

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Merrimack, ss

UNION LEADER CORPORATION

v.

NEW HAMPSHIRE POLICE STANDARDS AND TRAINING COUNCIL

217-2020-CV-613

ORDER

This matter is a statutory petition for injunctive relief brought by a newspaper publisher under the Right To Know Act, RSA 91-A:7. The petition seeks:

1. A permanent injunction requiring the New Hampshire Police Standards And Training Council ("the Council") to conduct all future law enforcement officer decertification hearings in public.¹
2. An order requiring the Council to provide the plaintiff with copies of the sealed minutes of decertification hearings relating to two specific police officers;

¹The court uses the short-hand phrase "decertification hearing" to apply to all Council hearings regarding the possible suspension or revocation of a regulated law enforcement officer's certification pursuant to RSA 106-L:5:V and N.H. Admin. Rules 402.02. This includes probable cause hearings, informal conferences, and final hearings. The court uses the broader term "decertification proceeding" to apply to both hearings before the Council and investigations by Council staff.

3. An order requiring the Council to provide the plaintiff with copies of documents Council staff received, reviewed, relied on or created in connection with one of the two decertification proceedings.

For the reasons set forth below, the court enters the following order:

1. The court rejects the plaintiff's argument that all future decertification hearings must be held in public. However, the court also finds that the Council's unwritten policy of allowing the respondent officer to unilaterally decide that a hearing will be non-public violates RSA 91-A:3. Therefore, the court issues the following narrowly tailored injunction:

The Council is permanently enjoined from holding non-public decertification hearings, and from sealing the minutes of non-public decertification hearings, if the only reason for prohibiting public access is that the respondent in the decertification hearing has so requested.

However, the Council may consider a respondent's request, along with all of the other relevant facts and factors, in making an independent, case-specific and fact-based determination to hold a decertification hearing in non-public session. The Council may also consider a respondent's request as one factor in the determination of whether the minutes of a sealed decertification hearing should be sealed.

Nothing in this injunction prohibits the Council from adopting a rule, pursuant to RSA 541-A, that would make the probable cause phase of a decertification hearing non-public.

2. With respect to the sealed minutes described on page 16 of this order, and with respect to all related documents that have been actually requested by the plaintiffs but withheld (or redacted), as described on page 14 of this order, the Council shall, within 30 days, either:

(a) unseal the minutes and documents, and provide copies to the plaintiff, except to the extent that any social security numbers, dates of birth, personal phone numbers and home addresses may be redacted, or in the alternative,

(b) submit the minutes and contested documents to the court *in camera* review pursuant to Orford Teachers Association v. Watson, 121 N.H. 118, 122 (1981).

If the Council opts for an *in camera* review, it may file a memorandum of law in support of its position that the minutes and/or records should remain sealed in whole or in part.

Pursuant to Superior Court Rule 13B, any portions of the memorandum that describes the factual substance of contested minutes and/or records may be sealed. However: (a) a motion to seal must be filed, (b) if the Council believes that it is necessary for some of the sealed portions of the memorandum to be reviewed by the court *ex parte*, this should be specifically requested in the motion to seal, and (c) a redacted publicly available version of the memorandum must be filed.

If the Council files a memorandum of law, the plaintiff shall have 30 days to file a responsive memorandum of law. Further memoranda are discouraged but will be allowed on motion.

3. This order is not a final order, because the Council may yet submit minutes or documents for an *in camera* review. This order does, however, resolve the claim for injunctive relief with respect to future non-public hearings.

The issue of attorneys' fees will be addressed at the conclusion of the case.

4. If the Council does not submit documents for *in camera* review within 30 days, the Council shall instead file a notice stating that it has provided plaintiff with the contested minutes and documents.

I. Procedural Posture

Pursuant to RSA 91-A:7, Right To Know petitions may be adjudicated on in an almost summary fashion based on (a) the Complaint, (b) the documents attached to the Complaint, (b) the Answer, and (c) the documents attached to the Answer. As Superior Court Rule 1(a) makes clear, the ordinary rules governing civil actions do not apply to the extent that a statute, like RSA 91-A:7, requires something different.

To be sure, RSA 91-A:7 does not prohibit the court from ordering either discovery or evidentiary hearings when appropriate. However, in this case the parties do not dispute

the salient facts (and the plaintiff is limited to the facts it alleged, and the case that it framed). Therefore, as the Council acknowledged in its Answer, this dispute may be resolved based on the state of the record.

