

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

No. 215-2020-CV-155

SAMUEL PROVENZA

v.

TOWN OF CANAAN

PUBLIC ORDER ON PLAINTIFF'S PETITION FOR DECLARATORY JUDGMENT AND FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND ON INTERVENOR'S CROSSCLAIM

The following order is issued under seal consistent with this Court's previous rulings. A public, redacted copy of this order will issue after the parties have had an opportunity to review it.

This matter is before the Court on the Plaintiff's Petition for Declaratory Judgment and for Preliminary and Permanent Injunctions. (Index #1.) On November 30, 2017, the plaintiff, Samuel Provenza, formerly a police officer for the Town of Canaan, was involved in a motor vehicle stop that became subject to some media coverage in the Upper Valley. The Plaintiff now petitions the Court to declare that an internal affairs investigation report related to the stop (the "Report") is not subject to disclosure under the New Hampshire Right-to-Know Law, RSA ch. 91-A, and to enjoin the defendant, the Town of Canaan (the "Town"), from disclosing the contents of the Report to the public. Valley News daily newspaper ("Valley News"), filed a motion to intervene, which the Court granted. (Index #4.) Thereafter, Valley News objected to the plaintiff's petition and filed a crossclaim requesting that the Court rule that the Report is subject to disclosure under RSA ch. 91-

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A.¹ (Indexes # 10, 11).

On September 15, 2020, the Court held a hearing at which counsel for the Plaintiff, the Town, and Valley News were present. Prior to the hearing, the Town submitted under seal a copy of the Report with minor redactions of information it contends is not subject to disclosure under RSA ch. 91–A and an unredacted copy of the Report. (Index #15), and the Court approved the parties' Stipulation and Protective Order Regarding Nondisclosure of Subject Investigation Report. (Index #14.) At the hearing, the parties agreed that, subject to a potential order of stay pending appeal, each was amenable to this order acting as a final adjudication on the merits of both the plaintiff's requests for declaratory judgment and for preliminary and permanent injunctions and on the merits of Valley News's crossclaim. After considering the parties pleadings, offers of proof, and arguments, the Court makes the following findings and rulings.

I. Factual Background

a. November 30, 2017 Traffic Stop²

On November 30, 2017, Canaan police dispatch received a call about a suspicious vehicle following a town school bus. Officer Provenza responded to the call and traveled to the location provided by dispatch. Officer Provenza did not activate his cruiser camera before responding to the call.³ Upon arriving at the location of the bus, Provenza observed a white SUV following closely behind the school bus, and he initiated a traffic stop of the

¹ Valley News filed a "Complaint-in-Intervention," but that is not a pleading allowed as a matter of right. See Superior Court Civil Rule 6(a). As a result, the filing was docketed as a crossclaim pursuant to Superior Court Civil Rule 10. No party objected. (Index #17.)

² The following facts are taken from the Report and the parties' pleadings.

³ Canaan Police Chief Frank explained that all police vehicles in Canaan, apart from Officer Provenza's, were equipped with cameras that automatically turn on when the car is turned on. Officer Provenza's cruiser camera, on the other hand, had to be manually activated by pushing a button. Chief Frank did not feel Officer Provenza's failure to activate his cruiser camera was intentional, but rather an oversight given the situation.

white SUV. Officer Provenza approached the vehicle and identified the driver as Crystal Eastman, a resident of Canaan, acknowledged that he recognized her, and asked her "what's going on?" [REDACTED] Ms. Eastman explained that she was following the bus because her daughter had been having ongoing issues with the driver of the school bus. Officer Provenza described Ms. Eastman's behavior as "nutty and weird," and further noted that, in his opinion, she was "not making sense and . . . was rambling." [REDACTED]

Officer Provenza, in an attempt to determine if Ms. Eastman was impaired, then moved his head toward the window and sniffed to see if he could detect an odor of alcohol or cannabis. Ms. Eastman claims he "got close enough that he could have kissed her," and she then angrily asked what he was doing. [REDACTED] Officer Provenza informed Ms. Eastman that he was investigating reports of a suspicious vehicle following a school bus. Officer Provenza asked Ms. Eastman for her license and registration multiple times, with Ms. Eastman responded by asking why he needed them because he knew who she was. Ms. Eastman then proceeded to retrieve her license to give to Officer Provenza, but before she handed it to him, she claims she began to lean across her front seat to retrieve her registration and cell phone, "probably pulling her license back in with her." [REDACTED] Officer Provenza, on the other hand, claims that as he reached for the license, she "snatched it back out of my fingers." [REDACTED]

