THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 218-2018-CV-01406

**UNION LEADER CORPORATION, ET AL.**

v.

**TOWN OF SALEM**

**PETITIONERS' RESPONSE TO THE TOWN OF SALEM'S JANUARY 25, 2019 MEMORANDUM OF LAW**

NOW COME Petitioners Union Leader Corporation and the ACLU of New Hampshire, and respectfully respond to the Town of Salem's January 25, 2019 Memorandum of Law.

## I. The Scope of the Town's Redactions are Extensive and Improper.

It appears that the names of officers who were the subject of internal investigations in the Audit Report are anonymized (e.g., "Officer A, B, etc."). Given this anonymization, there can be no privacy interest to withhold these portions of the Report, as the names of officers who were the subject of these investigations would not become public with the Report's release.

But even if names of subject officers are in the Report, they still must be released. For those (up to 20) officers disciplined, any purported "embarrassment" would be the byproduct of the officers' own sustained misconduct. And for those (up to 9) officers cleared through the internal affairs process, the Report will show that exoneration, thereby eliminating the potential for "embarrassment" after public disclosure. *See Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 507 (N.M. Ct. App. 2010) ("The fact that citizen complaints may bring negative attention to the officers is not a basis under this statutory exception for shielding them from public disclosure.").[1]

[1] The names of lawyers and judges who are alleged to have committed misconduct are routinely made public. Effective April 1, 2000, all records and proceedings relating to a complaint docketed by the attorney discipline system are available for public inspection upon, for example, when the Attorney Discipline Office general counsel, the complaint screening committee or the

And, as to the names of subject officers that may appear in the portion of the Audit Report addressing time and attendance practices in ***Exhibit C***, this information directly relates to public employee compensation that the Supreme Court has repeatedly ordered produced.[2]

Based on the Town's representations, it appears that many of the redacted names involve officers who conducted internal affairs investigations. The Town has provided no specific justification, beyond conclusory assertions of privacy, for why redacting these names is appropriate. As these investigating officers were conducting their official duties, they have no privacy interest justifying secrecy. These investigating officers are not private persons "being associated with misconduct." *See* Town's Memo. of Law at p. 10. The Supreme Court has also explained that "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." *Reid v. N.H. AG*, 169 N.H. 509, 532 (2016) (quotations omitted). Here, transparency is essential for the public to fully vet the Audit Report's conclusions as to how the Department and its officers have managed the internal affairs process in total. Indeed, the Town's redaction of officer names "cast[s] suspicion over the whole department and minimize[s]

professional conduct committee finally disposes of a complaint. *See* N.H. Sup. Ct. R. 37(20)(b)(1). The same principle generally applies to judges. Confidentiality with respect to alleged judicial misconduct, including the complaint and whether discipline was imposed, is generally lifted "until either the report is dismissed, a statement of formal charges is prepared and filed …, or the committee has disposed of the report by taking appropriate remedial action." *See* N.H. Sup. Ct. R. 40(3)(b); *see also* State of New Hampshire, Judicial Conduct Committee, at p. 3 ("Supreme Court Rule 40 (3) does prohibit a reporter, however, from publicly disclosing the fact that a report against a judge has been filed with the Committee regarding alleged misconduct until a statement of formal charges is prepared and filed as described in section 9(a) of Supreme Court Rule 40 or until the report is finally disposed of by the Committee. Once the report or complaint has been disposed of by the Committee, a reporter may make a public disclosure concerning the filing of a report including the conduct complained of and any action taken by the Committee."), *available at* https://www.courts.state.nh.us/committees/judconductcomm/docs/ADMNJCC-Report-of-Alleged-Judicial-Misconduct-Procedure.PDF. Just as attorneys and judges currently receive little confidentiality with respect to allegations of misconduct, police officers similarly have no right to privacy concerning such allegations, especially where they have engaged in sustained misconduct in the course of their official duties.

[2] *See, e.g., Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673, 684 (2011) (holding that the government must disclose a list of names of the 500 state retirement system members who received the highest annual pension payments during 2009 as well as the amounts each of the 500 received that year, notwithstanding RSA 91-A:5, IV); *Prof'l Firefighters of N.H. v. Local Gov't Ctr*., 159 N.H. 699, 709 (2010) (holding that the government must disclose records that identify salary information and ***names*** 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 hard work and dedication shown by the vast majority of the police department." *Rutland Herald v. City of Rutland*, 84 A.3d 821, 826 (Vt. 2013).

The scope of the Town's redactions is also significant and not limited to officer names and other identifying information. The Town actually acknowledges, without any explanation, that "[a]t other points it was necessary to redact an interview and more extensive information." *See* Town Memo. of Law at p. 2. For example, these redactions include: (i) Kroll's finding that the Department may not be complying with policies issued by the Attorney General's Office concerning retention of internal affairs investigatory files (*Exhibit A*, at p. 118); (ii) specific details concerning Kroll's review of how the Department handled 29 internal affairs investigations (*id.* at 39-91); (iii) the substance of Kroll's communications with external citizens (*id.* at. pp. 92-108); (iv) how the Department displays an "us versus them" mentality and the Department's culture (*Exhibit B*, at pp. 6-12); and (v) information that provides a basis for Kroll's time and attendance conclusions (*Exhibit C*, at pp. 16, 17, and 26; *Exhibit A*, at pp. 118-119). Releasing this information would help inform the public "what the government is up to." *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 477 (1996).

The overbreadth of these redactions is demonstrated by recent disclosures. The section of the Audit Report addressing the Department's response to the ICenter fight occurring on December 2, 2017 (*Exhibit A*, at p. 75-89) was recently released in unredacted form, as it was publicly filed in the *Andersen* case. These unredacted pages are attached as *Exhibit K* and they explain how the Department's leadership failed in accepting this investigation as complete. With these unredacted pages now exposed, it is clear that the Town had no justification to shield this section's valuable contents from public view.[3] The unredacted version of Page 89 also shows that the Town went so

[3] The portions of these pages that the Town redacted are highlighted in *Exhibit K*.

far as to redact "January 2018," "for his canine," and "Captain [Joel] Dolan"—the officer who apparently investigated "Officer BB" for payroll inconsistencies relating to training dates and for failing to keep his K-9 certified. (Two policy violations were ultimately found as part of this investigation.). The breadth of these redactions further highlights how this Court cannot conduct a meaningful, adversarial assessment of the Audit Report without the redactions being reviewed by Petitioners' counsel subject to a protective order.[4]

Finally, it is critical to reiterate that the Town's position protects internal affairs investigations concerning officers that have actually engaged in sustained misconduct resulting in discipline. This is troubling. Of the 29 internal affairs cases reviewed, 20 resulted in sustained findings of misconduct (13 of the sustained cases were generated internally and 5 of the sustained cases were generated externally). *Exhibit A*, at p. 39. These sustained cases include for example: (i) an officer—described as "Officer B"—who fled the police likely in violation of RSA 265:4, I(c), *see id.* at 41; and (ii) an officer—described as "Officer F"—who was involved in an off-duty traffic crash after consuming alcohol and left the scene of the incident prior to officers' arrival. *Id.* at 43. It appears that the Department did not conduct a meaningful criminal investigation of these incidents. There can be no legitimate governmental interest in protecting information in the Report concerning the investigation of such officers—including the officers' identities—where there was a finding of sustained misconduct. Disclosure of this information will "provide information about the operation of the police department."[5]

[4] *See, e.g., New Haven Police Chief v. Freedom of Information Com'n*, No. CV020514313S3, 2 Conn. L. Rptr. 314, 2002 WL 1518660, 2002 Conn. Super. LEXIS 2057, at *1-2 (Conn. Super. Ct. June 11, 2002) ("Without access to the records, defendants' counsel are in the difficult position of having to argue that records are not exempt under FOIA without having seen the records. Because counsel for the plaintiffs, based on their law enforcement positions, do have access to the police record, granting access to defendants' counsel will help level the playing field in this appeal and promote fairness in the adversary process.").

[5] *See NHCLU v. City of Manchester*, 149 N.H. 437, 441 (2003) (ordering disclosure of photographs taken by police department of individuals who were stopped, but not arrested, because disclosure "could provide information about the operation of the police department"; noting that government must meet "heavy burden" in resisting disclosure).

## II. There is No Dispute that the Audit Report Was Not Created for Employment Purposes. Thus, the Audit Report Cannot be a "Personnel" Document under RSA 91-A:5, IV.

The Audit Report and related documents are not "personnel" in nature under either the "internal personnel practices" or "personnel" file exemptions in RSA 91-A:5, IV. As the New Hampshire Supreme Court has explained, the term "personnel" "refers to human resources matters." *Reid v. N.H. AG*, 169 N.H. 509, 522 (2016). 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). In applying this test, the focus is not on whether the documents in question exist in a "personnel file," but rather whether they meet this definition of "personnel."[6]

Applying this test, it is not disputed that the Audit Report and related documents were not created for an employment or human resources purpose. As the Audit Report states, its scope "was not … to conduct[] an independent review of facts or circumstances surrounding individual complaints filed against Salem PD personnel." *See* Exhibit A, Page 4 (emphasis in original). Rather, these documents—unlike the documents in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and *Hounsell v. N. Conway Water Precinct*, 154 N.H. 1 (2006) which were created in the context of employee investigation and discipline—are designed to audit the Department. The Report's focus was to broadly examine the operations of the Department and "review the [internal affairs] process, in its entirety and make a determination as to its fairness and comprehensiveness, and whether it is in line with widely-regarded law enforcement best practices." *See* Exhibit A, at p. 4. This is dispositive, thereby requiring that this information be produced.

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

This case is also easily distinguishable from *Clay v. City of Dover*, 169 N.H. 681 (2017), where the Supreme Court followed *Fenniman* and held that completed rubric forms used to evaluate applicants for the position of school superintendent pertained to "internal personnel practices." As the Court explained, "the completed rubric forms relate to hiring, which is a classic human resources function," and, thus, "they pertain to 'personnel practices' as that term is used in the Right-to-Know Law." *Id.* at 686. Once again, unlike the documents at issue in *Clay* (and *Fenniman* and *Hounsell*), it is not disputed that the Audit Report was <u>not</u> created for an employment purpose, as its primary function is <u>not</u> "hiring, which is a classic human resources function." *Id.*; *see also Montenegro v. City of Dover*, 162 N.H. 641, 650 (2011) (finding that the job titles of persons who monitor the City's surveillance equipment are not "internal personnel practices" because they do not concern employee hiring/firing).[7] Rather, the document was created so that the management of the Town could know what the Department was up to.

