THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS. SUPERIOR COURT

Marianne Salcetti, et al.

v.

City of Keene

No. 213-2017-CV-00210

SECOND ORDER ON RIGHT-TO-KNOW PETITION AND *IN CAMERA* REVIEW

Marianne Salcetti, a journalism professor at Keene State College, brought this petition against the City of Keene ("the City"), alleging that the City has violated RSA chapter 91-A, New Hampshire's Right-to-Know law, when it denied several requests made by five of her students. Professor Salcetti has been certified under Superior Court Rule 20 as a non-attorney representative for the students. On June 5, 2018, the Court held a hearing on the merits of Professor Salcetti's petition and the Court issued an order on August 29, 2018 ("August 29 Order").[1] The Court's August 29 Order determined that the City had met its burden of proof on the majority of issues Professor Salcetti's petition raised but that it had failed to properly address others. Thus, the Court ordered the City to provide further evidence. After evaluating the City's additional submissions, the Court makes the following findings of fact and rulings of law.

[1] Marianne Salcetti v. City of Keene, Cheshire Cty. Super. Ct., No. 213-2017-CV-00210 (Aug. 29, 2018) (Order, Ruoff, J.)

I. Fleming & Vasas: Adequacy of Search

The Court's August 29 Order directed the City to respond to issues that it had failed to properly address. The first issue was that the City had failed to evidence that it made any search, or whether it decided to forego a search and why, for records responsive to Alex Fleming's and Abbygail Vasas' requests.

Mr. Fleming had requested "[a]ll documents including, but not limited to, printed document [sic] and electronic documents police [sic] citations involving infractions resulting from violations of" RSA 179:10 (Unlawful Possession and Intoxication) and RSA 644:18 (Facilitating a Drug or Underage Alcohol House Party) from 2012 to 2016. (Ex. 4.) The City's Records Manager/Deputy City Clerk William Dow responded:

> [T]here is no existing governmental record listing all citations pertaining to violations of NH RSA 179:10 or NH RSA 644:18 between the dates of January 1, 2012 and December 31, 2016. NH RSA Ch. 91-A does not require the City of Keene to create a record that does not already exist, therefore your request is denied.

(Ex. 4.) Mr. Fleming replied to Mr. Dow's email and asked for further explanation, stating, "These are state laws. Shouldn't there be a record of when they are violated?" (Id.) Mr. Dow replied to Mr. Fleming, stating:

> The Keene Police Department records all incidents and arrests in various recordkeeping systems maintained in their department. The Keene Police Department staff have reviewed the record systems containing governmental records in their possession for a report listing all citations pertaining to violations of NH RSA 170:10 and NH RSA 644:18 that occurred between the dates of January 1, 2012 and December 31, 2016. It has been determined by the Keene Police Department that the requested governmental record does not exist. It has been further determined that in order to satisfy this request, it is required to compile various recorded information into a form that is not already maintained by the department. NH RSA Ch. 91-A:4, VII states that "Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not

> already kept or reported by that body or agency"; therefore because this record does not exist, your request is denied.

(Id.)

On December 29, a string of emails between City employees concerning Professor Salcetti's Right-to-Know petition contained an email from Keene Police Department ("KPD") Chief Steven Russo that stated, "We never received a request reference [sic] the Fleming [request]." (Ex. 46.) Chief Russo continued: "Perhaps I or someone else here did have a conversation with the City Clerk's Office concerning it but without the actual request to look at I don't know." (Id.)

Ms. Vasas requested "[a]ll charges of Aggravated Felonious Sexual Assault" and "[a]ll charges of Drug/Alcohol Facilitated Sexual Assaults" from 2013 to 2017, as well as "[a] Copy of KPD's protocol for sexual assault incidents." (Ex. 6.) Ms. Vasas received access to a record concerning the KPD's protocol for sexual assault, and thus this request is not at issue. (Ex. 26.) To Ms. Vasas' other request, Mr. Dow responded:

> The Keene Police Department staff have further reviewed the governmental records for a report listing all charges of aggravated felonious sexual assaults or charges of drug/alcohol facilitated sexual assaults from 2013 through 2017 in their possession, as of November 19, 2017. It has been determined that this governmental record does not exist. The Keene Police Department records all incidents and arrests that are responded to or act [sic] upon in various recordkeeping systems maintained in their department. It has been further determined that in order to satisfy this request it is required to compile various recorded information in a form that is not already maintained or kept by the department. NH RSA Ch. 91-A:4, VII, states that "Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency"; therefore this portion of your request is denied.

