The State of New Hampshire

Supreme Court

No. 2022-0237

Laurie A. Ortolano

v.

City of Nashua, NH

AMICUS BRIEF BY GARY A. BRAUN IN SUPPORT OF APPELLEE LAURIE A. ORTOLANO

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Questions Presented for Review

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2. Whether this Court should adopt a per se rule which categorically provides that governmental records stored on electronic back-up tapes are *never* subject to search or disclosure under RSA 91-A?

3. Whether the City met its burden to demonstrate that the emails requested by appellee were "initially and legally" deleted by the City in accordance with applicable law and the City's own record-retention policies?

4. Whether any City employees require remedial training with respect to RSA 91-A given the facts of this case?

Statement of the Case

This case, and the appeal in the matter of Ortolano v. City of Nashua, Supreme Court Docket No. 2022-0342 (hereafter the "Related Case) both involve the same questions and issues. First and primarily, is the appellant-City required to search back-up computer tapes for emails requested under New Hampshire's Right to Know ("RTK") law, RSA 91-A, where the search takes only 2 or 3 hours of time, is done with fair frequency by the City, does not interfere with the use or functionality of the City's email and computer systems, and has been performed on one or more prior occasions by the City in order to search for and provide records responsive to earlier RTK requests? In addition, both appeals involve the question of whether the City's search for the emails was adequate and whether the City deleted emails in accordance with applicable law and its own policies, as well as the interpretation and application of RSA 33-A (NH's Disposition of Municipal Records Act). The rulings reached in this case should be followed for purposes of deciding the issues on appeal in the Related Case. The Court's attention is also directed to appellee's Statement of the Case for further information.

Statement of Relevant Facts and Information

The City's deputy Information Technology ("IT") director, Nick Miseirvitch, testified at trial in this case that it would take only 2 hours to search the City's back-up tapes to potentially locate the emails subject to Ms.

Ortolano's June 2021 RTK request at issue in this matter. Trial Transcript from this case (hereafter "TT") at page 89, lines 18-21.[1] Mr. Miseirvitch has been with the City for about 10 years and had occasion over that period of time to conduct searches of the City's back-up tapes every "couple of months". TT at page 85, lines 10-12 and 22-23. At the same time, he did not often need to search the back-up tapes for records. See trial court order at p. 5 in the Related Case at p. 122 of the City's Appendix II. Mr. Miseirvitch testified that the City performed a search of its back-up tapes for emails from the former City assessing chief in response to different RTK request made to the City by appellee in June 2019. TT at p.88, lines 21-25. Importantly, the City's back-up tapes could be accessed to search for and recover emails deleted by City employees. TT at p. 77, lines 13-16 and at p. 85, lines 1-9.

No evidence was adduced at trial in this case or the Related Case that searching the back-up tapes would require the shut-down of all or any part of the City's email or computer systems, or that such systems would suffer any loss of functionality for any period of time as a result of searching the tapes.

During the time in which Ms. Ortolano's June 2021 RTK request was pending, the City employed an ever-changing email retention policy which first required that an email be retained for 45 days, then for 90 days, and finally for

[1]Mr. Miseirvitch testified in the Related Case that it would take about 3 hours for him to review the City's back-up tapes in order to search for the emails requested by appellee that are the subject of the Related Case. See trial court order at p. 5 in the Related Case at p. 122 of the City's Appendix II.

120 days. TT at p.65, lines 19-25, p.66, line 1, p. 74, lines 12-25 and p. 75, lines 1-13. No evidence was proffered by the City that the length of time an email was required to be retained under any of its retention policies was based on the type, content, subject matter, or classification or categorization of the email at issue including any classification or categorization required by law. At the end of the retention period in effect at the time, emails would be automatically deleted from all City employees' email accounts including from Ms. Brown's account (TT at p. 75, lines 1-13) unless the employee moved the email to a so-called "PST file". Emails or other documents moved to PST files were not subject to auto deletion. TT at p. 76, lines 2-4 and 14-19. Conversely, moving the email to the Outlook "archive" folder would not protect the email from being auto-deleted at the conclusion of the then-in-effect email retention period. TT at p. 77, lines 2-12.

As of September 2021, the City's email retention policy was changed yet again so that City emails are now being saved for a period of 366 days via utilization by the City of a new cloud-based, email storage and retention system. See appellee's appendix at p. 12.

