THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 218-2018-CV-01406

UNION LEADER CORPORATION, ET AL.

v.

TOWN OF SALEM

PETITIONER ACLU-NH'S SUPPLEMENTAL MEMORANDUM OF LAW ON REMAND

Pursuant to this Court's June 24, 2020 order, Petitioner ACLU of New Hampshire ("ACLU-NH") respectfully submits this supplemental memorandum of law on remand following the New Hampshire Supreme Court's decision in this case, *see Union Leader Corp. v. Town of Salem*, No. 2019-0206, 173 N.H. __, 2020 N.H. LEXIS 102 (N.H. Sup. Ct. May 29, 2020) (hereinafter, "*Town of Salem*"), and in *Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135, 173 N.H. __, 2020 N.H. LEXIS 103 (N.H. Sup. Ct. May 29, 2020) (hereinafter, "*Seacoast Newspapers*").

On remand, Petitioner ACLU-NH asks that this Court order the release of the three internal audit reports (hereinafter, "Audit Report") in full with several narrow exceptions. For example, Petitioner ACLU-NH is not seeking the release of: (i) the names of private citizens, including any private citizen witness names in former Salem Police Chief Paul Donovan's quoted remarks on Page 7 of the Audit Report's culture addendum and that were referenced in Section V, Part J of this Court's April 5, 2019 order (*see Exhibit 2*, at APXII 237) and private citizen witness names

that may exist on Pages 7 to 12 of this addendum (*see id.*, at APXII 237-242),[1] and (ii) the redactions on Pages 93-94 of the Audit Report governing internal affairs that this Court sustained under the "invasion of privacy" exemption in RSA 91-A:5, IV in its April 5, 2019 order (*see id.*, at APXII 203-204). In particular, Petitioner ACLU-NH asks that this Court overrule the redactions in the Audit Report referenced in the following sections of this Court's April 5, 2019 order: (i) Section IV, Parts C, D, L, O addressing the internal affairs report; (ii) Section V, Parts B, C, I, K (except K.1(b) and K.4(b)) addressing the culture report; and (iii) Section VI, Parts A, C, D addressing the time and attendance report. Petitioner ACLU-NH has attached this Court's April 5, 2019 order as ***Exhibit 1***. Petitioner has also attached as ***Exhibit 2*** the version of the Audit Report that the Town released on April 26, 2019 following this Court's orders on April 5 and 22, 2019. This is the operative version of the Report that this Court should review on remand. Also, Petitioner ACLU-NH submits that the Town should release former Salem Police Chief Paul Donovan's 14-page response dated November 9, 2018 to these reports (*see* ***Exhibit D*** to Dec. 21, 2018 Chapter 91-A petition), and the two-page memorandum from Salem Town Manager Christopher Dillon to Chief Donovan dated October 29, 2018 discussing these reports (*see* ***Exhibit I*** to Dec. 21, 2018 Chapter 91-A petition). In further support, Petitioner ACLU-NH incorporates by reference its original December 21, 2018 Petition and February 4, 2019 Memorandum of Law in this case.

INTRODUCTION

Following *Town of Salem* and *Seacoast Newspapers*, a government entity now must independently balance the public interest in disclosure against any privacy and governmental

[1] Petitioner ACLU-NH does not challenge the redactions that this Court sustained in its April 22, 2019 order on Intervenor Robert Morin's motion for reconsideration, which addressed the names of private citizens.

interests in nondisclosure in determining whether a record is exempt under RSA 91-A:5, IV. However, in its April 5, 2019 order, this Court already concluded that the bulk of the Town's redactions in the Audit Report governing internal affairs were not justified by any privacy interest in nondisclosure. As this Court previously 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." *See* Super. Ct. Apr. 5, 2019 Order, at Page 3, attached as ***Exhibit 1*** (emphasis in original). This Court added: "[T]he 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." *Id.* The only redaction sustained by this Court under this invasion of privacy exemption was in Pages 93-94 of the internal affairs Audit Report. *Id.* at p. 8, Section IV(E); ***Exhibit 2***, at APXII 203-204 (IA Report 93-94). Petitioners did not appeal this ruling, and are not seeking this information on remand. Notwithstanding this Court's prior ruling, the Town has refused to produce the unredacted Audit Report after the New Hampshire Supreme Court's *Town of Salem* decision. Instead, the Town is forcing Petitioners' counsel—as well as this Court—to spend additional time, energy, and resources in this matter. Whatever its reasons in continuing to withhold this vital information from its taxpayers that spent $77,000 on the Audit Report, the Town's decision is now indefensible because this Court has already ruled that public interest balancing requires disclosure. Accordingly, this Court should compel production of this information. Additionally, pursuant to RSA 91-A:8, this Court should order the payment of reasonable costs, as well as reasonable attorneys' fees incurred by Petitioners' counsel from May 29, 2020 to the present following the *Town of Salem* decision.

THE *SEACOAST NEWSPAPERS* AND *TOWN OF SALEM* DECISIONS

In *Seacoast Newspapers*, the New Hampshire Supreme Court overruled how *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) interpreted the "internal personnel practices" exemption in RSA 91-A:5, IV. *See Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135, 173 N.H. __, 2020 N.H. LEXIS 103 (N.H. Sup. Ct. May 29, 2020). While *Fenniman* had construed this exemption to encompass records reflecting a public agency's internal discipline of an employee, the Court in *Seacoast Newspapers* explained that *Fenniman*'s interpretation was too broad. The Court noted that the "internal personnel practices" exemption more narrowly covers "records pertaining to the internal rules and practices governing an agency's operations and employee relations, *not information concerning the performance of a particular employee*." *Seacoast Newspapers*, 173 N.H. __ (slip op. at 11) (emphasis added); *see also id.* at 2, 9, 10 ("Today, we take the opportunity to redefine what falls under the 'internal personnel practices' exemption, overruling our prior interpretation set forth in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993)."; "[W]e overrule *Fenniman* to the extent that it broadly interpreted the 'internal personnel practices' exemption and its progeny to the extent that they relied on that broad interpretation."). For example, the "internal personnel practices" exemption is now limited to "rules and practices dealing with employee relations or human resources," which includes "such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id*. at 11 (quoting *Milner v. Department of Navy*, 562 U.S. 562, 570 (2011)). As the Court summarized, "[O]ur broad interpretation of the exemption in *Fenniman*, which has resulted in a broad category of governmental documents being withheld from public inspection, is contradictory to our state's principles of open government." *Id.* at 7; *see also id*. at 9 ("*Fenniman*'s broad interpretation of the

'internal personnel practices' exemption substantially undermines the guarantees protected by the Right-to-Know Law and reduces its defining goals to lip service.").

