THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS SUPERIOR COURT

No. 220-2020-CV-00143

JONATHAN STONE

v.

CITY OF CLAREMONT

INTERVENORS ACLU-NH AND UNION LEADER CORPORATION'S JOINT STATEMENT OF INTEREST SEEKING DISCLOSURE OF RECORDS AND UNSEALING OF PLEADINGS

NOW COME Intervenors American Civil Liberties Union of New Hampshire ("ACLU-NH") and Union Leader Corporation, by and through their attorneys, and submit this Joint Statement of Interest seeking disclosure of requested records under the Right-to-Know Law and the unsealing of pleadings in this case.

INTRODUCTION

Intervenors seek disclosure under the Right-to-Know Law of records that, on information and belief, are directly at issue in this case—namely, disciplinary records concerning the actions of former Claremont police officer Jonathan Stone that led to his termination, and personnel records of Mr. Stone concerning the 11 internal affairs investigations with sustained findings. On October 21, 2020, the ACLU-NH submitted a Right-to-Know request to the City of Claremont seeking this information. *See Exhibit 1*. On October 22, 2020, the Union Leader Corporation submitted a Right-to-Know request to the City of Claremont seeking similar information. *See Exhibit 2*.

Any effort to resist disclosure of the requested information is without basis. Here, the public interest in disclosure is both compelling and obvious. The requested records portray

sustained misconduct implicating Mr. Stone's ability to perform his duties as an officer. This alone justifies disclosure. Here, for example, we know that the City effectively terminated Mr. Stone as a police officer in 2006. We also know that Mr. Stone was the subject of 11 internal affairs investigations with sustained findings. This compelling public interest in disclosure is further enhanced by the fact that Mr. Stone is a current City councilor in Claremont and is running for election to the New Hampshire House of Representatives to represent District 10 in Sullivan County. The public has a right to know this information as it goes to the polls on November 3, 2020. Moreover, the records would help the public evaluate how the City supervised, investigated, and disciplined Mr. Stone, as well as learn why the City agreed to keep any misconduct secret. *See, e.g., Reid v. N.H. AG*, 169 N.H. 509, 532 (2016) ("[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate"). In short, in this historic moment of conversation about police accountability nationally and here in New Hampshire,[1] a government agency should take the position of accountability, not secrecy, concerning one of its officers who engaged in wrongdoing. This information should be released immediately in advance of the November 3, 2020 election. In addition, the pleadings in this case should be immediately unsealed.

ARGUMENT

1. 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,

[1] *See* Executive Order 2020-11 Creating the Commission on Law Enforcement Accountability, Community and Transparency (issued by Governor Sununu recognizing a "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance transparency, accountability, and community relations in law enforcement") *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf.

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).

2. 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).

3. 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) (emphasis added).

I. The "Personnel Files" Exemption under RSA 91-A:5, IV Requires Disclosure Because the Public Interest in Disclosure Outweighs Any Privacy Interest in Nondisclosure.

4. RSA 91-A:5, IV exempts, among other things, "[r]ecords pertaining to … personnel … files whose disclosure would constitute invasion of privacy." As the New Hampshire Supreme Court has explained, the term "personnel" "refers to human resources matters." *Reid*, 169 N.H. at 522; *see also Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135, 173 N.H. __, 2020 N.H. LEXIS 103, at *21 (N.H. Sup. Ct. May 29, 2020). 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.[2]

5. Even assuming that the records requested here constitute "personnel files" under RSA 91-A:5, IV, this is not a categorical exemption. Rather, the statute requires that such records be subjected to a public interest balancing test that evaluates the public interest in disclosure against any privacy and governmental interests in nondisclosure. *See Reid*, 169 N.H. at 527-28 ("[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

[2] 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.").

