The State of New Hampshire

STRAFFORD COUNTY SUPERIOR COURT

David K. Taylor

v.

The Oyster River Cooperative School Board
and Henry Brackett, Chairman

Docket No.: 219-2011-CV-00349

FINAL ORDER

Plaintiff, David K. Taylor, sues Defendants, the Oyster River Cooperative School Board ("ORCSB" or "Board") and Henry Brackett ("Brackett") as Chairman under RSA 91-A:7 and the New Hampshire Constitution. Plaintiff specifically asks that the Court order "the Board and Brackett to comply with [RSA c]hapter 91-A and produce the information he requested forthwith; [e]njoin future" RSA chapter 91-A violations; and award costs and fees to Taylor. (Pl. Am. Pet. p. 26.) Defendants object. The Court held a bench trial on this matter on November 17, 2011 where testimony was provided by Brackett and other members of the Board as well as Attorney Kim Memmesheimer. After a review of the evidence, the parties' arguments, and the applicable law, the Court finds and rules as follows.

I. Facts

The Court finds the following facts for the purposes of this order. Further factual findings will be included in the legal analysis where needed. The current case arises from the Board's procedures when entering into a separation agreement on June 15,

2011 ("separation agreement") with former superintendent Howard Colter and when hiring interim superintendent Leon Levesque.

Prior to entering into the separation agreement, the Board researched and discussed this decision starting, at least, in April 2011. (Pl. Am. Pet. Ex. 1, 2.) For example, on April 19, 2011, several Board members spoke with an attorney regarding RSA chapter 91-A issues and issues relating to the superintendent's contract. (Id.) During another discussion with an attorney on April 29, 2011, the Board also voted to negotiate with the superintendent to consummate a separation agreement. (Pl. Am. Pet. ¶ 13; Def.'s Ans. ¶ 13.) The Board again met with an attorney on May 20, 2011 and also decided on terms for the separation agreement. (Pl. Am. Pet. ¶ 17; Def.'s Ans. ¶ 17.)

On June 6, 10, and 13, 2011, less than a quorum of Board members interviewed interim superintendent candidates. (Pl. Am. Pet. ¶¶ 23, 26, 28; Def.'s Ans. ¶¶ 23, 26, 28.) On June 13, 2011, the Board met with an attorney and also discussed finalist interviews for interim superintendent and other public relations issues. (Pl. Am. Pet. ¶ 29; Def.'s Ans. ¶ 29.) On June 14, 2011, less than a quorum of Board members met and discussed the interim superintendent search. (Pl. Am. Pet. ¶ 31; Def.'s Ans. ¶ 31.) Less than a quorum of Board members interviewed public relations firms and discussed public relations matters on May 22, 23, and 27 of 2011. (Pl. Am. Pet. ¶¶ 18, 19, 21; Def.'s Ans. ¶¶ 18, 19, 21.) Finally, on June 15, 2011 the Board signed the separation agreement with superintendent Colter.

It was not until a posted non-public meeting on June 15, 2011 that the Board documented a motion and vote on its decision to enter a mutual separation agreement

with superintendent Colter. At the June 15, 2011 non-public meeting, the Board voted to "implement[] the mutual separation agreement." (Pl.'s Ex. 51.) Later, at the public meeting, the Board announced the separation agreement and authorized Brackett and other members to meet with candidates for interim superintendent. (Id.; Pl. Am. Pet. ¶ 36; Def.'s Ans. ¶ 36.) The Board discussed the interview procedures, noting that interviews will be held during public session and that the Board would deliberate in a non-public session. (Pl.'s Ex. 50.) The Board also discussed talking to the press regarding this situation. (Id.)

On July 5, 2011 the Board met for a special public meeting to interview candidates. They later entered a non-public session to deliberate. (Pl. Am. Pet. ¶ 46; Def.'s Ans. ¶ 46.) The Board met again on July 6, 2011 at a special non-public meeting and decided to hire Leon Levesque as an interim superintendent. (Id.)

In entering the separation agreement and selecting the interim superintendent, Plaintiff asserts that the Board and Brackett violated RSA chapter 91-A ("the Right-to-Know law") in many ways, including conducing business outside of public meetings, improperly entering non-public sessions, failing to provide proper notice of such meetings. Plaintiff also alleges the Board and Brackett failed to promptly respond to his information requests under the Right-to-Know law.

II. Discussion

In subsection (b) below, the Court concludes that the Board and Brackett could not agree to enter into a separation agreement, negotiate the terms of that contract, agree to hire an interim superintendent, and meet with potential candidates without first authorizing such actions at either a public or non-public meeting. When the Board took

these actions without such authorization, it violated RSA chapter 91-A. Several of these actions occurred during small gatherings of less than a quorum of members; during meetings with legal counsel; or via e-mail. The Court specifically addresses the propriety of these forms of gatherings and discussions under RSA chapter 91-A in subsections (c), (d), (e), and (f).

