THE STATE OF NEW HAMPSHIRE

GRAFTON, SS SUPERIOR COURT

No. 215-2020-cv-00155

SAMUEL PROVENZA

v.

TOWN OF CANAAN

VALLEY NEWS' OBJECTION TO PETITIONER'S REQUEST FOR PRELIMINARY INJUNCTION

NOW COMES Intervenor, the Valley News daily newspaper, by and through its attorneys affiliated with the American Civil Liberties Union of New Hampshire, and objects to Provenza's Request for Preliminary Injunction.

I. FACTS

1. This case began with the Valley News' investigation into allegations of excessive force by a police offer that occurred on November 30, 2017 when then-Canaan Police Officer Samuel Provenza ("Provenza") stopped Crystal Eastman ("Eastman") while she was driving. *See* Kenyon Aff. ¶4, Exhibit A. The Valley News published its first article on the matter on March 4, 2018, "Jim Kenyon: Canaan Mom Injured by Police Officer Cries Foul." *Id*. According to the Valley News' reporting, the police were notified that a suspicious vehicle was following a school bus around town. *Id*. Provenza then pulled over the driver, who was Eastman. *Id*. Provenza asked Eastman for her license and registration, even though Eastman believed Provenza already knew who she was and she had not broken any traffic laws. *Id*

2. As Eastman's attorney would later write in court papers, this "created an unexpected standoff." *Id*. Provenza stuck his head inside Eastman's automobile and started to sniff, and, according to Eastman's attorney, his head was "so far into Crystal's automobile that Officer

Provenza could have kissed Crystal's lips if he were so inclined." *Id*. Eastman then retrieved her license from her wallet. *Id*. What happened next was up for debate: either Eastman pulled her wallet back before Provenza could take it, or Eastman unintentionally dropped the license while handing it to Provenza. *Id*.

3. Provenza then ordered Eastman out of the car. *Id*. Instead of complying, Eastman reached for her cellphone, because she was "terrified [] Officer Provenza's behavior." *Id*. Provenza told Eastman she was under arrest, and opened the driver's door to physically remove Eastman. *Id*. Eastman closed the door on Provenza's hand, but according to the Canaan Police Chief, Provenza was uninjured. *Id*.

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

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

6. Eastman was charged with resisting arrest and disobeying a police officer. After a trial, she was acquitted of resisting arrest, and convicted of disobeying an officer by the Circuit Court following a bench trial. Her conviction was upheld on appeal. *See State v. Eastman*, 2019-0473 (June 18, 2020) attached hereto as Exhibit 1.

7. Sometime around July 2018, The Town of Canaan commissioned a report by Mark Myrdek of Municipal Resources Inc. ("MRI"), to review the circumstances surrounding Provenza's encounter with Eastman, and perhaps some other police matters. Kenyon Aff. ¶6, Exhibit C. The Town paid at least $6,443 to MRI of taxpayer money for the report. *Id.*

8. On February 4, 2019, the Valley News, through Kenyon, requested from the Town of Canaan (the "Town"), pursuant to RSA ch. 91-A, "all government records . . . pertaining to the report conducted by Mark Myrdek/Municipal Resources, Inc. concerning the Canaan Police Department." The Valley News specifically asked for the report itself, and also for information related to the cost of the report." See Email from Jim Kenyon dated February 4, 2019 attached hereto as Exhibit 2.

9. On February 8, 2019, the Town denied the request for the MRI report based on the "internal personnel practices" exemption to the Right-to-Know law and *Union Leader Corp. v. Finneman*, 136 N.H. 624 (2007) (describing contours of that exemption). See Letter dated February 8, 2019 attached hereto as Exhibit 3. The Town, however, did produce to the Valley News bills and payments between the Town and MRI (with the service descriptions redacted).