part of a 'personnel file'; and (2) whether disclosure of the material would constitute an invasion of privacy."; "[P]ersonnel files are not automatically exempt from disclosure"); *see also Union Leader Corp. v. Town of Salem*, No. 2019-0206, 173 N.H. __, 2020 N.H. LEXIS 102, at *18 (N.H. Sup. Ct. May 29, 2020) (holding that the "internal personnel practices" exemption under RSA 91-A:5, IV could not be used to circumvent the balancing test for "personnel file" information; noting that "adopting a per se rule of exemption for 'internal personnel practices,' while applying a balancing test to the exemption for 'personnel … and other files,' would render the latter a nullity 'because … a government agency could skirt the public interest balancing analysis required for 'personnel file' information by simply asserting the categorical 'internal personnel practices' exemption, thus leaving the 'personnel file' exemption without effect").

6. The Supreme Court has explained this 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 interest in disclosure and privacy interest in nondisclosure appear equal, this Court must err 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 ….").

7. At the outset, Intervenors must briefly address Mr. Stone's argument that this public interest balancing standard clarified in *Town of Salem* and *Seacoast Newspapers, Inc.* does not apply to records created before the New Hampshire Supreme Court issued these decisions. This position is without merit. The only relevant questions in a Right-to-Know case are whether the records exist, whether they are responsive, and whether they are not otherwise exempt from disclosure under current law. What the state of the law was when the records were created is irrelevant. For example, RSA 91-A:4, I states that "[e]very citizen … has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, …., except as otherwise prohibited by statute or RSA 91-A:5." Nothing in this statute says that whether a governmental record is exempt from disclosure under RSA 91-A:5 is based on the law that existed when the record was created. To the contrary, the question is whether the record is exempt from disclosure at the time the request is made and processed under the current law. To hold otherwise would rewrite the Right-to-Know Law and add limiting language that the legislature did not see fit to include. *See State v. Brouillette,* 166 N.H. 487, 490 (2014) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language it did not see fit to include."). The recent *Town of Salem* and *Seacoast Newspapers, Inc.* decisions overruling *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) further evidence this interpretation where, even though the records in question were created when *Fenniman* was controlling, the Supreme Court remanded the cases for consideration as to whether the records should be released under the balancing test standard. *See also Town of Salem*, 2020 N.H. LEXIS 102, at *21 (noting that "we agree with the Union that remand is required in this case 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'"); *Seacoast Newspapers, Inc.*, 2020 N.H. LEXIS 103, at *25-26 ("we remand this issue to the trial court for its consideration, in the first instance, as to whether the arbitration decision arising from the grievance provision of the collective bargaining agreement is exempt from disclosure pursuant to the two-part analysis for personnel files"; on remand, the arbitration report at issue was voluntarily released).

8. Here, as explained below, this balancing analysis requires disclosure.

A. The Privacy Interest in Nondisclosure is Nonexistent.

9. Police officers have no privacy interest in records implicating the performance of their official duties, especially when—as is the case here—there is evidence of wrongdoing. The information sought here does not constitute "intimate details … the disclosure of which might harm the individual," *see Mans v. Lebanon Sch. Bd.*, 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). Intervenors are not seeking, for example, medical or psychological records in an officer's personnel file. Instead, Intervenors are seeking information that relates to the performance of an officer's official duties. Thus, any privacy interest here is minimal, if not nonexistent.[3]

10. In examining the invasion of privacy exemption under RSA 91-A:5, IV, the Supreme Court has been careful to distinguish between information concerning private individuals

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

interacting with the government and information concerning the performance of government employees. *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).

11. Courts outside of New Hampshire have similarly rejected the notion of police officers having a significant privacy or reputational interest with respect to their official 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.").

12. There is no statutory privilege barring the public disclosure of this type of information implicating how an officer performed his, her, or their official duties. *See Marceau*

v. Orange Realty, 97 N.H. 497, 499 (1952) (noting that statutory privileges will be "strictly construed"). At the outset, the Supreme Court has 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 the categorical exclusion of police disciplinary information in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) "failed to give full consideration to our prior cases interpreting RSA 91-A:5, IV and to relevant legislative history," thereby overruling *Fenniman*); *see also Reid*, 169 N.H. at 527 (requiring balancing analysis for "personnel file" information).

