

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

CHESHIRE, SS.

Marianne Salcetti, et al.

v.

City of Keene

No. 213-2017-CV-00210

**ORDER ON RELEASE OF IN CAMERA MATERIALS**

Marianne Salcetti, a journalism professor at Keene State College, brought this petition against the City of Keene (“the City”), alleging 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. Ultimately, the Court sided with the City on most of its claims. However, on appeal the final order in this case was vacated by the Supreme Court and remanded for evaluation, in part, in light of more recent jurisprudence interpreting RSA 91-A exemptions applicable to this case. As explained below with respect to the internal investigation materials, the Court has concluded that unredacted copies of the statistical summaries be released, and that redacted copies of the substantive reports that support the summaries be released. The redaction made by the Court are minor and apply to personal identifiable information (PII). The Court is providing both sets of material, *ex parte*, to the City for review. The Court will release them to the Plaintiff in 45 days unless the City takes an appeal of this order.

## Issues before the Court

Currently before the Court are three issues: first, the parties disagree about certain arrest summaries; second, the parties disagree about the documents held in camera for review. And third, the parties disagree about attorney's fees.

The parties first disagree about arrest summaries for Alex Flemming and Abbygail Vassas. The arrest summaries contain a variety of identifiable information regarding arrestees.<sup>1</sup> The parties agree that the person's name can be disclosed, but the City wants to redact the address, cell phone number, SSN, DOB, etc. Ms. Salcetti argues that such information is in the public domain and should be unredacted. Both parties submitted memoranda which will be discussed below. The Court notes, however, that the City's spreadsheet differs from what its counsel identified at the hearing. The spreadsheet does not mention SSNs, but at the hearing it was discussed.

The parties next disagree about the police misconduct reports held *in camera*. The *in camera* review contains two parts: 1) statistical summaries, and 2) substantive documents of the internal investigations of the citizen complaints. The statistical summaries contain charts listing the types and number of complaints as well as charts listing officer names, the complaint type, and the finding. There is also the issue of the extent to which citizen complaints about police misconduct may be redacted by the Court if released; but Ms. Salcetti conceded that the City may redact personal identifying information of the complainants in those complaints.

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<sup>1</sup> The spreadsheet provided by the City also indicates that some of the reports list the victim and any suspects.

Ms. Salcetti also asked for attorney’s fees under RSA 91-A arguing that the City has “dragged its feet” on the document requests. The City objected.

### **Legal Standard – Citizen Complaints and In Camera Materials**

RSA 91-A exempts personnel files and confidential information from disclosure. In the past, the Supreme Court ruled that all “personnel files” were exempt from disclosure. See Union Leader Corp. v. Fenniman, 136 N.H. 624, 627 (1993). However, recently, the Court substantially overruled Fenniman. It concluded that the broad interpretation – creating a categorical per se exemption -of the “internal personnel practices” under RSA 91-A should be (much) narrower. See Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. \_\_\_\_ (decided May 29, 2020); Union Leader Corporation & a. v. Town of Salem, 173 N.H. \_\_\_\_ (decided May 29, 2020). Union Leader Corporation & a. v. Town of Salem, established that trial courts must conduct a three part balancing test to determine whether withheld records qualify for the exemption. Of course, this analysis also addresses whether certain information in the records should be redacted because redacted information is considered “withheld” even if the substantive document is disclosed.<sup>2</sup>

### **Analysis**

The balancing test has three prongs. First, the Court evaluates whether there is a privacy interest at stake that would be invaded by the disclosure. Second, the Court assess the public’s interest in disclosure. Third, the Court balances the public interest in

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<sup>2</sup> Under the Seacoast Newspapers, Inc. v. City of Portsmouth interpretation of the exemption, the summaries and substantive internal investigative reports are clearly not exempt because they do not “relate to the personnel rules or practices” of the City of Keene. Seacoast Newspapers, Inc. v. City of Portsmouth, slip op at 12.

disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. Importantly, "[i]f no privacy interest is at stake, then the Right-to-Know Law mandates disclosure." Union Leader Corporation & a. v. Town of Salem, slip op at 9. As to the assessment of a privacy interest, the Court uses an objective expectation rather than a subjective one. Id. (cleaned up).

