that the House recede from its position of non-concurrence in the Senate amendments and that the House and Senate concur in the adoption of the following amendments to said bill.

Amend said bill by striking out all after the enacting clause and inserting in place thereof the following:

1 New Chapter. Amend RSA by inserting after chapter 91 the following new chapter:

Chapter 91-A

Access to Public Records

91-A:1 Definition of Public Proceedings. The term "public proceedings" as used in this chapter means the transactions

of any functions affecting any or all citizens of the state by any board or commission of any state agency or authority, and all meetings of any board, commission, agency, or authority, of any county, town, municipal corporation, school district, or other political subdivision.

91-A:2 Meetings Open to the Public. All public proceedings are open to the public, and all persons are permitted to attend any meetings of these bodies or agencies, and minutes of such meetings shall be promptly recorded and open to public inspection, except as provided by section 5 of this chapter. If the charter of any city or guide lines set down by the appointing authority requires broader public access to official meetings and records than herein described, such charter provisions or guide lines shall take precedence over the requirements of this chapter.

91-A:3 Executive Sessions. I. Nothing contained in this chapter shall be construed to prevent these bodies or agencies from holding executive sessions but any decisions made during any executive session must be recorded and made available for public inspection promptly, and no ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official actions shall be finally approved in executive session. The conditions of this section do not apply to executive sessions of the committee of the general court.

II. Exceptions. A body, or agency, may exclude the public when it is considering or acting upon the following matters:

(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigating of any charges against him, unless the employee affected requests an open meeting.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, would be likely to affect adversely the reputation of any person, other than a member of the body itself.

(d) Consideration of the acquisition, sale, or lease of land which, if discussed in public, would be likely to benefit a party, or parties, whose interests are adverse to those of the general community.

91-A:4 Minutes and Records Available for Public Inspection. Every citizen during the regular or business hours of all

such bodies or agencies, an
of such bodies or agencies,
records, including minutes
cies, and to make memoran
static copies, of the records
otherwise prohibited by sta

91-A:5 Exemptions. T
are exempted from the provi

I. Grand and petit juries

II. Parole and pardon b

III. Personal school reco

IV. Records pertainin
confidential, commercial, o
medical, welfare, and other
stitute invasion of privacy.

91-A:6 Exclusion. This
282 of the Revised Statutes
security.

91-A:7 Violation. Any
this chapter may petition
relief. The courts shall giv
priority on the court calenda

2 Effective Date. This a
its passage.

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Report adopted by vv.

COMMITTEE OF C

HB 210

The committee of confer
Bill No. 210 An act providin

such bodies or agencies, and on the regular business premises of such bodies or agencies, has the right to inspect all public records, including minutes or meetings of the bodies or agencies, and to make memoranda abstracts, photographic or photostatic copies, of the records or minutes so inspected, except as otherwise prohibited by statute or section 5 of this chapter.

91-A:5 Exemptions. The records of the following bodies are exempted from the provisions of this chapter:

I. Grand and petit juries.

II. Parole and pardon boards.

III. Personal school records of pupils.

IV. Records pertaining to internal personnel practices, confidential, commercial, or financial information, personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy.

91-A:6 Exclusion. This chapter shall not apply to chapter 282 of the Revised Statutes Annotated, relative to employment security.

91-A:7 Violation. Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief. The courts shall give proceedings under this chapter priority on the court calendar.

2 Effective Date. This act shall take effect sixty days after its passage.

John P. H. Chandler, Jr.
Eileen Foley
Conferees on the part of the Senate

Donald H. Spitzli
A. C. Gorham
John M. Bednar
Conferees on the part of the House

Report adopted by vv.

COMMITTEE OF CONFERENCE REPORT

HB 210

The committee of conference to whom was referred House Bill No. 210 An act providing for the salary for the sheriff of