Even when emails were deleted from the City's Outlook system and not saved to a PST file, the deleted emails could be accessed, searched and retrieved via the City's back-up tapes. TT at p. 85, lines 1-9. See also page 42 at lines of the City's appendix where a former IT director for the City testified in the Granite

Green matter, supra, that deleted City emails could be recovered via a search of the City's back-up tapes despite the fact that the emails had been deleted.[2]

Ms. Brown, whose emails were the subject of the appellee's June 2021 RTK request in this case, testified at trial as follows: She became aware of the City's automatic deletion policy only because she and some of her assistants were "losing" emails from their email folders, without known explanation. TT at p. 101, lines 3-17. During the time she worked for the City (appx. 20 years), Ms. Brown was unaware that the City had an email retention policy or policies (TT at p. 106, lines 12-20) or that such policy(ies) required her and other employees in the assessing department to save emails for any specific period or periods of time. TT at p. 101, lines 11-16.

Ms. Brown was likewise unaware of the existence of RSA 33-A and the requirements under the statute that municipalities retain records, including emails, for specific periods of time. TT at p. 101, lines 9-18 and p. 106, lines 12-20. She failed to understand (and apparently was never trained on) the classification scheme enumerated in RSA 33-A:3, XXV through XXVII relative to email retention, as well as the specific mandates under the statute in terms of preserving email records so classified. She therefore never saved *any* of her emails in accordance with or as required by RSA 33-A. TT at p. 102, lines 9-25.

[2] During the same testimony, the City's former IT director admitted that the City's email system did not include any mechanism to prevent a City employee from deleting an email that would be subject to the RTK law including "because the [email] system wouldn't know what's important or not" in terms of knowing what to preserve for a RTK request. See the trial transcript from Granite Green set forth at p. 42, lines 15-24 of the City's appendix.

Mr. Brown and her co-workers in the assessing department did not retain emails received or sent by the department because they simply were "not aware they needed to be saved". TT at p. 103, lines 13-25.

Once she was "immediately done with" an email, Ms. Brown deleted the email including because she believed the emails were hers and that she was free to do so. She also deleted emails in order to free up space in her mailbox so she could receive additional emails. See TT at p. 99, lines beginning at line 12 up through and including p. 103, line 21.[3] Ms. Brown moved some of her emails to the Outlook "archive" folder but did not move emails into her so-called "PST" file. TT at p. 100, lines 20-25, and p. 101, beginning at line 1 up through a including p. 102, line 8. She continued to move emails into her archives folder even though she was aware at some point in time that emails moved into the archives file were subject to automatic deletion by the City's system. TT at p. 102, lines 2-8.

Mr. Miseirvitch apparently was aware of the existence of RSA 33-A, but like Ms. Brown and others employed by the City did not understand that the statute required the City to retain various types of emails for specific periods of time. TT at p. 67, lines 7-15. He testified that it's "unclear to me what exactly it [RSA 33-A] encompasses, in regards [sic] to emails." Despite his position with the City as deputy director of IT, Mr. Miseirvitch never received any training on the

[3] Being "immediately done" with an email apparently meant that Ms. Brown read, responded to or forwarded the email, or somehow in her estimation resolved or otherwise disposed of the issue(s) covered by the email.

email-retention requirements of RSA 91-A or RSA 33-A. Id. Nor apparently did Ms. Brown or others in the assessing department.

Another employee in the City's assessing department named Amanda Mazerolle testified in the Related Case that she was not aware of the term "transitory email" or its meaning, including as such term is used in RSA 33-A:3,XXVII. See trial transcript in the Related Case at p.32, lines 9-13 as set forth at appellee's appendix at p. 9. In fact, no evidence was offered in this case or in the Related Case that Ms. Brown or other employees in the City assessing department were aware of the term "transitory email" or the other categories of email described in RSA 33-A:3-a, XXV through XXVII, much less the meanings of those terms.[4]

The Court's attention is respectfully directed to appellee' Statement of Facts for further factual information relating to this case.

Summary of Argument

This Court should review this appeal and the Related Case on a de novo basis to rule in a manner consistent with the rulings reached by the trial court. If this Court reviews these matters on other than a de novo basis, the Court should affirm all findings and rulings made by the trial court. Based on the facts and

[4] In fact, no City employees who testified in this case or the Related Case seemed to have any knowledge of the various classifications of emails set forth in RSA 33-A:3-a, XXV through XXVII, or what the classification of emails by the statute required in terms of the City retaining certain emails for certain periods of time. Ignorance of, or an unwillingness to acknowledge and comply with, the terms and requirements of RSA 33-A seems to extend into the City's Office of Corporate Counsel as well.

circumstances of this case and the Related Case, the Court should employ the balancing test historically applied to resolve RTK disputes in New Hampshire. Upon application of the balancing test, the Court should find and rule that the City's searches for the emails subject to appellee's RTK requests in this case and the Related Case were inadequate and not reasonably calculated to search for and potentially find emails subject to the RTK requests.