## III. Even if the Audit Report is "Derived" From "Personnel"-Related Information, the Audit Report Still Does Not Constitute "Personnel" Information under RSA 91-A:5, IV.

This Court must reject the Town's theory that the unredacted Audit Report and related documents constitute "personnel" information under RSA 91-A:5, IV because they are "derived" from disciplinary information that separately may constitute "personnel" records. This argument, again, ignores the definition of "personnel" as established by the New Hampshire Supreme Court and other courts which focuses on: (i) the specific "nature and character" of the withheld document in question (including how the document is used)[8]; and (ii) whether the withheld document was

[7] The Town's reliance on *Pivero v. Largy*, 143 N.H. 187 (1998) is to no avail. *See* Town's Memo. of Law at p. 12. There, the investigatory report requested by the police officer was not part of his "personnel" file—and therefore he was not entitled to access under RSA 275:56 because the incident investigated did not lead to any discipline for that employee. *Id.* at 191. Similarly, the documents at issue here do not constitute "internal personnel practices" information because the documents do not have an employment purpose related to employee hiring, firing, or discipline.

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

"generated in the course of an investigation of claimed employee misconduct."[9] For example, in *Hounsell*, the Supreme Court emphasized how the report at issue there constituted an exempt "internal personnel practice" document because it was created during and as a result of an investigation of employee misconduct that could have resulted in employee discipline. *See Hounsell*, 154 N.H. at 4.

This "nature and character"/"was the document generated in the course of an employee misconduct investigation?" test addresses the very "derivative" use question that this case presents. *Worcester Telegram* is illustrative. There, the documents at issue concerned, in part, an "internal affairs report" that related to the "ultimate decision by the chief to discipline or to exonerate [the officer in question] based upon the investigation." *Id.* at 7. Nonetheless, the Massachusetts Appeals Court concluded that these documents were not "personnel" related because they concerned an internal affairs process "whose quintessential purpose is to inspire public confidence." *Id.* at 9. The Court explained: "[T]hat these documents bear upon such [employment] decisions does not make their essential nature or character 'personnel [file] or information.' Rather, their essential nature and character derive from their function in the internal affairs process"—a function which was not employment-related because the documents were created "separate and independent from ordinary employment evaluation and assessment." *Id.* at 7, 9. In short, information may confidentially exist in a personnel file for employment purposes, but that same information may exist elsewhere in a document that has no employment purpose and

[9] *See Hounsell v. N. Conway Water Precinct*, 154 N.H. 1, 4 (2006) ("[A]s in *Fenniman*, the Hunt-Alfano report [into precinct employee harassment], which was generated in the course of an investigation of claimed employee misconduct, was a record pertaining to 'internal personnel practices.'").

therefore is a public record. *Id.* at 10 ("Put differently, the same information may simultaneously be contained in a public record and in exempt 'personnel [file] or information.'").[10]

This is precisely the case here with respect to the unredacted Audit Report. As in *Worcester Telegram*, the Audit Report has a function to independently evaluate the Department and "to inspire public confidence"—a process that is "separate and independent from ordinary employment evaluation and assessment." *See id.* at 7, 9. The Audit Report itself acknowledges that the internal affairs process it examined exists to "establish[] the necessary trust and confidence to effectively police a community." *See Exhibit A*, at p. 4-5. Thus, the Audit Report was not "generated in the course of an investigation of claimed employee misconduct" as in *Hounsell* and *Fenniman*. Per the Supreme Court's command in *Reid*, this Court cannot, as the Town requests, extend the principle of *Fenniman* and *Hounsell* beyond their facts. *See Reid*, 169 N.H. at 522 ("[W]e decline to extend *Fenniman* and *Hounsell* beyond their own factual context."). This is especially the case where this Court is required to "construe provisions favoring disclosure broadly, while construing exemptions narrowly." *See Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551, 554 (2002).

The Supreme Court has also already touched upon derivative use when requiring disclosure of names and salary information of public employees.[11] In those cases, the names and salary information are plausibly derived from documents that relate to the internal personnel process, yet the compilation of name and salary information is not an "internal personnel practice" document because that compilation is not used for the purposes of employment hiring or firing.

[10] *See also Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 507 (N.M. Ct. App. 2010) ("While citizen complaints may lead DPS to investigate the officer's job performance and could eventually result in disciplinary action, this fact by itself does not transmute such records into 'matters of opinion in personnel files.'").
[11] *See, e.g.*, *Union Leader Corp.*, 162 N.H. at 684; *Prof'l Firefighters of N.H.*., 159 N.H. at 709; *Mans*, 112 N.H. at 164..

## IV. If the Audit Report Constitutes an "Internal Personnel Practice"—Which It Does Not—Applying this Exemption Categorically under RSA 91-A:5, IV Without a Public Interest/Privacy Interest Balancing Test Would Violate Part I, Article 8 of the New Hampshire Constitution.

At the outset, as explained in footnote 4 of Petitioners' Objection to the Town's Motion for *In Camera* Review, if the Audit Report and related documents constitute "internal personnel practice" information (which they do not), then Petitioners contend that *Fenniman/Hounsell*'s application of a categorical exemption, without a public interest balancing analysis, was incorrect as a matter of statutory interpretation. These decisions, which *Reid* appropriately criticized, should be reconsidered and overruled. *See, e.g., Bolm v. Custodian of Records of the Tuscon Police Department*, 969 P.2d 200 (Ariz. Ct. App. 1998) (refusing to fashion a blanket rule protecting police personnel and internal affairs records from a public records request, and finding that a balancing test should be applied to determine whether a particular record should be released). Petitioners make this argument for preservation purposes in the event of an appeal.[12]

[12] As the Supreme Court has explained: "[W]e will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Ford v. N.H. Dep't of Transp.*, 163 N.H. 284, 290 (2012). *First*, the failure of the Supreme Court in *Fenniman* and *Hounsell* to apply a public interest/privacy interest balancing analysis to "internal personnel practices" is unworkable and incomprehensible because, as *Reid* explained, all the other exemptions in the same sentence of RSA 91-A:5, IV textually require courts to engage in such balancing. As *Reid* suggested, all these exemptions should be read "in the context of the remainder of the statutory language — in particular, the language exempting "personnel … and other files whose disclosure would constitute invasion of privacy." *Reid*, 169 N.H. at 519. It makes no sense for Right-to-Know law jurisprudence to reject such balancing with respect to "internal personnel practices," while requiring a balancing analysis as to the remaining exemptions covered by the same language in the same sentence. *Second*, given *Reid*'s forewarning, reliance should be given little, if any, weight. Whatever reliance police officers might have concerning their privacy can be assessed as part of the balancing analysis required under Chapter 91-A. Referring to the third factor, as *Reid* makes clear, the law has developed so as to have narrowed the prior holdings of *Fenniman* and *Hounsell* to their facts. Those decisions' holdings to create a categorical exemption were incorrect then, and they are incorrect now. A balancing analysis must be employed. Otherwise, information meeting the definition of "internal personnel practices" that is in the public interest will never see the light of day. As to the fourth factor, here too *Reid*'s forewarning states why *Fenniman* and *Hounsell* were poorly reasoned and cannot be squared with the text of the exemption. They must be overruled. *See also Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018) (holding that the provision of the Illinois Public Labor Relations Act which forced public employees to subsidize a union, even if they chose not to join and strongly objected to the positions the union took in collective bargaining and related activities, violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern; holding that the Court's decision in *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), was poorly reasoned, had led to practical problems and abuse, was inconsistent with other First Amendment cases and had been undermined by more recent decisions, and was overruled).

Moreover, the application of RSA 91-A:5, IV's purported *per se* exemption in this case—without a public interest balancing analysis—would constitute an "unreasonable restriction" on the public's right of access in violation of Part I, Article 8 to the New Hampshire Constitution.[13] Part I, Article 8 requires such a public interest balancing analysis. "To determine whether restrictions are reasonable [under Part I, Article 8], we balance the public's right of access against the competing constitutional interests in the context of the facts of each case. The reasonableness of any restriction on the public's right of access to any governmental proceeding or record must be examined in light of the ability of the public to hold government accountable absent such access." *Sumner v. N.H. Sec'y of State*, 168 N.H. 667, 669-70 (2016) (internal quotations and citations omitted); *see also Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 290 (2005) (same). As *Sumner* explains, there must be a "constitutional interest" justifying the legislature's desire to withhold information from the public; a mere policy desire is insufficient.

Applying the *Sumner* balancing analysis to the information at issue in this case, the public's right of access is great for the reasons explained in Section V.A *infra*. *See, e.g.*, *Union Leader Corp. v. van Zanten*, No, 216-2019-cv-00009 (Hillsborough Cty. Super. Ct., Northern Dist., Jan. 24, 2019) (holding that security camera video recording of an arrest that occurred at the Manchester Public Library should be disclosed under Chapter 91-A because "[t]he public has a broad interest in the manner in which public employees are carrying out their functions—here, specifically how ongoing Manchester police officers engaged with a member of the public before and during effectuating an arrest") (Smuckler, J.), attached as ***Exhibit L***.

