THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

No. 218-2021-cv-00026

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
18 Low Avenue, #12
Concord, NH 03301
[PETITIONER]

UNION LEADER CORPORATION
100 William Loeb Drive
Manchester, NH 03109
[PROPOSED INTERVENOR]

v.

SALEM POLICE DEPARTMENT
9 Veterans Memorial Parkway
Salem, NH 03079
[RESPONDENT]

PETITIONER ACLU-NH'S AND PROPOSED INTERVENOR UNION LEADER CORPORATION'S RESPONSE TO (I) THE SALEM POLICE DEPARTMENT'S ANSWER AND (II) INTERVENOR MICHAEL VERROCCHI'S MOTION TO INTERVENE AND RESPONSE TO PETITION

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NOW COMES Petitioner ACLU of New Hampshire ("ACLU-NH") and Proposed Intervenor Union Leader Corporation, by and through their attorneys, and file this response to (i) the Salem Police Department's ("Department") March 1, 2021 Answer to the Petition and (ii) Proposed Intervenor Sergeant Michael Verrocchi's March 1, 2021 Motion to Intervene and Response to Petition.

In this case, both the Salem Police Department and a Salem police sergeant—Michael Verrocchi—are attempting to keep secret information concerning sustained police misconduct. But this is not just any misconduct. This is misconduct that led to the State charging Mr. Verrocchi with serious crimes. This is misconduct that was swept under the rug by the Salem Police Department in 2012 when it agreed to a "sweetheart deal" with the Salem Police Relief Union to treat this misconduct as a secret personnel matter instead of the criminal matter that it was. This is misconduct that was glossed over by the Police Standards and Training Council ("PSTC") when, in 2020, it declined to take any temporary action against Mr. Verrocchi despite the serious criminal charges pending against him. Mr. Verrocchi is not some innocent third-party witness. He is not like Richard Jewell who never engaged in sustained misconduct and never was charged with a crime. *See* Verrocchi Resp., at p. 12 (¶ 37). If this is not a case in which the public interest favors disclosure, then no case is. This Right-to-Know petition should be granted, and this Court should reject this attempt by law enforcement to shield information concerning this sustained misconduct from public view.

While Petitioner ACLU-NH and Proposed Intervenor Union Leader Corporation have no objection to this Court conducting an *in camera* review of the requested records, any such review must be done consistent with the fact that both the Department and Mr. Verrocchi bear the "*heavy burden* to shift the balance toward nondisclosure." *Murray v. N.H. Div. of State Police*, 154 N.H.

579, 581 (2006) (emphasis added). For the reasons explained below, they have not met their "heavy burden" in this case.

SUMMARY OF ARGUMENT

The requested records concerning Mr. Verrocchi's *sustained* misconduct are in the custody of the Salem Police Department, and it is the Department—as the "public agency" gatekeeper of these records under RSA 91-A:1-a, V—that has the heavy burden of resisting disclosure under the Right-to-Know Law. It is also the Department that is liable for any violation of the Right-to-Know Law, including liability for attorneys' fees and costs where appropriate. *See* RSA 91-A:8, I.

Here, the Department has only claimed that the requested records constitute information "compiled for law enforcement purposes" that are exempt from disclosure under *Murray* Exemptions 7(A) (addressing interference with enforcement proceedings) and 7(B) (addressing deprivation of a right to a fair trial). The Department has raised no other exemptions. *See* Salem Police Department Dec. 30, 2020 Chapter 91-A Response, attached as *Exhibit 10* to Petition. The Department has not met its heavy burden of resisting disclosure under Exemptions 7(A) and 7(B). At the outset, these records were not "compiled for law enforcement purposes" because they were, as Mr. Verrocchi has admitted, not created as part of a criminal investigation, but rather as part of an internal disciplinary matter. In addition, the Department has made no attempt to show—as is legally required using evidence—that disclosure of the requested information would prejudice Mr. Verrocchi's right to a fair trial. Instead, the Department has simply decided to side with its officer, despite the fact that case after case has concluded that *voir dire* can be used to address any potential prejudice at trial. Nor does the Department or Mr. Verrocchi address the recent *Letendre* decision where Judge Mark Howard of the Strafford County Superior Court held that disclosure of information concerning an officer's misconduct that led to a criminal prosecution should be made

public during the pendency of the criminal prosecution. *See State v. Letendre*, No. 219-2020-cr-0792 (Strafford Cty. Super. Ct. Feb. 4, 2021) (attached as ***Exhibit 1*** to Petitioner ACLU-NH's February 1, 2021 Second Notice of Supplemental Authority). This case is no different from *Letendre*, and this Court should reach the same conclusion. And if there was any further doubt that disclosure here would not prejudice Mr. Verrocchi's fair trial rights under Exemption 7(A) or 7(B) or otherwise invade his privacy, it is eliminated by the fact that Mr. Verrocchi himself requested that his September 22, 2020 police decertification proceeding addressing this incident be public—a hearing in which six Salem officials testified about the misconduct at issue in this case. *See* PSTC Sept. 22, 2020 Minutes, at pp. 9-16, attached as ***Exhibit 5*** to Petition.

In what is tantamount to a "reverse Chapter 91-A" action,[1] Proposed Intervenor Michael Verrocchi has similarly not met his heavy burden in proving that the "invasion of privacy" exemption under RSA 91-A:5, IV applies in this case. Setting aside the fact that only aggrieved requesters can seek relief under Chapter 91-A, the public interest balancing analysis required under RSA 91-A:5, IV mandates disclosure in this case. What Mr. Verrocchi ignores is that the records in question pertain to ***sustained*** misconduct governing an officer's ability to perform his official duties. But this is not just any sustained misconduct; rather, this is sustained misconduct that has triggered criminal charges. As court after court has held, when it comes to conduct implicating an officer's official duties, there is no privacy interest in nondisclosure, and the public interest in disclosure is compelling. *See, e.g., Union Leader Corp./ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406, at *23, 26 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) ("the public has a strong interest in understanding how workplace misconduct is handled by the police

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[1] *See* Department of Justice Guide to Freedom of Information Act, Reverse FOIA, at p. 1, 2-3 (noting that reverse FOIA actions have "been brought by plaintiffs challenging a contemplated agency disclosure of information that the plaintiffs contended was exempt under other FOIA exemptions"), *available at* https://www.justice.gov/oip/page/file/1197216/download.

department"; "[I]f an officer has been found, following a fair hearing disciplinary proceeding, of committing a serious disciplinary offense against a member of the public … why should the law hide that finding beneath [a] veneer of confidentiality? What social value or policy would it serve?") (attached as ***Exhibit A*** to Petitioner ACLU-NH's January 25, 2021 Notice of Supplemental Authority); *Salcetti v. City of Keene*, No. 213-2017-cv-00210, at *4-5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.) ("the public has an elevated interest in knowing whether officers are abusing their authority") (attached as ***Exhibit B*** to Petitioner ACLU-NH's January 25, 2021 Notice of Supplemental Authority). Disclosure in this case will also better inform the public as to why the Department failed to prosecute Mr. Verrocchi in 2012 for evading the police. This need for transparency even exists if the misconduct was not sustained so the public can evaluate the integrity of the public agency's investigation and actions, though this question is not currently before this Court given the sustained nature of Mr. Verrocchi's misconduct. *See Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that an internal investigation report which concluded that an allegation of excessive force was not sustained is still a public record because the public interest in disclosure trumps any privacy interest the officer may have under RSA 91-A:5, IV; currently on appeal), attached as ***Exhibit 1*** to Petition; *see also Reid v. N.H. AG*, 169 N.H. 509, 532 (2016) ("We recognize that [t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate.") (internal quotations omitted).[2]

[2] *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."). In addition, even misconduct complaints against judges or lawyers that are not docketed—and thus are effectively deemed "non-sustained"—are kept public for two years. *See* N.H. Sup. Ct. R. 37(20)(a)(2); N.H. Sup. Ct. R. 40(16)(b).

Rather than following this Right-to-Know Law standard that tilts the balance in favor of disclosure, Mr. Verrocchi conflates this standard with the limited evidentiary privilege that exists to prevent the use of compelled statements in later criminal prosecutions under *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). At the outset, Mr. Verrocchi's position is overbroad, as he is apparently seeking to keep secret information that goes *beyond* the two post-*Garrity* statements at issue in this case. Moreover, *Garrity* simply means that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in *subsequent criminal proceedings* of statements obtained under threat of removal from office." *Id.* at 500 (emphasis added). This principle only governs admissibility in later criminal cases and does not trump the Right-to-Know Law. In other words, information can be *both* inadmissible in a criminal case in light of *Garrity* and public under Chapter 91-A. As one court correctly concluded in rejecting a police department's attempt to use *Garrity* as a defense to a public records request, "*Garrity* … recognizes no constitutional right to prevent disclosure to the public of such statements under an open-records law." *Chasnoff v. Mokwa*, 466 S.W.3d 571, 578 (Mo. Ct. App. 2015). If the records are produced in this case, nothing would prevent this Court from separately enforcing Mr. Verrocchi's *Garrity* rights in his criminal case by deeming inadmissible any such post-*Garrity* warning statements.

Finally, both the Department and Mr. Verrocchi ignore that, in the *Union Leader Corp./ACLU-NH v. Town of Salem* decision issued on remand, Judge Andrew Schulman has already concluded that information on Page 41 (*Exhibit 4* to Petition, at REP 042) of the Kroll internal affairs audit report that addresses this incident concerning Mr. Verrocchi should be released because the public interest in disclosure trumps any privacy interests. *See Union Leader Corp./ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406, at *27-28 (Rockingham Cty. Super.

Ct. Jan. 21, 2021) (Schulman, J.) (attached as *Exhibit A* to Petitioner ACLU-NH's January 25, 2021 Notice of Supplemental Authority). This too should cinch the matter and also entitles Petitioner ACLU-NH and Proposed Intervenor Union Leader Corp. to reasonable attorneys' fees and costs in this case. In light of this decision, the Department and Mr. Verrocchi "knew or should have known that the conduct engaged in was in violation of this chapter." *See* RSA 91-A:8, I. The ACLU-NH and Union Leader Corp. should not have to keep spending their limited resources seeking information the disclosure of which one judge has already concluded is in the public interest. The Town of Salem has already been ordered to pay fees in another Right-to-Know Law case. *See Amodeo-Vickery v. Town of Salem*, No. 216-2020-cv-00877 (Hillsborough North Superior Court, Feb. 15, 2021) (Messer, J.), attached hereto as *Exhibit 1*. Such an order is also appropriate here.

ARGUMENT

I. The Salem Police Department's Answer is Deficient, Fails to Meet its Heavy Burden in Resisting Disclosure, and Fails to Appreciate its Independent Obligation to Evaluate the Public Interest in Disclosure as the Gatekeeper of These Records Under Chapter 91-A.

The Salem Police Department's March 1, 2021 Answer is deficient in multiple ways.

First, the Department's Answer repeatedly states that the Petitioner ACLU-NH should be held "to its strict burden of proof." *See* Dept.'s Mar. 1, 2021 Answer, at p. 5. However, it is not the ACLU-NH or Union Leader Corp. that has the burden in a Right-to-Know action. Instead, that "heavy burden" falls on the Department. *See Murray*, 154 N.H. at 581.

Second, the Department asserts that, after receiving the Petitioner ACLU-NH's request, it—pursuant to the recent New Hampshire Supreme Court decisions in *Seacoast Newspapers, Inc.* and *Town of Salem*—"balance[d] the public and private interest at stake" and concluded that "the privacy interest at stake and concerns raised by the parties [in the *Verrocchi* criminal matter] justify

keeping the requested documents confidential at this time." *See* Dept.'s Mar. 1, 2021 Answer, at p. 2. However, this balancing test only applies to the "invasion of privacy" exemption under RSA 91-A:5, IV that implicates "confidential … information," "personnel … file[]" information, or "other files." Here, the Department has not raised this "invasion of privacy" exemption under RSA 91-A:5, IV. Instead, the Department has *only* raised Exemptions 7(A) (addressing interference with enforcement proceedings) and 7(B) (addressing deprivation of a right to a fair trial) as a basis for nondisclosure under New Hampshire's Right-to-Know Law. *See* Salem Police Department Dec. 30, 2020 Chapter 91-A Response, attached as *Exhibit 10* to Petition (only raising Exemptions 7(A) and 7(B).

