

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS
SOUTHERN DISTRICT

SUPERIOR COURT

No. _____

THE NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM

38 Edgewater Drive
Barrington, NH 03825

TELEGRAPH OF NASHUA

110 Main Street, Suite 1
Nashua, NH 03060

UNION LEADER CORPORATION

100 William Loeb Drive
Manchester, NH 03109

**NEWSPAPERS OF NEW ENGLAND, INC., THROUGH ITS NEW HAMPSHIRE
PROPERTIES**

1 Monitor Drive
Concord, NH 03301

SEACOAST NEWSPAPERS, INC.

111 New Hampshire Avenue
Portsmouth, NH 03801

KEENE PUBLISHING CORPORATION

60 West Street
Keene, NH 03431

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

18 Low Avenue, #12
Concord, NH 03301

v.

NEW HAMPSHIRE DEPARTMENT OF JUSTICE

33 Capitol Street
Concord, NH 03301

**PETITION FOR ACCESS TO PUBLIC RECORDS UNDER THE “RIGHT TO KNOW
LAW,” RSA CHAPTER 91-A, AND PART I, ARTICLE 8 OF THE NEW HAMPSHIRE
CONSTITUTION**

(PRIORITY HEARING REQUESTED UNDER RSA 91-A:7)

NOW COME Petitioners the New Hampshire Center for Public Interest Journalism, the 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, and respectfully petition this Honorable Court for relief pursuant to RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution.

INTRODUCTION

“To the People of New Hampshire: The public’s right to know what its government is doing is a fundamental part of New Hampshire’s democracy.”
Joseph A. Foster, New Hampshire Attorney General, March 20, 2015¹

The Respondent New Hampshire Department of Justice (“Department”) currently maintains a list of police officers who have engaged in sustained misconduct that reflects negatively on their credibility or trustworthiness. This list is called the Exculpatory Evidence Schedule, or EES list. As of June 1, 2018, 171 New Hampshire law enforcement officers were on the list. The Department has declined to produce an unredacted version of the EES list to Petitioners because the Department claims that disclosure would invade the officers’ privacy under RSA 91-A:5, IV. The redacted version of the EES list produced by the Department is in the Appendix to this Petition.

Petitioners are not seeking any information contained in these officers’ personnel files maintained by individual police departments. The EES list is a separate and distinct record prepared and maintained by the Department. Petitioners are seeking only the list of officers (i) who have not challenged their placement on the EES list or (ii) for whom there has been a sustained finding of misconduct affecting the officer’s credibility or truthfulness.

¹ See A.G. Cover Letter to A.G. Memo. on New Hampshire’s Right-to-Know Law, RSA Chapter 91-A (Mar. 20, 2015), *available at* <https://www.doj.nh.gov/civil/documents/right-to-know.pdf>.

Under both RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution, the EES list Petitioners seek is a public record. Any minimal privacy interest held by the 171 officers on the list, who have engaged in conduct that bears on their credibility or truthfulness, must yield to the central purpose of the public's right to know: to know what police officers are up to so the public can hold them accountable.

In support of this petition, Petitioners state as follows:

Parties

1. Petitioner New Hampshire Center for Public Interest Journalism ("Center") is a non-profit organization that publishes the watchdog news website www.InDepthNH.org. The Center was founded by journalist and executive editor Nancy West in April 2015. The Center believes that vigorous, in-depth news coverage focused on government and public servants is the bedrock of a thriving democracy. The Center is located at 38 Edgewater Drive, Barrington, NH 03825.

2. Petitioner Telegraph of Nashua is a media corporation and daily newspaper owned by Ogden Newspapers. The *Telegraph* was founded in 1869, though a weekly version of the newspaper dates back to 1832. It is the second largest newspaper in New Hampshire and serves the second largest city in New Hampshire. The *Telegraph* has approximately 87,300 readers and reaches 60% of all adults in the Nashua area. Ogden Newspapers was founded in 1890 and has since grown to over 40 daily newspapers, along with a number of weeklies and a magazine division, stretching from New York to Hawaii. Throughout that time, Ogden Newspapers has been committed to excellence in journalism through service and leadership in their local communities. The *Telegraph* is located at 110 Main Street, Suite 1, Nashua, NH 03060, which is in Hillsborough County (Southern Division).

3. Petitioner Union Leader Corporation is a media corporation that publishes the daily *New Hampshire Union Leader*, the largest newspaper in New Hampshire. On Sundays, it publishes the *New Hampshire Sunday News*. The *New Hampshire Union Leader*, founded in 1863, is the only statewide newspaper in New Hampshire. In print, the *New Hampshire Union Leader* and *New Hampshire Sunday News* are delivered to every county in the state, reaching more than 160,000 readers. The Union Leader Corporation also owns and maintains the websites unionleader.com—which is its online news site—and NewHampshire.com—which is an information portal for arts and entertainment, community news, recreation and local business information for New Hampshire. These websites see approximately 950,000 unique visitors a month. The Union Leader Corporation is located at 100 William Loeb Drive, Manchester, NH 03109.

4. Petitioner Newspapers of New England, Inc., through its New Hampshire properties, is a media entity that publishes two daily newspapers, one twice-weekly newspaper, and one weekly newspaper in New Hampshire, including the daily newspaper *Concord Monitor* that serves the greater Capital Region. Sixty-five percent of adults in the greater Capital Region market area have read the *Concord Monitor* in the past week. In addition, the *Concord Monitor*'s primary website, www.concordmonitor.com, is the Capital Region's top local online news destination, with more than 2 million page views in a typical month. Petitioner Newspapers of New England, Inc.'s New Hampshire properties also publish the *Valley News*, a daily newspaper based in Lebanon, New Hampshire covering the Upper Valley region of New Hampshire and Vermont. Petitioner also publishes the *Monadnock Ledger-Transcript*, a twice-weekly newspaper based in Peterborough, New Hampshire that serves Antrim, Bennington, Dublin, Temple, Franconia, Greenfield, Greenville, Hancock, Jaffrey, Lyndeborough, Mason, New Ipswich, Peterborough, Rindge, Sharon,

and Wilton. Newspapers of New England, Inc., through its New Hampshire properties, is located at 1 Monitor Drive, Concord, NH 03301.

5. Petitioner Seacoast Newspapers, Inc. is a media corporation that publishes four weekly newspapers and two daily newspapers—*The Portsmouth Herald* and *Foster's Daily Democrat*—along the coasts of New Hampshire and York County, Maine with a combined daily readership of 52,851 and weekly readership of 112,573. In addition, the Seacoast Newspapers, Inc.'s website www.seacoastonline.com has, on average, 3.25 million page views per month, with more than 1 million unique visitors per month. Seacoast Newspapers, Inc.'s website www.fosters.com also has, on average, 1.5 million page views, with more than 500,000 unique visitors per month. Seacoast Newspapers, Inc. is a subsidiary of Gatehouse Media, LLC, which is headquartered in Pittsford, New York. Seacoast Newspapers, Inc.'s is located at 111 New Hampshire Avenue, Portsmouth, NH 03801.

6. Petitioner Keene Publishing Corporation is the publisher of the daily newspaper *The Keene Sentinel* and www.SentinelSource.com. *The Sentinel* is the fifth oldest continuously published newspaper in the United States, having operated under the “Sentinel” name since its founding in March 1799. *The Sentinel* covers the city of Keene, and 30 towns in Cheshire County (Alstead, Chesterfield, Dublin, Fitzwilliam, Gilsum, Harrisville, Hinsdale, Jaffrey, Marlborough, Marlow, Nelson, Richmond, Rindge, Roxbury, Stoddard, Sullivan, Surry, Swanzey, Troy, Walpole, Westmoreland, and Winchester), Hillsborough County (Antrim, Bennington, Greenfield, Hancock, and Peterborough), and Sullivan County (Acworth, Charlestown, and Langdon). Keene Publishing Corporation is located at 60 West Street, Keene, NH 03431.