13. Moreover, any reliance on RSA 516:36 to create a privacy interest 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.[4] ***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*

[4] 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.

Fenniman, 136 N.H. at 626. However, in *Town of Salem*, the Supreme Court overruled *Fenniman* and, in effect, rejected its reliance on RSA 516:36 to create a categorical privacy interest that allows the public to be deprived of vital information concerning the performance of police officers.[5]

14. Further, 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) ("the personal privacy interest protected by the fourth and fourteenth amendments is very different from that protected by the statutory exemption from

[5] Any reliance on RSA 105:13-b would also be misplaced. This statute 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" under the Right-to-Know Law: "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 having occurred 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. The same result is required here. Here, RSA 105:13-b does not apply because this is a Chapter 91-A case, <u>not</u> a case where "a police officer … is serving as a witness in [a] criminal case." 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*.

disclosure of materials"); *see also Lamontagne v. Town of Derry, et al.*, No. 2018-2019-CV-00338, at *4 (Rockingham Cty. Super. Ct. Apr. 27, 2020) (Schulman, J.) (holding that an officer who possessed unauthorized study materials while at the Police Academy received sufficient due process concerning his placement on the EES List; noting that the officer was "given an opportunity for a due process hearing to determine factual disputes, but he expressly waived that opportunity by instead entering into a settlement agreement"), attached as *Exhibit 4*; *In re AG Law Enf't Directive Nos. 2020-5 & 2020-6*, Nos. A-3950-19T4, A-3975-19T4, A-3985-19T4, A-3987-19T4, A-4002-19T4, 2020 N.J. Super. LEXIS 221, at *56 (Super. Ct. App. Div. Oct. 16, 2020) (in evaluating substantive due process claim of officer resisting disclosure, holding: "Simply stated, appellants cannot show they have a constitutionally protected reasonable expectation of privacy in their disciplinary records that is not outweighed by the government's interest in public disclosure, in light of prior case law establishing their diminished expectation of privacy in those records, and the clear statement in every IAPP issued since 2000 that the Attorney General could order the release of the records."). In other words, the procedural due process and privacy protections in the Fourteenth Amendment and Part I, Articles 15 of the New Hampshire Constitution protect the public from government officials, not the other way around.

15. From media reports, Mr. Stone has apparently argued that the requested records will only include "the city's versions of the facts." However, the presumption under Chapter 91-A is that the public is aided by transparency, not harmed by it. *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 …."). The Right-to-Know Law 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, police reports, and law enforcement press releases

often are "misleading" because they are one-sided and do not necessarily tell the story of the accused. But this does not mean that these records are any less public under Chapter 91-A. There surely is a lot of information that the government officials would like to withhold from the public or press because it feels 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. Here, of course, nothing prevents Mr. Stone from telling his side of the story upon release of the records.

16. Moreover, information concerning a government official's performance of his, her, or their 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 for misconduct. 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, her, or themselves. They are not private citizens.

B. The Public Interest in Disclosure is Compelling.

17. The public interest in disclosure is both compelling and obvious. This cannot be seriously disputed, especially where Mr. Stone is a Claremont city councilor and these records are relevant to helping the electorate evaluate Mr. Stone's candidacy in advance of the upcoming November 3, 2020 general election.

18. Here, the requested records depict sustained misconduct performed by an officer relating to that officer's official duties. This alone justifies disclosure. Indeed, these records

concerning Mr. Stone expose 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.).