Third, to the extent the Department is asserting the "invasion of privacy" exemption under RSA 91-A:5, IV, the Department's Answer presents no meaningful assessment of the public's interest in disclosure. As the *Town of Salem* and *Seacoast Newspapers, Inc.* decisions make clear, a public body, when confronted with a public records request, has a duty to meaningfully and independently examine the public interest in disclosure under RSA 91-A:5, IV. But, here, the Department's Answer demonstrates a failure to even acknowledge that a compelling public interest in disclosure exists when the sustained misconduct of a public official is implicated. Instead, the Department seems to have simply deferred to the prejudice "concerns" raised by Mr. Verrocchi. *See* Dept.'s Mar. 1, 2021 Answer, at p. 2. This decision shields not only Mr. Verrocchi's misconduct from public view, but also the Department's inadequate response to this 2012 incident. In sum, the requested information is in the possession of the Salem Police Department, and it is the Department that has the legal obligation to comply with Chapter 91-A consistent with the law's presumption in favor of disclosure, even if a third party expresses concerns with disclosure.

II. *Murray* Exemptions 7(A) and 7(B) Do Not Apply Here, as in *Letendre*.

Again, the only exemptions raised by the Respondent Salem Police Department are *Murray* Exemptions 7(A) and 7(B). *See* Salem Police Department Dec. 30, 2020 Chapter 91-A Response, attached as *Exhibit 10* to Petition. Exemption 7 exempts from disclosure, in part, records "compiled for law enforcement purposes" that "(A) could reasonably be expected to interfere with enforcement proceedings," or "(B) would deprive a person of a right to a fair trial or an impartial adjudication." *Murray*, 154 N.H. at 582.[3] Neither the Department nor Mr. Verrocchi meaningfully brief the legal standards that apply under Exemptions 7(A) and 7(B). As explained in the ACLU-NH's original petition, these standards presume the public's right of access, require concrete evidence of prejudice, and—to the extent prejudice exists—allow *voir dire* as a way of addressing prejudice while promoting the public's right of access. *See* ACLU-NH Petition, at pp. 15-25 (¶¶ 32-51).

As a threshold matter, the requested records were not "compiled for law enforcement purposes," thereby rendering Exemptions 7(A) and 7(B) inapplicable. *See* ACLU-NH Petition, at pp. 15-16 (¶¶ 32-34). This is confirmed by Mr. Verrocchi's admission that the requested records were not part of a criminal investigation, but rather were (i) "compiled for the purposes of a

[3] Mr. Verrocchi also argues that the requested records are exempt from disclosure under Exemption 7(C), contending that they constitute information "compiled for law enforcement purposes" that "(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See* Verrocchi Resp., at p. 11 (¶ 34), 14 (¶ 42). As explained in Section III.D, *infra*, even assuming that these records were "compiled for law enforcement" purposes (which they were not), there is no privacy interest in this case. Here, Mr. Verrocchi was not a "witness," but rather was the subject of an investigation that led to a finding of sustained misconduct. Federal courts interpreting Exemption 7(C) under the FOIA have frequently found this exemption to not apply where misconduct is implicated, as is the case here. *See, e.g., Hidalgo v. FBI*, 541 F. Supp. 2d 250, 255-56 (D.D.C. 2008) (in assessing FOIA Exemption 7(C), ordering disclosure of records reflecting any misconduct in agency's relationship with third party informant, as case was "atypical" and "plaintiff has made enough of a showing to raise questions about possible agency misconduct"); *Bennett v. DEA*, 55 F. Supp. 2d 36, 41 (D.D.C. 1999) (in assessing FOIA Exemption 7(C), ordering release of informant's rap sheet after finding "very compelling" evidence of "extensive government misconduct" in handling "career" informant; noting that "there is a substantial public interest in exposing any wrongdoing in which these two parties may have engaged").

personnel and disciplinary incident," *see* Verrocchi Resp., at p. 14 (¶ 44), (ii) created following *Garrity* warnings as part of a non-criminal internal investigation, *id.* at p. 1 (¶¶ 2-3), and (iii) part of an investigation that "was not initially conducted for the purposes of commencing a criminal prosecution." *Id.* at p. 14 (¶ 41). These admissions are fatal and conclusively show that Exemption 7 is inapplicable in this case. Simply because there has been a subsequent criminal prosecution years later does not magically transform the genesis of these requested records or change the fact that they were not created for any law enforcement purpose. *See Greenpeace USA, Inc. v. EPA*, 735 F. Supp. 13, 14-15 (D.D.C. 1990) (an investigation into whether an employee violated agency regulations was not compiled for law enforcement purposes).

Even assuming that these records were "compiled for law enforcement purposes" (which they were not), neither the Department nor Mr. Verrocchi have shown, beyond speculation, that disclosure of the requested information would prejudice Mr. Verrocchi's right to a fair trial under Exemptions 7(A) and 7(B). For example, the burden of proof for invoking Exemption 7(B) cannot be met by "merely conclusory statements," and that, even if a party is faced with litigation, "it [does] not automatically follow that disclosure . . . would deprive [that party] of a fair trial." *See Wash. Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 101 (D.C. Cir. 1988). The same is true under Exemption 7(A), especially where the State's investigation of Mr. Verrocchi is complete. *See, e.g.*, *Jane Does v. King Cty.*, 366 P.3d 936, 945 (Wash. Ct. App. 2015) (ordering release of security surveillance footage of a shooting and rejecting conclusory assertion of interference with witnesses or law enforcement; holding that proponents of secrecy "were obligated 'to come forward with specific evidence of chilled witnesses or other evidence of impeded law enforcement'") (citation omitted). Here, the Department's Answer simply assumes—without evidence—that such prejudice exists because of the pending prosecution,

stating that "Mr. Verrocchi's liberty is at stake in the pending criminal matter." *See* Dept.'s Mar. 1, 2021 Answer, at p. 3. Similarly, Mr. Verrocchi simply assumes—without evidence—that disclosure of the requested information would be prejudicial because New Hampshire is a "small state" and Mr. Verrocchi is "quite prolific." *See* Verrocchi Resp., at p. 13 (¶¶ 38-39). However, as case after case has held, such speculation is insufficient under both Exemptions 7(A) and 7(B). *See* ACLU-NH Petition, at pp. 15-17 (¶¶ 33, 36) (citing cases).

Here, media coverage of Mr. Verrocchi's sustained misconduct has mainly been limited to the *Union Leader* and the *Eagle Tribune* newspapers. While Mr. Verrocchi's misconduct is certainly newsworthy given his status as a public official, it can hardly be said that this incident has generated a "media circus" that could potentially compromise Mr. Verrocchi's right to a fair trial. If Pamela Smart can obtain a fair trial in New Hampshire with all the attention that her trial entailed, then surely Mr. Verrocchi can here with the disclosure of the requested information, especially where the trial has not yet been scheduled and where the public attention has been far less. *See State v. Smart*, 136 N.H. 639, 653 (1993) ("We hold that, notwithstanding extensive pretrial publicity, there was no manifest error in the trial court's determination that an impartial jury had been selected for the defendant's trial.").

Both the Department and Mr. Verrocchi also fail to acknowledge the recent *Letendre* decision where Judge Mark Howard of the Strafford County Superior Court held that an officer's misconduct that led to a criminal prosecution was not exempt from disclosure under Exemption 7(B) during the pendency of the criminal prosecution. *See State v. Letendre*, No. 219-2020-cr-0792 (Strafford Cty. Super. Ct. Feb. 4, 2021) (attached as *Exhibit 1* to Petitioner ACLU-NH's February 1, 2021 Second Notice of Supplemental Authority). This case is no different for at least three reasons. *First*, as in *Letendre*, it is not disputed that trial is not "pending or truly imminent"

in Mr. Verrocchi's criminal case, as the trial has not yet even been scheduled. This reality minimizes the potential of prejudice to the jury pool and "will likely cause any public attention to lessen." *See Letendre*, at p. 8; *see also Wash. Post Co.*, 863 F.2d at 102 (noting that, for Exemption 7(B) to apply, "a trial or adjudication" must be "pending or truly imminent"). Despite Mr. Verrocchi's claim that this delay in scheduling the trial was because New Hampshire was "experiencing the Covid-19 pandemic," *see* Verrocchi Resp., at p. 15 (¶ 47), the reason for this delay is irrelevant. *Second*, as in *Letendre*, any prejudice is "purely conjectural" and "speculative." *See Letendre*, at p. 6, 8. Nor does this case "involve the kind of gruesome violence or other horrific details that might cause widespread community prejudice against the defendant." *Id. Third and finally*, as in *Letendre*, any prejudice—to the extent it even exists—can be addressed through *voir dire*, as "the voir dire process is designed to ferret out potentially contaminated jurors" and is a "sufficient safeguard" to address prejudice. *Letendre*, at p. 7, 9.

Mr. Verrocchi argues that disclosure of the requested information would prejudice his right to a fair trial because this information, at least in part, concerns a statement he made following a *Garrity* warning. *See* Verrocchi Resp., at pp. 5-6 (¶¶ 19-22).[4] This argument too is faulty. Under *Garrity v. New Jersey*, 385 U.S. 493 (1967), "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Id.* at 500. At the outset, it seems that the information Mr. Verrocchi seeks to keep secret goes beyond any post-*Garrity* warning statements in the requested records. In any event, the fact that the requested records may contain such statements that are inadmissible in a subsequent criminal proceeding under *Garrity* is

[4] A *Garrity* warning is usually administered to a government employee during the course of an internal investigation explaining that self-incriminating statements will not be used against the speaker in any subsequent criminal proceeding.

irrelevant to the standards under Exemptions 7(A) and 7(B). Any *Garrity* warning does not trump the Right-to-Know Law. *See Chasnoff v. Mokwa*, 466 S.W.3d 571, 582 (Mo. Ct. App. 2015) ("The police officers' reliance on the contention that the Board promised the records would be used only for internal disciplinary purposes is misplaced. While the bracketed confidentiality language, which has since been removed from the 'advice of rights' form, is less than ideal, *<u>it cannot trump the Sunshine Law</u>*. We agree with the trial court's determination that '[e]ven if the custom and practice of the Board was to preserve '*Garrity* statements' as confidential, this custom and practice does not create any enforceable rights in the [police officers].'") (emphasis added). Mr. Verrocchi's attempt to conflate *Garrity*'s inadmissibility standard with the standards that apply under the Right-to-Know Law is improper.

Put another way, while some of the requested information may be inadmissible in a criminal case, this does not mean that the public does not have a right of access to this information. For example, as the court explained in *State v. Kozma*, No. 92-15914 CF10E, 1994 WL 397438 (Fla. Cir. Ct. Feb. 4, 1994) in which a criminal defendant's inadmissible confession was unsealed and provided to the public:

> [E]ven massive pretrial publicity about a case is not enough to show a serious and imminent threat to the administration of justice or to the denial of fair trial rights. *<u>The fact that the Statement has been determined to be inadmissible does not alter that conclusion</u>*. Even where pretrial publicity includes publication of inadmissible evidence or confessions, a defendant can still receive a fair trial.

Id. at *2 (emphasis added) (citations omitted). New Hampshire courts also allow public access to probable cause hearings despite the fact that the information presented therein may ultimately be inadmissible at trial. *See Keene Publ'g Corp. v. Keene Dist. Court*, 380 A.2d 261, 263 (N.H. 1977) (noting general ability of press to be present at probable cause hearings despite the fact that the evidentiary rules are relaxed in such proceedings where evidence may be allowed that would not

be presented to a jury at trial). Here, even with public disclosure in this case, Mr. Verrocchi will still be able to invoke his rights under *Garrity* in his criminal case to have his statements deemed inadmissible. But this inadmissibility simply has no bearing under Chapter 91-A.

