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BY EMAIL (LEACT@doj.nh.gov)

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Gordon MacDonald
New Hampshire Department of Justice
Office of the Attorney General
33 Capitol Street
Concord, NH 03301

Re: Testimony on Law Enforcement Transparency and Accountability

Dear Attorney General MacDonald and the members of the Governor's Commission on Law Enforcement Accountability, Community and Transparency:

Thank you for the opportunity to testify before this Commission with respect to law enforcement transparency and accountability. To be clear, the ACLU-NH's specific recommendations for this phase will be submitted at a later date, but I am testifying to provide background information on a number of these important issues.

The basis for my recommendations listed below is the notion that systemic racism in policing is not just a national problem. Even with the limited data collection that exists in the Granite State, this is also a New Hampshire problem. The most recent available data from 2014 compiled by The Sentencing Project shows that, in New Hampshire, the rate of Black people incarcerated is 1,040 per 100,000 Black people.¹ This compares to only 202 out of 100,000 white people. The rate for Hispanic people is 398 out of 100,000. Moreover, New Hampshire has Black/white imprisonment disparity ratio of 5.2 to 1 and a Hispanic/white ratio of 2 to 1. Though data is sparse, a 2016 *New Hampshire Public Radio* study has further exposed racial disparities in arrests and jailing.² Data from this study shows that Black people have a 5 times greater chance of being jailed compared to white people—a statistic that is well above the United States average where Black people are 3.5 times more likely to be in jail than white people. Equally disturbing is that, according to this study, Black people in New Hampshire have a 2.8 times greater chance of being arrested compared to white people. In addition, in Hillsborough County—the most populous and diverse county in the state—Black people are nearly 6 times more likely to be in jail than white people according to this study.

¹ The Sentencing Project, *New Hampshire Profile*, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR>.

² Emily Corwin, *Data Shows Racial Disparities Increase at Each Step of N.H.'s Criminal Justice System*, *NHPR* (Aug. 10, 2016) <https://www.nhpr.org/post/data-shows-racial-disparities-increase-each-step-nhs-criminal-justice-system#stream/0>.

New Hampshire court cases have further highlighted how race can seep into policing decisions about whom to stop, search, and arrest. *See State v. Katanga*, No. 226-2015-cr-00301 (N.H. Super. Ct., Hillsborough Cty., S. Dist. Feb. 16, 2016) (“While the supposed purpose of the stop was to investigate an invalid inspection sticker and possible obstructed view, the first thing Trooper Viglione did after leaving his cruiser was order the defendant, who is [B]lack, out of the car for an unconstitutional pat frisk. Thereafter, the troopers made absolutely to investigate Ms. Lucas—the white driver—for the traffic violations for which they stopped her. Rather, the two white troopers instead chose to focus their efforts on the black passenger, who was not stopped for any reason other than the fact that he was a passenger in Ms. Lucas’s vehicle.”); *State v. Hight*, 146 N.H. 746, 751 (2001) (“That the officer [from the Chesterfield police department] was Caucasian, the defendant was African-American and the officer’s suspicions did not extend to the defendant’s two Caucasian passengers is also troublesome.”). At a personal level, the ACLU-NH was involved in representing Jeff Pendleton, a Black man from Nashua, who was arrested simply for walking in a park adjacent to the public library in Nashua.³

However, data and court cases only tell part of this story. While the ACLU-NH cannot speak for communities of color, there have been compelling stories in recent news reports. For example, Reena Goldthree, a professor of African and African-American studies at Princeton University (and formerly of Dartmouth College), addressed race as an issue in New Hampshire—specifically in the context of Black peoples’ interactions with police officers—and how it can go unrecognized: “I think it might be difficult of some of our white neighbors in New Hampshire to understand the depth of fears that African Americans often experience during encounters with police officers.”⁴ Similarly, a 2016 *National Public Radio* interview examined the unique experience of Lakeisha Phelps, who, at the time, was one of only two Black officers on Nashua, New Hampshire’s force of more than 170.⁵ Officer Phelps discussed how, after she was hired, she was racially profiled by her fellow officers: “[O]ne of the troopers would stop me, like, once every other night.” Phelps also stated that “I absolutely know that I can get shot just because I’m black.” It is, in part, because of these experiences in New Hampshire and elsewhere that many Black parents have said that they feel forced to give their children “The Talk.”⁶

In the midst of these concerns about racial disparities and police treatment of communities of color, law enforcement in New Hampshire has frequently resisted disclosure of police disciplinary information, even in situations where there has been sustained misconduct. In the past month

³ Devon Chaffee, *Our Homeless Client Spent 33 Days in Jail Simply for Walking in a Park. Yes, You Heard That Right*, ACLU-NH (Nov. 4, 2014), <https://www.aclu-nh.org/en/news/our-homeless-client-spent-33-days-jail-simply-walking-park-yes-you-heard-right>.

