THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

Case No. 2022-0237

LAURIE A. ORTOLANO
v.
CITY OF NASHUA

BRIEF OF APPELLANT, CITY OF NASHUA

Celia K. Leonard, Esquire (NH Bar #14574)
Deputy Corporation Counsel
Steven A. Bolton, Esquire (NH Bar #67)
Corporation Counsel
Nicole M. Clay, Esquire (NH Bar #268456)
Attorney/RTK Coordinator
City of Nashua
229 Main Street - P. O. Box 2019
Nashua, New Hampshire 03061-2019
(603) 589-3250

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page**

Other Authorities **Page**

QUESTIONS PRESENTED

I. Whether the trial court erred as a matter of law in determining the City of Nashua failed to conduct a lawful search in response to a Right-to-Know request for emails because it failed to consider RSA 91-A:4, III-b and the City's uncontested evidence that the requested emails were transitory and "Initially and Legally Deleted. City's Mot. Recons. at 13. App. I at 18, 20-23.

II. Whether the trial court erred in failing to consider RSA 91-A:4, III-b and determine whether records that exist solely on back-up tapes were no longer readily accessible to the agency itself. City's Mot. Recons. at 13. App I at 18-21.

III. Whether the trial court erred in ordering the City of Nashua to conduct a search of its back-up tapes for responsive records. City's Mot. Recons. at 13, 15. App. I at 18, 20-23.

IV. Whether the trial court erred in determining that a search of back-up tapes is not unduly burdensome. City's Mot. Recons. at 13. App. I at 18, 23

V. Whether the trial court erred in relying on Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F3d 504 (D.C. Cir. 2011) in determining that a reasonable search under the Right-to-Know law requires searching back-up tapes. City's Mot. Recons. at 16, 17. App. I at 21-22.

VI. Whether the trial court erred in ordering the City to engage in remedial training without identifying who was to receive training and what type of training. City's Mot. Recons. at 13, 18, 19. App. I at 18, 23-24.

STATEMENT OF THE CASE

Appellee submitted a Right-to-Know request, under RSA 91-A, to the City of Nashua, appellant, on June 16, 2021, in which she requested, *inter alia,* "[a]ll emails sent by and received by Louise Brown for November 1, 2020 through her last day of work." App. II at 12.[1] Ms. Brown's last day of work was December 25, 2020. T. at 19, 28, 39. By letter (sent via email) dated June 23, 2021, the City responded to appellee's request, advising it "no longer has reasonable access to Ms. Brown's emails from the time of her employment." App. II at 13.

Appellee, *pro se,* filed suit against the City on July 19, 2021. App. I at 5. The trial court held a one-day bench trial on December 6, 2021, after which the City filed its Memorandum of Law. App. II at 4. The primary issue as identified by the trial court "is whether the City conducted a reasonable search in response to this request despite not searching the backup tapes." App. I at 9. By order dated February 7, 2022, the trial court found the City had violated the Right-to-Know law by not retrieving disaster recovery backup tapes from an off-site location, converting those backup tapes to a searchable format, and then searching those backup tapes for emails which the testimony at trial proved were transitory and initially and leagally deleted such that they were no longer subject to disclosure under RSA chapter 91-A. *See* App. I at 12, 14. The City filed a Motion to Reconsider on February 25, 2022, which was denied on March 28, 2022. App. I at 17. This appeal followed.

[1] Citations to the record are as follows: "App. I" refers to Appellant's Appendix I containing the appealed decisions; "App. II" refers to Appellant's Appendix II; "T" refers to the transcript of trial on December 6, 2021.

STATEMENT OF THE FACTS

By email dated Wednesday, June 16, 2021, appellee, Laurie A. Ortolano sent a Right-to-Know request to Kimberly Kleiner, Director of Administrative Services for the City of Nashua ("City"), with the subject line "Louise brown Emails, Amanda Mazerolle Emails and Karina Ochoa Emails." App. II at 12. The request was for the following:

- All emails sent by and received by Louise Brown for November 1, 2020 through her last day of work.
- All emails sent by and received by Amanda Mazerolle from November 1, 2020 through March 7, 2021.
- All emails sent by and received by Karina Ochoa from November 1, 2020 through March 7, 2021.

App. II at 12.

