THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0237

Laurie A. Ortolano

v.

City of Nashua

Rule 7 Appeal – Hillsborough Superior Court Southern District

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Brief of Petitioner-Appellee Laurie Ortolano

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....iii
PREFACE....8
PETITIONER IS PRO SE....8
STATEMENT OF THE CASE AND FACTS....9
Background....9
History of the case prior to the trial court action....10
History of the trial court action....11
The December 6, 2021 trial....13
SUMMARY OF ARGUMENT....15
STANDARD OF REVIEW....16
ARGUMENT....19
I. With regard to "plain language," the proper statutory construction of RSA 91-A:4, III-b supports the trial court's decision....19
II. The decisions of other jurisdictions, both state, and federal, firmly support the trial court's decision....24
III. The 2010 superior court decision (McNamara, J.) in *Twomey,* is outdated, nonprecedential, and wrong....31
IV. The trial court's ruling concerning remedial training under RSA 91-A:8, V was a sustainable exercise of discretion....35
CONCLUSION....37
ORAL ARGUMENT....38
CERTIFICATE OF WORD COUNT....39
CERTIFICATE OF SERVICE....39
TABLE OF CONTENTS OF SEPARATE APPENDIX....40

TABLE OF AUTHORITIES

Cases

Abdelfattah v. US. Department of Homeland Security, 488 F.3d 178 (3rd Cir. 2007).....25

American Civil Liberties Union v. Concord, 174 N.H. 653 (2021) 17

Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504 (D.C. Cir. 2011).....24pp., 30

Ancient Coin Collectors Guild v. U.S. Dep't of State, 866 F. Supp. 2d 28 (D.D.C. 2012).....30

ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746 (2011).....23

Ayuda, Inc. v. U.S. Fed. Trade Comm'n, 70 F. Supp. 3d 247 (D.D.C. 2014).....28

Bancorp Services v. Sun Life Assur. Co. of Canada, 687 F.3d 1266 (Fed. Cir.2012).....34

Cantu v. Yakima School District No. 7, No. 37996-5-III, Wash. Ct. App., 3rd Div. (Aug. 2, 2022).....25

Censabella v. Hillsborough Cnty. Attorney, 171 N.H. 424 (2018) 18, 24

City of Rochester v. Corpening, 153 N.H. 571 (2006).....18, 22

Dep't of Envtl. Prot. v. Legere, 50 A.3d 260 (Pa. Commw. 2012) 31

Erickson v. Pardus, 551 U.S. 89 (2007).....8

Estelle v. Gamble, 429 U.S. 97 (1976).....8

Gallo v. Traina, 166 N.H. 737 (2014).....19

Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473 (2nd. Cir. 1999).....25

Granite Green Investment Partners, LLC., v. City of Nashua, No. 2019-0004 (October 28, 2019).....19

Green v. Sch. Admin. Unit #55, 168 N.H. 796 (2016). .18, 22, 24, 33p.

Hawkins v. N.H. Dep't of Health & Human services, 147 N.H. 376 (2001).....31

In the Matter of Crowe & Crowe, 148 N.H. 218 (2002).....19

Kearsarge Computer, Inc. v. Acme Staple Co., 116 N.H. 705 (1976).....21

Lambert v. Belknap Cnty. Convention, 157 N.H. 375 (2008)....35

Long v. U.S. Immigration & Customs Enforcement, 149 F. Supp. 3d 39 (D.D.C. 2015).....28p.

MacDonald v. Jacobs, 171 N.H. 668 (2019).....19

Mechling v. City of Monroe, 152 Wash. App. 830 (2009)...18, 22, 24

Menge v. Manchester, 113 N.H. 533 (1973).....22, 34

Miccosukee Tribe of Indians of Florida v. United States, 516 F.3d 1235 (11th Cir. 2008).....25

Miller v. US. Department of State, 779 F.2d 1378 (9th Cir. 1985) 25

Murray v. NH Div. of State Police, 154 N.H. 579 (2006). 17p., 20

Muttitt v. U.S. Dep't of State, 926 F. Supp. 2d 284 (D.D.C. 2013) 26

N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit, 169 N.H. 95 (2016).....16, 20

Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't, 236 F. Supp. 3d 810 (S.D.N.Y. 2017).....29

Neighborhood Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 261 P.3d 119 (2011).....25

NH Civil Liberties Union v. City of Manchester, 149 N.H. 437 (2003).....31

Patterson v. Internal Revenue Service, 56 F.3d 832 (7th Cir. 1995).....25

Project on Predatory Lending of Legal Servs. Ctr. of Harvard Law Sch. v. U.S. Dep't of Just., 325 F. Supp. 3d 638 (W.D. Pa. 2018).....30

Reid v. N.H. Attorney Gen., 169 N.H. 509 (2016).....17

Rein v. U.S. Patent & Trademark Office, 553 F.3d 353 (4th Cir. 2009).....25

Rojas v. Federal Aviation Administration, 927 F.3d 1046 (9th Cir. 2019).....25

Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325 (2020).....32p., 35

State v. Etienne, 163 N.H. 57 (2011).....20

State v. Lambert, 147 N.H. 295 (2001).....19

Steward v. U.S. Dep't of Just., 554 F.3d 1236 (10th Cir. 2009)..27

Trentadue v. F.B.I., 572 F.3d 794 (10th Cir. 2009).....25, 29

Twomey v. N.H. Department of Justice, Docket No. 10-CV-503 (2010).....31pp.

