THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0279

The New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Union Leader Corporation, Newspapers of New England, Inc., through its New Hampshire Properties, Seacoast Newspapers, Inc., Keene Publishing Corporation, and The American Civil Liberties Union of New Hampshire
(Petitioners/Appellants)

v.

Department of Justice
(Respondent/Appellee)

Rule 7 Mandatory Appeal from the New Hampshire Superior Court, Hillsborough County (Southern Division)
Case No. 2018-cv-00537

OPENING BRIEF FOR UNION LEADER CORPORATION

Gregory V. Sullivan
N.H. Bar No. 2471
Malloy & Sullivan,
Lawyers Professional Corporation
59 Water Street
Hingham, MA 02043
(781)749-4141
g.sullivan@mslpc.net

Charles G. Douglas, III
N.H. Bar. No. 669
Douglas, Leonard & Garvey, P.C.
14 South Street, Suite 5
Concord, NH 03301
(603)224-1988
chuck@nhlawoffice.com

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CONSTITUTIONAL PROVISIONS

Constitution of New Hampshire, Part 1, Article 8:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings shall not be unreasonably restricted.

STATUTORY PROVISIONS AT ISSUE

N.H. R.S.A. c. 91-A:1 Preamble:

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

N.H. R.S.A. c. 91-A:5 Exemptions:

The following governmental records are exempted from the provisions of this chapter:

I. Records of grand and petit juries.

I-a. The master jury list as defined in RSA 500-A:1, IV.

II. Records of parole and pardon boards.

III. Personal school records of pupils, including the name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the assessment under RSA 193-C:6.

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel,

medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.

VI. Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

X. Video and audio recordings made by a law enforcement officer using a body-worn camera pursuant to RSA 105-D except where such recordings depict any of the following:

(a) Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

(b) The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

(c) An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure.

N.H. R.S.A. c. 105:13-b Confidentiality of Personnel Files:

I.Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond the finding of guilt.

II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.

III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purpose of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

STATEMENT OF THE CASE AND THE FACTS

The following salient facts are undisputed. The Petitioner, the New Hampshire Department of Justice, (hereinafter "DOJ"), maintains a list of New Hampshire police officers who have engaged in sustained misconduct, which reflects negatively on that police officer's credibility or trustworthiness. The list maintained by the DOJ is called the Exculpatory Evidence Schedule, (hereinafter "EES"). The EES is a spreadsheet that contains the officer's name, the department which the officer works for, the date of the incident, the date of notification and the category or type of conduct at issue. *See* Addendum, (hereinafter "*ADD.*"), *pp. 25 & 26;* Appendix, (hereinafter "*APX*."), *Vol. II, pp. 198-215*. The EES is maintained by the DOJ "for the singular purpose of establishing a reference tool for prosecutors to initiate their inquiry as to the existence of exculpatory evidence as to a particular defendant's criminal matter." It is not disputed that the DOJ does not perform any review or analysis of the personnel files of the police officers placed on the EES. *APX., Vol. II, p. 32.* It is also undisputed that there is no employment relationship between the DOJ and the police officers placed on the EES. Finally, it is undisputed that under the DOJ's current framework only police officers with sustained findings are placed on the EES. *ADD., pp. 25 & 29.*

On August 1, 2018, Union Leader Corporation, (hereinafter "Union Leader"), sent a written request pursuant to the relevant provisions of RSA 91-A to the DOJ seeking an unredacted version of the EES. *APX., Vol. 1, p. 97.* The DOJ denied Union Leader's request claiming that "providing an unredacted copy of the EES would constitute an invasion of

the named law enforcement officer's privacy." *APX. Vol. I., pp. 98-100.* On October 5, 2018, Union Leader, and others filed a Petition for Access to Public Records under the "Right-to-Know Law," RSA Chapter 91-A, and Part I, Article 8 of the New Hampshire Constitution seeking access to the unredacted EES. *APX. Vol. I, pp. 5-39.* Union Leader does not seek information in the EES pertaining to officers that have pending requests or applications to remove his or her name from the EES. *ADD., p. 26*. The DOJ filed a Motion to Dismiss, which was denied by the Trial Court. *APX. Vol. II, pp. 21-23*; *ADD., p.* (PAGE 1). The DOJ and the respondents entered into a Stipulation of Decision on the Merits and the DOJ filed a Notice of Appeal. *APX. Vol. II, p. 307*.