19. Moreover, the Supreme Court has 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 not only the conduct at issue, but also the performance of the Claremont Police Department's supervision, investigation, and discipline of Mr. Stone, as well as the City's actions in attempting to keep any misconduct secret. Disclosure would also assist the public in knowing whether the City communicated any of this misconduct to the Vermont Department of Corrections, which ultimately hired Mr. Stone. Here, keeping this information secret "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).

20. 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.

21. Finally, in the *Town of Salem* case which is now back before the Superior Court on remand following the Supreme Court's overruling of *Fenniman*, the Rockingham County Superior Court previously noted that, though it was bound by *Fenniman*, "[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 Union Leader Corp. v. Town of Salem*, No. 218-2018-CV-01406, at *3 (Rockingham Cty. Super. Ct. Apr. 5, 2019) (Schulman, J.), attached as ***Exhibit 3***. That 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.* This Court must reach the same conclusion here.

C. The Public Interest Trumps Any Privacy Interest.

22. Once the privacy 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 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; *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.").

23. Here, for the reasons explained above, any privacy interest is dwarfed by the compelling public interest in disclosure. Accordingly, disclosure is required. In addition, because disclosure is required, the pleadings in this case should be unsealed.

II. Any Agreement Between Mr. Stone and the City Has No Bearing on this Case.

24. Any agreement between Mr. Stone and the City in which the City agreed to "purge" responsive records has no impact on the Right-to-Know Law analysis. This is for several reasons.

25. ***First***, once again, the only question in a Right-to-Know case is whether the records exist, whether they are responsive, and whether they are not otherwise exempt from disclosure

under current law. As the records at issue here exist, are responsive, and are not exempt, the public is entitled to them regardless of any contractual agreement. Whether the City violated any agreement and whether Mr. Stone is entitled to a remedy from the City are questions to be resolved between the City and Mr. Stone. However, any agreement does not affect the question under the Right-to-Know Law of whether the public is entitled to this information.

26. *Second*, it is axiomatic that a City cannot contract away its obligations to keep, maintain, and produce records consistent with the Right-to-Know Law. Contractual language deeming certain records in a government agency's possession as "confidential" does not constitute a recognized exemption under RSA 91-A:5. Indeed, to uphold such an agreement would not only violate public policy, but it also would allow municipalities to habitually violate Chapter 91-A by entering into side agreements with government officials.[6] Any prior agreements that may exist where the parties agree that future changes in the Right-to-Know Law do not apply are not only irrelevant to the Chapter 91-A analysis, but they are also not enforceable because they circumvent the will of the legislature.

27. *Third*, as reflected in media reports, there is apparently conditional language in the agreement that suggests that, if disclosure is required under the Right-to-Know Law, then the Right-to-Know Law prevails and trumps any such agreement. Again, as explained herein, the Right-to-Know Law requires disclosure in this case.

28. *Fourth*, any such agreement fails to create an *objective* expectation of privacy, especially when the records would otherwise be subject to Chapter 91-A. New Hampshire courts have made clear that any expectation of privacy is governed by an objective standard and not a

[6] For example, whether it is by contract or otherwise, a government agency is barred from "destroy[ing] any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter." RSA 91-A:9.

party's subjective expectations (whether it be by agreement or otherwise). *See Prof'l Firefighters of N.H.*, 159 N.H. at 707. Here, New Hampshire law has objectively made clear that personnel file information is subjected to a public interest balancing analysis. Moreover, as explained above, an officer cannot reasonably and objectively believe that information concerning the performance of official duties is private information, especially when it implicates misconduct. In other words, where a police officer's misconduct is at issue, there is simply no objective expectation of privacy.