On the other side of the Article 8 equation, the Town raises no interests of "constitutional" dimension that justifies RSA 91-A:5, IV's purported categorical override of the public's right of

[13] This Court does not need to reach this constitutional question if it concludes, per the analysis above, that the Audit Report are related documents are not "internal personnel practices" under RSA 91-A:5, IV.

access to this information concerning the actions of the police. That said, the Town's Memorandum of Law focusses heavily on the officers' purported privacy interests. No such "constitutional" interest in privacy exists for the same reasons explained in Section V.B *infra*. The Town's position that the police have privacy interests with respect to their official acts is also troubling because it grants special secrecy rights to the police that those accused of crimes by the police do not enjoy. Of course, citizens accused of crimes—like Mr. Andersen who was arrested and tased by the Department in December 2017—are not given anonymity by law enforcement despite the stigma they face, nor should they given the public interest in knowing what its government is up to. Their names are public and the allegations are circulated widely by law enforcement and published in the press, even before the accused have received any due process. Complaints concerning lawyers and judges (including those that are unfounded) are also routinely made available to the public.[14] This transparency, despite the risk of stigma, is important to maintain accountability. The New Hampshire and United States Constitutions require that the public be informed of how the police, prosecutors, and the courts function so the government can be held accountable. This is the tradeoff we make as a democratic society. Like citizens, police officers have no constitutionally-recognized interest in anonymity or privacy concerning their official acts. Police officers should be held to a higher standard than regular citizens—not a lesser standard—especially given that police officers act in the name of the public, are professional witnesses funded by taxpayers, and have the ability to deprive persons of their liberty. The public interest in knowing about the activities of police officers is even greater than the public's substantial interest in knowing about police activity relative to the criminal acts of citizens.

[14] *See supra* note 1*; see also Denver Policemen's Protective Asso. v. Lichtenstein*, 660 F.2d 432, 436-37 (10th Cir. 1981) ("It is ironic, we believe, that the Association asserts that its right to privacy is the same as a citizen's, no greater or no less, while at the same time asserting that SIB files should be afforded greater protection than citizens' 'rap' sheets, which it concedes are routinely discoverable.").

Demonstrating the overbreadth of *Fenniman*'s creation of a categorical exemption for "internal personnel practices" under RSA 91-A:5, IV, documents are barred from public disclosure under this exemption even where the public interest in disclosure is high and where there may be no privacy interest implicated.[15] The Town apparently views RSA 91-A:5, IV's "internal personnel practices" exemption as even barring the disclosure of an officer's name when that officer has committed a serious abuse of power. This is an extraordinary position that hides the bad actions of government officials at the expense of governmental accountability.

Rather than effectuate the Town's constitutional responsibility to properly administer justice through its police department, the Town's policy of secrecy in an effort to protect its police officers undermines this responsibility. Secrecy damages public confidence in the administration of justice. On the other hand, disclosing this information will help the Town restore public confidence in the Department and help the public better evaluate how the Department conducts internal affairs investigations. Without transparency, the public also cannot evaluate whether the Town is complying with the Report's recommendations in full. Unfortunately, the Town's position is that the public must simply trust that the Department and its new civilian administrator are fully following the Report's recommendations. But Article 8 rejects "trust us" accountability in favor of "transparency accountability," thereby requiring a public interest balancing test for information that meets the "internal personnel practice" definition under RSA 91-A:5, IV.

[15] *See Associated Press v. State of N.H.*, 153 N.H. 120, 139 (2005) ("RSA 458:15-b, III does not permit the court to make the individualized determinations required by the State Constitution and by *Petition of Keene Sentinel* and its progeny."); *see also Hampton Police Ass'n, Inc. v. Town of Hampton*, 162 N.H. 7, 16 (2011) ("A blanket assertion is generally extremely disfavored, and ordinarily the privilege must be raised as to each record so that the court can rule with specificity.") (quotations omitted); *In re Keene Sentinel*, 136 N.H. 121, 129 (1992) (a party "cannot prevail in their claim to keep the records sealed merely by asserting a general privacy interest").

## V. Applying the Required Balancing Test, the Public Interest in Disclosure Outweighs any Privacy Interest in Nondisclosure.

**A. The Public Interest in Disclosure is Strong.** The Audit Report exposes the very type of misconduct that Chapter 91-A is designed to uncover. *See, e.g., Union Leader Corp. v. New Hampshire Retirement System*, 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. v. Local Gov't Ctr.*, 159 N.H. 699, 709 (2010) ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."). As the Supreme Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of information pertaining to its government activities." *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003). As one New Hampshire Court Judge similarly ruled in releasing a video of an arrest at a library, "[t]he public has a broad interest in the manner in which public employees are carrying out their functions." *See, e.g., Union Leader Corp. v. van Zanten*, No, 216-2019-cv-00009 (Hillsborough Cty. Super. Ct., Norther Dist., Jan. 24, 2019) (Smuckler, J.), attached as ***Exhibit L***. The Town also ignores the numerous cases outside of New Hampshire highlighting the public interest in disclosure when the official acts of the police are implicated.[16] Simply put, disclosure here will educate the public on "the official acts of those officers in dealing with the public they are entrusted with serving." *Cox*, 242 P.3d at

[16] *See, e.g., Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) ("As the trial court found, there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct."); *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press*, L.L.C., 4 So.3d 807, 809-10, 821 (La. Ct. App. 1st Cir. 2008) (holding the public interest in records of investigation into police officers' use of excessive force trumps officers' privacy interest; noting that "*[t]he public has an interest in learning about the operations of a public agency, the work-related conduct of public employees, in gaining information to evaluate the expenditure of public funds, and in having information openly available to them so that they can be confident in the operation of their government*") (emphasis added); *Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure, in part, because "*[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*") (emphasis added); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 299 (Conn. App. Ct. 2012) (in public records dispute concerning documents held by a police department implicating an employee's job termination, noting that a public concern existed where the "conduct did implicate his job as a public official").

507 (addressing disclosure of citizen complaint investigations). That some members of the community may engage in the "parlor" game of attempting to identify which of its employees engaged in acts of misconduct is of no moment. The suggestion that a citizenry seeking to become informed about which of its public servants have been found to have engaged in misconduct is nothing more than a "parlor game" makes a mockery of the very idea of public accountability.

The Town claims that producing the redacted information in the Audit Report, including officer names, will not shed light on the Department's conduct. *See* Town's Memo. of Law at p. 14-15. The Town is wrong. Unlike *Beck* and the other cases cited by the Town, the requested information here concerns the ability of the public to examine the completeness and full findings of an internal investigation that exposes significant misconduct on the part of the Department. *See, e.g.*, *Rutland Herald*, 84 A.3d at 825 (stating that "there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct" and ordering disclosure of employee names).[17] Producing officer names will allow the public to know how specific officers in the Department conduct internal affairs investigations. The public's ability to learn what the "government is up to" under Chapter 91-A includes not just the actions of the government, *see Union Leader Corp.*, 141 N.H. at 477, but <u>*who*</u> engaged in such actions on behalf of the government. After all, without knowing <u>*who*</u> engaged in actions on behalf of the government, how can the public hold specific officers and Department leaders accountable? This is why the Supreme Court has demanded that the government produce the names of government

[17] This case is in stark contrast to *Beck v. Dep't of Justice*, 997 F.2d 1489 (D.C. Cir. 1993), where the Court held that disclosure of records concerning two relatively low-level government agents did not provide information about the agency's own conduct. Central to the Court's holding was the fact that there was no evidence, or public knowledge, of any alleged scandal or wrongdoing on the part of the two agents. *Id.* at 1493. This is not the case here. Unlike *Beck*, the information at issue in this case concerns an actual formal investigation of wrongdoing. *See also MacLean v. United States Dep't of the Army*, No. 05-CV-1519 WQH(CAB), 2007 U.S. Dist. LEXIS 16162, at *41 (S.D. Cal. Mar. 6, 2007) (same; also noting that, unlike this case, the information sought would not necessarily expose information concerning government wrongdoing). There is a public interest in disclosing to the public the full scope of the Audit Report's investigation.

employees—rather than mere titles—along with their salary information.[18] What if, for example, many of the internal investigations criticized in the Report were conducted by the same officer? This would help inform the public that this particular officer may be part of the Department's problem concerning how internal affairs investigations are being conducted. Also, what if, in the 20 sustained cases of misconduct evaluated in the Report, the same officer was disciplined in the bulk of the cases? This would help inform the public that the Department may have a problem officer on its hands. But, right now, the public is left in the dark, with no ability to hold the Department and its civilian administrator accountable.

**B. The Privacy Interest in Nondisclosure is Nonexistent.** Police officers also have no privacy interest when their actions implicate their official duties, especially when—as is the case here—there is credible evidence of wrongdoing. Cases have roundly rejected the proposition that such a privacy interest exists, including in the context of internal investigations of citizen complaints.[19] And there is especially no privacy interest here where the Audit Report was not created for any employment purpose, as required to deem the information "personnel" in nature.

Here, despite the Town's assertion to the contrary (*see* Town's Memo. of Law at p. 9), the information sought does not constitute "intimate details … the disclosure of which might harm the individual," *see Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972), or the "kinds of facts [that] are regarded *as personal* because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*,

[18] *See e.g., Union Leader Corp.*, 162 N.H. at 684; *Mans*, 112 N.H. at 160.

[19] *See, e.g., City of Baton Rouge.*, 4 So.3d at 809-10, 821 (holding the public interest in records of investigation into police officers' use of excessive force trumps officers' privacy interest; "[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *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"); *Cox*, 242 P.3d at 507 (finding that police officer "does not have a reasonable expectation of privacy in a citizen complaint because the citizen making the complaint remains free to distribute or publish the information in the complaint in any manner the citizen chooses"); *Denver Policemen's Protective Ass'n*, 660 F.2d at 435 (noting that police officers have no privacy interest in documents related solely to the officer's work as police officers).