SUMMARY OF THE ARGUMENT

Pursuant to the relevant provisions of Rule 16 of the Rules of the New Hampshire Supreme Court, Union Leader hereby submits this brief in response to the briefs of the DOJ, the New Hampshire Association of Chiefs of Police, the New Hampshire Police Association and Matthew Jajuga. In all respects the Union Leader also adopts the legal arguments set forth in the brief of the New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Newspapers of New England, Inc., Seacoast Newspapers, Inc., Keene Publishing Corporation and The American Civil Liberties Union of New Hampshire submitted to this Honorable Court. The Trial Court's Order denying the DOJ's Motion to Dismiss was well reasoned and correct and should not be reversed or vacated and/or remanded for further argument. The Trial Court did not err, as a matter of law, in holding that the unredacted EES does not constitute an

'internal personnel practice' or personnel file that are categorically exempt from disclosure under RSA 105:13-b or RSA 91-A.

Liberty, fairness and the administration of justice are the pillars of a functioning democracy. Citizens of this state and this country have a significant and inherent interest in ensuring that government and its agents are fairly and faithfully administering justice. The release of the unredacted EES will clearly shed light on the DOJ and the county attorneys' performance of their constitutional and statutory mandates. Without the names of the police officers on the EES, it is impossible for the public to know if the DOJ and/or the county attorneys are adhering to their constitutional and statutory mandates to disclose exculpatory information to criminal defendants. In this case, the public's overwhelming interest in the administration of justice swallows the minimal privacy rights of the police officers and the government's speculative interest in non-disclosure.

ARGUMENT

New Hampshire is one of only a few states that enshrines the right of public access in its Constitution. Part I, Article 8 of the New Hampshire Constitution provides that,

> [a]ll power residing originally in, and being derived from, the people, all the magistrates and officers of the government are their substitutes and agents, and at all times accountable to them. Government, therefore, 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.

RSA Ch. 91-A, also known as the Right-to-Know law, supports and compliments New Hampshire's fundamental interest in fostering open and honest government. The preamble to the Right-to-Know law, unambiguously states that,

> [o]penness in 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 Ch. 91-A:1. The fundamental purpose of the Right-to-Know law is "…to provide the utmost information to the public about what its government is up to." Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996)(internal quotations omitted). Therefore, the courts traditionally consider the Right-to-Know law,

> with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents. Thus, while the statute does not provide for unrestricted access to public records [this Court] broadly construes provisions favoring disclosure and interprets the exemptions restrictively.

Union Leader Corp. v New Hampshire Hous. Fin. Auth., 142 N.H. 540, 546 (1997)(internal citations omitted).

While Part I, Article 8 and the Right-to-Know law do establish rights favoring access to the actions, discussions and records of government bodies such rights are not absolute. RSA 91-A:5, IV exempts the following from disclosure:

> Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy….

When an exemption pursuant to RSA 91-A:5, IV is utilized by a public body the Court also traditionally engages in a balancing inquiry to determine whether the requested materials should be disclosed. In so doing the Court must,

> ….evaluate whether there is a privacy interest that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know law mandates disclosure. Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations. Next, [the court must] assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, [the court must] balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in non-disclosure.

N.H. Right to Life v. Dir. N.H. Charitable Trusts Unit, 169 N.H. 95, 110-111(2016)(internal citations omitted). The governmental entity claiming an exemption to disclosure "bears a heavy burden to shift the balance towards nondisclosure." Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476

(1996). The interpretation of constitutional and statutory provisions is a question of law, which this Court reviews *de novo*. Ford v. N.H. Dep't. of Transp., 163 N.H. 284, 291 (2012)(citing Billewicz v. Ransmeier, 161N.H. 145, 151 (2010).

I. THE TRIAL COURT CORRECTLY DETERMINED THAT RSA 105:13-b IS INAPPLICABLE AND DOES NOT PROHIBIT THE DISCLOSURE OF THE UNREDACTED EES

The DOJ relies heavily on RSA 105:13-b to support its argument that the EES is a confidential document that bars disclosure. At the onset, it should be noted that the DOJ repeatedly and consistently claims that police personnel files are 'strictly confidential'. However, there is a clear legal distinction between exempt documents and confidential documents under New Hampshire's Right-to-Know law. Records of grand juries and parole and pardon boards are examples of records that are per se exempt from disclosure. On the other hand, confidential and personnel files are only exempt from disclosure if, after a balancing inquiry, a privacy interest outweighs the public's interest in disclosure. Consequently, the DOJ's reliance on RSA 105:13-b to withhold the unredacted EES is gravely misplaced.

The Trial Court correctly determined that RSA 105:13-b was inapplicable to the facts in this case. RSA 105:13-b states as follows:

> I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond the finding of guilt.

