THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0279

The New Hampshire Center for Public Interest Journalism,
Telegraph of Nashua,
Union Leader Corporation,
Newspapers of New England, Inc., Through its New Hampshire Properties,
Seacoast Newspapers, Inc.,
Keene Publishing Corporation, and
The American Civil Liberties Union of New Hampshire
(Petitioners/Appellees)

v.

Department of Justice
(Respondent/Appellant)

Rule 7 Mandatory Appeal from the New Hampshire Superior Court, Hillsborough County (Southern Division)
Case No. 2018-cv-00537

RESPONSIVE BRIEF FOR PETITIONERS/APPELLEES THE NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM, TELEGRAPH OF NASHUA, NEWSPAPERS OF NEW ENGLAND, INC., SEACOAST NEWSPAPERS, INC., KEENE PUBLISHING CORPORATION, AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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1. Did the Superior Court err in holding that RSA 105:13-b does not apply to Petitioners' Chapter 91-A request for the EES List because RSA 105:13-b's procedures only concern when a police officer is "serving as a witness in any criminal case"? *See* Part I.A *infra*.

2. Did the Superior Court err in holding that, even if RSA 105:13-b applies to Petitioners' Chapter 91-A request, the EES List is not a police "personnel file" record under RSA 105:13-b? *See* Part I.B *infra*.

3. If RSA 105:13-b categorically exempts the EES List from disclosure under Chapter 91-A, would that constitute an "unreasonable restriction" on the public's right of access in violation of Part I, Article 8 of the New Hampshire Constitution? *See* Part I.D *infra*.

4. Did the Superior Court err in holding that the EES List is not exempt from disclosure under RSA 91-A:5, IV's exemption for "internal personnel practices"? *See* Part II *infra*.

5. Did the Superior Court err in holding that the EES List is not exempt from disclosure under RSA 91-A:5, IV's exemption for "personnel … files"? *See* Part III *infra*.

6. Is the EES List exempt from disclosure under RSA 91-A:5, IV's exemption for "other files whose disclosure would constitute invasion of privacy"? *See* Part IV *infra*.

STATEMENT OF THE CASE AND THE FACTS

The Department of Justice currently maintains a secret list of police officers who have engaged in sustained misconduct that reflects negatively on their credibility or trustworthiness. In 2004, the Department required county attorneys to create similar so-called "*Laurie* Lists" to assist prosecutors in complying with their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). App. II 198-215. On March 21, 2017, the Department centralized the process and created its own statewide list of officers who have engaged in misconduct related to their credibility or truthfulness. The Department called this new statewide list the Exculpatory Evidence Schedule (hereinafter, the "EES List" or "List"). The Department's new process, which it updated in a subsequent April 30, 2018 Memorandum, strengthened due process protections for the officers on the List. App. I 200-219; App. II 239-44. The police applauded these due process protections. App. II 217-218. As of January 8, 2020, 275 officers are on the EES List. *Id.* It is unclear how many of these officers still work in law enforcement or are even alive. The redacted current version of the EES List is attached at Petitioners' Addendum ("Add.") 49-63.

The Department's policy of keeping the EES List secret is not only legally incorrect, but it also shields officers who have engaged in serious misconduct. The current List includes officers who have engaged in, for example, "criminal" or "unlawful" conduct, "deliberate lie[s]" during court cases, and "falsifying reports or records." *Id.* The Department's policy also protects (i) officers charged with and/or convicted of criminal conduct that resulted in placement on the List, (ii) officers who have been terminated as a result of the conduct that led to placement on the List, (iii) officers who have exhausted internal grievance procedures, and (iv) officers where there would be no dispute that disclosures would need to be made to defendants in every case in which the officer is a testifying witness. For example, the Department is potentially protecting Claremont police officers Ian Kibbe and Mark Burch. These officers performed an illegal search and falsified official reports, which caused prosecutors to drop at least 20 cases. *See* App. II 273-77. Both were terminated, and Mr. Kibbe ultimately pled guilty to two misdemeanors.

See App. II 278-81, 290-94. This secrecy serves no public interest. The Department must produce the List.

SUMMARY OF ARGUMENT

This Court should affirm the Superior Court's decision ordering the release of the EES List for several reasons. *First*, RSA 105:13-b does not exempt the List from disclosure. As the Superior Court correctly held, RSA 105:13-b does not apply to Petitioners' Chapter 91-A request because RSA 105:13-b only implicates how "police personnel files" are handled when "a police officer … is serving as a witness in [a] criminal case." *See* RSA 105:13-b, I. *See* Part I.A *infra*. Moreover, as the Superior Court correctly held, even if RSA 105:13-b applies to Petitioners' Chapter 91-A request, the EES List is not a "police personnel file" record under RSA 105:13-b. This is because the List is neither in an officer's "personnel file" nor used for human resources purposes. The Department does not employ the officers on the List. *See* Part I.B *infra*. *Second*, as the Superior Court correctly held, the EES List is not exempt from disclosure under RSA 91-A:5, IV's exemption for "internal personnel practices." The List is not an "internal personnel" record because it (i) is maintained by the Department outside of an officer's personnel file and (ii) does not have a human resource purpose. *See* Part II *infra*. *Third*, as the Superior Court correctly held, the EES List is not exempt from disclosure under RSA 91-A:5, IV's exemption for "personnel … files." Again, the List is not a "personnel" record because it does not have a human resource purpose. *See* Part III *infra*. *Finally*, the EES List is not exempt from disclosure under RSA 91-A:5, IV's exemption for "other files whose disclosure would constitute invasion of privacy." Here, the public interest balancing analysis favors disclosure where the List encompasses the sustained misconduct of police officers. These officers work for the public. *See* Part IV *infra*.

ARGUMENT

"Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both *the greatest possible public access* to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1 (emphasis added). Consistent with this principle, courts resolve questions

under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997). Courts, therefore, construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551, 554 (2002).

I. RSA 105:13-b Does Not Apply to this Chapter 91-A Request Seeking the EES List.

A. As the Superior Court Correctly Held, RSA 105:13-b Does Not Apply to Petitioners' Chapter 91-A Request Because RSA 105:13-b Only Concerns When a Police Officer is "Serving as a Witness in Any Criminal Case."

As the Superior Court correctly held, RSA 105:13-b does not apply to Petitioners' Chapter 91-A request. This is for two reasons.

First, RSA 105:13-b does not implicate Petitioners' Chapter 91-A request because RSA 105:13-b only concerns how "police personnel files" are handled when "a police officer … is serving as a witness in any criminal case." *See* RSA 105:13-b, I. As the Superior Court explained:

> 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.

Add. 39 (Page 3).[1]

[1] The Department's reliance on the sentence "[t]he remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer," *see* RSA 105:13-b, III, is to no avail. This language concerning confidentiality simply indicates that, in the context of a criminal case, the "remainder of the file" that is ***not exculpatory*** is to be returned to the police department, treated as "confidential" in the criminal case, and not disclosed to the defendant. Indeed, the ***exculpatory*** portions of the file are specifically not confidential under this statute, as the statute requires that they "shall be disclosed to the defendant." RSA 105:13-b, I.

Significantly, in *Officer A.B. v. Grafton County Attorney*, No. 215-2018-cv-00437 (Grafton Cty. Sup. Ct.) where an officer was seeking removal from the List, the Department agreed with the position of Petitioners. There, the Department correctly argued that, "[b]y its plain terms, the procedure in RSA 105:13-b *only* applies when a police officer is 'serving as a witness in any criminal case.'" Add. 80-81 (Page 3, ¶¶ 12-15) (emphasis added). The Department takes a different position in this case. However, just as that officer was correctly barred from invoking RSA 105:13-b outside the context of a criminal prosecution, so too is the Department here.

Nothing in RSA 105:13-b suggests that this statute implicates or trumps the Right-to-Know Law. Nor does RSA 105:13-b meet the "clear legislative mandate" test to establish a statutory privilege for "police personnel file" information in the context of a public records request. *See Marceau v. Orange Realty*, 97 N.H. 497, 499-500 (1952) (noting that statutory privileges "will be strictly construed"). RSA 105:13-b's plain terms reflect that the legislature never intended this law to alter or interfere with the public's access to information under Chapter 91-A—a statute that serves a broader purpose to educate the public about what the government is up to. If the legislature had intended RSA 105:13-b to completely exempt all police personnel files from disclosure under the Right-to-Know Law, it would have said so as it has done elsewhere.[2]

Second, to the extent there is any textual ambiguity (and there is none), the 1992 legislative history of RSA 105:13-b refutes the Department's contention that this statute creates an exemption under Chapter 91-A. *See State v. Brouillette*, 166 N.H. 487, 494-95 (2014) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent."). *Amicus curiae* New Hampshire Association of Chiefs of Police introduced RSA 105:13-b in 1992. The focus of the bill was merely to create a

[2] *See, e.g.*, RSA 659:13, III ("If a voter on the nonpublic checklist executes an affidavit in accordance with subparagraph I(c), the affidavit shall not be subject to RSA 91-A."); RSA 659:95, II ("Ballots, including cast, cancelled, and uncast ballots and successfully challenged and rejected absentee ballots still contained in their envelopes, prepared or preserved in accordance with the election laws shall be exempt from the provisions of RSA 91-A ….").

process—which previously had been ad hoc—for how police personnel file information would be disclosed to defendants *in the context of criminal cases*. As the police chief representing the New Hampshire Association of Chiefs of Police testified: "Attempts to get information from private files of police officers is nothing more than a fishing expedition *on the part of defense attorneys*." *See* App. II 128 (Complete 1992 RSA 105:13-b Legislative History) (emphasis added); *see also* App. II 159 (Police Chief's Association addressing concern of "potential abuse by *defense attorneys* throughout the state intent on fishing expeditions") (emphasis added).

Moreover, the legislature specifically rejected any notion that this statute would constitute an exemption under Chapter 91-A. In the first paragraph of the original proposed version of RSA 105:13-b, the bill contained a sentence stating, in part, that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A." App. II 126 (Complete 1992 RSA 105:13-b Legislative History). In January 14, 1992 testimony before the House Judiciary Committee, Petitioner Union Leader Corporation objected to this blanket exclusion:

> This morning we are discussing a bill that would not reinforce the existing protection of the privacy of New Hampshire's police, but instead would give them extraordinary status as men and women above the laws that apply to others. It would establish our police as a special class of public servants who are less accountable than any other municipal employees to the taxpayers and common citizens of our state. It would arbitrarily strip our judges of their powers to release information that is clearly in the public benefit. It would keep citizens from learning of misconduct by a police officer …. The prohibition in the first paragraph of this bill is absolute.

App. II 135-36 (Complete 1992 RSA 105:13-b Legislative History). Following this objection, the legislature amended the bill to delete this categorical exemption for police personnel files under Chapter 91-A. The legislature's amendment establishes that it never intended RSA 105:13-b to give the police special, categorical protections for their personnel file information that are not afforded to other public employees. *See Reid v. N.H. AG*, 169 N.H. 509, 528 (2016) (holding that the "personnel file" exemption under RSA 91-A:5, IV implicating public employees is not categorical, but rather is subject to public interest balancing). Nonetheless, the Department's strained interpretation of RSA 105:13-

b unilaterally bestows upon police officers the very special protections that the legislature deliberately rejected.

B. As the Superior Court Correctly Held, Even if RSA 105:13-b Applies to Petitioners' Chapter 91-A Request, the EES List is Not a Police "Personnel File" Record Under RSA 105:13-b.

Even if RSA 105:13-b applies to Chapter 91-A requests like this one, the Superior Court held that "the EES is not a personnel file within the meaning of the statute." Add. 39, 41-42 (Page 3, 5-6). This conclusion is correct for two independent reasons.

First, the List does not satisfy the definition of being "personnel" under RSA 105:13-b because the nature and character of the document is not human resources related. As this Court has explained in the Chapter 91-A context, the term "personnel" "refers to human resources matters," including with respect to the hiring of prospective employees. *Reid*, 169 N.H. at 522 (citing *Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011)); *see also Clay v. City of Dover*, 169 N.H. 681, 686 (2017) (applying definition of "personnel" to hiring, "which is a classic human resources function"). The Massachusetts Court of Appeals has similarly explained that "personnel" means documents "useful in making employment decisions regarding an employee." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 8 (2003). Whether a record satisfies the definition of "personnel" is not dependent on its location; rather, the focus is on the "nature and character" of the document. *Id.* at 5, 7.

Here, the nature and character of the List is <u>*not*</u> to make employment or human resources decisions regarding the officer, but rather to ensure that prosecutors make appropriate disclosures to defendants under *Brady*. The Department does not employ the officers, nor are the officers prospective employees. The Department has acknowledged that it does not "conduct[] any additional analysis nor reviews any particular personnel files as part of an officer's placement the list." App. II 32. Rather, the Department "merely takes the personnel information provided and enters it into the spreadsheet." *Id.* The Department had even admitted that the List has no employment purpose, stating that it exists "<u>*for the singular purpose*</u> of establishing a reference tool for prosecutors to initiate

their inquiry as to the existence of exculpatory evidence as to a particular defendant's criminal matter." App. II 32 (emphasis added). This admission should end the matter.