169 N.H. at 530 (emphasis added). Petitioners are not seeking, for example, medical or psychological records in an officer's personnel file. Instead, Petitioners are seeking redacted information in the Audit Report related to the performance of officers' official duties, including where there is credible evidence of wrongdoing. Thus, any privacy interest here is minimal, if not nonexistent.[20] Whatever concerns the Town may have about today's "super charged social media environment," *see* Town's Memo. of Law at p. 10, "these technological changes have by no means diminished the need for accountability and transparency in our system of justice."[21]

The Town's police officers are not, as the Town suggests, low level civilian "employees" with the same privacy interests as, for example, the Town's electrician or ministerial staff. *See* Town's Memo. of Law at p. 13. Police officers have even less of a privacy interest than normal government employees because the police have the incredible power to exercise broad discretion in the enforcement of the law by arresting members of the public, depriving people of their liberty, and using lethal force. Likewise, police officers have largely unfettered discretion to <u>*not*</u> enforce violations of the law that they may observe. The force used in the *Andersen* case is an example of the immense power bestowed on law enforcement. Indeed, many of the cases the Town cites permitting the redactions of names have no bearing here, as they do not implicate the police performing their official duties. Rather, these cases implicate non-police officer/civilian government employees[22] and/or private individuals who may be witnesses.[23] To narrow the issues

[20] *See Cox*, 242 P.3d at 507 ("[T]he [citizen] complaints at issue relate solely to the officer's official interactions with a member of the public and do not contain personal information regarding the officer other than his name and duty location."); *see also Hunt v. FBI*, 972 F.2d 286, 289-90 (9th Cir. 1992) ("Where there is no evidence that the government has failed to investigate adequately a complaint, or that there was wrongdoing on the part of a government employee the public interest in disclosure is diminished."; "the public interest in ensuring the integrity and the reliability of government investigation procedures is greater where there is some evidence of wrongdoing on the part of the government official").

[21] *See United States v. Chin*, No. 17-2048, 2019 U.S. App. LEXIS 1721, at *22 (1st Cir. Jan. 18, 2019) (ordering the district court to unseal the list of juror names and addresses as appellant requested in its motion, unless the district court makes further findings).

[22] *See Coleman v. Lappin*, 680 F. Supp. 2d 192, 199 (D.D.C. 2010) (involving a Bureau of Prisons staff member; not a police officer); *Ligorner v. Reno*, 2 F. Supp. 2d 400 (S.D.N.Y. 1998) (not concerning police officers); *Lurie v. City of Chi*., No. 69 C 2145, 2014 U.S. Dist. LEXIS 22971, at *5 (N.D. Ill. Feb. 21, 2014) (same).

[23] *See Reid*, 169 N.H. at 531 (addressing privacy interests that may exist with respect to "third party witnesses and interviewees," including civilian employees). In *Reid*, for example, the Court never held that it would have been permissible for the Attorney

in this case, Petitioners have made clear that they are *not* seeking the names of private citizens that may exist in the Audit Report.

The Town's reliance on RSA 516:36 to create a privacy right is also misplaced. *See* Town's Memo. of Law at p. 11. RSA 516:36 has no bearing on this analysis. This statute governs *admissibility*, not discoverability, of police internal investigation documents. RSA 516:36, II ("All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be *admissible* in any civil action other than in a disciplinary action between the agency and its officers, agents, or employee ….") (emphasis added). Information, of course, can be *both* inadmissible in court under RSA 516:36 *and* public under Chapter 91-A. As one Superior Court recently explained, RSA 516:36 "provides no basis for withholding records responsive to a Right-to-Know request." *See Salcetti v. City of Keene*, No. 213-2017-CV-00210 (Cheshire Super. Ct. Aug. 29, 2018) (Ruoff, J.), *available at* http://www.orol.org/rtk/rtknh/213-2017-CV-210-2018-08-29.html.

The Town's argument that the recent privacy protections added to the New Hampshire Constitution provide the officers in the Audit Report—who are government actors—with a right to privacy is both wrong and remarkable. *See* Town's Memo. of Law at p. 12. This constitutional amendment, which was enacted by the voters during the 2018 election, states in Part I, Article 2-b: "An *individual's* right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." (emphasis added). By its own terms, this constitutional amendment—like other provisions of Bill of Rights—protects individual citizens from government intrusion; it does not, as the Town seeks, protect the government and its actors

general's office to redact the name of the Assistant Attorney general conducting the investigation. Yet this is precisely what the Town seeks here by seeking to withhold the names of Department officers who engaged in internal affairs investigations.

from scrutiny by individual citizens. The ACLU of New Hampshire collaborated with the drafters of this amendment and was among its prominent advocates. The amendment's sponsor and chief legislative proponent—former Representative Neal Kurk—explained, along with the ACLU, that this amendment was a tool to protect individuals from the government, not the other way around: "Today's powerful surveillance technologies can provide *the state government and state and local law enforcement agencies* with the ability to spy on people when they walk on public sidewalks, drive on public roads, play in public parks, attend public schools, and visit public libraries …. Q2 would require that *the government* obtain a judicial warrant, supported by probable cause, before accessing any personal information …. Q2 would also help prevent *the police* from accessing your private information through third parties." (emphasis added). *See Exhibit M* (C. Marlow and N. Kurk, "On Election Day, the Voters of New Hampshire Can Protect Their Privacy in the Digital Age," *ACLU: Speak Freely* (Oct. 15, 2018)). In short, the Town's position (i) turns this added constitutional protection on its head by protecting the government from its own citizens and (ii) runs contrary to the amendment's text and intent.

Finally, it should go without saying that information concerning a government official's performance of his or official duties cannot be shielded from public scrutiny because exposure may cause "embarrassment" to that official. It should come as little surprise that government actors often wish to keep their misconduct secret out of fear that the public may find out and "embarrass" them by holding them publicly accountable. But such public scrutiny for official acts is the price that a government official must pay. This is because that official, including a police officer, works for the public, not him or herself. They are not private citizens. This is how government accountability works under Chapter 91-A. Adopting the Town's view would enable government entities to keep such misconduct from ever seeing the light of day.

**C. There is No Governmental Interest in Nondisclosure.** The Town suggests that disclosure would deter the reporting of police officer conduct by public employees, the participation in such investigations, and even the investigation undertaken by the Town of Salem, for fear of public embarrassment, humiliation, or even retaliation against employees. *See* Town's Memo. of Law at p. 16-17. This argument is speculative, lacks any evidentiary support, and was rejected by the Supreme Court when it was similarly made without evidence. *See Goode*, 148 N.H. at 556 ("[T]here is no evidence establishing the likelihood that auditors will refrain from being candid and forthcoming when reporting if such information is subject to public scrutiny."). The Supreme Court has emphasized that, in Chapter 91-A disputes, courts must reject assertions that are "speculative at best given the meager evidence presented in support." *See, e.g., Union Leader Corp.*, 162 N.H. at 679. This principle is especially important where the Town "has the burden of demonstrating that the designated information is exempt from disclosure under the Right-to-Know Law." *CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 587 (2015).[24] Here, disclosure will improve the criminal justice system and police accountability, not hinder it. Disclosing this information will not only expose misconduct, but it also will ensure that the public has the complete picture concerning the Audit's findings and whether the Department is following its recommendations.

**D. The Public Interest Trumps Any Nonexistent Privacy Interest.** Once the private and governmental interests in nondisclosure and public interest in disclosure have been assessed, courts "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Union Leader Corp.*, 162

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

N.H. at 679. The Supreme Court has consistently stated that this balancing test should be heavily weighted in favor of disclosure, even where the public and privacy interests appear equal. *See, e.g., Reid*, 169 N.H. at 532 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a ***heavy burden*** to shift the balance toward nondisclosure.") (citations omitted) (emphasis added).[25]

In performing this balancing test with respect to the Audit Report, any privacy interest is dwarfed by the compelling public interest in disclosure. The Town cannot meet the "heavy burden" required to resist disclosure. As explained in the Petition and above, the substantial public interest in disclosure is the public's right to learn the full nature of the Audit Report's findings and conclusions—a report that cost the Salem taxpayers $77,000. Police officers are public servants who, when performing their official duties, serve the public, not themselves; they do not have the same privacy rights as regular citizens or even other public employees.[26] A number of courts in other states have held that police officers' privacy interests are not sufficient to prevent disclosure of law enforcement disciplinary information. This Court must reach the same conclusion here.[27]

WHEREFORE, Petitioners pray that this Court grant the relief in their Petition.[28]

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

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

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

[28] Petitioners' counsel are entitled to their costs if they are successful, as this "lawsuit was necessary in order to enforce compliance with the provisions of" Chapter 91-A. *See* RSA 91-A:8. Also, in light of the foregoing, the Town knew or should have known that its conduct in withholding the Audit Report and related documents was in violation of Chapter 91-A. *See* RSA 91-A:8, I; *see also Scott v. City of Dover*, No. 05-E-170, 2005 N.H. Super. LEXIS 58, *4-5 (Strafford Cty. Super. Ct. Nov. 29, 2005) (Fauver, J.) ("[T]he court finds the City should have known it is was required to disclose the requested information. If the City had reviewed the case law interpreting the Right-to-Know disclosure requirements, the City would have discovered the requested information was information the terms of RSA 91-A requires to be disclosed to the public."). Therefore, Petitioners are entitled to reasonable attorneys' fees.

Respectfully submitted,

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Date: February 4, 2019

## Certificate of Service

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

*/s/ Gilles Bissonnette*
Gilles Bissonnette

February 4, 2019

# EXHIBIT

# K

**Internal Investigation (Informal Inquiry): Sgt. B, Officers U, V, X, Y, Z and AA**

A review of the case files shows Captain Wagner being assigned to conduct an informal inquiry into the conduct of the above listed officers relative to an occurrence at an ice rink on December 2, 2017. This task was assigned by Deputy Chief Morin after receiving a complaint from the Attorney General's Office as to the conduct of said officers. Some of the content provided appears to have been unable to be reviewed due to technological issues. Rather than finding technology that would allow for the agency to view this video content, a document stating that the Apple videos were not compatible with the program available was offered. (After the incident was highlighted in local media, the third video was accessed.) A memorandum summarizing a partial review of the information from the Attorney General's Office stated that the Salem PD had not received a formal complaint. No attempt was made to contact any of the parties involved in the incident. It is Kroll's opinion that this is an incomplete investigative effort and should not have been handled as an informal inquiry when it clearly meets the criteria for a formal complaint and a subsequent investigation. While the allegation is not the most serious in nature we have seen, the pattern of handling complaints from the public informally, incompletely and without regard to the definitions established in the Salem PD's General Orders are consistent across all levels of severity of allegation.

On December 2, 2017, four Salem PD officers arrested a youth hockey coach, after tazing him and wrestling him to the ground. Spectators claimed that he had done nothing wrong, and one officer was seen attempting to distract people from videotaping the incident by flashing his flashlight at the crowd.

