

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

UNION LEADER CORPORATION et al.

v.

TOWN OF SALEM

218-2018-CV-01406

FINAL ORDER ON REMAND

This matter is back before the court on remand from the New Hampshire Supreme Court. For the reasons set forth below, this court now concludes that the only redactions to the audit report that are permissible under RSA 91-A:4 and 5 are:

(a) The specific redactions at pages 40 and 92-98 of *Internal Affairs Investigative Practices* section of the audit report (attached as Exhibit A to the Complaint) that are detailed in Section V(D) of this order at pages 28-30 below; and

(b) The specific redactions in the *Time And Attendance* section of the audit report that are detailed in Section IV(C) of this order, at pages 18-19, below.

The balance of the unredacted audit report must be provided to the plaintiffs.

I. Relevant Procedural History And Governing Law

The plaintiffs brought this case under the Right To Know Act, RSA Ch. 91-A, to obtain an unredacted copy of an audit report that was highly critical of the Salem Police Department. The audit report was prepared by an outside vendor retained by the Town of Salem. The Town agreed that the audit report was a government record within the meaning of RSA 91-A:1-a, III.

Government records may be inspected and obtained by the public pursuant to RSA 91-A:4 except to the extent that they fall within a statutory exemptions set forth in RSA 91-A:5. The Town argued that the redacted portions of the audit report are protected from disclosure by virtue of the exemptions in RSA 91-A:5, IV for (a) “[r]ecords pertaining to internal personnel practices” and (b) “personnel . . . and other files whose disclosure would constitute invasion of privacy.”

Following an exhaustive, line-by-line, *in camera* comparison of the redacted and unredacted audit reports, this court issued a final order concluding that:

(a) some of the redacted material was not exempt under RSA 91-A:5, and, therefore, must be disclosed;

(b) a few redactions were justified because disclosure would constitute an invasion of privacy; and

(c) a great many more exemptions were justified under Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), which authoritatively construed the exemption for “records pertaining to internal personnel practices.”

Fenniman held that the “internal personnel practices” exemption applied broadly to internal affairs and workplace investigations that may lead to internal personnel discipline. Fenniman also held that the exemption was categorical and absolute, in contrast to the other exemptions in RSA 91-A:5, IV which require a case-specific balancing of the benefits of disclosures and nondisclosure. The Supreme Court later expanded Fenniman’s categorical exemption to investigations conducted by third parties retained by a government agency for that purpose. Housnell v. North Country Water Precinct, 154 N.H. 1, 6 (2006).

In this case, the audit report described the substance of internal affairs and workplace investigations and thus fell within the scope of the broad, categorical and absolute exemption recognized by Fenniman. The plaintiffs took the position that Fenniman should be overruled. Although this court noted its dissatisfaction with Fenniman, it was nonetheless bound by the precedent and, therefore, ruled the way it did.

The plaintiffs appealed this court's final order to the New Hampshire Supreme Court. The Town did file a cross-appeal.

On appeal, the New Hampshire Supreme Court did what the plaintiffs asked and overruled Fenniman. More particularly, the Court held that the exemption for "internal personnel practices" is now qualified, rather than absolute, and is subject to the same balancing test as the other exemptions in RSA 91-A:5, IV:

In the future, the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV shall apply to records relating to "internal personnel practices." . . . Determining whether the exemption for records relating to "internal personnel practices" applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy.

Union Leader Corp. v. Town of Salem, 173 N.H. 345, 357 (2020); see generally, Professional Firefighters of New Hampshire v. Local Government Center, Inc., 159 N.H. 699, 707 (2010):

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. [citation omitted]. Further,

whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.

(internal citations, parentheticals, quotations and bracketing omitted).

In a separate case, the Supreme Court further narrowed the breadth of the “internal personnel practices” exemption by holding that it “applies narrowly to records pertaining to internal rules and practices governing an agency's operations and employee relations.” Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325, 338 (2020).

The Supreme Court remanded this case for this court to determine—with respect to the redactions that it previously upheld under Fenniman—whether the redacted information falls within either (a) the exemption for of “internal personnel practices” as clarified by the Supreme Court on appeal or (b) the exemption for “personnel files.

II. Nomenclature

In its previous final order this court used the terms “sustained” and “overruled” as shorthand for finding that that particular redactions were justified or unjustified under RSA 91-A:5, IV. As this court noted in its last order, the language is an imperfect match for the concept, but it gets the point across. The court uses the same terms to denote the same concepts in this order.