The Department and *Amici* claim that the EES List is "personnel" information because the List is derived from officers' "personnel files" reviewed by police chiefs. *See* State's Br. at 24, 26. However, the fact that the List may contain information that is also separately reflected in an officer's personnel file maintained by an employer does not mean that the List is a "personnel" record. As the *Worcester Telegram & Gazette Corp*. Court correctly explained, the analysis is focused on the "nature and character" of the record and how it is used. *See* 58 Mass. App. Ct. at 10 ("[T]he nature and character of the document determines whether it is 'personnel [file] or information.' Put differently, the same information may simultaneously be contained in a public record and in exempt 'personnel [file] or information.'"); *see also Hounsell v. North Conway Water Precinct*, 154 N.H. 1, 4 (2006) (noting focus of whether the record "was generated in the course of an investigation of claimed employee misconduct"). Unlike the memorandum at issue in *Worcester Telegram* that had the human resource purpose of facilitating discipline—and like the internal affairs records in question in that same case—the "nature and character" of the EES List is neither human resource related nor generated by the Department "in the course of an investigation of claimed employee misconduct." *Hounsell*, 154 N.H. at 4.

Second, even if the List constitutes "personnel" information, RSA 105:13-b applies only to documents physically in the personnel "files" of police officers. *See* RSA 105:13-b, I. While the definition of "personnel" is not dependent on the location of the record, RSA 105:13-b's use of the term "file" limits the statute's reach and makes the record's location key to the statute's application. As the Department concedes, the EES List "does not physically reside in any specific police officer's personnel file." *See* State's Br. at 20. This should end this Court's inquiry, as it did for the Superior Court, which held the following: "[T]he Court finds a plain reading of the statute reflects that the legislature intended to limit RSA 105:13-b's confidentiality to the physical personnel file itself ….

There is no mention of personnel information in RSA 105:13-b, let alone an indication the legislature intended to make such information confidential." Add. 42 (Page 6).[3]

C. The Department's "Administrative Gloss" Theory Fails.

The Department's "administrative gloss" theory fails for several independent reasons. *See* State's Br. at 27-31. *First*, this theory is without merit because RSA 105:13-b unambiguously does not apply to the List. This Court has explained that the "[l]ack of ambiguity in a statute or ordinance … precludes application of the administrative gloss doctrine." *In re Kalar*, 162 N.H. 314, 322 (2011) (reciting administrative gloss standard). As the Superior Court correctly ruled—and as explained above in Parts I.A-B—RSA 105:13-b is clear. Nowhere in the text of the statute is there mention of a record bearing any resemblance to the List, nor is the List a "police personnel file" document under RSA 105:13-b's plain terms. Add. 45 (Page 9).

Second, the administrative gloss doctrine does not apply because the Department has <u>*not*</u> "interpreted [RSA 105:13-b] in a consistent manner" and applied it to the Department's EES List "over a period of years without legislative interference." *See Kalar*, 162 N.H. at 321-22. At the outset, the Department's 2004 and 2017 Memoranda addressing the List's confidentiality do not explicitly rely upon RSA 105:13-b. App. II 202; App. I 210. Moreover, while the Department took the position that separate so-called "*Laurie* Lists" in the possession of counties from 2004 to 2017 were confidential, the Department has only retained the EES List at issue here since the creation of the March 21, 2017 Foster Memorandum. App. I 210. It can hardly be said that the legislature acquiesced to a confidentiality decision concerning the Department's List that has only existed for less than

[3] While RSA 105:13-b is limited to police officer "personnel files," the Massachusetts statute at issue in *Worcester Telegram* is broader in addressing "personnel file <u>*or information*</u>." *Worcester Telegram*, 58 Mass. App. Ct. at 10 (emphasis added). Moreover, the State's reference to *Ass'n for L.A. Deputy Sheriffs v. Superior Court*, 447 P.3d 234 (Cal. 2019) is inapposite. *See* State's Br. at 20. That case interpreted a California statute deeming as confidential information "obtained from" certain personnel records and records of citizen complaints. *Id.* at 239. However, RSA 105:13-b specifically does not include this broader "obtained from" language, and is instead limited to "files."

three years. Moreover, none of the three bills considered and rejected by the legislature referenced in the State's brief specifically addressed the confidentiality of the List; rather, they addressed the procedure for handling officer personnel files in criminal cases currently in RSA 105:13-b. *See* State's Br. at 28. In fact, when considering the only known bill specifically addressing the confidentiality of the EES List—2019 HB155—the Senate took no position on the Department's policy of secrecy and instead expressed a desire to await the outcome of this case before taking action.[4]

Third, the Department is not entitled to deference because of its constitutional interest in administering justice and supervising all law enforcement. *See* State's Br. at 29-30. Of course, the Department also has a competing obligation to correctly interpret and apply statutes like RSA 105:13-b. Rather than effectuate the Department's constitutional responsibility to administer justice, its policy of secrecy undermines this responsibility and damages public confidence in the administration of justice. Transparency would promote the administration of justice by helping ensure that (i) prosecutors have made and will make appropriate disclosures, and (ii) officers who are found to have engaged in misconduct—like, for example, former Claremont police officer Ian Kibbe, and Manchester Detectives Darren Murphy and Aaron Brown who were terminated after allegations of coercing a woman facing criminal charges to have sex (App. I 263-267)—are actually on the List and have been the subject of disclosures. Transparency does not just help defense lawyers. It helps the public. It will either instill confidence that the system is working correctly or shed led light on its failures.

Fourth, the Department and *Amici*'s reliance on *Gantert v. City of Rochester*, 168 N.H. 640 (2016) and *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774 (2015) is

[4] The House of Representatives passed HB 155 on March 14, 2019. On January 8, 2020, the Senate voted to refer the bill to interim study in light of this litigation. *See* Jan. 8, 2020 Senate Floor Discussion on HB155 (Senator Harold French stating on the Senate floor: "[T]his is being challenged now. Although the intention of the bill has merits, there is a need to further examine this language before moving forward."), http://sg001-harmony.sliq.net/00286/Harmony/en/PowerBrowser/PowerBrowserV2/20200108/2029/21415#agenda_ (at 12:14:13).

misplaced. *See* State's Br. at 27. These cases say nothing about public disclosure of the EES List under Chapter 91-A. Instead, these cases *only* concerned police officers challenging their *placement on the EES List* on due process grounds. The parties in these cases—both the officers and government entities—never questioned the propriety of treating the EES List as confidential under RSA 105:13-b. This is not surprising. The officers challenging placement on the EES List would receive the benefit of such confidentiality, and the adverse prosecuting entities were merely reciting the Department's (erroneous) legal conclusion that the EES List is confidential. This Court's statements in these cases merely reflect, without any legal analysis, the parties' uncontested and unlitigated positions concerning the confidentiality of the EES List under RSA 105:13-b. In short, these cases stand for the proposition that officers have a liberty interest concerning *placement on the EES List*. These decisions say nothing about the Right-to-Know Law or depriving the public of access to the List *after* placement has occurred.[5]

Finally, the Department's "administrative gloss" theory fails because it runs counter to statutory construction rules that apply in public records disputes. New Hampshire courts have made clear that, in Chapter 91-A disputes, they should not defer to an agency's interpretation, but rather should construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode*, 148 N.H. at 554. This interpretative rule resolves questions "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.*, 142 N.H. at 546 (citation omitted). This Court cannot discard this interpretative rule by simply deferring to the Department's erroneous interpretation that few may have known about and, until now, no one may have had the legal resources, legal expertise, or political will to challenge.

[5] New Hampshire law makes available to the public disposed-of complaints concerning lawyers and judges (including those that are unfounded). *See* N.H. Sup. Ct. R. 37(20)(b)(1); N.H. Sup. Ct. R. 40(3)(b); *see also* N.H. Attorney Discipline System, *available at* http://www.nhattyreg.org/search.php.

In sum, this Court, not the Department, is "the final arbiter[] of the legislature's intent as expressed in the words of a statute considered as a whole." *Kalar*, 162 N.H. at 322. This Court should not "be so star-struck by it that we must defer to the agency at the first sign of uncertainty about the meaning of the words" that the legislature chose. *See Castañeda v. Souza*, 810 F.3d 15, 23 (1st Cir. 2015) (equally divided court discussing *Chevron* deference).[6] Government decisions to violate Chapter 91-A do not become any less unlawful because they have been done for years. If the Department disagrees with the law and its disclosure obligations, then it is the obligation of the Department—not Petitioners—to make its case before the legislature rather than unilaterally impose its own policy preference that is inconsistent with RSA 105:13-b's plain terms. In the meantime, whatever policy criticisms the Department may have of the legislature's approach in RSA 105:13-b are outside the purview of this Court. *See Boehner v. State*, 122 N.H. 79, 85 (1982) ("our task is not to second-guess the legislature or question the factors which went into its decision").

D. Alternatively, if RSA 105:13-b Categorically Exempts the EES List from Disclosure Under Chapter 91-A, that Would Violate Part I, Article 8 of the New Hampshire Constitution.

If the Court concludes that RSA 105:13-b categorically exempts the EES List from disclosure under Chapter 91-A, then RSA 105:13-b would constitute an "unreasonable restriction" on the public's right of access in violation of Part I, Article 8 to the New Hampshire Constitution as applied to Chapter 91-A requests.

This Court must employ a balancing analysis to address whether RSA 105:13-b, as it applies to a Chapter 91-A request for the EES List, violates Article 8. "To determine whether restrictions are reasonable, we balance the public's right of access against the competing *constitutional interests* in the context of the facts of each case. The reasonableness of any restriction on the public's right of access to any governmental

[6] This Court must be mindful that "a statute may foreclose an agency's preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque." *Id.* (quoting *Council for Urological Interests v. Burwell*, 790 F.3d 212, 221 (D.C. Cir. 2015)).

proceeding or record must be examined in light of the ability of the public to hold government accountable absent such access." *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 669-70 (2016) (emphasis added). As explained in Part III.B *infra* which engages in this balancing analysis, this restriction is unreasonable.

II. The "Internal Personnel Practices" Exemption Under RSA 91-A:5, IV Does Not Apply to the EES List.

A. As the Superior Court Correctly Held, the EES List Does Not Reflect an "Internal Personnel Practice" Under RSA 91-A:5, IV.

The EES List does not constitute an exempt "internal personnel practice" record under RSA 91-A:5, IV for two independent reasons.

First, the Superior Court was correct in concluding that the List is not an "internal" document. "Internal" has a distinct meaning, yet the Department conflates this term with "personnel." The term "internal" means "existing or situated within the limits … of something." *Reid*, 169 N.H. at 523. For information to be deemed "internal," "the agency must typically keep the records to itself for its own use." *Clay*, 169 N.H. at 687 (quoting *Milner*, 562 U.S. at 570-71). Viewing the term "internal" as an important limitation on the scope of this exemption, the *Reid* Court explained that "we construe 'internal personnel practices,' to mean practices that exist[ ] or [are] situated within the limits of employment." *Reid*, 169 N.H. at 523. Here, the List is not an "internal" record because it is not "situated within the limits of employment." As the Superior Court correctly explained, the List is maintained <u>*externally*</u> by the Department, and thus is <u>*not*</u> maintained by officers' employers for their own use. The Department does not employ these officers. Add. 47 (Page 11). Indeed, this case is identical to *Reid* where this Court held that documents concerning the Attorney General's investigation of the Rockingham County Attorney were not "internal" because the Attorney General was not the employer of a county attorney. *Reid*, 169 N.H. at 525. *Fenniman*, *Hounsell*, and *Clay* are distinguishable because, unlike the EES List, the documents at issue there were compiled, maintained, and used <u>*by the employer*</u> for its own use.

Second, for all the reasons explained in Part I.B *supra*, the Superior Court was correct in holding that the EES List is not a "personnel" document.

B. Even if the EES List Does Reflect an "Internal Personnel Practice" Under RSA 91-A:5, IV, This Court Must Weigh the Public Interest in Disclosure Against the Privacy and Governmental Interests in Nondisclosure.

Even if the EES List satisfies the definition of an "internal personnel practice," this Court must still engage in a balancing analysis where it weighs the public interest in nondisclosure against the privacy and governmental interests in nondisclosure. The question of whether such public interest balancing is required is before this Court in three pending cases that were heard on November 20, 2019. As explained in Part III.B *infra*, this balancing analysis requires disclosure, and therefore the List is not exempt.

III. The "Personnel" File Exemption Under RSA 91-A:5, IV Does Not Apply to the EES List.

A. As the Superior Court Correctly Held, the EES List is Not a "Personnel" File Document Under RSA 91-A:5, IV.

RSA 91-A:5, IV exempts "personnel … files whose disclosure would constitute invasion of privacy." As the Superior Court correctly held—and as explained in Parts I.B and II.A *supra*—the EES List is not a "personnel" file document.

