THE STATE OF NEW HAMPSHIRE

MERRIMACK, ss SUPERIOR COURT

UNION LEADER CORPORATION

v.

NEW HAMPSHIRE POLICE STANDARDS
AND TRAINING COUNCIL

Docket No.:

PETITION FOR ACCESS AND INFORMATION
(PRIORITY HEARING REQUESTED UNDER RSA 91-A:7)

Now comes the petitioner, Union Leader Corporation, (hereinafter "Union Leader" or "Petitioner"), by and through counsel, and states as follows:

THE PARTIES

1. Petitioner Union Leader is a publisher of newspapers of general circulation, and other media, throughout the state of New Hampshire, and elsewhere, and files this Petition pursuant to the provisions of Part I, Article 8 of the New Hampshire Constitution and RSA ch. 91-A. Union Leader is a corporation organized and existing under the laws of the State of New Hampshire with a principal place of business at 100 William Loeb Drive, Manchester, Hillsborough County.

2. Respondent New Hampshire Police Standards and Training Council, (hereinafter "NHPSTC"), is a body politic created by the New Hampshire Legislature with a principal office located at 17 Institute Drive, Concord, Merrimack County. Its establishment was governed by RSA 106-L:3, and its powers delineated by RSA 106-L:5.

INTRODUCTION

3. This case arises out of Petitioner's request for information concerning the decertification proceedings of Manchester police detective Aaron Brown and Ossipee police sergeant Justin Swift. While little is known about why Mr. Swift is undergoing decertification proceedings,[1] more is known about Mr. Brown's decertification proceedings.

4. As reported by Petitioner in the Union Leader, in 2017, Mr. Brown sent text messages to his wife on his department cell phone in which he joked about shooting Black men and referred to them as "parking tickets." He specifically texted: "Besides, I got this new fancy gun. Take out parking tickets no problem. FYI 'parking tickets' = black fella." Two months later, he sent his wife a video of a "crackbunny fight" and wrote: "I am certainly not a racist. I have my proclivities about people ... but those folks are straight up n's ... no two ways about it. Serve no place in life or society. And yet they are completely taking over all parts of daily life."[2] In part because of the racist text messages, the Manchester Police Department sought to terminate Mr. Brown. However, an arbitrator, though he found wrongdoing, reinstated Mr. Brown with back pay. To

[1] Though it is unknown if it is related to the potential decertification of Mr. Swift, a pending federal lawsuit by a former female Ossipee police department employee alleges that Mr. Swift engaged in misconduct. *See Kimberly Hatch v. Town of Ossipee*, No. 1:20-cv-00295-JF (D.N.H., filed on Mar. 1, 2020); *see also* Daymond Steer, "Fired Ossipee Police Officer Sues Town, Conway Daily Sun (Mar. 9, 2020), https://www.conwaydailysun.com/news/local/fired-ossipee-police-officer-sues-town/article_5a308e66-6246-11ea-889b-b7e920d7a06e.html. The plaintiff in that lawsuit has sued the town for sexual harassment and discrimination because she is a woman. In one particular incident, the lawsuit alleges that, on or about June 2013, Mr. Swift came up behind Ms. Hatch and tased her behind the neck, and then he took a permanent marker and wrote on her forehead while she was disabled by the tasing.

[2] *See* Mark Hayward, *City Ordered to Rehire 'Proven Racist' Cop; Status Uncertain*, Union Leader (Sept. 2, 2020),

date, the Manchester Police Department has refused to rehire Mr. Brown notwithstanding the arbitrator's decision. Mr. Brown continues to accumulate pay of $1,540 for every week that the Manchester Police Department refuses to rehire him. His back pay and benefits amount to about $139,600 as of October 2020.[3] Though an arbitrator reinstated Mr. Brown, decertification proceedings were initiated against him.

5. RSA 106-L:5, V, provides that the NHPSTC shall "certify persons as being qualified under the provisions of this chapter to be police officers, state correction officers, state probation-parole officers, or certified border patrol agents for the purposes of RSA 594:26, and establish rules under RSA 541-A for the suspension or revocation of the certification of such persons in the case of egregious misconduct or failure to comply with council standards." Notwithstanding this historic moment of conversation about police accountability nationally and here in New Hampshire[4], the NHPSTC repeatedly denies the public access to police decertification hearings under theory that such hearings "would likely affect adversely the reputation" of the officer. See RSA 91-A:3, II(c). The NHPSTC makes this decision without any assessment of the obvious and compelling public interest in transparency as required by law. Indeed, the disciplinary hearings of lawyers and judges are public because there is a compelling interest in shedding light on how these proceedings are conducted, the misconduct at issue, and the discipline

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https://www.unionleader.com/news/safety/city-ordered-to-rehire-proven-racist-cop-status-uncertain/article_9176341e-a6f3-51da-8f57-ceb8e60bf3fa.html.

[3] *See* Mark Hayward, *Fired Cop Aaron Brown: I Might Be Prejudiced, But Not Racist*, Union Leader (Oct. 27, 2020),https://www.unionleader.com/news/safety/fired-cop-aaron-brown-i-might-be-prejudiced-but-not-racist/article_25d480f3-4a45-5c35-823e-8485dc0028e4.html.

[4] *See* Executive Order 2020-11 Creating the Commission on Law Enforcement Accountability, Community and Transparency (issued by Governor Sununu recognizing a "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance transparency, accountability, and community relations in law

rendered. See N.H. Sup. Ct. R. 37A, III(c)(1) (explaining that attorney discipline hearings "shall be public"); N.H. Sup. Ct. R. 40(11)(a) explaining that judicial conduct committee hearings "shall be open to the public"). Here, however, the NHPSTC's practices bestow police officers with special treatment not afforded to lawyers and judges in analogous proceedings.

