STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

DEB PAUL

v.

TOWN OF LONDONDERRY

218-2023-CV-00569

FINAL ORDER

(To Be Sealed Pending An Appeal Or The Expiration Of The Time In Which To File An Appeal)

Plaintiff Deb Paul filed this action under the Right To Know Act, RSA Chapter 91-A, in order to obtain an email and email attachment in the Town of Londonderry's possession. The email was drafted and sent by the Town Manger to the Chair of the Town Council. The attachment, described in more detail below, was written by the Town Manager and addressed to the Chair of the Town Council.

The Town agrees that these documents are "governmental records" within the meaning of RSA 91-A:1-a, but claims that they may be withheld from the public by virtue of RSA 91-A:5, IV because:

(a) they "pertain to internal personnel practices" and are otherwise "confidential"; and

(b) applying the balancing test required by Union Leader Corporation v. Town Of Salem, 173 N.H. 345, 357 (2020) and

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Rockingham Superior Court
10/26/2023 10:48 AM

Professional Firefighters Of New Hampshire v. Local Government Center, Inc., 159 N.H. 699, 707 (2010) (Professional Firefighters I), the documents should be forever sealed from public view.

The court not only disagrees with the Town (and that is enough), but finds the Town's position to be objectively unreasonable. Therefore, the court grants JUDGMENT TO PLAINTIFF DEB PAUL. The Town is hereby ORDERED to:

(A) Provide Paul with the requested documents within 35 days of the clerk's notice of this order. This deadline is designed to allow the Town to file a timely notice of appeal. If a motion for reconsideration is filed, the deadline will be stayed pending the determination of the motion. If a notice of appeal is filed, this order will be automatically stayed pending the resolution of the appeal.

(B) Pay Paul's attorneys' fees and costs in connection with this matter because (a) this lawsuit was necessary to enforce compliance with RSA Chapter 91-A, and (b)the Town should have known that its position was unlawful. RSA 91-A:8, I.

I. Procedural Posture

Because this is a Right To Know Act case, upon the filing of the complaint the clerk scheduled an expedited final hearing. The parties then agreed that the case should be resolved based solely on (a) the court's *in camera* review of the requested

governmental records and (b) the parties' oral and written legal arguments. The court approved this procedure.

The court decides this case based on the record established by the parties and pursuant to the procedure chosen by the parties. If there are additional, salient facts that neither party made part of the record, those facts are unknown to the court. This is important because the court must consider the entire record--but only the record--in balancing privacy versus the public interest.

The record in this case was complete as of June 20, 2023. The court apologizes for the substantial delay in issuing this order.

II. Facts

On February 14, 2023, the Town Manager for the Town of Londonderry, Michael J. Malaguti, filed a frivolous complaint against plaintiff Deb Paul under the Town's Policy Against Harassment. Paul was a member of the Town Council at the time.

The Town's Policy Against Harassment is designed to ensure "a work environment that is free of harassment based on sex, race, color, national origin, religion, age, military or veteran status, physical or mental disability, marital status, pregnancy, sexual orientation, gender identity and other characteristic protected by applicable law." Policy, §1.

Among other things, the Policy prohibits "offensive, threatening or otherwise unwelcome comments or conduct based on sex . . . [or] gender identity." Policy, §III. Such prohibited conduct may take the form of "written or spoken disrespectful or derogatory terms about sex; slurs and epithets; unwelcome jokes; insults; . . . and any other unwelcome conduct or comments directed a person or group because of a particular protected characteristic."

Malaguti wrote his harassment complaint against Councilor Paul on his official Town stationary. He then filed his complaint by sending it via email to the Chairman of the Town Council, John Farrell.

Malaguti's complaint was grounded solely on his objection to statements Councilor Paul made at a public Town Council meeting on February 6,2023. Essentially, Councilor Paul opined that a recent staff reorganization created an inherent "conflict of interest" by combining the roles of Planning Director and Director of Economic Development. In Paul's view, the roles are in tension because the Economic Development director is charged with enticing businesses to move to or expand their presence in the town, while the Planning director must ensure that all proposed plans conform to the Town's land use restrictions. This means that the Planning director must sometimes tell business owners "no."

