THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0563

SAMUEL PROVENZA
(Petitioners/Appellants)

v.

TOWN OF CANAAN
(Respondent/Appellee)

BRIEF OF UNION LEADER CORPORATION AND THE NEW ENGLAND FIRST AMENDMENT COALITION *AMICUS CURIAE*

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August 2, 2021

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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. RSA 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. RSA c. 91-A:5 Exemptions:

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

I. Records of grand and petite juries

…

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.

N.H. RSA 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.

N.H. RSA 516:36, Written Policy Directives to Police Officers and Investigators:

I. In any civil action against any individual, agency or governmental entity, including the state of New Hampshire, arising out of the conduct of a law enforcement officer having the powers of a peace officer, standards of conduct embodied in policies, procedures, rules, regulations, codes of conduct, orders or other directives of a state, county or local law enforcement agency shall not be admissible to establish negligence when

such standards of conduct are higher than the standard of care which would otherwise have been applicable in such action under state law.

II. All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be admissible in any civil action other than in a disciplinary action between the agency and its officers, agents, or employees. Nothing in this paragraph shall preclude the admissibility of otherwise relevant records of the law enforcement agency which relate to the incident under investigation that are not generated by or part of the internal investigation. For the purposes of this paragraph, "internal investigation" shall include any inquiry conducted by the chief law enforcement officer within a law enforcement agency or authorized by him.

INTERESTS OF THE AMICI

Union Leader Corporation (hereinafter "Union Leader") is a corporation organized and existing under the laws of the State of New Hampshire and is the publisher of newspapers and other media that are distributed throughout New Hampshire and elsewhere. The New England First Amendment Coalition is a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts and it is dedicated to advancing protection for First Amendment and Right-to-Know rights in the six New England states. All parties to this appeal have provided their written consent to the filing of this amicus brief. Copies of those consents are appended hereto in the Addendum to this Brief, (hereinafter "*Add*." at pp. 107-109).

QUESTIONS PRESENTED

Did the Trial Court, in its Order of December 2, 2020, (*see Add. pp. 25-45)* correctly determine that RSA 105:13-b is inapplicable and does not prohibit the disclosure of the unredacted public records at issue in this case?

Did the Trial Court, in its Order of December 2, 2020, (*see Add. pp.25-45)* correctly determine that the privacy interest of the Appellant was outweighed by the public's interest in disclosure?

Did the Trial Court, in its Order of December 2, 2020, (*see Add. pp.25-45)* err or abuse its discretion in interpreting the relevant statutes in this case?

STATEMENT OF THE CASE AND FACTS

The Appellant, Samuel Provenza, (hereinafter "Appellant"), is currently employed as a police officer with the New Hampshire State Police, *(See Redacted Appendix to the Brief of the Appellant, hereinafter "App.", at p. 5)*, and was previously employed as a police officer by the Town of Canaan, New Hampshire, (hereinafter "Canaan"), *(App. at p. 5)*. During Appellant's employment with Canaan he arrested Crystal Eastman, (hereinafter "Eastman"), on November 30, 2017, and charged her with violating N.H. RSA 265:4, Disobeying a Police Officer, and N.H. RSA 642:2, Resisting Arrest. *(App. at p. 400).* On February 8, 2018, Eastman filed a complaint against Appellant alleging that he used excessive force in effectuating the arrest. *(App. at p. 6).*

Canaan engaged the services of a company called Municipal Resources, Inc. (MRI) to conduct an investigation to determine whether or not excessive force was used in making the arrest. *(App. at p. 6).* On August 10, 2018, the Canaan Police Department issued a Complaint Disposition Form labeling the excessive force allegations as "unfounded". *(App. at p. 6).* On May 23, 2019, following a trial, Eastman was found guilty of disobeying an officer and not guilty of resisting arrest. *(App. at p. 405).* On June 18, 2020, this Honorable Court affirmed that decision of the Trial Court. *(App. at pp. 406-411).*

On February 4, 2019, Jim Kenyon, on behalf of the Valley News, submitted a Right-to-Know request with Canaan seeking a copy of the MRI Report. *(App. at p. 87)*. On February 8, 2019, Canaan, through its Town Administrator, denied the Valley News' request. *(App. at p. 90).* On June

9, 2020, Valley News renewed its Right-to-Know request. *(App. at pp. 94-97).* In response, on July 2, 2020, Appellant filed a Verified Petition for Declaratory Judgment, Request for Temporary and Permanent Injunctive and Other Relief, against the Town of Canaan, to block the release of the records requested. *(App. at pp. 4-12).* The Valley News was allowed to intervene in Appellant's case against Canaan on August 10, 2020, *(App. at p. 13)*, objected to the relief requested by Appellant, and filed a Complaint-In-Intervention, seeking disclosure of the withheld MRI report requested.

Ultimately, on December 2, 2020, after a hearing, the Superior Court, (Bornstein, J.), denied Appellant's Petition and granted the crossclaim of Intervenor Valley News for declaratory relief. *(See Add. at pp. 25-45)*. This appeal followed.

SUMMARY OF THE ARGUMENT

The public's right to know "what the government is up to" is central and essential to democracy and to the proper administration of justice. Transparency and accountability lead to trust between the citizenry and the government. The need for such trust is critical when the governmental actors are authorized to effectuate arrests and to use force when necessary. The release of the unredacted materials currently under seal in this case will ensure that the citizens of New Hampshire are able to fully assess the conduct of a serving police officer and of the thoroughness and fairness of those entrusted with the responsibility of overseeing police officers. The public's overwhelming interest in the proper administration of justice

clearly outweighs any alleged privacy rights of Appellant and the government's speculative interest in non-disclosure.

ARGUMENT

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 claimed by a public body the court engages in a balancing test 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." City of Nashua, 141 N.H. at 476. The interpretation of constitutional and statutory provisions is a question of law, which this Court reviews *de novo*. *See* Ford v. N.H. Dep't of Transp., 163 N.H. 284, 291 (2012), (*citing* Billewicz v. Ransmeier, 161 N.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 MRI REPORT

RSA 105:13-b does not apply outside the context of a criminal case, and is not a bar to a Right-to-Know request. As explained in the Appellees' Responsive Brief, RSA 105:13-b, by its plain terms, has no bearing on this

Right-to-Know dispute because RSA 105:13-b only concerns how "police personnel files" are handled when "a police officer … is serving as a witness in any criminal case." *See* RSA 105:13-b, I. There is no textual ambiguity, therefore no further inquiry is necessary. *See* State v. Brouillette, 166 N.H. 487, 494-95 (2014) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent.").

Even if this Honorable Court were to find some ambiguity in the statute, the 1992 legislative history of RSA 105:13-b refutes Appellant's contention that this statute can apply outside the context of a criminal case, including as an exemption to the Right-to-Know Law. RSA 105:13-b's predecessor, House Bill 1359, introduced in 1992, focused upon creation of a process - which previously had been *ad hoc* - for how police personnel file information would be disclosed to defendants in the context of criminal cases. (*See Add. pp. 46-89*) As the Police Chief representing the New Hampshire Association of Chiefs of Police testified after the bill was amended, the bill would address "potential abuse by defense attorneys throughout the state intent on fishing expeditions." (*See Add. p.81).*

Moreover, the legislature specifically rejected any notion that this statute would apply as an exemption under the Right-to-Know Law or categorically bar police personnel file information from disclosure. The first paragraph of the original proposed version of HB 1359 contained a sentence stating, in part, that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A." (*Add. at p.48)*. In testimony from January 14, 1992, testifying before the House Judiciary Committee, Charles Perkins, speaking on behalf of Union Leader objected to this blanket exclusion:

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

(Add. at p. 57-58). Following this objection, the legislature amended the bill to delete this categorical exemption for police personnel files under Chapter 91-A. (*See Add. at p.59*). With this amendment, the title of the bill was changed to make clear that the bill only applied "to the confidentiality of police personnel files **in criminal cases**." (*emphasis added*); (*See Add. at pp.70, 72-75)* The amended analysis of the bill similarly explained that the "bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions." (*Add. at pp.60,71,72,74,78*). The amendment to delete the exemption language was apparently a compromise that involved the support of multiple stakeholders that opposed the original bill. (*Add. at p. 84*)*, noting support of stakeholders for amended version*). The Police Chiefs Association representative acknowledged, following the

amendment, that "[f]rankly, I would like to see an absolute prohibition [on disclosure of police personnel files], but since I realized the tooth fairy died some time ago, that is not going to happen"). (*Add. at p. 81*). The legislature's amendment establishes that the legislature never intended RSA 105:13-b to apply to disputes under RSA Ch. 91-A, and instead intended to limit its reach to criminal cases, under certain circumstances.

As this Court stated in the case of N.H. Ctr. for Pub. Interest Journalism, et al v. NH DOJ, 173, N.H. 648, 656 (2020):

> …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.

Appellant's brief 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. RSA 91-A:5, I. 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. *See* Union Leader v. Town of Salem, 173 N.H. 345 (2020).

Appellant's reliance on RSA 105:13-b to withhold the unredacted MRI report is gravely misplaced. 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. Id.

II. THE PUBLIC INTEREST IN DISCLOSURE OF THE UNREDACTED MRI REPORT CLEARLY OUTWEIGHS ANY GOVERNMENT INTEREST IN NONDISCLOSURE AND THE ALLEGED PRIVACY INTERESTS OF APPELLANT

"[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.). (*See Add. at p. 92*) 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., Id at 554, (*quoting* Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989)).

The Supreme Court of Connecticut, in the case of Perkins v. Freedom of Information Commission, 228 Conn. 158 (1993), utilized the Restatement of Torts 2d, section 652D, to establish the standard to be used in the context of balancing claims of privacy and the public's right to access governmental records. The Restatement provides that governmental records may be subject to closure if the matter:

(a) would be highly offensive to a reasonable person, and

(b) Is not of legitimate concern to the public.

The release of the MRI report will shed light on Canaan's performance of its constitutional and statutory duties. The contents of the MRI report will reveal pertinent information about Appellant's conduct while performing his public duties and about the thoroughness and fairness of Canaan's investigation and action taken, or not taken, upon its receipt of the report.

Appellant asserts that because Canaan determined the charge of excessive force was "unsustained" the report should remain secret. There is no case in New Hampshire jurisprudence that supports that position. Appellant's apparent reliance on the case of Pivero v. Largy, 143 N.H. 187 (1998), is misplaced as that case involved a police officer's rights under RSA 275:56, not RSA 91-A, and the Court at that time was relying on the case of Union Leader Corporation v. Fenniman, 136 N.H. 624 (1993). This Court's recent rulings in Town of Salem, 173 N.H. 345, Seacoast Newspapers Inc. v. City of Portsmouth, 175 N.H. 325 (2020), and Salcetti v. City of Keene, 2020 N.H. Lexis 106 (2020) all stand for the fact that

Fenniman and its progeny, including Pivero, have been overruled as "a remnant of abandoned doctrine". Town of Salem at 173 N.H. at 356. Shining the light of public scrutiny on police investigatory files can lead to instances of both good and bad conduct. In the case City of Nashua, 141 N.H. 473, the ultimate conclusion upon viewing the video tape at issue was that the police department had acted properly in dismissing a DUI charge against a defendant prior to trial. This Court, in the case of Hampstead School Board v. School Admin. Unit No. 55, 2021 N.H. Lexis 64 (2021) affirmed the Trial Court's Order requiring disclosure of an investigative report on alleged misconduct by governmental officials that contained a conclusion "that the allegations had no merit". Id at 65.

III. THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION IN RULING THAT RSA 516:36 WAS NOT APPLICABLE TO 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.

RSA 516:36 pertains to certain public records being non-admissible in civil actions only and has no relevance in Right-to-Know cases. It provides:

> I. In any civil action against any individual, agency or governmental entity, including the state of New Hampshire, arising out of the conduct of a law enforcement officer having the powers of a peace officer, standards of conduct embodied in policies, procedures, rules, regulations, codes of conduct, orders or other directives of a state, county or local law enforcement agency shall not be admissible to establish negligence when such standards of conduct are higher than the standard of care which would otherwise have been applicable in such action under state law.
>
> II. All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be admissible in any civil action other than in a disciplinary action between the agency and its officers, agents, or employees. Nothing in this paragraph shall preclude the admissibility of otherwise relevant records of the law enforcement agency which relate to the incident under investigation that are not generated by or part of the internal investigation. For the purposes of this paragraph, "internal investigation" shall include any inquiry conducted by the chief law enforcement officer within a law enforcement agency or authorized by him.

Appellant's argument that RSA 516:36 supports closure is clearly misplaced. That statute pertains to the issue of admissibility of records in civil actions involving police officer conduct alleged to be negligent. Whether or not a public record is admissible in a civil action has absolutely no bearing on or relevance to a request for public records made pursuant to the provisions of RSA 91-A.

CONCLUSION

For the reasons addressed above, and in the brief of the Appellee, Union Leader respectfully requests that this Honorable Court affirm the Trial Court's Order, order Appellant to release the unredacted MRI report to the Appellee, and grant such other and further relief as this Court deems just.

Respectfully submitted,
Union Leader Corporation and
New England First Amendment
Coalition,
by their attorney,

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Dated: August 2, 2021

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26, this brief complies with the provisions of New Hampshire Supreme Court Rule 26. 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 3,368 words, (including footnotes), from the "Interests of the Amici" to the "Certificate of Compliance".

/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 August 2, 2021, through the electronic-filing system upon counsel for the Appellant, Samuel Provenza (John S. Krupski, Esq.), Respondent, Town of Canaan (Shawn M. Tanguay, Esq.), and Intervenor/Appellee Valley News (Gilles Bissonette, Esq. and Henry Klementowicz, Esq.)

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ADDENDUM
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THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

No. 215-2020-CV-155

SAMUEL PROVENZA

v.

TOWN OF CANAAN

PUBLIC ORDER ON PLAINTIFF'S PETITION FOR DECLARATORY JUDGMENT AND FOR PRELIMINARY AND PERMANENT INJUNCTIONS AND ON INTERVENOR'S CROSSCLAIM

The following order is issued under seal consistent with this Court's previous rulings. A public, redacted copy of this order will issue after the parties have had an opportunity to review it.

This matter is before the Court on the Plaintiff's Petition for Declaratory Judgment and for Preliminary and Permanent Injunctions. (Index #1.) On November 30, 2017, the plaintiff, Samuel Provenza, formerly a police officer for the Town of Canaan, was involved in a motor vehicle stop that became subject to some media coverage in the Upper Valley. The Plaintiff now petitions the Court to declare that an internal affairs investigation report related to the stop (the "Report") is not subject to disclosure under the New Hampshire Right-to-Know Law, RSA ch. 91-A, and to enjoin the defendant, the Town of Canaan (the "Town"), from disclosing the contents of the Report to the public. Valley News daily newspaper ("Valley News"), filed a motion to intervene, which the Court granted. (Index #4.) Thereafter, Valley News objected to the plaintiff's petition and filed a crossclaim requesting that the Court rule that the Report is subject to disclosure under RSA ch. 91-

A.[1] (Indexes # 10, 11).

On September 15, 2020, the Court held a hearing at which counsel for the Plaintiff, the Town, and Valley News were present. Prior to the hearing, the Town submitted under seal a copy of the Report with minor redactions of information it contends is not subject to disclosure under RSA ch. 91–A and an unredacted copy of the Report. (Index #15), and the Court approved the parties' Stipulation and Protective Order Regarding Nondisclosure of Subject Investigation Report. (Index #14.) At the hearing, the parties agreed that, subject to a potential order of stay pending appeal, each was amenable to this order acting as a final adjudication on the merits of both the plaintiff's requests for declaratory judgment and for preliminary and permanent injunctions and on the merits of Valley News's crossclaim. After considering the parties pleadings, offers of proof, and arguments, the Court makes the following findings and rulings.

I. Factual Background

a. November 30, 2017 Traffic Stop[2]

On November 30, 2017, Canaan police dispatch received a call about a suspicious vehicle following a town school bus. Officer Provenza responded to the call and traveled to the location provided by dispatch. Officer Provenza did not activate his cruiser camera before responding to the call.[3] Upon arriving at the location of the bus, Provenza observed a white SUV following closely behind the school bus, and he initiated a traffic stop of the

[1] Valley News filed a "Complaint-in-Intervention," but that is not a pleading allowed as a matter of right. See Superior Court Civil Rule 6(a). As a result, the filing was docketed as a crossclaim pursuant to Superior Court Civil Rule 10. No party objected. (Index #17.)

[2] The following facts are taken from the Report and the parties' pleadings.

[3] Canaan Police Chief Frank explained that all police vehicles in Canaan, apart from Officer Provenza's, were equipped with cameras that automatically turn on when the car is turned on. Officer Provenza's cruiser camera, on the other hand, had to be manually activated by pushing a button. Chief Frank did not feel Officer Provenza's failure to activate his cruiser camera was intentional, but rather an oversight given the situation.

white SUV. Officer Provenza approached the vehicle and identified the driver as Crystal Eastman, a resident of Canaan, acknowledged that he recognized her, and asked her "what's going on?" [redacted] Ms. Eastman explained that she was following the bus because her daughter had been having ongoing issues with the driver of the school bus. Officer Provenza described Ms. Eastman's behavior as "nutty and weird," and further noted that, in his opinion, she was "not making sense and . . . was rambling." [redacted]

Officer Provenza, in an attempt to determine if Ms. Eastman was impaired, then moved his head toward the window and sniffed to see if he could detect an odor of alcohol or cannabis. Ms. Eastman claims he "got close enough that he could have kissed her," and she then angrily asked what he was doing. [redacted] Officer Provenza informed Ms. Eastman that he was investigating reports of a suspicious vehicle following a school bus. Officer Provenza asked Ms. Eastman for her license and registration multiple times, with Ms. Eastman responded by asking why he needed them because he knew who she was. Ms. Eastman then proceeded to retrieve her license to give to Officer Provenza, but before she handed it to him, she claims she began to lean across her front seat to retrieve her registration and cell phone, "probably pulling her license back in with her." [redacted] Officer Provenza, on the other hand, claims that as he reached for the license, she "snatched it back out of my fingers." [redacted]

Officer Provenza then informed Ms. Eastman that she was under arrest. Officer Provenza attempted to open the vehicle's door, but Ms. Eastman grabbed the door to prevent Officer Provenza from opening it. Eventually Officer Provenza was able to open the door, but Ms. Eastman wrapped her right arm around the steering wheel to prevent him from removing her from her vehicle. Officer Provenza claims that Ms. Eastman was

attempting to bite his hand whereas Ms. Eastman claims that Officer Provenza grabbed her hair behind her head and tried to pull her out of the car. Ms. Eastman claims to have been screaming for Officer Provenza to stop pulling her hair and to have honked her horn at least once.

Soon thereafter Officer Provenza was able to handcuff Ms. Eastman's left wrist. Officer Provenza again attempted to pull Ms. Eastman out of the vehicle to cuff her right wrist. While Officer Provenza was attempting to handcuff Ms. Eastman, Ms. Eastman claims her knee was hit, "she heard it pop," and she yelled that Officer Provenza had broken her leg. [redacted] Officer Provenza finished handcuffing Ms. Eastman and called for backup. Ms. Eastman claims that she did not see Officer Provenza hit her leg but she "felt it." [redacted]

Chief Frank arrived on the scene shortly thereafter.[4] Chief Frank assisted Ms. Eastman to the rear of her vehicle and attempted to calm her down. Ms. Eastman was still complaining that her leg was injured. Ms. Eastman was then transported to Dartmouth-Hitchcock Medical Center. Ms. Eastman claims that she did not bite or kick Officer Provenza during the altercation. Officer Provenza claims he did not pull Ms. Eastman's hair or "put any part of his body on her legs." [redacted]

b. Ms. Eastman's Subsequent Trial and News Coverage

Ms. Eastman was subsequently charged with resisting arrest and disobeying a police officer. At trial, Ms. Eastman was acquitted of the resisting arrest charge and

[4] Chief Frank later interviewed a number of witnesses and followed up with these witnesses.

convicted of disobeying a police officer, and that conviction was upheld on appeal. On February 8, 2018, Ms. Eastman filed a formal complaint against Officer Provenza. In response to Ms. Eastman's complaint, the Town commissioned Municipal Resources, Inc. ("MRI") to conduct an internal investigation into the excessive force complaint.

As [redacted] the November 30, 2017 traffic stop and Ms. Eastman's subsequent trial, the Valley News began to cover the story.[5] On February 4, 2019, Valley News reporter Jim Kenyon requested a copy of the Report, all government records related to it, and all information concerning the cost of the report pursuant to RSA ch. 91-A. On February 8, 2019, the Town denied Valley News's request for the Report based on the "internal personnel practices" exemption set forth in RSA 91–A:5, IV, and specifically citing Union Leader Corp. v. Finneman, 136 N.H. 624 (2007). (Valley News's Obj. ¶ 17, Ex. 3.) The Town did, however, provide redacted documentation related to the cost of the Report. On June 9, 2020, Valley News renewed its request for the Report following the New Hampshire Supreme Court's decisions in Union Leader Corporation & a. v. Town of Salem, 173 N.H. __ (May 29, 2020) and Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. __ (May 29, 2020) which overruled certain key holdings of Finneman.