B. Even if the EES List is a "Personnel" File Document Under RSA 91-A:5, IV, the List Should Be Disclosed Because the Public Interest in Disclosure Far Outweighs Any Privacy and Governmental Interest in Nondisclosure.

Even if the EES List is a "personnel" file document, this Court must balance the public's interest in disclosure against any privacy and governmental interests in nondisclosure. *See Reid*, 169 N.H. at 528. As this Court has explained:

> When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, we engage in a three-step analysis. 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.

Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 707 (2010) (citations and internal quotations omitted). In applying this test, the burden on the government is a "heavy" one. *Lambert v. Belknap Cty. Convention*, 157 N.H. 375, 379, 385 (2008).

1. The Public Interest in Disclosure is Compelling.

The public interest in disclosing the names of the officers on the EES List is compelling and obvious.

First, the Department does not contest that the List identifies officers who have engaged in sustained misconduct. *See* State's Br. at 20, 24. But this is not just any misconduct. This is misconduct implicating trustworthiness and credibility. These traits go to the core of an officer's ability to testify and perform his or her job. This Court has repeatedly stated that uncovering government misconduct is a paramount interest that Chapter 91-A aims to accomplish. *See, e.g., Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 684 (2011) (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."); *see also NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003) ("[t]he public has a strong interest in disclosure of information pertaining to its government activities").

Courts outside of New Hampshire have similarly recognized the obvious public interest where 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., Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) ("As the trial court found, there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct."; ordering disclosure of employee names); *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) (holding the public interest in names and records of investigation into police officers' use of excessive force trumps officers' privacy interest); *Burton v. York County*

Sheriff's Dep't., 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) ("[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 v. Wis. Dep't of Nat. Res.*, 725 N.W.2d 286, 303 (Wis. Ct. App. 2006) ("[t]he public has a particularly strong interest in being informed about public officials who have been derelict in [their] duty") (quotations omitted).

There is clear value to the public in knowing the identities of the officers on the List. The public will learn if any of these officers are currently patrolling the streets and, if so, who they are and generally what they did. The public can then evaluate this information and, if appropriate, ask why these individuals are still employed using public funds. For example, in Manchester and Nashua as of August 2018, two employed officers in each department were on the List. App. I 83-84, 91. Without knowing who is on the List, citizens in Manchester and Nashua cannot conclude with certainty that all officers they encounter on the streets are trustworthy and credible. This hurts public confidence in policing. *See Rutland Herald*, 84 A.3d at 826 ("redacting the employees' names would cast suspicion over the whole department and minimize the hard work and dedication shown by the vast majority of the police department"). And, for those on the List who are no longer in law enforcement, these names must be disclosed because (i) these officers could still be testifying witnesses, and (ii) this information could be used by the public to ask important questions about whether and how these officers were disciplined and how long they stayed employed by the department. The public can use this information to evaluate whether departments are in need of reform.

Second, disclosure is critical because it will help defense attorneys and the public evaluate whether prosecutors have been making appropriate disclosures. Currently, this process is secret with no ability to verify compliance. As this Court has held, "[b]ecause a prosecutor must be publicly accountable for his or her decisions, the public should have access to information that will enable it to assess how prosecutors exercise the tremendous power and discretion with which they are entrusted." *See Grafton Cty. Atty.'s Office v. Canner*, 169 N.H. 319, 328 (2016). Here, disclosing the List will provide greater assurance

that prosecutors and officers will make the appropriate disclosures to defendants in the future because defense attorneys would then be able to cross check the List with the list of testifying officers they receive in individual cases. Today, defense attorneys simply have to trust that they are receiving the required disclosures. Making the List public will also help defense attorneys and the press assess whether prosecutors have made appropriate disclosures in prior cases. Such a forensic review may disclose that the system has operated fine in secret. Alternatively, it may disclose that the system has broken down and needs reform, thereby entitling some defendants to new trials under *Laurie*. In short, disclosure is necessary "so that [the public] can be confident in the operation of their government." *City of Baton Rouge*, 4 So.3d at 809-10, 821.

Transparency is especially important here because we know that prosecutors have not made necessary disclosures to defendants on multiple occasions. App. I 28-30, ¶¶ 44-46. For example, for decades, prosecutors failed to disclose to defendants a documented lie told by a Nashua police officer (including in three homicide cases). App. I. 231-234. In 2013, prosecutors failed to inform a defendant that the Pelham police officer who arrested him was on the List, which caused a jury's guilty finding to be overturned. App. I 239-41. And, recently, Salem Sergeant Michael Verrocchi was arrested and charged with reckless conduct and disobeying a police officer for allegedly, while off-duty, fleeing the police and engaging in a high-speed chase on November 10, 2012. This incident was only uncovered with the release of an audit report in November 2018 (though Sergeant Verrocchi's name was not used in the report). Even if Sgt. Verrocchi was added to the EES List recently when this incident became known (and the Department is keeping this secret), there is a real possibility that disclosures concerning this incident were not made to defendants between 2012 and 2019. This incident also highlights how the EES List may implicate criminal behavior of certain police officers—criminal behavior that may need to be investigated by the Department if it has not already.[7]

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

The fact that approximately 93 officers were added to the List from June 1, 2018 and January 11, 2019 enhances the concern that prosecutors have not made appropriate disclosures.[8] The Department has publicly acknowledged that many of these officers were recently added based on conduct that occurred some time ago, well before placement on the List occurred. *See* App. II 301. (The Department has, without justification, redacted the "date of incident" from the public version of the EES List.) The Department's admission raises the possibility that, as to these officers, prosecutors did not make disclosures between the date the incident occurred and the date the officer was placed on the List potentially years later. The Department cannot provide an assurance that prosecutors made the necessary disclosures during this time period because assistant county attorneys and local prosecutors/police prosecutors—not the Department—handle the vast majority of criminal prosecutions in New Hampshire.

Third, the public interest in disclosure is significant because officers are placed on the List only after a "sustained" finding of misconduct. Placement on the List is not a cursory process. The Department has intended due process and notice to be a feature of the List since its inception in 2004. When the county lists were established in 2004, the Department recommended a "Sample Policy" explaining that, if an "incident constitutes potential *Laurie* material," the chief "shall notify the involved officer," who may then "request a meeting with the Chief to present any specific facts or evidence that the officer believes will demonstrate that the incident does not constitute potential *Laurie* material." App. II 208 (2004 Heed Memo., Procedure G). The Department's March 21, 2017 Memorandum similarly explains that "[a]ll officers placed on the EES will be notified by the Chief and/or the County Attorney," and that, if the officer disagrees with the Chief's finding, he or she should be given an opportunity to "present any specific facts or evidence that the officer believes will demonstrate that the incident does not constitute potentially exculpatory evidence." App. I. 204, 209, 212 (Procedure F) (Joseph A. Foster Mar. 21, 2017 Memo.). Further, under this Memorandum, local police departments are required to

[8] *Compare* Add. 64-76 (264 names as of January 11, 2019 List) *with* App. I 42-50 (171 names as of June 1, 2018 List).

complete a certificate of compliance attached to the Department's March 21, 2017 Memorandum stating that officers on the List have been notified. *See* App. I. 214 (Joseph A. Foster Mar. 21, 2017 Memo.). The Department's most recent April 30, 2018 Memorandum also explains that, before placement, (i) there must be an investigation into the officer's conduct, (ii) the allegations against the officer must be ***sustained*** after the investigation, and (iii) the head of the law enforcement agency must make a finding that the conduct at issue is "EES conduct" after giving the officer an opportunity to be heard. App. II 239 (Gordon J. MacDonald Apr. 30, 2018 Memo., at p. 1). The police commended this due process, with *amicus curiae* New Hampshire Police Association calling it a "long overdue correction" to the "*Laurie* List" process. App. II 218 (April 30, 2018 Press Release). The Department has engaged in extensive notification and trainings concerning the procedures in these memoranda. App. II 224 (DOJ Nov. 15, 2018 Ltr.). And the Department has acknowledged that all officers added to the EES List since March 21, 2017 "were added in conformance with the 2017 EES process"—a process that explicitly requires the above protections. *Id.* With this due process must come transparency as to the List.

Additionally, since at least 2017, there has been a process in place for eligible officers to have their names removed from the EES List if the conduct has been deemed unfounded. *See* App. I. 205, 207, 210 (Joseph A. Foster Mar. 21, 2017 Memo.) ("If an allegation is determined to be unfounded, or if the officer is exonerated after challenging the disciplinary action, the officer's name will be taken off the EES after consultation with the Attorney General or designee."); App. II 239, 242 (Gordon J. MacDonald Apr. 30, 2018 Memo.) (same). The Department created this process, in part, in an effort to comply with this Court's decisions in *Duchesne* and *Gantert*. In light of this removal process, Petitioners are not seeking the names of officers on the List who have pending requests with the Department to be removed from the list. In any event, many officers have had nearly 3 years to avail themselves of this removal process. And, if the List is made public and an officer is subsequently removed, then this removal will also be of public record. In

other words, the public will know he or she has been removed in recognition of any future exoneration.

Fourth, as explained in Part I.A-B *supra*, RSA 105:13-b does not minimize the public interest in disclosure with respect to the EES List, nor does it create a privacy interest as to this record. The Department's reliance on RSA 516:36 is also misplaced. This statute governs ***admissibility***, not discoverability, of police internal investigation documents. RSA 516:36, II. Information, of course, can be ***both*** inadmissible in court under RSA 516:36 ***and*** public under Chapter 91-A.

Finally, the Department argues that withholding the List is justified because disclosure "will mislead the public and undermine public confidence in law enforcement," as well as "threaten[] informed accountability by encouraging wild speculation" as to the reasons for why an officer is on the List. *See* State's Br. at 41, 44. Setting aside the absence of evidence supporting these assumptions, 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 …."). Chapter 91-A presumes that the public is to be informed and trusted, even where the requested records may not present the complete picture. For example, criminal complaints, indictments, mugshots, and police reports often are "misleading" because they are one-sided and do not necessarily tell the story of the accused. 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 would like to withhold from the public or press because it feels that the information is "misleading" or does not tell the full story. The correct response is not for the government to suppress information it finds "misleading"—a response that, if permitted, would give the government awesome power to withhold information from its citizens. Rather, the correct response is even greater transparency. Here, the Department could release the List accompanied with an explanation as to how the Department believes the public or press should interpret its contents. This could include the very explanation it provided to the Superior Court where

it argued that this information does not tell the full story of the nature of why the officers are on the List. App. II 49.

2. The Officers on the EES List Have No Privacy Interest That Would Be Invaded By Disclosure.

The privacy interests are minimal where the EES List reflects the misconduct of police officers.

Petitioners are not seeking information about private individuals that courts have frequently protected. The List implicates government officials. In examining the privacy exemption under RSA 91-A:5, IV, this Court has been careful to distinguish between information concerning private individuals interacting with the government and information concerning the performance of government employees. *Compare, e.g., Lamy v. N.H. Public Utilities 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 (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); *Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972) (government must disclose the names and salaries of each public schoolteacher employed by the district). The information sought in this case also does not constitute information about officials' private lives, "*intimate details* … the disclosure of which might harm the individual," *see Mans*, 112 N.H. at 164 (emphasis added), or the "kinds of facts [that] are *regarded as personal* because their public disclosure could subject the person to whom they pertain to

embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*, 169 N.H. at 530 (emphasis added).

Courts outside of New Hampshire have similarly rejected the concept of police officers having a significant privacy or reputational interest with respect to their public duties. This is because, when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. *See, e.g.*, *City of Baton Rouge*, 4 So.3d at 809-10, 821 ("[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*, 594 S.E.2d at 895 (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*, 725 N.W.2d at 301 ("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.").

The Department is also incorrect when it argues that "[n]othing about [officers' internal grievance' process[es] would lead an officer to reasonably expect any [placement on the List] to become public." *See* State's Br. at 39. No such expectation reasonably exists because the List (i) is a record maintained externally for reasons unrelated to employment, and (ii) functions to ensure constitutionally-required disclosure. Further, even if the EES List bears some nexus to employment (which it does not), any subjective belief of privacy police officers might have would be irrelevant. *Prof'l Firefighters of N.H.*, 159 N.H. at 707 ("Whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations."). The

cases cited above reject the notion that officers objectively have privacy rights with respect to their own official conduct.

The suggestion of the Department and *Amici* 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 is also both wrong and troubling. *See* State's Br. at 38; N.H. Police Assoc. Br. at 9-10. This Court has not recognized such a constitutionally-enshrined liberty interest in the public records context. This is because it would conflict with Chapter 91-A and the notion that public officials are not private citizens. Rather, they work for us. *See, e.g.*, *Burton*, 594 S.E.2d at 895-96 ("By raising this constitutional argument, the Sheriff's Department urges this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual's performance of his public duties to be free from public scrutiny. We find this would be ill-advised."); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 297 (Conn. App. Ct. 2012) ("the personal privacy interest protected by the fourth and fourteenth amendments is very different from that protected by the statutory exemption from disclosure of materials"). Setting aside the robust due process protections that are provided to officers on the List (*see* Part III.B.1 *supra*), the procedural due process protections in the Fourteenth Amendment and Part I, Article 15 of the New Hampshire Constitution protect individual citizens from the government, not the other way around.