Councilor Paul's comments (which are reproduced below) did not contain any *ad hominem* attacks on the individual who served as the Planner Director/Development Director. Paul did not reference this individual by name. Paul did not complain about any specific conduct by the individual. She did not cite anything the individual ever said. She did not mention any specific proposed development or plan. She said nothing about any individual's honesty, credibility or personal integrity. Councilor Paul spoke only to the question of whether it is sound public policy to combine both roles in a single office.

That said, according to Malaguti's complaint, "Councilor Paul appeared to be pointing at the Assistant Town Manager [i.e., the Town Planner/Development Director] during some of her comments." However, the gist of Councilor Paul's comments, as recounted in Malaguti's complaint, was that the combined roles were in conflict, regardless of the identity of the individual office holder.

Malaguti hinged his complaint on Paul's turn of phrase:

COUNCILOR PAUL:	. . . I believe that's conflict of interest with the Planner being in economic development. You have somebody **seducing businesses** to come here and then looking at their plans. That's not a conflict of interest? That's not a setup for a law firm, a lawsuit? No.
CHAIRMAN FARRELL	Ok, we don't seduce anybody.

COUNCILOR PAUL: Well, entice, intrigue, convince, use a word.

CHARMAN FARRELL: We follow the guidelines and follow the laws of the State of New Hampshire.

COUNCILOR PAUL: It’s still a conflict for me.

Harassment Complaint, p. 1 (emphasis added)

Malaguti made two claims in his harassment complaint. First, he insisted that Councilor Paul’s reference to “**seducing businesses**” amounted to sexual harassment. Malaguti argued that the phrase was “abhorrent” because (a) the current Town Planner/Development director is female, (b) the term has “sexual overtones” and “refer[s] directly to sexual encounters,” and (c) Councilor Paul had previously raised similar concerns regarding the combined role of Town Planner/Development Director with Malaguti, who is male, without using any form of the word “seduce.” Harassment Complaint, p. 2.

Second, Malaguti claimed that the language quoted above “publicly disparage[ed] one of my subordinates by suggesting she lacks integrity.” Id.

III. Analysis

(A) The Governmental Records At Issue

Paul brought this action to obtain a copy of Malaguti's complaint as well as the email that served as a cover letter.[1] The parties agree that these are governmental records within the meaning of RSA 91-A:1-a, III.

(B) The Parties' Positions

Pursuant to RSA 91-A:4, governmental records must be made available to any member of the public upon demand unless they fall within one of the exemptions established by RSA 91-A:5. The Town claims that Malaguti's complaint, and the associated electronic cover letter, fall within the exemptions in RSA 91-A:5, IV for:

(a) records pertaining to "internal personnel practices," and

(b) records pertaining to "confidential" information.

As the Town concedes, neither of these exemptions is absolute. Both require proof that disclosure of the records will result in an invasion of privacy. RSA 91-A:5, IV; Town of Salem, 173 N.H. at 357; Professional Firefighters I, 159 N.H. at

[1] The Complaint describes the documents as correspondence from the Chair of the Select Board with attachments. Perhaps Malaguti's complaint and cover letter were once included in a letter from the Chair of the Select Board. Regardless, the case is about whether Malaguti's complaint and cover letter are publicly accessible governmental records.

707. Pursuant to controlling caselaw, the court must determine whether the public interest in disclosure is outweighed by (a) individual privacy interest(s) and/or (b) the Town's interest in non-disclosure. Professional Firefighters I, 159 N.H. at 707.

Paul argues that (a) the records do not fall within either of the two claimed exemptions and (b) even if they do, their disclosure will not result in an invasion of privacy.

(C) The Records Do Not Pertain To Internal Personnel Practices

The first exemption claimed by the Town is that for records relating to "internal personnel practices." RSA 91-A:5, IV. In Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325, 337 (2020), the New Hampshire Supreme Court overruled prior caselaw and construed the "internal personnel practices" exemption narrowly to apply only to "records pertaining to internal rules and practices governing an agency's operations and employee relations." Thus, the exemption is limited to "human resources matters" id., at 338, relating to practices and policies "in which the public could not reasonably be expected to have an interest." Id., at 339. Examples of such internal practices are the assignment of parking spaces and the regulation of lunch hours. Id.