In the second decision—*Town of Salem*—the Supreme Court overruled *Fenniman*'s conclusion that the "internal personnel practices" exemption was categorical in nature, without any assessment of the public interest in disclosure. As the Court explained: "We now overrule *Fenniman* to the extent that it decided that records related to 'internal personnel practices' are categorically exempt from disclosure under the Right-to-Know Law instead of being subject to a balancing test to determine whether such materials are exempt from disclosure." *Town of Salem*, 173 N.H. __ (slip op. at 2-3); *see also id.* at 11-12. The Supreme Court then concluded that this case should be remanded back to this Court

> not only for the trial court to apply the balancing test in the first instance, but for it also to decide whether information in the redactions it upheld satisfies *Seacoast Newspapers* definition of "internal personnel practices." To the extent that the trial court finds that a redaction does not meet that narrow definition, it may, on remand, determine whether the redacted information, nonetheless, is exempt from disclosure under the exemption for "personnel . . . and other files." RSA 91-A:5, IV. This is so because, as the Union correctly observes, "it is not evident that the [trial] court considered whether any of the disputed materials were exempt 'personnel . . . files.'"

Id. at 11. This supplemental memorandum of law follows.

ADDITIONAL FACTUAL DEVELOPMENTS

There have been several additional factual developments in this case since this Court's April 5, 2019 decision that further enhance the public interest in disclosure.

I. Intervenor Deputy Chief Robert Morin's Subsequent Litigation

Intervenor Deputy Chief Robert Morin has filed three defamation lawsuits against individuals who spoke to and cooperated with Kroll as part of its investigation and completion of the Audit Report, including against a private Salem resident. Mr. Morin's aggressive litigation tactics against those who cooperated with Kroll's investigation highlight the compelling interest

in disclosure of the Audit Report, as well as eliminate any privacy right he may have concerning the Report's contents.

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), May 3, 2019 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:

> [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* *Exhibit 2*, at APXII 242 (Culture Add. 12). Mr. Morin's Amended Complaint in his 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 apparently includes speech about Muslim individuals. Compl. ¶ 49; *see also* *Exhibit 2*, at 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 this information in litigation. *See Morin v. Town of Salem, et al.*, No. 218-2019-cv-00523 (Rockingham Cty. Super. Ct. May 10, 2019) (Schulman, J.), attached as *Exhibit 3*.

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. *Exhibit 2*, at 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. *Id.* at 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 "Supervisor B." 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.

Id. at APXII 214-215 (IA Report 105-106). The Report goes on to suggest that (likely) Mr. Morin has received preferential treatment by the Department. *Id.* at APXII 215 (IA Report 106); *see also id.* at 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 a racial profiling complaint. *Id.* at APXII 176-182 (IA Report 67-73).[2] 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. *Id.* at APXII 201, 204-208 (IA Report 92, 95-99). There, a complainant alleged that "Supervisor B" engaged in threats, harassment, and unprofessional behavior. *Id.* at APXII 201 (IA Report 92).[3]

Further, portions of the Culture Report previously withheld by the Town under the "internal personnel practices" exemption, but ordered released by this Court pursuant to its April 5, 2019 order, indicate the following: (i) Mr. Morin, according to at least one employee, personally created a culture within the Department where employees are afraid to talk because, if they do, "he's going to go and get them," *see id.* at APXII 236 (Culture Add. 6); (ii) Mr. Morin made statements on Facebook that, according to the auditors, were "inaccurate" and "insubordinate," *see id.* at APXII 235 (Culture Add. 5); and (iii) a Salem officer—possibly Mr. Morin[4]—allegedly threatened his sister's boyfriend by flashing his firearm at a defendant while in a Massachusetts courtroom and continued to work while this criminal investigation was pending, *see id.* at APXII 237-38, 241 (Culture Add. 7-8, 11).

[2] As explained below, the Town's April 26, 2019 produced version of the internal affairs Audit Report inexplicably redacts portions of Pages 67-73 concerning this incident that were ***not*** redacted in the original November 21, 2018 produced version. In many instances, the new redactions redact "Supervisor B," which appears to be Mr. Morin.

[3] 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.).

[4] Responses to Massachusetts public records requests indicate that this allegation may concern Deputy Chief Morin, though this identifying information in the Report remains redacted by the Town. *See* Haverhill, Massachusetts Police Department Public Records, attached as ***Exhibit 4***.

Significantly, 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 original November 21, 2018 produced version. *Compare* Pages 67-74, 89, and 92 of Nov. 21, 2018 IA Report at *Exhibit A* to Dec. 21, 2019 Chapter 91-A petition) *with Exhibit 2*, at APXII 176-183, 198, 201 (Apr. 26, 2019 version of IA Report with added redactions). The Town has provided no explanation for these new redactions. Many of these new redactions in the April 26, 2019 version reference "Supervisor B" which, again, likely is Mr. Morin. In short, it seems that, even since this Court's April 5, 2019 order, the Town has taken steps through these redactions to protect Mr. Morin.