> II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required
>
> III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purpose of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

The plain language of RSA 105:13-b applies only in the context of a particular criminal case. It is a statute which mandates certain disclosures to a defendant in a criminal matter. As this Court has previously noted, RSA 105:13-b,

> …explicitly codifies the distinction we have recognized 'between exculpatory evidence that must be disclosed to the defendant under the State and Federal Constitutions, and other information contained in a confidential personnel file that may be obtained through the…procedure set forth in paragraph III of RSA 105:13-b.

Duchesne v. Hillsborough County Atty., 167 N.H. 774, 781 (2015)(internal citations and quotations omitted). RSA 105:13-b is not a statute that

wholly bars disclosure of police personnel files to the public. Rather, it is a statute that provides a mechanism by which a defendant in a criminal case may obtain such information. Consequently, the DOJ's reliance on such a statute to withhold documents is without merit.

Furthermore, the legislative history of RSA 105:13-b clearly demonstrates that the legislature did not intend for the statute to operate as a categorial exemption to disclosure under the Right-to-Know law. In 1992 the original proposed version of RSA 105:13-b contained the following sentence: "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***." (emphasis added). After public testimony from the Union Leader, the legislature amended the bill and deleted "and shall not be treated as a public record pursuant to RSA 91-A." *APX. Vol. II, p. 126.* The legislature's deletion of such language unequivocally demonstrates that RSA 105:13-b was not intended to categorically exempt police personnel files from disclosure as argued by the DOJ.

In sum, RSA 105:13-b is inapplicable to this case and does not support the DOJ's argument that the unredacted EES should not be disclosed to the public. The DOJ's interpretation of RSA 105:13-b is clearly unreasonable. The plain language and legislative history of the statute unequivocally show that RSA 105:13-b is not meant to serve as a per se exemption to the Right-to-Know law. Despite the DOJ's assertions, RSA 105:13-b and the Right-to-Know law are not mutually exclusive. The law is clear in New Hampshire that confidential and personnel files are only exempt from disclosure if, after a balancing inquiry, the privacy interest

outweighs the public's interest in disclosure. Under this framework, the language of RSA 105:13-b does not become a nullity.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE EES IS NOT AN 'INTERNAL PERSONNEL PRACTICE' EXEMPT FROM DISCLOSURE

The EES is not an 'internal personnel practice' as defined by this Court in previous decisions concerning 91-A exemptions to disclosure. The case of Reid v. N.H. Attorneys General, 169 N.H. 509 (2016), is directly on point and dispositive of the issues in this case. In Reid, this Court recognized that the term personnel "when used as an adjective…refers to human resources matters." Reid 169 N.H. at 522 (internal citations omitted). Furthermore, in Reid, this Court,

> ….held that documents related to an investigation into alleged misconduct constitute 'internal personnel practices' only when the investigation is conducted on behalf of the employer of the investigation's target. Because the relationship between the attorney general and the county attorney lacked the usual attributes of an employer-employee relationship…the attorney general was not [the county attorneys] employer, and, thus that the documents did not pertain to internal personnel practices within the meaning of the Right-to-Know Law.

Clay v. City of Dover, 169 N.H. 681, 688 (2017). In light of the undisputed facts in this case the EES simply cannot be an 'internal personnel practice' as defined by this Court in Reid.

It is undisputed that the EES is created and maintained by the DOJ for the sole purpose of "establishing a reference tool for prosecutors to initiate their inquiry as to the existence of exculpatory evidence" consistent with due process of law in this State. It is also undisputed that the DOJ does not "conduct any additional analysis nor reviews any particular personnel files as part of an officer's placement on the list." It is also undisputed that the EES is not located in a police officer's personnel file. Finally, it is undisputed that there is no employment relationship between the DOJ and the police officers listed in the EES. Because the EES lacks any employment or human resources function and there is no investigation of misconduct performed by the DOJ or employment relationship between the DOJ and the officers the EES is not an 'internal personnel practice' exempt from disclosure[1]. The EES is simply an external document created and maintained by the DOJ, which it has categorized as 'strictly confidential'.

[1] There is one glaring exception to the traditional inquiry employed by the New Hampshire courts when considering Right-to-Know cases. In Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), this Court ruled that internal personnel practices are categorically exempt under RSA 91A-5, IV and eschewing the traditional balancing inquiry. The holding in Fenniman is a clear departure from the Right-to-Know law's purpose and presumption in favor of disclosure and should now be expressly overruled. Internal personnel practices should no longer be considered per se exemptions pursuant to RSA 91A-5, IV and the traditional balancing inquiry should be employed by the courts in determining if disclosure is warranted.