10. On June 9, 2020, the Valley News renewed its request for the MRI report as *Finneman* had been overturned in two key respects by *Union Leader Corp. v. Salem*, ___ N.H. ___, 2019-0206 (May 29, 2020) (categorical exemption of "internal personnel practice" documents described in *Finneman* overruled and replaced with public interested balancing) and *Seacoast*

Newspapers, Inc. v. Portsmouth¸ ___ N.H. ___, 2019-0135 (May 29, 2020) (narrowing category of documents described in *Finneman* which constitute "internal personnel practices" to internal rules and practices, and not individual investigations). See Email from Jim Kenyon dated June 9, 2020 attached hereto as Exhibit 4.

11. In response to this renewed request, the Town responded that it "felt it necessary to make the former Canaan police officer, which is the subject of the report, aware of this Right-to-Know Law request in order to see if he had any object to same based upon his perceived privacy rights." See Letter dated June 29, 2020 attached hereto as Exhibit 5. Provenza then filed this lawsuit against the Town. The Valley News moved to intervene, which motion was granted.

12. All told, the Valley News has written 5 columns about the Eastman incident, the lack of body camera footage of the incident, the cost of the MRI investigation and report of the incident, the Town's refusal to make public the report, and the legal proceedings in *State v. Eastman*. See Kenyon Aff. ¶¶4-8. The Eastman incident is a matter of high public interest in the area.

II. STANDARD OF REVIEW

13. "The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *DuPont v. Nashua Police Dep't,* 167 N.H. 429, 434 (2015). "The issuances of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." *N.H. Dep't of Envtl. Servs. v. Mottolo*, 155 N.H. 57, 63 (2007). "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relieve, and there is no adequate remedy at law." *Id.* "Also, a party seeking an injunction must show that it would likely succeed on the merits." *Id.* In addition, a court considering whether to grant an

injunction should consider whether the public interest would be served by the issuance of an injunction. *See Thompson v. N.H. Bd. of Med.*, 143 N.H. 107, 108 (1998).

III. ANALYSIS

14. As an equitable remedy, a court should only grant a motion for preliminary injunction, where the movant has established 1) a likelihood of success on the merits, 2) an immediate danger of irreparable harm, 3) no adequate remedy at law, and 4) an injunction would serve the public interest. Provenza cannot meet this burden. Thus, this Court cannot issue an injunction. In particular, Provenza cannot establish a likelihood of success on the merits, nor can he show that an injunction would serve the public interest.

A. Provenza is Not Likely to Succeed on the Merits

15. The Court should reject Provenza's arguments that RSA 91-A:5, IV precludes the Town from releasing the requested documents to the Valley News for two independent reasons. *First*, RSA 91-A:5, IV provides an exemption from mandated disclosure under the State's Right-to-Know Law. However, it *does not* create a statutory right of action for government officials seeking to have documents withheld, nor does it create a statutory privilege that can be invoked by Provenza to compel the Town to withhold the MRI report. A Right-to-Know exemption does not prevent the Town from voluntarily releasing records to the public, even if the records are subject to the exemption. In other words, all a Right-to-Know exemption does is provide a license to a government to entity to withhold a record, but it does not require that it do so. As a result, RSA 91-A:5, IV does not create a statutory privilege that grants Petitioner a cause of action, nor does this exemption provide a legal basis for the Petitioner to demand that the Town be ordered to withhold records under RSA ch. 91-A. *Second*, Provenza's argument that the report into the

incident generated by MRI is exempt from disclosure under RSA 91-A:5, IV is wrong because the public interest balancing analysis compels its disclosure.

i. <u>RSA 91-A:5, IV Does Not Vest a Government Official With the Substantive Right to Seek Declaratory or Injunctive Relief, Nor Does It Prohibit the Town From Disclosing the Documents.</u>

16. Provenza is not likely to succeed because a Right-to-Know exemption does not vest a government official with the freestanding, statutory right statutory to seek declaratory or injunctive relief seeking that information be withheld. Rather, "[i]n order to maintain a petition for a declaratory judgment, a plaintiff must claim a 'present legal or equitable right or title.'" *Benson v. N.H. Ins. Guar. Ass'n*, 151 N.H. 590, 593 (2004) (quoting RSA 491:22, I). Put differently, a party cannot maintain a declaratory judgment action "unless he shows that some right of his is impaired or prejudiced [by the challenged law or conduct]." *Id.* (emphasis in original). To the extent Provenza bases his request for declaratory and injunctive relief pursuant to a Right-to-Know exemption, his claim fails because the statute does not create a cause of action for anyone other than a requester who has been "aggrieved by a violation" of a government entity's who has declined to produce documents pursuant to an applicable exemption. *See* RSA 91-A:7. As Provenza is not an aggrieved requester, he has no statutory right of action under the Right-to-Know Law.

