

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

No. 218-2018-CV-01406

UNION LEADER CORPORATION

100 William Loeb Drive
Manchester, NH 03109

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

18 Low Avenue, #12
Concord, NH 03301

v.

TOWN OF SALEM

33 Geremonty Drive
Salem, NH 03079

**PETITION FOR ACCESS TO PUBLIC RECORDS UNDER THE “RIGHT TO KNOW
LAW,” RSA CHAPTER 91-A, AND PART I, ARTICLE 8 OF THE NEW HAMPSHIRE
CONSTITUTION**

(PRIORITY HEARING REQUESTED UNDER RSA 91-A:7)

INTRODUCTION

NOW COME Petitioners Union Leader Corporation and the American Civil Liberties Union of New Hampshire, and respectfully petition this Honorable Court for relief pursuant to RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution against Respondent Town of Salem.

This lawsuit demands that Respondent Town of Salem release to the public, the taxpayers of Salem, and the Petitioners complete, unredacted copies of the following documents: (i) the 120-page audit report of the Salem Police Department (“Department”) dated October 12, 2018 focusing on internal affairs complaint investigations (*Exhibit A*); (ii) the 15-page addendum focusing on the Department’s culture (*Exhibit B*); (iii) the 42-page audit report of the Department dated September

19, 2018 focusing on time and attendance practices (*Exhibit C*); (iv) the 14-page response dated November 9, 2018 (*Exhibit D*) to these three audit reports (collectively, the “Audit Report”) by Salem Police Department Chief Paul Donovan; and (v) the two-page memorandum from Salem Town Manager Christopher Dillon to Chief Donovan dated October 29, 2018 discussing the Report (*Exhibit I*). The Town of Salem’s decision to redact and shield portions of these documents from public view undermines the very purpose of the Audit Report and Chapter 91-A—namely, to foster public confidence in the Town’s police and to promote government accountability. Salem’s taxpayers spent \$77,000 on the Audit Report that depicts a Department that is dysfunctional and poorly serving the taxpayers it is tasked with protecting. The Audit Report goes so far as to state: “We see a system designed to intimidate members of the public and make them fearful of the consequence of filing a complaint about concerning police conduct.” See *Exhibit A*, at p. 53. Especially in light of the Report’s findings, Salem’s taxpayers, the press, and the public have a right to this information in full.

This case is related to *State of New Hampshire v. Andersen*, No. 218-2018-cr-241 (Schulman, J. presiding) where Defendant Robert Andersen is seeking the unredacted Audit Report as part of his criminal prosecution and has filed a pending “Motion to Compel for Intentional Withholding of Exculpatory Information.”

In support of this Petition, Petitioners further state as follows:

Parties

1. Petitioner Union Leader Corporation is a media corporation that publishes the daily *New Hampshire Union Leader*, the largest newspaper in New Hampshire. On Sundays, it publishes the *New Hampshire Sunday News*. The *New Hampshire Union Leader*, founded in 1863, is the only statewide newspaper in New Hampshire. In print, the *New Hampshire Union Leader* and *New*

Hampshire Sunday News are delivered to every county in the state, reaching more than 160,000 readers. The Union Leader Corporation also owns and maintains the websites unionleader.com—which is its online news site—and NewHampshire.com—which is an information portal for arts and entertainment, community news, recreation and local business information for New Hampshire. These websites see approximately 950,000 unique visitors a month. The Union Leader Corporation is located at 100 William Loeb Drive, Manchester, NH 03109.

2. Petitioner American Civil Liberties Union of New Hampshire (“ACLU-NH”) is a non-profit organization with an address of 18 Low Avenue, #12, Concord, NH 03301. The ACLU-NH is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with approximately 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as amicus curiae, to encourage the protection of individual rights guaranteed under federal and state law, including the right to access to information pursuant to Part 1, Article 8 of the New Hampshire Constitution and New Hampshire’s Right-to-Know Law. The ACLU-NH has a long track record of working on open records issues both in and out of the courts.

3. Respondent Town of Salem is a public agency of the State of New Hampshire and, as such, is subject to the Right-to-Know law under RSA 91-A:1-a, V.

Jurisdiction and Venue

4. This Court has jurisdiction over this matter pursuant to RSA 91-A:7, and under this statute this matter shall be given “high priority on the court calendar.”

5. Venue is proper in this Court pursuant to RSA 507:9 because Respondent Town of Salem is located in Rockingham County.

The Facts

I. The Audit Report

6. The Town of Salem, through its employment law firm, Drummond Woodsum, engaged Kroll Inc. (“Kroll”) to conduct an audit of the Salem Police Department. This audit was commenced out of a concern that the Department may not be appropriately handling citizen complaints concerning the behavior of its officers. *Exhibit A*, at pp. 7-9. Daniel Linskey, a former superintendent-in-chief of the Boston Police Department, led Kroll’s audit. The taxpayers in Salem paid approximately \$77,000 for the audit. See *Exhibit E* (Ryan Lessard, “High-ranking Salem Police Officers Take to Social Media to Criticize Report,” *Union Leader* (Nov. 27, 2018)).

7. The Town of Salem released a redacted version of the Audit Report, totaling 177 pages, at 5:33 p.m. on Wednesday, November 21, 2018—the day before Thanksgiving. See <http://www.townofsalemnh.org/home/news/police-audit>. The Report is scathing and paints the picture of a dysfunctional police department in New Hampshire’s seventh largest municipality that is badly in need of reform and is not properly serving the citizens it is tasked with protecting.

8. The Audit Report covered three categories: (i) internal affairs complaint investigations (*Exhibit A*), (ii) the culture of the Salem Police Department (*Exhibit B*), and (iii) time and attendance practices (*Exhibit C*).