Ms. Brown worked for the City for 22 ½ years. T. at 98. She was a supervisor in the City's Assessing Department from 2006 until her separation from the City on December 25, 2020. T. at 99, 19, 28, 39. At the time of the request, therefore, Ms. Brown was not employed by the City. T. at 98, 19, 28, 39. During the relevant time (November 1 – December 25, 2020), Director Kleiner was Ms. Brown's direct supervisor. T. at 30, 38. During the relevant time, Ms. Brown conducted business via telephone and in-person communications, as well as by email. T. at 104. Ms. Brown testified that most, if not all, of the emails she sent and received were transitory in nature. T. at 103. Ms. Brown testified that she would view an email and either respond immediately, keep it temporarily to

respond shortly thereafter, or forward it to the appropriate personnel. T. at 99, 100, 103.

There was no evidence or testimony that Ms. Brown did not perform her job duties well for her over twenty-two years at the City. There was no evidence or testimony that Ms. Brown acted contrary to City policy or any law when she deleted emails she had answered, forwarded or otherwise addressed. There was no evidence or testimony that Ms. Brown was ever disciplined for not filing her emails properly or failure to keep records for any required period. In fact, Ms. Brown left the City to work in the Assessing Department in the largest City in the state, Manchester. T. at 97. Further, Ms. Brown testified that she did not ever delete an email to avoid its disclosure in a pending or anticipated right to know request. T. at 105-106. There was no evidence or testimony whatsoever that would tend to show that she had done anything to avoid her record-keeping duties for the City or to avoid disclosing information under the Right-to-Know law.

Deputy IT Director Nicholas Miservitch explained the City's email retention policies and procedures. T. at 65-68, 74,75. Ms. Brown's emails were received and temporarily retained in Outlook. T. at 70, 75 – 76. During the relevant time, including at the time of Ms. Brown's separation from the City, the testimony at trial was that the City's retention schedule for emails contained and/or maintained in Outlook was 120 days. T. at 74-75. The City's email retention policy dictated that any items in an Outlook account would be automatically purged after 120 days. T. at 75.

City users also have the ability to save individual emails outside of their Outlook application. T. at 75. City employees are given access to their personal U-drives, where they may save individual files. T. at 71. City

employees may create PST folders on their personal U-drives. T. at 43, 75. A PST folder is not part of Outlook, but works in conjunction with it, meaning it cannot be opened without access to an Outlook account. T. at 75. A PST folder does not exist until or unless it is created by an individual user. T. at 75. It requires a savvy end-user to set-up an automatic path from Outlook to a PST file. T. at 76. Any email saved in a PST folder is not subject to the automatic purge of Outlook. T. at 43, 75, 76.

Emails may exist on city system back-up tapes. T. at 77. The City's system back-up tapes are meant for use in a catastrophic event. T. at 78, 79. The back-up tapes are not meant to save records, but rather to restore the City's computer system if necessary. T. at 78, 79. With substantial effort, records on the City's email back-up tapes can be converted to a readable format and searched if the City knows which mail box, what time frame and which search terms to use for the search. T at 81 – 82, 90.

After Ms. Brown's departure from City employment, Director Kleiner requested access to Ms. Brown's Outlook application and personal (U) drive. T. at 41, 71, 88. In response to appellee's Right-to-Know request, Director Kleiner searched within Ms. Brown's Outlook application and Ms. Brown's personal U-drive for Ms. Brown's emails in the requested time frame and found none. T. at 39-41. Director Kleiner was not surprised by this because any emails in the Outlook application would have been automatically purged prior to the City receiving the Right-to-Know request at issue. T. at 42, 43. Ms. Brown testified that to preform her daily responsibilities for the City, she did not need to save her emails. T. at 103. There was no evidence or testimony that Ms. Brown ever set up a PST folder on the U drive.

By letter (sent via email) dated June 23, 2021, the City responded to appellee's June 16, 2021 Right-to-Know request. App. II at 13. In its June 23, 2021 letter, as it pertained to Ms. Brown's emails, the City stated it "no longer has reasonable access to Ms. Brown's emails from the time of her employment." T. at 44. Id. Appellee filed suit on her June 16, 2021 request on July 19, 2021.

Sometime before or during August 2021, Director Kleiner conducted a search of her own emails and found emails to and from Louise Brown. T. at 57. App. II at 24. Those emails were produced to appellee on October 29, 2021, with a letter explaining where they were located. T. at 48. Id.