⁴ Peter Biello & Cordelia Zars, *Police, Black Lives Matter, and Violence: A New Hampshire Perspective*, NHPR, July 8, 2016, <https://www.nhpr.org/post/police-black-lives-matter-and-violence-new-hampshire-perspective#stream/0>.

⁵ Emily Corwin, *Black Officer Navigates ‘2 Incompatible Worlds’ on N.H. Police Force*, NPR, Oct. 12, 2016, <https://www.npr.org/2016/10/12/497637765/black-officer-navigates-2-incompatible-worlds-on-n-h-police-force>.

⁶ Ray Duckler, *Racism, More Subtle Here Than in Metro Areas, is Still Felt by Black Community*, CONCORD MONITOR, July 24, 2016, <https://www.concordmonitor.com/If-you-re-black-in-NH-and-get-pulled-over-do-you-worry-You-bet-3518899> (last visited Mar. 20, 2019); *see also Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”).

alone, there have been repeated examples of this. For example, the Salem Police Department has continued to resist the full disclosure of an internal audit that revealed serious deficiencies in how that Department handled internal affairs investigations, including dismissing or discouraging citizen complaints, as well as not fully investigating complaints if they were submitted more than six (6) months after the incident. The Lebanon Police Department is resisting disclosure concerning the reasons why two officers have currently been placed on administrative leave, as well as resisting disclosure concerning a misconduct incident involving one of these officers. A former Canaan police officer is also resisting disclosure of an independent audit report that investigated allegations that the officer engaged in excessive force. In addition, the Claremont Police Department has resisted disclosure of information concerning one former police officer, who is also currently a candidate for the New Hampshire House of Representatives. This former officer let his certification expire after eight years on the force and was the subject of internal affairs investigations, which resulted in varying (unknown) determinations as to the merits of the underlying allegations. This policy of secrecy is not limited to isolated police departments. This policy of secrecy is systemic. This secrecy not only harms government accountability, but it reduces public confidence in law enforcement, including with respect to officers who are doing their jobs the right way.⁷

I believe that real policy reforms are needed that will address police accountability and transparency in ways that fosters faith and confidence among the public that New Hampshire law enforcement is committed to doing better and holding itself accountable. With the tragic murder of George Floyd and the nationwide momentum for racial justice and police reform, this is a historic moment. In this moment, now is the time for New Hampshire to step up and, in recognition of our own flaws as a State, be a national leader in these reform efforts.

Below are my specific policy recommendations addressing police accountability and transparency. More specifically, I am proposing three policy recommendations concerning accountability, and three policy recommendations concerning transparency.

ACCOUNTABILITY RECOMMENDATIONS

I. Creation of a Statewide System for Reporting, Investigating, and Adjudicating Police Officer Misconduct.

I propose the creation of a statewide system for reporting, investigating, and adjudicating police officer misconduct. This system would involve the creation of an independent agency that would also have the ability to investigate police departments for department-wide issues that may exist with respect to police misconduct, internal affairs, and citizen complaints. It is critical to have an independent, statewide agency perform this function so the public can trust that all reports of misconduct are being consistently, fairly, and appropriately addressed. This will create confidence among the public that certified police officers can be trusted and consistently have met the highest standards of the profession. To be clear, this proposal does nothing to hinder the ability of police

⁷ See, e.g., *Rutland Herald v. City of Rutland*, 84 A.3d 821, 826 (Vt. 2013) (826 (“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”).

departments and chiefs to impose discipline on their own officers for misconduct in the context of the employer/employee relationship.

An independent agency and procedure would address the difficulty and mistrust that may stem from police departments internally investigating their own officers for misconduct. While this proposal would not limit the ability of police departments to conduct their own internal investigations for human resources or other purposes, there is value to an outside agency having this authority. There are often inherent conflicts with investigations into misconduct being exclusively performed by an officer's own department (meaning their own colleagues). Such conflicts can raise suspicions that internal investigations that have led to "unfounded" or "unsubstantiated" determinations may not have been done with full independence.