The officers on the List are entitled to no more privacy rights than the citizens whom they regularly accuse of crimes, especially where the accused have a greater liberty interest at stake. Citizens accused of crimes do not receive confidentiality, even if the charge is dropped or the citizen is acquitted. *See* RSA 594:14-a; *Grafton Cty. Atty.'s Office*, 169 N.H. at 327-28 (arrest records related to annulled case were not exempt under RSA 91-A:4, I). The police (including the Department) routinely make public the allegations against the accused, including mugshots. As a result, those publicly accused of crimes may suffer considerable stigma, even before they have received any hint of due process. This stigma often includes job loss and estrangement from friends or family. In making this

information public, we make this tradeoff as a society to ensure that the public has maximum access to information concerning how the criminal justice system functions. Here, whatever stigma may come from making the List public is a consequence of our constitutional commitment to accountability: the public's right to know what the government and its officials are doing.

3. There is No Public or Governmental Interest in Nondisclosure.

The Department and the *amici* New Hampshire Association of Chiefs of Police argue that there is a public interest in nondisclosure on the theory that disclosure would create the possibility of chilling police chiefs' initial identification of officers for the EES List out of a fear that the officer will be subjected to "ridicule and scrutiny." *See* Chiefs of Police Br. at 8; *see also* State's Br. at 42.

First, this Court has previously rejected such speculative suggestions. *See Goode*, 148 N.H. at 556 ("[T]here is no evidence establishing the likelihood that auditors will refrain from being candid and forthcoming when reporting if such information is subject to public scrutiny."); *Union Leader Corp.*, 162 N.H. at 681 (rejecting withholding rationale that was "speculative at best given the meager evidence presented in its support"). Before the Superior Court, the Department acknowledged that this "chill" was only a "possibility." *See* App. II 38, 46. This Court cannot credit speculative concerns not borne out by evidence, especially where the Department "has the burden of demonstrating that the designated information is exempt from disclosure under the Right-to-Know Law." *CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 587 (2015); *see also Nash v. Whitman*, 05-cv-4500, 2005 WL 5168322 (Dist. Ct. of Colo., City of Denver, Denver Cty. Dec. 2005) (ordering that the bulk of internal affairs police files be produced because fear of chilling witnesses "did not find significant support in the evidence"); *Kroeplin*, 725 N.W.2d at 303 ("Kroeplin fails to point to any evidence that disclosing records created in the course of investigating employee misconduct and of the subsequent disciplinary action taken would have or has the effect he predicts [of chilling investigations]."). A hypothetical fear of "chill" has also not hindered other police

departments from producing similar so-called "*Brady* lists," including in Philadelphia (App. II 179-185, 186-197), Seattle (App. II 185), and counties in Florida.[9]

Second, the Department's fear of "chill" does not trust police chiefs to do their jobs. Police chiefs, as sworn officers, are expected to follow the law and direction from the Department concerning *Brady*. *See Kroeplin*, 725 N.W.2d at 303 ("[w]e are not persuaded that a conscientious and motivated supervisor would act in any way other than in the employer's best interest"). In addition, the Department's fear cannot be reconciled with the institutional incentives police chiefs have to make appropriate *Brady* designations. If a police chief fails to make a designation and a defendant is convicted, a court may be required to reverse that conviction. *See State v. Laurie*, 139 N.H. 325, 326 (1995). The Department's fear of "chill" is also minimized by the fact that, as explained above, officers on the List receive various due process protections.

Third, disclosure will enhance the "robust realization for criminal defendants of the constitutional right to exculpatory evidence," *see* State's Br. at 42, not hinder it. Disclosing the EES List will help ensure that (i) prosecutors have made and will make appropriate disclosures, and (ii) the right officers are on the EES List. Conversely, keeping this process secret creates an environment where police chiefs and prosecutors may not be incentivized to make appropriate disclosures because there is no public accountability. If the EES List is public, police chiefs will be ***more*** likely to comply with their obligations to place on the List officers who have committed clear EES misconduct—for example, former Claremont police officer Ian Kibbe. App. II 290-94. This is because the public will be able to look over their shoulders. As one court has explained: "Openness and disclosure are conducive to better accountability. If public employers know that the investigations they perform are subject to public review, common sense dictates that they will be more diligent in ensuring that charges of potential misconduct are thoroughly investigated … than they would be if they were not so held accountable to the public." *Kroeplin*, 725 N.W.2d at 304.

[9] Florida *Brady* Lists, https://southfloridacorruption.com/Brady-List/.

4. The Compelling Public Interest in Disclosure Trumps the Officers' Nonexistent Privacy Interests.

In balancing these interests, this 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 Union Leader Corp.*, 141 N.H. at 476. In performing this balancing test with respect to the EES List, the Department cannot meet its "heavy burden" of showing that any privacy or governmental interests in nondisclosure trump the compelling public interest in disclosure. *See Reid*, 169 N.H. at 532. The EES List must be disclosed. *See Kroeplin*, 725 N.W.2d at 301-302 ("We are not persuaded that the public's interest in encouraging open and frank discussions between supervisors and disciplined employees outweighs the public's interest in being well informed about the circumstances surrounding a law enforcement officer's discipline for conduct that violates a significant work rule.").

IV. The Privacy Exemption Under RSA 91-A:5, IV Does Not Apply to the EES List Because The Public Interest in Disclosure Far Outweighs Any Privacy and Governmental Interest in Nondisclosure.

RSA 91-A:5, IV also exempts "other files whose disclosure would constitute invasion of privacy." For the same reasons explained in Part III.B *supra*, the balancing analysis employed under this exemption requires disclosure. The Superior Court's analysis compels this result given its holding that the EES List was not a "personnel" document. Especially where the List is not "personnel"-related, the privacy interests here are minimal, if not nonexistent.

CONCLUSION

This Court should affirm the Superior Court's April 23, 2019 order.

REQUEST FOR ORAL ARGUMENT

The above-captioned Petitioners request 15 minutes of argument before the full Court. Gilles Bissonnette, Esq. will present for these Petitioners.

Respectfully Submitted,

THE NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM,
TELEGRAPH OF NASHUA,
NEWSPAPERS OF NEW ENGLAND, INC.,
SEACOAST NEWSPAPERS, INC.,
KEENE PUBLISHING CORPORATION, AND
THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE,

By their attorneys,

/s/ Gilles R. Bissonnette

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Dated: January 29, 2020

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 9,477 words (including footnotes) from the "Questions Presented" to the "Request for Oral Argument" sections of the brief.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 29th day of January, 2020 through the electronic-filing system on counsel for the Respondent/Appellant New Hampshire Department of Justice.

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

ADDENDUM

1

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2018-CV-00537

New Hampshire Center for Public Interest Journalism, et al

v.

New Hampshire Department of Justice

ORDER ON MOTION TO DISMISS

Currently before the Court is petitioners'[1] request under RSA 91-A to access an un-redacted version of the Exculpatory Evidence Schedule ("EES"). The New Hampshire Department of Justice ("DOJ") moves to dismiss, arguing the EES is confidential under RSA 105:13-b and/or exempt from disclosure under RSA 91-A. Petitioners object. The Court held a hearing on February 25, 2019. After review of the pleadings, arguments, and applicable law, the DOJ's motion to dismiss is DENIED.

Factual Background

The New Hampshire Department of Justice ("DOJ") currently maintains a list of police officers who have engaged in sustained misconduct, when such misconduct reflects negatively on their credibility or trustworthiness. Formerly known as the "Laurie List," the list is now called the EES. In its current formation, the EES is a spreadsheet containing five columns: (1) officer's name; (2) department employing said officer; (3) date of incident; (4) date of notification; and (5) category or type of behavior that

[1] Petitioners include: the New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Union Leader Corporation, Newspapers of New England, Inc., through its New Hampshire Properties, Seacoast Newspapers, Inc., Keene Publishing Corporation, and the American Civil Liberties Union of New Hampshire. (Pets.' Pet. p. 1.)

resulted in the officer being placed on the EES. (See Pets.' Appx. p. 1.)

Each petitioner filed a Chapter 91-A request with the DOJ seeking the most recent EES. On each occasion, the DOJ provided petitioners with a version of the EES that redacted any personal identifying information of the officers contained therein. Certain petitioners thereafter submitted 91-A requests seeking an un-redacted version of the EES. These requests excluded information concerning officers that had pending requests or applications before the DOJ in which they sought removal from the EES. The DOJ denied these requests, claiming such disclosures would constitute an invasion of privacy of the officers contained within the EES.

Analysis

As stated above, petitioners seek disclosure of the un-redacted version of the EES pursuant to New Hampshire's Right-to-Know Law. The DOJ objects, arguing: (1) the EES is confidential under RSA 105:13-b; (2) longstanding DOJ practice, coupled with legislative inaction, confirms disclosure of the EES is prohibited by RSA 105:13-b; (3) the EES is *per se* exempt from disclosure as it reflects records of police departments' internal personnel practices; and (4) disclosure of the EES, which constitutes a personnel file under RSA 91-A, would constitute an invasion of privacy of the officers included on the list. (See DOJ's Mot. Dimiss, p. 8–18.) Petitioners dispute these arguments.

I. RSA 105:13-b

As stated above, the DOJ first argues RSA 105:13-b forecloses the disclosure of the EES, as it "holds police personnel files strictly confidential with narrow exception." (Id. at 8.) RSA 105:13-b states, in relevant part:

> I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.
>
> II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.
>
> III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

At the outset, the Court is not convinced that RSA 105:13-b governs the petitioners' request. 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 Reid v. New Hampshire Attorney General, 169 N.H. 509, 528 (2016) ("'[P]ersonnel files' are not automatically exempt from disclosure." (citing RSA 91-A:5, IV)).

Even assuming RSA 105:13-b does apply, the Court finds the EES is not a personnel file within the meaning of the statute. The parties do not dispute that the EES

does not physically reside in any specific police officer's personnel file. Instead, the list is created and maintained by the DOJ for the purpose of identifying police officers "whose personnel files may contain potentially exculpatory evidence." (DOJ's Mot. Dismiss, p. 2.) Despite the foregoing, the DOJ argues that the EES should nevertheless be considered a protected police personnel file because the information contained therein is simultaneously contained in each officer's respective personnel file. The DOJ asserts that the relevant inquiry is whether the substantive information in the EES constitutes information taken from the police personnel files.

The petitioners counter, arguing RSA 105:13-b's protection is limited to documents contained in a police personnel file or, put another way, is limited to the physical police personnel files that are maintained by the respective police departments. The petitioners assert further that the EES, which is created and maintained by the Attorney General—who does not employ any of the police officers named in the EES—is an external document and does not fall within the scope of RSA 105:13-b's confidentiality.

In Reid, the New Hampshire Supreme Court defined "personnel" within the meaning of RSA 91-A:5's exemption for disclosures of internal personnel practices. 169 N.H. at 528. The Reid Court, relying on the United States Supreme Court's decision in Milner v. Department of Navy, 562 U.S. 562, 569 (2011), held that the term "'personnel,' when used as an adjective, . . . refers to human resources matters." Id. 522. The Supreme Court explained that the word "personnel" concerned "the conditions of employment in a governmental agency, including such matters as hiring and firing, work rules and discipline, compensation and benefits." Clay v. City of Dover, 169 N.H. 681,

686 (2017) (citing Reid, 169 N.H. at 522); see Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 606 (Mass. App. Ct. 2003) (interpreting "personnel file and information" to "include[], at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee . . . . [as] [t]hese constitute the core categories of personnel information that are useful in making employment decisions regarding an employee"). It then summarized that the term "personnel" related to employment. Reid, 169 N.H. at 523.

Applying the foregoing definition of "personnel," the Court finds the EES does not constitute a personnel file within the meaning of RSA 105:13-b. Here, the parties do not dispute that the officers on the EES are not employed by the DOJ, and the DOJ and the officers do not share any of the "usual attributes of an employer-employee relationship, such as the power to set the salary, hire or fire." Reid, 169 N.H. at 525. Moreover, the DOJ did not create and maintain the EES to discipline the officers contained therein, nor is there any evidence suggesting the DOJ has the authority to do so. Cf. Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (holding a report investigating employee harassment that "could have resulted in disciplinary action" constituted a "personnel practice" under RSA 91-A:5); Fenniman, 136 N.H. at 626 (holding "internal police investigatory files," which "document[ed] the procedures leading up to internal discipline," constituted personnel practices). Further, the DOJ concedes that it does not conduct any type of investigation or review—either independently or on behalf of the police departments—of the respective police personnel files of the officers on the EES. (DOJ's Mot. Dismiss, p. 9.) Therefore, because the officers listed on the EES do not

share an employee-employer relationship with the DOJ, and the EES lacks any type of employment or human resources function, the Court finds the EES is not a personnel file under RSA 105:13-b.