II. Criminal Investigation and Prosecution of Some of the Department's Officers

Following the November 2018 initial publication of the redacted Audit Report, the New Hampshire Department of Justice opened a 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.[5] On June 1, 2019, Mr. Morin retired from the Department.[6]

In January 2020, the New Hampshire Department of Justice charged Sgt. Verrocchi with reckless conduct with a deadly weapon, a Class B felony, and disobeying an officer, a misdemeanor.[7] Sgt. Verrocchi, a shift supervisor and the former union president, is accused of

[5] *See* Ryan Lessard, "AG's Criminal Probe Expanded to Include Former Salem Chief Paul Donovan," *Union Leader* (Mar. 11, 2019), https://www.unionleader.com/news/crime/ag-s-criminal-probe-expanded-to-include-former-salem-chief/article_504689d9-42da-52a4-93a1-46770241f0f7.html.

[6] *Id.*

[7] Included in the Audit Report's Culture Addendum is a screenshot of a post on the public Facebook profile of Sgt. Michael Verrocchi—who was then the union president for sworn personnel—where he wrote: "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

leading another Salem police officer on a high-speed chase while off duty in 2012. This incident was documented in the internal affairs audit report, where Sgt. Verrocchi likely is listed as "Officer B." *Exhibit 2*, at APXII 150 (IA Report 41). The Department of Justice alleged in a press release that Sgt. Verrocchi drove a Jeep Grand Cherokee down Route 28 in Salem on November 10, 2012, "in excess of the posted speed limit" and failed to stop when Officer Sean York tried to pull him over. (The Town of Salem inexplicably appears to have redacted Officer York's name in the Report.) Sgt. Verrocchi allegedly ignored Officer York's signals and sped along for two miles, going through a red light and avoiding spike strips placed by Officer Kevin Swanson (whose name the Town also inexplicably redacted). The Department of Justice further alleged that the Jeep constituted a deadly weapon, and that Sgt. Verrocchi's conduct "placed others in danger of serious bodily injury." *See* N.H. DOJ Jan. 15, 2020 Press Release, attached as *Exhibit 5*.[8] At least until the release of the internal affairs audit report in November 2018, the Salem Police Department apparently swept this allegedly criminal behavior under the rug for over six years. The Town has even endeavored to keep secret in the Report the names of the officers who pursued Sgt. Verrocchi, yet apparently declined to arrest him. Neither the Salem Police Department nor Officers York and

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the court of public opinion." *Exhibit 2*, at APXII 235 (Culture Add. 5). Moreover, following the publication of a redacted version of the Report in late November 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." *See* Ryan Lessard, "High-ranking Salem Police Officers Take to Social Media to Criticize Report," *Union Leader* (Nov. 27, 2018), https://www.unionleader.com/news/politics/local/high-ranking-salem-police-officers-take-to-social-media-to-criticize-report/article_31adc0df-2917-5be1-8b5e-25eaff311d1e.html.

[8] *See also* Ryan Lessard, "Salem Police Sergeant Arrested for 2012 High-speed Chase," *Union Leader* (Jan. 15, 2020), https://www.unionleader.com/news/courts/salem-police-sergeant-arrested-for-high-speed-chase/article_25d72d6c-71ef-5d89-a68e-4cbc7f87303a.html.

Swanson[9] have offered any explanation as to why they collectively declined to arrest Sgt. Verrocchi back in 2012.[10]

Moreover, on approximately July 2, 2020, the United States Department of Justice charged Captain Wagner with one count of filing a false tax return. The indictment alleges that Captain Wagner purchased 36 assault rifles using his law enforcement discount at Sig Sauer Academy in Epping, resold them at a profit of $33,000, and purposely omitted them from his tax return. The United States Government alleges that Captain Wagner bought the firearms between December 2012 and January 2013, and sold them in 2013. The Government further alleges that he filed his tax return in February 2013, claiming a total income of $166,170. The indictment also alleges Captain Wagner falsely claimed $10,790 in deductions in the form of non-reimbursed expenses for police equipment, ammunition and firearms in the same tax return. *See* U.S. DOJ July 2, 2020 Press Release, attached as *Exhibit 6*.[11]

[9] The Department apparently still employs Officer Swanson. *See* https://www.townofsalemnh.org/police-department/pages/department-roster.

[10] The Department's decision to not arrest Sgt. Verrocchi is in stark contrast with its aggressive decision to arrest and prosecute a person for "assaulting a police officer" when the person simply swatted the hand of a police officer during the December 2, 2017 ICenter incident. *See* Ryan Lessard, "Hockey Dad Pleads Guilty to Violation in Salem ICenter Incident," *Union Leader* (May 9, 2019), https://www.unionleader.com/news/crime/hockey-dad-pleads-guilty-to-violation-in-salem-icenter-incident/article_b6e311e1-4501-59c7-a883-87a762b3f5b6.html. The Audit Report was heavily critical of how the Department handled the ICenter incident and explained how the Department's leadership failed in accepting this investigation as complete. *Exhibit 2*, at APXII 184-198 (IA Report 75-89). Captain Wagner—who has since been indicted—was in charge of conducting an informal inquiry following a complaint concerning the ICenter incident and closed the matter in less than 24 hours without even contacting the complainant.

[11] *See* Ryan Lessard, "Salem Police Captain Arrested for Federal Tax Evasion in Gun Resale Scheme," *Union Leader* (July 2, 2020), https://www.unionleader.com/news/crime/salem-police-captain-arrested-for-federal-tax-evasion-in-gun-resale-scheme/article_1393c949-fca7-584b-882f-65d0873d3e83.html.