The City first notified appellee, via letter, that it would be providing emails from Louise Brown to Director Kleiner on September 24, 2021. App. II at 20. The City's September 24, 2021 letter was produced in response to another Right-to-Know request dated September 17, 2021, where appellee asked the City to search for emails to Louise Brown, as sent by nine different City employees. T. at 35, 59, 60. In addition to Director Kleiner, appellee asked the City to search for emails from Louise Brown to Karina Ochina [sic] and Amanda Mazerolle. T. at 31. Such emails had previously been captured in response to appellee's June 16, 2021 Right-to-Know request. T. at 31, 35. The City conducted more than one search to locate relevant documents and provided numerous responsive documents to appellee. App. I at 5-6.

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law by: (1) failing to consider that under RSA 91-A:4, III-b, "legally and initially deleted" records are not subject to disclosure; (2) failing to consider that under RSA 91-A:4, III-b, records that are not "readily accessible" to the agency itself are considered deleted under the statute; (3) failing to consider that in the City of Nashua, the Assessing Department is a distinct "agency" under the Right-to-Know law from the Information Technology Department; (4) applying a test articulated in a 2011 District of Columbia Federal Circuit Court case which has not been adopted by the First Circuit, the New Hampshire Supreme Court or New Hampshire Federal District Court which test was for analysis of the Federal Freedom of Information Act, which does not have a provision the same as RSA 91-A:4, III-b; (5) determining that converting back-up tapes to search for deleted emails which tapes are stored off-site for restoration of the City's computer system if there is a catastrophic event was not unduly burdensome; (6) finding that the City's search for the requested records was not reasonable and therefore improper under the law; and (7) ordering remedial training for unspecified persons when guidance from the New Hampshire Attorney General's Office and the New Hampshire Municipal Association supported the City's position not to search its back-up tapes.

Accordingly, the trial court's order should be REVERSED.

STANDARD OF REVIEW

"We defer to the trial court's findings of fact if they are supported by the evidence and are not erroneous as a matter of law. We review the trial court's statutory interpretation de novo. We first look to the language of the statute itself and, if possible, construe that language according to its plain and ordinary meaning. We give effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We also construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. However, we do not construe statutes in isolation; instead, we attempt to construe them in harmony with the overall statutory scheme." *Town of Lincoln v. Chenard*, No. 2020-0316, decided January 19, 2022 at 1 (N.H. 2022)(internal citations and quotations omitted).

With respect to the trial court's order requiring participation in remedial training, the language of RSA 91-A states that "[t]he court may also enjoin future violations of this chapter [91-A], and may require any officer, employee, or other official of a public body or public agency found to have violated the provisions of this chapter to undergo appropriate remedial training, at such person or person's expense." RSA 91-A:8, V. Thus, there is a statutory requirement to have found that there was a violation of Chapter 91-A to be able to require remedial training. If this Court finds there was no violation of RSA Chapter 91-A, there is no authority to require remedial training.

If this Court does find that there was a violation of Chapter 91-A, Appellant believes that the standard of review for requiring participation in

remedial training is whether or not there was an unsustainable exercise of discretion by the trial court. Although there is no New Hampshire Supreme Court decision that specifically discusses the appropriate standard of review for this particular statutory remedy, RSA 91-A:8, V provides for two permissive remedies – granting an injunction and requiring appropriate remedial training. In cases assessing the standard of review for permissive injunctive relief under the Right-to-Know law, courts have found that "the trial court retains the discretion to determine whether such relief should be ordered in a particular case." *ATV Watch v. N.H. Dep't of Res. & Econ. Dev.*, 155 N.H. 434, 438 (N.H. 2007). To assess if there was an unsustainable exercise of discretion, this Court would "determine whether the record establishes an objective basis sufficient to sustain the discretionary judgement made….[the City], as the party asserting that the trial court ruling is unsustainable, must demonstrate that the ruling was unreasonable or untenable to the prejudice of its case. *B&C Mgmt. v. N.H. Div. of Emergency Servs.*, No. 2020-0052, decided February 23, 2022 (internal citations and quotations omitted).

ARGUMENT

I. The trial court erred as a matter of law in determining the City of Nashua failed to conduct a lawful search in response to a Right-to-Know request for emails because the trial court failed to consider RSA 91-A:4, III-b and the City's uncontested evidence that the requested emails were transitory and "initially and legally deleted."

The adequacy of the City's search for documents is judged by the standard of reasonableness. *ATV Watch v New Hampshire Dept. of Transportation*, 161 N.H. 746, 753 (2011). "The search need not be exhaustive. Rather, the agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Id.* "Once the agency meets its burden to show that its search was reasonable, the burden shifts to the requestor to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith." *Id.*

"The Right-to-Know Law does not . . . guarantee the public an unfettered right of access to all governmental workings, as evidenced by certain legislatively created exceptions and exemptions." *Goode v. NH Legislative Budget Assistant*, 148 N.H. 551,553 (2002).