The Court should reject the City's and State's invitation to return to the Fenniman doctrine by adopting a per se, categorical rule that governmental records stored on back-up tapes are never subject to disclosure under RSA 91-A. The Court should also find and rule that the City failed to meet its burden to demonstrate that Ms. Brown "initially and legally deleted" emails subject to appellee's RTK request given that she did not comply with the email-retention requirements of NH law and the City's own email retention polices. Finally, this Court should order on a de novo basis that employees working in the City's assessing, IT and legal departments are required to undergo remedial training as to the requirements of complying with NH and municipal law regarding record-retention and responding to RTK requests.

Argument

I. Introductory Matters

Because the Supreme Court engages in de novo review of cases involving

RSA 91-A, it need not refer to nor review the trial court's decision in this matter including for errors of law or fact. Nonetheless, the Court ought to adhere to the rationale and rulings of the trial court in reaching a decision on appeal. The trial court's decision represents a rational and reasoned approach to applying 91-A. It properly utilized and applied a balancing test in order to weigh the competing interests of assuring the appellee's (and the public's) right to know what the government is doing, against the government's interest in non-disclosure. As written, the TCO assures that the constitutional and statutory purposes of 91-A are met under the facts of this case.

Appellant argues that the trial court did not consider or properly consider the claims made by the City at and subsequent to trial that Ms. Brown "initially and legally" deleted her emails, and that such constitutes an issue for appeal. See City's brief at p. 6. Such argument is misplaced given that this Court examines the City's claim that the Brown emails were "initially and legally" deleted de novo, and as such the trial court's ruling on that issue is of no accord. For the reasons set forth in this brief and in appellee's brief, the Court should find and rule de novo that the City has not met its burden to show that Ms. Brown "initially and legally" deleted her emails, including in accordance with RSA 91-A:4, III-b.[5]

II. Standard of Review and Law Relating to the Case

When the facts are not in dispute, this Court resolves questions

[5] To the extent that this Court examines any issue in this matter other than on a de novo basis, the Court should affirm the findings and/or rulings of the trial court on that issue or issues.

concerning the interpretation of RSA 91-A as a question of law on a de novo basis.[6] ATV Watch v. NHDOT, 161 NH 746 (2011). Ordinary rules of statutory construction are used, and the Court ascribes the plain and ordinary meaning to the words used in the statute. Id. See also Lambert v. Belknap County, 157 NH 375, 378 (2008) and Union Leader v. Town of Salem, 239 A.2d 961 (2020). The Court interprets a statute in the context of the overall statutory scheme and not in isolation. Lambert, supra.

"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." Id citing to Murray v. State Police, 154 NH 579, 581 (2006). "The law 'helps further our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted.'" Id. See also NH CONST. pt. I, sec. 8. Under the statute, full access to public records is assured in order to hold government open, accountable, accessible and responsive. Associated Press v. State of NH, 153 NH 120 (2005). Although RSA 91-A does not provide unrestricted access to public records, to best effectuate the statutory and constitutional objectives of facilitating access to all public documents and proceedings, this Court resolves

[6] The author submits that none of the material facts in this case are disputed including those facts associated with the appellant's claim that the emails at issue were "initially and legally deleted" by the City and its employee. Specifically, as demonstrated by the following sections in this brief and by appellee's brief, deletion by City employees of their emails did **not** comply with the record-retention requirements of RSA 33-A::3-a, XXV, XXVI and XXVIII, and as such, those emails by definition could not be considered "legally deleted".

questions regarding the RTK law a view to providing the utmost information. Lambert, supra at 378.

Thus, the Court construes provisions of the law favoring disclosure broadly, while construing exemptions narrowly and strictly. Id citing to Murray, supra. See also Mans v. Lebanon School Bd., 112 NH 160 (1972). The benefit to the public from disclosure of the records is balanced against the benefit to the public entity from non-disclosure. Mans, supra. A governmental entity has the burden in all respects to demonstrate, beyond a material doubt, that its search for governmental records is reasonably calculated to uncover all relevant documents before the entity will be excused or exempted from disclosing those records. ATV, supra at 753. See also Union Leader v. NHHFA, 142 NH 540 (1997). The adequacy of the government's search is determined by a standard of reasonableness. ATV, supra at 753-754.

