THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

No. 217-2022-cv-00112

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

v.

NEW HAMPSHIRE DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE
33 Hazen Drive
Concord, NH 03305

PETITIONER ACLU-NH'S REPLY TO THE NEW HAMPSHIRE DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE'S RESPONSE TO PETITIONER'S CORRECTED/AMENDED PETITION FOR ACCESS TO PUBLIC RECORDS UNDER THE "RIGHT TO KNOW LAW"

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In this case, the State Police was required to choose between the public's right to know and the interests of a disgraced former trooper who lied during an internal investigation and violated a woman's Fourth Amendment rights. In its March 11, 2022 Response, the State Police—supported by the Attorney General's Office—has sided with the disgraced former trooper. *See* Resp. at p. 13 ("Wilber's privacy interest outweighs the public's interest."). In so doing, the State Police endeavors to keep secret this former trooper's misconduct done in an official capacity. This position is concerning and without merit. The State Police works for the public, not its troopers.

INTRODUCTION

Former trooper Haden Wilber's misconduct is egregious. According to the State Police's August 9, 2021 investigatory report, the State Police terminated Mr. Wilber on August 9, 2021 for lying to investigators during its investigation into (i) how Mr. Wilber inspected the phone of Robyn White without a warrant and (ii) how his actions led Ms. White to needlessly spend 13 days in jail arising out of a questionable February 10, 2017 arrest. The report also concluded that Mr. Wilber's actions violated the Fourth Amendment's prohibition on unreasonable searches and seizures. *See* *Exhibit Q*, at p. 14 (Colonel Noyes Aug. 9, 2021 Disciplinary Action/Dismissal from State Service Memo.). The State Police further found that its investigation "revealed disturbing facts regarding [Mr. Wilber's] investigatory habits and overall integrity as a law enforcement officer." *Id.* at p. 13. The report added that Mr. Wilber's "personal conduct … reflects negatively upon [Mr. Wilber's] character, the law enforcement profession, and is an embarrassment to [him], [his] colleagues and the Division of State Police." *Id.* While the State Police has refused to produce this report, the Personnel Appeals Board ("PAB") released this report on January 28, 2022.

Further highlighting Mr. Wilber's misconduct, the August 9, 2021 report indicates that the State Police intended to submit Mr. Wilber's name for inclusion on the Exculpatory Evidence

Schedule ("EES").[1] Mr. Wilber's conduct led the State of New Hampshire to pay $212,500 in taxpayer funds to Ms. White to resolve a federal civil rights case.[2] Mr. Wilber's misconduct also calls into question the supervision of the Mobile Enforcement Team ("MET"). One State Police supervisor made clear on April 26, 2017 that Mr. Wilber's conduct leading to Ms. White's "body cavity search[]" "was complete horseshit," but Mr. Wilber's "supervisor [didn't] want to hear that they're doing anything wrong."[3]

In the face of this misconduct and the State Police's admission that Mr. Wilber has demonstrated an "unwillingness to apply the law within correct legal parameters,"[4] the State Police in this case has elected to advance Mr. Wilber's personal privacy interests instead of the interests of the public that it serves. In so doing, the State Police either stretches the law or ignores it. For example, in claiming that RSA 105:13-b provides "maximum confidentiality" for police disciplinary information (and *only* police disciplinary information) under RSA ch. 91-A, the State Police casts aside the New Hampshire Supreme Court's recent decisions in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020) and *Union Leader Corp./ACLU-NH v. Town of Salem*, 173 N.H. 345 (2020) that both overruled *Fenniman* and required a public interest balancing test for such records. The State Police also ignore subsequent Superior Court decisions, its prior practice,[5] and its own internal policy.[6]

Furthermore, in invoking RSA 105:13-b to argue that the police have categorical (and special) secrecy rights with respect to their disciplinary records under RSA ch. 91-A, the State

[1] *See* *Exhibit Q*, at p. 15.
[2] *See* *Exhibit R* (Settlement Agreement).
[3] *See* *Exhibit T* (Sgt. Melissa Robles Apr. 26, 2017 email).
[4] *See* *Exhibit Q*, at p. 13.
[5] In at least one prior instance, the State Police produced police misconduct information. *See* *Exhibit P* to Corrected Petition (Records Explaining Callahan Conduct and Oct. 15, 2020 State Police Production Email).
[6] The State's formal policy states that "personnel records [of State employees, including the State Police] are subject to a balancing test, weighing the public's right to know against the privacy interest at stake." *See* *Exhibit CC* (Aug. 13, 2021 Director of Personnel Memo. re: "Right-to-Know Update–Personnel Records").

Police discards the text of RSA 105:13-b that specifically limits its reach to when "a police officer … is serving as a witness in any criminal case." *See* RSA 105:13-b, I. Multiple Superior Courts—including this one (Kissinger, J.)—have adopted this narrower interpretation of RSA 105:13-b, including at the request of the Department of Justice that is taking a different position in this case.[7] As this is a case under RSA ch. 91-A, not a criminal case in which an officer is testifying, RSA 105:13-b has no bearing here. Indeed, it seems that the State Police wants to broaden *Petition of State of New Hampshire.*, No. 2021-0146, 2022 N.H. LEXIS 11 (N.H. Super. Ct. Feb. 4, 2022) and RSA 105:13-b to effectively overrule *Seacoast Newspapers/Town of Salem* as to police misconduct and, in so doing, reinvigorate the 27-year-old *Fenniman* era in which police misconduct was categorically secret. While the State Police may prefer the *Fenniman* era of secrecy, the proper venue for expressing this policy preference is the legislature, not the court system which has already resolved this question in favor of greater public transparency.

Since the police murder of George Floyd on May 25, 2020, there has been much discussion both locally and nationally about the concern that law enforcement may be protecting bad police officers. Regrettably, the State Police's position in this case in which it invokes the privacy rights of a former trooper who lacks "sound judgment, professionalism, accountability, [and] integrity"[8] will only further damage confidence in law enforcement. Even in the face of much progress in New Hampshire through reforms recommended by the Commission on Law Enforcement Accountability, Community, and Transparency, the State Police's position demonstrates that much work is left to be done to transform police culture.