II. Legal Background

The Council is an executive branch council, RSA 106-L:4, that functions as the professional training and licensure authority for police officers and other law enforcement officers described in RSA 106-L:2. With the exception of certain probationary employees, no person may perform the duties of a regulated law enforcement officer without first being certified by the Council.

The Council promulgates standards for certification including standards relating to (a) preparatory training, RSA 106-L:6, I; (b) minimum age, physical fitness and mental fitness, RSA 106-L:6, III, and (c) "citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of their offices." RSA 106-L:6, III. See N.H. Admin. Rules Pol Chapter 300.

The Council is also charged with the responsibility for decertifying law enforcement officers when they either (a) breach the standards set by the Council or (b) are no longer able to meet those standards. RSA 106-L:5, V; N.H. Admin Rules

Pol Chapter 400. An officer who has been decertified, or whose certification has been suspended, "shall not be allowed to work in a capacity that would allow them to exercise the same authority as a certified officer, or that would give the appearance that they have the same authority as a certified officer during the period of suspension or revocation." Pol 402.02(m).

Although most of the grounds for decertification or suspension of certification involve criminal or other serious misconduct, some do not. See, e.g., Pol 402.02(a)(6)(a) (marijuana use regardless of its legality under state law)²; 402.02(a)(7) (severe mental illness); 402.02(a)(12) (pleas of not guilty to criminal offenses that are resolved by diversion in lieu of a determination of guilt or innocence); 402.02(d) (suicide attempts, requiring suspension of certification until evaluation by a psychologist).

The Council's organic statute, RSA Chapter 106-L, does not limit the procedure the Council must follow in conducting decertification hearings. There is nothing in Chapter 106-L

²Pol 402.02(6)(a) categorically forbids "marijuana use." RSA Chapter 126-X allows for medical marijuana use. The laws of several other States, including every neighboring state, allow recreational marijuana use by persons present within their borders.

that specifically requires, forbids or even discusses when such hearings may be closed to the public.

RSA 106-L:5, V empowers the Council to promulgate its own procedural rules pursuant to the Administrative Procedure Act, RSA Chapter 541-A. Using this authority the Council has adopted a lengthy set of rules governing all hearings before the Council including decertification hearings. See Pol Chapter 200. However, those Rules do not address the criteria that the Council must or may consider prior to a conducting a non-public decertification hearing. The Rules say only that all oral proceedings shall be recorded and that "any person entitled by RSA 91-A" may request a copy of the recording. Pol 205.04(c). There is likewise no statute or administrative rule that specifically addresses the confidentiality *vel non* of any of the Council's records.

Thus, the only controlling statute regarding public access to the Council's decertification hearings and records is the Right To Know Act, RSA Chapter 91-A. Relying on the general language RSA 91-A:3, II and III and RSA 91-A:5, IV, the Council has adopted an unwritten, unpublished, yet hard and fast policy that, upon receipt of a request from an officer charged with misconduct or other grounds for decertification: (a) a decertification hearing will be automatically held in non-public session, (b) the minutes of the proceeding will be forever

sealed, and (c) most of the underlying documents will be kept confidential. See Answer, ¶41 ("[The Council] has always treated discipline hearings as non-public at the option of the officer, and withheld most records related to officer discipline as personnel matters, because of concerns of privacy and confidentiality, and to protect the integrity of its own work"); Id., ¶9 ("The PSTC admits that it routinely permits police officers to elect whether to proceed with their disciplinary hearings in public or non-public session."); and Affidavit of David Parenteau, Bureau Commander for the Council and former Interim Director of the Council, attached as Exhibit 1 to the Council's Answer, ¶¶ 35-26 ("With respect to discipline hearings, the Council's practice has historically been to allow the officer to decide whether to proceed in public or non-public session. We provide that option to the officer because, almost always, the reasons for suspending or revoking a certification involve matters that, if discussed in public, would likely affect the officer's reputation adversely.").

Although the existence of this unwritten policy is conceded by the Attorney General and by the Council's Bureau Commander and former Interim Director, the Council nonetheless warns respondents in decertification proceedings that:

If you choose to have your hearing held in non-public session, please be advised that if the council issues an order finding cause to take action on your

certification, they will consider whether the testimony offered at the hearing will remain sealed. The authority to hear cases involving public employees in non-public session is contained in RSA 91-A:3, III and is not automatic.