This was seen recently with respect to the Salem Police Department where an internal audit report from 2018 showed that the Department failed to take seriously complaints concerning their officers' alleged misconduct.⁸ Moreover, this report showed that, pursuant to Salem's collective bargaining agreement with the police union, there is a narrow window of six months from the date of an incident within which time a complaint must be filed, or else the Department is prohibited from even investigating the case. Further, this 2018 report showed that the Department failed to meaningfully investigate potential criminal activity from 2012 where an officer, while off-duty, led another Salem police officer on a high-speed chase. It was not until 2019, after the publication of the report, that this incident was criminally investigated, and the New Hampshire Department of Justice ultimately criminally charged the officer. The report said this internal investigation "did not meet acceptable best practices for internal review." This report also noted that a Salem Police Department investigator made little effort to review a heated altercation at a local ice rink where police stunned and arrested a hockey coach in December 2017. In the end, the Salem Police Department deemed the complaint against its officers as "unfounded" within less than 24 hours.⁹

These concerns about the independence and integrity of police internal investigations are precisely why an independent agency is needed, along the lines of the independent agencies that regulate judicial and attorney misconduct. Any proposed statewide agency, as well as its transparency rules, could be modeled after the Judicial Conduct Commission that regulates judicial misconduct. *See* New Hampshire Supreme Court Rules 39¹⁰ and 40¹¹. The body evaluating whether misconduct has occurred should contain law enforcement, but a majority must consist of members of the public.

Finally, because findings of misconduct by this statewide agency would be public, this would potentially eliminate the need for the Department of Justice to maintain an Exculpatory Evidence Schedule (aka "Laurie List"). As explained below in Section I (Transparency), in many states

⁸ Ryan Lessard, *Report Blasts Salem Police for Handling Officer Complaints, Internal Investigations*, Union Leader (Nov. 23, 2018), https://www.unionleader.com/news/politics/local/report-blasts-salem-police-for-handling-of-officer-complaints-internal-investigations/article_a7b3323c-d6a1-5380-9b46-1f1114c5250e.html.

⁹ Ryan Lessard, *Court documents: Salem police made little effort to investigate complaints*, Union Leader (Jan. 25, 2019), https://www.unionleader.com/news/courts/court-documents-salem-police-made-little-effort-to-investigate-complaints/article_3e93d64e-8682-56bd-853d-adc735a1d22f.html.

¹⁰ N.H. Sup. Ct. R. 39 (<https://www.courts.state.nh.us/rules/scr/scr-39.htm>)

¹¹ N.H. Sup. Ct. R. 40 (<https://www.courts.state.nh.us/rules/scr/scr-40.htm>)

where there is transparency concerning police misconduct, there is no need for the creation of such a list.¹²

II. The Use of Pretextual Stops Should be Banned.

The use of pretextual stops by law enforcement should be banned in New Hampshire. Pretextual stops are what they sound like: they are a traffic stop that an officer says was made for one reason (like a minor traffic or vehicle equipment violation), but that is actually a pretext because the officer *actually* made the stop for a different reason that would not provide a lawful basis for the stop (like finding the driver's race, location, sex, car or record "suspicious"). Pretextual stops are common in New Hampshire due to first person accounts of defense attorneys and in court decisions. Though the data is sparse, an examination needs to be done as to whether pretextual stops are disproportionately used against people of color.¹³ Indeed, given the pervasiveness of these stops in New Hampshire, there is a real possibility that these stops contribute to some of the racial disparities that exist in New Hampshire, including in incarceration rates.

From the testimony of Donna Brown and recent court decisions, it appears that the State Police's Mobile Enforcement Team in New Hampshire regularly conducts pretextual stops, with people of color often being the ones stopped.¹⁴ Indeed, as the Superior Court concluded in the *Perez* case, the State Police had a "de jure department policy of detaining citizens for purely pretextual reasons." Based on the information received from Right-to-Know requests, it also appears that there are no specific policies or trainings for the MET, thereby underscoring concerns about the use of pretextual stops and racial profiling. While the following court decisions footnoted below are not from New Hampshire, I include them here to highlight how many state courts have expressed concerns with pretextual stops under their respective state constitutions.¹⁵

¹² With this transparency concerning findings of misconduct, RSA 105:13-b would also need to be repealed, which—as currently construed by law enforcement (which is disputed)—provides law enforcement with *blanket* confidentiality with respect to their "personnel" files, including files documenting sustained misconduct. This construed blanket confidentiality gives the police special protections that do not even apply to other public employees (whose personnel files are subject to a public interest balancing analysis). See *Reid v. N.H. AG*, 169 N.H. 509, 527 (2016) ("[W]e now hold that the determination of whether material is subject to the exemption for 'personnel ... files whose disclosure would constitute invasion of privacy,' RSA 91-A:5, IV, also requires a two-part analysis of: (1) whether the material can be considered a 'personnel file' or part of a 'personnel file'; and (2) whether disclosure of the material would constitute an invasion of privacy.").

