THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0501

JOHN DOE
Petitioner/Appellant

v.

NEW HAMPSHIRE ATTORNEY GENERAL
Respondent/Appellee

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT/APPELLEE NEW HAMPSHIRE ATTORNEY GENERAL

Appeal Pursuant to Supreme Court Rule 7 from Merrimack County Superior Court
Docket No. 217-2020-cv-250

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IDENTITY OF *AMICI CURIAE*

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest civil liberties organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed under state and federal law. The ACLU-NH regularly participates before this Court through direct representation and as *amicus curiae* in cases involving police accountability and criminal justice. *See e.g., Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020) (seeking disclosure of police department's internal affairs audit report); *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020) (seeking disclosure of arbitration decision concerning police department's attempt to terminate an officer); *N.H. Ctr. for Pub. Interest Journalism v. N.H. D.O.J.*, 173 N.H. 648 (2020) (seeking public disclosure of the Exculpatory Evidence Schedule); *American Civil Liberties Union of N.H. v. City of Concord*, No. 2020-0036 (pending case before New Hampshire Supreme Court seeking information concerning police department's use of "covert communications equipment"); *Provenza v. Town of Canaan*, No. 2020-0563 (pending case before New Hampshire Supreme Court seeking internal report concerning investigation of allegation of excessive force); *Appeal of N.H. Dep't of Safety*, No. 2020-0450 (arguing, as *amicus curiae*, that Personnel Appeals Board decision overturning the Department of Safety's termination decision of an officer should be reversed).

The New Hampshire Association of Criminal Defense Lawyers ("NHACDL") is the voluntary, professional organization of the criminal defense bar in New Hampshire. It has over 300 members, including almost half of all practicing public defenders and virtually all members of the private bar who do any significant criminal defense work in New Hampshire. Collectively, the membership practices in all ten counties, all eleven superior courts, all fourteen district division courthouses, this Court, and the federal courts. The NHACDL's mission is to safeguard and promote the effective assistance of counsel in criminal cases, to support the lawyers who practice criminal defense, to represent in public

the interests of criminal defendants, and to preserve the fairness and integrity of the criminal justice system. Thus, when proposed legislation or a judicial decision is likely to affect the procedural fairness of criminal adjudications for years to come, the NHACDL will take a stand. The issues in this case are of direct concern to the NHACDL, as the NHACDL's past, present, and future clients are directly impacted by the Exculpatory Evidence Schedule ("EES"), as the EES helps ensure that its clients are being provided all exculpatory discovery materials to which they are constitutionally entitled.

QUESTIONS PRESENTED

1. Did the Superior Court err when it held in its October 20, 2020 order that RSA 105:13-b did not apply to Officer Doe's lawsuit or provide him an independent basis to seek removal from the Exculpatory Evidence Schedule because this statute only "pertains to whether information in an officer's personnel file qualifies as exculpatory or impeachment evidence in the context of a specific prosecution"? *See* Pet.'s Addendum at 42.

2. Based on the allegations of the Petition, did the Superior Court err when it held that Officer John Doe received adequate procedural due process, especially where Officer Doe (i) "had an opportunity to challenge the department's disciplinary finding" when the incident occurred in April 2011 "and elected not to do so," thereby leading to a sustained finding of misconduct, *see* Pet.'s Addendum at 43, (ii) does not "disagree that the finding was valid," *see id.*, and (iii) was apparently timely notified of his placement on the EES at the time the placement occurred in December 2017.

STATEMENT OF THE CASE AND THE FACTS

Amici Curiae incorporate by reference the Statement of the Case and Facts in the Responsive Brief of Respondent/Appellee New Hampshire Attorney General.

SUMMARY OF ARGUMENT

In this case, Petitioner Officer Doe is attempting to invoke RSA 105:13-b to ask the New Hampshire court system to conclude that his *sustained* misconduct implicating his deliberate decision to violate a court order cannot be exculpatory in any hypothetical future

criminal case in which Officer Doe is a testifying witness.[1] Officer Doe's claim goes even further and asks the New Hampshire court system to use RSA 105:13-b as a vehicle to resolve *de novo* the underlying disciplinary matter in this case. Officer Doe, himself, acknowledges that he is asking the trial court to review in this case "the factual basis of the placement of [his] name on the EES." *See* Pet.'s Br. at 30-31. As this brief explains, Officer Doe's claim fails for two reasons.

First, as the Superior Court correctly held, RSA 105:13-b does not apply to Officer Doe's lawsuit or provide him with an independent basis to seek removal from the EES because RSA 105:13-b only implicates how "police personnel files" are handled when "a police officer … is serving as a witness in [a] criminal case." *See* RSA 105:13-b, I. At least five Superior Courts have reached this same conclusion, and the law's legislative history similarly supports this result. This Court declined to answer this question in *N.H. Ctr. for Pub. Interest Journalism v. N.H. D.O.J.* *See* 173 N.H. 648, 656 (2020) (assuming, "*without deciding* that RSA 105:13-b … applies outside of the context of a specific criminal case in which a police officer is testifying") (emphasis added).

Second, while this Court has procedurally allowed officers to bring procedural due process claims concerning placement on the EES—*see Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015) and *Gantert v. City of Rochester*, 168 N.H. 640 (2016)—this Court should conclude that adequate pre-deprivation procedural due process was provided to Officer Doe based on the allegations in the Petition. Here, Officer Doe was provided ample notice and an opportunity to be heard concerning both the underlying misconduct and placement on the EES. In April 2011, Officer Doe served a temporary restraining

[1] Law enforcement heralded the April 30, 2018 guidance issued by the Attorney General's Office that confirmed that placement on the EES could only occur for sustained misconduct. One law enforcement representative stated that this guidance "has led to appropriate due process rights being established for New Hampshire's police officers." *See* Press Release, New Hampshire Updates Guidance Concerning the Exculpatory Evidence Schedule (Apr. 30, 2018), https://www.governor.nh.gov/news-and-media/new-hampshire-updates-guidance-concerning-exculpatory-evidence-schedule. Here, however, Officer Doe challenges placement on the EES even where the misconduct was the product of a sustained finding and union representation.

order on a child's father that directed the father to relinquish custody of the father's son to the child's mother. Pet. ¶ 9. However, Officer Doe did not enforce the temporary restraining order as he was legally required to do. Instead, Officer Doe substituted his own judgment for the judgment of the court that issued the temporary restraining order and refused to relinquish the child to the child's mother out of a concern for the child's safety. *Id.* Officer Doe subsequently worked with the father's attorney to arrange an emergency hearing on custody *ex parte* before a court in Massachusetts. *Id.* ¶ 10. In other words, Officer Doe has admitted that—whatever his reasons—he deliberately disregarded and helped circumvent a lawful court order. Following a personnel complaint filed by the child's mother with Officer Doe's police department, the department conducted an internal investigation into Officer Doe's behavior. There is no allegation in this case that the police department failed to notify Officer Doe of this investigation or refused to allow Officer Doe to participate. Following the investigation, the police chief issued a sustained finding, concluding that Officer Doe had violated department rules by failing to properly enforce the valid domestic violence temporary restraining order of protection. *Id.* ¶ 13. Though outside the Petition, Officer Doe states that he had the benefit of union representation and declined to contest the finding. *See* Pet.'s Br. at 32-33. Though Officer Doe asserts that he would have challenged the misconduct at issue had he known that placement on the EES was a possibility, *see id.* at 20, Officer Doe does not appear to meaningfully contest that he violated a court order.

In December 2017, pursuant to the new EES procedures promulgated by the New Hampshire Department of Justice in September 2017, the chief of Officer Doe's police department notified Officer Doe that he was going to be added to the EES. Pet. ¶ 14. This placement occurred six years after the initial misconduct, *thereby leading to potentially six years of inadequate disclosures to defendants*. In any event, it appears that Officer Doe was provided notice of this placement on the EES at or around the time that this placement occurred in December 2017. Furthermore, Officer Doe subsequently retained counsel and later contested his placement on the EES before the Respondent/Appellee Department of Justice on two separate occasions. Both requests for removal were denied because the

misconduct was sustained and it involved a "conscious decision to disregard [a] lawful order." *Id.* ¶¶ 16-19.

In sum, Officer Doe received adequate pre-deprivation due process where he was (i) given the opportunity, with union representation, to contest the underlying finding of misconduct before the police department back in 2011, (ii) given notice by the police department chief of placement on the EES at or around the time that the placement occurred in December 2017, and (iii) given the opportunity to contest placement on the EES before the Department of Justice. The time for Officer Doe to have challenged this underlying misconduct was back in 2011, not years later in court through a *de novo* process that is not grounded in RSA 105:13-b. Indeed, "one who has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard." *See Wozniak v. Conry*, 236 F.3d 888, 890 (7th Cir. 2001).

What Officer Doe is seeking in this case—namely, post-deprivation process in the form of *de novo* judicial review after already having received pre-deprivation process—are unique due process rights that are not provided to other public employees and many criminal defendants. Here, Officer Doe contends that his due process rights were violated even where he had the benefit of union representation when this misconduct occurred in 2011, *see* Pet.'s Br. at 32—a time in which the EES (then called the *Laurie* List) existed and, thus, there was always a possibility that any sustained misconduct could trigger placement. Criminal defendants receive far less due process every day in New Hampshire criminal courts. For example, every day in the trenches of the criminal justice system, people plead guilty to violation-level offenses and Class B misdemeanors without having received full discovery or the benefit of counsel. Without the benefit of counsel, many have no idea that pleading guilty can have massive collateral consequences and can lead to substantial fines. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27 (1981) (holding that a presumption exists that indigent individuals do not have the right to court-appointed counsel unless physical liberty is threatened); *State v. Weeks*, 141 N.H. 248, 250-51 (1996) ("when no term of incarceration is imposed, a defendant charged with a misdemeanor has no constitutional right to counsel," even where "[t]he fact that the conduct for which the

defendant was convicted without the assistance of counsel *has collateral ramifications*") (emphasis added). Simply put, a defendant has a choice whether to plead guilty or not, even in the face of no representation, little information about the allegations, an uncertain sentence, and unknown collateral ramifications. And if the person pleads guilty, that person has to live with the collateral consequences of the decision and is not—except in rare circumstances—able to vacate his or her plea. *See, e.g.*, *State v. Ortiz*, 163 N.H. 506, 510 (2012) ("We have consistently held that as a matter of constitutional due process, the defendant must be advised of the direct consequences of entering a guilty plea, *but not the potential collateral consequences*, in order for the guilty plea to be considered knowing"; affirming trial court's decision denying request to vacate plea where trial court did not inform defendant of collateral immigration consequences from the conviction because New Hampshire's constitutional due process protections do not require trial courts to advise defendants of such potential consequences during plea colloquy) (emphasis added); *State v. Vogt*, No. 2011-0474, 2013 N.H. LEXIS 6, at *2 (N.H. Sup. Ct. Jan. 31, 2013) (affirming lower court's denial of motion to vacate plea); *State v. Welch*, No. 2011-0703, 2012 N.H. LEXIS 103, at *1 (N.H. Sup. Ct. Aug. 1, 2012) (same). Police going through the disciplinary process have no greater constitutional rights than defendants in such similar instances, especially insofar as such misconduct could lead to collateral consequences implicating the EES. *See also Doe v. State*, 167 N.H. 382, 415 (2015) (holding that procedural due process was not violated concerning placement on the sex offender registry for a person who was convicted of a sex offense before the registry was created because "[t]he petitioner was afforded due process during the proceeding that led to his criminal conviction").

This case is important because if Officer Doe can be removed from the EES in the face of having committed sustained misconduct and having received adequate pre-deprivation due process, then this likely will lead, as a practical matter, to criminal defendants not receiving disclosures in future cases in which Officer Doe is a testifying witness.[2] This

[2] To be clear, a prosecutor's constitutional obligation to produce exculpatory information in a police officer's personnel file exists regardless of whether the officer is on a so-called

is significant, as defendants have a constitutional right to receive such exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (in a criminal case, the State is obligated to disclose information favorable to the defendant that is material to either guilt or punishment); *State v. Laurie*, 139 N.H. 325, 329 (1995) ("In New Hampshire, criminal defendants have an explicit right to produce all proofs that may be favorable to them."). Where the constitutional rights of defendants who have their property and liberty at stake run up against the rights of police officers in employment disputes, the rights of defendants must prevail.