III. Proposed Intervenor Michael Verrocchi's Asserted "Invasion of Privacy" Exemption Under RSA 91-A:5, IV is Without Merit.

Proposed Intervenor Michael Verrocchi appears to raise the "invasion of privacy" exemption under RSA 91-A:5, IV that implicates (i) "confidential … information," (ii) "personnel … file[]" information, or (iii) "other files." *See* Verrocchi Resp., at p. 7 (¶ 25) (principally citing the exemption for "confidential information"). Under each of these three "invasion of privacy" exemptions—and even if information can be deemed "confidential" or "personnel" in nature—the requested information is not categorically or *per se* exempt from disclosure. Rather, that information is still subject to a balancing test that weighs the public interest in disclosure against any privacy or governmental interests in nondisclosure. *See Reid*, 169 N.H. at 528 (clarifying that "personnel … files" are not automatically exempt from disclosure, but rather are subject to the three-step balancing analysis); *Union Leader Corp./ACLU-NH v. Town of Salem*, 173 N.H. 345, 355 (2020) (noting that, even if information meets the criteria for being deemed "confidential," the court must determine whether disclosure amounts to an invasion of privacy, which requires "a three-step [balancing] analysis"); *see also Union Leader Corp. v. N.H. Hous. Fin. Auth.*, 142 N.H. 540, 553 (1997) ("[T]he asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure … since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure."). These "invasion of privacy" exemptions do not apply for multiple reasons.

A. Chapter 91-A Only Allows Aggrieved Requesters to Seek Relief in Court. Accordingly, Mr. Verrocchi's Attempt to Intervene in this Case and Raise RSA 91-A:5, IV as an Exemption Should Be Denied.

A threshold question is whether the Right-to-Know Law allows Mr. Verrocchi's "reverse Chapter 91-A" action where he—as a private party—seeks to raise exemptions in an effort to prevent a government agency from producing records to the public. The text of the Right-to-Know Law does not allow such a "reverse Chapter 91-A" action. Instead, Chapter 91-A only allows aggrieved requesters to seek relief in court. As a result, Mr. Verrocchi's attempt to intervene in this case and raise RSA 91-A:5, IV as an exemption should be denied.

A Right-to-Know Law exemption does not vest a government official with the freestanding, statutory right to ask courts to prevent an agency from releasing information to the public. Here, Mr. Verrocchi's 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 Chapter 91-A due to a public body's decision to not produce records. *See* RSA 91-A:7 ("Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief."). This is further supported by RSA 91-A:8, I, which only allows a requester to seek attorneys' fees and costs for a Chapter 91-A violation against a "public body or public agency" that is the custodian of the requested records. *See* RSA 91-A:8, I ("If any public body or public agency or officer, employee, or other official thereof, violates any provisions of this chapter, such *public body or public agency* shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter ….") (emphasis added). As a textual matter, this strongly suggests that it is the public agency—and only the public agency—that is tasked with making disclosure decisions under Chapter 91-A. Otherwise, if a

private individual can assert an exemption in court, a requester may not be able to seek attorneys' fees and costs under RSA 91-A:8, I against that private individual if the court determines that the private individual's position is without merit. In sum, as Mr. Verrocchi is not an aggrieved requester, he has no statutory right of action under the Right-to-Know Law.

The "invasion of privacy" exemptions in RSA 91-A:5, IV—like all Right-to-Know Law exemptions, including those under *Murray*—also do not create a statutory privilege that can be invoked by Mr. Verrocchi to compel the Department to withhold the requested information. *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 Department from voluntarily disclosing any records, even if they are exempt.[5] 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 entity to withhold a record, but it does not require that it do so. As the United States Supreme Court has similarly explained in the FOIA context, "Congress did not design the FOIA exemptions to be

[5] By contrast, where the legislature has chosen to make records confidential—and thus completely prohibited from public disclosure—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.").

mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin agency disclosure." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293-94 (1979) ("We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure."); *see also Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997) (declaring that the "mere fact that information falls within a FOIA exemption does not of itself bar an agency from disclosing the information"); *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 338 (2020) ("we often look to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions"). As a result, RSA 91-A:5, IV does not create a statutory privilege that grants Mr. Verrocchi a right to demand that the Department be ordered to not disclose the records under RSA ch. 91-A.[6]

B. The "Invasion of Privacy" Exemption Under RSA 91-A:5, IV—as Well as *Murray* Exemption 7(C)—Raised by Mr. Verrocchi Cannot Be Considered By This Court Because the Department Has Not Raised Them.

To the extent this Court were to allow Mr. Verrocchi to bring a "reverse Chapter 91-A" action despite the express provisions of RSA 91-A:7 and RSA 91-A:8, it is impermissible for Mr. Verrocchi to rely on exemptions—here, the "invasion of privacy" exemption in RSA 91-A:5, IV and *Murray* Exemption 7(C)—that the Department has not raised. The Department's seeming decision that RSA 91-A:5, IV and *Murray* Exemption 7(C) do not apply must be given deference by this Court when challenged by a third party who is not a requester. In other words, while a requester's challenge to a government agency's asserted exemptions is entitled to *de novo* review,

[6] As the Rockingham County Superior Court has similarly explained, "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 voluntarily disclosing documents*." *See Morin v. Salem*, 218-2019-CV-523 (Rockingham Cty. Super. Ct. May 17, 2019) (emphasis added), attached hereto as *Exhibit 2*.

a third party's challenge to a government agency's decision that an exemption is inapplicable is not entitled to *de novo* review. *See McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 215 F. Supp. 2d 200, 204 (D.D.C. 2002) (in a "reverse FOIA" action, "[a] reviewing court must base its review on the full administrative record that was available to the agency at the time of its decision," and "[a] reviewing court does not substitute its judgment for the judgment of the agency under the arbitrary and capricious standard of review" when the agency concludes that the records should be produced; "Instead, the court simply determines whether the agency action constitutes a clear error in judgment."), *rev'd on other grounds*, 180 F.3d 303 (D.C. Cir. 1999).

C. Mr. Verrocchi's Argument That the May 29, 2020 *Town of Salem/Seacoast Newspapers, Inc.* Decisions Interpreting RSA 91-A:5, IV Do Not Apply to the Petitioner ACLU-NH's December 2, 2020 "Right-to-Know" Request Fails.

Mr. Verrocchi appears to argue that the May 29, 2020 decisions in *Union Leader Corp./ACLU-NH v. Town of Salem*, 173 N.H. 345 (2020) and *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020)—which overruled *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and concluded that police disciplinary information is subject to a public interest balancing test under RSA 91-A:5, IV—do not apply to any requested records that were created before May 29, 2020. *See* Verrocchi Resp., at pp. 6-7 (¶¶ 23-24). This position is without merit. To be clear, nothing about this case implicates retroactivity. Petitioner ACLU-NH and Proposed Intervenor Union Leader Corp. merely ask, in a manner no different than any other Right-to-Know request, that the law in effect at the time of the ACLU-NH's December 2, 2020 request be applied to records in the possession of the Department as of December 2, 2020.

The only relevant questions in a Right-to-Know case are whether the records exist, whether they are responsive, and whether they are not otherwise exempt from disclosure under current law. When the records were created is irrelevant. What the state of the law was when the records were

created is similarly irrelevant. For example, RSA 91-A:4, I states that "[e]very citizen … has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, …., except as otherwise prohibited by statute or RSA 91-A:5." Nothing in this statute says that whether a governmental record is exempt from disclosure under RSA 91-A:5 is based on the law that existed when the record was created. To the contrary, the question is whether the record is exempt from disclosure at the time the request is made and processed under the current law. To hold otherwise would rewrite the Right-to-Know Law and add limiting language that the legislature did not see fit to include. *See State v. Brouillette*, 166 N.H. 487, 490 (2014) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language it did not see fit to include.").

The recent *Town of Salem* and *Seacoast Newspapers, Inc.* decisions further evidence this interpretation where, even though the records in question were created when *Fenniman* was controlling, the Supreme Court remanded the cases for consideration as to whether the records should be released under the new balancing test standard. *See Town of Salem*, 173 N.H. at 357 (noting that "we agree with the Union that remand is required in this case not only for the trial court to apply the balancing test in the first instance, but for it also to decide whether information in the redactions it upheld satisfies *Seacoast Newspapers* definition of 'internal personnel practices'"; on remand, the Superior Court held that most redactions to the 2018 Kroll report should be released); *Seacoast Newspapers, Inc.,* 173 N.H. at 341 ("we remand this issue to the trial court for its consideration, in the first instance, as to whether the arbitration decision arising from the grievance provision of the collective bargaining agreement is exempt from disclosure pursuant to the two-part analysis for personnel files"; on remand, the arbitration report at issue was voluntarily released). Since the *Town of Salem/Seacoast Newspapers, Inc.* decisions, government

agencies have often produced documents that were created before these decisions pursuant to the public interest balancing test.[7]

D. Even If This Court Considers the "Invasion of Privacy" Exemption Under RSA 91-A:5, IV Raised by Mr. Verrocchi, Mr. Verrocchi Has Not Met His Heavy Burden of Satisfying this Exemption When Applying the *Lambert* Public Interest Balancing Test.

Even if this Court were to consider the "invasion of privacy" exemption under RSA 91-A:5, IV (which it should not), Mr. Verrocchi has failed to meet his heavy burden of satisfying this exemption. *See Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 342 (1989) (noting in reverse FOIA action that "the statutory policy favoring disclosure requires that the opponent of disclosure indeed bear that burden"); *see also Murray*, 154 N.H. at 581 (noting "heavy burden" to resist disclosure). Further, a private person's challenge to an agency's disclosure decision should be reviewed in light of the basic policy of the Right-to-Know Law to "open agency action to the light of public scrutiny" and in accordance with the "narrow construction" accorded Chapter 91-A exemptions. *See Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 (D.D.C. 1997) (applying rule in "reverse FOIA case); *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 555 (2002) (noting that exemptions should be construed narrowly). It is also no defense to a Right-to-Know request to claim that a requester can get the information "through other means." *See* Verrocchi Resp., at p. 16. The presence of an alternative ground for obtaining public records does not preclude application of Chapter 91-A, and Mr. Verrocchi has cited no case to the contrary. Further, if the records in dispute are merely duplicative of what already is in the public domain, then why is Mr. Verrocchi resisting disclosure?

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[7] *See, e.g.*, Mark Hayward, "Fired Cop Aaron brown: I Might Be Prejudiced, But Not Racist," *Union Leader* (Oct. 27, 2020) (documenting release by Manchester Police Department of records concerning Aaron Brown who engaged in racist speech concerning African Americans), *available at* https://www.unionleader.com/news/safety/fired-cop-aaron-brown-i-might-be-prejudiced-but-not-racist/article_25d480f3-4a45-5c35-823e-8485dc0028e4.html

In evaluating this "invasion of privacy" exemption under RSA 91-A:5, IV—even if the information is deemed "personnel" or "confidential" in nature[8]—the Supreme Court has explained that the following public interest balancing test applies:

> We engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV. First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.
>
> Second, we assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. 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.
>
> Finally, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.

