

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

SUPERIOR COURT

No. 215-2020-cv-00155

SAMUEL PROVENZA

v.

TOWN OF CANAAN

VALLEY NEWS' COMPLAINT-IN-INTERVENTION

NOW COMES Intervenor, the Valley News daily newspaper, by and through its attorneys affiliated with the American Civil Liberties Union of New Hampshire, and submits this Complaint-in-Intervention against the Town of Canaan.

Parties

1. Plaintiff-in-Intervention the *Valley News* is the largest daily newspaper that serves the greater Upper Valley area. Its address is 24 Interchange Drive, West Lebanon, NH 03784.
2. Respondent Town of Canaan (“Canaan” or “the Town”) is a municipality and “public body” in the State of New Hampshire and, as such, is subject to the Right-to-Know Law under RSA 91-A:1-a, VI and N.H. Const. Part I, Art. 8.

Jurisdiction and Venue

3. This Court has jurisdiction over this matter pursuant to RSA 91-A:7. “Any person aggrieved by a violation of [RSA 91-A] may petition the superior court for injunctive relief. In order to satisfy the purposes of [RSA 91-A], the courts shall give proceedings under [RSA 91-A] high priority on the court calendar. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter” RSA 91-A:7.

4. Venue is proper in this Court pursuant to RSA 507:9 because Plaintiff-in-Intervention the *Valley News* and the Town of Canaan are located in Grafton County.

The Eastman Incident and this Lawsuit

5. This case began with the Valley News' investigation into allegations of excessive force by a police officer that occurred on November 30, 2017 when then-Canaan Police Officer Samuel Provenza ("Provenza") stopped Crystal Eastman ("Eastman") while she was driving.

6. The Valley News published its first article on the matter on March 4, 2018, "Jim Kenyon: Canaan Mom Injured by Police Officer Cries Foul." According to the Valley News' reporting, the police were notified that a suspicious vehicle was following a school bus around town. Provenza then pulled over the driver, who was Eastman.

7. Provenza asked Eastman for her license and registration, even though Eastman believed Provenza already knew who she was and she had not broken any traffic laws.

8. As Eastman's attorney would later write in court papers, this "created an unexpected standoff." Provenza stuck his head inside Eastman's automobile and started to sniff, and, according to Eastman's attorney, his head was "so far into Crystal's automobile that Officer Provenza could have kissed Crystal's lips if he were so inclined."

9. Eastman then retrieved her license from her wallet. What happened next was up for debate: either Eastman pulled her wallet back before Provenza could take it, or Eastman unintentionally dropped the license while handing it to Provenza.

10. Provenza then ordered Eastman out of the car. Instead of complying, Eastman reached for her cellphone, because she was "terrified [] Officer Provenza's behavior." Provenza told Eastman she was under arrest, and opened the driver's door to physically remove Eastman.

Eastman closed the door on Provenza's hand, but according to the Canaan Police Chief, Provenza was uninjured.

11. Provenza then pulled Eastman, who is 5 feet 2 inches tall and weighs 115 pounds, out of her car. According to Eastman's attorney, Provenza pulled Eastman out of the car by her hair, which was in a ponytail, kned Eastman in the left leg, and then tossed Eastman around. *Id.* Eastman suffered a serious leg injury as a result of the encounter. This required surgery and extensive physical therapy, and required Eastman, a heavy equipment operator with the Department of Transportation, to take time away from her job. She has not returned to her job with the Department.

12. While Canaan police cruisers are equipped with cameras, this incident was not caught on dashboard camera to prove or disprove the allegations of excessive force. According to the Canaan Town Administrator, "It's not an intentional thing." Provenza wrote in his report that cruiser cameras must be manually powered on to record, that his cruiser had been recently in maintenance, and that when he received the call that led to the Eastman encounter, he responded quickly without first turning on the recording system and logging in.

13. Eastman was charged with resisting arrest and disobeying a police officer. After a trial, she was acquitted of resisting arrest, and convicted of disobeying an officer by the Circuit Court following a bench trial. Her conviction was upheld on appeal.

