

STATE OF NEW HAMPSHIRE

GRAFTON, SS

SUPERIOR COURT
215-2020-CV-00155

SAMUEL PROVENZA

V.

TOWN OF CANAAN

**VERIFIED PETITION FOR DECLARATORY JUDGMENT,
REQUEST FOR TEMPORARY AND PERMANENT
INJUNCTIVE AND OTHER RELIEF**

NOW COMES, the Petitioner Samuel Provenza, by and through their attorneys, Milner and Krupski, PLLC and petitions this Honorable Court for Declaratory Judgment and Request for Temporary and Permanent Injunctive and Other Relief.

1. This action is brought by the Petitioner to request that this Honorable Court declare that an unfounded internal affairs investigation concerning a certified police officer is not subject to disclosure under the New Hampshire Right to Know Law, RSA 91-A and to issue injunctive relief for the same.

2. Specifically, the Petitioner claims that his privacy interests in an unfounded internal affairs investigation outweighs the request for disclosure to the public.

I. PARTIES

3. The Petitioner, Samuel Provenza, is a certified police officer with the New Hampshire Police Standards and Training Council and an individual having a service address of 109 North State Street, Suite 9 in the City of Concord, County of Merrimack, and State of New Hampshire 03301.

4. The Respondent, The Town of Canaan (hereinafter "Town") is a political subdivision of the State of New Hampshire governed by a Board of Selectman (3 person)/Town

Administrator form of government. The address of the Town's offices are located at P.O. Box 38, 1169 US Route 4, in the Town of Canaan, County of Grafton and State of New Hampshire 03741.

5. The current Board of Selectman consists of Chairman Scott Borthwick, Selectman Al Posnanski, and Selectman David McAlister. The current Town Clerk is Vickey McAlister.

II. JURISDICTION AND VENUE

6. This Court has personal jurisdiction over the parties and subject matter jurisdiction to New Hampshire RSA 491:22 and RSA 498:1.

7. Venue is proper because the principal place of business of the Town is Canaan, which is located within Grafton County. The cause of action occurred in Grafton County, the information was obtained in Grafton County and the information is requested to be disseminated in the Grafton County. See, RSA 507:9.

III. VERIFIED RELEVANT FACTS

8. The Petitioner is a certified full-time police officer who is currently a Trooper employed by the State of New Hampshire, Department of Safety and Division of State Police assigned to Troop D.

9. The Petitioner has been employed by the State as a Trooper since February 1, 2019.

10. The Petitioner was previously employed by the Town of Canaan as a full-time certified police officer during the time period of 2014 through 2019. The Petitioner was employed as a part-time certified officer from 2012-2014.

11. On or about November 30, 2017, the Petitioner engaged, stopped and charged an operator of a motor vehicle with two (2) Class B Misdemeanors. During the encounter, the Petitioner attempted to arrest the operator and the operator physically resisted the arrest.

12. The Petitioner, pursuant to protocol, submitted a report concerning the incident.

13. The Town, based on external pressures, employed the Municipal Resources, Inc. to conduct an internal affairs investigation into this matter to determine if the Petitioner had acted inappropriately. Based on information and belief, the conclusion of the report did not support the imposition of discipline and the charges were unsustainable.¹

14. In a Complaint Disposition Form dated August 10, 2018, Chief Frank determined that the allegations of wrongdoing by the Petitioner for the traffic stop of November 30, 2017 were determined to be UNFOUNDED, i.e. factually untrue. No Discipline issued.

15. In June of 2018, the Valley News requested a copy of the MRI report and the Town of Canaan denied said request.

16. During the criminal trial of the motor vehicle operator, the defense team made requests from the prosecutor as well as the Trial Court for the MRI report and these requests were denied.

17. In June of 2020, the Valley News and Douglas Wright requested a copy of the MRI report citing recent Supreme Court cases.

18. Prior to disclosure, Counsel for the Petitioner has requested that the issue of disclosure be made by a Court based on recent developments in the law. The Town, through counsel, agrees with this course of action.

¹ The Petitioner has requested, but has not been given access to the report based on the fact that no disciplinary action was initiated. See Pivero v Largy, 143 N.H. 187, 191 (1998).

IV. COUNTS

COUNT I DECLARATORY JUDGMENT

19. The Petitioners hereby incorporate by reference paragraphs 1 through 18 as if fully set forth herein and further states as follows:

20. New Hampshire Law provides for a robust access to governmental records and such rights are codified in RSA 91-A:1, *et seq.*

21. New Hampshire law also balances the right of the public's access with other important public policy and constitutional concerns that prevent disclosure.

22. The statutory framework of the New Hampshire access to governmental records provides for statutory exception. These are codified in RSA 91-A:5 which provides:

91-A:5 Exemptions. –

The following governmental records are exempted from the provisions of this chapter:

I. Records of grand and petit juries.

I-a. The master jury list as defined in RSA 500-A:1, IV.

II. Records of parole and pardon boards.

III. Personal school records of pupils, including the name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the assessment under RSA 193-C:6.

IV. 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. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.

VI. Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not

disclosed, circulated, or available to a quorum or a majority of the members of a public body.

X. Video and audio recordings made by a law enforcement officer using a body-worn camera pursuant to RSA 105-D except where such recordings depict any of the following:

(a) Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

(b) The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

(c) An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure.

XI. Records pertaining to information technology systems, including cyber security plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed.