(Ex. 44.) In its August 29 Order, the Court noted that the City had provided Ms. Vasas with records responsive to her request for KPD sexual assault protocol but that it

needed to further explain its response to the remainder of her request. (August 29 Order, 36 n.8.)

The Right-to-Know law obligates public bodies or agencies to allow inspection, or must make available for inspection, only the "governmental records in [its] possession, custody, or control." RSA 91-A:4, I. "Under the federal Freedom of Information Act (FOIA), 'the adequacy of an agency's search for documents . . . is judged by a standard of reasonableness. The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents.'" ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 753 (2011) (quoting Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 230 (1st Cir.1994)). The burden to show that a search was adequate is on the agency. Id. (quoting Lee v. U.S. Atty. for the S. Dist. of Fla., 289 Fed.Appx. 377, 380 (11th Cir.2008)) ("[T]he agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents."); see also Truitt v. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990).

In its August 29 Order, the Court determined that the City had properly construed Mr. Fleming's and Ms. Vasas' requests but had failed to evidence that the City had adequately searched for responsive records:

> The Court cannot presume the City acted reasonably in denying Mr. Fleming's and Ms. Vasas' requests, even if their requests were for lists, without any evidence of conducting a search or of why foregoing a search was reasonable; doing so would circumscribe the purpose of the Right-to-Know law: accountability to the public.

(August 29 Order, 32, 35–36.) The City has now submitted an affidavit from Mr. Dow explaining his actions in response to Ms. Vasas' and Mr. Fleming's requests. (Dow Aff.,

Sept. 28, 2018.) In this affidavit, Mr. Dow explains that, upon review of both Ms. Vasas' and Mr. Fleming's requests, he made "a reasonable initial interpretation that Miss Vasas and Mr. Fleming were requesting governmental records consisting of lists." (Id. at ¶ 7.) Mr. Dow explains that neither student had included specific incidents, names, dates of birth, or specific dates of any incidents with their requests. (Id.) Mr. Dow then states:

> I had specific knowledge from processing multiple previous requests for records of the Keene Police Department that all incident reports maintained in their recordkeeping systems are entered on a case by case basis. I further researched the Keene Police Department record list in the *City of Keene Record Schedule* to further determine if a record or report existed documenting a summary or list of violations of any specific crime or criminal offense. I did not find any reference in the *Records Retention Schedule* to indicate that a record existed to satisfy Miss Vasas' or Mr. Fleming's request for such a list.

(Id.) Mr. Dow further explains that he met with Police Chief Steven Russo on October 23, 2017, "prior to the weekly City department heads staff meeting," and he states:

> Chief Russo confirmed my previous determination that no record exists in the Keene Police Department consisting of lists of all charges of aggravated felonious sexual assaults or all charges of drug/alcohol facilitated sexual assaults; or a list of the total number of infractions of violations of NH RSA 179:10, and NH RSA 644:18, during each of the requested timeframes.

(Id.) Mr. Dow also explains that he approached Ms. Vasas' and Mr. Fleming's requests differently than he approached Grace Pecci's request, which sought records regarding "charges of excessive police force and/ or police brutality." (Ex. 3.) Mr. Dow explains that because Ms. Pecci's request concerned citizen complaints involving excessive police force and/or brutality, with which he "had no prior knowledge or experience," he researched Ms. Pecci's request with the KPD in a different manner. (Dow Aff., ¶ 10, Sept. 28, 2018.)

Professor Salcetti has asserted that Mr. Dow's affidavit is not sufficiently detailed and that inspecting the Record Retention Schedule was insufficient because it is not a record system. (Pl.'s Resp. 2–5.) She also asserts that the KPD failed to search its records systems in response to the request. (Id. at 5–6.)