14. Sometime around July 2018, The Town of Canaan commissioned a report by Mark Myrdek of Municipal Resources Inc. ("MRI"), to review the circumstances surrounding Provenza's encounter with Eastman, and perhaps some other police matters.

15. The Town paid at least \$6,443 to MRI of taxpayer money for the report.

16. On February 4, 2019, the Valley News, through Kenyon, requested from the Town of Canaan (the “Town”), pursuant to RSA ch. 91-A, “all government records . . . pertaining to the report conducted by Mark Myrdek/Municipal Resources, Inc. concerning the Canaan Police Department.” The Valley News specifically asked for the report itself, and also for information related to the cost of the report.” See Email from Jim Kenyon dated February 4, 2019 attached hereto as Exhibit 1.

17. On February 8, 2019, the Town denied the request for the MRI report based on the “internal personnel practices” exemption to the Right-to-Know law and *Union Leader Corp. v. Finneman*, 136 N.H. 624 (2007) (describing contours of that exemption). See Letter dated February 8, 2019 attached hereto as Exhibit 2. The Town, however, did produce to the Valley News bills and payments between the Town and MRI (with the service descriptions redacted).

18. On June 9, 2020, the Valley News renewed its request for the MRI report as *Finneman* had been overturned in two key respects by *Union Leader Corp. v. Salem*, ___ N.H. ___, 2019-0206 (May 29, 2020) (categorical exemption of “internal personnel practice” documents described in *Finneman* overruled and replaced with public interested balancing) and *Seacoast Newspapers, Inc. v. Portsmouth*, ___ N.H. ___, 2019-0135 (May 29, 2020) (narrowing category of documents described in *Finneman* which constitute “internal personnel practices” to internal rules and practices, and not individual investigations). See Email from Jim Kenyon dated June 9, 2020 attached hereto as Exhibit 3.

19. In response to this renewed request, the Town responded that it “felt it necessary to make the former Canaan police officer, which is the subject of the report, aware of this Right-to-Know Law request in order to see if he had any object to same based upon his perceived privacy

rights.” See Letter dated June 29, 2020 attached hereto as Exhibit 4. Provenza then filed a lawsuit against the Town seeking to block the Town from disclosing the MRI Report.

20. The Valley News moved to intervene. The motion to intervene was granted.

21. All told, the Valley News has written 5 columns about the Eastman incident, the lack of body camera footage of the incident, the cost of the MRI investigation and report of the incident, the Town’s refusal to make public the report, and the legal proceedings in *State v. Eastman*. The Eastman incident is a matter of high public interest in the area.

COUNT I
FAILURE TO PRODUCE DOCUMENTS PURSUANT TO RSA ch. 91-A AND PART I,
ARTICLE 8 OF THE NEW HAMPSHIRE CONSTITUTION
(AGAINST TOWN OF CANAAN)

22. New Hampshire’s Right-to-Know law under RSA ch. 91-A is designed to create transparency with respect to how the government interacts with its citizens. The preamble to the law states: “Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” RSA 91-A:1. The Right-to-Know Law “helps further our State Constitutional requirement that the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 553 (2002).

23. The Right-to-Know Law has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: “Government ... should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” *Id.* New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8’s language was

included upon the recommendation of the bill of rights committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire already had RSA 91-A to address the public and the press's right to access information, the committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, *THE NEW HAMPSHIRE STATE CONSTITUTION* 53 (2d ed. 2015).

24. Consistent with these principles, courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode*, 148 N.H. at 554 (citation omitted); *see also Lambert v. Belknap County Convention*, 157 N.H. 375, 379 (2008). "[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581 (2006).

25. Upon a request for governmental records, an agency shall make available for filing and inspection such files when those files are immediately available for release. RSA 91-A:4, IV. If the agency is not able to make the records immediately available for inspection, "it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonable necessary to determine whether the request shall be granted or denied." *Id.* "A public body or agency denying, in whole or part, inspection or copying of any record shall provide a written statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld." RSA 91-A:4, IV(c).

26. In this case, in response to the Valley News' request, the Town did not comply with the dictates of RSA 91-A, IV. The Town neither produced the MRI Report for inspection nor identified a specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies.