Furthermore, in any action by an officer challenging whether misconduct is exculpatory outside a criminal case, the standard that an officer must meet for determining whether information is not exculpatory must be a high one, as it requires a court to conclude that information cannot be exculpatory in ***any*** hypothetical criminal case from now into the future. This must be a difficult standard to meet because whether information is exculpatory is fact specific and can often be dependent on the defenses raised by the defendant. *See Gantert*, 168 N.H. at 649 ("The government has a great interest in placing on the 'Laurie List' officers whose confidential personnel files may contain exculpatory information."). Here, it is impossible to say that this sustained misconduct finding based on Officer Doe's failure to comply with a lawful court order cannot be potentially exculpatory in ***every*** criminal case concerning Officer Doe in the future. This case exhibits a serious dereliction of duty that directly implicates an officer's regard for rules and procedures—here, a court order. It is not difficult to imagine a criminal case in which there is a question as to whether Officer Doe complied with a court order, decision, or department policy—for example, an order, decision, or policy implicating a defendant's rights. In such a case, Officer Doe's failure to comply with a lawful court order in this case would be directly relevant and potentially exculpatory.

Brady or *Laurie* list maintained by a prosecutor. Here, the EES only acts a tool to help prosecutors facilitate this constitutional obligation.

ARGUMENT

I. As the Superior Court Correctly Held, RSA 105:13-b Does Not Apply to This Case or Provide Officer Doe with an Independent Basis to Seek Removal from the Exculpatory Evidence Schedule Because This Statute Only Applies When a Police Officer is "Serving as a Witness in Any Criminal Case."

As the Superior Court (Tucker, J.) correctly held in its October 20, 2020 order, RSA 105:13-b does not apply outside the context of a criminal case, and thus does not provide Officer Doe with an independent basis to seek removal from the Exculpatory Evidence Schedule. As the Superior Court explained, this statute only "pertains to whether information in an officer's personnel file qualifies as exculpatory or impeachment evidence *in the context of a specific prosecution*." *See* Pl.'s Addendum at 42 (emphasis added). The Superior Court added that RSA 105:13-b "does not provide for the court to make a broader finding that the information could never be material to the defense in any case," and therefore this statute "is not a basis for a court to decide whether information in an officer's personnel file qualifies the officer for inclusion on the EES." *Id.* This holding is correct for two reasons.

First, under its plain terms, RSA 105:13-b does not implicate Officer Doe's request for removal from the EES 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 (emphasis added). This Court seemingly reached this conclusion in *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015), explaining:

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

Duchesne, 167 N.H. at 781 (emphasis added); *see also State v. Shaw*, 173 N.H. 700, 708 (2020) (same). One federal court has similarly concluded that this statute only concerns

the treatment of "personnel files of police officers *serving as a witness or prosecutors in a criminal case*." *See Hoyt v. Connare*, 202 F.R.D. 71 (D.N.H. 1996) (Muirhead, M.J.) (rejecting position of defendant police officers that the discovery sought should not occur because RSA 105:13-b "has no application to the discoverability of the files now at issue") (emphasis added).

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

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

See Amici Addendum ("ADD") 27, *N.H. Ctr. for Public Interest Journalism v. N.H. D.O.J.*, No. 2018-cv-00537, at *3 (Hillsborough Cty. Super. Ct., S. Dist., Apr. 23, 2019) (Temple, J.), *affirmed in part, and vacated and remanded on other grounds in* 173 N.H. 648, 656 (2020) ("For the purposes of this appeal, we assume without deciding that RSA 105:13-b … applies outside of the context of a specific criminal case in which a police officer is testifying."). Judge Bornstein reached the same conclusion in a case under the Right-to-Know Law concerning whether a report investigating an excessive force allegation should be disclosed to the public. ADD 49-50, *Provenza v. Town of Canaan*, No. 215-2020-cv-155, at *13-14 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that RSA 105:13-b did not apply because "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'") (on appeal to Supreme Court at No. 2020-563). In another case where an officer was seeking removal from the EES, the Grafton County Superior Court granted the Department of Justice's motion to dismiss, which correctly argued that, "[b]y its plain terms, the procedure

in RSA 105:13-b *only* applies when a police officer is 'serving as a witness in any criminal case.'" ADD 60-61, *Officer A.B. v. Grafton County Att'y*, No. 215-2018-cv-00437, at *3-4, ¶¶ 12-15 (Grafton Cty. Super. Ct. Oct. 12, 2019) (MacLeod, J.) (emphasis added). Moreover, in two separate cases where officers are seeking removal from the EES, Judge Kissinger of the Merrimack County Superior Court correctly explained that the officer's reliance on RSA 105:13-b was incorrect because "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case.'" ADD 78, *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00216, at *8 (Merrimack Cty. Super. Ct., Aug. 27, 2020) (Kissinger, J.) (holding that "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case'") (on appeal to Supreme Court at Case No. 2020-448); ADD 93, *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00176, at *8 (Merrimack Cty. Super. Ct., Aug. 27, 2020) (Kissinger, J.) (same) (on appeal to Supreme Court at Case No. 2020-447).

In sum, as court after court has held, nothing in RSA 105:13-b suggests that this statute applies outside the context of a criminal case. RSA 105:13-b's plain terms reflect that the legislature never intended this law to provide an independent basis for an officer to seek removal from the EES or otherwise interfere with other laws, including the public's access to information under Chapter 91-A. Indeed, this statute predates *Laurie* and the creation of the EES.

Second, to the extent that there is any textual ambiguity (and there is none), the 1992 legislative history of RSA 105:13-b refutes Officer Doe's contention that this statute can apply outside the context of a criminal case. *See State v. Brouillette*, 166 N.H. 487, 494-95 (2014) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent."). The New Hampshire Association of Chiefs of Police introduced RSA 105:13-b in 1992. The focus of the bill was to create a process—which previously had been *ad hoc*—for how police personnel file information would be disclosed to defendants *in the context of criminal cases*. 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 136 (LEG037 at Complete 1992 RSA 105:13-b Legislative History) (emphasis added).

Moreover, the legislature specifically rejected any notion that this statute would apply in other legal contexts, including as an exemption under Chapter 91-A. In the first paragraph of the original proposed version of RSA 105:13-b, the bill contained a sentence stating, in part, that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A." ADD 103 (LEG004 at Complete 1992 RSA 105:13-b Legislative History). In January 14, 1992 testimony before the House Judiciary Committee, the Union Leader Corporation 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 112-13 (LEG013-14 at Complete 1992 RSA 105:13-b Legislative History).

Following this objection, the legislature amended the bill to delete this categorical exemption for police personnel files under Chapter 91-A. ADD 114 (LEG015). 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 <u>*in criminal cases*</u>." *Id.* (emphasis added); *see also* ADD 125, 127, 128, 129, 130, 133, 134 (LEG026, 28, 29, 30, 31, 34, 35). The amended analysis of the bill similarly explained that the "bill permits the personnel file <u>*of a police officer serving as a witness or prosecutor in a criminal case*</u> to be opened for purposes of that case under certain conditions." ADD 115, 126, 127, 129, 133 (LEG016, 27, 28, 30, 34) (emphasis added). The amendment to delete the Chapter 91-A exemption was apparently a compromise that involved the support of multiple stakeholders, including the Union Leader Corporation that opposed the original bill. ADD 139 (at LEG040, noting support

of stakeholders for amended version); *see also* ADD 136 (at LEG037, Police Chiefs Association representative acknowledging, following the amendment, that "[f]rankly, I would like to see an absolute prohibition [on disclosure of police personnel files], but since I realized the tooth fairy died some time ago, that is not going to happen"). The legislature's amendment establishes that the legislature never intended RSA 105:13-b to apply to other legal contexts, and instead intended to limit its reach to criminal cases.

II. As Alleged, Officer Doe Received Adequate Procedural Due Process Where He Was Given an Opportunity to Contest the Underlying Finding of Misconduct But Failed to Do So, Does Not Appear to Contest That He Consciously Failed to Comply With a Lawful Court Order, and Was Timely Notified of His Placement on the Exculpatory Evidence Schedule at the Time the Placement Occurred.

Notwithstanding the provisions of RSA 105:13-b, Officer Doe does have a separate right to seek a declaration under RSA 491:22 that his procedural due process rights were violated under Part I, Article 15 of the New Hampshire Constitution. *See Gantert v. City of Rochester*, 168 N.H. 640 (2016) (addressing procedural due process claim in seeking removal from EES); *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015) (same). However, based on the allegations in the Petition, Officer Doe received sufficient procedural due process in this case, and simply chose not to robustly challenge the allegation of misconduct.

Part I, Article 15 provides that "[n]o subject shall be … deprived of his property, immunities, or privileges … or deprived of his life, liberty, or estate … but by the law of the land." N.H. Const. pt. I, art. 15. This Court has held that "law of the land" means due process of law. *State v. Veale*, 158 N.H. 632, 636 (2009). This Court engages in a two-part analysis in addressing procedural due process claims: first, it determines whether the individual has an interest that entitles him or her to due process protection; and second, if such an interest exists, it determines what process is due. *Id.* at 637-39. "The ultimate standard for judging a due process claim is the notion of fundamental fairness." *Saviano v. Director, N.H. Div. of Motor Vehicles*, 151 N.H. 315, 320 (2004). *Amici* assume that Officer Doe has a legally-protected interest entitling him to due process protection concerning

placement on the EES. *See Duchesne*, 167 N.H. at 783 ("Although the 'Laurie List' is not available to members of the public generally, placement on the list all but guarantees that information about the officers will be disclosed to trial courts and/or defendants or their counsel any time the officers testify in a criminal case, thus potentially affecting their reputations and professional standing with those with whom they work and interact on a regular basis."). Thus, the next question of the analysis is what process is due. This Court has concluded that post-deprivation process after being placed on the EES is not required if the officer is afforded sufficient pre-deprivation process during the underlying investigation and disciplinary proceeding. As the *Gantert* Court explained in that case, there was "no need for a formalized hearing of additional process" before placement on the EES where there was an internal investigation—which the plaintiff does not allege was unfairly or improperly conducted—two layers of review within the department, an opportunity to meet with the chief, and a hearing before the police commission." *Gantert*, 168 N.H. at 650; *see also Doe*, 167 N.H. at 413-15 (holding that the application of sex offender registration requirements to a person who was convicted before the registration requirements existed did not violate procedural due process because the person was afforded due process in his criminal case).

As alleged, the pre-deprivation due process provided to Officer Doe in this case was ample. Because pre-deprivation notice and an opportunity to be heard were afforded to Officer Doe, post-deprivation process was not required in this case. Here, in response to the mother's personnel complaint to the police department contending that Officer Doe had failed to comply with the court order in April 2011, the department conducted an internal investigation. Setting aside the fact that Officer Doe seems to concede that he did not comply with the court order (whatever his reasons), there does not appear to be a dispute that the police department notified Officer Doe of this internal investigation and gave him an opportunity to participate and be heard. Following the investigation, the police chief issued a sustained finding, concluding that Officer Doe had violated department rules by failing to properly enforce the valid court order. Pet. ¶ 13. Though outside the Petition, it

is worth noting that Officer Doe had union representation at the time and could have challenged the finding but declined to do so. *See* Pet.'s Br. at 32.

Further, as alleged, the police department chief later notified Officer Doe of his placement on the EES in December 2017. Such notice of EES placement appears to have been provided at or around the time that this placement occurred in December 2017. *Id.* ¶ 14. Officer Doe does not appear to allege that this notification belatedly occurred well after Officer Doe was formally placed on the EES. Moreover, Officer Doe was able to subsequently retain counsel and later contest his placement on the EES before the Respondent/Appellee Department of Justice on two separate occasions. Both requests for removal were denied. While Officer Doe may not like this result, process was provided. *Id.* ¶¶ 16-19.