Officer Provenza then informed Ms. Eastman that she was under arrest. Officer Provenza attempted to open the vehicle's door, but Ms. Eastman grabbed the door to prevent Officer Provenza from opening it. Eventually Officer Provenza was able to open the door, but Ms. Eastman wrapped her right arm around the steering wheel to prevent him from removing her from her vehicle. Officer Provenza claims that Ms. Eastman was

attempting to bite his hand whereas Ms. Eastman claims that Officer Provenza grabbed her hair behind her head and tried to pull her out of the car. Ms. Eastman claims to have been screaming for Officer Provenza to stop pulling her hair and to have honked her horn at least once.

Soon thereafter Officer Provenza was able to handcuff Ms. Eastman's left wrist. Officer Provenza again attempted to pull Ms. Eastman out of the vehicle to cuff her right wrist. While Officer Provenza was attempting to handcuff Ms. Eastman, Ms. Eastman claims her knee was hit, "she heard it pop," and she yelled that Officer Provenza had broken her leg. [REDACTED] Officer Provenza finished handcuffing Ms. Eastman and called for backup. Ms. Eastman claims that she did not see Officer Provenza hit her leg but she "felt it." [REDACTED]

[REDACTED]

Chief Frank arrived on the scene shortly thereafter.⁴ Chief Frank assisted Ms. Eastman to the rear of her vehicle and attempted to calm her down. Ms. Eastman was still complaining that her leg was injured. Ms. Eastman was then transported to Dartmouth-Hitchcock Medical Center. Ms. Eastman claims that she did not bite or kick Officer Provenza during the altercation. Officer Provenza claims he did not pull Ms. Eastman's hair or "put any part of his body on her legs." [REDACTED]

b. Ms. Eastman's Subsequent Trial and News Coverage

Ms. Eastman was subsequently charged with resisting arrest and disobeying a police officer. At trial, Ms. Eastman was acquitted of the resisting arrest charge and

⁴ Chief Frank later interviewed a number of witnesses and followed up with these witnesses.

convicted of disobeying a police officer, and that conviction was upheld on appeal. On February 8, 2018, Ms. Eastman filed a formal complaint against Officer Provenza. In response to Ms. Eastman's complaint, the Town commissioned Municipal Resources, Inc. ("MRI") to conduct an internal investigation into the excessive force complaint.

As [REDACTED] the November 30, 2017 traffic stop and Ms. Eastman's subsequent trial, the Valley News began to cover the story.⁵ On February 4, 2019, Valley News reporter Jim Kenyon requested a copy of the Report, all government records related to it, and all information concerning the cost of the report pursuant to RSA ch. 91-A. On February 8, 2019, the Town denied Valley News's request for the Report based on the "internal personnel practices" exemption set forth in RSA 91-A:5, IV, and specifically citing Union Leader Corp. v. Finneman, 136 N.H. 624 (2007). (Valley News's Obj. ¶ 17, Ex. 3.) The Town did, however, provide redacted documentation related to the cost of the Report. On June 9, 2020, Valley News renewed its request for the Report following the New Hampshire Supreme Court's decisions in Union Leader Corporation & a. v. Town of Salem, 173 N.H. ___ (May 29, 2020) and Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. ___ (May 29, 2020) which overruled certain key holdings of Finneman.