23. The Supreme Court has recently provided guidance as to when “internal personnel practices”, “confidential” or “personnel files” may be shielded from disclosure to the public by RSA 91-A:5 IV. See, Union Leader Corp, et al v Town of Salem, (NH Slip op May 29, 2020).

24. “When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, we engage in a three-step analysis. See, Lambert, 157 N.H. at 382-83. First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Id. at [**590] 382; *see also* Union Leader Corp., 142 N.H. at 553 (court examines whether the asserted private confidential, commercial, or financial interest “is sufficiently private [such] that it must be balanced against the public's interest in disclosure”). Second, we assess the public's interest in disclosure. See, Lambert, 157 N.H. at 383. Third, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. Id. If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. Id. Further, “[w]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.” Id. at 382-83. Professional Firefighters of New

Hampshire, 159 N.H. 699, 707 (2010)

25. In New Hampshire, a police officer has a substantial privacy interest in unfounded or unsustained internal affairs report which precludes the disclosure to the public because it outweighs the public's right to know.

26. The public policy of confidentiality of police records has been recognized in common law and statute for a significant period of time. See, RSA 105:13-b; Gantert v. City of Rochester, 168 N.H. 640, 646 (2016) (finding Police officer personnel files confidential by statute and EES list confidential); Duchesne v. Hillsborough County Attorney, 156 N.H. 774, 780-782 (Discussion of EES list and interplay of 105:13-b extensively); Pivero v. Largy, 143 N.H. 187, 191 (1998) (Subject police officer not entitled to investigative file until initiation of Disciplinary process) see also RSA 516:36 (denying admissibility for police investigatory files in civil proceedings) and Per 1501.02-1501.04 (Law enforcement disciplinary records and investigations for individuals employed by the State are confidential).

27. In addition, the publication of baseless allegations deprives a police officer of his/her constitutionally protected liberty and property interests. Part 1 Article 15 of the New Hampshire constitution Gantert v. City of Rochester, 168 N.H. 640, 648 (2016), See Veale, 158 N.H. at 638-39; Petition of Bagley, 128 N.H. 275, 284, 513 A.2d 331 (1986) .

28. Further, it is New Hampshire public policy that the non-disclosure of unfounded or unsustained investigations that do not require discipline is in the best interest of the public because it protects confidentiality, law enforcement investigations and the reduction of attempted character assassination. Pivero v. Largy, 143 NH 187, 191 (1998).

COUNT II
REQUEST FOR TEMPORARY AND PERMANENT INJUNCTION

29. The Petitioners hereby incorporate by reference paragraphs 1 through 35 as if fully set forth herein and further states as follows:

30. In order to prevail on a preliminary injunction, the Petitioner must show that there is present threat of irreparable harm, there is no adequate alternative remedy at law, there is a likelihood of success on the merits by the balance of the probabilities and the public interest would not be adversely effected if the Court granted the preliminary injunction. Thompson v. N.H. Board of Medicine, 143 N.H. 107, 108 (1998) (citations omitted).

31. As discussed above, there is a threat of irreparable harm to the Petitioner as the disclosure of confidential information is violative of the constitution, law and common sense. Further, the disclosure of confidential information erodes the confidence of officers to perform their duties without threats of retaliation.

32. The Petitioner seeks to invoke the courts equitable powers to prevent the irreparable harm.

33. There is no adequate remedy at law as the disclosure of the MRI report is imminent without the Courts intervention.

34. There is a likelihood of success based on the balance of the probabilities as there is a clear privacy interest recognized by the public policy of the State of New Hampshire.

35. The public interest would not be adversely affected but rather promoted, as the public policy requires that personnel matters be held confidential pursuant to

statute and that matters and allegations not be indiscriminately disseminated by individuals.

36. After a full hearing on the merits, the Petitioner request that a permanent injunction be issued against the Town.

37. The Petitioners have been forced to suffer direct, consequential, and incidental damages, all within the minimum and maximum jurisdictional limits of this Court.

WHEREFORE, the Petitioners respectfully request this Honorable Court grant the following declaratory and injunctive relief:

- A. Grant the Petitioners' request for Declaratory Judgment;
- B. Grant the Petitioners' request for a Preliminary Injunction;
- C. Schedule a hearing on this matter as soon as possible and issue Orders of Notice;
- D. Declare that the dissemination of the information requested is not required pursuant to 91-A;
- F. Order a cease and desist on the dissemination of confidential information; and
- G. Grant such other and further relief as is deemed just and equitable.

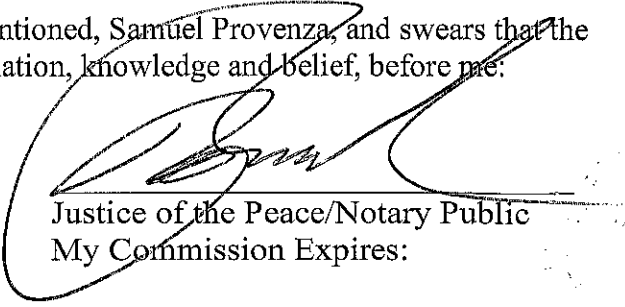
July 1st, 2020

Respectfully submitted,


Samuel Provenza

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK

Personally, appeared the aforementioned, Samuel Provenza, and swears that the foregoing is true to the best of his information, knowledge and belief, before me:



Justice of the Peace/Notary Public
My Commission Expires:

MARC G. BEAUDOIN
Justice of the Peace - New Hampshire
My Commission Expires January 22, 2025

Dated: July 15th, 2020

Respectfully submitted,

By: /s/ John S. Krupski
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