In sum, as the Superior Court correctly held, Officer Doe received adequate pre-deprivation due process where he (i) "had an opportunity to challenge the department's disciplinary finding and elected not to do so" and (ii) does not "disagree that the finding [of not complying with a lawful court order] was valid." *See* Pet.'s Addendum at 43. Thus, post-deprivation review is unnecessary. Indeed, as one court has noted, "one who has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard." *See Wozniak v. Conry*, 236 F.3d 888, 890 (7th Cir. 2001). Moreover, in at least four other similar cases, New Hampshire courts have concluded that there was no procedural due process violation. *See Gantert*, 168 N.H. at 650 (holding that the placement of plaintiff police officer on the "Laurie list" comported with due process, in part, because there was an internal investigation, two layers of review within the department, an opportunity to meet with the chief, and a hearing before the police commission before plaintiff was placed on the list); ADD 147, *Lamontagne v. Town of Derry*, No. 218-2019-cv-00338, at *4 (Rockingham Cty. Super. Ct. Apr. 27, 2020) (Schulman, J.) (concluding that officer received sufficient due process concerning placement on the EES where the officer "was given the opportunity for a due process hearing to determine factual disputes, but he expressly waived that opportunity by instead entering into a settlement

agreement"); ADD 95-96, *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-176, at *10-11 (Merrimack Cty. Super. Ct. Oct. 20, 2020) (Kissinger, J.) (on appeal to Supreme Court at Case No. 2020-447) ("The Court finds that, like the plaintiff in *Gantert*, the plaintiff had two layers of review before his placement in the EES and that this was sufficient pre-deprivation process in light of the competing interests at stake."); ADD 81, *Doe v. N.H. D.O.J.*, No. 217-2020-cv-00216, at *11 (Merrimack Cty., Aug. 27, 2020) (Kissinger, J.) (on appeal to Supreme Court at Case No. 2020-448) (procedural due process provided to an officer on the EES where the officer "participated in the internal investigation," "spoke with both the investigating sergeant and with the chief of police regarding the investigation," and "chose to resign instead of participating further in the internal investigation").

Despite this due process, Officer Doe asks for removal from the EES. *See* Pet., at p. 9 (Prayer for Relief B). At the outset, the relief for any procedural due process violation would be to have the employing police department provide the required process, not removal from the EES outright. Further, where there was sufficient pre-deprivation due process provided, Officer Doe's request for relief essentially asks the New Hampshire courts to permit a *de novo* second hearing to re-litigate this matter. Neither *Duchesne* nor *Gantert* stand for the proposition that a police officer gets to re-litigate misconduct leading to placement on the EES where the person already had notice and an opportunity to be heard. Here, the time for Officer Doe to have challenged this alleged misconduct was when this misconduct was first raised in 2011. In *Duchesne*, for example, the officer challenged the underlying finding of misconduct, which led to an unfounded finding—a finding that this Court concluded warranted removal from the EES. *See Duchesne*, 167 N.H. at 784-85 ("Given that the original allegation of excessive force has been determined to be unfounded, there is no sustained basis for the petitioners' placement on the 'Laurie List.'"). Here, unlike *Duchesne*, the finding of misconduct has not been deemed unfounded, unsustained, or otherwise "clearly … without basis." *See also Gantert*, 168 N.H. at 650 ("In *Duchesne*, we recognized that after an officer is placed on the 'Laurie List,' he may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis."). To the contrary, the misconduct has been sustained.

For these reasons, appropriate pre-deprivation process was provided in this case.

CONCLUSION

For these reasons, this Court should affirm the Superior Court's October 20, 2020 order.

Respectfully Submitted,

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By and through its attorneys,

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Dated: June 4, 2021

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,797 words, which is fewer than the 9,500-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 4th day of June, 2021 through the electronic-filing system on all counsel of record.

/s/ Gilles Bissonnette
Gilles Bissonnette, Esq.

ADDENDUM

THE STATE OF NEW HAMPSHIRE

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

New Hampshire Center for Public Interest Journalism, et al

v.

New Hampshire Department of Justice

ORDER ON MOTION TO DISMISS

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

Factual Background

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

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

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

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

Analysis

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

I. RSA 105:13-b

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

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

At the outset, the Court is not convinced that RSA 105:13-b governs the petitioners' request. By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file "of a police officer who is serving as a witness in any criminal case." Under this statute, the mandated disclosure is to the defendant in that criminal case. Here, in contrast, there is no testifying officer, pending criminal case, or specific criminal defendant. Rather, petitioners seek disclosure of the EES to the general public. See Reid v. New Hampshire Attorney General, 169 N.H. 509, 528 (2016) ("'[P]ersonnel files' are not automatically exempt from disclosure." (citing RSA 91-A:5, IV)).

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

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

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

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

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

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

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

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

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

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

II. Administrative Gloss

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

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

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

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

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

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

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

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

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

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

III. RSA 91-A

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

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

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

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

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

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

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

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

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

So ordered.

Date: April 23, 2019

Hon. Charles S. Temple,
Presiding Justice

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

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

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.

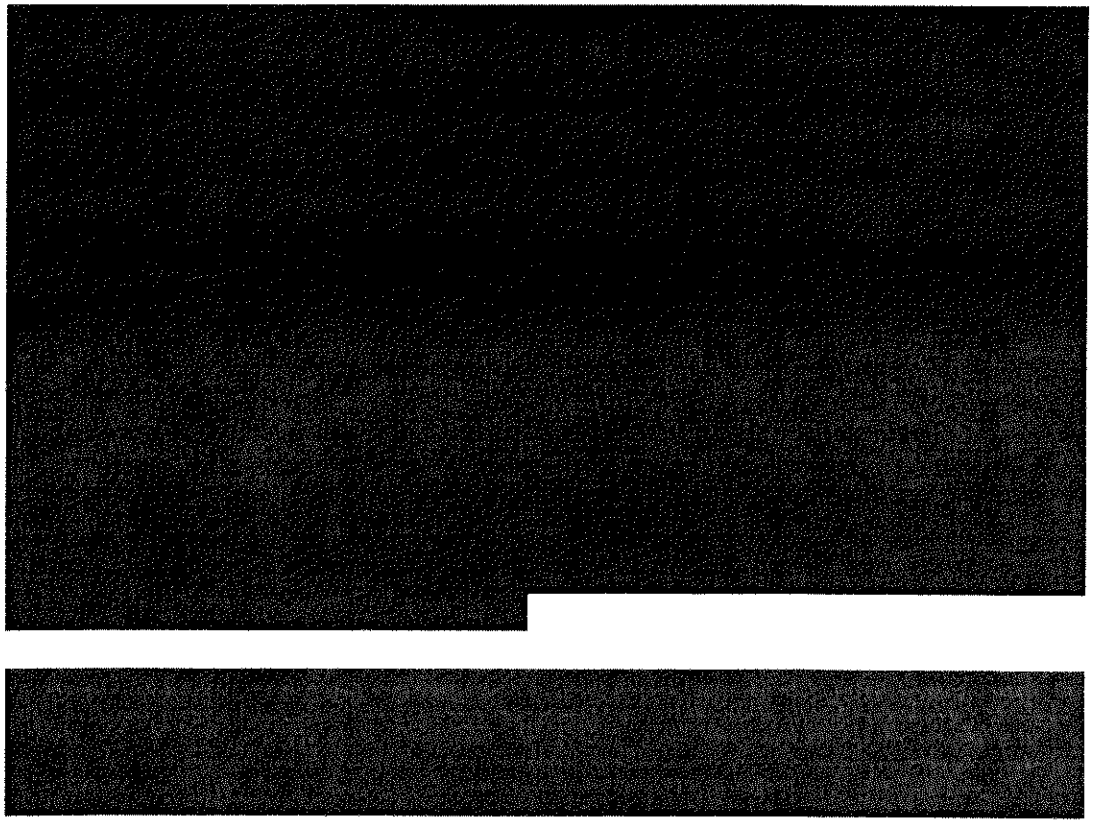
In response to Valley News's renewed request for the Report, the Town made Officer Provenza aware of the request. Officer Provenza then filed this lawsuit seeking to enjoin the Town from releasing the Report. Valley News filed a motion to intervene, which

[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

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

Officer A.B.

v.

Laura Saffo, Esq., in her capacity as Grafton County Attorney, et al.

Docket No. 215-2018-CV-00437

MOTION TO DISMISS

The co-respondent, the New Hampshire Attorney General's Office ("NHAG's Office"), by and through counsel, hereby moves to dismiss the petition. In support thereof, the NHAG's Office states as follows:

1. The petitioner alleges that certain conduct in which he engaged in 2007 and which resulted in his/her name being added to the Exculpatory Evidence Schedule ("EES") is stale and of no further relevance under *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 139 N.H. 325 (1995). *See* Pet. ¶¶ 7-8, 21-22.

2. That conduct consists of an alleged instance of excessive force, alleged falsification of a police report, and allegedly providing false testimony in court. Pet. ¶¶ 7-8, 21-22.

3. The petitioner concedes in his/her Petition that he inaccurately or erroneously completed the police report and provided inaccurate or erroneous testimony in court, *see* Pet. ¶ 8 ("Specifically, Petitioner alleges that the finding that s/he provided inaccurate or erroneous testimony in the above cited incident is stale and of no further relevance."), and does not appear to dispute the truth or accuracy of Confidential Exhibit #1, *see, e.g.*, Pet. ¶¶ 17-20.

Granted

Honorable Lawrence A. MacLeod, Jr.
October 12, 2019

Clerk's Notice of Decision
Document Sent to Parties
on 10/17/2019

4. Instead, the petitioner presents four claims in his/her Petition premised on this conduct being allegedly stale and of no further relevance because it occurred more than 10 years ago. *See, e.g.*, Pet. ¶¶ 8, 23, 33-34.

5. First, the petitioner asserts that keeping him/her on the EES for this allegedly stale and irrelevant conduct violates RSA 105:13-b (Count I). *Id.* ¶¶ 35-41.

6. Second, the petitioner asserts that keeping him/her on the EES for this allegedly stale and irrelevant conduct violates his/her constitutional rights under the Fourteenth Amendment of the United States Constitution (Count IV). *Id.* ¶¶ 54-56.

7. The petitioner seeks a preliminary and permanent injunction (Count II) to remedy these harms and secure his/her removal from the EES. *Id.* ¶¶ 42-49.

8. The petitioner also seeks a writ of mandamus (Count III) asserting that the obligation to remove him/her from the list for conduct he/she claims is stale and of no further relevance violates an unidentified ministerial duty or obligation. *Id.* ¶¶ 50-53.

9. All of the petitioner's claims fail as a matter of law.

A. Standard of Review

10. In ruling on a motion to dismiss, this court determines "whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery." *Harrington v. Brooks Drugs*, 148 N.H. 101, 104 (2002). The court assumes the truth of the plaintiff's well-pleaded allegations of fact and construe all reasonable inferences in the light most favorable to the plaintiff. *See, e.g., Hacking v. Town of Belmont*, 143 N.H. 546, 549 (1999). However, the court need not accept allegations in the complaint that are merely conclusions of law. *See, e.g., Konefal v. Hollis/Brookline Coop. Sch. Dist.*, 143 N.H. 256, 258 (1998). The court "must rigorously scrutinize the

pleading to determine whether, on its face, it asserts a cause of action." *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44 (1987).

11. In deciding a motion to dismiss, "[t]he trial court may also consider documents attached to the plaintiff's pleadings, or documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the complaint." *Beane v. Dana S. Bean & Co.*, 160 N.H. 708, 711 (2010) (quotations omitted). Thus, the confidential exhibits attached to the Petition may be, and should be, considered in resolving this motion.

B. The Petitioner Cannot Invoke RSA 105:13-b Outside Of A Pending Criminal Action In Which Officer A.B. Is A Witness.

12. The petitioner seeks, in essence, a declaratory judgment that, pursuant to RSA 105:13-b, his/her personnel file no longer contains exculpatory evidence, for all cases going forward (Count I).

13. The petitioner's attempt to invoke RSA 105:13-b's procedure in this way fails as a matter of law.

14. By its plain terms, the procedure in RSA 105:13-b only applies when a police officer is "serving as a witness in any criminal case." RSA 105:13-b, I. In that scenario, the duty to disclose exculpatory evidence attaches and, "[i]f a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required." RSA 105:13-b, II.

15. In this case, Officer A.B. is not serving as a witness in a criminal case. RSA 105:13-b therefore does not apply. *See Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 780 (2015) (explaining that RSA 105:13-b was "designed to balance the

rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records").

16. RSA 105:13-b does not provide for a blanket determination that certain evidence in an officer's personnel file is never exculpatory.

17. Additionally, RSA 105:13-b does not govern whether and under what circumstances an officer may be removed from the EES, and RSA 105:13-b's provisions are not otherwise independently enforceable under RSA chapter 105 through a declaratory judgment action.

18. Moreover, this Court cannot evaluate whether particular conduct and information constitutes exculpatory evidence favorable to the accused under *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 139 N.H. 325 (1995) in the abstract, outside of a pending criminal matter.

19. Indeed, neither *Brady* nor *Laurie* support the position that a court may determine generally through a declaratory judgment action that certain conduct in which a police officer engaged no longer constitutes exculpatory evidence favorable to the accused in all future criminal matters. Rather, *Brady* and *Laurie*, and their progeny, require a case-by-case assessment of whether particular conduct or information constitutes exculpatory evidence favorable to the accused within the context of the specific criminal matter in which the officer will be appearing as a witness.

