THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

American Civil Liberties Union of New Hampshire
18 Low Ave. # 12
Concord, NH 03301

v.

TOWN OF SALEM
33 Geremonty Drive
Salem, NH 03079

No. _____

VERIFIED PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF PURSUANT TO RSA 91-A

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

NOW COMES the Petitioner, the American Civil Liberties Union of New Hampshire ("ACLU-NH"), and respectfully petitions this Honorable Court for a declaratory judgment and injunctive relief pursuant to Chapter 91-A and RSA 491:22. For case management purposes, this case is related to three pending criminal cases, including one pending in this Court: (i) *State v. Andersen*, No. 218-2018-CR-00241 (Rockingham County Superior Court, filed on February 8, 2018); (ii) *State v. Christopher Albano*, No. 473-2018-CR-01360 (Salem District Court, filed on June 1, 2018); and (iii) *State v. John Chesna*, No. 473-2018-CR-01180 (Salem District Court, filed on May 18, 2018).

This case concerns the ACLU-NH's investigation into whether the Salem Police Department ("Department") used its immense law enforcement power to intimidate two individuals who were potential witnesses against the Department in a pending criminal case. More specifically, the ACLU-NH is investigating whether the Department, in violation of the First

Amendment, charged Christopher Albano for crimes in retaliation for him speaking to *CBS Boston* about his concern that the Department improperly arrested and used excessive force against a youth hockey coach—Robert Andersen—on December 2, 2017. Mr. Albano is a witness in the pending *Andersen* case, and the Department charged him with crimes five months after the December 2, 2017 *Andersen* incident. Mr. Albano's arrest may also have violated his right to record the police—a right that is recognized under the First Amendment as a means of ensuring government accountability. The ACLU-NH is similarly investigating the Department's actions in criminally charging John Chesna, who too is a witness in the *Andersen* case. The Department also charged Mr. Chesna about five months after the December 2, 2017 *Andersen* incident and several weeks after *CBS Boston* informed the public of the *Andersen* case on April 26, 2018.

The Department's decision to charge these two potential witnesses so long after the December 2, 2017 *Andersen* incident is concerning, especially in Mr. Albano's case where the Department's actions came shortly after Mr. Albano criticized the Department in statements to *CBS Boston*. It is, of course, inappropriate for a police department to criminally charge a witness because that witness will present negative testimony in a criminal case or because that witness has spoken out against the police. *See Houston v. Hill*, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). Indeed, the ability of people to speak freely to the press without fear of police retaliation is critical to a free press and its valuable role of promoting government accountability. *See Mortgage Specialists v. Implode-Explode Heavy Indus.*, 160 N.H. 227, 233 (2010) ("Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have

access to an unimpeded and uncensored flow of reporting.") (quoting *Opinion of the Justices*, 117 N.H. 386, 389 (1977)).

It is not clear from the information publicly available whether the Department acted appropriately. But what is clear is that the public and the residents of Salem have a right to access basic information to make an assessment for themselves as to how the Department—which is funded by the public—handled this situation. This case highlights the critical importance of Chapter 91-A: to shed light on government behavior so the public can hold the government accountable.

Parties

1. Petitioner American Civil Liberties Union of New Hampshire is a non-profit organization with an address of 18 Low Ave # 12, Concord, NH 03301. The ACLU-NH routinely submits Chapter 91-A requests to municipalities in New Hampshire and will continue to do so in the future, including to the Salem Police Department and the Town of Salem.

2. Respondent Town of Salem is a public body of the state of New Hampshire with an address of 33 Geremonty Drive, Salem, NH, 03079. Respondent is authorized by law to maintain a police department, which acts as its agent and for which it is ultimately responsible.

Jurisdiction and Venue

3. This Court has jurisdiction over this matter pursuant to RSA 491:22 and RSA 91-A:7. "Any person aggrieved by a violation of [RSA 91-A] may petition the superior court for injunctive relief. In order to satisfy the purposes of [RSA 91-A], the courts shall give proceedings under [RSA 91-A] high priority on the court calendar. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter . . . ." RSA 91-A:7.[1]

[1] Furthermore, "[i]f any public body or public agency or officer, employee, or other official thereof, violates any provisions of [RSA 91-A], such public body or public agency shall be liable for reasonable attorney's fees and costs

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

The Facts and the Need for the Information Requested

5. On December 2, 2017, the Salem Police Department responded to a call stating that parents were fighting at the Icenter hockey rink where there was a youth hockey game. There was an argument between two parents during the game. According to witnesses, Robert Andersen—one of the coaches at the game—was standing between the two parents in an attempt to deescalate the situation. Several witnesses say that the Salem police—without announcing themselves, without asking anyone what happened, and without engaging in de-escalation techniques—came through the door, grabbed Mr. Andersen, pushed him to the ground, tased him several times, and put him in handcuffs. The Department ultimately charged Mr. Andersen with simple assault, criminal threatening, and resisting arrest. These charges are pending in Rockingham County Superior Court. The case summary in Mr. Andersen's case is attached as *Exhibit A*. *See State v. Andersen*, No. 218-2018-CR-00241 (Rockingham Superior Court).

