THE STATE OF NEW HAMPSHIRE

SULLIVAN, SS. **SUPERIOR COURT**

Jonathan Stone

v.

City of Claremont

Docket No. 220-2020-CV-00143

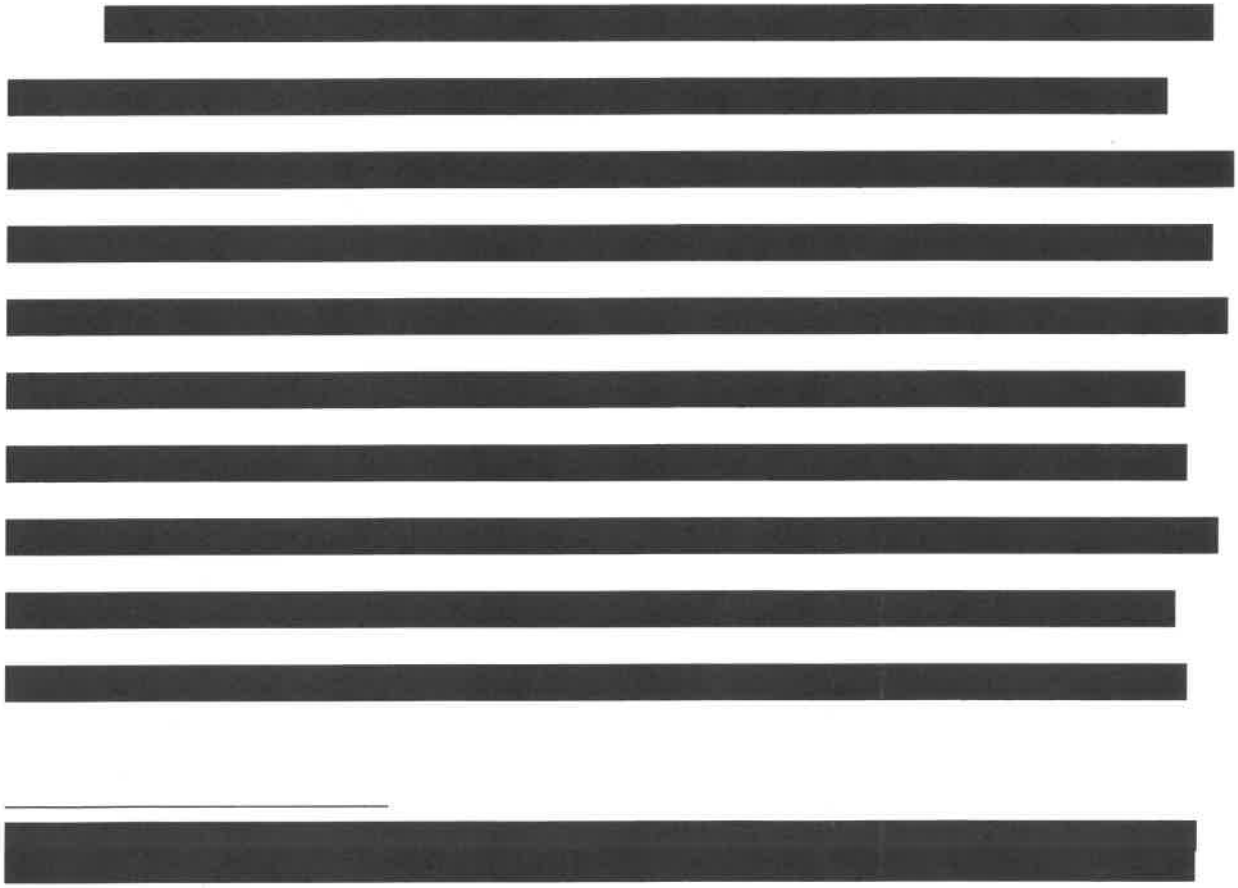
ORDER
(REDACTED)