17. Provenza is also not likely to succeed on the merits because RSA 91-A:5, IV—like all Right-to-Know exemptions—does not create a statutory privilege that can be invoked by Provenza to compel the Town to withhold the MRI report. *See Marceau v. Orange Realty*, 97 N.H. 497, 499 (1952) ("It is well settled that statutory privileges … will be strictly construed. It should plainly appear that the benefits of secrecy were thought to outweigh the need for the correct disposal of litigation."; noting that a statutory privilege does not exist unless there is "a clear

legislative mandate," and holding that a statutory privilege did not exist even where there was a penalty for unauthorized disclosure). RSA 91-A:5, IV does not prevent the Town from voluntarily disclosing any records and cannot provide a basis for an injunction to block the Town from releasing the documents in question. This is because the exemptions to the Right-to-Know Law only identify documents which are not subject to mandatory public inspection—they do not create an affirmative privilege of confidentiality. In other words, all a Right-to-Know exemption does is provide a license to a government to entity to withhold a record, but it does not require that it do so. As a result, RSA 91-A:5, IV does not create a statutory privilege that grants Petitioner a cause of action to demand that the Town to be ordered to not disclose the records under RSA ch. 91-A.

18. New Hampshire's Right-to-Know Law under RSA ch. 91-A is designed to create transparency with respect to how the government interacts with its citizens. The law does *not* act to limit transparency and public access. The preamble to the law makes clear that the purpose of the law is to create a statutory scheme promoting, rather than curtailing, public access to documents: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. The Right-to-Know Law "helps further our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Goode v. N.H. Legis. Budget Assistant*, 148 N.H. 551, 553 (200).

19. The Right-to-Know Law has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: "Government … should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.*

New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8's language was included upon the recommendation of the bill of rights committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire already had RSA ch. 91-A to address the public and the press's right to access information, the committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 53 (2d ed. 2015).

20. The statutory scheme enacted by the legislature provides that generally public records are subject to inspection. RSA 91-A:4, I provides that "[e]very citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including the minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5."

21. RSA 91-A:5, in turn, provides that certain categories of governmental records are exempted from the provisions of the law giving the public the right to public inspection. Nothing in the language of the statute prohibits governmental agencies from voluntarily producing any documents. By contrast, where the legislature has chosen to make records confidential—and thus completely prohibited form public disclosure—and not merely exempt from mandatory disclosure under the Right-to-Know Law, it has done so more forcefully. *See*, *e.g.*, RSA 654:45, VI (the statewide voter database "shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31, nor shall it or any of the information contained therein be disclosed pursuant to a subpoena or civil litigation discovery request"); RSA 170-G:8-a ("The case records of the

department [involving juvenile delinquency proceedings] shall be confidential"); RSA 169-B: 34, IV ("It shall be unlawful for a victim or any member of the victim's immediate family to disclose any confidential information [related to delinquency proceedings] to any person not authorized or entitled to access such confidential information. Any person who knowingly discloses such confidential information shall be guilty of a misdemeanor."); RSA 132:34, II (b) (governing judicial bypass of parental notification for minors wishing to terminate pregnancies, "Proceedings under this section shall be held in closed court, shall be confidential and shall ensure the anonymity of the minor. All court proceedings under this section shall be sealed.").

22. As the above statutes demonstrate, when the legislature intends to prohibit governmental bodies and agencies from disclosing information, it says so, and does not merely exempt that information from disclosure under RSA ch. 91-A.