Upon review of the summaries and substantive reports in this case, the Court concludes that they are disclosable but the substantive reports must be subjected to minor redactions to protect privacy concerns.

### **The Summaries**

The summaries invoke one minor privacy interest: the identity of the officer and the administrative "finding" about the claim of misconduct. The documents are essentially tallies of spreadsheets, with some brief narrative explanations. They are authored by the Chief and are issued to "File" – based on the context of these forms and the corresponding underlying investigations, the Court finds that the "File" is the department's Citizen Complaint file, not a personnel file. They simply identify the fact that a complaint was made against a particular "member," the member's last name, the name of the investigator, the nature of the complaint, and the finding. Thus, any privacy interest is nominal. This balances in favor of disclosure without redaction.

Second, the public has an elevated interest in the disclosure given the nature of the work the department performs. Law Enforcement officers, in contrast to those who work at the State Library, are vested with considerable power and authority. They are authorized to use deadly force when necessary. They are routinely critical witnesses in

criminal cases. As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their authority, whether the department is accounting for complaints seriously, and how many complaints are made. This factor strongly favors unredacted disclosure.

Third, balancing the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure, the Court finds public interest in disclosure is compelling. The City has not articulated any compelling interest in non-disclosure. Lastly, given the *de minimus* privacy interest involved, the public interest in unredacted disclosure carries the day.

### **The Substantive Reports<sup>3</sup>**

The in camera material also contain substantive reports of interviews and conclusions conducted in response to the Citizen Complaints. They all follow the same format: the cover sheet identifies the nature of the complaint, the date and time received, the name of the officer(s) subject to the complaint, and the personal identifying information of the complainant. The report is copied, via an email distribution list, to the Captain, Supervisor and the Officer(s). The following pages in the reports contain narrative interviews of any witnesses and the officer. Many of the reports contain the underlying arrest reports, correspondence with attorneys involved in the underlying criminal case, and some photographs.<sup>4</sup> Upon review of the reports, it is not always clear who conducts the investigative interviews. The narrative is followed by a

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<sup>3</sup> The Court notes that there is currently a legislative proposal to specifically exempt internal investigations from disclosure under RSA 91-A. See SB39.

<sup>4</sup> The substantive reports, are, in the Court's review, very detailed and well-documented.

conclusion from the Chief, and a letter to the complainant letting him/her know the outcome of the investigation.

Applying the balancing test factors discussed above, the Court finds the substantive reports are to be disclosed subject to the following redactions: personally identifiable “victim” information must be redacted, any reference to personnel action taken (if any) against the officer; and any discussion of internal personnel practices or procedures, if any, within the City. The Court will provide a redacted copy of what it intends to release to the City, but delay disclosure to the plaintiff for 45 days to allow the City to determine whether to take an appeal.

The Court finds that any privacy interest is minor in the records, and that victim information must be redacted by virtue of RSA 21-M:8-k II (m) Rights of Crime Victims (right of confidentiality of personal information). The Court cannot discern any privacy interest vested in an officer against whom a citizen has filed a complaint.

Second, the Court finds that the nature of police work invokes a very significant public interest in disclosure. Because law enforcement officers are entrusted with significant authority, granted additional protection for the use of force, and are mandated to act with honesty and integrity, the public has a heightened interest in knowing of the content of the investigation of such complaints.<sup>5</sup> This weighs in heavy favor of disclosure. Additionally, upon review,

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<sup>5</sup> See RSA 105:19 (mandating that police investigate complaints of police misconduct).

much of the information contained in the reports is contained in arrest reports that are subject to disclosure, or interviews with civilian witnesses (and complainants) none of whom are bound by any confidentiality. In other words, the “facts” that they convey to the interviewer are not subject to any confidentiality. The Court finding on this prong also dictates the result of the third prong of the balancing test.