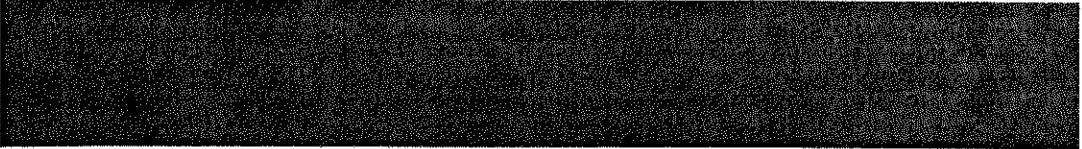
In response to Valley News's renewed request for the Report, the Town made Officer Provenza aware of the request. Officer Provenza then filed this lawsuit seeking to enjoin the Town from releasing the Report. Valley News filed a motion to intervene, which

⁵ Before the plaintiff instituted this action, the Valley News had published five stories related to traffic stop and trial—"Jim Kenyon: Canaan Mom Injured by Police Officer Cries Foul" on March 4, 2018; "Jim Kenyon: In Canaan, Police Transparency Not a Priority" on August 12, 2018; "Jim Kenyon: Canaan report about police excessive force case remains a secret" on February 29, 2019; "Jim Kenyon: Judge finds Canaan woman not guilty of resisting arrest" on June 4, 2019; "Jim Kenyon: Plenty of question marks follow Canaan woman's sentence" on July 20, 2019.(Kenyon Aff., Index #12.)

this Court granted. Valley News then filed an objection to Officer Provenza's suit for injunctive relief and a crossclaim seeking disclosure of the Report.

c. Findings of the Report

The Town commissioned MRI to conduct an internal investigation into the excessive force complaint filed by Ms. Eastman. The purpose of its investigation was "to determine if the level of force used by Officer Provenza when he arrested Crystal Eastman was justified, given the circumstances." (Report at 13.) MRI conducted interviews of Officer Provenza, Ms. Eastman, Chief Frank, Ms. Eastman's supervisor, and several eyewitnesses⁶, and it also reviewed police reports, medical documentation, and other relevant evidence. MRI released its Report in July 2018. The investigator summarized his conclusions as follows:



⁶ As discussed below, infra. fn. 9, the eyewitnesses are all minors and their privacy interests require the Court to keep their names anonymous.

[REDACTED]

[REDACTED]

(Id. at 14–15.)

II. Analysis

Officer Provenza now petitions the Court to enjoin the Town from disseminating the Report to the public and to declare the Report exempt from public access under the Right-to-Know Law, pursuant to RSA 91-A:5, IV. (Pl.’s Pet. ¶¶ 1, 22.) Specifically, Officer Provenza argues that “his privacy interests in an unfounded internal affairs investigation outweighs the request for disclosure to the public.” (Id. ¶ 2.) Valley News objects and asserts that the Report is “a public record that must be made available for inspection” to Valley News and the public at large, pursuant to RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution. (Valley News’s Crossclaim ¶ 32, prayer A.) Valley News contends that the Report is subject to disclosure because: 1) “the public interest in disclosure is compelling”; 2) “the privacy interests in nondisclosure are nonexistent”; and 3) “the public interest trumps any nonexistent privacy interest.” (Id. ¶ 32.)

With respect to Officer Provenza’s petition for injunctive relief, “[t]he issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy.” New Hampshire Dep’t of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). An injunction should not issue unless the petitioner shows: (1) that he is likely to succeed on the merits; (2) that he has no adequate remedy at law; (3) that he will suffer immediate

irreparable harm if the injunctive relief is not granted; and (4) that the public interest will not be adversely affected if the injunction is granted. Id.; UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13–15 (1987); see also Kukene v. Genualdo, 145 N.H. 1, 4 (2000) (“injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted”). “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, 167 N.H. at 434.

As to the likelihood of success on the merits, Officer Provenza argues that he is likely to succeed on the merits “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.” (Pl.’s Pet. ¶ 34.) Essentially, Officer Provenza asserts that, as a matter of public policy, the Report is exempt from disclosure under the Right-to-Know Law. He maintains that “[t]he public interest would not be adversely affected but rather promoted” by granting injunctive relief “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.” (Id. ¶ 35.) Valley News disagrees and contends that Provenza’s request for injunctive relief should fail because: 1) RSA 91-A:5, IV “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 [Report]”; and 2) under RSA 91-A:5, IV the “public interest balancing analysis compels its disclosure.” (Valley News’s Obj. ¶15.)

Turning first to the parties' statutory arguments, generally, "[t]he ordinary rules of statutory construction apply to [the Court's] review of the Right-to-Know Law." Censabella v. Hillsborough Cty. Attorney, 171 N.H. 424, 426 (2018) (citing N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 102–03 (2016)). "When examining the language of a statute, [the Court] ascribe[s] the plain and ordinary meaning to the words used." Id. at 103. "[The Court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "[The Court] also interpret[s] a statute in the context of the overall statutory scheme and not in isolation." Id.