Vietnam Veterans of Am. Conn. Greater Hartford Chapter 120 v. U.S. Dep't of Homeland Security, 8 F. Supp. 3d 188 (D. Conn. 2014).....29

Whitaker v. LA Drew, 149 N.H. 55 (2003).....8

Constitutional Provisions

N.H. Const. pt. 1., art. 8.....15, 17, 20

Statutes

5 U.S.C. § 552 (FOIA).....18p., 24p., 25, 26, 28, 29

Revised Code of Washington (RCW) Chapter 42.56.....18, 24

RSA 33-A.....21

RSA 5:38.....34

RSA 91-A.....9, 11, 15p., 20p., 21p., 23, 36p., 37

RSA 91-A:1.....17

RSA 91-A:4, III-a.....22

RSA 91-A:4, III-b.....19, 20, 21

RSA 91-A:8, V.....35p., 37

Other Authorities

Juvenal, *Satires*.....8

McQuillan, Eugene. *The Law of Municipal Corporations*, § 14:1 (3rd ed. 2004).....31

PREFACE

"*Quis custodiet ipsos custodes?*" – Juvenal, *Satires*.

PETITIONER IS PRO SE

The Petitioner is a *pro se* litigant in this case, both in the trial court, and on appeal. Petitioner has no formal training in law or civil trial experience.

Because Petitioner appears *pro se*, this Court should construe her pleadings more favorably than it would those drafted by an attorney. *Erickson v. Pardus*, 551 U.S. 89 (2007). A document filed *pro se* is "to be liberally construed," *Estelle*, 429 U.S, at 106, 97 S.Ct. 285 (1976), and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *Ibid*. Cf. Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice"). Ibid. Further, New Hampshire Courts emphasize justice over procedural technicalities. *Whitaker v. LA Drew*, 149 N.H. 55 (2003).

STATEMENT OF THE CASE AND FACTS

Background

This case concerns Petitioner-Appellee Laurie Ortolano's "Right to Know" requests filed with the the City of Nashua's (the "City") Assessing Department (the "Department"), requesting that the City produce various records pursuant to RSA 91-A. More specifically, Ms. Ortolano requested, *inter alia*, that the City produce copies of certain emails[1] concerning the official City business of various City employees.

As further background, this "Right to Know" case has involved the following current, or former, government employees:

- Jon Duhamel, the former Chief of the Assessing Department.
- Louise Brown, former Administrative Supervisor of the Assessing Department.[2]
- Amanda Mazerolle, a subordinate of Louise Brown.
- Kimberly Kleiner, the City's Director of Administrative Services.

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1 The City maintained certain emails in both electronic and printed form. Indeed, Ms. Kleiner testified at trial "If they're important emails, they may have been printed. They may have been filed." Tr. 21-22.

2 Ms. Brown was employed by the city for 22½ years and served as the Administrative Supervisor for the Assessing Department from 2006 until she left at the end of December 2021. Tr. 98-99.

- Karina Ochoa, who is Kimberly Kleiner's administrative assistant
- Nick Miseirvitch, the City's Deputy Director of Information Technology ("IT").
- John Griffin, the City's CFO.
- Gary Turgiss, a former Assessor in the Assessing Department.
- Greg Turgiss, an Assessor in the Assessing Department.
- Mike Mandile, an Assessor in the Assessing Department.
- Doug Dame, an Assessor in the Assessing Department.
- Lindsay Monaghan, who is a clerical assessing staff member.[3]

History of the case prior to the trial court action.

On June 16, 2021, Petitioner Laurie Ortolano made an email request to Ms. Kleiner seeking access to specified correspondence.[4] The request asked for all emails sent and received by the following current and former City employees: Louise Brown, between November 1, 2020 and her last day of work, December 25, 2020; Amanda Mazerolle, a subordinate of Ms. Brown, between November 1, 2020 and March 7, 2021; and Karina Ochoa, Ms. Kleiner's administrative

3 Ms. Monaghan was also described as "Lindsey (the new office clerk)" in correspondence to and from the City.

4 Ms. Kleiner testified that she "thought [the request] was reasonably described." Tr. 61.

assistant, between November 1, 2020 and March 7, 2021. CAppII at 21.

On June 23, 2021, the City replied, informing the Petitioner that Ms. Mazerolle and Ms. Ochoa would both conduct reasonable searches for records matching the Petitioner's descriptions and that the Petitioner would receive an update or response by July 16, 2021. However, the City also told the Petitioner that it no longer had "reasonable access to Ms. Brown's emails from the time of her employment." CAppII at 22.[5]

History of the trial court action

On July 19, 2021, dissatisfied with the City's response, Ms. Ortolano brought a petition in Hillsborough County Superior Court, under New Hampshire's Right-to-Know Law, RSA 91-A, seeking access to these records from the City of Nashua (the "City") Assessing Department (the "Department").