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[7] *See Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00216, at *8 (Merrimack Cty. Super. Ct., Aug. 27, 2020) (Kissinger, J.) (agreeing with Department of Justice that "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case'") (on appeal to Supreme Court at Case No. 2020-448) (attached as Exhibit U); *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00176, at *8 (Merrimack Cty. Super. Ct., Aug. 27, 2020) (Kissinger, J.) (same) (on appeal to Supreme Court at Case No. 2020-447, and argued on Sept. 28, 2021) (attached as Exhibit V).

[8] *See* Exhibit Q, at p. 13.

If the State Police will not comply with the Right-to-Know Law and make public all information concerning Mr. Wilber's discipline, then this Court should immediately compel it do so. And, for claiming secrecy for information that is obviously in the public interest and that other Superior Courts have ordered disclosed, the State Police must pay reasonable attorneys' fees and costs in this case, especially where some of this information has already been released by the PAB.[9] The State Police should be held accountable for its unlawful position of secrecy that has needlessly consumed the resources of both Petitioner and this Court.

I. RSA 105:13-b Does Not Apply to Petitioner's "Right-to-Know" Request and Creates No Privacy Interest in this Case.

The State Police argue that, under the Right-to-Know Law, RSA 105:13-b "cloaks police personnel files with maximum confidentiality," including records that evidence egregious misconduct like those at issue in this case. *See* State Police Resp. at pp. 3-6. However, as this very Court (Kissinger, J.) has held, RSA 105:13-b *only* applies to situations in which a police officer is serving as a witness in a criminal case. Thus, RSA 105:13-b does not apply in a "Right-to-Know" case like this one outside the context of a criminal case in which an officer is testifying.

A. RSA 105:13-b Only Applies When a Police Officer "Is Serving as a Witness in [a] Criminal Case," and Therefore this Statute Does Not Act as a Categorical Exemption for Police Misconduct Information in an Action Brought Under RSA ch. 91-A.

Under its plain terms, RSA 105:13-b—which must be construed narrowly[10]—does not implicate RSA ch. 91-A or constitute an exemption under the Right-to-Know Law. This is because RSA 105:13-b *only* concerns how "police personnel files" are handled when "a police officer … is serving as a witness in any criminal case." *See* RSA 105:13-b, I. In other words, this statute

[9] *See* RSA 91-A:8, I ("…. Fees 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 chapter").
[10] Courts construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 554 (2002) (citation omitted).

and its presumption of confidentiality for police personnel files only applies in criminal cases. *See Petition of State of New Hampshire*, No. 2021-0146, 2022 N.H. LEXIS 11, at *12 (N.H. Super. Ct. Feb. 4, 2022) ("Thus, read as a whole, the statute details the procedure for turning over *to a criminal defendant* any exculpatory or relevant evidence found in the personnel files of any police officer testifying *in the criminal case* while maintaining the confidentiality of those files for all other purposes.") (emphasis added).

The New Hampshire Supreme Court also seemingly reached this same conclusion in *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015), explaining:

> The current version of RSA 105:13-b addresses three situations that may exist *with respect to police officers who appear as witnesses in criminal cases*. First, insofar as the personnel files of such officers contain exculpatory evidence, paragraph I requires that such information *be disclosed to the defendant*. RSA 105:13-b, I. Next, paragraph II covers situations in which there is uncertainty as to whether evidence contained within police personnel files is, in fact, exculpatory. RSA 105:13-b, II. It directs that, where such uncertainty exists, the evidence at issue is to be submitted to the court for in camera review. *Id*.

Duchesne, 167 N.H. at 781 (emphasis added); *see also State v. Shaw*, 173 N.H. 700, 708 (2020) (same). One federal court has similarly concluded that this statute only concerns the treatment of "personnel files of police officers *serving as a witness or prosecutors in a criminal case*." *See Hoyt v. Connare*, 202 F.R.D. 71 (D.N.H. 1996) (Muirhead, M.J.) (rejecting position of defendant police officers that the discovery sought should not occur because RSA 105:13-b "has no application to the discoverability of the files now at issue") (emphasis added).

Here, consistent with these cases—and unlike *Petition of the State of New Hampshire* which arose in the context of three consolidated criminal cases where potentially exculpatory evidence concerning testifying officers was to be produced—RSA 105:13-b does not apply because this is a matter under RSA ch. 91-A and *not* one in which an officer "is serving as a witness in [a] criminal case." *See* RSA 105:13-b, I.

At least five Superior Court judges—Judges Kissinger in the Merrimack County Superior Court, Tucker in the Merrimack Superior Court, Temple, Bornstein, and MacLeod—have unanimously agreed that RSA 105:13-b only applies in the context of a criminal case. For example, the Hillsborough County Superior Court (Southern Division) held the following in concluding that RSA 105:13-b did not provide a basis to withhold the EES from the public under the Right-to-Know Law:

> By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file "of a police officer who is serving as a witness in any criminal case." Under this statute, the mandated disclosure is to the defendant in that criminal case. Here, in contrast, there is no testifying officer, pending criminal case, or specific criminal defendant. Rather, petitioners seek disclosure of the EES to the general public.

See N.H. Ctr. for Public Interest Journalism v. N.H. D.O.J., No. 2018-cv-00537, at *3 (Hillsborough Cty. Super. Ct., S. Dist., Apr. 23, 2019) (Temple, J.), *affirmed in part, and vacated and remanded on other grounds in* 173 N.H. 648, 656 (2020) ("For the purposes of this appeal, we assume without deciding that RSA 105:13-b … applies outside of the context of a specific criminal case in which a police officer is testifying.") (attached as *Exhibit W*). The Grafton County Superior Court reached the same conclusion in a case under the Right-to-Know Law concerning whether a report investigating an excessive force allegation should be disclosed to the public. *See Provenza v. Town of Canaan*, No. 215-2020-cv-155, at *13 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (in RSA ch. 91-A case where ACLU-NH is counsel, holding that the police officer's reliance on RSA 105:13-b was "misplaced" because that statute, "by its plain language, applies only to situations in which 'a police officer … is serving as a witness in any criminal case'"; currently on appeal at Supreme Court at No. 2020-563 and argued on October 20, 2021) (attached as *Exhibit N* to Corrected Petition).