The suspect's lawyer filed a complaint with the Attorney General's Office, including with his complaint 15 affidavits of witness statements supporting the defense's allegations and three cell phone videos. The Attorney General's Office concluded that there was no criminality in the officers' actions and referred the matter to the Salem PD for administrative review. In the letter sent to Anderson's attorney by the Attorney General, there was no direction to contact Salem PD to submit a formal complaint, and even though the attorney submitted a formal written complaint to the Attorney General's Office alleging improper arrest, excessive force, unprofessional behavior and intimidation of witnesses, the Salem PD still has yet to initiate a formal IA investigation. It is the department's belief that until the arrestee appears at the Salem PD and submits a formal written complaint, there is no need by the department to conduct a formal review. Note, again, the department's policy that formal investigations be issued in writing or must allege "criminal misconduct or similar serious offense."

***FORMAL COMPLAINT*** – A complaint received under the above guidelines that is submitted in writing, where the complainant is available for follow-up investigation, interview, and/or the complaint alleges criminal misconduct or similar serious offense.

***INFORMAL COMPLAINT*** - A complaint, as defined above, that is received anonymously, or by an identifiable subject not seeking action but supplying the information as advisory, to be used as see fit. Informal complaint, during the course of review, may become Formal Complaints if a complainant steps forward and files a more in-depth report, or if circumstances or information dictate an a more in-depth investigation is appropriate.

***INTERNAL COMPLAINT INVESTIGATION (ICI)*** – The action taken on a complaint. This in-depth, thorough investigation requires an ICI number assigned, full documentation of all action taken, with all factual information gathered forwarded to the Chief of Police for review and discipline, if deemed necessary.

*Salem PD General Order 65-7

While a formal IA investigation was not initiated, Deputy Chief Morin does assign Captain Wagner to conduct an informal inquiry. The captain reviewed the complaint with the Attorney General's investigator, reviewed the 15 witness affidavits and reviewed two of the three videos, as he was unable to access the third. (After he wrote his report unfounding the complaint, he was able to open the third video.) He also reviewed the reports previously filed by the officers and drafted a report closing out the informal investigation less than 24 hours after being tasked with the review. His report is dated March 13, 2018. Kroll notes that the department never issued notices to the officers informing them that a complaint was filed against them and that an investigation was being conducted, which violates the CBA. (This appears to occur almost every time there is an informal inquiry.) There were no interviews of independent witnesses, no canvasing of the surroundings where the incident occurred for video footage and no interviews of hockey rink staff who may have provided an independent version of events. The captain did not reach out to the complainant's attorney or any of the individuals who signed affidavits, including one who is a Massachusetts State Trooper and who allegedly helped calm tensions and physically assisted the Salem PD in keeping people back during the arrest. In his report, the captain noted that the affidavits all contained similar statements, appeared to be rehearsed and some appeared to be "cut and pasted," indicating to him an air of bias, and effectively closed out the informal inquiry.

Relative to the amount of time spent by Captain Wagner on the informal inquiry, Deputy Chief Morin states:

*MR. LINSKEY: And then, you know, so the inquiry comes into you, you give it to Wagner, this is basically the -- the informal inquiry and he got it on -- you got it on March 12th and he's completed it on March 13th.*
*DEPUTY CHIEF MORIN: I got it on March 9th.*
*MR. LINSKEY: March 9th?*
*DEPUTY CHIEF MORIN: Yeah, I think that's when.*
*MR. LINSKEY: He got it on March 12th?*
*DEPUTY CHIEF MORIN: Yeah, because I talked to Lisa Wolford[13] before.*
*MR. LINSKEY: Yup.*
*DEPUTY CHIEF MORIN: Where's her original letter; is it March 9th?*
*MR. LINSKEY: Yeah.*
*DEPUTY CHIEF MORIN: March 9th is her original letter?*
*MR. LINSKEY: Drafted a cover letter.*
*DEPUTY CHIEF MORIN: Yup.*
*MR. LINSKEY: But the -- the -- the Captain got a request on March 12th --*
*DEPUTY CHIEF MORIN: Yup.*
*MR. LINSKEY: -- and was finished with it by March 13th. Is that a short period of time for that? I mean, that's one of the bigger kind of complaints you guys have around here; right?*
*DEPUTY CHIEF MORIN: Yeah, but it -- it -- he reviewed everything, he made the contacts with the officers that he needed to, he read the reports; okay? So, we're efficient, I don't know -- and again, we've yet to hear from Dabella[14] and instead what we get is we get a 91A[15] request from WBZ; okay?*

Kroll then asks Deputy Chief Morin if it would be a more thorough and fair investigation if they interviewed those that signed affidavits. His response is as follows:

*MR. LINSKEY: Did -- any thought of speaking to the Massachusetts State Trooper who was there?*
*DEPUTY CHIEF MORIN: No.*
*MR. LINSKEY: Why not?*
*DEPUTY CHIEF MORIN: Why?*

[13] Senior Assistant Attorney General Lisa Wolford
[14] Attorney Christopher DiBella
[15] The Right to Know Law RSA 91-A:4 grants all citizens the right to access public records.

MR. LINSKEY: Because he's a law enforcement official who would be expected and required to give an independent review as to what he saw.
DEPUTY CHIEF MORIN: And if you read his statement it's pretty clear that it's more of a character reference. We saw his actions in there, he wasn't condemning the actions of the police department.
MR. LINSKEY: You would say he was -- he was assisting you guys.
DEPUTY CHIEF MORIN: He was assisting us. When he realized that it was his buddy -- his statement was a character reference, that this -- this has to be a misunderstanding and it probably -- I don't disagree that the coach probably was trying to, but what I do disagree with is that when the officers told him to step off, put your hands down, relax, he did not do that, and when he was -- when they grabbed hold of him, he didn't say okay guys, this is just a big misunderstanding and put his hands behind his back, he continued to, whether he thought he was justified in doing it or not, that's not the case; okay? So, the -- I read the, I think he's a detective --
MR. LINSKEY: Yup.
DEPUTY CHIEF MORIN: -- in Mass State Police, again, it was a character reference. He didn't say the officers did X, Y, and Z wrong or anything like that. In fact, in the video he's assisting, he's saying let them do their job, let -- let them -- stand back, let them do their job.
MR. LINSKEY: So probably a fair ended minded --
DEPUTY CHIEF MORIN: Yeah.
MR. LINSKEY: So, if you're looking for a fair -- look at the, --
DEPUTY CHIEF MORIN: Yeah.
MR. LINSKEY: -- you know, somebody from the other side who says, look, this is what I saw --
DEPUTY CHIEF MORIN: If --
MR. LINSKEY: -- and there's no thought of reaching out to him to get his version of events?
DEPUTY CHIEF MORIN: There is no complaint. There is no -- when they come in and file a complaint, which they will not do, --
MR. LINSKEY: So if they came in tomorrow and filed a complaint, --
DEPUTY CHIEF MORIN: Absolutely.
MR. LINSKEY: -- you would interview all of those people?
DEPUTY CHIEF MORIN: Absolutely.
MR. LINSKEY: What if it's within the six months' time period?

*DEPUTY CHIEF MORIN: Six months?*

*MR. LINSKEY: Yeah.*

*DEPUTY CHIEF MORIN: It has to be within six months, it can't be after six months, but yeah.*

*MR. LINSKEY: So if they file -- just -- and this just goes to your CBA, if they filed six months and one day and they come up with a video that shows six ways to Sunday guys were swearing and throwing rocks and bottles and you guys under your CBA could not take action for discipline, you could investigate it, but you couldn't tale discipline?*

*DEPUTY CHIEF MORIN: If we had a situation in which -- let's go back to Officer I.*

*MR. LINSKEY: Yup.*

*DEPUTY CHIEF MORIN: Six months and a day it came back that he split the guy over the head with a flashlight and we didn't know that, I don't care about the CBA, I'm going to fire his ass.*

*MR. LINSKEY: Okay. And then it would just work out in the grievance process, he could fight it.*

*DEPUTY CHIEF MORIN: Whatever.*

Kroll further notes that relative to the ice rink investigation, the informal inquiry was conducted in less than 24 hours without any actions other than reading the documents and examining two of the three videos. Captain Wagner did not interview any of the witnesses, as their statements were considered to have an air of bias and favoritism towards the complainant. However, with that logic, then the involved officers' statements should also be disregarded, as they are all acquaintances and co-workers, and their reports could also be considered biased toward the Salem PD. Further, one of the witnesses is a sworn law enforcement officer who, according to several law enforcement and civilian statements, assisted the Salem PD. Despite his actions that night at the ice center, he agreed to complete and sign an affidavit against fellow sworn law enforcement officers to support the complainant, and even his statement was disregarded.

Kroll also interviewed Captain Wagner, who as noted above, has never received any formal training in conducting IA investigations. Captain Wagner stated the following as to the thoroughness of his informal inquiry into the occurrence at the ice rink:

*CAPTAIN WAGNER: However, to give you a -- and you have it, so you -- so you know that I've done it, we received a -- the Ice Center, --*

MR. LINSKEY: Yup.
CAPTAIN WAGNER: -- we never received a complaint for that, still haven't to this day, no phone calls, Attorney Dabella was asked to contact me, my name directly.
MR. LINSKEY: Who asked?
CAPTAIN WAGNER: The AG's office.
MR. LINSKEY: Did anyone confirm with the AG's office that they asked the attorney to do that?
CAPTAIN WAGNER: Nope -- nope, but --
MR. LINSKEY: Would that be -- would that be something that would be helpful if somebody is saying, look, you guys never even reached out to the attorney --
CAPTAIN WAGNER: With all due respect, Dan, I'm not chasing down complainants, if they want to file a complaint and they've been given direction to contact me, and I -- I welcome them to call me, it -- it's out there but they -- but they chose to do other things --
MR. LINSKEY: Roger that.
CAPTAIN WAGNER: -- like contact media, contact, you know, newspapers and set up this whole charade to make their client the victim, I'm not chasing them down for their complaint. I'm here, I'm willing to take it, I'm willing to sit down and speak with them, all -- although at -- at this point I think that there's issue with that because of -- of the -- the witnesses and -- and I can't really speak to the defendant right now because he's represent --
MR. LINSKEY: Why not?
CAPTAIN WAGNER: Because he's represented by -- by his attorney. If I'm going to be questioning him about --
MR. LINSKEY: Well you can't speak to him about his criminal case, you can speak to him about his complaint.
CAPTAIN WAGNER: But that's the criminal case, that's part of the criminal case, I mean, evidence of what occurred during that, that's going to be part of it, so probably not the best time to be speaking to him. Secondly, I did take what the AG sent me, you have the CD, I did review every statement on there, I reviewed all the officer's reports, I did do an informal inquiry and looked into it even though I didn't receive a formal complaint.
MR. LINSKEY: Okay. So an informal inquiry was initiated because the email from -- because of the letter from the AG
CAPTAIN WAGNER: Yes.

