THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Laurie A. Ortolano

v.

City of Nashua

CASE NO. 2022-0237

MEMORANDUM OF LAW OF *AMICUS CURIAE* NEW HAMPSHIRE MUNICIPAL ASSOCIATION IN SUPPORT OF APPELLANT THE CITY OF NASHUA

Pursuant to Supreme Court Rule 30, *amicus curiae* New Hampshire Municipal Association ("NHMA") submits the following memorandum of law in support of the Appellant the City of Nashua ("the city").

INTRODUCTION

This case concerns the question of whether it is reasonable to expect a government entity to conduct a search of "backup tapes" when seeking to fulfill a Right-to-Know request under RSA 91-A. With the steady increase of Right-to-Know requests seen throughout the state, it is increasingly important to provide clarity on the provisions of RSA 91-A when ambiguity arises and to consider the impact interpretations of this statute has on both the smallest of municipalities and the largest of state agencies.

The purpose of RSA 91-A is to "ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." *RSA 91-A:1*. The statute confers on any citizen "the right to inspect all governmental records in the possession, custody, or control" of public bodies or agencies. RSA 91-A:4. Since there is no limit to the scope and size of such records requests, whether a public agency has met its statutory duties is measured by the standard of "reasonableness." When it is alleged that the standard of "reasonableness" has not been satisfied by the responding agency, the after the fact examination by the trial court should focus on whether the search conducted was reasonably calculated to uncover relevant documents. *ATV Watch v. N.H. Dep't Transp.*, 161 N.H. 746, 753 (2011) (Hereinafter *ATV Watch)*. In the case at hand, the superior court ruled that it was

reasonable to require the city to search through its backup tapes pursuant to a request for emails that had been automatically deleted from the city's Outlook server after a period of 120 days and which had not been saved to the city's U-drive. The U-drive is the city's record retention function for important emails. The court ruled that by failing to search the backup tapes, the city did not perform an adequate search under RSA 91-A, and the court ordered those representatives of the city responsible for such violations of the statute to undergo appropriate remedial training at such persons' expense. Superior Court Order, page 10 (hereinafter SCO).

The superior court imposed the penalty of remedial training without first making a separate finding that, under decisional law in New Hampshire, the city knew or should have known that by not searching the backup tapes it was failing to comply with the duty to provide access to governmental records as required by RSA chapter 91-A. It is not settled law in this state whether a public body or agency is required to search a "backup system" for electronic records.

QUESTION PRESENTED

Whether the superior court err in ruling that the city knew or should have known that failure to search back up tapes in response to a Right-to-Know request was a violation of RSA chapter 91-A, thus improperly imposing the penalty of remedial training under RSA 91-A:8, V

INTEREST OF *AMICUS CURIAE*

The New Hampshire Municipal Association is a non-profit, non-partisan association committed to promoting effective municipal government in the State of New Hampshire. NHMA provides training, publications, and advocacy to assist cities and towns with complying with the laws of the state, including RSA chapter 91-A, a principal area of legal guidance to our members.

SUMMARY OF ARGUMENT

This memorandum focuses on two issues. First, the court should not have concluded that the city should have known it was required search through its backup tapes for emails related to a Right-to-Know request, where the city had already searched through its email system and U-drive, and where the backup tapes were not kept or intended to be used as the

city's record retention mechanism. Second, the court should not have found the city to have violated RSA 91-A and ordered the city to participate in remedial training as the decision not to search those tapes did not violate the reasonableness standard set forth in *ATV Watch*, and the city did not know or have reason to know not searching the backup tapes would violate New Hampshire law.

ARGUMENT

RSA 91-A does not provide an explanation as to what lengths a governmental agency must go in searching for records. Instead, the New Hampshire Supreme Court has concluded that the adequacy of an agency's search for documents is judged by a standard of reasonableness. *ATV Watch* at 753 (2011). Consequently, what constitutes a reasonable search for records is a matter of interpretation under RSA 91-A, and the interpretation of a statute is a question of law for the Court to decide. *Hawkins v. N.H. Dep't of Health and Human Servs.*,147 N.H. 376, 378 (2001). The crucial issue [in determining reasonableness] is not whether the relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents. *ATV Watch* at 753. When making a determination as to whether the agency's search was reasonably calculated, the Court looks to whether or not the government entity acted in good faith. *Id.*

Therefore, the court must consider both the actions that the city took in an attempt to fulfill this particular request as well as the reasonableness of the city's decision not to search the backup tapes when assessing whether the city acted in good faith. The city conducted a thorough search of the most reasonable locations for these emails to exist. Between June 16, 2021 and October 29, 2021, the city responded to at least two record requests from the petitioner and provided documents pursuant to those requests. (SCO, pg. 1-2). At the bench trial in this matter, witnesses for the city testified that they searched for emails related to the petitioner's request in many different places including printed emails, (Trial Tr., pg. 22, December 6, 2021), Outlook inboxes (*Id*. 39), and the city's U-drive (*Id*. 40).

Under a good faith standard of analysis, the city demonstrated that it undertook a full search, reasonably calculated to discover the requested documents. Under RSA 33-A:3-a, there is no requirement for a municipality to retain every email communication sent by an employee during their course of employment. Instead, municipalities are free to establish their own retention policies for retention of emails, unless the content of that correspondence

qualifies as something that requires retention under the statute. The city established a policy that all emails would be retained for 120 days. (SCO, p. 3). Employees were also advised to transfer any important emails to a U-drive where they would be permanently saved. (*Id*). It is undisputed that the city searched both the primary location where emails related to the 91-A request would be kept, the Outlook server, and the secondary location, the U-drive. It is also undisputed that the city met with the petitioner several times and provided "numerous responsive documents to the petitioner's request" (*Id.* at 2).