A. The Internal Affairs Complaint Investigations Audit (Exhibit A)

9. Kroll’s Audit Report concluded, among other things, that the Department demonstrated a pattern of mismanaging internal investigations, ignoring or discouraging citizen complaints, failing to keep complete records of internal investigations, and violating Department policies regarding complaints and personnel issues.

10. **Collective Bargaining Agreements, Union Issues, and Conflicts.** Kroll's review of the Department's policies and Collective Bargaining Agreement found several deficiencies and areas that failed to meet accepted best practices.

11. For example, the Collective Bargaining Agreement contained "some of the most restrictive language ever reviewed by Kroll," and "severely impacts" the Department's ability to effectively discipline officers, the Report says. See Exhibit A, at p. 111. The Report recommends a legal review of the union contract and revision where needed. *Id.* at 111-112 (Finding #1 and Recommendation #1).

12. In particular, the union contract dictates a narrow window of six months from the date of an incident that a complaint must be filed, or else the Department is prohibited from investigating the case, the Report says. *Id.* at 17-19.

13. The union contract further sets a 10-day clock to complete an investigation, even though a corruption investigation might take months to gather evidence, according to the Report. *Id.* at 111-12.

14. The Report also found that the Department had no policy addressing how officers should respond to situations involving their friends or family. *Id.* at 27.

15. The Report further concluded that Deputy Police Chief Robert Morin's role as union president for administrative staff to be a conflict of interest since he also oversees all internal affairs investigations. *Id.* at 118 (Finding #5 and Recommendation #5).

16. **Incomplete Record Keeping.** The Department's policy on internal affairs record retention, dictated by the Collective Bargaining Agreement, is possibly a violation of the policies issued by the New Hampshire Attorney General's Office, according to the Report. See Exhibit A, at pp. 117-18 (Finding #4 and Recommendation #4). Chief Donovan further told the Report's

authors that he does not keep records of any internal investigations that result in a not sustained or an unfounded disposition. *Id.* The Town has redacted portions of this finding in the Report that provides the basis for the recommendation. *Id.* at 118.

17. **Police Complaints.** One of the issues that triggered the audit was concern that the Department repeatedly discouraged citizens from filing complaints. *Exhibit A*, at pp. 7-9. Indeed, the Audit Report identifies a system within the Department that does not take police complaints seriously, stating: “We see a system designed to intimidate members of the public and make them fearful of the consequence of filing a complaint about concerning police conduct.” *See id.* at 53.

18. In one instance, a citizen submitted a complaint directly to Town Manager Christopher Dillon because the citizen did not expect the Department to investigate. Town Manager Dillon asked the citizen to submit it in writing. The resident wrote the complaint and the Town Manager forwarded it to Police Chief Paul Donovan, but Chief Donovan declined to investigate. Instead, Chief Donovan accused Town Manager Dillon of violating the Collective Bargaining Agreement by getting involved in the investigation, an assertion the Report refutes. *Id.* at 9.

19. The Report also found that the Department’s official complaint form was intimidating, with language warning of criminal charges if any statements are later deemed to be untrue. Individuals with complaints were directed to go to police headquarters to file that form, which some found intimidating. *Id.* at 116. But that appears to have been the point, according to the Report. Kroll “determined that citizens were actively dissuaded from filing complaints.” *Id.* A supervisor of the Internal Affairs (“IA”) program was quoted as saying during an interview for the Report that he wants a complainant to fill out the form “because when she does, and we disprove it — and we will — we’re going to charge her; that’s why she’s not coming in.” *Id.* The

Report states: “This statement and attitude by a senior leader who has oversight for the professionalism of the department is quite concerning and certainly exposes some truth behind comments that the department makes it difficult for the public to submit a formal complaint.” *Id.* Inclusion of this language on a complaint form being filed with the same police department that has authority and jurisdiction to commence criminal proceedings against a complainant is a uniquely powerful form of intimidation.

20. **Internal Affairs Investigations.** In a section of the Report that the Town has heavily redacted, Kroll reviewed 29 cases¹ from the past five years using documents supplied by Chief Donovan. *Exhibit A*, at pp. 39-91. Ten (10) of the cases were found to have been both compliant with Department policy and to have met with accepted best practices, but most (at least 16) violated internal policy, failed to meet best practices, or both. *Id.* at 39-91.

21. The Report notes a “significant lack of documentation” in those case files, with several supporting documents missing and no audio files of interviews. *Id.* at 39.

22. The Report reveals the following problems with the Department’s handling of internal affairs investigations: (i) treating formal complaints as informal complaints; (ii) closing internal affairs investigations very quickly; (iii) making it difficult for citizens to file complaints; (iv) inappropriate reviews of excessive force complaints; (v) failure to interview witnesses; (vi) inadequate documentation; (vii) destruction of materials; (viii) bad attitude toward complainants²; and (ix) ignorance of Department policies. *Id.* at 39-91. Accordingly, the Report recommends a “complete overhaul” of the Department’s internal affairs program, as well as other changes to policies and procedures. *Id.* at 117 (Recommendation #3).

¹ Of those 29 cases, 16 were generated internally and all resulted in sustained findings. Thirteen were generated from outside the Department, five of which were sustained. The rest were not sustained or unfounded. *Exhibit A*, at p. 39.

² In one instance, Chief Donovan, in an interview with Kroll, referred to two people who filed an excessive force complaint as “soup sandwiches.” *Id.* at 62, 64, 66.