7. Petitioner American Civil Liberties Union of New Hampshire (“ACLU-NH”) is a non-profit organization with an address of 18 Low Avenue, #12, Concord, NH 03301. The ACLU-

NH is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with approximately 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as amicus curiae, to encourage the protection of individual rights guaranteed under federal and state law, including the right to access to information pursuant to Part 1, Article 8 of the New Hampshire Constitution and New Hampshire’s Right-to-Know Law. The ACLU-NH has a long track record of working on open records issues both in and out of the courts.

8. Respondent New Hampshire Department of Justice is a public agency of the State of New Hampshire and, as such, is subject to the Right-to-Know law under RSA 91-A:1-a, V. The Attorney General, under RSA 7:6, also has “general supervision of the criminal cases pending before the supreme and superior courts of the state.” Respondent is located at 33 Capitol Street, Concord, NH 03301.

Jurisdiction and Venue

9. This Court has jurisdiction over this matter pursuant to RSA 91-A:7, and under this statute this matter shall be given “high priority on the court calendar.”

10. Venue is proper in this Court pursuant to RSA 507:9 because Petitioner Telegraph of Nashua is located in Hillsborough County (Southern Division).

The Petitioners’ Chapter 91-A Requests and the Department’s Response

11. Petitioner New Hampshire Center for Public Interest Journalism has regularly reported on the EES list, including “Three Unidentified Officers Removed from Secret ‘Laurie List’ Under New Protocol” (published on July 9, 2018) and “Contracts Reveal Chiefs Routinely Purge Discipline from Police Officer Personnel Files” (published on July 26, 2018). See Exhibits

A and B. As part of its investigation into its story published on July 9, 2018, the Center sent a Chapter 91-A request to the Department on May 30, 2018, seeking “the most recent EES list.” *See Exhibit C*. On June 19, 2018, the Department produced a version of the EES list that was last updated on June 1, 2018 with the names of the officers, the date of incident, and other information redacted. The Department’s June 19, 2018 letter explained that “we have redacted information which would constitute an unwarranted invasion of an individual’s privacy.” *See id*.

12. Petitioner *Telegraph of Nashua* has reported on issues concerning the EES list, including “ACLU Concerned about [Nashua Police Department] Contract” (published July 21, 2018). *See Exhibit D*. The *Telegraph* wishes to report on the officers in the Nashua area who are on the EES list. As reported in the *Telegraph*, the Nashua Police Department has at least 15 officers on the list, with two still working for the Department. *See id*. Hudson also has one officer on the list. On or about July 31, 2018, the *Telegraph* sent a Chapter 91-A request to the Department seeking the EES list. On August 28, 2018, the Department denied this request on the basis that producing an unredacted copy of the EES list “would constitute an invasion of the named law enforcement officers’ privacy. RSA 91-A:5, IV.” *See Exhibit E*.

13. Petitioner Union Leader Corporation, through journalist Mark Hayward and others, similarly has reported on issues concerning the EES list, including “AG Releases List of 171 NH Police Officers on ‘Laurie List’ Due to Credibility Issues” (published on Aug. 2, 2018) and “New Hampshire AG Rejects Request to Disclose Names of Police Officers with Credibility Issues on ‘Laurie List’” (published on Aug. 29, 2018). *See Exhibits F and G*. The Union Leader Corporation, which publishes New Hampshire’s only statewide newspaper, wishes to report on the officers in the state, including in the Manchester area, who are on the EES list. As reported in the *Union Leader*, the Manchester Police Department has approximately 22 officers on the list, with

two still working for the Department. *See Exhibit F.* On August 1, 2018, the Union Leader Corporation sent a Chapter 91-A request to the Department seeking “an unredacted version of the Exculpatory Evidence Schedule that [the Department] maintains.” *See Exhibit H.* On August 28, 2018, the Department denied this request on the basis that producing an unredacted copy of the EES list “would constitute an invasion of the named law enforcement officers’ privacy.’ RSA 91-A:5, IV.” *See id.*

14. The *Concord Monitor* and *Valley News*, through journalist Caitlin Andrews, similarly have reported on issues concerning the EES list, including “N.H. AG: List of Officers with Credibility Issues Should Stay Private” (published on Aug. 30, 2018 in *Valley News* and Sept. 3, 2018 in the *Concord Monitor*). *See Exhibit I.* Petitioner Newspapers of New England, Inc., through its New Hampshire properties, wishes to report on the officers in the Capital Region and Upper Valley who are on the EES list. Based on the Department’s heavily redacted June 1, 2018 EES list, in the Capital Region, one Concord officer and seven Weare officers are on the list. In addition, in the Upper Valley, one officer from Hanover, three officers from Claremont, two officers from Lebanon², two officers from Newport, one officer from Grantham, and one officer from Springfield are on the list. On July 26, 2018, the *Monitor* sent a Chapter 91-A request to the Department seeking the “most current Exculpatory Evidence Schedule (‘EES’) maintained by the department in unredacted form, including the unredacted fields ‘Name,’ ‘Department,’ ‘Date of Incident,’ ‘Date of Notification,’ and ‘Category.’” This request specifically excluded information concerning any individual who has a pending request or application before the Department seeking

² One of the two officers from Lebanon on the EES list is still employed by the Lebanon Police Department. *See Exhibit J* (Jim Kenyon, “Jim Kenyon: Rule Change Protects Bad Cops,” *Valley News* (July 24, 2018) (“Lebanon has two officers on the list — one for ‘dishonesty’ and the other for who knows what. No reason is given. Chief Richard Mello told me that one of the two is still on Lebanon’s 35-officer force. ‘I don’t have concerns about that officer’s trustworthiness,’ Mello said. Guess we’ll have to trust him on that.”).

removal from the EES list pursuant to the Department's April 30, 2018's Memorandum entitled "Additional Guidance Concerning the Exculpatory Evidence Schedule." See Exhibit K. On August 28, 2018, the Department denied this request on the basis that producing an unredacted copy of the EES list "would constitute an invasion of the named law enforcement officers' privacy.' RSA 91-A:5, IV." See *id.*

15. Petitioner Seacoast Newspapers, Inc., through journalist Elizabeth Dinan, has reported extensively on the EES list, including "All County Attorneys Deny Release of Cop Conflict List" (published on March 10, 2013), "Sununu: Laurie List Replacement Gives Police 'Benefit of Doubt'" (published on May 1, 2018), "ACLU: Make Police Misdeeds Public" (published on Aug. 5, 2018), and "AG Declines to Release Officer Credibility List" (published on Aug. 28, 2018). See Exhibits L, M, N, and O. Seacoast Newspapers, Inc. wishes to report on the officers who are on the EES list in the regions it serves. For example, the Department's redacted June 1, 2018 EES list includes officers from Dover (1), East Kingston (2), Epping (1), Exeter (2), Farmington (2), Hampton (2), Hampton Falls (1), Kingston (1), Portsmouth (1), North Hampton (1), Seabrook (2), South Hampton (1), and Rochester (2). On July 19, 2018, journalist Elizabeth Dinan sent a Chapter 91-A request to the Department seeking the "most current Exculpatory Evidence Schedule maintained by the Department, in unredacted form, including the unredacted fields 'Name,' 'Department,' 'Date of Incident,' 'Date of Notification,' and 'Category.'" This request also excluded information concerning any individual who has a pending request or application before the Department seeking removal from the EES list pursuant to the Department's April 30, 2018's Memorandum entitled "Additional Guidance Concerning the Exculpatory Evidence Schedule." See Exhibit P. On August 28, 2018, the Department denied the request on

the basis that producing an unredacted copy of the EES list “would constitute an invasion of the named law enforcement officers’ privacy. RSA 91-A:5, IV.” *See id.*