Lambert v. Belknap Cty. Convention, 157 N.H. 375, 382-83 (2008) (citations and quotations omitted). To be clear, this test should be construed consistent with the Right-to-Know Law's presumption in favor of transparency. As the Supreme Court has noted: "The legislature has provided the weight to be given one side of the balance, declaring the purpose of the Right-to-Know Law in this way: "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

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[8] As a threshold matter, the requested information are not "confidential." As the Supreme Court recently reaffirmed, "[t]o establish that information is sufficiently 'confidential' to justify nondisclosure, the party resisting disclosure must prove that disclosure 'is likely: (1) to impair the [government's] ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* As to the first prong, disclosure here will enhance government accountability, not hinder it, for the reasons explained in Part III.D.3, *infra*. As to the second prong, to the extent this prong even applies to a criminal case like Mr. Verrocchi's—as opposed to commercial financial information in the hands of a government entity at issue in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019)—public disclosure would not "substantially harm" Mr. Verrocchi because the statements at issue would still be inadmissible in his criminal case under *Garrity*. Moreover, at best, the *Garrity* warnings only created an expectation that Mr. Verrocchi's statements could not be used in a future criminal case, ***not*** that they would be sealed from the public forever. Mr. Verrocchi appears to acknowledge this. *See* Verrocchi Resp., at p. 8 (¶ 28) (acknowledging that "*Garrity* only prohibits use of compelled statements in subsequent criminal proceedings").

actions, discussions and records of all public bodies, and their accountability to the people." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (quoting RSA 91-A:1).

1. The Privacy Interest is Nonexistent.

There is no privacy interest implicated here. All of the investigatory file information in this case—including the post-*Garrity* warning statements of the officers—pertains to the ability of a police officer to perform his or her job effectively. This sustained misconduct information 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). This requested information, for example, does not disclose medical or psychological records in an officer's personnel file. Instead, this information constitutes the sustained misconduct of an officer that led to criminal charges.

For context, under the invasion of privacy exemption in 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 Com'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. v. New Hampshire Retirement System*, 162 N.H. 673, 684 (2011) (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. v. Local Gov't Ctr.,* 159 N.H. 699, 709-10 (2010) (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).

Courts outside of New Hampshire have similarly rejected the notion that police officers have a significant privacy or reputational interest with respect to actions implicating their official duties. This is because, when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. *See, e.g., Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs.*, 484 Mass. 279, 292 (2020) ("[P]olice officers and members of the judiciary occupy positions of special public trust. By assuming their unique position of power and authority in our communities, police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel .... Accordingly, the public has a vital interest in ensuring transparency where the behavior of these public officials allegedly fails to comport with the heightened standards attendant to their office."); *Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 809-10, 821 (La. Ct. App. 1st Cir. 2008) ("[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *Denver Policemen's Protective Asso. v. Lichtenstein*, 660 F.2d 432, 436-37 (10th Cir. 1981) (rejecting officers' claim of privacy); *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"); *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."); *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."); *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.").

The privacy interests here are also minimal because the factual allegations in this case and the Kroll Report's depiction of this incident are already in the public record. *See* Kroll Internal Affairs Report, at p. 41 (REP 042), attached as *<u>Exhibit 4</u>* to Petition. The State has already issued two press releases concerning the allegations in this case. *See* N.H. D.O.J. Jan. 15, 2020 Press Release, attached as *<u>Exhibit 2</u>* to Petition; N.H. D.O.J. Sept. 17, 2020 Press Release, attached as *<u>Exhibit 3</u>* to Petition.

Mr. Verrocchi's own actions further demonstrate the lack of a privacy interest here. Mr. Verrocchi personally requested that his September 22, 2020 police decertification proceeding addressing this incident be public, effectively conceding that any privacy interest concerning this

incident is nonexistent. *See* PSTC Sept. 22, 2020 Minutes, at pp. 9-16, attached as *Exhibit 5* to Petition. At this public hearing, six Salem officials—including Acting Salem Police Chief Joel Dolan—publicly testified on this incident. *See* Mark Hayward, "Police 'Prank': Salem Sergeant Keeps His Certification," *Union Leader* (Dec. 1, 2020), attached as *Exhibit 6* to Petition. Mr. Verrocchi and the PSTC also submitted exhibits during this public hearing, some of which the PSTC subsequently made public under the Right-to-Know Law. *See* Sept. 22, 2020 Select Exhibits Produced by PSTC under Chapter 91-A, attached as *Exhibit 7* to Petition.

Finally, it is no defense to a Right-to-Know request to claim, as Mr. Verrocchi does, that the information sought is "unreliable," "inadmissible" in his criminal case, or involves statements made after receiving *Garrity* warnings. *See* Verrocchi Resp., at pp. 5-6 (¶¶ 19-22), 17 (¶ 53). *Garrity* provides no privacy interest that would bar disclosure of this information to the public. Instead, *Garrity* is simply a rule governing admissibility in a subsequent criminal case. At best, these *Garrity* warnings *only* created an expectation that Mr. Verrocchi's statements would be inadmissible in a subsequent criminal case, *not* that they would be sealed from the public forever. *See id.*, at p. 8 (¶ 28) (acknowledging that "*Garrity* only prohibits use of compelled statements in subsequent criminal proceedings"). And, even with public disclosure of these statements, Mr. Verrocchi's rights will be protected because the statements *still* are inadmissible in his criminal case under *Garrity*. The fact that such statements are "inadmissible" under *Garrity* or viewed by Mr. Verrocchi as "unreliable" is simply irrelevant to the Chapter 91-A analysis. *See Chasnoff v. Mokwa*, 466 S.W.3d 571, 578 (Mo. Ct. App. 2015) (holding that police officers have no right under Missouri's Sunshine Law to compel closure of public records regarding their substantiated misconduct, even if the there was a policy of using police officers' compelled *Garrity* statements only for internal discipline); *see also Great Lakes Media, Inc. v. City of Pontiac*, No. 208306, No.

208320, 2000 Mich. App. LEXIS 2134, at *13 (Mich. Ct. App. May 19, 2000) (in assessing a request for internal investigation records concerning alleged police brutality, concluding that, "to the extent that defendants argue that *Garrity* itself provides an additional basis for nondisclosure, their argument fails").

Chapter 91-A presumes that the public is to be informed and trusted, even where the requested records may not present the complete picture, are viewed by some as unreliable, or are inadmissible. *See Union Leader Corp.*, 141 N.H. at 476 ("The legislature has provided the weight to be given one side of the balance ...."). For example, criminal complaints, indictments, mugshots, and police reports often are misleading or one-sided because they are one-sided and do not necessarily tell the story of the accused. And court pleadings that are publicly accessible may contain information that a judge ultimately deems inadmissible before a jury. But this does not mean that these records are any less public under Chapter 91-A. There surely is a lot of information that the government would like to withhold from the public or press because it feels that the information is "unreliable," "misleading," or does not tell the full story. The correct response is not to suppress this information from public view—a response that, if permitted, would give the government awesome power to withhold information from its citizens. Rather, the correct response is even greater transparency.

2. The Public Interest in Disclosure is Compelling.

The presumption in favor of public access is strong because the requested information—including the post-*Garrity* warning statements—concern officials who work for the public, as well as the sustained misconduct of a police officer. And, here, this misconduct led to criminal charges. *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (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.*, 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."). As the Supreme Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of information pertaining to its government activities." *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003). As one New Hampshire Court Judge similarly ruled in releasing a video of an arrest at a library, "[t]he public has a broad interest in the manner in which public employees are carrying out their functions." *See, e.g., Union Leader Corp. v. van Zanten*, No, 216-2019-cv-00009 (Hillsborough Cty. Super. Ct., Norther Dist., Jan. 24, 2019) (Smuckler, J.).[9]

Moreover—and critically—the Rockingham County Superior Court already concluded that information on Page 41 (*Exhibit 4* to Petition, at REP 042) of the Kroll internal affairs audit report that addresses this incident concerning Mr. Verrocchi should be released because the public interest in disclosure trumps any privacy interests. As Judge Schulman explained:

> But there are limits to all general rules and when a police officer's off-duty conduct includes the alleged commission of serious crimes, or actions that endanger public safety, the expectation of privacy is lower and the public interest is higher …. In another instance an officer [likely Mr. Verrocchi] committed a minor vehicle infraction but then refused to pull over and led the police on a dangerous chase …. In these instances, the public interest in disclosure is significant, and the officer's privacy interest is … reduced.

Union Leader Corp./ACLU-NH v. Town of Salem, No. 218-2018-cv-01406, at *27-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (attached as *Exhibit A* to Petitioner ACLU-NH's January 25, 2021 Notice of Supplemental Authority). This should cinch the matter, especially where neither the Department nor Mr. Verrocchi make an effort to meaningfully engage

[9] Proposed Intervenor Mr. Verrocchi questions Petitioner ACLU-NH's motives and calls the ACLU-NH "disingenuous" for seeking the requested information, *see* Verrocchi Resp., at p. 16 (¶ 49), despite the obvious public interest in disclosure in this case implicating sustained misconduct. In any event, the motives of a requester are irrelevant under Chapter 91-A. *See Union Leader Corp.*, 141 N.H. at 476 ("In Right-to-Know Law cases, the plaintiff's motives for seeking disclosure are irrelevant.").

this decision.[10] Two other cases have similarly held that the public interest in disclosure trumps any privacy interests with respect to official police conduct. *See Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (currently on appeal), attached as *Exhibit 1* to Petition; *Salcetti v. City of Keene*, No. 213-2017-cv-00210, at *4-5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.) (attached as *Exhibit B* to Petitioner ACLU-NH's January 25, 2021 Notice of Supplemental Authority).

Disclosure of this sustained misconduct information may also assist the public in vetting both the Salem Police Department's and the Department of Justice's investigation of Mr. Verrocchi. This public interest requires the disclosure of all statements made during the course of the investigation so the public can examine the integrity of these investigations and the resulting decisions of these agencies. Here, the Salem Police Department's actions in not charging Mr. Verrocchi is particularly concerning and, as a result, there is a public interest in knowing more about the nature of the Department's investigation back in 2012. Without disclosure, the public has no ability to thoroughly vet the Department's 2012 investigation and conclusions. *See Reid*, 169 N.H. at 532 ("We recognize that [t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate.") (internal quotations omitted); *see also Rutland Herald v. City of Rutland*, 84 A.3d 821, 825-26 (Vt. 2013) ("[T]he internal investigation records and related material will allow the public to gauge the police department's responsiveness

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[10] In the *Town of Salem* matter, on January 29, 2021, Intervenor former Deputy Chief Robert Morin filed a limited motion for partial reconsideration seeking to have the Court sustain the redactions referenced on Page 8 of the Court's January 21, 2021 Final Order on Remand addressing an "incident that occurred at a hockey rink" as reflected on Pages 8-9 in Kroll's Culture Addendum. *See* Culture Addendum, at p. 8-9 (REP 130-31), attached as *Exhibit 4* to Petition. This motion is still pending and has delayed release of the information ordered disclosed by the Court. Mr. Morin's motion for partial reconsideration does *not* implicate the overruled redactions concerning Mr. Verrocchi and the 2012 incident in Kroll's internal affairs audit report. Petitioner ACLU-NH and Proposed Intervenor Union Leader Corp. anticipate that when Mr. Morin's motion for reconsideration is resolved, the information ordered released by Judge Schulman will immediately be made available to the public, including this information concerning Mr. Verrocchi. The Town of Salem has publicly indicated that it has no plans to appeal the order.

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.").

Disclosure will help the public evaluate the PSTC's troubling September 22, 2020 decision to not temporarily suspend Mr. Verrocchi's police certification pending the disposition of this serious felony case. During this decertification hearing—which, in this rare occasion, was public at Mr. Verrocchi's request—multiple Salem police and civilian officials rallied to Mr. Verrocchi's defense despite the pendency of his felony criminal case. One retired Salem deputy chief, after being asked whether "he agreed that the events that happened were reckless and a criminal act," even stated "'one hundred percent,' it was egregious putting people's lives in jeopardy that night." *See* PSTC Sept. 22, 2020 Minutes, at p. 12, attached as *Exhibit 2* to Petition. Another retired Salem sergeant acknowledged that Mr. Verrocchi's actions "had put the public at risk." *Id.* at 13. It is difficult to imagine how the PSTC's decision to allow an officer to maintain his certification pending a felony criminal case does not undermine public confidence in the criminal justice system.

