THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2021-0253

Laura Colquhoun

v.

City of Nashua

MEMORANDUM OF LAW IN LIEU OF BRIEF PURSUANT TO SUPREME COURT RULE 16(4)(B)

STANDARD OF REVIEW

The appellant has elected not to provide a transcript of the aforementioned hearing. Accordingly, this Court's review is "limited to determining whether or not there are any errors of law apparent on the face of the record." *Baker v. Dennis Brown Realty, Inc.,* 121 N.H. 640, 644 (1981), citing *McCrady v. Mahon,* 119 N.H. 241 (1979) (without a transcript, the "sufficiency of the evidence to support the [court's] findings . . . cannot be raised"). The record, as provided by the appellant, consists of the appellant's original complaint with exhibits, the defendant's answer with attachment, the trial court's order, and applicable legislative history. *See* ADD 18-60. Absent a transcript of the hearing on the merits, this Court shall review the decision below for an unsustainable exercise of discretion. *Orford Teachers Assn. v. Watson, Superintendent of Schools,* 122 N.H. 803, 804 (1982); *State v. Lambert,* 147 N.H. 295 (2001) (former "abuse of discretion" standard hereafter referred to as "unsustainable exercise of discretion" standard).

ARGUMENT

The trial court did not err in denying the appellant's request for attorney's fees pursuant to RSA 91-A:8 as there was no evidence that the City of Nashua knew or should have known that it's denial of appellant's Right-to-Know request was a violation of RSA chapter 91-A.

"Pursuant to RSA 91-A:8, I, an agency shall be liable for reasonable attorney's fees and costs incurred if the trial court finds that: (1) the agency violated any provision of RSA chapter 91-A; (2) the lawsuit was necessary in order to make the information available; and (3) the agency knew or should have known that the conduct engaged in was a violation of RSA chapter 91-A." *38 Endicott Street North, LLC v. State Fire Marshal, N.H. Div. of Fire Safety,* 163 N.H. 656, 668 (2012) (internal quotations omitted).

Here, the only disputed element is whether the City of Nashua "knew or should have known that the conduct engaged in was a violation of [RSA] chapter" 91-A. RSA 91-A:8, I. After a hearing on the merits, the trial court found in the negative and decided correctly not to award attorney's fees. ADD 26-27.[1]

In denying appellant her request for attorney's fees, the trial court could not make a finding that the City "knew or should have known that the conduct engaged in was a violation of RSA chapter 91-A." ADD 26. In support of this assertion, the trial court cited the legislature's failed attempt to further define "reasonably described" as it relates

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[1] References to the record are as follows:
"AB": Appellant's Brief
"ADD": Addendum to Appellant's Brief
"DA": Defendant's Appendix

to the Right-to-Know law, and this Court's silence in defining "the limits of a reasonably described request." ADD 26-27. The trial court asserted that determining what constitutes a reasonably described request is "highly context specific." ADD 27. Given conflicting case law from other jurisdictions, and the lack of case law in New Hampshire, the trial court correctly found that "it ha[d] not been shown that the City knew or should have known that the plaintiff's request was reasonably described." ADD 27.

In support of her contention that the City of Nashua acted in bad faith, the appellant relies heavily on the trial court's determination that her initial request was reasonably described. AB 9, 13-15. The appellant reasons that since the trial court found the City of Nashua was wrong to initially deny the Right-to-Know request, then it must follow that the City also knew or should have known, prior to the trial court's decision to the contrary, that its conduct was wrong. AB 10. This is not consistent with statutory requirements. In order for the appellant to be awarded attorney's fees, all three elements of RSA 91-A:8, I must be met. *38 Endicott Street North LLC,* 163 N.H. at 668. The legislature did not intend for RSA 91-A:8, I to allow for attorney's fees merely because a public agency was wrong. Had that been the legislature's intent, it would not have set limitations on the awarding of attorney's fees. *Lambert v. Belknap County Convention,* 157 N.H. 375, 949 A.2d 709, 715 (N.H. 2008) (finding "our legislature chose to limit instances in which a body or agency may meet in nonpublic session").