16. Petitioner *The Keene Sentinel*, through journalist Paul Cuno-Booth, has reported on issues concerning the EES list in “Local Officers among Those on Redacted Laurie List” (published on Aug. 11, 2018) and “Chesterfield Officers on Laurie List No Longer Work in Law Enforcement, Chief Says” (published on Aug. 14, 2018). *See Exhibit Q and R* (online versions). Based on the Department’s heavily redacted June 1, 2018 EES list, four Chesterfield officers (none of whom, as reported by *The Sentinel*, are currently working for that Department) and three Keene officers are on the list.³ Dublin, Jaffrey, and Antrim also each have one officer on the list, and Hinsdale has two officers on the list. *The Sentinel* wishes to report on the officers in the Keene area who are on the EES list. For example, based on the Department’s redacted list, the date of notification with respect to the four Chesterfield officers is the same date, January 30, 2018. *The Sentinel* would like to know why the notification date is the same for all four officers. If there was a delay in placing one or more of these officers on the EES list, then there would be a question as to whether proper disclosures were made in criminal cases between the incident date and the EES list notification date. Accordingly, on September 20, 2018, *The Sentinel* sent a Chapter 91-A request to the Department seeking the “most current Exculpatory Evidence Schedule (‘EES’) maintained by the department in unredacted form, including the unredacted fields ‘Name,’ ‘Department,’ ‘Date of Incident,’ ‘Date of Notification,’ and ‘Category.’” This request also specifically excluded information concerning any individual who has a pending request or

³ Keene Police Chief Steven Russo has stated that two Keene entries are duplicates, thus meaning that only two officers from Keene may actually be on the list. According to Chief Russo, one of these two officers no longer works in the department. The other officer, according to Chief Russo, was cleared after an investigation and is no longer on the EES list. If this is true, it is unclear why this officer is still on the EES list maintained by the Department. *See Exhibit Q* (Paul Cuno-Booth, “Local Officers among Those on Redacted Laurie List,” *The Keene Sentinel* (Aug. 11, 2018)).

application before the Department seeking removal from the EES list pursuant to the Department's April 30, 2018's Memorandum entitled "Additional Guidance Concerning the Exculpatory Evidence Schedule." See Exhibit S. On September 24, 2018, the Department denied this request on the basis that producing an unredacted copy of the EES list "would constitute an invasion of the named law enforcement officers' privacy. RSA 91-A:5, IV." See *id*.

17. Petitioner ACLU-NH frequently uses the provisions of Chapter 91-A to investigate civil liberties issues, including issues relating to law enforcement accountability, the EES list, and the failure to disclose exculpatory evidence. On July 13, 2018, the ACLU-NH sent a Chapter 91-A request to the Department seeking the "most current Exculpatory Evidence Schedule maintained by the Department, in unredacted form, including the unredacted fields 'Name,' 'Department,' 'Date of Incident,' 'Date of Notification,' and 'Category.'" This request similarly excluded information concerning any individual who has a pending request or application before the Department seeking removal from the EES list pursuant to the Department's April 30, 2018's Memorandum entitled "Additional Guidance Concerning the Exculpatory Evidence Schedule." See Exhibit T. On July 18, 2018, the Department denied this request on the basis that producing an unredacted copy of the EES list "would constitute an invasion of the names law enforcement officers' privacy. RSA 91-A:5, IV." See *id*.

THE EES LIST

18. The Department maintains a list of police officers who have engaged in misconduct that reflects negatively on their credibility or trustworthiness. This list has existed since at least 2004. In 2004, then Attorney General Peter Heed requested county attorneys to create such a list within their respective counties. See Exhibit U (Peter Heed Feb. 20, 2004 Memo. at p. 4).

19. As of June 1, 2018, 171 New Hampshire law enforcement officers are on the EES list. It is unclear how many of these officers still work in law enforcement. For example, as noted above, 22 officers associated with the Manchester Police Department are on the list, with two still working for the Department.⁴ Also as noted above, at least 15 officers associated with the Nashua Police Department are on the list, with two still working for the Department.⁵

20. The Department's maintenance of the EES list is not required by statute; rather, the Department maintains the list as a matter of policy, in part, to ensure that prosecutors can easily identify testifying officers who may have information in their personnel files relating to their credibility or truthfulness that needs to be disclosed to defendants. In other words, the EES list is designed to help prosecutors identify when they have a constitutional duty to produce to a defendant potentially exculpatory evidence in a police officer's personnel file. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (a prosecutor's suppression of evidence favorable to an accused violates the Fourteenth Amendment's due process protections where the evidence is material to guilt or punishment, regardless of the State's good or bad faith); *State v. Laurie*, 139 N.H. 325, 329-330 (1995) (criminal defendants have an explicit right "to produce all proofs that may be favorable to [them]" under Part I, Article 15 to the New Hampshire Constitution, including information that would negatively reflect on an officer's character or credibility); *see also Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774, 779 (2015) ("Our decision in *Laurie* demonstrated the need for prosecutors and law enforcement agencies to share information that

⁴ See *Exhibit F* (Mark Hayward, "AG Releases List of 171 NH Police Officers on 'Laurie List' Due to Credibility Issues," *Union Leader* (Aug. 2, 2018) ("Manchester Police Chief Carlo Capano said only two Manchester police officers are on the list who currently work with the department. They have been there since 2011 and remain full-time patrol officers and have no supervisory rank.")).

⁵ See *Exhibit D* (Damien Fisher, "ACLU Concerned about NPD Contract," *Telegraph of Nashua* (July 21, 2018) ("Nashua has 15 officers listed on the EES, though most of those officers are no longer with the department, Chief Andrew Lavoie said in a previous interview. Of the officers Lavoie reported under the EES directive, two are still working for Nashua.")).

pertains to police officers who may act as witnesses for the prosecution.”). According to the Department, the EES list was also created because law enforcement agencies in New Hampshire treat police personnel file information—even on-duty misconduct resulting in discipline—as confidential and *per se* exempt from disclosure under Chapter 91-A, citing RSA 105:13-b, I. *See Exhibits E, H, K, P, and S* (Department’s Aug. 28, 2018 Letters and September 24, 2018 Letter to Petitioners). However, as explained below, this interpretation is incorrect. *See infra* ¶¶ 36-37.

21. The Department further maintains the EES list to help it evaluate whether officers should be removed from the list pursuant to the Department’s March 21, 2017 and April 30, 2018 memoranda. *See Exhibit V* (Joseph A. Foster Mar. 21, 2017 Memo., at p. 5 of 2017 Protocol (“The master EES will be maintained by the Attorney General’s Office If it is determined that information in the personnel file would not be exculpatory in any case, the officer’s name shall be removed from the list, but only with the approval of the Attorney General or designee.”)); *Exhibit W* (Gordon J. MacDonald Apr. 30, 2018 Memo., at p. 4 (“Because sustained findings of conduct warranting inclusion on the EES may be overturned through these processes, the Memo and Protocol permit an officer’s name to be removed from the EES ‘with the approval of the Attorney General or designee.’”)). The Department created this process, in part, in an effort to comply with the Supreme Court’s decisions in *Duchesne v. Hillsborough Cty. Atty.*, 167 N.H. 774 (2015) and *Gantert v. City of Rochester*, 168 N.H. 640 (2016) where the Court effectively held that a post-deprivation process needs to exist for an officer to challenge placement on the EES list. *See Gantert*, 168 N.H. at 650 (noting that after an officer is placed on an exculpatory evidence list, he or she “may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis”). In light of this removal process, Petitioners, while

reserving their rights, have not sought, and herein do not seek, the names of officers on the EES list who have pending requests with the Department to be removed from the list.

22. As of July 9, 2018, six people have applied to have their names removed from the EES list under this process. Three have been removed, one was denied, and two have not yet been acted on by the Department as of July 9, 2018. See Exhibit A (Nancy West, “Three Unidentified Officers Removed from Secret ‘Laurie List’ Under New Protocol,” InDepthNH.org (July 9, 2018)).

ARGUMENT

23. Part I, Article 8 of the New Hampshire Constitution and the Right-to-Know law are the fundamental prerequisites for a self-governing people. As the legislature made clear in the preamble to the Right-to-Know law: “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 (emphasis added). The Right-to-Know Law “helps further our State Constitutional requirement that the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 553 (2002).

24. The Right-to-Know Law has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: “Government . . . should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8’s language was

included upon the recommendation of the bill of rights committee to the 1974 Constitutional Convention and adopted in 1976. While New Hampshire already had the Right-to-Know Law to address the public and the press's right to access information, the committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, *THE NEW HAMPSHIRE STATE CONSTITUTION* 53 (2d ed. 2015).