6. Moreover, the NHPSTC has asserted in this case that documents related to the police decertification proceeding of Arron Brown is exempt from disclosure under RSA 91-A:5, IV as "confidential [or] other files whose disclosure would constitute invasion of privacy" despite the obvious public interest in disclosure. This decision is also wrong and deprives the public and media of valuable information concerning the decertification proceedings of Mr. Brown.

7. In short, the NHPSTC generally keeps secret the police de-certification process. Not only does this violate Chapter 91-A, but it also "cast[s] suspicion over [law enforcement] and minimize[s] the hard work and dedication shown by the vast majority of [l]aw enforcement]." See Rutland Herald v. City of Rutland, 84 A.3d 821, 825-26 (Vt. 2013).

STANDARD

8. New Hampshire's Right-to-Know Law under RSA ch. 91-A is designed to create transparency with respect to how the government interacts with its citizens. The preamble to the law states: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible

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enforcement") *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf.

public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. The Right-to-Know Law "helps further our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Goode v. N.H. Legis., Budget Assistant, 148 N.H. 551, 553 (2002).

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

10. Consistent with these principles, courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe "provisions favoring disclosure broadly, while

construing exemptions narrowly." Goode, 148 N.H. at 554 (citation omitted); see also Lambert v. Belknap County Convention, 157 N.H. 375, 379 (2008). "[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a *heavy burden* to shift the balance toward nondisclosure." Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006) (emphasis added).

COUNT I – ACCESS TO MEETINGS

11. The NHPSTC at its meetings conducts hearings to certify and decertify individuals seeking to become, or seeking to remain, law enforcement officers in New Hampshire.

12. On April 13, 2020, David G. Parenteau, Major (Ret.), (hereinafter "Parenteau") sent a letter to Mr. Aaron Brown, a former police officer employed by the City of Manchester, stating in relevant part: "[A] summary of case facts was presented to the Council pertaining to your termination from the Manchester Police Department and subsequent arbitration decision ordering your reinstatement with a 30 day suspension. The Council voted to hold a hearing to determine probable cause." A redacted copy of that letter is appended hereto as Exhibit 1.

13. On August 10, 2020, John Scippa, the Director of the NHPSTC, sent a letter to Mr. Brown stating, in relevant part that:

> …you are hereby notified to appear before the Police Standards and Training Council to show cause why your certification as a police officer should not be suspended or revoked. The hearing is scheduled for August 25, 2020 at 9:00 a.m., at the Arthur D. Kehas Law Enforcement Training Facility, 17 Institute Drive, Concord, NH.

> The basis for this hearing is as follows:
>
> Aaron Brown (PTSC ID# 5451) is a certified police officer in the State of New Hampshire, employed by the Manchester Police Department.
>
> On April 11, 2018 Aaron Brown was discharged from the Manchester Police Department after violation of that agency's departmental policies and standard operating procedures, due to having committed acts of Criminal Mischief while conducting searches of apartments within the City of Manchester. Additionally, you made racist remarks while engaged in a text conversation while on duty and using a department issued cellphone. There was no legitimate law enforcement purpose for your actions.

A copy of that letter is appended hereto as Exhibit 2. That hearing was postponed until October 27, 2020.

14. On October 19, 2020, Union Leader, through counsel, sent a letter to the NHPSTC requesting access to the hearing for Union Leader and requesting to be notified should the NHPSTC intend to handle the matter in executive session. A copy of that letter is appended hereto as Exhibit 3.

15. On October 22, 2020, John S. Krupski, Esq., counsel for Aaron Brown, sent a letter to Director Scippa stating in pertinent part:

> Aaron James Brown agrees that his certification as a Full Time Police Officer be suspended, effective October 27, 2020, until he satisfies the requirements of POL 404.03 and 403.01 pursuant to POL 402.02. Mr. Brown specifically reserves the right to lift the suspension when he is returned to service. Therefore, there is no need to conduct a hearing on the status of Aaron's certification. It is my understanding that the appearance on October 27, 2020 is unnecessary. I request that submission of this letter to the Council be made in non-public session.

A copy of that letter is appended hereto as Exhibit 4.

16. On October 27, 2020, the undersigned counsel, acting on behalf of Union Leader, attended the meeting of the NHPSTC, (via zoom). After reading portions of Attorney Krupski's October 22, 2020 letter, the NHPSTC voted to temporarily suspend Aaron Brown's certification based on the reasons in Attorney Krupski's letter. As a result, NHPSTC did not hold a decertification hearing concerning Mr. Brown's text messages.

17. In sum, Mr. Brown agreed to a temporary suspension of his certification not for his racist text messages, but rather because of his apparent failure to complete firearms training requirements and certain in-service training requirements while he challenged his termination. Because of this disposition, nothing prevents Mr. Brown from having his certification reinstated if and when these requirements are satisfied. Indeed, Attorney Krupski's letter states that Mr. Brown "specifically reserves the right to lift the suspension when he is returned to service." *Id.* Moreover, nothing prevents Mr. Brown from being rehired by the Manchester Police Department or hired by another police department upon reinstatement. In other words, in accepting this temporary suspension for reasons unrelated to the text messages, the NHPSTC punted on whether Mr. Brown should be permanently decertified for the text messages he sent.