Courts outside of New Hampshire have similarly recognized the obvious public interest that exists when disclosure will 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, 507-08 (N.M. Ct. App. 2010); *see also, e.g., City of Baton Rouge*, 4 So.3d at 809-10, 821 (holding the public interest in names and records of investigation into police officers' use of excessive force trumps officers' privacy interest); *Burton*, 594 S.E.2d at 895 ("[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"); *Kroeplin*, 725 N.W.2d at 303 ("[t]he public has a particularly strong interest in being informed about public officials who have been derelict in [their] duty") (quotations omitted).

3. The Governmental Interest in Nondisclosure is Nonexistent.

Mr. Verrocchi also makes the remarkable claim that there is a governmental interest in nondisclosure of *all* internal investigation files—even where the misconduct is sustained—on the theory that disclosure "would have a chilling effect on future internal investigations conducted by police departments throughout the state" and, as a result, "will create more harm than good." *See* Verrocchi Resp., at p. 9, 11 (¶ 35). At the outset, the New Hampshire Supreme Court has previously rejected such speculative suggestions made without evidence. *See Goode*, 148 N.H. at 556 ("[T]here is no evidence establishing the likelihood that auditors will refrain from being candid and forthcoming when reporting if such information is subject to public scrutiny."); *Union Leader Corp.*, 162 N.H. at 681 (rejecting withholding rationale that was "speculative at best given the meager evidence presented in its support"). This Court cannot credit speculative concerns of "chill" not borne out by evidence, especially where Mr. Verrocchi "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); *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 because fear of chilling witnesses "did not find significant support in the evidence"); *Kroeplin*, 725 N.W.2d at 303 ("Kroeplin fails to point to any evidence that disclosing records created in the course of investigating employee misconduct and of the subsequent disciplinary action taken would have or has the effect he predicts [of chilling investigations]."). Here, any concern that officers will be

chilled from giving statements during internal investigations is especially without basis because *Garrity*, itself, protects the officers involved by ensuring that this information cannot be used in the course of any subsequent criminal proceeding. *Garrity* provides all the protections that officers need to facilitate investigations.[11]

Transparency concerning internal investigation files will help—not harm—the integrity of internal investigations. Keeping all internal investigations secret prevents the public from evaluating the effectiveness and integrity of such investigations. Consequently, secrecy creates an environment where police departments are not incentivized to engage in robust investigations because the public is not looking over their shoulder. This case highlights this problem. Had this incident not been kept secret by the Department in 2012—and instead made known to the public—the Salem Police Department perhaps would have decided to treat Mr. Verrocchi like it would have treated any other person who evaded the police. Instead, the Department, under a veil of secrecy, swept this incident under the rug. Similarly, in evaluating whether the Town of Salem appropriately redacted the Kroll audit report before the Supreme Court's *Town of Salem* decision, Judge Schulman correctly noted that "the audit report proves that bad things happen in the dark

[11] Mr. Verrocchi cites a recommendation made in the August 31, 2020 report of the Governor's Commission on Law Enforcement Accountability, Community, and Transparency ("LEACT") in support of his remarkable claim that internal investigation files should be secret, even where misconduct is sustained. *See* Verrocchi Resp., at pp. 11-12 (¶ 35). Setting aside that this proposal of the LEACT Commission is not the law, was only a recommendation, and only concerned the possible creation of a future statewide agency that investigates police misconduct, Mr. Verrocchi misstates this LEACT Commission recommendation. Under this proposed statewide agency, the LEACT Commission recommended that the "*full investigative report [be] subject to disclosure*" in cases. *See* Aug. 31, 2020 LEACT Report and Recommendations, at p. 17 (emphasis added), *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf. The only caveat to this recommendation was the ability of the statewide agency to conduct an initial "in-camera review" to omit sensitive information before public disclosure is made. Four LEACT Commission members—including the ACLU-NH—recently wrote the New Hampshire Senate Judiciary Committee debunking Mr. Verrocchi's incorrect interpretation of this recommendation. *See* Jan. 20, 2021 LEACT Ltr. to Senate Judiciary Committee, attached hereto as *Exhibit 3*. As these four LEACT members explained, the LEACT Commission did not "advocate[] for confidentiality of all law enforcement officer personnel and investigatory files under the Right-to-Know Law." *Id.* Indeed, "[t]he statewide agency recommendation says nothing about whether law enforcement personnel and investigatory files should be confidential under our Right-to-Know Law, nor does it preclude public access of detailed misconduct findings as part of any proposed statewide agency." *Id.*

when the ultimate watchdogs of accountability—i.e., the voters and the taxpayers—are viewed as alien rather than integral to the process of policing the police." *See Union Leader Corp./ACLU-NH v. Town of Salem*, No. 218-2018-cv-1406, at *3 (Rockingham Cty. Super. Ct. Apr. 5, 2019) (attached hereto as *Exhibit 4*), *vacated and remanded*, 173 N.H. 345 (2020). The same is true here. Furthermore, in the *Town of Salem/Seacoast Newspapers, Inc.* cases, the New Hampshire Supreme Court rejected a *per se* rule that internal investigation files are categorically exempt from disclosure, and instead opted for a public interest balancing test. In evaluating this balancing test in the context of an internal investigation concerning excessive force, one court has already concluded that "[t]he public has a significant interest knowing that a government investigation is comprehensive and accurate," even if the investigation led to a non-sustained finding. *See Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (quoting *Reid v. N.H. AG*, 169 N.H. 509, 532 (2016)) (Bornstein, J.), attached as *Exhibit 1* to Petition.

CONCLUSION

For these reasons, Petitioner ACLU-NH and Proposed Intervenor Union Leader Corporation respectfully pray that this Honorable Court (i) grant the January 10, 2021 Petition in this case, (ii) require that the Salem Police Department pay reasonable fees and costs under RSA 91-A:8, and (iii) deny proposed Intervenor Michael Verrocchi's Motion to Intervene.

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION,

By its attorneys,

/s/ Gilles R. Bissonnette
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UNION LEADER CORPORATION

By its attorney,

/s/ Gregory V. Sullivan
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g.sullivan@mslpc.net

Dated: April 2, 2021

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.

Also served were the following parties in the matter *State of New Hampshire v. Michael D. Verrocchi*, No. 218-cr-00077 (Rockingham Cty. Super. Ct.):

- Counsel for Defendant Michael D. Verrocchi (Peter Perroni, Esq. [peter@nolanperroni.com] and Andrew F. Cotrupi, Esq. [andrew@cotrupilaw.com]); and

- Counsel for the State (Nicole Clay, Esq. [Nicole.Clay@doj.nh.gov] and Joshua L. Speicher, Esq. [Joshua.Speicher@doj.nh.gov]).

/s/ Gilles Bissonnette
Gilles Bissonnette

April 2, 2021

EXHIBIT 1

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN CIRCUIT

SUPERIOR COURT

Andrea Amodeo-Vickery

v.

Town of Salem

Docket No. 216-2020-CV-00877

ORDER

Petitioner Andrea Amodeo-Vickery brings this action seeking disclosure of specific documents pursuant to RSA 91-A, New Hampshire's Right-to-Know Law. The Court held a hearing on January 4, 2021. For the following reasons, the Petitioner's request is GRANTED.[1]

On September 18, 2020, Petitioner sent a letter to Christopher Dillon, Town Manager of Salem, requesting certain information under the Right-to-Know Law. In pertinent part, she requested:

> Any and all written correspondence between you and/or Anne Fogarty and any employee of the NH Attorney General's Office wherein you described said past, present[,] or future accidental disability retirees as committing "fraud" in regard to their disability claims[.]

(Compl. Ex. 1 (emphasis added).) The Town, through counsel, sent three letters in response asking for an extension of time to comply. The first on September 22, 2020, asserted COVID-19-related reasons, (id. Ex. 2); the second and third on October 26 and 29, 2020, explaining that the Town had been a victim of a cyberattack, (id. Ex. 4).

[1] In its Answer, the Town objected to venue in Hillsborough County. Where Petitioner resides in Hillsborough County, however, venue is proper pursuant to RSA 507:9.

On November 24, 2020, the Town responded to Petitioner's information request with one ten-page document. (Id. Exs. 6, 7.) That same day, Petitioner followed up with the Town, saying their response "did not answer in any way" the above-quoted request. (Id. at 8.) The Town told Petitioner that "there are no such emails or correspondence that exist responsive to" that request. (Id. at 9.)

Around this time, Petitioner submitted a similar Right-to-Know request to the Attorney General's (AG's) office. This request sought, in pertinent part:

> Any and all written correspondence, including emails, between you and any employee of the Town of Salem wherein said past, present[,] or future accidental disability retirees were described as engaging in possibly fraudulent activity in regard to their disability claims.

(Ans. Ex. B (emphasis added).) The AG's office responded with documents Bates Stamped 1-188, (id.), including emails between the Town and the AG's office, (see Compl. Ex. 10). In one email, Mr. Dillon asked to meet with the AG's office "to make [them] aware of possible fraudulent activity" regarding disability claims. (Id.) In another, Ms. Fogarty, the Town's Human Resources Director, followed up with information about a police "duty related disability retirement" case that went to arbitration. (Id.) In another email, Mr. Dillon addressed the unusually high number of police disability retirees in Salem with the AG's office, noting, "I do not think what is going on is right and I believe the tax payers are being unfairly charged." (Id.) He also asked the AG's office if they are going to investigate further. (Id.) The AG's office responded stating they "hope to be able to let [him] know shortly whether or not [they] will open a criminal investigation in the issues [he's] raised." (Id.)

Petitioner alleges that the Town's representation that it had no documents responsive to her request is plainly false, given the documents she received from the

AG's office. She seeks an injunction compelling the Town to produce any additional records they may be withholding; attorney's fees and costs pursuant to RSA 91-A:8, I; and civil penalties imposed on the Town and Mr. Dillon pursuant to RSA 91-A:8, IV.

"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.'" N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003) (quoting RSA 91-A:1). The law "furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit, 169 N.H. 95, 103 (2016); see also N.H. CONST. pt. 1, art. 8 ("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."). "Although the statute does not provide for unrestricted access to public records and proceedings, to best effectuate the statutory and constitutional objective of facilitating access to all public documents and proceedings, [the Court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information." Lambert v. Belknap Cty. Convention, 157 N.H. 375, 379 (2008). Consistent with this statutory purpose, the Court may "look to other jurisdictions construing similar statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)." Censabella v. Hillsborough Cty. Attorney, 171 N.H. 424, 426 (2018).

The Town highlights the differences between Petitioner's requests, noting that her request to the Town sought documents describing certain individuals as "committing fraud," while her request to the AG's office sought documents describing certain

individuals as "possibly engaging in fraudulent activity." The Town argues that the requests are clearly different, and therefore, it did not fail to respond to Petitioner's request because it did not find any documents describing certain individuals as "committing fraud."

RSA 91-A:4, IV(a) requires only a "record reasonably described" in a request, not a record described with absolute specificity. "Although a requester must 'reasonably describe' the records sought, an agency also has a duty to construe a [Right-to-Know] request liberally." Nation Magazine, Wash. Bureau v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting FOIA, 5 U.S.C. § 552(a)(3), citation omitted).

Construing Petitioner's request to the Town consistent with the statute's interest of disclosure, the Court finds Petitioner's request extended to documents that discuss potential and suspected fraud by disability retirees. The Town unreasonably interpreted Petitioner's request in the narrowest possible sense to situations where Town officials described individuals as definitively committing fraud. Upholding the Town's refusal to disclose documents while following such a limited reading of Petitioner's request would require those who submit Right-to-Know requests to use magic words to receive information. This high burden is inconsistent with RSA 91-A's purpose of open, reasonable access to government records.