¹³ Nationally, there are significant racial disparities in motor vehicle stops. For example, a 2006 study showed that 18-19 year old black men in New York City had nearly an 80 percent chance of being stopped by New York City Police in a given year; that figure dips to 50-70 percent when the age group expanded to 18-to-24 year olds within the same racial demo-graphic. For whites in these age groups, the percentages were 10 and 13 percent, respectively. See Tracey Meares, *The Legitimacy of Police Among Young African- American Men*, 92 Marq. L. Rev. 651, 654 (2009) (discussing deterrence theory versus legitimacy theory).

¹⁴ See, e.g., *State of New Hampshire v. Perez*, No. 218-2018-cr-334 (Rockingham Cty. Super Ct. Oct. 4, 2019); *State of New Hampshire v. Melendez*, No. 218-2018-cr-335 (Rockingham Cty. Super. Ct. Oct. 4, 2019); *United States v. Hernandez*, 2019 DNH 109, 2019 U.S. Dist. LEXIS 113449 (D.N.H. July 9, 2019); *United States v. Garcia*, 2014 DNH 218, 53 F. Supp. 3d 502, 504 (D.N.H. 2014).

¹⁵ See, e.g., *State v. Ladson*, 979 P.2d 833 (Wash. 1999) ("By definition, pretextual stops are without the 'authority of law' because a pretextual traffic stop occurs when a police officer relies on some legal authorization as 'a mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.'"); *State v. Ochoa*, 206 P.3d 143 (N.M. Ct. App. 2008) (finding the *Whren* decision incompatible with New Mexico's "distinctively protective standards for searches and seizures of automobiles" because, under the New Mexico

Increased training or changes to internal policy likely will not adequately address the apparent use of pretextual stops, which may ultimately have a disparate impact on people of color. I believe that it is important to go beyond internal policy and actually ban pretextual stops by law. In short, though racial profiling goes beyond pretextual stops, but banning pretextual stops is a critical and necessary step.

III. Creating a state cause of action for police violations of citizens' state constitutional civil rights, which eliminates qualified immunity as a defense.

Accountability is why this Commission was formed. If public distrust of law enforcement could be attributed to a single thing, it may be how common it is for an officer to evade individual legal accountability for violating someone's constitutional rights. While the most high profile cases of this have not occurred in New Hampshire, the policy that prevents officers from being held individually accountable does exist in New Hampshire, and that is qualified immunity. Such immunity must be eliminated if we are to achieve accountability of (and public trust in) law enforcement. Accordingly, I propose a state cause of action for damages when a state or local police officer violates the New Hampshire Constitution and, in so doing, causes harm to a person, with qualified immunity not being permitted as a defense.

Currently, if a state or local police officer violates the New Hampshire Constitution and, as a result, causes damage to a person, that person often has little recourse to seek damages in the courts.¹⁶ Put another way, if a state or local police officer harms someone in violation of the New Hampshire Constitution, often little can be done. This is a significant loophole that may come as a surprise to most people in New Hampshire. After all, what good are the independent protections of our New Hampshire Constitution if a citizen cannot sue for damages when those protections are violated and damage is caused? This proposal would remedy this problem and, in so doing, will make local police officers and departments more accountable – and build public trust.

It is critical that qualified immunity not be a defense to this new state cause of action. Qualified immunity is a judge-made doctrine that shields government officials from liability for damages — even if they have violated the Constitution — so long as they did not violate “clearly established” law. According to the U.S. Supreme Court, the law is “clearly established” only when a prior court has held that an officer violated the Constitution under incredibly similar circumstances. Under this doctrine, victims and families accusing police officers of brutality must find an incredibly similar case where officers were held responsible to cite as precedent. This is exceedingly difficult. As a result, police officers are often not held liable when they violate the federal constitutional rights of citizens. In short, qualified immunity often immunizes an officer from personal accountability, even in the face of egregious action, such as misuse of force resulting in bodily injury or death.¹⁷

Constitution, individuals do not have a lower expectation of privacy when they are in a vehicle); *but see State v. McBreaity*, 142 N.H. 12, 13 (1997) (following *Whren* under the New Hampshire Constitution).

¹⁶ See *Marquay v. Eno*, 139 N.H. 708, 721 (1995) (our constitution does not specify remedies for its violation).

¹⁷ See Joanna C. Schwartz, Suing police for abuse is nearly impossible. The Supreme Court can fix that, *Washington Post* (June 3, 2020), <https://www.washingtonpost.com/outlook/2020/06/03/police-abuse-misconduct-supreme-court-immunity/>.