18. After temporarily suspending Mr. Brown's certification, the NHPSTC then took up the issue of the decertification of a law enforcement officer named Justin Swift. The NHPSTC voted to take up that matter in secret executive session.

19. In accordance with the provisions of the rules of the NHPSTC, the Union Leader, through counsel, orally moved to intervene, and also moved that NHPSTC postpone the hearing regarding Justin Swift until such time as Union Leader had the opportunity to seek judicial review of the practice of the NHPSTC to conduct such hearings in secret executive session.

20. The NHPSTC's apparent basis for going into executive session was RSA 91-A:3, II(c), which allows a public body to go into nonpublic session for "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting."[5] This provision does not permit a public body to go into nonpublic session without consideration of the public interest in openness, especially where any reputational interest at issue implicates not private citizens, but rather *public* police officers who have engaged in alleged misconduct impacting their official duties.

21. Indeed, RSA 91-A:3, II(c) is analogous to RSA 91-A:5, IV, which allows for records to be exempt from disclosure where "disclosure would constitute [an] invasion of privacy." See RSA 91-A:5, IV. However, this exemption under RSA 91-A:5, IV is not categorical in nature. Rather, consistent with RSA 91-A:1's command that the Right-to-Know Law exists to "ensure both the greatest possible public access to the

[5] RSA 91-A:3, II(a) also allows a public body to go into nonpublic session to address "[t]he dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted." This provision does not apply here because the NHPSTC is not the employer of officers who are the subject of decertification hearings. *See also Reid v. N.H. AG*, 169 N.H. 509, 525 (2016) (holding that Department of Justice was not county attorney's employer); *N.H. Ctr. for Pub. Interest Journalism v. N.H. DOJ*, No. 2019-0279, 2020 N.H. LEXIS 174, at *16 (Oct. 30, 2020) (noting that "the DOJ does not employ officers on the EES").

actions," the New Hampshire Supreme Court has repeatedly held since 1972 that this privacy exemption requires an assessment of the public's interest in the form of a balancing test:

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

See Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 707 (2010) (citations and internal quotations omitted); see also, e.g., Union Leader Corp. v. New Hampshire Retirement System, 162 N.H. 673, 679 (2011) (same); Mans v. Lebanon School Board, 112 N.H. 160, 162 (1972) ("In determining whether salaries are exempt as financial information or as private information the benefits of disclosure to the public are to be balanced against the benefits of nondisclosure to the administration of the school system and to the teachers."); Reid v. N.H. AG, 169 N.H. 509, 528 (2016) ("We now clarify that … 'personnel … files' are not automatically exempt from disclosure. RSA 91-A:5, IV. 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."); Union Leader Corp. v. Town of Salem, No. 2019-0206, 173 N.H. __, 2020 N.H. LEXIS 102, at *21 (May 29, 2020) ("In

the future, the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV shall apply to records relating to 'internal personnel practices.'").

22. Consistent with RSA 91-A:1 and RSA 91-A:5, IV, this Court must interpret RSA 91-A:3, II(c)'s exemption language narrowly and in the same manner. Before a public body like the NHPSTC can go into nonpublic session under RSA 91-A:3, II(c), the body must evaluate the reputational and privacy interests that may justify going into nonpublic session *along with the public's interest in transparency*. Only where the privacy and nongovernmental interests in secrecy trump the public's interest in nondisclosure can the body go into nonpublic session because of a person's reputational privacy.

23. Here, it does not appear that NHPSTC employs any such required balancing test, and instead simply wholesale allows the police officer to have his or her entire decertification hearing be kept secret upon request, even where the misconduct is serious and even where the public's interest in transparency is strong. In such hearings, this balancing test favors transparency in *all* police decertification hearings, with portions of the hearings *only* to be closed in narrow and exceptional circumstances (e.g., instances implicating minors, confidential informants, etc.). *See, e.g.*, N.H. Super. Ct. R. 13B (listing general information that may be filed under seal in court proceedings); State v. Kibby, 170 N.H. 255, 258-59 (2017) (noting high standard to close court proceedings; "[T]here is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a

sufficiently compelling interest which outweighs the public's right of access to those records."). (To be clear, Petitioner is not arguing that the internal deliberations of the NHPSTC be made public; rather, Petitioner is only seeking the hearing to be made public).

24. For example, the information discussed in these decertification hearings does not constitute "intimate details … the disclosure of which might harm the individual," see Mans, 112 N.H. at 164, 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). Rather, these decertification hearings relate to the ability of an officer to perform his or her official duties.

25. Finally, it should go without saying that a police officer' misconduct implicating his or her official duties cannot be shielded from public scrutiny in a decertification hearing because exposure may cause reputational "embarrassment" to that official. It should come as little surprise that government actors often wish to keep their misconduct secret out of fear that the public may find out and "embarrass" them by holding them publicly accountable. Such public scrutiny for acts implicating an official's ability to perform their job is the price that the government official must pay. This is because that official—here, a police officer—works for the public, not him or herself. They are not private citizens. In other words, should the reputation of a law enforcement officer be adversely affected by information presented at a decertification hearing that would be a result about which the public has a right to know.

26. As explained in more detail below, any claimed privacy interest raised by the NHPSTC on behalf of a law enforcement officer pertaining to the decertification process must be discarded in favor of the public's constitutional and statutory right to know information about that officer's performance. Such claimed privacy interests are substantially outweighed by the public's compelling interest in knowing what the government is up to. This is especially the case where public hearings will also shed light upon the performance of those supervisory personnel tasked with overseeing and responding appropriately to any untoward motivations, misconduct and/or bias on the part of the officer. These supervisory personnel include not only the supervisors of the local departments but also the NHPSTC itself.

