THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0150

PAUL MARTIN v. CITY OF ROCHESTER

Mandatory appeal pursuant to Rule 7 from decisions of the
Strafford County Superior Court

Appellant's Brief

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(15 minutes requested)

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TEXT OF PERTINENT AUTHORITIES

Article 1. [Equality of Men; Origin and Object of Government.].

All men are born equally free and independent; Therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

RSA 91-A:1. Preamble. –

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-a. Definitions. –

In this chapter:

I. "Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

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V. "Public agency" means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.

VI. "Public body" means any of the following:

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(d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.

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RSA 91-A:2. Meetings Open to Public. –

I. For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include:

(a) Strategy or negotiations with respect to collective bargaining;

(b) Consultation with legal counsel;

(c) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan

basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

II. Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings. Minutes of all such meetings, including nonpublic sessions, shall include the names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions. Subject to the provisions of RSA 91-A:3, minutes shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal

holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. For the purposes of this paragraph, a business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays.

RSA 91-A:4. Minutes and Records Available for Public Inspection. –

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

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IV. Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release. If a public body or agency is unable to make a governmental record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably

practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.

VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.

VII. Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

MRS ch. 13 § 408-A. Public records available for inspection and copying—

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11. Waivers. The agency or official having custody or control of a public record subject to a request under this section may waive part or all of the total fee charged pursuant to subsection 8 if:

A. The requester is indigent; or

B. The agency or official considers release of the public record requested to be in the public interest because doing so is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings—

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(a)(4)(A)(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

QUESTIONS PRESENTED

I. Is the Rochester Technical Review Group a public body under the Right-to-Know law?

Preserved by Memorandum of Law, Appx at 3–6

II. Is Rochester's copy fee schedule consistent with the Right-to-Know law?

Preserved by Memorandum of Law, Appx at 6–9

STATEMENT OF THE CASE AND FACTS

1. Rochester's Technical Review Group

When someone submits an application to engage in a project that requires approval of Rochester's Planning Board, those plans are distributed to the various city department heads for review. (Appx. 72.) Approximately bi-weekly those department heads will assemble as the Technical Review Group (TRG) to discuss the plans with the applicant and any agent. (Id.) The TRG was created as a "self-directed work team" made up of the City's Chief Planner, Engineer, Director of Code Enforcement; Fire Marshall, Police Captain, Economic Development Manager, and a Representative of the Conservation Commission. (Appx. 71.) The TRG meetings take place in the City Hall Annex Building at certain times listed on the City's website. (T. 65, 91.) The explanations, comments, and suggestions generated from the discussions at the TRG meeting are compiled into a set of notes that are then passed on as the TRG's recommendation to the Planning Board before their final review and approval. (Appx 71; T. 172–73.) The planning board would sometimes discuss the recommendations of the TRG at length when deciding to grant or deny a request. (T. 148.)

2. Dr. Martin and the TRG Meetings

The Plaintiff, Dr. Paul Martin, is a retired professor from the veterinary college at Iowa State and a resident of Rochester, NH (the "City"). (T. 134.) In 2016, contractors were working with the City on a development known as the "Jeremiah Lane Project" that abutted his property. (T. 139.) Dr. Martin became interested in the project when he noticed a vernal pool that was not being considered as a vernal pool and wetlands that he believed needed protection. (T. 140.)

One day, he sends a message to the mayor seeking information about the project. (T. 135.) That email, pursuant to the City's Standard Operating Procedures (SOPs) (Appx. 23), is forwarded to the City's attorney, whose office responds to Dr. Martin. (T. 135.) Dr. Martin furthers his information-gathering by attending Planning Board meetings, where he eventually became interested in the TRG. (T. 135–36.)

Dr. Martin then goes to the planning and development office to ask about attending meetings of TRG. (T. 136.) He is told he cannot attend. (Id.) He expresses concern to either the city manager or the city attorney about the way the meetings were conducted at the planning board and that he had questions about the TRG. That summer, he had meetings with both of them to discuss his concerns. Each told him that he could not attend the TRG meetings. (Id.) He asked if he could see minutes or agenda for these meetings, but was told there were none. (T. 137.)

At some point later Dr. Martin hears of someone who had attended a TRG meeting, so he decides to go himself. (T. 138.) He emails Seth Creighton ahead of a number of meetings inquiring if the Jeremiah Lane project would be discussed, and learns on one occasion that it will be. (T. 139.) The first time he goes, Creighton allows him to enter with the applicant but does not allow him to ask questions. (T. 138–39.) Dr. Martin is successful in observing two meetings without incident. (T. 139.) He sees the developer and an agent reviewing different aspects of the project and its site plan with the TRG. (T. 141.) Throughout his investigation, Dr. Martin would learn that developers requested nine waivers from regulations in 2015, which the TRG reported as departing from the intent of what the City felt should be the case for developments in

Rochester. (T. 140.) Later, five of those waivers were approved: three on sidewalks, one on drainage, and one on slopes. (T. 140.)

In October of 2017, Dr. Martin protests the City's practice of closing the TRG meetings from the public in an email telling the City Attorney that closing the meetings violates the Right-to-Know law as being an unjustified non-public session. (Appx. 65.) The City Attorney responds that the TRG does not hold "meetings" as defined in the Right-to-Know law because the TRG is not a "public body" subject to its mandate. (Appx. 67.)

Dr. Martin brought suit alleging that the City was holding meetings in secret and chilling the public's desire to obtain copies of government records with its fees and operating procedures. He sought declaratory and injunctive relief. (Appx. 73.)

After a trial to the bench, the lower court sided with the City and issued no relief. In so doing, it found that the TRG is not a "public body" and that copying fees are permissible. (Infra, 20.) This appeal follows.

SUMMARY OF THE ARGUMENT

I. Is the Rochester Technical Review Group a public body under the Right-to-Know law?

Rochester's TRG is a "public body" under the Right-to-Know law because is it an "advisory committee" as that term is defined by law. An advisory committee need not have any special authority or duty; rather, it must be constituted to consider a certain issue and, in turn, give its advice on that issue to another body. Rochester's TRG does just that. It considers applications for site plans and other matters that would come before the Planning Board, and, in turn, gives its advice on whether the applications call for development consistent with applicable regulations. Therefore, it is an advisory committee subject to the open meetings requirement.

II. Is Rochester's copy fee schedule consistent with the Right-to-Know law?

The Right-to-Know law limits a governmental unit's authority to charge copying fees above its actual costs for copying an identified public record. Rochester's copy fee schedule calls for the City to charge fees well in excess of its actual costs. As the Plaintiff demonstrated in the lower court, Rochester's actual costs are roughly $0.04 per page, while it charges $0.50 for the first ten pages of any document. The City, in turn, offered no support other than a firm belief that such a fee reflected the actual costs.

ARGUMENT

I. IS THE ROCHESTER TECHNICAL REVIEW GROUP A PUBLIC BODY UNDER THE RIGHT-TO-KNOW LAW?

"Openness in the conduct of public business is essential to a democratic society." RSA 91-A:1. Therefore, "[t]he purpose of [the Right-to-Know law] 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." *Id.* The law, in other words, is designed to make sure that Dr. Martin can get the "greatest possible" picture of how the government is treating the wishes of the developers involved in the Jeremiah Lane Project vis à vis the public's interest in the vernal pool and wetlands that the developers might encroach upon.

Here, Dr. Martin's primary concern is that he's not allowed to see the TRG's discussion with developers despite the Right-to-Know law's requirement that "meetings" be open to the public. *See* RSA 91-A:2. II. A "meeting" under the Right-to-Know law is "[t]he convening of a quorum of membership of a public body … whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously … for the purpose of discussing … a matter or matters over which the public body has … advisory power." RSA 91-A:2, I. The City has blocked Dr. Martin's access to the TRG meetings on the Jeremiah Lane Project claiming that the TRG is not a "public body" as defined in the Right-to-Know law. *See* RSA 91-A:1-a.

