THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS SUPERIOR COURT
SOUTHERN DISTRICT

No. 226-2018-CV-00537

THE NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM, ET AL.
v.
NEW HAMPSHIRE DEPARTMENT OF JUSTICE

PETITIONERS' SURREPLY WITH RESPECT TO THE DOJ'S MOTION TO DISMISS

Petitioners respectfully file this Surreply concerning Respondent Department of Justice's Motion to Dismiss. The Department cannot meet its significant burden to justify withholding the EES List.[1] At the outset, the Department's Reply is telling for what it does not dispute:

- The Department does *not dispute* that the List is not created or maintained by the Department for any human resource or employment purpose. Thus, the List cannot be viewed as "personnel" related under either RSA 105:13-b or RSA 91-A:5, IV.[2] This is dispositive and requires this Court to grant the Petition in full.

- The Department does *not dispute* that that disclosure of the List will inform the public of police misconduct. Of course, there is an overwhelming public interest in disclosure with respect to documents that reflect the ability of a government official—here, a police officer—to perform his or her job properly.[3]

- The Department does *not dispute* that its policy of secrecy protects the following officers who are on the List: (i) officers who the State has charged with criminal conduct that resulted in placement on the List, (ii) officers who have been convicted of crimes, (iii) officers who have been terminated as a result of the conduct that led to placement on the List, (iv) officers who have exhausted internal grievance procedures, and (v) officers where there would be no dispute that disclosures would need to be made to defendants in every criminal case in which the officer is a testifying witness.

[1] *See N.H. Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 439 (2003) ("The party seeking nondisclosure has the burden of proof.").
[2] *See Reid v. N.H. AG*, 169 N.H. 509, 532 (2016) (the term "personnel" "refers to human resources matters"); *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 8 (2003) ("personnel" means documents "useful in making employment decisions regarding an employee").
[3] *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) (same); *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."); *see also Mulgrew v Bd. of Educ. of City School Dist. of City of New York*, 87 A.D.3d 506, 507-08 (Sup. Ct. of N.Y., App. Div., 1st Dep't 2011) ("[Teacher Data Reports that disclose teachers' names] concern information of a type that is of compelling interest to the public, namely, the proficiency of public employees in the performance of their job duties").

- The Department does *not dispute* that its interpretation of RSA 105:13-b gives the police special categorical protections with respect to their personnel files—categorical protections do not exist for other government employees under Chapter 91-A.

- The Department does *not dispute* that the sample certificate of compliance attached to the Department's March 21, 2017 memorandum (located at *Exhibit V*) states that (i) the police chief has reviewed the personnel files of its officers "in compliance with the guidance provided by the Attorney General's Memorandum" (which include due process protections), and (ii) "I have notified every officer whose name was placed on the EES of such placement in writing," thereby ensuring that due process has been provided to at least those who have been placed on the List since March 21, 2017 under this process.[4]

- The Department appears to *not dispute* that, despite its burden, it has presented no evidence supporting its argument that disclosure "could chill police chiefs' willingness to designate more borderline personnel issues as so-called 'Brady' or 'Laurie material.'"[5]

Petitioners file this Surreply to make the following additional points.

I. The Department Ignores the Definition of "Personnel" as Defined by the Courts.

The Department accuses Petitioners of not addressing the plain language of RSA 105:13-b. *See* Reply at p. 1. This is incorrect. As explained in Section I.A of Petitioners' Objection, the EES List is not a "personnel" document under the plain meaning of RSA 105:13-b or RSA 91-A:5, IV because the List does not have a relationship to employment. As the 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*

[4] Moreover, the additional due process that was given to the police officers on the List in the April 30, 2018 Memorandum (*Exhibits W and VV*) was heralded by the police and the Governor. In a press release (*Exhibit QQ*), the Governor stated: "The new guidance being issued today represents a major step in restoring full due process for our men and women in law enforcement …. [O]ur men and women in law enforcement deserve the benefit of the doubt, and they deserve the same robust due process protections as any criminal defendant would have in court. Today's new guidance from the Attorney General will ensure that each and every officer has clear due process rights that they can rely on." The New England Police Benevolent Association New Hampshire State Director Stephen J. Arnold, Sr. added that, through the creation of the April 30, 2018 Memorandum, "Governor Sununu came through with his promise to us." *Id.* The State cannot, on one hand, publicly herald these due process protections and then, in this litigation, claim that they are essentially hollow and inadequate.