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) (citation omitted). 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, as this Court has held in a related case, an exemption under the Right-to-Know Law does not create a privilege that prohibits a government entity from voluntarily disclosing an exempt document. *See Morin v. Town of Salem, et al.*, No. 218-2019-cv-00523 (Rockingham Cty. Super. Ct. May 10, 2019) (Schulman, J.) ("With respect to the question of confidentiality, RSA 91-A is merely a restriction on the public's right to get documents from the government on demand. The statute does not prohibit anybody from voluntarily disclosing documents."), attached as *Exhibit 3*; *see also Marceau v Orange Realty*, 97 N.H. 497, 499 (1952) ("It is well settled that statutory privileges … will be strictly construed. It should plainly appear that the benefits of secrecy were thought to outweigh the need for the correct disposal of litigation."; noting that a statutory privilege does not exist unless there is "a clear legislative mandate," and holding that a statutory privilege did not exist even where there was a penalty for unauthorized disclosure).

I. The Report and Related Documents Do Not Constitute "Internal Personnel Practice" Information Under RSA 91-A:5, IV Following *Seacoast Newspapers*.

The Supreme Court remanded this case back to this Court to, in part, decide whether information in the redactions it previously upheld satisfies *Seacoast Newspapers*' definition of "internal personnel practices" under RSA 91-A:5, IV.

Again, the Supreme Court in *Seacoast Newspapers* noted that the "internal personnel practices" exemption narrowly covers "records pertaining to the internal rules and practices governing an agency's operations and employee relations, *not information concerning the performance of a particular employee*." *Seacoast Newspapers*, 173 N.H. __ (slip op. at 11) (emphasis added). Based on the Town's own admissions in this case, the Audit Report and related documents do not satisfy this narrow definition. For example, as the Town explained on appeal, the Report "discusses disciplinary investigations and *investigates employees* with respect to time and attendance." *See* Town of Salem N.H. Sup. Ct. Br. at 15 (emphasis added), attached as *Exhibit 7*. In other words, the Town has conceded that the Report and related documents implicate the performance of individual employees. However, *Seacoast Newspapers* specifically excludes this type of information from the narrow definition of an "internal personnel practice."

In any event, even if the Report and related documents do constitute "internal personnel practice" information under RSA 91-A:5, IV (which they do not), the information would still be subject to the public interest balancing analysis employed in Section III *infra* per the Supreme Court's decision in *Town of Salem*. As explained in Section III *infra*, this balancing analysis requires disclosure.

II. The Report and Related Documents Do Not Satisfy the "Personnel File" Exemption Under RSA 91-A:5, IV.

These records are also not "personnel files" under RSA 91-A:5, IV. As the New Hampshire Supreme Court has explained, the term "personnel" "refers to human resources matters." *Reid v. N.H. AG*, 169 N.H. 509, 522 (2016); *see also Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135, 173 N.H. __, 2020 N.H. LEXIS 103 (N.H. Sup. Ct. May 29, 2020) (slip op. at 21). The Supreme Court has further analogized the "personnel file" exemption in RSA 91-A:5, IV to Exemption 6 of the Federal Freedom of Information Act:

> Like the exemption for personnel files in RSA 91-A:5, IV, FOIA contains an exemption, known as Exemption 6, for "personnel and medical files and similar files." 5 U.S.C. § 552(b)(6) (2018). As the Supreme Court has explained, Exemption 6 shields from disclosure, in certain circumstances, an employee's "personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, [and] evaluations of his work performance." [*Dept. of Air Force v. Rose*, 425 U.S. 352, 377 (1976)]. Simply put, Exemption 6 protects employee files which are "typically maintained in the human resources office — otherwise known … as the 'personnel department.'" [*Milner v. Department of Navy*, 562 U.S. 562, 570 (2011)].

See Seacoast Newspapers, Inc., 2020 N.H. LEXIS 103 (slip op. at 23-24). 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, 5 (2003). In applying this test, the focus is not on whether the documents in question are physically in a "personnel file," but rather whether they meet this definition of "personnel"—namely, whether the records in question have a "human resources" purpose.[12]

[12] This principle makes sense because, otherwise, police departments could deem documents that are related to employees, but have no employment purpose, as "personnel" (and therefore confidential) by simply placing them in an officer's personnel file. *See Worcester Telegram*, 58 Mass. App. Ct. at 11 ("The mere placement of these materials in an internal affairs file does not make them disciplinary documentation or promotion, demotion, or termination information.").

Applying this test, the Audit Report and related documents were not created for a human resources purpose. As the Audit Report states, its scope "was not … to conduct[] an independent review of facts or circumstances surrounding individual complaints filed against Salem PD personnel." *See Exhibit 2*, at APXII 113 (IA Report 4) (emphasis in original). Rather, these records were designed to audit the Salem Police Department. The Report's focus was to broadly examine the operations of the Department and "review the [internal affairs] process, in its entirety and make a determination as to its fairness and comprehensiveness, and whether it is in line with widely-regarded law enforcement best practices." *See id*.

This Court must reject any theory that the unredacted Audit Report and related documents constitute "personnel" information under RSA 91-A:5, IV because they are "derived" from disciplinary information that separately may constitute "personnel" records. This argument, again, ignores the definition of "personnel" as established by the New Hampshire Supreme Court and other courts that focuses on whether document itself has a "human resources" purpose. *Worcester Telegram* is illustrative. 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 & Gazette Corp.*, 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. The Court explained: "[T]hat these documents bear upon such [employment] decisions does not make their essential nature or character 'personnel [file] or information.' Rather, their essential nature and character derive from their function in the internal affairs process"—a function which was not employment-related because the documents were created "separate and independent from ordinary employment evaluation and

assessment." *Id.* at 7. In short, information may 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 ("Put differently, the same information may simultaneously be contained in a public record and in exempt 'personnel [file] or information.'").[13] As in *Worcester Telegram*, the Audit Report has a function to independently evaluate the Salem Police Department and "to inspire public confidence"—a process that is "separate and independent from ordinary employment evaluation and assessment." *See id.* at 7, 9. The Audit Report itself acknowledges that the internal affairs process it examined exists to "establish[] the necessary trust and confidence to effectively police a community." *See* Exhibit 2, at APXII 113-14 (IA Report 4-5).