WHEREFORE, Intervenors ACLU-NH and Union Leader Corporation respectfully pray that this Honorable Court:

A. Rule that the records requested by the ACLU-NH and the Union Leader Corporation, respectively, at ***Exhibits 1 and 2*** are public records under RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution;

B. Unseal the pleadings in this case; and

C. Award such other relief as may be equitable.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

by its attorneys,

/s/ Gilles Bissonnette

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

UNION LEADER CORPORATION

by its attorney,

/s/ Gregory V. Sullivan

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

Date: October 22, 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

October 22, 2020

Exhibit 1

October 21, 2020

VIA EMAIL (mchase@claremontnh.com)

Mark Chase
Chief of Police
Claremont Police Department
58 Opera House Square
Claremont, NH 03743

Re: Right-to-Know Request

Dear Chief Chase:

This is a Right-to-Know request to the Claremont Police Department ("the Department") pursuant to RSA 91-A and Part I, Article 8 of the New Hampshire Constitution by the American Civil Liberties Union of New Hampshire ("ACLU-NH"). The ACLU-NH defends and promotes the fundamental principles embodied in the Bill of Rights and the U.S. and New Hampshire Constitutions. In furtherance of that mission, the ACLU-NH regularly conducts research into government activities in New Hampshire. We ask that your Department waive all fees associated with responding to this request. Please contact me to discuss the fee waiver in advance of preparing any copies.

Below is the specific request:

1. All reports, investigatory files, and disciplinary records concerning the actions of former officer Jon Stone that led to his termination.[1]

2. All personnel records or Mr. Stone concerning the 11 internal affairs investigations with sustained findings.

[1] In conducting public interest balancing with respect to an internal audit report that documented misconduct of officers within the Salem Police Department, the Rockingham County Superior Court concluded: "A balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report." *See Union Leader Corp. and ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406, at *3 (Rockingham Cty. Super. Ct. Apr. 5, 2019) (emphasis in original), *available at* https://www.aclu-nh.org/sites/default/files/field_documents/salem_final_order.pdf. The analysis is no different here. *See also Union Leader Corp. and ACLU-NH v. Town of Salem*, No. 2019-0206, 173 N.H. __, 2020 N.H. LEXIS 102 (N.H. Sup. Ct. May 29, 2020) (overruling 1993 *Fenniman* decision in holding that the public's interest in disclosure must be balanced in determining whether the "internal personnel practices" exemption applies to requested records).

If produced, these records must be produced irrespective of their storage format; that is, they must be produced whether they are kept in tangible (hard copy) form or in an electronically-stored format, including but not limited to e-mail communications. If any records are withheld, or any portion redacted, please specify the specific reasons and statutory exemption relied upon. *See* RSA 91-A:4, IV(c) ("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.").

Thank you for your anticipated cooperation. I look forward to hearing from you as soon as possible. Of course, if you have any questions or concerns, do not hesitate to contact me.

Very truly yours,

/s/ Gilles Bissonnette

Gilles Bissonnette
ACLU-NH, Legal Director
Gilles@aclu-nh.org

Cc: Shawn M. Tanguay (STanguay@dwmlaw.com)

Exhibit 2

From: **Mark Hayward** <mhayward@unionleader.com>
Date: Thu, Oct 22, 2020 at 10:40 AM
Subject: Right to Know request, Jonathan Stone
To: <mchase@claremontnh.com>, <centralcollections@claremontnh.com>
Cc: Timothy Kelly <tkelly@unionleader.com>, Mike Cote <mcote@unionleader.com>

Dear Chief Chase and Claremont City Clerk,

I am writing to request the review and possible reproduction of certain documents related to former Claremont Police Department employee, Jonathan (Jon) Stone. This request includes:

- Any and all documents involving any commendations, complaints, investigations and discipline, including termination, of Stone.
- Any and all documents related to any internal affairs investigations and findings against Stone.
- Any and all documents involving any collective-bargaining-related grievance, arbitration and arbitration decision involving Stone.
- Any and all documents your office has exchanged with the New Hampshire Police Standards and Training Council regarding the certification of Stone.
- Any and all documents your office has exchanged with the New Hampshire Attorney General regarding Stone's possible placement on the Exculpatory Evidence Schedule.