MR. LINSKEY: -- and you did that -- were going to do that, you evaluated all the written documents from the people who put it in, --

CAPTAIN WAGNER: Yeah.

MR. LINSKEY: -- you read all the written reports from the officers, and you reviewed the videotapes. Were you able to get the third video to open?

CAPTAIN WAGNER: I was.

MR. LINSKEY: Okay.

MR. LINSKEY: Three years from now if this were in Court and you're on the stand defending your response, would it be better for the Town of Salem and the officers who were being possibly sued if your response was, well, I shouldn't have to chase people down, but I reached out, here's an email I sent to the attorney saying that I've become aware of a complaint from the Attorney General's Office, please call me at this number, if you have any issues or concerns I'd like to go over these complaints and see what you have to say. There's a process we have in place, I'd be willing to put it forward, let me know what your client would like to do; would it be better for you and Salem PD to have that document on file saying that, look, we -- we think this is all a bunch of bull, we don't -- we don't -- we think this is an attorney who's trying to use the media for his side, we've got this report from the AG, the AG's declined criminal, and what's -- the --

all the AG can do is say criminal; right? So, it's criminality, civil rights violations; right? If it's rules and regulation, F bombs, excessive kicks, telling people, you know, if you're --

CAPTAIN WAGNER: I'll stop you right there because the only thing that -- that is missing from this is me calling or -- or reaching out to -- to the attorney. I -- I felt it was sufficient that the authority that he decided to complain to, which was a tactical move on his part I feel, he complained to the AG's office, the highest law enforcement authority in the state, --

MR. LINSKEY: Yup.

CAPTAIN WAGNER: -- and then it was -- the complaint, it wasn't rejected but it was unfounded, so there was -- there was no criminal wrong doing, no civil rights violations --

MR. LINSKEY: Right.

CAPTAIN WAGNER: -- in -- in their opinion, and it was returned to him with instruction to contact Captain Wagner, I have the letter from the AG, so what -- what they sent to him,

MR. LINSKEY: And did --
CAPTAIN WAGNER: -- and --
MR. LINSKEY: So, you have the letter the AG sent to him?
CAPTAIN WAGNER: Yeah.
MR. LINSKEY: And it says contact Captain Wagner?
CAPTAIN WAGNER: I believe so, yeah.
MR. LINSKEY: Okay. We don't have that.
CAPTAIN WAGNER: Okay.
MR. LINSKEY: All we have is the -- your report that says the AG said that she was going to have him reach out to me, that's --
CAPTAIN WAGNER: I'll try -- when we take a break or whatever, I'll -- I'll --
MR. LINSKEY: But that's exactly what I'm look -- is there a documentation that says, look, --
CAPTAIN WAGNER: Let me see, I'll pull it out and see if it -- it might have been one that came in after the fact --
MR. LINSKEY: Okay.
CAPTAIN WAGNER: -- so maybe you didn't get it in that original -- when we sent out those -- the reproductions of all the -- the informals and the IAs that you guys got, --
MR. LINSKEY: Yup.
CAPTAIN WAGNER: -- it very well may have been not here yet, --
MR. LINSKEY: Okay.
CAPTAIN WAGNER: -- so, I'll look and see if that's in the -- I have -- I have the file.
MR. LINSKEY: Then we would both be in agreement that that's a better position for Salem PD to defend, to say --
CAPTAIN WAGNER: Yeah, I -- I suppose it would be a -- a better but in the same token there's also -- I don't feel there's anything wrong with -- with the way it was done. This guy is an attorney, he defends people for a living, --
MR. LINSKEY: Yup.
CAPTAIN WAGNER: -- he knows what to do, he knows where we are. If he so chose to make a complaint, he would do it with us if he wanted to, he knows it -- he -- it can be done and how to do it, it wouldn't be his first go around.
MR. LINSKEY: Sure.
CAPTAIN WAGNER: He certainly figured out where to find the AGs and he certainly figured out where to find Cheryl Fiandaca and -- and every other person involved in* this debacle that's out on the media, one sided debacle, he totally figured that out on

*his own, so do I need to leave him a trail of breadcrumbs to come in here and -- and fill out a complaint or did -- did he have no intention of ever doing that? That's my position on that.*

*MR. LINSKEY: Okay.*

"Kroll notes that a controversy arose regarding information that was reported by WBZ TV regarding this incident. WBZ TV reporter Cheryl Fiandaca ran an on-air story with several individuals critical of the arrest of the hockey coach at the ice rink. The reporter was the former public information officer for the Boston Police Department and worked for Former Chief Linskey in that capacity. Kroll had been provided the IA file concerning the ice rink prior to the story airing; however, the reports were in a file box in Kroll's office space, which was not accessed until Chief Linskey returned from international travel. Reports are also believed to have been provided to the attorney and defendant. Since leaving BPD, Chief Linskey has not had contact with Cheryl Fiandaca except by direct Twitter messages on three occasions – the last being on December 6, 2016 before she sent a link to the story she was airing over Twitter on April 26, 2018 saying she heard he may be involved in a review of the Salem PD. Linskey responded that he was on vacation. Linskey returned on May 1, 2018. On May 2, he went to the Kroll office and brought the case files concerning Salem out of their box for review while traveling domestically on another client matter. It was then that he reviewed the ice center report for the first time. Chief Donovan wrote a letter to the town manager stating that he was concerned that the Kroll team provided the documents to the news. Kroll has addressed this issue with the chief and several others. Kroll takes the integrity of their cases extremely seriously and did not share any documents with anyone other than the Kroll team.

Kroll has included hereto the letter sent by the Attorney General's Office to the complainant, the letter sent to the Salem PD and the letter sent to the plaintiff's attorney, Christopher Dibella, which states, "As mentioned when we spoke, I have referred your complaint and materials to the Salem Police Department for administrative review."

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

March 23, 2018

Christopher DiBella, Esq.
DiBella Law Offices, P.C.
45 Osgood Street
Methuen, MA 01844

By mail, and email to: Cdibella@dibellalaw-office.com

Dear Attorney DiBella,

As I said I would, I have reviewed the witness statements and video clips you provided to this office in conjunction with your complaint about Salem Police Department officers who responded to the Salem Icenter on December 2, 2017. I also reviewed the police reports about the incident.

The witness statements you provided suggest that parents attending an ice hockey game that night became angry at one or more hockey officials. The game became "contentious," emotions "escalated," and parents engaged in "verbal abuse." After the game ended, several parents from both teams continued to have "heated" discussions.

John Griffin was one of the parents who was still "heated" after the game. He argued with a man and his wife. Bob Andersen stepped in between Mr. Griffin and the others and raised his arms. One witness said that it appeared that Griffin and Andersen were "having a serious discussion." According to several of the witness statements, a tattooed officer (Sergeant Bagley) rushed up to Mr. Andersen, pushed and/or grabbed him, and threw him down or into a wall. Other officers got on top of Mr. Andersen, and according to some, assaulted and tased him. The videos show three to four officers on top of Mr. Andersen, who is on the ground. One of the officers appears to get flipped over by Mr. Andersen.

One of the witness statements reported that Sgt. Bagley ran over to Mr. Andersen and told him to put his hands behind his back; when Mr. Andersen took a step back and asked why, the officer grabbed him. Another statement reported that the officer told Mr. Andersen he was under arrest and then grabbed him. At least two of the witnesses recalled that in response to Sgt. Bagley telling Mr. Andersen's wife to shut up, Mr. Andersen said to the officer, "Don't tell her to shut up."

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The police reports suggest that police had been called to a fight at the Icenter. One of the officers reported that upon arrival, he was told that there was fight in the lower rink involving parents. He saw a crowd of people yelling, and noted that Sgt. Bagley, who was surrounded by people, pushed a man while ordering him to get back. The officer saw Mr. Andersen yell something at Bagley and take a step toward him with raised hands. The officer believed that Mr. Andersen was going to assault Sgt. Bagley. The officer ran up, grabbed Mr. Andersen, and began to pull him away from the crowd. Mr. Andersen began to "violently thrash around." Other officers arrived and assisted. Because Mr. Andersen continued to struggle and thrash, one of the officers used his Taser.

In his report, Sgt. Bagley indicates that when he entered the lower level of the rink, he walked into a crowd of 40-50 people. He saw two men, who he later determined were Mr. Griffin and Mr. Andersen, standing face to face. Mr. Andersen had both arms raised above his head. Sergeant Bagley believed that there was "animosity" between the two. He told Mr. Andersen to back off, but Mr. Andersen did not move. Bagley walked between the two and told Mr. Andersen to "back off" while pushing him. According to Sgt. Bagley, Mr. Andersen appeared angry and walked toward Bagley in an aggressive manner. At this point, a second officer grabbed onto Mr. Andersen and physically removed him from the area. Mr. Andersen was "twisting" and tried to pull away. He was ultimately tased. According to the reports, two of the officers were injured by Mr. Andersen during the struggle, one sustaining a cut in his mouth.

The Criminal Justice Bureau investigates allegations of criminal misconduct against State, and in some circumstances, local public officials. We will conduct an investigation when there is reason to suspect that a crime has occurred. Given the evidence summarized above, I cannot conclude that there is such reason here. Even if, as your witness statements suggest, Sgt. Bagley was mistaken about the nature of Mr. Andersen and Mr. Griffin's interaction, there is insufficient evidence to indicate that Sgt. Bagley's belief was unreasonable. *See* RSA 627:5.