COUNT II – ACCESS TO RECORDS AND INFORMATION

27. On September 9, 2020, Mark Hayward, (hereinafter "Hayward") a reporter employed by Petitioner Union Leader sent a request for access to documents involving the then upcoming decertification hearing of Aaron Brown before the NHPSTC. A copy of that request is appended hereto as Exhibit 5.

28. On October 22, 2020, Parenteau responded to Hayward and provided two (2) documents in response to Hayward's request. The first document is a Notice of Hearing sent to Mr. Aaron Brown C/O Attorney John Krupski and dated August 10, 2020. A copy of that letter is appended hereto as Exhibit 2. The second document is a letter sent to Mr. Aaron Browne from Parenteau dated April 13, 2020, also advising Brown that the NHPSTC intended to hold a hearing to "determine probable cause." That

letter was provided to Hayward in a redacted form and a copy of it is appended hereto as Exhibit 1.

29. Parenteau informed Hayward in the October 22, 2020 response that: "[A]ny other documents such that they exist are determined to be exempt from disclosure pursuant to RSA 91-A:5 IV as the disclosure of which would constitute an invasion of privacy as well as being confidential due to an upcoming proceeding." A copy of that response is appended hereto as Exhibit 6.

30. The upcoming October 27, 2020 decertification hearing concerning Mr. Brown was subsequently cancelled.

31. RSA 91-A:5, IV exempts, among other things, records pertaining to (i) confidential … information … whose disclosure would constitute invasion of privacy" and (ii) "other files whose disclosure would constitute invasion of privacy."[6]

32. At the outset, nothing about these requested records is "confidential" under RSA 91-A:5, IV "due to an upcoming proceeding." There is no longer an upcoming proceeding, as Mr. Brown's October 27 decertification hearing was cancelled.

33. In any event, "[t]o establish that information is sufficiently 'confidential' to justify nondisclosure, the party resisting disclosure must prove that disclosure 'is likely: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the

[6] It does not appear that the NHPSTC is alleging that these records constitute "internal personnel practices." Indeed, the Supreme Court of New Hampshire in Seacoast Newspapers, Inc. held that the "internal personnel practices" exemption covers only "records pertaining to the internal rules and practices governing an agencies operations and employee relations, *not information concerning the performance of a particular employee*." Seacoast Newspapers, Inc. v. City of Portsmouth, No. 2019-0135, 2020 N.H. LEXIS 103, at *23 (May 29, 2020) (emphasis added).

information was obtained." Town of Salem, 2020 N.H. LEXIS 102, at *16; see also Union Leader Corp., 142 N.H. at 553. None of these criteria applies. Here, it is difficult to imagine how making records public related to a decertification hearing will "impair the government's ability to obtain … necessary information in the future." Here, Petitioner is not seeking records relating to the deliberations of the NHPSTC, but rather the underlying records related to the hearing itself, just as, for example, charging documents and exhibits in criminal cases are made public. Disclosure of this information will improve the NHPSTC's functions, rather than hinder it. Currently, decertification hearings are generally secret with no ability for the public to scrutinize its actions. With transparency of records relating to these hearings, the public and press will now be able to look over the shoulder of the NHPSTC to assess how it is performing. As one court has explained: "Openness and disclosure are conducive to better accountability. If public employers know that the investigations they perform are subject to public review, common sense dictates that they will be more diligent in ensuring that charges of potential misconduct are thoroughly investigated … than they would be if they were not so held accountable to the public." Kroeplin v. Wis. Dep't of Nat. Res., 725 N.W.2d 286, 304 (Wis. Ct. App. 2006).

34. But even if the requested records could somehow be viewed as "confidential" (which they are not), they would still be subjected to a public interest balancing test, just as they would be under the exemption governing "other files whose disclosure would constitute invasion of privacy." See Town of Salem, 2020 N.H. LEXIS 102, at *15 ("our case law has consistently applied the balancing test to the disclosure of

'confidential, commercial, or financial information,' even after semicolons were added in 1986"); Union Leader Corp., 142 N.H. at 553 ("We have interpreted our statute, however, as requiring analysis of both whether the information sought is 'confidential, commercial, or financial information,' and whether disclosure would constitute an invasion of privacy.").

35. Again, the Supreme Court has explained this balancing analysis as follows under RSA 91-A:5, IV:

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

Prof'l Firefighters of N.H., 159 N.H. at 707 (citations and internal quotations omitted). In applying this test, the burden on the government entity resisting disclosure is a heavy one. See, e.g., Reid, 169 N.H. at 532 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a *heavy burden* to shift the balance toward nondisclosure.") (citations omitted) (emphasis added). Even if the public interest in disclosure and privacy interest in nondisclosure appear equal, this Court must err on the side of disclosure. See Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance

….”). When applying this balancing test, disclosure of the requested records is clearly required.

I. The Privacy Interest is Nonexistent

36. Police officers have no privacy interest in records implicating the performance of their official duties, especially when—as is the case here—there is indicia of misconduct. Again, the information sought here does not constitute “intimate details … the disclosure of which might harm the individual,” see Mans, 112 N.H. at 164, 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). Petitioner is not seeking, for example, medical or psychological records in an officer’s personnel file. Instead, Petitioner is seeking information that relates to the performance of an officer’s official duties. Thus, any privacy interest here is minimal, if not nonexistent.

