The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

THE HAMPSTEAD SCHOOL DISTRICT AND
THE HAMPSTEAD SCHOOL BOARD

V.

SCHOOL ADMINISTRATIVE UNIT NO. 55

Docket No.: 218-2020-CV-00236

OMNIBUS ORDER

The Hampstead School District and the Hampstead School Board (collectively, "Hampstead") brought this action under RSA chapter 91-A, New Hampshire's Right-To-Know Law, seeking access to an investigative report (the "Report") concerning members of the Board of School Administrative Unit No. 55 (the "SAU"). See Doc. 1 (Pet. filed Feb. 19, 2020); see also Doc. 6 (Hampstead's March 17, 2020 Mem.). On March 18, 2020, the SAU moved to dismiss Hampstead's Petition. See Docs. 7–8; see also Doc. 9 (Hampstead's Obj.). The Court held a hearing on the matter on March 19, 2020.[1] On March 20, 2020, the SAU filed a post-hearing memorandum. See Doc. 10; see also Doc. 11 (Hampstead's Resp.). After consideration of the pleadings, the arguments presented during the hearing, and the applicable law, the Court finds and rules as follows.

[1] During the hearing, the SAU acknowledged that the issue presented in its motion to dismiss was the same issue that the Court would need to resolve in deciding the merits of this action: whether the Report is exempt form disclosure under RSA 91-A. The SAU has in no way indicated that its March 19, 2020 presentation was limited to addressing the SAU's motion to dismiss. Accordingly, the Court will analyze the issues presented in Hampstead's Petition and the SAU's motion to dismiss based upon the current state of the record.

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Rockingham Superior Court
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Facts

The following facts are undisputed. At all times relevant here, the SAU was comprised of the Hampstead School District and the Timberlane Regional School District.[2] See Doc. 1, ¶¶ 1–3. All five members of the Hampstead School Board serve as members of the SAU Board. See id. Nine members of the Timberlane School Board also serve as members of the SAU Board. See Doc. 9, ¶ 10. The Chair of the SAU Board, Kim Farah, is a member of the Timberlane School Board. See Doc. 1.

In November of 2018, the Hampstead School Board unanimously adopted a resolution rejecting and disapproving of what it described as "the inappropriate and unprofessional conduct and commentary engaged in by members of the Timberlane . . . School Board with regard to . . . SAU[] administrators." Id., Ex. 1, pp. 3–4. Thereafter, in the summer of 2019, one former SAU employee and one current SAU employee alleged that certain members of the SAU Board had engaged in workplace harassment and/or created a hostile work environment. See Doc. 8, p. 2. After consulting with the SAU's attorneys, Chair Farah arranged to have Mitchell Municipal Group conduct an investigation into these allegations (the "Investigation").[3] Id.; see also Doc. 1, Ex. 2 (engagement letter indicating that the Investigation was being conducted "on behalf of SAU #55" and that the results of the Investigation would be subject to the attorney-client privilege). The Investigation cost the SAU $28,600. See Doc. 6, p. 3.

During the public session of a December 4, 2019 SAU Board meeting, Chair Farah made the following statement concerning the Investigation:

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[2] The Court learned during the hearing in this matter that in March of 2020 the Timberlane Regional School District voted to withdraw from the SAU.

[3] The parties disagree as to whether Chair Farah properly authorized the Investigation.

> [A]n independent, experienced employment attorney . . . conducted an extensive investigation of a hostile work environment allegation. At the conclusion of that investigation the independent investigator found that the allegations had no merit. So that investigation is nearly complete, with the exception of the writing of the final report.[4]

See Doc. 6, p. 11 (citing and quoting the internet-based video recording of the December 4, 2019 SAU Board meeting).

After the Report was complete, the Hampstead contingent of the SAU Board requested access to the Report. See Doc. 1, ¶ 23. Chair Farah and/or the SAU's legal counsel denied that request. See id., ¶ 24. Hampstead thereafter requested access to the Report under RSA 91-A. See id., ¶ 26. On February 18, 2020, the SAU's legal counsel informed Hampstead that the Report was exempt from disclosure under RSA 91-A. See Doc. 1, Ex. 4. Hampstead then initiated this action. See Doc. 1.

