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August 19, 2020

Via Email (LEACT@doj.nh.gov)

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

Re: Testimony on Law Enforcement Accountability, Community, and Transparency

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

Thank you for the opportunity to provide testimony before this Commission concerning the paramount and pressing topics of transparency and accountability in law enforcement. I write to you in my capacity as General Counsel to Union Leader Corporation, (Union Leader), and as a member of the Executive Committee of the New England First Amendment Coalition, (NEFAC). For over 150 years Union Leader has been committed to advancing and protecting the constitutional values of a free press and the public's corresponding right to know what its government is up to. NEFAC is a 501(c)(3) non-profit organization that is also committed to advancing and protecting the five freedoms guaranteed by the First Amendment and the principle of the public's right to know throughout New England. Union Leader and NEFAC understand that accountability and transparency are inherent and fundamental pillars of a functioning and healthy democracy and fight every day to advance openness and transparency in governmental actions and proceedings as mandated by New Hampshire's Constitution and its Right-to-Know Law.

New Hampshire has protected the important values of transparency and accountability in its various statutes and Constitution. In fact, New Hampshire is one of only a few states that enshrines the right of public access in its Constitution. Part I, Article 8 of the New Hampshire Constitution provides that,



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All power residing originally in, and being derived from, the people, all the magistrates and officers of the government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The public also has a right to an orderly, lawful and accountable government...

The fundamental purpose of New Hampshire's Right-to-Know law is "...to provide the utmost information to the public about what its government is up to." Union Leader Corp. v. City of Nashua, (1996). Its preamble unambiguously states that,

Openness in conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

See R.S.A. Ch. 91-A:1. Transparency and accountability of law enforcement is perhaps more important today than ever. One needs only to turn on the television or computer to learn that communities across this nation innately distrust their local, state and federal governments, and, in particular, the police forces tasked to protect and serve those communities. Such distrust is clearly born from the lack of accountability and transparency, perceived or actual, from law enforcement agencies.

For nearly three decades police departments in New Hampshire, relying on the holding of Union Leader Corp. v. Fenniman, have routinely refused to disclose any information evidencing or pertaining to misconduct committed by police officers. On May 29, 2020, the New Hampshire Supreme Court overturned the holding in Union Leader Corp. v. Fenniman that made "internal personnel practices", which included disciplinary action, categorically exempt from



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disclosure under New Hampshire's Right-to-Know law. Internal personnel practices of police departments are now subject to a three-prong balancing inquiry by the courts. Despite the Supreme Court's recent decision it is clear that statutory changes and reform concerning the misconduct of the women and men sworn to protect and serve is necessary in New Hampshire to more fully serve the public's right to know what its government is up to.

New Hampshire House Bill 153 (2019) "AN ACT relative to circumstances under which police officer disciplinary records shall be public documents", which is in committee, is a good next step towards shining the light of public scrutiny upon police misconduct. The bill is similar to numerous other state statutes which provide for disclosure of misconduct by a government employee so long as the charge of misconduct is sustained. For instance, in Maine:

Investigations of deadly force or physical force by law enforcement officer. The name of a law enforcement officer is not confidential under subsection 1, paragraph B, subparagraph (5) in cases involving:

- A. The use of deadly force by a law enforcement officer; or
- B. The use of physical force by a law enforcement officer resulting in death or serious bodily injury.

In cases specified in paragraphs A and B, regardless of whether disciplinary action is taken, the findings of any investigation into the officer's conduct are no longer confidential when the investigation is completed and a decision on whether to bring criminal charges has been made, except that if criminal charges are brought, the findings of the investigation remain confidential until the conclusion of the criminal case.

See Title 30-A Section 503, 1-A. Similarly, Florida's Chapter 119.071 states, in relevant part, that:



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A complaint of misconduct filed with an agency against an agency employee and all information obtained pursuant to an investigation by the agency of the complaint of misconduct is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the investigation ceases to be active, or until the agency provides written notice to the employee who is the subject of the complaint, either personally or by mail, that the agency has either:

1. Concluded the investigation with a finding not to proceed with disciplinary action or file charges; or
2. Concluded the investigation with a finding to proceed with disciplinary action or file charges.

In Minnesota, public data is defined as follows:

(a) Except for employees described in subdivision 5 and subject to the limitations described in subdivision 5a, the following personnel data on current and former employees, volunteers, and independent contractors of a government entity is public:

- (1) name; employee identification number, which must not be the employee's Social Security number; actual gross salary; salary range; terms and conditions of employment relationship; contract fees; actual gross pension; the value and nature of employer paid fringe benefits; and the basis for and the amount of any added remuneration, including expense reimbursement, in addition to salary;
- (2) job title and bargaining unit; job description; education and training background; and previous work experience;
- (3) date of first and last employment;
- (4) **the existence and status of any complaints or charges against the employee, regardless of whether the complaint or charge resulted in a disciplinary action;**



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(5) the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis of the action, excluding data that would identify confidential sources who are employees of the public body;

(emphasis supplied). Finally, in North Dakota “[r]ecords relating to a public entity’s internal investigation of a complaint against a public entity or employee for misconduct are exempt until the investigation of the complaint is complete, but no longer than seventy-five calendar days from the date of the complaint.” *See* North Dakota Statute 44-04-18.1. New Hampshire should follow the lead of these other states that have made disclosure of law enforcement records pertaining to police misconduct matters of public record.

To summarize, as Justice Shulman of the Rockingham County Superior Court has stated “...bad things happen in the dark when the ultimate watchdogs of accountability- i.e. the voters and taxpayers – are viewed as alien rather than integral to the process of policing the police.” “A citizenry’s full and fair assessment of a police department’s internal investigation of its officer’s actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.” Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, Massachusetts Appeals Court (2003). For these reasons, I fully support the accountability and transparency recommendations contained in the testimony of Attorney Gilles Bissonnette previously presented to this Commission and calling for the amendment of RSA c. 91-A making police disciplinary files categorically public. I call on General MacDonald and the Department of Justice to make the “Laurie List” public. The creation of an independent



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oversight agency for periodically certifying and disciplining police officers will foster confidence and trust between the community and law enforcement agencies. Thank you again for the opportunity to present this written testimony and I will be pleased to participate in your video conference meeting tomorrow and to answer any questions that the Commission members may have.

Respectfully,

A handwritten signature in blue ink, which appears to read "Gregory V. Sullivan", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke at the end.

Gregory V. Sullivan

xc: Brendan McQuaid, President
Justin Silverman, Executive Director