When a public entity seeks to avoid disclosing materials under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure. See Lambert and Murray supra. Consistent with the statute's purpose of providing the broadest disclosure possible, this Court looks "… to other jurisdictions construing similar statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)." Censabella v. County Attorney, 171 NH 424, 426 (2018).

III. Under the facts and circumstances of this case and the Related Case, the City's search for Ms. Brown's emails was inadequate absent a search of the City's back-up tapes.

The trial court properly concluded that the primary and dispositive issue before it in this case and the Related Case was whether the City conducted an adequate and reasonable search of its records for Ms. Brown's emails. See the TCO at p. 5 and the trial court's order in the Related Case at pp. 6-7. This Court should likewise focus on the adequacy of the City's efforts to search its governmental records in response to Ms. Ortolano's RTK request(s).

"The adequacy of [a governmental entity's] search for documents is judged by a standard of reasonableness." ATV, supra at 753. "The crucial issue is not whether the relevant documents might exist, but whether the [government's] search was reasonably calculated to recover the requested documents." Id. "[T]he [government] must show beyond a material doubt that it has conducted a search reasonably calculated to uncover all relevant documents …." Id. The government bears the initial and primary burden of demonstrating that its search for the records is adequate. ATV, supra (citation omitted).

The City failed to meet its burden in both this case and the Related Case to demonstrate beyond a material doubt that its search of its records in response to appellee's RTK requests was adequate and reasonably calculated to recover all relevant documents requested by appellee. Per the testimony of the City's deputy IT director in this case and in the Related Case, it is undisputed that

the back-up tapes exist and can be converted into readable form. It is likewise undisputed that the tapes can be searched by the City with minimal expenditure of time and at little, if any, real cost. Further, there is no practical or other obstacle to the City conducting the search of the back-up tapes, including in terms of loss of functionality or use of the email system or City computer systems while the tapes are being searched. In fact, it seems the only "obstacle" facing the City in order to perform the search of the back-up tapes is the rather minimal expenditure of 2 hours of Mr. Miseirvitch's time in this case and 3 hours of his time in the Related Case.

In addition, the evidence shows that Mr. Miseirvitch could leave the back-tapes running while performing the search for the emails at issue and could otherwise turn his attention during that time to other work-related matters. As such, even less of Mr. Miseirvitch's time is needed to search the back-up tapes, resulting in even less cost and less of a burden for the City to conduct the search. The ease with which the back-up tapes can be searched to locate and reproduce any of the deleted emails warrants a ruling that searching the back-up tapes is reasonable in this case and the Related Case, and that absent such search the City's search for the emails was and remains inadequate.[7]

[7] The rationale for concluding that the City is required to search the back-up tapes under the Ancient Coin test discussed in the next section of this brief is the same as that used to conclude that the City's search was inadequate and not reasonably calculated to recover the requested emails as required by ATV.

IV. This Court should rely on FOIA case law, including the decision in Ancient Coin, in reaching a decision in this case and the Related Case.

The trial court properly relied on FOIA-based case law for guidance in terms of determining whether the City's search for Ms. Brown's emails was adequate, including in light of the City's refusal to conduct a 2-hour search of its back-up tapes for the emails. Censabella, supra at 426. This Court should follow suit.

In Ancient Coin v. USDOS, 641 F.3d 504 (D.C. Circuit 2011), the US Court of Appeals for the District of Columbia fashioned a reasonable and pragmatic, three-part test to determine if a governmental entity is required to search for and disclose records stored on back-up tapes based. That test is based on the following factors: (i) whether or not back-up tapes exist that might potentially contain records responsive to a FOIA request; (ii) if so, whether a search of those tapes might yield responsive materials not already provided in response to the record request; and, (iii) if the first two factors are answered in the affirmative, whether or not there is a "practical obstacle to searching them [the back-up tapes]". Ancient Coin, supra at 515. As demonstrated above in Section III of this brief, all 3-factors of the Ancient Coin test are properly decided in favor of Ms. Ortolano and against the City when considered in light of the facts of this case and the Related Case.

