THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2021-CV-00306

Laurie Ortolano

v.

City of Nashua

ORDER

The petitioner, Laurie Ortolano, has brought a petition under RSA 91-A, New Hampshire's Right-to-Know ("RTK") Law, seeking access to records from the City of Nashua's (the "City") Assessing Department (the "Department"). The Court held a bench trial on the petition on February 28 and March 24, 2022. At the trial, the Court heard testimony from the City's Chief Information Officer Nick Miseirvitch, Director of Administrative Services Kimberly Kleiner, the Department's Chief Assessor Richard Vincent, former Department Administrative Specialist Amanda Mazerolle, and former Department Administrative Assistant Lindsay Monaghan. Additionally, exhibits were submitted at the bench trial for the Court's consideration. After consideration of the evidence, the arguments, and the applicable law, the Court finds and rules as follows.

Background

This action arose from the petitioner's concerns regarding the Department's assessment of property values. The petitioner made numerous requests under RSA 91-A, related to the Department's Assesshelp email inbox. The Assesshelp inbox is one to which members of the public can send emails concerning their assessing-related inquiries. Department employees then access those emails to determine what response is required. Some emails are forwarded to specific Department employees.

Some emails are deleted after they are responded to or deemed unimportant, and all emails are subject to automatic purging unless saved.

On March 7, 2021, the petitioner submitted a RTK request (the "March 7 Request") to Mr. Vincent via email, asking to be provided with "all [A]ssesshelp emails from January 1, 2021 to March 5, 2021." (Pl.'s Ex. 4 at 1.) She asked for the emails to be scanned for her review. However, she did not receive a response within five days, as required under the RTK Law.[1] On March 19, 2021, she again emailed Mr. Vincent, asking him to provide a response to her earlier request. (See id. at 1.) On March 28, 2021, she reiterated the initial request in an email to City Corporation Counsel Steve Bolton (the "March 28 Request"). In this request, she stated that she sought all Assesshelp emails between January 1 and March 5, 2021. She further specified that she was seeking electronic copies of all emails between those dates and electronic copies of the responses to the emails "which would include forwarding." (Pl.'s Ex. 5.)

On March 29, 2021, she again emailed Mr. Vincent to inquire whether her request for the Assesshelp emails had been forwarded to the City's legal department (the "Legal Department"). (See Pl.'s Ex. 4 at 2.) He replied the same day, informing her that her email from March 7 had "slipped by" him, but that her March 19, 2021 email had been sent to the Legal Department on March 22, 2021. (Id.) He further informed that they were then "in the process of assembling the documents for [the petitioner]." (Id.) Also on March 29, 2021, the petitioner requested Mr. Vincent "forward[] the email

[1] Under RSA 91-A:4, if a requested record is not immediately available for inspection and copying, the agency "shall, within 5 business days of a request," either make the record available, deny the record request, or provide a written statement informing the requestor of the amount of time "reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay."

communication to provide me with verification" that he had sent her records request to the Legal Department on March 22, 2021 (the "March 29 Request"). (Pl.'s Ex. 6.)

On March 31, 2021, the petitioner received an email from City Attorney and RTK Law Coordinator Jesse Neumann. This email acknowledged receipt of the March 7 Request for Assesshelp emails. The email described the March 7 Request as "unclear, overbroad, and not reasonably described." (Pl.'s Ex. 7 at 2.)[2] Nevertheless, "in the spirit of cooperation," the email informed the petitioner that the City had searched the Assesshelp inbox, located over 200 separate responsive emails, and that those would be provided to her. (Id.) However, Attorney Neumann wrote that each email would require individual review to either be redacted or exempted. The petitioner was told that, due to other RTK requests, obligations, and deadlines, she could expect a response or update by April 27, 2021. However, in response to the March 29 Request, requesting that she be forwarded an email verifying Mr. Vincent had sent her request to the Legal Department, Attorney Neumann explained that this request was being denied under RSA 91-A:5, IV, as confidential attorney-client communications.