It is important to note that when a police officer violates the constitutional rights of a citizen, the citizen's only recourse is usually to sue the officer because, absent special circumstances (e.g., where this is an established policy or established pattern and practice), the police department or municipality cannot be held liable for the actions of its officers. However, as explained above, the doctrine of qualified immunity makes holding individual officers accountable extremely difficult. This leaves citizens whose constitutional rights have been violated with little recourse. Not only is this unfair and unjust, it tells officers that they likely will not be held accountable for misconduct because they are immune from personal liability. This message is harmful to public trust and risks influencing officer's behavior.

Police officers have said that qualified immunity is essential for officers' ability to respond to calls and to make split-second decisions. However, qualified immunity applies even where the officer did not engage in a split-second decision. Moreover, officers are protected even without qualified immunity because, if they make a mistake and are personally liable, they are indemnified. In other words, if a police officer is held liable, the officer is not going to lose or his or her house or assets.¹⁸ Police were also still able to do their jobs even before the U.S. Supreme Court created qualified immunity several decades ago.

Qualified immunity has been repeatedly used by federal courts to immunize police officers even when the officer has violated a citizen's constitutional rights, even in some egregious cases. Below are some cases:

- Fresno police officers stealing \$225,000 they seized pursuant to a warrant. *Jessop v. City of Fresno*, 936 F.3d 937 (9th Cir. 2019).
- Allowing a police dog to bite a suspect did not violate "clearly established law" because the case cited by the plaintiff involved a suspect who had surrendered by lying on the ground with his hands to the side, whereas the plaintiff had surrendered by sitting on the ground with his hands raised. *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018).
- A police officer shot a ten-year-old child who was lying on the ground, while the officer repeatedly tried to shoot a non-threatening family dog. *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019).
- Prison officials placed a prisoner alone for six days in an "extremely cold" cell without a toilet, water fountain, or bed, where raw sewage flooded up from a floor drain. The Court ruled that the prisoner could not overcome qualified immunity because of the time period involved. *Taylor v. Stevens*, 946 F.3d 211 (5th Cir. 2019).

¹⁸ See RSA 99-D:2 (indemnifying state employees for negligent or wrongful acts within the scope of official duties so long as such acts were not wanton or reckless); RSA 31:106 (indemnifying municipal employees except for violations of civil rights done within the scope of employment so long as the acts were not committed with malice). While an officer is indemnified, the resulting financial hardship on a department or a town from a cause of action should incentivize reforms. It gives those entities reasons to review training and policies and evaluate individual officers. Moreover, it enables a person whose rights have been violated to actually have recourse.

- Police officers shot and killed a mentally ill man who was dozens of feet away from the nearest person and turning to run from the officers. *Reich v. City of Elizabethtown*, 945 F.3d 968 (6th Cir. 2019).
- A police officer body slammed a non-threatening woman and broke her collarbone as she walked away from him. *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019).
- *Farrelly v. City of Concord*, 902 F. Supp. 2d 178, 195 (D.N.H. 2012) (qualified immunity barred a false arrest claim against an officer for arresting the plaintiff under a statutory provision that had been held unconstitutional by the New Hampshire Supreme Court some 5 years before).
- *Gray v. Cummings*, 917 F.3d 1, 10, 12 (1st Cir. 2019) (“Based on the body of available case law, we hold that an objectively reasonable police officer in May of 2013 could have concluded that a single use of the Taser in drive-stun mode to quell a nonviolent, mentally ill individual who was resisting arrest, did not violate the Fourth Amendment. Even if such a conclusion was constitutionally mistaken — as a jury could find on the facts of this case — Cummings is shielded by qualified immunity.”; noting that “the plaintiff must identify either controlling authority or a consensus of cases of persuasive authority sufficient to send a clear signal to a reasonable official that certain conduct falls short of the constitutional norm”).

However, one federal judge—Carlton Reeves—was recently heavily critical of the qualified immunity doctrine, though he reluctantly concluded the officer should benefit from qualified immunity based on current case law. In this case, a white police officer pulled over a Black man driving through Mississippi in a newly purchased Mercedes convertible. For nearly two hours, the officer pushed to search the vehicle, allegedly lied to its owner, enlisted a drug detection dog, and ultimately left the exhausted man by the side of the road to put his car back together again. The Mercedes had been ripped apart, and the driver was so shaken he sued the police officer. In this legal opinion that traced some of the racist origins of policing, the Black Lives Matter movement, and Mississippi’s own tragic history of traffic stops, Judge Reeves urged the Supreme Court to revisit the issue of qualified immunity and to toss it into “the dustbin of history.” “Immunity is not exoneration,” Reeves wrote. “And the harm in this case to one man sheds light on the harm done to the nation by this manufactured doctrine.” See *Jamison v. McClendon*, No. 3:16-cv-595-CWR-LRA (S.D. Miss. Aug. 4, 2020), <https://www.documentcloud.org/documents/7013933-Jamison-v-McClendon.html>.