The Town also argues that Petitioner, an attorney, is seeking to obtain information relevant to a case she is litigating in Rockingham County. See Morin v. Town of Salem, Rockingham Cty. Super. Ct., No. 218-2019-CV-523. A review of the complaint in that case, see Ans. Ex. A, reflects that the subject matter of that case is not related to fraudulent activity by disability retirees. Moreover, "[t]he requester's motives in seeking disclosure are irrelevant to the question of access." Censabella, 171 N.H. at 427. Without

commenting on the admissibility of records received through a Right-to-Know disclosure, "there are no restrictions on the use of the records, once disclosed." Id. "As a general rule, if the information is subject to disclosure, it belongs to all." Id.

Based on the foregoing, the Town's failure to disclose documents responsive to Petitioner's request is in violation of RSA 91-A:4, IV. The Court finds that disclosure of those records is warranted.

The statute also states that a violation of the Right-to-Know Law entitles Petitioners to recover "reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter." RSA 91-A:8, I. The Court must also find that the Town "knew or should have known that the conduct engaged in was in violation of this chapter." Id.

The Town's interpretation of Petitioner's request yielded no responsive documents. Because the Town argued at the hearing that it considered a liberal reading of Petitioner's request a wholly new request, the Court finds that the Town would not have turned over responsive documents in compliance with RSA 91-A:4 without this lawsuit. Further, given that Right-to-Know requests are considered in accordance with the statutory policy of ensuring "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 Court finds that the Town knew or should have known it was violating the statute by reading Petitioner's request in such a restrictive way. Thus, in accordance with RSA 91-A:8, I, Petitioner is awarded reasonable attorney's fees and costs.

Petitioner also requests civil penalties against the Town and Mr. Dillon. Under RSA 91-A:8, IV, "[i]f the court finds that an officer, employee, or other official of a public body . . . has violated any provision of this chapter in bad faith, the court shall impose against such person a civil penalty of not less than $250 and not more than $2,000." "[S]uch person . . . may also be required to reimburse the public body . . . for any attorney's fees or costs it paid pursuant to [RSA 91-A:8, I]." Id.

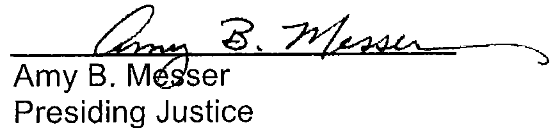
As the statute allows only for civil penalties to be imposed on a person, and not a governing body, the Court cannot institute a civil penalty under the statute as against the Town. As against Mr. Dillon, the Court finds that the current record does not reflect that he violated the statute in bad faith. Though Petitioner alleges the Town, through Mr. Dillon, engaged in a pattern of dilatory tactics and ultimately did not provide documents responsive to the Right-to-Know request that is the subject of her Petition, she has not shown specific actions taken by Mr. Dillon that warrant the imposition of civil penalties on him personally. Mr. Dillon worked with Town counsel in responding to the requests, provided responsive documents to the two additional requests, and there was to at least to some minimal extent an argument regarding whether the request as submitted included a request for documents describing "possibly fraudulent activity". Although the Court finds that the Town construed the request too narrowly in light of the dictates and spirit of 91-A, the Court does not find there is sufficient evidence of bad faith for a finding of civil penalties. Therefore, her request for civil penalties is DENIED.

Consistent with the foregoing, the Court issues the following orders:

1. The Town shall disclose any documents it has that are responsive to Petitioner's request, in accordance with RSA 91-A:4, within five business days of the Clerk's notice of this decision.
2. Petitioner's request for reasonable attorney's fees and costs pursuant to RSA 91 A:8, I is GRANTED. Petitioner shall file her request for reasonable attorney's fees and costs within thirty (30) days;
3. Petitioner's request for civil penalties under RSA 91-A:8, IV is DENIED.

SO ORDERED.

February 15, 2021
Date



Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 02/16/2021

EXHIBIT 2

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

ROBERT MORIN, JR.

v.

TOWN OF SALEM, CHRISTOPHER A. DILLON, AND ANNE M. FOGARTY

DOCKET #218-2019-CV-00523

MOTION FOR RECONSIDERATION

NOW COMES the Plaintiff, Robert Morin, Jr., by and through his attorneys, Andrea Amodeo-Vickery, Esquire, and Borofsky, Amodeo-Vickery and Bandazian, PA, and respectfully requests that this Court reconsider its Order denying Plaintiff's Verified Motion to Seal Complaint made on May 1, 2019; and, as and for his reasons, states as follows:

1. Plaintiff requested that his Complaint be filed under seal to avoid non-party access to information that is confidential by statute.

2. Among other reasons, Plaintiff seeks thereby to avoid violation of this Court's confidentiality Order in the matter of Union Leader Corp. et al. v. Town of Salem, No. 218-2018-CV-01406 (N.H. Super. April 5, 2019).

3. Plaintiff requested that his Complaint be sealed indefinitely subject to further order of the Court due to the status of parallel litigation in this Court and the New Hampshire Supreme Court.

4. On April 5, 2019, this Court issued an Order detailing information in common with this matter that shall be confidential and which information may be open to the public. Union Leader Corp. et al. v. Town of Salem, No. 218-2018-CV-01406 (N.H. Super. April 5, 2019).

5. Plaintiff requested that his Complaint be sealed in its entirety as the entire document is confidential. N.H. Super. Ct. Civ. R. 13B.

6. The Court made several rulings that sustained redactions of information that is relied upon by Plaintiff in this Complaint.

7. The information forming the basis of Paragraph 48 of Plaintiff's Complaint relies upon information that this Court sustained redactions. The Court sustained these redactions because they related to an Internal Affairs investigation.

8. The information forming the basis of Paragraph 56 of Plaintiff's complaint relies upon information that this Court has sustained the redaction of. The Court sustained these redactions because they relate to "internal personnel practices," and the redactions protect the identity of the participants in the investigation.

9. With respect to paragraphs 49, 51, 52, 57, and 58 this Court sustained the redaction of the information contained therein. Although the Court's prior Order did not specify grounds, it is clear from the context that the Court concluded that the information was exempt under the "internal personnel practices" exemption or the "invasion of privacy" exemption.

10. These paragraphs substantially encapsulate acts of defamation perpetrated against Plaintiff and largely consist of statements in the confidential report which remain redacted.

11. On April 10, 2019, the ACLU and Union Leader appealed this Court's Order to the New Hampshire Supreme Court.

12. The confidentiality of the information contained within these paragraphs is on appeal to the Supreme Court as to whether it must be disclosed to the public. As this Court's current ruling stands, it will undermine any ruling the Supreme Court could make as to the confidentiality of the information at issue therein.

13. Plaintiff understands that he requested a public jury trial and that it is therefore impossible to have secrecy in this case at time of trial.

14. However, the issue for which Plaintiff is suing the Defendants has been highly publicized. Plaintiff requests that his pleadings be confidential until the Supreme Court has ruled on this Court's April 5 Order.

15. Plaintiff seeks to prevent tainting the jury by media reporting which can be reasonably anticipated given media coverage of the companion litigation. See State v. Laaman, 114 N.H. 794, 798 (1974) (holding that publicity can result in prejudice to a defendant's case in a criminal trial).

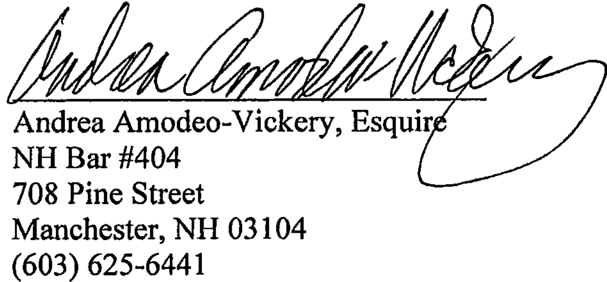
16. Accordingly, due to the confidential sensitive nature of the information referred to within Plaintiff's Complaint, the ongoing Supreme Court appeal, as well as consistency with the prior Court Order addressing the confidentially thereof, there is a specific and substantial interest in temporarily maintaining confidentiality of Plaintiff's Complaint.

WHEREFORE your Plaintiff respectfully requests that this Honorable Court:

A. ISSUE appropriate Orders sealing the Complaint to be filed by the Plaintiff, not to be accessed by the public without permission from the Court;

B. GRANT such other and further relief as justice may require.

Respectfully Submitted



Date: May 10, 2019

Andrea Amodeo-Vickery, Esquire
NH Bar #404
708 Pine Street
Manchester, NH 03104
(603) 625-6441

F:\Clients\Morin, Robert Jr\CIV-P .2\Drafts\05-08-19 Motion for Reconsideration V2 (AAV & CAB Edits).doc

5-17-19. The court has given this motion sustained and careful consideration. The court appreciates counsel's arguments. Nonetheless, the court continues to believe that its original ruling was correct. 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 voluntarily disclosing documents. There is no claim of a statutory or other privilege, and if there was such a claim, the privilege would likely be waived by the decision to use the information in litigation. The fear of jury contamination is not great. This is a geographically large county and the jury pool comes from Portsmouth, Londonderry, Plaistown, Derry, Candia, Auburn and many other towns, as well as Salem. It would be surprising if most of the jury pool followed the news regarding the Salem Police Department. More important, the remedy for media coverage is voir dire, as we know from the many high profile criminal trials in which this becomes a potential issue.

Denied

Honorable Andrew R. Schulman
May 17, 2019

Clerk's Notice of Decision
Document Sent to Parties
on 05/23/2019

EXHIBIT 3

January 20, 2021

Chairwoman Sharon Carson
Senate Judiciary Committee
The New Hampshire State Senate
107 North Main Street
Concord, NH 03301

Re: Our Opposition to Senate Bill 39 as LEACT Commission Members

Dear Chairman Carson and the members of the Senate Judiciary Committee:

We are four members of the Governor's Commission on Law Enforcement Accountability, Community, and Transparency ("LEACT"), and we strongly oppose SB39. Thank you for hearing some of our testimony at yesterday's hearing on this bill.

The LEACT Commission was formed last summer in the wake of the egregious murder of George Floyd. The LEACT Commission was formed with the task of critically looking at the state of policing in New Hampshire and helping ensure that law enforcement is transparent and accountable to the public. Law enforcement officers are certainly entitled to privacy regarding sensitive matters in their personnel files that members of the public should not have access to, and there are currently mechanisms to protect such information. Accordingly, we ask that the Senate vote *inexpedient to legislate* on this legislation.

At yesterday's hearing on SB39, Lieutenant Mark Morrison—a member of the LEACT Commission and President of the New Hampshire Police Association—stated that SB39 is consistent with the LEACT Commission's recommendations. Lieutenant Morrison appears to be relying on the LEACT Commission recommendation advocating for the creation of a "single, neutral and independent statewide agency to receive complaints alleging misconduct" where, among other things, an "[e]xecutive summary of [the] finding" would be "made available to the public ***with the full investigative report subject to disclosure*** upon in-camera review."[1]

We strongly disagree with Lieutenant Morrison's suggestion that this statewide agency recommendation means that the LEACT Commission advocated for the confidentiality of all law enforcement officer personnel and investigatory files under our Right-to-Know Law. The statewide agency recommendation says nothing about whether law enforcement personnel and investigatory files should be confidential under our Right-to-Know Law, nor does it preclude public access of detailed misconduct findings as part of any proposed statewide agency. To the contrary, this recommendation contemplates public disclosure subject to a review process to ensure that confidential information is not released—a process that recognizes the need to protect

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[1] The LEACT Commission's August 31, 2020 Report and Recommendation can be found here. *See* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf. The language in the statewide agency recommendation that Lieutenant Morrison appears to be referencing is on Page 17 of the LEACT Commission Report. Since the publication of the LEACT Commission Report, several recommendations have been memorialized in an "omnibus" LSR with the input of stakeholders and which will be sponsored by Senator Jeb Bradley. *See* LSR 1001. Aside from this omnibus bill, two outstanding legislative issues remain from the LEACT Commission's work. First, the statewide agency recommendation referenced by Lieutenant Morrison has not yet been proposed as legislation. This recommendation's status is unclear and was the subject of negotiation among stakeholders from October to December last year. No consensus has yet been reached on its provisions, as there continues to be areas of significant disagreement among stakeholders, including on how transparent this new agency will be. Second, as for the Commission's recommendation concerning the Exculpatory Evidence Schedule, this too has not yet been memorialized in legislation, as it is still the subject of stakeholder negotiation, especially given this recommendation's nexus to litigation that is pending before the Hillsborough South Superior Court.

private information and similarly exists under the Right-to-Know Law where a court can review information *in camera* prior to disclosure to ensure that private information unrelated to official conduct is not released. But SB39 is far different from this LEACT Commission recommendation. Unlike this LEACT Commission recommendation, SB39 contemplates wholesale secrecy concerning police misconduct.