The State and City argue that FOIA case law, including the decision in Ancient Coin, are not properly relied upon by this Court or the trial court because FOIA does not include a provision that is identical or similar to RSA 91-A:4, III-b regarding the "initial and legal deletion" of emails. See State's brief at pp. 12-14 and City's brief at pp. 19-21. The State's and City's arguments on this issue are without merit including because they fail to account for the way federal law operates with respect to preservation and disposition of federal governmental records.

FOIA is meant to provide the public access to records from all federal agencies. In turn, federal agency responsibilities and duties for the creation, management, retention and disposal of federal records are set out in a collection of statutes (and related regulations) known collectively as the Federal Records Act at 44 USC Sec. 2101 et seq. (the "FRA"). See Armstrong v. Office of the President, 1 F.3d 1274, 1278 (1993). The FRA prescribes the exclusive mechanism for disposal of federal records, which requires the approval of the National Archives (hereafter "NARA") and prohibits a federal agency from discarding a federal record by fiat. Armstrong, supra at 1278-1279.

FOIA itself does not contain all of the standards for disclosure or non-disclosure of federal government records that are applicable to retention by the federal government. Instead, the FRA and related federal statutes like the Presidential Records Act include provisions affecting and regulating the retention

and disposal of governmental records, including emails and other electronic records.

Per this body of federal law, all federal agencies must establish and follow record retention policies, including in coordination with and under the oversight of NARA. See 44 USC Sections 3101 and 3102 beginning at p. 2 of the Appendix accompanying this amicus brief (the "Appendix"). Some federal agencies may adopt retention standards in addition to those required by the NARA but those standards must comply with the minimum standards set by NARA. See 44 USC Section 3302 at p. 5 of the Appendix. The "unlawful removal or destruction of records" is expressly prohibited by 44 USC Sec. 3105 and compliance with applicable law must be followed if federal records are to be "alienated or destroyed". See 44 USC Section 3105 at p. 3 of the Appendix.

Federal regulations set forth at 36 Code of Federal Regulations ("CFR") Part 1236 provide additional and even more specific standards in terms of retaining and disposing of federal records, including with respect to electronic records. Some the CFR provisions explicitly address deletion of emails and other electronic records. See e.g. 36 CFR Section 1236.10 (a) (requiring that controls for record management be utilized to protect against deletion of electronic records); Section 1236.20 (b) (4) (requiring utilization of record-keeping systems that prevent the unauthorized deletion of emails); Section 1236.20 (b) (6) (requiring record-keeping systems that operate to ensure electronic records are retrievable and usable for as long as needed to comply with NARA-approved

record-retention and disposal policies); and, Section 1236.22 (c) (1) (providing that emails cannot deleted be prior to the expiration of the NARA-approved retention period, including emails which are or may be deemed "transitory" in nature). See copies of the foregoing provisions of 36 CFR 1236 beginning at p. 6 of the Appendix.

The provisions of federal law cited above all relate in some way or the other to preserving and disposing of emails and other electronic records, including so those records are available for disclosure under FOIA. Section 1236.22 (c) (1) is strikingly similar to RSA 91-A:4, III-b in terms of requiring that emails not be deleted unless such is done in compliance with the law. As will be discussed below, the term "legally" as used in RSA 91-A:4, III-b is commonly defined as acting "in accordance with the law". Notwithstanding the assertions to the contrary by the City and State, the full body of federal law relating to retention and disposal of emails and other electronic records therefore does in fact include provisions similar to RSA 91-A:4, III-b, including provisions specifically requiring compliance with statutory retention periods before emails can be deleted such as 36 CFR 1236.22 (c) (1). Accordingly, the use of FOIA case law for guidance by this Court is appropriately undertaken in this case and in the Related Case. This Court ought to therefore rely on Ancient Coin and the 3-part

test set forth therein, and rule that the City must search its back-up tapes for the emails at issue [8]

V. The Court should decline to rule that governmental records contained on back-up tapes are categorically exempt in all instances from disclosure per RSA 91-A.