27. Instead, the Town responded: "In conducting this balancing test, the Town felt it necessary and proper to make the former Canaan police officer, which is the subject of the Report, aware of this Right-to-Know Law request in order to see if he had any objection to same based upon his perceived privacy rights. Upon learning of the request, this former employee has notified the Town, vial legal counsel, that he intends to mount a legal action to any potential disclosure of said document. In light of an impending legal action against the Town of Canaan, we require an additional 5 days commencing Monday, June 29th to determine if this individual's legal counsel will actually file suite. In the event that no injunctions is brought [sic[]], the Town will *likely* issue some form of public disclosure of the document (*with redactions to some degree*) in response to your RSA 91-A request... In the event that there is legal action, we will turn the report over to the court so that it can decide if and to what degree this record is available for public inspection." (Ellipsis in original, emphasis added).

28. This response was deficient in at least four ways.

29. *First*, the Town did not identify a specific exemption to the Right-to-Know Law authorizing withholding of documents otherwise available for public inspection based upon threat of impending litigation.

30. *Second*, the Town did not commit to produce the MRI report in the event that no injunction was sought and did not otherwise provide a basis for withholding the report,

31. *Third*, the Town did not identify in writing the legal basis for any proposed redactions.¹

32. *Fourth*, the Town did not produce the MRI Report, despite it being a public record that must be made available for public inspection pursuant to RSA 91-A:4, I. To the extent that the Town resists public disclosure under the exception for “personnel . . . files whose disclosure whose disclosure would constitute an invasion of privacy,” that exemption is inapplicable because the public interest balancing required by *Reid v. N.H. Att’y Gen.*, 169 N.H. 509 (2016) mandates its disclosure because 1) the public interest in disclosure is compelling, 2) the privacy interests in nondisclosure are nonexistent, and 3) the public interest trumps any nonexistent privacy interest.²

WHEREFORE, Plaintiff-In-Intervention Valley News respectfully prays that this Honorable Court:

- A. Rule that the MRI Report requested by Plaintiff-in-Intervention is a public record that must be made available for inspection by Plaintiff-in-Intervention and members of the public under RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution;
- B. Award such other relief as may be equitable.

Respectfully submitted,

VALLEY NEWS

By its attorneys,

/s/ Henry R. Klementowicz

Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)

¹ Prior to the filing of this Complaint-In-Intervention, counsel for the Valley News and counsel for the Town had an informal conversation during which counsel for the Town explained the basis for any potential redactions.

² The Valley News incorporates by reference the legal arguments articulated in its Objection to Petitioner’s Request for Preliminary Injunction filed August 14, 2020.

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

Date: August 14, 2020

Certificate of Service

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

/s/ Henry Klementowicz
Henry Klementowicz

August 14, 2020

EXHIBIT 1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

----- Forwarded message -----
From: **Mike Samson** <townadmin@canaannh.org>
Date: Sun, Feb 10, 2019 at 12:38 PM
Subject: RE: Valley News Public Records request
To: Jim Kenyon <jkenyon@vnews.com>

From: Jim Kenyon [mailto:jkenyon@vnews.com]
Sent: Monday, February 4, 2019 7:14 PM
To: Mike Samson
Subject: Valley News Public Records request

Mike,

Under the State of New Hampshire's Right-to-Know law (RSA 91-a), I request all government records in the possession or control of the town of Canaan, including the Selectboard, or any other town official, or employee, pertaining to the report conducted by Mark Myrdek/Municipal Resources, Inc. concerning the Canaan Police Department. As part of this request, I would like a copy of the Myrdek/MRI report.

The public is entitled to know the outcome of the Myrdek/MRI report under the Right-to-Know law based on *Hounsell v. North Conway Water Precinct* and *Union Leader Corp. v.*

Fenniman.

I also request information on the cost of the report, including any payments made to Myrdek/MRI or payments made to or through a third party. In addition, I request a copy of the RFP that the town solicited prior to the hiring of Mr. Myrdek and MRI.