25. Consistent with these principles, courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts, therefore, construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode*, 148 N.H. at 554 (citation omitted); *see also Lambert v. Belknap County Convention*, 157 N.H. 375, 379, 383-85 (2008) (candidates' applications for county sheriff, recommendation letters, and score sheets must be produced over privacy objections).

26. As explained below, the EES list is a public record for two independent reasons. *First*, disclosing the names of officers on the list would not constitute an invasion of privacy under RSA 91-A:5, IV. *Second*, if the Court concludes that RSA 105:13-b creates an irrebuttable privacy interest under RSA 91-A:5, IV that bars the disclosure of the EES list, then RSA 105:13-b would constitute an "unreasonable restriction" on the public's right of access to the EES list in violation of Part I, Article 8 to the New Hampshire Constitution.

I. The Right-to-Know Law Requires Disclosure of the EES List.

27. The Department has declined to produce an unredacted version of the EES list, arguing that disclosing the names of the list's 171 officers and related information would constitute an invasion of privacy under RSA 91-A:5, IV. The Department has declined to disclose the EES list even though (i) the officers have not contested their placement on the list or otherwise sought

to be removed and (ii) there has been a sustained finding of misconduct against these officers concerning their credibility or truthfulness.

28. As the Supreme Court has explained:

When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, we engage in a three-step analysis. First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Second, we assess the public's interest in disclosure. Third, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. Further, [w]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.

Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 707 (2010) (citations and internal quotations omitted); *see also Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673, 679 (2011) (same).

29. As explained below, the invasion of privacy exemption under RSA 91-A:5, IV—which must be construed narrowly—does not and cannot apply to the 171 officers on the EES list under this “three-step analysis.”

A. The Officers on the EES List Have No Privacy Interest That Would Be Invaded By Disclosure.

30. When it comes to misconduct by law enforcement officers, any privacy interest held by the officers that would be implicated by disclosure is virtually nonexistent.

31. The privacy interests are minimal where the EES list reflects the misconduct of police officers employed by the government, especially where the misconduct implicates the ability of officers to do their jobs effectively. Indeed, police officers perform vital functions *on behalf of the public*, and their misconduct creates the potential for considerable social harm. *See Everitt v. Gen. Elec. Co.*, 156 N.H. 207, 217-18 (2007) (“Police officers are trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety.

This essential and inherently governmental task is not shared with the private sector. Police officers are regularly called upon to utilize judgment and discretion in the performance of their duties. They must make decisions and take actions which have serious consequences and repercussions to the individuals immediately involved, to the public at large and to themselves.”); *see also Rotkiewicz v. Sadowsky*, 730 N.E. 2d 282, 288-289 (Mass. 2000) (“We conclude, in line with the vast majority of other jurisdictions, that the abuse of a patrolman’s office can have great potentiality for social harm; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws.”) (footnote and citation and internal quotations omitted).

32. Petitioners are not seeking information about private individuals that courts have frequently protected. In examining the privacy exemption under RSA 91-A:5, IV, the Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government—which often has been withheld on privacy grounds depending on the circumstances—and information concerning government employees—which it generally has ordered to be disclosed. *Compare, e.g., Lamy v. New Hampshire Public Utilities Com’n*, 152 N.H. 106, 111 (2005) (the names and addresses of public utilities customers can be withheld on privacy grounds under RSA 91-A:5, IV; “The public interest that the Right-to-Know Law was intended to serve concerns “informing the citizenry about the activities of their government ... 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.””) (emphasis in original); *Brent v. Paquette*, 132 N.H. 415 (1989) (government not required to produce records kept by school superintendent containing students’ names and addresses); *New Hampshire Right to Life v.*

Director, New Hampshire Charitable Trusts Unit, 169 N.H. 95 (2016) (protecting identities of private patients at a women’s health clinic); *with Union Leader Corp.*, 162 N.H. at 684 (holding that the government must disclose the names of retired public employees receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV); *Professional Firefighters of N.H.*, 159 N.H. at 709 (holding that the government must disclose specific salary information of firefighters notwithstanding RSA 91-A:5, IV); *Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972) (government must disclose the names and salaries of each individual schoolteacher in the district), and *Lambert*, 157 N.H. at 383-85 (applications for county sheriff must be disclosed).

33. Petitioners’ request also does not impact current criminal investigations. The Supreme Court has noted that, in some cases, there is a public interest in nondisclosure where disclosure may result in the identification of confidential informants, or other witnesses who have cooperated with internal investigations into possible misconduct by fellow employees. *See Reid v. New Hampshire Attorney General*, 169 N.H. 509, 529 (2016). These concerns do not exist here. The information on the EES list sought here is “limited to the officer’s name ..., the name of the law enforcement agency, the date(s) on which the misconduct occurred, and a short description of the type(s) of EES conduct at issue.” *See Exhibit W* (Gordon J. MacDonald Apr. 30, 2018 Memo., at p. 2, n. 1). The EES list contains no names or identifying details of cooperating witnesses, and only describes the incidents themselves in the broadest of terms (e.g., “credibility” or “excessive use of force”). *See id.*

34. The State argues that the officers on the EES list have a privacy interest that would be violated by the disclosure of their names, citing RSA 105:13-b. The State is incorrect for at least three reasons.

35. First, by its own terms, RSA 105:13-b applies only to documents in police personnel files. See RSA 105:13-b, I (addressing only “[e]xculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case”) (emphasis added). It does not apply to the EES list because the EES list is a document independently prepared and maintained by the Department, a separate governmental entity.⁶ RSA 105:13-b simply creates a court process, in the context of a criminal prosecution, whereby potentially exculpatory information in an officer’s personnel file “shall be disclosed to the defendant” or may be reviewed by a court *in camera* to determine whether disclosure should be made to a defendant. RSA 105:13-b was initially enacted in 1992 before the *Laurie* decision or the creation of the EES list.⁷

36. Second, even if the EES list can be viewed as consisting of personnel file information under RSA 105:13-b, the Department’s view of RSA 105:13-b effectively renders disciplinary information in police officer personnel files as *per se* exempt from disclosure under the Right-to-Know Law. The Department’s *per se* view is not only incorrect, but it also provides the police with special protections that are not afforded to the personnel files of other government employees. As the Supreme Court recently made clear in *Reid*, the personnel files of government employees—which includes police officers—are not per se exempt from Chapter 91-A, but rather are subject to a balancing analysis that weighs the public interest in disclosure against the privacy

⁶ The Department has—correctly—not invoked the “personnel file” exemption under RSA 91-A:5, IV with respect to the EES list, as the list is not contained in officers’ individual personnel files. See *Reid*, 169 N.H. at 527 (noting that, for the “personnel file” exemption to apply, (i) the material must be considered a “personnel file” or part of a “personnel file” and (ii) disclosure must constitute an invasion of privacy).