Although the DOJ attempts to argue that the information contained in the EES is "personnel information" and should be confidential under RSA 105:13-b, the Court is unpersuaded by this argument. "[The Court] interpret[s] legislative intent from the statute as written, and, therefore, [it] will not consider what the legislature might have said or add words that the legislature did not include." In re Kenick, 156 N.H. 356, 359 (2007). Here, there is no indication the legislature intended to protect information contained in a police personnel file, regardless of its location, when it enacted RSA 105:13-b. To the contrary, the Court finds a plain reading of the statute reflects that the legislature intended to limit RSA 105:13-b's confidentiality to the physical personnel file itself, as it expressly contemplates the personnel file being provided to the Court for *in camera* review and, after examination, the remainder of the file being returned to the police department that employs the police officer. There is no mention of personnel *information* in RSA 105:13-b, let alone an indication the legislature intended to make such information confidential. If the legislature had so intended, it could have used words to effectuate that intent, such as making confidential all "personnel information" or all information contained in a police personnel file.[2] Cf. Mass. Gen. Laws Ann. ch. 4 § 7

[2] Even assuming the EES contains "personnel information," the DOJ offers no authority supporting its contention that this fact would entitle it to confidentiality. In addressing a somewhat similar issue relating to Massachusetts's Right-to-Know law, the Massachusetts Appeal Court reached the opposite conclusion. In Worcester Telegram, 787 N.E.2d at 602, the Appeals Court, in distinguishing the applicability of the personnel file exemption to two separate documents that contained similar information, held "[t]he exemption for 'personnel file or information' is not dependent upon whether the same information may be available, or discernible, through alternative sources . . . . Rather, the nature and character of the document determines whether it is 'personnel file or information.'" 787 N.E.2d at 609. It

(exempting from public records "personnel . . . files or *information*") (emphasis added).

II. Administrative Gloss

The DOJ next argues the Court should defer to its interpretation of RSA 105:13-b because it has independently interpreted that statute for approximately fifteen years to mean that the EES/Laurie List was confidential. The Court disagrees with the DOJ that it is entitled to such deference.

"The doctrine of administrative gloss is a rule of statutory construction." In re Kalar, 152 N.H. 314, 321 (2011). "Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." Id. "If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate the legislative intent." Id. "Lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine." Id. at 322.

Resolution of the parties' dispute regarding RSA 105:13-b turns on the definition of "personnel file," and whether it includes the EES. Although the parties disagree as to the scope of RSA 105:13-b's confidentiality, neither party contends the statute as a whole is ambiguous, and the Court finds it is not. Therefore, the Court finds the administrative gloss doctrine is inapplicable. See State v. Priceline.com, Inc., No. 2017-0674 (N.H. Mar. 8, 2019) ("[T]he administrative gloss doctrine applies only when a statutory provision is ambiguous."); Heron Cove Ass'n v. DVMD Holdings, Inc., 146 N.H.

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concluded that "the same information [could] simultaneously be contained in a public record and in exempt 'personnel file or information.'" Id.

211, 215 (2001) ("If the language is plain and unambiguous, [the Court] need not look beyond the statute for further indications of the legislative intent.").[3]

Although the DOJ relies on Petition of Warden, New Hampshire State Prison (State v. Roberts), 168 N.H. 9 (2015), in asserting its position that the Court should grant deference to its interpretation of RSA 105:13-b, the Court finds that case distinguishable. In Petition of Warden, the issue before the Supreme Court was whether the Adult Parole Board ("APB") had the authority to parole an inmate from one sentence to a consecutive sentence, while still imposing the time remaining/conditions of the first sentence after the inmate had completed the second sentence. 168 N.H. at 9. The APB had "developed an intermediate step in the traditional parole process that allow[ed] prisoners to parole into a consecutive sentence upon completion of the minimum of a prior sentence." Id. "The effect of this practice [was] to restructure the order of sentences by allowing a prisoner to serve time on a consecutive sentence while continuing to serve time on the initial sentence, and thus potentially earn conditional release into the community more quickly." Id.

The Supreme Court first noted that "[t]here is no right to parole in New Hampshire," as "the grant of parole rest[ed] squarely within the discretion of the APB." Id.; see RSA 651-A. It then held that although the APB's "intermediate step" was neither expressly permitted nor prohibited under RSA 651-A, "given the APB's longstanding history of exercising this power, [it] agree[d] with the State that the legitimacy of [that] practice [was] now beyond question." Id.

[3] The Court also notes that the House of Representatives has introduced and passed a bill, HB 155, that would expressly make the EES a public record under RSA 91-A. HB 155 was scheduled to be heard and considered by the Senate Judiciary Committee on April 11, 2019. See Senate Calendar 17A.

Unlike Petition of Warden, where RSA 651-A granted the APB with wide discretion in granting or denying parole, here, RSA 105:13-b does not give the DOJ any discretion in determining what information is to be kept confidential. In fact, RSA 105:13-b does not grant the DOJ any discretion at all. Rather, it mandates disclosure of exculpatory evidence in a police personnel file if that officer is testifying in a criminal case, and lays out a step-by-step process to determine whether evidence in a police personnel file is exculpatory, if such a determination cannot be made by the State. See RSA 105:13-b.

Accordingly, because RSA 105:13-b is clear and unambiguous and does not grant the State any discretion in its administration, the Court declines to give deference to the DOJ's interpretation of the statute under the administrative gloss doctrine.

III. RSA 91-A

The DOJ also argues the EES is categorically exempt from disclosure under RSA 91-A:5 as an "internal personnel practice." See Fenniman, 136 N.H. at 624. Petitioners dispute the EES is exempt under 91-A:5, arguing it is neither an "internal" nor a "personnel" document.

"The purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003); see RSA 91-A:1 ("Openness in the conduct of public business is essential to a democratic society."). Thus, the law "furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire Right to Life v.

Director, New Hampshire Charitable Trusts Unit, 169 N.H. 95, 103 (2016). "Although the statute does not provide for unrestricted access to public records, [the Court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. "As a result, [the Court] broadly construe[s] provisions favoring disclosure and interpret[s] exemptions restrictively." Id. "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 towards nondisclosure." Id.

With respect to the "internal personnel practices" exemption, the Supreme Court has noted that the terms "internal" and "personnel" modify the word "practices," "thereby circumscribing the provision's scope." Reid, 169 N.H. at 522. Looking to guidance from federal case law analyzing the Freedom of Information Act, the Supreme Court has determined that the term "personnel" "general[ly] . . . relates to employment," specifically "rules and practices dealing with employee relations or human resources . . . [including] such matters as hiring and firing, work rules and discipline, compensation and benefits." Id. at 523. The Court also defined "internal" as "existing or situated within the limits . . . of something." Id. (citing Webster's Third New International Dictionary 1180 (unabridged ed. 2002)). Therefore, "[e]mploying the foregoing definitions, [the Supreme Court] construe[d] 'internal personnel practices' to mean practices that 'exist[] or [are] situated within the limits' of employment." Id. Personnel practices are also considered "internal" if carried out by someone other than the employer if it is done on the employer's behalf. Id. (citing Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (finding police internal affairs investigation report authored by outside

investigators that were hired by the precinct constituted "internal personnel practices")).

For the same reasons the Court found the EES was not a personnel file within the meaning of RSA 105:13-b, it finds the EES is not a personnel practice within the meaning of RSA 91-A:5. Moreover, the Court finds the EES is not an "internal" document. As stated previously, the EES is created and maintained by the Attorney General, who does not employ any of the police officers contained therein. Unlike the outside investigators in Hounsell, who were hired by the police department to perform an internal investigation of one of its employees, 169 N.H. at 521, here, the Attorney General was not hired by any individual police department to generate the EES. Rather, the "singular purpose" of the EES is to alert prosecutors "to the existence of exculpatory evidence as to a particular defendant's criminal matter." (DOJ's Mot. Dismiss, p. 9.) Thus, given that the creation of the list did not arise out of an agency relationship between the Attorney General and any police department, and the character and purpose of the list does not relate to or occur within the limits of the officers' employment, the Court finds it is not an internal personnel practice within the meaning of RSA 91-A:5.

Finally the DOJ argues that, in the alternative, even if the EES does not fall within the internal personnel practice exemption, it is still a "personnel file" under RSA 91-A:5 and it should not be disclosed because its disclosure would amount to an invasion of privacy of the officers contained therein. For the reasons previously discussed in this order, the Court finds the EES is not a "personnel file" within the meaning of RSA 91-A:5. As a result, the Court need not conduct a 91-A balancing test to determine

whether an invasion of privacy would result from disclosure of the EES.[4]

Accordingly, because the EES is not confidential under RSA 105:13-b and not exempt under RSA 91-A, the DOJ's motion to dismiss is DENIED.

So ordered.

Date: April 23, 2019

Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/24/2019

[4] If a document or file is considered a "personnel file" under RSA 91-A, the Court then must determine whether disclosure of the material "would constitute an invasion of privacy," which is done by applying the "customary balancing test" set forth in Reid. 169 N.H. at 528.

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LAST UPDATED 1/8/2020

EXCULPATORY EVIDENCE SCHEDULE

New Hampshire Department of Justice
Criminal Justice Bureau

NAME *(Note: Officers may no longer be employed by agency noted, or may be deceased.)*	**DEPARTMENT**	**DATE OF INCIDENT**	**DATE OF NOTIFICATION**	**CATEGORY**
[redacted]	Nashua PD	[redacted]	12/20/17	Legal procedure
	Hampstead PD [redacted]		2/13/06	
	NH Bureau of Liquor			
	Nashua PD		8/16/18	Falsifying Reports or Records; Issuance of Unlawful Orders
	Nashua PD		6/24/19	Truthfulness
	Nashua PD		12/20/17	Obedience to Laws and Policies
	Windham PD		5/31/18	Deception; Credibility
	Campton PD		9/13/19	Lack of credibility, failure to comply with legal procedures
	Claremont PD		7/20/17	Truthfulness
	Hanover PD		3/7/18	Sustained violation of department rules - truthfulness
	NHSP-B			
	Northfield PD		4/5/18	Credibility
	Plaistow PD		2/9/09	

[redacted]	Plaistow PD	[redacted]	9/30/13	
	Canterbury PD		12/14/17	Untruthful
	Loudon PD		7/5/18	Credibility
	Weare PD		10/1/12 12/6/12 – [redacted]	
	Londonderry PD		5/13/19	Criminal conduct
	Fire Marshal's Office		6/6/17 (Email)	Dishonesty
	Div Fire Safety		2/7/17 (Letter to AG 8/20/18)	
	NH State Fire Marshal's Office			
	Belknap Cty. Sheriff's Dept.		11/30/18	Deliberate lie during investigation; misuse of authority; criminal conduct
	Milford PD			
			6/1/18	Credibility
	Rockingham County Sheriff		7/31/18	Honesty
	Laconia PD		4/29/19	Falsification of a timecard
	Nashua PD		12/20/17	Sexual Harassment; Falsifying Reports/Records
	Manchester PD		8/2/10	Excessive Force
	SCHOC		9/5/18	Excessive use of force
	Manchester PD		7/29/14	Excessive force/truthfulness
	NH State Police		2/1/13	
	Manchester PD		4/16/18	Unlawful conduct/truthfulness

[redacted]	Middleton PD	[redacted]	6/9/17	Untruthfulness
	NH State Police		10/1/18	Credibility
	SCCCP		9/5/18	Truthfulness
	Derry PD		9/17/18	Criminal conduct
	NHSP		8/29/19	Credibility
	Canaan PD		8/15/18	Credibility
	Claremont PD		3/15/18	False reports
			6/1/18	Credibility
	Newport PD		4/10/18	Excessive force
	Stoddard PD		6/1/18	Credibility
	Chesterfield PD		1/30/18	Untruthfulness; Falsification of records/evidence
	Hollis PD		9/1/18	Truthfulness
	Weare PD		10/1/12 12/6/12 – [redacted]	
	Durham PD		9/5/18	Truthfulness
	Manchester PD			
	Chesterfield PD		1/30/18	Official Oppression
	Goffstown PD		12/8/17	
	Manchester PD		9/14/18	Truthfulness
	Lebanon PD		8/15/18	
	NH State Police		12/13/12	
	Manchester PD		3/26/13	Unlawful conduct/truthfulness
	Haverhill PD		8/15/18	Credibility
	Hampton PD		12/19/17	Excessive force