In the wake of the murder of George Floyd, Colorado recently created a cause of action against police officers for violating an individual’s constitutional rights, and eliminated qualified immunity as a defense.¹⁹ There is also talk of federal action on this front in response to the Floyd murder and resulting protests for police reform.

¹⁹ See Pages 12-13, https://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf.

TRANSPARENCY RECOMENDATIONS

I. Making police disciplinary files categorically public under the Right-to-Know Law.

To foster public confidence in law enforcement, it is critical that police department records concerning police officer discipline and misconduct implicating official duties be released to the public under the Right-to-Know Law. Indeed, as one court has explained, withholding this type of information “cast[s] suspicion over the whole department and minimize[s] the hard work and dedication shown by the vast majority of the police department.” *See Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013).

For the last 27 years, police departments in New Hampshire agencies have categorically withheld this information from the public, including incidents of sustained and serious misconduct. For example, the Salem Police Department has withheld from the public portions of a redacted internal audit report documenting serious mismanagement within the Department. The report documented how the Department did not take seriously citizen complaints, including a complaint of racial profiling.²⁰ The taxpayers paid approximately \$77,000 for the report, yet the Department has continued to keep portions of it secret.

Fortunately, under two recent New Hampshire Supreme Court decisions²¹, these records are now subjected to a public interest balancing analysis and cannot be categorically withheld from the public. However, despite these decisions—as the introduction of this letter demonstrates— police departments are still fighting disclosure in many court cases, thereby costing taxpayers thousands of dollars in litigation costs and impeding transparency. This demonstrates that police departments tend to fight the production of disciplinary information even where it evidences serious misconduct. This perpetuates the impression that police departments protect bad officers and hide misconduct from the public. To foster public trust and transparency, New Hampshire should ensure that the public has access to this information.²²

Police departments routinely claim that producing an officer’s disciplinary files would violate that officer’s privacy rights. However, the police do not have the same privacy rights as private citizens because they are public servants with the authority to arrest individuals, use lethal force, and deprive individuals of their liberty. As one court has explained: “By accepting his public position [a police officer] has, to a large extent, relinquished his right to keep confidential activities directly

²⁰ Ryan Lessard, *Report Blasts Salem Police for Handling Officer Complaints, Internal Investigations*, Union Leader (Nov. 23, 2018), https://www.unionleader.com/news/politics/local/report-blasts-salem-police-for-handling-of-officer-complaints-internal-investigations/article_a7b3323c-d6a1-5380-9b46-1f1114c5250e.html.

²¹ *Union Leader Corp. v. Town of Salem*, No. 2019-0206, 173 N.H. ___, 2020 N.H. LEXIS 102 (N.H. Sup. Ct. May 29, 2020); *Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135, 173 N.H. ___, 2020 N.H. LEXIS 103 (N.H. Sup. Ct. May 29, 2020).

²² Indeed, the police have even resisted modest reform efforts like HB 153 (2019), which would have deemed public: (i) records reflecting findings after an officer discharged a firearm, which led to death or serious injury, (ii) disciplinary records in which there has been a final adjudication of a matter involving a law enforcement officer who was found guilty of sexual assault; and (iii) disciplinary records in which there was a sustained finding of dishonesty by a law enforcement officer including perjury, false statements, filing false reports destruction, or falsifying or concealing evidence.

relating to his employment as a public law enforcement official.” *See State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252, 261-62 (Wis. 1983). The Court went on to note that the police chief in that case “cannot thwart the public’s interest in his official conduct by claiming that he expects the same kind of protection of reputation accorded an ordinary citizen.”

Many other states (at least 12) permit the public to access this information in various ways. *See* <https://project.wnyc.org/disciplinary-records/>. There is no reason New Hampshire cannot join these states, many of which have larger cities and larger police departments.

This proposal, if adopted, may also eliminate the need for the so-called “Laurie list” going forward, as these documents would now be public and available to defense attorneys, which would avoid the need for the current flagging mechanism managed by the Department of Justice. RSA 105:13-b would also need to be repealed, which—as currently construed by law enforcement—provides law enforcement with *blanket* confidentiality with respect to their “personnel” files, including files documenting sustained misconduct. This construed blanket confidentiality gives the police special protections that do not even apply to other public employees (whose personnel files are subject to a public interest balancing analysis²³).