III. THE TRIAL COURT ALSO CORRECTLY DETERMINED THAT THE EES IS NOT A PERSONNEL FILE EXEMPT FROM DISCLOSURE UNDER RSA 105:13-B

Based upon the same undisputed facts outlined in section II above, the EES is not a personnel file as contemplated by the law. Because the EES does not have any employment or human resources function, as the DOJ concedes, the EES cannot constitute a personnel file. The Trial Court correctly determined that,

> …the legislature intended to limit RSA 105:13-b's confidentiality to the physical personnel file itself…There is **no mention of personnel information in RSA 105:13-b**, let alone an indication the legislature intended to make such **information confidential**. If the legislature had so intended, it could have used words to effectuate that intent, **such as making confidential all 'personnel information' or all information contained in a personnel file**. (Emphasis supplied)

ADD., p. 30. The EES is simply an external document created and maintained by the DOJ, which it has categorized as 'strictly confidential'.

IV. THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN INTERPRETING THE RELEVANT STATUTES IN THIS CASE

The interpretation of a statute is a question of law that the Court reviews de novo. When a question of statutory interpretation is at issue the Court,

> …first examine[s] the language of the statute, and, where possible…[it] ascribe[s] the plain and ordinary meanings to the words used.

> When statutory language is ambiguous…[it] examine[s] the statute's overall objective and presume[s] that the legislature would not pass an act that would lead to an absurd or illogical result…[The] goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.

Soraghan v. Mt. Cranmore Ski Resort, Inc., 152 N.H. 399, 401 (2005)(internal citations). The DOJ urged the Trial Court, under the doctrine of administrative gloss, to defer to its own interpretation of RSA 105:13-b to support its assertion that the EES is confidential and exempt from disclosure. "The doctrine of administrative gloss is a rule of statutory construction…[which] is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." In re Kalar, 152 N.H. 314, 321 (2011). However, the doctrine of administrative gloss applies only when a statutory provision is ambiguous. Heron Cove Ass'n v. DVMD Holdings, Inc., 146 N.H. 211, 215 (2011). The language of RSA 105:13-b is clear and unambiguous; it applies only to treatment of police personnel files in the prosecution of criminal cases. It does not address a document such as the EES list. The Trial Court correctly determined that RSA 105:13-b is unambiguous and therefore the doctrine of administrative gloss does not apply.

More importantly, the DOJ's interpretation of the relevant statutes is unreasonable in light of the plain language and legislative history discussed in section I above. The fact that the legislature has not taken any action

concerning the DOJ's interpretation of the EES does not automatically mean that the legislative intent has been met. Long ago the Supreme Court of the United States made clear that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law…". Girouard v. United States, 328 U.S. 61, 69 (1946). While deference to an agency is appropriate in certain circumstances, it is this Court that is "the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole." Soraghan, 152 N.H. at 401. The Trial Court did not abuse its discretion or err in interpreting the Right-to-Know Law or RSA 105:13-b in this case.

V. THE PUBLIC INTEREST IN DISCLOSURE OF THE UNREDACTED EES CLEARLY OUTWEIGHS ANY GOVERNMENT INTEREST IN NONDISCLOSURE AND THE PRIVACY INTERESTS OF THE POLICE OFFICERS

"[B]ad things happen in the dark when the ultimate watchdogs of accountability – i.e. the voters and taxpayers – are viewed as alien rather than integral to the process of policing the police [and other government agencies]." Union Leader Corporation et al v. Town of Salem, No. 218-2018-cv-01406 (Rockingham Super. Ct., April 5, 2019)(Schulman, J.). New Hampshire's Right-to-Know law is modeled after the Freedom of Information Act, which was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Dep't of the Air Force v. Rose, 425 U.S. 352, 361 (1975)(internal citations and quotations omitted). Under New Hampshire's Right-to -Know law the "disclosure of the requested information should serve the purpose of informing the public about the conduct and activities of their government."

N.H. Civ. Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003). And "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know law." Union Leader Corp. v. New Hampshire Hous. Fin. Auth., 142 N.H. 540, 554 (1997)(quoting Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989)).

The release of the names of the police officers on the EES will shed light on the government's performance of its constitutional and statutory duties. While disclosure of the name of a police officer ordinarily will not reveal anything about the operation of the police department, in this particular case the names on the EES will reveal pertinent information about the police, the DOJ and the county attorneys. It is impossible for the public to know, without the names of the police officers on the EES, if in fact the county attorneys are adhering to their constitutional and statutory mandates to disclose exculpatory information to criminal defendants. Therefore, the release of the police officers' names on the EES will serve the public's interests.

The words "Live Free or Die" are the official motto of the State of New Hampshire. There can be no doubt that the public has a significant and inherent interest in the values of liberty, fairness and the administration of justice. Such values serve as the pillars of a vibrant and robust democracy. As the Supreme Court of the United States stated in Brady v. Maryland, 373 US 83, 87 (1963),

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

When a criminal defendant is denied his or her constitutional due process rights the public's interest in a fair and just democracy is at stake. The public's inherent interest in the fair administration of justice clearly outweighs the police officer's privacy interests and the government's speculative interest in non-disclosure. This is particularly true in this case given that it is undisputed that only the names of the police officers with sustained findings of misconduct are placed on the EES.