20. "[I]n a criminal case, the State is obligated to disclose information favorable to the defendant that is material to either guilt or punishment." *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774, 777 (2015). "This obligation arises from a defendant's constitutional right to due process of law, and aims to ensure that defendants

receive fair trials." *Id.* "The duty to disclose encompasses both exculpatory information and information that may be used to impeach the State's witnesses and applies whether or not the defendant requests the information." *Id.* (internal citations omitted). "'Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose.'" *Id.* (quoting *Laurie*, 139 N.H. at 329).

21. "The duty of disclosure falls on the prosecution and is not satisfied merely because the particular prosecutor assigned to a case is unaware of the existence of the exculpatory information." *Id.* at 778 (internal citations omitted). The Court "impute[s] knowledge among prosecutors in the same office" and holds them "responsible for at least the information possessed by certain government agencies, such as police departments or other regulatory authorities, that are involved in the matter that gives rise to the prosecution." *Id.* (internal citations omitted). "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

22. "The prosecutor's constitutional duty of disclosure extends only to information that is material to guilt or to punishment." *Id.* "'Favorable evidence is material under the federal standard only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Laurie*, 139 N.H. at 328). However, "the New Hampshire Constitution affords defendants greater protection than the federal standard." *Id.* Under the New Hampshire Constitution, "'[u]pon a showing by the defendant that favorable,

exculpatory evidence has been knowingly withheld by the prosecution, the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict.'" *Id.* (quoting *Laurie*, 139 N.H. at 330).

23. Thus, in *Laurie*, when the officer submitted to a polygraph examination that revealed that the officer was not being truthful in all of his/her testimony under oath, the New Hampshire Supreme Court held that this information should have been turned over to the accused. *Laurie*, 139 N.H. at 331.

24. Against these precedents, the conduct in this case, inaccurate or erroneous information provided in a police report and inaccurate or erroneous provision of testimony under oath, and the particular manner in which Officer A.B. brought that conduct forward, would seem to suggest that Officer A.B.'s conduct will frequently, if not always, constitute favorable evidence that is material to guilt or punishment in many criminal cases in which he/she is a witness. *See* Confidential Exhibits #1 & #3.

25. Regardless, to determine if this information is material under *Brady* and *Laurie*, Officer A.B.'s prior conduct and the information reflecting it would need to evaluated within the context of the specific criminal action in which Officer A.B. would be appearing as a witness.

26. Consequently, this Court cannot generally declare that Officer A.B.'s prior conduct and the information reflecting it is too stale or has been made too irrelevant by the passage of time to ever need to be disclosed in the future under RSA 105:13-b.

27. Count I must therefore be dismissed.

C. The Petitioner Does Not Have A Fourteenth Amendment Due Process Right To Be Removed From The EES After A Particular Period Of Time, Particularly Where He/She Does Not Contest That The Underlying Conduct That Resulted In His/Her Placement On The List Actually Occurred.

28. In Count IV, the petitioner advances a Fourteenth Amendment due process claim against the defendants. That claim must be dismissed for several reasons.

29. First, the petitioner may only enforce the Fourteenth Amendment of the United States Constitution through 42 U.S.C. § 1983. It is well-settled that the States, their agencies, and their officials acting in their official capacities are not "persons" within the meaning of Section 1983. *See, e.g.*, *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 70 (1989) (holding that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" as a matter of statutory construction).

30. Under 42 U.S.C. § 1983, a state agency like the New Hampshire Attorney General's Office is not a "person" and therefore may not be sued under that statute. Consequently, Count IV fails to state a cause of action against the New Hampshire Attorney General's Office and must be dismissed on this basis.

31. Second, Count IV must also be dismissed because the petitioner does not have a constitutional due process right in his/her admitted conduct.

32. The New Hampshire Supreme Court has held that the due process protections of the New Hampshire Constitution, which affords greater reputational protection than the Fourteenth Amendment of the United States Constitution in this context, *see State v. Veale*, 158 N.H. 632, 636-45 (2009), provides police officers with a liberty and/or property interest in their professional reputations that placement on the EES may impair. *Gantert v. City of Rochester*, 168 N.H. 640, 648-49 (2016).

33. In this case, however, the government likewise has "a great interest in placing on the 'Laurie List' officers whose confidential personnel files may contain exculpatory information," so as to ensure criminal defendants the most robust enjoyment of their constitutional right to exculpatory evidence. *Id.* at 649-50.

34. Thus, to safeguard against the "risk of *erroneous* deprivation" of the officer's reputational interest (*i.e.*, that an officer may mistakenly be placed on the EES for conduct that did not actually occur), the officer has a right to procedural due process on the allegations that result in his/her initial placement on the EES. *Id.* at 648-49 (emphasis added). But an officer's reputation interest in no way suffers erroneously through correct, non-mistaken placement on the EES.

35. In this case, there is no risk of erroneous deprivation of a protected reputational interest. The petitioner concedes that the conduct in which he/she engaged actually occurred. He/She provided inaccurate or erroneous information in a police report and provided inaccurate or erroneous testimony under oath and does not dispute the truth or accuracy of Confidential Exhibit #1. The petitioner also does not allege or argue that his/her initial placement on the EES was erroneous. Rather, the petitioner alleges only that his/her conduct and the information reflecting it has been made stale and irrelevant by the passage of time and, for this reason alone, he/she should be removed from the EES.

36. The New Hampshire Supreme Court has never held that a petitioner has a constitutional due process right to be removed from the EES after an arbitrary period of time on the basis that certain prior conduct which actually occurred has become, in the individual officer's opinion, stale and/or irrelevant. Defense counsel is similarly unaware

of any federal case law establishing a right to relief under such circumstances under the Fourteenth Amendment of the United States Constitution. Moreover, contrary to the petitioner's assertion, it is difficult to imagine a scenario in which his/her prior conduct and the information reflecting it would not be constitutionally required to be disclosed as exculpatory under the New Hampshire and United States Constitutions.

37. Consequently, because the petitioner placement on the EES has not resulted in an erroneous deprivation of a protected reputational interest and because there is no constitutional right to seek removal from the EES for conduct that actually occurred and justifies inclusion on the EES, Count IV must be dismissed.

D. The Petitioner Is Not Entitled To Preliminary Or Permanent Injunctive Relief.

38. Count II of the petitioner's Petition should also be dismissed because it is predicated on the causes of action advanced in Counts I and IV. Because Counts I and IV fail as a matter of law, the petitioner cannot show a likelihood of success on the merits, cannot show irreparable harm, cannot show that the balance of the equities tip in his/her favor, and cannot show that it is in the public interest to have him/her removed from the EES. *See Thompson v. N.H. Bd. Of Medicine*, 143 N.H. 107, 108 (1998) (setting forth preliminary injunction elements). The petitioner is therefore not entitled to preliminary or permanent injunctive relief under Count II.

E. The Petitioner Is Not Entitled To A Writ Of Mandamus (Count III).

39. A writ of mandamus is "an extraordinary writ that may be addressed to a public official, ordering him to take action, and it may be issued only when no other remedy is available and adequate." *Rockhouse Mt. Property Owners Ass'n, Inc. v. Town of Conway*, 127 N.H. 593, 602 (1986).

40. "A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily or in bad faith." *In re Petition of CIGNA Healthcare, Inc.*, 146 N.H. 683, 687 (2001).

41. "When an official is given discretion to decide how to resolve an issue before [her/]him, a mandamus order may require [her/]him to address the issue, but it cannot require a particular result." *Rockhouse Mt. Property Owners Ass'n*, 127 N.H. at 602.

42. "Th[e] court will, *in its discretion*, issue a writ of mandamus only where the petitioner has an apparent right to the relief requested and no other remedy will fully and adequately afford relief." *In re Petition of CIGNA Healthcare, Inc.*, 146 N.H. at 687 (emphasis added). "Th[e] court exercises its discretionary power to issue such writs with caution and forbearance and then only when the right to relief is clear." *Id.*

43. The petitioner's claim for a writ of mandamus (Count III) fails for several reasons.

44. First, a writ of mandamus does not lie against a state agency like the New Hampshire Attorney General's Office. It lies against a public official, to compel that public official to perform a ministerial obligation that the official (a) has the authority to perform and (b) has refused to perform. The Grafton County Attorney does not have the authority to remove Officer A.B. from the EES. No other public official has been named in this action. Thus, the writ of mandamus claim fails for this reason.

45. Second, the petition fails to identify any ministerial obligation that a public official from the New Hampshire Attorney General's Office could perform for

him/her that it has not performed. As the petition concedes, there is no process for an officer to be removed from the EES because the underlying conduct for which he/she has been placed on the EES is, in the individual officer's opinion, stale or of no further relevance to future criminal proceedings, nor does the state or federal constitution require such process. To the contrary, an EES removal process based on staleness would likely violate both *Brady* and *Laurie* and would not extinguish a prosecutor's independent, constitutional obligation to provide all exculpatory evidence to the accused in a criminal matter.

46. Consequently, the petition fails to plead factual matter establishing a ministerial obligation which a public official at the New Hampshire Attorney General's Office has failed to perform.

47. Third, the petitioner has not established that he/she has any right to relief on the allegations of the petition, much less a "clear" right to relief that would justify the court exercising its discretionary power to issue a writ of mandamus against the New Hampshire Attorney General's Office in this action.

48. Fourth, the petitioner has not pled that any public official has performed an official act arbitrarily or in bad faith and does not appear to seek to correct any such action through the writ of mandamus claim.

49. Consequently, Count III fails to state a claim for a writ of mandamus.

F. Conclusion

50. For the above reasons, Counts I-IV fail as a matter of law. All of them must therefore be dismissed.[1]

[1]If the petitioner contends that he/she has been erroneously placed on the EES (and it does not appear that he/she does), the petitioner may be entitled to a due process remedy through a declaratory judgment action

51. Accordingly, and for all of the above reasons, the plaintiff's Petition should be dismissed.

WHEREFORE, the New Hampshire Attorney General's Office respectfully requests that this court issue an order:

A. Dismissing the plaintiff's Petition for Declaratory Judgment and Equitable Relief; and

B. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

THE OFFICE OF THE ATTORNEY GENERAL

By its attorney,

THE OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL

Date: September 13, 2019

By:/s/ Anthony J. Galdieri

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in superior court to attempt to prove that the underlying conduct which got him/her placed on the EES in first instance never occurred or is not substantiated, consistent with *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015) and *Gantert v. City of Rochester*, 168 N.H. 640 (2016). If the petitioner prevails in such an action, the New Hampshire Attorney General's Office has a procedure in place to remove officers from the EES who present the Office with such a court order. *See* Law Enforcement Memorandum, Additional Guidance Concerning the Exculpatory Evidence Schedule, https://www.doj.nh.gov/criminal/documents/exculpatory-evidence-20180430.pdf (last visited Sept. 9, 2019). The New Hampshire Attorney General's Office takes no position at this time as to whether such a declaratory judgment action, if brought by Officer A.B., would be timely under the applicable statute of limitations or would be barred by other timeliness defenses.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was served September 13, 2019, to all counsel of record via the court's electronic filing system.

/s/ Anthony J. Galdieri
Anthony J. Galdieri

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

JOHN DOE

v.

GORDON J. MACDONALD, IN HIS CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW HAMPSHIRE

Docket No.: 217-2020-CV-00216

ORDER

The plaintiff is a certified New Hampshire law enforcement officer who is seeking to have his name removed from the "exculpatory evidence schedule," formerly known as the Laurie List (hereinafter, the "EES").[1] The plaintiff is seeking a declaratory judgment, injunctive relief, and attorneys' fees. The defendant, Gordon MacDonald in his official capacity as Attorney General, now moves to dismiss for failure to state a claim. The plaintiff objects. The Court held a hearing on the motion on June 24, 2020.[2] For the following reasons, the defendant's motion to dismiss is **GRANTED**.

FACTS

The plaintiff alleges the following relevant facts, which the Court assumes to be true. The plaintiff was hired as a police officer in November of 2005. (Petition ¶ 7.) After graduating from the academy and completing his field training, the plaintiff was

[1] The EES, which was formerly known as the Laurie List after State v. Laurie, 139 N.H. 325 (1995), is "an informal list of police officers who have been identified as having potentially exculpatory evidence in their personnel files or otherwise." Duchesne v. Hillsborough Cty. Atty., 167 N.H. 774, 775 (2015). This list is kept by each County Attorney to assist prosecutors in meeting their constitutional obligation to disclose potentially exculpatory evidence regarding police witnesses. LaMontagne v. Town of Derry, Rockingham Cnty. Super. Ct., No. 218-2019-CV-00338 at 1 (Apr. 27, 2020) (Order, Schulman, J.).