II. The So-Called “Laurie List” Should Be Made Public.

The Department of Justice keeps a secret list—the so-called “Laurie List” or Exculpatory Evidence Schedule—containing the names of around 275 police officers who have committed sustained misconduct relating to their truthfulness or credibility. These are officers whose involvement in a criminal case has to be disclosed to defense counsel, as it could be considered exculpatory evidence. Along with the New Hampshire Association of Criminal Defense Lawyers, I believe that the Commission should recommend that this list be made public. This list is specific to misconduct that implicates an officer’s trustworthiness and credibility. These traits go to the core of an officer’s ability to testify and perform his or her job.

It is critical to understand why New Hampshire has a “Laurie List.” New Hampshire has a Laurie List as a way of complying with the State’s obligation to produce exculpatory evidence to defense counsel *only* because the police insist on confidentiality with respect to their personnel files. If police files indicating misconduct were transparently made public (which would be consistent with the ACLU-NH’s earlier recommendations), defense counsels and the public would have access to them, thereby eliminating the need for the Department of Justice to maintain the Laurie List. Without confidentiality, no list would be needed, just as it is not needed in other states where such files are made more widely available to the public.

The secrecy of the list protects (i) officers charged with and/or convicted of criminal conduct that resulted in placement on the List, (ii) officers who have been terminated as a result of the conduct that led to placement on the List, (iii) officers who have exhausted internal grievance procedures,

²³ *Reid*, 169 N.H. at 527 (“[W]e now hold that the determination of whether material is subject to the exemption for ‘personnel ... files whose disclosure would constitute invasion of privacy,’ RSA 91-A:5, IV, also requires a two-part analysis of: (1) whether the material can be considered a ‘personnel file’ or part of a ‘personnel file’; and (2) whether disclosure of the material would constitute an invasion of privacy.”).

and (iv) officers where there would be no dispute that disclosures would need to be made to defendants in every case in which the officer is a testifying witness.

Law enforcement's stated commitment to accountability is undermined by a secret list of police who have committed sustained misconduct. For example, this secrecy is potentially protecting Claremont police officers Ian Kibbe and Mark Burch. These officers performed an illegal search and falsified official reports, which caused prosecutors to drop at least 20 cases. Both were terminated, and Mr. Kibbe ultimately pled guilty to two misdemeanors.²⁴ The public also has no way of knowing whether former Manchester police officers Darren Murphy and Aaron Brown are on the list. These individuals were terminated after allegations of coercing a woman facing criminal charges to have sex. Prosecutors eventually dropped charges in 35 cases in which Murphy was involved.²⁵ This secrecy serves no public interest.

There is clear value to the public in knowing the identities of the officers on the List. The public will learn if any of these officers are currently patrolling their communities, and, if so, who they are and generally what they did. The public can then evaluate this information and, if appropriate, ask why these individuals are still employed using public funds. For example, in Manchester and Nashua as of August 2018, two employed officers in each department were on the List. Without knowing who is on the List, citizens in Manchester and Nashua cannot conclude with certainty that all officers they encounter on the streets are trustworthy and credible. This hurts public confidence and trust in policing.

Disclosure is critical because it will help defense attorneys and the public evaluate whether prosecutors have been making appropriate disclosures in criminal cases. Currently, as Attorney Robin Melone of the NHACDL testified, this process is secret with no ability to verify compliance. As the New Hampshire Supreme Court has held, "[b]ecause a prosecutor must be publicly accountable for his or her decisions, the public should have access to information that will enable it to assess how prosecutors exercise the tremendous power and discretion with which they are entrusted." *See Grafton Cty. Atty.'s Office v. Canner*, 169 N.H. 319, 328 (2016). Here, disclosing the List will provide greater assurance that prosecutors and officers will make the appropriate disclosures to defendants in the future because defense attorneys would then be able to cross check the List with the list of testifying officers they receive in individual cases. Today, defense attorneys simply have to trust that they are receiving the required disclosures.

Making the List public will also help defense attorneys assess whether prosecutors have made appropriate disclosures in prior cases. Such a forensic review may disclose that the system has operated fine in secret. Alternatively, it may disclose that the system has broken down and needs reform, thereby entitling some defendants to new trials. In short, disclosure is necessary so that the public can be confident in the operation of their government.

²⁴ Jordan Cuddemi, *Former Claremont police officer sentenced to 90 days in jail*, Valley News (Jan. 1, 2019), <https://www.concordmonitor.com/Ian-Kibbe-Sentenced-22641736>.

²⁵ Todd Feathers, *Review of evidence begins in Manchester police officers' sexual assault case*, Union Leader (Oct. 24, 2018), https://www.unionleader.com/news/crime/review-of-evidence-begins-in-manchester-police-officers-sexual-assault-case/article_8047fa68-d7ea-11e8-b19f-a3bbd5abbb57.html.