Finally, though the Audit Report and related documents are not "personnel files," even if they are, they are subject to the same public interest balancing analysis employed in Section III *infra*. *See Reid*, 169 N.H. at 527 ("[W]e now hold that the determination of whether material is subject to the exemption for 'personnel … files whose disclosure would constitute invasion of privacy,' RSA 91-A:5, IV, also requires a two-part analysis of: (1) whether the material can be considered a 'personnel file' or part of a 'personnel file'; and (2) whether disclosure of the material would constitute an invasion of privacy."). As explained in Section III *infra*, this balancing analysis requires disclosure.

[13] *See also Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 507 (N.M. Ct. App. 2010) ("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.'").

III. To the Extent this Court Construes the Report as Constituting "Other Files" that are Subject to the Invasion of Privacy Exemption, the Public Interest Balancing Test Requires Production.

To the extent the Report and related documents could constitute "other files … whose disclosure would constitute invasion of privacy" under RSA 91-A:5, IV, this exemption requires a balancing of the public interest in disclosure against any privacy and governmental interests in nondisclosure. The Supreme Court has explained this three-step balancing analysis as follows under RSA 91-A:5, IV:

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

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

A. The Privacy Interest in Nondisclosure is Nonexistent.

At the outset, Intervenor Deputy Chief Morin has waived any purported privacy interests he may have concerning the Audit Report by placing the Report directly at issue in three separate lawsuits he has filed. In one of these related cases, this Court has reached a similar conclusion. *See Morin v. Town of Salem, et al.*, No. 218-2019-cv-00523 (Rockingham Cty. Super. Ct. May 10, 2019) (Schulman, J.) ("There is no claim of a statutory or other privilege, and if there was such a claim, the privilege would likely be waived by the decision to use the information in litigation."), attached as ***Exhibit 3***.

Moreover, police officers have no privacy interest in records implicating the performance of official duties, especially when—as is the case here—there is credible evidence of wrongdoing. Here, the information sought does not constitute "intimate details … the disclosure of which might harm the individual," *see Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972), or the "kinds of facts [that] are regarded ***as personal*** because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*, 169 N.H. at 530 (emphasis added). Petitioners are not seeking, for example, medical or psychological records in an officer's personnel file. Instead, Petitioners are seeking redacted information in the Audit Report that relate to the performance of officers' official duties. Thus, any privacy interest here is minimal, if not nonexistent.[14]

In examining the privacy of privacy exemption under RSA 91-A:5, IV, the Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government and information concerning the performance of government employees.

[14] *See Cox*, 242 P.3d at 507 ("[T]he [citizen] complaints at issue relate solely to the officer's official interactions with a member of the public and do not contain personal information regarding the officer other than his name and duty location.").

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

Courts outside of New Hampshire have similarly rejected the notion of police officers having a significant privacy or reputational interest with respect to their public duties. This is because, when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. *See, e.g., Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 809-10, 821 (La. Ct. App. 1st Cir. 2008) ("[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *Denver Policemen's Protective Asso. v. Lichtenstein*, 660 F.2d 432, 436-37 (10th Cir. 1981) (rejecting officers' claim of privacy); *Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure, in part,

because the requested documents did not concern "the off-duty sexual activities of the deputies involved"); *State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252, 261-62 (Wis. 1983) ("By accepting his public position [the police chief] has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official. The police chief cannot thwart the public's interest in his official conduct by claiming that he expects the same kind of protection of reputation accorded an ordinary citizen."); *Kroeplin v. Wis. Dep't of Nat. Res.*, 725 N.W.2d 286, 301 (Wis. Ct. App. 2006) ("When an individual becomes a law enforcement officer, that individual should expect that his or her conduct will be subject to greater scrutiny. That is the nature of the job."); *see also Perkins v. Freedom of Info. Comm'n*, 635 A.2d 783, 792 (Conn. 1993) ("Finally, we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties."); *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 698 A.2d 803, 808 (Conn. 1997) (in upholding the trial court's judgment requiring disclosure of an internal affairs investigation report exonerating a state trooper of police brutality, concluding: "Like the trial court, we are persuaded that the fact of exoneration is not presumptively sufficient to overcome the public's legitimate concern for the fairness of the investigation leading to that exoneration. This legitimate public concern outweighs the department's undocumented assertion that any disclosure of investigative proceedings may lead to a proliferation of spurious claims of misconduct.").

There is no statutory privilege barring the public disclosure of this type of information implicating how an officer performed his or her official duties. *See Marceau*, 97 N.H. at 499 (noting that statutory privileges will be "strictly construed"). At the outset, the Supreme Court has

now explicitly rejected the notion that the legislature created a categorical or absolute privilege for personnel information, including such information pertaining to the police. *See Town of Salem*, 173 N.H. __, 2020 N.H. LEXIS 102, at *12-13 (noting that *Fenniman*'s categorical exclusion of police disciplinary information "failed to give full consideration to our prior cases interpreting RSA 91-A:5, IV and to relevant legislative history").