The purpose of the Right-to-Know Law "is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." (RSA 91-A:1 (2013); N.H. Right to Life, 169 N.H. at 103. "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Censabella, 171 N.H. at 426; see also N.H. Const. pt. 1, art. 8 ("the public's right of access to governmental proceedings and records shall not be unreasonably restricted.") (emphasis added). The Right-to-Know Law provides "[e]very citizen" with a "right to inspect and copy all government records . . . except as otherwise prohibited by statute." RSA 91-A:4, I. RSA 91-A:4, IV requires public bodies and agencies to make such government records available for inspection and copying upon request. The statute allows "[a]ny person aggrieved by a violation of this chapter" to petition for injunctive relief. RSA 91-A:7; Censabella, 171 N.H. at 427.

Valley News first argues that “[t]o 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 . . . who has declined to produce documents pursuant to an applicable exemption.” (Valley News’s Obj. ¶ 16.) In short, Valley News maintains that because “Provenza is not an aggrieved requester, he has no statutory right of action under the Right-to-Know Law.” (*Id.*) The Court concludes that it need not address the merits of this argument in order to rule on the merits of the parties’ dispute and the relief each requests. For purposes of this order, the Court assumes without deciding that the plaintiff is a “person aggrieved” within the meaning of RSA 91-A:7. In addition, the Court further rules that the plaintiff has standing to maintain this action under RSA 491:22 and RSA 498:1.

The Court next considers the parties’ arguments regarding to the balancing of public and private interests relating to disclosure of the Report. The Right-to-Know Law carves out exemptions from the general rule providing citizen access to governmental records. See RSA 91-A:5. RSA 91-A:5 provides, in pertinent part, that “[t]he following governmental records are exempted from the provisions of” the Right-to-Know Law:

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.

Id. While it is true that “the statute does not provide for unfettered access to public records,” New Hampshire courts “broadly construe provisions in favor of disclosure and interpret the exemptions restrictively.” Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 3.)

As noted above, Union Leader Corp. and Seacoast Newspapers, Inc., overruled key holdings in Fenniman relating to RSA 91-A:5, IV. Specifically, Seacoast Newspapers, Inc. “overrule[d] Fenniman to the extent that it broadly interpreted the “internal personnel practices” exemption and its progeny to the extent that they relied on that broad interpretation.” 173 N.H. at ___ (slip op. at 9). Similarly, Union Leader Corp. “overrule[d] Fenniman to the extent that it adopted a per se rule of exemption for records relating to ‘internal personnel practices.’” 173 N.H. at ___ (slip op. at 11). The Court clarified that “[i]n the future, the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV shall apply to records relating to ‘internal personnel practices.’” Id. (citing Prof'l Firefighters of N.H., 159 N.H. 699, 707 (2010)) (setting forth the three-step analysis required to determine whether disclosure will result in an invasion of privacy). Furthermore, “[d]etermining whether the exemption for records relating to ‘internal personnel practices’ applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy.” Id. (citing N.H. Housing Fin. Auth., 142 N.H. at 552).

New Hampshire Courts “engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91–A:5, IV.” Lambert v. Belknap Cty. Convention, 157 N.H. 375, 382–83 (2008). This balancing test applies to all categories of records enumerated in RSA 91–A:5, IV. New

Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice ___ N.H. ___, ___ (October 30, 2020) (slip op. at 10); Union Leader Corp., 173 N.H. at ___ (slip op. at 11). “First, [the Court] evaluates whether there is a privacy interest at stake that would be invaded by the disclosure.” Lambert, 157 N.H. at 382. “Second, [the Court] assess[es] the public’s interest in disclosure.” Id. at 383. “Finally, [the Court] balance[s] the public interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure.” Id.

As to the first factor, the individual privacy interest, “[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. “If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.” Id. at 383. Generally, “[a] clear privacy interest exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available.” Reid, 169 N.H. at 531.