Superior Courts—including this Court (Kissinger, J.)—have reached the same conclusion in cases where police officers have attempted to invoke RSA 105:13-b in seeking removal from the EES. For example, the Grafton County Superior Court granted the Department of Justice's motion to dismiss a lawsuit from an officer seeking removal from the EES, which correctly argued that, "[b]y its plain terms, the procedure in RSA 105:13-b *only* applies when a police officer is 'serving as a witness in any criminal case.'" *Officer A.B. v. Grafton County Att'y*, No. 215-2018-cv-00437, at *3-4, ¶¶ 12-15 (Grafton Cty. Super. Ct. Oct. 12, 2019) (MacLeod, J.) (emphasis added) (attached as *Exhibit X*). In another case where an officer was seeking removal from the EES, the Merrimack County Superior Court (Tucker, J.) explained that the officer's reliance on RSA 105:13-b was "inapt … as it pertains to whether information in an officer's personnel file qualifies as exculpatory or impeachment evidence *in the context of a specific prosecution*." *See Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-250, at *4 (Merrimack Cty. Super. Ct. Oct. 20, 2020) (Tucker, J.) (emphasis added) (on appeal to Supreme Court at Case No. 2020-501) (attached as *Exhibit Y*). The Merrimack County Superior Court (Kissinger, J.) reached this same conclusion in two cases where officers were seeking removal from the EES. *See Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-176, at *7 (Merrimack Cty. Super. Ct. Aug. 27, 2020) (Kissinger, J.) (holding that "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case'") (on appeal to Supreme Court at Case No. 2020-447, and argued on Sept. 28, 2021) (attached as *Exhibit V*); *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00216, at *8 (Merrimack Cty. Super. Ct., Aug. 27, 2020) (Kissinger, J.) (same) (on appeal to Supreme Court at Case No. 2020-448) (attached as *Exhibit U*).[11]

[11] The Department of Justice's Motions to Dismiss in both cases before Judge Kissinger are attached as *Exhibits Z and AA*.

The State Police's interpretation of RSA 105:13-b would, if adopted, provide officers who have committed misconduct with special, categorical secrecy rights under RSA ch. 91-A that other public employees do not receive. *See Reid v. N.H. AG*, 169 N.H. 509, 528 (2016) ("We now clarify that … 'personnel … files' are not automatically exempt from disclosure. 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.'") (internal citations omitted). In fact, it appears that the State Police aims to rewrite RSA 105:13-b to discard the public interest balancing test altogether for the police (and only the police). In so doing, the State Police seeks to reinvigorate the *Fenniman* era of categorical secrecy with respect to (and only) the disciplinary records of the police. The State Police even goes so far as to rely on *Fenniman*'s interpretation of a 1986 quotation from a single legislator addressing a bill that did not pertain to RSA 105:13-b (which was not enacted until 1992). *See* State Police's Resp. at pp. 10-11 (referencing *Fenniman*'s quotation of Representative Donna Sytek pertaining to RSA 516:36 that, on its face, is textually limited to admissibility).

However, the New Hampshire Supreme Court has explicitly rejected *Fenniman*'s rule of blanket secrecy, with the Court in *Town of Salem* going so far as to discard *Fenniman*'s analysis of the 1986 legislative history. *See Town of Salem*, 173 N.H. at 355 (overruling 1993 *Fenniman* decision in holding that the public's interest in disclosure must be balanced in determining whether the "internal personnel practices" exemption under RSA 91-A:5, IV applies to requested records; also concluding that "the history of the 1986 amendment to RSA 91-A:5, IV does not demonstrate that the legislature intended the semicolons to limit the balancing test established in *Mans* to the last clause of the statute ('personnel … and other files')"); *Seacoast Newspapers, Inc.*, 173 N.H. 325 (overruling 1993 *Fenniman* decision in holding that the "internal personnel practices"

exemption only narrowly covers "records pertaining to the internal rules and practices governing an agency's operations and employee relations, not information concerning the performance of a particular employee," with individual employee personnel information being covered by the public interest balancing test). In both *Town of Salem* and *Seacoast Newspapers, Inc.*, the records in question concerned law enforcement and ultimately, in large part, were released. And Superior Courts since the *Seacoast Newspapers/Town of Salem* decisions have generally ordered disclosure of police conduct information under RSA ch. 91-A. *See* Page 23, ¶ 51 of Corrected Petition (citing cases); *see also State of New Hampshire v. Marsach*, No. 216-2021-cr-00046, at *5-9 (Hillsborough Cty. North Super. Ct., Feb. 25, 2022) (Delker, J.) (in employing public interest balancing test for Hillsborough County Attorney materials, concluding that public interest balancing analysis favors disclosure of employee information in court filings) (attached as ***Exhibit BB***). The State Police outright ignores these Superior Court decisions.

As RSA 105:13-b's terms and these cases reflect, nothing in RSA 105:13-b suggests that this statute trumps or abrogates the Right-to-Know Law and its three-step public interest analysis with respect to police officers' "personnel files" under RSA 91-A:5, IV. Rather, RSA 105:13-b simply explains how police personnel files are to be disclosed to defendants in the context of criminal prosecutions. If the legislature had intended RSA 105:13-b to completely exempt police personnel files from disclosure to the public under the Right-to-Know Law, it would have said so as it has done in other contexts.[12] *Cf., e.g., Motion Motors, Inc. v. Berwick*, 150 N.H. 771, 774

[12] *See, e.g.*, RSA 659:13, III ("If a voter on the nonpublic checklist executes an affidavit in accordance with subparagraph I(c), the affidavit shall not be subject to RSA 91-A."); RSA 659:95, II ("Ballots, including cast, cancelled, and uncast ballots and successfully challenged and rejected absentee ballots still contained in their envelopes, prepared or preserved in accordance with the election laws shall be exempt from the provisions of RSA 91-A …."); RSA 654:31-a ("All other information on the voter registration form, absentee registration affidavit, qualified voter affidavits, affidavit of religious exemption, and application for absentee ballot shall be treated as confidential information and the records containing this information shall be exempt from the public disclosure provisions of RSA 91-A, except as provided by statutes other than RSA 91-A."); RSA 654:45, VI ("The voter database

(2004) ("The statute applies to timber felled on the land of another person. The legislature could have, but did not, provide that it apply when a party fells timber belonging to another person.").