Any reliance on RSA 516:36 to create a privacy right is misplaced for two reasons. *First*, this statute governs *admissibility*, not discoverability, of police internal investigation documents. RSA 516:36, II ("All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be *admissible* in any civil action other than in a disciplinary action between the agency and its officers, agents, or employee ….") (emphasis added). Information, of course, can be *both* inadmissible in court under RSA 516:36 *and* public under the Right-to-Know Law. As one Superior Court recently explained, RSA 516:36 "provides no basis for withholding records responsive to a Right-to-Know request." *See Salcetti v. City of Keene*, No. 213-2017-CV-00210 (Cheshire Super. Ct. Aug. 29, 2018) (Ruoff, J.), http://www.orol.org/rtk/rtknh/213-2017-CV-210-2018-08-29.html.[15] *Second*, RSA 516:36's legislative history was relied on by the Supreme Court in *Fenniman* to justify the categorical withholding of "internal personnel practices." *See Fenniman*, 136 N.H. at 626. However, in *Town of Salem*, the Supreme Court rejected *Fenniman* and, in effect, rejected its reliance on RSA 516:36

[15] In an unpublished order, the New Hampshire Supreme Court affirmed in part, reversed in part, and vacated in part this and other orders entered in the case by the Superior Court, with the case being remanded back to the Superior Court. *See Salcetti v. City of Keene*, No. 2019-0217 (N.H. Sup. Ct. June 3, 2020), https://www.courts.state.nh.us/supreme/finalorders/2020/20190217.pdf.

to create a categorical privacy interest that allows the public to be deprived of vital information concerning the performance of police officers.[16]

Any suggestion that police officers have significant privacy and reputational interests that, as a matter of constitutional due process, should limit disclosure of acts done in the course of public duties would be both wrong and troubling. The New Hampshire Supreme Court has not recognized such a constitutionally-enshrined liberty interest in the public records context. This is because it would conflict with the Right-to-Know Law and the notion that public officials must be subjected to public scrutiny. *See, e.g.*, *Burton*, 594 S.E.2d at 895-96 ("By raising this constitutional argument, the Sheriff's Department urges this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual's performance of his public duties to be free from public scrutiny. We find this would be ill-advised."); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 297 (Conn. App. Ct. 2012)

[16] Nor can the Town or Intervenors rely on RSA 105:13-b in asserting a blanket privacy right preventing disclosure. RSA 105:13-b only concerns how "police personnel files" are handled when "a police officer ... is serving as a witness in any criminal case." *See* RSA 105:13-b, I. As one Superior Court explained in a case ordering the disclosure of the so-called "Laurie List": "By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file 'of a police officer who is serving as a witness in any criminal case.' Under this statute, the mandated disclosure is to the defendant in that criminal case. Here, in contrast, there is no testifying officer, pending criminal case, or specific criminal defendant. Rather, petitioners seek disclosure of the EES to the general public." *See N.H. Ctr. For Public Interest Journalism, et al v. N.H. Dep't of Justice*, 2018-cv-00537, at *3 (N.H. Super. Ct., Hillsborough Cty., S. Dist., Apr. 23, 2019) (currently on appeal, with oral argument scheduled on September 16, 2020), https://www.aclu-nh.org/sites/default/files/field_documents/court_order_4-24-2019_10.50.39_2982486_8a12d652-e8f8-4277-9f14-dbfa0db4f1ca.pdf. Indeed, to interpret RSA 105:13-b as giving categorical protections to police personnel files would give special protections to the police that do not apply to other public employees who have their files subjected to a public interest balancing analysis under *Town of Salem*. Any reliance on *Gantert v. City of Rochester*, 168 N.H. 640 (2016) and *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774 (2015) would also be misplaced. These cases say nothing about RSA 105:13-b constituting an exemption under the Right-to-Know Law. Instead, these cases only concerned police officers challenging their placement on the "Laurie List" on due process grounds.

("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"). In other words, the procedural due process and privacy protections in the Fourteenth Amendment and Part I, Articles 15 and 2-b of the New Hampshire Constitution protect individual citizens from government officials, not the other way around.

Information concerning a government official's performance of his or official duties cannot be shielded from public scrutiny because exposure may cause "embarrassment" or "stigma" to that official. It should come as little surprise that government actors often wish to keep their misconduct secret out of fear that the public may find out and "embarrass" them by holding them publicly accountable. But such public scrutiny for official acts is the price that a government official must pay. This is because that official, including a police officer, works for the public, not him or herself. They are not private citizens. The Right-to-Know Law also presumes that the public is to be informed and trusted, even where the requested records may not present the complete picture. For example, criminal complaints, indictments, mugshots, and police reports often are "misleading" because they are one-sided and do not necessarily tell the story of the accused. However, this does not mean that these records are any less public under the Right-to-Know Law. There surely is a lot of information that the government and its officials would like to withhold from the public or press because they feel that the information is "misleading" or does not tell the full story. But the correct response is not for the government to suppress information it finds "misleading"—a response that, if permitted, would give the government awesome power to withhold information from its citizens. Rather, the correct response is even greater transparency.

Finally, the officers in the Report and related documents are entitled to no more privacy rights than the citizens whom they regularly accuse of crimes, especially where the accused have

a greater liberty interest at stake. Citizens accused of crimes do not receive confidentiality, even if the charge is dropped or the citizen is acquitted. *See* RSA 594:14-a; *Grafton Cty. Atty.'s Office*, 169 N.H. at 327-28 (arrest records related to annulled case were not exempt under RSA 91-A:4, I). The police routinely make public the allegations against the accused, including mugshots. As a result, those publicly accused of crimes may suffer considerable stigma, even before they have received any hint of due process. This stigma often includes job loss and estrangement from friends or family. In making this information public, we make this tradeoff as a society to ensure that the public has maximum access to information concerning how the criminal justice system functions. Here, whatever stigma may come from making the Report public is a consequence of our constitutional commitment to accountability: the public's right to know what the government and its officials are doing.

B. The Public Interest in Disclosure is Compelling.

The Audit Report exposes the very type of misconduct that the Right-to-Know Law is designed to uncover. *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Prof'l Firefighters of N.H.*, 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."). As the Supreme Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of information pertaining to its government activities." *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003). As one New Hampshire Court Judge similarly ruled in releasing a video of an arrest at a library, "[t]he public has a broad interest in the manner in which public employees are carrying out their functions." *See, e.g., Union Leader Corp. v. van Zanten*, No, 216-2019-cv-00009 (Hillsborough Cty. Super. Ct., Norther Dist., Jan. 24, 2019) (Smuckler,

J.). The Supreme Court has also explained that "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." *Reid*, 169 N.H. at 532 (quotations omitted). Here, transparency is essential for the public to fully vet the Audit Report's conclusions as to how the Salem Police Department and its officers have managed the internal affairs process in total. Indeed, the Town's redaction of officer names "cast[s] suspicion over the whole department and minimize[s] the hard work and dedication shown by the vast majority of the police department." *See Rutland Herald v. City of Rutland*, 84 A.3d 821, 825-26 (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."; ordering disclosure of employee names).