Officer Provenza asserts that “[i]n New Hampshire, a police officer has a substantial privacy interest in [an] unfounded or unsustainable internal affairs report which precludes the disclosure to the public because it outweighs the public’s right to know.” (Pl.’s Pet. ¶ 25.) To support his assertion of the heightened privacy interest of police officers, Officer Provenza also urges the Court to consider RSA 105:13-b, RSA 516:36, and Pivero v. Largy, 143 N.H. 187, 191 (1998). (Pl.’s Pet. ¶¶ 26–28.) Officer Provenza further argues that “the publication of baseless allegations deprives a police officer of his/her constitutionally protected liberty and property interests” pursuant to Part 1, Article 15 of the New Hampshire Constitution. (Id. ¶ 27.)

Valley News contends that Officer “Provenza’s privacy interest in disclosure in nonexistent.” (Valley News’s Obj. ¶ 31.) It asserts that the plaintiff’s reliance on RSA 105:13–b, RSA 516:36, and Pivero is misplaced. (Valley News’s Obj. ¶¶ 34–36.) Valley News points to numerous cases from other jurisdictions that stand for the proposition that courts routinely reject the argument that police officers have a privacy interest when their actions implicate their official duties, including in the context of internal investigation of citizen complaints. (Valley News’s Obj. ¶ 31, fn.7.) To rebut Officer Provenza’s constitutional argument, Valley News posits that “the procedural due process and privacy protections in . . . Part I, Article 15 of the New Hampshire Constitution protect individual citizens from government officials, not the other way around.” (Id. ¶ 37.)⁷

The Court first addresses the plaintiff’s invocations of RSA 105:13–b, RSA 516:36, and Pivero. The Court agrees that the plaintiff’s reliance thereon is misplaced. RSA 105:13–b concerns the disclosure of evidence in a “police personnel file.” RSA 105:13–b, I. In this case, however, the Town initially denied Valley News’s request for a copy of the Report based on the “internal personnel practices” exemption, not the exemption for “personnel . . . files,” in RSA 91–A:5, IV. (Valley News’s Obj., Ex. 3.) Moreover, RSA 105:13–b, by its plain language, applies only to situations in which “a police officer . . . is serving as a witness in any criminal case.” John Doe v. Gordon J. MacDonald, Merrimack Super. Ct., No. 217-2020-CV-176 (August 27, 2020) (Order, Kissinger, J.); see Duchesne v. Hillsborough County Attorney, 167 N.H. 774, 781 (2015) (observing that the “current

⁷ To bolster this position, Valley News cites to Tompkins v. Freedom of Info. Comm’n, 46 A.3d 291 (Conn. App. Ct. 2012), which noted that “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.” 46 A.3d at 297.

version of RSA 105:13–b addresses three situations that may exist with respect to police officers who appear as witnesses in criminal cases”). Finally, even if the Court was to “assume without deciding that RSA 105:13-b constitutes an exception to the Right-to-Know Law and that it applies outside of the context of a specific criminal case in which a police officer is testifying,” an argument the plaintiff does not make, there is nothing in the record to suggest that the Report is contained in or is a part of the plaintiff’s personnel file. New Hampshire Center for Public Interest Journalism, ___ N.H. at ___ (slip op. at 7–9); see Reid, 169 N.H. at 528 (discussing the personnel files exemption in RSA 91–A:5, IV). RSA 516:36 is also inapplicable because it governs the admissibility and not the discoverability of internal police investigation documents and, thus, has no bearing on the Right-to-Know analysis. Similarly, Pivero v. Largy is unpersuasive because that case did not concern the Right-to-Know Law and relied on a holding in Fenniman that has since been overruled.

With respect to the plaintiff’s contention that disclosure of the Report to the public would deprive him of his “protected liberty and property interests” under Part 1, Article 15 of the New Hampshire Constitution (Pl.’s Pet. ¶ 27), the Court finds that the plaintiff has not sufficiently developed this argument for judicial review and deems it waived. See Guy v. Town of Temple, 157 N.H. 642, 658 (2008) (stating that “judicial review is not warranted for complaints . . . without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration”) (brackets, quotations and citation omitted); State v. Chick, 141 N.H. 503, 504 (1996) (considering waived

defendant's undeveloped Part 1, Article 15 argument upon which he did "not further elaborate").