[2] At the hearing, the parties agreed to incorporate, to the extent they are relevant, arguments from an earlier hearing in a related case, John Doe v. Gordon MacDonald, No. 217-2020-CV-00176.

released to solo status as a probationary police officer. (Id.) On or about August 27, 2006, the plaintiff was assigned as a patrol officer and working a midnight shift. (Id. ¶ 8.) At the beginning of his shift, the plaintiff stopped at a bar to check on the safety of his girlfriend. (Id.) While he was speaking with his girlfriend outside the bar, a verbal confrontation ensued between the plaintiff and one of his girlfriend's male friends, during which the plaintiff threatened to arrest the friend if he did not return inside the bar. (Id.) The friend complied. (Id. ¶ 9.) After the plaintiff finished speaking with his girlfriend, he apologized to the male friend and left the bar to begin his patrol. (Id.) While transiting to his assigned patrol area, the plaintiff accelerated too quickly out of a turn, lost control of his cruiser, and was involved in a minor collision. (Id. ¶¶ 10, 12.)

The next day, the male friend from the previous evening's encounter filed a formal complaint against the plaintiff with the police department. (Id. ¶ 11.) A sergeant was assigned to investigate the allegations, and interviewed several witnesses, including the plaintiff. (Id.) The sergeant conducted two eight-hour, recorded interviews with the plaintiff. (Id.) During this time, the plaintiff was only allowed a "couple" of five-minute breaks to use the restroom and eat. (Id.) The plaintiff initially denied the allegations levied toward him, until they were phrased differently by the sergeant. (Id. ¶ 12.) At the conclusion of the investigation, the sergeant "sustained" the allegations against the plaintiff, which included conduct unbecoming a police officer, neglect of duty, oppression of duty/misuse of authority, and truthfulness. (Id. ¶¶ 11, 13.) He also recommended that the plaintiff be formally disciplined at the discretion of the Chief. (Id. ¶ 13.)

After careful consideration, which included the plaintiff's status as a probationary employee without the full protections of the collective bargaining agreement, the plaintiff tendered his letter of resignation to the Chief of Police on or about November 17, 2006. (Id.) The plaintiff allegedly was told that there would be no repercussions because of his resignation, and was not informed that the Chief would submit his name to the Attorney General's Office for inclusion on the EES. (Id.)

The plaintiff was subsequently hired by another police department as a dispatcher, against the recommendations of his background investigator, because the department was inclined to give him a second chance. (Id. ¶ 15.) He worked in this role until 2010, when he completed another background investigation and was hired as a police officer. (Id. ¶ 16.) During his time as a police officer, the plaintiff has served as a field training officer, drug recognition expert, and eventually, as a detective. (Id. ¶¶ 17–18.) In February of 2019, the Chief of Police received an inquiry from the County Attorney's Office regarding the circumstances of the plaintiff's inclusion on the EES. (Id. ¶ 17.) Until that inquiry, neither the police department nor the plaintiff were aware of his inclusion on the list. (Id. ¶¶ 13, 15, 17.) As a result of his inclusion on the EES, the plaintiff was returned to patrol and forbidden from investigating any felonies with an individual victim. (Pl.'s Obj. Mot. Dismiss ¶ 37.)

The plaintiff, the police chief, the department's executive captain, and the department's police prosecutor all wrote letters to the Attorney General's Office asking that the plaintiff's name be removed from the EES. (Petition ¶¶ 18–19.) A representative of the New England Police Benevolent Society also formally requested that the defendant intervene in the matter and remove the plaintiff's name from the list.

(Id. ¶ 21.) After the defendant, through a designee, responded that he was unable to remove a name from the EES absent a court or administrative ruling that overturned the original finding of misconduct, the plaintiff filed a three-count petition. (See id. at ¶ 22; Pl.'s Obj. Mot. Dismiss, App. D, Letter from Geoffrey W.R. Ward (Mar. 28, 2019).) Count I asks this Court to review the alleged misconduct in camera and issue a declaratory judgment that it does not rise to the level of exculpatory evidence requiring the plaintiff to be included on the EES. Count II seeks both a preliminary and permanent injunction ordering the defendant to remove the plaintiff's name from the EES. Finally, Count III seeks attorneys' fees. The defendant now moves to dismiss all three counts for failure to state a claim, and the plaintiff objects. (See Def.'s Mot. Dismiss; Pl.'s Obj. Mot. Dismiss.)

ANALYSIS

In ruling on a motion to dismiss for failure to state a viable legal claim, the Court considers "whether the allegations in the complaint are reasonably susceptible of a construction that would permit recovery." Kurowski v. Town of Chester, 170 N.H. 307, 310 (2017). The Court must "assume all facts pleaded in the complaint to be true and construe all reasonable inferences drawn from those facts in the plaintiff's favor," but need not "assume the truth of statements in the pleadings that are merely conclusions of law." Id. The Court then engages "in a threshold inquiry that tests the facts in the complaint against the applicable law[.]" Id. Dismissal is proper if the facts do not constitute a basis for legal relief. Id.

Here, the defendant's motion to dismiss relies on four principal arguments. First, the defendant argues that RSA 516:36 forecloses the suit because it makes internal

investigations inadmissible in almost all civil actions.[3] Second, the defendant argues that, as a matter of law, RSA 105:13-b does not provide the plaintiff a cause of action to seek a declaratory judgment. (Def.'s Mot. Dismiss ¶¶ 11–15.) Third, the defendant argues that the plaintiff has failed to state a claim for either a procedural or substantive Fourteenth Amendment Due Process violation. (Id. ¶¶ 27–60.) Finally, the defendant argues that the plaintiff is barred by 42 U.S.C. § 1983 from seeking monetary damages from the defendant in his official capacity. (Id. ¶¶ 61–64.)

The plaintiff objects. First, he contends that the rule of evidence in RSA 516:36 does not apply to this proceeding because it is not a tort case and sounds exclusively in equity. Second, he argues that while RSA 105:13-b does not explicitly provide an individual mechanism for the Court to determine whether the information in the plaintiff's personnel file is exculpatory, it at least provides a framework for the Court to exercise its equitable power. (Pl.'s Obj. Mot. Dismiss ¶¶ 9–11.) He goes on to argue that even if the Court deems the facts of the underlying alleged misconduct to be potentially exculpatory, the plaintiff's name should still be removed because the evidence is "stale." (Id. ¶ 25.) Third, the plaintiff asserts that he does state facts to support both a Fourteenth Amendment Due Process claim and a claim for violation of Part I, Articles 2 and 14 of the New Hampshire Constitution. (Id. ¶ 26.) Finally, the plaintiff argues that contrary to the defendant's assertions, he is not seeking monetary damages, and therefore does not need to bring his claim as a 42 U.S.C. § 1983 action. (Id. ¶ 42.) The Court will address each argument in turn.

I. RSA 516:36

As a threshold matter, the defendant asserts that RSA 516:36 expressly

[3] The defendant raised this statutory argument for the first time at oral arguments on the motion.

forecloses the plaintiff's suit because it renders the records of the department's internal investigation inadmissible in any civil proceeding. RSA 516:36 provides in relevant part that:

> 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 . . . 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.

RSA 516:36, II.

While the scope of paragraph II appears to be broad, the Court is not persuaded that it entirely forecloses a suit in equity such as the instant action. By its own language, the statute addresses the admissibility of internal records in civil actions—not the ability of the Court to conduct an in camera review of those records, as the plaintiff here seeks. Cf. Moses v. Mele, No. 10-cv-253-PB, 2011 WL 2174029, at *6 (D.N.H. Jun 1, 2011) (finding the RSA 516:36, by its own terms, did not bar the discovery of internal investigative files, only their admissibility). Indeed, the Court routinely conducts in camera reviews of evidence prior to making a determination about its admissibility in a particular case.

Additionally, on at least three prior occasions, the New Hampshire Supreme Court has heard appeals involving officers challenging their inclusion on the EES. See Gantert v. City of Rochester, 168 N.H. 640 (2016); Duchesne v. Hillsborough Cty. Atty., 167 N.H. 774 (2015); In re John Doe, No. 2019-0705, 2020 N.H. LEXIS 123 (Aug, 16, 2020) (non-precedential order). The New

Hampshire Supreme Court has held that a person's "interest in [his] reputation, particularly in [his] profession, is significant and that governmental actions affecting it require due process." Gantert, 168 N.H. at 648 (citations omitted). The Supreme Court has likewise held that "the interest of individual officers in their reputations and careers is such that there must be some post-placement mechanism available to an officer to seek removal from the 'Laurie List' if the grounds for placement on the list are thereafter shown to be lacking substance." Gantert, 168 N.H. at 650 (emphasis in original).

Furthermore, just days ago the Supreme Court observed that the Superior Court is the appropriate venue in which an officer can seek equitable relief over his inclusion on the EES. See In re John Doe, 2020 N.H. LEXIS 132, at *5 ("In fact, in two recent cases appealed to this court, police officers properly sought such equitable relief in the superior court.") (emphasis added). Yet that equitable remedy would be rendered a nullity without the Court's ability to review the record of an officer's underlying disciplinary proceeding for conformity with the constitutional requirements of due process. Therefore, the Court rejects the defendant's argument that the rule of evidence in RSA 516:36 entirely forecloses this Court's consideration of this action.

II. RSA 105-b:13

The defendant's argument that RSA 105-b:13 does not create a cause of action requires this Court to engage in statutory interpretation, the principles of which are well settled. When construing a statute, the Court looks first to the language of the statute itself and, when possible, interprets that language according to its plain and ordinary

meaning. Langevin v. Travco Ins. Co., 170 N.H. 660, 664 (2018). The Court interprets "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 does not "consider words or phrases in isolation, but rather in the context of the statute as a whole." Id.

RSA 105-b:13 provides in relevant part that:

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

(emphasis added). The plaintiff relies on this statute as the basis to argue that he is "entitled to an in camera review and hearing on whether this matter constitutes exculpatory evidence requiring him to be on the EES." (Petition ¶ 27.) By its plain language however, the procedure outlined under RSA 105:13-b clearly applies only when a police officer is "serving as a witness in any criminal case." See Duchesne, 167 N.H. at 781 ("The current version of RSA 105:13-b addresses three situations that may exist with respect to police officers who appear as witness in criminal cases."); In re John Doe, 2020 N.H. LEXIS 132, at *1 (describing the in camera review of an officer's file to determine the presence of exculpatory evidence in the context of his appearance as a witness at a criminal trial).

It is also clear from its plain language that RSA 105-b:13 does not provide a police officer with an independent cause of action to seek a declaratory judgment in a civil suit. Nor does it—despite the plaintiff's assertions to the contrary—provide this

Court with a framework to determine in the abstract whether the conduct that caused the plaintiff to be on the EES is exculpatory. As the plaintiff himself concedes, "evidence could be exculpatory in some cases, all cases, or never . . . ." (Pl.'s Obj. Mot. Dismiss ¶ 13.) Consequently, this Court cannot determine as a matter of law whether evidence in the plaintiff's personnel record is exculpatory or not outside the facts or circumstances of a particular criminal case. Cf. Gantert, 168 N.H. at 649 ("The government has a great interest in placing on the Laurie List officers whose confidential personnel files may contain exculpatory information.") (emphasis added).

The plaintiff's argument that his underlying conduct is too "stale" from the passage of time to be exculpatory also misses the mark. This argument again presumes that RSA 105-b:13 creates a vehicle through which the plaintiff can seek an in camera review in the first instance, which as established above, does not. And even if it did, the Court is not persuaded that the passage of time alone automatically renders formerly exculpatory evidence non-exculpatory.

The plaintiff's reliance on Rule of Evidence 609 is similarly misplaced. Rule 609 focuses on the admissibility of a particular class of evidence, and not on a prosecutor's constitutional duty to disclose potentially exculpatory evidence it to a defendant. Indeed, the New Hampshire Supreme Court has remarked that "the admissibility of evidence at trial does not necessarily mark the bounds of the prosecutor's disclosure obligations under Brady." Duchesne, 167 N.H. at 784.

Because RSA 105-b:13 does not create a legal or equitable right that can be enforced by the plaintiff, and because it does not provide this Court a suitable

framework to exercise its equitable power, this Court holds that Count I fails to state a claim and must be dismissed. See RSA 491:22, I; Kurowski, 170 N.H. at 310.