[redacted]	Hollis PD	[redacted]	4/26/19	Conduct unbecoming – untruthfulness; Required conduct - untruthfulness
	Manchester PD		11/18/08 [redacted]	Truthfulness; Unlawful conduct
	Manchester PD		4/16/18	Unlawful conduct/truthfulness
	Manchester PD		9/7/10	Truthfulness
	Jackson PD		3/19/19	Disregard for constitutional rules and procedures
	Barnstead PD		11/30/18	
	Rochester PD		9/5/18	Truthfulness
	Warren PD		8/15/18	Credibility
	Tilton PD		11/30/18	
	South Hampton PD			
	Lebanon PD		8/15/18	Credibility
	SCHOC		9/5/18	Truthfulness
	Manchester PD		4/13/11 [redacted]	Truthfulness
	Pelham PD			
	Exeter PD		8/22/17	Egregious dereliction of duty
	Kensington PD		9/30/13 - [redacted]	

[redacted]		[redacted]	2/7/14-Court Orders.	
	New Boston PD		9/14/18	Truthfulness
	Farmington PD		9/5/18	Truthfulness & Excessive use of force
	Hampstead PD		3/19/18	
	Londonderry PD			
	Swanzey PD		6/1/18	Excessive force
	North Hampton PD		5/4/16	
	Bedford PD Justice Department		9/14/18	Truthfulness
	Troy PD		6/1/18	Credibility
	Fremont PD		3/6/18	Result of receiving stolen property investigation by NHSP
	Laconia PD		12/7/17	Deliberate lie during court case, admin. hearing, in a report, investigation; criminal conduct
	Exeter PD		11/30/05	Truthfulness & Reliability
	NH State Police		8/18/16	Lied
	NH State Police		1/22/18	Credibility
	NH State Police		2/6/18 – [redacted]	Credibility
	Plaistow PD			
	Manchester PD		10/20/09	Truthfulness
	Hanover PD		8/15/18 2/15/19	Sustained violation of department rules –

[redacted]		[redacted]		truthfulness per 2/15/19 letter
	Peterborough PD		9/1/418	Truthfulness
	Nashua PD		9/14/18	
	New Boston PD		9/14/18	Truthfulness
	Salem PD			
	Lebanon PD		8/15/18	Misrepresentation to Chief
	Salem PD		3/11/10	
	Rochester PD		8/10/17	
	Lebanon PD		2/28/18 7/18/19	Dishonesty
	Nottingham PD			
	Middleton PD		9/5/18	Truthfulness
	Manchester PD		5/3/10	Truthfulness
	Nashua PD			Truthfulness
			6/1/18	Credibility
	Keene PD		10/16/17	Credibility
	Keene PD		7/24/17	Credibility
	CCDOC		8/20/18	Credibility
	Ossipee PD		11/7/18	Credibility
	Plainfield PD			Forgery; Truthfulness
	Rockingham County HOC			
	Carroll County Sheriff's Dept.		8/20/18	Credibility
	NH State Police			
	Dublin PD		12/29/17	
	NH State Police		2/1/13	
	Jaffrey PD		12/15/17	Egregious dereliction of duty
	State Police			

[redacted]		[redacted]	6/1/18	
	Laconia PD		12/7/17	Deliberate lie during court case, admin. hearing, in a report, investigation/credibility
			6/1/18	Credibility
	East Kingston PD			
	Hinsdale		12/31/18	Dereliction of duty
	Jackson PD		3/27/19	Falsification of records/evidence; egregious dereliction of duty; excessive force
	Thornton PD		8/15/18	
	Bedford PD			
	Carroll County Sheriff's Dept.		1/5/18	Credibility
	Springfield PD		4/11/18	Excessive force
	Grantham PD		6/6/18	Excessive force
	Newport PD		4/10/18	Excessive force
	Weare PD		10/1/12 12/6/12 – [redacted]	
	Conway PD		8/20/18	Credibility/Potential criminal conduct
	Claremont PD		3/15/18	False reports
	Belmont & Gilford PD (notification by Belknap Cty. Atty.)		12/4/18	
	Manchester PD		11/29/18	Unlawful conduct/truthfulness
	Bristol PD		8/15/18	

[redacted]	New Boston/Allenstown PD	[redacted]		
	Brookline PD			
	Salem PD			
	Derry PD		12/26/17	Credibility Issue
	Hampstead PD		3/19/18	
	Nashua PD		12/20/17	Truthfulness
	Seabrook PD			
	Fremont PD			
	Hampton Falls PD (2 findings)			
	Concord PD			
	Merrimack PD			
	Bristol PD			Truthfulness and simple assault
	Lebanon PD		8/15/18	
	Windham PD		3/17/08	
	Durham PD		9/5/18	Truthfulness
	Newton PD		6/1/12	
	Atkinson PD			
	Bath PD		8/15/18	Credibility
	Manchester PD		3/4/11	Truthfulness
	Candia PD		5/17/17	Untruthfulness
	Bedford PD		12/20/17	Bias
	Bedford P.D.		12/3/15	Credibility
	Nashua PD		12/20/17	Falsifying reports/records
	Nashua PD			
	Sheriff's Department			
	Manchester PD			Unlawful conduct

[redacted]	Concord PD	[redacted]	9/30/13	
	Loudon PD		4/4/17	[redacted]
			6/1/18	Criminal conduct
	Kingston PD			
	NH State Police		2/1/13	
	Milford/Lyndeborough PD			
	County House of Corrections			
	Plymouth PD			
	Pittsfield PD (Incident related to serve as Franklin PD Officer)			
	Conway PD		8/20/18	Credibility/Criminal conduct
	Conway PD Jackson PD		11/24/14 (Letter to AG 8/20/18)	Credibility
	Allenstown & Concord PD			Theft conviction – AG's Office prosecuted
	Conway PD		2013 (Letter to AG 8/20/18)	Credibility
	SCHOC		9/5/18	
	Keene PD		6/1/18	
	Farmington PD		9/5/18	Excessive use of force
	Weare PD		4/19/16	
	Moultonborough PD		10/31/18	Criminal conduct
	Lebanon PD		8/15/18	
	Wakefield PD		8/20/18	Credibility
	Wakefield PD			

[redacted]	Merrimack PD	[redacted]		[redacted]
	Jackson PD		3/19/19	Disregard for constitutional rules and procedures
	Milford PD		1/8/19	Credibility/Trust
	Lebanon PD		7/31/19	Credibility
	NHSP – Marine Patrol		2/13/18	Credibility
	Salem PD			
	Manchester		2/7/18	Truthfulness
			6/1/18	
	New Ipswich PD			
	Manchester PD		8/27/09	Excessive force
	Chesterfield PD		1/30/18	Falsification of records; violations of department policy
	DTF		9/16/92	
	Nashua PD		12/20/17	Truthfulness
	Antrim PD			
	Brookline PD			
	Littleton PD		8/15/18 2/13/19	Violations of department policies; truthfulness; credibility; credibility and failure to follow police procedure per 2/13/19 letter
	Epping PD		1/2/18	
	Lyme PD		8/15/18	Credibility

[redacted]	Carroll County Sheriff's Dept.	[redacted]	8/20/18	Credibility
	NHSP		8/27/19	Credibility
	Nashua PD		12/20/17	Truthfulness
	Hollis PD			
	Manchester PD		6/14/11	Truthfulness
	NH State Police		10/23/18 & 11/8/18	Credibility
	Pembroke PD		12/4/18	
	Manchester PD		9/11/08	Truthfulness
	CCDOC		8/20/18	
	Hampton PD		12/19/17	Dishonesty
	Bellows Falls PD		6/1/18	Credibility
	Manchester PD		11/19/08	Truthfulness
	Hinsdale PD			
	CCDOC		8/20/18	
	Nashua PD		12/20/17	Truthfulness
	Nashua PD		12/20/17	Truthfulness; Falsifying Reports/Records
	DCYF/JJS		3/8/19	Truthfulness
	Rockingham Sheriff's Department			
	Weare PD			
			6/1/18	
	Farmington PD		9/5/18	Truthfulness
	CCDOC		8/20/18	Dereliction/Potential Criminal Conduct
	Portsmouth PD			
	Milton PD		9/5/18	Truthfulness
	Carroll County Sheriff's Dept.			
	Seabrook PD			
	Hudson PD			

[redacted]	Manchester PD	[redacted]		
	DOC-SPU		9/14/18	Truthfulness
	Farmington PD		7/12/17	Untruthfulness
	Dover PD			
	CCDOC		8/20/18	Criminal conduct
	Manchester PD		4/13/11 [redacted]	Unlawful conduct
	Nashua PD		12/20/17	Use of physical/Deadly Force; Falsifying Reports or Records; Truthfulness
	NH State Police		11/30/18	
	Bedford PD		12/20/17	Cover up
	Nashua PD			
	East Kingston PD			
	Nashua PD		12/20/17	Truthfulness
	New Durham PD		9/5/18	Truthfulness
	Campton PD		8/15/18	
	Pelham PD			
	Bartlett PD		3/30/16 (Letter to AG 8/20/18)	Dereliction/Credibility
	Rochester PD			
	NH State Police		2/1/13	
	Durham PD		9/5/18	Truthfulness
			6/1/18	Criminal conduct
	Chesterfield PD		1/30/18	Excessive force
	Manchester PD		7/29/14	Unlawful conduct/truthfulness
	Hinsdale PD			

[redacted]	Winchester PD	[redacted]	6/1/18	Excessive force
	Raymond PD			
	Weare P.D.			
	Salem PD		7/29/19	Conduct unbecoming an employee
	Barnstead PD		11/30/18	Untruthful in connection with police reports
	Manchester PD		10/14/11	Truthfulness
	Pittsfield PD		9/19/17	[redacted]
	Manchester PD		11/19/08 [redacted]	Truthfulness
	Belmont PD (formerly of Allenstown PD)		3/4/19	
	Seabrook PD			
	Rochester		7/12/19	Credibility
	Weare PD		10/31/16	
	ME's Office			
	Hill PD		8/15/18	Credibility/truthfulness
	Middleton PD		9/5/18	Truthfulness
	Sandown PD			
	Nashua PD		12/1/16	
	Nashua PD		12/20/17	Truthfulness
	Winchester PD		6/1/18	Excessive force
	Hinsdale			Use of Force
	Kensington PD			Credibility
			6/1/18	Credibility
	Dover PD		3/13/19 & 3/29/19	Excessive force; credibility
	Middleton PD		9/5/18	Truthfulness
	Lebanon PD			

[redacted]	Keene PD	[redacted]	12/28/17	Credibility
	Hampton PD		12/19/17	Dishonesty; Obedience to proper authority; Failure to appear for trial; submission of reports

[redacted]

3

LAST UPDATED 1/11/19

EXCULPATORY EVIDENCE SCHEDULE

New Hampshire Department of Justice
Criminal Justice Bureau

NAME *(Note: Officers may no longer be employed by agency noted, or may be deceased.)*	**DEPARTMENT**	**DATE OF INCIDENT**	**DATE OF NOTIFICATION**	**CATEGORY**
[redacted]	Nashua PD	[redacted]	12/20/17	Legal procedure
	Hampstead PD [redacted]		2/13/06	
	NH Bureau of Liquor			
	Nashua PD		8/16/18	Falsifying Reports or Records; Issuance of Unlawful Orders
	Nashua PD		12/20/17	Obedience to Laws and Policies
	Windham PD		5/31/18	Deception; Credibility
	NH State Police		9/5/18	
	NH State Police		9/14/18	
	Claremont PD		7/20/17	Truthfulness
	Hanover PD		3/7/18	
	NHSP-B			
	Northfield PD		4/5/18	Credibility
	Plaistow PD		2/9/09	
	Plaistow PD		9/30/13	
	Canterbury PD		12/14/17	Untruthful
	Loudon PD		7/5/18	Credibility
	Weare PD		10/1/12	

[redacted]		[redacted]	12/6/12 – [redacted]	
	Fire Marshal's Office		6/6/17 (Email)	Dishonesty
	Div Fire Safety		2/7/17 (Letter to AG 8/20/18)	
	NH State Fire Marshal's Office			
	Belknap Cty. Sheriff's Dept.		11/30/18	Deliberate lie during investigation; misuse of authority; criminal conduct
	Milford PD			
			6/1/18	Credibility
	Rockingham County Sheriff		7/31/18	Honesty
	Nashua PD		12/20/17	Sexual Harassment; Falsifying Reports/Records
	Manchester PD			Excessive Force
	SCHOC		9/5/18	Excessive use of force
	Manchester PD			
	NH State Police		2/1/13	
	Manchester PD		4/16/18	
	Middleton PD		6/9/17	Untruthfulness
	NH State Police		10/1/18	Credibility
	SCCCP		9/5/18	Truthfulness
	Derry PD		9/17/18	Criminal conduct
	Canaan PD		8/15/18	Credibility
	Claremont PD		3/15/18	False reports
			6/1/18	Credibility
	Newport PD		4/10/18	Excessive force