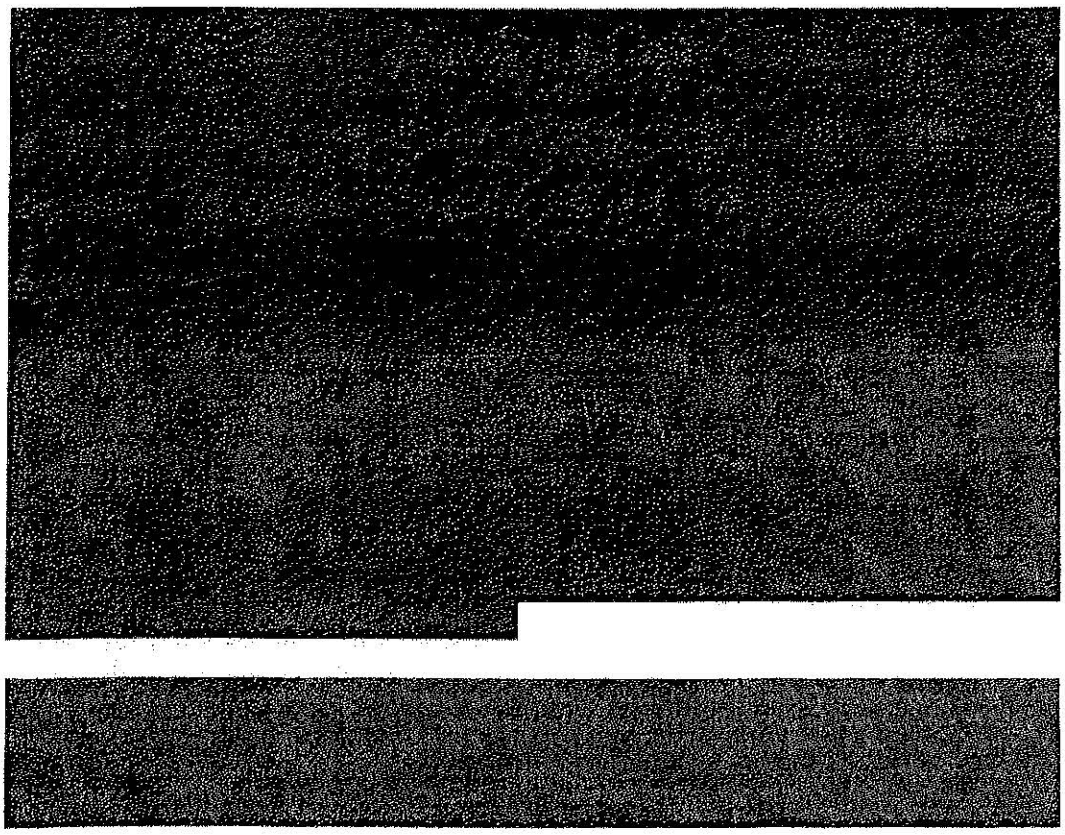
In response to Valley News's renewed request for the Report, the Town made Officer Provenza aware of the request. Officer Provenza then filed this lawsuit seeking to enjoin the Town from releasing the Report. Valley News filed a motion to intervene, which

[5] Before the plaintiff instituted this action, the Valley News had published five stories related to traffic stop and trial–"Jim Kenyon: Canaan Mom Injured by Police Officer Cries Foul" on March 4, 2018; "Jim Kenyon: In Canaan, Police Transparency Not a Priority" on August 12, 2018; "Jim Kenyon: Canaan report about police excessive force case remains a secret" on February 29, 2019; "Jim Kenyon: Judge finds Canaan woman not guilty of resisting arrest" on June 4, 2019; "Jim Kenyon: Plenty of question marks follow Canaan woman's sentence" on July 20, 2019.(Kenyon Aff., Index #12.)

this Court granted. Valley News then filed an objection to Officer Provenza's suit for injunctive relief and a crossclaim seeking disclosure of the Report.

c. Findings of the Report

The Town commissioned MRI to conduct an internal investigation into the excessive force complaint filed by Ms. Eastman. The purpose of its investigation was "to determine if the level of force used by Officer Provenza when he arrested Crystal Eastman was justified, given the circumstances." (Report at 13.) MRI conducted interviews of Officer Provenza, Ms. Eastman, Chief Frank, Ms. Eastman's supervisor, and several eyewitnesses[6], and it also reviewed police reports, medical documentation, and other relevant evidence. MRI released its Report in July 2018. The investigator summarized his conclusions as follows:



[6] As discussed below, infra. fn. 9, the eyewitnesses are all minors and their privacy interests require the Court to keep their names anonymous.

(Id. at 14–15.)

II. Analysis

Officer Provenza now petitions the Court to enjoin the Town from disseminating the Report to the public and to declare the Report exempt from public access under the Right-to-Know Law, pursuant to RSA 91-A:5, IV. (Pl.'s Pet. ¶¶ 1, 22.) Specifically, Officer Provenza argues that "his privacy interests in an unfounded internal affairs investigation outweighs the request for disclosure to the public." (Id. ¶ 2.) Valley News objects and asserts that the Report is "a public record that must be made available for inspection" to Valley News and the public a large, pursuant to RSA ch. 91-A and Part I, Article 8 of the New Hampshire Constitution. (Valley News's Crossclaim ¶ 32, prayer A.) Valley News contends that the Report is subject to disclosure because: 1) "the public interest in disclosure is compelling"; 2) "the privacy interests in nondisclosure are nonexistent"; and 3) "the public interest trumps any nonexistent privacy interest." (Id. ¶ 32.)

With respect to Officer Provenza's petition for injunctive relief, "[t]he issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." New Hampshire Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). An injunction should not issue unless the petitioner shows: (1) that he is likely to succeed on the merits; (2) that he has no adequate remedy at law; (3) that he will suffer immediate

irreparable harm if the injunctive relief is not granted; and (4) that the public interest will not be adversely affected if the injunction is granted. Id.; UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13–15 (1987); see also Kukene v. Genualdo, 145 N.H. 1, 4 (2000) ("injunctive relief is an equitable remedy, requiring the trial court to consider the circumstances of the case and balance the harm to each party if relief were granted"). "The granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." DuPont, 167 N.H. at 434.

As to the likelihood of success on the merits, Officer Provenza argues that he is likely to succeed on the merits "based on the balance of the probabilities as there is a clear privacy interest recognized by the public policy of the State of New Hampshire." (Pl.'s Pet. ¶ 34.) Essentially, Officer Provenza asserts that, as a matter of public policy, the Report is exempt from disclosure under the Right-to-Know Law. He maintains that "[t]he public interest would not be adversely affected but rather promoted" by granting injunctive relief "as the public policy requires that personnel matters be held confidential pursuant to statute and that matters and allegations not be indiscriminately disseminated by individuals." (Id. ¶ 35.) Valley News disagrees and contends that Provenza's request for injunctive relief should fail because: 1) RSA 91-A:5, IV "does not create a statutory right of action for government officials seeking to have documents withheld, nor does it create a statutory privilege that can be invoked by Provenza to compel the Town to withhold the [Report]"; and 2) under RSA 91-A:5, IV the "public interest balancing analysis compels its disclosure." (Valley News's Obj. ¶15.)

Turning first to the parties' statutory arguments, generally, "[t]he ordinary rules of statutory construction apply to [the Court's] review of the Right-to-Know Law." Censabella v. Hillsborough Cty. Attorney, 171 N.H. 424, 426 (2018) (citing N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 102–03 (2016)). "When examining the language of a statute, [the Court] ascribe[s] the plain and ordinary meaning to the words used." Id. at 103. "[The Court] interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "[The Court] also interpret[s] a statute in the context of the overall statutory scheme and not in isolation." Id.

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." (RSA 91-A:1 (2013); N.H. Right to Life, 169 N.H. at 103. "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Censabella, 171 N.H. at 426; see also N.H. Const. pt. 1, art. 8 ("the public's right of access to governmental proceedings and records shall not be unreasonably restricted.") (emphasis added). The Right-to-Know Law provides "[e]very citizen" with a "right to inspect and copy all government records . . . except as otherwise prohibited by statute." RSA 91-A:4, I. RSA 91-A:4, IV requires public bodies and agencies to make such government records available for inspection and copying upon request. The statute allows "[a]ny person aggrieved by a violation of this chapter" to petition for injunctive relief. RSA 91-A:7; Censabella, 171 N.H. at 427.

Valley News first argues that "[t]o the extent Provenza bases his request for declaratory and injunctive relief pursuant to a Right- to-Know exemption, his claim fails because the statute does not create a cause of action for anyone other than a requester who has been "aggrieved by a violation" of a government entity . . . who has declined to produce documents pursuant to an applicable exemption." (Valley News's Obj. ¶ 16.) In short, Valley News maintains that because "Provenza is not an aggrieved requester, he has no statutory right of action under the Right-to-Know Law." (Id.) The Court concludes that it need not address the merits of this argument in order to rule on the merits of the parties' dispute and the relief each requests. For purposes of this order, the Court assumes without deciding that the plaintiff is a "person aggrieved" within the meaning of RSA 91–A:7. In addition, the Court further rules that the plaintiff has standing to maintain this action under RSA 491:22 and RSA 498:1.

The Court next considers the parties' arguments regarding to the balancing of public and private interests relating to disclosure of the Report. The Right-to-Know Law carves out exemptions from the general rule providing citizen access to governmental records. See RSA 91-A:5. RSA 91-A:5 provides, in pertinent part, that "[t]he following governmental records are exempted from the provisions of" the Right-to-Know Law:

> 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.

Id. While it is true that "the statute does not provide for unfettered access to public records," New Hampshire courts "broadly construe provisions in favor of disclosure and interpret the exemptions restrictively." Seacoast Newspapers, Inc., 173 N.H. at __ (slip op. at 3.)

As noted above, Union Leader Corp. and Seacoast Newspapers, Inc., overruled key holdings in Fenniman relating to RSA 91-A:5, IV. Specifically, Seacoast Newspapers, Inc. "overrule[d] Fenniman to the extent that it broadly interpreted the "internal personnel practices" exemption and its progeny to the extent that they relied on that broad interpretation." 173 N.H. at __ (slip op. at 9). Similarly, Union Leader Corp. "overrule[d] Fenniman to the extent that it adopted a per se rule of exemption for records relating to 'internal personnel practices.'" 173 N.H. at __ (slip op. at 11). The Court clarified that "[i]n 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.'" Id. (citing Prof'l Firefighters of N.H., 159 N.H. 699, 707 (2010)) (setting forth the three-step analysis required to determine whether disclosure will result in an invasion of privacy). Furthermore, "[d]etermining whether the exemption for records relating to 'internal personnel practices' applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy." Id. (citing N.H. Housing Fin. Auth., 142 N.H. at 552).

New Hampshire Courts "engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91–A:5, IV." Lambert v. Belknap Cty. Convention, 157 N.H. 375, 382–83 (2008). This balancing test applies to all categories of records enumerated in RSA 91–A:5, IV. New

Hampshire Center for Public Interest Journalism v. New Hampshire Department of Justice ___ N.H. ___, ___ (October 30, 2020) (slip op. at 10); Union Leader Corp., 173 N.H. at ___ (slip op. at 11). "First, [the Court] evaluates whether there is a privacy interest at stake that would be invaded by the disclosure." Lambert, 157 N.H. at 382. "Second, [the Court] assess[es] the public's interest in disclosure." Id. at 383. "Finally, [the Court] balance[s] the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." Id.