See Notice of Hearing (Complaint Ex. 2). This boilerplate seemingly acknowledges that it is the Council's statutory responsibility, rather than the officer's personal and plenary prerogative, to decide whether, and to what extent, a decertification proceeding may be sealed.

The general statutes upon which the Council's policy is grounded provide in pertinent part as follows:

RSA 91-A:3, II

Only the following matters shall be considered or acted upon in nonpublic session:

(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.

* * *

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.

RSA 91-A:,III

Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. . . . Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions. . . .

RSA 91-A:5, IV

The following governmental records are exempted from the provisions of this chapter:

IV. 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. Without 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.

III. Factual Background

This case involves two separate decertification proceedings against two separate police officers from different departments.

A. The Manchester Officer's Case

One case involves a former Manchester officer. In the Manchester officer's case, the Council provided the plaintiff with three pertinent documents:

(a) A Notice dated April 13, 2020 which stated that the Council reviewed information relating to the officer for the purpose of making a preliminary determination of probable cause to hold a decertification hearing.³ The Notice went on to advise the officer that a summary of the facts was presented to the Council. Those facts revealed that the officer was terminated by the Manchester Police Department but that the termination was later reversed by an arbitration decision. The Notice concluded by informing the officer that the Council would hold a hearing to determine whether there was probable cause to hold a final decertification hearing.

(b) A Notice dated August 10, 2020 advising the officer that the Council would hold a decertification hearing.⁴ The

³The Council reviewed this information during a non-public hearing. Parenteau Affidavit, ¶¶58, 59. The public minutes do not disclose the officer's name, department, rank or status and do not describe the facts relating to his case. See, Council Minutes of March 24, 2020, p. 10 (attached to Parenteau Affidavit as Ex. A). The non-public minutes were sealed. Id.

⁴On July 28, 2020 the Council had determined in public session that a probable cause hearing was unnecessary and that case could proceed to a final decertification hearing. See Council Minutes of 7/28/2020 at p. 6 (attached to Parenteau Affidavit as Ex. B). The minutes do not disclose the officer's name, department or rank. The substance of the accusations

Notice stated that the Council learned the officer had been terminated from the Manchester Police Department because he committed acts (plural) of criminal mischief while conducting searches of apartments. According to the Notice, the Manchester Police Department also discovered that the officer made racist remarks in text conversations while on duty and using a Department issued cell phone. The Notice went on to state that the Council learned that the officer's termination was later changed to a thirty day suspension as a result of an arbitration decision. The Notice advised the officer that his certification was suspended pending the decertification hearing.

(c) A letter from the officer's attorney dated October 22, 2020. The letter informed the Council that, due to his "illegal" termination, the officer had been unable to complete the firearms training necessary to maintain his certification. The letter also informed the Council that the officer would agree to remain suspended until such time as he might satisfy this training requirement. The officer's attorney opined that, because the officer agreed to an indefinite suspension, albeit

against the officer are not mentioned in the minutes and, presumably, were not discussed at the public hearing. Rather, the Council discussed only a procedural anomaly resulting from the officer's termination and subsequent reinstatement, as it related to the need for a probable cause hearing under the Council's procedural rules. The public discussion related solely to the Council's interpretation of its rules.

with the right to later seek reinstatement, there was no need for any further hearing. The officer's attorney requested the Counsel to consider this possibility in a non-public session.

The Council held the following hearings in the Manchester officer's case:

(a) A March 24, 2020 non-public hearing, described above in footnote 3.

(b) A July 28, 2020 public hearing, described above in footnote 4.

(c) A September 11, 2020, non-public "informal conference." An informal conference provides the respondent officer and the Council the opportunity to discuss both the prospects for settlement and the scope of the decertification hearing if settlement proves elusive. See Pol 205.04. The Manchester officer asked for the conference to be conducted in non-public session and to have the transcript sealed. The Council agreed to do so. The Council's Rules governing informal settlement conferences say only that (a) the conference must be recorded verbatim and (b) any person entitled by RSA 91-A thereto may obtain a copy of the audio. Id.

(d) An October 27, 2020 public hearing. Plaintiff sent one of its reporters to the hearing (via Zoom due to the pandemic). The hearing had been scheduled to serve as the final decertification hearing. However, after reading portions of the

officer's attorney's letter, the Council voted to suspend the decertification proceeding. In short, this meant that the officer's certification would remain indefinitely suspended due to the failure to complete firearms training. The officer is free to apply for reinstatement if he completes training.