CONCLUSION

For the reasons addressed above, and in the brief of the other respondents, Union Leader respectfully requests that this Honorable Court affirm the Trial Court's Order conduct a balancing analysis, if deemed necessary, and order the DOJ to release the unredacted EES, overrule Fenniman, and grant such other and further relief as this Court deems just.

REQUEST FOR ORAL ARGUMENT

Union Leader hereby requests fifteen (15) minutes of oral argument to be presented before the full Court by undersigned counsel, Gregory V. Sullivan.

RULE 16(3)(1) CERTIFICATION

Counsel hereby certifies that the appealed decisions are in writing and are appended to this brief.

Respectfully submitted,
Union Leader Corporation,
by its attorney,

/s/ *Gregory V. Sullivan*
Gregory V. Sullivan N.H. Bar No. 2471
Malloy & Sullivan,
Lawyers Professional Corporation
59 Water Street
Hingham, MA 02043
(781)749-4141
g.sullivan@mslpc.net

Charles G. Douglas, III
N.H. Bar. No. 669
Douglas, Leonard & Garvey, P.C.
14 South Street, Suite 5
Concord, NH 03301
(603)224-1988
chuck@nhlawoffice.com

Dated: January 29, 2020

ADDENDUM

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
SOUTHERN DISTRICT **No. 2018-CV-00537**

New Hampshire Center for Public Interest Journalism, et al

v.

New Hampshire Department of Justice

ORDER ON MOTION TO DISMISS

Currently before the Court is petitioners'[1] request under RSA 91-A to access an un-redacted version of the Exculpatory Evidence Schedule ("EES"). The New Hampshire Department of Justice ("DOJ") moves to dismiss, arguing the EES is confidential under RSA 105:13-b and/or exempt from disclosure under RSA 91-A. Petitioners object. The Court held a hearing on February 25, 2019. After review of the pleadings, arguments, and applicable law, the DOJ's motion to dismiss is DENIED.

Factual Background

The New Hampshire Department of Justice ("DOJ") currently maintains a list of police officers who have engaged in sustained misconduct, when such misconduct reflects negatively on their credibility or trustworthiness. Formerly known as the "Laurie List," the list is now called the EES. In its current formation, the EES is a spreadsheet containing five columns: (1) officer's name; (2) department employing said officer; (3) date of incident; (4) date of notification; and (5) category or type of behavior that

[1] Petitioners include: the New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Union Leader Corporation, Newspapers of New England, Inc., through its New Hampshire Properties, Seacoast Newspapers, Inc., Keene Publishing Corporation, and the American Civil Liberties Union of New Hampshire. (Pets.' Pet. p. 1.)

resulted in the officer being placed on the EES. (See Pets.' Appx. p. 1.)

Each petitioner filed a Chapter 91-A request with the DOJ seeking the most recent EES. On each occasion, the DOJ provided petitioners with a version of the EES that redacted any personal identifying information of the officers contained therein. Certain petitioners thereafter submitted 91-A requests seeking an un-redacted version of the EES. These requests excluded information concerning officers that had pending requests or applications before the DOJ in which they sought removal from the EES. The DOJ denied these requests, claiming such disclosures would constitute an invasion of privacy of the officers contained within the EES.

Analysis

As stated above, petitioners seek disclosure of the un-redacted version of the EES pursuant to New Hampshire's Right-to-Know Law. The DOJ objects, arguing: (1) the EES is confidential under RSA 105:13-b; (2) longstanding DOJ practice, coupled with legislative inaction, confirms disclosure of the EES is prohibited by RSA 105:13-b; (3) the EES is *per se* exempt from disclosure as it reflects records of police departments' internal personnel practices; and (4) disclosure of the EES, which constitutes a personnel file under RSA 91-A, would constitute an invasion of privacy of the officers included on the list. (See DOJ's Mot. Dimiss, p. 8–18.) Petitioners dispute these arguments.

I. RSA 105:13-b

As stated above, the DOJ first argues RSA 105:13-b forecloses the disclosure of the EES, as it "holds police personnel files strictly confidential with narrow exception." (Id. at 8.) RSA 105:13-b states, in relevant part:

> I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.
>
> II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.
>
> III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

At the outset, the Court is not convinced that RSA 105:13-b governs the petitioners' request. 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 Reid v. New Hampshire Attorney General, 169 N.H. 509, 528 (2016) ("'[P]ersonnel files' are not automatically exempt from disclosure." (citing RSA 91-A:5, IV)).