A municipal subdivision can fit into one or more categories of public entities, each of which come with a different set of obligations to that subdivision. For the purpose of this case, all parties agree that a "public body" is required to obey the Right-to-Know law's command to allow the public access to both meetings and records, while a "public agency" need only allow

the public access to its records. Both of these designations are defined in the Right-to-Know law, though they are not mutually-exclusive. RSA 91-A:1-a. The parties agree that the TRG is at least a "public agency" but, for the reasons that follow, disagree as to whether it is also a "public body." Resolving this disagreement requires this Court to determine whether the trial court correctly interpreted the Right-to-Know law, so its review is *de* novo. *Taylor v. SAU 55*, 170 N.H. 322, 326 (2017). In this endeavor the Court must lean toward the view that provides the utmost information. *See Menge v. Manchester*, 113 N.H. 533, 537 (1973).

The TRG will be a "public body" if it is "[a]ny legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto." RSA 91-A:1-a, VI(d). Dr. Martin is arguing that the TRG is an "advisory committee" to the Planning Board. An "advisory committee" is a "committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority." RSA 91-A:1-a, I.

The parties agree that TRG members are appointed by the city manager. The record makes clear that the TRG's primary purpose is to consider land use applications submitted to the Planning Board, of which the city manager, through a designee, is a member. (Appx. 70.) The TRG's consideration includes providing advice or recommendations on the applications—albeit non-binding advice—the notes of which are submitted to the Planning Board. (T. 13–14, 105–

06.) Thus, its function is to "consider an issue" and provide "recommendations" in line with the plain text of the law. The trial court disagreed, adopting the City's three arguments as to why the TRG is not an "advisory board": (A) that the TRG's "primary purpose" is not to advise the Planning Board and (B) that individuals forming a group do not trigger the open meetings requirement.

A. "Primary Purpose"

The trial court disagreed, adopting the City's argument that the TRG is not an advisory committee because its "primary purpose" is to advise the *applicants* not the Planning Board. (Infra, 32.) This is a misreading of the statute. As used in the statute, "primary purpose" describes the group's action in "considering" — not "advising." Determining the primary purpose, in other words, is focused on the subject matter that the city manager has designated for consideration. Had the statute placed the phrase "primary purpose" near the end, the City's argument might be stronger. The statute would then read:

> "Advisory committee" means any committee, council, commission, or other like body … [created] to consider an issue or issues designated by the appointing authority **and whose primary purpose is** to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

But with the language as it is, the "primary purpose" is attached to the topic that the appointing authority (the City, through its manager) is tasked to "consider." Because the TRG was created consider Planning Board applications, and it gives its advice and recommendations to both the applicants and the Planning Board, (T. 107–08) the Right-to-Know law mandates that it hold its meetings in public.

B. Group of Individuals

The trial court adopted the City's argument that the TRG was merely a mechanism to streamline a process by which the planning board applicants would otherwise meet department heads seriatim. (Infra, 35–36.) Because individual meetings with those department heads would not be subject to the open meetings requirement, the trial court believed that bringing those people together would not subject them to open meetings requirements.

The Right-to-Know law, however, does just that. In many situations where meetings with individuals could be held privately, bringing the group together triggers the requirement. For example, citizens are free to discuss proposed state contracts with individual members of the Executive Council in private, but must do so in pubic once the Council is convened. On this point, *Bradbury v. Shaw*, 116 N.H. 388 (1976), is instructive. At issue was the status of a group assembled by the mayor called the "Industrial Advisory Committee." *Id.* At 389. This committed was composed of business owners, members of city council, and representatives of the newspaper. No statute or ordinance created it. It had no power to make policy. Rather, all it did was encourage and advise businesses they thought would be interested in operating in Rochester, gather information to provide those businesses, and helping arrange city land transactions. According to its chairman, the committee was useful in that they "couldn't be a tenth as effective because [they] need the immediate ability to tell a prospect 'yes, a city can do this, that, and the other,'…." *Id.* At 389. Much like the TRG, it was merely a means to make an otherwise laborious serial process quick and efficient. The gathering of these particular people provided no significance other than it put them in the same room to do their work contemporaneously. Yet the

Court found that it was subject to the open meetings requirement. Its (admittedly cursory) decision rested on the fact that the committee at issue was "involve[d] in governmental programs and decisions…." *Id.* at 390. Looking at the facts of the case, the involvement of the Industrial Advisory Committee appears to have been concerned primarily with the businesses rather than the mayor. More importantly, it did not involve any of the functions the trial court believed to be crucial to its decision, such as: whether meetings with any of the individual members would be subject to 91-A; whether the advisory committee has any decision-making authority, or any power to suspend, hinder, or facilitate any proposals; or whether the board advised by the committee was required to agree with its recommendations. Indeed, there is no indication that the Industrial Advisory Committee in *Bradbury* had any more influence on decisions of the mayor or city council than the TRG has on the Planning Board. *Compare Bradbury*, 116 N.H. at 389 *with* Infra, 36. It merely gathered and disseminated information to get it ready for submission to the city council in a more efficient way than it would have otherwise.

Therefore, the TRG is no different than the Industrial Advisory Committee that this Court has previously required to adhere to the Right-to-Know law. This Court should reverse the lower court's ruling to the contrary, declare that the TRG is an "advisory committee" insofar as it is a group of government actors convening to discuss the government's business and issue advice to another public body, and remand this case to the trial court to fashion an appropriate remedy.

II. IS ROCHESTER'S COPY FEE SCHEDULE CONSISTENT WITH THE RIGHT-TO-KNOW LAW?

This Court is next tasked with determining whether the City's fee schedule for providing public records complies with the Right-to-Know law. In handling a public records case over fees imposed by a government agency, the Wisconsin Supreme Court observed:

> This case is not about a direct denial of public access to records, but the issue in the present case directly implicates the accessibility of government records. The greater the fee imposed on a requester of a public record, the less likely the requester will be willing and able to successfully make a record request. Thus the imposition of fees limits and may even serve to deny access to government records. In interpreting the Public Records Law, we must be cognizant that the legislatures preference is for "complete public access" and that the imposition of costs, as a practical matter, inhibits access.
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> *Milwaukee Jounal Sentinel v. Milwaukee*, 815 N.W.2d 367, 370 (Wis. 2012).

As with any other provision in New Hampshire's Right-to-Know law, our legislature has expressed a general policy of skewing interpretations toward disclosure. RSA 91-A:1. This Court should recognize what Wisconsin has—that favoring disclosure means favoring lower fees. But how is the Court to know when the fees are low enough to satisfy the law? Dr. Martin's answer is simple: when a trial court can determine that the fee is derived from an actual calculation of the costs. Once a court has reached that determination, it can be assured that the public's access to records is as robust as it can be without depriving the government of its resources.

This issue is especially important for the indigent; for whom a $15 variance in fees could be the difference between obtaining a critical record and moving on. Unlike other states, New Hampshire's Right-to-Know law does not have a mechanism for waiving fees—whether for indigence, *see*, *e.g.*, Maine Rev. Stat. ch. 13 § 408-A, 11, or public interest, *see*, *e.g.*, 5 U.S.C. §

552(a)(4)(A)(iii). This makes the process of fee-setting all the more important, lest the important constitutional right in access to public records is subordinated to the government's interest in its bottom line. *See Censabella v. Hillsborough County Attorney*, 171 N.H. 424, 428 (2018) (recognizing that public records "requests may implicate political, policy, or public interest considerations, particularly when the request is pursued by a whistleblower or advocacy organization.").