37. In examining the invasion of privacy exemption under RSA 91-A:5, IV, the Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government and information concerning the performance of government employees. Compare, e.g., Lamy v. N.H. Public Utilities Com’n, 152 N.H. 106, 111 (2005) (“The central purpose of the Right–to–Know Law is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.”); Brent v. Paquette, 132 N.H. 415, 427 (1989) (government not required to produce records kept by school superintendent containing private students’ names and

addresses); N.H. Right to Life v. Director, N.H. Charitable Trusts Unit, 169 N.H. 95, 114, 120-121 (2016) (protecting identities of private patients and employees at a women's health clinic); with Union Leader Corp., 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); Prof'l Firefighters of N.H., 159 N.H. at 709-10 (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); Mans, 112 N.H. at 164 (government must disclose the names and salaries of each public schoolteacher employed by the district).

38. Courts outside of New Hampshire have similarly rejected the notion of police officers having a significant privacy or reputational interest with respect to their official duties. This is because, when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. See, e.g., Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs., 484 Mass. 279, 292 (2020) ("[P]olice officers and members of the judiciary occupy positions of special public trust. By assuming their unique position of power and authority in our communities, police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel .... Accordingly, the public has a vital interest in ensuring transparency where the behavior of these public officials allegedly fails to comport with the heightened standards attendant to their office."); Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C., 4 So. 3d 807, 809-10,

821 (La. Ct. App. 1st Cir. 2008) ("[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); Denver Policemen's Protective Asso. v. Lichtenstein, 660 F.2d 432, 436-37 (10th Cir. 1981) (rejecting officers' claim of privacy); Burton v. York County Sheriff's Dep't., 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure, in part, because the requested documents did not concern "the off-duty sexual activities of the deputies involved"); State ex rel. Bilder v. Township of Delavan, 334 N.W.2d 252, 261-62 (Wis. 1983) ("By accepting his public position [the police chief] has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official. The police chief cannot thwart the public's interest in his official conduct by claiming that he expects the same kind of protection of reputation accorded an ordinary citizen."); Kroeplin, 725 N.W.2d at 301 ("When an individual becomes a law enforcement officer, that individual should expect that his or her conduct will be subject to greater scrutiny. That is the nature of the job."); see also Perkins v. Freedom of Info. Comm'n, 635 A.2d 783, 792 (Conn. 1993) ("Finally, we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties."); Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n, 698 A.2d 803, 808 (Conn. 1997) (in upholding the trial court's judgment requiring disclosure of an internal affairs investigation report exonerating a state trooper of police brutality, concluding: "Like the

trial court, we are persuaded that the fact of exoneration is not presumptively sufficient to overcome the public's legitimate concern for the fairness of the investigation leading to that exoneration. This legitimate public concern outweighs the department's undocumented assertion that any disclosure of investigative proceedings may lead to a proliferation of spurious claims of misconduct.").

39. Moreover, as early as 1931, the United State Supreme Court in Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931), recognized the diminished privacy interests of law enforcement officers. The Court held:

> [P]ublic officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations under libel laws providing for redress and punishment, and not in proceedings to restrain the publications of newspapers and periodicals.

Id. at 718-19.

40. There is no statutory privilege barring the public disclosure of this type of information implicating the ability of an officer to perform his or her official duties. See Marceau v. Orange Realty, 97 N.H. 497, 499 (1952) (noting that statutory privileges will be "strictly construed"). For example, the Supreme Court has explicitly rejected the notion that the legislature created a categorical or absolute privilege for personnel information, including such information pertaining to the police. See Town of Salem, 2020 N.H. LEXIS 102, at *12-13 (noting that the categorical exclusion of police disciplinary information in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) "failed to give full consideration to our prior cases interpreting RSA 91-A:5, IV and to

relevant legislative history," thereby overruling Fenniman); *see also* Reid, 169 N.H. at 527 (requiring balancing analysis for "personnel file" information).

41. Finally, it should be noted that New Hampshire courts recognize only four (4) types of wrongful invasion of privacy consistent with the Restatement of Torts 2nd. They are:

1. intrusion upon seclusion;
2. misappropriation of name or likeness;
3. false light; and
4. publicity given to private life.

Importantly, section 652D of the Restatement (Second) of Torts addressing "publicity given to private life," which has been adopted by the Supreme Court, reads as follows:

> Publicity given to Private Life – One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is one of a kind that:
>
> a. would be highly offensive to a reasonable person; and
>
> b. ***is not a legitimate concern to the public*.**

Restatement (Second) of Torts § 652D (1977) (emphasis added). See Lovejoy v. Linehan, 161 N.H. 483 (2011) and Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964). Clearly, and as explained in more detail below, the performance of law enforcement officers relative to their public duties is a legitimate and compelling concern to the public.

II. The Public Interest in Disclosure is Compelling

42. The public interest in disclosure is both compelling and obvious. This cannot be seriously disputed where alleged police misconduct is at issue. These records concerning Mr. Brown expose the very type of misconduct that the Right-to-Know Law is designed to uncover. See, e.g., Union Leader Corp., 162 N.H. at 684 (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); Prof'l Firefighters of N.H., 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."). As the Supreme Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of information pertaining to its government activities." NHCLU v. City of Manchester, 149 N.H. 437, 442 (2003). As one New Hampshire Court Judge similarly ruled in releasing a video of an arrest at a library, "[t]he public has a broad interest in the manner in which public employees are carrying out their functions." See, e.g., Union Leader Corp. v. van Zanten, No, 216-2019-cv-00009 (Hillsborough Cty. Super. Ct., Norther Dist., Jan. 24, 2019) (Smuckler, J.).