As to the first factor, the individual privacy interest, "[w]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations." Id. at 382–83. "If no privacy interest is at stake, the Right–to–Know Law mandates disclosure." Id. at 383. Generally, "[a] clear privacy interest exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available." Reid, 169 N.H. at 531.

Officer Provenza asserts that "[i]n New Hampshire, a police officer has a substantial privacy interest in [an] unfounded or unsustained internal affairs report which precludes the disclosure to the public because it outweighs the public's right to know." (Pl.'s Pet. ¶ 25.) To support his assertion of the heightened privacy interest of police officers, Officer Provenza also urges the Court to consider RSA 105:13-b, RSA 516:36, and Pivero v. Largy, 143 N.H. 187, 191 (1998). (Pl.'s Pet. ¶¶ 26–28.) Officer Provenza further argues that "the publication of baseless allegations deprives a police officer of his/her constitutionally protected liberty and property interests" pursuant to Part 1, Article 15 of the New Hampshire Constitution. (Id. ¶ 27.)

Valley News contends that Officer "Provenza's privacy interest in disclosure in nonexistent." (Valley News's Obj. ¶ 31.) It asserts that the plaintiff's reliance on RSA 105:13–b, RSA 516:36, and Pivero is misplaced. (Valley News's Obj. ¶¶ 34–36.) Valley News points to numerous cases from other jurisdictions that stand for the proposition that courts routinely reject the argument that police officers have a privacy interest when their actions implicate their official duties, including in the context of internal investigation of citizen complaints. (Valley News's Obj. ¶ 31, fn.7.) To rebut Officer Provenza's constitutional argument, Valley News posits that "the procedural due process and privacy protections in . . . Part I, Article 15 of the New Hampshire Constitution protect individual citizens from government officials, not the other way around." (Id. ¶ 37.)[7]

The Court first addresses the plaintiff's invocations of RSA 105:13–b, RSA 516:36, and Pivero. The Court agrees that the plaintiff's reliance thereon is misplaced. RSA 105:13–b concerns the disclosure of evidence in a "police personnel file." RSA 105:13–b, I. In this case, however, the Town initially denied Valley News's request for a copy of the Report based on the "internal personnel practices" exemption, not the exemption for "personnel . . . files," in RSA 91–A:5, IV. (Valley News's Obj., Ex. 3.) Moreover, RSA 105:13–b, by its plain language, applies only to situations in which "a police officer . . . is serving as a witness in any criminal case." John Doe v. Gordon J. MacDonald, Merrimack Super. Ct., No. 217-2020-CV-176 (August 27, 2020) (Order, Kissinger, J.); see Duchesne v. Hillsborough County Attorney, 167 N.H. 774, 781 (2015) (observing that the "current

[7] To bolster this position, Valley News cites to Tompkins v. Freedom of Info. Comm'n, 46 A.3d 291 (Conn. App. Ct. 2012), which noted that "the personal privacy interest protected by the fourth and fourteenth amendments is very different from that protected by the statutory exemption from disclosure of materials." 46 A.3d at 297.

version of RSA 105:13–b addresses three situations that may exist with respect to police officers who appear as witnesses in criminal cases"). Finally, even if the Court was to "assume without deciding that RSA 105:13-b constitutes an exception to the Right-to-Know Law and that it applies outside of the context of a specific criminal case in which a police officer is testifying," an argument the plaintiff does not make, there is nothing in the record to suggest that the Report is contained in or is a part of the plaintiff's personnel file. New Hampshire Center for Public Interest Journalism, __ N.H. at __ (slip op. at 7–9); see Reid, 169 N.H. at 528 (discussing the personnel files exemption in RSA 91–A:5, IV). RSA 516:36 is also inapplicable because it governs the admissibility and not the discoverability of internal police investigation documents and, thus, has no bearing on the Right-to-Know analysis. Similarly, Pivero v. Largy is unpersuasive because that case did not concern the Right-to-Know Law and relied on a holding in Fenniman that has since been overruled.

With respect to the plaintiff's contention that disclosure of the Report to the public would deprive him of his "protected liberty and property interests" under Part 1, Article 15 of the New Hampshire Constitution (Pl.'s Pet. ¶ 27), the Court finds that the plaintiff has not sufficiently developed this argument for judicial review and deems it waived. See Guy v. Town of Temple, 157 N.H. 642, 658 (2008) (stating that "judicial review is not warranted for complaints . . . without developed legal argument, and neither passing reference to constitutional claims nor off-hand invocations of constitutional rights without support by legal argument or authority warrants extended consideration") (brackets, quotations and citation omitted); State v. Chick, 141 N.H. 503, 504 (1996) (considering waived

defendant's undeveloped Part 1, Article 15 argument upon which he did "not further elaborate").

The Court agrees with Valley News that Officer Provenza's privacy interests in disclosure, if any, are minimal. First, "the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Censabella, 171 N.H. at 426. Second, information concerning purely private details about a person who happens to work for the government is very different from facts, such as those detailed in the Report, concerning that individual's conduct in his or her official capacity as a government employee. See Lamy v. N.H. Public Utilities Comm'n, 152 N.H. 106, 113 (2005) (observing that "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") (quotations and citation omitted). Therefore, even "[a]ssuming there is a relevant privacy interest at stake, that interest is minimal because the [Report] do[es] not reveal intimate details of [Officer Provenza's] life," but rather information relating to Officer Provenza's conduct as a government employee while performing his official duties and interacting with a member of the public. See New Hampshire Civil Liberties Union, 149 N.H. at 441.

As to the second factor, the public's interest in the information, "[d]isclosure of the requested information should inform the public about the conduct and activities of their government." Lambert, 157 N.H. at 383. Indeed, "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." Reid, 169 N.H. at 532 (quotations and citation omitted). "The legitimacy of the public's interest in

disclosure, however, is tied to the Right-to-Know Law's purpose, which is 'to provide the utmost information to the public about what its government is up to.'" Id. (citing N.H. Right to Life, 169 N.H. at 111). "If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." Id. (citing Lamy, 152 N.H. at 111) (quotations omitted). "Conversely, 'an individual's motives in seeking disclosure are irrelevant to the question of access.'" Id. (citing Lambert, 157 N.H. at 383).

Officer Provenza argues that, because the Report ultimately concluded that the excessive force allegation against him was determined to be "not sustained," the public interest in the Report is insignificant. Officer Provenza further contends that nondisclosure of the Report actually promotes the public interest in two regards: firstly, "public policy requires that personnel matters be held confidential pursuant to statute and that matters and allegations not be indiscriminately disseminated by individuals," and, secondly, the public's interest in public safety is undermined if police are worried about dissemination of unfounded complaints, which would have a chilling effect on policing in the State. (Pl.'s Pet. ¶¶ 28, 31, 35.)

Valley News asserts that the "public interest in disclosure is strong." (Valley News's Obj. ¶ 28.) Specifically, Valley News argues that "[p]roducing the full report would enable the public to know not just the contours of Provenza's conduct, but also the policies and procedures governing internal affairs investigations and whether they were appropriately followed in this case." (Id. ¶ 29.) Valley News notes that this case occurs "[i]n this moment of conversation about police accountability nationally and here in New Hampshire"[8] and,

[8] Valley News directs the Court to Governor Sununu's Executive Order 2020-11, which recognized the "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance

as such, "it is imperative that the public be able to know whether law enforcement agencies can be trusted to hold themselves accountable, or if a different system is necessary." (Id.) Valley News posits that "setting aside the obvious public interest in allowing the public to evaluate the findings of MRI and the completeness of its investigation, there is a compelling public interest in enabling the public to use the MRI report to evaluate the integrity of the Canaan Police Department's internal affairs investigation of this incident." (Id. ¶ 30)

Valley News relies heavily on, and the Court finds persuasive, a Vermont Supreme Court case, Rutland Herald v. City of Rutland, 84 A.3d 821 (Vt. 2013), for the proposition that "there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct." Id. at 825. The Rutland Herald court reasoned that "the 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." Id. (quotations omitted).

Indeed, the public has a significant interest in knowing how the police investigate such complaints for a number of reasons. First, the public has the right to know that the police take their complaints seriously and that the investigation was "comprehensive and accurate." See Reid, 169 N.H. at 532 (in reference to an investigation of the New Hampshire Attorney General's office, the Court noted "[t]he public has a significant

transparency, accountability, and community relations in law enforcement." https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf.

interest in knowing that a government investigation is comprehensive and accurate") (quotations omitted); N.H. Civil Liberties Union, 149 N.H. at 441 ("Official 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") (quotations and citation omitted). Second, the public similarly has the right to know whether the police officer in question was given a fair investigation aligned with traditional notions of due process. Third, as is evidenced by the national conversation concerning policing in the United States, transparency at all levels of police conduct investigations is fundamentally important to ensure the public's confidence and trust in local police departments. See RSA 91-A:1 (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.") (emphasis added); Prof'l Firefighters of N.H., 159 N.H. at 709 (noting that "knowing how a public body is spending taxpayer money in conducting public business is essential to the transparency of government, the very purpose underlying the Right-to-Know Law").

Moreover, the New Hampshire Supreme Court's overruling of Fenniman reinforces the importance of transparency in government. See Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 9) ("An overly broad construction of the 'internal personnel practices' exemption has proven to be an unwarranted constraint on a transparent government."); see e.g., Salcetti v. City of Keene, (unpublished order, decided June 3, 2020), (slip op. at 7, 9–10) (where the Supreme Court vacated and remanded a superior court decision denying a petition concerning "any and all citizen complaints, logs, calls, and emails regarding charges of excessive police force and/or police brutality" in light of its recent decisions in Union Leader Corp. and Seacoast Newspapers, Inc.).

As to the third factor, the balancing of the private and public interests, "'the legislature has provided the weight to be given one side of the balance by declaring the purpose of the Right-to-Know Law in' the statute itself." Reid, 169 N.H. at 532 (brackets omitted) (quoting Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996)). Specifically, the preamble to RSA chapter 91–A provides: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91–A:1. "Thus, 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." Reid, 169 N.H. at 532 (quotations and brackets omitted). Here, although Officer Provenza is not a public entity, as the party opposing disclosure he bears the same "heavy burden." See id.