This is an issue of first impression that requires this Court to determine how to apply the legislative mandate that governments only charge the "actual costs" of a copy. There is general agreement that the Right-to-Know law forbids charging the costs of labor in preparing documents for inspection, so the City is not seeking to recover those costs. (T. 20–21). The City's fee schedule for copies of public records is found in Administrative Procedure 1.011, which reads, in pertinent part:

> 2. The individual requesting a copy of a governmental record will be charged the actual cost of providing the copy. The City has established the following rate for all items:
>
> a. Black and White photocopies of documents and of black and white computer-printed documents will be charged at $0.50 per page for the first 10 pages of any document for letters (8.5 x 11) size, legal (8.5 x 14) size and ledger (11 x 17) size and $0.10 per page thereafter. *For example, since each document is treated separately for purposes of these charges, if a person wanted copies of both a 10 page document and a 20 page document, there would be a $5.00 charge for the first document ($0.50 x 10) and a $6.00 charge for the second document ($0.50 x 10 + $0.10 x 10), not a $7.00 charge for the two documents.*
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6. Nothing in the law requires the City to provide information electronically. As such, only photocopies of requested information will be provided.

(Appx. 23–24; T. 120–22.)

In this case, the parties agree that the term "actual costs" refers to items such as the cost of paper and ink and the cost of leasing and maintaining the copying machines. (T. 22–24)[1]. The parties diverge on the question of how to arrive at that figure — i.e. when a town sets a rate, what serves as permissible support for that rate?

The operative statute reads:

> Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release.
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> ***
>
> If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged."
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> RSA 91-A:4, IV.

By permitting public agencies to charge for reproducing public records, the legislature has authorized towns to shift the financial burden of complying with records requests away from

[1] Later in his testimony, Blaine Cox would go through another list of items that would make up the "actual costs" but only added electricity, then merely concluded that the fee scheduled reflected the "actual costs" to the City and that he had never seen a profit. (T. 41–42.)

the general taxpayer and onto those who benefit directly from the duplication of the requested records. However, by limiting the allowable charges for reproduction to the "actual costs," the legislature is maximizing the availability of public records for those who endeavor to learn about the business of their local government. In other words, the law permits the town to recoup fees while preventing it from making a profit; for once the fee surpasses the actual costs, the City is no longer sparing taxpayers from the costs of fulfilling the request and instead extracting a benefit from the requestor. This is the balance point that makes the law function as intended.

So where is that balance point in the context of this case? It will not be found in the City's arguments or the trial court's analysis. The trial court permitted the City to merely pronounce that its fees are commensurate with the actual costs. (*See* Infra, 38 (finding the copying fees permissible "as evidenced by the testimony of City officials and by comparison with other fees assessed in comparable municipalities across the state.")) The City, through the city manager, had the opportunity to offer numbers to support its rate when Plaintiff's counsel listed and added the City's printing costs. (T. 25–27; Appx. 25–60.) But instead of analyzing these costs, the City proclaimed its fee as permissible because it is in line with the rates of a handful of other hand-selected towns. (Appx. 20.) There was no analysis of where those towns got their rates. Indeed, the city manager admitted he was not familiar with how those towns decided on those rates. (T. 17–19, 27.) All of those rates could violate RSA 91-A:4, IV. Yet, the trial court denied relief without suggesting any other method to analyze the issue.

If this Court credits the trial court's analysis as the prevailing rubric for determining whether a public records fee comports with the Right-to-Know law, it will leave the lower courts without any guidance in resolving this issue in future cases. Determining whether some arbitrary

rate—such as the City's and those upon which it relies—is the "actual cost" for that governmental unit's printing or photocopying will be guesswork for the lower courts, municipalities, and those parties and counsel who are tasked with assessing issues before (or to prevent) litigation. With this rubric, nothing stops Judge A from finding $1.00 per page reasonable in one town, while Judge B finds $0.50 per page unreasonable in a town with higher copying costs? Or vice-versa? If the lower court's opinion becomes the precedent, and these seemingly incompatible orders proliferate, would that not invite the public to look askew at the judicial process that has produced them?

Dr. Martin, on the other hand, proposes a methodology based on an intelligible principle that corresponds with the law's function. First, and with thanks to the Right-to-Know law and the municipal records law, these costs are ascertainable. Indeed, Martin proposed the exhibit and was able to walk through the City's printing costs with city manager (T. 23–27). It is clear that this analysis targets the "actual cost" that the legislature envisioned. There is no burden on any government agency to look at its actual costs and set the rates accordingly. On this record, the lower court should not have entertained any rate greater than $0.039 ($0.04, rounded) per page as being in compliance with the Right-to-Know law, absent some evidence that some unconsidered cost justified it. In any event, the trial court should not have permitted the City to justify a $0.50 per page rate (more than ten times the actual cost) merely on the city manager's word that it did not include impermissible labor costs. Thus, the $0.46 difference in every page is the unsupported, unprincipled, and unnecessary barrier between the public and the information.

More concerning is that the City did not offer any evidence to rebut clear indications that the City makes a profit on public records requests at its current copying rates. Under our State

Constitution, the government "originates from the people" and is obligated to serve them. N.H. CONST. PT.1 ART. 1. The government is the people's employee in that sense. But when the government profits off of complying with public records requests, it becomes a purveyor of records. The people more closely resemble the government's customer in this relationship, which comes with all the incentives that are tolerable for private enterprise but perverse in the administration of government. Because this Court cannot let such a scheme persist, it must reverse the lower court's decision, pronounce Rochester's public records copy fee schedule to violate RSA 91-A, and remand the case to the trial court to fashion a remedy.

CONCLUSION

The citizens of Rochester deserve to know how the TRG arrives at any given recommendation. If we are to consider ourselves as part of a robust democracy, Dr. Martin's ability to observe city officials' treatment of developers at these meetings is a critical ingredient —it enables him to inform other parts of the electorate how to vote in municipal elections. That the TRG's purpose is strictly advisory is of no moment. This is a meeting of city officials who have a "back and forth among the members" concerning development in the city. (Tr. 100.) There's a "give-and-take discussion, questions, answers between the developer and various members." (Tr. 14, 100–01.) It might very well swing an election for the people of Rochester to know whether the Jeremiah Lane Project is endangering the environment, and how city officials prioritize those concerns (i.e. whether they recommend certain waivers be granted despite known or ignored risks). Without allowing an interested citizen to watch the interaction among the agencies, the electorate is losing critical information that could inform the exercise of its its elective franchise.

That ability to personally observe the government in action is especially important where the government charges a fee to take home of copy of the written record of the meeting. Under the lower court's commandment excluding the public from the meeting room, it forces the interested citizen to either sit and read the minutes at City Hall or pay for the privilege to take home a copy. And when a person deigns to make off with a version of the public record that can be accessed and re-accessed as their needs demand, they must pay an arbitrary amount that—on this record—surely results in a profit for the City.

For these reasons, the Plaintiff requests that this Court REVERSE the trial court's decisions that the TRG is not a public body and that its fees are consistent with RSA 91-A. This Court should then REMAND this case to determine the appropriate remedies for each.

REQUEST FOR ARGUMENT

Dr. Martin respectfully requests 15-minute argument in front of a full court, for which Attorney Soltani will appear.

RULE 16(3)(I) STATEMENT

The decisions on appeal were written in the lower court's Order of February 8, 2018, which is appended to this brief.

Respectfully Submitted,

DR. PAUL MARTIN
By his attorney:

Date: 10/18/2019

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Certificate of Service

I hereby certify that the foregoing Brief has been forwarded this day to Rochester City Solicitor Terrence O'Rourke, Esq, who is a registered e-filer, through the NH Electronic Filing Service.

/s/ Jared Bedrick
Jared Bedrick #20438

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Paul Martin

v.

City of Rochester

Docket No. 219-2018-CV-00172

ORDER

The plaintiff, Paul Martin ("Dr. Martin") filed this petition against the City of Rochester ("the City") seeking declaratory and injunctive relief pursuant to RSA 91-A, the Right-to-Know Law. (Court index #1.) The defendant filed an answer and, among other things, requested dismissal of the petition. (Court index #5.) The matter was tried to the court on November 29, 2018, and the last post-trial pleading was filed on December 28, 2018. After considering the evidence presented at the trial, the parties' pleadings and arguments, and the applicable law, the court finds and rules as follows.