III. Specific Rulings On Remand With Respect To The Addendum To The Audit Report (i.e., Complaint Ex. B, “Culture Within The Salem Police Department”)

All of the redactions in the 15 page Addendum to the audit report (attached to the complaint as Exhibit B, and captioned as “*Culture Within The Salem Police Department*”) are now overruled. The court’s reasoning follows with respect those

redactions that the court previously sustained in its final order. No further analysis is required with respect to the redactions that were previously overruled.

A. The redactions on **pages 1 and 2 of the Addendum** are overruled because the benefits of public disclosure strongly and definitively outweigh any privacy concerns. These redactions relate to the manner in which the former Chief of Police arranged to take vacation leave and FMLA time off from work. Town policy, as made clear by the Town manager, required the former Chief to (a) provide advance notice of multiple days off and (b) obtain advance approval for FMLA leave. Implicit in the policy is that the Chief needed to coordinate his leave days with the Town. The Town manager told the auditors that the Chief instead unilaterally approved his time off and did so without notice to the Town.

This issue cannot be viewed in isolation. Elsewhere in the audit report (in the *Time and Attendance* Section attached to the Complaint as Exhibit C), the auditors raised a related concern. The Chief told the auditors that, (a) his employment contract gave him flexible hours and (b) he sometimes arranged his work week so that he could perform outside details during normal, daytime working hours. However, the Chief did not maintain time cards or other records to document his working hours. Therefore, there was no auditable record of the Chief's hours and the Town was forced to rely on the his say-so. (To be clear: The auditors did not allege that the former Chief worked details for private employers during hours for which he also received compensation from the Town. The auditors said only that due to the Chief's failure to keep records, there was no way to determine what hours he worked for the Town.)

The manner in which the Chief arranged for and documented his vacation, FMLA leave and working hours clearly relates to “internal personnel practices” within the meaning for RSA 91-A:5, IV. Much of the information upon which the auditors relied also falls within the scope of a “personnel file” for the purpose of the statute. However, the redactions must be overruled because the public interest in disclosure outweighs any concerns relating to the Chief’s privacy and any reasons for nondisclosure.

The former Chief was the highest ranking manager of the police department. He had the benefit of a written employment contract, as well as statutory protections to ensure his independence from Town politics. See RSA 105:2-a. Yet he was still accountable to the taxpayers, the public and the Town. The manner in which the Chief interacted with Town officials, and the extent to which he complied with Town personnel policies, is a proper matter for public inquiry. Ultimately it is the public, through their representatives, that determines the extent to which the police department is autarkic or, alternatively, integrated into the Town’s personnel system. Likewise, it is the public, through those who negotiate on the Town’s behalf, who determine not only who the next Chief will be, but also the terms of the next Chief’s contract. To do so, the public must be informed and alert to the concerns raised by the Town Manager as reflected in pages 1 and 2 of the Addendum to the audit report.

The court does not see the Chief as having a particularly strong privacy interest in these matters. The audit report does not disclose the reasons for the Chief’s use of vacation or FMLA leave. Thus, the report does not provide any details into the Chief’s personal or family life. It only discloses information regarding the manner in which he carried out his duties for the Town.

B. The redactions on **pages 7 to 12 of the Addendum** are all overruled because the benefits of public disclosure outweigh the relevant privacy concerns. These redactions relate to internal affairs investigations into conduct by the former Deputy Chief. The auditors opined that these IA investigations were emblematic of an “us versus them” mentality,” both with respect to “police department versus town,” and with respect to “those aligned with management versus everyone else.” Addendum, p. 6. Additionally, the auditors believed that this pro-management bias “result[ed] in a discriminatory application of discipline for some members of the police department, with some being disciplined in one way for an action and other officers, considered aligned with management, receiving a less severe punishment.” Id.

The auditors' recounting of the former Chief's comments about one of the investigations is especially salient. The auditors wrote that the former Chief “discredited complaints relative to [the former Deputy Chief] based on his own bias against the complainant.

One of the complaints against the former Deputy Chief was particularly concerning. According to the audit report, the former Deputy Chief flashed a firearm at an individual in a courtroom in Massachusetts. The allegation was that the Deputy Chief acted with the specific purpose of intimidation in violation of Massachusetts law. The Deputy Chief disputed this allegation. The audit report states that a criminal complaint was filed against the Deputy Chief with a Massachusetts police department. There is no suggestion in the audit report that a criminal charge was ever brought. (To be 100% clear: The auditors did not opine on whether the former Deputy Chief intentionally brandished his firearm in a courtroom with the intent to intimidate a civilian.

The auditors reported only that such allegations were the subject of a criminal investigation by a police department in Massachusetts. The Deputy Chief)

According to the auditors, the Town Manager was upset because the former Chief kept Town HR officials in the dark about the undisputed fact that his deputy was under investigation by a Massachusetts criminal justice agency for allegedly using a firearm to threaten a civilian in a courtroom. The auditors opined that the former Chief's silence about the investigation was symptomatic of the more general approach the Chief took in his dealings with the Town.