Officer Provenza calls for a bright-line rule to the effect that if an internal police investigation concludes that the complaint against the officer is unfounded or not sustained, then the officer's privacy interest outweighs the public interest. (Pl.'s Pet. ¶¶ 25, 28.) This proposition, however, contravenes the purposes of the Right-to-Know Law — ensuring maximum public access to governmental proceedings and records, and promoting accountability of public officials to the citizens of New Hampshire. See RSA 91–A:1. The people of New Hampshire have the constitutionally rooted right to access public information and hold those in power accountable for their actions, a right "essential to a democratic society." Id.; N.H. Const. pt. 1, art. 8. To apply the bright-line rule that Officer Provenza urges the Court to adopt would be to acknowledge that the people of New Hampshire merely have the right to access information concerning founded

misconduct of police officers and not, among other things, whether an investigation resulting in a finding that the misconduct complaint was not sustained was "comprehensive and accurate." See Reid, 169 N.H. at 532. In the absence of Fenniman and its progeny, Officer Provenza cannot meet his "heavy burden" to shift the balance towards nondisclosure. Reid, 169 N.H. at 532. The Court concludes that the balancing test overwhelmingly favors the public's interest in disclosure of the report in the name of transparency and accountability. See RSA 91–A:1.

As the trial court in Union Leader Corp. noted, "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." Union Leader Corp. v. Town of Salem, No. 218-2018-CV-01406, 2019 WL 3820631, at *2 (N.H.Super. Apr. 05, 2019) (vacated and remanded by Union Leader Corp.,173 N.H. at __). "Democracies die behind closed doors," and through laws, such as the Right-to-Know Law, the people are better able to hold government officials accountable. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

For the reasons articulated above, the Court rules that the Report is subject to disclosure. The Right-to-Know Law provides "[e]very citizen" with a right to inspect and copy government records except as otherwise prohibited by statute" and "requires public bodies and agencies to make such government records available upon request." RSA 91-A:4, I; RSA 91-A:4, IV. Here, because the Report is not exempt under RSA 91-A:5, IV, the Town must comply with the statute by disclosing the Report.[9]

[9] At the September 15, 2020 hearing, the Town requested that certain information–specifically medical information, license plate numbers, and the names of minors–be redacted from the Report. Valley News does not object to the proposed redactions. (Index #19.) The Court agrees that the privacy interest in this information outweighs any public interest in it. Reid, 169 N.H. at 531.

III. Conclusion

For the foregoing reasons, the plaintiff's petition for declaratory judgment and for preliminary and permanent injunctions is **DENIED**, and Valley News's crossclaim for declaratory relief is **GRANTED**.

The Court requests that the parties review the redacted copy of this order, attached hereto, and if they believe further redaction is necessary, to so inform the Court by motion filed within seven (7) days of the date of the clerk's notice of decision. Thereafter, the redacted version will be issued publicly.

So Ordered.

Date: 12/2/2020

Hon. Peter H. Bornstein
Presiding Justice

HOUSE

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HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-two

AN ACT

requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Confidentiality of Police Personnel Files. Amend RSA 105 by inserting after section 13-a the following new section:

105:13-b Confidentiality of Personnel Files.

I. Except as provided in paragraph II, 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.

II. No personnel file on a police officer shall be opened in a criminal matter involving the subject officer unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence pertinent to the criminal case. If a 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, with the prosecutor and the defense counsel present, and make a determination whether it contains evidence pertinent to the criminal case. Only those portions of the file which the judge determines may be admissible as evidence 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.

2 Effective Date. This act shall take effect January 1, 1993.

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING on HB 1359

BILL TITLE: Requiring confidentiality of personnel files of local police officers except in certain criminal cases.

DATE: January 14, 1992

LOB ROOM: 208 **Time Public Hearing Called to Order:** 10:30 AM

(please circle if absent)

Committee Members: Reps. Martling, Lown, Jacobson, C. Johnson, Lozeau, Moore, N. Ford, Lockwood, Bickford, Hultgren, Record, R. Campbell, Nielsen, Dwyer, D. Healy, Burling, Baldizar, D. Cote, Wall and DePecol

Bill Sponsors: Rep. Burling, Sullivan District 1; Rep. Record, Hillsborough District 23

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

REP. ALICE RECORD, Hillsborough District 23, Co-Sponsor: Spoke in support of bill. This bill is submitted at the request of a chief of police. It is a problem for police departments. Files of police officers should be maintained in confidentiality unless so directed for release by a judge. Currently attorneys can request and obtain these files.

*CHIEF OF POLICE DAVID BARRETT, NH Association of Chiefs of Police: Spoke in support of this bill. In a case he had recently, the judge allowed a defense attorney to obtain the personnel file of a police officer because he did not think the police officer was creditable. RSA 91:a specifically forbids this type of disclosure. It is an abuse. Since that case, 60 or 70 cases have come up in violation of our state laws. Attempts to get information from private files of police officers is nothing more than a fishing expedition on the part of defense attorneys. These files go into great depth on the police officers, including psuchological evaluations and many, many things that are not appropriate to be seen by the public.

NINA GARDNER, NH Judicial Council: Spoke in support of the bill. This bill guarantees that the privacy of the personnel file of the police employee be maintained.

EDWARD KELLEY, Manchester Police Patrolmen's Association: Spoke in favor of this bill. He has seen cases of defense counsel requesting the file of a police officer to be able to discredit the police officer's testimony. Information from this file goes through the entire life of the officer, and much of this information is not germaine to the case. Yet this information is used by defense attorneys to discredit the officer. This is inappropriate, and in violation of the privacy of personal information. There are reprimands

in these files, there are psychological evaluations and other items of a private nature that should not be in the hands of an attorney.

JIM McGONIGLE, JR., NH Police Association: Spoke in favor of this bill. The right of privacy of the police officers' files are already protected by RSA 91:a; however, there are many abuses of this statute by defense counsel. He feels a judge should review the file in camera alone. If the judge finds there is reason to give the file to defense, then he would do so. Mr. McGonigle does not like the idea of so many persons seeing a confidential file. He prefers this method of file examination if it is not constitutionally denied.

CLAIRE EBEL, NH Civil Liberties Union: Spoke in favor of the bill because the rights of privacy of police officers are already protected by law.

*CHARLES PERKINS, "The Union Leader": Spoke opposing the bill. This bill gives special privileges and rights to police. The public's right to know outweighs certain rights of the police officer's right to privacy. The prohibition in this bill takes away the public's right to know.

APPEARING IN SUPPORT OF THE BILL, BUT NOT TESTIFYING:
LOUIS COPPONI, NH Troopers Association
MATT SOCHALSKI, NH Association of Fire Chiefs
DOUG PATCH, NH Department of Safety

Respectfully submitted,

C. William Johnson

C. William Johnson, Clerk

26149

Public hearing Judiciary Committee January 14, 1992 10 30 AM
HB 1359, requiring confidentiality of personnel files of local police officers except in certain Criminal Cases.
Sponsors: Rep. P. Burling Sull. 1 Rep. A. Record Hills. 23

Sponsor Rep. Alice Record in support of bill. This bill put in at request of a Chief of Police. It is a problem for for Police departments. Files of Police officers should be maintained in confidentiality unless so directed for release by a judge. Currently attorneys can request and obtain these files.

Chief of Police David Barrett, N.H. Association of Chiefs of Police in support of this bill. In a case he had recently the judge allowed a defense attorney ~~to~~ obtain the personnel file of a police officer because he did not think the police officer was creditable. RSA 91:a specifically forbids this type of disclosure It is an abuse. Since that case 60 or 70 cases have come up in violation of our state laws. Attempts to get information from private files of Police officers is nothing more than a fishing expedition on the part of defense attorneys. These files go into great depth on the police officers including psychologic evaluations and many, many things that are not appropriate to be seen by the public. (See file for additional written testimony.)

Nina Gardner N.H. Judicial Council in support of the bill. This bill guarantees the privacy of the personnel file of the police employee be maintained.

Edward Kelley Manchester Police Patrolmans Assoc in favor of this bill. He has seen cases of defense Council requesting the file of a police officer to be able to discredit the police officers testimony. Information from this file goes through the entire life of the officer and much of this information is not germane to the case and yet this information is used by defense attorneys to discredit the officer. This is inappropriate and in violation of the privacy of personal information. There are reprimands in these files, there are psychological evaluations and other items of a private nature that should not be in the hands of an attorney.

Jim McGonigle Jr. N.H Police Association in favor of this bill. The right of privacy of the police officers files are already protected by RSA: 91a, however, there are many abuses of this statute by defense Council. He feels judge should review the file in camera alone. If he feels there is reason to give the file to defense then he would do so. He does not like the idea of so many persons seeing a confidential file. He prefers this method of file examination if it is not Constitutionally denied.

Claire Ebel, N.H. Civil Liberties Union. In favor of the bill because rights of Privacy of Police Officers are already protected by law.

Charles Perkins, "The Union Leader" in opposition of the bill. This bill gives special privileges and rights to police. (See written notes for testimony) The Publics right to know outweigh certain right of the police officers right to Privacy. The prohibition in this bill takes away the ~~right~~ Publics right to know.

HB 1359

Appearing in support of the bill but not testifying

Louis Copponi, N. H. Troopers Association
Matt Sochalski, N. H. Association of Fire Chiefs
Doug Patch, ~~Re~~ N. H. Department of Safety.

Respectfully Submitted
Rep. C. William Johnson
Clerk -

HB1359 N.H. Assoc. of Chiefs of Police Testimony Chief David Barrett

On the surface, this case appears to be reasonably innocuous. As such, I have absolute respect for your Honor's discretion and judgment. However, history has shown us time and time again that reasonably insignificant and narrowly focused decisions have a habit of replicating themselves in a broader fashion. In fact, how many times have we in this room asked ourselves "How did we get to this point? Could this have been the intent when the original decision was rendered? Or for that matter, when the Constitution was penned?"

Defense Counsel have an obligation to zealously represent their clients and to insure the preservation of their Constitutional rights. But what about the rights of the police officer or employee and his or her family? Frankly, it strikes me as particularly abhorrent that a police officer who is hired and charged with the responsibility of keeping the peace, preserving the rights of the citizens, and occasionally apprehending offenders, should have to expose his personnel file for merely doing his or her job.

I believe this decision opens the door to potential abuse by defense attorneys throughout the State intent on fishing expeditions. It strikes me that, absent any facts to show that the personnel file might contain legitimate foundation for an attack on an officer's credibility and veracity, this Defendant's Motion is meant to do nothing more than embarrass this officer and invade his privacy.

Without sounding like I have read too much George Orwell, would it be fair for me to conclude that, given the potential for abuse, in six months, two years or five years, we as police managers will be reluctant to discipline employees for fear that, as a matter of routine, any time a defense attorney gets a tickle that an arresting officer may have been subjected to a disciplinary action, that, upon review, that action can be so broadly construed so as to impugn that officer's credibility?

Conversely, could this situation manifest to such a degree that an employee who might normally accept a disciplinary action, create an additional burden on the hiring authority by grieving and appealing any disciplinary action for fear it may become a public record?

When an offer of employment is made, there is an expectation on the part of the employee that we, the employer, will maintain the privacy and confidentiality of personal financial, psychological and physical matters. At what point are the Constitutional rights of the Defendant of more import than that of the rights of an employee who has done no wrong.