On April 1, 2021, Attorney Neumann again wrote to the petitioner to provide further responses to her various requests. Attorney Neumann told the petitioner that the March 28 Request to Counsel Bolton for electronic copies of the Assesshelp emails was not reasonably described.[3] However, Attorney Neumann provided that, "in the spirit of cooperation," all Department employees had been instructed to search their "sent" and

[2] Attorney Neumann asked whether the request was for all emails received by the Assesshelp inbox, including junk mail, personal correspondence, and whether the petitioner was seeking emails subject to deletion or that had corrupted files.

[3] Attorney Neumann specified this was because Assesshelp emails are responded to by individual Department employees and "there is no way to match all Assesshelp emails with their individual responses without comprehensive cross-referencing efforts." (Pl.'s Ex. 8 at 3.) Attorney Neumann stated that such efforts would go beyond what is required by RSA 91-A:4, VII.

"deleted" folders for emails regarding Assesshelp for the specified time period. (Pl.'s Ex. 8 at 3.) The petitioner was told this effort was ongoing and that she could expect an update or response by April 16, 2021.

On April 14, 2021, Attorney Neumann informed the petitioner that the process of reviewing the 200 Assesshelp emails from the March 7 Request and additional 100 emails found in response to the March 28 Request was ongoing. The petitioner was told she could expect a response or update by April 27, 2021. (See Pl.'s Ex. 9 at 3.) On April 27, 2021, Attorney Neumann wrote the petitioner to inform her that the review of the emails in response to the March 7 and March 28 Requests was complete. The email messages were attached to the correspondence. (See Pl.'s Ex. 10.) However, the petitioner realized that at least one January 2021 email she herself emailed to Assesshelp was not among the responsive records she was given.[4]

The petitioner filed her petition on June 17, 2021, seeking records she believed she should have been provided with in response to her RTK request. On February 28 and March 24, 2022, the Court held a bench trial on the petition.[5] At the trial, Mr. Miseirvitch testified about the City's email retention policy. He testified that all emails—including those sent to employees and to the Assesshelp inbox—are automatically deleted after a specific period of time has elapsed. This timeframe was initially 45 days but was increased to 90 days at the onset of the COVID-19 pandemic, and again to 120 days in the summer of 2020.

[4] Additional responsive records were provided to the petitioner in February and March of 2022. These records came from Ms. Mazerolle's search of her own emails, related to the March 28 Request. Ms. Mazerolle apparently found them when asked to search but mistakenly saved them to a location other than the one she was requested to use.

[5] At the outset of the first day of the trial, the City represented that it had made an offer to the petitioner to perform a backup tape search for the missing January 2021 emails. The petitioner turned the offer down.

Mr. Miseirvitch also testified that, while emails are automatically purged after 120 days, employees may move data including emails onto an S-drive, which is a folder on a file server that employees can access based on permissions, or a U-drive, which is where employees can store personal information before putting it onto the S-drive. However, he also testified that files not located in an email inbox or on an S-drive or U-drive may still be accessed via the City's backup tapes, derived from regular system backups. He described the process involved in finding data located on a backup tape and rendering it into a format that is usable by the requestor. He said that the entire process of finding and rendering a single tape takes about three hours. He did not perform a search of the relevant backup tapes until May 27, 2021.[6] This search revealed at least one January 2021 email sent by the petitioner to Assesshelp that apparently was not provided to her by the City. (See Pl.'s Ex. 44.) Finally, relevant here, Mr. Miseirvitch testified that if he had to perform ten RTK requests that involved searching the backup tapes his department would struggle to get the work done. However, he also stated he is only asked to assist with RTK requests a few times per month, and that he does not often need to search the backup tapes for records.

Analysis

"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

[6] Mr. Miseirvitch represented that he performed this search to determine if Assesshelp emails were being received properly, and not in direct response to the petitioner's request.

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."). "Although the statute does not provide for unrestricted access to public records, [the Court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. (quotation omitted). Consistent with this statutory purpose, the Court may "look to other jurisdictions construing similar statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)." Censabella v. Hillsborough Cty. Attorney, 171 N.H. 424, 426 (2018).