⁷ RSA 105:13-b was repealed and reenacted in 2012, though Paragraph III of the operative 2012 version of RSA 105:13-b is almost identical to the original version of the statute enacted in 1992. See *State v. Amirault*, 149 N.H. 541, 543 (2003) (quoting original 1992 version of law). The 2012 reenactment added language to Paragraph I of the statute, stating: “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.” See also *Exhibit X* (Nancy West, “Law Intended to Keep Discredited Police from Testifying Draws Fire,” *Union Leader* (Nov. 10, 2012) (describing history of 2012 amendment and sponsor’s belief that people accused of crimes should be informed if police personnel records contain information that could hurt an officer’s credibility as a witness)).

interest in nondisclosure. *See Reid*, 169 N.H. at 528 (“We now clarify that ... ‘personnel ... files’ are not automatically exempt from disclosure. For those materials, ‘th[e] categorical exemption[] [in RSA 91-A:5, IV] mean[s] not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public’s interest in disclosure.’”) (internal citations omitted). Moreover, unlike the confidentiality sought here by the Department with respect to law enforcement misconduct, an arrest by an officer of a private citizen is not treated as confidential even if the charge is ultimately not sustained by a court or jury. *See* RSA 594:14-a.⁸

37. Nothing in RSA 105:13-b suggests that this statute trumps or abrogates the Right-to-Know Law and its “three-step analysis” with respect to police officers’ personnel files. Rather, RSA 105:13-b simply explains how police personnel files are to be disclosed to defendants in the context of criminal prosecutions. If the legislature had intended RSA 105:13-b to blanketly exempt police personnel files from disclosure under the Right-to-Know Law, it would have said so as it has done in other contexts.⁹ *Cf., e.g., Motion Motors, Inc. v. Berwick*, 150 N.H. 771, 774 (2004) (“The statute applies to timber felled on the land of another person. The legislature could have, but

⁸ From the perspective of Petitioner ACLU-NH, police officers should be held to a higher standard than regular citizens—not a lesser standard—especially given that police officers are professional witnesses funded by taxpayers and have the ability to deprive persons of their liberty. In fact, the EES list—and the stigma that the police claim it causes—could be eliminated altogether if, consistent with Chapter 91-A’s public interest in disclosure, government entities in New Hampshire—like many other states (including Florida and Texas)—transparently made sustained disciplinary findings in police officers’ personnel files available to the public. *See* Jonathan Abel, “Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team,” 67 Stan. L. Rev. 743, 770-771 (Apr. 2015) (discussing how other states handle police disciplinary information).

⁹ *See, e.g.,* RSA 659:13, III (“If a voter on the nonpublic checklist executes an affidavit in accordance with subparagraph I(c), the affidavit shall not be subject to RSA 91-A.”); RSA 659:95, II (“Ballots, including cast, cancelled, and uncast ballots and successfully challenged and rejected absentee ballots still contained in their envelopes, prepared or preserved in accordance with the election laws shall be exempt from the provisions of RSA 91-A”); RSA 654:31-a (“All other information on the voter registration form, absentee registration affidavit, qualified voter affidavits, affidavit of religious exemption, and application for absentee ballot shall be treated as confidential information and the records containing this information shall be exempt from the public disclosure provisions of RSA 91-A, except as provided by statutes other than RSA 91-A.”); RSA 654:45, VI (“The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31”); RSA 193-E:5, I(j) (“Information maintained in the random number generator [regarding unique school pupil information] shall be exempt from the provisions of RSA 91-A.”); RSA 169-C:25-a (child abuse medical records received by law enforcement “shall be exempt from disclosure under RSA 91-A.”).

did not, provide that it apply when a party fells timber belonging to another person.”). In short, the Department’s view of the law is not only wrong, but it also hinders transparency and government accountability where it matters, as police officers—unlike other government employees—have the immense power to deprive people of their liberty.

38. *Third*, any subjective expectation of privacy that law enforcement may have with respect to their personnel files in light of RSA 105:13-b is irrelevant. Courts have repeatedly held that “subjective expectations are not dispositive.” *See, e.g., Prof’l Firefighters of N.H.*, 159 N.H. at 709. Rather, a court’s analysis of whether information is “private” is based on objective criteria. *Id.* The subjects of the EES list are public officials whose behavior can reasonably be expected to become public when it concerns a sustained finding of misconduct implicating an officer’s credibility or truthfulness. *Cf. Reid*, 169 N.H. at 530-31 (seeking investigatory records into alleged misconduct by former county attorney; “Here, it may be that certain information regarding allegations of misconduct potentially rising to the level of criminal actions by an elected official could objectively have been expected to become public as or after an investigation ran its course.”).

B. The Public Interest in Disclosure is Compelling.

39. The public interest in disclosing the names of the officers on the EES list is compelling even if the list does not contain the substance or context of the officers’ underlying conduct. This is so for at least five reasons.

40. *First*, the EES list identifies officers who have engaged in misconduct impacting their official duties. This, by itself, would require disclosure under the Right-to-Know Law regardless of whether the information is potentially exculpatory under *Brady*. The public has a right to know whether current and former officers serving them have committed misconduct in the course of their duties. As the New Hampshire Supreme Court has repeatedly explained, the public

interest in disclosure is great when it will potentially expose government misconduct. *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the “Union Leader seeks to use the information to uncover potential governmental error or corruption”); *Professional Firefighters of N.H.*, 159 N.H. at 709 (“Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism.”).

41. Here, the public interest is even greater because the EES list (i) reflects officers who have engaged in misconduct that impacts their credibility or truthfulness, and (ii) indicates that information concerning these officers may need to be disclosed to defendants under *Brady*. As the Department explained in its March 21, 2017 memorandum, “EES conduct” constitutes, for example: (i) a deliberate lie during a court case; (ii) the falsification of records or evidence; (iii) any criminal conduct; (iv) egregious dereliction of duty; and (v) excessive use of force. *See Exhibit V* (Joseph A. Foster Mar. 21, 2017 Protocol, at p. 2). This is undoubtedly serious conduct. Regardless of whether this information is exculpatory under *Brady*, such misconduct goes to the core of an officer’s integrity and performance. Thus, it is obviously valuable for a citizen to learn (i) whether his or her department still employs a police officer who is on the list, (ii) who the officer is, and (iii) the general nature of that officer’s misconduct. Armed with this information from the EES list, the public and press can better hold the government—here, the police—accountable for its employment practices and disciplinary decisions.

42. *Second*, the public interest is further enhanced by the fact that the Department views the EES list as a critical tool that aids it in fulfilling its constitutional obligation to produce exculpatory information to defendants. *See Exhibit V* (Joseph A. Foster Mar. 21, 2017 Memo., at p. 3). If the EES list is critical for the Department to perform its constitutionally-required function, then it is equally critical to the public’s assessment of whether (i) the Department is performing its

duties under *Brady* and adequately ensuring that county attorneys are similarly making *Brady* disclosures, and (ii) local prosecutors have made and are making the necessary disclosures to defense attorneys.¹⁰ Keeping information secret, especially when it comes to police behavior and how prosecutors do their jobs, only creates distrust and suspicion that minimizes the hard work and dedication shown by the overwhelming majority of law enforcement professionals. See *Rutland Herald v. City of Rutland*, 84 A.3d 821, 826 (Vt. 2013) (“redacting the employees’ names would cast suspicion over the whole department and minimize the hard work and dedication shown by the vast majority of the police department”). Of course, fostering public trust in the criminal justice system is good as a matter of policy.

43. *Third*, the public interest is even more significant because officers are placed on the EES list only after a sustained finding of misconduct. As explained in the Department’s April 30, 2018 memorandum, officers placed on the list must obtain due process. In particular, (i) there must be an investigation into the officer’s conduct, (ii) the allegations against the officer must be sustained after the investigation, and (iii) the head of the law enforcement agency must make a finding that the conduct at issue is “EES conduct” after giving the officer an opportunity to be heard. See *Exhibit W* (Gordon J. MacDonald Apr. 30, 2018 Memo., at p. 1). It is not, as the Department suggests in its August 28, 2018/September 24, 2018 letters to several Petitioners, speculative as to whether the EES list communicates the existence of exculpatory evidence. This is because, under the Department’s own April 30, 2018 guidance, a law enforcement agency head must have formally determined that “EES conduct” occurred before placing an officer on the EES

¹⁰ For example, if the list is made public, the press and defense attorneys would then be able to examine whether prosecutors made disclosures as required under *Brady* in past criminal cases concerning officers on the list.

list. *Id.* (“[I]f the conclusion is that the allegation is ‘sustained,’ the head of the law enforcement agency will determine whether the conduct at issue is EES conduct”) (emphasis added).