Courts outside of New Hampshire have similarly recognized the obvious public interest that exists when disclosure 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); *see also, e.g., City of Baton Rouge*, 4 So.3d at 809-10, 821 (holding the public interest in names and records of investigation into police officers' use of excessive force trumps officers' privacy interest); *Burton*, 594 S.E.2d at 895 ("[i]n the present case, we find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye"); *Kroeplin*, 725 N.W.2d at 303 ("[t]he public has a particularly strong interest in being informed about public officials who have been derelict in [their] duty") (quotations omitted). 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*, 242 P.3d at 507.

Indeed, producing officer names will allow the public to know how specific officers in the Department conduct internal affairs investigations. The public's ability to learn what the "government is up to" under the Right-to-Know Law includes not just the actions of the government, *see Union Leader Corp.*, 141 N.H. at 477, 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 is why, for example, the Supreme 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 164. What if, for example, the same officer conducted many of the internal investigations criticized in the Report? This would help inform the public that this particular officer may be part of the Department's problem concerning how internal affairs investigations are being conducted. In addition, what if, in the 20 sustained cases of misconduct evaluated in the Report, the same officer was disciplined in the bulk of the cases? This would help inform the public that the Department may have a problem officer on its hands. However, right now, the public is left in the dark, with no ability to hold the Department and its leadership fully accountable.

C. There is No Governmental Interest in Nondisclosure.

The Town has previously suggested that disclosure would deter the reporting of police officer conduct by public employees, the participation in such investigations, and even the investigation undertaken by the Town, for fear of public embarrassment, humiliation, or even retaliation against employees. This argument is speculative, lacks any evidentiary support, and was rejected by the Supreme Court when it was similarly made without evidence. *See Goode*, 148 N.H. at 556 ("[T]here is no evidence establishing the likelihood that auditors will refrain from

being candid and forthcoming when reporting if such information is subject to public scrutiny."). The Supreme Court has emphasized that, in Right-to-Know 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. This principle is especially important where the Town "has the burden of demonstrating that the designated information is exempt from disclosure under the Right-to-Know Law." *CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 587 (2015); *see also Kroeplin*, 725 N.W.2d at 303 ("Kroeplin fails to point to any evidence that disclosing records created in the course of investigating employee misconduct and of the subsequent disciplinary action taken would have or has the effect he predicts [of chilling investigations]."). [17] Here, disclosure will improve the criminal justice system and police accountability, not hinder it, especially where the Petitioners are not seeking the identities of private citizens. Disclosing this information will not only likely expose potential misconduct, but it also will ensure that the public has the complete picture concerning the Audit's findings and whether the Salem Police Department is following its recommendations.

D. The Public Interest Trumps Any Nonexistent Privacy Interest.

Once the private and governmental interests in nondisclosure and public interest in disclosure have been assessed, courts "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Union Leader Corp.*, 162 N.H. at 679. The Supreme Court has consistently stated that this

[17] *See also Nash v. Whitman*, 05-cv-4500, 2005 WL 5168322 (Dist. Ct. of Colo., City of Denver, Denver Cty. Dec. 2005) (ordering that the bulk of internal affairs police files be produced, in part, because the department's concern that disclosure would chill cooperation of civilian and officer witnesses "did not find significant support in the evidence"); *Soto v. City of Concord*, 162 F.R.D. 603, 614 (N.D. Cal. 1995) (in declining to apply the self-critical analysis privilege, noting that the City's "general claim that disclosure would harm their internal investigatory system is not sufficient").

balancing test should be heavily weighted in favor of disclosure, even where the public and privacy interests appear equal. *See, e.g., Reid*, 169 N.H. at 532 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a ***heavy burden*** to shift the balance toward nondisclosure.") (citations omitted) (emphasis added); *Union Leader Corp.*, 141 N.H. at 476.[18]

In performing this balancing test with respect to the Audit Report, any privacy interest is dwarfed by the compelling public interest in disclosure. The Town cannot meet the "heavy burden" required to resist disclosure. As explained above, the substantial public interest in disclosure is the public's right to learn the full nature of the Audit Report's findings and conclusions—a report that cost the Salem taxpayers $77,000. Police officers are public servants who, when performing their official duties, serve the public, not themselves; they do not have the same privacy rights as regular citizens.[19] A number of courts in other states have held that police officers' privacy interests are not sufficient to prevent disclosure of law enforcement disciplinary information. This Court must reach the same conclusion here.[20]

[18] *See also WMUR v. N.H. Dep't of Fish and Game*, 154 N.H. 46, 48 (2006) (noting that courts must "resolve questions regarding the Right-to-Know Law with a view providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents.").

[19] *See State v. Hunter*, No. 73252-8-I, 2016 Wash. App. LEXIS 1470, at *5 (Ct. App. June 20, 2016) (noting that a police officer is "a professional witness").

[20] *See, e.g.*, *Rutland Herald*, 84 A.3d at 826 (affirming that police disciplinary records must be disclosed); *Tompkins*, 46 A.3d at 299-300 (affirming that a police officer's termination records must be disclosed); *City of Baton Rouge*, 4 So.3d at 809-10, 821 (holding the public interest in records of investigation into police officers' use of excessive force trumps officers' privacy interest; "[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *Jones v. Jennings*, 788 P.2d 732, 738 (Ala. 1990) ("There is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public's trust in those charged with enforcing the law.").