On September 3, 2021 and September 17, 2021, the records for Ms. Mazerolle and Ms. Ochoa were sent to the Petitioner. Also on September 17, 2021, the Petitioner

5 While considerable testimony was heard at trial, concerning "back-up tapes," the City did not initially deny Ms. Ortolano's request "to the extent it sought documents stored on back-up tapes," as the State claims in its Amicus Brief (at 6). The trial transcript (at 44) describes a "letter that explains that the city no longer has reasonable access to Mrs. Brown's emails," referring to the the June 23, 2021 correspondence from the City. CAppII at 22. There is no mention of "back-up tapes" in the June 23, 2021 correspondence.

requested additional records under the Right-to-Know Law. The request specifically asked for "copies of emails to Louise Brown from Karina Och[oa], Kim Kleiner, John Griffin, Gary Turgiss, Greg Turgiss, Mike Mandile, Doug Dame, Lindsey (the new office clerk)[6] and Amanda Mazerolle for the time period of November 1, 2020 through her last day of work for the City of Nashua." CAppII at 29-31. In response, the City stated it would not reproduce the emails already produced in response to the Petitioner's earlier request, but would conduct reasonable searches for emails sent between Ms. Brown and the other named individuals between November 1 and December 25, 2020. The City told the Petitioner to expect a response or update by October 18, 2021. CAppII at 29-31. On October 29, 2021, the City emailed the Petitioner records, which consisted of emails located by Ms. Kleiner from a search of her personal Outlook that were sent to or from Ms. Brown for the requested time period. CAppII at 35-36.

In August 2021, Ms. Kleiner told the Petitioner that the City was exploring cloud based email storage. Apx. at 3. On September 5, 2021, the City then fully implemented a cloud based email storage system with all emails maintained for a period of 366 days using Mimecast's "Enterprise Information Archiving" product.[7] The Petitioner first

6 i.e., Lindsay Monaghan.

7 *See* https://www.mimecast.com/content/enterprise-information-archiving/

learned about this from an email exchange with the City in April 2022. Apx. at 12-13.

The December 6, 2021 trial

On December 6, 2021, the trial court held a bench trial on the petition. At the hearing, the trial court heard testimony from the City's Director of Administrative Services Kimberly Kleiner, the City's Deputy Director of Information Technology ("IT") Nick Miseirvitch, and former Administrative Supervisor of the Department Louise Brown.

Although the City had submitted numerous responsive documents to the Petitioner's request since she filed her petition, and although the Petitioner did not explicitly say so, the Petitioner believed she had not yet been provided with all responsive records to which she was entitled.[8] Mr. Miseirvitch testified regarding the City's email retention policy and what systems are in place to permanently store employee documents. Specifically, he testified that emails in Outlook are automatically deleted after a specific period of time has elapsed. This time-frame was initially 45 days, increased to 90 days at the onset of the COVID-19 pandemic, and again increased to 120 days in the summer of 2020.[9] By the time the Petitioner requested Ms. Brown's emails, more

8 At the trial, the Petitioner said that when she made the September 17, 2021 request she believed the records she received as a result "were not going to be complete" because they came "from the outside to Ms. Brown." Tr. 52.

than 120 days had passed since she left employment with the City. Any emails in Ms. Brown's Outlook account, therefore, had already been automatically deleted. However, Mr. Miseirvitch also testified that employees are advised to move important emails to their U-drives to permanently save them as PST files, which are not subject to the same automatic deletion as emails in Outlook. Ms. Kleiner testified that, at the time of the Petitioner's request, there were not any PST files on Ms. Brown's U-drive. Ms. Brown testified that while she did regularly correspond over email with a number of different individuals as part of her job, she did not regularly save emails to which she was a party on the U-drive. She testified that she did save some emails that were forwarded to her when she was requested to do so.

Mr. Miseirvitch also testified that files not located in Outlook or on a U-drive may still be accessed via the City's back-up tapes, derived from regular system back-ups. He testified that it is possible to convert records from these back-up tapes into a readable format and search them. He said that for a back-up that occurred approximately five months ago (the time-frame relevant to the Petitioner's request), the process would add "a couple of hours" to the time it takes to search for responsive documents. Tr. 84.

9 These changes to the retention policy were not publicly announced, nor generally known to the public.

However, a search of the back-up tapes was not done in response to the Petitioner's records requests.[10]

The trial court then found that the City did not conduct a "reasonable search" under RSA 91-A, and then ordered that the City be compelled "to conduct a reasonable search of its back-up tapes for responsive records."

SUMMARY OF ARGUMENT

The Petitioner first argues what standard(s) of review this Court should follow. In particular, 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, furthering our state constitutional requirement that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Const. pt. 1., art. 8.

Further, when any public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.