In responding to my request, please keep in mind the time limits mandated by the Right-to-Know law. In discussing those limits in the *ATV Watch* case, then-Chief Justice Broderick state RSA 91-A:4, IV requires that the public body or agency "within 5 business days of the request, make such records available, deny the request in writing **with reasons**, or furnish written acknowledgement of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied."

If you have any questions about the records I am request, please don't hesitate to call.

Sincerely,

Jim Kenyon

Valley News Columnist

603 727-3212

EXHIBIT 2



Town of Canaan
Office of the Selectmen
PO Box 38
Canaan, New Hampshire
03741

Phone: (603) 523-4501

FAX: (603)-523-4526

February 8, 2019

Sent Via Electronic and U.S. Mail

Jim Kenyon, Reporter
Valley News
24 Interchange Drive
West Lebanon, NH 03784

***Re: Town of Canaan's Response to Requests Pursuant to
RSA 91-A (the Right-to-Know Law)***

Dear Mr. Kenyon:

In accordance with your written request for governmental records under the State's Right-to-Know Law, I provide the following response and information which are categorized below based upon the various topics in which you raised in your correspondence:

Myrdek/MRI Report:

It is my understanding that this request is associated with a Canaan Police Department's internal investigation concerning the activities of a Canaan police officer. The State of New Hampshire's Right-to-Know Law (RSA 91-A) provides certain exceptions to public disclosure of governmental records. In particular, the "records of internal personnel practices" are specifically set forth, in statute, as being exempt from such inspection and/or disclosure. *See N.H.*

Rev. Stat. Ann. §91-A:5(IV). In fact, the New Hampshire Supreme Court has recognized that the State Legislature specifically intended, “that RSA chapter 91-A exempt[s] police internal investigatory files from public disclosure.” *See Union Leader Corp. v. Fenniman*, 136 N.H. 624, 627 (1993).

Moreover, the Court has set forth the policy considerations for this exemption in that, “[u]ntil an internal investigation produces information that results in the initiation of disciplinary process, public policy requires that internal investigation files remain confidential. Generally, these policy considerations include instilling confidence in the public to report, without fear of reprisal, incidents of police misconduct to internal affairs. Further, disclosure of confidential internal affairs matters could seriously hinder an ongoing investigation or future law enforcement efforts.” *See Pivero v. Largy*, 143 N.H. 187, 190 (1998). In addition, the Supreme Court has more recently determined, in *Hounsell v. North Conway Water Precinct*, that this exemption from the Right-to-Know Law extends to internal investigation reports conducted by a third party in which MRI was specifically identified in the *Hounsell* case. *See Hounsell v. North Conway Water Precinct*, 154 N.H. 1, 5 (2006).

The Town of Canaan agrees with the policy considerations that the N.H. Supreme Court articulated in *Pivero v. Largy* and wishes to adhere to the confidential nature of any internal investigation that may have occurred, by a third party, for the Canaan Police Department concerning the activities of one of the Department’s officers. As such, the Town **DENIES** this request for any document(s) associated with this matter.

Request for Proposals for Internal Investigations of Personnel Matters:

The Town of Canaan has no governmental records/information that are responsive to this request.

Payment Records to MRI:

While your request fails to identify any particular timeframe, the Town hereby provides with this response copies of documents showing any and all payments made by the Town of Canaan to MRI for the 2018 and 2019 calendar years. **(Will be emailed and sent on February 11th as Finance Director is unavailable until then.)**

If you have any additional requests for governmental records from the Town of Canaan, that may be subject to public disclosure in accordance with RSA 91-A, please submit a written request at your convenience.

Town of Canaan

Michael Samson, Town Administrator

EXHIBIT 3

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: **Mike Samson** <townadmin@canaannh.org>
Date: Tue, Jun 30, 2020 at 6:31 PM
Subject: RE: Valley News public records request
To: Jim Kenyon <jkenyon@vnews.com>

See attached letter and below.

Mike

From: Jim Kenyon [mailto:jkenyon@vnews.com]
Sent: Monday, June 29, 2020 12:32 PM
To: Mike Samson
Subject: Re: Valley News public records request

Mike,

Is there an update on the Valley News' public records request, regarding Canaan police audit?