The redacted materials also reference a widely publicized incident that occurred at a hockey rink. That incident was investigated by the New Hampshire Attorney General and the details of that incident are largely in the public realm.

The court finds that (a) all of the redacted information in pages 7 through 12 that the court previously sustained relates to "internal personnel practices" within the meaning for RSA 91-A:5, IV and (b) the same information arguably falls within the meaning of a "personnel file" within the meaning of the same statute. However, the public interest in disclosure of the information outweighs any privacy concerns on the part of the Chief or Deputy Chief. The public has a compelling interest in overseeing its police department to ensure that the type of dysfunction described by the auditors, if it exists, is remedied. The redactions on pages 7 through 12 unduly occlude the auditors' factual argument, making it impossible for the public to understand why the auditors reached the conclusion they did.

The fact that it was the former Deputy Chief who was the subject of the investigations is critical to the auditors' analysis. After all, the auditors alleged that the

former Chief, the former Deputy Chief and a few other high ranking managers benefited from a culture that gave them greater leeway and less oversight than others. Therefore, the Deputy Chief's rank cannot be redacted without obscuring the substance of the auditor's report.

The court recognizes that the former Deputy Chief has a significant privacy interest. He denied all of the accusations of misconduct and provided plausible innocent explanations. He was never criminally charged and, as best the court can tell from the audit report, was not found to have violated any departmental rules. The disclosure of unproven accusations could cause embarrassment and adversely affect his reputation.

On the other hand, all of the conduct at issue occurred in public and has been the subject of public controversy. During the incident in the Massachusetts courtroom, the former Deputy Chief was wearing his Salem Police Department badge and carrying his Salem Police Department firearm. During the incident at the hockey rink, he was identified as a Salem Police Officer. Thus, the matters at issue relate to the Deputy Chief's interactions with the public under color of the Town's authority. The matters do not relate to what he did in private, or in his home, or with respect to purely private concerns.

C. The redactions on **pages 13 to 15 of the Addendum** are overruled based on balancing the same criteria. Many of the redactions refer to a few allegedly inappropriate social media posts and work place comments by the former Deputy Chief. These were not the subject of internal disciplinary investigations and were not included

in any personnel file. Rather, the auditors obtained the information from witnesses who wanted the auditors to hear their accounts.

The court finds that the information relating to the former Deputy Chief in pages 13 through 15 relates to “internal personnel procedures, but do not fall within the scope of a “personnel file” within the meaning for RSA 91-A:5, IV. The court does not see any privacy concerns regarding the disclosure of this information to the public. The Deputy Chief made social media posts for the world to see and his workplace comments were not made under circumstances suggestive of confidentiality or privacy. The Deputy Chief occupied a high position of public trust and the public has a compelling interest in understanding how his alleged statements and behavior may have had a deleterious effect on police department culture.

Some of the redacted information on page 13 of the addendum relates to an unnamed former dispatcher. The report details some improper comments on the part of the former Deputy Chief regarding the dispatcher’s medical condition. However, the identity of the former dispatcher is not disclosed and the year of the incident is not mentioned. The paragraph contains only the most general information regarding the dispatcher. A member of the public would not be able to identify the dispatcher from the text. The court finds that (a) the information relates to a “personnel practice or procedure,” (b) the information is not part of a “personnel file,” and (c) any privacy interest is far outweighed by the public’s interest in disclosure.

IV. Specific Rulings On Remand With Respect To The “Time And Attendance” Section Of The Audit Report (i.e., Complaint Ex. C)

The redactions in the *Time And Attendance* section of the audit report (attached to the Complaint as Exhibit C) sustained in part, and overruled in part, as explained Section IV(C) of this order, at pages 18-19, below.

A. Preface Regarding Page References

The *Time and Attendance* section of the audit report is not paginated. Because the court must refer to page numbers in its rulings, it will treat the cover page of the section as page 1. To make sure that the reader is oriented, this means that the following page, which bears the caption “Privileged & Confidential” is page 2.

The court will also refer to the page numbers in the redacted PDF that was attached to the complaint. The PDF page numbers are easy to determine when viewing the exhibit in a PDF reader. However, the PDF document includes several different exhibits and the *Time and Attendance* section of the audit report begins on PDF page 18. Thus, the cover page will be referred to as “page 1 (PDF page 18).”

B. Factual Background And Legal Reasoning

Introduction: The *Time and Attendance* section of the audit report raised disparate concerns relating to four distinct groups of employees:

- The former Chief of Police;
- High ranking officers;
- Rank and file police officers; and
- Civilian employees.