One such legislatively created exception is for electronic records that have been "initially and legally delated." RSA 91-A:4, III-b. The law states that such records "shall no longer be subject to disclosure." *Id*.

It is axiomatic that a reasonable search for records to satisfy a Right-to-Know request does not require the City to search for records which, by law, are not subject to disclosure under the Right-to-Know law. If they are not

subject to disclosure, they are not relevant. The trial court erred, therefore, when it did not consider whether Ms. Brown's emails had been "initially and legally deleted" and therefore, were not subject to disclosure.

The trial court's Order does not cite RSA 91-A:4, III-b. It also makes no mention of any factual findings regarding the transitory nature of Ms. Brown's emails. If the trial court had properly considered 91-A:4, III-b, the uncontroverted testimony at trial clearly established that Ms. Brown's emails were transitory in nature.

While "legally deleted" is not defined in Chapter 91-A, it is logical to turn to the state's record retention statute, RSA 33-A, for guidance in interpreting "legally deleted." As this Court has stated, "we do not construe statutes in isolation; instead, we attempt to construe them in harmony with the overall statutory scheme." *Town of Lincoln v. Chenard* (N.H. 2022) at 1.

Under RSA 33-A:3-a, XXVII, "transitory" correspondence by and to a municipality needs to be retained only as long as needed for reference. Ms. Brown was a Supervisor in the City's Assessing Department for over 14 years. T. at 99. Ms. Brown was the uncontroverted expert on how long she needed to keep emails and her credible testimony was that once she was done with it, she saw no reason to keep the email. T at 99, 100, 103, 106. There was no evidence that she did not perform her job to the highest standard. Accordingly, if in her professional opinion she knew of no need to maintain the emails beyond the time to she needed to act on the email, there is no evidence that her decision to delete the emails was illegal. There is also no evidence that there was any other reason to maintain the emails

beyond the time Ms. Brown adjudged they were necessary, e.g. no litigation hold and no then-pending request for those records.

Even if, *assuming arguendo*, Ms. Brown had deleted the emails illegally, as with FOIA, the Right-to-Know law is not a records retention statute and "[e]ven where an agency was obligated to retain a document and failed to do so, that failure would create neither responsibility under FOIA to reconstruct those documents nor liability for the lapse." *Landmark Legal Foundation v. E.P.A.*, 272 F.Supp.2d 59, 66-67 (D. D.C. 2003)(internal quotes and citations omitted).

The emails at issue in this case only existed on the City's catastrophic, system-wide back-up tapes at the time appellee's Right-to-Know request was submitted. T. 66, 77-78. Such emails had been initially and legally deleted. Ordering the City to search its back-up tapes for records that were not subject to disclosure, renders RSA 91-A:4, III-b meaningless. This is contrary to the rules of statutory interpretation and an error of law.

Here, the City conducted a search reasonably calculated to produce all reasonably described and relevant documents. Meaning, those records which were still subject to disclosure under the Right-to-Know law, not those which had been "initially and legally deleted" under RSA 91-A:4, III-b and were, by statute, "no longer subject to disclosure." RSA 91-A:4, III-b. This search entailed the Information Technology ("IT") Department granting access to Ms. Brown's direct supervisor, Director Kleiner, to search in Ms. Brown's Outlook application and any files saved on her personal U-drive. T. at 40-41. Ms. Brown had separated from the City on December 25, 2020, over five months prior to date of the request at issue,

June 16, 2021. At the relevant time, emails in the Outlook application were retained for 120 days. T at. 74-75. Therefore, the City met its burden of showing that its searches were reasonable.

The Right-to-Know law does not require, nor is it reasonable for, the City to search for documents that are no longer subject to disclosure to prove it has conducted a reasonable search for documents for a Right-to-Know request. Documents no longer subject to disclosure are not "relevant." The testimony at trial shows "beyond a material doubt that [the City] conducted a search reasonably calculated to uncover all relevant documents." See *ATV Watch*, 161 N.H. at 753. The City met its burden. The burden therefore, shifted to appellee to show that the City's searches were not reasonable or not conducted in good faith. *Id.* The appellee offered no such evidence or testimony. The appellee did not offer any evidence that Ms. Brown's emails were not "initially and legally deleted." Nor did the appellee offer any evidence that the emails were "readily accessible" to the Assessing Department. Rather, the evidence before the trial court was Ms. Brown deleted her transitory emails legally, the back-up tapes were off-site and accessible only to IT to convert and search, T. at 79, 80, and the City acted reasonably in the circumstances and in good faith in searching for relevant documents responsive to appellee's request.