Plaintiff sent the Council as 91-A request for the documents that had been reviewed and created by the Council and Council staff in connection with the Manchester Officer's case. The Council provided plaintiff with the three documents described above. The Council withheld all of the other documents from the proceeding citing RSA 91-A:5.

Later—after this lawsuit was filed—the Council provided the plaintiff with what it describes as "most of the records previously withheld." Parenteau Affidavit, ¶107. The Council opined that additional disclosure was warranted because (a) the Council's proceedings had concluded, and (b) other governmental agencies had already disclosed "a significant amount of records." *Id.*

B. The Ossipee/Loudon Officer's Case

At its October 27, 2020 hearing the Council also held an unrelated decertification hearing regarding a different police officer. The Complaint alleges that the officer worked for the Ossipee Police Department. However, the Council's Public Minutes state that the officer was employed by the Loudon Police

Department at the time of the hearing. See Council Minutes of 10/27/2020 (Parenteau Exhibit B). The Court infers from the record that the Officer was earlier employed by the Ossipee Police Department and that the decertification proceeding related to matters that occurred during his tenure at Ossipee.

The officer appeared before the Council for a final decertification hearing. At the officer's request, and over the plaintiff's oral objection, the Council went into non-public session and later sealed the minutes. The Council then deliberated briefly in public session.

The public minutes indicate that (a) a civil stalking petition against the officer had been filed but later dismissed, (b) the civil talking petition was no longer a ground for decertification, (c) the only remaining ground was a "SPOTS violation",⁵ and (d) the officer was not criminally charged in connection with the SPOTS violation and the police department did not believe he had engaged in any criminal conduct. The Council unanimously voted to suspend the officer's certification for thirty days.

⁵"SPOTS" is an acronym for the State Police On-Line Telecommunication System. This is a database used by law enforcement. A "SPOTS violation" likely refers to the unauthorized use of SPOTS for personal or other unapproved reasons.

IV. The Relief Requested In The Complaint

As the Court construes the Complaint, the plaintiff is seeking the following:

-A permanent injunction requiring the Council to hold all future decertification hearings in public session; and

-A copy of the sealed minutes of the non-public portion of the March 24, 2020 Council meeting pertaining to the Manchester officer;

-A copy of the sealed audio or transcript of the September 11, 2020 informal conference pertaining to the Manchester officer;

-The underlying records relating to the Manchester Officer that were received by or created by the Council; and

-A copy of the sealed transcript of the non-public portion of the October 27, 2020 Council meeting pertaining to the Ossipee/Loudon officer; and

-Attorneys' fees and costs.

V. Legal Analysis

A. Guiding Principles

As originally enacted in 1784, Part 1, Article 8 of the New Hampshire Constitution consisted of a single sentence that eloquently describes the social compact that forms the cornerstone all just societies:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them.

In 1976, Article 8 was amended by the addition of a second and third sentence.

Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

If every word in our Constitution is important, none is more important than the conjunctive adverb "therefore" in the 1976 Amendment to Article 8. It is that word—"therefore"—that links the right to access government proceedings and records to the very purpose of government itself.

The Right To Know Act, RSA Chapter 91-A, provides the prose by which this Constitutional right is enforced. See, Murray v. New Hampshire Division of State Police, 154 N.H. 579, 581 (2006) ("[T]he Right-to-Know Law helps further our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted."); Lambert v. Belknap County Convention, 157 N.H. 375, 378 (2008).

The preamble to the statute says as much:

Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter 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.

Accordingly, the New Hampshire Supreme Court "resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information" and "construe[s] provisions favoring disclosure broadly, while construing exemptions narrowly." Murray, 154 N.H. at 581.

At the same time, privacy is a human right that also finds protection in the New Hampshire Constitution, see Part 1, Articles 2-b, and 19, as well as state common law. The right of reasonable access to government proceedings and records must make some accommodation for the justifiable privacy and reputational interests of identifiable individuals. This is especially true for government employees and licensed professionals who may be required to share otherwise off-limits details of their private lives with their employers or regulators. This accommodation is spelled out in RSA 91-A:3 and 5.

With these thoughts in mind, the court turns to the specific questions presented.

B. The Request For A Permanent Injunction Requiring All Future Decertification Hearings To Be Public

Introduction: The court rejects the plaintiff's overbroad request for an injunction requiring the Council to hold all phases of all future law enforcement officer decertification

hearings in public. As a threshold matter, the adjudication of such a broad and far reaching claim for relief, regarding *future* hearings, requires a more fulsome record than the truncated process the court follows in Right To Know disputes over existing records.