In general terms, the *Time and Attendance* section looked into (a) whether police department employees were paid for hours they did not work and (b) whether the police

department's record-keeping system was adequate to document its employees' attendance and compensation.

To be clear: The auditors did not find a single instance in which any employee, was overpaid or paid for unworked hours. Further, putting Chief's unique situation (addressed below) aside, the auditors did not find a single instance in which an employee even arguably failed to follow department procedures with respect to time-keeping and compensation. The employees mentioned in the audit report played by the rules. That the auditors critiqued those rules should not be misconstrued as an allegation of individual wrongdoing.

The Former Chief: The auditors' concerns about the former Chief had to do with the way he arranged and documented his working hours and leave time. As explained above, the Chief believed his employment contract gave him the flexibility to arrange his work week so that he could work details for private employers during regular business hours. The Town Manager disagreed with this reading of the Chief's employment contract. The Town Manager opined that the Chief needed to use his leave time if he wished to work outside details for private employers during ordinary, weekday business hours.

The auditors were also critical of the former Chief because he did not keep permanent records of his specific working hours. His time cards said only that he worked the requisite total number of 37.5 hours per week. Additionally, the former Chief did not notify the Town, or necessarily others within the department, regarding how he was arranging his hours. However, it bears repeating that the auditors did not allege the Chief short-changed the Town on hours.

The Town redacted the former Chief's name and rank to preserve his privacy. The Town also redacted much of his interview, and the Town Manager's interview to keep the former Chief's identity confidential.

With respect to the former Chief, the *Time and Attendance* section of the audit report relates to "internal personnel practices" and the auditors relied on information obtained from a the Chief's "personnel file." However, the public interest in disclosure far outweighs the Chief's privacy interest.

The public has a strong interest in ensuring that its department heads, who serve as role models for their agencies, turn square corners with respect to time and attendance. Further, the public has a compelling interest in determining the terms of future police chief contracts. In fairness, a police department is a 24 hour a day institution and the Chief no doubt needs a somewhat flexible schedule. Further, there is nothing wrong with the Chief working outside paid details during hours when he or she is not working for the Town. However, the concerns raised by the auditors are not ones that should remain hidden from public view.

Further, the adequacy of the former Chief's record-keeping (and more generally that of the police department) is a matter of public concern. Record-keeping for time and attendance is critical function for any employer. The public has a strong interest in discovering and remedying any deficiencies.

The former Chief's privacy concerns are muted. The facts do not relate to any personal matter (such as a medical condition or family situation) but merely to the manner in which the Chief arranged his working hours. As framed by the audit report, this is a matter of policy and contract rather than personal integrity.

Finally, because the issues are particular to the Chief's position, and because there is only one Chief at a time, it is impossible to disclose the relevant facts without also disclosing the former Chief's identity. Thus, the redacted version of the report does not provide the public with a meaningful understanding of the issues.

Therefore, as specifically detailed in Section IV(C) below, the redactions that serve only to obscure the former Chief's identity are overruled.

High Ranking Officers And Ordinary Police Officers: The issues with respect to both high ranking officers and officers of lower ranks have to do with primarily with paid details and comp time. The auditors' review of selected personnel records suggested the possibility that officers worked private details for outside employers during hours for which they were paid by the Town. After interviewing most of the officers whose records were reviewed, the auditors did not find any chicanery. However, the auditors raised significant concerns about departmental policy and record-keeping.

One concern arose from the fact that the department requires private employers to pay a minimum price for a detail equal to four hours of paid detail time. This means that if an officer shows up for a private detail that lasts half an hour, he receives the equivalent of four hours of detail pay from the private employer. Indeed, as reflected in the audit, if an officer shows up for a detail and is immediately told he is not needed, he is still paid as if he worked for the private employer for four hours.

The department also permits an officer who leaves a scheduled detail early to immediately start working for the department if the officer is needed. Thus, an officer who works only thirty minutes on a detail can work the rest of the day as a police officer on the Town payroll. Although this may be perceived as a kind of double-dipping, in

reality it has no ill effect on the Town fisc. The Town pays only for the hours that the officer actually works for the Town.

The problem is that the police department records do not adequately reflect the specific hours that officers actually perform detail work. Instead, the relevant records show only the scheduled detail hours and the hours for which Town payroll was paid. Looking only at those records, one would conclude (contrary to fact) that some officers worked outside details during the very same hours that they were supposed to be working for the town.

A second issue arose from the officers' use of comp time. As the court understands the audit, some officers used their comp time so that they could do outside details. The problem was that the department record-keeping system did not properly record their comp time as relating to those particular hours. The officers (or at least those who were interviewed by the auditors) explained that they filed the correct forms and followed the right procedures.