III. Due Process

As an initial matter, the defendant argues that the plaintiff does not assert a due process claim under the New Hampshire Constitution and fails to state a claim under the Federal Constitution for either a procedural or substantive due process violation. (Def.'s Reply to Pl.'s Obj. at 4–5, 8.) Nonetheless, because the plaintiff relies so heavily on Gantert and Duchesne as the basis for his procedural due process claims—cases that were decided under the State Constitution—the Court will treat the complaint as raising a State Constitutional procedural due process claim as well. Ultimately, however, it is immaterial under which constitutional framework the Court analyzes the plaintiff's claims because under either constitutional framework he fails to state a claim upon which relief can be sought.

A. Procedural Due Process

In addressing procedural due process claims under the New Hampshire Constitution, the Court engages in a two-part inquiry. Gantert, 168 N.H. at 647. First, it determines whether the plaintiff has an interest that entitles him or her to due process protection. Id. If so, the Court then determines what process is due. Id. To determine what process is due, the Court balances three factors: "(1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest though the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements." Id. at 647–48.

Here, there is no doubt that the plaintiff has a constitutionally protected interest in both his continued employment as a police officer and in his professional reputation. See Gantert, 168 N.H. at 648 (citations omitted); Duchesne, 167 N.H. at 782–83. On the other hand, it can also be said that "[t]he government has a great interest in placing on the Laurie List officers whose confidential personnel files may contain exculpatory information." Gantert, 168 N.H. at 649 (emphasis omitted). Thus, the only inquiry that remains is to balance the two interests and determine whether, based upon the facts alleged in the complaint as assumed to be true, the plaintiff was afforded sufficient process prior to being placed on the EES. The Court holds that he was.

The plaintiff acknowledges that he participated in the internal investigation in 2006, that he spoke with both the investigating sergeant and with the chief of police regarding the investigation, and that, knowing his reduced procedural protections as a probationary employee, he chose to resign instead of participating further in the internal investigation. (See Petition ¶¶ 11–13; Pl.'s Obj. Mot. Dismiss ¶ 30.) While it is true that the plaintiff was never given a separate opportunity for an EES-specific hearing prior to his name being included on the list, this additional process is not required if the officer is afforded sufficient pre-deprivation process during the underlying investigation and disciplinary proceeding. See Gantert, 168 N.H. at 649–50 (after noting that the plaintiff was afforded sufficient process during the department's internal investigation, holding that "[t]here is no need for a more formalized hearing or additional process before an officer is placed on the "Laurie List." (emphasis in original)). Based on the allegations in the Petition, the Court finds that, in light of the competing interests at stake, the plaintiff

was afforded sufficient process before being place on the EES and he fails to state a claim for a violation of his pre-deprivation due process rights.

Relying on Gantert, the plaintiff asserts that he is entitled to further post-deprivation due process after being placed on the EES. In that regard, the plaintiff's reliance on Gantert in inapposite. In Gantert, the New Hampshire Supreme Court observed that "the interest of individual officers in their reputations and careers is such that there must be some post-placement mechanism available to an officer to seek removal from the 'Laurie List' if the grounds are thereafter found to be lacking in substance. . . ." Gantert, 168 N.H. at 650 (emphasis added). Citing its previous decision in Duschesne, the Gantert Court went on to note that an officer "may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis." Id. (emphasis added). Here, the plaintiff does not allege that the underlying investigative findings "lack substance" or have been "clearly shown to be without basis." Instead, he admits to much of the underlying conduct and argues that said behavior is either not exculpatory or no longer exculpatory because of the passage of time. For these reasons, the Court concludes that under both Gantert and Duchesne, the plaintiff is not entitled to additional post-deprivation process based on the facts as alleged.

To the extent that the plaintiff disagrees with the underlying determinations of his alleged misconduct or with his placement on the EES, the Court finds that the Attorney General is not the proper defendant. In making the determination to place an officer on the EES, the Attorney General and County Attorneys rely on the reporting of chiefs of police throughout the State. See Duchesne, 167 N.H. at 780; (Pl.'s Obj. Mot. Dismiss,

App. C, Memorandum from Gordon J. MacDonald, Attorney General, re: Additional Guidance Concerning the Exculpatory Evidence Schedule (Apr. 30, 2018) (hereinafter, "MacDonald Memo").[4] Those reports are largely based on internal investigations conducted by chiefs within their respective agencies and departments. Any objections to the determination that there is exculpatory information in an officer's file must first be addressed to the agency that made the initial determination. (See MacDonald Memo. at 4–5.) Once the "sustained" finding is overturned, the Attorney General will remove this officer from the EES. (Id.) If the Attorney General then fails to do so, the plaintiff has cause of action against the Attorney General seeking equitable relief.

Indeed, this was the procedural posture in Duchesne. There, the plaintiff officers were placed on the EES (then known as the "Laurie List") after a department investigation found that they had violated use of force policies during an off-duty incident at a bar. Duchesne, 167 N.H. at 775. Thereafter, a neutral arbitrator overturned the chief's discipline of the officers and an investigation by the Attorney General's Office found that the plaintiffs' use of force was justified. Id. at 775–76. After the Hillsborough County Attorney refused to remove the officer's names from the EES, the officers brought suit seeking declaratory and injunctive relief. Id. at 776. The Supreme Court held that the trial court erred in not ordering the officers' names removed from the EES, in large part because the allegations of excessive force had

[4] Although the Court is generally limited to the four corners of the Complaint when ruling on a motion to dismiss, it may also consider "official public records" and "documents the authenticity of which are not disputed by the parties." Beane v. Dana S. Beane and Co., PC, 160 N.H. 708, 71 (2010). The plaintiff attached this memorandum as an appendix to his objection to the motion to dismiss. (See Pl.'s Obj. Mot. Dismiss, App. C.) Both parties refer to the series of Attorney General Memoranda regarding the EES, and neither party has challenged the authenticity of these memoranda provided to the Court.

been determined to be "unfounded." Id. at 784–85.[5]

Consequently, because the plaintiff has not alleged sufficient facts to support a finding that he was not afforded sufficient due process during the internal investigation which resulted in his placement on the EES, or that his sustained finding of misconduct against him has been subsequently overturned, found to be lacking substance, or to be clearly without basis, the plaintiff has failed to state a claim for relief under the New Hampshire Constitution. Because the New Hampshire Constitution is more protective in this area than its federal counterpart, the Court need not address the plaintiff's arguments under the Fourteenth Amendment. See, e.g., State v. Veale, 158 N.H. 632, 645 (2009).

B. Substantive Due Process

As a threshold matter, the Court finds that to the extent he raises one, the plaintiff's substantive due process claim is raised under the Fourteenth Amendment. (See generally Petition; see also Def.s' Reply at 8.) Substantive due process is a constitutional cause of action that leaves the door slightly ajar for [] relief in truly horrendous situations." Clark v. Boscher, 514 F.3d 107, 112 (1st Cir. 2008) (internal quotation omitted). To state a Fourteenth Amendment substantive due process claim, a plaintiff must allege both that he was deprived of a protected interest in life, liberty, or property and that the action of the government was so egregious as to shock the conscience. Id. The plaintiff argues that RSA 41:48 creates a property interest in the plaintiff's continued employment as a police officer. (Pl.'s Obj. Mot. Dismiss ¶ 36.)

[5] It should be noted that the court also expressed doubt that a single instance of the use of excessive force without any allegations of lying or misrepresentation had any bearing on the credibility of the officers. Duchesne, 167 N.H. at 784. The plaintiff here, however, has pleaded that he had sustained findings of conduct unbecoming a police officer, neglect of duty, oppression of duty/misuse of authority, and truthfulness. (See Petition ¶¶ 11, 13.)

Assuming for the sake of argument that this is the case, the plaintiff has not alleged the that actions of the Attorney General have deprived him of his continued employment. RSA 41:48 protects police officers in New Hampshire from removal except for cause. As far as the Court can glean from the plaintiff's allegation, he remains employed as a police officer, notwithstanding his placement on the EES. Moreover, even if he were deprived of a protected interest, given the important constitutional obligations at stake, the Court does not find it troubling that the defendant did not remove the plaintiff from the EES absent his sustained finding of misconduct being overturned or subsequently found to lack basis. Therefore, the Court finds that the plaintiff fails to state a claim for a Fourteenth Amendment substantive due process claim.

IV. Attorneys' Fees and Costs

Because the Court has determined that that plaintiff has failed to state a claim upon which relief can be sought, it need not address the parties' arguments regarding attorneys' fees.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss is **GRANTED**. Accordingly, Counts I, II, and III of the Petition are dismissed.

SO ORDERED.

8/27/2020
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/27/2020

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

JOHN DOE

v.

GORDON J. MACDONALD, IN HIS CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW HAMPSHIRE

Docket No.: 217-2020-CV-00176

ORDER

The plaintiff is a certified New Hampshire law enforcement officer who is seeking to have his name removed from the "exculpatory evidence schedule," formerly known as the Laurie List (hereinafter, the "EES").[1] The plaintiff seeks a declaratory judgment, injunctive relief, and attorneys' fees. The defendant, Gordon MacDonald, in his official capacity as Attorney General, now moves to dismiss for failure to state a claim. The plaintiff objects. The Court held a hearing on the motion on June 24, 2020. For the following reasons, the defendant's motion to dismiss is **GRANTED**.

FACTS

The plaintiff alleges the following relevant facts, which the Court assumes to be true. On or about April 15, 2016, the plaintiff was employed as a patrol officer. (Petition ¶ 7.) The plaintiff had just finished an overnight shift from 12:00 a.m. to 8:00 a.m. and returned to the station, where he encountered other officers in the break room. (Id.)

[1] The EES, which was formerly known as the Laurie List after State v. Laurie, 139 N.H. 325 (1995), is "an informal list of police officers who have been identified as having potentially exculpatory evidence in their personnel files or otherwise." Duchesne v. Hillsborough Cty. Atty., 167 N.H. 774, 775 (2015). This list is kept by each County Attorney to assist prosecutors in meeting their constitutional obligation to disclose potentially exculpatory evidence regarding police witnesses. LaMontagne v. Town of Derry, No. 218-2019-CV-00338 at 1 (N.H. Super. Apr. 27, 2020) (Schulman, J.).

Among the officers he encountered was the Chief of the Department. (Id.) At the time of the encounter, the plaintiff was wearing a high-visibility rain jacket. (Id. ¶ 8.) On the back of the neck portion of the jacket, a name had been written in black permanent marker, and the plaintiff had crossed the name out and written his own in its place. (Id.) The Chief asked the plaintiff who had written on the back of his jacket. (Id. ¶ 7.) Allegedly thinking that the Chief was intending to ask him who had written the other name, the plaintiff responded that he did not know. (Id. ¶¶ 7–8.)

On or about April 16, 2016, the plaintiff was working a day shift when he was approached by his supervisor, who informed him that he had conducted an internal investigation into who had written on the back of the jacket. (Id. ¶ 9.) The supervisor concluded that it was the plaintiff who had written on the jacket, and the plaintiff agreed that it was him. He alleges that this time he was under the impression that they were talking about his own name. (Id.) The plaintiff states he was led to believe that he would only receive a "verbal counseling." (Id.) However, he later discovered in February of 2017 that the incident had progressed into a one-page, documented internal investigation when he applied to another police department. (Id.)

In September of 2016, the plaintiff left that department and in March of 2017 was subsequently hired by another Town. (Id. ¶ 10.) On or about April 27, 2017, the plaintiff received a letter from the County Attorney's Office informing him that it had reviewed information about his conduct submitted by his prior department and concluded that one matter was potentially disclosable as exculpatory evidence. (Id. ¶ 11.) At the time he received this letter, the plaintiff was enrolled in the full-time police academy and he alleges he did not have time to contest his inclusion on the EES. (Id.)

After the plaintiff graduated from the police academy, he retained counsel to assist him with removing his name from the EES. (Id. ¶ 12.) The plaintiff twice requested that the defendant remove his name from the EES. (Id. ¶¶ 13–14.) Both times, the defendant, through a designee, responded that he was unable to remove a name from the EES absent a court or administrative ruling that overturned the original finding of misconduct. (Id.; see Pl.'s Obj. Mot. Dismiss, App. A, Letter from Lisa L. Wolford (Jul. 17, 2018); App. B, Letter from Geoffrey W.R. Ward (Mar. 28, 2019).)