Under RSA 91-A:7, "Any person aggrieved by a violation of [RSA chapter 91-A] may petition the superior court for injunctive relief." "The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." ATV Watch v. N.H. Dept. of Resources and Econ. Dev., 155 N.H. 434, 437 (2007) (quotations omitted). "An injunction should not issue unless there is an immediate danger or irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law, and the party seeking injunctive relief is likely to succeed on the merits." Id. (quotations, ellipses, and brackets omitted). The court has discretion to grant or deny such a request. Id.; see, also RSA 91-A:7-8.

a) Agency Regulations

Preliminarily, the Court first addresses the effect of the Board's policies on the Court's RSA chapter 91-A analysis. Plaintiff cites several Board policies and argues that such policies, if they require broader public access than RSA chapter 91-A, "take[] precedence over the requirements of [the statute]." (Pl.'s Ruling Law ¶ 7.) Plaintiff further asserts that violations of these more protective Board policies constitute a violation of RSA chapter 91-A. (Id.) The Court disagrees. Although administrative agencies unquestionably must follow their own rules, In re Town of Bethlehem, 154 N.H. 314, 327 (2006), this Court is unable to find support for the proposition that an

agency's failure to follow its own policies, in and of itself, constitutes a violation of RSA chapter 91-A. Plaintiff's argument, therefore, is without merit. The Court will, however, review the RSA chapter 91-A actions of the Board and Brackett.

b) Meeting Procedures: Public and Non-Public Sessions

RSA chapter 91-A emphasizes open and public meetings. See RSA 91-A:2. The statute mandates that school board meetings "shall be open to the public . . . [and that m]inutes of all such meetings, including . . . a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to the public [] within five (5) business days." RSA 91-A:2. "[A] notice of the time and place of each [public or non-public] meeting . . . shall be posted in 2 appropriate places . . . at least 24 hours" before the meeting. Id.

School boards "shall not meet in non[-]public session, except for one of the purposes set out in [RSA 91-A:3] paragraph II. No [school board] may enter non[-]public session, except pursuant to a motion properly made and seconded." RSA 91-A:3. (Emphasis added.) A motion to enter non-public session must state the specific exemption under paragraph II that is the basis for such motion. Id. "The vote to go into non-public session [must be] taken at the public meeting and recorded in the minutes of the public meeting that will be available to the public." New Hampshire Attorney General Right to Know Memorandum ("AG Mem.") at 14 (July 15, 2009). (Emphasis added.) The vote must be by roll call and requires an affirmative vote of the majority of the members present. RSA 91-A:3. The Board must take minutes for each non-public session, including a "record of all actions [taken] . . . and decisions reached. [The minutes] shall be publicly disclosed within 72 hours of the meeting." RSA 91-A:3; AG Mem. at 17–18.

(Emphasis added.)

"While not required under the Right-to-Know law, it is generally appropriate that the notice include or be accompanied with a brief list of the planned agenda items and a general notice that other matters within the public body's jurisdiction may be considered." AG Mem. at 9.

The grounds for holding a non-public session are as follows: (1) the hiring, dismissal, promotion or compensation of any public employee, (2) matters which would likely affect adversely the reputation of any person other than a member of the body or agency itself, (3) consideration of the purchase or sale of real or personal property, (4) consideration or negotiation of pending claims or litigation, (5) consideration of applications by the adult parole board, (6) consideration of security-related issues and, (7) consideration of applications by the business finance authority. RSA 91-A:3.

The decisions at issue in this case involve the separation agreement and the hiring of an interim-superintendent. The Court finds that these matters fall under RSA 91-A:3, II (a) and (b) as the dismissal and hiring of a public employee. Thus, the Board could properly deliberate and decide these matters in a non-public session. However, as provided above, for the Board to enter a non-public session, it must do so by a roll call vote at a posted meeting where the reason to enter non-public session is announced. The Board must also subsequently disclose the minutes of the non-public meeting within 72 hours. See, RSA 91-A:2.

Here, prior to the vote on June 15, 2011, the Board decided to enter into negotiations relative to a separation agreement, negotiated the terms of that contract, decided to hire an interim superintendent, and began meeting with potential candidates,

all without a recorded vote at a posted public or non-public reflecting the Board's majority decision in violation of RSA 91-A:3. (Pl. Am. Pet. ¶¶ 13, 17, 23, 26, 28, 36; Def's Ans. ¶¶ 13, 17, 23, 26, 28, 36.) The Court has no evidence that these issues were discussed at a posted meeting before the June 15, 2011 meeting when the Board signed the separation agreement. The Board was required, under RSA chapter 91:A, to enter into a non-public (or public) session in order to deliberate. The Board violated the statute when, prior to June 15, 2011 and outside of a public or non-public meeting, it deliberated and decided to separate from superintendent Colter and decided to begin a search for an interim superintendent.