The Plaintiff, Jonathan Stone, was formerly an officer in the Claremont Police Department ("CPD"). The Plaintiff brought this action under RSA 91-A:5, seeking preliminary and permanent injunctions to prevent the City of Claremont (the "City") from disclosing various documents related to the Plaintiff's employment with the CPD, and also seeking to preclude disclosure via specific performance of the confidentiality provisions of a negotiated agreement between the Plaintiff and the City. See generally Doc. 3 (Compl.), Doc. 7 (Pl.'s Mem. Law). The American Civil Liberties Union of New Hampshire (the "ACLU") and the Union Leader Corporation (the "Union Leader") (together, "Intervenors") moved to intervene. See Doc. 10 (Joint Mot. to Intervene) and Doc. 11 (Intervenor's Mem. Law). A hearing was held on November 16, 2021. The Court (Tucker, J.) denied the Plaintiff's request for a preliminary injunction on the narrow grounds of the contractual confidentiality provision, but left open the question of whether the documents were subject to a statutory exemption under RSA 91-A:5. See generally Doc. 27 (Dec. 7, 2021, Order # 1). The Court granted the Intervenors access to redacted documents for purposes of constructing further pleadings. See Doc 28 (Dec. 7, 2021, Order # 2). The City produced the documents pursuant to a Stipulation

and Protective Order. See Doc. 31 (Stipulation); Doc. 37 (City's Redacted Docs.); Doc. 38 (City's Mem. Law). The Plaintiff filed a second Memorandum of Law based on the City's redacted documents. Doc. 41 (Pl.'s Mem. Law #2). The Intervenors responded. Doc. 43 (Intervenors' Resp.); Doc 44 (Intervenors' Exhs.).

BACKGROUND

The Plaintiff was employed as an officer in the CPD from 2000 to 2006, and he resigned from that position on June 9, 2007, pursuant to a negotiated agreement with the City. See Doc. 43 at 1; Doc. 39 at 1-3. The Plaintiff has since become a Claremont City Councilor, and he is currently running for election to the New Hampshire House of Representatives in District 8, Sullivan County. Doc. 43 at 1. While this case has been pending, he also ran for the House unsuccessfully in 2020. Id.



[redacted]

[redacted]

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[2] RSA 91-A is often called the "Right-to-Know Law.""

[redacted]

[redacted]

ANALYSIS

The Plaintiff argues that the documents at issue should be withheld for two reasons: (1) because some or all of them are barred from disclosure by terms of the Stipulated Award entered into between the City and the Plaintiff on June 9, 2007; (2) because some or all of them fall into an exemption in RSA 91-A:5, IV. The Court will address each of these arguments in turn.

I. The Stipulated Award

The Plaintiff argues that several provisions of the Stipulated Award bar disclosure of the documents at issue. First, Paragraph 5, "Personnel File," provides that the City "shall purge [the Plaintiff's] personnel file of all reference to the one-day suspension of March 8, 2006, the March 27, 2006 notice of termination, and all events leading up to them." Doc. 40, Ex. 1 ¶ 5. The Plaintiff reads "and the events leading up to" as embracing virtually everything having to do with the March 2006 sanctions, and therefore "there should be nothing in Mr. Stone's personnel file connected to any of the events discussed in any of the four grievances." Doc. 39 at 2. Moreover, Paragraph 6 of the Stipulated Award provides that the City would not report "the disposition of this matter . . . to the newspaper or any other media outlet. If contacted by the media, it was agreed that the City would make no comment." Id. ¶ 6.

In its denial of the Plaintiff's request for a preliminary injunction based narrowly on the confidentiality provision of the Stipulated Award, the Court has already indicated

[4] The Plaintiff agrees that a letter from PSTC to the Chief of the CPD dated June 4, 2007, can be disclosed.