In contrast, records pertaining to accusations of wrongdoing by particular employees, and records relating to

employee disciplinary proceedings, do not fall within the "internal personnel practices" exemption. Employee disciplinary records may fall within a different exemption, such as that for personnel files[2], or the catch-all exemption for "other files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV.

The records at issue in this case relate to (frivolous) accusations of wrongdoing on the part of a Town Councilor. Regardless of whether they fall into any other exemption, these records do not pertain to "internal personnel practices" as that term was authoritatively construed in City of Portsmouth, 173 N.H. at 337.

(C) The Court Need Not Determine Whether The Records Contain "Confidential" Information

The Town relies on the exemption for "confidential, commercial or financial," information the disclosure of which would result is an "invasion of privacy." RSA 91-A:5, IV. The determination of whether a record contains "confidential" information is separate and distinct from the question of whether its disclosure would result in an "invasion of privacy." See, Professional Firefighters I, 159 N.H. at 707 ("[W]e must analyze both whether the information sought is confidential,

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[2]Like the exemption for "internal personnel practices," the exemption for "personnel files" only shields records if public disclosure would constitute an invasion of privacy.

commercial, or financial information, and whether disclosure would constitute an invasion of privacy." (internal quotation marks and citation omitted)).

Whether the records are "confidential" within the meaning the statute is a close call. To resolve the issue, the court would need to construe the term "confidential" in a novel context. Usually, the exemption is claimed for information relating to confidential business or financial matters. Indeed, the doctrines of *ejusdem generis* and *noscitur a sociis* would counsel in favor of limiting the scope of the exemption to such matters.[3] However, the New Hampshire Supreme Court has applied the exemption more broadly. See, e.g., Professional Fire Fighters of New Hampshire v. New Hampshire Local Government Center, 163 N.H. 613 (2012)(Professional Firefighters II)

[3]See, e.g., Home Gas Corp. v. Strafford Fuels, Inc., 130 N.H. 74, 82 (1987)(When a text contains a series of terms, some specialized or specific, and others broad or generic, "the broader term takes on the more specialized character of its neighbors" pursuant to the doctrine of *noscitur a sociis.)*; Kurowski v. Town of Chester, 170 N.H. 307, 311 (2017) ("The principle of *ejusdem generis* provides that, when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words.") 11 Williston On Contracts (4th Ed., 2013 Update), §§32:5 (*noscitur a sociis)* and 32:10 (*ejusdem generis*).

(attorney/client communications)[4]; New Hampshire Right To Life v. Director N.H. Charitable Trusts Unit, 169 N.H. 95 (2016) (attorney work product).

RSA 91-A:5, IV includes a separate, catch-all exemption for "other files whose disclosure would constitute invasion of privacy." The court presumes that the exemption for "confidential" records was not intended as a redundant, identical catch-all exemption. Therefore, the term "confidential" must mean something different.

Fortunately, this court need not speculate as to what that something might be. As explained below, the disclosure of the records will not result in an invasion of privacy. This means that the records must be provided to Paul regardless of the meaning of the statutory term "confidential."

(D) Disclosure Of The Records Will Not Result In An Invasion Of Privacy

1. The Governing Standard

In Professional Firefighters I, 159 N.H. at 707, the Supreme Court clarified how trial courts should proceed in determining whether disclosure will result in an invasion of privacy:

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[4]The Legislature has since added a separate, blanket exemption for "records protected under the attorney-client privilege or the attorney work product doctrine." RSA 91-A:5, XII (added by 2021 N.H. Laws 163:2).

> When considering whether disclosure of public records constitutes an invasion of privacy under RSA 91–A:5, IV, we engage in a three-step analysis. First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Second, we assess the public's interest in disclosure. Third, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. If no privacy interest is at stake, then the Right–to–Know Law mandates disclosure. Further, whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.

2. Application Of The Governing Standard

An employee who has been subjected to unwanted sexual advances, or who has been harassed, teased, or bullied because of their sex or gender identity, or who has been forced to work in a sexually charged, hostile environment, may have a strong privacy interest in keeping their report of sexual harassment private. Public disclosure could cause embarrassment in many cases and extreme emotional distress in some cases. Some reporting employees would find it difficult to continue to work if their colleagues knew of their allegations of abuse. Others might legitimately fear ostracism, retaliation and anger from co-workers. Thus, in many cases the public disclosure of an employee's report of sexual harassment could well result in an invasion of privacy.

But this case different. This case involves a frivolous complaint of sexual harassment, brought in apparent bad faith.

The complaint was brought by the highest administrative officer of a town. He brought the complaint against an elected official to have her censured for what she said at an on-the-record, public hearing. The views she expressed, and the language that she used, was constitutionally and statutorily protected political speech. U.S. Constitution, Amendment 1; N.H Constitution, Part 1, Article 22; RSA 98-E:1 (protecting freedom of expression by public employees). Town Manager Malaguti has no cognizable privacy interest at stake and the Town has no discernable interest in non-disclosure.

Make no mistake, Malaguti's accusation of sexual harassment was frivolous. It was the administrative equivalent of a SLAPP suit.[5] As explained above, the Town's Policy forbids sexual harassment by means of "offensive, threatening or otherwise unwelcome comments or conduct based on sex . . . [or] gender identity," Policy Section III. Thus, the policy prohibits, *inter alia,* what is known as the 'hostile work environment' variant of workplace sexual discrimination. See, RSA 354-A:7, V(c) (Prohibiting sex discrimination in the workplace by "...

[5]"SLAPP" is an awkward acronym that refers to Strategic Lawsuits Against Public Participation. A SLAPP suit is a lawsuit filed for the purpose of silencing or punishing speech protected by the First Amendment that is critical of person or entity filing the SLAPP suit. A majority of states (but not New Hampshire) have enacted anti-SLAPP suit statutes that allow for dismissal at the outset of a case and, in some cases, provide for fee shifting.

creating an intimidating, hostile or offensive work environment."); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986) (recognizing hostile work environment claims under Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. §200e *et seq.*).

Generally, to be actionable as sexual harassment under under the language in the Town's Policy, a co-worker's conduct must be "sufficiently severe or pervasive" to "alter the conditions of . . . employment and create an abusive working environment." Meritor, 477 U.S. at 67 (discussing analogous federal law). Thus, the "mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment[.]" Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (construing the federal statute; internal citations and quotation marks omitted, formatting altered). To rise to the level of sexual harassment, a co-worker's speech or conduct must be objectively hostile or abusive in the sense that a reasonable person would find it so. Id.

Councilor Paul did not even use the proverbial, non-actionable "single epitaph." She used a word, often used in polite society in a context devoid of any sexual connotation. This word—"seducing," a variation of the word "seduce"--has a commonly understood secondary meaning that has nothing to do

with either sex or romance. Thus, for example, the second definition of the word "seduce" in the Cambridge Dictionary (online) is as follows:

> to persuade or cause someone to do something that they would not usually consider doing by being very attractive and difficult to refuse:
>
> > **I wouldn't normally stay in a hotel like this, but I was seduced by the fabulous location.**
> >
> > **They were seduced into buying the washing machine by the offer of a free flight.**

(emphasis added); See also, The American Heritage Dictionary of the English Language (online) (defining "seduce" as "to attract or lead (someone) away from proper behavior or thinking: 'He had been in this way seduced from the wisdom of his cooler judgment.'") (Anthony Trollope)); Collins Online Dictionary ("If something seduces you, it is so attractive that it makes you do something that you would not otherwise do. ***The view of lake and plunging cliffs seduces visitors.***" (emphasis added)); Lenin, V.I *The Question Of Peace (1915) (*"An end to wars, peace among the nations, the cessation of pillaging and violence-such is our ideal, but only bourgeois sophists can **seduce** the masses with this ideal[.]"): Gates, Bill, The Road Ahead (1995) ("Success is a lousy teacher. It **seduces** smart people into thinking they can't lose."); Plimpton, George, "*Maya Angelou, The Art Of Fiction,"* The Partis Review, Fall 1990 (quoting Maya Angelou as saying "Autobiography is awfully **seductive**; it's wonderful[.]").

Indeed, what Malaguti calls "abhorrent" word choice is commonplace in the most stodgy species of writing, judicial opinions. See, e.g.:

-State v. Guyette, 139 N.H. 526, 529 (1995) ("The inferential jump from Robbie's prior intentional injuries to the conclusion that the defendant scalded him on this occasion is **seductive**, but not logically permissible in the absence of evidence connecting the defendant to the prior injuries." (emphasis added));

-Alden v. Maine, 527 U.S. 706, 796, fn. 30 (1999)(Souter, J, dissenting) ("The court's occasional **seduction** by the natural law view should not, however, obscure its basic adherence to the common law approach." (emphasis added));

-Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 623 (1990) ("Authority for that **seductive** standard is not to be found in any of our personal jurisdiction cases." (emphasis added));

-Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California, 454 U.S. 290, 298 (1981) ("It is true that when individuals or corporations speak through committees, they often adopt **seductive** names that may tend to conceal the true identity of the source.") (emphasis added);

-Damiani v. Rhode Island Hospital, 704 F.2d 12, 16 (1st Cir. 1983) (The argument that the sins of the attorney should not be visited on the client is a **seductive** one, but its siren call is overborne by the nature of the adversary system.") (emphasis added);

In this case, Councilor Paul spoke of the Development Director's role in "seducing businesses" to come into the Town or expand their presence. When the Chair of the Town Council said, "we don't seduce," Councilor Paul clarified what she meant by saying "well, entice, intrigue, convince, use a word." Clearly what Paul meant was that the Development Director is charged with bringing more business and development to the Town.

On the record provided by the parties, it is impossible to view Councilor Paul's comments as sexual harassment, or as sexual anything, or as a comment on the gender of the Town Planner/Development Director.

Malaguti's complaint that Councilor Paul attacked the personal integrity of the Town Planner/Development Director is equally specious. By way of analogy, a litigant may seek to disqualify opposing counsel, based on a conflict of interest, without thereby attacking the integrity or character of opposing counsel. In this case, Councilor Paul said no more than that any person who served as the Town Planner/Developer Director

would have two conflicting roles. Regardless of whether this is so, Paul said nothing untoward about any person's integrity.

For the same reasons, disclosure of Malaguti's complaint would not invade the privacy of the Town Planner/Development Director. Malaguti's complaint does not say anything about that individual's personal life. Her job description is a matter of public record.

Finally, the substance of Malaguti's compliant is a matter of public record. Councilor Paul's comments were made in the public session of a public hearing. What she said was recorded. Any individual in the world may obtain a copy of the audio.

Moreover, there is a compelling public interest in the disclosure of Malaguti's sexual harassment complaint. The Town's residents have a right to know how the person they hired to manage the Town's administration does his job. The Town has bestowed considerable authority in Malaguti. It has a legitimate interest in monitoring how he uses or abuses that authority. Likewise, the Town has a keen interest in how its elected officials behave.

By contrast, the Town has only a minimal interest in non-disclosure. Public disclosure of a sexual harassment complaint may chill future complaints. An employee with a good faith claim of sexual harassment may be dissuaded from making a report if they believed it would become a public document. But, as

explained above, in this case the highest ranking administrative officer of a Town made a frivolous complaint against an elected official to punish the elected official's constitutionally protected speech. The disclosure of this compliant should have no chilling effect on future good faith complaints.

In short, the documents that Paul requested must be disclosed.

(E) Attorneys' Fees

RSA 91-A:8, I provides as follows:

> If any public body or public agency or officer, employee, or other official thereof, violates any provisions of this chapter, such public body or public agency 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, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter or if the parties, by agreement, provide that no such fees shall be paid.

The court finds that (a) the Town violated RSA 91-A:4 by failing to allow public access to the public records described above; (b) Paul had to file this lawsuit in order to enforce compliance with RSA 91-A:4, and (c) the Town knew, or certainly should have known, that the records were public. Accordingly, the court awards Paul reasonable attorneys' fees and costs.

Paul is directed to file an itemized request for attorneys' fees and costs within 20 days. The Town will then have 20 days to file any objections.

The court considers this order to be the final order with respect to the resolution of the merits of the case. Any subsequent litigation concerning the amount of attorneys' fees and costs will be collateral.

So ordered.

October 26, 2023

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/26/2023