6. Several people videotaped the incident with their cell phones. Mr. Andersen can be heard screaming with four Salem officers pinning him to the floor of the rink lobby. Two of the officers then tased Mr. Andersen. In the video, witnesses yelled "he did nothing wrong," yet the Salem police officers appeared unwilling to listen to these witnesses' version of events that conflicted with the aggressive actions that they had just undertaken against Mr. Andersen. One officer said in response to witnesses explaining that Mr. Andersen did nothing wrong, "No, I didn't grab the wrong guy. Don't tell me what I did."

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incurred in a lawsuit under [RSA 91-A], provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of [RSA 91-A] or to address a purposeful violation of [RSA 91-A]." RSA 91-A:8. However, "[f]ees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this [RSA 91-A] . . . ." RSA 91-A:8.

7. On April 26, 2018, *CBS Boston* ran a story about this incident. *See* Cheryl Fiandaca, "I-Team: Video Captures Controversial Arrest of Youth Hockey Coach," *CBS Boston*, Apr. 26, 2018, attached as ***Exhibit B***, at http://boston.cbslocal.com/2018/04/26/iteam-salem-youth-hockey-coach-tased-police/. In the story, one witness explained that "I felt like that if you opened your mouth, they were going to arrest you too." *Id.* Witness Christopher Albano was interviewed in the story and stated that "nobody knew what was going on. Nobody knew why this was happening." *Id.* When questioned about the force used by the Salem Police Department against Mr. Andersen, Mr. Albano stated: "[Mr. Andersen] wasn't going anywhere. There [were] four cops on him. And he wasn't fighting back or anything, so there was no reason for that." *Id.*

8. In May 2018—just weeks after the April 26, 2018 *CBS Boston* story aired and five months after the December 2, 2017 incident—the Salem Police Department charged Mr. Albano with disorderly conduct and simple assault in Salem District Court. The allegation is purportedly for touching an officer's hand while the officer was attempting to interfere with Mr. Albano's First Amendment right to record the officers and their interaction with Mr. Andersen. *See Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (holding that there is a First Amendment right to record the police who are performing their duties in public so long as the recording does not interfere with the performance of such duties); *Gericke v. Begin*, 753 F. 3d 1 (1st Cir. 2014) (same). The prosecutor has indicated an intent to seek Class A misdemeanor penalties in Mr. Albano's case.

9. Mr. Albano's arrest was further reported by *CBS Boston* on May 23, 2018 where several experts expressed concern that this arrest, occurring about five months after the incident and soon after speaking to the press against the Department's actions, constitutes retaliation against a witness. *See* Cheryl Fiandaca, "I-Team: Father Arrested After Speaking To WBZ About Arrest of Hockey Coach," *CBS Boston*, May 23, 2018, attached as ***Exhibit C***, at

http://boston.cbslocal.com/2018/05/23/father-arrested-salem-police-hockey-coach-arrest-assault-iteam/. Indeed, one expert in the story noted the following: "There are situations where police are assaulted and beaten, so it's a very serious criminal offense. To diminish and trivialize it like this undermines situations where police officers are legitimately assaulted." *Id.* The case summary for Mr. Albano's case is attached as ***Exhibit D***. *See State v. Christopher Albano*, No. 473-2018-CR-01360 (Salem District Court, filed on June 1, 2018).

10. Similarly, in May 2018, after the original April 26, 2018 *CBS Boston* story, the Salem Police Department arrested John Chesna—also a witness in the *Andersen* case—on two charges of disorderly conduct. The case summary for Mr. Chesna's case is attached as ***Exhibit E***. *See State v. John Chesna*, No. 473-2018-CR-01180 (Salem District Court, filed on May 18, 2018).