Even assuming RSA 105:13-b does apply, the Court finds the EES is not a personnel file within the meaning of the statute. The parties do not dispute that the EES

does not physically reside in any specific police officer's personnel file. Instead, the list is created and maintained by the DOJ for the purpose of identifying police officers "whose personnel files may contain potentially exculpatory evidence." (DOJ's Mot. Dismiss, p. 2.) Despite the foregoing, the DOJ argues that the EES should nevertheless be considered a protected police personnel file because the information contained therein is simultaneously contained in each officer's respective personnel file. The DOJ asserts that the relevant inquiry is whether the substantive information in the EES constitutes information taken from the police personnel files.

The petitioners counter, arguing RSA 105:13-b's protection is limited to documents contained in a police personnel file or, put another way, is limited to the physical police personnel files that are maintained by the respective police departments. The petitioners assert further that the EES, which is created and maintained by the Attorney General—who does not employ any of the police officers named in the EES—is an external document and does not fall within the scope of RSA 105:13-b's confidentiality.

In Reid, the New Hampshire Supreme Court defined "personnel" within the meaning of RSA 91-A:5's exemption for disclosures of internal personnel practices. 169 N.H. at 528. The Reid Court, relying on the United States Supreme Court's decision in Milner v. Department of Navy, 562 U.S. 562, 569 (2011), held that the term "'personnel,' when used as an adjective, . . . refers to human resources matters." Id. 522. The Supreme Court explained that the word "personnel" concerned "the conditions of employment in a governmental agency, including such matters as hiring and firing, work rules and discipline, compensation and benefits." Clay v. City of Dover, 169 N.H. 681,

686 (2017) (citing Reid, 169 N.H. at 522); see Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 606 (Mass. App. Ct. 2003) (interpreting "personnel file and information" to "include[], at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee . . . . [as] [t]hese constitute the core categories of personnel information that are useful in making employment decisions regarding an employee"). It then summarized that the term "personnel" related to employment. Reid, 169 N.H. at 523.

Applying the foregoing definition of "personnel," the Court finds the EES does not constitute a personnel file within the meaning of RSA 105:13-b. Here, the parties do not dispute that the officers on the EES are not employed by the DOJ, and the DOJ and the officers do not share any of the "usual attributes of an employer-employee relationship, such as the power to set the salary, hire or fire." Reid, 169 N.H. at 525. Moreover, the DOJ did not create and maintain the EES to discipline the officers contained therein, nor is there any evidence suggesting the DOJ has the authority to do so. Cf. Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (holding a report investigating employee harassment that "could have resulted in disciplinary action" constituted a "personnel practice" under RSA 91-A:5); Fenniman, 136 N.H. at 626 (holding "internal police investigatory files," which "document[ed] the procedures leading up to internal discipline," constituted personnel practices). Further, the DOJ concedes that it does not conduct any type of investigation or review—either independently or on behalf of the police departments—of the respective police personnel files of the officers on the EES. (DOJ's Mot. Dismiss, p. 9.) Therefore, because the officers listed on the EES do not

share an employee-employer relationship with the DOJ, and the EES lacks any type of employment or human resources function, the Court finds the EES is not a personnel file under RSA 105:13-b.

Although the DOJ attempts to argue that the information contained in the EES is "personnel information" and should be confidential under RSA 105:13-b, the Court is unpersuaded by this argument. "[The Court] interpret[s] legislative intent from the statute as written, and, therefore, [it] will not consider what the legislature might have said or add words that the legislature did not include." In re Kenick, 156 N.H. 356, 359 (2007). Here, there is no indication the legislature intended to protect information contained in a police personnel file, regardless of its location, when it enacted RSA 105:13-b. To the contrary, the Court finds a plain reading of the statute reflects that the legislature intended to limit RSA 105:13-b's confidentiality to the physical personnel file itself, as it expressly contemplates the personnel file being provided to the Court for *in camera* review and, after examination, the remainder of the file being returned to the police department that employs the police officer. There is no mention of personnel *information* in RSA 105:13-b, let alone an indication the legislature intended to make such information confidential. If the legislature had so intended, it could have used words to effectuate that intent, such as making confidential all "personnel information" or all information contained in a police personnel file.[2] Cf. Mass. Gen. Laws Ann. ch. 4 § 7

[2] Even assuming the EES contains "personnel information," the DOJ offers no authority supporting its contention that this fact would entitle it to confidentiality. In addressing a somewhat similar issue relating to Massachusetts's Right-to-Know law, the Massachusetts Appeal Court reached the opposite conclusion. In Worcester Telegram, 787 N.E.2d at 602, the Appeals Court, in distinguishing the applicability of the personnel file exemption to two separate documents that contained similar information, held "[t]he exemption for 'personnel file or information' is not dependent upon whether the same information may be available, or discernible, through alternative sources . . . . Rather, the nature and character of the document determines whether it is 'personnel file or information.'" 787 N.E.2d at 609. It

(exempting from public records "personnel . . . files or *information*") (emphasis added).