The plaintiff's former Chief of Police provided a written affidavit to the plaintiff on or about November 4, 2019.[2] (Id. ¶ 15.) In it, he stated that he had conducted an informal internal investigation into the incident and concluded that the plaintiff had written on the back of the jacket. (Id.) He further stated that the plaintiff's integrity was not a part of the investigation and that he did not submit the plaintiff's name for inclusion on the EES. (Id.) The Chief surmised that the plaintiff's name was submitted after the Chief retired and that the plaintiff may be a victim of "office politics." (Id.)

Thereafter, the plaintiff filed a three-count petition. Count I asks this Court to review the alleged misconduct in camera and issue a declaratory judgment that it does not rise to the level of exculpatory evidence requiring the plaintiff to be included on the EES. Count II seeks both a preliminary and permanent injunction ordering the defendant to remove the plaintiff's name from the EES. Finally, Count III seeks attorneys' fees. The defendant now moves to dismiss all three counts for failure to state a claim, and the plaintiff objects. (See Def.'s Mot. Dismiss; Pl.'s Obj. Mot. Dismiss.)

[2] A copy of this affidavit was not provided to the Court, nor is there any indication in the record that it was provided to the Attorney General's Office or the County Attorney's Office.

ANALYSIS

In ruling on a motion to dismiss for failure to state a viable legal claim, the Court considers "whether the allegations in the complaint are reasonably susceptible of a construction that would permit recovery." Kurowski v. Town of Chester, 170 N.H. 307, 310 (2017). The Court must "assume all facts pleaded in the complaint to be true and construe all reasonable inferences drawn from those facts in the plaintiff's favor," but need not "assume the truth of statements in the pleadings that are merely conclusions of law." Id. The Court then engages "in a threshold inquiry that tests the facts in the complaint against the applicable law[.]" Id. Dismissal is proper if the facts do not constitute a basis for legal relief. Id.

Here, the defendant's motion to dismiss relies on four principal arguments. First, the defendant argues that RSA 516:36 forecloses the suit because it makes internal investigations inadmissible in all civil actions.[3] Second, the defendant argues that as a matter of law, RSA 105:13-b does not provide the plaintiff with a cause of action to seek a declaratory judgment. (Def.'s Mot. Dismiss ¶¶ 9–22.) Third, the defendant argues that the plaintiff has failed to state a claim for either a procedural or substantive Fourteenth Amendment Due Process violation. (Id. ¶¶ 23–52.) Finally, the defendant argues that the plaintiff is barred by 42 U.S.C. § 1983 from seeking monetary damages from the defendant in his official capacity. (Id. ¶¶ 53–56.)

The plaintiff objects. First, he contends that the rule of evidence in RSA 516:36 does not apply to this proceeding because this is not a tort case and the action sounds exclusively in equity. Second, he argues that RSA 105:13-b does in fact provide a mechanism for the court to determine whether the information in the plaintiff's record is

[3] The defendant raised this statutory argument for the first time at oral arguments on the motion.

exculpatory. (Pl.'s Obj. Mot. Dismiss ¶¶ 6–7.) However, even if, as the defendant asserts, it does not provide an independent cause of action, RSA 105:13-b at least provides a framework for the Court to exercise its equitable power. (Id. ¶¶ 8–12.) Third, the plaintiff asserts that he does state facts giving rise to a violation of his procedural and substantive Due Process rights under the Fourteenth Amendment. (Id. ¶¶ 17, 20–21, 26–27.) Finally, the plaintiff argues that contrary to the defendant's assertions, he is not seeking monetary damages, and therefore does not need to bring his claim as a 42 U.S.C. § 1983 action. (Id. ¶ 33.) This Court will address each argument in turn.

I. RSA 516:36

As a threshold matter, the defendant asserts that RSA 516:36 expressly forecloses the plaintiff's suit because it renders the records of the department's internal investigation inadmissible in any civil proceeding. RSA 516:36 provides in relevant part that:

> 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 . . . 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.

RSA 516:36, II.

While the scope of paragraph II appears to be broad, the Court is not persuaded that it entirely forecloses a suit in equity such as this one. By its own language, the statute addresses the admissibility of internal records in civil actions—not the ability of the Court to conduct an in camera review of those records, as the plaintiff here seeks. Cf. Moses v. Mele, No. 10-cv-253-PB, 2011

WL 2174029, at *6 (D.N.H. June 1, 2011) (finding the RSA 516:36, by its own terms, did not bar the discovery of internal investigative files, only their admissibility). Indeed, the Court routinely conducts in camera reviews of evidence prior to making a determination about its admissibility.

Additionally, on at least three prior occasions, the New Hampshire Supreme Court has heard cases involving officers challenging their inclusion on the EES. See Gantert v. City of Rochester, 168 N.H. 640 (2016); Duchesne v. Hillsborough Cty. Atty., 167 N.H. 774 (2015); In re Doe, No. 2019-0705, 2020 N.H. LEXIS 132 (Aug. 16, 2020) (non-precedential order). The New Hampshire Supreme Court has held that a person's "interest in [his] reputation, particularly in [his] profession, is significant and that governmental actions affecting it require due process." Gantert, 168 N.H. at 648 (citations omitted). The Supreme Court has likewise held that "the interest of individual officers in their reputations and careers is such that there must be some post-placement mechanism available to an officer to seek removal from the 'Laurie List' if the grounds for placement on the list are thereafter shown to be lacking substance." Gantert, 168 N.H. at 650 (emphasis in original). Moreover, just days ago, the Supreme Court reasserted that the Superior Court is the appropriate venue in which an officer can seek equitable relief over his inclusion on the EES. See In re Doe, 2020 N.H. LEXIS 132, at *5 ("In fact, in two recent cases appealed to this court, police officers properly sought such equitable relief in the superior court.") (emphasis added). That equitable remedy would be rendered a nullity without the Court's ability to review the record of an officer's underlying disciplinary proceeding for conformity

with the constitutional requirements of due process. Therefore, the Court rejects the defendant's argument that the rule of evidence in RSA 516:36 forecloses this Court's consideration of the plaintiff's instant action.

II. RSA 105-b:13

The defendant's argument that RSA 105-b:13 does not create a cause of action requires this Court to engage in statutory interpretation, the principles of which are well settled. When construing a statute, the Court looks first to the language of the statute itself and, when possible, interprets that language according to its plain and ordinary meaning. Langevin v. Travco Ins. Co., 170 N.H. 660, 664 (2018). The Court interprets "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 does not "consider words or phrases in isolation, but rather in the context of the statute as a whole." Id.

RSA 105-b:13 provides in relevant part that:

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

(emphasis added). The plaintiff relies on this statute as the basis to argue that he is "entitled to an in-camera review and hearing on whether this matter constitutes exculpatory evidence requiring him to be on the EES." (Petition ¶ 23.) By its plain language however, the procedure outlined under RSA 105:13-b clearly applies only when a police officer is "serving as a witness in any criminal case." See Duchesne, 167 N.H. at 781 ("The current version of RSA 105:13-b addresses three situations that may

exist with respect to police officers who appear as witness in criminal cases.") (emphasis added); In re Doe, 2020 N.H. LEXIS 132, at *1 (describing the in camera review of an officer's file to determine the presence of exculpatory evidence in the context of his appearance as a witness at a criminal trial).

It is also clear from its plain language that RSA 105-b:13 does not provide a police officer with an independent cause of action to seek a declaratory judgment in a civil suit. Nor does it—despite the plaintiff's assertions to the contrary—provide this Court with a framework to determine in the abstract whether the conduct that caused the plaintiff to be on the EES is exculpatory. As the plaintiff himself concedes, "evidence could be exculpatory in some cases, all cases, or never . . . ." (Pl.'s Obj. Mot. Dismiss ¶ 11.) Consequently, this Court cannot determine as a matter of law whether evidence in the plaintiff's personnel record is exculpatory outside the facts or circumstances of a particular criminal case. Cf. Gantert, 168 N.H. at 649 ("The government has a great interest in placing on the Laurie List officers whose confidential personnel files may contain exculpatory information.") (emphasis added).

Because RSA 105-b:13 does not create a legal or equitable right that can be enforced by the plaintiff, and because it does not provide this court a suitable framework to exercise its equitable power, this Court holds that Count I fails to state a claim and must be dismissed. See RSA 491:22, I; Kurowski, 170 N.H. at 310.

III. Due Process

As an initial matter, the defendant argues that the plaintiff does not assert a due process claim under the New Hampshire Constitution and fails to state a claim under the Federal Constitution for either a procedural or substantive due process violation.

(See Def.'s Mot. Dismiss ¶¶ 34, 52; Def.'s Reply to Pl.'s Obj. at 3, 7.) Nonetheless, because the plaintiff relies so heavily on Duchesne and Gantert as the basis for his procedural due process claims—cases that were decided under the State Constitution—the Court will treat the Petition as raising a State Constitution procedural due process claim as well. Ultimately, however, it is immaterial under which constitutional framework the Court analyzes the plaintiff's claims, because under either constitutional framework he fails to state a claim upon which relief can be sought.

A. Procedural Due Process

In addressing procedural due process claims under the New Hampshire Constitution, the Court engages in a two-part inquiry. Gantert, 168 N.H. at 647. First, it determines whether the plaintiff has an interest that entitles him or her to due process protection. Id. If so, the Court then determines what process is due. Id. To determine what process is due, the Court balances three factors: "(1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest though the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements." Id. at 647–48.

Here, there is no doubt that the plaintiff has a constitutionally protected interest in both his continued employment as a police officer and in his professional reputation. See Gantert, 168 N.H. at 648 (citations omitted); Duchesne, 167 N.H. at 782–83. On the other hand, it can also be said that "[t]he government has a great interest in placing on the 'Laurie List' officers whose confidential personnel files may contain exculpatory information." Gantert, 168 N.H. at 649 (emphasis omitted). Thus, the only inquiry that

remains is to balance the two interests and determine whether, based upon the facts alleged in the Petition as assumed to be true, the plaintiff was afforded sufficient process. The Court holds that he was.

The plaintiff does not argue that he was deprived of pre-deprivation due process. (Pl.'s Obj. Mot. Dismiss ¶ 20.) Instead, relying on Gantert, the plaintiff asserts that he is entitled to additional post-deprivation process after being placed on the EES. (Id. ¶ 20.) However, this additional process is not required if the officer is afforded sufficient pre-deprivation process during the underlying investigation and disciplinary proceeding. See Gantert, 168 N.H. at 649–50 (after noting that the plaintiff was afforded sufficient process during the department's internal investigation, holding that "[t]here is no need for a more formalized hearing or additional process before an officer is placed on the 'Laurie List.'" (emphasis in original)). Indeed, the plaintiff in Gantert was not arguing for additional post-deprivation process, rather he was challenging the trial court's finding that he was provided sufficient pre-deprivation due process. Id. at 647.

Here, the plaintiff acknowledges that he participated in the internal investigation in 2016. (See Petition ¶¶ 7–9.) While he argues that he was initially told that he would only receive a "verbal counseling" regarding the incident, the plaintiff admits that he later discovered that it had resulted in a one-page internal investigation in February of 2017. (Id. ¶ 9.) The plaintiff also acknowledges that he was informed by the County Attorney of his pending placement on the EES in April of 2017 and given an opportunity to contest it. (Id. ¶ 11.) He also admits that he chose to forgo this opportunity to contest his placement on the EES. (Id. ¶ 11.) The Court finds that, like the plaintiff in Gantert, the plaintiff had two layers of review before his placement in the EES and that this was

sufficient pre-deprivation process in light of the competing interests at stake. See Gantert, 168 N.H. at 649–50. The fact that he did not avail himself of one layer of protection does not negate the fact the he was provided sufficient process. As the defendant points out, "[o]ne who has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard." (Def.'s Mot. Dismiss ¶ 31 (quoting Wozniak v. Conry, 236 F.3d 888, 890 (7th Cir. 2001) (emphasis in original)).

Furthermore, in Gantert, the New Hampshire Supreme Court observed that "the interest of individual officers in their reputations and careers is such that there must be some post-placement mechanism available to an officer to seek removal from the 'Laurie List' if the grounds are thereafter found to be lacking in substance. . . ." Gantert, 168 N.H. at 650 (emphasis added). Citing its previous decision in Duchesne, the Gantert Court went on to note that an officer "may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis." Id. Here, the plaintiff does not allege that the underlying investigative findings "lack substance" or have been "clearly shown to be without basis. While the plaintiff asserts that his "integrity was never part of the investigation," he does not allege that the sustained finding against him was ever overturned. (See Petition ¶ 15.) Thus, under both Gantert and Duchesne, the plaintiff is not entitled to additional post-deprivation process based on the facts as alleged.