11. On May 17, 2018, Petitioner ACLU-NH filed a Right-to-Know request with the Salem Police Department. This request is attached as ***Exhibit F***. This request sought, among other things, police reports arising from a simple assault and disorderly conduct allegedly committed by Christopher Albano on December 2, 2017, and the criminal complaint filed against Mr. Albano after this alleged incident, and any internal or external communications concerning Mr. Albano.

12. On May 18, 2018, Petitioner filed a second Right-to-Know request with the Salem Police Department. This request is attached as ***Exhibit G***. This request sought police reports arising from criminal activity allegedly committed by John Chesna on December 2, 2017, the criminal complaint filed against Mr. Chesna after this alleged incident, and any internal or external communications concerning Mr. Chesna.

13. On May 24, 2018, the Salem Police Department refused to supply these records on the basis of a May 23, 2018 "gag" order issued in the related case *State v. Andersen*, No. 218-2018-CR-00241. In addition, the Department raised two exemptions under Chapter 91-A: (a) the

exemption for documents that could reasonably be expected to interfere with enforcement proceedings; and (b) the exemption for documents that would deprive a person of a right to a fair trial or an impartial adjudication. In its May 24, 2018 response, which is attached as *Exhibit H*, the Department stated:

> This email is in response to the two Right to Know Law requests dated May 17 and May 18, 2018, regarding Christopher Albano and John Chesna. Disclosure of the information requested would result in the deprivation of the right to fair trials or impartial adjudications of the Albano and Chesna matters as both cases are presently pending in the Salem District Court. It is our understanding that on May 23, 2018, an Order was issued by the Rockingham Superior Court precluding the parties in the matter of State v. Anderson from publically disclosing police reports. Given that the Albano and Chesna cases have some factual connection to the Anderson case, we will certainly obey the Court's order and deny your request. Please also see RSA 91-A:5. Furthermore, the disclosure of the investigatory records you are seeking could reasonably be expected to interfere with enforcement proceedings.

Based on the "gag" order, the Department is also apparently withholding the arrest warrant and supplemental affidavit for arrest warrant filed with the Court in Mr. Albano's case. *See* Albano Case Summary, attached as *Exhibit D*.

14. This May 23, 2018 "gag" order referenced in Salem's response is attached as *Exhibit I*. The "gag" order issued by the Court in the *Andersen* matter was hand-written in the case's Dispositional Conference Order and states that "In the interim, the parties shall not disclose any information learned from any police report to any outside source/person without permission from the court." This "gag" order was requested by the State (not Mr. Andersen) (i) just days after the ACLU-NH submitted its Chapter 91-A requests on May 17 and 18, 2018 and (ii) immediately before *CBS Boston* aired a story on May 23, 2018 explaining how the Department arrested Mr. Albano after he spoke to the press. As explained below, this order is unconstitutional.

15. The public import of the police reports and communications requested by the ACLU-NH concerning the charges against Mr. Albano and Mr. Chesna brought approximately

five months after the December 2, 2017 incident is both compelling and obvious. These arrests have potential civil liberties implications and raise questions about the Department's police practices and whether it attempted to use its law enforcement power to intimidate witnesses, including one person who spoke out to the press against the Department.[2] As one police expert told *CBS Boston* in its May 23, 2018 story concerning the Department's arrest of Mr. Albano, "I have never heard of it before and it is certainly, in my experience that runs to four decades, if it was determined that an arrest was warranted, the arrest should have been carried out in December [2017], not six months after the fact as we are seeing here. This is beyond the pale for what is appropriate and professional police conduct." *See* Cheryl Fiandaca, "I-Team: Father Arrested After Speaking To WBZ About Arrest of Hockey Coach," *CBS Boston*, May 23, 2018, attached as *Exhibit C*, at http://boston.cbslocal.com/2018/05/23/father-arrested-salem-police-hockey-coach-arrest-assault-iteam/. In Mr. Albano's case, the ACLU-NH strongly suspects that the original police reports from December 2017 say little about any alleged assault conducted by Mr. Albano. As explained in the May 23, 2018 *CBS Boston* story, in Salem police officer Sean Wilson's police report describing the December 2, 2017 incident, he makes no mention of being assaulted in his report. *Id.*

16. In short, the public has a right to records which show how the Department has conducted these arrests. Records such as the ones at issue here are presumptively open to the public, and the issue these records present—namely, whether or not the Department has abused its power to intimidate witnesses—adds significantly to the public's interest in accessing the requested documents.

[2] Under RSA 641:5, a person is guilty of a class B felony if (i) believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to withhold any testimony, information, document or thing or (ii) he commits any unlawful act in retaliation for anything done by another in his capacity as witness or informant.