[redacted]	Stoddard PD	[redacted]	6/1/18	Credibility
	Chesterfield PD		1/30/18	Untruthfulness; Falsification of records/evidence
	Hollis PD		9/1/18	Truthfulness
	Weare PD		10/1/12 12/6/12 – [redacted]	
	Durham PD		9/5/18	Truthfulness
	Manchester PD			
	Chesterfield PD		1/30/18	Official Oppression
	Goffstown PD		12/8/17	
	Manchester PD		9/14/18	Truthfulness
	Lebanon PD		8/15/18	
	NH State Police		12/13/12	
	Manchester PD			
	Haverhill PD		8/15/18	Credibility
	Hampton PD		12/19/17	Excessive force
	Manchester PD			
	Manchester PD		4/16/18	
	Manchester PD			
	Barnstead PD		11/30/18	
	Rochester PD		9/5/18	Truthfulness
	Warren PD		8/15/18	Credibility
	Tilton PD		11/30/18	
	South Hampton PD			
	Lebanon PD		8/15/18	Credibility
	SCHOC		9/5/18	Truthfulness

[redacted]	Manchester PD		
	Pelham PD		
	Exeter PD	8/22/17	Egregious dereliction of duty
	Kensington PD	9/30/13 - [redacted]	
	New Boston PD	9/14/18	Truthfulness
	Farmington PD	9/5/18	Truthfulness & Excessive use of force
	Hampstead PD	3/19/18	
	Londonderry PD		
	Swanzey PD	6/1/18	Excessive force
	North Hampton PD	5/4/16	
	Bedford PD Justice Department	9/14/18	Truthfulness
	Troy PD	6/1/18	Credibility
	Fremont PD	3/6/18	Result of receiving stolen property investigation by NHSP
	Laconia PD	12/7/17	Deliberate lie during court case, admin. hearing, in a report, investigation; criminal conduct
	Exeter PD	11/30/05	Truthfulness & Reliability
	NH State Police	8/18/16	Lied

[redacted]	NH State Police	[redacted]	1/22/18	Credibility
	NH State Police		2/6/18 – [redacted]	Credibility
	Plaistow PD			
	Manchester PD			
	Hanover PD		8/15/18	
	Peterborough PD		9/1/418	Truthfulness
	Nashua PD		9/14/18	
	New Boston PD		9/14/18	Truthfulness
	Salem PD			
	Lebanon PD		8/15/18	Misrepresentation to Chief
	Salem PD		3/11/10	
	Rochester PD		8/10/17	
	Lebanon PD		2/28/18	Dishonesty
	Nottingham PD			
	Middleton PD		9/5/18	Truthfulness
	Manchester PD			
	Nashua PD			Truthfulness
			6/1/18	Credibility
	Keene PD		10/16/17	Credibility
	Keene PD		7/24/17	Credibility
	CCDOC		8/20/18	Credibility
	Ossipee PD		11/7/18	Credibility
	Rockingham County HOC			
	Carroll County Sheriff's Dept.		8/20/18	Credibility
	NH State Police			

[redacted]	Dublin PD	[redacted]	12/29/17	
	NH State Police		2/1/13	
	Jaffrey PD		12/15/17	Egregious dereliction of duty
	State Police			
			6/1/18	
	Laconia PD		12/7/17	Deliberate lie during court case, admin. hearing, in a report, investigation/credibility
			6/1/18	Credibility
	East Kingston PD			
	Hinsdale		12/31/18	Dereliction of duty
	Thornton PD		8/15/18	
	Bedford PD			
	Carroll County Sheriff's Dept.		1/5/18	Credibility
	Springfield PD		4/11/18	Excessive force
	Grantham PD		6/6/18	Excessive force
	Newport PD		4/10/18	Excessive force
	Weare PD		10/1/12 12/6/12 – [redacted]	
	Conway PD			Credibility/Potential criminal conduct
	Claremont PD		3/15/18	False reports
	Belmont & Gilford PD (notification by Belknap Cty. Atty.)		12/4/18	
	Manchester PD		11/29/18	
	Bristol PD		8/15/18	

[redacted]	New Boston/Allenstown PD	[redacted]		
	Brookline PD			
	Salem PD			
	Derry PD		12/26/17	Credibility Issue
	Hampstead PD		3/19/18	
	Nashua PD		12/20/17	Truthfulness
	Seabrook PD			
	Fremont PD			
	Hampton Falls PD (2 findings)			
	Concord PD			
	Merrimack PD			
	Bristol PD			Truthfulness and simple assault
	Lebanon PD		8/15/18	
	Windham PD		3/17/08	
	Durham PD		9/5/18	Truthfulness
	Newton PD		6/1/12	
	Atkinson PD			
	Bath PD		8/15/18	Credibility
	Manchester PD			
	Candia PD		5/17/17	Untruthfulness
	Bedford PD		12/20/17	Bias
	Bedford P.D.		12/3/15	Credibility
	Nashua PD		12/20/17	Falsifying reports/records
	Nashua PD			
	Sheriff's Department			
	Manchester PD			Unlawful conduct
	Concord PD		9/30/13	

[redacted]		[redacted]		
	Loudon PD		4/4/17	[redacted]
			6/1/18	Criminal conduct
	Kingston PD			
	NH State Police		2/1/13	
	Milford/Lyndeborough PD			
	County House of Corrections			
	Plymouth PD			
	Pittsfield PD (Incident related to serve as Franklin PD Officer)			
	Conway PD		8/20/18	Credibility/Criminal conduct
	Conway PD Jackson PD		11/24/14 (Letter to AG 8/20/18)	Credibility
	Allenstown & Concord PD			Theft conviction – AG's Office prosecuted
	Conway PD		2013 (Letter to AG 8/20/18)	Credibility
	SCHOC		9/5/18	
	Keene PD		6/1/18	
	Farmington PD		9/5/18	Excessive use of force
	Weare PD		4/19/16	
	Moultonborough PD		10/31/18	Criminal conduct
	Lebanon PD		8/15/18	
	Wakefield PD		8/20/18	Credibility
	Wakefield PD			
	Merrimack PD			[redacted]

[redacted]		[redacted]		[redacted]
	Milford PD		1/8/19	Credibility/Trust
	NHSP – Marine Patrol		2/13/18	Credibility
	Salem PD			
	Manchester		2/7/18	
			6/1/18	
	New Ipswich PD			
	Manchester PD			
	Chesterfield PD		1/30/18	Falsification of records; violations of department policy
	DTF		9/16/92	
	Nashua PD		12/20/17	Truthfulness
	Antrim PD			
	Brookline PD			
	Littleton PD		8/15/18	Violations of department policies; truthfulness; credibility
	Epping PD		1/2/18	
	Lyme PD		8/15/18	Credibility
	Carroll County Sheriff's Dept.		8/20/18	Credibility
	Nashua PD		12/20/17	Truthfulness
	Hollis PD			
	Manchester PD			
	NH State Police		10/23/18 & 11/8/18	Credibility
	Pembroke PD		12/4/18	
	Manchester PD			

[redacted]	CCDOC	[redacted]	8/20/18	
	Hampton PD		12/19/17	Dishonesty
	Bellows Falls PD		6/1/18	Credibility
	Manchester PD			
	Hinsdale PD			
	CCDOC		8/20/18	
	Nashua PD		12/20/17	Truthfulness
	Nashua PD		12/20/17	Truthfulness; Falsifying Reports/Records
	Rockingham Sheriff's Department			
	Weare PD			
			6/1/18	
	Farmington PD		9/5/18	Truthfulness
	CCDOC		8/20/18	Dereliction/Potential Criminal Conduct
	Portsmouth PD			
	Milton PD		9/5/18	Truthfulness
	Carroll County Sheriff's Dept.			
	Seabrook PD			
	Hudson PD			
	Manchester PD			
	DOC-SPU		9/14/18	Truthfulness
	Farmington PD		7/12/17	Untruthfulness
	Dover PD			
	CCDOC		8/20/18	Criminal conduct
	Manchester PD			
	Nashua PD		12/20/17	Use of physical/Deadly Force; Falsifying Reports or Records;

[redacted]		[redacted]		Truthfulness
	NH State Police		11/30/18	
	Bedford PD		12/20/17	Cover up
	Nashua PD			
	Sullivan County			
	East Kingston PD			
	Nashua PD		12/20/17	Truthfulness
	New Durham PD		9/5/18	Truthfulness
	Campton PD		8/15/18	
	Pelham PD			
	Bartlett PD		3/30/16 (Letter to AG 8/20/18)	Dereliction/Credibility
	Rochester PD			
	NH State Police		2/1/13	
	Durham PD		9/5/18	Truthfulness
			6/1/18	Criminal conduct
	Chesterfield PD		1/30/18	Excessive force
	Manchester PD			
	Hinsdale PD			
	Winchester PD		6/1/18	Excessive force
	Raymond PD			
	Weare P.D.			
	Barnstead PD		11/30/18	Untruthful in connection with police reports
	Manchester PD			
	Pittsfield PD		9/19/17	[redacted]
	Manchester PD			
	Seabrook PD			
	Weare PD		10/31/16	

ME's Office			
Hill PD	8/15/18	Credibility/truthfulness	
Middleton PD	9/5/18	Truthfulness	
Sandown PD			
Nashua PD	12/1/16		
Nashua PD	12/20/17	Truthfulness	
Winchester PD	6/1/18	Excessive force	
Hinsdale		Use of Force	
Kensington PD		Credibility	
	6/1/18	Credibility	
Middleton PD	9/5/18	Truthfulness	
Lebanon PD			
Keene PD	12/28/17	Credibility	
Hampton PD	12/19/17	Dishonesty; Obedience to proper authority; Failure to appear for trial; submission of reports	

4

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

Officer A.B.

v.

Laura Saffo, Esq., in her capacity as Grafton County Attorney, et al.

Docket No. 215-2018-CV-00437

MOTION TO DISMISS

The co-respondent, the New Hampshire Attorney General's Office ("NHAG's Office"), by and through counsel, hereby moves to dismiss the petition. In support thereof, the NHAG's Office states as follows:

1. The petitioner alleges that certain conduct in which he engaged in 2007 and which resulted in his/her name being added to the Exculpatory Evidence Schedule ("EES") is stale and of no further relevance under *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 139 N.H. 325 (1995). *See* Pet. ¶¶ 7-8, 21-22.

2. That conduct consists of an alleged instance of excessive force, alleged falsification of a police report, and allegedly providing false testimony in court. Pet. ¶¶ 7-8, 21-22.

3. The petitioner concedes in his/her Petition that he inaccurately or erroneously completed the police report and provided inaccurate or erroneous testimony in court, *see* Pet. ¶ 8 ("Specifically, Petitioner alleges that the finding that s/he provided inaccurate or erroneous testimony in the above cited incident is stale and of no further relevance."), and does not appear to dispute the truth or accuracy of Confidential Exhibit #1, *see, e.g.*, Pet. ¶¶ 17-20.

Granted

Honorable Lawrence A. MacLeod, Jr.
October 12, 2019

Clerk's Notice of Decision
Document Sent to Parties
on 10/17/2019

4. Instead, the petitioner presents four claims in his/her Petition premised on this conduct being allegedly stale and of no further relevance because it occurred more than 10 years ago. *See, e.g.*, Pet. ¶¶ 8, 23, 33-34.

5. First, the petitioner asserts that keeping him/her on the EES for this allegedly stale and irrelevant conduct violates RSA 105:13-b (Count I). *Id.* ¶¶ 35-41.

6. Second, the petitioner asserts that keeping him/her on the EES for this allegedly stale and irrelevant conduct violates his/her constitutional rights under the Fourteenth Amendment of the United States Constitution (Count IV). *Id.* ¶¶ 54-56.

7. The petitioner seeks a preliminary and permanent injunction (Count II) to remedy these harms and secure his/her removal from the EES. *Id.* ¶¶ 42-49.

8. The petitioner also seeks a writ of mandamus (Count III) asserting that the obligation to remove him/her from the list for conduct he/she claims is stale and of no further relevance violates an unidentified ministerial duty or obligation. *Id.* ¶¶ 50-53.

9. All of the petitioner's claims fail as a matter of law.

A. Standard of Review

10. In ruling on a motion to dismiss, this court determines "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Harrington v. Brooks Drugs*, 148 N.H. 101, 104 (2002). The court assumes the truth of the plaintiff's well-pleaded allegations of fact and construe all reasonable inferences in the light most favorable to the plaintiff. *See, e.g., Hacking v. Town of Belmont*, 143 N.H. 546, 549 (1999). However, the court need not accept allegations in the complaint that are merely conclusions of law. *See, e.g., Konefal v. Hollis/Brookline Coop. Sch. Dist.*, 143 N.H. 256, 258 (1998). The court "must rigorously scrutinize the

pleading to determine whether, on its face, it asserts a cause of action." *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44 (1987).

11. In deciding a motion to dismiss, "[t]he trial court may also consider documents attached to the plaintiff's pleadings, or documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the complaint." *Beane v. Dana S. Bean & Co.*, 160 N.H. 708, 711 (2010) (quotations omitted). Thus, the confidential exhibits attached to the Petition may be, and should be, considered in resolving this motion.