The plaintiff's argument for deciding the issue here and now is grounded on the false supposition that no future case can involve facts warranting a non-public hearing. Plaintiff's rationale is that (a) "police officers have no privacy interest in records implicating the performance official duties," Complaint, ¶36 and (b) the privacy interests of third parties can never matter.

The suggestion that police officers can never have a legitimate privacy interest at stake in a decertification hearing is absurd. No doubt, a police officer's on-the-job conduct is generally a matter of public concern for which there should be a minimal expectation of privacy. The term "officer," lest we forget, means agent, and police officers are literally and figuratively clothed as the public's agents to enforce the public's laws. But that does not mean that the humans who serve as police officers have "no privacy interests" connected to their jobs.

The plaintiff's proposed injunction would not distinguish between cases that are dismissed at the probable cause stage and

cases that progress towards a final hearing or settlement. A police officer clearly has a legitimate interest in avoiding unfounded infamy resulting from bad faith, specious accusations or good faith misunderstandings. Thus, if the Council determines that there is no probable cause, an officer's privacy interest could be at its zenith, and the public interest could be at its nadir.

Further, a police officer's certification may be suspended or revoked for matters other than misconduct. Consider the following hypotheticals:

-An officer suffers from severe depression and takes a medical leave of absence, without doing anything improper on the job. During his leave of absence the officer attempts suicide. The Council's rules require suspension of the officer's certification pending a psychological examination. However, the officer may regain his or her health and later resume work as an exemplary member of his or her department. The privacy interest is palpable. The public interest is minimal.

-An officer, who does nothing wrong on the job, develops an alcohol problem that morphs into abuse of prescription drugs.

-An officer uses medical marijuana as permitted by RSA 126-X.

The plaintiff also gives short shrift to the potential privacy concerns of third parties in future cases. For example,

an intra-departmental case of workplace sexual harassment could simultaneously raise licensure concerns and privacy concerns for the reporting employee.

However, the Council's unwritten rule permitting the officer to unilaterally make a final decertification hearing non-public is contrary to RSA 91-A:3, I and II. Therefore, a more limited injunction is both warranted and supported by the record.

RSA 91-A:3, I(a) provides that "(a)Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II." The council relies on two exemptions in paragraph II, i.e. the exemptions for disciplining public employees, RSA 91-A:3, II(a), and the exemption for matters that would likely adversely affect a person's reputation, RSA 91-A:3, II(c).

The Public Employee Discipline Exception: A public body may hold a non-public hearing to consider "[t]he dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted." RSA 91-A:4, II(a).

The Council argues that decertification proceedings fall within this exception because they involve the "disciplining" of

"public employees". The court disagrees and construes the exemption to apply only to employees of the public body that is holding the hearing. Thus, the court does not believe the exception allows state licensing boards to go into non-public session whenever they consider professional disciplinary charges against licensees who happen to be public employees.

The interpretation of a statute is a question of law.

Dichiara v. Sanborn Regional School District, 165 N.H. 694, 696 (2013); Kenison v. Dubois, 152 N.H. 448, 451 (2005). The court's responsibility is to determine the intent of the legislature as expressed in the words of the statute considered as a whole. Dichiara, 165 N.H. at 696. If possible, the court must give the language used by the Legislature its plain and ordinary meaning. Id.; see also, Petition Of Carrier, 165 N.H. 719, 721 (2013). However, the court does not read statutory phrases and provisions in isolation, but rather "interpret[s] a statute in the context of the overall statutory scheme." State v. Kousounadis, 159 N.H. 413, 423 (2009).

The exception at issue applies to "dismissal," "promotion," "compensation" and "discipline" of a public employee. The first three terms apply to decisions that can only be made by the public employee's employer. The term "discipline" must be read in this context to apply to workplace discipline by an employer. Cf: Home Gas Corp. v. Strafford Fuels, Inc., 130 N.H. 74, 82,

(1987) (discussing the canon of construction known as *noscitur a sociis* (literally "it is known by its associates"), under which the meaning of a "broader term . . . takes on the more specialized character of its neighbors."); State v. Hodgkiss, 132 N.H. 376, 380 (1989) (applying *noscitur a sociis* to construe the terms in a local ordinance).