Next, a statutory construction of RSA 91-A is undertaken, which Petitioner argues firmly supports the

10 However, the City had previously used back-up tapes to retrieve emails of Jon Duhamel, after he had left employment, to fulfill a prior Right-to-Know request. Tr. 80.

trial court's decision. Insofar as such a statutory construction is necessary, but not sufficient, further argument is then made that the decisions of other jurisdictions, both of sister State(s), and federal, also firmly support the trial court's decision, and that this Court has historically also looked to such decisions for guidance.

Petitioner next rebuts a specific argument made by both the City and State. On appeal, both the City, and the State, have relied heavily upon an outdated 2010 nonprecedential superior court decision, that Petitioner argues, *inter alia*, has since been robbed of any significant application or justification, and consequently should not be applied to this instant case.

Finally, Petitioner argues that the trial court's order for the City to undergo remedial training, was a sustainable exercise of discretion.

Consequently, in conclusion, the trial court's decision should be affirmed.

STANDARD OF REVIEW

"The purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." *N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit*, 169 N.H. 95, 103 (2016) (quoting

RSA 91-A:1). "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.* (quotation omitted); see also N.H. CONST. pt. 1, art. 8 ("Government … should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.").

"While the statute does not provide for unrestricted access to public records, [this Court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents. Therefore, [this Court] construe[s] provisions favoring disclosure broadly, while construing exemptions narrowly." *Murray v. NH Div. of State Police*, 154 N.H. 579, 913 A. 2d 737, 740 (2006). (quotations omitted).

"Therefore, when a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." *American Civil Liberties Union v. Concord*, 174 N.H. 653, 273 A.3d 895, 901 (2021), citing *Reid v. N.H. Attorney Gen.*, 169 N.H. 509, 532, 152 A.3d 860 (2016).

In addition, "[This Court] also look[s] to the decisions of other jurisdictions, since other similar acts, because they are in *pari materia*, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved." *Murray* at 740. In particular, when this Court "look[s] to other jurisdictions construing similar statutes for guidance, [this] includ[es] federal interpretations of the federal Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq." *Censabella v. Hillsborough Cty. Attorney*, 171 N.H. 424, 197 A.3d 74 (2018).

This Court has also turned to the decisions of sister States in their interpretation of similar state statutes. See, e.g. *Green v. Sch. Admin. Unit #55*, 168 N.H. 796, 138 A. 3d 1278 (2016), that cited *Mechling v. City of Monroe*, 152 Wash.App. 830, 222 P.3d 808, 817 (2009). *Mechling* concerned public record requests to the City of Monroe, Washington for e-mail messages of city council members discussing city business, and the proper statutory construction of Washington State's Public Disclosure Act (PDA), that is "a strongly-worded mandate for broad disclosure of public records." *Id*.

With regard to any factual findings of the trial court, this Court "defer[s] to the trial court's findings of fact if they are supported by the evidence and are not erroneous as a matter of law." *City of Rochester v. Corpening*, 153 N.H. 571, 573 (2006). In general, this Court "will not overturn

the trial court's decision absent an unsustainable exercise of discretion." *In the Matter of Crowe & Crowe*, 148 N.H. 218, 221 (2002). Cf. *State v. Lambert*, 147 N.H. 295 (2001) (Explaining the unsustainable exercise of discretion standard and describing the requirements of that standard.)

Finally, "the appealing party … has the burden of demonstrating reversible error." *Granite Green Investment Partners, LLC., v. City of Nashua*, No. 2019-0004 (October 28, 2019), citing *Gallo v. Traina*, 166 N.H. 737, 740 (2014). Indeed, the Appellant "must demonstrate that the [trial] court's ruling was clearly untenable or unreasonable to the prejudice of his case." *MacDonald v. Jacobs*, 171 N.H. 668, 201 A.3d 1253, 1258 (2019).

Petitioner argues, *infra*, that the Appellant has failed to meet this burden.

ARGUMENT

I. With regard to "plain language," the proper statutory construction of RSA 91-A:4, III-b supports the trial court's decision.

"In matters of statutory interpretation, [this Court] is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. In doing so, [this Court] must first look to the plain language of the statute to determine legislative intent. Absent an ambiguity

[this Court] will not [normally] look beyond the language of the statute to discern legislative intent." *State v. Etienne*, 163 N.H. 57, 35 A.3d 523, 535 (2011). (quotations omitted).

However, in the instant case, this must be considered in light that the purpose of RSA 91-A is to implement N.H. Const. pt. 1., art. 8, which constitutional provision ultimately controls. *N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit*, 169 N.H. 95, 103 (2016). Further, it must also be considered in light of the clear precedent with regard to this *particular* statute, RSA 91-A, that this Court also "look[s] to the decisions of other jurisdictions, since other similar acts, because they are in *pari materia*, are interpretatively helpful." *Murray v. NH Div. of State Police*, 154 N.H. 579, 913 A. 2d 737, 740 (2006).

Nevertheless, the plain language of RSA 91-A:4, III-b states (emphasis added):

> **A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. 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.