FACTUAL BACKGROUND

The court finds the following facts based on the evidence presented at the hearing. The Technical Review Group ("TRG") is a "self-directed work team" in the City originally established by a former City Manager.[1] The City Manager is the sole appointing authority for the TRG, and has the ability to dissolve or expand the TRG without the approval of the City Council. The City Manager can appoint or remove members at will. Neither the City Council nor the City Planning Board ("Planning Board") have any input or authority over the TRG. The TRG is not included in the City charter or any City ordinance.

Blaine Cox ("Mr. Cox"), the current City Manager, testified that the TRG is an advisory committee to both planning applicants and the Planning Board, although it has no binding

[1] The current City Manager, Blaine Cox, testified that through his membership and involvement with the International City Manager's Association, he became familiar with the term "self-directed work team." Mr. Cox explained that a self-directed work team is a staff committee formed by the chief executive, or in the City's case, the City Manager. The staff committee is given a charge or a charter with a specific purpose, and its members are self-directed to determine how they are going to achieve the directive they have been given. Mr. Cox stated the IT self-directed work group and the Employee of the Month Selection Committee are other examples of self-directed work teams in the City.

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decision-making authority and operates only within furtherance of its charge designated by the City. Jim Campbell ("Mr. Campbell")[2], Director of Planning and Development for the City, testified that the TRG as a whole and the individual staff members that make up the committee have no authority to grant or deny conditional use permits, waivers, or variances. The TRG is made up of City employees, including the Chief Planner or designee, City Engineer, Director of Code Enforcement, Fire Marshall, Police Captain, Economic Development Manager or designee (who chairs the group), and a representative of the Conservation Commission. (Def.'s Ex. B.) The TRG does not have a separate budget and is funded by the departments from which the representatives come. The TRG is currently chaired by Jenn Marsh, an employee of the Economic Development Department. Mr. Campbell testified that the City has a constitutional duty to assist applicants and that the TRG is part of meeting that obligation.

According to its October 2017 Statement of Purpose ("2017 SOP"), the purpose of the TRG is to "review projects that are submitted for review to the Planning Board, including site plans and subdivisions." (Def.'s Ex. B.) The applicant or the applicant's agent presents plans to the TRG which then comments on the plans and suggests changes in accordance with various City regulations, laws, and policies. (Id.)

Karen Pollard ("Ms. Pollard")[3], the Economic Development Director for the City, testified that the TRG is a group of City employees who work in an informal setting where the applicant can ask questions to prepare applicants for their time in front of the Planning Board. She testified that if the TRG did not exist, the applicant would still have to speak to each one of the staff members separately before going in front of the Planning Board. The TRG acts to streamline the process for the applicants by having all of the pertinent department representatives available to applicants in one place. The TRG functions as follows:

> The Economic Development Manager or designee is chair of the Technical Review Group. The Planning Department creates the schedule of meetings for the year and distributes the schedule to the TRG members and to engineers/agents. Meetings are held at 10:00am on Thursdays, on the Thursday

[2] In his capacity as head of the Planning Department, Mr. Campbell makes sure the department runs smoothly and supervises his staff, including the Chief Planner, Senior Planner, and the Administrative Assistant. He is also the resource person for the Planning Board. When he was first hired in 2012, he was the Chief Planner and was required to staff the TRG meetings.

[3] Ms. Pollard has been the Economic Development Director since October 2003. Her job duties include assisting businesses that want to grow and expand in Rochester. When she started in 2003, the TRG was already in existence. Ms. Pollard stated she attends TRG meetings infrequently.

> the week after new submittals and the week prior to Planning Board regular meetings and workshops.
>
> An email is sent to the TRG a few days before the meeting to remind them of the upcoming meeting and to let them know which projects will need signoffs. If there are no commercial projects to discuss it is helpful to point that out to the Economic Development Manager, or designee, so that they need not attend.
>
> The TRG members will need to complete the sign off sheet when a project is ready for final action by the Planning Board.
>
> Members should sign off on projects by the TRG meeting prior to the Planning Board meeting at which approval is expected. If members cannot attend the meeting or are not ready to sign off they should come to the planning office or enter their comments into Viewpermit by the end of the day Friday following the TRG meeting so that their comments can be incorporated into the Staff Recommendations.

(Id.) The 2017 SOP states that the TRG meetings are not considered public meetings for public notice purposes, and that therefore no notices are sent and no minutes are taken at the meetings. (Id.) However, the dates and times of the TRG meetings are usually listed on the City's website under the Planning Department page. TRG meetings take place in the City Hall Annex Building. Public participation and observation are not part of the process, and the TRG does not permit other applicants or the public to observe TRG interactions with applicants for fear other applicants would read into the comments or requests made for one project and assume they are universally applicable. Ms. Pollard testified that if a member of the public showed up at a meeting, he or she would be asked to leave. The TRG does not hold electronic meetings.

Crystal Galloway ("Ms. Galloway"), the Secretary for the Planning Department, is responsible for scheduling the TRG meetings, and does so via email. Prior to a TRG meeting, Ms. Galloway sends to members of the TRG electronic copies of the meeting agenda, the application(s) that will be reviewed during the meeting, and the accompanying plans. Seth Creighton ("Mr. Creighton")[4], Chief Planner in the Planning and Development Department for the City, testified that meeting agendas do not get put into the Planning Board file kept for each project plan, but Ms. Galloway testified that the both the application and the project plans do and

[4] Mr. Creighton has been the Chief Planner for the City since August 2013. His duties and responsibilities include a multitude of zoning and planning interpretations, including reviewing applications and building permits for conformance with zoning ordinances and the City site plan subdivision regulations, and long term planning for the City. Prior to working for the City, he worked in the field of planning with the Lakes Region Planning Commission and for the City of Laconia Planning Committee.

are available for inspection by the public. Generally, the TRG members do not make comments to each other, and the email addresses they use are typically their City email addresses, although there is no regulation or rule that says they have to use their City email addresses. Although TRG members may communicate frequently in their capacity as City employees, they rarely communicate about TRG matters, other than if a member cannot attend a meeting. Emails sent using City email addresses are captured on the City email server can be requested by the public for inspection.

An applicant may choose to submit the applicant's plan to the TRG prior to its submission to the Planning Board. However, an applicant is not obligated to do so. Mr. Creighton stated that if an applicant chooses to submit the applicant's plan to the TRG, the TRG group would assemble approximately one week after receiving the application. Between the time the application is submitted and the group assembles, TRG members review the application individually. When the TRG members meet with the applicant, the applicant is asked to give a short verbal summary of what the applicant is proposing. Thereafter, each TRG staff member tells the applicant their understanding of the proposed project, explains to the applicant the result of each member's review, explains how the applicant appears to be either conforming or not conforming to City development rules and regulations, and gives the applicant their comments and recommendations to get the application to a point at which the Planning Board might approve it. The applicant may choose to adopt the recommendations or proceed with the plan as is. Additionally, the applicant is free to meet with the TRG again before presenting the applicant's plan in front of the Planning Board. If a plan came before the TRG that was not ready for the Planning Board, the planning staff would suggest that it be delayed until the data was correct. The TRG does not make decisions as a group; each individual has his or her own area of expertise and each person contributes and makes suggestions based on that person's specific knowledge. One member may say the project appears ready for approval based on that member's individual area of expertise, while another staff member may say that there appear to be problems with another aspect of the project.

Ms. Pollard testified that the Planning Board is not a "rubber stamp" for the TRG. She stated she has observed instances in which individual members of the TRG have indicated that a project appears ready for approval and the project does not get approved by the Planning Board, instances where members of the TRG think a project is not where it needs to be and it gets

approved by the Planning Board, and instances where the Planning Board ignores the TRG comments altogether. The TRG on its own can neither advance nor stop a project from moving forward.