Attorney DiBella, if you have any questions, please don't hesitate to call. As I mentioned when we spoke, I have referred your complaint and materials to the Salem Police Department for administrative review.

Sincerely,

Lisa L. Wolford
Senior Assistant Attorney General
Chief, Criminal Justice Bureau

Cc: Gordon J. MacDonald, Attorney General
Jane E. Young, Associate Attorney General
Patricia Conway, Rockingham County Attorney
Paul T. Donovan, Chief, Salem Police Department

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ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

March 9, 2018

Chief Paul T. Donovan
Salem Police Department
9 Veterans Memorial Parkway
Salem, NH 03079

Dear Chief Donovan,

On February 27, 2018, we received a complaint from Attorney Chris Dibella concerning an incident involving Salem officers, which occurred at the Salem New Hampshire Ice Center on December 2, 2017. Attorney Dibella's client, Robert Andersen, was charged in connection with the incident. Dibella alleged, amongst other things, that a Salem officer shoved Andersen and told Andersen's wife to "shut the f*** up."

I am referring this matter to you for what action you deem appropriate. Enclosed on disc are the documents and video provided by to this office Attorney Dibella, and the report generated by the New Hampshire Department of Justice investigator who took Attorney Dibella's call.

If I can be of additional assistance, please let me know.

Sincerely,

Lisa L. Wolford
Senior Assistant Attorney General
Chief, Criminal Justice Bureau
(603) 271-3671

LLW/mmp
Enclosure
1964918

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There is, in fact, no direction to contact Captain Wagner, in contrast with comments provided to Kroll. Captain Wagner completed his informal inquiry, wrote his report and closed the matter in less than 24 hours. In direct contrast with the department's policy, Captain Wagner did not attempt to call the complainant, claiming that he was not "chasing down complainants" and that such contact was precluded by the complainant's being represented by counsel.

It is Kroll's opinion that making good faith efforts to speak to a complainant is certainly not chasing them down and would represent standard practice in IA investigations or even informal inquiries. It is also Kroll's opinion that this informal inquiry was not conducted fairly or thoroughly and certainly not in accordance with law enforcement best practices. It also was not conducted in accordance with the Salem PD Policy GO 65-7, which states:

> II. POLICY: All complaints will be accepted and documented. Any investigation based on a complaint will be conducted in an open and fair manner, with the truth as the primary objective. The Salem Police Department shall accept all complaints against their employees and will fully investigate all such complaints.
>
> All violations of Department Rules and Regulations, Code of Conduct, Policies and Procedures, and all other directives which occur shall be dealt with in a fair and impartial manner, and in accordance with the Collective Bargaining Agreements in place with the Town of Salem. In all cases where disciplinary action is taken, the employee shall receive a copy of the documented discipline issued. (26.1.4)

Kroll further notes that in stark contrast with this department's policy was the fact that at some point after closing the informal inquiry, the Salem PD sought criminal complaints against two other individuals identified in video footage of the ice center incident. The evidence supporting those arrests allegedly came from the WBZ news footage. However, Deputy Chief Morin and Captain Wagner also told Kroll that they had received complaints from several witnesses from the other side of the disturbance who had come forward to dispute the complainant's version of events. The department accepted these witness statements and conducted interviews of them without attempting to corroborate the accounts by speaking to the complainant or any of the witnesses who signed affidavits in support of the complainant's allegations. If witnesses came forward to provide information to the Salem PD, the department should have made every effort to gather and evaluate that information. The officers' actions show an acceptance of information that supports their officers and also shows a complete disregard for any information to the contrary.

While Kroll does not claim to know what occurred at the ice rink and was not tasked with conducting an independent investigation of the events, it is our opinion that the Salem PD cannot conduct a fair or comprehensive IA review without speaking to witnesses from both sides. Furthermore, an IA

investigation is an administrative review and must be conducted in parallel with a criminal investigation. This is certainly not the first time the Salem PD has conducted a criminal investigation while at the same time conducting an administrative investigation. Several of the IA instances noted above confirm this statement. However, it is imperative that these investigations remain separate to avoid any indication of potential retaliatory charges.

Captain Wagner noted the following in his interview:

*MR. LINSKEY: But you can look at the video and if – if all of a sudden the guy is handcuffed and people kicked him five times in the head –*
*CAPTAIN WAGNER: A hundred percent.*
*MR. LINSKEY: But we don't have that, that's not –*
*CAPTAIN WAGNER: We – we don't have it and I'm a hundred percent agreeing with you, handcuffs go on, it's over.*
*MR. LINSKEY: Okay.*
*CAPTAIN WAGNER: But it – it didn't occur. So, in – in speaking to her about that, she – we got into talking about the – about the – the fact that we arrested two additional people from it and, you know, her*
*MR. LINSKEY: Two additional people?*
*CAPTAIN WAGNER: Yeah, yup. Her initial response to that was, well that looks retaliatory, I'm like, well, it may look that way but without getting into it, additional evidence was uncovered and the – we had proof of it, as a result of you airing that video. I didn't have that video, it was actually discovered when I – I got the CD.*
*MR. LINSKEY: The third one?*
*CAPTAIN WAGNER: Yeah. When – when I was reviewing it for the internal review I came across some of this stuff and showed it to the – the guys involved and they're like, oh shit, yeah, there it is, and then they found out some additional video of the guy on the ice or whatever, so that's what it is, it's the guy that went out on the ice and – did you say the – the – the guy that slapped the officer?*
*MR. LINSKEY: I heard there was one other and that – so I received a call from her again saying, did you know they're bringing complaint against the guy who slapped the officer's hand? I said, nope. She said, yup, they're going to get a warrant for him, they told him you're going to turn himself in. I said oh, okay, thanks, Cheryl. And I also spoke to Cheryl and the attorney and said, because the attorney called me, look, we are not doing a review of the internal affairs cases, just so we're clear, I'm not –*

*CAPTAIN WAGNER: You said this?*
*MR. LINSKEY: Yeah.*
*CAPTAIN WAGNER: To who?*
*MR. LINSKEY: Cheryl Fiandaca and Dabella.*
*CAPTAIN WAGNER: But you are.*
*MR. LINSKEY: No, we're not. I'm doing a review of the process. Who -- I'm not going to interview people about --*
*CAPTAIN WAGNER: Well, okay --*
*MR. LINSKEY: I'm not going to interview the people about, you know, is -- is -- is, you know, what did you say, did -- what did you see, --*
*CAPTAIN WAGNER: No, --*
*MR. LINSKEY: -- I'm not pulling my own video, I'm not doing my own independent review of what happened at the skating rink or any of these events.*
*CAPTAIN WAGNER: No -- no -- no, you're not doing your own investigation but you're -- you're questioning the -- the steps and tactics and -- and -- and verbiage and phrases and things that we said and the way we did things in the -- in the individual investigations.*

This investigation ***was not*** compliant with the Salem PD policy. This investigation ***did not meet*** acceptable best practices for internal reviews. Not only did this investigation not meet acceptable best practices, but these actions undermine the integrity of the Salem PD. Further, it is Kroll's opinion that there was a significant failure by the department's leadership in their accepting this investigation as a complete effort.

**Internal Investigation (formal) IA #18-01: Officer BB**

A review of this formal investigation from January 2018 shows that Captain Dolan investigated a failure of Officer BB to keep a current certification for his K-9, as well as payroll inconsistencies related to training dates. The findings of failure to maintain narcotics certification was sustained, as well as a finding of failure to keep required department records. The allegations of collecting pay for training days without being in attendance were unfounded. Despite the sustained findings of two policy violations, it is unknown what discipline, if any, was recommended or issued to Officer BB, as there is no documentation of such with this packet.

This investigation ***was*** compliant with the Salem PD policy. This investigation ***did not meet*** acceptable best practices for internal reviews, as it lacked documentation.

# EXHIBIT

# L

# THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.** **SUPERIOR COURT**
**NORTHERN DISTRICT**

Union Leader Corporation

v.

Denise M. van Zanten, in her capacity as Library Director of the Manchester Public Library

No. 216-2019-CV-00009

**ORDER**

The plaintiff, Union Leader Corporation, brought the instant petition for access to public records against the defendant, Denise M. van Zanten, in her capacity as the director of the Manchester Public Library. Specifically, the plaintiff seeks access to a security camera video recording of an arrest that occurred on September 24, 2018, under RSA 91-A—the Right-to-Know law. The defendant objects. The court heard argument on January 23, 2019. Because the public's interest in disclosure outweighs the government's interest in nondisclosure and the privacy interest in nondisclosure of the involved individual, the plaintiff's request for access is GRANTED.

The material facts are not in dispute. On September 24, 2018, the Manchester police effectuated an arrest of C.E. in a public area of the Manchester Public Library. A library security camera recorded a video of the event. The state subsequently initiated criminal proceedings against C.E. based on his conduct before and during the arrest. Specifically, C.E. is charged with simple assault, disorderly conduct, resisting arrest or detention, and criminal trespass. The criminal proceedings are currently stayed pending an adjudication of competency. The plaintiff requested access to the video recording. Citing the RSA 91-A:5, IV privacy exemption, the defendant denied the plaintiff's request. The instant action followed.

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." RSA 91–A:1 (2001). "This legislation helps further our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Goode v. New*

*Hampshire Office of Legislative Budget Assistant*, 148 N.H. 551, 553 (2002) (citing N.H. CONST. PT. I, ART. 8). "The Right–to–Know Law does not, however, guarantee the public an unfettered right of access to all governmental workings, as evidenced by certain legislatively created exceptions and exemptions." *Id*. (quotations and citations omitted).

One legislatively created exception is set forth in RSA 91-A:4, I, which states that every citizen "has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies … except as otherwise prohibited by statute or RSA 91-A:5." RSA 91-A:5, IV expressly exempts:

> Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.

In this case, the defendant claims that disclosure of the video would constitute an invasion of privacy.[1]

The determination of whether the release of public records would constitute an invasion of privacy requires the court to engage in a three-step analysis.