Mr. Dow's affidavit is not inspiringly detailed, but it does illustrate that the City did not make a "search" for responsive records and only explored whether a responsive record could exist. In his affidavit, Mr. Dow states that his personal knowledge from responding to similar requests in the past made him familiar with the KPD's records maintenance and, from that, he determined that KPD did not maintain, and would not have, records responsive to the requests for lists. (Dow Aff., ¶ 7, Sept. 28, 2018.) Mr. Dow then consulted the City's Record Retention Schedule "to further determine if a record or report existed documenting a summary or list of violations of any specific crime or criminal offense" and concluded that "no record exists" in the KPD to satisfy the two students' requests. (Id. at ¶¶ 7–8.) He then "confirmed [his] previous determination" after he spoke with Chief Russo. (Id.)

When an agency has undertaken a search, a standard of reasonableness applies. ATV Watch, 161 N.H. at 753. However, the City is not required to search for records that unquestionably do not exist or it does not possess; a public body or agency responding to a record request is only required to show that "all files likely to contain responsive materials (if such records exist) were searched." Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (explaining what must be contained in a reasonably detailed affidavit concerning response to a Freedom of Information Act ("FOIA") request). An agency thus is only required to make a reasonable search of the

files or areas that would contain the requested record; and, if the requested record is not one possessed by the agency at all, there is no obligation to search for it. This principle is supported by the common FOIA and Right-to-Know understanding that public bodies and agencies are only obligated to provide responsive records that they in fact possess or control. Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980) ("The conclusion that possession or control is a prerequisite to FOIA disclosure duties is reinforced by an examination of the purposes of the Act. The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained."); see also Nolen v. Rumsfeld, 535 F.2d 890, 891 (5th Cir. 1976) ("The Act compels disclosure only of existing records."); Anderson v. U.S. Dep't of Justice, 518 F. Supp. 2d 1, 10 (D.D.C. 2007) ("No agency is required to produce records that it does not possess."); Nichols v. United States, 325 F. Supp. 130, 137 (D. Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir. 1972) ("[T]he Court may not require production of records not in custody or control of an agency."); Brent v. Paquette, 132 N.H. 415, 426 (1989) ("[T]he statute does not require public officials to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist."). It thus follows that an entity cannot be liable under RSA chapter 91-A for failing to search for records that it determinedly does not possess.

Federal FOIA law has determined that when there is evidence that the requested records exist outside of the recipient agency's control and also when the requestor has failed to show that the recipient agency controls the requested records, the recipient agency cannot be liable under FOIA for failing to provide records. Kissinger, 445 U.S.

at 155; see also Sneed v. U.S. Dep't of Labor, 14 F. App'x 343, 345 (6th Cir. 2001) (citing Kissinger, 445 U.S. at 155) (explaining that evidence that the respondent possessed responsive documents is a prerequisite to FOIA liability); Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency, 877 F. Supp. 2d 87, 98 (S.D.N.Y. 2012) (finding that one officer's presence at one meeting was "not sufficiently probative of the existence of records in the office's control" therefore the government's decision to forego a search was reasonable).

Because the City has provided specific and reasonable explanations for why it forewent a search—specifically, because Mr. Dow suspected and confirmed that no such records existed—the Court finds that the City is not liable for foregoing a search. Furthermore, in both her original post trial memorandum and her response to the City's recent submission, Professor Salcetti argued that the City failed to conduct a search in response to Ms. Vasas' and Mr. Fleming's requests. (Pl.'s Resp. 2–3; Pl.'s Mem. 25–26.) However, Professor Salcetti has not asserted that the City possesses responsive documents. Indeed, the City has represented consistently that it does not have records responsive to the two students' requests as the requests were originally, and reasonably, interpreted as requests for lists. (Def.'s Post Trial Subm. 2–3; Def.'s Reply Pl.'s Post Trial Mem. 3; August 29 Order, 28–32.) Professor Salcetti therefore does not challenge the City's explanation or that Mr. Dow was unreasonable in deciding to forego a search. (Id.)