23. In one case, a citizen came to the Department to report a complaint for racial profiling. *Id.* at 67-73. Rather than forwarding this complaint to Chief Donovan, per policy, the report was given to a supervisor, who interviewed the complainant. The citizen said: “I want this documented in case that white cop kills a black guy.” *Id.* at 72. According to Kroll, the supervisor took “offense to that statement[,] saying, ‘Okay, sir, have a nice day. Why don’t you move along?’” *Id.* No investigation was conducted and the complainant was made to leave the police station. *Id.* The supervisor describes the complaint as “foolishness” even though he acknowledges that the officer about whom the citizen complained did not have probable cause to order the citizen out of his car, seize the car, or search the car. *Id.* The Report concludes that this investigation was not compliant with internal policy and did not meet acceptable best practices for internal reviews. *Id.* at 73.

24. This section of the Report also includes some discussion of officers who may have committed crimes, but were not arrested or charged by the Department. Two cases are especially problematic:

- a. One case resulting in a sustained finding concerned an off-duty Salem police officer who traveled 62 miles per hour in a 30-mile-per-hour zone. When the Salem Police Department attempted to initiate a stop of this off-duty police officer, the off-duty officer did not pull over. As a result, stop sticks had to be deployed. However, the off-duty officer maneuvered around the stop sticks. When the off-duty officer was finally pulled over, “he was laughing, thinking the whole incident to be a joke.” Though the off-duty officer likely committed a crime of fleeing an officer pursuant to RSA 265:4, I(c), the Department apparently did not arrest or charge him; instead, he was given a one-day suspension without pay. *Id.* at 41.
- b. In another case, an officer was investigated after he was involved in an off-duty traffic crash after consuming alcohol and left the scene of the incident prior to officers’ arrival. Two policy violations were sustained. After negotiations with the union, the officer was suspended five working days. *Id.* at 43. The Department apparently did not charge the off-duty officer with driving while intoxicated or leaving the scene of an accident.

The officers in these two incidents were not charged, nor were they, on information and belief, placed on the Exculpatory Evidence Schedule (“EES”) by the Department, though placement on the EES may be required as a result of this potentially criminal conduct. The Department’s decision to not charge these officers is in stark contrast to its decision to charge Mr. Andersen and Mr. Christopher Albano arising out of the December 2, 2017 Salem ICenter incident, which is discussed in more detail below.

25. **The Heavily Redacted Analysis of the Salem ICenter Fight Investigation.** The Audit Report also highlights the Department’s troubling response to a fight at the Salem ICenter after a youth hockey game on December 2, 2017, though the Town improperly redacted the bulk of this section.³ *Exhibit A*, at pp. 75-89. As a result of this fight, the Department criminally charged Robert Andersen, who was tased multiple times and is facing prosecution in this Court for alleged simple assault, criminal threatening, and resisting arrest. *See State of New Hampshire v. Andersen*, No. 218-2018-cr-241 (Schulman, J. presiding). Several parents say Mr. Andersen was trying to mediate a fight between parents when the police arrested him. The Department claimed he made a threatening motion toward an officer, failed to comply with orders, and violently resisted arrest. The Department also, nearly five months after the incident, criminally charged two other individuals who were at the ICenter that day, including one man (Christopher Albano) who (i) spoke out publicly to WBZ-TV (Boston) in April 2018 against the Department’s treatment of Mr. Andersen, and (ii) simply touched an officer’s hand while he was recording the officers during the December 2, 2018 incident.

³ Nearly all of pages 75-89 in the Report addressing the Salem ICenter incident are redacted, though footnote 15 on page 77 ironically is unredacted, which states: “The Right to Know Law RSA 91-A:4 grants all citizens the right to access public records.”

26. The Audit Report finds the internal investigation into citizen complaints concerning how the Department handled the ICenter fight violated internal policy and best practices. The Report uses strong language in its findings, stating: “Not only did this investigation not meet acceptable best practices, but these actions undermine the integrity of the Salem PD. Further, it is Kroll’s opinion that there was a significant failure by the department’s leadership in their accepting this investigation as a complete effort.” *Id.* at 89.

27. Later in the Report, under the section covering Kroll’s communication with people outside the Department, it further addresses the internal investigation into the ICenter incident. The Report says Salem police initiated an “internal inquiry” that did not rise to the level of a formal internal affairs investigation and took less than 24 hours to find the complaint not sustained. *Id.* at 106.

28. Kroll found that no one in the Department tried to interview the complainant or their witnesses, and only began seeking testimony from witnesses who would support the officers’ version of events after “adverse” media coverage — a possible reference to a WBZ-TV (Boston) report in April 2018. The Report states: “This is a complete violation of the Salem PD complaint policy and can even appear to be negligent or retaliatory in nature.” *Id.* (emphasis added).

29. Also heavily redacted is the substance of Kroll’s communications with external citizens. *Id.* at. pp. 92-108. While Petitioners seek the unredacted portions of this section, Petitioners are not seeking the names of any private citizens to the extent they are included in this section.

B. The Culture of the Police Department Addendum (Exhibit B)

30. Kroll found it necessary to complete an additional addendum focusing on the culture of the Salem Police Department. In an addendum entitled “Culture within the Salem PD,”

Kroll explained: “While Kroll was not specifically tasked with conducting a review of the culture within the Salem PD, nearly every interview and communication over the course of Kroll’s audit included comments attributing challenges within the department to a deficiency with the department’s cultural environment.” See Exhibit B, at p. 1.