If the State Police wishes to rewrite and expand RSA 105:13-b to provide blanket secrecy to law enforcement under RSA ch. 91-A, then it should go to the legislature, not the courts. In the meantime, this Court should not second guess the legislature's decision to limit RSA 105:13-b's application to criminal cases, while subjecting law enforcement disciplinary records to public interest balancing under RSA ch. 91-A. *See Boehner v. State*, 122 N.H. 79, 85 (1982) ("our task is not to second-guess the legislature or question the factors which went into its decision"). As explained below, this was precisely the regime the legislature envisioned where criminal discovery rules were treated as distinct from the public's right of access under RSA ch. 91-A.

B. RSA 105:13-b's 1992 Legislative History Supports the Conclusion That This Statute Does Not Act as an Exemption in an Action Brought Under RSA ch. 91-A.

To the extent that RSA 105:13-b is textually ambiguous (and it is not), the 1992 legislative history of RSA 105:13-b refutes the State Police's contention that this statute can apply outside the context of a criminal case, including as an exemption to the Right-to-Know Law. *See State v. Brouillette*, 166 N.H. 487, 494-95 (2014) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent.").

The New Hampshire Association of Chiefs of Police introduced RSA 105:13-b in 1992. The focus of the bill was to create a process—which previously had been *ad hoc*—for how police personnel file information would be disclosed to defendants <u>*in the context of criminal cases*</u>. As the police chief representing the New Hampshire Association of Chiefs of Police testified after the

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shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31 …."); RSA 193-E:5, I(j) ("Information maintained in the random number generator [regarding unique school pupil information] shall be exempt from the provisions of RSA 91-A."); RSA 169-C:25-a, IV (child abuse medical records received by law enforcement "shall be exempt from disclosure under RSA 91-A").

bill was amended, the bill would address "potential abuse *by defense attorneys* throughout the state intent on fishing expeditions." *See* *Exhibit DD*, at LEG037 (Complete 1992 RSA 105:13-b Legislative History) (emphasis added).

Moreover, the legislature specifically rejected any notion that this statute would apply as an exemption under the Right-to-Know Law or categorically bar police personal file information from disclosure. In the first paragraph of the original 1992 proposed version of RSA 105:13-b, the bill contained a sentence stating, in part, that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A." *See id.* at LEG004. In January 14, 1992 testimony before the House Judiciary Committee, the Union Leader Corporation objected to this blanket exclusion, arguing that it would upend the public interest balancing test for law enforcement misconduct records and provide police with special, categorical secrecy protections:

> This morning we are discussing a bill that would not reinforce the existing protection of the privacy of New Hampshire's police, but instead would give them extraordinary status as men and women above the laws that apply to others. It would establish our police as a special class of public servants who are less accountable than any other municipal employees to the taxpayers and common citizens of our state. It would arbitrarily strip our judges of their powers to release information that is clearly in the public benefit. It would keep citizens from learning of misconduct by a police officer …. [I]t will knock a gaping hole in the right-to-know law …. The prohibition in the first paragraph of this bill is absolute.

See id. at LEG013-14.

Following this objection, the legislature amended the bill to delete this categorical exemption for police personnel files under RSA ch. 91-A. *Id.* at LEG015. With this amendment, the title of the bill was changed to make it relative "to the confidentiality of police personnel files *in criminal cases*." *Id.* (emphasis added); *see also id.* at LEG026, 28, 29, 30, 31, 34, 35. The amended analysis of the bill similarly explained that the "bill permits the personnel file *of a police*

officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions." *Id.* LEG016, 27, 28, 30, 34) (emphasis added). The amendment to delete the exemption language was apparently a compromise that involved the support of multiple stakeholders, including the Union Leader Corporation that opposed the original bill. *Id.* at LEG040 (noting support of stakeholders for amended version); *see also id.* at LEG037 (Police Chiefs Association representative acknowledging, following the amendment, that "[f]rankly, I would like to see an absolute prohibition [on disclosure of police personnel files], but since I realized the tooth fairy died some time ago, that is not going to happen"). In sum, this amendment establishes that the legislature never intended RSA 105:13-b to apply to disputes under RSA ch. 91-A, and instead intended to limit its reach to criminal cases.

II. RSA 516:36 Does Not Apply to Petitioner's "Right-to-Know" Request Because This Statute Only Governs Admissibility.

The State Police's reliance on RSA 516:36 similarly is to no avail. *See* State Police Resp. at pp. 5, 6. RSA 516:36 is an evidentiary statute governing admissibility in court, not secrecy from the public. The statute provides that "[a]ll records …. relating to any internal investigation into the conduct of any officer … shall not be admissible in any civil action other than in a disciplinary action between the agency and its officers, agents, or employees." *See* RSA 516:36, II. It says nothing about such records being confidential or exempt from public disclosure.

Accordingly, other courts examining RSA 516:36 have not interpreted this statute to bar disclosure of police personnel information. *See In re N.H. Div. of State Police*, 174 N.H. 176, 185 (2021) (declining to address whether "RSA 516:36, II prohibits the discovery of documents as well as their admission into evidence"); *Provenza*, No. 215-2020-cv-155, at *14 (Bornstein, J.) (in RSA ch. 91-A case, holding that "RSA 516:36 is also inapplicable because it governs the admissibility and not the discovery of internal police investigation documents and, thus, has no bearing on the

Right-to-Know analysis"; currently on appeal at Supreme Court at No. 2020-563 and argued on October 20, 2021) (attached as Exhibit N to Corrected Petition); *Carney v. Town of Weare*, No. 15-cv-291-LM, 2016 U.S. Dist. LEXIS 8809 (D.N.H. Jan. 26, 2016) ("RSA 516:36, II is an evidentiary rule concerning the admissibility of certain 'records, reports, letters, memoranda, and other documents.'"); *Moses v. Mele*, No. 10-cv-253-PB, 2011 U.S. Dist. LEXIS 59590, at *16 (D.N.H. June 1, 2011) ("RSA § 516:36, II, does not, by its terms, bar disclosure of police internal investigation files in discovery. The statute states, instead, that police records of internal investigations shall not be 'admissible in any civil action' in a court.").

III. The Public Interest Balancing Test Mandates Disclosure.

In applying the public interest balancing test, it cannot seriously be disputed that there is a compelling public interest in disclosure. The State Police's own August 9, 2021 investigatory report highlights that the requested information implicates egregious misconduct on the part of Mr. Wilber. *See* Exhibit Q, at p. 13-14. As case after case in New Hampshire confirms, the public interest in disclosure is compelling where the requested information could implicate potential misconduct. Whether the misconduct concerns one employee or many is irrelevant. *See, e.g., Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 684 (2011) (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 709 (2010) (noting that "[p]ublic scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism").