Neither can the Court challenge Mr. Dow's decision to forego a thorough search for documents that he understood to be non-existent when he based his decision on his previous experiences, a schedule of retained documents, and verification with Chief

Russo. Mr. Dow serves as the City's Records Manager/Deputy City Clerk, has been employed by the City since 2000, is a Certified Records Manager with certification from the Institute of Certified Records Managers, is a member of both the National Association of Government Archives and Record Administrators and the Association of Record Managers and Administrators International, and teaches a Records Management Course for the New Hampshire Tax Collectors and City and Town Clerks' Association's Joint Certification Committee. (Dow Aff., ¶ 2, Sept. 28, 2018.) Mr. Dow is familiar with KPD records and practices. (Id. at ¶ 7.) He has also processed multiple previous requests for KPD records in the past. (Id.) Importantly, he was aware that the KPD inputs criminal offenses on a case-by-case manner, which indicated that the recordkeeping system would not contain lists. (Id.) Mr. Dow consulted the City's Records Retention Schedule and verified his conclusion by discussing the requests with Chief Russo; both actions could reasonably be expected to alert him of any responsive records that had been created of which he was not aware. (Id. at ¶¶ 7–8.) The Court finds that Mr. Dow's decision to forego a thorough search was reasonable.

Thus, because it was reasonable for Mr. Dow to conclude that the KPD did not possess records responsive to Ms. Vasas' and Mr. Fleming's requests for lists, the Court finds that the City's decision not to conduct a search for responsive record was reasonable.

II. Pecci: Redactions

In its August 29 Order, the Court ordered the City to submit evidence concerning its response to Grace Pecci's request. (August 29 Order, 41.) In response, the City has submitted 119 pages with an index for the Court's review and has addressed its burden

of proof by pointing to RSA 91-A:5, IV as a "categorical exemption" to disclosure. (Def.'s Post Trial Subm. 4–5.) The City has asserted that records responsive to Ms. Pecci's request are "internal personnel practices" and, more specifically, "internal police investigation records." (Def.'s Post Trial Subm. 4–5.) The City describes the development of this exemption through case law, concluding that the records in question are categorically exempt because they do not concern merely the privacy interests of an individual but rather the "internal police investigations of alleged police officer misconduct." (Id. at 4–6.)

A. In Camera *Review*

In addressing the *in camera* review, the Court first considers what information Ms. Pecci's request and Professor Salcetti's petition sought. Then, the Court considers what its August 29 Order required the City to provide compared with the City's submission and whether the City has met its burden to show that the information it withheld was withheld properly.

1. **Information the Plaintiffs Seek**

Ms. Pecci had requested "[a]ny and all documents from August 1, 2012-September 22, 2017 that are in the Keene Police Department, the Keene City Attorney's office, and the Keene City Manager's office regarding: any and all citizen complaints, logs, calls, and emails regarding charges of excessive police force and/ or police brutality." (Ex. 3.) In response, the City provided "a report by the former Keene Police Chief, Kenneth Meola, which contains statistical summaries of citizen complaints of brutality/excessive by by [sic] police officers for the years requested and this record contains a total of 18 pages" with officers' names redacted. (Ex. 12.) These summaries

consist of five redacted summary reports from the years 2012 to 2016 ("Summary Reports"), and each report included a table with a column and the column's heading blacked out ("Summary Reports Tables"). (Pl.'s Mem. 13; Ex. 51; Pl.'s Resp. Def.'s Post Trial Subm. 7, Attach.) The City informed Ms. Pecci that there were responsive records available for public access and that, after review by the City's legal department "and in accordance with RSA 91-A:5, IV, and the Attorney General's Memorandum on New Hampshire Right-to-Know Law, it has been determined that Keene police officers' names are exempt from disclosure and have been redacted." (Ex. 12.) Mr. Dow also explained that, while there were documents available for her to view, "formal complaints filed through the Keene Police Department's internal investigations process" would not be released for the same reason. (Ex. 12; Ex. 51.)