After a TRG meeting, the applicant may still have contact with the individual staff members of the TRG. Staff members assist with applications well after the initial meeting, and an applicant can request additional TRG meetings to review plan modifications, or an applicant can be sent back to the TRG by the Planning Board. Not all applications are approved by the Planning Board the first time. Applications can stay at the Planning Board stage for months or even years depending on the case, and during that time applicants still communicate with staff members assigned to the TRG and may possibly attend additional TRG meetings.

Mr. Creighton testified that he puts together a summary of comments made by TRG members during the meeting that is then given to the applicant and placed in the Planning Board file (or "project file") for that project, which is public. He stated that sometimes individual departments submit their own comments in a separate memo. Any such memos would also be included in the file. Ms. Pollard testified that the TRG does not have records of its own, as its only function is to review applications and assist applicants. She stated that comments made by individual TRG staff members are loaded into a City database called Viewpermit so that the Planning Board can view the comments. Joseph Devine ("Mr. Devine"), Compliance Officer for the City, testified that Viewpermit is an online database that is used when people apply for permits. The permit application is put into the database which is linked to all City departments. All departments can view the applications and make and see comments which are saved in the system. If a permit is issued, it is done so electronically.

Viewpermit is a cloud-based system, and comments and input from the TRG are captured and stored in that system. Mr. Creighton testified that Viewpermit is accessible to the public. An individual interested in accessing the system would need to create a free account in order to view documents within Viewpermit. An individual can access information about properties by either the permit number or by the property address, and any permits associated with the address will be pulled up. A user would be able to view any comments made on any applications, including comments made by TRG members, or other City employees, when the application was uploaded to the system. Mr. Creighton testified that there is, however, no final version of the permit contained in Viewpermit.

Mr. Campbell testified that he staffs the Planning Board meetings, and while the Planning Board members receive the TRG comments summary in the Planning Board packet they receive with the application prior to meeting with applicants, the TRG comments are not always discussed at the Planning Board meeting. The Planning Board considers the comments made by the TRG, but does not necessarily accept them. When an applicant modifies an application based on TRG member comments, there would be a new set of plans with the notes that would go into the project file. Each iteration of a project is contained in the project file and the applicant or the public can go back and see all the versions of the project from the beginning. Any details or numbers reviewed by the TRG would be in the Planning Board project file, which is available to the public for inspection through the planning department.

Applicants may apply for waivers when a developer seeks relief from a rule. Mr. Campbell testified that applicants can apply for a waiver as part of their initial application, and other times waivers are initiated by the Planning Board, depending on the situation. The applicable technical department comments on a waiver application, and either Mr. Creighton or another member of the planning staff writes a memo regarding its recommendation concerning the waiver. The Planning Board does not always adopt the recommendations, and it is ultimately up to the Planning Board to grant or deny any waiver request. Applicants may raise waiver requests and seek comments on them at a TRG meeting.

Dr. Paul Martin ("Dr. Martin") moved to Rochester in 2014. Dr. Martin is a veterinarian and a retired professor from the veterinary college at Iowa State University. In early 2016, Dr. Martin was an opposing abutter to the Jeremiah Lane project. At that time, Dr. Martin became interested in matters concerning the Planning Board and the TRG.

As an abutter of the Jeremiah Lane project, Dr. Martin became concerned that a vernal pool was not being treated as such. Dr. Martin stated he became particularly concerned with the number of waivers requested by the developers of the project. In 2015, the developers requested nine waivers for the project, which Dr. Martin felt were at odds with the intent of the City in allowing developments in Rochester. At that point, no waivers were granted. However, at some point later, five waivers were approved in connection with the development, including three sidewalk waivers, one drainage waiver, and one slope waiver. Dr. Martin was interested in whether the previous four waivers requested by the developers had been withdrawn by the applicant or if they had been denied based on comments by the TRG.

Dr. Martin inquired of the Planning Development office as to whether he could attend the TRG meetings. Each of the four staff members in that office responded that he could not attend the meetings. Dr. Martin was concerned about his inability to attend the TRG meetings, so he wrote a message to either then City Manager Fitzpatrick or the City Attorney stating that he had concerns about the way the Planning Board was conducting its meetings, as well as questions about the TRG. He met with both the City Manager and the City Attorney to discuss his concerns and was told the TRG meetings were not public and that he could not attend. At some point, Dr. Martin made an oral request for TRG meeting minutes. His request was denied and, upon further inquiry, he was informed there were neither TRG minutes nor agendas.

Mr. Creighton testified that he has had many interactions with Dr. Martin. Mr. Creighton testified that starting in 2017, Dr. Martin inquired about attending TRG meetings. Although he could not recall his response to Dr. Martin, he testified that Dr. Martin attended one or two TRG meetings. Mr. Creighton testified that he is not sure why Dr. Martin was allowed to attend the meetings, as they are not public meetings, and stated it could have been error or a lack of understanding of the process. Dr. Martin testified that he showed up at a meeting one day to see if he would be allowed to attend. Dr. Martin stated that Mr. Creighton told him that he would be allowed to attend the meeting when the applicant presented the plan, but that he would not be able to ask questions. Dr. Martin testified that he attended two TRG meetings.

At some point, Dr. Martin sent an email directly to the City Mayor asking to view certain records, which included the applications of members of the Planning Board and documents concerning the procedures of the Planning Board. Dr. Martin testified he was interested in seeing how the Planning Board did business. The Mayor referred him to the City Attorney, at which point the City Attorney's paralegal responded and stated they had received his request and would be handling it according to the City's "Administrative Procedure, Subject: Right to Know Requests for Information" ("PPM"). (See Pl.'s Ex. 1; Def.'s Ex. C.) Dr. Martin eventually received copies of the applications of all members serving on the Planning Board and the bylaws.

Ms. Galloway testified that, although she does not handle Right-to-Know requests, she has assisted Dr. Martin with inspecting and reviewing files and copying the files. Ms. Galloway testified that she has always provided Dr. Martin with the requested files, including the agendas

she creates for TRG meetings and emails she sends to TRG members scheduling TRG meetings.[5] She stated that in all her interactions with Dr. Martin, she is unaware of any known document that exists and has been requested that has not been provided to him. Ms. Galloway testified that she believes Dr. Martin requested to see emails between and among the TRG members and a Right-to-Know request was filed through the City Attorney's office. She received a copy of the request and provided the City Attorney's office with the requested agendas and emails creating the TRG meetings, which took a few days to produce. She then left it to the City Attorney's office to give the documents to Dr. Martin. Ms. Galloway stated she never gave the requested documents directly to Dr. Martin and does not know whether or not he received them. Dr. Martin testified that although he received one or two agendas from Mr. Creighton when he made specific inquiries about Jeremiah Lane and whether it would be on the agenda for that particular TRG meeting, he received the majority of the requested TRG agendas for 2014 through 2018 from the City only as a result of this legal action. (See Pl.'s Exs. 3–4.)