Analysis

The crux of this action is whether the Report falls within certain exemptions to disclosure under RSA 91-A. See Doc. 8 (arguing that the Report falls under the internal personnel practices exemption and the confidential information exemption). Resolving this issue requires the Court to interpret and apply RSA 91-A. "The ordinary rules of statutory construction apply to . . . the Right-to-Know Law." Clay v. City of Dover, 169 N.H. 681, 685 (2017) (quoting N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 102–03 (2016)). Thus, the Court must examine the language of the statute as a whole, and ascribe the plain and ordinary meaning to the words used. See id. In

[4] During the March 19, 2020 hearing, the SAU's legal counsel indicated that the SAU's reluctance to release the Report was due in part to the fact that Hampstead had not agreed to keep the Report confidential. The SAU's legal counsel explained that the SAU did not want to be forced to release materials that could be used against the SAU in future legal proceedings. In response, Hampstead's counsel expressed confusion as to how a report that found "no merit" to the hostile work environment allegations could be used against the SAU. The SAU did not clarify this point during the hearing or in its post-hearing memorandum. See Doc. 10.

addition, the Court interprets "legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. (citation omitted). The Court must also "interpret [the] statute in the context of the overall statutory scheme and not in isolation." Id. (citation omitted).

"The Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Id. (citing Montenegro v. City of Dover, 162 N.H. 641, 645 (2011) and N.H. CONST. pt. I, Art. 8). "Although the statute does not provide for unrestricted access to public records, [courts] resolve questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. (quoting N.H. Right to Life, 169 N.H. at 103). "As a result, [courts] broadly construe provisions favoring disclosure and interpret the exemptions restrictively." Id. (citation omitted). In addition, New Hampshire courts "look to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)." Id. at 686 (citation 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. (citation omitted).

As relevant here, RSA 91-A:5 exempts the following records from disclosure:

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

RSA 91-A:5, IV (clarifying that "[w]ithout otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected"). As noted above, the SAU argues that the Report falls within the "internal personnel practices" exemption, and the SAU further argues that the Report is confidential because it implicates the attorney-client privilege and the work product doctrine. The Court will address each argument, in turn.

I. Internal Personnel Practices

The New Hampshire Supreme Court has analyzed the scope and application of the internal personnel practices exemption on several occasions. See, e.g., Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993); Reid v. N.H. Attorney Gen., 169 N.H. 509, 522 (2016). In so doing, the court has determined that the term "personnel" "refers to human resources matters" and concerns "the conditions of employment in a governmental agency, including such matters as hiring and firing, work rules and discipline, compensation and benefits." Clay, 169 N.H. at 686 (citations and quotations omitted). The court has further determined "that the use of the word 'internal' to modify the phrase 'personnel practices' means practices that exist or are situated within the limits of employment." Id. (citations and quotations omitted). Relying on those determinations, the court has held "that an investigation into employee misconduct relates to 'internal personnel practices' when it 'take[s] place within the limits of an employment relationship[;] [i]n other words, the investigation must be conducted by, or . . . on behalf of, the employer of the investigation's target.'" Id. (quoting Reid, 169 N.H. at 523); see generally Fenniman, 136 N.H. 624.

More recently, the supreme court has criticized this holding: i.e., that the internal personnel practices exemption applies to investigations into employee misconduct. For example, in Reid the court discussed at length the ways in which the court's earlier analysis of this exemption stood out from its analysis of other RSA 91-A exemptions:

> [I]n interpreting the "internal personnel practices" exemption in Fenniman, we twice departed from our customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly and declining to employ a balancing test in determining whether to apply the exemption. In addition, we did not interpret the portion of RSA 91–A:5, IV at issue in the context of the remainder of the statutory language—in particular, the language exempting "personnel . . . and other files whose disclosure would constitute invasion of privacy." . . . . Thus, we did not examine whether a broad, categorical interpretation of "internal personnel practices" might render the exemption for "personnel . . . files whose disclosure would constitute invasion of privacy" in any way redundant or superfluous.
>
> Moreover, although the practice of consulting decisions from other jurisdictions interpreting similar statutes is common in our Right-to-Know Law jurisprudence, we did not conduct such an inquiry in Fenniman. The Freedom of Information Act (FOIA) exemption contained in 5 U.S.C. § 552(b)(2) is worded similarly to the portion of RSA 91–A:5, IV at issue here . . . . Nevertheless, our construction of the "internal personnel practices" exemption . . . is markedly broader than the United States Supreme Court's interpretation of that exemption's federal counterpart.

Reid, 169 N.H. at 519–21 (citations and quotations omitted). Although the Reid court determined that "stare decisis" required it to "treat[] procedures leading up to internal personnel discipline—in particular, an investigation into employee misconduct—as a personnel practice," the court expressly "decline[d] to extend Fenniman . . . beyond [its] own factual context[]" and clarified that "in further interpreting RSA 91–A:5, IV" it would "return to . . . customary standards for construing the Right-to-Know Law." Id. at 522 (citations and quotations omitted).