The trial court's finding that appellant's request was reasonably described does not automatically lead to the conclusion that the "knew or should have known" standard is satisfied for purposes of awarding attorney's fees. *Hampstead School Board v. SAU 55,*

pg. 10, No. 2020-0268 (N.H. April 20, 2021). This Court has yet to define the term "reasonably described." AD 21-22. Though this Court need not define every term within RSA chapter 91-A in order for public agencies to comply with it, the information available as to what constitutes a "reasonably described record" is contradictory. In determining whether the appellant's request was reasonably described, the trial court looked to other jurisdictions for guidance. ADD 21-26.

Federal courts have determined that "all-encompassing requests" are overbroad. *Freedom Watch, Inc. v. Dep't of State,* 925 F. Supp.2d 55, 62 (D.D.C. 2013); *Dale v. I.R.S.*, 238 F. Supp.2d 99, 104 (D.D.C. 2002). The trial court, in a previous order to which the City of Nashua was a party, cited with approval these same federal cases. ADD 50; *see* DA 4. In a footnote, the trial court stated:

> Indeed, courts tend to frown on requests for "all communications" because they do "not describe the records sought sufficiently to allow a professional employee familiar with the area in question to locate responsive records." Freedom Watch, Inc. v. Dep't of State, 925 F.Supp.2d 55, 62 (D.D.C. 2013); see also Dale v. I.R.S., 238 F.Supp.2d 99, 104 (D.D.C. 2002) (noting that "courts have found that FOIA requests for *all* documents concerning a requester are too broad" and collecting cases (emphasis in original)).

Ortolano v. City of Nashua, Hills. Cty. Super. Ct. S. Dist., No. 226-2020-CV-0133, at 4 n.2 (Jan. 12, 2021) (Order, *Temple*, J.); DA 4. Both the trial court and the United States District Court for the District of Columbia place a negative connotation on the word *all.* Without a temporal reference to narrow such expansive requests, a request for *all* is simply too broad.

Other jurisdictions have set parameters that a request for a year's worth of emails is overbroad while a request for 30 days' worth of emails is not. *Pa. Dep't of Educ. V. Pittsburgh Post-Gazette,* 119 A.3d 1127, 1127 (PA. Commw. Ct. 2015); *Easton Area School District v. Baxter,* 35 A.3d 1259, 1265 (PA. Commw. Ct. 2012). Here, the stated time-frame was 59 days' worth of emails between two individuals that discuss a variety of topics on a daily basis. ADD 33, 49-50.

It was reasonable for the City of Nashua to rely both on the trial court's prior ruling as well as other case law in determining whether this appellant's request reasonably described a governmental record. Given that, it cannot be said that the City of Nashua knew or should have known that denying the appellant's request would constitute a violation of RSA chapter 91-A. A reasonably described request "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Marks v. U.S (Dep't of Justice)*, 578 F.2d 261, 263 (9th Cir. 1978); ADD 22. This standard contemplates a request for records that pertain to a specific topic, subject, or particular project. This standard is untenable when it comes to email communications of one or two individuals. While many employees may have working knowledge in a particular department, only that person whose email is requested has sufficient knowledge to search for the specified records. Applying the standard above, it was reasonable for the City of Nashua to conclude that an employee with working knowledge of the subject area would not know where to look to find all emails between two individuals, when those individuals discussed a number of topics and projects on a daily basis. ADD 49-50. At

the outset, it was not reasonable to search every single physical and electronic file that two specific individuals may have communicated about. ADD 49-50.

Similar to *Ettinger,* the City of Nashua lacked guidance as to what constitutes a reasonably described record. *Ettinger v. Town of Madison Planning Board,* 162 N.H 78, 792 (2011). Though the legislature recently declined to further specify what is meant by reasonably described record, when combined with other contradictory case law, the trial court correctly concluded the City of Nashua "did not knowingly violate, [or] have reason to know that [it's] refusal would violate, the provisions of RSA chapter 91-A." *Chambers v. Gregg,* 135 N.H. 478, 482 (1992) (finding the legislature's failure to define "confidential" combined with past history did not lead to the conclusion that defendants knew or should have known its action(s) would violate 91-A).

Ultimately, the trial court found the appellant's request reasonably described a governmental record and required the City to produce responsive records. ADD 25-26. Had the City of Nashua come to this conclusion on its own, it had reasonable grounds to deny the request as the required search would be unreasonably burdensome. *Am. Oversight v. U.S. Envir. Prot. Agency,* 386 F.Supp.3d 1, 15 (D.D.C. 2019). As noted in *Am. Oversight,* whether a request "reasonably describes the records sought . . . is highly context-specific." *Id.* (internal quotations omitted). "While the linchpin inquiry is whether the agency is able to determine precisely what records are being requested, an agency need not honor a request that requires an unreasonably burdensome search or would require the agency to locate, review, redact and arrange for inspection a vast quantity of material." *Id.* (internal quotations and citations omitted). "This is so because

FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." *Id.* (internal quotations omitted).