II. Administrative Gloss

The DOJ next argues the Court should defer to its interpretation of RSA 105:13-b because it has independently interpreted that statute for approximately fifteen years to mean that the EES/Laurie List was confidential. The Court disagrees with the DOJ that it is entitled to such deference.

"The doctrine of administrative gloss is a rule of statutory construction." In re Kalar, 152 N.H. 314, 321 (2011). "Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." Id. "If an 'administrative gloss' is found to have been placed upon a clause, the agency may not change its *de facto* policy, in the absence of legislative action, because to do so would, presumably, violate the legislative intent." Id. "Lack of ambiguity in a statute or ordinance, however, precludes application of the administrative gloss doctrine." Id. at 322.

Resolution of the parties' dispute regarding RSA 105:13-b turns on the definition of "personnel file," and whether it includes the EES. Although the parties disagree as to the scope of RSA 105:13-b's confidentiality, neither party contends the statute as a whole is ambiguous, and the Court finds it is not. Therefore, the Court finds the administrative gloss doctrine is inapplicable. See State v. Priceline.com, Inc., No. 2017-0674 (N.H. Mar. 8, 2019) ("[T]he administrative gloss doctrine applies only when a statutory provision is ambiguous."); Heron Cove Ass'n v. DVMD Holdings, Inc., 146 N.H.

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concluded that "the same information [could] simultaneously be contained in a public record and in exempt 'personnel file or information.'" Id.

211, 215 (2001) ("If the language is plain and unambiguous, [the Court] need not look beyond the statute for further indications of the legislative intent.").[3]

Although the DOJ relies on Petition of Warden, New Hampshire State Prison (State v. Roberts), 168 N.H. 9 (2015), in asserting its position that the Court should grant deference to its interpretation of RSA 105:13-b, the Court finds that case distinguishable. In Petition of Warden, the issue before the Supreme Court was whether the Adult Parole Board ("APB") had the authority to parole an inmate from one sentence to a consecutive sentence, while still imposing the time remaining/conditions of the first sentence after the inmate had completed the second sentence. 168 N.H. at 9. The APB had "developed an intermediate step in the traditional parole process that allow[ed] prisoners to parole into a consecutive sentence upon completion of the minimum of a prior sentence." Id. "The effect of this practice [was] to restructure the order of sentences by allowing a prisoner to serve time on a consecutive sentence while continuing to serve time on the initial sentence, and thus potentially earn conditional release into the community more quickly." Id.

The Supreme Court first noted that "[t]here is no right to parole in New Hampshire," as "the grant of parole rest[ed] squarely within the discretion of the APB." Id.; see RSA 651-A. It then held that although the APB's "intermediate step" was neither expressly permitted nor prohibited under RSA 651-A, "given the APB's longstanding history of exercising this power, [it] agree[d] with the State that the legitimacy of [that] practice [was] now beyond question." Id.

[3] The Court also notes that the House of Representatives has introduced and passed a bill, HB 155, that would expressly make the EES a public record under RSA 91-A. HB 155 was scheduled to be heard and considered by the Senate Judiciary Committee on April 11, 2019. See Senate Calendar 17A.

Unlike Petition of Warden, where RSA 651-A granted the APB with wide discretion in granting or denying parole, here, RSA 105:13-b does not give the DOJ any discretion in determining what information is to be kept confidential. In fact, RSA 105:13-b does not grant the DOJ any discretion at all. Rather, it mandates disclosure of exculpatory evidence in a police personnel file if that officer is testifying in a criminal case, and lays out a step-by-step process to determine whether evidence in a police personnel file is exculpatory, if such a determination cannot be made by the State. See RSA 105:13-b.

Accordingly, because RSA 105:13-b is clear and unambiguous and does not grant the State any discretion in its administration, the Court declines to give deference to the DOJ's interpretation of the statute under the administrative gloss doctrine.

III. RSA 91-A

The DOJ also argues the EES is categorically exempt from disclosure under RSA 91-A:5 as an "internal personnel practice." See Fenniman, 136 N.H. at 624. Petitioners dispute the EES is exempt under 91-A:5, arguing it is neither an "internal" nor a "personnel" document.

"The purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003); see RSA 91-A:1 ("Openness in the conduct of public business is essential to a democratic society."). Thus, the law "furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire Right to Life v.