The city looked in all of the most reasonable locations where these email communications would have been stored, provided multiple responsive documents to the petitioner's request, and continued to search for documents on more than one occasion when the petitioner either expanded her request or expressed dissatisfaction with the city's response. There was no evidence presented to the court that anyone from the city intentionally delayed in fulfilling this request, purposely ignored an obvious location where these documents would have been stored, or made any effort to stifle the petitioner's attempts to access these records.

The trial court relied upon federal court FOIA decisions to craft a set of principles to determine whether a reasonable search under RSA 91-A required an examination of the backup tapes. Indeed, in undertaking that review of federal law, the court acknowledged that this court has not addressed whether a reasonable search could require searching backup tapes. Under current New Hampshire case law, the public is not entitled to those tapes made by the record-keeper which do not have an official purpose. *Brent v. Paquette*, 132 N.H. 415, 421 (1989). In fact, the Merrimack Superior Court has addressed the issue of backup tapes in the case of *Paul Twomey v. New Hampshire Department of Justice,* Merrimack Superior Court, Docket No. 10-CV-503 (decision dated November 11, 2010), concluding that the state was not required to search its backup tapes. In *Twomey*, the court considered whether information contained on "backup tapes" held by the NH Department of Justice constituted government records for the purpose of RSA 91-A. The court noted that due to the immense volume of information capable of being backed up in digital form, to require agencies to comb through all this information would cause the entire staff to do nothing but respond to requests under RSA 91-A. Such a result is absurd. *Id.*, p. 8.

As mentioned above, witnesses for the city testified that their email system is bifurcated into two categories, emails that are still obtainable through direct access to

Microsoft Outlook, and a backup system for important emails saved to the U-drive. Put another way, the city has created a specific backup system for retaining important emails through the use of this U-drive. There is no question that the U-drive is a record retention system designed to backup emails as government records. However, the trial court erred in making the leap to considering the city's "backup tapes" as part of the city's government record retention system, and thus a reasonable or logical next step in a good faith search for emails. These backup tapes kept by the city are akin to the exact type of tapes kept in the *Twomey* case.

The backup tapes at issue in *Twomey*, much like the backup tapes in the case at hand, were not produced as a method of retaining or storing government records. On the contrary, they were designed to store vast amounts of information contained in electronic formats in the event the government agency experienced some sort of catastrophic technical failure and needed to restore their computer systems to a previous point in time. It is not unreasonable to assume that some of the larger government entities in our state could have hundreds of terabytes of information stored on backup tapes for the purpose of data recovery and system restoration. Woven into these backup tapes there would almost certainly be information considered "government records" under RSA 91-A; however, it is not the purpose of these tapes to create a dedicated "backup" of these records, and to be required to comb through them to pick out individual documents would create an unreasonable burden.

In the case at hand, the court gave deference to the city's witness who testified that a search of their backup tapes for the emails requested by the petitioner would have added only hours to the searching process, as opposed to months or even years. However, while the court felt that a few hours in this instance was not an unreasonable amount of time to require the city to search through these backup tapes, the court erred in using this as a justification for concluding that it was reasonable to expect the city to search the backup tapes in the first place. Regardless of the amount of time it would take a government entity to search through their backup tapes, it is still not reasonable to have expected the city to search there after searching all the other locations mentioned. Therefore, when the trial court concluded the city did not conduct a reasonable search for records, it should have then determined whether the city knew or should have known not searching the backup tapes was unreasonable. Based on

the current state of the law on this issue in New Hampshire, the city's actions were not unreasonable, and the court should not have ordered remedial training as a remedy

CONCLUSION

The court ruled that the city violated RSA 91-A by failing to search for emails that may have been located on backup tapes kept by the city. As a consequence, the court also ordered the city to require certain employees to undergo further training on proper compliance with the Right-to-Know law. In coming to this conclusion, the court determined that the records contained on the backup tapes were both admissible as government records under the provisions of RSA 91-A, and that it was reasonable to expect the city to have searched those backup tapes after first searching the Outlook server and U-drive. The evidence presented at trial proved both that the city engaged in a good faith effort to comply with this records request by providing multiple responsive documents over the course of several months, and also that the backup tapes were not designed to act as a record retention mechanism or a reasonable location to expect a municipal employee to search. The superior court's ruling sets a dangerous precedent for the future of Right-to-Know requests, one which could quite literally cause government agencies to be forced to either halt all operations and spend thousands of dollars to fulfill a simple request or be forced to choose not to back up their computers and be left devastated in the event of a system failure. Therefore, NHMA respectfully requests that this Court reverse and remand the prior decision.

Respectfully submitted,

Dated: August 15, 2022

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

By: /s/ Jonathan E. Cowal

Jonathan E. Cowal, Esq.
Municipal Services Counsel
NH Bar ID # 267675
25 Triangle Park Drive
Concord, NH 03301
603-224-7447
jcowal@nhmunicipal.org

CERTIFICATE OF SERVICE

I hereby certify that this 15th day of August, 2022 a copy of this MEMORANDUM OF LAW has been transmitted via the NH Supreme Court's electronic filing system to the following: Celia K. Leonard, Steven A. Bolton, Nicole M. Clay, Laurie Ann Ortolano.

Dated: August 15, 2022

/s/ Jonathan E. Cowal

Jonathan E. Cowal, Esq.