Argument

I. The police reports must be produced under Chapter 91-A and Part I, Article 8 to the New Hampshire Constitution because the stated exemptions do not apply. Accordingly, the "gag" order barring disclosure of police reports by the parties must also be vacated or enjoined, as the order violates Chapter 91-A and Part I, Article 8 to the New Hampshire Constitution.

17. New Hampshire's Right-to-Know law under Chapter 91-A is designed to create transparency with respect to how the government interacts with its citizens. The preamble to the law states: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. The Right-to-Know Law "helps further our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Goode v. N.H. Legis, Budget Assistant*, 148 N.H. 551, 553 (2002).

18. Chapter 91-A has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: "Government . . . should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.* New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8's language was included upon the recommendation of the bill of rights committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire already had RSA 91-A to address the public and the press's right to access information, the committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 53 (2d ed. 2015).

19. Consistent with these principles, courts resolve questions under Chapter 91-A "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode*, 148 N.H. at 554 (citation omitted); *see also Scott v. City of Dover*, No. 05-E-170, 2005 N.H. Super. LEXIS 57, at *3–4 (N.H. Super. Ct., Strafford Cty. Oct. 11, 2005) (same) (Fauver, J.).

20. Because the New Hampshire Right-to-know Law does not explicitly address requests for police investigative files, in *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 582 (2006), the New Hampshire Supreme Court used language from the Freedom of Information Act (FOIA) to evaluate such a request. FOIA exempts from disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information [(A)] *could reasonably be expected to interfere with enforcement proceedings*, [(B)] *would deprive a person of a right to a fair trial or an impartial adjudication* . . . .

46 CFR § 503.33 (a)(7) (emphasis added). Simply stated, there is no blanket exemption from production of public records for criminal matters that are pending prosecution.

21. Neither of these exemptions are applicable here and therefore the requested police reports and communications are public documents that must be produced under Chapter 91-A and Part I, Article 8 to the New Hampshire Constitution. Because these documents must be produced under Chapter 91-A and Part I, Article 8, the "gag" order barring disclosure of these documents must be vacated or enjoined, as it violates these statutory and constitutional provisions designed to ensure government accountability.

A. The documents in question cannot reasonably be expected to interfere with enforcement proceedings

22. Exemptions under Category 7 first require that the entity resisting disclosure "initially show that the requested documents are: (1) investigatory; and (2) compiled for law enforcement purposes." *Lodge v. Knowlton*, 118 N.H. 574, 576–77 (1978). At this stage, Petitioner does not contest that the Department may have compiled these documents for law enforcement purposes.

23. Once it has been established that the records are investigatory and compiled for law enforcement purposes, the key question is "whether revelation of the data will tend to obstruct, impede, or hinder enforcement proceedings." *Curran v. Dept. of Justice*, 813 F.2d 473, 474 (1st. Cir. 1987). To show that these adverse consequences would result from disclosure, the party resisting disclosure must show (1) that "enforcement proceedings are pending or reasonably anticipated" and (2) <u>*that "disclosure of the requested documents could reasonably be expected to interfere with those proceedings*</u>." *38 Endicott St. N., LLC v. State Fire Marshal*, 163 N.H. 656, 665 (2012) (emphasis added) (quoting *Murray*, 154 N.H. at 582–83). This burden falls squarely on the government entity resisting disclosure. *See Murray*, 154 N.H. 579 ("[i]t is not the petitioner's responsibility to clarify the respondents' vague categorizations.").

24. As to the second question, it is clear that the Town has not met its burden. To successfully invoke the 7(A) exemption, "the government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." *Campbell v. Department of Health & Human Servs.*, 682 F.2d 256, 257 (D.D.C. 1982). Courts across the country have uniformly rejected invocation of the "law enforcement" exception based on conclusory, speculative assertions without particularized supporting facts. *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); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007) (exception "require[s] specific information about the impact of the disclosures" on an enforcement proceeding); *id.* ("[I]t is not sufficient for an agency merely to state that disclosure would" interfere with a proceeding; "it must rather demonstrate how disclosure" would do so); *Grasso v. I.R.S.*, 785 F.2d 70, 77 (3d Cir. 1986) ("[T]he government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding." (citation omitted)); *Estate of Fortunato v. I.R.S.*, No. 06-6011 (AET), 2007 WL 4838567, at *4 (D.N.J. Nov. 30, 2007) (a "categorical indication of anticipated consequences of disclosure is clearly inadequate.") (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987)); *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989) (the government must prove release of records would "interfere in a palpable, particular way"). In the present case, the Town of Salem has not put forth any such specific evidence that releasing the police reports and related communications would have any effect on its case against these individuals, and thus its claim under the law enforcement exception must fail.