Here, it was reasonable for the City to deny the request on the grounds it would be unreasonably burdensome. Though the requested time period was only 59 days, that relatively short period of time was an incredibly busy one for the City, and in particular for the two people whose emails were requested. ADD 49-50. At the time of appellant's original request, the City's default email retention period was 45 days. ADD 55. This meant that any email older than 45 days was automatically deleted out of the email program. ADD 55. Email communications older than 45 days may be stored in a multitude of other locations, however they were likely filed by subject matter and not by date. ADD 55.

Fulfilling the appellant's request may have "require[d] a hand search of thousands of files containing tens of thousands of documents." ADD 50. Surely, this is the definition of "unreasonably burdensome" as contemplated in *Am. Oversight.* Such a search would in fact turn City employees into "full-time investigators on behalf of requestors." *Am. Oversight v. U.S. Envir. Prot. Agency,* 386 F.Supp.3d at 15. Though New Hampshire has yet to adopt this reasoning, given the fact that New Hampshire looks to other jurisdictions when interpreting its Right-to-Know law, it was reasonable for the City to rely on this case law in denying appellant's request. Given this, it cannot be said that the City of Nashua knew or should have known that its conduct was a violation of RSA chapter 91-A.

CONCLUSION

The City's reasonable reliance on existing case law supports the trial court's finding that the City did not know, nor should it have known, that its actions violated or would violate RSA chapter 91-A. For the reasons contained herein, the City of Nashua respectfully requests that this Honorable Court affirm the judgment below.

The City of Nashua waives oral argument.

Respectfully submitted,
Jim Donchess, Mayor
City of Nashua

By their Attorney
Office of Corporation Counsel

September 27, 2021

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CERTIFICATE OF COMPLIANCE

I, Nicole M. Clay, hereby certify that pursuant to Rule 16(4)(b) of the New Hampshire Supreme Court Rules, this memorandum of law contains approximately 1,949 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

September 27, 2021

/s/ Nicole M. Clay
Nicole M. Clay

CERTIFICATE OF SERVICE

I hereby certify that the foregoing memorandum of law in lieu of a brief was electronically served this date to Richard J. Lehmann, Esq.

September 27, 2021

/s/ Nicole M. Clay
Nicole M. Clay

DEFENDNAT'S APPENDIX

Ortolano v. City of Nashua

Hillsborough County Superior Court, Southern District

No. 226-2020-CV-00133

January 12, 2021

Judge Temple

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2020-CV-00133

Laurie Ortolano

v.

The City of Nashua

ORDER ON PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff, Laurie Ortolano, has brought a petition in which she seeks access to records from the City of Nashua's (the "City") assessing department (the "Department"). Currently pending before the Court is the plaintiff's second motion for partial summary judgment, to which the City objects. On November 18, 2020, the Court held a hearing on the plaintiff's motion. After consideration of the evidence, arguments, and the applicable law, the Court finds and rules as follows.

Standard of Review

The Court decides summary judgment motions by considering "the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." SegTEL, Inc. v. City of Nashua, 170 N.H. 118, 120 (2017) (quotation omitted). If this "review of the evidence does not reveal any genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law," then summary judgment is proper. Id. (quotation omitted); see also RSA 491:8-a, III.

Analysis

"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." N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit, 169

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N.H. 95, 103 (2016) (quotation omitted). "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Id. (quotation and citation omitted). "Although the statute does not provide for unrestricted access to public records, [the Court] resolve[s] 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." Id. (quotation omitted). "As a result, [the Court] broadly construe[s] provisions favoring disclosure and interpret[s] the exemptions restrictively." Id. (quotation omitted).

Here, the plaintiff seeks summary judgment related to three distinct types of records: (F) Department meeting notes; (G1) Field Data Collection Cards; and (G2) policy and procedure documents.[1] During the hearing, the plaintiff withdrew her motion for summary judgment related to the (G2) policy and procedure documents. (Hr'g at 1:56–57.) As such, the plaintiff's motion for summary judgment regarding those documents is MOOT. The Court will address the remaining records in turn.