I am making these requests under the New Hampshire Right to Know Law, RSA 91-A. As you know, this request initiates several responsibilities and deadlines on your part.
Ideally, I request that electronic versions of these documents, such as PDFs, be emailed to me. If that is not possible, please contact me with an estimate of copying costs, and we can decide how to move forward.
Thank you so much, Chief Chase, for giving this matter your prompt attention.
Sincerely,

Mark Hayward

--
Mark Hayward | columnist, reporter
New Hampshire Union Leader | 100 William Loeb Drive, Manchester, NH 03109
(mobile) 603-785-9929
mhayward@unionleader.com
www.unionleader.com| www.facebook.com/unionleader
"Open Up New Hampshire"

Exhibit 3

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER

I. Introduction

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

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

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

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

II. The Court's Review

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

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

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

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

III. Governing Law

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

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

Notwithstanding that sentiment, the audit report proves that bad things happen in the dark when the ultimate watchdogs of accountability—i.e. the voters and taxpayers—are viewed as alien rather than integral to the process of policing the police. Reasonable judges—including all five justices of the New Hampshire Supreme Court, joining together in a published opinion—have criticized the Fenniman line of cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Order

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

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

April 5, 2019

Andrew R. Schulman,
Presiding Justice

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

Exhibit 4

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

BRYAN F. LAMONTAGNE

v.

TOWN OF DERRY;
DERRY POLICE DEPARTMENT;
OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL; and
NEW HAMPSHIRE POLICE STANDARDS AND TRAINING COUNCIL

218-2019-CV-00338

ORDER

The motions to dismiss filed by the Town of Derry, the Derry Police Department and the New Hampshire Attorney General are GRANTED because the complaint does not state a claim upon which relief may be granted.

Plaintiff's claims against the remaining defendant, the New Hampshire Police Standards And Training Council ("the Academy") are dismissed by the court *sua sponte* for the same reasons.

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Plaintiff is a certified police officer who seeks to have his name removed from the "exculpatory evidence schedule" also known as the Laurie list. See State v. Laurie, 139 N.H. 325 (1995). As criminal practitioners know, a Laurie list is kept by each County Attorney to assist prosecutors in meeting their constitutional obligation to disclose evidence that might impeach the credibility of police witnesses. In other words, a Laurie list is a list of police officers with credibility problems. From time to time the Attorney General has provided written guidance regarding the criteria for placing an

officer on the list. That guidance, of course, is not the last word on what the due process clauses of the state and national constitutions require, either with respect to the disclosure of exculpatory evidence in criminal cases or with respect to the due process rights of suspect police officers.

According to the complaint, plaintiff was a Derry Police Department recruit and a cadet at the Academy when he and several other cadets were expelled for cheating and for possession of contraband study materials. As explained below, those materials contained the answers to test questions. Pursuant to state regulations, plaintiff was offered the opportunity for a hearing before the Police Standards and Training Council before the expulsion order became permanent. See N.H. Code Admin. Rules, Pol 205.01 *et. Seq.* Plaintiff requested a hearing but later entered into a settlement agreement pursuant to Pol 205.05. By virtue of the settlement agreement:

A. The allegation that plaintiff "possessed unauthorized study materials" was sustained;

B. The plaintiff's discharge (i.e. expulsion) from the Academy remained in effect;

C. Plaintiff remained eligible to start the Academy over if he ever returned to employment as a police officer; and

D. The other formal grounds for the plaintiff's expulsion (i.e. cheating and failing to report rules violations) were withdrawn.

Plaintiff thus agreed to be expelled for the venial offense of "possession of unauthorized study materials" while spared a finding of guilt on the mortal offense of "cheating." However, while the "possession" charge may sound innocuous, in actuality it was a serious integrity violation for which expulsion was a proportionate response.