In her petition to this Court, Professor Salcetti took issue with the blacked-out heading on the Summary Reports Tables Ms. Pecci was provided, though she conceded that the police officer names could properly be withheld.[2] (August 29 Order, 38; Pl.'s Mem. 29–30.) The Court notes that Professor Salcetti did not challenge the City's withholding of the individual citizen complaints.[3] (Pl.'s Mem. 29–30.) Rather, she only alleged that the Summary Reports Tables were "overly redacted" because the category heading was blacked-out, and that "[w]hile the specific names of the officers

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[2] Despite conceding earlier that the police officer names that are blacked-out in the tables was fair, Professor Salcetti has now asserted that the names should be disclosed. (Pl.'s Resp. Def.'s Post Trial Subm. 10–14.) The Court will not consider this request because it was not raised in the original Right-to-Know petition or in the plaintiffs' post-trail memorandum, and because Professor Salcetti has already conceded that withholding the names was proper. (Pl.'s Mem. 30.)

[3] Though Professor Salcetti alleged that the City's explanation for why it would not be disclosing the individual complaints violated RSA chapter 91-A, she made this allegation by asserting that the City failed to sufficiently specify its reasoning, not that its reasoning was invalid or that the documents were improperly withheld. (Id. at 42–44.)

may be properly exempted, their identity would still be protected by replacing each name with an arbitrary but consistent identifier." (Id. at 30.) Indeed, even in an email to the City in which Professor Salcetti articulated all of the documents that would satisfy the students' requests, she stated that Ms. Pecci would like that "all charts include all category headings and are not redacted," that officer names be replaced with another indicator so as to reflect repeat names while protecting their identities, and that the information be "presented" in a form consistent with the records she had already received. (Ex. 52.)

2. **The City's Submission**

In its August 29 Order, the Court determined that the City had failed to meet its obligation to show what had been redacted or its burden to prove that the redactions were proper.[4] (August 29 Order, 40.) The Court noted that the correct mechanism for determining whether redacted information was properly withheld according to a statutory exemption is an *in camera* review and ordered submission of the unredacted responsive records. (Id. at 41.) Despite the Court's direct order to provide the unredacted Summary Reports Tables that Ms. Pecci requested,[5] the City did not

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[4] As the Court stated in its Order:

> The City bears the burden of proving the characteristics of the requested documents and the contents that have been redacted. The only evidence before the Court of what was redacted and why is an email from Ms. DiNapoli to Mr. Dow that explained, "These records consist of statistical summaries of citizen complaints for the years requested . . . . [O]fficers' names have been redacted as this information is exempt from disclosure." (Ex. 38.) Again, the Court is without context or evidence of what headings are at issue and what interests the parties may have in the headings.

(August 29 Order, 40.)

[5] "For this reason, the Court has no evidence upon which to make this decision and allows the City 30 days to provide the Court with the unredacted documents Ms. Pecci requested, as well as any arguments about weighing the privacy interest and the public interest in disclosure." (August 29 Order, 40 (emphasis added).)

provide them, redacted or unredacted. The City has instead submitted 119 pages of citizen complaints of police officers plus their accompanying documents reflecting complaint resolutions by KPD supervisors and stated that these documents are responsive to Ms. Pecci's request. (Def.'s Post Trial Subm. 3–4.)

From the Court's *in camera* review, it appears that the 119 pages, if not exempt, would have been responsive to Ms. Pecci's original request because they consist of citizen complaints of excessive police force or police brutality against the KDP. However, through Professor Salcetti's petition, Ms. Pecci has not requested documents other than unredacted versions of the redacted Summary Reports Tables that she had already received. Whether these citizen complaints would satisfy her original request is therefore irrelevant because they have not been sought in this petition.[6] The City has thus failed to provide the documents the Court ordered be submitted.

