THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.**
**SOUTHERN DISTRICT**

**SUPERIOR COURT**
**No. 2020-CV-00133**

Laurie Ortolano

v.

The City of Nashua

**ORDER ON PLAINTIFF'S MOTION TO RECONSIDER**

The plaintiff, Laurie Ortolano, has brought a petition in which she seeks access to records from the City of Nashua's (the "City") assessing department (the "Department"). Currently pending before the Court is the plaintiff's motion to reconsider the Court's March 25th Order. After consideration of the evidence, the arguments, and the applicable law, the Court finds and rules as follows.

Legal Standard Governing Motions for Reconsideration

"A motion for reconsideration allows a party to present, [with particular clarity,] points of law or fact that a court has overlooked or misapprehended." Broom v. Cont'l Cas. Co., 152 N.H. 749, 752 (2005) (citation omitted); see also Super. Ct. R. 12(e).

Analysis

The plaintiff makes two arguments in her motion for reconsideration: (1) the Court erred in limiting the plaintiff's request for all emails sent by Kim Kleiner, the City's Administrative Services Director, from August 9, 2019 to September 30, 2019; and (2) the Court erred in denying the motion to compel with regards to communications between the City and the New Hampshire Department of Revenue ("DoR") related to sanctions imposed by the DoR against the City's property assessors. The Court will address each in turn.

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Hillsborough Superior Court Southern District
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A. Kleiner Emails

In her motion to compel, the plaintiff sought "all emails sent by [Director] Kleiner from August 9, 2019 to September 30, 2019." (Pl.'s Mot. Compel ¶ 3.) The plaintiff argued that the emails would show that the City acted in bad faith when responding to the plaintiff's requests. (Jan. 25, 2021 Hr'g at 9:58–10:00). The City objected, arguing that the emails are not relevant or reasonably calculated to lead to the discovery of admissible evidence. (City's Obj. Mot. Compel ¶¶ 1–2.) After analyzing the arguments, the Court found that "the plaintiff's request for production is broader than necessary to effectuate its purpose [of proving Director Kleiner or the City acted in bad faith]" and "limit[ed] discovery to only those emails sent by Director Kleiner during the requested time period which relate to the plaintiff, the plaintiff's Right-to-Know request, or the production of related documents" using its "broad discretion to determine the limits of discovery." (March 25, 2021 Court Order at 3 (quotation omitted).) The Court reasoned that although "FOIA actions are typically resolved without discovery," one exception "is . . . if the plaintiff has made a sufficient showing that the agency acted in bad faith," as the plaintiff has done here. (Id. at 2.)

The plaintiff now moves for reconsideration of this ruling. The plaintiff first argues that "[i]t makes little sense that the plaintiff's rights as a litigant in this Right-to-Know case are not at least as broad as the same plaintiff's rights as a *citizen* seeking access to the same materials unde[r] the Right-to-Know statute." (Id. ¶ 12 (emphasis in original).) The Court again looks to FOIA for guidance. (See March 25, 2021 Court Order at 2 (stating that because the New Hampshire Supreme Court has not spoken on the scope of discovery in context of Right-to-Know actions, the Court looks to other

jurisdictions for guidance).) "The FOIA disclosure regime . . . is distinct from civil discovery." Stonehill v. I.R.S., 558 F.3d 534, 538 (D.D.C. 2009). "Different considerations determine the outcome of efforts to obtain disclosure: relevance, need, and applicable privileges—bounded by the district court's exercise of discretion—in the discovery regime . . . [compared with] statutory exceptions reflecting a congressional balancing of interests in FOIA." Id. Given the distinct nature of these two information-gathering regimes, the Court finds unpersuasive the plaintiff's argument that, because this information may be available to her under a Right-to-Know request, she is entitled to it as part of discovery.

The plaintiff next argues that "[b]ecause the City has chosen not to come forward with factual averments to explain its conduct and attempt to bring this matter to a prompt conclusion, broader-than-ordinary discovery is warranted in order that the plaintiff can attempt to prove her case." (Pl.'s Mot. Reconsider ¶ 17.) "[I]n a typical FOIA case the question is whether the agency has conducted a thorough search and given reasonably detailed explanations why any withheld documents fall within an exemption." Am. Ctr. for Law & Just. v. U.S. Dep't of State, 289 F. Supp. 3d 81, 92 (D.D.C. 2018) (quotation omitted). However, "persistent and unexplained delays in processing FOIA requests may raise a sufficient question of bad faith on the part of the government to warrant further exploration through discovery." Id. (cleaned up). "In such cases, a plaintiff may need to conduct narrow discovery on the agencies policies and practices for responding to FOIA requests, and the resources allocated to ensure its compliance with the FOIA time limitations." Id. (quotation omitted and emphasis added). Here, the Court balanced these concerns in its original decision and

appropriately used its discretion to determine the plaintiff's arguments related to the City's alleged bad faith in responding to her requests warranted further exploration. The Court therefore allowed discovery into "Director Kleiner['s emails] during the requested time period which relate to the plaintiff, the plaintiff's Right-to-Know request, or the production of related documents." (March 25, 2021 Court Order at 3.) Additionally, the Court weighed and determined that emails not related to the aforementioned topics were not relevant to the questions before the Court. The Court does not find that it misapprehended or overlooked any points of fact or law in reaching its decision. Accordingly, the Court DENIES the plaintiff's motion for reconsideration.

B. Department of Revenue Sanctions

Next, in her motion to compel, the plaintiff sought production of "records, communications, findings, sanctions, and other documents related to the [DoR] investigation and sanction of any member of the [Department] between November 1, 2018 and the present." (Mot. Compel ¶ 20.) The plaintiff stated she had also submitted a Right-to-Know request for these documents that the City denied, which is not part of the current suit. (Id. ¶¶ 24–25.) The City objected based on relevance, prejudice, and because "the Right-to-Know law itself exempts disclosure." (City's Obj. Mot. Compel ¶ 10–11.) The Court denied the plaintiff's request, finding that since the documents at issue were the subject of a Right-to-Know request made by the plaintiff the "disclosure of the documents is the ultimate relief the plaintiff is seeking, not the subject of a discovery dispute." (March 25, 2021 Court Order at 5–6 (citing Bogan v. Bureau of Prisons, No. 06-C-0490-C, 2006 WL 6045183, at *1 (W.D. Wisc. Nov. 16, 2006) (cleaned up).)

The plaintiff asserts that the Court erred when denying her request because the plaintiff's prior Right-to-Know request for these documents is not at issue in the present case. The Court agrees. Obtaining the documents is not the ultimate relief the plaintiff is seeking in this lawsuit and, therefore, the Court should not have based its decision on that finding. Rather, the Court should have determined whether the requested records were relevant to the current matter under the discovery standard articulated above.

Here, the Court cannot find that the requested documents relate to: (1) whether the City has conducted a thorough search and thereafter given reasonably detailed explanations why any withheld documents fall within an exemption to the Right-to-Know law; or (2) the City's policies and practices for responding to Right-to-Know requests. See Am. Ctr. for Law & Just., 289 F. Supp. 3d at 92. Indeed, although these documents may show the Department violated state assessing board standards, they lack any connection to the City's response to the plaintiff's Right-to-Know requests at issue. Therefore, the documents are not relevant to the current matter or reasonably calculated to lead to the discovery of admissible evidence. See Super. Ct. R. 21(b). Consequently, the Court's ultimate ruling remains the same—the plaintiff is not entitled to discovery of these documents. As a result, her motion to reconsider is DENIED.

So ordered.

Date: May 10, 2021

Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/12/2021