> First, [the court] evaluate[s] whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right–to–Know Law mandates disclosure. … Next, [the court] assess[es] the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, [the court] balance[s] the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure.

*Lamy v. N.H. Public Utilities Comm'n.*, 152 N.H. 106, 109 (2005).

In this case, the defendant is not claiming a governmental interest in nondisclosure; rather, the defendant is asserting the privacy interest of C.E. as an individual who has been arrested and faces the stigma of a criminal prosecution. The court agrees that this is a legitimate privacy interest. Additionally, the defendant asserts C.E.'s privacy interest based on the pending competency determination. The court disagrees. The plaintiff is not seeking information pertinent to C.E.'s present ability to consult with and assist his lawyer with a reasonable degree of rational understanding and his factual as well as rational under-

[1] The defendant did not claim the "library user" exemption and the court will not engage in a *sua sponte* analysis of its applicability.

standing of the proceedings against him—the standard under which competency is adjudicated. *State v. Moncada*, 161 N.H. 791, 794 (2011). It is only seeking the video record of C.E.'s arrest.

With respect to the public's interest in disclosure, the plaintiff asserts that the video will shed light on the performance of on-duty Manchester police officers regarding their interactions with C.E. The court agrees that this is an appropriate public interest in disclosure.

It remains to balance the public's interest in disclosure against C.E.'s privacy interest in nondisclosure. In so doing, the court is mindful of its obligation to "resolve questions regarding the Right-to-Know law with a view of providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *WMUR Channel Nine v. N.H. Dep't of Fish & Game*, 154 N.H. 46, 48 (2006). Thus, the court must "construe provisions favoring disclosure broadly, while construing exemptions narrowly." *Montenegro v. City of Dover*, 162 N.H. 641, 650 (2011), citing *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581 (2006). Under this standard, the balance favors the plaintiff. The public has a broad interest in the manner in which public employees are carrying out their functions—here, specifically how ongoing Manchester police officers engaged with a member of the public before and during effectuating an arrest. C.E.'s privacy interest is less compelling. While there is a stigma in facing criminal charges, the charges and the underlying factual allegations are already a part of the public record. The arrest itself was effectuated in a public area of the Manchester Library.

The plaintiff also seeks an award of attorney's fees. RSA 91-A:8 provides

> If any public body or public agency or officer, employee, or other official thereof, violates any provisions of this chapter, such public body or public agency shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter. Fees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter or if the parties, by agreement, provide that no such fees shall be paid.

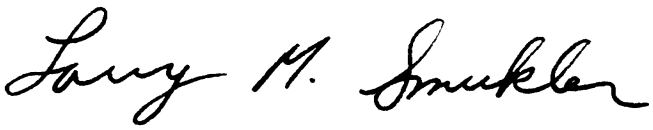
Here, the plaintiff did require the court's intervention to obtain relief. The complicating factor is C.E.'s pending competency adjudication. Although the court did not accept the defendant's assertion of C.E.'s privacy interest in the confidentiality of his competency adjudication because the video of the arrest does

not involve it, there can be no question of a privacy interest in competency matters. RSA 135:17-c. Additionally, the pending competency adjudication prevents C.E.'s criminal attorneys from taking a position in the underlying criminal matter as to whether particular information, including the video of the arrest, should be sealed. Consequently, the court cannot find that the defendant "knew or should have known that the conduct engaged in was in violation of [the Right-to-Know Law]."

Based on the foregoing, the court finds and rules that the public's interest in disclosure outweighs C.E.'s privacy interest. Accordingly, the plaintiff's request for access to the security camera video recording of C.E.'s September 24, 2018 arrest is GRANTED. The court also finds and rules that the defendant did not know and should not have known that denial of access would violate RSA 91-A. Accordingly, the defendant's request for an award of attorney's fees is DENIED.

**So ORDERED.**

**Date: January 24, 2019**



**LARRY M. SMUKLER**
**PRESIDING JUSTICE**

Clerk's Notice of Decision
Document Sent to Parties
on 01/25/2019

# EXHIBIT

# M

**CACR 16 - VERSION ADOPTED BY BOTH BODIES**

22Feb2018... 0118h
10May2018... 1936-EBA

2018 SESSION

18-2643
06/10

CONSTITUTIONAL AMENDMENT
CONCURRENT RESOLUTION ***16***

RELATING TO: privacy.

PROVIDING THAT: an individual's right to live free of governmental intrusion is natural, essential, and inherent.

SPONSORS: Rep. Kurk, Hills. 2; Rep. Cushing, Rock. 21

COMMITTEE: Judiciary

---

AMENDED ANALYSIS

This constitutional amendment concurrent resolution provides that there is a natural, essential, and inherent right to live free of governmental intrusion.

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Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type

**CACR 16 - VERSION ADOPTED BY BOTH BODIES**

22Feb2018... 0118h
10May2018... 1936-EBA

18-2643
06/10

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Eighteen*

CONCURRENT RESOLUTION PROPOSING CONSITUTIONAL AMENDMENT

RELATING TO: privacy.

PROVIDING THAT: an individual's right to live free of governmental intrusion is natural, essential, and inherent.

*Be it Resolved by the House of Representatives, the Senate concurring, that the Constitution of New Hampshire be amended as follows:*

I. That the first part of the constitution be amended by inserting after article 2-a the following new article:

[Art.] 2-b. [Right to Privacy.] An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.

II. That the above amendment proposed to the constitution be submitted to the qualified voters of the state at the state general election to be held in November, 2018.

III. That the selectmen of all towns, cities, wards and places in the state are directed to insert in their warrants for the said 2018 election an article to the following effect: To decide whether the amendments of the constitution proposed by the 2018 session of the general court shall be approved.

IV. That the wording of the question put to the qualified voters shall be:
"Are you in favor of amending the first part of the constitution by inserting after article 2-a a new article to read as follows:

[Art.] 2-b. [Right to Privacy.] An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."

V. That the secretary of state shall print the question to be submitted on a separate ballot or on the same ballot with other constitutional questions. The ballot containing the question shall include 2 squares next to the question allowing the voter to vote "Yes" or "No." If no cross is made in either of the squares, the ballot shall not be counted on the question. The outside of the ballot shall be the same as the regular official ballot except that the words "Questions Relating to Constitutional Amendments proposed by the 2018 General Court" shall be printed in bold type at the top of the ballot.

VI. That if the proposed amendment is approved by 2/3 of those voting on the amendment, it becomes effective when the governor proclaims its adoption.

SPEAK FREELY

# On Election Day, the Voters of New Hampshire Can Protect Their Privacy in the Digital Age


Chad Marlow, Senior Advocacy and Policy Counsel, ACLU & Neal Kurk, Representative (Hillsborough 2), New Hamsphire House of Representatives

OCTOBER 15, 2018 | 2:45 PM

TAGS: Surveillance Technologies, Privacy & Technology


“Live free or die.”

As reflected in its official state motto, no state has unequivocally embraced the principles of liberty and privacy more than the state of New Hampshire. These ideals make up the core of the state’s philosophical DNA. It is therefore surprising that New Hampshire is conspicuously missing from the list of the 10 diverse states that have explicitly enshrined the right to privacy in their constitutions. But on Election Day, Granite State voters will have a chance to remedy that oversight.

Earlier this year, the New Hampshire Legislature passed by a necessary two-thirds vote a proposed amendment to the state constitution guaranteeing the right to privacy in the digital age. Now it’s up to voters to enshrine that natural right. New Hampshire’s ballot Question 2 (Q2) would do just that by adding simple but mighty language to the constitution: “An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.”

The risks to personal privacy are certainly greater today than they were when Gen. John Stark wrote — “Live free or die. Death is not the greatest of evils.” — in an 1809 letter to his fellow veterans of the Battle of Bennington, a turning point in the American Revolutionary War. Today’s powerful surveillance technologies can provide the state government and state and local law enforcement agencies with the ability to spy on people when they walk on public sidewalks, drive on public roads, play in public parks, attend public schools, and visit public libraries. They can track you using your own cell phone like a GPS device. They can access your internet search history and social media accounts, and they can read your text messages and emails.

Without state constitutional protections, privacy is not the Granite State's default setting. Rather, it needs to be repeatedly established, protected, and defended by the state legislature each time a new surveillance technology or method is established, which is a common occurrence in our modern technological world. State legislators should not play an endless game of Whack-A-Mole against threats to their residents' privacy. Relying exclusively on piecemeal statutes or search and seizure provisions written before the dawn of the internet is no way for New Hampshire to protect privacy.

To be sure, the Fourth Amendment to the United States Constitution provides every American with privacy rights. But in New Hampshire, where the right to privacy is a bedrock, nonpartisan political value, the U.S. constitutional right to privacy should be considered a floor, not a ceiling. That is why it is high time for the voters of New Hampshire to follow their legislature's lead by voting to guarantee an explicit right to informational privacy in the state constitution.



Understandably, some New Hampshire voters may find it hard to believe their state does not already have the nation's highest privacy standards, but a simple examination of current state law reveals that it does not. For example, while Part I, Article 19 of

the New Hampshire Constitution provides some privacy protections in the arena of police investigations, if Q2 were adopted, the constitution would provide much broader protection against a wide array of potential governmental intrusions into private, personal information.

Q2 would require that the government obtain a judicial warrant, supported by probable cause, before accessing any personal information. If contested, the government would need to show a compelling state interest in obtaining access to that information before a court would allow the government access. This is not intended to be an insurmountable burden, especially when public safety is legitimately at risk, but it will serve as an important speed bump – and, from time to time, an all-out stop sign – on the road between the government and your private information.

Q2 would also help prevent the police from accessing your private information through third parties. For instance, Q2 would deny the police access to any account held by your internet service provider unless you provided your ISP with a waiver or the police obtained a warrant. This principle applies to an array of circumstances where a third party has not obtained your consent to turn your personal information over to the police.

Put simply, adopting Q2 would fill important gaps in current statutory privacy protections and would provide automatic privacy protections regardless of what the next wave of surveillance technologies and techniques bring. Nothing could be more consistent with New Hampshire's legacy of cherishing individual liberty. This November, New Hampshire voters should vote yes on Ballot Question 2.

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