

Court Expands Public Employers' Disclosure Obligations under RSA 91-A by Narrowing "Internal Personnel Practices" Exemption and Requiring Balancing Analysis

On May 29, 2020, the New Hampshire Supreme Court issued two decisions – *Seacoast Newspapers, Inc. v. City of Portsmouth* and *Union Leader Corp. v. Town of Salem* – that substantially broaden public entities' obligation to disclose documentation related to employee investigations and related disciplinary documentation in response to RSA 91-A requests. Specifically, taken together, these two decisions overturned *Union Leader Corp. v. Fenniman*, a 1993 decision, in which the Court had determined that RSA 91-A, IV provided a blanket exemption for all "internal personnel practices" and that the phrase encompassed all records documenting a public employer's internal discipline of an employee, including investigations of alleged employee misconduct.

In *Seacoast Newspapers, Inc.*, the Court dramatically narrowed the scope of the "internal personnel practices" exemption by holding that it excludes only "records pertaining to the internal rules and practices governing an agency's operations and employee relations" from disclosure, **not** information concerning the performance or conduct of a particular employee. Examples of records that could potentially be withheld as an "internal personnel practice" under the *Seacoast Newspaper* interpretation include: "personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like"; essentially, the type of information that might be contained in an employee handbook or personnel manual, or in standard operating procedures. The Court explained that this exemption exists to relieve public employers of the burden of assembling and maintaining records in which the public does not have a strong interest.

In *Town of Salem*, the Court went a step further and overturned *Fenniman*'s blanket exemption for "internal personnel practices" records. Instead, consistent with the other RSA 91-A exemptions, the Court held that a public entity must apply a "balancing test" to determine whether an internal personnel practices record (as that term has been narrowed by the *Seacoast Newspaper* decision) can be withheld. The required balancing test is the same test that is used for analyzing whether a record that includes "confidential, commercial, or financial information" can be withheld under RSA 91-A, IV. Specifically, in order to determine whether a record can be withheld, a public entity must:

1. Evaluate whether there is a privacy interest at stake that would be invaded by the disclosure.
2. Assess the public's interest in disclosure.
3. Balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.

As a result of these cases, public entities must assume that there is now a greater likelihood that personnel file information and investigations of alleged misconduct may ultimately be subject to disclosure. Public entities should consider reviewing their policies and procedures regarding the content and maintenance of personnel files, as well as their procedures for conducting employee investigations. Importantly, local governments will want to make sure that their investigation procedures and processes for selecting investigators are geared to producing thorough and thoughtful reports capable of withstanding public and media scrutiny.

Public employers that receive 91-A requests for personnel investigations and related employee discipline documentation will need to carefully apply the balancing test to determine whether there is a valid basis to withhold the record in whole or in part. Public employers would be wise to adopt Right-to-Know policies and procedures that both ensure timely responses to requests, and also provide sufficient time for review internally, and likely, by counsel. The **Drummond Woodsum Labor and Employment Group** and **Municipal Law Group** are available to assist with effective policy drafting and/or procedure review.

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