II. The trial court erred in failing to consider RSA 91-A:4, III-b and determine whether records that exist solely on back-up tapes were no longer readily accessible to the agency itself.

When engaging in statutory interpretation, this Court has said:

> [W]e first look to the language of the statute itself, and, if possible, construe that language according to its plain and

> ordinary meaning. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole.

Merrimack Premium Outlets, LLC v. Town of Merrimack, pg. 3, N.H. Supreme Court No. 2020-0358 (October 1, 2021) (internal brackets, citations and quotations omitted). These rules of statutory interpretation apply to the Right-to-Know law as well. *Lambert v. Belknap Cty. Conv.,* 157 N.H. 375, 949 A.2d 709, 713 (2008).

RSA 91-A:4, III-b itself offers a starting point for the analysis, stating:

> For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

RSA 91-A:4, III-b is plain and unambiguous on its face. Deleted electronic records that are not "readily accessible" to an agency are not subject to disclosure.

Ms. Brown testified that she deleted her emails when she was done with them. T at 103. She had separated from the City over five months prior to the initial records request at issue. Her deleted emails had been purged from the "active" system of the City. T at 66. They thus had been "initially and legally deleted." While City emails are captured during

routine "back-ups" of the City's computer system, those are for recovery in case of a catastrophic event. T at 77, 78. These back-up tapes are only accessible to the IT Department. T at 86. As the testimony at trial showed these back-up tapes are not "readily accessible" as defined by RSA 91-A:4, III-b, to the Assessing Department.

The City's system back-up tapes are meant for use in a catastrophic event. T. at 79. The back-up tapes are not meant to save records, but rather to restore the City's computer system if necessary. T. at 78, 79. With substantial effort, records on the City's email back-up tapes can be converted to a readable format and searched if the City knows which mail box, what time frame and which search terms to use for the search. T at 81 – 82, 90.

Deputy IT Director Miseirvitch testified that the City "backs up its entire system on a periodic basis." T. 77. The purpose of the back-up tapes is to ensure City government can function in the event of a catastrophic event. T. 78. In order to search any information on back-up tapes, the tapes must first be restored. T. 81, 82. The restoration process can only begin after the relevant back-up tapes have been identified and retrieved from an off-site facility. T. 81.

In enacting RSA 91-A:4, III-b, the legislature did not intend that every deleted item be considered a governmental record. The Vice Chair of the Right-to-Know Oversight Commission, John Lassey, testified on April 22, 2008 relative to HB 1408-L, which enacted RSA 91-A:4, III-b.[2] Attorney Lassey testified:

[2] http://gencourt.state.nh.us/BillHistory/SofS_Archives/2008/senate/HB1408S.pdf, pg. 35.

> A record can be ephemeral. You can get a pink slip. Your secretary hands you a pink slip, saying, "So-and-so called on the telephone." You look at that; you crumple it up; you throw in in the waste basket. That was a governmental record very, very briefly. Once it's in the waste basket and gone, it's no longer a government record. . . .
>
> There is section, proposed section, III-a and III-b, . . . that cover retention of government records and deletion of government records. If that pink slip, somebody gets wind of that it and asks . . . for a copy of it during the brief thirty seconds that it's in existence, you can't throw it in the waste basket. . . [I]t is a governmental record as long as it's in existence.[3]

Similarly, Ms. Brown's emails were a governmental record so long as they existed. However, Ms. Brown's emails were initially and legally deleted, and therefore, no longer considered governmental record subject to RSA chapter 91-A. RSA 91-A:4, III-b.

Emails sent and received by Ms. Brown, but not retained by the City, were deleted in compliance with RSA 33-A:3-a. When "public records, including emails, are properly disposed of in accordance with a duly adopted records-retention policy, there is no entitlement to those records" under the Right-to-Know Law. *See Twomey v. N.H. Department of Justice*, Docket No. 10-CV-503 (2010). RSA 33-A:3-a, XXVII requires "transitory" correspondence by and to a municipality to be retained as needed for reference.