F. Department Meeting Notes

The plaintiff's claim related to these documents stems from her November 14, 2018 Right-to-Know request. (Pl.'s Mem. Supp. Summ. J. at 2.) The plaintiff requested "[a]ll communications between the Assessing Department and KRT Appraisal (including Rob Tozier, KRT's Vice President) related to the state-required five-year full statistical re-evaluation of all properties in the City of Nashua for 2018." (App. 200–201.) On November 19th, the City informed the plaintiff that responsive documents would be

[1] The Court will refer to the letters as used in the plaintiff's pleadings.

assembled and available for inspection on December 3, 2018. (Id. at 201.1) The City then produced a total of 1,951 pages for the plaintiff's review, including one document consisting of 1,383 pages. (Lloyd Aff. ¶¶ 8–9.)

After reviewing the produced documents, the plaintiff learned about notes created during an October 11, 2018 meeting between Rob Tozier and members of the Department. (Ortolano Aff. ¶ 9.) Additionally, in June 2019, the plaintiff found a copy of the meeting notes while looking through unrelated Department documents. (Id. ¶ 10.) After learning of the meeting notes, the plaintiff filed another Right-to-Know request specifically seeking the meeting notes as part of the Board of Assessors packet distributed on October 18, 2018. (App. 220.) In response to the plaintiff's request, on September 4, 2019, the City provided two versions of the notes taken during the October 11, 2018 meeting. (Id. 222–227.)

The plaintiff argues that the meeting notes were responsive to the November 14, 2018 Right-to-Know request. She asserts that the notes should have been produced by the City. (Pl.'s Mem. Supp. Summ. J. at 5.) The plaintiff maintains that the City failed to produce the notes when she first requested them because the City failed to conduct an adequate search. (Id.) In response, the City asserts that the November 14, 2018 Right-to-Know request did not adequately describe the meeting notes. (Def.'s Obj. ¶¶ 20–21.) Rather, the City argues that it reasonably understood the November 14, 2018 request for "all communications" to mean only letters, memorandums, and emails, and not minutes or notes of meetings. (Id. ¶ 29.) Additionally, the City points out that it produced the notes at issue once the plaintiff reasonably described them in her subsequent Right-to-Know request. (Id. ¶ 36.)

The threshold issue for the Court to decide is whether the plaintiff's November 14, 2018 Right-to-Know demand actually requested the meeting notes at issue, i.e. whether the demand "reasonably described" the meeting notes. As the supreme court has never defined the term "reasonably described" as used under RSA 91-A, the Court "look[s] to other jurisdictions construing similar statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq, [and] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objectives." Censabella v. Hillsborough County Atty., 171 N.H. 424, 426 (2018). Under FOIA, a reasonably described request "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." Marks v. United States (Dep't of Justice), 578 F.2d 261, 263 (9th Cir. 1978).

Here, the plaintiff requested "[a]ll communications between the Assessing Department and KRT Appraisal (including Rob Tozier, KRT's Vice President) related to the state-required five-year full statistical re-evaluation of all properties in the City of Nashua for 2018." (App. 200–201.) The Court agrees with the City that a request for "all communications"[2] between two entities does not reasonably request "meeting notes." See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litig., MDL No. 1532, No. 2007 WL 1668634, at *1 (D. Me. June 5, 2007) (distinguishing between

[2] The plaintiff arguably invited this problem by using such a broad request. Indeed, courts tend to frown on requests for "all communications" because they do "not describe the records sought sufficiently to allow a professional employee familiar with the area in question to locate responsive records." Freedom Watch, Inc. v. Dep't of State, 925 F.Supp.2d 55, 62 (D.D.C. 2013); see also Dale v. I.R.S., 238 F.Supp.2d 99, 104 (D.D.C. 2002) (noting that "courts have found that FOIA requests for *all* documents concerning a requester are too broad" and collecting cases (emphasis in original)).

meeting notes and communications, and noting that "meeting notes are not communications"). As such, the City could have reasonably found that the October 11th meeting notes at issue here were not responsive to the plaintiff's request. Moreover, it is undisputed that the City produced 1,951 pages of documents which it had deemed to be responsive to the plaintiff's November 14, 2018 request. Additionally, once the plaintiff specifically requested the meeting notes at issue with particularity, the City produced two versions of them. Consequently, given the record before it, the Court finds that summary judgment is not warranted. The plaintiff's motion for summary judgment as to these records is accordingly DENIED.