23. In another context, the Rockingham County Superior Court has recognized that RSA ch. 91-A does not create a privilege against disclosure. In *Morin v. Salem*, 218-2019-CV-00523, the Salem Deputy Police Chief brought a defamation action against the Town of Salem and others, and moved to seal his Complaint on the basis that it contained information compiled in an audit report, portions of which the Superior Court had ruled in *Union Leader Corp. v. Salem*, 218-2018-CV-1406[1] were exempt from disclosure under RSA ch. 91-A. That motion was denied, and Morin sought reconsideration. The basis for the motion for reconsideration was that parts of the Complaint contained information exempt from disclosure under the "internal personnel practices" in RSA 91-A:5, IV. The Superior Court rejected the motion for reconsideration, ruling that "With respect to the question of confidentiality, RSA 91-A is merely a restriction on the public's right to get documents from the government on demand. *The statute does not prohibit anybody from*

[1] This ruling was vacated and remanded by the Supreme Court in *Union Leader Corp. v. Salem*, ___N.H.___, 2019-0206 (May 29, 2020).

voluntarily disclosing documents." *See* Order, *Morin v. Salem*, 218-2019-CV-523 (Rock. Cty. Super. Ct. May 17, 2019), attached hereto as Exhibit 6 (emphasis added).

24. As the *Morin* court recognized, RSA ch. 91-A does not prohibit anybody from voluntarily disclosing documents, including the Town. Because the statute does not prohibit the Town from voluntarily disclosing the documents, it cannot form the basis for a request that a Court prohibit the Town from disclosing the documents.

ii. The Records In Question Are Not Exempt From Disclosure Under RSA 91-A:5, IV Because Public Interest Balancing Compels Disclosure

25. As noted above, the Right-to-Know Law was enacted to further public transparency and to promote governmental accountability to the people. Consistent with these principles, courts resolve questions under RSA ch. 91-A "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode*, 148 N.H. at 554 (citation omitted); *see also Lambert v. Belknap County Convention*, 157 N.H. 375, 379 (2008). "[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a *heavy burden* to shift the balance toward nondisclosure." *Murray*, 154 N.H. at 581 (emphasis added).

26. RSA 91-A:5, IV exempts from mandated public disclosure "personnel … and other files whose disclosure would constitute invasion of privacy."[2] However, this is not a categorical

[2] It is apparent that the "internal personnel practices" exemption in RSA 91-A:5, IV does not apply to the MRI report. In overruling *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), the Supreme Court in *Seacoast Newspapers* noted that the "internal personnel practices" exemption narrowly covers "records pertaining to the internal rules and practices governing an agency's operations and employee relations, *not information concerning the performance of a particular employee*." *See Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135 (N.H. Sup. Ct. May 29, 2020) (slip op. 11) (emphasis added). As Provenza's petition makes clear, the MRI report cannot be an "internal personal practice" because it addresses information concerning the performance of a particular employee—here, Provenza. *See* Provenza Pet. ¶ 13.

exemption, as "personnel" information is subject to public interest balancing. *See Reid v. N.H. Att'y Gen.*, 169 N.H. 509, 528 (2016) ("[P]ersonnel files are not automatically exempt from disclosure" and explaining that the such files are subject to the *Lambert* public interest balancing analysis) (ellipsis and quotations omitted). For the sake of Provenza's motion for a preliminary injunction, Intervenor assumes as true (without conceding) his allegation that the MRI report is "personnel" related under RSA 91-A:5, IV.[3] (In any event, even if the MRI report is not a "personnel" record, and instead constitutes "other files" under RSA 91-A:5, IV, it would still be subjected to the "invasion of privacy" public interest balancing test explained below).

27. Courts engage in a three-step analysis to conduct the public interest balancing and determine whether records are exempt from public disclosure under RSA 91-A:5, IV. *See Lambert v. Belknap Cty. Convention*, 157 N.H. 375, 382 (2008). "First, [courts] evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. . . Second, [courts] assess the public's interest in disclosure . . . Finally, [courts] balance the public interest in disclosure against