43. The requested records will also assist the public in vetting not only the potential misconduct at issue, but also the performance of the NHPSTC in how it evaluates police officer misconduct and decertification. See Reid, 169 N.H. at 532; see also Rutland Herald, 84 A.3d at 825-26 ("[T]he internal investigation records and related material will allow the public to gauge the police department's responsiveness to specific instances of misconduct; assess whether the agency is accountable to itself internally,

whether it challenges its own assumptions regularly in a way designed to expose systemic infirmity in management oversight and control; the absence of which may result in patterns of inappropriate workplace conduct.").

44. Courts outside of New Hampshire have similarly recognized the obvious public interest that exists when disclosure will educate the public on "the official acts of those officers in dealing with the public they are entrusted with serving." Cox v. N.M. Dep't of Pub. Safety, 242 P.3d 501, 507-08 (N.M. Ct. App. 2010); see also, e.g., City of Baton Rouge, 4 So.3d at 809-10, 821 (holding the public interest in names and records of investigation into police officers' use of excessive force trumps officers' privacy interest); Burton, 594 S.E.2d at 895 ("[i]n the present case, we find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye"); Kroeplin, 725 N.W.2d at 303 ("[t]he public has a particularly strong interest in being informed about public officials who have been derelict in [their] duty") (quotations omitted). Simply put, disclosure here will educate the public on "the official acts of those officers in dealing with the public they are entrusted with serving." Cox, 242 P.3d at 507.

45. Finally, in the Town of Salem case which is now back before the Superior Court on remand following the Supreme Court's overruling of Fenniman, the Rockingham County Superior Court previously noted that, though it was bound by Fenniman, "[a] balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors the disclosure of all but small and isolated portions of the Internal Affairs Practices section of the audit report."

See Union Leader Corp. v. Town of Salem, No. 218-2018-CV-01406, at *3 (Rockingham Cty. Super. Ct. Apr. 5, 2019) (Schulman, J.), appended hereto as Exhibit 7. That Court added: "[T]he audit report proves that bad things happen in the dark when the ultimate watchdogs of accountability—i.e., the voters and taxpayers—are viewed as alien rather than integral to the process of policing the police." *Id.* This Court must reach the same conclusion here.

WHEREFORE, the petitioner, Union Leader, respectfully requests that this Honorable Court:

A. Order the NHPSTC to conduct hearings regarding the decertification of any and all law enforcement officers in public hearings;

B. Order the NHPSTC to grant access to all requested records and information requested by Union Leader concerning Mr. Brown and referenced in Exhibit 5 above;

C. Order the NHPSTC to release to Union Leader all documents, transcripts and recordings of the NHPSTC relating to the hearing conducted on October 27, 2020, pertaining to Justin Swift;

D. Award to Union Leader its attorneys' fees incurred in bringing this action in accordance with the provisions of N.H. R.S.A. 91-A:8; and

E. Grant such other and further relief as the Court deems just and equitable.

UNION LEADER HEREBY RESPECTFULLY REQUESTS THE OPPORTUNITY TO PRESENT ORAL ARGUMENT IN SUPPORT OF THIS PETITION.

Respectfully Submitted,
Union Leader Corporation,
by its attorneys,

/s/ Gregory V. Sullivan
Gregory V. Sullivan
N.H. Bar No.: 2471
g.sullivan@mslpc.net

Malloy & Sullivan,
Lawyers Professional Corporation
59 Water Street
Hingham, MA 02043
(781) 749-4141

Dated: November 16, 2020

EXHIBIT 1

State of New Hampshire
POLICE STANDARDS & TRAINING COUNCIL
ARTHUR D. KEHAS
LAW ENFORCEMENT TRAINING FACILITY & CAMPUS
17 Institute Drive — Concord, N.H. 03301-7413
603-271-2133 FAX 603-271-1785
TDD Access: Relay NH 1-800-735-2964

Chief David P. Cahill
Chairman

John V. Scippa
Director

April 13, 2020

Mr. Aaron Browne
[redacted]
Manchester, NH 03103

Dear Mr. Browne:

Please be advised that Police Standards and Training Council has been made aware that the Manchester Police Department [redacted]

On March 24, 2020,during the regular Council meeting, pursuant to Council Rule Pol 205.02, Commencement of Proceeding, which states in part:

(a) The director, or his or her designee, shall review information received relating to an officer's eligibility to be certified, the decertification of an officer, or an agency's compliance with the council's rules, and make a preliminary determination of probable cause to hold a hearing on the matter, or refer the matter to the council for a determination on whether a hearing is necessary.

A summary of case facts was presented to the Council pertaining to your termination from the Manchester Police Department and subsequent arbitration decision ordering your reinstatement with a 30 day suspension. The Council voted to hold a hearing to determine probable cause. Due to the ongoing Covid-19 restrictions of public gatherings, the hearing will be determined at a later date, at which time you will be notified.

I can be reached at 271-8278 or email David.G.Parenteau@pst.nh.gov if you have questions.