The Court has also considered whether the 119 pages that the City provided would satisfy Ms. Pecci's request and Professor Salcetti's petition. They would not. First, the unredacted Summary Reports Tables Ms. Pecci requested are not contained in those 119 pages, thus as a matter of fact they cannot satisfy her petition to this Court for the unredacted tables. Second, while 119 pages is more than the 18 she originally

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[6] Because Professor Salcetti has not sought the documents the City submitted, they are not actually at issue in this case, thus the Court's ruling of whether they are exempt from disclosure is irrelevant. However, the Court notes that the citizen complaints submitted *in camera* would fall squarely within an exemption because they concern investigatory documents of police misconduct and potential or actual discipline. See Union Leader Corp. v. Fenniman, 136 N.H. 624, 625–27 (1993) (holding that police internal investigation documents were categorically exempt from disclosure as per RSA 91-A:5, IV); see also Hounsell v. N. Conway Water Precinct, 154 N.H. 1, 4 (2006) (holding that a report that was generated in the investigation of an employee who was put on paid leave, and the result of which could have led to disciplinary action, were exempt as per the "internal personnel practices" exemption). The Court recognizes that, instead of submitting the correct, court-ordered documents, the City submitted citizen complaints nearly guaranteed to be found exempt under RSA 91-A:5, IV.

received, and while the individual complaints inherently provide more details than the Summary Reports would, the City's submission lacks information from 2015 and 2016. Ms. Pecci undisputedly received Summary Reports from each year between 2012 and 2016, and Mr. Dow wrote to Ms. Pecci that the 2015 report was two pages and the 2016 report was 5 pages. (Ex. 51.) The 119 pages of the City's submitted documents only include citizen complaints received in 2012, 2013, 2014, and 2017. Thus, even cross-comparing the 119 pages to the Summary Reports would fail to provide the redacted information on the 2015 and 2016 reports from Chief Meola that Ms. Pecci seeks.

Additionally, the City has failed to address why the redactions in the tables were appropriate in the first place, or even what was redacted. (See Def.'s Post Trial Subm. 4–6.) It can be inferred from the City's representations to Ms. Pecci that the blacked-out column was at least a column of officer names. (Ex. 12; Ex. 51.) But, even assuming that the blacked-out column is officer names and nothing else, the City has not explained why a column of officer names in a statistical summary or its heading falls within the "internal personnel policy" or any other exemption. The City has thus failed to address its burden as to why the redacted records Ms. Pecci received complied with RSA 91-A. Therefore, even with two opportunities, the City has failed to explain why the redactions on the summary reports were proper and in compliance with RSA 91-A:5, IV.

B. *Exemptions*

Though the City has failed to address its burden to demonstrate that its redactions were proper, the Court cannot order disclosure of records that are exempt under the Right-to-Know law. The City's noncompliance with this Court's instructions

are likely frustrating for the plaintiffs but, conveniently, the burden of proof has been and remains on the City; the Court therefore will not allow the City's noncompliance to further stall disposition of this matter and instead analyzes the Summary Reports Tables' blacked-out information according to the evidence before it.

As stated above, the City's correspondence with Ms. Pecci strongly suggests that the blacked-out column contained officer names and a column heading that described the column's content as officer names. (See Ex. 12; Ex. 52; Pl.'s Resp. Def.'s Post Trial Subm., Attach.) Professor Salcetti has argued that the headings should not have been blacked-out and conceded that the officer names were properly redacted; but, she has also requested that the redactions be replaced by anonymous identifiers such as "officer 1" so Ms. Pecci can see whether there were repeat employee names. (Pl.'s Mem. 30; Ex. 52.) Thus, the only question before the Court is whether the redacted headings, rather than the column's contents, are exempt from disclosure. Professor Salcetti has argued that there is no privacy interest in the column headings if they are on the Summary Reports Tables, and, therefore, those items should not be redacted. (Pl.'s Resp. Def.'s Post Trial Subm. 11.) The Court does not address whether the officer names on the tables were properly redacted because Professor Salcetti has conceded that they were; however, the Court considers whether replacing the officer names on the tables with an anonymous indicator is permissible. Professor Salcetti has also raised the argument that officer titles, if included in the Summary Reports Tables, should not be redacted. (Id.)