The petitioner now seeks to be provided with all responsive emails from January 2021 that she argues should have been made available to her pursuant to her requests under RSA 91-A. The City represents that it provided "additional responsive records" on April 8, 2022 and that the lawsuit, in the City's opinion, is accordingly moot. (City Memo. at 2.) However, it appears that the petitioner still may not have been provided with all of the responsive records to which she believes she is entitled.[7] Finally, the petitioner seeks costs based on the City's alleged violations of the RTK law. For its part, the City argues it complied with the RTK law by conducting a reasonable search for the requested records. To resolve the dispute, the Court must determine if the City's search was adequate or if it was required, under the RTK Law, to perform a backup

[7] The City represented at trial that some emails would have been lawfully deleted in the course of business. The petitioner contends the City is violating RSA 33-A through their email retention practices. However, while relevant to the Court's consideration of potential RTK violations, determining whether the City has violated RSA 33-A is beyond the scope of this RTK Law proceeding.

tape search for records responsive to the petitioner's March 7 and March 28 Requests for Assesshelp emails.[8]

"[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.

The New Hampshire Supreme Court has not addressed whether a reasonable search under the RTK law could require an agency to search its backup tapes. This Court, however, has addressed the issue. See Ortolano v. City of Nashua, No. 226-2021-CV-354, Court Doc. 25 at 6–10 (Feb. 7, 2022) (Temple, J.)[9], appeal docketed,

[8] As indicated above, the petitioner requested to be provided with an email from Mr. Vincent to the Legal Department to confirm that he had sent them the petitioner's request (the March 29 Request). The City denied this request as being attorney-client privileged. The Court performed an in camera review of the email. On the first day of the trial, February 28, 2022, the Court ruled that the body of the email was privileged but the date and time header of the email was responsive and not protected. The Court provided the redacted email to both parties. This issue is accordingly MOOT.

[9] The issue before the Court is strikingly similar to the one the Court considered and discussed in detail in its No. 226-2021-CV-354 order. In both cases, the City's position is that its searches for responsive records were in compliance with the RTK law despite not including searches of their backup tapes. In both cases, Mr. Miseirvitch testified that the search of the backup tapes required to find the responsive records would take two or three hours. In the No. 226-2021-CV-354 order, the Court found the search of the backup tapes was necessary in response to the petitioner's RTK request in that case.

2022-0237 (N.H. May 17, 2022). The Court also turns to federal courts' interpretation of FOIA for guidance. Censabella, 171 N.H. at 426. In determining whether the City is required to search its backup tapes in response to the petitioner's March 7 and March 28 Requests, the Court looks to (1) whether any backup tapes potentially relevant to the request existed; (2) if so, whether their responsive material would be reasonably likely to add to what 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." Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 515 (D.C. Cir. 2011).

With respect to the first factor, it is undisputed that the City's backup tape system exists, can be searched, and that files such as those requested by the petitioner are retrievable from the backup tapes. In fact, Mr. Miseirvitch has already performed a search of the relevant backup tapes. In addition, the City offered to search the tapes in order to provide the petitioner with the responsive records she seeks. 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 recordkeeping system where the court found there was "no reason to believe that an electronic backup recording system of the kind described by the plaintiff actually exists."). Likewise, as to the second factor, there are likely additional responsive documents on the City's backup system, as evidenced by the completed backup tape search on May 27, 2021. Cf. Steward v. U.S. Dep't of Just., 554 F.3d 1236, 1244 (10th Cir. 2009) (noting that a search of the backup system for responsive emails would be unlikely to reveal any additional communications where the backup system did not keep files for more than six months and where the requested material pre-dated that time).