IV. Petitioners Are Entitled to Reasonable Costs and Attorneys' Fees.

Petitioners' counsel are entitled to their reasonable costs, as this lawsuit and this Court's April 5, 2019 order were necessary in order to enforce compliance with the Right-to-Know Law. *See* RSA 91-A:8, I.

Petitioners are also entitled to reasonable attorneys' fees incurred from May 29, 2020 to the present following the New Hampshire Supreme Court's *Town of Salem* decision. Under RSA 91-A:8, I, "[f]ees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter." This is an exceptional case warranting this relief. In its April 5, 2019 order, this Court already concluded that the bulk of the Town's redactions in the Salem internal affairs report were not justified by any privacy interest in nondisclosure. This 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." Super. Ct. Apr. 5, 2019 Order, at Page 3, attached as ***Exhibit 1*** (emphasis in original). Notwithstanding this prior ruling, the Town has continued to refuse to produce the unredacted report after the New Hampshire Supreme Court's *Town of Salem* decision. Instead, the Town is forcing Petitioners and this Court to spend additionally time, energy, and resources in this case. In formulating its April 5, 2019 order, this Court already went through the "laborious process" of "review[ing] the unredacted audit report in camera and compared it, line by line, to the redacted version that was released to the public." *Id.* at p. 2. Regrettably, the Town's and Intervenors' position of secrecy is requiring this Court to do this once again. Whatever its reasons, the Town's decision to continue to withhold this information from the taxpayers that spent $77,000 on the Report is indefensible in light of this Court's prior April 5, 2019 order holding that

public interest balancing would favor disclosure. As a result, the Town knew or should have known that its conduct in continuing to resist disclosure of the Audit Report and related documents after the *Town of Salem* decision would be in violation of the Right-to-Know Law. *See* RSA 91-A:8, I; *see also Scott v. City of Dover*, No. 05-E-170, 2005 N.H. Super. LEXIS 58, *4-5 (Strafford Cty. Super. Ct. Nov. 29, 2005) (Fauver, J.) ("In the case at bar, the court finds the City should have known it is was required to disclose the requested information. If the City had reviewed the case law interpreting the Right-to-Know disclosure requirements, the City would have discovered the requested information was information the terms of RSA 91-A requires to be disclosed to the public.").

It is unclear why the Town is continuing to refuse to produce the Report and related information. In any event, following the *Town of Salem* decision, the Town has a duty to independently re-evaluate the Petitioners' Right-to-Know request and engage in a public interest balancing analysis with respect to the requested records, as the Town is the gatekeeper of this information. Under the Right-to-Know Law, if the Town concludes that portions of the Report are not subject to RSA 91-A:5, IV under this balancing analysis, then the Town should immediately release those portions without the need for court intervention, even if a public employee objects. Indeed, the Right-to-Know Law evinces a legislative intent that public records be promptly disclosed to a requester, even if an employee challenges their release. *See* RSA 91-A:4, IV(a-b) ("Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release."; further requiring a timely response within 5 days).

Here, however, it is possible that the Town has simply delegated its obligation to independently evaluate Petitioners' Right-to-Know request to Intervenor Deputy Chief Morin and the Salem Police Employees Association who may be demanding that this information continue to be withheld. Though it is unclear whether this is occurring here, such delegation would be inappropriate. A municipality should not commandeer judicial resources by insisting on an order and punting to the courts as a way of seeking cover from a public employee or union who wishes to keep that information secret. Doing so creates significant additional costs for members of the public seeking information from the government. It also burdens the court system, which is already stretched thin. Rather than deferring to public employees who may be asking for secrecy, government entities should independently evaluate a Right-to-Know request and, without the need for judicial intervention, air on the side of transparency consistent with the law's presumption in favor of disclosure. *See Union Leader Corp.*, 141 N.H. at 476 ("The legislature has provided the weight to be given one side of the balance ….").

WHEREFORE, Petitioners pray that this Court grant the following relief:

A. Order the release of the three audit reports in their entirety, excluding: (i) the names of private citizens, including any private citizen witness names in Chief Donovan's quoted remarks on Page 7 of the Audit Report's culture addendum and that were referenced in Section V, Part J of the Court's April 5, 2019 order (*see Exhibit 2*, at APXII 237) and private citizen witness names that may exist on Pages 7 to 12 of this addendum (*see id.* at APXII 237-242), and (ii) the redactions on Pages 93-94 on the Audit Report governing internal affairs that this Court sustained under the "invasion of privacy" exemption in RSA 91-A:5, IV in its April 5, 2019 order (*see id.* at APXII 203-204);

B. Overrule the redactions referenced in Section IV, Parts C, D, L, O of this Court's April 5, 2019 order addressing the internal affairs report;

C. Overrule the redactions referenced in Section V, Parts B, C, I, K [except K.1(b) and K.4(b)] of this Court's April 5, 2019 order addressing the culture report;

D. Overrule the redactions referenced in Section VI, Parts A, C, D of this Court's April 5, 2019 order addressing the time and attendance report;

E. Order the release of former Salem Police Chief Paul Donovan's 14-page response dated November 9, 2018 to these reports (*see* ***Exhibit D*** to Dec. 21, 2018 Chapter 91-A petition);

F. Order the release of the two-page memorandum from Salem Town Manager Christopher Dillon to Chief Donovan dated October 29, 2018 discussing these reports (*see* ***Exhibit I*** to Dec. 21, 2018 Chapter 91-A petition);

G. Grant an award of all reasonable costs to Petitioners' counsel under RSA 91-A:8, I;

H. Grant an award of all reasonable attorneys' fees incurred by Petitioners' counsel from May 29, 2020 to the present following the *Town of Salem* decision under RSA 91-A:8, I; and

I. Award such other relief as may be equitable.

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION,

By its attorneys,

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Date: August 7, 2020

Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel or record pursuant to the Court's electronic filing system.

/s/ Gilles Bissonnette
Gilles Bissonnette

August 7, 2020