G1. Field Data Collection Cards

Pursuant to a contract with the City, KRT performed a statistical update for the City for tax year 2018. (Tozier Aff. ¶ 2.) During this process, KRT printed field data collection cards from the AssessPro database in order to perform a field review of each property. (Id. ¶ 3.) While performing the field review, KRT appraisers verified or noted corrections to the data contained on the cards. (Id. ¶ 5.) KRT then used these notations to develop preliminary assessments for the properties. (Id. ¶ 6.) Thereafter, KRT senior appraisers would use the preliminary assessments in combination with the information contained on the collection cards to set the final assessments for each property. (Id. ¶ 7.) During the process, only KRT staff used the data collection cards and the cards were never circulated. (Id. ¶ 10.) After setting the final assessment, the final data elements used to develop the final assessments were transferred to the official Property Record Card for each property in the City's AssessPro database. (Id. ¶ 12.)

On August 13, 2019, the plaintiff requested copies of field data collection cards, worksheets, and other documents used in the valuation process. (Pl.'s Memo. Supp. Summ. J. at 10; see also App. 235.) The City responded that:

> There are approximately 31,000 individual printed property record cards . . . and over 1000 printed property record cards for properties sold within the revaluation timeframe which are responsive to this request. These property record cards are exempt from disclosure under RSA 91-A:5, IX as preliminary drafts, notes, and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

(App. 237–38.) The plaintiff claims that the City improperly withheld these documents pursuant to RSA 91-A:5, IX and now moves for summary judgment on that issue.

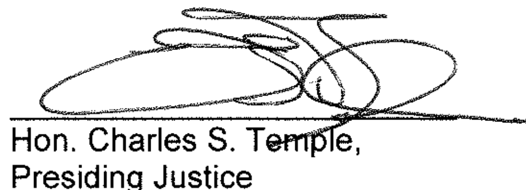
RSA 91-A:5, IX provides that "[p]reliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body" are exempt from disclosure. The object of the exemptions found in RSA 91-A:5, IX "is to strike a balance between the public's right to know and the government's need to function effectively." ATV Watch v. N.H. Dep't of Trans., 161 N.H 746, 758 (2011) (quotation omitted).

The plaintiff argues that the redacted information does not meet the requirements of RSA 91-A:5, IX because there "was simply no decision to be made, no deliberations to be conducted, and no policy to be determined." (Pl.'s Post Hr'g Mem. at 10.) In response, the City contends that "the facts clearly show that the field cards were 'pre-decisional' notes not circulated to a quorum or a majority of any public body and not the final form of the property record card." (Def.'s Obj. Summ. J. ¶ 62.) Moreover, the City asserts that "[t]he inquiry is not whether the information itself would be confidential if in a document final form, it's how the documents and information were used." (Id. ¶ 45.)

Here, on the one hand, the plaintiff claims that the information on the "Field Data Collection Cards" merely represents data collected by the KRT employees during the review process and it is not related to any decision or deliberation. See Chicago Tribune Co. v. Cook County Assessor's Office, 109 N.E.3d 872, 880 (Ill. App. Ct. 2018) (finding that "[d]ocuments reflecting data . . . are not subject to exemption . . . because they are not part of the predecisional, deliberative process"). On the other hand, the City claims that the cards include the thoughts and assessments of the KRT employees, which may or may not be reflected in the final assessed value of the property. See id. (finding opinions or deliberations of employees, including internal debates or discussions, as opposed to data, may be protected under the deliberative process exemption); see also Hearst Corp. v. Hoppe, 580 P.2d 246, 252 (Wash. 1978). It further argues that the cards are the very definition of drafts, as they were preliminary notes made by KRT assessors in making preliminary assessments before being reviewed by KRT senior assessors in making a final decision. See ATV Watch, 161 N.H. at 759–60 (distinguishing between predecisional, decisional, and postdecisional documents). There is a significant factual dispute as to the substance, character and purpose of these cards. Accordingly, given the record before it, the Court finds that summary judgment is not warranted as there are genuine issues of material fact as to the nature of the information on the Field Data Collection Cards. The plaintiff's motion for summary judgment for these records is therefore DENIED.

So ordered.

Date: January 12, 2021



Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
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