The audit report redacted the officers' names, ranks, pay rates and other information in an effort to shield their identities. The court sustains the redactions of the names but overrules the other redactions based on the balancing test described above. The information clearly relates to "internal personnel practices" and much of it comes directly from "personnel files." The officers have some legitimate privacy concerns:

(a) Although the auditors did not find wrongdoing, they looked for it. A police officer's reputation may be unfairly tarnished by publication of the fact that he or she was investigated for possibly submitting false timesheets. This would be so even if the officer was exonerated.

(b) While some of the officers were interviewed and gave exculpatory accounts, a few were not even interviewed. Thus, they were denied the opportunity to have their accounts included in the audit report.

(c) The auditors did not look at every police officer, or even at every police officer who worked details. Instead, they looked at only a handful of officers. Singling out these officers, while allowing other similarly situated officers to remain anonymous is not fair.

At the same time, the officers' privacy interest is not such that the audit report must be scrubbed of any clue that a sleuth could use to unmask their identities. This is true even with respect to the high ranking officers whose identities may be more easily inferred from their ranks. The auditors focused on high ranking officers because of the large number apparent discrepancies in the department's records. The public interest is particularly acute with respect to the manner in which a Town department accounts for its higher-ups' time, hours and compensation.

Civilian Employees: Because the police department did not properly account for comp time, the auditor's attention was drawn to civilian employees who appeared to be paid for days they used for vacations. The auditors spoke with two civilian employees, and a supervisor who were not identified by name in the audit report. They had posted on social media about their vacations. They used their comp time (i.e. earned time off) for their vacations. None of the employees did anything wrong.

However, while the payroll records for all other Town departments accounted for comp time, the police department's payroll records did not. Instead, for payroll and paystub purposes, comp time was treated as regular time (i.e. as time when the

employee should have been working rather than as earned time off from work). The employees' requests for comp time are presumably stored but not reflected in the database.

The information regarding the civilian employees relates to "internal personnel procedures" and the auditors pulled the information from "personnel files." Nonetheless, the public interest in disclosure outweighs the employees' privacy concerns. The public has an obvious interest in ensuring that comp time (i.e. time off) is properly reflected as in the police department's payroll database.

The employees have a privacy interest because—even though they were exonerated—their reputations might be unfairly tarnished by public disclosure of the fact they were investigated. However, the employees' privacy is substantially protected by the fact that their names are not included in the unredacted audit report. They are referred to by pseudonyms such as "Civilian A."

To further protect the employees' privacy, the court sustains those redactions that obscure (a) the specific travel destination, (b) the type of travel destination (for example, "theme park," "beach," "city," etc.), (c) the means of travel (for example "plane," "car," etc.), (d) the relationships of travelling partners, and (e) the purpose for the trips. These details could be used to unmask the identities of the employees and they add nothing of public interest.

Other redactions—including redactions of the pertinent dates—are overruled. The dates are important to the public's understanding and are unlikely to aid in the unmasking of the identities of the civilian employees.

C. Page-Specific Rulings With Respect To The *Time And Attendance* Section Of The Audit Report

Based on the facts and legal reasoning provided above, the court makes the following page-specific rulings with respect to the *Time and Attendance* section of the audit report:

Page 13 (30 of the PDF)

-The redacted reference to the former chief in the chart at the top of page 13 of the section (i.e. page 30 of the PDF attached to the Complaint) is overruled.

-The references to hourly rates in that chart are also overruled.

-The redacted references in that chart to other individuals' names and ranks are sustained.

-The references to the former chief in the two paragraphs below that chart are overruled.

-The references to other individuals by name and rank in those two paragraphs is sustained.

-The redaction in the first line of the last paragraph on that page is overruled (thereby making the term "higher-ranking" visible).

Page 14 (31 of the PDF)

-The redactions on the topmost (carryover) paragraph on page 14 of the section (i.e., Page 31 of the PDF) are sustained.

-The redactions to the names in the chart on that page are sustained.

-The redactions to the number of instances in that chart are overruled.

-The redaction to the name of the officer in the second to last paragraph of that page (i.e., the paragraph that begins "3. 11 of the 22 Outside Details. . .") is sustained.

-All of the redactions in the last, carryover paragraph on that page are overruled.

Pages 15-18 (32-35 of the PDF)

-All of the redactions on from the top of page 15 through the middle of page 18, (Pages 32-35 of the PDF) are overruled. All of these redactions relate to the former Chief of Police

Pages 18-34 (35-51 of the PDF)

-All of the redactions to individual names and ranks, starting in the middle of page 18 through page 34 (i.e. pages 35-51 of the PDF) are sustained,

-The redaction of so much of the employee's statement, at the top of page 26 (43 of the PDF), that reveals the location and purpose of the intra-state travel is sustained.