[5] *See Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551, 556 (2002) ("[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.").

Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 8 (2003).[6] Under this definition, the List has no employment purpose. The Department has already conceded this point in stating that the List exists "for the singular purpose of establishing a reference tool for prosecutors to initiate their inquiry as to the existence of exculpatory evidence as to a particular defendant's criminal matter." *See* D.O.J. Mot. to Dismiss Memo. at 9. Perhaps because of this fatal admission, the Department now argues that *Reid* defined the term "personnel" in the context of Chapter 91-A, not RSA 105:13-b. *See* Reply at p. 6. But the Department offers no explanation—because it cannot—for why the term "personnel" would somehow have a definition under RSA 105:13-b that differs from its well-established definition under Chapter 91-A.

This Court can easily reject the Department's theory that, despite its admission that the List has no employment purpose, the List is still "personnel" related because it "is comprised of confidential disciplinary findings made by the employer" and sent to the Department. *See* Reply at p. 6. This argument, again, ignores the definition of "personnel" as established in *Reid* and by other courts. The question in determining whether a document is "personnel" related is not its location or contents, but rather what the "nature and character" of the document is and how the document is used.[7] For example, in *Worcester Telegram*, the documents at issue concerned "officers' reports," "witness interview summaries," and 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 Court concluded that the documents were not "personnel" related. The Court explained: "However, that these documents bear upon such

[6] *See also Md. Dep't of State Police v. Md. State Conference of NAACP Branches*, 190 Md. App. 359, 373, 374-75 (Ct. Special App. Md. 2010) (noting that, for the personnel exemption to apply, the documents requested must, in part, "directly pertain to employment"), *aff'd on other grounds*, 430 Md. 179 (Ct. App. Md. 2013).

[7] *See Worcester Telegram*, 58 Mass. App. Ct. at 9, 10 ("[T]he <u>nature and character</u> of the document determines whether it is 'personnel [file] or information.' Put differently, the same information may simultaneously be contained in a public record and in exempt 'personnel [file] or information.'") (emphasis added).

[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.* (emphasis added). Put another way, 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 therefore is a public record.[8] This is precisely the case here with respect to the List, as the List's "essential nature and character derive from [its] function" to help ensure that exculpatory information is given to defendants—a function which, as the Department has effectively acknowledged, is not employment related.

Accordingly, the List is not a "personnel" document under RSA 105:13-b or RSA 91-A:5, IV. Thus, this Court's inquiry is over and the Petition must be granted.[9]

II. The Department Ignores RSA 105:13-b's Textual Limitation to Criminal Cases. Even if the List is a "personnel" document under RSA 105:13-b (and it is not), that statute is plain on its face that it does not operate as a categorical exemption under Chapter 91-A for police personnel documents.[10] Rather, the statute only pertains to how police personnel files should be treated in the context of a "criminal case."

The Department makes much of the language in the statute stating, "…. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer." *See* RSA 105:13-b, III; Reply at p. 2. But the Department ignores the context of

[8] This principle in *Worcester Telegram* 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.").

[9] Because RSA 105:13-b does not apply to the EES List given that the List is not a "personnel" document, RSA 91-A:4, I's exemption for information "exempt as otherwise prohibited by statute" also does not apply.

[10] This Court need not reach this inquiry if the Court concludes that the List is not a "personnel" document under RSA 105:13-b or RSA 91-A:5, IV.

this statement, which indicates that this confidentiality applies to judges and prosecutors in the context of *a criminal case*. Indeed, the statute's focus is how to create confidentiality in the limited context of a "criminal case."[11] As the statute goes on to explain:

> No personnel file of a police officer who is serving as a witness or prosecutor *in a criminal case* shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence *in that criminal case*, unless *the sitting judge* makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to *that criminal case*. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to *the judge*. *The judge* shall examine the file in camera and make a determination as to whether it contains evidence relevant to *the criminal case*. Only those portions of the file which *the judge* determines to be relevant *in the case* shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases ….

RSA 105:13-b, III (emphasis added).