The State Police (correctly) concedes "that there is a public interest in knowing that a government investigation is comprehensive and accurate." *See* State Police Resp. at pp. 12-13; *see also Reid*, 169 N.H. at 532 (the "public has a significant interest in knowing that a government

investigation is comprehensive and accurate"). This concession should end the matter. But the State Police then pivots to contend that this public interest is somehow reduced in this case because Petitioner is focusing "solely on the conduct of one employee." *See* State Police Resp. at p. 13. But whether the misconduct concerns one employee or many, the public is entitled to know how the State Police responded to such misconduct and whether any investigation was done with integrity. *See Provenza*, No. 215-2020-cv-155, at *15 (Bornstein, J.) (in RSA ch. 91-A case where ACLU-NH is counsel involving the investigatory report of one employee's alleged misconduct, holding that "the public has a significant interest in knowing how the police investigate" complaints of misconduct; currently on appeal at Supreme Court at No. 2020-563 and argued on October 20, 2021) (attached as *Exhibit N* to Corrected Petition).

The State Police's contention that the information requested would not shed light on the State Police's practices more broadly is also wrong. *See* State Police Resp. at pp. 12-13. Mr. Wilber's misconduct directly calls into question the practices and supervision of the MET. For example, with respect to Mr. Wilber's treatment of Ms. White's phone, Mr. Wilber stated to investigators that he and the MET "do this all [the] time," that is "dumping phones for Intel."[13] Did the State Police vigorously investigate this claim? This is unclear. In other words, according to Mr. Wilber, this Fourth Amendment violation may be indicative of a broader, problematic practice of the MET—a team that apparently lacked formal policies concerning its operations at the time of Mr. Wilber's misconduct. Further, did the State Police timely investigate one supervisor's claim on April 26, 2017 that Mr. Wilber's treatment of Ms. White was "complete horseshit"? *See* *Exhibit T* (Sgt. Melissa Robles Apr. 26, 2017 email). This too is unclear, but it does not appear that any investigation started until after Ms. White's Second Amended Complaint

[13] *See* *Exhibit Q*, at pp. 10-11.

was filed on February 5, 2020. (It seems to have taken another month after this email was sent for the State Police to dismiss the remaining simple "possession of a controlled drug" charge against Ms. White on May 23, 2017.) This all comes against the backdrop of multiple successful suppression motions following arrests by the MET troopers (including Mr. Wilber[14]), with one Superior Court judge (Schulman, J.) concluding that the State Police had a "*de jure* department policy of detaining citizens for purely pretextual reasons."[15]

In this case, there is especially no privacy interest because the misconduct implicates acts done in an official capacity. In other words—like salaries—the information sought here does not constitute "intimate details … the disclosure of which might harm the individual," *see Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972), or the "kinds of facts [that] are regarded *as personal* because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*, 169 N.H. at 530 (emphasis added); *see also Provenza*, No. 215-2020-cv-155, at *15 (Bornstein, J.) (no privacy interest where the report in question reveals "information relating to Officer Provenza's conduct as a government employee while performing his official duties and interacting with a member of the public"; currently on appeal at Supreme Court at No. 2020-563 and argued on October 20, 2021) (attached as *Exhibit N* to Corrected Petition). After all, police officers work for the public, not themselves. *See Kroeplin v. Wis. Dep't of Nat. Res*., 725 N.W.2d 286, 301 (Wis. Ct. App. 2006) ("When an individual becomes a law enforcement officer, that individual should expect that

[14] *See* Sept. 21, 2020 Suppression Motion in *United States v. Dance*, No. 1:19-cr-00185-LM (D.N.H. 2019) (following the filing of this suppression motion that stemmed from Mr. Wilber's conduct in monitoring a car, in part, "due to how clean it was" and it being "in great condition," charges were dismissed by the Government before the suppression hearing), attached as *Exhibit EE*.

[15] *See, e.g., State of New Hampshire v. Perez*, No. 218-2018-cr-334, at *2-3, 6-7 (Rockingham Cty. Super Ct. Oct. 4, 2019) (Schulman, J.) (attached as *Exhibit D* to Corrected Petition); *see also* Pages 6-8, ¶¶ 9-10 of Corrected Petition (citing suppression cases).

his or her conduct will be subject to greater scrutiny. That is the nature of the job."). For all these reasons, disclosure is required in this case.

IV. The State Police's Other Arguments Fail Under the Public Intertest Balancing Test.

A. The State Police Ignore That Much of the Information Concerning Mr. Wilber's Egregious Misconduct is Already Public, and Mr. Wilber is Litigating His Termination in a Public Proceeding Before the Personnel Appeals Board.

Any claim of privacy especially fails in this case because, on January 28, 2022, the PAB released much of the factual basis for Mr. Wilber's misconduct in the form of the State Police's August 9, 2021 investigatory report. *See* Exhibit Q.[16] While the public is entitled to all records that formed the basis for the conclusions in this report because "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate," *see Reid*, 169 N.H. at 532, this disclosure further eliminates any purported privacy interest that may exist in this case. Furthermore, Mr. Wilber's has waived any privacy interest by appealing his termination to the PAB. PAB hearings are open to the public and most PAB records, including pleadings and exhibits, will typically be disclosed upon request. The PAB released the State Police's August 9, 2021 investigatory report consistent with this practice.

Courts both in and outside New Hampshire have held that there is no prevailing privacy interest when the subject of records in question is already in the public sphere. *See Marsach*, No. 216-2021-cr-00046, at *7 (Delker, J.) ("much of this information is already publicly available by virtue of the HCAO being a government organization") (attached as Exhibit BB); *ACLU-NH v. Salem Police Department*, No. 218-2021-cv-00026, at *4, 6 (Rockingham Cty Super. Ct., July 16, 2021) (St. Hilaire, J.) (ordering disclosure of disciplinary information where such information was

[16] *See also* Exhibit FF (Paul Cuno-Booth, "Ex-trooper Fired for Illegal Search, False Statements, Records Show," *Foster's Daily Democrat* (Feb. 1, 2022)).