In the first instance, the City's claim that "legally deleted" is not defined in RSA 91-A is, *prima facie*, false. The statute clearly states that, for purposes of this paragraph, "a record ... shall be considered to have been deleted only if it is no longer readily accessible." Further, concerning any "plain meaning" of the phrase "readily accessible," this Court has previously used precisely this same phrase. *See*, e.g. *Kearsarge Computer, Inc. v. Acme Staple Co.*, 116 N.H. 705, 707 (1976) (finding that "Acme did not have readily accessible and precise records.")

Moreover, RSA 91-A:4, III-b further clarifies that "the mere transfer of an electronic record ... shall not constitute deletion of the record."

Consequently, the City's argument that "it is logical to turn to the state's record retention statute, RSA 33-A, for guidance in interpreting 'legally deleted,'" in the context of RSA 91-A, is wholly without merit.

Further, "[t]he intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. The general rule of statutory construction is that the word 'may' makes enforcement of a statute permissive

and that the word 'shall' requires mandatory enforcement." *City of Rochester v. Corpening*, 153 N.H. 571, 907 A.2d 383, 386, 387 (2006).

However, in the instant case, the clause "shall be considered to be deleted" is defined by the phrase "only if it is no longer readily accessible," "which affects the overall meaning of the clause." See *Id*. ("interpreting 'shall' within the overall meaning of the relevant clause").

Further, concerning "the mere transfer of an electronic record," this Court has already held nearly 50 years ago that, under a prior version of the Right-to-Know Law, that the plaintiff was entitled to the production of certain computerized tapes of field record cards from the defendants. *Menge v. Manchester*, 113 N.H. 533, 538 (1973).

Under the current Right-to-Know Law, pursuant to RSA 91-A:4, III-a, "Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats."

Indeed, "producing electronic documents is often more efficient and cost-effective than producing them in paper form." *Green v. Sch. Admin. Unit #55*, 168 N.H. 796, 138 A. 3d 1278 (2016), citing *Mechling v. City of Monroe*, 152

Wash.App. 830, 222 P.3d 808, 817 (2009). Clearly, RSA 91-A does not exclude the production of documents held in paper form. Further, any "electronic documents," *a priori*, would include any electronic media content intended to be used in either an electronic form or as printed output.[11]

Consequently, "[T]he adequacy of an agency's search for documents is judged by a standard of reasonableness." *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746, 753 (2011). Accordingly, "[t]he crucial issue is not whether the relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents." *Id*. "The search need not be exhaustive." *Id*. "Rather, the agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents" by, for instance, "providing affidavits that are relatively detailed, nonconclusory, and submitted in good faith." *Id*. "Once the agency meets its burden to show that its search was reasonable, the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith." *Id*.

11 Ms. Louise Brown testified that "AssessHelp is emails that come into the Assessing Department and not me personally." Tr. 108-109. Ms. Brown also testified that she maintained a physical "AssessHelp binder in the assessing office." Tr.106. Indeed, a number of emails were printed and placed in this physical binder. Tr. 108-110.

II. The decisions of other jurisdictions, both state, and federal, firmly support the trial court's decision.

Insofar as the trial court needed to ascertain whether the records requested "were no longer readily accessible" or whether the City's search for them was "reasonable" or constituted an "adequate search," then the decisions of other jurisdictions, both state and federal, firmly support the trial court's decision.

As described, *supra*, concerning standards of review, this Court has often looked to the decisions of other jurisdictions, both state and federal, since other similar acts, because they are in *pari materia*, are interpretatively helpful. *See*, e.g. *Green v. Sch. Admin. Unit #55*, 168 N.H. 796, 138 A. 3d 1278 (2016), citing *Mechling v. City of Monroe*, 152 Wash.App. 830, 222 P.3d 808, 817 (2009), where this Court looked to the State of Washington's interpretation of its Public Disclosure Act (PDA). *See* also, e.g., *Censabella v. Hillsborough Cty. Attorney*, 171 N.H. 424, 197 A.3d 74 (2018), concerning reliance by this Court on federal interpretations of FOIA.

In addition, the State of Washington and the New Hampshire trial court have both properly found the considerations articulated in *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 515 (D.C. Cir. 2011) instructive.

In *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 261 P.3d 119 (2011), the Washington State Supreme Court followed federal decisions that impose an enforceable duty, under FOIA, on federal agencies to conduct an adequate search. Moreover, as a more recent Washington State appellate decision (*Cantu v. Yakima School District No. 7*, No. 37996-5-III, Wash. Ct. App., 3rd Div. (Aug. 2, 2022)) pointed out:

> Some of those [federal] decisions now include *Rojas v. Federal Aviation Administration*, 927 F.3d 1046, 1052-53 (9th Cir. 2019), superseded on reh'g, 989 F.3d 666, 2021; *Ancient Coin Collectors Guild v. U.S. Department of State*, 641 F.3d 504, 514 (D.C. Cir. 2011); *Trentadue v. F.B.I.*, 572 F.3d 794 (10th Cir. 2009); *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353 (4th Cir. 2009); *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235 (11th Cir. 2008); *Abdelfattah v. US. Department of Homeland Security*, 488 F.3d 178 (3rd Cir. 2007); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d. Cir. 1999); *Patterson v. Internal Revenue Service*, 56 F.3d 832 (7th Cir. 1995); *Miller v. US. Department of State*, 779 F.2d 1378 (9th Cir. 1985).

