

The State of New Hampshire

MERRIMACK, SS.

SUPERIOR COURT

No. 217-2019-CV-792

IDELL "DELLIE" CHAMPAGNE, *et al.*

v.

CONCORD SCHOOL DISTRICT

ORDER

The plaintiffs have sued the Concord School District, asking for an order directing the District to disclose a report it commissioned on compliance with its policies and procedures in responding to complaints of inappropriate behavior by a former teacher. The plaintiffs sought to have the district disclose the report under the Right to Know Law (RSA 91-A), which gives citizens access to records of public bodies, subject to certain exceptions. The district declined on the ground that as an investigation into employee conduct, it is a record pertaining to internal personnel practices and exempt from disclosure under RSA 91-A:5, IV.

Citing the exemption, the district moves to dismiss the complaint. The standard of review on a motion to dismiss is whether the "allegations in the plaintiffs' pleadings are reasonably susceptible of a construction that would" (in this case) justify an order directing disclosure. *Boyle v. Dwyer*, 172 N.H. 548, 553 (2019). The specific question here is whether

the plaintiffs' factual allegations are susceptible of a construction that shows the report is something other than one pertaining to internal personnel practices.

The motion quotes the relevant facts set out in the complaint, which are restated here.

1. This lawsuit asks the Court to order the Concord School District to release to the public, the taxpayers and parents of Concord, and the Petitioners the over 100-page report submitted to the Concord School Board on September 23, 2019 authored by independent investigator Djuna Perkins. She was hired by the district to investigate the District's response to complaints of inappropriate behavior by a former teacher Primo 'Howie' Leung in December 2014 and December 2018 and whether School Board policies were followed. Petition at 1.
2. There is reason to believe that the report documents a failure in how the District responded to allegations that Leung was abusing children as the Board terminated the District's Superintendent and High School Principal within days of receiving the report. Petition at 1.
3. What the District did or failed to do is likely extensively documented in the September 23, 2019 report at issue in this case. Petition at 1.
4. In mid-June 2019, the District agreed to have an independent investigation conducted into how it handled reports of Leung's inappropriate behavior, both in 2014 in response to [a] complaint and in December 2018/January 2019 following the report of three students that Leung kissed a student in a car. Petition at ¶ 20.
5. At the same time this independent investigation was announced, the District also announced that Concord High School Principal Tom Sica would be placed on voluntary paid administrative leave, presumably because his response to the multiple allegations concerning Leung would be examined as part of the investigation. Petition at ¶ 20.
6. On July 1, 2019, the District commissioned Djuna Perkins – an attorney from Massachusetts who conducts investigations, training, advice and litigations for schools businesses and individuals – to complete an “independent

investigation into how Board policies and procedures had been followed in December 2014 and December 2018.” Petition at ¶ 21 (quotation omitted.)

7. On September 23, 2019, Investigator Perkins submitted her report to the Concord School Board addressing the District’s response to complaints of inappropriate behavior by Leung. It is this report that is at issue in this case. Petition at ¶ 25.
8. Investigator Perkins was retained to complete an “independent investigation into how Board policies and procedures had been followed in December 2014 and December 2018.” Petition at ¶ 47.

“The purpose of the Right-to-Know Law 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.” *Hampton Police Association v. Town of Hampton*, 162 N.H. 7, 11 (2011) (quotation omitted). “When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.” *Id.* at 11-12 (quotation omitted).

A governmental record is exempt from disclosure if it “pertain[s] to internal personnel practices.” RSA 91-A:5, IV. The exemption extends to records of “procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice.” *Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993). See *Hounsell v. North Conway Water Precinct*, 154 N.H. 1, 4 (2006) (“report, which was generated in the course of an investigation of claimed employee misconduct, was a record pertaining to “internal personnel practices.”) The exemption is “categorical” and unlike other exemptions is not subject to a balancing test that weighs the merits of disclosure against those of non-disclosure. *Fenniman*, 136 N.H. at 626-27. Under *Fenniman*, the terms “internal,”

“personnel,” and “practices” are given broad meaning in deciding what is exempt. *Reid v. N.H. Attorney General*, 169 N.H. 509, 519 (2016).