RSA 91-A:5, IV exempts "[r]ecords pertaining to internal personnel practices." The same provision also contains an exemption for "personnel . . . files whose

disclosure would constitute invasion of privacy."[7] RSA 91-A:5, IV; see Reid v. N.H. Attorney Gen., 169 N.H. 509, 520 (2016) (distinguishing the two "personnel" exemptions). For the "internal personnel practices" exemption, it has been established that an investigation into employee misconduct constitutes a personnel practice and, for documents concerning the investigation to be exempt, the investigation must be conducted by or on behalf of the employer of the investigation's target such that the investigation is within the limits of an employment relationship. Reid, 169 N.H. at 523. As for the second "personnel" exemption, "[w]hen the exemption is claimed on the ground that disclosure would constitute an invasion of privacy, we examine the nature of the requested document or material and its relationship to the basic purpose of the Right-to-Know Law." Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996). "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." N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 103 (2016) (quoting Montenegro v. City of Dover, 162 N.H. 641, 649 (2011)). To meet this burden, the non-disclosing party must show "that the records sought will not inform the public about the department's activities, or that a valid privacy interest, on balance, outweighs the public

[7] The Court's August 29 Order did not examine these two different exemptions because the Court concluded that, regardless of the City's claimed exemption from disclosure, the City had not provided any evidence to support its assertion that the requested documents were exempt and properly redacted, thus the Court could not address whether the requested documents had been properly withheld. (See August 29 Order, 38–41.) Furthermore, the Court did not engage in the analysis of the two "personnel" exemptions in its discussion of the City's denial of Ms. Pecci's request, an analysis that found that the City had provided a proper explanation by citing to RSA 91-A:5, IV and that there is no requirement that the City provide further explanation beyond a minimal reason in writing. (See id. at 41–42.) Though the Court's analysis of the City's response did not consider the two "personnel" exemptions contained in RSA 91-A:5, IV, the Court's prior determination that the City's response to Ms. Pecci's request was sufficient is unaffected.

interest in disclosure." N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003).

1. **Internal Personnel Practices Exemption**

The City's submission and accompanying memorandum explains why the submitted documents, the 119 pages of citizen complaints, fall under the "internal personnel practices" exemption of RSA 91-A:5, IV. (Def.'s Post Trial Subm. 3–6.) As stated above, those documents are not at issue, and whether they are exempt has no bearing on the redaction issue that Professor Salcetti has raised in her petition. The Court thus addresses whether the redacted heading in the Summary Reports Tables Ms. Pecci was given would fall under this exemption.

The "internal personnel practices" exemption is not a categorical exemption to all personnel information from disclosure but rather only applies to documents concerning an investigation into employee misconduct that was conducted by or on behalf of the employer of the investigation's target such that the investigation is within the limits of an employment relationship. Reid, 169 N.H. at 523. A record is exempt from disclosure when it is "generated in the course of an investigation of claimed employee misconduct." Hounsell v. N. Conway Water Precinct, 154 N.H. 1, 4 (2006). The Hounsell Court emphasized how a report at issue was created during and as a result of an investigation of employee misconduct and that the report's finding could have resulted in employee discipline. Id. It was thus exempt as internal personnel practice. Id.

Here, there appears to be no question that the Summary Reports Chief Meola generated for 2012 through 2016 would not qualify as "internal personnel practices." The reports make no indication that they are in contemplation of employee discipline or

were created in the course of an investigation into an employee's misconduct. In fact, each entry in the Summary Reports Tables was resolved by the respective reports' creation: the 2012 Summary Report Professor Salcetti provided to this Court states that all the complaints "were resolved at the supervisory level" and "[n]o internal investigations were initiated." (Pl.'s Resp. Def.'s Post Trial Subm., Attach.) The Summary Reports covered all employee misconduct over a year with no apparent purpose other than to create a statistical report. In contrast, the citizen complaints that the City has submitted for *in camera* review and their accompanying documents appear to include all documents related to the complaints, including their resolutions. And, as stated, the Summary Reports and Summary Reports Tables are not included in the City's submission.

Thus, the information in the Summary Reports Tables cannot be said to be protected by the "internal personnel practices" exemption. See Montenegro v. City of Dover, 162 N.H. 641, 650 (2011) (finding that "the job titles of persons who monitor the City's surveillance equipment are not an internal personnel practice within the meaning of RSA 91–A:5, IV" because "[t]hey are not related to internal personnel discipline . . . . Nor are they akin to such matters as hiring and firing, work rules and discipline"). Because the Summary Reports are not internal personnel practices, a column's heading within the reports cannot be protected. And, if the officer names were replaced with anonymous indicators, there is no potential that any information these indicators might reveal would include information subject to the "internal personnel practices" exemption. The Court notes that the City did not argue that this particular exemption applied to the

redacted parts of the Summary Reports Tables and only argued that the exemption prevented disclosure of the individual citizen complaints.