RSA 91-A:4, III-b is plain and unambiguous on its face. Initially and legally deleted electronic records that are not readily accessible

[3] *Id.*

to an agency are not subject to disclosure. The emails at issue in this case only existed on the City's catastrophic, system-wide back-up tapes at the time appellee's Right-to-Know request was submitted. T. 66, 77-78. Such emails had been initially and legally deleted Ordering the City to search its back-up tapes for records that were not subject to disclosure, renders RSA 91-A:4, III-b meaningless. This is contrary to the rules of statutory interpretation and was an error of law.

III. The trial court erred in ordering the City of Nashua to conduct a search of its back-up tapes for responsive records.

Restoring the City's system back-up tapes to search for emails is exactly the kind of speculative, time-consuming fishing search that is not required by RSA 91-A. See *Assassination Archives & Research Ctr. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989), aff'd in pertinent part, No. 89-5414 (D.C. Cir. Aug. 13, 1990) ("FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters"). Further, the City is not required to maintain its records or perform searches which are not compatible with its own document retrieval system. See RSA 91-A:4, VII; see also *Assassination Archives* at 219.

Deputy IT Director Miseirvitch testified that the City "backs up its entire system on a periodic basis." T. 77. The purpose of the back-up tapes is to ensure City government can function in the event of a catastrophic event. T. 78. In order to search any information on back-up tapes, the tapes must first be restored. T. 82. The restoration process can only begin after the relevant back-up tapes have been identified and retrieved from an off-site facility. T. 81.

"A 'reasonably calculated search' does not require that an agency search every file where a document could possibly exist, but rather requires that the search be reasonable in light of the totality of the circumstances. *Pardo v. Fed. Aviation Admin.*, Civil Action No. 1:13-cv-14 at 9. (E.D. Va. 2013)(internal quotations omitted).

The circumstances here are that the requested records had been "initially and legally deleted" and purged from the City's active computer system which was readily accessible to the Assessing Department months prior to the records requests. The records only, possibly if they had been captured at the time of a back-up tape that had not been overwritten, existed on back-up tapes meant for use in a catastrophic event.

Searching the backup tapes is akin to going to the landfill and retrieving a bag of trash. The items in the bag of trash have been disposed of. They are no longer readily accessible to the person who threw away the trash. In enacting RSA 91-A:4, III-b, the legislature contemplated the necessity and practicality of going to the landfill to retrieve trash and determined it was not required when certain conditions are met. That is why the provision of "initially and legally deleted" is in the statute. Whether an electronic record is "initially and legally deleted" is akin to throwing a paper record in the trash. Once it is in the trash, it is no longer subject to disclosure as a governmental record. The legislature went a bit further and specified that "no longer readily available" did not include items in an easily retrieved deleted items folder. With a paper record, that would be akin to throwing a paper record in the trashcan in one's office. But once the paper record has made it to the landfill, or the email has been purged from Outlook and is only available by restoring system-wide backup tapes designed for

reconstruction after a catastrophic event, that paper record in the landfill or purged email is no longer readily available to the owner that disposed of it. The statute defines such an electronic record as "a governmental record no longer [] subject to disclosure." Accordingly, it is not reasonable for and the City had no obligation under the law to go looking for records that it was not required to disclose and which are therefore not responsive to the request.

IV. The trial court erred in determining that a search of back-up tapes is not unduly burdensome.

As the uncontroverted testimony at trial showed that the records at issue were "initially and legally deleted" and no longer "readily accessible" to the Assessing Department, the records were, by law, not subject to disclosure. Any amount of time, therefore, a minute, 15 minutes, an hour or 5 hours, spent in City employee time to retrieve, restore, search for and sort through, such records is burdensome as the law does not requires that they be produced. The Right-to-Know law does not place a burden on the City to search for records that are not subject to disclosure. Any search not required by the law is burdensome to the City and to order such a search is therefore an error of law.

To require the City to search for records which, by law, are not subject to disclosure, would be to serve "mismatched incentives." *See Newman v. Federal Bureau of Prisons*, No. 1:20-cv-3761 at 9 (D. D.C. May 13, 2022). New Hampshire's Right-to-Know law does not allow the City to charge for the time required to search for requested records. While fees may be charged by an agency under FOIA, there are restrictions on the amount and

certain searches must be free or charged a reduced fee. *See* FOIA § 552(A)(3).