[3] Having no access to the MRI report, it is difficult for Intervenor to ascertain whether the MRI report is "personnel" related. As the New Hampshire Supreme Court has explained, the term "personnel" "refers to human resources matters." *Reid v. N.H. AG*, 169 N.H. at 522; *see also Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135 (N.H. Sup. Ct. May 29, 2020) (slip op. at 21). The Massachusetts Court of Appeals has similarly explained that "personnel" means documents "useful in making employment decisions regarding an employee." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 5 (2003). In applying this test, the focus is not on whether the documents in question are physically in a "personnel file," but rather whether they meet this definition of "personnel"—namely, whether the records in question have a "human resources" purpose. Applying this test, it is distinctly possible that MRI report was not created for a human resources purpose, but rather to audit the Canaan Police Department's initial internal affairs review of this incident. *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." *Worcester Telegram & Gazette Corp.*, 58 Mass. App. Ct. 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. In short, information may 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. *Id.* at 10 ("Put differently, the same information may simultaneously be contained in a public record and in exempt 'personnel [file] or information.'"). The same could be true in this instance with respect to the MRI report.

the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." *Id.* at 383.

a. The Public Interest in Disclosure is Compelling

28. The public interest in disclosure is strong. The MRI report exposes the very type of misconduct that the Right-to-Know Law 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."); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070 (1991) ("[T]he criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about the happenings in the criminal justice system, and, if sufficiently informed about those happening, might wish to make changes in the system."). 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 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 7. Numerous cases outside of New Hampshire also highlight the public interest in disclosure when the official acts of the police are implicated.[4] Simply put, disclosure here will

[4] *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-

educate the public on "the official acts of those officers in dealing with the public they are entrusted with serving." *Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 507 (N.M. Ct. App. 2010) (addressing disclosure of citizen complaint investigations).

29. Moreover, any suggestion that there is no public interest in the MRI report because the allegations of excessive force were deemed "unfounded" is wrong. *See, e.g.*, *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) (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). Producing the full report would enable the public to know not just the contours of Provenza's conduct, but also the policies and procedures governing internal affairs investigations and whether they were appropriately followed in this case. In this moment of conversation about police accountability nationally and here in New Hampshire, *see* Executive Order 2020-11 (order issued by Governor Sununu recognizing a "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance transparency, accountability, and community relations in law enforcement") *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf, it is imperative that the public be able to know whether law enforcement agencies can be trusted to hold themselves accountable, or if a different system is necessary.

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").

30. In other words, setting aside the obvious public interest in allowing the public to evaluate the findings of MRI and the completeness of its investigation, there is a compelling public interest in enabling the public to use the MRI report to evaluate the integrity of the Canaan Police Department's internal affairs investigation of this incident. *See, e.g., Reid v. N.H. AG*, 169 N.H. 509, 532 (2016) ("[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate"); *see also Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 698 A.2d 803, 808 (Conn. 1997) (in upholding the trial court's judgment requiring disclosure of an internal affairs investigation report exonerating a state trooper of police brutality, concluding: "*Like the trial court, we are persuaded that the fact of exoneration is not presumptively sufficient to overcome the public's legitimate concern for the fairness of the investigation leading to that exoneration*. This legitimate public concern outweighs the department's undocumented assertion that any disclosure of investigative proceedings may lead to a proliferation of spurious claims of misconduct.") (emphasis added). According to Provenza's petition, Police Chief Samuel Frank examined this incident and, in a Complaint Disposition Form dated August 10, 2018, concluded that the allegations were "unfounded, i.e. factually untrue" with no discipline issued. *See* Provenza Pet. ¶ 14.[5] Here, for example, if the MRI report reached a different conclusion than Chief Frank (or even examined the thoroughness of Chief's Frank's investigation), then the report will undoubtedly be beneficial to the public, as disclosure would yield valuable information on the integrity of Chief Frank's internal investigation. Indeed, there is real reason to believe that police internal affairs investigations are often not always robust given the inherent conflicts of interest that often exist. Just recently, an internal audit of the Salem Police Department revealed serious deficiencies in how that Department handled internal affairs investigations, including dismissing

[5] In a relatively small department in a town with a population of around 3,900 persons, it would be expected that Chief Frank had a professional relationship with Mr. Provenza.