why the Plaintiff's instant arguments based on the Stipulated Award must fail: contract provisions that are contrary to public policy are unenforceable. See Doc. 27 (Order dated Dec. 7, 2020) (Tucker, J.) (citing Mentis Sciences, 173 N.H. at 591); see also Mentis Sciences, 173 N.H. at 591-92 ("[A]n agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or . . . is at war with the interests of society and is in conflict with the morals of the time." (quotation omitted)). As the Court noted in its prior Order, the public policy advanced by RSA 91-A "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, and it touches upon the principles articulated in the New Hampshire Constitution that "Government . . . should be open, accessible accountable and responsive" and "the public's right of access to governmental proceedings and records shall not be unreasonably restricted," N.H. Const. Pt. 1, art. VIII. See Doc. 27 at 3. Thus, by restricting the public's access to records, the confidentiality provision violated the public policy behind RSA 91-A. As the Court explained, "the parties [can]not lawfully agree that the City would violate the Right to Know law." Id. at 3.

The Court adheres to that principle here with respect to the rest of the Stipulated Award. Just as a contract provision barring disclosure of the Plaintiff's records violates public policy when it conflicts with RSA 91-A, so too does a provision requiring the destruction of those same documents. The Court need not reach the question of which of the documents at issue are subject to "purgation" under Paragraph 5—whether virtually all the documents, as the Plaintiff would have it, or, as the Intervenors argue,

only those directly concerning the March 27, 2006, notice and the Plaintiff's four grievances. See Doc. 39 at 2; Doc. 43 at 14. Likewise, the Court need not decide whether "purge" here means the wholesale destruction of documents or simply their removal from the Plaintiff's official "personnel" file. See Doc. 43 at 14-17. It is self-evident that destroying any such documents would violate the public policy motivating RSA 91-A, because the public could not access records that have been destroyed. If, as here, the records have not been destroyed but simply moved, they are subject to the RSA 91-A regardless of any contract provision.

In sum, and notwithstanding any agreement of the parties to the contrary, no provision of the Stipulated Award, no matter how construed, can be enforced if the result would be a violation of RSA 91-A. For that reason, the Court finds the Plaintiff's contractual arguments unavailing, and the Court turns to the question of whether the requested documents fall under an exemption to RSA 91-A.

II. RSA 91-A

The Plaintiff next argues that disclosure of the records at issue is barred because they fall under the "invasion of privacy" exemption in RSA 91-A:5, IV. For the reasons stated below, the Court disagrees.

A. Standing

As a threshold matter, the Court first considers the question of the Plaintiff's standing to sue under RSA 91-A. RSA 91-A:7 provides that "[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief." The Intervenors argue that RSA 91-A:7 "does not create a cause of action for anyone other than a requester who has been 'aggrieved by a violation' . . . due to a public body's

decision to not produce records," and that so-called "reverse 91-A actions" like the case at bar—where the Plaintiff seeks to prevent a government agency from producing records requested by a third party—are not supported by the statute. Doc. 43 at 12.

The New Hampshire Supreme Court has not addressed this question. See Provenza v. Town of Canaan, No. 2020-0563, 2022 WL 1196296, at *3 (N.H. Apr. 22, 2022) ("We have not yet addressed whether RSA 91-A:7 provides a remedy for, and grants standing to, an individual who seeks to prevent disclosure of information pursuant to the Right-to-Know Law. . . . The legislature may wish to consider whether clarifications as to who is entitled to seek relief under RSA 91-A:7 is warranted." (internal citations omitted)).

This case followed an earlier matter that sought a decision from this Court on the application of RSA 91-A. That case, City of Claremont v. Stone, et al. (Docket No. 220-2020-CV-107), was dismissed by the Court (Tucker, J.). As summarized by Judge Tucker earlier in the instant case (see Doc. 25), the Court's order in the earlier matter directed the City to process the RSA 91-A request, and to notify Plaintiff's counsel if it determined that the records in dispute should be produced. Notice was to be provided to give the Plaintiff "time to decide whether to seek an injunction." Id. The Court thus assumes the Plaintiff has standing to make his complaint and goes on to consider the parties' substantive arguments.