Police Officers, as a class of employees, have become viewed by the State of New Hampshire as second class citizens. The Supreme Court has said that we do not have the right of civil redress. The Legislature has voted against bills for enhanced penalties for assaulting a police officer. Now we are addressing the Court on the issue of their right to privacy. All of these are rights guaranteed to every citizen of this State yet denied to us the minute we assume our professional roles. Am I to assume that an officer, acting in his or her appointed capacity, has deemed to have given up his or her Constitutional rights? With all due respect to your decision in this matter, the slightest broadening of this decision by others down the road can only lead to the further erosion of the Constitutional rights of police employees.

I would like to request of this Court that, since I have personally generated the majority of the material contained in this personnel file, it be willing to accept my word and representation that there is absolutely nothing in this file that could impugn the integrity or credibility of Officer Jaillet. Beyond that, it is my opinion that I am merely the keeper of the file, and the contents therein are the property of the employee. I would like this Court to know that I have a signed letter by Mr. Jaillet dated May 6, 1991 asking that I not release his file. Since, however, the Court has Ordered me to do so under threat of contempt, I am hereby surrendering former Officer Jaillet's personnel file.

Respectfully Submitted

_____

David T. Barrett
Chief of Police
Jaffrey, N.H.

HB 1359 COB 208 HB 1359 10/1m

01/13 21:16 CXP RTK VER-03 BY-CXP DEPTH-
PAGE-

testimony of Charles Perkins "Union Leader newspaper"

TOP OF STORY<
Good morning. My name is Charles Perkins. I am the managing editor of The Union Leader and the New Hampshire Sunday News.<EOP>

This morning we are discussing a bill that would not reinforce the existing protection of the privacy of New Hampshire's police, but instead would give them extraordinary status as men and women above the laws that apply to others. It would establish our police as a special class of public servants who are less accountable than any other municipal employees to the taxpayers and common citizens of our state. It would arbitrarily strip our judges of their powers to release information that is clearly in the public benefit. It would keep citizens from learning of serious misconduct by a police officer.<EOP>

Such a change in state law is not in the best interests of the state at large, nor is it in the best interest of the state's police.<EOP>

While the intent of this bill may be benign, if enacted it would prove divisive. By giving special privileges and protections to New Hampshire's police, it will invite other groups of municipal employees to demand equal treatment. It will unnecessarily endanger the high regard in which New Hampshire residents hold their police officers. And it will knock a gaping hole in the right-to-know law.<EOP>

The New Hampshire right-to-know law is not a statute which strips police or public employees of their privacy. It is not a law which allows pesky reporters or busybodies to rummage through the personnel files of police officers at will. Instead, it effectively and properly keeps confidential the vast majority of public employee personnel files and protects the privacy of law enforcement officers. As written by the Legislature and as interpreted by the state's highest court in the past quarter-century, the right-to-know law does empower the state's judiciary to weigh the sometimes conflicting interests of public employees and of inquiring citizens in determining what records shall be private, and what shall be public.<EOP>

In the precedent-setting Mans v. Lebanon School Board case of 1972, the New Hampshire Supreme Court ruled that in right-to-know cases involving personnel records of public employees, the trial court must balance the benefits of disclosure to the public against the benefits of nondisclosure.<EOP>

That isn't an open-door policy. It is a sensible rule. It is not arbitrary. It works, because it is fair, and flexible. It allows a Superior Court judge to determine if the limited release of information about an employee is or is not in the public interest. Should the judge's decision be unacceptable to the employee, he or she can appeal. This system is a carefully crafted test that has served the state well for twenty years.<EOP>

In practice, police already have special treatment from judges in New Hampshire to shield their personnel records. As an example, in the continuing case of Union Leader Corporation v. Dover Police Department, Judge Michael Sullivan refused this newspaper's request for schedules and pay records, citing Chief William Fenneman's testimony about the risks that release of that information would pose to his officers and to public safety. That was a request for special treatment for police officers. The current law allows it. The system worked.<EOP>

In that case, which is now on appeal to the state Supreme Court, Judge Sullivan did order the release of an internal investigation and of disciplinary action taken against one officer, ruling that the public's right to know outweighs that officer's wish to keep his violation secret.<EOP>

The judge applied a balancing test. He found that some information should be protected, due to the nature of police work. He found that other information should be released to the public.<EOP>

If House Bill 1359 passes, the Legislature will be telling Judge Sullivan

scrutiny in all but a handful of criminal cases is preferable to a system in which the public's right to know is weighed against an officer's right to privacy. The Legislature will be telling the courts that even if the case for release of this information to the public is clearcut, even if it is overwhelmingly in the interest of the police department involved, it can't be done. The prohibition in the first paragraph of this bill is absolute.{EOP}

That is not good public policy. Don't tie the hands of our judges with this bill. I urge you to consider the full impact of this legislation, because I believe that once you do, you will vote to kill it.

Record – at req. of one police chief

• secured by request of an attorney.

Chief ~~Barrett~~ David – Taffrey   5/91 decision opened door to defense fishing expedition.

felony DWI in motion – def counsel req officer's personnel file

"rumor on the street not the standard of the inv. of privacy"

setting dangerous precedent – would start to see pattern

60/70 times since – req to relinquish personnel files. Kyler standard.

request to view personnel file for violation. –

Amendment to HB 1359

Amend the title of the bill by replacing it with the following:

AN ACT

relative to the confidentiality of police personnel files in criminal cases.

Amend RSA 105:13-b as inserted by section 1 of the bill by replacing it with the following:

105:13-b Confidentiality of Personnel Files. No personnel file on a police officer or fire ~~officer~~ chief or designee who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of 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 or fire department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination 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.

4648L

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

HOUSE COMMITTEE JUDICIARY

Public Hearing on (HB)/SB # (please circle one): 1359

Bill Title:

Date:

L.O.B. Room #: 208 Time Public Hearing Called to Order: 10 30/A.

(please circle if absent)

Committee Members: Reps. Martling, (Lown,) Johnson, (Jacobson,) (Lozeau) Ford, (Bickford,) Record, Nielsen, (Healy,) Cote, (Wall,) (Moore,) Lockwood, Hultgren, Campbell, (Dwyer,) (Burling,) Baldizar, (DePecol.)

Bill sponsors:

Testimony

* Use asterisk if written testimony and/or amendments are submitted.

Speaker and Comments:

HOUSE COMMITTEE JUDICIARY

Executive Session on (HB/SB) # (please circle one): 1359

Bill Title:

Date: 2/5/92

L.O.B. Room #: 208

(please cirlce, if absent)

Committee Members: Reps. Martling, Lown, Johnson, Jacobson, Lozeau, Ford, Bickford, Record, Nielsen, Healy, Cote, (Wall) Moore, Lockwood, Hultgren, Campbell, Dwyer, Burling, Baldizar, (DePecol)

OTP, (OTP/A), ITL, Re-refer - (please circle one)

Motion:

Moved by Rep. Burling

Seconded by Rep. Lockwood

Vote: 17-1 (Please attach record of roll call vote)

Motion:

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote)

HOUSE COMMITTEE: JUDICIARY

Executive Session on (HB)/SB # (please circle one): 1359

Date: 2/5/92

Consent Calendar: Yes ✓ Vote: 18-0 No ____ Vote: ____

(requires unanimous vote)

Committee Report: (please fill out committee report slip in duplicate)

Respectfully submitted,

Rep. G. William Johnson, Clerk

JUDICIARY 1991-1992 SESSION

HB Bill # 1359

Public Hearings 1/14/92 Executive Session 2/5/92

COMMITTEE REPORT: OTP/A

	YEAS	NAYS
Martling, W. Kent, Ch.	✓	
Lown, Elizabeth D., V. Ch.	✓	
Jacobson, Alf E.	✓	
Johnson, C. William	✓	
Lozeau, Donnalee M.	✓	
Moore, Elizabeth A.	✓	
Ford, Nancy M.	✓	
Lockwood, Robert A.	✓	
Bickford, Drucilla	✓	
Hultgren, David D.	✓	
Record, Alice B.	✓	
Campbell, Richard H., Jr.	✓	
Nielson, Niels F., Jr.	✓	
Dwyer, Patricia R.	✓	
Healy, Daniel J.	✓	
Burling, Peter H.	✓	
Baldizar, Barbara J.	✓	
Cote, David E.		✓
Wall, Janet G.		
DePecol, Benjamin J.		
TOTAL VOTE	17	1

Appeared in Favor	Appeared in Opposition

2065 9
0775T

COMMITTEE REPORT

COMMITTEE: Judiciary

BILL NUMBER: 1359

DATE: 2/5/92 CONSENT CALENDAR: YES ✓ NO ____

OUGHT TO PASS ____

OUGHT TO PASS WITH AMENDMENT ✓ 17-1

INEXPEDIENT TO LEGISLATE ____

RE-REFER TO COMMITTEE (1st year session) ____

REFER FOR INTERIM STUDY (2nd year session) ____

VOTE: 17-1

STATEMENT OF INTENT

This bill was submitted in response to growing evidence that police personnel files are being used for "fishing expeditions" in the course of criminal trials, the purpose of the fishing expedition being to deter or delay criminal prosecutions. The bill as amended by the committee provides an effective and appropriate standard for court review of personnel files, and preserves the important confidentiality which police personnel files require.

The FN calls for state expenditures of $ ____ in FY '91 and

$ ____ in FY '92. The Committee amendment

increases/decreases House expenditures.

Elizabeth D. Cowan
Signature

Original: House Clerk
cc: Committee bill file

LEG021

USE ANOTHER FORM FOR MINORITY REPORT

1457/02

HOUSE BILL 1359

Judiciary
Committee

for the Committee

Committee

for the Committee

CHAIRMAN'S COPY

GRESS CHART

BY H DATE FEB 12 1992 FLOOR ACTION TAKEN OTP/A COMMITTEE Judic AMENDMENT DOCUMENT# 4648 ASST. CLERK'S INITIALS

BY S DATE 3-26-92 FLOOR ACTION TAKEN OTP COMMITTEE Judic AMENDMENT DOCUMENT# - ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

BY DATE FLOOR ACTION TAKEN COMMITTEE AMENDMENT DOCUMENT# ASST. CLERK'S INITIALS

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

CHAIRMAN'S COPY

REFERRED TO: Judiciary

AN ACT requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Due Date: 2/26/92

ANALYSIS

This bill declares that the personnel files of local police officers are to remain confidential except in certain criminal cases.

- -

EXPLANATION: Matter added appears in ***bold italics***.
Matter removed appears in [brackets].
Matter which is repealed and reenacted or all new appears in regular type.

HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-two

AN ACT

requiring confidentiality of personnel files of local police officers except in certain criminal cases.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Confidentiality of Police Personnel Files. Amend RSA 105 by inserting after section 13-a the following new section:

105:13-b Confidentiality of Personnel Files.