> "Nonprofit FOIA requestees like Newman pay little to nothing for their FOIA requests. So they do not internalize the costs of a wild goose chase like this one. This case has tasked multiple attorneys at three agencies (including the U.S. Attorney's Office) and several FOIA specialists in the search for decades-old inmate records that by regulation should have been transferred or destroyed years ago. Unsurprisingly, they were. But the cost of this predictably fruitless search is borne by the agencies, and ultimately, American taxpayers." *Id*. (internal citations omitted).

Similarly, in this case, a search through back-up tapes would be a fruitless search for records not subject to disclosure, which unnecessary search would be funded by Nashua taxpayers.

Further, citing the same reasoning and based on the trial court's order in this matter, the same trial court has found a second time that searching catastrophic back-up tapes is required to show a reasonable search under the Right-to-Know law. See *Order dated June 21, 2022 (Laurie Ortolano v. City of Nashua 226-2021-CV-00306)* App. II at 108. Notice of Appeal in that matter was filed by the City on July 21, 2022. The trial court found that the burden to the City was not great in this case, however, the trial court is itself adding to that burden exponentially by repeat orders to search back-up tapes for the City to show a reasonable search. That is not required by the law and is therefore in error.

V. The trial court erred in relying on Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504 (D.C. Cir. 2011) in determining that a reasonable search under the Right-to-Know law requires searching back-up tapes.

In finding the City should have searched its back-up tapes, the trial court applied the factors articulated in *Ancient Coin Collectors Guild v. U.S. Dep't of State,* 641 F.3d 504 (D.C. Cir. 2011). Though New Hampshire courts routinely apply federal cases interpreting the Freedom of Information Act (FOIA) to our Right-to-Know law, it makes little sense to do so here as there are no similar provisions within the two statutes. *Censabella v. Hills. Cnty. Atty.,* 171 N.H. 424, 428-29 (2018). Since FOIA does not have a provision that discusses initially and legally deleted electronic records, FOIA is not *in pari materia* with RSA chapter 91-A. Accordingly, there is "little basis for using" the *Ancient Coin* case "as an aid" in determining whether the City should have searched its back-up tapes. *Petition of Thayer,* 145 N.H. 177, 184 (2000).

Ancient Coin has not been cited, nor the test therein articulated used by the trial court, by the New Hampshire Supreme, the New Hampshire Federal District Court, or the First Circuit. This Court should decline to adopt the *Ancient Coin* test as is not in harmony with New Hampshire's Right-to-Know law. Specifically, the *Ancient Coin* test is meant to be applied to FOIA, which does not have language similar to RSA 91-A:4, III-b regarding "initially and legally deleted emails," which are not "reasonably accessible" to the agency itself are no longer subject to disclosure under the Right-to-Know law.

To the extent federal case law is applicable, the Court should look to *Stewart v. U.S. Dept. of Interior.* There, the 10th Circuit found that "data on backup tapes is not organized for retrieval of individual documents or files, but rather for purposes of disaster recovery." *Stewart,* 554 F.3d 1236, 1244 (10th Cir. 2009). Here too, the City's backup tapes are maintained for

disaster recovery, they are "not the official means" by which the City maintains its records or complies with the Right-to-Know Law. *Id.* The disaster recovery tapes are stored off-site. T at 82. They can only be accessed by IT. Accordingly, the Right-to-Know law does not require that back-up tapes be searched for Assessing Department emails which have been initially and legally delated.

VI. The trial court erred in ordering the City to engage in remedial training without identifying who was to receive training and what type of training.

The Court ordered "the City to participate in remedial training." It appears this remedy is ordered pursuant to RSA 91-A:8, V, which states:

> The court may also enjoin future violations of this chapter, and may require any officer, employee, or other official of a public body or public agency found to have violated the provisions of this chapter to undergo appropriate remedial training, at such person or person's expense.

RSA 91-A:8, V contemplates that specific individuals be required to undergo training. The Court identified no such individuals. The Court also made no specific findings as to which specific individuals violated any part of RSA Chapter 91-A. The City has over 2000 employees and many different agencies including school, fire, police, planning, code enforcement, public works, assessing, information technology, and risk management, just to name a few. Accordingly, the trial court erred as a matter of law when it failed to identify the individuals who violated the law and required remedial training.

The trial court also erred when it ordered the training and failed to identify the subject matter of the training and who should conduct the

training. The New Hampshire Municipal Association routinely supplies trainings relative to RSA Chapter 91-A. The materials on its website offer the same interpretation of RSA 91-A:4, III-b that the City argues here[4]: that back-up tapes do not have to be searched. This interpretation is the basis of the guidance already provided to City employees, and therefore remedial training is not necessary.