31. As part of this addendum, Kroll reported that the Department appeared to: (i) disregard Town authority; (ii) post apparently insubordinate statements on social media; (iii) display an “us versus them” mentality between the Department and the Town; (iv) issue disciplinary judgments based on whether officers were viewed to be aligned with management or not; and (v) have an adversarial relationship with the Town’s human resources department. *Id.* at 6-12. Kroll specifically noted “the apparent contempt in which administration is held by some members of Salem PD and the apparent deviation from law enforcement best practice.” *Id.* at 4.

32. The Audit Report’s concerns with the Department’s culture included “members of management who either ignore or even encourage an environment where there exists a complete disregard for the Town’s authority.” *Id.* at 1. Included in the Report is a screenshot of a post on Sgt. Michael Verrocchi’s public Facebook profile where he wrote: “There comes a point when it’s time to say fuck you to politics and I’m there. We need to make decisions, stand by those decisions and not waiver simply to satisfy the court of public opinion.” *Id.* at 5.

33. According to the Report, that lack of regard for the Town’s authority started at the top. As noted in the Report, Town Manager Dillon said Chief Donovan would not respect his authority as his direct supervisor. Mr. Dillon said it became increasingly challenging to get answers to questions and Chief Donovan began refusing to attend meetings altogether. *Id.* at 1.

34. Pages 6-12 addressing these issues have been heavily redacted, and the Town redacted pages 8-11 in their entirety.

C. The Time and Attendance Practices Audit (Exhibit C)

35. The Audit Report also concludes that some officers, including Police Chief Paul Donovan, worked outside details during their paid shifts. See Exhibit C. Significant portions of Exhibit C are redacted, including pages 16, 17, and 26 in their entirety.

36. The Report further finds: “[M]embers of the administration are also known to work detail assignments, often during regular working hours. It is Kroll’s opinion that these detail assignments may adversely impact the supervisors’ ability to properly oversee the department IA program.” See Exhibit A, at pp. 118-119 (Finding #6 and Recommendation #6). Significant portions of these findings on Pages 118-119 of Exhibit A are redacted. *Id.*

37. The Report further recommends: “Kroll recommends an evaluation as to the impact that Chief Donovan’s working details during regular work hours may have relative to his failure to properly supervise the department’s IA program.” *Id.* at 119.

D. The Response from Members of the Department to the Audit – “Wolves Don’t Lose Sleep Over the Opinion of Sheep”

38. On November 9, 2018, Chief Donovan authored a 14-page response to the Audit Report. See Exhibit D. Portions of the public version of this response are also improperly redacted. *Id.*

39. The response from some members of the Department following the public issuance of the Audit Report has also been troubling and further confirms the Report’s findings concerning the Department’s culture.

40. High-ranking Salem police officers have taken to social media to express their displeasure with a town-commissioned report that included criticism of the negative culture inside the Department. See Exhibit E (Ryan Lessard, “High-ranking Salem Police Officers Take to Social Media to Criticize Report,” *Union Leader* (Nov. 27, 2018)).

41. Deputy Police Chief Robert Morin—who was featured in the 15-page portion of the Report addressing the Department’s culture (*Exhibit B*)—took issue with the Audit Report, writing that “significant portions” are “without merit and contain speculation, opinion and hearsay presented as fact without any attempt to seek the truth from first-person witnesses.” *Id.*

42. On the public Facebook account of Sgt. Michael Verrocchi, the union president for sworn personnel, Deputy Chief Morin also wrote that he was outraged and “pissed off,” and called the audit a waste of money and a “complete and utter pile of (expletive).” *Id.*

43. On November 24, 2018, Sgt. Verrocchi posted a meme on his Facebook page saying #istandwithsalempd, with the heading “*Wolves don’t lose sleep over the opinion of sheep.*” *Id.* (emphasis added). This is a remarkable statement from a leader of an organization that is charged with protecting, and not menacing or threatening, citizens in the Town.

44. In late November 2018, the Town signed an agreement with Municipal Resources Inc. for the services of former Andover, Massachusetts Police Chief Brian Pattullo. Mr. Pattullo is tasked with working with the Department as a civilian administrator to implement recommendations laid out in the Audit Report. Mr. Pattullo began work on December 3, 2018. See *Exhibit F* (Ryan Lessard, “Salem Chief Not in His Office, Civilian Administrator Named,” *Union Leader* (Nov. 28, 2018)).

45. On December 6, 2018, Chief Paul Donovan tendered his resignation. In a statement released by his lawyer, Chief Donovan said that he will continue to serve the Town as Chief until the end of December and will be supportive of the Department thereafter. See *Exhibit G* (Ryan Lessard, “Salem Police Chief Announces Resignation Under Cloud of Critical Audit, Allegations of Wrongdoing,” *Union Leader* (Dec. 6, 2018)).

II. The Petitioners' Chapter 91-A Requests and the Town's Response

46. Petitioner Union Leader Corporation, through journalist Ryan Lessard, has reported extensively on issues concerning the release of the Audit Report and its fall out. See Exhibits E, F, and G. Accordingly, on December 6, 2018, the Union Leader Corporation, through Mr. Lessard, submitted a Chapter 91-A Request to the Town of Salem seeking the “full, unredacted Kroll audit report.” See Exhibit H. That day, the Town of Salem, through Town Administrator Christopher Dillon, rejected the request, stating: “The full, unredacted version of the Kroll audit is not open to a general 91-A request. The town’s attorney has redacted the exempt portions of the report under 91-A:5. The town has shared what it is able to share.” *Id.* The Town failed to state which specific exemptions it was relying on in refusing to produce the requested information, as is required under Chapter 91-A. See RSA 91-A:4, IV (official must “make such record available” or “deny the request in writing *with reasons*”) (emphasis added).