B. RSA 91-A:5, IV

The Plaintiff argues that virtually all the records produced by the City in response to the Court's Order of December 7, 2021, should be barred from disclosure to the public. First, the Plaintiff argues that some of the investigative reports (IA Reports

8-14) should be withheld because, by the terms of the Stipulated Award, there were "no findings of misconduct" to report. Doc. 39 at 17; Doc 41 at 3-4. The Plaintiff argues further that the production of all the documents, including IA Reports ## 8-14 and all but one set of PSTC correspondence, is barred because releasing the information would constitute an invasion of the Plaintiff's privacy under RSA 91-A:5, IV. Doc. 39 at 19-20.

The City counters that IA Reports ## 1-10 and 10A, and the entirety of the PSTC correspondence, are subject to public disclosure with either minor or no redactions, but IA Reports ## 11-14 are exempt from public disclosure because "the entirety of the allegations, circumstances and findings" in the reports concern "activities that [the Plaintiff] undertook during his off-duty time and as a merely private individual." Doc. 38 ¶ 8. As such, the City argues, IA Reports ## 11-14 "do not provide any assistance to the general public in revealing . . . '[the Plaintiff's] conduct as a government employee while performing his official duties.'" Id. (citing Provenza, 2022 WL 1196296, at *6).

The Intervenors concur with the City's assessment of all the documents except IA Reports ## 11-14, although to narrow the scope of the dispute the Intervenors have withdrawn their requests for IA Reports ## 11 and 12. Doc. 43 at 5. The Intervenors take issue with the City's contention that IA Reports ## 13 and 14 concern only off-duty conduct with no bearing on the Plaintiff's performance of his official duties. IA Report # 13, the Intervenors contend, concerns [redacted] IA Report # 14 details [redacted] and the Intervenors cite New Hampshire superior court precedent in support of the proposition that off-duty conduct is not per se private and may reflect on

the ability of an officer to perform his or her official duties. Id. (citing Union Leader Corp./ACLU-NH v. Town of Salem, No. 218-2018-CV-1406 at 27-28 (Jan. 1, 2021) (Schulman, J.) ("[W]hen a police officer's off-duty conduct includes the alleged commission of serious crimes, or actions that endanger the public safety, the expectation of privacy is lower and the public interest is higher.").

At issue in all of the parties' arguments is the application of RSA 91-A. New Hampshire's legislature and its courts are in general agreement that RSA 91-A weighs heavily in favor of disclosure of public records. The preamble of the statute states that presumption clearly: "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. The New Hampshire Supreme Court has consistently upheld the statute's presumption of openness: "[The law] furthers our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire Right to Life v. Dir., New Hampshire Charitable Trusts Unit, 169 N.H. 95, 103 (2016) (internal quotation and citation omitted). The purpose of RSA 91-A is to "provide the utmost information to the public about what the government is up to." Seacoast Newspapers, 173 N.H. at 338 (quotation omitted). While the law does "not guarantee the public an unfettered right of access to all governmental workings," see Professional Firefighters of New Hampshire v. Local Government Center, Inc., 169 N.H. 699, 707 (2016), "to advance the purposes of the Right-to-Know Law we construe provisions favoring disclosure broadly and

exemptions narrowly," Reid v. New Hampshire Attorney General, 169 N.H. 509, 518 (2016) (quotation and citation omitted).

RSA 91-A:5 lists the categories of governmental records exempt from disclosure under the statute, including the subparagraph at issue here, which exempts

> . . . [r]ecords pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.

RSA 91-A:5, IV. There is no dispute among the parties that the documents at issue are "governmental records."[5] The Plaintiff, relying on the provision in the Stipulated Award in which the City agreed to "purge" the Plaintiff's personnel file, does argue that some of the records at issue are not properly part of a "personnel file." See Doc. 39 at 3-5. The Court, however, finds this argument immaterial, since whether the documents at issue are characterized as "personnel files" or as "other files whose disclosure would constitute invasion of privacy," the Court's analysis with respect to the statutory exemption remains the same. What matters in that analysis is that the documents at issue are "governmental records," and on this all the parties, and the Court; agree.