"duplicative of information already within the public sphere") (attached as Exhibit GG); *Gannett River States Publ'g Corp. v. Bureau of the Nat'l Guard*, No. J91-0455, 1992 WL 175235, 1992 U.S. Dist. LEXIS 11287, at *19 (S.D. Miss. Mar. 2, 1992) (holding that, given previous disclosure of investigative report of helocasting accident, disclosure of actual discipline received would result in "insignificant burden" on soldiers' privacy interests).

B. The State Police's Request to Assert a Glomar Response Should Be Rejected.

The State Police's argument that it should only be required to give a Glomar response also fails. *See* State Police Resp. at p. 13. Under the federal Freedom of Information Act ("FOIA"), the Court of Appeals for the District of Columbia Circuit has explained that "[a] 'Glomar' response to a FOIA request, [i.e., when an agency does not acknowledge whether records responsive to the request exist] is permitted in that *rare situation* when either confirming or denying the very existence of records responsive to a request would 'cause harm cognizable under a FOIA exception.'" *Bartko v. DOJ*, 898 F.3d 51, 63-64 (D.C. Cir. 2018) (quoting *Roth v. Department of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011)) (concluding that Glomar response was inappropriate, in part, because records did not satisfy law enforcement threshold of Exemption 7) (emphasis added). Petitioner is not aware of any New Hampshire case recognizing the permissibility of a Glomar response under RSA ch. 91-A. In any event, a Glomar response would be inappropriate here for two reasons.

First, unlike *Wadhwa v. Sec'y United States Dep't of Veterans Affairs*, 707 F. App'x 61 (3d Cir. 2017) cited by the State Police, a Glomar response is inappropriate here because Petitioner is not seeking files that, if revealed, would cause harm by disclosing the identities of persons (e.g., informants or investigation subjects, etc.) who are previously unknown to the public. Rather, the perpetrator of the misconduct—namely, Mr. Wilber—is already publicly known. As federal courts

have held, if it has already been confirmed that the third party was or is the subject of an investigation, then the very fact that an agency maintains a corresponding investigatory file cannot be regarded as a "private" fact about that person. This is exactly the situation here where Mr. Wilber was the subject of a public misconduct lawsuit and settlement (*see* Exhibit R), the PSTC has acknowledged Mr. Wilber's termination (*see* Exhibit I to Corrected Petition), the Rockingham County Attorney's Office has acknowledged that Mr. Wilber is on the EES (*see* Exhibit J to Corrected Petition), and Mr. Wilber is publicly appealing his termination before the PAB which has produced the State Police's April 9, 2021 investigatory report (*see* Exhibit Q).[17]

Second, federal courts have found Glomar responses to be inappropriate when the asserted exemption does not apply and there is a substantial public interest in the requested information that outweighs the privacy interest. As explained in the Petition and in this Reply, this is the case here. *See Roth v. DOJ*, 642 F.3d 1161, 1176 (D.C. Cir. 2011) (holding that the public's "general interest in knowing whether the FBI [wa]s withholding information" that could corroborate death-row inmate's claim of innocence overcame the FBI's Glomar response). And, unlike *Wadhwa*, there is specific evidence of misconduct in this case that mandates disclosure.

C. The State Police's "Low Level Employee" Theory is Without Merit.

To avoid disclosure, the State Police contends that Mr. Wilber is merely a "low level" employee and seeks to bootstrap federal cases applying Exemption 6 under the FOIA. *See* State

[17] *See, e.g., ACLU v. CIA*, 710 F.3d 422, 427-29 (D.C. Cir. 2013) (agency may not issue Glomar response if it has already publicly acknowledged existence of records sought); *Pickard v. DOJ*, 653 F.3d 782, 787 (9th Cir. 2011) (finding that agency could not refuse to confirm or deny records pertaining to third party where "the government … intentionally elicited testimony from [the third party] and several DEA agents as to [the third party's] activities as a confidential informant in open court in the course of official and documented public proceedings"); *Boyd v. Crim. Div. of the DOJ*, 475 F.3d 381, 389 (D.C. Cir. 2007) ("Where an informant's status has been officially confirmed, a Glomar response is unavailable, and the agency must acknowledge the existence of any responsive records it holds"); *North v. DOJ*, 810 F. Supp. 2d 205, 208-09 (D.D.C. 2011) (rejecting Glomar response where requester produced trial transcripts in which government referred to third party as informant, and that third party testified regarding his cooperation agreement with government).

Police Resp. at pp. 9-10. In particular, the State Police relies on *Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984), which states "that the level of responsibility held by a federal employee, *as well as the activity for which such an employee has been censured*, are appropriate considerations for determining the extent of the public's interest in knowing the identity of that censured employee." *Id.* at 92 (emphasis added). Setting aside the fact that the public already knows the name of the employee in this case,[18] this argument fails for multiple reasons.

First, at outset, the State Police's position that a state trooper is a "low level" employee whose misconduct should automatically be kept secret would, if adopted, effectively bar the disclosure of disciplinary information of *all* police officers in New Hampshire. However, such a categorical rule was explicitly rejected in the *Seacoast Newspapers/Town of Salem/Reid/Lambert* decisions in favor of a fact-specific public interest balancing test for all personnel records, including those of the police. Indeed, the New Hampshire Supreme Court has repeatedly ordered the disclosure of the identities of government employee names *regardless of their position* even where no misconduct is alleged. The Court even has distinguished federal FOIA cases in doing so. *See Prof'l Firefighters of N.H.*, 159 N.H. at 709-10 (holding that the government must disclose specific name and salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV, and dismissing federal FOIA cases that "largely turn on granting protection to records involving individual employee names and personal addresses, which if publicly disclosed,

[18] The federal cases cited by the State Police—*Stern v. FBI*, 737 F.2d 84 (1984) and *Beck v. Dep't of Justice*, 997 F.2d 1489 (D.C. Cir. 1993)—implicate requests for unknown employee identities. There, the federal courts employed this theory on the premise that disclosure of names of low-level employees would shed little light on the conduct of the agency; rather, it would simply identify the alleged wrongdoer. *See Stern*, 737 F.2d at 92 ("For example, the public may have an interest in knowing that a government investigation itself is comprehensive, that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner. These other public interests do not enter into the determination of the case now before us, because they would not be satiated in any way by the release of the names of the censured employees."). Here, however, this lawsuit is not about the identity of the wrongdoer, as Mr. Wilber's identity is already known. Rather, this case is about the public's ability to learn more about the scope of the wrongdoing, the integrity of the investigation, and MET's practices.

would expose the individual employees to intrusion into the privacy of their homes"); *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); *Mans*, 112 N.H. at 164 (government must disclose ***the names*** and salaries of each public schoolteacher employed by the district); *see also Marsach*, No. 216-2021-cr-00046, at *5-9 (Delker, J.) (ordering disclosure of information concerning Hillsborough County Attorney employees, including names) (attached as ***Exhibit BB***).