25. While New Hampshire courts have not provided a precise definition of "interfere" in this context, they have given a general sense of the severity of interference they consider sufficient to justify withholding information, stating that "disclosure of information may interfere with enforcement proceedings by '[resulting] in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation.'" *38*

Endicott St., 163 N.H. at 667 (quoting *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998)). None of these considerations are applicable here.

26. Simply put, the Town of Salem has not pointed to any specific potential interference, especially where there is no pending criminal investigation in the *Andersen*, *Albano*, or *Chesna* cases. The criminal investigations in these cases are complete and there has been a decision to prosecute. The Town also cannot meet this burden of establishing interference where it must acknowledge that the facts and circumstances of these arrests will be adjudicated as part of a proceeding that will be open and available to the public and press. Simply put, it is inappropriate to blanketly view something as "interfering with enforcement proceedings" simply because there is a criminal case pending.

27. If the Town's broad interpretation of this exemption was correct, the exception would apply to all police reports which form the basis of charges against all criminal defendants. Put another way, if mere speculation were sufficient to invoke the "interference" exception, there would be a categorical exclusion for all public records involved in a criminal prosecution. That view of the law is unsupported by case law. "[M]erely because a piece of paper has wended its way into an investigatory dossier created in anticipation of enforcement action, an agency . . . cannot automatically disdain to disclose it." *Providence Journal Co. v. Pine*, No. C.A. 96-6274, 1998 R.I. Super. LEXIS 86, at *31 (R.I. June 24, 1998) (citation omitted). To find otherwise would create a "blanket exemption for police files" that "would turn on its head [the] basic presumption of openness." *City of Fort Thomas v. Cincinnati Enquirer*, 406 S.W.3d 842, 850 (Ky. 2013); *see also Jefferson v. Reno*, 1997 U.S. Dist. LEXIS 3064, *9–11, 1997 WL 135723 (D.D.C. Mar. 14, 1997) (rejecting government's decision to withhold records on grounds that they were "maintained in a case file that pertains to a criminal prosecution" because the government could

not "describe[] how the release of any or all responsive documents could reasonably be expected to interfere with these enforcement proceedings"; rejecting government's generalized statement that "the release of such information would severely compromise the United States Attorney's Office in its ability to effectively carry out its functions in" the pending criminal actions, and concluding that the government's position "would result in a 'blanket exemption' for all documents contained in pending criminal files"); *Penn. State Police v. Grove*, No. 1646 C.D.2014, 2015 Pa. Commw. Unpub. LEXIS 714, at *4 (Pa. Commw. Ct. Sept. 28, 2015) (ordering release of police dashcam video and holding that "[t]he mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under" open records laws (citation omitted) (alteration in original)).

28. Also troubling is the Town's implicit assumption that public access necessarily "interferes with" law enforcement proceedings. To the contrary, the United States Supreme Court has recognized for decades that public access to court proceedings ensures basic fairness and the appearance of fairness in the proceedings, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) ("*Press-Enterprise II*"), fosters public confidence in the judicial process and acceptance of its results, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 507–08 (1984) ("*Press-Enterprise I*"), acts as a necessary check on the judiciary, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980), and allows the public to participate in government, *id.* at 587–88 (Brennan, J., concurring).

29. For these reasons, Exemption 7(A) does not apply.

B. Release of the documents in question would not result in deprivation of the right to a fair trial or an impartial adjudication

30. The Town's contention that disclosure of the police reports would result in deprivation of the right to a fair trial is similarly incorrect. Here, again, the Town has only raised

this exemption using conclusory statements that are insufficient to justify withholding this information under the "fair trial" exemption.