Notwithstanding the foregoing, the SAU urges this Court to expand the parameters of the internal personnel practices exemption such that it not only applies to

investigations into employee misconduct, but also applies to investigations into employer misconduct even where, as here, the employer is a board made up of publicly-elected officials acting in their official capacity. While the SAU acknowledges that the relevant case law only discusses investigations into employee misconduct, the SAU suggests that this is because the factual scenario at issue here has simply not come up before now. The Court is unpersuaded.

As Hampstead emphasizes, the purpose of RSA 91-A "is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1 (noting that "[o]penness in the conduct of public business is essential to a democratic society"). In a similar vein, the New Hampshire Supreme Court has recognized that the public has a significant interest in the disclosure of information concerning the official conduct of elected officials, as such information is necessary in order for the public to meaningfully assess the job performance of those elected to public office. See Lambert v. Belknap Cty. Convention, 157 N.H. 375, 384–86 (2008). Although New Hampshire courts do not apply a balancing test under the internal personnel practices exemption, this Court must nevertheless consider the public's overarching interest in the disclosure of information concerning the official conduct of elected officials when deciding whether to expand the above-described exemption in the manner urged by the SAU. See generally Clay, 169 N.H. at 685 (explaining that courts interpret statutes in the context of the overall statutory scheme); see also Reid, 169 N.H. at 518 (citing Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475 (1996) for the proposition that, "[t]o advance the purposes of the Right-to-Know Law," New Hampshire courts customarily "construe provisions

favoring disclosure broadly and exemptions narrowly"); id. at 522 (indicating that although the court had previously departed from customary standards in interpreting the internal personnel practices exemption, the court would "return to" those customary standards "in further interpreting RSA 91–A:5, IV").

In the Court's view, disclosure of the information at issue here—that is, a report documenting the results of an investigation into the official conduct of those who, by virtue of their publicly-elected positions, serve as employers of public employees—would best serve the core purpose of RSA 91-A. Accordingly, the Court declines the SAU's invitation to extend the parameters of the internal personnel practices exemption so that it applies to the Report. See Reid, 169 N.H. at 522 (declining "to extend Fenniman . . . beyond [its] own factual context[]"). Rather, the Court concludes that the Report is not exempt from disclosure under the internal personnel practices exemption set forth in RSA 91-A:5, IV.

II. Attorney-Client Privilege and Work Product Doctrine

The SAU argues in the alternative that the Report is exempt from disclosure because the attorney-client privilege and the work product doctrine render the Report confidential. See N.H. Right to Life, 169 N.H. at 104–05 ("[W]e agree . . . that attorney work product, like communications protected by the attorney-client privilege, falls within the Right–to–Know Law exemption for 'confidential' information." (citations omitted)). In response, Hampstead questions whether the Report constitutes attorney work product and/or falls within the attorney-client privilege. Hampstead further argues that the SAU waived any confidentiality by discussing the Report and the findings thereof during the public portion of an SAU Board meeting. Lastly, Hampstead argues that even if the

Report remains confidential, the balancing test that applies to this exemption favors disclosure.

As the Court observed during the March 19, 2020 hearing, this is a unique case. All five members of the Hampstead School Board are also members of the SAU Board. According to the engagement letter giving rise to the Investigation and Report, the SAU was/is the "client." See Doc. 1, Ex. 2. In simple terms, then, one faction of the "client" is invoking the attorney-client privilege and the work product doctrine in an effort to avoid disclosing the Report to another faction of the client. The Court lacks sufficient information concerning the rules and regulations of the SAU to render an opinion as to whether the Chair's refusal to disclose the Report to other members of the SAU Board is appropriate. In any event, this case was brought solely under RSA 91-A, and thus the Court must focus its attention on that statutory framework.

In Hampton Police Ass'n, Inc. v. Town of Hampton, the New Hampshire Supreme Court discussed the manner in which New Hampshire courts apply the RSA 91-A:5, IV exemption for confidential records. 162 N.H. 7, 14 (2011). In that case, the Town of Hampton challenged the trial court's order requiring the Town to photocopy certain attorney invoices containing "narrative descriptions of the work performed" by the attorney. See id. The Town argued that those narrative descriptions were confidential within the meaning of RSA 91-A:5, IV, and thus exempt from disclosure, because they were "subject to the attorney-client evidentiary privilege." Id.