The Court agrees with Valley News that Officer Provenza's privacy interests in disclosure, if any, are minimal. First, "the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Censabella, 171 N.H. at 426. Second, information concerning purely private details about a person who happens to work for the government is very different from facts, such as those detailed in the Report, concerning that individual's conduct in his or her official capacity as a government employee. See Lamy v. N.H. Public Utilities Comm'n, 152 N.H. 106, 113 (2005) (observing that "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") (quotations and citation omitted). Therefore, even "[a]ssuming there is a relevant privacy interest at stake, that interest is minimal because the [Report] do[es] not reveal intimate details of [Officer Provenza's] life," but rather information relating to Officer Provenza's conduct as a government employee while performing his official duties and interacting with a member of the public. See New Hampshire Civil Liberties Union, 149 N.H. at 441.

As to the second factor, the public's interest in the information, "[d]isclosure of the requested information should inform the public about the conduct and activities of their government." Lambert, 157 N.H. at 383. Indeed, "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." Reid, 169 N.H. at 532 (quotations and citation omitted). "The legitimacy of the public's interest in

disclosure, however, is tied to the Right-to-Know Law's purpose, which is 'to provide the utmost information to the public about what its government is up to.'" Id. (citing N.H. Right to Life, 169 N.H. at 111). "If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." Id. (citing Lamy, 152 N.H. at 111) (quotations omitted). "Conversely, 'an individual's motives in seeking disclosure are irrelevant to the question of access.'" Id. (citing Lambert, 157 N.H. at 383).

Officer Provenza argues that, because the Report ultimately concluded that the excessive force allegation against him was determined to be "not sustained," the public interest in the Report is insignificant. Officer Provenza further contends that nondisclosure of the Report actually promotes the public interest in two regards: firstly, "public policy requires that personnel matters be held confidential pursuant to statute and that matters and allegations not be indiscriminately disseminated by individuals," and, secondly, the public's interest in public safety is undermined if police are worried about dissemination of unfounded complaints, which would have a chilling effect on policing in the State. (Pl.'s Pet. ¶¶ 28, 31, 35.)

Valley News asserts that the "public interest in disclosure is strong." (Valley News's Obj. ¶ 28.) Specifically, Valley News argues that "[p]roducing 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." (Id. ¶ 29.) Valley News notes that this case occurs "[i]n this moment of conversation about police accountability nationally and here in New Hampshire"⁸ and,

⁸ Valley News directs the Court to Governor Sununu's Executive Order 2020-11, which recognized the "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance

as such, “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.” (Id.) Valley News posits that “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.” (Id. ¶ 30)

Valley News relies heavily on, and the Court finds persuasive, a Vermont Supreme Court case, Rutland Herald v. City of Rutland, 84 A.3d 821 (Vt. 2013), for the proposition that “there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct.” Id. at 825. The Rutland Herald court reasoned that “the internal investigation records and related material will allow the public to gauge the police department’s responsiveness to specific instances of misconduct; assess whether the agency is accountable to itself internally, whether it challenges its own assumptions regularly in a way designed to expose systemic infirmity in management oversight and control; the absence of which may result in patterns of inappropriate workplace conduct.” Id. (quotations omitted).

Indeed, the public has a significant interest in knowing how the police investigate such complaints for a number of reasons. First, the public has the right to know that the police take their complaints seriously and that the investigation was “comprehensive and accurate.” See Reid, 169 N.H. at 532 (in reference to an investigation of the New Hampshire Attorney General’s office, the Court noted “[t]he public has a significant

transparency, accountability, and community relations in law enforcement.”
<https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf>.

interest in knowing that a government investigation is comprehensive and accurate”) (quotations omitted); N.H. Civil Liberties Union, 149 N.H. at 441 (“Official information that sheds light on an agency’s performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know Law”) (quotations and citation omitted). Second, the public similarly has the right to know whether the police officer in question was given a fair investigation aligned with traditional notions of due process. Third, as is evidenced by the national conversation concerning policing in the United States, transparency at all levels of police conduct investigations is fundamentally important to ensure the public’s confidence and trust in local police departments. See RSA 91-A:1 (The purpose of the Right-to-Know Law “is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.”) (emphasis added); Prof’l Firefighters of N.H., 159 N.H. at 709 (noting that “knowing how a public body is spending taxpayer money in conducting public business is essential to the transparency of government, the very purpose underlying the Right-to-Know Law”).