The Department ignores this plain language making clear that this statute only applies to criminal cases and, instead, seeks to rewrite the statute to provide blanket confidentiality—and special protections—to police officers under Chapter 91-A. The categorical exemption that the Department seeks to create exists nowhere in the text of RSA 105:13-b. Both the Department and this Court are barred from "add[ing] words [to the statute] that the legislature did not see fit to include." *See N. Country Envtl. Servs. v. Bethlehem*, 150 N.H. 606, 616 (2004).[12]

III. The Department Misstates RSA 105:13-b's Legislative History. Assuming again that the List is a "personnel" document under RSA 105:13-b, the 1992 legislative history supports the fact that RSA 105:13-b does not operate as a categorical exemption from Chapter 91-A.[13] Following Petitioner Union Leader Corp.'s objection, the legislature amended the bill

[11] *See State v. Brouillette*, 166 N.H. 487, 490 (2014) ("[W]e interpret a statute in the context of the overall statutory scheme and not in isolation.").

[12] The Department cites *CaremarkPCS Health, LLC v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583 (2015) for the proposition that a statute that does not expressly mention RSA 91-A nonetheless can "otherwise[]" prohibit disclosure of documents. *See* Reply at p. 3. This statement of the law is unremarkable. While the statute at issue *CaremarkPCS* did create clear exemptions that barred disclosure, RSA 105:13-b does not by its plain terms.

[13] This Court can examine the legislative history of RSA 105:13-b if it believes that the statute is ambiguous as to its applicability to the List. *See State v. Brouillette*, 166 N.H. 487, 494-95 (2014) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent."). Moreover, if the Court believes that there is ambiguity, any such ambiguity must be

creating RSA 105:13-b to delete a categorical exemption for police personnel files under Chapter 91-A. This amendment makes clear that the legislature did not intend RSA 105:13-b to act as a blanket exemption for police officers' personnel files under Chapter 91-A. Instead, such files are subject to, in applying this exemption, the public interest/privacy interest balancing analysis recognized in *Reid*.[14] *See Cowan v. Tyrolean Ski Area*, 127 N.H. 397, 403 (1985) (noting the cannon of interpretation that "any material change in the language of the original act is presumed to indicate a change in legal rights"). As Petitioner Union Leader Corp. explained to the legislature, this means that such information will be available to the public *only* where a court finds that the public interest in disclosure outweighs the officer's privacy interest in nondisclosure. This is precisely how Chapter 91-A is supposed to work to foster accountability.

The Department attempts to minimize the significance of the legislature's deletion of this categorical exemption by speculating that some legislators may have thought that the deleted exemption was "superfluous." *See* Reply at p. 4. However, nothing in the legislative record indicates that legislators deleted the categorical exemption specifically because they believed that such a categorical exemption already existed and was surplusage. At the time this bill was being considered in 1992, there was, like today, an exemption for "personnel" file information

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resolved in favor of disclosure, as statutes creating exemptions under Chapter 91-A must be viewed narrowly. *See Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551, 554 (2002) (noting that courts construe "provisions favoring disclosure broadly, while construing exemptions narrowly").

[14] The Department cites the following sentence in the statement of intent of the bill, as amended, in support of its view that the legislature believed that Chapter 91-A already created a categorical exemption for police personnel files: "This bill, as amended by the Committee, provides an effective and appropriate standard for court review of personnel files, and preserves the important confidentiality which police personnel files require." *See Exhibit LL*, at LEG21; Reply at p. 5. But this statement, when read in context, does not support the Department's position. This statement goes on to specify that its focus is confidentiality *in the context of criminal cases*: "This bill was submitted in response to growing evidence that police personnel files are being used for 'fishing expeditions' *in the course of criminal trials*, the purpose of the fishing expedition being to deter or delay *criminal prosecutions*." *See Exhibit LL*, at LEG21 (emphasis added). Indeed, the "analysis" to the original version of the bill that contained the categorical Chapter 91-A exemption stated that this bill "require[es] confidentiality of personnel files of local police officers except in certain criminal cases." *See id.* at LEG004. After this categorical exclusion was deleted by the legislature, the "analysis" to the bill was changed to simply address "the confidentiality of police personnel files *in criminal cases*." *Id.* at LEG026 (emphasis added). The amended analysis of the bill also made clear that it "permits the personnel file of a police officer serving as a witness or prosecutor *in a criminal case* to be opened for purposes of that case under certain conditions." *Id.* at LEG027 (emphasis added).