### **Legal Standard – Arrest Records**

There is scant authority regarding the redaction or disclosure of arrest records under RSA 91-A. RSA 594:14-a notes that arrest records are “governmental records as defined in RSA 91-A and subject to disclosure in accordance with that chapter, with the exception noted in RSA 106-B:14.” RSA 594:14-a then specifies what an arrest record must contain: the identity of the arrestee, the identity of the arresting officer, a statement of reasons why/how the arrest was made, the alleged crime, and whether the arrest was made pursuant to a warrant. RSA 106-B:14 notes that “[a]ny person may, for a fee, obtain the public criminal history record information on another person.” (emphasis added). Neither party has identified whether “public criminal history records” includes records in which a person was arrested but not convicted of an offense. It is the Court’s belief that the public portion of criminal records obtainable under RSA 106-B:14 contains only records of arrests that are accompanied by convictions. Compare RSA 106-B,II (defining “confidential criminal history record”) with RSA-B,XI (defining “public criminal history record”). But even though RSA 594:14-a allows for disclosure of arrest records as “governmental records” under RSA 91-A, it doesn’t mention if they fall under an exemption. Moreover, RSA 594:14-a qualifies that disclosure of arrestee information

is “subject to the exception in RSA 106-B:14” which appears to limit public disclosure (by the State Police) to arrest records that result on a conviction. Obviously, local law enforcement routinely issue press releases and report arrest records publicly. However, the issue is whether RSA 91-A mandates disclosure or whether it is confidential information.

Federal case law provides some helpful examples. A federal district court dealing with similar facts noted that “[s]ince an individual's right of privacy is essentially a protection relating to his or her private life, this right becomes limited and qualified for arrested or indicted individuals, who are essentially public personages.” Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318, 1321 (M.D. Tenn.1975). However, the court warned that “this decision does not provide the plaintiffs with a license to obtain from the defendants any type and amount of information about an arrested or indicted individual which they desire to publish.” Id. Other federal cases have similarly struck that balance. See Ctr. for Investigative Reporting v. United States Immigration & Customs Enf't, 2019 U.S. Dist. LEXIS 207840 at \*13 (finding that even though an ICE detainee’s name and country of origin can be found online, other more personal information held by ICE carried a “significant privacy interest.”); see also United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 764 (1989) (“there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”)

A secondary source, the 2015 Attorney General RSA 91-A Law Enforcement Memorandum, addresses the issue of what should be redacted from law enforcement



records due to privacy interests (though it does not provide citations). The AG recommends always redacting items like SSNs, DOBs, driver's license numbers, criminal records<sup>6</sup>, and many other less-relevant items. The AG then recommends generally redacting addresses and telephone numbers but also suggests doing a privacy analysis on those items.<sup>7</sup>

In light of the foregoing analysis, the Court finds that the City may redact from the disclosure of arrest records in its possession, aside from the arrestee's name, any PII from the arrest records, specifically the arrestees': street address, date of birth, social security number; and any other information protected by federal law. The Court finds that the limitation to conviction-only arrest records under RSA 106-B:14 applies to the records maintained by the City. By its express terms, members of the general public may make a request of records, but the request is limited to "public criminal history record[s]." The court construes this limitation as "the exception noted in RSA 106-B:14" carved out in RSA 91-A.

### **Attorney's Fees**

Under RSA 91-A, the statute "requires two findings by the superior court: (1) that the plaintiff's lawsuit was necessary to make the information available; and (2) that the defendant knew or should have known that its conduct violated the statute." N.H. Challenge v. Commissioner, N.H. Dep't of Educ., 142 N.H. 246 (1997).

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<sup>6</sup> From the central repository. I think that is different from arrest summaries.

<sup>7</sup> The Court notes that prior to the AG memo, and after RSA 91-A was enacted societal concerns about personally identifiable information (PII) have escalated. It is beyond dispute that "data breaches," "data mining," and the fraudulent use of PII are of great societal concern.

In this case, the court finds that there is no evidence that the City knew or should have known that its conduct violated the statute. Thus, an award of fees is not warranted under the statute. In light of this finding, it follows that the plaintiff is not entitled to a common law award of fees. Therefore, the request for attorney's fees is denied.

SO ORDERED.

Date: January 22, 2021



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Hon. David W. Ruoff

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