The Plaintiff argues, however, that the production of these governmental records, including those that the City proposes to release with light or no redactions, is barred because releasing the information would constitute an invasion of the Plaintiff's privacy under RSA 91-A:5, IV. Doc. 39 at 19-20. When a court must determine whether a governmental record is exempt from disclosure under RSA 91-A:5, IV, as an initial

[5] Governmental records are defined in the statute as "any information created, accepted, or obtained by, or on behalf of, any public body . . . or any agency in furtherance of its official function." RSA 91-A:1-a, III.

matter, "the party resisting disclosure bears a heavy burden to shift the balance toward nondisclosure." Provenza, 2022 WL 1196292 at *2. To determine whether the party has met that heavy burden, the Court applies the three-step balancing test articulated in Provenza. First, the Court determines whether there is a privacy interest that would be invaded by the disclosure. Id. (citing Union Leader Corp. v. Town of Salem, 173 N.H. 345, 355 (2020)). Second, the Court assesses the public interest in disclosure. Id. Third, the Court balances the public interest in disclosure against the government's and the private individual's interests in nondisclosure. Id.

Here, with respect to all of the records at issue, including the disputed IA Reports, the Court concludes that the Plaintiff's privacy interest is not weighty. As was the case in Provenza, the documents at issue here do not reveal "intimate details of [the Plaintiff's] life," but are concerned with "information relating to his conduct as a government employee while performing his official duties and interacting with [members] of the public." See id. at *6. IA Report # 13, for example, [redacted] IA Report # 14 details [redacted]

The Court finds, as did the investigators, that these allegations of both on- and off-duty conduct—[redacted]—relate to the Plaintiff's performance of his official duties as a government employee and therefore do not implicate the Plaintiff's privacy interest under RSA 91-A. In Provenza, the New Hampshire Supreme Court cited a Wisconsin case to support the proposition that "when an individual becomes a law enforcement officer, that individual should expect that his or her conduct will be subject to greater scrutiny. That is the nature of the job." 20222 WL 1106296 at *6 (citing Kroeplin v. Wis. Dep't of Natural Resources, 725 N.W.2d 286, 301 (Wis. App. Ct. 2006) (internal quotation omitted)). The Court notes that the same expectation of heightened scrutiny applies in the instant case, and so holds that the Plaintiff's privacy interest in the records at issue does not weigh heavily in his favor.

The public's interest in disclosure, however, weighs heavily, and not solely because "[t]he public has a substantial interest in information about what its government is up to." Id. at *6 (citing Lamy v. New Hampshire Public Utilities Com'n, 152 N.H. 106, 111 (2005). All the IA Records at issue here document instances of misconduct on the part of a police officer and are related to that officer's official duties. The Court agrees with the Intervenors that this fact "justifies disclosure regardless of whether the misconduct led to (i) a 'verbal warning' memorialized in writing or (ii) recommended termination." Doc. 43 at 27. The Intervenors provide a number of citations to New Hampshire superior court decisions supporting this proposition, and the Court is persuaded by the reasoning of the court in Salcetti v. City of Keene. In that case, the

court held that RSA 91-A protects the public's interest in knowing both the activities of its police officers and the activities of its police departments: "As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their authority, whether the department is accounting for complaints seriously, and how many complaints are made." No. 213-2017-CV-210 at 5 (Jan. 22, 2021) (Ruoff, J.); see also Doc. 43 at 28-30 (collecting cases). The Court likewise holds, with the Salcetti court, that "this factor strongly favors . . . disclosure" of the IA Reports, including IA Reports ## 13 and 14. Id. With respect to the PSTC correspondence, the Court concurs with the City's conclusion that the records did not contain "any information . . . that would be subject to either redaction or exemption." Doc. 38 at 6.

Moving to the third step of the Provenza analysis, the government's interest in nondisclosure is articulated by the City in its redactions to IA Reports ## 1-10 and 10A, which the Intervenors accept, and its argument for withholding IA Reports ## 11-14. As the Intervenors have withdrawn their request for IA Reports ## 11 and 12, at issue is the balance of the City's interest in withholding IA Reports ## 13 and 14, the Intervenors' interest in their disclosure, and the Plaintiff's interest in nondisclosure.