or discouraging citizen complaints, as well as not fully investigating complaints if they were submitted more than six (6) months after the incident.[6] On the other hand, if the MRI report confirms the findings of Chief Frank, then the public is benefited by now knowing that his internal investigation was thorough. Under either scenario, as the MRI report pertains to an officer's official actions, there is a public interest in disclosure. But, right now, the public is left in the dark, with no ability to hold the Canaan Police Department accountable if necessary. This secrecy damages public confidence. *See Rutland Herald*, 84 A.3d at 826 ("redacting the employees' names would cast suspicion over the whole department and minimize the hard work and dedication shown by the vast majority of the police department").

b. The Privacy Interests in Nondisclosure are Nonexistent

31. Provenza's privacy interest in nondisclosure is nonexistent. Police officers have no privacy interest when their actions implicate their official duties. Cases have roundly rejected the proposition that such a privacy interest exists, including in the context of internal investigations of citizen complaints.[7] This is because, when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny.[8]

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[6] *See* Ryan Lessard, "Report Blasts Salem Police for Handling Officer Complaints, Internal Investigations," Union Leader (Nov. 23, 2018), https://www.unionleader.com/news/politics/local/report-blasts-salem-police-for-handling-of-officer-complaints-internal-investigations/article_a7b3323c-d6a1-5380-9b46-1f1114c5250e.html.

[7] *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); *Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure, in part, because the requested documents did not concern "the off-duty sexual activities of the deputies involved").

[8] *See, e.g.*, *State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252, 261-62 (Wis. 1983) ("By accepting his public position [the police chief] has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official. The police chief cannot thwart the public's interest in his official conduct by claiming that he expects the same kind of protection of reputation accorded an ordinary citizen.");

32. Here, despite the Provenza's assertions to the contrary, a police officer does not have a substantial privacy interest in unfounded or unsustained internal affairs reports. Police officers have no privacy interest in records implicating the performance of official duties, especially when—as is the case here—there is possible evidence of misconduct. Here, 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*, 169 N.H. at 530 (emphasis added). Intervenor is not seeking, for example, medical or psychological records in an officer's personnel file. Instead, Intervenor is seeking information in the MRI report related to the performance of officers' official duties, including where there is credible evidence of wrongdoing.[9] Thus, any privacy interest here is minimal, if not nonexistent.[10]

Kroeplin v. Wis. Dep't of Nat. Res., 725 N.W.2d 286, 301 (Wis. Ct. App. 2006) ("When an individual becomes a law enforcement officer, that individual should expect that his or her conduct will be subject to greater scrutiny. That is the nature of the job."); *see also Perkins v. Freedom of Info. Comm'n*, 635 A.2d 783, 792 (Conn. 1993) ("Finally, we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties."); *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 698 A.2d 803, 808 (Conn. 1997) (in upholding the trial court's judgment requiring disclosure of an internal affairs investigation report exonerating a state trooper of police brutality, concluding: "Like the trial court, we are persuaded that the fact of exoneration is not presumptively sufficient to overcome the public's legitimate concern for the fairness of the investigation leading to that exoneration. This legitimate public concern outweighs the department's undocumented assertion that any disclosure of investigative proceedings may lead to a proliferation of spurious claims of misconduct.").

[9] Criminal defendants who have been charged with crimes are often publically identified. Moreover, court records of criminal proceedings are public, and police reports governing the investigation are public records subject to the Right-to-Know law unless the records fall within a limited exception discussed in *Murray v. N.H. Div. of State Police*, 154 N.H. 579 (2006). This information is made public regardless of whether a finding of guilt is ever made or whether the charges result in an acquittal. There is no reason why police officers have a greater privacy interest than everyday people they arrest. In fact, the opposite is true because the public has an interest in knowing what these public officials, whose salaries are paid with tax dollars, are doing.

[10] *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").

And there is especially minimal privacy interest in form of embarrassment or reputational harm if the MRI report, as Provenza expects, concluded that the imposition of discipline was not supported and the charges against him were unsustained. *See* Petition ¶ 13.