under Chapter 91-A, but that exemption was not categorical. *Reid* makes this clear.[15] Petitioner Union Leader Corp. also explained clearly to the legislature that there was no categorical exemption for police personnel files under Chapter 91-A, and that the disclosure of such information was governed by a public interest/privacy interest balancing analysis. Informed that, with the categorical exemption, the bill "will knock a gaping hole in the right-to-know law," *see* *Exhibit LL*, at LEG013, the legislature, over no opposition, deleted the categorical exemption, leaving in place the public interest/privacy interest balancing analysis for such information. *Id.* at LEG 040 (noting "[t]here was no opposition" to the amended bill). The Department would have this Court ignore what the legislative history makes unmistakable.

The Department also argues that it "makes no sense" for a member of the public to access police personnel files through Chapter 91-A "when RSA 105:13-b prescribes disclosure except in limited circumstances to specific criminal defendants." *See* Reply at p. 2. But this makes perfect sense because RSA 105:13-b is a special process for defendants in the context of a criminal case to obtain *only* police personnel file information that is potentially exculpatory. It was not intended to alter or interfere with the public's access to information under Chapter 91-A—a statute that serves a broader purpose to (i) educate the public about government employees' misconduct and (ii) deem information "public" so long as the public interest in disclosure is greater than the privacy interest in nondisclosure. Whatever policy criticisms the Department has of the legislature's approach are outside the purview of this Court.[16]

IV. The Department's Position of Secrecy Gives the Police Special Constitutional Protections to Avoid "Stigma." The Department misses the point of Petitioners' argument that

[15] *See Reid*, 169 N.H. at 528 ("We now clarify that … 'personnel … files' are not automatically exempt from disclosure. For those materials, 'th[e] categorical exemption[ ] [in RSA 91-A:5, IV] mean[s] not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure.'") (internal citations omitted)).
[16] *See Boehner v. State*, 122 N.H. 79, 85 (1982) ("our task is not to second-guess the legislature or question the factors which went into its decision").

the List's secrecy gives the police greater confidentiality rights than the citizens whom they charge with crimes. The Department believes that the stigma associated with placement on the List—after a sustained finding of misconduct—gives officers on the List a constitutional liberty interest in privacy that justifies secrecy. *See* D.O.J. Memo. in Support of Mot. to Dismiss at 37-38. What makes this position troubling is that, of course, members of the public charged with crimes have no constitutional liberty interest in privacy due to the stigma of being accused. Indeed, the stigma that individuals charged with crimes face is far greater than the stigma that police officers face when they are placed on the List. Yet the accused have no constitutionally-protected privacy interest in anonymity because our constitutional and statutory framework values transparency over secrecy when it comes to how the criminal justice system operates. Like persons charged with crimes, police officers on the EES List have no constitutionally-protected interest in anonymity when they have committed serious "sustained" misconduct.

V. The Department's Position Protects Police Officers Who Have Done Bad Things.

Further demonstrating the lengths to which it is willing to go to keep the EES List secret, the Department continues to take the position that even officers who have been charged and convicted of crimes have a "privacy" interest in nondisclosure. For example, the Department criminally charged former Claremont police officer Ian Kibbe with, among other things, two misdemeanors: one count of unsworn falsification and one count of obstructing government administration. *See* ***Exhibit II***. Mr. Kibbe ultimately pled guilty. On January 7, 2019, he was sentenced to 90 days in jail. At sentencing, Senior Assistant Attorney General Geoffrey Ward stated that Mr. Kibbe engaged in "a calculated lie, one that he never took any steps to correct when he had the opportunity to …. [I]t's not an understatement to say it shakes one's faith in the

system."[17] Superior Court Judge Brian Tucker also stated at sentencing that Mr. Kibbe's actions hurt the entire criminal justice system.[18] Yet, despite the fact that Mr. Kibbe lied in the performance of his duties and engaged in conduct that "shakes one's faith in the system," the Department is hiding from the public whether Mr. Kibbe is on the List. It cannot be seriously disputed that the public has a strong interest in knowing whether Mr. Kibbe is on the List. Should not the public know if Mr. Kibbe is on the EES List if it is to have confidence in how the Department manages the List?