Moreover, the New Hampshire Supreme Court’s overruling of Fenniman reinforces the importance of transparency in government. See Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 9) (“An overly broad construction of the ‘internal personnel practices’ exemption has proven to be an unwarranted constraint on a transparent government.”); see e.g., Salcetti v. City of Keene, (unpublished order, decided June 3, 2020), (slip op. at 7, 9–10) (where the Supreme Court vacated and remanded a superior court decision denying a petition concerning “any and all citizen complaints, logs, calls, and emails regarding charges of excessive police force and/or police brutality” in light of its recent decisions in Union Leader Corp. and Seacoast Newspapers, Inc.).

As to the third factor, the balancing of the private and public interests, “the legislature has provided the weight to be given one side of the balance by declaring the purpose of the Right-to-Know Law in the statute itself.” Reid, 169 N.H. at 532 (brackets omitted) (quoting Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996)). Specifically, the preamble to RSA chapter 91–A provides: “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. “Thus, when a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.” Reid, 169 N.H. at 532 (quotations and brackets omitted). Here, although Officer Provenza is not a public entity, as the party opposing disclosure he bears the same “heavy burden.” See id.

Officer Provenza calls for a bright-line rule to the effect that if an internal police investigation concludes that the complaint against the officer is unfounded or not sustained, then the officer’s privacy interest outweighs the public interest. (Pl.’s Pet. ¶¶ 25, 28.) This proposition, however, contravenes the purposes of the Right-to-Know Law — ensuring maximum public access to governmental proceedings and records, and promoting accountability of public officials to the citizens of New Hampshire. See RSA 91–A:1. The people of New Hampshire have the constitutionally rooted right to access public information and hold those in power accountable for their actions, a right “essential to a democratic society.” Id.; N.H. Const. pt. 1, art. 8. To apply the bright-line rule that Officer Provenza urges the Court to adopt would be to acknowledge that the people of New Hampshire merely have the right to access information concerning founded

misconduct of police officers and not, among other things, whether an investigation resulting in a finding that the misconduct complaint was not sustained was “comprehensive and accurate.” See Reid, 169 N.H. at 532. In the absence of Fenniman and its progeny, Officer Provenza cannot meet his “heavy burden” to shift the balance towards nondisclosure. Reid, 169 N.H. at 532. The Court concludes that the balancing test overwhelmingly favors the public’s interest in disclosure of the report in the name of transparency and accountability. See RSA 91–A:1.

As the trial court in Union Leader Corp. noted, “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.” Union Leader Corp. v. Town of Salem, No. 218-2018-CV-01406, 2019 WL 3820631, at *2 (N.H.Super. Apr. 05, 2019) (vacated and remanded by Union Leader Corp., 173 N.H. at ___). “Democracies die behind closed doors,” and through laws, such as the Right-to-Know Law, the people are better able to hold government officials accountable. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

For the reasons articulated above, the Court rules that the Report is subject to disclosure. The Right-to-Know Law provides “[e]very citizen” with a right to inspect and copy government records except as otherwise prohibited by statute” and “requires public bodies and agencies to make such government records available upon request.” RSA 91-A:4, I; RSA 91-A:4, IV. Here, because the Report is not exempt under RSA 91-A:5, IV, the Town must comply with the statute by disclosing the Report.⁹

⁹ At the September 15, 2020 hearing, the Town requested that certain information—specifically medical information, license plate numbers, and the names of minors—be redacted from the Report. Valley News does not object to the proposed redactions. (Index #19.) The Court agrees that the privacy interest in this information outweighs any public interest in it. Reid, 169 N.H. at 531.


III. Conclusion

For the foregoing reasons, the plaintiff's petition for declaratory judgment and for preliminary and permanent injunctions is **DENIED**, and Valley News's crossclaim for declaratory relief is **GRANTED**.

The Court requests that the parties review the redacted copy of this order, attached hereto, and if they believe further redaction is necessary, to so inform the Court by motion filed within seven (7) days of the date of the clerk's notice of decision. Thereafter, the redacted version will be issued publicly.

So Ordered.

Date: 12/2/2020



Hon. Peter H. Bornstein
Presiding Justice