Director, New Hampshire Charitable Trusts Unit, 169 N.H. 95, 103 (2016). "Although the statute does not provide for unrestricted access to public records, [the Court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. "As a result, [the Court] broadly construe[s] provisions favoring disclosure and interpret[s] exemptions restrictively." Id. "When a public entity seeks to avoid disclosure of material under the Right-to-Know law, that entity bears a heavy burden to shift the balance towards nondisclosure." Id.

With respect to the "internal personnel practices" exemption, the Supreme Court has noted that the terms "internal" and "personnel" modify the word "practices," "thereby circumscribing the provision's scope." Reid, 169 N.H. at 522. Looking to guidance from federal case law analyzing the Freedom of Information Act, the Supreme Court has determined that the term "personnel" "general[ly] . . . relates to employment," specifically "rules and practices dealing with employee relations or human resources . . . [including] such matters as hiring and firing, work rules and discipline, compensation and benefits." Id. at 523. The Court also defined "internal" as "existing or situated within the limits . . . of something." Id. (citing Webster's Third New International Dictionary 1180 (unabridged ed. 2002)). Therefore, "[e]mploying the foregoing definitions, [the Supreme Court] construe[d] 'internal personnel practices' to mean practices that 'exist[] or [are] situated within the limits' of employment." Id. Personnel practices are also considered "internal" if carried out by someone other than the employer if it is done on the employer's behalf. Id. (citing Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (finding police internal affairs investigation report authored by outside

investigators that were hired by the precinct constituted "internal personnel practices")).

For the same reasons the Court found the EES was not a personnel file within the meaning of RSA 105:13-b, it finds the EES is not a personnel practice within the meaning of RSA 91-A:5. Moreover, the Court finds the EES is not an "internal" document. As stated previously, the EES is created and maintained by the Attorney General, who does not employ any of the police officers contained therein. Unlike the outside investigators in Hounsell, who were hired by the police department to perform an internal investigation of one of its employees, 169 N.H. at 521, here, the Attorney General was not hired by any individual police department to generate the EES. Rather, the "singular purpose" of the EES is to alert prosecutors "to the existence of exculpatory evidence as to a particular defendant's criminal matter." (DOJ's Mot. Dismiss, p. 9.) Thus, given that the creation of the list did not arise out of an agency relationship between the Attorney General and any police department, and the character and purpose of the list does not relate to or occur within the limits of the officers' employment, the Court finds it is not an internal personnel practice within the meaning of RSA 91-A:5.

Finally the DOJ argues that, in the alternative, even if the EES does not fall within the internal personnel practice exemption, it is still a "personnel file" under RSA 91-A:5 and it should not be disclosed because its disclosure would amount to an invasion of privacy of the officers contained therein. For the reasons previously discussed in this order, the Court finds the EES is not a "personnel file" within the meaning of RSA 91-A:5. As a result, the Court need not conduct a 91-A balancing test to determine

whether an invasion of privacy would result from disclosure of the EES.[4]

Accordingly, because the EES is not confidential under RSA 105:13-b and not exempt under RSA 91-A, the DOJ's motion to dismiss is DENIED.

So ordered.

Date: April 23, 2019

Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/24/2019

[4] If a document or file is considered a "personnel file" under RSA 91-A, the Court then must determine whether disclosure of the material "would constitute an invasion of privacy," which is done by applying the "customary balancing test" set forth in Reid. 169 N.H. at 528.

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with the provisions of New Hampshire Supreme Court Rule 26(2)-(4). Counsel hereby certifies that this brief complies with New Hampshire Supreme Court Rule 16(11) that provides that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, table of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other matters." Counsel hereby certifies that this brief contains 3,823 words, (including footnotes), from the "Statement of the Case and the Facts" to the "Rule 16(3)(1) Certification".

/s/ *Gregory V. Sullivan*
Gregory V. Sullivan N.H. Bar No. 2471

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that Union Leader Corporation's Opening Brief was served on January 29, 2020, through the electronic-filing system upon counsel for the Petitioner New Hampshire Department of Justice (Daniel E. Will, Esq.), Respondents The American Civil Liberties Union of New Hampshire, The New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Newspapers of New England, Inc., Seacoast Newspapers, Inc., Keene Publishing Corporation (Gilles Bissonette, Esq., Henry R. Klementowitz, Esq., James H. Moir, Esq.), and Amicus Curiae New Hampshire Police Association, Mathew Jajuga and The New Hampshire Association of Chiefs of Police (John S. Krupski, Esq. Daniel M. Conley, Esq.)

/s/ *Gregory V. Sullivan*
Gregory V. Sullivan N.H. Bar No. 2471