Therefore, the "internal personnel practices" exemption does not apply and does not authorize the City's nondisclosure of the information in the Summary Reports Tables. The Court next considers whether the other "personnel" exemption in RSA 91-A:5, IV applies.

2. **Personnel Files & Invasion of Privacy Exemption**

In regard to the "personnel . . . files whose disclosure would constitute invasion of privacy," the Court must first consider "whether any of the disputed material is, or is contained in, a personnel file. If not, the 'personnel files' exemption does not apply." Reid, 169 N.H. at 528 (ellipses omitted). Again, the City has not provided any information about the Summary Reports and whether they are included in any officer personnel files. The reports themselves, as indicated from the report Professor Salcetti provided to the Court, do not indicate that they are part of any personnel files. Because the reports are not created in regard to one officer but rather to all whom have been complained about within a contemplated year, it is more likely that an officer's personnel file would contain information regarding his or her own performance rather than the Summary Reports. And, as stated, the citizen complaints the City has provided to the Court for *in camera* review illustrate the documents included in a resolution of a complaint and the Summary Reports are not among them. An officer's personnel file may contain one or more of the misconduct complaints that the reports analyze but not necessarily the Summary Reports themselves. Thus, the Court cannot consider the "personnel files" exemption in regard to the redacted information because the City has

not demonstrated that they are a part of a personnel file nor does the Summary Reports' nature indicate they are part of any personnel files. Therefore, in regard to Professor Salcetti's request that the City provide the Summary Reports without the headings redacted, the Court agrees that there is no privacy interest or applicable exemption that permits the headings' redaction.

The same analysis applies to Professor Salcetti's request that the officer names that have been blacked-out be replaced by an anonymous indicator. Even if an officer's name is repeated in a table, there is no chance that the repeat listing of a nameless officer would concern information from a personnel file; the Summary Reports Tables are not included with the citizen complaints, nor their resolutions, nor in an officer's personnel file; and an illustration of a nameless officer's repeat listing in any of the reports is not information that, independent of other information, would implicate an officer or an officer's personnel file. Thus, replacing the officer names in the Summary Reports Tables with an anonymous indicator would be permitted.

However, Professor Salcetti's request that officer titles in the tables, if present, be provided is more likely to concern information contained in a personnel file. An officer's title on a specific year's annual report could reveal the officer's identity, such as if there is only one officer at the KPD with that title at that time. The Court thus cannot order that the officer titles be provided; but, because the Court does not have the unredacted tables before it, and because the City has failed to meet its burden to explain why such a redaction would be proper, the Court denies this request without prejudice. Meaning, after the plaintiffs receive the Summary Reports and Summary Reports Tables with the headings unredacted and with officer names replaced with anonymous identifiers, if the

plaintiffs detect a new issue with the disclosure or a redaction that this Court has not considered, the plaintiffs may return to this Court to seek further disclosure from the City. This request would, of course, require the City to respond to address its burden of proof of what was redacted and why any such redaction was proper.

CONCLUSION

The City's responses to Ms. Vasas and Mr. Fleming was proper because the City cannot be obligated to search for records that it unquestionably does not possess. In regard to the City's disclosure of the unredacted records to Ms. Pecci, the Court reiterates: The City is ordered to provide Ms. Pecci with the Summary Reports Tables with no redactions other than the officer names, which must be replaced with an anonymous signifier so as to permit the reader to observe repeated entries.[8] Furthermore, if Ms. Pecci receives these documents and determines that they do not align with this order, or if the unredacted documents suggest that the City has withheld or redacted information this Court has ordered for disclosure, Ms. Pecci or Professor Salcetti may return to this Court for aid.

SO ORDERED.

1-25-19
DATE

David W. Ruoff
Presiding Justice

[8] To clarify, names that are repeated over two or more reports must be identified so as to illustrate the same name is repeated.