Prior to its ruling in Union Leader v. Fenniman, 136 NH 624 (1990), this Court had consistently employed the Mans' balancing test when deciding RTK cases. See Town of Salem and Mans, supra, as well as Chambers v. Gregg, 135 N.H. 478 (1992). In Fenniman, the Court deviated from applying a balancing test (if only temporarily) by holding that the "internal personnel practices" exemption set forth in RSA 91-A:5, IV should be broadly construed such that governmental records related to such practices were categorically exempt from disclosure under RSA 91-A. See Fenniman, supra at 626-627. However, in Town of Salem, supra and its companion case Seacoast Newspapers v. City of Portsmouth, 173 NH 325 (2020), this Court took the extraordinary step of overruling Fenniman including to the extent that Fenniman held that internal personnel practice records were per se exempt from disclosure under 91-A. In deciding to reverse Fenniman, the Court pointed to the fact that neither the plain language nor the legislative history of 91-A provided a basis to conclude that a per se test should be employed to exempt governmental records

[8] To the extent the Court declines to use FOIA case law to resolve this appeal, it nonetheless ought to craft a decision based on the facts of this case by adopting a rule relating to the adequacy of searching of government back-up tapes that is consistent with the test employed in Ancient Coin.

involving internal personnel practices from disclosure while decisions to disclose or withhold other government records were premised on a balancing test. See Town of Salem, supra.

The same rationale at the heart of Seacoast and Town of Salem applies in this matter as well as in the Related Matter; namely, there is no basis to conclude from a plain meaning reading of RSA 91-A that governmental records stored on back-up tapes should be categorically exempt from disclosure while other types of government records are subject to a balancing test to determine whether those records require disclosure under the statute.

A return to the Fenniman doctrine, including based on the facts of this case or the Related Case, would also be contrary to the long-standing approach of this Court in RTK cases to construe provisions of the law favoring disclosure broadly, while construing exemptions narrowly and strictly. Nor would a return to the holdings of Fenniman and its progeny serve to best effectuate the statutory and constitutional objectives of facilitating access to all public information, documents and proceedings, and in fact would operate to the detriment of attaining those objections.

The Fenniman doctrine was rightfully abandoned long ago. The Court should not go backwards and resurrect it now.

VI. The courts in New Hampshire are well-equipped to handle RTK cases and "absurd results" will not occur if this Court applies a balancing test on a case-by-case basis to decide whether governmental records on back-up tapes are subject to disclosure pursuant to RSA 91-A.

The State boldly proclaims that adherence to the trial court's decisions in this case and the Related Case, which utilize a balancing test to determine whether the City must search its back-up tapes under the facts of these cases, will create "an unworkable precedent" and will lead to "absurd results". Nothing could be further from the truth.

This Court has historically and consistently (including when overruling Fenniman) applied a balancing test when deciding if governmental records are subject to disclosure under RSA 91-A. Numerous Superior Court decisions have followed the law and utilized the balancing test to render appropriate and lawful decisions, and this Court has upheld many of those decisions on appeal. Is the State suggesting that all past cases decided by this Court and NH trial courts over the decades using the balancing test have been wrongfully decided? It is plainly wrong and a bit insulting to suggest that NH courts cannot be relied upon to sift through differing fact patterns in differing cases and apply the law correctly. This Court should reject the State's contention that judges and courts in NH lack the capability to utilize and apply the balancing test including so that justice is served.[9]

[9] The State's citation to and reliance upon Hawkins v. NHHHS, 147 NH 376 (2001) in support of its argument that this Court should not apply a balancing test here is misplaced. Hawkins preceded

VII. Assuming that Twomey was properly decided, that case is distinguishable on the facts and the same result should not be reached in this case or in the Related Case.

The City and its amicus supporters rely primarily or exclusively on a 2001 opinion from the Merrimack Superior Court in support of their argument that this Court ought to establish a per se test that governmental records stored on back-up tapes are never subject to disclosure under RSA 91-A. See Twomey v. NHDOJ, Merrimack Superior Court Docket No. 10-CV-503 (2001) set forth at the State's appendix starting at p. 15, as well as the City's brief at p.15 and the State's brief at pp. 16-18. The Court ought to reject such argument for the following reasons.[10]

In the first instance, the differing outcomes in this case and the Related Case, as contrasted with the outcome in Twomey, demonstrate why this Court should always utilize a balancing test when deciding whether governmental records are exempt from RTK disclosure. The relevant facts in Twomey are as follows: The back-up tapes at issue in Twomey were "not searchable" as are the City's back-up tapes. The cost of maintaining the State's back-up tapes for RTK purposes would exceed a million dollars a year measured in 2009 or 2010

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this Court's repudiation of the Fenniman doctrine in Seacoast and Town of Salem, and as such, the decision reached in Hawkins no longer has precedential effect or persuasive value.