44. *Fourth*, one mission of Petitioner ACLU-NH is to ensure that defendants in criminal cases are afforded their constitutional rights. The other Petitioners investigate and report on criminal cases so the public will know whether the government is fulfilling that obligation. Here, the public interest in disclosure is great given the fact that the current system provides defendants with no ability to verify that they have received all the information to which they are constitutionally entitled. Instead, defendants simply have to trust that the system has worked. For this system to work as intended, multiple events all need to occur: (i) the police chief needs to become aware of a credibility/exculpatory issue concerning an officer; (ii) the police chief needs to determine that the issue warrants placement on the EES list and then place the officer on the list; (iii) the police chief needs to inform the county attorney of the decision to place the officer on the EES list; (iv) the county attorney needs to conduct his or her own review and determine whether EES placement is warranted (if the police chief is unsure whether the conduct requires placement on the list), (v) the assistant county attorney needs to consult the list in every criminal case to see if any testifying officers may have potentially exculpatory information in their personnel files; and (vi) the assistant county attorney needs to make a disclosure to the defendant if the officer is on the list (or, if the assistant county attorney is unsure whether the information is potentially exculpatory, seek *in camera* review from the criminal court under RSA 105:13-b and the Attorney General’s March 21, 2017 memorandum). If any of these steps is not followed, the system breaks down and defendants may not receive information to which they are entitled. And if the system

does break down, defendants will never know because the EES list is viewed by the State as a secret document.

45. This is not a hypothetical concern. The system has broken down on several occasions. For example, a lie told by former Nashua Police Chief John Seusing while he was a junior officer in the mid-1980s was never disclosed—with the exception of one instance in 1995—in decades of criminal cases (including in three homicide cases). See Exhibit Y (Nancy West, “3 Nashua Murder Convicts Notified of Witness Issue,” *Union Leader* (Aug. 21, 2013) (reporting that officer John Seusing had been disciplined for lying to his superiors once in the mid-1980s, but “[n]one of the [three convicted] men had been informed of the potential credibility issue before trial, as required”)). As part of a 2013 investigation, the Attorney General’s Office acknowledged Nashua’s failure to disclose this lie in decades of cases was in error, but concluded that this lack of disclosure “was a matter of misunderstanding, not malfeasance.” See Exhibit Z (A.G. Press Release, “Complaint about Nashua Police Chief Unfounded,” (Aug. 22, 2013)). The *Union Leader* also reported in 2013 that County Attorneys were not sharing the EES list (then called the “Laurie List”) with local prosecutors. See Exhibit JJ (Nancy West, “County Attorneys Failing to Provide Suspect Cop Lists,” *Union Leader* (Oct. 22, 2013)).

46. Also, in 2013, a defendant was not informed that the Pelham police officer who arrested him was on the EES list, which caused a jury’s guilty finding to be overturned. See Exhibit AA (Nancy West, “Nashua Road Rage Verdict set Aside,” *Union Leader* (Apr. 19, 2013)). The Pelham officer had committed numerous violations of department policy, including loudly berating a female drunken-driving suspect in a profanity-laced interrogation and pointing his service weapon at two unarmed teens during a traffic stop. The Pelham Police Department

terminated this officer, who was a 12-year veteran, in 2013.¹¹ In 2014, the Attorney General's Office also alleged that former Rockingham County Attorney Jim Reams improperly removed an officer—former Salem Sgt. Eric Lamb—from the then-called “Laurie List.” See Exhibit BB (Jason Schreiber, “AG Claims Reams Removed Officer’s Name from Laurie List,” Seacoast Online.com (June 4, 2014)). There may be other examples where the system has broken down but the public and defendants would never know because this system operates in total secrecy. Indeed, as explained above, *The Keene Sentinel* wishes to investigate whether defendants have received proper disclosures with respect to the four Chesterfield officers on the EES list. See *supra* ¶ 16.

47. Moreover, as of July 17, 2018, approximately 36% of law enforcement agencies in New Hampshire had not certified their compliance with existing EES procedures mandated by the Department, which includes a requirement that police chiefs to review all personnel files of all officers in their department by September 1, 2017 to ensure the accuracy of the EES list. See Exhibit V (Joseph A. Foster Mar. 21, 2017 Memo., at p. 3). New Hampshire’s two largest cities—Manchester and Nashua—are among those municipalities which have not complied as of July 17, 2018. See Exhibit CC (July 17, 2018 Initial EES Certificates of Compliance). These failures create suspicion that defendants are not receiving the evidence to which they are entitled—a suspicion that, when compounded by the secrecy of this regime, undermines confidence in the criminal justice system. Making the EES list public will enhance the public’s confidence that this part of

¹¹ John Collins, “Veteran Pelham Police Officer Fired for Misconduct,” *Lowell Sun* (Sept. 12, 2013), available at http://www.lowellsun.com/todaysheadlines/ci_24076912/veteran-pelham-police-officer-fired-misconduct#ixzz5Q9gc8ss3.

our criminal justice system is working correctly and that defendants are afforded their rights under *Brady*.

48. *Fifth*, the Department's fear, as stated in its August 28, 2018/September 24, 2018 letters to several Petitioners, that disclosure of the officers' names "would operate largely to label particular officers as generally not credible, regardless of other relevant circumstances that may ... render that officer's personnel file information not 'exculpatory' as to particular criminal cases" does not provide a basis for treating the EES list as confidential. Undoubtedly, there is a lot of information that the government would like to withhold from the public or press because it feels that the information is incomplete or does not tell the full story. But the correct response is not for the government to suppress this information; rather, the correct response is to be more transparent. Here, the Department could, of course, release the EES list accompanied with an explanation as to how the government believes the public or press should interpret its contents. Also, if the Department believes that the public will misinterpret the EES list without the context of the disciplinary information in the officers' personnel files describing the officers' misconduct, then the more transparent course would be for this disciplinary information to be released under the Right-to-Know Law given the significant public interest in disclosure.

C. The Compelling Public Interest in Disclosure Trumps the Officers' Nonexistent Privacy Interests.

49. Once the private and governmental interests in nondisclosure and public interest in disclosure have been assessed, courts "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Union Leader Corp.*, 162 N.H. at 679. In performing this balancing test with respect to the EES list, any privacy interest is dwarfed by the compelling public interest in disclosure.

50. Here, the substantial public interest in disclosure is the public's right to know the names of officers who have had sustained findings against them concerning their credibility or trustworthiness. Police officers are public servants who appear as professional witnesses in criminal cases, and, as such, do not have the same privacy rights as regular citizens or even other public employees. *See State v. Hunter*, No. 73252-8-I, 2016 Wash. App. LEXIS 1470, at *5 (Ct. App. June 20, 2016) (noting that a police officer is "a professional witness"). As explained above, this public interest is further enhanced by the facts that (i) there is a constitutional obligation for exculpatory information about officers to be produced to defendants, and (ii) the misconduct that puts officers on the EES list occurs only after they were given the opportunity to contest whether their conduct constituted exculpatory information. Further, criminal defendants must be assured that they will be notified of possible exculpatory evidence.

51. Conversely, the 171 officers have little privacy interest in information on the EES list. Their names are placed on the list only after a sustained finding of misconduct that negatively impacts their credibility or trustworthiness. Disclosure of the list will also not impact ongoing investigations or divulge the identities of witnesses or confidential informants.

52. The Supreme Court has consistently stated that this balancing test should be heavily weighted in favor of disclosure, even where the public and privacy interests appear equal. *See, e.g., Reid*, 169 N.H. at 532 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.") (citations omitted); *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance").

53. When performing this balancing test, the Supreme Court has also often looked to the decisions of other jurisdictions. *See Union Leader Corp.*, 142 N.H. at 546. A number of courts

in other states have held that police officers' privacy interests are not sufficient to prevent disclosure of law enforcement disciplinary reports. *See, e.g., Rutland Herald*, 84 A.3d at 826 (affirming that police disciplinary records must be disclosed); *Duane Tompkins v. Freedom of Information Com'n*, 46 A.3d 291, 299 (Conn. App. Ct. 2012) (affirming that a police officer's termination records must be disclosed); *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So.3d 807, 809-10, 821 (La. App. 1 Cir. 2008) (holding the public interest in records of investigation into police officers' use of excessive force trumps officers' privacy interest; "[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace").

54. When balancing these factors, the EES list must be disclosed.

II. If RSA 105:13-b Creates an Irrebuttable Privacy Interest Under RSA 91-A:5, IV that Bars the Disclosure of the EES List, Then RSA 105:13-b Constitutes an Unreasonable Restriction on the Public's Right of Access to the EES List in Violation of Part I, Article 8 to the New Hampshire Constitution.