While all of these federal decisions address what constitutes an "adequate search," *Ancient Coin* specifically addresses the issue of "back-up tapes."

There, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's grant of summary judgment in favor of the defendant as to whether its search for requested documents under FOIA was adequate. See *Id*. at 515. The court remanded for further clarification as to whether back-up tapes might be a required of that aspect search, instructing the district court to consider (1) whether any back-up tapes potentially relevant to the request existed; (2) if so, whether their responsive material would be reasonably likely to add to what was already produced; and (3) if the first two questions were answered in the affirmative, whether there was a "practical obstacle to searching them." *Id*.

In applying those factors to the instant case, first, it is undisputed that the City's back-up tape system exists, can be searched, and that files such as those requested by the Petitioner are retrievable from the back-up tapes.[12] Cf. *Muttitt v. U.S. Dep't of State*, 926 F. Supp. 2d 284, 298 (D.D.C. 2013) (holding defendant could not be required to search a purported electronic record keeping system where

12 Mr. Miseirvitch even testified that he performed a search of the back-up tapes in response to a separate Right-to-Know Law request. *See* Tr. 88, concerning the restoration of Jon Duhamel's emails from back-up. Mr. Miseirvitch's credible testimony supports the findings of the trial court. Tr. 64-93.

the court found there was "no reason to believe that an electronic back-up recording system of the kind described by the plaintiff actually exists."). Likewise, as to the second factor, it is undisputed that there are likely additional responsive documents on the City's back-up system.[13] Cf. *Steward v. U.S. Dep't of Just.*, 554 F.3d 1236, 1244 (10th Cir. 2009) (noting that a search of the back-up system for responsive emails would be unlikely to reveal any additional communications not previously uncovered where the back-up system did not keep files for more than six months and where the requested material would have pre-dated that time).

The third factor—whether there is any practical obstacle to accessing the responsive records from the back-up tapes—is at the heart of the present dispute. The City argues there is a practical obstacle as the back-up tapes are not "readily accessible" and that a search for the requested records on the back-up tapes would be excessively time-consuming and unduly burdensome. CAppII at 7-8. However, the trial court had no difficulty finding that the emails the Petitioner sought were readily accessible and that no practical obstacle to their retrieval existed. That finding was firmly rooted in the credible testimony of Mr. Miseirvitch.

13 For example, Ms. Brown testified that "I was at one point was requested to save the board of assessors' members emails so they were forwarded to me and put them in the legal department's folder." Tr. 102-103. She also testified that she received emailed questions about assessing, which she "responded to" or forwarded, and that she deleted. (Id.)

First, to the extent the City contends that it need not search the back-up tapes because the added time renders the search unduly burdensome, the trial court rightfully disagreed. Courts "have held that agencies are excused from complying with FOIA requests where review[ing], redact[ing], and arrang[ing] for inspection [of] a vast quantity of material presents an unreasonable burden." *Long v. U.S. Immigration & Customs Enforcement*, 149 F. Supp. 3d 39, 55-56 (D.D.C. 2015) (quotation omitted). That said, "when an agency claims that complying with a request is unreasonable, it bears the burden to provide [a] sufficient explanation as to why such a search would be unreasonably burdensome." *Ayuda, Inc. v. U.S. Fed. Trade Comm'n*, 70 F. Supp. 3d 247, 275 (D.D.C. 2014) (quotation omitted). "Among the factors that a court may consider in assessing the claimed burden are the amount of time, expense, and personnel that would be required to complete document searches and production, as well as whether the agency has the existing technology or would have to purchase new technology to perform those tasks." *Long*, 149 F. Supp. 3d at 55.

As discussed above, the City has the technological capability to retrieve responsive documents from back-up tapes and has already done so with respect to an unrelated records request. Mr. Miseirvitch also testified that the time it would take to restore a back-up that would locate

documents responsive to the Petitioner's request "should only take a couple of hours." Tr. 84. This additional time does not render the resulting search so time-consuming as to obviate the City from having to perform the search in the first place. See *Trentadue v. U.S. Fed. Bureau of Investigation*, 572 F.3d 794, 807 (10th Cir. 2009) (noting that a manual search of more than one million pages in a file that would take thousands of hours would be unreasonably burdensome); *Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't*, 236 F. Supp. 3d 810 (S.D.N.Y. 2017) (finding defendant sufficiently demonstrated its response to a FOIA request would be unreasonably burdensome where defendant showed it would take up to 58 work years to comply with the request).