33. In examining the privacy of privacy exemption under RSA 91-A:5, IV, the Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government and information concerning the performance of government employees. *Compare, e.g., Lamy v. N.H. Public Utilities Comm'n*, 152 N.H. 106, 111 (2005) ("The central purpose of the Right–to–Know Law is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."); *Brent v. Paquette*, 132 N.H. 415, 427 (1989) (government not required to produce records kept by school superintendent containing private students' names and addresses); *N.H. Right to Life v. Director, N.H. Charitable Trusts Unit*, 169 N.H. 95, 114, 120-121 (2016) (protecting identities of private patients and employees at a women's health clinic); *with Union Leader Corp*., 162 N.H. at 684 (holding that the government must disclose the names of retired public employees receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV); *Prof'l Firefighters of N.H*., 159 N.H. at 709-10 (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); *Mans*, 112 N.H. at 164 (government must disclose the names and salaries of each public schoolteacher employed by the district).

34. Provenza's reliance on RSA 516:36 to create a privacy right is misplaced. *See* Petition ¶ 26. 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.), http://www.orol.org/rtk/rtknh/213-2017-CV-210-2018-08-29.html.[11]

35. Nor can Provenza rely on RSA 105:13-b in asserting a blanket privacy right preventing disclosure. *See* Petition ¶ 26. RSA 105:13-b only concerns how "police personnel files" are handled when "a police officer ... is serving as a witness in any criminal case." *See* RSA 105:13-b, I. As one Superior Court explained in a case ordering the disclosure of the so-called "Laurie List": "By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file 'of a police officer who is serving as a witness in any criminal case.' Under this statute, the mandated disclosure is to the defendant in that criminal case. Here, in contrast, there is no testifying officer, pending criminal case, or specific criminal defendant. Rather, petitioners seek disclosure of the EES to the general public." *See N.H. Ctr. For Public Interest Journalism, et al v. N.H. Dep't of Justice*, 2018-cv-00537, at *3 (N.H. Super. Ct., Hillsborough Cty., S. Dist., Apr. 23, 2019) (currently on appeal, with oral argument scheduled on September 16, 2020), https://www.aclu-nh.org/sites/default/files/field_documents/court_order_4-24-2019_10.50.39_2982486_8a12d652-e8f8-4277-9f14-dbfa0db4f1ca.pdf. Indeed, to interpret

[11] In an unpublished order, the New Hampshire Supreme Court affirmed in part, reversed in part, and vacated in part this and other orders entered in the case by the Superior Court, with the case being remanded back to the Superior Court. *See Salcetti v. City of Keene*, No. 2019-0217 (N.H. Sup. Ct. June 3, 2020), https://www.courts.state.nh.us/supreme/finalorders/2020/20190217.pdf.

RSA 105:13-b as giving categorical protections to police personnel files would give special protections to the police that do not apply to other public employees who have their files subjected to a public interest balancing analysis under *Town of Salem*. Provenza's reliance on *Gantert v. City of Rochester*, 168 N.H. 640 (2016) and *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774 (2015) is similarly misplaced. *See* Petition ¶ 26. These cases say nothing about RSA 105:13-b constituting an exemption under the Right-to-Know Law. Instead, these cases only concerned police officers challenging their placement on the "Laurie List" on due process grounds.

36. Provenza's reliance on *Pivero v. Largy*, 143 N.H. 187 (1998) is also misplaced for two reasons. *See* Petition ¶ 26. *First*, *Pivero* concerned a statute not at issue here, which governed the rights of employees to have access to their own personnel files. *Second*, to the extent that *Pivero* held that "public policy requires that internal investigation files remain confidential," *id.* at 191, it based that holding in part on *Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993). As discussed above, *Finneman* has been overturned by a pair of recent cases, *Union Leader Corp. v. Salem*, ___ N.H. ___, 2019-0206 (May 29, 2020) and *Seacoast Newspapers, Inc. v. Portsmouth*¸ ___ N.H. ___, 2019-0135 (May 29, 2020). In particular, *Union Leader Corp. v. Salem* overturned *Fenniman*'s holding that records relating to "internal personnel practices"[12] were categorically exempt from disclosure, and instead required public interest balancing. (Slip op. p. 11). What remains of *Finneman* therefore does not stand for the proposition that the legislature has categorically pronounced that internal disciplinary files are automatically confidential. Indeed, *Town of Salem* expressly rejected this proposition.