Section D39 of the Academy Manual prohibits cadets from possessing unauthorized study materials "including copies of tests from the Police Standards and Training Academies."[1] The forbidden materials include test questions and test answers from prior years.[2] Section D39 expressly requires that any cadet arriving at the Academy with such contraband either (a) lock it in his or her car, (b) send it home or (c) give it to a staff member. Section D39(c) explains that, "The purpose of the rule is to provide each student with an equal chance academically[.]" Thus, the rule against "possession" is a prophylactic against active cheating. Indeed, why else possess test questions and test answers in violation of the rule?

Further, the Manual's definition of "cheating" includes "obtaining or attempting to obtain test materials or test information improperly from any source." Thus, there is a substantial overlap between "possession of unauthorized study materials" and "cheating." In this case—as effectively admitted by plaintiff in his complaint—that overlap is 100%, meaning that he was expelled by agreement for conduct that was, in fact, a form of cheating. The grounds for the finding that led to plaintiff's expulsion were

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[1]The Academy Manual is not attached to the plaintiff's complaint. However, the pertinent provisions of the Manual are referenced in the attachments to the compliant. The text of those provisions are included in the attachments to the Academy's Answer. In general, in determining whether a complaint states a claim upon which relief may be granted the court is limited to the facts set forth in the four corners of the complaint. However, the court may also consider documents that are referenced or attached to the complaint. See, Beane v. Dana S. Beane & Company, P.C., 160 N.H. 708, 711 (2010) (in ruling on a motion to dismiss the court may consider "documents sufficiently referred to in the complaint"). In this case, the pertinent provisions of the Academic Manual are directly or indirectly referenced in the complaint.

[2]The parties appear to agree that the Academy uses all or many of the same test questions each year. Therefore, a cadet possessing last year's questions and answers would possess many of this year's questions and answers as well.

recited in the Director's letter of expulsion (attached to the Complaint) which included the plaintiff's admission that (a) he possessed "test questions and answers" from a recent Academy year," (b) he knew that he was not allowed to possess these materials and (c) he actually used these materials prior to taking an exam. The Director's letter reciting plaintiff's admissions was grounded on the report of the investigating Captain (attached to the Academy's Answer). Plaintiff has not disputed that he made these admissions to the Captain; indeed he alleges that he gave truthful answers to the investigator. Complaint, ¶8. Thus:

A. Plaintiff was expelled, by agreement, for a serious rule violation that involved a lapse in integrity;

B. That lapse of integrity detracts from the plaintiff's general credibility. If the plaintiff testifies for the State in a criminal case, the fact of his expulsion from the Academy and the reasons for the expulsion must be disclosed to the defense.

B. Plaintiff was given notice of the accusations and actively participated in the investigation;

C. Plaintiff was given the opportunity for a due process hearing to determine factual disputes, but he expressly waived that opportunity by instead entering into a settlement agreement; and

D. The settlement agreement did not reverse, vacate or modify any of the factual findings of the investigation.

Therefore, the court concludes that there was abundant evidence to support placing the plaintiff on the Laurie list. Further, the court concludes that the plaintiff received sufficient due process to satisfy Gantert v. City of Rochester, 168 N.H. 640

(2016). To be sure, plaintiff was never given the opportunity for a Laurie list-specific hearing. However, plaintiff had the opportunity for a hearing regarding the underlying facts. Under the almost *sui generis* facts of this case that is all that was required.

The Complaint does not state a claim for removal from the Laurie list. Plaintiff's other claims fail because they are all predicated on the assumption that plaintiff was improperly placed on the Laurie list. The Derry Police Department did not defame plaintiff when its Chief placed him on the Laurie list, notwithstanding the fact that the Chief recited the original grounds for plaintiff's expulsion rather than the narrowed grounds reflected in the settlement agreement. Likewise, the Derry Police Department did not intentionally interfere with plaintiff's current or potential contractual relations when its Chief, after consultation with the County Attorney and Attorney General placed plaintiff on the Laurie list.

April 27, 2020

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/28/2020