The plaintiffs say *Fenniman* and *Hounsell* were wrongly decided, and in fact, the Supreme Court has questioned whether it should re-examine how *Fenniman* and *Hounsell* construe the exemption. See *Reid*, 169 N.H. at 522; see also *Clay v. City of Dover*, 169 N.H. 681, 687 (2017). The plaintiffs note the Supreme Court heard argument and has under advisement three cases asking it to overrule these precedents. Obj. to Mot. Dism. p. 3. But they recognize the decisions remain the law that lower courts must follow unless the Court overrules them. Cf. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”) Because the district contends the report is exempt from disclosure under the “internal personnel practices” exemption, the analysis is guided by *Fenniman* and *Hounsell*.

The plaintiffs say *Fenniman* and *Hounsell* do not support exemption because the report was “not generated for disciplinary reasons, but rather for a broader purpose – namely, to ascertain how the District responded to Leung’s alleged misconduct.” Petition, ¶ 47 (citing Petition Exhibit H, July 1, 2019 Concord School Board Minutes, p. 8.) Even though the complaint does not say the district sought to uncover evidence of misconduct, *Fenniman* and *Hounsell* do not confine the exemption to investigations of employee

wrongdoing. Even so, the complaint alleges the report “presumably” examined the conduct of the high school principal in responding to the allegations about the teacher, Complaint, ¶ 20, and suggests it played a role in employment actions with respect to the principal and school superintendent. Complaint, p. 1. In addition, public policy reasons for the exemption were cited by the Court and apply here. These include an interest in not deterring “participation in such investigations, for fear of public embarrassment, humiliation, or even retaliation.” *Hounsell*, 154 N.H. at 6.

As described in the complaint, the report examines how the district – necessarily operating through its employees – acted in responding to reports of teacher misconduct. Controlling precedent provides that a report made under the direction of the employer and which scrutinizes the acts and omissions of employees is one pertaining to internal personnel practices and, therefore, exempt from disclosure.

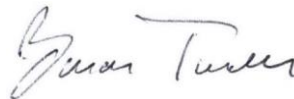
Based on the complaint’s factual allegations, it would be dismissed if the report could be construed as addressing only the conduct of district employees. Nevertheless, the complaint describes the report as of one commissioned to “investigate the *District’s* response to complaints of inappropriate behavior” by a former teacher and “whether *School Board policies* were followed.” Petition, p. 1. While the district acts through its employees, the complaint does not describe the investigation as one confined to employee conduct. See *id.* ¶ 21 (investigator “commissioned . . . to complete an ‘independent investigation into how Board policies and procedures had been followed’ . . .”) The district does not

challenge the plaintiffs' contention that board members are not its employees, and in the context of investigations the Supreme Court recently "construe[d] 'internal personnel practices,' to mean practices that 'exist[] or [are] situated within the limits' of employment." *Reid*, 169 N.H. at 523 (quotation omitted). The district asserts the investigation was of employee conduct only, (Mot. Dism. p. 7, at n.3), but its unsupported representation does not resolve the issue as a matter of law. See SUPER. CT. CIVIL R. 11 (b). Conceivably, the report discusses whether school board members or others not employed by the district complied with district policies.

Review *in camera* is appropriate "[w]hen there is a question whether [materials] are exempt from public access." *Professional Firefighters of N.H. v. HealthTrust, Inc.*, 151 N.H. 501, 506 (2004) (quotation omitted). The plaintiffs suggest *in camera* review of the report and the district is not opposed. Therefore, counsel for the district shall file the report under seal with the court as soon as practicable, but in any event within 14 days of the date on the clerk of court's notice of this decision. The plaintiffs asked that counsel for both sides participate in the review, but in the first instance it will be by the court.

SO ORDERED.

DATE: APRIL 6, 2020



BRIAN T. TUCKER
PRESIDING JUSTICE

Clerk's Notice of Decision
Document Sent to Parties
on 04/07/2020