31. The D.C. Circuit Court of Appeals established a test, which states that "to withstand a challenge to the applicability of (7)(B) the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Wash. Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988). As with exemption 7(A), the burden of proof for invoking exemption 7(B) cannot be met by "merely conclusory statements." *Id.* at 101. Even if a party is faced with litigation, "it [does] not automatically follow that disclosure . . . would deprive [that party] of a fair trial." *Id.* at 102. The State "must show how release of the particular material would have the adverse consequence that [FOIA] seeks to guard against." *Id.* at 101; *see also, e.g.*, *Playboy Enterprises, Inc. v. United States Dep't of Justice*, 516 F. Supp. 233 (D.D.C. 1981) (denying 7(B) exemption because "the degree of publicity that might come about as a result of the disclosure . . . [was] speculative at best"); *Dow Jones Co. v. FERC*, 219 F.R.D. 167, 174–75 (C.D. Cal 2003) (denying 7(B) exemption, in part, because "defendant has failed to demonstrate that disclosure . . . would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial"); *State News v. Mich. State Univ.*, 735 N.W.2d 649, 660 (Mich. Ct. App. 2007) ("by failing to find with sufficient particularity that [the party resisting disclosure] specifically justified its claim of exemption, the trial court erred in its determination that [the party] met its statutory burden"), *rev'd in part on other grounds*, 481 Mich. 692, 753 N.W.2d 20 (2008).

32. All criminal prosecutions involve information that is unflattering, prejudicial, and sometimes inflammatory, but "pre-trial publicity—even pervasive, adverse publicity—does not

inevitably lead to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). Hypothetical prejudice alone has never been sufficient under the First Amendment or the common law to deny the public access to records. If the law were otherwise, no negative information about a criminal defendant would ever be released—a rule that would undoubtedly hurt victims who, like the public, are entitled to information from court proceedings. 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 confession was unsealed:

> [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. The fact that the Statement has been determined to be inadmissible does not alter that conclusion. Even where pretrial publicity includes publication of inadmissible evidence or confessions, a defendant can still receive a fair trial.

Id. at *2 (citations omitted).

33. Numerous other courts have agreed, including the New Hampshire Supreme Court. *See In re Keene Sentinel*, 136 N.H. 121 (1992) (denying a political candidate's efforts to prevent a newspaper's access to divorce records on privacy grounds because court records are presumptively accessible to the public and the candidate had not made anything more than a "blanket assertion" of privacy rights); *People v. DeBeer*, 774 N.Y.S.2d 314, 316 (N.Y. Co. Ct. 2004) (finding that defendant was not entitled to have sealed a confession contained in document filed with court); *U.S. ex rel. Callahan v. U.S. Oncology, Inc.*, No. 7:00-CV-00350, 2005 U.S. Dist. LEXIS 31848, at *8 (W.D. Va. Dec. 7, 2005) (finding that "defendants ha[d] not overcome the presumption in favor of public access" by providing "general claims of prejudice"); *State v. Cianci*, 496 A.2d 139, 145 (R.I. 1985) (finding that "blanket statement of potential prejudice was not sufficient to demonstrate compelling reasons for ordering the sealing of discovery documents").

34. Even if the police reports were potentially prejudicial, the proper and least restrictive means of mitigating that prejudice is not by restricting the public's access in which it has a compelling interest, but through voir dire. *See Keene Publ'g Corp.*, 117 N.H. at 962–63 ("Much that has been written about empirical studies of pretrial publicity indicates that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence. Appropriate tools are available to the trial court as outlined in the draft ABA standard to exclude jury prejudice."). Indeed, courts across the country have repeatedly endorsed voir dire as effective at ensuring a fair and impartial jury and rejected the notion that jurors are "nothing more than malleable and mindless creations of pretrial publicity." *In re Application & Affidavit for a Search Warrant*, 923 F.2d 324, 330 (4th Cir. 1991). As the Fourth Circuit explained:

> The reason that fair trials can coexist with media coverage is because there are ways to minimize prejudice to defendants without withholding information from public view. *With respect to the potential prejudice of pretrial publicity, . . . [v]oir dire is of course the preferred safeguard against this particular threat to fair trial rights . . . [and] can serve in almost all cases as a reliable protection against juror bias however induced.*

Id. at 329 (internal quotation marks omitted; alterations and second ellipsis in original; emphasis added); *see also, e.g.*, *Press-Enterprise II*, 478 U.S. at 15 ("Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict."); *United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984) ("Testing by voir dire remains a preferred and effective means of determining a juror's impartiality and assuring the accused a fair trial.") (internal quotation marks omitted); *State v. Schaefer*, 599 A.2d 337, 345 (Vt. 1991) ("As a basic principle, voir dire is the normal and preferred method of combating any effects of pretrial publicity.").

35. In summary, release of the police reports and related communications will not deny defendants their right to a fair trial. For these reasons, exemption 7(B) does not apply.

II. The May 23, 2018 "gag" order violates free speech and due process rights because it bars disclosure of the contents of the police reports to third parties, including the press and witnesses.