The former City Manager, Daniel Fitzpatrick, first created the PPM in 2012, with revisions made in 2015. (Pl.'s Ex. 1; Def.'s Ex. C.) Mr. Cox testified that the PPM was created to provide guidance to City staff on how to handle Right-to-Know requests, and is not directed at the general public. He stated the PPM does not require the public to do anything in particular when making a Right-to-Know request and does not limit the public's rights under the Right-to-Know Law. The PPM states it "seeks to balance openness and transparency (in accordance with RSA 91-A) versus staff time and City resources." (Pl.'s Ex. 1.) Mr. Cox testified that the PPM was created for the purpose of helping the citizens requesting the information so that they could be as specific as possible with their requests. However, citizens are not required to fill out the form in order to receive documents. (See Pl.'s Ex. 1; Def.'s Ex. C.) If a citizen does not want to fill out the form, the relevant office will fill it out on behalf of the citizen making the request and forward it to the City Attorney's office. (Pl.'s Ex. 1; Def.'s Ex. C.) Mr. Cox stated he believes the City Attorney may refer citizens to other departments. If the citizen does not want to tell the City official their name or why they want access to the information, the City official will fill in the form with whatever information the requesting party provides. According to the PPM, "[a]ll

[5] Ms. Galloway testified that she cannot remember whether the request for the TRG agenda was from the City Attorney's office or directly from Dr. Martin. She also stated she could not remember if she personally gave the documents to him or whether there were redactions contained within the documents. Additionally, Dr. Martin could not recall if he made a Right-to-Know request for the TRG agendas.

requests for information per RSA 91-A should be referred to the City Attorney's Office. The intent here is that there is but one point of contact for our offices and one point of information dissemination." (Pl.'s Ex. 1.) However, if the information is readily available for immediate inspection, the City must allow that to occur. (Pl.'s Ex. 1; Def.'s Ex. C.) Mr. Cox testified that he understands that if documents are not immediately available for inspection upon request, the City has five business days to make the records available. If a citizen does not give their name or contact information, Mr. Cox stated the City would likely indicate the person needed to come back in five days and the documents would be ready for them, or they would be encouraged to leave their contact information. Conversely, he understands that if the documents are available electronically, the City is obligated to provide those documents in that form.

The City charges individuals a fee for making copies of City records or files. Mr. Cox testified that the City has established its own mechanism for determining what the fee structure is for making copies of City records or files.[6] The City's administrative procedure states the following regarding costs of copies:

> 2. The individual requesting a copy of a governmental record will be charged the actual cost of providing the copy. The City has established the following rate for all items:
>
> > a. Black and White photocopies of documents and of black and white computer-printed documents will be charged at $0.50 per page for the first 10 pages of any document for letter (8.5 x 11) size, legal (8.5 x 14) size and ledger (11 x 17) size and $0.10 per page thereafter. *For example, since each document is treated separately for purposes of these charges, if a person wanted copies of both a 10 page document and a 20 page document, there would be a $5.00 charge for the first document ($0.50 x 10) and a $6.00 charge for the second document ($0.50 x 10 + $0.10 x 10), not a $7.00 charge for the two documents.*

(Pl.'s Ex. 1.) (emphasis in original). Mr. Cox stated he understands that the City may only charge for the cost of copying, and not for the labor associated with making the copies. While Mr. Cox testified that he has not done a comparison of the cost of copying that is being passed

[6] Mr. Cox testified that he does not believe the City consulted copying rates in Dover, Somersworth, Portsmouth, or Derry in arriving at its decision to charge its copying rates. The City produced fee schedules from the following local towns or cities: Derry charges twenty-five cents per page for a photocopy; Dover charges fifty cents per page; Portsmouth charges two dollars for the first page and fifty cents thereafter; Somersworth charges ten dollars for up to ten pages and any page beyond that is one dollar per page; Claremont charges twenty-five cents to one dollar per page depending on the paper size; Nashua charges seventy-five cents for first page and ten cents per page after that; Laconia charges one dollar per page and; Manchester charges one dollar for the first copy and fifty cents for each additional copy. (Def.'s Ex. D.)

along to the citizen and the cost which the City must incur in order to provide those copies, the cost of copying includes the cost of leasing the machines, their maintenance, and the cost to purchase paper from Office Supply. Mr. Cox testified that the cost of copying must take into account the capital costs of the copiers that are incurred at the end of the lease agreement. According to the City's FY19 copier allocations, $53,280.83 is the actual lease total for the City copiers and $6,223.92 is the total cost of the maintenance for the black and white copiers. (See Pl.'s Ex. 5A.) Based on his previous years as Finance Director for the City, Mr. Cox testified that he believes that the City is charging a reasonable approximation of the actual costs to the City. He testified that payments for copying are not a revenue source and do not produce a profit. Dr. Martin testified that when he has requested documents, he has received both paper and electronic copies. He stated the City charged him fifty cents for the first ten pages and ten cents for every page after that regardless of how many documents he requested.

ANALYSIS

Dr. Martin seeks statutory and injunctive relief against the City, arguing that he is aggrieved by the City's failure to fulfill his requests for public information. (Pl.'s Memo. Law § I.) Further, Dr. Martin argues he is aggrieved by the City's assertions that it has the right to hold TRG meetings that are not open to the public, and its contention the TRG does not fall within the ambit of the Right-to-Know law pursuant to RSA 91-A. (Pl.'s Memo. Law § I.) Additionally, Dr. Martin argues the copy fee structure assessed by the City is meant to chill and deter public access and is not related to the actual costs of making copies. (Id. at § II. (B).) Dr. Martin argues he is entitled to his costs and fees associated with this litigation. (Compl. ¶ F.) The court addresses these claims in turn.

I. Right-to-Know Law

Dr. Martin argues that the TRG is a public body under RSA 91-A:1-a, VI(d), a public agency under RSA 91-A:1-a, V, and an advisory committee under RSA 91-A:1-a, I, and is therefore subject to the requirements of the Right-to-Know mandates of public notice, open meetings, maintenance of and publication of minutes, open votes, and the ability of the public to record. (Pl.'s Memo. Law § II. (A).) Dr. Martin asserts that the TRG is charged with "getting the business of government done" and does so by meeting, discussing, deliberating, and advising developers and the Planning Board regarding how, under what conditions, and with what changes a project is to be expedited, approved, and completed. (Id.) Additionally, Dr. Martin

argues that as a public body, public agency, or advisory committee, the TRG must also maintain all government records, including notes, handouts, and minutes at a known place and make them available for public inspection and duplication during normal business hours pursuant to RSA 91-A:4. (Id.)

Dr. Martin further argues the City's PPM is void as it is against the law, and that a person requesting documents need not identify himself or herself, nor provide any reason or basis for their request as it is irrelevant to the information sought. (Compl. ¶ D; Pl.'s Memo. Law § II. (A).)

The City concedes that the TRG is part of a public agency and is therefore susceptible to the RSA 91-A governmental records inspection requirement applicable to both public agencies and public bodies, RSA 91-A:4. (Def.'s Summ. 6.) The City recognizes that subject to certain exceptions, all government records produced by, for, with, or in the possession of the City must be made available to the public for review. (Id. at 7.) However, the City argues that the TRG, although made up of City employees appointed to it by the City Manager, is not a public body and that its meetings are accordingly not required to be open to the public. (Id. at 6.) The City points out that while both pubic agencies and public bodies are subject to the Right-to-Know Law's records inspection requirement, RSA 91-A:4, only public bodies are subject to the Law's open meetings requirement, RSA 91-A:2. (Id. at 6–7.) The City asserts a group of employees with no foundation in the City charter, City ordinance, Land Use regulations, with no budget, authority, and no power, and that can be dissolved at any time by the City Manager, is not what the Legislature intended when it defined "public bodies" in RSA 91-A:1-a. (Id. at 7.) The City also asserts that there has been no showing that the PPM violates the law, or how Dr. Martin has been aggrieved by the existence of the PPM. (Id. at 8–9.)

RSA 91-A sets out the Right-to-Know Law in New Hampshire. RSA 91-A guarantees that "[e]very citizen . . . has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes . . . ." RSA 91-A:4, I. RSA 91-A also guarantees that all meetings of public bodies "shall be open to the public." RSA 91-A:2. The statute addresses "public agencies," "public bodies," and "advisory committees," and defines each of those terms.

A "public agency" means "any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision." RSA 91-A:1-a, V.

A "public body" means any of the following:

> (a) The general court including executive sessions of committees; and including any advisory committee established by the general court.
> (b) The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.
> (c) Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.
> (d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.
> (e) Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

RSA 91-A:1-a, IV. The portion of the definition of "public body" potentially applicable to this case is RSA 91-A:1-a, IV(d).

An "advisory committee" means

> any committee, council, commission or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

RSA 91-A:1-a, I.