-The remaining redactions on pages 18-34 (i.e. 35-52 of the PDF) are overruled.

Pages 35 (52 of the PDF)

-The redactions on page 35 (i.e. 52 of the PDF) are sustained but only with respect to the civilian employees' (a) specific travel destinations, (b) type of travel destination, (c) means of travel, (d) traveling partners, and (e) purposes of travel. The other redactions on page 35 (52 of the PDF), including specific dates, are overruled.

Page 36-42 (53-59 of the PDF)

-All of the redactions on pages 36-42 (i.e. 53-59 of the PDF) are overruled).

V. Specific Rulings With Respect To The *Internal Affairs Investigative Practices* Section Of The Audit Report (i.e., Complaint Ex. A)

All of the redactions in the *Internal Affairs Investigative Practices* section of the audit report (attached to the Complaint as Exhibit A) are overruled except for certain redactions on pages 40 and 92-99, as detailed in Section V(D), at pages 28-30 below.

A. Introduction

The *Internal Affairs Investigative Practices* section of the audit report looked at the manner in which the police department investigated, adjudicated and resolved both (a) citizen complaints and (b) internally generated disciplinary complaints against police officers. The unredacted report does not identify any officer, complainant or witness by name. Instead, it uses pseudonyms such as "Officer A" or "Citizen B." However, the report does identify the higher ranking officers who were in charge of the investigations.

With some exceptions, the Town's redactions are as follows:

(a). The Town redacted the names, ranks and pronouns of the higher ranking officers who conducted IA investigations.

(b) The Town also redacted the names, ranks and pronouns of the supervising officers who assigned officers to lead specific IA investigations.

(c) The Town similarly redacted the identities of witnesses or complainants whose identities were not already obscured through the use of pseudonyms.

(d) To prevent unmasking, the Town redacted virtually all of the pertinent dates and many of the specific locations.

(e) To further prevent unmasking, the Town redacted factual details that could be used to deduce the identities of those involved. In many instances, the underlying

facts were stated in the unredacted report in general and abstract terms. In those instances the Town redacted very little beyond names, ranks, pronouns, dates and locations. However, in other instances the auditors provided more factual details, resulting in far more aggressive redactions.

The auditors' sources included (a) IA and related department files, (b) interviews conducted by the auditors with the high ranking officers involved in some particular IA investigations, and (c) input from members of the community who contacted the auditors directly and without solicitation.

B. Classifications Under RSA 91-A:5, IV

Most of the IA investigations relate to alleged misconduct by police officers in the course of their employment. Regardless of whether the alleged misconduct was committed in the workplace or in public, the resulting IA file related to an "internal personnel practice" within the meaning of RSA 91-A:5, IV. The court will also assume, *arguendo* (and to some extent dubitante), that these IA investigations became part of the officers' "personnel files." Finally, the court will treat the auditors' interviews of the participants in these IA investigations as sufficiently grounded in the underlying investigations to qualify for analysis under both the "internal personnel practices" and "personnel files" exemptions.

A few of the IA investigations relate solely to misconduct allegedly committed by police officers when they were off duty and acting as private individuals. For example, one officer was arrested for DUI following a motor vehicle crash that occurred *when he was on his own time and acting as a civilian*. These IA investigations likely do not qualify as "internal personnel practices," as that term has been construed by Seacoast

Newspapers. However, the court will assume that the IA proceedings (and the auditors' related interviews) must be analyzed as components of the officers' personnel files.

As noted above, several members of the community parachuted into the auditors' investigation when they responded to the Town's request for citizen input. The resulting interviews were not part of the police department's "internal personnel practices" and were not part of any officer's "personnel file." Nonetheless, this information comes from "other records" the court must still consider whether public disclosure of the information would result in an unfair invasion of personal privacy. RSA 91-A:5, IV.

Thus, the court must apply the same balancing test to all of the redactions in the Internal Affairs Practices section of the audit report.

C. Balancing

In balancing the public interest in disclosure against the privacy concerns of accused officers, complainants and witnesses, the court makes the following observations:

1. The Presiding Officers' Identities:

Disclosing the identities of the high ranking officers who presided over IA investigations is not invasive of their privacy. By definition, they were not the ones accused of misconduct but rather the ones charged with determining whether misconduct took place. It is one thing to protect the identities of parties and witnesses, and another thing altogether to hide the identity of the presiding officers. Whatever privacy concerns the presiding officers may have are outweighed by the public interest in disclosure. (Thus, to use an analogy, the New Hampshire Supreme Court uses

pseudonyms to protect the privacy of juvenile litigants and witnesses, but will always disclose the identity of the trial judge.)