There is nothing in the record to indicate there are any other practical obstacles to accessing the back-up system in order to comply with the Petitioner's request. For instance, the City has not alleged it would need to heavily redact the emails once located. Cf. *Long*, 149 F. Supp. 3d at 56-58 (finding defendants demonstrated search and redaction of five terabytes of information would be unduly burdensome); *Vietnam Veterans of Am. Conn. Greater Hartford Chapter 120 v. U.S. Dep't of Homeland Security*, 8 F. Supp. 3d 188, 203 (D. Conn. 2014) (finding it unreasonably burdensome to require agency to locate, review, and heavily redact 26,000 packets of 50 pages each). There is also nothing in the record

to indicate that accessing the back-up tapes for this purpose would interfere with the City's network functionality or that it lacks the manpower or technological capabilities to conduct such a search. Cf. *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 866 F. Supp. 2d 28, 34 (D.D.C. 2012) (holding that the defendant was not required to search the back-up system where the defendant "persuasively argue[d]" that the "back-up system was not designed to retain documents in an easily searchable form, therefore, any search efforts would 'significantly interfere' with the functioning of [the defendant's] entire information system"); *Project on Predatory Lending of Legal Servs. Ctr. of Harvard Law Sch. v. U.S. Dep't of Just.*, 325 F. Supp. 3d 638, 655 (W.D. Pa. 2018) (finding that it would be unduly burdensome to require the defendant to search and produce records from certain hard drive materials because the hard drives contained more than nine terabytes of information and the defendant explained it did not have the technological capability to process, store, host, or review that volume of data on its servers). In fact, the reliable testimony of Mr. Miseirvitch establishes that the retrieval process is not subject to any significant obstacles.

Finally, the trial court rightfully disagreed with the City that it was not required to search the back-up tapes because such a search is incompatible with its own document retrieval system. The trial court rightfully found that

searching the back-up tapes would not be incompatible with the City's retrieval system; rather, a search of the back-up tapes would be a supplement to that system. Also, the City's records must be "maintained in a manner that makes them available to the public." *NH Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 439 (2003), citing *Hawkins v. N.H. Dep't of Health & Human services*, 147 N.H. 376, 379 (2001). Indeed, Municipal records must always be kept so as to show "all essential or material facts respecting the particular activity being recorded." McQuillan, Eugene. *The Law of Municipal Corporations*, § 14:1 (3rd ed. 2004).

A requestor cannot control how an agency catalogues or organizes its files. "[A]n agency's failure to maintain the files in a way necessary to meet its obligations under the [Right-to-Know Law] should not be held against the requestor." *Department of Environmental Protection v. Legere*, 50 A.3d 260, 265 (Pa. Cmwlth. 2012). "To so hold would permit an agency to avoid its obligations ... simply by failing to orderly maintain its records." (*Id.*)

III. The 2010 superior court decision (McNamara, J.) in *Twomey*, is outdated, nonprecedential, and wrong.

The City's argument relies on a 2010 superior court decision (McNamara, J.); namely, *Twomey v. N.H. Department of Justice*, Docket No. 10-CV-503 (2010), and the State's argument relies heavily on *Twomey*.

In the first instance, it is axiomatic that a 12 year old decision, by a different superior court judicial officer, has no precedential value upon this Court whatsoever. Notwithstanding that this, in and of itself, reveals both the City and State's arguments to be astonishingly weak, it is nevertheless instructive, for purposes of comparison, to review the *stare decisis* factors used by this Court, on an occasion where this Court has recently overturned one of this Court's own prior decisions, in a "Right to Know" case.

In *Seacoast Newspapers v. City of Portsmouth*, 173 N.H. 325, 239 A.3d 946 (2020), this Court overturned its own prior "Right to Know" case law, by reviewing: "(1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Seacoast* at 952.

And, while consideration of these factors are, strictly speaking, totally unnecessary for this Court in order for this Court to simply disregard *Twomey*, it is nevertheless both instructive, and amusing, at least to briefly entertain a comparable analysis, for *Twomey*.

In 2010, according to *Twomey*, "the back-up tapes are not knowledge, opinions, facts or data of any kind. Rather, they are electronic storage devices used to hold and maintain information, much like a file cabinet is used to hold and maintain documents."

However, this rule now defies practical workability. Cf. *Seacoast* at 952. Indeed, in 2016, this Court determined that "Electronically stored information, if kept in electronic form … can be very inexpensive to search through and sort using simple, readily available technologies…. The cost of copying and transporting electronically stored information is virtually nil." *Green v. Sch. Admin. Unit #55*, 168 N.H. 796, 138 A. 3d 1278 (2016).

Aside from the City and State's recent desperate efforts to "resurrect" *Twomey* from the dustbin of history,[14] there is certainly otherwise no reliance on it whatsoever that would lend any kind of special hardship to "overruling" this obscure trial court decision. Cf. *Seacoast* at 952.

Indeed, in light of *Green*, "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine" Cf. *Seacoast* at 952.

14 Insofar as Mr. Miseirvitch testified that the time it would take to restore a back-up that would locate documents responsive to the Petitioner's request "should only take a couple of hours," this also begs the question of how long it took for the government's attorneys to "find" and "restore" the *Twomey* case.