Also, I'm hearing about the two vigils scheduled for Thursday on the common. Could you send me contact info for the person/persons who applied to use the space for all lives matter group?

Also, I'm hearing about a fee that town/police charge, based on a state statute, to use the common. How much is the fee and when does it apply? (The state statute, VII, Chap. 105, 105:9 doesn't mention how much "shall be paid by the applicant.")

If it's easier, we could talk by phone this afternoon.

Thanks,

Jim Kenyon

Valley News Columnist

603 727-3212

On Tue, Jun 16, 2020 at 2:33 PM Mike Samson <townadmin@canaanh.org> wrote:

I am still waiting for legal review at my end and I am requesting the 10 day extension to respond (no later than June 19).

Mike Samson

From: Jim Kenyon [mailto:jkenyon@vnews.com]
Sent: Saturday, June 13, 2020 10:45 AM
To: Mike Samson
Subject: Re: Valley News public records request

Ok. Thanks for getting back to me.

Sent from my iPhone

On Jun 13, 2020, at 10:07 AM, Mike Samson <townadmin@canaannh.org> wrote:

SORRY, BUT I WANTED TO REVIEW THE NEW CASE LAW BEFORE RESPONDING.

I AM HAVING OUR COUNSEL REVIEW THE REQUEST AND IT WILL BE ANSWERED BY WEDNESDAY, JUNE 17.

THANKS FOR YOUR PATIENCE.

Mike Samson

Canaan Town Administrator

From: Jim Kenyon [<mailto:jkenyon@vnews.com>]

Sent: Tuesday, June 9, 2020 1:40 PM

To: Mike Samson

Subject: Valley News public records request

Mike,

Under the State of New Hampshire's Right-to-Know law (RSA 91-a), I request a copy of the report conducted by Mark Myrdek/Municipal Resources, Inc., concerning the Canaan Police Department.

As you might recall, I previously requested a copy of the report in February 2019, but was denied. Since then, the New Hampshire Supreme Court has ruled in *Union Leader Corporation v. Town of Salem* (May 29, 2020). As a representative of the Valley News, I argue that decision now requires the town of Canaan to release an unredacted copy of the Myrdek/Municipal Resources report.

If you have any questions about this request, please call me at the number below.

Thank you for your help.

Jim Kenyon

Valley News Columnist

603 727-3212

EXHIBIT 4



Town of Canaan
Office of the Selectmen
PO Box 38
Canaan, New Hampshire
03741

Phone: (603) 523-4501

FAX: (603)-523-4526

June 29, 2020

Jim Kenyon
Valley News
Lebanon, NH

Re: Request for Public Information – Personnel Record

Dear Jim:

We have received your request for information that may be contained in a report regarding a police officer accused of use of unreasonable force.

The Town of Canaan has previously maintained employee reviews as privileged, confidential documents. It has been brought to our attention that the NH Supreme Court has issued two rulings this year that impact this position. See *Union Leader Corporation v. Town of Salem* (May 29, 2020).

As you may know, the N.H. Supreme Court has removed the “per se exemption” for those matters which have been historically treated under RSA 91-A’s exemption of “internal personnel practices” and now requires the Town to conduct a balancing test to determine if such documents are subject to public disclosure. As part of that balancing test, the Town needs to examine the privacy rights and concerns, of those individuals, associated with the governmental record and weigh that against the public’s interest in knowing of the municipality’s actions relative to this matter. In conducting this balancing test, the Town felt it necessary and proper to make the former Canaan police officer, which is the subject of the report, aware of this Right-to-Know Law request in order to see if he had any objection to same based upon his perceived privacy rights. Upon learning of the request, this former employee has notified the Town, via legal counsel, that he intends to mount a legal challenge to any potential disclosure of said document. In light of an impending legal action against the Town of Canaan, we require an additional 5 days commencing Monday, June 29th to determine if this individual’s legal counsel will actually file suit. In the event that no injunctions is brought, the Town will likely issue some form of public disclosure of the document (with redaction to some degree) in response to your RSA 91-A request... In the event that there is legal action, we will turn the report over to the court so that it can decide if and to what degree this record is available for public inspection..

Sincerely,

Michael Samson
Canaan Town Administrator