The City recognizes that, subject to certain exceptions, all government records produced by, for, with, or in the possession of the City must be made available to the public for review (Def.'s Summ. 7), and concedes that the governmental records inspection requirement applicable to both public agencies and public bodies, RSA 91-A:4, applies to the TRG. (Id. at 6.) The court accordingly assumes without deciding that the public records inspection requirements applicable to public agencies as set out in RSA 91-A:4 apply to the TRG.

The question presented by this litigation is not just whether the TRG is subject to the records inspection provisions of RSA 91-A:4 but whether the TRG is an "advisory committee" or is otherwise a "public body," and thus subject to the open meetings requirements of RSA 91-A:2.

"Public bodies" are subject to the mandates of the Right-to-Know Law regarding meetings, meaning all meetings must be open to the public and noticed, any person is permitted to record the meetings, and meeting minutes are promptly recorded and must be open to the public for inspection within five business days of the meeting. RSA 91-A:2, II.

RSA 91-A:1-a, VI(d) expressly states that "public bodies" include any "agency" or "advisory committee thereto." The question then is whether the TRG is an "advisory committee" or an "agency" within the meaning of RSA 91-A:1-a, VI(d). The court concludes that it is not.

The term "advisory committee" has a particularized definition in the Right-to-Know Law. Pursuant to RSA 91-A:1-a, I, an "advisory committee" is a committee "designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority." The TRG is not constituted to advise or make recommendations concerning formulation of public policy or legislation. It instead is a group of staff members from various City departments brought together to advise applicants concerning the applicants' proposed projects, and then to advise the Planning Board as to the view of each department concerning the applicant's proposed project. Most such advisory committees, those not charged with providing advice or recommendations concerning formulations of public policy or legislation, "are not public bodies and are not themselves subject to the Right-to-Know law meeting requirements. However, any information an advisory committee provides to the agency will be subject to the governmental records requirements." ATTORNEY GENERAL'S MEMORANDUM ON NEW HAMPSHIRE'S RIGHT-TO-KNOW LAW, RSA CHAPTER 91-A, n.1 (March 20, 2015) (last accessed Feb. 5, 2019) (https://www.doj.nh.gov/civil/documents/right-to-know.pdf.) The TRG is not an "advisory committee" within the meaning of RSA 91-A:1-a.

As the Attorney General's Memorandum on New Hampshire's Right-to-Know Law points out, there is an unresolved issue concerning whether and to what extent State and

municipal "agencies" are intended by the Right-to-Know Law to be considered "public bodies" subject to open meeting requirements:

> Members of the former Right-to-Know Commission have publicly commented that the inclusion of "agency" in the definition of a municipal public body was unintended. The Right-to-Know law otherwise distinguishes a public agency from a public body. Generally, public bodies are subject to the open meeting requirements and public agencies are not. Such municipal agencies and authorities are subject to the governmental records requirements of the Right-to-Know law because they fall within the definition of a public agency. The courts have not yet had occasion to interpret whether the existing paragraph imposes public meeting requirements on a municipal agency. Applying public meeting requirements to an agency would be impractical and it is expected a court would find application of the public meeting requirement on a municipal public agency an absurd construction of the statute. Legislation introduced in 2009, House Bill 53, would have removed the words "agency" and "authority" from the definition of a municipal public body. House Bill 53 was retained in the House Judiciary Committee and vetoed after passage in the 2010 legislative session.

Id. at n. 4.

In order to resolve the current litigation, however, the court need not resolve this issue, because the TRG is not a City "agency" (nor is it a board, committee, subcommittee, or subordinate body or the like of any City "agency").

"The purpose of the Right-to-Know Law 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." 38 Endicott St. N. v. State Fire Marshal, 163 N.H. 656, 660 (2012) (quotation omitted). "It thus furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Id.; see also N.H. CONST. pt. I, art. 8. While the statute does not provide for unlimited access to public records, the court resolves 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." 38 Endicott St. N., 163 N.H. at 660. Therefore, the court broadly construes provisions favoring disclosure and interprets the exemptions restrictively. Taylor v. Sch. Admin. Unit #55, 170 N.H. 322, 326 (2017). "A public entity seeking to avoid disclosure under the Right-to-Know Law bears a heavy burden to shift the balance toward nondisclosure." 38 Endicott St. N., 163 N.H. at 660 (quotation omitted).

However, "[n]ot all organizations that work for or with the government are subject to the right-to-know law." Bradbury v. Shaw, 116 N.H. 388, 389–90 (1976). In classifying an organization, the court recognizes that "any general definition can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of government done," and the court must "construe[ ] the right-to-know law to further the statutory objectives of increasing public access to governmental proceedings." Union Leader Corp. v. New Hampshire Hous. Fin. Auth., 142 N.H. 540, 547 (1997) (quotations and citations omitted).

In Bradbury v. Shaw, 116 N.H. 388, 390 (1976), the Court affirmed the trial court's ruling that the Industrial Advisory Committee's "involvement in governmental programs and decisions brought it within the scope of the right-to-know law." Id. The Industrial Advisory Committee was established by the Mayor of Rochester and consisted of prominent businessmen, newspapermen, and members of the city council. Id. at 389. There was no statute or ordinance that established or provided for the committee—it derived its authority from the Mayor who created the committee and called its meetings. Id. The committee met once a month for six months and performed a number of functions, such as contacting businesses it believed might be interested in moving to Rochester, gathered information which potential investors might find useful, and devoted time to the sale of city-owned land, which included arranging transactions and participating in negotiations. Id.

In Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 N.H. 540, 547 (1997), the Court dealt with an entity that was "not easily characterized as solely private or entirely public." The statutory intent in creating the New Hampshire Housing Finance Authority (the "Authority") was to create a "state housing finance authority," but was also considered a "body politic and corporate having a distinct legal existence separate from the state and not constituting a department of state government." Id. (citations omitted). Many of the Authority's day-to-day operations functioned independently from the State. Id. The Court found, on balance, that the Authority was subject to the Right-to-Know Law because the Authority was created "to encourage the investment of private capital . . . through the use of public financing" and that it was deemed "to be a public instrumentality and the exercise by the authority of the powers conferred by [RSA chapter 204–C] shall be deemed and held to be the performance of public and essential governmental functions of the state." Id. (citations omitted). Additionally,

the Authority "performs the essential government function of providing safe and affordable housing to the elderly and low income residents of our State." Id.

In Professional Firefighters of New Hampshire v. HealthTrust, Inc., 151 N.H. 501, 504 (2004), the Court was confronted with a similar quasi-public entity. HealthTrust existed as a distinct legal entity, provided products and services also supplied by private entities, and competed with private entities in the market for the sale of those products and services. Id. (citations omitted). The Court ultimately found that HealthTrust was subject to the Right-to-Know Law because it was an organization comprised exclusively of political subdivisions, which are subject to the Right-to-Know Law; it was governed entirely by public officials and employees; it provided health insurance benefits for public employees through a pooled risk management program deemed by the legislature to be an "essential government function"; it operated for the sole benefit of its constituent governmental entities and for the sole purpose of managing and providing health insurance benefits for public employees and; it managed money collected from governmental entities and enjoyed the tax-exempt status of public entities. Id.

In determining this issue, the court broadly construes the evidence in favor of disclosure. The TRG is a self-directed work team that is made up of City employees. During its meetings, the TRG members discuss with individual applicants the land use plans the applicants seek to present to the Planning Board for approval. Applicants are not obligated to meet with the TRG. Applicants may choose to meet separately with the applicable individual City departments before presenting their plans to the Planning Board, or may choose to present their plans to the Planning Board directly, without any departmental input.

The TRG does not have its own budget and was not created by any City ordinance, charter, or regulation. Rather, the TRG was created by the City Manager, and the City Manager has sole discretion to dissolve the group, or to add or remove members. The City Mayor, City Council, and the Planning Board have no input as to how the TRG is managed.