47. Petitioner ACLU-NH frequently uses the provisions of Chapter 91-A to investigate civil liberties issues, including issues relating to law enforcement accountability. On November 8, 2018, the ACLU-NH sent a Chapter 91-A request to the Town of Salem seeking: (i) the complete and unredacted independent audit report by Kroll Inc., reviewing the internal affairs investigation practices, payroll and record keeping practices and “observations regarding the culture within the [Salem Police] department.”; and (ii) “an unredacted copy of the October 29, 2018 Memo issued from Salem Town Manager Chris Dillon to Salem Police Chief Donovan.” See Exhibit I. The Town of Salem has failed to respond to this request in writing despite being required to do so under Chapter 91-A. See RSA 91-A:4, IV (official must “make such record available” or “deny the request in writing with reasons”). However, in response to a similar Chapter 91-A request from undersigned counsel Richard Lehmann seeking the unredacted Audit Report, the Town of Salem,

through Town Manager Dillon, stated: “The redacted portions represent confidential personnel records, not subject to disclosure under RSA 91-A:5,IV. As a consequence, I cannot provide the requested document.” See *Exhibit J*.

ARGUMENT

48. Part I, Article 8 of the New Hampshire Constitution and the Right-to-Know law are the fundamental prerequisites for a self-governing people. As the legislature made clear in the preamble to the Right-to-Know law: “Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both *the greatest possible public access* to the actions, discussions and records of all public bodies, and their accountability to the people.” RSA 91-A:1 (emphasis added). The Right-to-Know Law “helps further our State Constitutional requirement that the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 553 (2002).

49. The Right-to-Know Law has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: “Government . . . should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8’s language was included upon the recommendation of the Bill of Rights Committee to the 1974 Constitutional Convention and adopted in 1976. While New Hampshire already had the Right-to-Know Law to address the public and the press’s right to access information, the Committee argued that the right

was “extremely important and ought to be guaranteed by a constitutional provision.” LAWRENCE FRIEDMAN, *THE NEW HAMPSHIRE STATE CONSTITUTION* 53 (2d ed. 2015).

50. Consistent with these principles, courts resolve questions under the Right-to-Know Law “with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents.” *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts, therefore, construe “provisions favoring disclosure broadly, while construing exemptions narrowly.” *Goode*, 148 N.H. at 554 (citation omitted); *see also Lambert v. Belknap County Convention*, 157 N.H. 375, 379, 383-85 (2008) (candidates’ applications for county sheriff, recommendation letters, and score sheets must be produced over privacy objections).

51. Despite the obvious public interest in disclosing the complete Audit Report and related documents, the Town of Salem is withholding this information from the public, including from the Salem taxpayers that fund the Department and that funded the completion of the Report (at a cost of \$77,000). In a letter to undersigned counsel, the Town of Salem has claimed that “[t]he redacted portions represent confidential personnel records, not subject to disclosure under RSA 91-A:5, IV.” *See Exhibit J*. As explained below, the Town is wrong.

I. The Audit Report and Related Documents are Not “Personnel” Information or “Confidential” Information Under RSA 91-A:5, IV, and Therefore RSA 91-A:5, IV Does Not Apply.

52. The Town’s reliance on the “personnel” information exemption under RSA 91-A:5, IV, and apparently the “confidential” information exemption under RSA 91-A:5, IV, is misplaced, especially given this Court’s obligation to construe these exemptions narrowly. *See Goode*, 148 N.H. at 554.

53. First, the Audit Report and related documents are not “personnel” information under RSA 91-A:5, IV because they are not human resources related.

54. The New Hampshire Supreme Court, following the United States Supreme Court decision in *Milner v. Dep’t of the Navy*, 562 U.S. 562 (2011) interpreting the Freedom of Information Act (FOIA), has defined “personnel” in the context of RSA 91-A:5, IV’s “internal personnel practices” exemption and explained: “[T]h[e] term refers to human resources matters. ‘Personnel,’ in this common parlance, means ‘the selection, placement, and training of employees and ... the formulation of policies, procedures, and relations with [or involving] employees or their representatives.’” *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 522 (2016) (quoting *Milner*, 562 U.S. at 570) (emphasis added). The Court added: “In general, then, the term ‘personnel’ relates to employment.” *Id.* The New Hampshire Supreme Court has looked to federal court interpretation of FOIA to construe portions of RSA 91-A. See *38 Endicott Street North, LLC v. State Fire Marshal, N.H. Div. Fire Safety*, 163 N.H. 656, 660 (2012).

55. In interpreting Massachusetts’ “personnel file or information” exemption, the Massachusetts Court of Appeals similarly explained that:

While the precise contours of the legislative term “personnel [file] or information” may require case-by-case articulation, it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee. These constitute the core categories of personnel information that are “useful in making employment decisions regarding an employee.”

Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 58 Mass. App. Ct. 1, 5-6 (2003) (quoting *Wakefield Teachers Ass’n v. School Comm.*, 431 Mass. 792, 797-98) (2000)) (emphasis added); see also *Md. Dep’t of State Police v. Md. State Conference of NAACP Branches*, 190 Md. App. 359, 373, 374-75 (Ct. Special App. Md. 2010) (racial profiling complaints were not personnel records because, in part, they were not disciplinary records stored in the officers’

personnel files; noting that, for this exemption to apply, the documents requested must, in part, “*directly pertain to employment*” (emphasis added), *aff’d on other grounds*, 430 Md. 179 (Ct. App. Md. 2013).