To the extent that the plaintiff does have any quarrel with the underlying determinations of his alleged misconduct or with his placement on the EES, the Attorney General is not the proper defendant. In making the determination to place an

officer on the EES, the Attorney General and County Attorneys rely on the reporting of chiefs of police throughout the State. See Duchesne, 167 N.H. at 780; Memo. from Gordon J. MacDonald, Attorney General, re: Additional Guidance Concerning the Exculpatory Evidence Schedule (Apr. 30, 2018) (hereinafter, "MacDonald Memo").[4] Those reports are largely based on internal investigations conducted by chiefs within their respective agencies and departments. Any objections to the determination that there is exculpatory information in an officer's file must first be addressed to the agency that made the initial "sustained" determination. See MacDonald Memo. at 4–5. Only once the "sustained" finding is overturned will the Attorney General remove the objecting officer from the EES. See Id. If the Attorney General then fails to do so, the officer has a cause of action against the Attorney General seeking equitable relief.

Indeed, this was the procedural posture in Duchesne. There, the plaintiff officers were placed on the EES (then known as the "Laurie List") after a department investigation found that they had violated use of force policies during an off-duty incident at a bar. Duchesne, 167 N.H. at 775. Thereafter, a neutral arbitrator overturned the chief's discipline of the officers and an investigation by the Attorney General's Office found that the officers' use of force was justified. Id. at 775–76. After the Hillsborough County Attorney refused to remove the officers' names from the EES, the officers brought suit against the County Attorney seeking declaratory and injunctive relief. Id. at 776. The Supreme Court held that the trial court erred in not ordering the

[4] Although the Court is generally limited to the four corners of the Complaint when ruling on a motion to dismiss, it may also consider "official public records" and "documents the authenticity of which are not disputed by the parties." Beane v. Dana S. Beane and Co., 160 N.H. 708, 711 (2010). Both parties refer to the series of Attorney General Memoranda re: the EES, and neither party has challenged the authenticity of these memoranda provided to the Court.

officers' names removed from the EES in large part because the allegations of excessive force had been determined to be "unfounded." Id. at 784–85.[5]

Consequently, because he has not alleged sufficient facts to support a finding that he is entitled to additional post-deprivation process above and beyond what he has already received, the plaintiff has failed to state a claim for violation of his procedural due process rights under the New Hampshire Constitution. Because the New Hampshire Constitution is more protective in this area than its federal counterpart, the Court need not address the plaintiff's arguments under the Fourteenth Amendment. See, e.g., State v. Veale, 158 N.H. 632, 645 (2009).

B. Substantive Due Process

The parties appear to agree that to the extent he raises one, the plaintiff's substantive due process claim is raised under the Fourteenth Amendment. (See Def.'s Mot. Dismiss ¶ 47; Pl.'s Obj. Mot. Dismiss ¶ 27; Def's Reply ¶ 39.) Substantive due process is a constitutional cause of action that leaves the door slightly ajar for [] relief in truly horrendous situations." Clark v. Boscher, 514 F.3d 107, 112 (1st Cir. 2008) (internal quotation omitted). To state a substantive due process claim under the Fourteenth Amendment, a plaintiff must allege both that he was deprived of a protected life, liberty, or property interest and that the action the government was so egregious as to shock the conscience. Id.

The plaintiff argues that RSA 41:48 creates a property interest in the plaintiff's continued employment as a police officer. (Pl.'s Obj. Mot. Dismiss ¶ 26.) Assuming for

[5] It should be noted that the Supreme Court also expressed doubt that a single instance of the use of excessive force without any allegations of lying or misrepresentation had any bearing on the credibility of the officers. Duchesne, 167 N.H. at 784. The allegations here, however, do not concern the use of excessive force.

the sake of argument that this is the case, the plaintiff has not alleged that the actions of the Attorney General have deprived him of his continued employment. RSA 41:48 protects police officers in New Hampshire from removal except for cause. As far as the Court can glean from the plaintiff's allegation, he remains employed as an officer, notwithstanding his placement on the EES. Moreover, even if he were deprived of a protected interest, given the important constitutional obligations at stake, the Court does not find it troubling that the defendant did not remove the plaintiff from the EES absent his sustained finding of misconduct being overturned. Therefore, the Court finds that the plaintiff fails to state a claim for a Fourteenth Amendment substantive due process violation.

IV. Attorneys' Fees and Costs

Because the Court has determined that that plaintiff has failed to state a claim upon which relief can be sought, it need not address the parties' arguments regarding attorneys' fees.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss is **GRANTED**. Accordingly, Counts I, II, and III of the Petition are dismissed.

SO ORDERED.

8/27/2020
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/27/2020

HOUSE

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1992 SESSION

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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.

3732L
92-2419
09

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 [redacted] much of this information is not germane to the case and yet this information is used by defense attorney's 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 finds 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 [redacted] 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, ~~Dr~~ 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.

Records at regst of one police chief

• secured by reqest of an attorney.

Chief ~~David~~ Barrett - Taffney   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. Kyles 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

20659
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

USE ANOTHER FORM FOR MINORITY REPORT

144 5/02

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 OPPW/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

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HOUSE BILL NO. 1359

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

REFERRED TO: Judiciary

CHAIRMAN'S COPY

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

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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:

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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.

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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.

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HOUSE BILL - FINAL VERSION

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SENATE

1992 HB 1359

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HOUSE BILL AMENDED BY THE HOUSE

1992 SESSION

3732L
92-2419
09

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HB 1359

HOUSE BILL AMENDED BY THE HOUSE

- 1 -

3732L
92-2419
09

HB 1359

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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 Counties

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

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

Supporting Bill: ✓ Opposing Bill:

PLEASE LEAVE COPY OF ANY PREPARED STATEMENT WITH COMMITTEE CLERK

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 McConigle Jr	21 LAKE ST Concord	NH Police Association DO NOT WISH TO SPEAK
✓ Nina Gardner	Rm 410 State House Annex	Judic 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

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

BRYAN F. LAMONTAGNE

v.

TOWN OF DERRY;
DERRY POLICE DEPARTMENT;
OFFICE OF THE NEW HAMPSHIRE ATTORNEY GENERAL; and
NEW HAMPSHIRE POLICE STANDARDS AND TRAINING COUNCIL

218-2019-CV-00338

ORDER

The motions to dismiss filed by the Town of Derry, the Derry Police Department and the New Hampshire Attorney General are GRANTED because the complaint does not state a claim upon which relief may be granted.

Plaintiff's claims against the remaining defendant, the New Hampshire Police Standards And Training Council ("the Academy") are dismissed by the court *sua sponte* for the same reasons.

* * *

Plaintiff is a certified police officer who seeks to have his name removed from the "exculpatory evidence schedule" also known as the Laurie list. See State v. Laurie, 139 N.H. 325 (1995). As criminal practitioners know, a Laurie list is kept by each County Attorney to assist prosecutors in meeting their constitutional obligation to disclose evidence that might impeach the credibility of police witnesses. In other words, a Laurie list is a list of police officers with credibility problems. From time to time the Attorney General has provided written guidance regarding the criteria for placing an

officer on the list. That guidance, of course, is not the last word on what the due process clauses of the state and national constitutions require, either with respect to the disclosure of exculpatory evidence in criminal cases or with respect to the due process rights of suspect police officers.

According to the complaint, plaintiff was a Derry Police Department recruit and a cadet at the Academy when he and several other cadets were expelled for cheating and for possession of contraband study materials. As explained below, those materials contained the answers to test questions. Pursuant to state regulations, plaintiff was offered the opportunity for a hearing before the Police Standards and Training Council before the expulsion order became permanent. See N.H. Code Admin. Rules, Pol 205.01 *et. Seq.* Plaintiff requested a hearing but later entered into a settlement agreement pursuant to Pol 205.05. By virtue of the settlement agreement:

A. The allegation that plaintiff "possessed unauthorized study materials" was sustained;

B. The plaintiff's discharge (i.e. expulsion) from the Academy remained in effect;

C. Plaintiff remained eligible to start the Academy over if he ever returned to employment as a police officer; and

D. The other formal grounds for the plaintiff's expulsion (i.e. cheating and failing to report rules violations) were withdrawn.

Plaintiff thus agreed to be expelled for the venial offense of "possession of unauthorized study materials" while spared a finding of guilt on the mortal offense of "cheating." However, while the "possession" charge may sound innocuous, in actuality it was a serious integrity violation for which expulsion was a proportionate response.

Section D39 of the Academy Manual prohibits cadets from possessing unauthorized study materials "including copies of tests from the Police Standards and Training Academies."[1] The forbidden materials include test questions and test answers from prior years.[2] Section D39 expressly requires that any cadet arriving at the Academy with such contraband either (a) lock it in his or her car, (b) send it home or (c) give it to a staff member. Section D39(c) explains that, "The purpose of the rule is to provide each student with an equal chance academically[.]" Thus, the rule against "possession" is a prophylactic against active cheating. Indeed, why else possess test questions and test answers in violation of the rule?

Further, the Manual's definition of "cheating" includes "obtaining or attempting to obtain test materials or test information improperly from any source." Thus, there is a substantial overlap between "possession of unauthorized study materials" and "cheating." In this case—as effectively admitted by plaintiff in his complaint—that overlap is 100%, meaning that he was expelled by agreement for conduct that was, in fact, a form of cheating. The grounds for the finding that led to plaintiff's expulsion were

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[1]The Academy Manual is not attached to the plaintiff's complaint. However, the pertinent provisions of the Manual are referenced in the attachments to the compliant. The text of those provisions are included in the attachments to the Academy's Answer. In general, in determining whether a complaint states a claim upon which relief may be granted the court is limited to the facts set forth in the four corners of the complaint. However, the court may also consider documents that are referenced or attached to the complaint. See, Beane v. Dana S. Beane & Company, P.C., 160 N.H. 708, 711 (2010) (in ruling on a motion to dismiss the court may consider "documents sufficiently referred to in the complaint"). In this case, the pertinent provisions of the Academic Manual are directly or indirectly referenced in the complaint.

[2]The parties appear to agree that the Academy uses all or many of the same test questions each year. Therefore, a cadet possessing last year's questions and answers would possess many of this year's questions and answers as well.

recited in the Director's letter of expulsion (attached to the Complaint) which included the plaintiff's admission that (a) he possessed "test questions and answers" from a recent Academy year," (b) he knew that he was not allowed to possess these materials and (c) he actually used these materials prior to taking an exam. The Director's letter reciting plaintiff's admissions was grounded on the report of the investigating Captain (attached to the Academy's Answer). Plaintiff has not disputed that he made these admissions to the Captain; indeed he alleges that he gave truthful answers to the investigator. Complaint, ¶8. Thus:

A. Plaintiff was expelled, by agreement, for a serious rule violation that involved a lapse in integrity;

B. That lapse of integrity detracts from the plaintiff's general credibility. If the plaintiff testifies for the State in a criminal case, the fact of his expulsion from the Academy and the reasons for the expulsion must be disclosed to the defense.

B. Plaintiff was given notice of the accusations and actively participated in the investigation;

C. Plaintiff was given the opportunity for a due process hearing to determine factual disputes, but he expressly waived that opportunity by instead entering into a settlement agreement; and

D. The settlement agreement did not reverse, vacate or modify any of the factual findings of the investigation.

Therefore, the court concludes that there was abundant evidence to support placing the plaintiff on the Laurie list. Further, the court concludes that the plaintiff received sufficient due process to satisfy Gantert v. City of Rochester, 168 N.H. 640

(2016). To be sure, plaintiff was never given the opportunity for a Laurie list-specific hearing. However, plaintiff had the opportunity for a hearing regarding the underlying facts. Under the almost *sui generis* facts of this case that is all that was required.

The Complaint does not state a claim for removal from the Laurie list. Plaintiff's other claims fail because they are all predicated on the assumption that plaintiff was improperly placed on the Laurie list. The Derry Police Department did not defame plaintiff when its Chief placed him on the Laurie list, notwithstanding the fact that the Chief recited the original grounds for plaintiff's expulsion rather than the narrowed grounds reflected in the settlement agreement. Likewise, the Derry Police Department did not intentionally interfere with plaintiff's current or potential contractual relations when its Chief, after consultation with the County Attorney and Attorney General placed plaintiff on the Laurie list.

April 27, 2020

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/28/2020