[12] *Seacoast Newspapers* also overturned *Fenniman* and said the "internal personnel practices" exemption only applies to an agency's internal rules and practices governing operations and employee relations. As a result, records such as the Report in question in this case must now be analyzed under the exemption for "personnel . . . files whose disclosure would constitute invasion of privacy" and not the exemption for "[r]ecords pertaining to internal personnel practices."

37. Petitioner's suggestion that police officers have significant privacy and reputational interests that, as a matter of constitutional due process, should limit disclosure of acts done in the course of public duties is both wrong and troubling. *See* Petition ¶ 27. The New Hampshire Supreme Court has not recognized such a constitutionally-enshrined liberty interest in the public records context. This is because it would conflict with the Right-to-Know Law and the notion that public officials must be subjected to public scrutiny. *See, e.g., Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895-96 (S.C. Ct. App. 2004) ("By raising this constitutional argument, the Sheriff's Department urges this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual's performance of his public duties to be free from public scrutiny. We find this would be ill-advised."); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 297 (Conn. App. Ct. 2012) ("the personal privacy interest protected by the fourth and fourteenth amendments is very different from that protected by the statutory exemption from disclosure of materials"). In other words, the procedural due process and privacy protections in the Fourteenth Amendment and Part I, Article 15 of the New Hampshire Constitution protect individual citizens from government officials, not the other way around.

38. 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 Right-to-Know law. Adopting Provenza's view would enable government entities— to keep such misconduct and any investigations into such misconduct—from ever seeing the light of day.

39. Provenza offers no argument why there would be any governmental interest in keeping the report private. Under the law, a governmental agency "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).[13] Here, disclosure will improve the criminal justice system and police accountability, not hinder it. Disclosing this information will not only address potential misconduct, but it also will ensure that the public has the complete picture concerning the MRI report's findings, whether Provenza committed misconduct, and whether the Canaan Police Department is able to effectively investigate its own law enforcement agents.

c. The Public Interest Trumps Any Nonexistent Privacy Interest.

40. 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 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,

[13] *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").

that entity bears a ***heavy burden*** to shift the balance toward nondisclosure.") (citations omitted) (emphasis added). In other words, even if the public interests in disclosure and privacy interests in nondisclosure appear equal, this Court must air on the side of disclosure. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance ….").[14]

41. In performing this balancing test with respect to the Report, any privacy interest is dwarfed by the compelling public interest in disclosure. Provenza cannot meet the "heavy burden" required to resist disclosure. The substantial public interest in disclosure is the public's right to learn the full nature of the MRI report's findings and conclusions—a report that cost Canaan taxpayers thousands of dollars. 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.[15] 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. Indeed, in the *Town of Salem* case which is now back before the Superior Court on remand following the Supreme Court's overruling of *Fenniman*, the Rockingham Superior Court previously noted that, though it was bound by *Fenniman*, "[a] balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors the disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report." *See Union Leader Corp. v. Town of Salem*, 218-2018-CV-01406, at *3 (Rockingham Cty. Super. Ct. Apr. 5, 2019), attached as Exhibit 8. That Court added: "[T]he audit

[14] *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.").
[15] *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").

report proves that bad things happen in the dark when the ultimate watchdogs of accountability—i.e., the voters and taxpayers—are viewed as alien rather than integral to the process of policing the police." *Id.* This Court must reach the same conclusion here.

B. The Public Interest Does Not Favor Granting an Injunction

42. An injunction should not issue if it would not be in the public interest. As discussed above in Section *ii* of this pleading, the public interest favors the disclosure of the Report. The Court should therefore deny the request for an injunction.

WHEREFORE, Intervenor Valley News respectfully prays that this Honorable Court:

A. Deny Provenza's Request for Preliminary Injunctive Relief; and

B. Award such other relief as may be equitable.

Respectfully submitted,

VALLEY NEWS

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Date: August 14, 2020

Certificate of Service

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

/s/ Henry Klementowicz
Henry Klementowicz

August 14, 2020