After noting the Town's arguments, the Hampton Police Court explained the law surrounding the application of this exemption as follows:

> The Right–to–Know Law specifically exempts from disclosure "[r]ecords pertaining to . . . confidential . . . information." RSA 91–A:5, IV. The determination of whether information is confidential for purposes of our Right–to–Know Law is assessed objectively, not based upon the subjective expectations of the party generating that information. Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 554 (2002). Even if records are deemed confidential, however, they are not per se exempt from disclosure. Id. "Rather, to determine whether records are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government." Id. (quotation and brackets omitted). To show that information is sufficiently confidential to justify nondisclosure, the party resisting disclosure must prove that disclosure is likely to: (1) impair the information holder's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. Id. This test emphasizes the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential. Id. at 554–55. The burden of proving whether information is confidential rests with the party seeking nondisclosure. Id. at 555.

Hampton Police Ass'n, 162 N.H. at 14. The court then explained that the trial court had not "engage[d] in the balancing test . . . because it concluded that the Town failed to meet its burden of proving that the narrative descriptions were subject to the attorney-client privilege." Id. (holding "that the trial court did not err in this regard").

Throughout the pendency of this action, Hampstead has repeatedly referenced the above-described balancing test in support of its request to obtain the Report. See, e.g., Doc. 6, p. 12 (arguing that even if the SAU could establish that the Report fell within the attorney-client privilege or the work product doctrine, "the Court would still need to conduct a balancing test, weighing the benefits of disclosure to the public against those of non-disclosure"); Doc. 9, ¶ 13 ("Respondent ignores that fact that, even if it is correct that these privileges somehow apply, a balancing test must nevertheless be conducted."); Doc. 11, p. 2 ("Finally, despite Respondent's failure to address it, successful initial application of these privileges merely requires a balancing test—one

that Respondent simply fails."). Curiously, the SAU has not directly addressed this argument: that is, the SAU has not argued that the above-described balancing test is inapplicable to records covered by the attorney-client privilege or the work product doctrine, and the SAU has also not presented a direct argument as to why the balancing test, if applied here, would favor nondisclosure. In light of the case law described above, and absent any developed legal argument to the contrary from the SAU, the Court finds it appropriate to apply the balancing test described in Hampton Police to determine whether the Report must be disclosed in this case. See Hampton Police Ass'n, 162 N.H. at 14; see also Reid, 169 N.H. at 519 (noting that, by not applying a balancing test in connection with the "internal personnel practices" exemption, the Fenniman court had "departed from . . . customary Right-to-Know Law jurisprudence").

On balance, the Court concludes that the relevant considerations favor disclosure.[5] First, the benefits of disclosure to the public are quite substantial. The SAU spent $28,600 on the Investigation and Report. Those taxpayer funds were aimed at investigating reports of official misconduct by individuals holding publicly-elected positions. For the reasons described above, the public generally has a significant interest in knowing the results of such an investigation. See Lambert, 157 N.H. at 384–86 (recognizing that the public has a significant interest in disclosure of information concerning the official conduct of elected officials, as such information is necessary in order for the public to meaningfully assess the job performance of those elected to public office).

[5] Hampstead has presented several reasons why, in its view, neither the attorney-client privilege nor the work product doctrine would apply to the Report. Because the Court concludes that the Report must be disclosed even if it is "confidential" for the purposes of RSA 91-A:5, IV, the Court will assume, without deciding, that this is so.

The public's interest is particularly high in this case due to Chair Farah's statement during the December 4, 2019 SAU Board meeting. Indeed, Hampstead argues that this statement resulted in a waiver of any applicable privilege or protection. As noted above, RSA 91-A:5, IV clarifies that a public body or agency may release "information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected" without compromising the confidentiality of the files . . . ." This statutory language plainly contemplates that other "limited" releases of information from investigative files can compromise the confidentiality thereof. In this case, however, the Court need not determine whether Chair Farah's statement, in and of itself, vitiated any applicable confidentiality. Rather, assuming without deciding that her statement was insufficient in this regard, it nevertheless provides additional support for Hampstead's position: allowing the Chair of the SAU Board to publicly declare that the Investigation (and corresponding Report) "found that the allegations" concerning a hostile work environment "had no merit," without affording the public any meaningful way to vet the Chair's characterization of that purported finding, is inconsistent with the purpose of RSA 91-A.

While there may be circumstances in which such a result strikes the appropriate balance between the competing interests involved, in this case the SAU's comments (through counsel) during the March 19, 2020 hearing further support Hampstead's position. As noted above, the SAU argued that it should not be required to disclose information that could be used against it in future litigation. Although Hampstead questioned how a report that absolved the SAU Board of any wrongdoing could be used against the SAU, the SAU never clarified its reasoning in this regard. See Doc. 10.