Putting the Council's own staff to the side, the Council does not employ law enforcement officers. It does not make hiring decisions for the myriad of local police departments, sheriff's offices, and state law enforcement agencies. It does not decide which officers in a department should be promoted or demoted. It does not negotiate compensation. It cannot impose ordinary workplace discipline, such as suspension with or without pay. The Council is a training and licensing authority.

The Council's reliance on the public employee discipline exception is misplaced.

The Reputation Exception: A public body may hold a non-public meeting to consider "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting." RSA 91-A:3,II(c). The Council argues that this exception applies to every decertification hearing because the grounds for decertification are such that an officer's reputation may be blemished (or

worse) by public disclosure. The court disagrees with the Council's broad and promiscuous interpretation of the exception.

In construing our Right To Know Act, the New Hampshire Supreme Court looks to case law construing similar provisions in other jurisdictions. See, e.g., Lambert v. Belknap County Convention, 157 N.H. 375, 379(2008) (discussing the Right To Know Act and noting that, "[w]e also look to the decisions of other jurisdictions, since other similar acts, because they are *in pari materia*, are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved."); Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 N.H. 540, 546 (1997).

This court finds the opinion of the Wisconsin Supreme Court in Wisconsin Newspress, Inc. v. School District of Sheboygan Falls, 546 N.W.2d 143, 146 (1996) helpful. Like this case, Wisconsin Newspress involved a statute requiring public bodies to have open hearings unless a specific statutory exception allows for a non-public hearing. One exception at issue in Wisconsin Newspress allowed for non-public hearings to consider matters "which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person." The issue before the court was whether records used in a hearing held in non-public session pursuant to this exception could be accessed by the public. Relying on earlier caselaw, the court

held that the exception "requires a balancing of the interest of the public to be informed on public matters against the harm to reputations which would likely result from permitting inspection." Wisconsin Newspress, Inc. 546 N.W. 2d 143.

Without such a balancing test, any information that might mar a person's reputation would suffice to close a hearing from public view. This would be the case regardless of the weight of the public interest and regardless of whether the likely harm to reputation would be defamatory or deserved.

The public interest in police officer decertification hearings, at least when such hearings are grounded on misconduct, is significant. The privacy and reputational interest of the respondent in such a proceeding is less pronounced after a finding of probable cause than before such a finding is made. Therefore, non-public final decertification hearings should be the exception rather than the rule.

In any event, the determination is one that must be made on the facts of the specific case. The exception for reputational harm does not grant the respondent police officer plenary authority to make the hearing non-public.

B. The Request For Copies Of The Sealed Minutes

RSA 91-A:3, III requires public bodies to publish public minutes of non-public meetings unless, as applicable and pertinent to this case, "it is determined that divulgence of the

information likely would affect adversely the reputation of any person other than a member of the public body itself[.]" The Council maintains that the sealed minutes at issue in this case fall within this exception.

For the reasons set forth above, in connection with the court's analysis of the same wording as it applies to the decision to go into a non-public meeting, the court construes the exception to require a balancing of the public interest against the likely reputational harm. Accordingly, the court concludes that RSA 91-A:3, III does not allow the Council to seal the minutes of its non-public decertification hearings just because the respondent officer makes such a request.

If, exercising its independent judgment, the Council applies the required balancing test and decides to unseal the minutes, then those minutes must be provided to the plaintiff.

Alternatively, if the Council does not provide the minutes to the plaintiff within 30 days, then the minutes shall be submitted to this Court for an *in camera* review. See Orford Teachers Association v. Watson, 121 N.H. 118, 122 (1981) (holding that "[w]hen there is a question whether minutes are exempt from public access, the trial judge should conduct an *in camera* review.").

C. The Request For Records

The Council has provided the Court with an affidavit stating that "most" of the contested records have been provided to the plaintiff. However, the nature of the remaining records has not been described in a manner that allows the court to determine whether they fall within the exceptions to public disclosure set forth in RSA 91-A:5.

It is possible that the court's analysis of the other issues in this case might moot any remaining dispute, in which case the remaining records should be provided to the plaintiff.

Alternatively, the records should be submitted to the court for an *in camera* review. In undertaking an *in camera* review, the court will act with the understanding that the Council no longer believes the records may be withheld on the grounds that there is an on-going investigation or proceeding. Therefore, the court will apply the balancing test required by the Supreme Court's recent decision in Union Leader Corporation v. Town of Salem, 13 N.H. 345, 357 (2020).

June 10, 2021



Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/10/2021