56. The facts of *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester* are informative. There, the Worcester Telegram newspaper sought disclosure of information relating to a citizen complaint against an officer and the subsequent internal affairs investigation. The sole issue before the Massachusetts Appeals Court was the applicability of the “personnel file or information” exemption to this information under Massachusetts’s public records law. The Court held that the officers’ reports, witness interview summaries, and an internal affairs report were not “personnel file or information” exempt from disclosure because these documents related to the workings and determinations of the internal affairs process whose quintessential purpose was not human resources related, but rather to inspire public confidence. *See Worcester Telegram & Gazette Corp.*, 58 Mass. App. Ct. at 8-9.

57. This Court must reach the same conclusion here, as the Audit Report and accompanying documents are not employment related. These documents were not created as a part of a human resources or employment process. Rather, the requested documents were generated to broadly ascertain the performance of the Department, hold the Department accountable for its actions, and inspire public confidence in both the Department and the Town. Thus, the Audit Report and related documents are not “personnel” documents subject to RSA 91-A:5, IV.

58. *Second*, for all the reasons in Part II.A, *infra*, the redacted information in the Audit Report and related documents are not “confidential” information under RSA 91-A:5, IV, and

therefore this exemption does not apply. Public officials—especially the police—have no right to confidentiality concerning their performance of official duties.

II. Even If RSA 91-A:5, IV Applies (And It Does Not), the Three-step Public Interest/Privacy Interest Balancing Analysis Nonetheless Requires Disclosure.

59. Even if RSA 91-A:5, IV applies (and it does not), what the Town of Salem ignores is the fact that RSA 91-A:5, IV’s exemption for “confidential ... information” and “personnel” information “whose disclosure would constitute invasion of privacy” is not categorical; rather, documents implicated by this exemption are further subjected to an inquiry that balances the public interest in disclosure against the privacy interest in nondisclosure. As the New Hampshire Supreme Court recently held in evaluating the exemption for “personnel” information, “‘personnel ... files’ are not automatically exempt from disclosure.” *Reid*, 169 N.H. at 528. The Court added that, for those materials, “th[e] categorical exemption[] [in RSA 91-A:5, IV] mean[s] not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public’s interest in disclosure.” *Id.* (internal quotations omitted).

60. The Supreme Court has explained this three-step balancing analysis as follows under RSA 91-A:5, IV:

First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Second, we assess the public’s interest in disclosure. Third, we balance the public interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure. If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. Further, [w]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party’s subjective expectations.

Prof’l Firefighters of N.H. v. Local Gov’t Ctr., 159 N.H. 699, 707 (2010) (citations and internal quotations omitted); *see also Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673, 679 (2011) (same).

61. As explained below, when engaging in this three-step analysis, the requested documents must be produced in unredacted form.

A. The Department and Its Officers Have No Privacy or Confidentiality Interest That Would Be Invaded By Disclosure.

62. When it comes to the behavior of the police in their official capacity, especially when it concerns misconduct, there is no privacy or confidentiality interest in nondisclosure. Police officers perform vital functions *on behalf of the public*, and their misconduct creates the potential for considerable social harm. *See Everitt v. Gen. Elec. Co.*, 156 N.H. 207, 217-18 (2007) (“Police officers are trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety. This essential and inherently governmental task is not shared with the private sector.”).

63. Petitioners are not seeking information about private individuals that courts have frequently protected; rather, Petitioners are seeking information in the Audit Report and related documents about public officials acting in their official capacity. In examining the exemption in RSA 91-A:5, IV, the New Hampshire Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government—which often has been withheld on privacy grounds depending on the circumstances—and information concerning official actions of government employees—which it generally has ordered to be disclosed. *Compare, e.g., Lamy v. New Hampshire Public Utilities Com’n*, 152 N.H. 106, 111 (2005) (the names and addresses of *private utilities customers* can be withheld on privacy grounds under RSA 91-A:5, IV; “The public interest that the Right-to-Know Law was intended to serve concerns “informing the citizenry about the activities of their government ... 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.’’) (emphasis in original); *Brent v. Paquette*, 132 N.H. 415 (1989) (government not required to produce records kept by school superintendent containing private students’ names and addresses); *New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit*, 169 N.H. 95 (2016) (protecting identities of private patients at a women’s health clinic); *with Union Leader Corp.*, 162 N.H. at 684 (holding that the government must disclose the names of retired public employees receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV); *Professional Firefighters of N.H.*, 159 N.H. at 709 (holding that the government must disclose specific salary information of public firefighters notwithstanding RSA 91-A:5, IV); *Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972) (government must disclose the names and salaries of each individual public schoolteacher in the district), and *Lambert*, 157 N.H. at 383-85 (applications for county sheriff must be disclosed).

64. Courts outside of New Hampshire have also roundly rejected the concept of police officers having a privacy interest with respect to their official conduct. *See City of 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) (holding the public interest in records of investigation into police officers’ use of excessive force trumps officers’ privacy interest; “[t]hese investigations were not related to private facts; the investigations concerned public employees’ alleged improper activities in the workplace”); *Md. Dep’t of State Police*, 190 Md. App. at 368 (“Racial profiling complaints against Maryland State Troopers do not involve private matters concerning intimate details of the trooper’s private life A State Trooper does not have a reasonable expectation of privacy as to such records.”) (emphasis added); *Burton v. York County Sheriff’s Dep’t.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff’s department records regarding investigation of employee misconduct were subject to disclosure, in part, because the requested documents did not concern “the off-duty sexual

activities of the deputies involved”). These cases are instructive here. *See Union Leader Corp.*, 142 N.H. at 546 (noting that “[w]e also look to the decisions of other jurisdictions” in interpreting Chapter 91-A).