B. The Petitioner Cannot Invoke RSA 105:13-b Outside Of A Pending Criminal Action In Which Officer A.B. Is A Witness.

12. The petitioner seeks, in essence, a declaratory judgment that, pursuant to RSA 105:13-b, his/her personnel file no longer contains exculpatory evidence, for all cases going forward (Count I).

13. The petitioner's attempt to invoke RSA 105:13-b's procedure in this way fails as a matter of law.

14. By its plain terms, the procedure in RSA 105:13-b only applies when a police officer is "serving as a witness in any criminal case." RSA 105:13-b, I. In that scenario, the duty to disclose exculpatory evidence attaches and, "[i]f a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required." RSA 105:13-b, II.

15. In this case, Officer A.B. is not serving as a witness in a criminal case. RSA 105:13-b therefore does not apply. *See Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 780 (2015) (explaining that RSA 105:13-b was "designed to balance the

rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records").

16. RSA 105:13-b does not provide for a blanket determination that certain evidence in an officer's personnel file is never exculpatory.

17. Additionally, RSA 105:13-b does not govern whether and under what circumstances an officer may be removed from the EES, and RSA 105:13-b's provisions are not otherwise independently enforceable under RSA chapter 105 through a declaratory judgment action.

18. Moreover, this Court cannot evaluate whether particular conduct and information constitutes exculpatory evidence favorable to the accused under *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 139 N.H. 325 (1995) in the abstract, outside of a pending criminal matter.

19. Indeed, neither *Brady* nor *Laurie* support the position that a court may determine generally through a declaratory judgment action that certain conduct in which a police officer engaged no longer constitutes exculpatory evidence favorable to the accused in all future criminal matters. Rather, *Brady* and *Laurie*, and their progeny, require a case-by-case assessment of whether particular conduct or information constitutes exculpatory evidence favorable to the accused within the context of the specific criminal matter in which the officer will be appearing as a witness.

20. "[I]n a criminal case, the State is obligated to disclose information favorable to the defendant that is material to either guilt or punishment." *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 777 (2015). "This obligation arises from a defendant's constitutional right to due process of law, and aims to ensure that defendants

receive fair trials." *Id.* "The duty to disclose encompasses both exculpatory information and information that may be used to impeach the State's witnesses and applies whether or not the defendant requests the information." *Id.* (internal citations omitted). "'Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose.'" *Id.* (quoting *Laurie*, 139 N.H. at 329).

21. "The duty of disclosure falls on the prosecution and is not satisfied merely because the particular prosecutor assigned to a case is unaware of the existence of the exculpatory information." *Id.* at 778 (internal citations omitted). The Court "impute[s] knowledge among prosecutors in the same office" and holds them "responsible for at least the information possessed by certain government agencies, such as police departments or other regulatory authorities, that are involved in the matter that gives rise to the prosecution." *Id.* (internal citations omitted). "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

22. "The prosecutor's constitutional duty of disclosure extends only to information that is material to guilt or to punishment." *Id.* "'Favorable evidence is material under the federal standard only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Laurie*, 139 N.H. at 328). However, "the New Hampshire Constitution affords defendants greater protection than the federal standard." *Id.* Under the New Hampshire Constitution, "'[u]pon a showing by the defendant that favorable,

exculpatory evidence has been knowingly withheld by the prosecution, the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict.'" *Id.* (quoting *Laurie*, 139 N.H. at 330).

23. Thus, in *Laurie*, when the officer submitted to a polygraph examination that revealed that the officer was not being truthful in all of his/her testimony under oath, the New Hampshire Supreme Court held that this information should have been turned over to the accused. *Laurie*, 139 N.H. at 331.

24. Against these precedents, the conduct in this case, inaccurate or erroneous information provided in a police report and inaccurate or erroneous provision of testimony under oath, and the particular manner in which Officer A.B. brought that conduct forward, would seem to suggest that Officer A.B.'s conduct will frequently, if not always, constitute favorable evidence that is material to guilt or punishment in many criminal cases in which he/she is a witness. *See* Confidential Exhibits #1 & #3.

25. Regardless, to determine if this information is material under *Brady* and *Laurie*, Officer A.B.'s prior conduct and the information reflecting it would need to evaluated within the context of the specific criminal action in which Officer A.B. would be appearing as a witness.

26. Consequently, this Court cannot generally declare that Officer A.B.'s prior conduct and the information reflecting it is too stale or has been made too irrelevant by the passage of time to ever need to be disclosed in the future under RSA 105:13-b.

27. Count I must therefore be dismissed.

C. The Petitioner Does Not Have A Fourteenth Amendment Due Process Right To Be Removed From The EES After A Particular Period Of Time, Particularly Where He/She Does Not Contest That The Underlying Conduct That Resulted In His/Her Placement On The List Actually Occurred.

28. In Count IV, the petitioner advances a Fourteenth Amendment due process claim against the defendants. That claim must be dismissed for several reasons.

29. First, the petitioner may only enforce the Fourteenth Amendment of the United States Constitution through 42 U.S.C. § 1983. It is well-settled that the States, their agencies, and their officials acting in their official capacities are not "persons" within the meaning of Section 1983. *See, e.g.*, *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 70 (1989) (holding that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" as a matter of statutory construction).

30. Under 42 U.S.C. § 1983, a state agency like the New Hampshire Attorney General's Office is not a "person" and therefore may not be sued under that statute. Consequently, Count IV fails to state a cause of action against the New Hampshire Attorney General's Office and must be dismissed on this basis.

31. Second, Count IV must also be dismissed because the petitioner does not have a constitutional due process right in his/her admitted conduct.

32. The New Hampshire Supreme Court has held that the due process protections of the New Hampshire Constitution, which affords greater reputational protection than the Fourteenth Amendment of the United States Constitution in this context, *see State v. Veale*, 158 N.H. 632, 636-45 (2009), provides police officers with a liberty and/or property interest in their professional reputations that placement on the EES may impair. *Gantert v. City of Rochester*, 168 N.H. 640, 648-49 (2016).

33. In this case, however, the government likewise has "a great interest in placing on the 'Laurie List' officers whose confidential personnel files may contain exculpatory information," so as to ensure criminal defendants the most robust enjoyment of their constitutional right to exculpatory evidence. *Id.* at 649-50.

34. Thus, to safeguard against the "risk of *erroneous* deprivation" of the officer's reputational interest (*i.e.*, that an officer may mistakenly be placed on the EES for conduct that did not actually occur), the officer has a right to procedural due process on the allegations that result in his/her initial placement on the EES. *Id.* at 648-49 (emphasis added). But an officer's reputation interest in no way suffers erroneously through correct, non-mistaken placement on the EES.

35. In this case, there is no risk of erroneous deprivation of a protected reputational interest. The petitioner concedes that the conduct in which he/she engaged actually occurred. He/She provided inaccurate or erroneous information in a police report and provided inaccurate or erroneous testimony under oath and does not dispute the truth or accuracy of Confidential Exhibit #1. The petitioner also does not allege or argue that his/her initial placement on the EES was erroneous. Rather, the petitioner alleges only that his/her conduct and the information reflecting it has been made stale and irrelevant by the passage of time and, for this reason alone, he/she should be removed from the EES.

36. The New Hampshire Supreme Court has never held that a petitioner has a constitutional due process right to be removed from the EES after an arbitrary period of time on the basis that certain prior conduct which actually occurred has become, in the individual officer's opinion, stale and/or irrelevant. Defense counsel is similarly unaware

of any federal case law establishing a right to relief under such circumstances under the Fourteenth Amendment of the United States Constitution. Moreover, contrary to the petitioner's assertion, it is difficult to imagine a scenario in which his/her prior conduct and the information reflecting it would not be constitutionally required to be disclosed as exculpatory under the New Hampshire and United States Constitutions.

37. Consequently, because the petitioner placement on the EES has not resulted in an erroneous deprivation of a protected reputational interest and because there is no constitutional right to seek removal from the EES for conduct that actually occurred and justifies inclusion on the EES, Count IV must be dismissed.

D. The Petitioner Is Not Entitled To Preliminary Or Permanent Injunctive Relief.

38. Count II of the petitioner's Petition should also be dismissed because it is predicated on the causes of action advanced in Counts I and IV. Because Counts I and IV fail as a matter of law, the petitioner cannot show a likelihood of success on the merits, cannot show irreparable harm, cannot show that the balance of the equities tip in his/her favor, and cannot show that it is in the public interest to have him/her removed from the EES. *See Thompson v. N.H. Bd. Of Medicine*, 143 N.H. 107, 108 (1998) (setting forth preliminary injunction elements). The petitioner is therefore not entitled to preliminary or permanent injunctive relief under Count II.

E. The Petitioner Is Not Entitled To A Writ Of Mandamus (Count III).

39. A writ of mandamus is "an extraordinary writ that may be addressed to a public official, ordering him to take action, and it may be issued only when no other remedy is available and adequate." *Rockhouse Mt. Property Owners Ass'n, Inc. v. Town of Conway*, 127 N.H. 593, 602 (1986).

40. "A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily or in bad faith." *In re Petition of CIGNA Healthcare, Inc.*, 146 N.H. 683, 687 (2001).

41. "When an official is given discretion to decide how to resolve an issue before [her/]him, a mandamus order may require [her/]him to address the issue, but it cannot require a particular result." *Rockhouse Mt. Property Owners Ass'n*, 127 N.H. at 602.

42. "Th[e] court will, *in its discretion*, issue a writ of mandamus only where the petitioner has an apparent right to the relief requested and no other remedy will fully and adequately afford relief." *In re Petition of CIGNA Healthcare, Inc.*, 146 N.H. at 687 (emphasis added). "Th[e] court exercises its discretionary power to issue such writs with caution and forbearance and then only when the right to relief is clear." *Id.*

43. The petitioner's claim for a writ of mandamus (Count III) fails for several reasons.

44. First, a writ of mandamus does not lie against a state agency like the New Hampshire Attorney General's Office. It lies against a public official, to compel that public official to perform a ministerial obligation that the official (a) has the authority to perform and (b) has refused to perform. The Grafton County Attorney does not have the authority to remove Officer A.B. from the EES. No other public official has been named in this action. Thus, the writ of mandamus claim fails for this reason.

45. Second, the petition fails to identify any ministerial obligation that a public official from the New Hampshire Attorney General's Office could perform for

him/her that it has not performed. As the petition concedes, there is no process for an officer to be removed from the EES because the underlying conduct for which he/she has been placed on the EES is, in the individual officer's opinion, stale or of no further relevance to future criminal proceedings, nor does the state or federal constitution require such process. To the contrary, an EES removal process based on staleness would likely violate both *Brady* and *Laurie* and would not extinguish a prosecutor's independent, constitutional obligation to provide all exculpatory evidence to the accused in a criminal matter.

46. Consequently, the petition fails to plead factual matter establishing a ministerial obligation which a public official at the New Hampshire Attorney General's Office has failed to perform.

47. Third, the petitioner has not established that he/she has any right to relief on the allegations of the petition, much less a "clear" right to relief that would justify the court exercising its discretionary power to issue a writ of mandamus against the New Hampshire Attorney General's Office in this action.

48. Fourth, the petitioner has not pled that any public official has performed an official act arbitrarily or in bad faith and does not appear to seek to correct any such action through the writ of mandamus claim.

49. Consequently, Count III fails to state a claim for a writ of mandamus.

F. Conclusion

50. For the above reasons, Counts I-IV fail as a matter of law. All of them must therefore be dismissed.[1]

[1]If the petitioner contends that he/she has been erroneously placed on the EES (and it does not appear that he/she does), the petitioner may be entitled to a due process remedy through a declaratory judgment action

51. Accordingly, and for all of the above reasons, the plaintiff's Petition should be dismissed.

WHEREFORE, the New Hampshire Attorney General's Office respectfully requests that this court issue an order:

A. Dismissing the plaintiff's Petition for Declaratory Judgment and Equitable Relief; and

B. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

THE OFFICE OF THE ATTORNEY GENERAL

By its attorney,

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

Date: September 13, 2019

By:/s/ Anthony J. Galdieri

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in superior court to attempt to prove that the underlying conduct which got him/her placed on the EES in first instance never occurred or is not substantiated, consistent with *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015) and *Gantert v. City of Rochester*, 168 N.H. 640 (2016). If the petitioner prevails in such an action, the New Hampshire Attorney General's Office has a procedure in place to remove officers from the EES who present the Office with such a court order. *See* Law Enforcement Memorandum, Additional Guidance Concerning the Exculpatory Evidence Schedule, https://www.doj.nh.gov/criminal/documents/exculpatory-evidence-20180430.pdf (last visited Sept. 9, 2019). The New Hampshire Attorney General's Office takes no position at this time as to whether such a declaratory judgment action, if brought by Officer A.B., would be timely under the applicable statute of limitations or would be barred by other timeliness defenses.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was served September 13, 2019, to all counsel of record via the court's electronic filing system.

/s/ Anthony J. Galdieri
Anthony J. Galdieri