36. The Rockingham County Superior Court's May 23, 2018 "gag" order in the *Andersen* case also cannot act as a bar to production of the documents requested because that order impermissibly acts as a prior restraint in violation of the First Amendment and Part I, Article 22 of the New Hampshire Constitution. This "gag" order effectively bars the litigants in the *Andersen* case from discussing the facts of the *Andersen*, *Albano*, and *Chesna* cases in their entirety to anyone.

37. A prior restraint is a judicial order or administrative system that restricts speech, rather than merely punishing it after the fact. *See Mortgage Specialists v. Implode-Explode Heavy Indus.*, 160 N.H. 227, 240 (2010) (invalidating a court injunction prohibiting republication of a loan chart, as the petitioner's interests in protecting its privacy and reputation did not justify this extraordinary remedy of imposing a prior restraint). As the New Hampshire Supreme Court has held, "[w]hen a prior restraint takes the form of a court-issued injunction, the risk of infringing speech protected under the First Amendment increases." *Id.* at 241. The danger of a prior restraint is that it has an immediate and irreversible sanction which "freezes" speech at least for the time. For these reasons, any prior restraint on expression comes with a heavy presumption against its constitutional validity. *Id.*

38. Because the May 23, 2018 "gag" order imposed in the *Andersen* case precludes the parties from discussing or releasing any information from the police reports to any non-parties to the case—including the press—the order constitutes a prior restraint. Accordingly, the party seeking the prior restraint has a heavy burden of showing that the imposition of the restraint is justified, as prior restraints must only be issued in rare and extraordinary circumstances. *See In re*

Nebraska Press Assn. v. Stewart, 427 U.S. 539, 558 (1976); *In re N.B.*, 169 N.H. 265, 269 (2016) ("Our case law establishes that the burden is on a party seeking closure or nondisclosure of court records."); *Mortgage Specialists*, 160 N.H. at 241 ("prior restraints may be issued only in rare and extraordinary circumstances, such as when necessary to prevent the publication of troop movements during time of war, to prevent the publication of obscene material, and to prevent the overthrow of the government"). This burden cannot be satisfied here.[3]

39. There is no basis for the "gag" order. The Rockingham County Superior Court, in issuing the "gag" order, does not appear to have conducted the required analysis or made any necessary factual findings that would justify this prior restraint. For example, in *In re Nebraska Press Assn. v. Stewart*, 427 U.S. 539 (1976), the Supreme Court struck down a gag order preventing the petitioners from publishing or broadcasting confessions, admissions, or "strongly implicative" facts. *Id.* at 541. The Court did so on the basis that the lower court had undergone no analysis of whether there were less restrictive ways of protecting the trial from undue prejudice. *Id.* at 565. The same is true here. There is no indication that the Court, as required, assessed whether alternative, less restrictive, measures could sufficiently mitigate any concerns the State or the Court may have concerning the disclosure of these police reports. *See also N.B.*, 169 N.H. at 271-73 (overruling a court order requiring any future cases between the plaintiff and DCYF and CASA to be initially placed under seal as an unconstitutionally overbroad, and thus not narrowly tailored).

[3] Indeed, this burden must be met even if all the litigants agreed to issuance of the "gag" order. For example, in *In re Sentinel*, 136 N.H. 121 (1992), the Court overturned a gag order, finding that the lower court that issued it had simply sealed the records "at the request of the parties" without engaging in a balancing analysis. *Id.* at 129-30. Thus, even where the parties agree among themselves to make records confidential, the court must still balance the purported privacy interests against a heavy presumption of constitutional invalidity that comes with a prior restraint on speech. *Id.*

40. The May 23, 2018 "gag" order comprises of a single, broadly worded sentence, and was apparently issued in response to an oral request (without a formal motion) by the State. But the State cannot possibly meet its burden to justify this prior restraint, as it failed to make *any* factual showing that the order was necessary to ensure Mr. Andersen's right to a fair trial. It does not appear that State presented any actual evidence demonstrating the need for the order. Given the press criticism that has erupted over how Salem handled Mr. Andersen's arrest, there is an appearance that the State may have requested the "gag" order on May 23, 2018 in an effort to (i) save the Department from further public criticism and (ii) avoid having to produce documents in response to the ACLU-NH's May 17 and 18, 2018 Chapter 91-A requests. Of course, experiencing criticism is not cognizable prejudice justifying the withholding of public records. Any public concern over how Salem handled these arrests only highlights the need for these documents to be immediately produced in their entirety. Indeed, typically, it is the defendant—not the government—requesting the "gag" order on the basis that press statements by the litigants will prejudice the accused's right to a trial by an impartial jury. Here, the State apparently requested the order, not the defendant. Simply put, the public has a right to know how the Department handled these cases.