Second, even if this "low level employee" doctrine had any basis in New Hampshire law (and it does not), police officers and state troopers like Mr. Wilber are not "low level" employees. Police officers have the unique ability to deprive a person of their liberty and use lethal force. Their testimony alone can cause people to spend years in jail. In the past two years since the *Seacoast Newspapers/Town of Salem* decisions, no New Hampshire court has held that police officers are "low level" employees whose misconduct should be categorically secret. To the contrary, this information has either been produced voluntarily—including by the State Police[19]—or by court order. *See* Page 23 (¶ 51), 25-26 (¶¶ 56-57) of Corrected Petition (citing cases); *see also Marsach*, No. 216-2021-cr-00046, at *5-9 (Delker, J.). Moreover, other out-of-state cases have ordered disclosure of police information employing the similar balancing test that New Hampshire courts are required to employ. The State Police makes no effort to distinguish these cases. *See* Pages 18-19 (¶¶ 43-44), 23-24 (¶ 52) of Corrected Petition (citing out-of-state cases).

Third, even if this Court were to entertain the theory that some police officers are somehow "low level" employees who have greater privacy protections with respect to their disciplinary information, Mr. Wilber would not fit into that category. He was a 12-year veteran and a member

[19] *See* ***Exhibit P*** to Corrected Petition (Records Explaining Callahan Conduct and Oct. 15, 2020 State Police Production Email).

since January 8, 2016 of the MET—which has been described as a "specialized team with the New Hampshire State Police [that] is working around the clock to interrupt the pipeline of crime on the state's highways."[20] Mr. Wilber received the Medal of Meritorious Service on September 13, 2019 for his work,[21] and the State Police put him on *WMUR* television on or about May 3, 2019 to describe the MET's practices.[22] The State Police's 2019 public promotion of Mr. Wilber's work occurred not only after Mr. Wilber's egregious February 2017 actions that harmed Ms. White, but after one State Police supervisor, on April 26, 2017, described Mr. Wilber's treatment of Ms. White as "complete horseshit." *See* Exhibit T (Sgt. Melissa Robles Apr. 26, 2017 email).

Finally, even if this Court was to consider Mr. Wilber a "low level" employee despite his sophisticated role as a MET trooper, this theory would not cover the requested records because this case implicates egregious misconduct. The federal FOIA cases employing the State Police's "low level employee" theory under Exemption 6 make clear that, even if a low-level employee is implicated, this is not dispositive. This is because "the activity for which such an employee has been censured" is also relevant to the analysis. *Stern*, 737 F.2d at 92. In other words, even with purported "low level" employees, "courts favor disclosure under the FOIA balancing test when a government official's actions constitute a violation of public trust." *See Cochran v. United States*, 770 F.2d 949, 956 (11th Cir. 1985). The State Police ignores this separate consideration altogether specifically referenced in *Stern*.

Here, unlike in *Stern*—which the Court there acknowledged was "close" and where the "two employees were not in any sense directly responsible for the cover-up, but rather were

[20] *See* Exhibit HH (Amy Coveno, "Mobile Enforcement Team Aims to Interrupt State's 'Drug Pipeline,'" *WMUR* (May 3, 2019) (indicating that Mr. Wilber is a member of the MET)).
[21] *See* Exhibit II (Sept. 13, 2019 State Police Twitter Post).
[22] *See* Exhibit HH (Amy Coveno, "Mobile Enforcement Team Aims to Interrupt State's 'Drug Pipeline,'" *WMUR* (May 3, 2019)).

culpable only for inadvertence and negligence"—Mr. Wilber was in every sense directly responsible for his own misconduct. *See, e.g., Stern*, 737 F.2d at 94 ("There is a decided difference between knowing participation by a high-level officer in such deception and the ***negligent performance*** of particular duties by the two other lower-level employees.") (emphasis added). And, unlike in *Stern* where the misconduct implicated "acts of negligence" and "no element of intentional deception," here the State Police's own August 9, 2021 investigatory report indicates that Mr. Wilber not only violated Ms. White's constitutional rights, but also he engaged in a "lack of integrity, as well as [demonstrated an] unwillingness to apply the law within the correct legal parameters to which [he] was allowed." *See* ***Exhibit Q***, at p. 14. Similarly, unlike *Beck v. Dep't of Justice*, 997 F.2d 1489 (D.C. Cir. 1993) where there was only a mere allegation of misconduct, here the misconduct is not disputed by the State Police. *Id.* at 1494 ("Here, by contrast, there is no evidence, let alone any public knowledge, that wrongdoing has occurred. Beck has failed, in short, to identify any such public interest in this case."). Under similar circumstances where there was direct evidence of impropriety federal courts have routinely ordered disclosure under the FOIA.[23] The same result is required here.

[23] *See, e.g., CASA de Maryland, Inc. v. DHS*, 409 F. App'x 697, 700-01 (4th Cir. 2011) (per curiam) (affirming district court's decision ordering disclosure of names contained in an internal investigation report authored by DHS's Office of Professional Responsibility in light of evidence produced by plaintiff indicating that agency impropriety might have occurred); *Columbia Packing Co. v. United States Department of Agriculture*, 563 F.2d 495, 499 (1st Cir.1977) (upholding an order requiring disclosure under the FOIA of personnel records of two former federal meat inspectors who had been convicted of accepting bribes from meat packing companies, stating that "the public has an interest in whether public servants carry out their duties in an efficient and law-abiding manner"; further emphasizing the important deterrence function served by public disclosure of the information and expressing hope that disclosure would "forestall similar occurrences" in the future); *ACLU of Ariz. v. United States Dep't of Homeland Sec. Office*, No. CV-15-00247-PHX-JJT, 2018 U.S. Dist. LEXIS 47599, at *18 (D. Ariz. Mar. 22, 2018) ("Plaintiffs have demonstrated more than a bare suspicion that Defendants' investigations into misconduct allegations were insufficient; indeed, from the evidence before the Court, it appears completed investigations were almost nonexistent."); *see also Swickard v. Wayne Cty. Med. Examiner*, 475 N.W.2d 304, 330 (Mich. 1991) ("United States Courts of Appeal have similarly held that the balance favors disclosure where the public record evidences official misconduct in office ….").