Finally, there is no practical obstacle to accessing the responsive records from the backup tapes. This finding is firmly rooted in the credible testimony of Mr. Miseirvitch, who said that it would take three hours to perform the search. Three hours does not render the resulting search so time-consuming as to obviate the City from having to perform the search in the first place. Cf. 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 to review would be unreasonably burdensome). There was also no evidence of other impediments to performing the search presented at trial. Cf. Ancient Coin Collectors Guild v. U.S. Dep't of State, 866 F. Supp. 2d 28, 34 (D.D.C. 2012) (holding that defendant was not required to search the backup system where defendant "persuasively argue[d]" that the "backup 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"). Again, the fact that Mr. Miseirvitch performed the search of the relevant backup tapes and that the City has offered to do so again for the petitioner indicates that the search is reasonable. While the Court does not doubt Mr. Miseirvitch's testimony as to whether backup tape searches would be onerous if his department were asked to perform ten such searches per week, there is no evidence that the City currently faces such an onus. In fact, he testified he seldom is asked to search the backup tapes for responsive records. Thus, any argument as to how burdensome searching the backup tapes would be under different circumstances than presently exist is not persuasive.

Based on the foregoing, the Court finds that the City has not met its burden to show that a search of the backup tapes was not required in this case. It appears from the evidence—specifically, the May 27, 2021 backup tape search—that the City eventually performed what would have constituted an adequate search under RSA 91-A. However, this search was not done in a timely fashion, and the petitioner was not timely provided with the responsive records. The City accordingly violated RSA 91-A:4. As such, the Court GRANTS the petition. Out of an abundance of caution, the Court orders the City to conduct a second backup tape search responsive to the petitioner's RTK request. This includes a search of the January 2021 and February 2021 backup tapes. This search will ensure that the petitioner has received all of the responsive records related to the Assesshelp emails for the time period of January 1, 2021 to March 5, 2021.

Request for Costs

The petitioner lastly requests the Court award her "her costs for bringing and prosecuting this action." (Compl. ¶ 44.) The City replies that, even if the City did violate the RTK Law, any such violations were remedied because the City "restor[ed] emails that may have existed at the time the request was received." (Def.'s Mem. at 16.)

Under the RTK Law:

> If any public body or public agency or officer, employee, or other official thereof, violates any provisions of this chapter, such public body or public agency shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter. Fees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter or if the parties, by agreement, provide that no such fees shall be paid.

RSA 91-A:8, I. In other words, "an agency shall be liable for reasonable attorney's fees and costs incurred if the trial court finds that: (1) the agency violated any provision of RSA chapter 91-A; (2) the lawsuit was necessary in order to make the information available; and (3) the agency knew or should have known that the conduct engaged in was a violation of RSA chapter 91-A." 38 Endicott St. North, LLC v. State Fire Marshal, N.H. Div. of Fire Safety, 163 N.H. 656, 669 (2012) (quotations omitted). However, "[e]stablishing that the agency 'knew or should have known' that its refusal constituted a Right-to-Know Law violation is required for an award of legal fees, but not for costs." ATV Watch v. N.H. Dep't of Res. & Econ. Dev., 155 N.H. 434, 439 (2007).

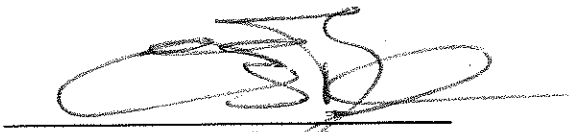
The Court finds that the petitioner is not entitled to be awarded her costs for bringing this suit. As is explained above, the City did violate the RTK Law by not initially responding to the March 7 Request within five days and by not providing her with all of the responsive records to which she was entitled. However, the Court cannot find the present suit was necessary such that the petitioner is entitled to costs. This finding is supported by the City's response history after the initial delay. Most importantly, prior to the start of trial, the City offered to provide the petitioner the very relief she seeks—requiring a search of the backup tapes for the missing records. The petitioner acknowledged this offer but refused it. The Court also finds any other potential relief, such as remedial training, is unwarranted given the City's efforts to remedy their RTK Law violation.

Conclusion

In conclusion, the Court finds the City violated RSA 91-A by not providing certain requested records in a timely manner. While the petitioner is entitled to any responsive records not yet provided to her by the City, she is not entitled to costs or any other relief.

So ordered.

Date: June 20, 2022



Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
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