The Department of Justice has memorialized due process protections for those officers on the list, which should alleviate concerns about disclosure. The Department’s most recent April 30, 2018 Memorandum explains that, before placement, (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. The police commended this due process, with the New Hampshire Police Association calling it a “long overdue correction” to the “Laurie List” process. Additionally, since at least 2017, there has been a process in place for eligible officers to have their names removed from the EES List if the conduct that put them on the list has been deemed unfounded. On top of that, law enforcement have the ability to seek a declaratory judgment in court if they feel that they were placed on the List improperly. With this due process must come transparency as to the List.²⁶

The Hillsborough Superior Court has concluded that this list is a public document, yet this decision was appealed. *See N.H. Ctr. For Public Interest Journalism, et al v. N.H. Dep’t of Justice*, 2018-cv-00537 (N.H. Super. Ct., Hillsborough Cty., S. Dist., Apr. 23, 2019) (currently on appeal), https://www.aclu-nh.org/sites/default/files/field_documents/court_order_4-24-2019_10.50.39_2982486_8a12d652-e8f8-4277-9f14-dbfa0db4f1ca.pdf. Oral argument in this case is scheduled for September 16, 2020.

III. Require all police personnel records to be retained for 20 years like all other employees, as opposed to being subjected to collective bargaining agreements.

Under RSA 33-A:3-a, personnel files for municipal employees are retained for “retirement or termination plus 20 years.” However, unlike the 20-year retention rules that apply to the personnel records of all other municipal employees, the retention rules governing police internal-affairs documents are dictated by collective bargaining agreements. *See* RSA 33-A:3-a. In other words, these retention provisions give the police special protections that do not exist for other public employees. I propose, consistent with how personnel records are treated for all other public employees, that police internal-affairs documents similarly be retained for “retirement or termination plus 20 years.” This proposal simply puts the municipal retention of these police

²⁶ Due process with respect to discipline an officer has received is different from due process being used to withhold information from the public concerning official police actions. The New Hampshire Supreme Court has not recognized such a constitutionally-enshrined liberty interest in the public records context. This presumably is because it would conflict with the Right-to-Know Law and the notion that public officials must be subjected to public scrutiny. *See, e.g., Burton v. York County Sheriff’s Dep’t.*, 594 S.E.2d 888, 895-96 (S.C. Ct. App. 2004) (“By raising this constitutional argument, the Sheriff’s Department urges this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual’s performance of his public duties to be free from public scrutiny. We find this would be ill-advised.”); *Tompkins v. Freedom of Info. Comm’n*, 46 A.3d 291, 297 (Conn. App. Ct. 2012) (“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”). In other words, the procedural due process and privacy protections in the Fourteenth Amendment and Part I, Article 15 of the New Hampshire Constitution protect individual citizens from government officials, not the other way around, when it comes to transparency.

internal affairs documents in line with the retention rules that apply for “personnel” information of all other municipal employees.²⁷

This change is especially needed because the New Hampshire collective bargaining agreements often allow disciplinary documents to be purged after a certain period of time. For example, a recent collective bargaining agreement in Nashua requires (i) letters of warning to be purged after 5 years, and (ii) letters of suspension to be purged after 7 years. Many other police departments in major cities do not have similar personnel file purging policies that exist in these New Hampshire collective bargaining agreements, including Cincinnati, Los Angeles, and Pittsburgh.

Purging disciplinary documents can be problematic because it could prevent systemic issues within a department from being uncovered by the department itself. For example, a recent audit of the Salem Police Department concerning potential misconduct uncovered that the Department’s retention of internal affairs documents was incomplete. Moreover, in investigating the Chicago Police Department, the United States Department of Justice found that the provision requiring the destruction of disciplinary records “deprives CPD of important discipline and personnel documentation that will assist in monitoring historical patterns of misconduct.”²⁸

Thank you for considering my recommendations, and do not hesitate to contact me with any questions you may have.

Sincerely,

/s/ Gilles Bissonnette

Gilles Bissonnette
Legal Director
ACLU of New Hampshire

²⁷ A similar proposal was presented to the legislature in 2019. See 2019 HB 334. The New Hampshire Police Association signed-in in opposition to this bill. (However, the New Hampshire Police Chiefs Association did not oppose the bill.) It passed the House and died in the Senate.

²⁸ <http://www.chicagoappleseed.org/wp-content/uploads/2019/12/CPCA-Final-Paper-3-Requirements-that-Evidence-of-Misconduct-be-Ignored-or-Destroyed.pdf>.