C. The 2018 "Right to Privacy" Amendment to Part I, Article 2-b of the New Hampshire Constitution Does Not Apply.

The State Police—in seeking to protect a fired trooper who has credibility issues—also invokes Mr. Wilber's privacy rights under Part I, Article 2-b of the New Hampshire Constitution. *See* State Police Resp. at p. 9. This constitutional amendment, which was enacted by the voters during the 2018 election, states: "An *individual's* right to live free from governmental intrusion in *private or personal information* is natural, essential, and inherent." (emphasis added).

First, the State Police does not have standing to invoke Article 2-b privacy rights for a third party—here, Mr. Wilber. *See Swickard v. Wayne Cty. Med. Examiner*, 475 N.W.2d 304, 312 (Mich. 1991) ("Similar to the common-law right of privacy, the constitutional right of privacy is a personal right to be asserted only by the person whose right has been violated.").

Second, the Amendment does not apply because, as explained on Pages 16-29 (¶¶ 40-44) of the Corrected Petition and in Section III of this Reply, the information requested here is neither "private" nor "personal," as it addresses the ability of a state trooper to perform his official duties, as well as the integrity of the State Police's investigation. By its own terms, this constitutional amendment—like other provisions of Bill of Rights—protects individual citizens from government intrusion; it does not protect the government and its actors from scrutiny by individual citizens, especially where a government actor's official duties are implicated. The amendment's sponsor and chief legislative proponent—former Representative Neal Kurk—explained that this amendment was a tool to protect individuals from the government, not the other way around:

> Today's powerful surveillance technologies can provide *the state government and state and local law enforcement agencies* with the ability to spy on people when they walk on public sidewalks, drive on public roads, play in public parks, attend public schools, and visit public libraries …. Q2 would require that *the government* obtain a judicial warrant, supported by probable cause, before accessing any personal information …. Q2 would also help prevent *the police* from accessing your private information through third parties.

See Exhibit JJ (C. Marlow and N. Kurk, "On Election Day, the Voters of N.H. Can Protect Their Privacy in the Digital Age," *ACLU: Speak Freely* (Oct. 15, 2018)) (emphasis added). In short, the State Police's position (i) turns this added constitutional protection on its head by protecting the government from its citizens and (ii) runs contrary to the amendment's text and intent.

D. The State Police's Claim That Alternative Channels Exist to Obtain the Requested Information Fails.

Finally, this Court can easily dismiss the State Police's claim that "there exist alternative mechanisms that do not require intrusion into officer personnel files." *See* State Police at p. 11. The State Police cites no case justifying this position.

The Right-to-Know Law states that "[e]very citizen … has the right to inspect all governmental records in the possession, custody, or control of … public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5." *See* RSA 91-A:4, I. Whether the records exist elsewhere is a not recognized exemption under RSA 91-A:5. In other words, "punting" to other agencies is not a permissible response under the Right-to-Know Law. This is especially the case here where the State Police never even notified Petitioner of alternative mechanisms to obtain this information when Petitioner made its request on August 18, 2021. The State Police has left Petitioner to do this work for itself.

In any event, the State Police's proposed alternative channels would not provide all the information Petitioner is seeking. As for the EES, neither the State Police nor the Department of Justice have volunteered to disclose EES information concerning Mr. Wilber. Further, this EES information—even if it was produced—would not paint a full picture of Mr. Wilber's misconduct. The EES likely only consists of Mr. Wilber's name and a two-to-three-word description of the misconduct and will shed no light on the details of the misconduct or the State Police's

investigation. *See* Exhibit KK (April 4, 2020 Redacted Version of EES). As for the Police Standards and Training Council ("PSTC"), the PSTC has not taken up Mr. Wilber's decertification and, instead, has continued any decertification proceeding until any PAB decision becomes final. *See* Exhibit S (Dec. 14, 2021 PSTC Meeting Minutes, at pp. 21-22/Motion to Continue and Convert Hearing). There likely would not even be a decertification proceeding unless Mr. Wilber is rehired as an officer.[24] Accordingly, the records in the PSTC's possession concerning Mr. Wilber are limited and likely only presently include records like the "Form B" that, without detail, indicates that the State Police discharged Mr. Wilber. *See* Exhibit I to Corrected Petition (Form B from PSTC). As for the PAB, this Board's records are also limited. While the PAB has released the State Police's investigatory report and other pleadings, the PAB likely does not yet have the underlying records that formed the basis of the report, nor is the public obligated to wait until the PAB conducts its hearing for it to get a full picture of this misconduct and the State Police's investigation. In sum, all relevant records that will tell the complete picture of Mr. Wilber's misconduct and related investigation are in the State Police's possession. The State Police must produce this information.

[24] The Kingston Police Department hired Mr. Wilber as a part-time officer on August 30, 2021, though Mr. Wilber is currently not participating as an officer for Kingston. *See* Exhibit S (Dec. 14, 2021 PSTC Meeting Minutes, at pp. 21-22/Motion to Continue and Convert Hearing); *see also* PSTC Jan. 25, 2022 Meeting Minutes, at p. 22 ("Major Parenteau explained further, that in 2008, the Council did not want everyone that was discharged to come in for a hearing."), *available at* https://www.pstc.nh.gov/council/documents/minutes-20220125.pdf; PSTC Feb. 2019 Performance Audit, at p. 20 (noting that if a PSTC rules violation may have occurred leading to an employee status change, but the officer is no longer actively employed, a memorandum is placed in the officer's file requiring an eligibility hearing *if the officer seeks police employment in the future*), *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/20200814-john-scippa-2019-legislative-audit-of-pstc.pdf.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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Date: March 25, 2022

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served on all counsel of record through the court's electronic filing system on today's date.

Dated: March 25, 2022

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette