

June 2, 2025

New Durham Board of Selectmen
Via email only c/o Steven M. Whitley, Esq.

RE: Report of Findings - K. Bernier 5/12/25 Complaint

1. Introduction

On May 12, 2025, Kristyn Bernier filed a “formal complaint” with Rudy Rosiello, identified in Bernier’s complaint as a New Durham selectman. Bernier alleged substantial misconduct by David Swenson, identified in the complaint as the chairman of the New Durham Selectboard (“Board”). On May 14, 2025, Bernier filed a “complaint that was amended . . . for several scri[ve]ner’s errors and to clarify information since obtained germane to this issue.” References to the “Complaint” are to Bernier’s May 14 amended complaint.

On May 27, 2025, on behalf of the Board, Attorney Steven Whitley (“Whitley”) asked me to investigate a discrete aspect of Bernier’s Complaint, specifically paragraph 44.¹ I understood that I had full reign to investigate this matter as I saw fit free of his influence or the Board’s. I further understood that Attorney Whitley as advice counsel would likely advise the Board as to any next steps, following delivery of my findings as investigative counsel. At no point during my investigation did I discern any express or implicit message from Whitley as to a desired outcome.

2. The Complaint

In paragraph 44 of the Complaint, Bernier alleges:

On May 06, 2025, a private resident met with David Swenson to inquire as to why Swenson was refusing to reappoint Peter Varney [as fire chief], going against the wishes of the fire department and community, and potentially putting the safety of the community in jeopardy. David Swenson violated Peter Varney’s confidentiality as an employee, by making numerous statements to this resident in justification of his decision not to reappoint Varney as fire chief. Not only did Swenson violate

¹ Whitley informed me the Board had reviewed the Complaint, considered it in a light favorable to Bernier, and determined the single issue requiring investigation concerned the allegations contained in paragraph 44. I had no involvement in delimiting the matters to be investigated.

Varney's employee confidentiality, but Swenson made numerous false and defamatory² statements, to include:

- a. That Varney had been asked to provide a plan for medical coverage, and that Varney had not done so.*
- b. That there were only a few of the rostered firefighters who were actually active in the department.*
- c. That there was a large faction of the fire department who were not happy with Varney's leadership and did not agree with him being fire chief.*
- d. That there were organizational deficits in the fire department.*
- e. That Varney had not adequately covered the town with regard to medical calls.*
- f. That Varney was not medically certified, and that he wanted a chief to be medically certified.*
- g. Swenson had met with Varney in February for supervision regarding his job performance.*
- h. Varney told Swenson that he wanted to retire.*
- i. That only two or three members had any certifications.*
- j. That Swenson did not believe that the town needed a ladder truck, which had nothing to do with Varney as Chief, since the BOS, Budget Committee and the town residents all voted for the ladder truck, which has been in the town's possession for many years and is not germane to the issue of reappointment. Swenson falsely attributed the ladder truck to Varney in his position as fire chief.*

A close reading of the Complaint reveals two possible references extraneous to paragraph 44 which may reasonably be construed as relating back to the substance of the paragraph 44 allegations: 1) On page 1: "[b]reaching the confidentiality of an employee, specifically Peter Varney, in violation of [Swenson's] oath of office"[:] and 2) at paragraph 46, referring to "[h]is comments to the resident" about medical "credentials[.]" While not part of paragraph 44, I considered these allegations as part of my investigation.

3. Interview with Russell Weldon

While the "private resident" is not identified by name, Bernier identified him as Russell Weldon when asked to do so. I interviewed Weldon on May 29, 2025, for just over an hour. At the outset, I went over my role as investigative counsel and advised Weldon that my firm represents the Town and not him. I stated that while information contained in my report would likely be privileged and confidential in the first instance, the privilege (which belongs to the Town) can be waived, and sometimes is for a variety of reasons. I also referenced the Right to Know law, and concluded my preliminary remarks by stating

² The Town lacks standing to assert a defamation claim on behalf of a Town employee. Therefore, I disregard allegations of defamation in my analysis.

that I cannot promise my report or the information he provides will remain confidential. He indicated he understood and wanted to proceed.

Weldon returned to town around April 1 or 2 for the season and described encountering a “brouhaha” surrounding the reappointment (or non-reappointment) of fire chief Peter Varney.³ Weldon described an abortive effort championed by Swenson and others to upgrade the fire chief position from part-time to full-time at considerable cost to the taxpayers. He drew parallels with what he views as a similar “debacle” that “obliterated” the Police Department. Weldon described it as a “pattern of behavior,” lamenting, “here we go again.”

For this reason, Weldon called Swenson, whom he has known for years. While he did not describe Swenson as a friend, he told me they have an “open relationship” that had not been characterized by any kind of animus.⁴ They agreed to meet at Dunkin Donuts in Alton, which they did around 9:00 a.m. on May 6. Weldon offered his perspective and advice how to “diffuse the groundswell of negativity.” Swenson “decide[d] to tell [him] all this shit regarding Varney[,]” although he “thought nothing of it” at the time, until he “told others—we all know who that is.” He summarized the conversation to Bernier within about a week. Bernier, whom Weldon noted is a “cop” and knows more about these things than him, said: “He can’t say that. That’s privileged information regarding him and an employee.”

Swenson “start[ed] by telling [Weldon] what [Weldon] do[esn’t] know.⁵ Varney wasted money on a ladder truck “we don’t need.”⁶ “Peter’s not doing some kind of training.”⁷ Weldon felt Swenson was “trying to paint” Varney as having received

³ Not wanting to prompt Weldon, I began my questioning by stating I was investigating an allegation that a selectman divulged confidential information about a town employee to a private resident. I asked if he had information about this allegation. Weldon proceeded to provide a lengthy, narrative response in which he supplied Swenson’s name as the subject of the complaint and Bernier’s name as complainant.

⁴ Weldon stated: “It was not my intent to be here. I just wanted to get the train back on track.” He elaborated that he had had a “good relationship with” Swenson and didn’t “want to throw him under the bus” or “throw him out” of office. He did not know Bernier would include Weldon’s information in the Complaint and had not seen a copy of the Complaint as of our meeting. Weldon was mildly annoyed Bernier had included the information he conveyed to her, telling me he was not “thrilled,” and “didn’t want to be the face guy.”

⁵ Weldon was not able to articulate this much more specifically. When I pressed him to do so, he stated he had “racked his brain,” and felt that Swenson was “alluding” to things. Except as otherwise noted, Weldon did not provide any specific, articulable information about what Swenson was “alluding” to.

⁶ As Bernier acknowledges in the Complaint, appropriation for and acquisition of the ladder truck was a matter largely outside of Varney’s purview. It cannot accordingly constitute confidential personnel information about Varney, having also been a matter of public discussion before the Board and Town Meeting.

⁷ Later, I asked for clarification on this point, asking if Weldon meant that Swenson had said (or suggested) that Varney was supposed to be doing training that he had not done. Weldon responded affirmatively, but provided no more detail.

“instruction” he did not fulfil. Weldon, being a businessman, asked Swenson if he had made his expectations clear. How often had he met with Varney? Did he “give [him] anything specific” in terms of direction? Swenson did not provide an answer, and Weldon believes Swenson provides minimal direction to Varney.

For several minutes, Weldon provided information I do not regard as relevant to the scope of my inquiry. Looking for more details, I then pressed him about the confidential information Swenson had supposedly shared. The most Weldon could say is the thrust of Swenson’s statements was, “if you knew what I know....” However, he stated this was “not a quote,” and characterized Swenson’s statements as, “you gotta know.... For example....”, leading into a discussion again about the wisdom of acquiring the ladder truck. Weldon volunteered, unprompted, that Swenson was “trying to convince [him],” but “it wasn’t harsh.”

I asked whether Swenson had said anything “specific about Varney’s performance?” He replied, “yes—the issue of training[,]” but he did not elaborate. Weldon stated Swenson was “inferring that Varney wasn’t playing ball, towing the line, doing what was expected.” After listening to Weldon mostly uninterrupted for at least 30 minutes and asking at least 3 times for more specifics about the information Swenson had shared with him, Weldon provided no additional information of relevance to my inquiry. I also asked at the conclusion of our meeting if there was anything we hadn’t discussed that he felt was relevant. There was nothing.⁸

4. Interview with Swenson

I interviewed Swenson on May 30, 2025, and spoke to him for about an hour. I went over the same preliminary information that I provided Weldon about my role, privilege, and that I could provide no assurance of confidentiality. He indicated he understood and wanted to proceed.

I began my questioning by stating I was investigating an allegation that he had divulged confidential information about a town employee to a private resident. I asked if he had information about this allegation. Swenson “categorically den[ied]” doing so, and quickly acknowledged meeting with Weldon in “early May at his request[,]” which he received via text message. While Weldon did not specify why he wanted to meet, Swenson inferred it was probably concerning the fire chief appointment. He told me that while Weldon had initially invited him to his house, they ultimately met at Dunkin Donuts in Alton for between 1 and 1.5 hours, beginning at 9:00 a.m. Swenson entered the meeting aware of Weldon’s “close relationship” with Varney, and his “developing relationship” with Bernier.

⁸ I found Weldon to be personable, engaging, and very credible. He appeared to have a good memory, and verbalized the limits of his memory, lending to his credibility.

Swenson described knowing Weldon for years and talking periodically free of any antagonism. Their recent conversation was also cordial, with Weldon giving his opinions about the police chief and fire chief. He opined there is “no one more qualified than Varney” to be fire chief. Swenson responded that he hopes Varney is a finalist to be interviewed by the Board, and that his “interest is in getting the best public safety system we can for the town.” Swenson recalls some discussion about the “different styles” of the current and former police chiefs—all “broad strokes.”⁹

Weldon advised appointing Varney for one year, to which he replied, “why kick the can down the road?” It should be noted the Board is due to interview finalists for the position soon, which was advertised as a permanent (and likely longer-term) appointment. Swenson denied telling Weldon that he met with Varney in February regarding his job performance, and denied actually meeting with Weldon in February concerning his job performance, but may have mentioned speaking with Varney in February about the department’s needs and Varney’s retirement plans.

Swenson acknowledged discussing Varney’s lack of a medical certification¹⁰ and his desire for the next chief to be medically certified.¹¹ Weldon asserted the chief should not be involved hands-on in providing medical care and therefore this is unnecessary. Swenson acknowledged discussing the sufficiency of department operations, including organizational deficits, the town not being adequately covered for medical calls, that many of the rostered firefighters are not active, and that some department members have concerns about Varney’s leadership. However, Swenson strenuously denied violating applicable confidentiality requirements, noting that “all related information to supposedly illustrate this allegation provided by the complainant was not confidential and has been presented in public at various times over the course of the last 11 years.” He also noted that “people have pressed” the Board in public to justify certain actions vis à vis the fire department, and their response has been, “There are issues we can’t discuss.”¹²

⁹ They also discussed “social stuff, lake stuff,” and the status of an unrelated real estate transaction involving Weldon and the town.

¹⁰ The shorthand used by Bernier, Weldon, and Swenson (“medically certified”) likely refers to state EMS certifications, which include Emergency Medical Responder; Emergency Medical Technician; Advanced Emergency Medical Technician; and Paramedic.

¹¹ Swenson stated this is a preferred qualification in the public job posting/description.

¹² I also found Swenson to be very credible. There are numerous areas where he and Weldon told me almost exactly the same thing about their conversation. Additionally, Swenson acknowledged saying some of the things attributed to him in the Complaint, which I found to reflect well on his credibility.

5. Analysis

Selectmen are subject to removal from office for violating their oaths of office. The only conceivable basis to investigate Swenson for such is set forth in RSA 42:1-a, which provides:

[I]t shall be considered a violation to divulge to the public any information which that officer learned by virtue of his official position, or in the course of his official duties, if:

(a) A public body properly voted to withhold that information from the public by a vote of $\frac{2}{3}$, as required by RSA 91-A:3, III, and if divulgence of such information would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or would render proposed municipal action ineffective; or

(b) The officer knew or reasonably should have known that the information was exempt from disclosure pursuant to RSA 91-A:5, and that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective.

There is no allegation that would support Swenson's violation of paragraph (a), even if the Complaint is taken as entirely true. Thus, I consider whether he violated paragraph (b) in the course of his May 6, 2025 discussion with Weldon. Only if I determine that the disclosed information was both exempt from disclosure under RSA 91-A and that its divulgence would invade Varney's privacy or adversely affect Varney's reputation would it be necessary to consider whether Swenson "knew or should have known this." Put another way, if the information disclosed or discussed would be releasable under RSA 91-A, its disclosure cannot be a violation of paragraph (b).

Taken together, my interviews of Swenson and Weldon establish the two had a conversation requested by Weldon in which Weldon pressed Swenson about 1) Fire Chief Peter Varney; 2) the reappointment process; and 3) to justify certain decisions and actions made by the Board. My investigation also established that the conversation was fairly high-level, steering well clear of topics such as discipline, performance evaluations, or other material or information that would be found in Varney's personnel file. The information they discussed falls into three categories:

(1) Certification or Training Information:

- a. Varney's lack of a medical certification and Swenson's desire for the next chief to be medically certified.

- b. "Peter's not doing some kind of training."¹³

(2) Operational Concerns:

- a. Organizational deficits and the town not being adequately covered for medical calls.
- b. That many of the rostered firefighters are not active.
- c. That some department members have concerns about Varney's leadership.

(3) Allusory Language:

- a. Discussing "what [Weldon] do[esn't] know.
- b. "Trying to paint" Varney as having received "instruction" he did not fulfil.
- c. "If you knew what I know...."
- d. There are issues we can't discuss."

None of the certification or training information discussed is exempt from disclosure under RSA 91-A. Training and certification¹⁴ records are regularly disclosed, as there is no measurable employee privacy interest in these records. However, there is a significant public interest in understanding the qualifications and readiness of public officials to perform their important work.¹⁵ Similarly, whether Varney is or is not doing required training could be learned by anyone submitting a Right to Know request for his training records.

I next address Weldon's description of Swenson's use of language allegedly referring—by allusion—to prohibited topics.¹⁶ None of the statements attributed to

¹³ To the extent this statement could be interpreted not as a simple factual assertion about the status of Varney's training but rather a suggestion that he is irresponsible or defiant as an employee, it is similar to statements Swenson made about Fire Department operations. My analysis of these statements would apply to this alternate interpretation of this statement.

¹⁴ Bernier herself acknowledges this, but not as to Varney. See Complaint at ¶ 43.

¹⁵ See *Barvick v. Cisneros*, 941 F. Supp. 1015, 1020 n.4 (D. Kan. 1996) (noting that agency "released information pertaining to the successful candidates' educational and professional qualifications, including letters of commendation and awards, as well as their prior work history, including federal positions, grades, salaries, and duty stations"); *Associated Gen. Contractors v. EPA*, 488 F. Supp. 861, 863 (D. Nev. 1980) (discussing education, former employment, academic achievements, and employee qualifications).

¹⁶ There is some overlap in Weldon and Swenson's account of these statements, although these parties diverge very slightly in how they characterize the statements and the apparent intent behind them.

Swenson comes close to divulging information exempt from disclosure under the Right to Know law. On the one hand (most favorable to the complainant), they are “dog whistle” statements, but even then they are almost entirely devoid of factual content. On the other hand (most favorable to Swenson), they evidence a public official, accountable to his constituents (including Weldon), politely declining Weldon’s invitation to share more information than he should.¹⁷ Either way, there is no objective reading of these statements that amounts to the disclosure of information exempt under the Right to Know law.

Lastly, I address the statements Swenson made about the operation of the Fire Department. I begin by appraising the relative importance of the fire chief position within the Town’s government. I do so because the purpose of the Right to Know law is to ensure the government’s activities are open to the sharp eye of public scrutiny. Lamy v. N.H. Pub. Utils. Comm’n, 152 N.H. 106, 113 (2005). Accordingly, the public interest in information generally increases, and the employee’s corresponding privacy interest decreases, as the employee ascends to high office within an organization. See Perlman v. DOJ, 312 F.3d 100, 107 (2d Cir. 2002).

Fire chiefs are statutory officers enjoying protection against termination except for cause, RSA 154:5, a rare shield enjoyed by only a few other public employees solely by virtue of their office. E.g., RSA 105:2-a (police chiefs). In law and in practice, fire chiefs are important and respected community leaders, charged with public duties of the highest order. How they run their departments is a matter of strong public interest. Importantly, the Supreme Court has found a strong public interest in the official duties of far lower-ranking employees. See, e.g., Provenza v. Town of Canaan, 175 N.H. 121 (2022).

The Court has also recognized a weighty public interest in information similar to what Swenson said here.¹⁸ In Union Leader Corp. v. Salem, 173 N.H. 345 (2020), the Court cleared the way for the release of an independent audit of the Salem Police Department, which was harshly critical of the department’s operations, practices, and culture, identifying many employees (including the chief) by name.

The information disclosed by Swenson about the efficiency of the Fire Department’s operations, including Varney’s leadership, is plainly not exempt from disclosure under the Right to Know law, and it is not a close call. Swenson was speaking about a matter over which he has direct purview, and for which he is ultimately responsible as one of three selectmen. He did so in the context of a pending fire chief recruitment, which has crystalized into a matter of public controversy, scrutiny, and interest. If Union Leader sets the outer boundary of the kinds of information that may be shared about a public official, Swenson could have said far more.

¹⁷ While one possibility is that there is a slight factual dispute about what was said, it is also possible Weldon simply misunderstood Swenson’s intent in making these statements.

¹⁸ Actually, Swenson’s statements are anodyne compared to the sharply negative information ultimately disclosed under the Union Leader decision.

Varney's privacy interest in the information disclosed is minimal at best. All of Swenson's statements pertain to the discharge of Varney's official duties and functions. A privacy interest exists and may defeat even a strong public interest in information about the "intimate details of [Varney's] life." Provenza, 175 N.H. at 130. The information shared by Swenson is of an entirely different character. See Lovejoy v. Linnehan, 161 N.H. 483 (2011) (claim for invasion of privacy requires public disclosure of private facts that are both highly offensive to a reasonable person and not of legitimate concern to the public).

6. Conclusion

My investigation established the contours of Weldon and Swenson's conversation with little daylight between their two accounts. Both were truthful and credible in answering my questions. Ultimately, the voluminous body of law surrounding RSA 91-A dictates the outcome. Because Swenson did not divulge information exempt from disclosure under the Right to Know law, Bernier's Complaint that he violated Varney's privacy is unfounded.

Respectfully submitted,
Michael J. Malaguti