The redactions of the names and ranks of the presiding officers, as well as the high ranking officers who appointed them are all overruled.

2. Complaints Of Workplace Misconduct

The officers accused of workplace misconduct have the most significant privacy concerns. For the purpose of this order, the court uses the term “workplace misconduct” to mean misconduct that occurs in the course of employment but does not involve any interaction with the public. For example, one officer was accused of showing up for work under influence of prescription drugs. Another was accused of making inappropriate comments to a coworker. These are the type of workplace concerns that are usually addressed confidentially by human resource managers.

The officer who showed up for work under the influence had an apparent substance misuse disorder, i.e., a medical issue. There is no suggestion in the audit report that the officer interacted with the public while impaired or drove while impaired. The officer left the department many years ago. The officer’s present privacy interest is palpable.

That said, the public has a strong interest in understanding how workplace misconduct is handled by the police department. Mishandling of workplace complaints could result in expensive litigation (brought either by complaining coworkers or improperly disciplined officers). The public also has a strong interest in ensuring that workplace rules are enforced fairly, without favoritism or bias, and in a manner consonant with the enforcement of workplace rules in other Town departments.

Therefore, the public has the right to know both the auditors' opinions and the factual basis for the auditors' opinions..

Fortunately, the auditors wrote the unredacted report in a way to protect the privacy of (a) the officers who were accused of workplace misconduct and (b) any complainants and witnesses. In all of the specific cases of alleged workplace misconduct, the identities of all officers and civilians were fully obscured through the use of pseudonyms. The facts were stated in general terms. With one exception, the additional redactions of specific dates, timeframes and other information does not provide a measurable increase in protection of privacy.

That one exception is limited to the redacted dates on page 40, relating to specific dates involving the internal investigation of Officer A. These redactions are sustained because Officer A has a heightened privacy interest. Officer A is a former officer who had a substance misuse disorder. Officer A resigned from the department many years ago. Because (a) the former officer has been separated from the department for a long time, (b) the former officer's difficulties were the result of a medical disorder, and (c) there was no allegation that the former officer committed any act of dishonesty or interacted improperly with any member of the public, the court finds that disclosing information that might help identify former officer would result in a potential invasion of privacy. (The court notes that the audit report found that the department handled the investigation relating to the former officer properly.)

All of the other redactions relating to IA investigations of workplace misconduct (as the court has idiosyncratically defined that term of the purpose of this order) are overruled.

3. Alleged Misconduct Towards Members Of The Public Under Color Of Law

The public interest is at its zenith, and the officers' privacy concerns are at their nadir, with respect to accusations of misconduct towards members of the public under color of law. These accusations involve claims of abuse or misuse of government power. The IA investigations at issue include allegations of unjustified assaults (i.e. excessive force), arrests without probable cause, unlawful seizures of vehicles, verbal intimidation and other inappropriate interactions with members of the public. The public has a compelling interest in having such complaints investigated fairly and impartially. The public also has a right to expect (a) that all officers, regardless of rank will receive procedural due process, (b) that founded complaints will result in proportionate and substantively reasonable discipline, and (c) that when an incident reveals a lack of training, rather than misconduct, that adequate training will be provided,

Thus, the public has the right to learn how such complaints are handled by the police department. Are citizen complaints properly logged and vetted? Is it easy or difficult to file a complaint? Are citizen complainants treated with dignity and respect? Are complaints investigated without bias? Are proper officers chosen to preside? Is discipline meted out equally and fairly? Are the accused officers provided with adequate due process? These are the same questions the auditors asked and answered in their report. It is impossible to understand the auditors' conclusions without also understanding the factual basis for those conclusions.

Although, as discussed below, many of the officers have legitimate privacy concerns, those concerns are reduced because the conduct at issue occurred in the public sphere (i.e. in the presence of third parties) and under color of law. Thus, the

officers never had an expectation of privacy with respect to what a third party might disclose. Indeed, most of the IA complaints were made by members of the public and in no case did the complainant specifically ask for confidentiality. Further, because the officers were on-the-job, in most cases, bystanders would have had the First Amendment right to video record the officer and then publish the recording.

Further—and this applies only to a few of the IA investigations—if an officer has been found, following a fair disciplinary proceeding, of committing a serious disciplinary offense against a member of the public (such as excessive force, or an unlawful arrest, or a false report), why should the law hide that finding beneath an veneer of confidentiality? What social value or policy would it serve?

To be sure, even founded cases may become stale through the passage of time and so a justification for confidentiality may accrue over time. Likewise, some founded disciplinary infractions may result from a lack of training rather than a rogue spirit. Here too, confidentiality would serve a benign purpose, even in cases of founded allegations.