I. Except as provided in paragraph II, 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.

II. No personnel file on a police officer shall be opened in a criminal matter involving the subject officer unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence pertinent to the criminal case. If a 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, with the prosecutor and the defense counsel present, and make a determination whether it contains evidence pertinent to the criminal case. Only those portions of the file which the judge determines may be admissible as evidence 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.

2 Effective Date. This act shall take effect January 1, 1993.

Amendment to HB 1359

Amend the title of the bill by replacing it with the following:

AN ACT

relative to the confidentiality of police personnel files in criminal cases.

Amend RSA 105:13-b as inserted by section 1 of the bill by replacing it with the following:

105:13-b Confidentiality of Personnel Files. No personnel file on a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of 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 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.

4648L

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

HOUSE BILL AMENDED BY THE HOUSE

1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT relative to the confidentiality of police personnel files in criminal cases.

AMENDED ANALYSIS

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HOUSE BILL AMENDED BY THE HOUSE

3732L
92-2419
09

HB 1359

STATE OF NEW HAMPSHIRE
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2 Effective Date. This act shall take effect January 1, 1993.

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3732L
92-2419
09

HOUSE BILL - FINAL VERSION

1992 SESSION

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT relative to the confidentiality of police personnel files in criminal cases.

AMENDED ANALYSIS

This bill permits the personnel file of a police officer serving as a witness or prosecutor in a criminal case to be opened for purposes of that case under certain conditions.

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HOUSE BILL - FINAL VERSION

HB 1359

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and ninety-two

AN ACT

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2 Effective Date. This act shall take effect January 1, 1993.

SENATE

1992 HB 1359

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HOUSE BILL AMENDED BY THE HOUSE

1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT relative to the confidentiality of police personnel files in criminal cases.

AMENDED ANALYSIS

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HB 1359

HOUSE BILL AMENDED BY THE HOUSE

3732L
92-2419
09

HB 1359

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nine hundred and ninety-two

AN ACT
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2 Effective Date. This act shall take effect January 1, 1993.

DATE: March 11, 1992
TIME: 11:36 a.m.
ROOM: 103, LOB

The Senate Committee on Judiciary held a hearing on the following:

HB 1359: relative to confidentiality of police personnel files in criminal cases.

Committee members present:

Senator Podles, Chairman
Senator Hollingworth, Vice Chairman
Senator Colantuono
Senator Nelson
Senator Russman

Senator Podles opened the hearing.

Rep. Alice Record, Hills D 23: This is something that has proved to be very much of a problem to the police around. In opening the files of somebody who is to testify, the information that is in the police files on their special officers, or people who work for the different police departments who have to come out as a witness, testify to an arrest or what have you. It seems that we already do have on the books that says they shall not open these files, but the judges have said it is not explicit enough. So therefore they are opening the files on the police officers. The information included in the files of the personal life of these men is very different than it is in a company. Sanders Associates, or Digital or any of those have a file that has color, race, creed, and those things have been eliminated that they can no longer have too. But in the police files, they have a total record of these men who have been hired by the police department. And it is something that is very dangerous in my estimation of their opening these files. This allows for the judge to open the file in camera and decide whether there is anything in the file contradictory to testimony that might be given by a police officer. And if there is nothing relevant to a particular case, he orders the files closed again, but it does not become public property. Peter and I feel very strongly about this. And we put this in on behalf of Chief Barrett. There have been different problems within the police departments. I would be happy to answer any questions.

Chief Barrett, Police Chief, Jaffrey: I am here as the legislative representative and chair of the New Hampshire Association of Chiefs' of Police. As Representative Record pointed out, we, the Chief's Association, came to her and Representative Burling. First we explained our problem and then we asked if they might be willing to sponsor a bill which they gladly did after we explained the nature and the kinds of problems that we have had. This has come up as a result of some actions that have taken place in certain district and particularly superior courts throughout the state in the last year. I think the case that I had personally was the one that kind of set the wheels rolling. I was concerned at the time that it might do that if I put up much of a stink, which I did. Of course, it ultimately came down to a test of will and the fellow with the black robe won as he appropriately should. But I would like to share with you some of my testimony before the court that day

and explain to you some of the things that subsequently took place. On the surface, that case appeared to be reasonable innocuous. However, history has shown us time and time again that reasonable insignificant and narrowly focused decisions from the bench have a habit of replicating themselves in much broader fashion. In fact, how many times have we, in this very room, asked ourselves how did we get to this point. Could this have been the intent when the original decision was rendered, for that matter, when the constitution was penned. Defense council has, and I would defend their right to do so, an obligation to zealously represent their clients and to insure preservation of their client's constitutional rights. But what about the rights of a police officer who are employed and his or her family. Frankly, it strikes me as particularly abhorrent that a police officer who is hired and charged with keeping the peace, preserving the rights of the citizens and occasionally apprehending the offender should have to expose his personnel file for merely doing his job. That is what happened in that case. I believe the decision opens the door to potential abuse by defense attorneys throughout the state intent on fishing expeditions. It strikes me that absent any facts to show that a personnel file might contain legitimate foundation for an attack on the officer's credibility and voracity, that a defendant's motion is meant to do nothing more than embarrass an officer and invade his privacy. I would like to point out that subsequent to the case that I am making reference to, as I had foreseen, this matter has come up 38 times in less than a year. We have even seen it come up in the district court for violations. Fortunately, the two courts that it has come up in the district court level, the judges have ruled appropriately that it is not their perview. But, it seems to us that it is pretty clear that since the door got opened, this has become a regular course of conduct. I should point out to you that in the case that brought this all to light, the court ruled that a sufficient showing existed that there may be some concern about the office who was merely testifying about an arrest that he made, of the officer's credibility and voracity. I accepted that on the surface, but in open court, I found out the standard that was set was, as it was represented by defense council, that in the case at hand that created this, rumor on the street and it is straight from the transcript (and I have the transcript) constituted enough for the court to rule in favor of viewing this officer's personnel file. I submit, if we could get search warrants based on rumor on the street, we would be doing 50 or 60 of them a week. It seems to me that an officer, or any police employee, who has taken his responsibility seriously, has agreed to go through the kind of selection process that is required today to become a police officer, and once he raises his hand and is sworn in to protect the citizens of this state and enforce the laws appropriately that at no time should he be expected to have given consent to abrogate his rights under the constitution of the United States or the state of New Hampshire. And that is what has happened in this case. I submit to this committee that no one in no other walk of life would have to open up their personnel files for any reason such as doing their job. And that is what happened in this case. The officer did nothing but his job. By the way, I would like to report to you that in the case at hand which started this whole ball rolling, the judge ruled there was nothing in the file. We offered that. We said there was nothing in the file, but they had to go see for themselves. At any rate, this does set up some rules and some parameters. Frankly, I would like to see an absolute prohibition, but since I realized the tooth fairy died some time ago, that is not going to happen. But this does at least set some parameters. I spoke to Representative Burling, and because of vacation, he is unable to be here. I do have a copy of the letter he sent to the Chair, and I think it pretty well

outlines that. I would like to also share with you, without belaboring the point, some of the things that you might find in a personnel file. If the police agency is doing their job, like I would like to believe most of us do, you are going to find initial written test scores, physical agility exams, you are going to find psychological profiles in there. And I don't frankly think that is something that should be shared with many people. You are going to find financial documents and records, because we do credit checks on our prospective employees. You are going to find counseling, you are going to find family matters that have come up and created some kind of interference with their performance and if we as good police administrators are doing our job, we will in fact have that material in there because we have to insure the credibility and the performance of our employees. You are going to find the kinds of things that you won't find in the average working person's file. I don't know many occupations that require psychological profiles. Those things are all contained in a personnel file. And it seems to me that the average person should expect some privacy on those issues. I could go on because obviously I feel very strongly about this, but I will defer to any questions.

Senator Thomas Colantuono, D. 14: I am just curious how you envision this working. It says the sitting judge has to make a specific ruling that probable cause to exist. How does the judge make that ruling? What constitutes probable cause and could rumor on the street be enough?

Chief Barrett: Certainly in my view it wouldn't and I would hope in yours as an attorney that that doesn't make the standard of probable cause. But what happened absent this, in the case that started this, is there was no requisite of probable cause. Sufficient showing was the dialog that was used. Probable cause, as we know - those of us who operate in the system, is a standard that has to be met. I always liken it to the early days in my career that if you have 100 percent, you have to have at least 51 percent to meet the probable cause standard if you were going to break it up into percentages of all these things put together. The totality of those issues that may be raised, you would have to at least be 51 percent. Certainly, I would like to believe that rumor on the street does not constitute anybody's interpretation of probable cause. I am told from the Judicial Council, one of the reasons they like the concept is because it sets some rules which didn't exist before. I would say that we are going to have to rely on the judiciary to appropriately deal with what constitutes probable cause.

Senator Thomas Colantuono, D. 14: Where you might get most of these cases is on assault situations, where someone is charged by a police officer and the defense is going to be "I was just defending myself, he hit me first." And whether it is rumor on the street or just well known in the community that that police officer has had two or three internal investigations for abusing citizens, that is highly relevant. That is my question. How do you get that in front of a judge so that a judge can say, "I think we should look at that."?

Chief Barrett: I don't have an answer for you, but I would say, however, that the instance of cases that have come up since this was started, only 1 of them was an assault case. This one was on a felony DWI case, which had nothing to do with assault.

Senator Mary S. Nelson, D. 13: I just want to follow up on Senator Colantuono's question. I was thinking the same thing, contains relevant

evidence, how is the judge going to determine that there is evidence relevant to the criminal case. And how is an attorney going to get that before the judge? How are you going to do it? Are you going to go to the judge, write him a letter, petition him?

Chief Barrett: Are you talking about defense counsel? How are they going to do it?

Senator Mary S. Nelson, D. 13: Any lawyer that wanted to get this information, I don't know what you call it, but you want to go before the judge and you want them to. How do they do it now?

Chief Barrett: They would file a motion. They would make some offer of proof so far as they understand it and the judge is either going to say this meets the standard or it doesn't.

Senator Mary S. Nelson, D. 13: And if this law is passed, they can do that?

Chief Barrett: They should be able to do that.

Senator Mary S. Nelson, D. 13: What would stop them from doing that? Is there anything in this statute that prevents them from doing that?

Chief Barrett: Not that I am aware of. They can file a motion. What this does is set some rules that you have to at least follow before that happens. Before we just arbitrarily say I want to look at this guy's file.

Senator Mary S. Nelson, D. 13: I don't see what the rules are?

Chief Barrett: The rule says that it has to be the matter at hand, and it has to meet some probable cause standard. Absent this legislation, we have found that there was no standard and if you don't meet any standard it can be at will. Like in the case we had where rumor on the street met the standard. I don't think rumor on the street should be the standard.

Senator Mary S. Nelson, D. 13: So particular piece of legislation would help in preventing rumor on the street?

Chief Barrett: Absolutely. I don't know of any legal mind that would say that constitutes probable cause. If it is, as I said, we would be doing search warrants every day of the week, if that is all you have to do to meet a probable cause standard.