41. There is no basis to simply assume that defendant Mr. Anderson's right to a fair trial or impartial jury will be prejudiced by media exposure of what transpired in these cases. Significant media interest neither, by itself, creates prejudice nor demonstrates a likelihood that the persons who are "gagged" by a court order will make prejudicial statements. *See WXIA-TV v. State of Ga.*, 811 S.E.2d 378 (Ga. 2018) ("A reasonable likelihood of prejudice sufficient to justify a gag order cannot simply be inferred from the mere fact that there has been significant media interest in a case. After all, 'pretrial publicity — even pervasive, adverse publicity — does not

inevitably lead to an unfair trial,' and '[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [the right to trial by an impartial jury].'") (quoting *Nebraska Press Assn.*, 427 U.S. at 554, 551). The publicity surrounding this case, while noteworthy, is no greater or sensational than an average event of similar newsworthiness. As the Georgia Supreme Court held, such publicity is not sufficient to justify a prior restraint on the speech of attorneys, trial participants, and news organizations. The State must show more than the handful of press reports covering this incident in order to argue that the right to a fair trial is in jeopardy; they must show that the parties and counsel in *this case* are likely to make prejudicial statements or disclosures that will place the fairness of the trial at risk. No such showing has or can be made. *See In re Application of New York Times Co.*, 878 F.2d 67, 68 (2d Cir. 1989) ("Not only has there been no showing that prejudice may result from statements made to the press by counsel, but there has been no showing that statements are likely to be made at all.").

42. Finally, the "gag" order also violates the due process right under Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution of the defendant in the *Andersen* case—and possibly the defendants in the *Chesne*, and *Albano* cases—by depriving defense counsel of the ability to discuss the case and the contents of the police reports with potential witnesses. Critical to the ability to present a defense is the ability of a defendant's counsel to contact witnesses about the case and share relevant information. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own

witnesses to establish a defense. This right is a fundamental element of due process of law."); *State v. Kidder*, 150 N.H. 600, 605 (2004) ("At a minimum, a lawyer must interview potential witnesses and . . . make an independent investigation of the facts and circumstances of the case.") (internal quotations omitted).

Conclusion

WHEREFORE, the American Civil Liberties Union of New Hampshire respectfully prays that this Honorable Court:

A. Order the Town of Salem to produce all responsive police reports and communications immediately to the ACLU-NH pursuant to the ACLU-NH's May 17, 2018 and May 18, 2018 Chapter 91-A requests attached at *Exhibit F* and *Exhibit G*;

B. To the extent the Rockingham County Superior Court's May 23, 2018 "gag" order bars disclosure of responsive police reports and communications, declare the "gag" order unlawful in violation of Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution (*see* Section I, *supra*);

C. Vacate the Rockingham County Superior Court's May 23, 2018 "gag" order or, alternatively, preliminarily and permanently enjoin its enforcement under Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution (*see* Section I, *supra*);

D. To the extent the Rockingham County Superior Court's May 23, 2018 "gag" order bars the litigants from discussing the contents of the police reports with third parties, declare the "gag" order unconstitutional in violation of the free speech protections of Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution, as well as the due process protections of Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution (*see* Section II, *supra*);

E. Vacate the Rockingham County Superior Court's May 23, 2018 "gag" order or, alternatively, preliminarily and permanently enjoin its enforcement under the free speech protections of Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution, as well as the due process protections of Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution (*see* Section II, *supra*);

F. Award Petitioner its reasonable attorneys' fees and costs; and

G. Grant such other and further relief as may be deemed just and equitable.

Respectfully submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION

Date: June 26, 2018

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VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that the documents attached are true and correct copies.

Executed on June 26, 2018

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KAREN M. ROSE, Notary Public
My Commission Expires November 18, 2020

Certificate of Service

I hereby certify that a copy of the foregoing was sent to the following:

- The prosecutor in the *Andersen* matter, William Pate, Esq. (wpate@rcao.net);
- Defense counsel in the *Andersen* matter, Michael Delaney, Esq. (Michael.Delaney@mclane.com);
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- Counsel for the Town of Salem, Bart Mayer, Esq. (bmayer@uptonhatfield.com)

Gilles Bissonnette
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June 26, 2018