B. The Public Interest in Disclosure is Compelling.

65. The public interest in disclosing the unredacted Audit Report and related documents is obviously compelling.

66. The Audit Report and related documents concern Department misconduct and was commissioned precisely because it was in the public interest to investigate the Department’s behavior and make findings and recommendations to the public so the Department can be held accountable. This public interest is made clear by the Report itself, which states that the investigation was triggered by the Town Manager’s concern that the Department “was known to discourage citizens from making formal complaints, and when complaints were, in fact, submitted, the investigative actions were insufficient or disregarded entirely.” *See Exhibit A*, at p. 7.

67. As the New Hampshire Supreme Court has repeatedly explained, the public interest in disclosure is great when it will potentially expose government misconduct. *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”); *Professional Firefighters of N.H.*, 159 N.H. at 709 (“Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism.”); *Reid*, 169 N.H. at 532 (“The public has a significant interest in knowing that a government investigation is comprehensive and accurate. We also note that the rank of the official being investigated and the seriousness of the alleged misconduct will bear upon the strength of the public interest.”) (internal quotations and citation omitted; citing *Coleman v. Lappin*, 680 F. Supp. 2d 192, 199 (D.D.C. 2010) (stating that “[t]he

Court ordinarily considers, when balancing the public interest in disclosure against the private interest in exemption, the rank of the public official involved and the seriousness of the misconduct alleged’’)).

68. Courts outside of New Hampshire have similarly recognized the obvious public interest that exists when police misconduct is implicated. *See City of Baton Rouge/Parish of East Baton Rouge*, 4 So.3d at 809-10, 821 (holding the public interest in records of investigation into police officers’ use of excessive force trumps officers’ privacy interest; noting that “[t]he public has an interest in learning about the operations of a public agency, the work-related conduct of public employees, in gaining information to evaluate the expenditure of public funds, and in having information openly available to them so that they can be confident in the operation of their government’’); *Md. Dep’t of State Police*, 190 Md. App. at 368 (noting public interest in disclosing racial profiling complaints of police, as “the files at issue concern public actions by agents of the State concerning affairs of government, which are exactly the types of material the Act was designed to allow the public to see’’), *aff’d on other grounds*, 430 Md. 179 (Ct. App. Md. 2013); *Burton v. York County Sheriff’s Dep’t.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff’s department records regarding investigation of employee misconduct were subject to disclosure, in part, because “[i]n the present case, we find the manner in which the employees of the Sheriff’s Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye’’); *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) (“As the trial court found, there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct.’’); *Tompkins v. Freedom of Info. Comm’n*, 46 A.3d 291, 299 (Conn. App. Ct. 2012) (in public records dispute

concerning documents held by a police department implicating an employee's job termination, noting that a public concern existed where the "conduct did implicate his job as a public official").

69. In addition to the Right-to-Know law, New Hampshire's commitment to open government and public accountability is expressly set forth in Part I, Article 8 of the State Constitution, which reads, "All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them."

70. Here, it cannot seriously be disputed that producing the complete Audit Report and related information will reveal information that will assist the public in holding the Department and the Town accountable. Therefore, disclosure is in the public interest. As the Audit Report itself demonstrates, disclosure will directly implicate Department misbehavior and the fact that it has not been serving the public of Salem effectively. It is worth repeating that the Report opines concerning the Department's complaint investigation procedures: "We see a system designed to intimidate members of the public and make them fearful of the consequence of filing a complaint about concerning police conduct." *See Exhibit A*, at p. 53. If it is important enough for the Town to commission a report about the Department's misbehavior, then surely it is important for the public and the taxpayers in Salem to obtain the full report so the Department can be held accountable. This is especially true where the portions of the Audit Report that have been released have already led to the resignation of Chief Donovan and the appointment of a civilian to administer the Department. *See Nash v. Whitman*, 05-cv-4500, 2005 WL 5168322 (Dist. Ct. of Colo, City of Denver, Denver Cty. Dec. 2005) ("Weighing in favor of disclosure is the public's strong interest in knowing how DPD handles IAB investigations of citizen complaints in general and how it handled these investigations in particular."). Moreover, disclosure of the full Audit

Report will assist Salem’s taxpayers in evaluating the performance of Kroll’s investigation itself—an investigation that the taxpayers paid for. *See Reid*, 169 N.H. at 532 (noting obvious public interest in how Attorney General’s Office conducts investigations).

71. The Town’s redactions are extensive, concern issues that are clearly of tremendous public concern, and may represent an attempt to shield the Department from public accountability. For example, these redactions include: (i) the Department’s troubling response to the ICenter fight occurring on December 2, 2017 (*Exhibit A*, at p. 75-89); (ii) Kroll’s finding that the Department may not be complying with policies issued by the Attorney General’s Office concerning retention of internal affairs investigatory files (*id.* at p. 118); (iii) Kroll’s review of how the Department handled 29 internal affairs investigations (*id.* at 39-91); (iv) the substance of Kroll’s communications with external citizens (*id.* at pp. 92-108)⁴; (v) how the Department displays an “us versus them” mentality and the Department’s culture (*Exhibit B*, at pp. 6-12); and (vi) information that provides a basis for Kroll’s time and attendance conclusions (*Exhibit C*, at pp. 16, 17, and 26; *Exhibit A*, at pp. 118-119). Transparency as to these issues is critical “so that [the public] can be confident in the operation of their government.” *See City of Baton Rouge/Parish of East Baton Rouge*, 4 So.3d at 809-10, 821.