Senator Beverly Hollingworth, D. 23: Probably the standard of probable cause would answer this but I am thinking of the Cushing case, where the police officer killed Mr. Cushing and all the records indicated they had a hard time getting those records. But when they were released, then it became known that he had problems. In that case, under this, perhaps his record would be able to be achieved because they could prove that there was cause.

Chief Barrett: It would be incumbent on the prosecutor to meet a probable cause standard. Whoever wants the records has to meet some standard and they have to say this constitutes probable cause. Ultimately the decision is the judge's. That is the way it always is on everything. The judge is going to rule whether that standard has been met or not. Some judges are going to, in

their practice or application, their standard may be higher than another judge. We know that is true in every case we take before the court. Some courts see the standards for anything different than others. I am sure counsel will both agree to that. They all have their own way of viewing it. That is going to vary from court to court because you are still leaving it up to the bench to decide when you have met that threshold. When you have passed the threshold and have met the probable cause standard. Would this correct that problem? I don't want to say yes or no. It certainly would have set some standard in that case which doesn't exist now. That judge may have seen that as a much higher threshold to meet than the one I had.

Senator Beverly Hollingworth, D. 23: One of the things it says is "only those portions of the file which the judge determines to be relevant." That bothers me a little bit, because again it means their discretion.

Chief Barrett: Yes. That is discretion on the part of the bench. Do you want to expose the whole file? I don't think you should, personally. I would think you have to consider the kind of material that is in a personnel file. Are officers financial records germane on an assault case, for instance. I don't think so. They might be germane on a theft case. It would depend on the issue. I don't think you should be getting into people's personnel files unless you have really demonstrated a need to do so. I fall back on my argument before we got into specifics that was as a class of employees where does it say you abrogate your rights, the rights that you have, the rights that the guy who works for General Electric has, or the guy who works for the state highway department has. We should be entitled to the same rights. Granted, we do something a little differently, and that is why this is at least allowing some access if you have met a standard. But, if we didn't do that, I would say we have every constitutional right to keep that matter private. I can't go to my local school board and say I disagree with one of the teachers and I would like to see their personnel file because it is my understanding they whatever. They say "yeah, right." And that wouldn't happen. I wouldn't have access to it. Well I am not sure that we should be found in a different class or put in a different category, as law enforcement people. Again, I don't know that we should be expected to have abrogated our rights under the constitution by merely raising our hand and accepting the responsibility of our position.

Rep. Kent Martling, Straf D 4: I am here for one reason I knew that Peter was going to be away but I understand he has written you letter, and as chairman of Judiciary in the House, I just wanted to report that we had a hearing that consisted of Nina Gardner, Chief Barrett, Ed Kelly - Administrative Judge of the Courts, Jim McGonigle, Claire Ebel - Civil Liberties Union, and even a person from the Union Leader. They all came in support of the bill. There was no opposition. Our civil subcommittee voted ought to pass with the amendment 5-0 and it came out of the committee 17 to 1. It was on the consent calendar. I would like to point out one thing which you might take up if this goes to subcommittee or however you work this. I looked this over last night, and in the original bill, before it was amended, it start out as new section "confidentiality of police personnel files" amend RSA 105 by inserting after section 13-A the following new section. That was 105:13-B. Then they had roman one, except as provided in paragraph 2, contents of any personnel file of a police officer shall be confidential and shall not be treated as a public record, pursuant to RSA 91:A. Then it went on and gave number 2, which was substantially the amendment. That was changed by a

sentence or two. Now, speaking to Chief Barrett and Jim McGonigle before the hearing this morning, there is a question that one word maybe was left out. So I would like to have this checked into. Otherwise, that takes care of my testimony and I will be happy to answer any questions.

Doug Patch; Assistant Commissioner, Department of Safety: I am here to appear in support of this bill. I won't reiterate what Chief Barrett has said, other than to say that I really think on behalf of the state police, the highway enforcement officers, the marine patrol officers, and our gaming enforcement officers who are all police officers who work for our department, I think this is a reasonable compromise. I think it provides some standards for a court to use. It may not be perfect, but I think it is a good step in the right direction. I agree with what the Chief said. There is a need to protect a police officer from an unreasonable intrusion into that individuals privacy. I think that is really what we are asking you to do here. At the same time, I think the bill is reasonable because it is providing a mechanism for a defendant to be able to get to know relevant information. So I think it is a good bill in its current form.

Nina Gardner; Judicial Council: The Judicial Council looked at this piece of legislation and voted to come in and support the legislation. As was testified earlier, the Judicial Council has looked at it. We had a unique perspective on the bill because the judges who are familiar with this problem and had seen it played out in court and some of the other members of the council were familiar with the issues. We felt that by establishing this standard that has been alluded to, and that is the probable cause standard, that there would be something that the judge would need to look at. The judges were concerned that the defense counsels, without a limit, can simply go on a fishing expedition. I think everybody has to know that the other part of my job involves defense council of the state. I discussed this with some of the attorneys in the public defenders office. Of course, they would prefer to see no standard and have that access unlimitedly to the issues that may be relevant for their client. However, they felt that this standard was an appropriate standard. It is a recognized standard and would give the judges something to look to. They also agree with what Chief Barrett said. You are going to have judges with varying degrees of discretion and varying interpretation of what that standard is. However, absent that, you do expose the whole issue to open exploration and that is what this attempts to deal with. I would be glad to answer any questions that you might have.

Hearing closed at 12:02

COMMITTEE HEARING ON HB 1359

Date March 11 '97 Place LOB Rm 103

NAME: Rep W. Kent Martling

Business Address: (Retired)

City: DURHAM Phone: 865-2749

REPRESENTING: Durham, Lee, Madbury - Dist 4. Strafford County

WISH TO SPEAK: YES ✓ NO Time Needed: 2 min

Supporting Bill: ✓ Opposing Bill:

PLEASE LEAVE COPY OF ANY PREPARED STATEMENT WITH COMMITTEE CLERK

164

LEG042

Date March 11, 1992 Time 11:00 a.m.

SENATE JUDICIARY COMMITTEE

PUBLIC HEARING

ON

HB 1359: relative to the confidentiality of police personnel files in criminal cases.

APPEARING IN FAVOR (Please Print)

NAME	ADDRESS	REPRESENTING
✓ Rep. Alice B. Record		Constituency - Dist. 23
✓ CHIEF DAVID BARRETT	11 RIVER ST. JAFFREY	N.H. ASSOC. OF CHIEFS OF POLIC
✓ DOUG PATCH	10 Hazen Dr.	D.O.S.
✓ Jim McConiche Jr	21 LAKE ST Concord	NH Police Association DO NOT WISH TO SPEAK
✓ Nina Gardner	Rm 410 State House Annex	Judicial Council

APPEARING IN OPPOSITION: (Please Print)

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF COMMITTEE

DATE: March 26, 1992

THE COMMITTEE ON JUDICIARY

To which was referred House Bill 1359

AN ACT relative to confidentiality of police personnel files in criminal cases.

VOTE: 5-0

Having considered the same, report the same without amendment and recommend that the bill: **OUGHT TO PASS.**

Senator Hollingworth
For the Committee

1992 SESSION

3732L
92-2419
09

HOUSE BILL NO. 1359

INTRODUCED BY: Rep. Burling of Sullivan Dist. 1; Rep. Record of Hillsborough Dist. 23

REFERRED TO: Judiciary

AN ACT requiring confidentiality of personnel files of local police officers except in certain criminal cases.

ANALYSIS

This bill declares that the personnel files of local police officers are to remain confidential except in certain criminal cases.

- -

EXPLANATION: Matter added appears in ***bold italics***.
Matter removed appears in [brackets].
Matter which is repealed and reenacted or all new appears in regular type.

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.

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[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

Gregory V. Sullivan

From: Henry Klementowicz <henry@aclu-nh.org>
Sent: Wednesday, July 7, 2021 2:10 PM
To: Gregory V. Sullivan; John Krupski; stanguay@dwmlaw.com; Gilles Bissonnette
Subject: RE: Provenza v. Town of Canaan

Greg,

The Valley News assents.

Best,

Henry

From: Gregory V. Sullivan <g.sullivan@mslpc.net>
Sent: Wednesday, July 7, 2021 2:09 PM
To: John Krupski <jake@milnerkrupski.com>; stanguay@dwmlaw.com; Gilles Bissonnette <gilles@aclu-nh.org>; Henry Klementowicz <henry@aclu-nh.org>
Subject: Provenza v. Town of Canaan

Counsel: We represent Union Leader Corporation and the New England First Amendment Coalition. In accordance with Rule 30 of the Rules of the New Hampshire Supreme Court, we hereby seek your written consent to file an amicus brief in support of the position of the Valley News. Please respond with your consent or objection. Thank you.

Gregory V. Sullivan, Esq.

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Gregory V. Sullivan

From: Shawn M. Tanguay <STanguay@dwmlaw.com>
Sent: Thursday, July 8, 2021 4:02 PM
To: Gregory V. Sullivan; John Krupski; Gilles Bissonnette; Henry Klementowicz
Subject: RE: Provenza v. Town of Canaan

Attorney Sullivan:

The Town of Canaan consents to your request to file an amicus brief in the pending matter, as referenced above, before the New Hampshire Supreme Court.

Shawn M. Tanguay
Attorney

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DrummondWoodsum
ATTORNEYS AT LAW

From: Gregory V. Sullivan <g.sullivan@mslpc.net>
Sent: Wednesday, July 7, 2021 2:09 PM
To: John Krupski <jake@milnerkrupski.com>; Shawn M. Tanguay <STanguay@dwmlaw.com>; Gilles Bissonnette <gilles@aclu-nh.org>; Henry Klementowicz <henry@aclu-nh.org>
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Counsel: We represent Union Leader Corporation and the New England First Amendment Coalition. In accordance with Rule 30 of the Rules of the New Hampshire Supreme Court, we hereby seek your written consent to file an amicus brief in support of the position of the Valley News. Please respond with your consent or objection. Thank you.

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Gregory V. Sullivan

From: John Krupski <jake@milnerkrupski.com>
Sent: Friday, July 16, 2021 12:23 PM
To: Gilles Bissonnette; Henry Klementowicz; Shawn M. Tanguay; Gregory V. Sullivan
Cc: Marc Beaudoin; Samuel Provenza
Subject: Re: Provenza v. Town of Canaan

Yes you have my assent. JSK

On Friday, July 16, 2021, 12:21:55 PM EDT, Gregory V. Sullivan <g.sullivan@mslpc.net> wrote:

Jake: Thank you for speaking with me this morning. The arguments in our amicus brief will be based exclusively on the public record. We have no access to the underlying report or the sealed materials. We will argue that the report should be made available to the public. Please confirm your assent to us filing an amicus brief on behalf of Union Leader Corporation and the New England First Amendment Coalition. Thank you.

Gregory V. Sullivan, Esq.

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