The Court finds that the balance weighs heavily in favor of the disclosure of IA Reports ## 13 and 14. The City's objection to disclosure relies heavily on the City's assertion that IA Reports # 11-14 concern "activities that [the Plaintiff] undertook during his off-duty time and as a merely private individual." Doc. 38 ¶ 8. As discussed above, this clearly is not the case for IA Reports ## 13 and 14. The City's further argument that "the public interest could not overcome the privacy rights of [individuals other than the Plaintiff named in the Reports]" is an argument for the redaction of the records, as the

City has argued with respect to IA Reports ## 1-10 and 10A, but is not a sufficient argument for withholding the records entirely. See id. ¶ 9. The City's final objection, that the allegations were "found to be untrue or could not be 'sustained' for purposes of the internal investigation," may arguably be true of IA Reports ## 11 and 12, but is not true of IA Reports ## 13 and 14, both of which resulted in recommendations regarding the Plaintiff's employment as a police officer and were considered in the negotiation of the Stipulated Award. Regardless, New Hampshire superior courts have rejected "a bright-line rule to the effect that if an internal police investigation concludes that the complaint against an officer is unfounded or not sustained, then the officer's privacy interest outweighs the public interest," finding that such a rule would "contravene[] the purposes of the Right-to-Know Law." See Provenza v. Town of Canaan, No. 215-2020-CV-155 at 19 (Dec. 2, 2020) (Bornstein, J.). This Court concurs with Judge Bornstein, and holds that neither the Plaintiff's privacy interest nor the City's interest in the nondisclosure of IA Reports ## 13 and 14 outweighs the public's substantial interest in knowing "what its government is up to." See Provenza, 2022 WL 1196296 at *6.

Accordingly, the Court concludes that the Plaintiff has not met the "heavy burden to shift the balance toward nondisclosure." Id. at *5. As such, the Plaintiff's petition for an injunction barring the City from disclosing the records at issue is DENIED.[6]

[6] The Plaintiff's papers reference to two other possible theories that might be relevant to the decision here, but neither reference is developed into a full argument. First, alluding to the City's internal review board, the Plaintiff asks rhetorically whether his due process rights have been protected. See Doc. 39 at 12. For the reasons stated by the Intervenors, there is no due process violation here. See Doc. 43 at 24-25. Second, at the end of his memorandum, the Plaintiff throws out the word "laches." See Doc. 39 at 21. He provides no decisions or other authority to support the notion that laches might affect the analysis in a matter under RSA 91-A and the Court is aware of none.

CONCLUSION

For the reasons stated in this Order, the Plaintiff's petition for an injunction is DENIED. Within 20 days of the Clerk's notice of this Order, the City is ordered to (A) furnish the Intervenors with IA Reports ## 1-10 and 10A and all four sets of PSTC correspondence with the redactions agreed upon by the parties and in a manner consistent with this Order; and (B) furnish the Plaintiff and the Intervenors with IA Reports ## 13 and 14, with proposed redactions consistent with this Order.

Within 10 days of service of the City's proposed redactions to IA Reports ## 13 and 14, the Plaintiff and the Intervenors shall notify the City of changes they believe should be made. If the parties disagree, they are to negotiate in good faith to see if they can reach an agreement on the redactions.

Within 45 days of the Clerk's notice of this Order, the City shall file either the agreed-upon versions of IA Reports ## 13 and 14, or versions that show the redactions that are agreed and the areas of disagreement. The Court will then determine whether further proceedings are necessary.

To the extent necessary, the protective order previously entered in this case applies to the exchange of redacted versions of IA Reports ## 13 and 14.

This Order is sealed. The Court will prepare and place in the file a redacted version. If and when the decisions herein become final, the Court will unseal the sealed version.

SO ORDERED.

October 7, 2022
Date

Judge Martin P. Honigberg

Clerk's Notice of Decision
Document Sent to Parties
on 10/07/2022