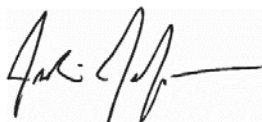
To be clear, during the LEACT Commission process, no one proposed the blanket and wholesale secrecy of law enforcement personnel and investigatory files under our Right-to-Know Law that SB39 would impose. The LEACT Commission neither took up nor voted on such a recommendation. As members of the Commission, we would have staunchly opposed any such proposal for secrecy, which we believe flies in the face of the motivation for the Commission. Last year, thousands of Granite Staters peacefully protested and marched to call for police reform and racial justice, and their movement helped bring about the LEACT Commission. Legislation like SB39 goes in the opposite direction from the work of the LEACT Commission—a Commission that has "transparency" in its name. This bill, as written, has the consequence of creating a cloak of secrecy concerning police misconduct, including instances of dishonesty, racial inequality, and excessive force. In so doing, this bill would run counter to the fundamental reforms that the LEACT Commission was created to address.

Yesterday, at least one representative of law enforcement suggested that the LEACT Commission somehow endorsed SB39. This view, however, would be at odds with, for example, our unanimous recommendation to make the Exculpatory Evidence Schedule ("Laurie List") public subject to notice being provided to officers on the Schedule. This recommendation was endorsed by the Governor. It would be a misinterpretation and distortion of the work of the LEACT Commission to suggest that our findings, in any way, could be used to support the passage of SB39.

SB39 is not needed to protect law enforcement privacy. As was explained at yesterday's hearing—including by Attorneys Gregory Sullivan and Richard Gagliuso—the public interest balancing test that currently applies in determining whether information in law enforcement personnel and investigatory files is exempt from disclosure already protects medical records, home addresses, and other private information because the public has no valid interest in that information. This is because this information has no connection to an officer's official duties. Such information is routinely redacted from any documents that are turned over in response to Right-to-Know requests. This balancing test enables consideration for the unique facets of any particular case, while protecting personal and private information the disclosure of which would serve no compelling public interest. Accordingly, no change to our Right-to-Know Law is necessary.

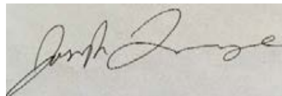
In conclusion, SB39 would run counter to the spirit and intent of the LEACT Commission. If enacted, it would further damage public trust in law enforcement, as several individuals expressed at yesterday's hearing. We urge all senators to vote *inexpedient to legislate* on SB39 and to stand in solidarity with the thousands of Granite Staters advocating for New Hampshire to be a better version of itself by advancing police reform and racial justice.

Best,

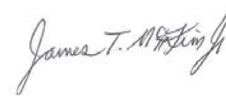


Julian Jefferson, Esq.
Criminal Defense
Representative

Ronelle Tshiela
Public Member and Co-Founder, Black Lives
Matter Manchester, NH



Joseph Lascaze
Smart Justice Organizer
ACLU of New
Hampshire



James T. McKim
President of the
Manchester, NH NAACP

EXHIBIT 4

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER

I. Introduction

The plaintiffs brought this case under the Right To Know Act, RSA Ch. 91-A, to obtain an unredacted copy of an audit report that is highly critical of the Salem Police Department. The audit was performed by a nationally recognized consulting firm retained by the Town of Salem's outside counsel at the Town's request. The audit looked at only two aspects of the police department's operations, i.e., its internal affairs investigative practices and its employee time and attendance practices. The audit report also includes an addendum that is critical of the culture within the police department and the role that senior police department managers have played in promoting that culture.

The Town has already released a redacted copy of the audit report to the public. The Town admits that the audit report is a governmental record that must be made available to the public in its entirety absent a specific statutory exemption. RSA 91-A:1-a,III; RSA 91-A:4,I and RSA 91-A:5. The Town argues that the redacted portions of the audit report fall within two such exemptions, namely those for "[r]ecords pertaining to internal personnel practices" and "personnel . . . and other files whose disclosure would

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constitute invasion of privacy." RSA 91-A:5. The Town has not cited any other statutory exemptions.

The plaintiffs do not merely dispute the applicability of these exemptions, they also argue that the exemptions cannot be applied without violating their State constitutional right to access public records. N.H. Constitution, Part 1, Article 8. The Town disagrees, arguing that it honored its constitutional obligation by releasing the redacted report.

II. <u>The Court's Review</u>

The court reviewed the unredacted audit report *in camera* and compared it, line by line, to the redacted version that was released to the public. What this laborious process proved was that—with a few glaring exceptions—the Town's redactions were limited to:

(A) names, gender based pronouns, specific dates, and a few other incidental references that would identify the participants in internal affairs proceedings;

(B) names, dates and other identifying information relating to specific instances in which employees were paid for details they worked while they were also simultaneously paid for their shifts; and

(C) the name and specific instances in which a very senior police manager worked paid outside details during his regular working hours and purportedly, but without documentation, did so through the use of flex time rather than vacation or other leave time, contrary to Town policy.

III. Governing Law

To paraphrase the famous quote, you apply the law that you have, not the law you might want.[1] A balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report. Yet, New Hampshire law construing the "internal personnel practices" exemption forbids the court from making this balance and requires the court to uphold most of the Town's redactions in this section of the audit. Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993); see also Hounsell v. North Conway Water Precinct, 154 N.H. 1 (2006); Clay v. City of Dover, 169 N.H. 681 (2017).

The holdings in Fenniman, Hounsell and Clay, construing and applying the "internal personnel practices" exemption in RSA 91-A:5,IV, allow a municipality to keep police department internal affairs investigations out of the public eye. Indeed, Fenniman was grounded in part on legislative history suggesting that confidentiality (i.e. secrecy) would "encourage thorough investigation and discipline of dishonest or abusive police officers." Fenniman, 136 N.H. at 627.

Notwithstanding that sentiment, the audit 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. Reasonable judges—including all five justices of the New Hampshire Supreme Court, joining together in a published opinion—have criticized the Fenniman line of cases.

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[1] "You go to war with the army you have, not the army you might want[.]," Donald Rumsfeld, December 8, 2004, (*Troops Put Rumsfeld In The Hot Seat*, available at www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html).

Reid v. New Hampshire Attorney General, 169 N.H. 509 (2016) (severely criticizing, but conspicuously not overruling Fenniman and Hounsell). Consistent with this criticism, reasonable judges in other states have read nearly identical statutory language 180 degrees opposite from the way Fenniman construed RSA 91-A:5,IV. See, e.g., Worcester Telegram & Gazette Corporation v. Chief of Police of Worcester, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003).

However, this court is bound by the Fenniman line of cases and must, therefore, uphold the Town's decision to redact the auditor's descriptions of specific internal affairs investigations. That said, as recounted below, while the Town's redactions may prove nettlesome to the taxpayers and voters, for the most part the publicly available, redacted version of the audit report provides the reader with a good description of both the individual investigations that the auditors reviewed and the bases for the auditor's conclusions.

The Time and Attendance audit is a more classical "internal personnel practices" record. To be sure, the Time and Attendance section of the audit report reveals operational concerns and suggests remedial policies. However, the publicly available version of the audit report describes those concerns, provides the underlying evidence supporting those concerns (with names, dates and places redacted), and includes all of the proposed changes in policy. Accordingly, the court must uphold most, but not all, of the Town's redactions in this section of the audit report.

With respect to plaintiff's constitutional argument concerning the "internal personnel practices" exemption, the New Hampshire Supreme Court has never suggested that the right of public access established by Part 1, Article 8 is any broader

than that established by the Legislature. See generally, Sumner v. New Hampshire Secretary of State, 168 N.H. 667, 669 (2016) (finding that a statutory exemption to Chapter 91-A for cast ballots is constitutional, and noting that such statutory exemptions are presumed to be constitutional and will not be held otherwise absent "a clear and substantial conflict" with the constitution).

With respect to plaintiff's constitutional argument concerning the "invasion of privacy" exemption, the court finds that the constitution requires no more than what the statute demands.

IV. Specific Rulings With Respect To The Internal Affairs Practices Section Of The Audit Report (i.e., Complaint Ex. A)

Arguably, the entire Internal Affairs Practices section of the audit report could be squeezed into the "internal personnel practices" exemption. However, because the Town released a redacted version of the report, the court looked at each specific redact in light of what has already been disclosed. The court then determined which redactions could be justified under the "internal personnel practices" exemption or the "invasion of privacy" exemption.

The court's rulings are set forth in page order. Although the terminology does not fit exactly, for the sake of clarity the court either "sustained" (i.e. approved) or "overruled" (i.e. disapproved) each redaction as follows:

A. The redactions on **page 7** are overruled. These redactions do not fall within either claimed exemption. The relevant paragraph describes a conversation between the Town director of recreation and a police supervisor. It was not part of an internal affairs investigation or disciplinary proceeding. The audit report does not even name

the supervisor. It just refers to him or her as "a supervisor." The Town apparently redacted the reference to "a supervisor" to avoid embarrassment: The gist of the passage was that a police supervisor condoned the use of force as form of street justice, contrary to both civil and criminal law. The supervisor told the auditor, "Well, if you are going to make us run, you are going to pay the price." The public has a right to know that a *supervisor* believes that it is appropriate for police officers to use force as a form of extra-judicial punishment.

B. The redactions on **page 36** are overruled. These redactions do not fall within either exception. They simply refer to the facts that (a) a lieutenant was caught drunk driving, (b) an officer left a rifle in a car and (c) there was an event at an ice center. There is no reference to any named individual or to anything specific about any investigation. In today's parlance, the discussion on page 36 is just too meta to fall within either exemption.

C. The redactions on **Page 38** are sustained because they fall within the "internal personnel practices" exemption. They reference the pseudonym of the involved officer and provide the date of the investigation.

D. With the exceptions set forth below, all of the redactions in **Section 5 (pp. 39-91)** are sustained because they fall within the "internal personnel practices" exemption. The audit report does not identify the subject of any internal affairs investigation. Instead it uses pseudonyms such as "Officer A," "Lieutenant B," "Supervisor C," etc. The Town redacted (a) the names of the internal affairs investigators, (b) the names of the individuals who assigned the investigators to each case, (c) in some cases the gender of one or more persons (i.e. the pronouns "he," "she," "his," "her" etc.), (d) the

dates of the alleged incidents of misconduct, (e) the dates of the investigations. All of this was done to protect the identity of the participants in specific internal affairs investigations. This is permissible. The Town also redacted a few locations, as well as other specific facts that might identify a participant. For example, the Town redacted the fact that one individual was a K9 handler, presumably because the Town had specific reasons for believing that information would unmask one or more of the participants. The court finds that this was permissible.

That said, a few of the redactions in Section 5 cannot withstand scrutiny, and are, therefore, overruled, i.e.

- **Page 46-47** was over-redacted. The supervisor should be identified as a supervisor. The employee should be identified as such. Doing so would not intrude upon their anonymity. To this extent the redactions are overruled.

-**Page 58** was over-redacted. It should be made clear that the individual did not take a photograph of the injury. The redaction changes the substantive meaning of the sentence. To this extent the redactions are overruled.