The City is constitutionally obligated to provide assistance to applicants. The Supreme Court has "consistently held that municipalities have a constitutional obligation 'to provide assistance to all their citizens' under Part I, Article 1 of our State Constitution." Kelsey v. Town of Hanover, 157 N.H. 632, 638 (2008) (quoting Carbonneau v. Town of Rye, 120 N.H. 96, 99 (1980)); see also Richmond Co. v. City of Concord, 149 N.H. 312, 314 (2003); Savage v. Town of Rye, 120 N.H. 409, 411 (1980). The Supreme Court has "reminded towns that it is their

function to provide assistance to their citizens, and that the measure of assistance certainly includes informing applicants not only whether their applications are substantively acceptable but also whether they are technically in order." Richmond Co., 149 N.H. at 315 (internal quotation and citation omitted).

The TRG is nothing more, or less, than one of the ways the City Manager has implemented compliance with this constitutional requirement. Each of the City's departments is obligated to assist applicants as the applicants try to determine whether their applications are substantively acceptable and technically in order. See id. There is no argument that an applicant's department-by-department meetings with staff members to get input as to whether an application is viewed as substantively acceptable and technically in order is a meeting open to the public within the meaning of RSA 91-A:2. The City Manager has chosen to bring the relevant department staff members together to perform that function in this working group as a way to streamline the constitutionally mandated process for applicants and as a way to increase efficiency for City department staff members. Doing so does not render a process which is outside of the open meetings provisions of RSA 91-A subject to those requirements.

Further, although the TRG members provide recommendations and comments to the applicants, they have no decision-making authority, nor any power to suspend, hinder, or facilitate any land use proposals or waiver requests. In addition, the Planning Board is neither required to nor does it always agree with or consider the comments made by TRG members, nor is the Planning Board a "rubber stamp" for the TRG. There was, for example, testimony that it is not uncommon for TRG members to either recommend or decline to recommend applications for approval, with the Planning Board ultimately ruling the other way. The Planning Board maintains the sole authority to grant or deny land use applications and waiver requests.

Dr. Martin's main contention is that he is not able to attend TRG meetings or gain access to TRG meeting minutes. Because the TRG does not fall within the definition of a public body under RSA 91-A, it is not required to hold public meetings.[7] Accordingly, neither Dr. Martin nor any other member of the general public, is entitled to attend TRG meetings. The TRG does not take meeting minutes (nor is it required to do so), but its members do produce work product, including comments or suggestions concerning applications, and that work product becomes part

[7] The City Manager's 2003 and 2017 SOPs concerning the TRG make it clear as well that TRG sessions are not public meetings. (See Def.'s Exs. A–B.)

of the Planning Board project file that can be accessed by the public. The City maintains the records of the TRG and allows the public to access these records. Just as with departmental staff comments or recommendations made to the Planning Board after a meeting between an individual department member and an applicant, the comments or recommendations made by a TRG member after an applicant meeting become part of the public file, and just as with such individual meetings, the TRG meetings with applicants are not public meetings.

Lastly, the court finds that the City's PPM is not unlawful. Mr. Cox testified that the PPM exists only for use by City employees, as it provides them guidance on how to process Right-to-Know requests for governmental records. This form is not intended for use by the general public. Members of the public are not required to fill out the PPM form or provide identifying information in order to access City records. If the documents are readily available, members of the public are allowed to immediately inspect them. If they will take longer to produce, the City official may ask for contact information or ask the individual to come back after five days. Moreover, Dr. Martin testified that he has never had to fill out a PPM form and has never been asked to provide information when he has requested records subject to disclosure under the Right-to-Know Law. Further, the evidence presented shows that Dr. Martin has been able to access the TRG agendas, TRG emails, and the Planning Board project files containing TRG comments, and these materials appear to be the entirety of the material generated by the TRG.

II. Copy Fee Structure

Dr. Martin argues the City's copy fee structure chills and deters public access. (Pl.'s Memo. Law § II. (B).) Dr. Martin asserts that the City could not proffer any reason for its fee structure, nor provide an explanation as to why the price drastically differs from the first page of a document to the eleventh page of the document. (Id.) Dr. Martin argues that an analysis based on the City's own documents and numbers indicate that, at most, the actual cost of copying is 3.9 cents a copy, and not the fifty cent and ten cent rates assessed by the City. (Id.) The City argues that Dr. Martin has not presented evidence that anyone, including himself, has ever been denied access to governmental records based on the City's fee structure. (Def.'s Summ. 9.) The City notes that the fee structure is only triggered when a citizen requests the City to make copies of documents, and that citizens may inspect and copy the records themselves for free. (Id.) Furthermore, the City argues that to the extent Dr. Martin is arguing the City is charging too

much for copies, he has failed to meet his burden. (Id. at 10.)[8] The City argues its fee schedule is reflective of operating costs and maintenance associated with the copiers, and that it is commensurate with fees charged by other New Hampshire municipalities. (Id.)

> Pursuant to RSA 91-A:4, VI,
>
> If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

Id. In Taylor v. School Administrative Unit #55, 170 N.H. 322, 327–28 (2017), the Court found that the School Administrative Unit #55's fee of $7.49 for a thumb drive it sold to individuals making Right-to-Know requests was the actual cost of a thumb drive and that the fee complied with RSA 91-A:4. Id.

The court finds the copying fees assessed by the City are commensurate with "the actual cost of providing the copy," RSA 91-A:4, IV, as evidenced by testimony of City officials and by comparison with other fees assessed in comparable municipalities across the state. The City currently charges fifty cents per page for the first ten pages of any standard black and white document and ten cents per page thereafter. Mr. Cox testified that the fee structure is based on the actual cost of copying, and not for the labor associated with making the copies. These costs include the cost of leasing the machines, their maintenance, and the cost to purchase paper from Office Supply. Mr. Cox testified that the cost of copying must take into account the capital costs of the copiers that are incurred at the end of the lease agreement. Although not determinative, the City presented strongly persuasive evidence of fee schedules from other towns or cities: Derry charges twenty-five cents per page for a photocopy; Dover charges fifty cents per page; Portsmouth charges two dollars for the first page and fifty cents thereafter; Somersworth charges ten dollars for up to ten pages and any page beyond that is one dollar per page; Claremont

[8] The court assumes without deciding that it is the City's burden to prove reasonableness, not Dr. Martin's burden to prove unreasonableness. Cf. Murray v. N.H. Div. of State Police, 154 N.H. 579, 583 (2006) (government's obligation to show exemption to disclosure applies).

charges twenty-five cents to one dollar per page depending on the paper size; Nashua charges seventy-five cents for the first page and ten cents per page after that; Laconia charges one dollar per page; and Manchester charges one dollar for the first copy and fifty cents for each additional copy. (Def.'s Ex. D.)

The court finds that the City's fee structure of fifty cents per page for the first ten pages and ten cents per page thereafter is in compliance with RSA 91-A:4, VI, nor is there any evidence that it chills or deters public access.

III. Attorney's Fees

Dr. Martin argues he is entitled to costs and attorney's fees pursuant to RSA 91-A:8, the redemption of a public right doctrine, and under the Harkeem[9] doctrine. (Compl. ¶ F.) The City argues that it should prevail on the issues, and therefore attorney's fees would not be appropriate. (Def.'s Summ. 11.) Alternatively, the City argues that if Dr. Martin prevails, he would not be entitled to attorney's fees because he is unable to prove that the City knew or should have known that its actions constituted a violation of RSA 91-A. (Id.)

Because Dr. Martin has not prevailed, he is not entitled to attorney's fees or costs associated with litigation.

CONCLUSION

In sum, for the foregoing reasons the court denies Dr. Martin's request for declaratory and injunctive relief pursuant to RSA 91-A.

So Ordered.

February 8, 2019

Steven M. Houran
Presiding Justice

[9] Harkeem v. Adams, 117 N.H. 687 (1977).