VI. The Department's Recent Addition of Approximately 80 Officers to the List Highlights the Critical Need for Disclosure. The fact that anywhere between 78 and 86 officers have been added to the List during the past six months only enhances the critical public interest in disclosure.[19] As the Department has publicly acknowledged, many of these officers have been recently added based on conduct that occurred some time ago, well before placement on the List occurred.[20] The Department's admission raises the real possibility that, with respect to many of these recently added officers, (i) there is a meaningful time gap between the "date of the incident" and the recent date that the Department was notified of the placement on the List, and (ii) during this time gap before formal placement on the List, disclosures concerning these added officers were not made by local prosecutors in individual criminal cases as required under the United States and New Hampshire Constitutions. Unfortunately, the public does not know

[17] ***Exhibit YY*** (Jordan Cuddemi, "Former Claremont Police Officer Sentenced to 90 Days in Jail," *Valley News*, Jan. 7, 2019)
[18] ***Exhibit ZZ*** (Damien Fisher, "Former Claremont Officer Given Three-month Jail Sentence," *Union Leader*, Jan. 7, 2019).
[19] For this Court's reference, Petitioners attach as ***Exhibit WW*** the Respondent's updated EES List dated November 29, 2018 containing the names of approximately 249 officers that have credibility or trustworthiness issues—an increase of at least 78 officers from the June 1, 2018 EES List containing the names of 171 officers. Petitioners also attach as ***Exhibit XX*** the Respondent's EES List Certificate of Compliance addressing municipalities' compliance with EES List procedures contained in the Respondent's March 21, 2017 memorandum located at ***Exhibit V***. It is worth noting that New Hampshire two largest cities—Manchester and Nashua—are apparently, for whatever reason, still not in compliance with these procedures.
[20] Petitioner *Concord Monito*r recently reported: "[Senior Assistant Attorney General Geoffrey Ward] pointed out on Friday [November 30, 2018] some of the new names might be officers who have done something in the past but were not added to the DOJ's list until recently." *See* ***Exhibit AAA*** (Caitlin Andrews, "N.H. AG's Office: Number of Officers with Credibility Issues Has Increased Since June," *Concord Monitor*, Dec. 3, 2018).

whether a time gap exists between the "date of incident" and the "date of notification" because the Department has, without any explanation or justification, redacted the "date of incident" from the public version of the EES List. Here, disclosure of the List will give the public and defense attorneys the ability to vet whether local prosecutors made appropriate disclosures in past cases with respect to each of these added officers. The Department should, given its obligation to perform justice and ensure that prosecutors are following the Constitution, investigate whether disclosures have occurred during these "gaps." And, whether the Department investigates or not, the public has a right to investigate this for itself.

The Department cannot provide an assurance that disclosures were made during any of these time "gaps," as assistant county attorneys and local prosecutors/police prosecutors—not the Department—handle the vast majority of criminal prosecutions in New Hampshire. While the Department may be diligent in making necessary disclosures in its own cases, the Department cannot possibly know whether disclosures have been made by local prosecutors and police prosecutors outside its office. This is why disclosure of the List is necessary: to arm the public with information that will either expose constitutional violations or create confidence that all appropriate disclosures have been made. Either way, the Department's policy of secrecy only creates suspicion that it is suppressing information that, when exposed to the press and public, will show that the system has broken down. The public is not required to simply take the Department and the police at their word that "all is well."[21] Under Chapter 91-A, the presumption is that government best functions when it is transparent.

For these reasons, the Petition must be granted.

[21] As an example of this "trust us" mentality, Lebanon Police Chief Richard Mello stated when questioned by a journalist about an officer on his force who was on the List: "I don't doubt the truthfulness and trust in that officer …. The officer wouldn't be here if I didn't think that to be the case." *See* Exhibit BBB (Jordan Cuddemi, "N.H. Attorney General Adds 89 Names to Laurie List," *Valley News*, Dec. 5, 2018). Under the Department's view of the law, the public simply has to take Chief Mello at his word.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel of record pursuant to the State's court's e-filing system.

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January 14, 2019