-The term "supervisor" on **page 66** should not have been redacted. The term "supervisor" was redacted from a sentence describing Kroll's (i.e. the outsider auditor's) "grave concern that a Salem PD **supervisor** expressed contempt towards complainants, ignored the policy requiring fair and thorough investigations and has an attitude that this department is not under any obligation to make efforts to prove or disprove complaints against his officers, especially one involving alleged physical abuse while in custody." Why should that "grave concern" not be shared with the public? This redaction is overruled.

-The reference to Red Roof Inn on **pages 67 and 72**, as a place that has seen its share of illicit activity, should not have been redacted. This reference does nothing to identity any participant in an investigation. Public disclosure of the reference might be deemed impolitic, but there is no exemption for impolitic opinions. This redaction is overruled.

-The entirety of **pages 75 through the top portion of page 89**, relating to a December 2, 2017 incident at a hockey rink was already made public. Those pages were originally heavily redacted. However, the unredacted pages were provided to a criminal defendant as discovery and the Town responded by making those pages public.

E. The redactions on **pages 93-94** are sustained because they fall within the "invasion of privacy exemption." These redactions do not relate to an internal affairs investigation. Essentially, a police supervisor spoke gruffly to his daughter's would-be prom date because he disapproved of him as a prospective boyfriend. The supervisor's comments did not relate or refer to his position. The supervisor's comments had nothing to do with the Salem Police Department. The prom date's mother was dissuaded from filing a formal complaint over the gruff comments. The redactions protect the privacy of the supervisor's (presumably) teenage daughter and her young friend. The public interest in the redacted passages is minimal, and is made even more minimal by the fact that most of the audit report has been made public already.

F. The redactions on **Page 99** are overruled. An individual contacted Kroll to explain that he spoke with Deputy Chief Morin and Chief Dolan about a complaint that he had. The individual was pleased with Morin's and Dolan's professionalism. He

decided not to file a complaint. The Town redacted Moran's and Dolan's names and ranks. These redactions do not relate to an internal affairs investigation because there was none. The redactions do not further any privacy interest.

G. The redactions on **page 100** are overruled because they do not fall within either exemption. The redactions do not relate to an internal affairs investigation. Rather, a resident contacted Kroll to complain that the Salem PD allegedly failed to enforce a restraining order. The phrase "restraining order" was redacted, for no apparent reason. No individual officer is identified, even by pseudonym.

H. The redactions on **page 101**, **item 6** are overruled because they do not fall within either exemption. Kroll was contacted by somebody who opined that complaints against supervisors were not taken seriously. No specific complaint or supervisor was discussed. The Town redacted the fact that the person who contacted Kroll was a former member of the Salem PD. The redaction serves no purpose and does not fall within either of the claimed exemptions.

I. The redactions on **page 101, item 7** are overruled. Kroll was contacted by a person who claimed that the Salem PD arrested a family member without probable cause. The Town redacted the portion of the passage that states the family member believed that the alleged victim in the case had a relationship with a supervisor. There was no internal affairs investigation. No individual is mentioned by name. The redaction does not fall within either of the claimed exceptions.

J. The redactions on **page 101-106, Item 8** are overruled. The redactions relate to statements that a town resident made to Kroll. These are not "internal personnel

practices" and there is no "invasion of privacy." An investigation was performed by the Attorney General's office, but this was an *"internal* personnel practice." See Reid.

K. The redactions on **pages 107 and 108** are all overruled because they do not fall within either claimed exemption. The Town redacted the names of individuals who called Kroll. These calls were not part of an "internal personnel practice." The callers did not ask for anonymity. They were coming forward. There is no invasion of privacy. Additionally, the redacted reference to the Red Roof Inn has nothing to do with personnel practices or personal privacy.

L. The redaction on **Page 109** is sustained. The pertinent paragraph refers to an internal affairs investigation described at pages 40-41. The same information is the subject of an earlier redaction.

M. The redactions on **Page 110** are overruled. They do not fall within either claimed exemption. The redactions related to Deputy Chief Morin's dual roles as (a) a senior manager and (b) a union president responsible.

N. The redactions on **Page 118, first full paragraph** are overruled. They do not relate to an internal affairs investigation or any other sort of personnel practice.

O. The redactions on **Page 118-119**, carryover paragraph are sustained. These relate to an individual employee's scheduling of outside details and time off. Those are classic "internal personnel practices" concerns. Although there is no indication as to whether the same facts are reflected in a formal personnel file, the audit report is itself an investigation into internal personnel practices. Therefore, under Fenniman, the court cannot engage in a balancing analysis but must instead sustain the redaction.

V. Specific Rulings With Respect To The Addendum To The Audit Report (i.e., Complaint Ex. B, "*Culture Within The Salem Police Department*")

A. The redactions on the **first two sentences of the third paragraph on Page 1**[2] of the Addendum are overruled. Essentially, the redacted material explains that it was the Chief who took "an extended absence" and "the rest of the week off. This is just a fact, not an "internal personnel practice," or a matter of personal privacy.

B. The remaining redactions in the **third paragraph on Page 1** of the addendum are sustained. Those redactions relate to the manner in which an employee arranged to take vacation leave and other time off from work. This is a classic internal personnel matter.

C. The redactions on the **carryover paragraph on Pages 1 – 2** are sustained for the same reason.

D. The **remainder of the redactions on Page 2** (i.e. those below the carryover paragraph) are overruled. Those redactions relate to operational concerns rather than "internal personnel practices." To be sure, the Chief is identified by name as being personally responsible for the Police Department's lack of cooperation with the Town Manager and Board of Selectmen. However, this was a Departmental policy or practice and the Chief was necessarily essential to the implementation of this policy or practice. The redactions do not fall within either of the claimed exemptions.

E. The redactions on **Page 4** are overruled. The redacted passages relate to comments made by Deputy Chief Morin concerning (a) his opinion of the Town

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[2]The original document was not paginated. **The page numbers refers to the Bates stamped numbers at the bottom of each page of Exhibit B to the Complaint (i.e. the redacted, publicly available document).**

Manager's credibility and (b) his thoughts as to why the outside auditor was hired. Morin makes reference to a citizen's complaint that the Town Manager referred to the Police Department. However, there is no reference to (a) the substance or nature of the complaint, (b) the year or month of the complaint, or (c) any subsequent investigation. There is no reference to an internal affairs investigation or any personnel proceeding. The redactions indicate that (a) Morin was a subject of the complaint and (b) the complaining party was female. The fact that a citizen made a complaint to the Town Manager is not, in and of itself, an "internal personnel practice." The redactions are not necessary to prevent an invasion of personal privacy.

F. The redactions on **Pages 5** are overruled. The Town redacted the outside auditor's opinions regarding statements that Deputy Chief Morin made on Facebook about the Town Manager. Those statements were disclosed in the publicly available, redacted copy of the report. The only thing that was kept from the public was the characterization of the statements by the auditors. Thus, the redactions do not relate to facts or to any sort of investigation, proceeding or personnel practice. Further, because Morin placed his comments on Facebook, (albeit in a closed group for Town residents), the auditor's opinions about those comments is not an invasion of Morin's personal privacy.

G. The redaction on **Page 6, on the carryover paragraph from Page 5,** is overruled. This redaction relates to post-hoc opinions that "human resources" gave to the auditors relating to Morin's statements on Facebook. However, there was no "internal personnel practice" or proceeding that flowed from Morin's statements. The

Town does not argue that any such practice or proceeding may be forthcoming. The made-for-the-audit opinion does not fall within either of the claimed exemptions.

H. The balance of the redactions on **Page 6** are overruled. Most of these redactions relate to comments about the workplace culture instilled by the Chief and Deputy Chief. Thus, they relate to operational issues, i.e. to the manner in which the department is operated and to the top executives' management style. To be sure, the comments are highly critical of the Chief and Deputy Chief, but not every alleged misstep or every problematic approach to managing a police department is an "internal personnel practice." The line between an operational critique and an "internal personnel practice" is sometimes blurry. In this case, there is no suggestion of a pending, impending or probable internal affairs investigation, disciplinary proceeding or informal rebuke. The information in the auditor's report does not come from a personnel file or from any document that should be in a personnel file. The court finds that the redactions do not fit within either of the claimed exemptions.

The other redactions on **Page 6** relate to the month and year that (a) an unidentified officer was cited for DUI and (b) an unidentified second officer left the scene of an accident without an alcohol concentration test. These facts are not "internal personnel practices." The officer's identities are not disclosed. The redactions do not fall within either claimed exemption and, therefore, they are overruled.

I. The redactions on **the first full paragraph of Page 7** are sustained. These redactions relate to "internal personnel practices." The redactions protect the identity of the participants in the investigation (i.e. the subject and the investigator).

J. The redactions in the **quoted remarks of Chief Donovan on Page 7** are sustained for the same reason. The redactions protect the identity of the witnesses in the internal affairs investigation.

K. The redactions on **the balance of Page 7 and on Pages 8-12** are sustained in part and overruled in part. These redactions relate to two internal affairs investigations involving the same police department employee. However, instead of simply redacting the names of the participants, the Town redacted six pages of facts and analysis. This is a marked departure from how the Town redacted virtually all of the other discussions of internal affairs matters. The court finds that:

1. The only IA participants who are referenced in the audit report are (a) the subject of the investigation and (b) a witness whose name appears on pp.10 and 11. Those individual's names were properly redacted.

2. The other named individuals were not involved in the IA investigation and, therefore, their names should not be redacted.

3. The tension between the Police Chief and the Town concerning the reporting of these matters to the Town authorities is an operational concern, not an "internal personnel practice."

4. The Chief's comments about the matters need not be redacted, except that the references to (a) the individual who was the subject of the investigation, (b) the witness in the investigation and (c) the dates of occurrences may be redacted.

VI. Specific Rulings With Respect To The Time And Attendance Section Of The Audit Report (Complaint Ex. B)

The redacted, publicly available version of the Time and Attendance section of the audit report indicates that a number of police employees (including twelve out of fifteen high ranking officers) were paid for outside details during hours for which they were also receiving their regular pay. To be fair, the audit report does not suggest chicanery or ill-motive. Apparently, the companies that paid for the details would pay for a set number of hours even when the details lasted for a shorter duration and even when the officers returned to work thereafter.

The publicly available version of the audit report also indicates that a very high ranking employee acted contrary to Town policy by working details during business hours and then making up the hours with flex time, rather than leave time.

The Time and Attendance audit was an archetypical workplace investigation into personnel issues. It is the very paradigm, the Platonic Ideal, of a record relating to "internal personnel practices." Nonetheless, the Town has made the bulk of this document public. The redactions in the publicly available report serve mainly to shield the identity of the affected employees.

A. Except to the limited extend described below, all of the redactions of employee names are sustained under the "internal personnel practices" exemption.

B. The dates of the outside work details and the identities of the outside parties that contracted for the details were unnecessarily redacted. Nobody could determine the identity of the affected employees from this information. Therefore, in light of what has already been released to the public, these redactions cannot be justified under

either of the claimed exemptions. The redactions of dates and outside contracting parties are overruled.

C. The court reluctantly sustains the redactions to the interviews of police department employees. These were investigative interviews that focused not only on operational issues but also on potential personnel infractions by the interviewees.

D. The court sustains the redactions to the interview of the former Town Manager for the same reason.

E. The reference to "higher-ranking" officers on **Page 15** of the report is overruled because the same information already appears elsewhere in the publicly available report.

F. The court overrules the redactions on **the last paragraph of Page 40** (relating to a finding with respect to the SPD detail assignment program). This paragraph discusses an operational concern and does not relate to any particular employee's alleged conduct. Therefore, these redactions do not fall within either of the claimed exemptions.

G. The court overrules the redactions on **Page 42.** The redactions do not apply to any specific individual. The issue was presented as an operational concern going forward rather than a personnel matter. The redactions do not fall within either of the claimed exemptions.

VII. <u>Order</u>

Within 21 days, the Town shall provide the plaintiff's with a copy of the audit report that contains only those redactions that have been sustained by this court. The

court will stay this order pending the filing of a notice of appeal upon motion by the Town.

April 5, 2019

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/05/2019