72. This public interest is heightened by the fact that the citizens of Salem spent approximately \$77,000 funding the Report’s creation. Salem’s taxpayers paid for the Report and are entitled to review it in its entirety. Keeping information secret, especially when it comes to police behavior, only creates distrust and suspicion that minimizes the hard work and dedication shown by the overwhelming majority of law enforcement professionals. *See Rutland Herald*, 84 A.3d at 826 (“redacting the employees’ names would cast suspicion over the whole department and

⁴ To reiterate, Petitioners are not seeking the names of any private citizens to the extent they are included in the Report.

minimize the hard work and dedication shown by the vast majority of the police department”). Keeping portions of the Audit Report secret (i) prevents taxpayers from fully evaluating whether the Department is taking corrective measures consistent with the Report’s findings and recommendations, and (ii) undermines the very goal of the Report to inspire public confidence in the Department and the Town’s leadership.

C. The Compelling Public Interest in Disclosure Trumps Nonexistent Privacy Interests.

73. Once the private and governmental interests in nondisclosure and public interest in disclosure have been assessed, courts “balance the public interest in disclosure against the government interest in nondisclosure and the individual’s privacy interest in nondisclosure.” *Union Leader Corp.*, 162 N.H. at 679. In performing this balancing test with respect to the Audit Report and related documents, any privacy/confidentiality interest is dwarfed by the compelling public interest in disclosure.

74. Here, the substantial public interest in disclosure is the public’s right to know the complete findings and recommendations contained in the Audit Report that was paid for by the taxpayers of Salem. Moreover, police officers are public servants who appear as professional witnesses in criminal cases, and, as such, do not have the same privacy rights as regular citizens or even other public employees. *See State v. Hunter*, No. 73252-8-I, 2016 Wash. App. LEXIS 1470, at *5 (Ct. App. June 20, 2016) (noting that a police officer is “a professional witness”). Simply put, there is no privacy interest that exist with respect to the requested information.

75. The New Hampshire Supreme Court has consistently stated that this balancing test should be heavily weighted in favor of disclosure, even where the public and privacy interests appear equal. *See, e.g., Reid*, 169 N.H. at 532 (“When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward

nondisclosure.”) (citations omitted)); *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (“The legislature has provided the weight to be given one side of the balance”).

76. When performing this balancing test, the Supreme Court has also often looked to the decisions of other jurisdictions. *See Union Leader Corp.*, 142 N.H. at 546. A number of courts in other states, for example, have held that police officers’ privacy interests are not sufficient to prevent disclosure of law enforcement disciplinary reports. *See, e.g., Rutland Herald*, 84 A.3d at 826 (affirming that police disciplinary records must be disclosed); *Duane Tompkins v. Freedom of Information Com’n*, 46 A.3d 291, 299 (Conn. App. Ct. 2012) (affirming that a police officer’s termination records must be disclosed); *City of Baton Rouge/Parish of East Baton Rouge*, 4 So.3d at 809-10, 821 (holding the public interest in records of investigation into police officers’ use of excessive force trumps officers’ privacy interest; “[t]hese investigations were not related to private facts; the investigations concerned public employees’ alleged improper activities in the workplace”).

77. When balancing these factors, the complete Audit Report and related documents must be disclosed.

Conclusion

WHEREFORE, Petitioners respectfully pray that this Honorable Court:

- A. Give this action “priority on the Court calendar” as required by RSA 91-A:7, by issuing Orders of Notice forthwith and scheduling a hearing on the relief Petitioners seek;
- B. Rule that the following unredacted documents requested by Petitioners are public records that must be made public under RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution: (i) the 120-page audit report of the Salem Police Department dated October 12, 2018 focusing on internal affairs complaint investigations (*Exhibit A*); (ii) the 15-page addendum focusing on the Salem Police Department’s culture (*Exhibit B*); (iii) the 42-page audit report of the Salem Police Department dated September 19, 2018 focusing on time and attendance practices (*Exhibit C*); (iv) Salem Police Chief Paul Donovan’s November 9, 2018 14-page

response to the Audit Report (*Exhibit D*); and (v) the two-page memorandum from Salem Town Manager Christopher Dillon to Chief Donovan dated October 29, 2018 discussing the Audit Report (*Exhibit D*);

C. Pursuant to RSA 91-A:8, I, grant Petitioners reasonable attorneys' fees and costs as this lawsuit was necessary in order to enforce compliance with the provisions of RSA Chapter 91-A or to address a purposeful violation of Chapter 91-A. Fees are appropriate because Respondent knew or should have known that the conduct engaged in was in violation of RSA Chapter 91-A; and

D. Award such other relief as may be equitable.

Respectfully submitted,

UNION LEADER CORPORATION,

THE AMERICAN CIVIL LIBERTIES
UNION OF NEW HAMPSHIRE
FOUNDATION,

By its attorney,

By its attorneys,

/s/ Gregory V. Sullivan

Gregory V. Sullivan, Esq. (N.H. Bar No. 2471)

Malloy & Sullivan,
Lawyers Professional Corporation
100 William Loeb Drive
Manchester, NH 03109
Tel. (781) 749-4141
g.sullivan@att.net

/s/ Gilles R. Bissonnette

Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)

Henry R. Klementowicz (N.H. Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Ave. # 12
Concord, NH 03301
Tel. (603) 227-6678
gilles@aclu-nh.org
henry@aclu-nh.org

Richard J. Lehmann, Esq. (N.H. Bar No. 9339)

835 Hanover Street, Suite 301
Manchester, NH 03104
Tel. 603.731.5435
rick@nhlawyer.com

Date: December 21, 2018

Certificate of Service

I hereby certify that a copy of the foregoing was sent to counsel for the Town of Salem, Attorney Bart Mayer, Esq., Upton & Hatfield, LLP, 10 Centre St, Concord, NH 03301.

/s/ Gilles Bissonnette
Gilles Bissonnette

December 21, 2018