55. If the Court concludes that, notwithstanding the Right-to-Know Law and the balancing analysis it requires, RSA 105:13-b creates an irrebuttable privacy interest that bars the disclosure of the EES list, then RSA 105:13-b would constitute an "unreasonable restriction" on the public's right of access in violation of Part I, Article 8 to the New Hampshire Constitution.

56. At the outset, this Court does not have to reach this constitutional question if it concludes that the EES list must be produced under the Right-to-Know Law. Indeed, given the serious constitutional concerns explained below with allowing RSA 105:13-b to create an irrebuttable privacy interest with respect to the EES list, this Court can avoid this constitutional question altogether by ruling that RSA 105:13-b has no bearing on Chapter 91-A's "three-step analysis." *See* Part I, ¶¶ 34-37, *supra*; *see also State v. Paul*, 167 N.H. 39, 44-45 (2014) (explaining that the well-established doctrine of constitutional avoidance "requires [the Court], whenever

reasonably possible, to construe a statute so as to avoid bringing it into conflict with the constitution”).

57. The standard of review in determining whether a legislative restriction on the public’s right of access to government records violates Article 8 is strict scrutiny. That is, “(1) the party opposing disclosure of the document [must] demonstrate that there is a sufficiently compelling reason that would justify preventing public access to that document” and (2) “the court [must] determine that no reasonable alternative to nondisclosure exists” and “use the least restrictive means available to accomplish the purposes sought to be achieved.” *Associated Press*, 153 N.H. at 130 (applying strict scrutiny under Part I, Article 8 to law restricting access to court records).

58. As explained above in Part I *supra*, there is no privacy interest that would justify the legislature keeping the EES list secret where the list reflects sustained findings of police officer misconduct. Moreover, officers are, as explained above, afforded due process safeguards concerning their placement on the EES list. *See supra* ¶ 43.

59. Furthermore, there is no legitimate state interest in granting police officers a special *per se* exemption from disclosure of personnel file misconduct that reflects adversely on their credibility or truthfulness, especially where such misconduct in the personnel files of other government employees would not be *per se* exempt from disclosure under *Reid*. (Government employee conduct would only be *per se* exempt if it were compiled as part of an “internal personnel practice” under RSA 91-A:5, IV. *See Reid*, 169 N.H. at 519-522.¹²) The only plausible explanation for this differential treatment is the Department’s desire to give law enforcement a

¹² In *Reid*, the Supreme Court narrowed the application of the “internal personnel practice” exemption, stating that “we decline to extend *Fenniman* and *Hounsell* beyond their own factual contexts and, in further interpreting RSA 91-A:5, IV herein, we return to our customary standards for construing the Right-to-Know Law.” *Reid*, 169 N.H. at 522 (holding that Attorney General investigation of county attorney was not “internal” for the purposes of this exemption).

special privilege that other public employees (and private citizens) do not have. Such a justification is both illegitimate and irrational where police officers (i) have the power to arrest (unlike other government officials and members of the public) and (ii) where their disciplinary records might have to be produced to a defendant under *Brady*.

60. Even if RSA 105:13-b were construed to apply to the EES list, it is not narrowly tailored to protect whatever privacy interest officers might have. As construed by the Department, RSA 105:13-b renders police personnel files as *per se* exempt from disclosure without any individualized assessment as to any privacy interests in nondisclosure and/or public interests in disclosure. *See Associated Press*, 153 N.H. at 139 (“RSA 458:15-b, III does not permit the court to make the individualized determinations required by the State Constitution and by *Petition of Keene Sentinel* and its progeny.”); *see also Hampton Police Ass’n, Inc. v. Town of Hampton*, 162 N.H. 7, 16 (2011) (“A blanket assertion is generally extremely disfavored, and ordinarily the privilege must be raised as to each record so that the court can rule with specificity.”) (quotations omitted); *Keene Sentinel*, 136 N.H. at 129 (a party “cannot prevail in their claim to keep the records sealed merely by asserting a general privacy interest”). For example, even where an officer’s privacy interests are minimal because the officer’s placement on the EES list has been reported by the press—e.g., the cases of former Nashua officer John Seusing, former Pelham officer Eugene Stahl, former Weare officer Joseph Kelley¹³, former Salem officer Eric Lamb¹⁴, and former Rochester officer John Gantert¹⁵, etc.—the Department’s apparent position is that RSA 105:13-b

¹³ *See Exhibit DD* (Mark Hayward, “Fired Weare Police Officer May Get More from Suit vs. Town,” *Union Leader* (Sept. 27, 2018) (stating that Sgt. Kelley is on the EES list)).

¹⁴ *See Exhibit BB* (Jason Schreiber, “AG Claims Reams Removed Officer’s Name from Laurie List,” *Seacoast Online.com* (June 4, 2014) (stating that Sgt. Lamb is on the list)).

¹⁵ *Gantert v. City of Rochester*, 168 N.H. 640 (2016); *see also Exhibit EE* (Nancy West, “Court: Rochester Police Officer Stays on ‘Laurie’ List,” *InDepthNH.org* (Mar. 25, 2016)).

would bar disclosure of whether that officer is on the EES list despite this information already being publicly available.

61. RSA 105:13-b, as construed by the Department, is also overbroad because it would bar disclosing whether an officer is on the EES list (i) where the officer's misconduct has been reported by the press, (ii) where the misconduct has led to the officer's termination, (iii) and/or where the misconduct has led to public criminal charges (and even conviction) against the officer. Here, of course, the officer's privacy interest is minimal, and the public would have a substantial interest in disclosure to ensure that the officer is, in fact, on the list and potentially subject to the disclosure obligations required by *Brady*. For example, former Manchester Detectives Darren Murphy and Aaron Brown have been accused of using their position to coerce a woman facing criminal charges to have sex with them in exchange for getting the charges dropped. See Exhibit FF (Mark Hayward, "Two Fired Manchester Cops Accused of Rape in Claim Filed With City," *Union Leader* (June 17, 2018)). The Manchester Police Department terminated these officers, and this incident led prosecutors to drop 35 felony drug cases. See Exhibit GG (Mark Hayward, "35 of Manchester Ex-officer's Case to be Dropped," *Union Leader* (Mar. 21, 2018)). Also, former Claremont police officers Ian Kibbe and Mark Burch are alleged to have performed an illegal search and falsified official reports, which caused charges in at least 20 cases to be dropped. See Exhibit HH (Jordan Cuddemi, "Arrests Tossed as More Are Reviews," *Valley News* (Apr. 29, 2018)). Both were terminated. Mr. Kibbe has since been criminally charged with lying in official reports about how he discovered weapons in a specific case. See Exhibit II (Jordan Cuddemi, "Former Police Officer Seeks to Have Criminal Charges Dismissed," *Valley News* (Aug. 2, 2018)).

The public has the right to know whether former officers Murphy, Brown, Kibbe, and Burch are on the EES list.¹⁶

62. Finally, as explained above, the more narrowly tailored approach to any concern the Department has that disclosure of the EES list might stigmatize officers could be addressed by more transparency, not secrecy. *See supra* ¶ 48.

Conclusion

WHEREFORE, Petitioners respectfully pray that this Honorable Court:

- A. Give this action “priority on the Court calendar” as required by RSA 91-A:7, by issuing Orders of Notice forthwith and scheduling a hearing on the relief Petitioners seek;
- B. Rule that the unredacted EES list requested by Petitioners is a public record that must be made public under RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution;
- C. Pursuant to RSA 91-A:8, I, grant Petitioners reasonable attorneys’ fees and costs as this lawsuit was necessary in order to enforce compliance with the provisions of RSA Chapter 91-A or to address a purposeful violation of Chapter 91-A. Fees are appropriate because Respondent knew or should have known that the conduct engaged in was in violation of RSA Chapter 91-A; and
- D. Award such other relief as may be equitable.