As the *Green* Court pointed out, "It is worth noting that when we decided *Menge*, personal computers, laptops, tablets, smartphones, and other forms of modern technology did not exist. Cf. *Bancorp Services v. Sun Life Assur. Co. of Canada*, 687 F.3d 1266, 1277 (Fed. Cir.2012) (observing that '[m]odern computer technology offers immense capabilities and a broad range of utilities'). In the intervening 43 years, advances in storing, copying, transferring, and analyzing computerized data have facilitated the public's access to 'the utmost information … about what its government is up to.'" *Green* at 1264.

Finally, in 2010, according to *Twomey*, "From May 2009, to May 2010, the size of information stored on DOJ's servers alone grew from 673 GB to 1212 GB. The current cost of back-up tapes alone is approximately 42,000 dollars. The cost is relatively low, because the tapes are now overwritten, although overwriting has ceased during the pendency of this litigation. Under RSA 5:38, if each back-up tape is a government record, each tape would need to be maintained for 4 years. Without even taking into account this growth, or any other costs, the cost of back-up tapes to the Technical Support Division would exceed 1 million dollars if they were considered government records."

However, in 2022, internal 2TB drives for individual consumer laptops cost approximately $100-$200, that is double the size of information stored on DOJ's servers, in

2010. Now, in 2022, *Twomey's* claim that "the cost of back-up tapes to the Technical Support Division would exceed 1 million dollars if they were considered government records," is antiquated, and now seems ridiculous.

Consequently, the facts have so changed, and have come to be seen so differently, so as to have robbed *Twomey* of any significant application or justification. Cf. *Seacoast* at 952.

IV. The trial court's ruling concerning remedial training under RSA 91-A:8, V was a sustainable exercise of discretion.

RSA 91-A:8, V states that "The court may … 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."

Because the term "may" is generally interpreted as permissive, the trial court had discretion in ordering this as a remedy. *Lambert v. Belknap Cnty. Convention*, 157 N.H. 375, 381 (2008).

Considering the factual circumstances of this case, the parties' arguments, and equitable principles, the trial court's order for the City to participate in remedial training was a sustainable exercise of discretion.

Indeed, the trial court reasonably found that future violations could best be avoided through requiring participation in remedial training regarding the City's compliance with Right-to-Know Law records requests. In addition, the trial court ordered that the parties were to submit memoranda within 30 days of the Clerk's notice of its order addressing their respective proposals regarding the nature and duration of this remedial training. The trial court did not, *sua sponte*, specify any specific terms for this training, and rightly so.

Such a decision was squarely within the sound discretion of the trial court.

On May 2, 2022, the trial court docketed Petitioner's *Memorandum on Right to Know Training*. Apx. at 14-18. However, the case has been stayed pending appeal. Consequently, there is presently no final ruling from the trial court concerning remedial training.

As previously argued, *supra*, this Court should uphold the trial court's finding that the City violated RSA 91-A. Consequently, it also remains within the sound discretion of the trial court, after this Court offers its opinion, for the trial court to provide some remedy, pursuant to RSA 91-A:8, V concerning the City's violation of RSA 91-A.

Finally, there are other related appeals, still presently pending before this Court; namely, docket nos. No. 2022-

0342 (226-2020-CV-00133) and 2022-0399 (226-2021-CV-00306). Notably, in the latter case (No. 2022-0399) the City has raised precisely those same questions, on appeal, as in this case.

It has since come to light in this related appeal, No. 2022-0399, that Ms. Mazerolle, an employee of the City, was not aware of the City's email retention policy. Apx. at 5-11.

Consequently, this is all the more reason, that any remedy pursuant to RSA 91-A:8, V, concerning remedial training for an RSA 91-A violation, should remain within the sound discretion of the trial court.

CONCLUSION

For the forgoing reasons, this Honorable Court should affirm the trial court's decision.

ORAL ARGUMENT

Insofar as this Honorable Court might believe that oral argument may be necessary to decide this appeal, the Petitioner Laurie Ortolano requests 15 minutes of time pursuant to N.H. Sup. Ct. R. 16(10).

Respectfully submitted,

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September 29, 2022.

CERTIFICATE OF WORD COUNT

I, Laurie Ortolano, hereby certify that pursuant to N.H. Sup. Ct. R. 16(11), this brief contains less than 9,500 words, as determined by the word count of the computer program used to prepare this brief.

/s/ Laurie Ortolano
LAURIE ORTOLANO

September 29, 2022

CERTIFICATE OF SERVICE

I, Laurie Ortolano, hereby certify that a copy of this brief shall be served on all parties of record through the New Hampshire Supreme Court's electronic filing system.

/s/ Laurie Ortolano
LAURIE ORTOLANO

September 29, 2022

TABLE OF CONTENTS – APPENDIX

August 16, 2021 – Email from Laurie Ortolano.....3
March 24, 2022 – Transcript Excerpt, No. 226-2021-CV-00306..5
April 28, 2022 – Email exchange.....12
May 2, 2022 – Hearing Memorandum.....14