Absent such clarification, the Court concludes that this apparent inconsistency favors disclosure. See generally Hampton Police Ass'n, 162 N.H. at 14 ("The burden of proving whether information is confidential rests with the party seeking nondisclosure." (citation omitted)).

In addition, the aforementioned "unique" aspect of this case—in which one faction of the SAU "client" is invoking the attorney-client privilege and the work product doctrine in an effort to avoid disclosing the Report to another faction of the SAU "client"—further supports Hampstead's position. As noted above, in November of 2018 the Hampstead School Board adopted a resolution decrying the behavior of members of the Timberlane School Board. See Doc. 1, Ex. 1, pp. 3–4. After arranging for the Investigation (without seeking prior approval from the full SAU Board), Chair Farah has publicly claimed that the Report deems the allegations of a hostile work environment meritless. Yet, Chair Farah has refused to allow the minority members of the SAU Board—i.e., those representing Hampstead—to review the Report. Indeed, the SAU has suggested that the Timberlane contingent of the SAU affirmatively voted to keep the Report confidential from the public and the full SAU Board. This further undermines public confidence in the SAU Board, as even the Hampstead School Board members have no ability to verify Chair Farah's claims about the Investigation.

As noted above, the SAU has not presented any direct argument concerning the above-described balancing test. Nevertheless, the Court is mindful of the policy considerations implicated whenever a public agency is asked to disclose information that arguably falls within the attorney-client privilege or the work product doctrine. There could well be a chilling effect if public bodies cannot investigate their own alleged

misdeeds without thereafter releasing the results of such an investigation to the public. However, this case does not call upon the Court to establish a blanket rule concerning such investigations: rather, in this case the Court is tasked with balancing the competing interests once the Chair of a public body has made a public claim about the results of such an investigation, and after individual members of that very body have been precluded from reviewing the results thereof. After considering all of the evidence in the record and the arguments presented by both sides, the Court cannot conclude that the SAU has carried the "heavy burden" necessary to avoid disclosure in this unique case. See Clay, 169 N.H. at 685. Even if the Report is protected by the attorney-client privilege or the work product doctrine, the competing considerations favor disclosure.

Consistent with the foregoing, the Court concludes that neither the "internal personnel practices" exemption nor the "confidential" exemption allows the SAU to avoid disclosure in this case. Accordingly, the SAU's motion to dismiss is **DENIED,** and Hampstead's request for an Order compelling the SAU to immediately produce the Report to Hampstead is **GRANTED**.

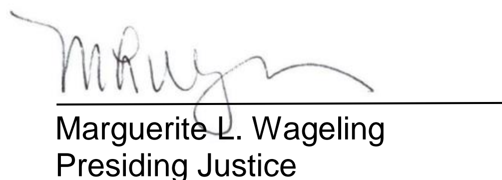
Before concluding, the Court must address Hampstead's request for an award of attorney's fees and costs incurred in bringing this action. Invoking RSA 91-A:8, Hampstead argues that in refusing to disclose the Report, the SAU knew or should have known that it was violating RSA 91-A. See Doc. 1, ¶¶ 39–41; see also RSA 91-A:8, I ("If any public body . . . violates any provisions of this chapter, such public body . . . shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this

chapter. Fees shall not be awarded unless the court finds that the public body . . . knew or should have known that the conduct engaged in was in violation of this chapter . . . ."). While the Court agrees that an award of costs is appropriate because the filing of this lawsuit was necessary in order to enforce compliance with RSA 91-A, the Court cannot conclude that an award of fees is also warranted. Given the nature of the legal issues involved, the SAU had a reasonable basis to believe that the Report was exempt from disclosure under the "confidential" exemption set forth in RSA 91-A:5, IV. Although the Court ultimately disagrees with that conclusion, the issues involved are not so clear-cut that the "knew or should have known" standard is satisfied here. Accordingly, Hampstead's request for an award of costs is **GRANTED**, but Hampstead's request for an award of attorney's fees is **DENIED**.

Conclusion

For the reasons discussed above, the SAU's motion to dismiss is **DENIED,** Hampstead's request for an Order compelling the SAU to immediately produce the Report to Hampstead is **GRANTED**, Hampstead's request for an award of attorney's fees is **DENIED**, and Hampstead's request for an award of costs is **GRANTED**. The Report shall be provided to Hampstead within 10 days of the issuance of this order.

So Ordered.



April 8, 2020
Date

Marguerite L. Wageling
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/09/2020