Sincerely,

David G. Parenteau, Major (Ret.)
Legal Division

DGP/amp
cc: Chief Carlo Capano

EXHIBIT 2

State of New Hampshire
POLICE STANDARDS & TRAINING COUNCIL
ARTHUR D. KEHAS
LAW ENFORCEMENT TRAINING FACILITY & CAMPUS
17 Institute Drive — Concord, N.H. 03301-7413
603-271-2133 FAX 603-271-1785
TDD Access: Relay NH 1-800-735-2964

Chief David P. Cahill
Chairman

John V. Scippa
Director

Registered Return Receipt Mail

In hand 8/12/20

August 10, 2020

Mr. Aaron Brown

C/O Attorney John Krupski
109 North State Street - Suite 9
Concord, NH 03301

Re: Notice of Hearing

Dear Mr Brown:

We received notification that you were discharged from the Manchester Police Department on April 11, 2018. An internal investigation by the Manchester Police Department revealed that while assigned to the Department's Drug Unit you were found to have committed acts of Criminal Mischief while conducting searches of apartments within the City of Manchester. The internal investigation also revealed that you made racist remarks while engaged in text conversations while on duty and using a Department issued cellphone.

We also received notification that on February 11, 2020 your discharge was changed to a thirty (30) day suspension pursuant to an arbitrator's decision.

Council rule Pol 402.02(a) provides: The council shall, unless it has just cause to do otherwise as provided in (e) below, order the suspension or revocation of the certification of any police or corrections officer for any of the following reasons:

(5) The officer's discharge has become final or he or she has been allowed to resign in lieu of discharge, has resigned during an internal investigation, or resigned through a negotiated resignation, from police or corrections employment in this or any other state, country, or territory for reasons of:

a. A lack of moral character as defined in Pol 101.28 or Pol 402.02 (l)

b. Moral turpitude as defined in Pol 101.29; or

c. For acts or omissions of conduct which would cause a reasonable person to have doubts about the individual's honesty, fairness, and respect for the rights of others and for the laws of the state or nation;

(e) The council shall apply a balancing test to determine whether factors constituting just cause outweigh the public interest in protecting the safety of the public or confidence in the criminal justice system, including maintaining the integrity of sworn law enforcement, if a violation of section (a) or (d) of this rule is found. If any just cause demonstrated by the officer outweighs the purpose of protecting the safety of the public or confidence in the criminal justice system including maintaining the integrity of sworn law enforcement, the council shall decline to order suspension or revocation

Accordingly, you are hereby notified to appear before the Police Standards and Training Council to show cause why your certification as a police officer should not be suspended or revoked. The hearing is scheduled for August 25, 2020 at 9:00 a.m., at the Arthur D. Kehas Law Enforcement Training Facility, 17 Institute Drive, Concord, NH.

The basis for this hearing is as follows:

Aaron Brown (PSTC ID# 5451) is a certified police officer in the State of New Hampshire, employed by the Manchester Police Department.

On April 11, 2018 Aaron Brown was discharged from the Manchester Police Department after violation of that agency's departmental policies and standard operating procedures, due to having committed acts of Criminal Mischief while conducting searches of apartments within the City of Manchester. Additionally, you made racist remarks while engaged in text conversations while on duty and using a department issued cellphone. There was no legitimate law enforcement purpose for your actions.

If you need a more detailed statement of the issues involved, one will be issued to you upon request, within a reasonable time.

If you fail to appear at this hearing, without notice to the Council, rule Pol 206.03 shall apply.

You may contest this action and appear at a hearing before the Council, at which you may represent yourself, or be represented by an attorney at your own expense, and provide the Council with evidence to show cause why your certification as a police officer should not be suspended or revoked.

Council rule Pol 206 outlines the structure of our hearings and is available upon request. To the extent that the Council's rule regarding hearings do not address procedures for pre-hearing exchange of information and computation of time periods (Jus 805 et. seq.) shall apply.

If at the upcoming hearing, you want a certified court reporter, the Council will arrange for one at your expense. If you wish to have a certified court reporter at the hearing, please submit your request in writing, at least 10 days before the hearing.

If you choose to have your hearing held in non-public session, please be advised that if the council issues an order finding cause to take action on your certification, they will reconsider whether the testimony offered at the hearing will remain sealed. The authority to hear cases

involving public employees in non-public session is contained in RSA 91-A:3, III and is not automatic.

Pursuant to Pol 204.03(c) the staff will provide you with the exhibits that will be provided to the Council, and a copy of protocol for Police Standards and Training meetings for your review.

You may not work as a police officer if your certification is suspended or revoked.

Decisions of the Council are appealable only to the New Hampshire Supreme Court.

If you have questions, please call Major David Parenteau (retired) at 271-8278 or email, david.g.parenteau@pstc.nh.gov.

Sincerely,

John V. Scippa
Director

DVS/dgp
Enclosures
cc: Attorney John Krupski
Chief Carlo Capano

EXHIBIT 3

Malloy & Sullivan
LAWYERS
PROFESSIONAL CORPORATION

Gregory V. Sullivan, MA, NH
Kathleen C. Sullivan, MA, NH
Kerstin H. Peterson, MA
Brendan T. Bowes, MA

Founders
Ralph Warren Sullivan
Richard A. Sullivan
James Malloy
Morton Myerson

October 19, 2020

Via First Class Mail and email

David P. Cahill, Chairman
John V. Scippa, Director
State of New Hampshire
Police Standards & Training Council
17 Institute Drive
Concord, NH 03301-7413

Re: Union Leader Corporation/ Aaron Brown

Dear Chairman Cahill and Director Scippa:

We represent Union Leader Corporation (hereinafter "Union Leader") of Manchester, New Hampshire. We understand that a hearing regarding the revocation of the certification of Aaron Brown as a police officer in the state of New Hampshire is being held on October 27, 2020. Whether that hearing is held in person or via Zoom (or some other virtual platform), we hereby request access to that hearing for a representative of Union Leader.