[10] The State also cites to Stewart v. USDOJ, 554 F.3d 1236, 1244 (10th Cir. 2009) for the proposition that government officials legally comply with the RTK law when those officials retain governmental records for the statutorily-required retention period for such records. See State brief at p. 17. This argument might benefit the City had Ms. Brown actually complied with the email-retention requirements of RSA 33-A (or with the City's own email-retention policies), which of course she did not do.

dollars. The amount of data stored on the State's back-up tapes grew to 1212 GB as of May, 2010. Because the back-up tapes were not searchable, the amount of the time needed by State to respond to RTK requests involving records stored on the back-up tapes "would be so great that [the State's IT department] would be unable to perform its other basic functions." See Twomey, supra at pp. 2-3 of the State's Appendix. The court in Twomey concluded that "[t]o interpret RSA 91-A as the Petitioner requests would mean that the entire staff of [the State's IT department] would be involved in doing nothing but responding to requests under RSA 91-A. Such a result is absurd …" Twomey supra at p. 8.

The author agrees that requiring the State to search its tapes under the facts of Twomey would seem to be unduly burdensome for the State and might well lead to an absurd result. But the facts of this case and the Related Case are wholly different than those present in Twomey. Here, the City bears little burden in terms of searching its back-up tapes. The amount of time for the City to conduct the search is minimal. The IT staff at the City will not be required to spend "all their time" searching the back-up tapes in response to RTK requests as was the case with the State IT department in Twomey.

In actuality, this case, the Related Case and Twomey exemplify perfectly why this Court should always use a balancing test, and should refrain from *ever* adopting a per se rule categorically exempting *any* category or class of governmental records from disclosure under RSA 91-A.

Importantly, Twomey also preceded this Court's reversal of Fenniman and abandonment of the doctrine thereunder that per se exemptions to disclosure under RSA 91-A were sometimes appropriate. Had Twomey been decided and appealed to this Court after the decisions in Seacoast and Town of Salem that overturned Fenniman, this Court would and should have properly reversed the decision reached in Twomey based on that case's establishment of a per se rule categorically excluding governmental records stored on back-up tapes from the reach of RSA 91-A.[11]

VIII. The City has not met its burden demonstrating that Ms. Brown "initially and legally" deleted her emails in accordance with and as required by RSA 91-A:4, III-b.

The Court's attention is directed in the first instance to the arguments made in appellee's brief regarding the legality of Ms. Brown's deletion of emails which were or may have been the subject of Ms. Ortolan's RTK requests.

Putting aside the meaning of the phrase "initially deleted" used in RSA 91-A:4, III-b, there can be no uncertainty as to the meaning of the term "legally deleted" as used in that provision. The common definition of "legally" is some thing or some act done "in compliance with the law". See excerpt from Merriam-Webster Dictionary of the definition of "legally" at p. 12 of the

[11] Had Judge McNamara applied a balancing test when deciding Twomey, he would and should have reached the very same conclusion he reached by applying a per se exemption test – that is, that the State was not required to search its back-up tapes given the heavy burden imposed on the State to do so under the particular facts of that case.

Appendix. This Court applies a plain meaning reading of statutory language in order to interpret the meaning of a statute. See Lambert, supra.

The facts are uncontroverted in this case and the Related Case that Ms. Brown deleted emails without any knowledge of, or regard to or for, RSA 91-A, RSA 33-A or the City's own email retention polices including the email retention requirements contained in those laws. In fact, she essentially deleted emails whenever she wanted to including because she was completely unaware of the requirements to retain emails collectively imposed by RSA 33-A, RSA 91-A and the City's own email retention policies.

It strains credulity for the City and its amicus supporters to argue that Brown "legally deleted" emails under the facts of this case or the Related Case. Moreover, it was and is the City's burden to prove that the manner in which Ms. Brown deleted her emails was "legal", a burden which the City utterly failed to meet in both this case and the Related Case.

To be persuaded by the City's arguments on this issue, the Court would have to assume that *every* email Ms. Brown deleted was "transitory" in nature. However, the evidence is that Ms. Brown and her co-workers in the assessing department were unaware of what a "transitory" email is within the meaning of RSA 33-A. Alternatively, the Court would need to assume that by pure happenstance Ms. Brown properly deleted all "transitory" emails while at the same time saving all non-transitory emails as required by and in accordance with

RSA 33-A, XXV and XXVI for the time periods mandated by those statutory provisions. No evidence of this sort was adduced at trial, and in fact the evidence showed exactly the contrary. Simply put, Ms. Brown's deletion of her emails was not done "legally" because she failed to comply with the statutorily required retention periods for emails set forth in RSA 33-A.[12] For all of these reasons, the Court should reject the assertion that Ms. Brown "legally deleted" her emails.