¹⁶ It is unclear whether Claremont officers Kibbe and Burch are on the EES list. Pages 2 and 5 of the Department’s redacted EES list contain entries for two Claremont officers with the date of notification being March 15, 2018 and the category being “false reports.” The public and defense attorneys are entitled to know whether these entries are for Mr. Kibbe and Mr. Burch.

Respectfully submitted,

THE NEW HAMPSHIRE CENTER FOR
PUBLIC INTEREST JOURNALISM,
TELEGRAPH OF NASHUA,
NEWSPAPERS OF NEW ENGLAND,
INC. (THROUGH ITS NEW HAMPSHIRE
PROPERTIES), SEACOAST
NEWSPAPERS, INC., and KEENE
PUBLISHING CORPORATION,

By their attorney,

/s/ William L. Chapman

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THE AMERICAN CIVIL LIBERTIES
UNION OF NEW HAMPSHIRE
FOUNDATION,

By its attorneys,

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By its attorney,

/s/ Gregory V. Sullivan

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Date: October 5, 2018

Certificate of Service

I hereby certify that a copy of the foregoing was sent to Attorneys Lisa Wolford, Geoffrey W. Ward, and Francis Fredericks at the New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301.

/s/ Gilles Bissonnette
Gilles Bissonnette

October 5, 2018

APPENDIX

LAST UPDATED 6/1/18

EXCULPATORY EVIDENCE SCHEDULE

New Hampshire Department of Justice

Criminal Justice Bureau

NAME (Note: Officers may no longer be employed by agency noted, or may be deceased.)	DEPARTMENT	DATE OF INCIDENT	DATE OF NOTIFICATION	CATEGORY
	Nashua PD		12/20/17	Legal procedure
	Hampstead PD [REDACTED]		2/13/06	
	NH Bureau of Liquor			
	Nashua PD		12/20/17	Obedience to Laws and Policies
	Windham PD		5/31/18	Deception; Credibility
	Claremont PD		7/20/17	Truthfulness
	Hanover PD		3/7/18	
	NHSP-B			
	Northfield PD		4/5/18	Credibility
	Plaistow PD		2/9/09	
	Plaistow PD		9/30/13	
	Canterbury PD		12/14/17	Untruthful
	Weare PD		10/1/12 12/6/12 – [REDACTED] [REDACTED]	
	Fire Marshal's Office		6/6/17 (Email)	Dishonesty
	NH State Fire Marshal's Office			

Milford PD		
Nashua PD	12/20/17	Sexual Harassment; Falsifying Reports/Records
Manchester PD		Excessive Force
Manchester PD		
NH State Police	2/1/13	
Manchester PD	4/16/18	
Middleton PD	6/9/17	Untruthfulness
Claremont PD	3/15/18	False reports
Newport PD	4/10/18	Excessive force
Chesterfield PD	1/30/18	Untruthfulness; Falsification of records/evidence
Weare PD	10/1/12 12/6/12 – [REDACTED] [REDACTED]	
Manchester PD		
Chesterfield PD	1/30/18	Official Oppression
Goffstown PD	12/8/17	
NH State Police	12/13/12	
Manchester PD		
Hampton PD	12/19/17	Excessive force
Manchester PD		
Manchester PD	4/16/18	
Manchester PD		
Tilton PD		
South Hampton PD		
Manchester PD		
Pelham PD		

	Exeter PD		8/22/17	Egregious dereliction of duty
	Kensington PD		9/30/13 - [REDACTED]	
	Londonderry PD			
	Hampstead PD		3/19/18	
	Nashua PD		12/20/17	[REDACTED]
	North Hampton PD		5/4/16	
	Bedford PD			
	Fremont PD		3/6/18	Result of receiving stolen property investigation by NHSP
	Laconia PD		12/7/17	Deliberate lie during court case, admin. hearing, in a report, investigation; criminal conduct
	Exeter PD		11/30/05	Truthfulness & Reliability
	NH State Police		8/18/16	Lied
	NH State Police		1/22/18	Credibility

NH State Police		2/6/18 – [REDACTED]	Credibility
Plaistow PD			
Manchester PD			
Salem PD			
Salem PD		3/11/10	
Rochester PD		8/10/17	
Lebanon PD		2/28/18	Dishonesty
Nottingham PD			
Keene PD		7/24/17	
Manchester PD			
Nashua PD			Truthfulness
Keene PD		10/16/17	Credibility
Keene PD		7/24/17	Credibility
Rockingham County HOC			
NH State Police			
Dublin PD		12/29/17	
NH State Police		2/1/13	
Jaffrey PD		12/15/17	Egregious dereliction of duty
State Police			
Laconia PD		12/7/17	Deliberate lie during court case, admin. hearing, in a report, investigation
East Kingston PD			
Bedford PD			

Carroll County Sheriff's Dept.	1/5/18	Credibility
Springfield PD	4/11/18	Excessive force
Newport PD	4/10/18	Excessive force
Grantham PD	6/6/18	Excessive force
Weare PD	10/1/12 12/6/12 - [REDACTED]	
Claremont PD	3/15/18	False reports
New Boston/Allentown PD		
Brookline PD		
Salem PD		
Derry PD	12/26/17	Credibility Issue
Hampstead PD	3/19/18	
Nashua PD	12/20/17	Truthfulness
Seabrook PD		
Fremont PD		
Hampton Falls PD (2 findings)		
Concord PD		
Merrimack PD		
Bristol PD		Truthfulness and simple assault
Windham PD	3/17/08	
Newton PD	6/1/12	
Atkinson PD		
Manchester PD		
Candia PD	5/17/17	Untruthfulness
Bedford PD	12/20/17	Bias

	Bedford P.D.		12/3/15	Credibility
	Nashua PD		12/20/17	Falsifying reports/records
	Nashua PD			
	Sheriff's Department			
	Concord PD		9/30/13	
	Loudon PD		4/4/17	
	Kingston PD			
	NH State Police		2/1/13	
	Milford/Lyndeborough PD			
	County House of Corrections			
	Plymouth PD			
	Weare PD		4/19/16	
	Wakefield PD			
	Merrimack PD			
	Milford PD			
	NHSP – Marine Patrol		2/13/18	Credibility
	Salem PD			
	Manchester		2/7/18	
	New Ipswich PD			
	Manchester PD			
	Chesterfield PD		1/30/18	Falsification of records; violations of department policy
	DTF		9/16/92	
	Nashua PD		12/20/17	Truthfulness

	Antrim PD		
	Brookline PD		
	Epping PD	1/2/18	
	Farmington PD	11/18/14	
	Nashua PD	12/20/17	Truthfulness
	Hollis PD		
	Manchester PD		
	Manchester PD		
	Hampton PD	12/19/17	Dishonesty
	Manchester PD		
	Hinsdale PD		
	Nashua PD	12/20/17	Truthfulness
	Nashua PD	12/20/17	Truthfulness; Falsifying Reports/Records
	Rockingham Sheriff's Department		
	Weare PD		
	Portsmouth PD		
	Carroll County Sheriff's Dept.		
	Seabrook PD		
	Hudson PD		
	Manchester PD		
	Farmington PD	7/12/17	Untruthfulness
	Dover PD		
	Manchester PD		
	Nashua PD	12/20/17	Use of physical/Deadly Force; Falsifying Reports or Records; Truthfulness
	NH State Police		

Bedford PD	12/20/17	Cover up
Nashua PD		
Sullivan County		
East Kingston PD		
Nashua PD	12/20/17	Truthfulness
Pelham PD		
Bartlett PD		
Rochester PD		
NH State Police	2/1/13	
Chesterfield PD	1/30/18	Excessive force
Manchester PD		
Hinsdale PD		
Raymond PD		
Weare P.D.		
Manchester PD		
Pittsfield PD	9/19/17	
Manchester PD		
Seabrook PD		
Weare PD	10/31/16	
ME's Office		
Sandown PD		
Nashua PD	12/1/16	
Nashua PD	12/20/17	Truthfulness
Kensington PD		Credibility
Lebanon PD		
Hampton PD	12/19/17	Dishonesty; Obedience to proper authority; Failure to appear for trial; submission of

			reports
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