We believe that the Constitution of New Hampshire and N.H. RSA 91-A require that this hearing be made accessible to the public. Please confirm forthwith that this requested access will be granted. Should the Council intend to handle this matter in executive session please advise of that intent at this time. Thank you for your attention to these matters.

Respectfully,

Gregory V. Sullivan

xc: Brendan McQuaid, President
Tim Kelly, Executive Editor

59 Water Street, Hingham Harbor, Massachusetts 02043
781-749-4141 • Fax: 781-749-4109 • email: g.sullivan@mslpc.net • MSLPC@aol.com

EXHIBIT 4

MILNER & KRUPSKI, PLLC
ATTORNEYS AT LAW

www.milnerkrupski.com

Glenn R. Milner, Esq.

John S. Krupski, Esq.

Marc G. Beaudoin, Esq.

October 22, 2020

Director John V. Scippa
NH Police Standards and Training Council
17 Institute Drive
Concord, NH 03301

Re: Aaron Brown

Dear Director Scippa:

As you know I am representing Aaron Brown in regards to his hearing before the Police Standards and Training Council on October 27, 2020 regarding the possible suspension of his certification. On October 22, 2020, Aaron received Notice of Hearing from Major David Parenteau that he was to appear before the New Hampshire Police Standards and Training Council to determine if his certification as a Full Time Police Officer should be suspended pursuant to POL 402.02 (10). Aaron James Brown, has been unable to complete the applicable firearms training requirements of POL 404.03 and the in-service training requirements of POL 403.01 as he was illegally terminated from employment by the City of Manchester. The City was ordered to reinstate him through final and binding arbitration and have not done so as of this date.

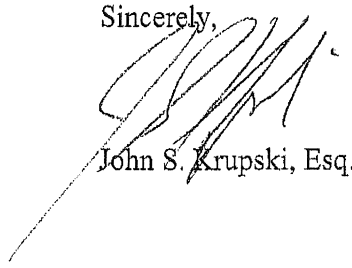
Aaron James Brown agrees that his certification as a Full Time Police Officer be suspended, effective October 27, 2020, until he satisfies the requirements of POL 404.03 and 403.01 pursuant to POL 402.02. Mr. Brown specifically reserves the right to lift the suspension when he is returned to service. Therefore, there is no need to conduct a hearing on the status of Aaron's certification. It is my understanding that the appearance on October 27, 2020 is unnecessary. I request that submission of this letter to the Council be made in non-public session.

109 North State Street, Suite 2
Concord, NH 03301

Tel. (603) 410-6011
Fax (603) 505-4652

Thank you for your time and consideration. In the event that you have any questions please feel free to contact me if you have any questions.

Sincerely,



John S. Krupski, Esq.

EXHIBIT 5

Gregory V. Sullivan

From: Mark Hayward <mhayward@unionleader.com>
Sent: Wednesday, September 9, 2020 4:37 PM
To: Parenteau, David
Cc: Gregory V. Sullivan; Timothy Kelly
Subject: Aaron Brown certification

Dear Major Parenteau,
It was a pleasure, as always, speaking to you a few minutes ago.
This is a Right to Know request under RSA 91-A for access to documents involving the upcoming hearing of Aaron Brown before the Police Standards and Training Council. This request for public records includes but is not limited to:

- any request from Police Chief Carlo Capano for the hearing.
- any response from Aaron Brown or parties representing him.
- and supporting notes, documents or exhibits from all parties, including Police Standards and Training.

As a side note, could you please let me know what the PTSC's practice is when it comes to public access to the Brown hearing on Sept. 22. We at the Union Leader would like access to that hearing, and if you believe that access will be denied to a portion or all of the hearing, please point us to any law or rule that forbids such access.
Thank you very much,
Mark

--
Mark Hayward | columnist, reporter
New Hampshire Union Leader | 100 William Loeb Drive, Manchester, NH 03109
(mobile) 603-785-9929
mhayward@unionleader.com
www.unionleader.com| www.facebook.com/unionleader
"Open Up New Hampshire"

EXHIBIT 6

[redacted]

---------- Forwarded message ---------
From: **Parenteau, David** <David.G.Parenteau@pst.nh.gov>
Date: Thu, Oct 22, 2020 at 4:18 PM
Subject: RE: Aaron Brown certification
To: Mark Hayward <mhayward@unionleader.com>

Mr. Hayward,

Attached please find a notice of hearing for the Brown matter and an additional correspondence to Mr. Brown.

Please be advised that there is no document from Chief Capano requesting a hearing.

Any other documents such that they exist are determined to be exempt from disclosure pursuant to RSA 91A:5 IV as the disclosure of which would constitute an invasion of privacy as well as being confidential due to an upcoming proceeding.

Major David G. Parenteau (Ret)

From: Mark Hayward <mhayward@unionleader.com>
Sent: Monday, October 19, 2020 11:41 AM
To: Parenteau, David <David.G.Parenteau@pst.nh.gov>
Subject: Re: Aaron Brown certification

EXHIBIT 7

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER

I. Introduction

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

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

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

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

II. The Court's Review

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

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

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

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

III. Governing Law

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

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

Notwithstanding that sentiment, the audit report proves that bad things happen in the dark when the ultimate watchdogs of accountability—i.e. the voters and taxpayers—are viewed as alien rather than integral to the process of policing the police. Reasonable judges—including all five justices of the New Hampshire Supreme Court, joining together in a published opinion—have criticized the Fenniman line of cases.

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Order

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

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

April 5, 2019

Andrew R. Schulman,
Presiding Justice

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