Innocent officers have a less controversial privacy interest in their reputations. Public disclosure of an IA complaint could harm an officer's reputation even if the resulting investigation revealed that the officer did nothing wrong. This is especially so today because it is so easy for partial information to be spread widely through social media.

With these thoughts in mind, the court re-reviewed the Internal Affairs Investigation section of the audit report and notes the following:

(a) In some of instances, the facts are stated so generally that the use of the pseudonyms provides adequate protection for the officer's privacy. In these cases,

even when the dates are unredacted, it would be very difficult to unmask the identities of the officers.

(b) In those instances in which the auditors provide greater factual detail, they do so for a reason. The public interest in learning those facts outweighs the potential privacy concerns arising from the marginally greater risk of unmasking. Further, some of the IA investigations that the auditors detail involve facts that have already been placed in the public domain by other means.

(c) Because there are fewer higher ranking officers, they may be more easily identified from their ranks. However, the public has a keen interest in understanding how the police department processed IA complaints against senior officers. In the addendum to the audit report, the auditors opined that the police department treated those in senior management differently from rank and file officers. Because the officers' ranks are necessary to the public's understanding of the audit report, the public interest in disclosing those ranks outweighs the privacy concern.

4. Off Duty Misconduct Not Committed Under Color Of Law

The IA investigations into off duty behavior fall into a middle ground as far as privacy and public interest are concerns. A police officer has a weighty and enforceable expectation of privacy in his or her personal affairs. Furthermore, the public has no legitimate interest in knowing how its officers spend their time off. But there are limits to all general rules and when a police officer's off-duty conduct includes the alleged commission of serious crimes, or actions that endanger public safety, the expectation of privacy is lower and the public interest is higher.

The IA investigations into off-duty misconduct all involved either accusations of criminal conduct or conduct that endangered safety. In one instance an officer was alleged to have committed DUI. In another instance an officer committed a minor motor vehicle infraction but then refused to pull over and led the police on a dangerous chase. Another officer lost track of a department issued firearm which was then found in public. Yet another officer accidentally discharged his department issued firearm. In these instances, the public interest in disclosure is significant, and the officer's privacy interest is at reduced.

D. Ultimate Conclusions And Specific Rulings

The court has re-reviewed the Internal Affairs Investigations section of the audit report. To verbally analyze each specific redaction would require the court to write a voluminous, repetitive and likely turgid order. Such an order would not provide the parties with any further insight into the court's reasoning.

Further, the court notes that while the parties all filed supplemental memoranda of law, none of the parties isolated and provided particularized argument with respect to specific redactions or sets of redactions in the Internal Affairs Investigations section of the audit report. The court presumes that the parties themselves thought that an inch-at-a-time, redaction-by-redaction approach was neither necessary nor good advocacy.

Thus:

Page 40

The redactions on **page 40 of the *Internal Affairs Investigative Practices* section of the audit report**, relating to specific dates are sustained. These specific

redactions relate to the officer who had a substance misuse disorder, as discussed and analyzed above.

Pages 92 Through 99

The redactions on **pages 92 through 99** are sustained in part and overruled in part. More particularly:

- (a) the redactions on page 92, starting with the paragraph numbered "1" and continuing through the bottom of the page are sustained;
- (b) the redactions on pages 93-97 are sustained;
- (c) the redactions on page 98 are sustained, except for the redactions of the bottom carryover paragraph that continues onto page 99;
- (d) The redactions on page 99 are overruled.

The redactions on pages 92 through 99 relate to a claim that a police supervisor made gruff and inappropriate comments to his daughter's prom date because he disapproved of him as a potential boyfriend. The supervisor was not on duty and was not acting under color of law. Thus, the public interest is reduced, because (a) the conduct did not allege the misuse of official authority, (b) the conduct did not involve the Town or the police department, and (c) the conduct was not alleged to be either criminal or otherwise a matter of public concerns. Further, the redactions at Pages 92-99 include unsourced information about the civilian. Disclosing this information could prove harmful to the police supervisor, his family, and the young man.

That said, the public does have an interest in the facts set forth on the carryover paragraph on pages 98-99 and the following paragraphs. These paragraphs relate to

the manner in which a police Captain discouraged a civilian witness from complaining about the incident.

Other Redactions

All of the remaining redactions in the Internal Affairs Investigations section of the audit report are overruled. In each instance the court engaged in the balancing required by RSA 91-A:5, IV and by the New Hampshire Supreme Court's order remanding the case.

V. Conclusion

On remand this court sustains only those redactions specified in Sections IV(C) and V(D) of this order at pages 18-19 and 28-30 above, respectively. All other redactions are overruled.

January 21, 2021



Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/22/2021