IX. The Court should rule and order that City employees undergo remedial training given the facts and circumstances of this case and the Related Case.

The evidence is uncontroverted that employees of the City's assessing and IT departments are unaware of the existence of RSA 33-A and/or the City's own email and record-retention policies. Likewise and unsurprisingly, the evidence shows that those employees lack knowledge of the record-retention requirements set forth in RSA 33-A and in the City's own record-retention policies. The evidence also demonstrates that City employees are unaware of the requirements of RSA 91-A with respect to deletion of emails. The trial court properly found that City employees require remedial training on these issues and this Court should reach the same conclusion.[13]

[12] The City and its amicus supporters devote numerous pages in their briefs to the issue of whether Ms. Brown "initially and legally" deleted her emails. Those pages are full of conclusory statements of fact and law. Yet nowhere does the appellant or its amicus supporters actually address the facts of this case or the Related Case, including by discussing how those facts support and prove the assertion that Ms. Brown "initially and legally" deleted her emails.

[13] The City argues at pages 21-22 if its brief that the trial court failed to identify the subject matter of the remedial training necessary and the persons or organizations who should conduct

Since this Court resolves RTK disputes de novo, the Court should craft and issue its own order outlining the requirements for remedial training for City employees. An organization like the NH Municipal Association ought to carry out the training of City employees in the assessing and IT departments on an in-person basis. Conversely, the City's own legal department should not be tasked to provide remedial training to City employees in the IT or assessing departments, including for the reasons that follow.

Based on the City's actions and omissions in these matters, as well as the arguments set forth in the City's brief in this appeal, it is apparent that the lawyers in the City's legal office are unaware of the requirements of RSA 91-A and RSA 33-A. Alternatively, if the City's lawyers are actually aware of those requirements, it would appear they have failed o neglected for a significant period of time to advise City employees how to comply with those laws. Were the City's lawyers aware or willing to advise other City employees how to comply with the requirements of RSA 91-A and RSA 33-A, Ms. Brown, Ms. Mazerolle and Mr. Miseirvitch would have been properly made aware of and trained to comply with the provisions of applicable law and the City's own record-retetnion policies. Even now, the City's lawyers have not assured that the City is employing an email-retention policy that demonstrably complies with RSA 33-A:3-a, XXV

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the training. However, the timing of the City's filing of an appeal in this case and the Related Case effectively cut off the trial court's opportunity to address such issues subsequent to the date of trial in those matters. See appellee's filing with the trial court regarding proposed remedial training for City employees set forth beginning at p. 14 of appellee's appendix.

through XXVII and/or with RSA 91-A:3-a, III-b.[14] As such, all lawyers and other staff members employed by the City's legal department should also undergo remedial training regarding the requirements of RSA 91-A and RSA 33-A with respect to governmental record-retention and responding to RTK requests.

The Court should therefore order that all attorneys and staff members in the City's legal department undergo remedial training as to the issues in this matter, preferably by attending at least a full-day CLE-seminar on RTK and 33-A compliance issues. Given the need to provide remedial training directly to the City's lawyers, it would be inappropriate for those lawyers to provide remedial training to other City employees including those in the City's IT and assessing departments.

Conclusion

For all the above reasons, this Court should rule that the City is required to search its back up tapes for the emails which are the subject of appellee's RTK request. The Court should also order City employees, including all members of the City's legal department, to undergo remedial training as described herein.

Request to be Heard at Oral Argument

I respectfully request to be heard at oral argument in this matter for the time period permitted by Court rules.

[14] The fact that the City now utilizes a cloud-based, email retention system that saves emails for only 366 days does not, on its face, assure compliance with RSA 33-A:3-a, XXVI.

September 30, 2022 Respectfully submitted,

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Certificate of Total Word Compliance

I certify that this brief contains less than 9500 total words as indicated by the word-counting program or indicator on my Word program.

September 30, 2022 s/ Gary A. Braun
Gary A. Braun

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Certificate of Service

I certify that a copy of this brief and my accompanying Appendix was served on all parties and others of record on this date via the Court's electronic filing system.

September 30, 2022 s/ Gary A. Braun
Gary A. Braun