In addition, the most recent New Hampshire Attorney General's Memorandum on New Hampshire's Right-Know law, RSA 91 Chapter 91-A, dated March 20, 2015 states:

> "While the New Hampshire Supreme Court has not yet addressed the issue, it is our view that electronic records that have been legally delated are are available only on system back-up storage media are properly treated as no longer subject to disclosure under RSA 91-A:4, III-b. To access a record that exists only on back-up media typically requires either replicating the system hardware or taking the system in use off-line to restore the back-up. RSA 91-A:4, III-a (*sic*. from context, it appears this should be a reference to 91-A:4, III-b) has the effect of making restoration from back-up unnecessary in the ordinary course of responding to Right to Know requests."
>
> Citing *Twomey v. N.H. Department of Justice*, Docket No. 10-CV-503 (2010).[5]

Further, the trial court itself, in a previous case Right-to-Know law suit against the City, *Granite Green Investment Partners, LLC v. City of Nashua,* Docket 226-2017-CV-00609, App. II at 85 found that the "[r]ecords stored in the City's back-up system are not "readily accessible" as defined by 91-A:4, III-b." *See* City of Nashua's Revised Request for

[4] https://www.nhmunicipal.org/town-city-article/not-so-%E2%80%98new%E2%80%99-right-know-law

[5] https://www.doj.nh.gov/civil/documents/right-to-know.pdf

Findings of Fact and Rulings of Law, Par. 58 submitted October 5, 2018; and Order, Par. 58, issued October 31, 2018. App. II at 72, 85. The testimony supporting that ruling was nearly identical to the testimony before the trial court in this case. See transcript at App. II at 28. This Court upheld the trial court in that matter. See App. II at 94.

The record in this matter does not establish "an objective basis sufficient to sustain the discretionary judgement" of the trial court in ordering remedial training. *See B&C Mgmt. v. N.H. Div. of Emergency Servs.*, No. 2020-0052. As such, and given the guidance available to the City within the plain language of the Right-to-Know law itself in RSA 91-A:4, III-b, the New Hampshire Municipal Association, the Attorney General and the trial court itself in a prior decision, the trial court's ruling on remedial training was "unreasonable or untenable to the prejudice of [the City's] case." *Id.* Accordingly, the trial court's order on remedial training was an unsustainable exercise of discretion and should be reversed.

CONCLUSION

For the reasons set forth in this brief, the City respectfully requests that this Honorable Court reverse the judgement of the trial court.

The City requests the opportunity to present oral argument, not to exceed 15 minutes, to be presented by Celia K. Leonard.

CITY OF NASHUA

By Its Counsel,
OFFICE OF CORPORATION
COUNSEL

Date: August 16, 2022

By: /s/ Celia K. Leonard
Celia K. Leonard (NH Bar #14574)
Deputy Corporation Counsel
Steven A. Bolton (NH Bar #67)
Corporation Counsel
Nicole M. Clay (NH Bar #268456)
Attorney/RTK Coordinator
City of Nashua
Office of Corporation Counsel
229 Main Street, P.O. Box 2019
Nashua, NH 03061-2019
603-589-3250
leonardc@nashuanh.gov
boltons@nashuanh.gov
clayn@nashuanh.gov

CERTIFICATE OF WORD LIMITATION COMPLIANCE

Pursuant to Supreme Court Rule 26(7), the Appellant hereby certifies that the foregoing Brief complies with the word limitation of Supreme Court Rule 16(11) and contains 6,625 words according to the word processing program, exclusive of pages containing the table of contents, table of citations and any addendum.

/s/Celia K. Leonard

Celia K. Leonard, Esquire

CERTIFICATE OF DECISIONS APPEALED

Pursuant to Supreme Court Rule 26(7), the Appellant hereby certifies that the decisions of the Hillsborough County Superior Court appealed from by Appellant are in writing and that a true and correct copy of each decision has been attached hereto in Appendix I of Appellant's Brief in compliance with Supreme Court Rule 16(3)(i).

/s/Celia K. Leonard

Celia K. Leonard, Esquire

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Supreme Court Rule 26(7), the Appellant hereby certifies that on August 16, 2022, Laurie Ortolano, pro se, was served with a copy of the foregoing Brief via the electronic filing system in compliance with Supreme Court Rules 16(10), 26(2) and 26(3), as modified by the 2018 Supplemental Rules of the Supreme Court for Electronic Filing, Rule 18.

/s/Celia K. Leonard

Celia K. Leonard, Esquire