At the June 15, 2011 public meeting, the Board authorized Brackett and other Board members to meet with candidates for interim superintendent. (Pl. Am. Pet. ¶ 36; Def.'s Ans. ¶ 36.) It also authorized Board members Butts and O'Quinn to meet with the press regarding the separation agreement and interim superintendent search. (Pl. Am. Pet. ¶ 33; Def.'s Ans. ¶ 33.) Therefore, the Board members' outreach to potential candidates after June 15 and Board members O'Quinn and Butts' discussions with the press did not violate RSA chapter 91-A. However, Board member Turnbull's involvement with the press prior to June 15 without prior authorization violated the Right-to-Know law.

The Court further finds that the Board violated several procedural requirements of RSA chapter 91-A. The Board failed to record minutes for certain meetings. (Pl. Am. Pet. ¶ 9; Def.'s Ans. ¶ 9.) The Board failed to properly record votes to enter non-public session, (Pl. Am. Pet. ¶ 38; Def.'s Ans. ¶ 38), to list the attendees, and to state the statutory basis for entering non-public session. (Pl. Am. Pet. ¶ 56; Def.'s Ans. ¶ 56.)

The Board has also failed to post minutes of non-public meetings within 72 hours. (Pl. Am. Pet. ¶ 23; Def.'s Ans. ¶ 23.) Lastly, the Board permitted members to participate in meetings via telephone without recording the reason for non-attendance in the minutes. (Pl. Am. Pet. ¶ 46; Def.'s Ans. ¶ 46.) During the hearing, the Board admitted it violated certain provisions of RSA chapter 91-A and indicated that it would rectify its behavior.

Plaintiff argues that the Board also violated the Right-to-Know law by failing to post notice of meetings 72 hours in advance and to list the subject of each meeting in such notice. The Court finds these failures do not violate RSA chapter 91-A. See RSA 91-A:2, II (requiring notice 24 hours in advance); AG Mem. at 9 ("While not required under the Right-to-Know law, it is generally appropriate that the notice include or be accompanied with a brief list of the planned agenda items."). In a separate order issued by the Court on January 12, 2012 involving the same litigants (Dkt. 219-2012-CV-0001), the Court noted that the Board's meeting announcements did not list agenda items. The Court recommended that, in the future, the Board's meeting announcements refer the public to the separate agenda posting.

c) Public Relations Subcommittee

Plaintiff alleges that Brackett, Turnbull, and O'Quinn convened on several occasions to meet with and hire a public relations firm. He argues that these meetings constituted a subcommittee, falling within the definition of a public body under the statute. Plaintiff asks the Court to find that these activities violated RSA chapter 91-A and that any documents related to these meetings are within the scope of his Right-to-Know request.

"It is the position of the Board that the work undertaken by members of the Board

to begin exploring an interim superintendent search process was [] outside the scope of RSA 91-A." (Def.'s Trial Mem. 2.) The Board claims, "the informal work sessions which involved less than a quorum of the School Board were not the work of a subcommittee. Rather, they were work sessions undertaken to begin exploring the process for conducting an interim superintendent search." (Id.) "Brackett was tasked[1] with gathering information about such a process. [He] engaged Board members as well as outside consultants to assist in that fact-finding function consistent with his authority as chairman." (Id.)

A meeting within the meaning of RSA chapter 91-A occurs when a "quorum of the membership of the public body is convened . . . and [t]he purpose of convening a quorum or a majority of the membership is to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power." AG Mem. at 6 (citing RSA 91-A:2).

Certain activities are exempted from the definition of a "meeting," such as "[s]trategy or negotiations with respect to collective bargaining, a caucus of officeholders elected on a partisan basis at a state or municipal general election, and consultation with legal counsel are not meetings." Id. at 7; RSA 91-A:2, I(a-c).

"The Right-to-Know law does not apply to isolated conversations among less than a quorum of individual members outside of public meetings, unless the conversations were planned or intended for the purpose of discussing matters relating to official business and the public entity made decisions during the isolated conversation." Id. (citing Webster v. Town of Candia, 146 N.H. 430 (2001)). "Such

[1] The Court notes that Brackett was only officially tasked with this assignment as of June 15, 2011. Therefore, any work performed before this date could not be justified by Brackett's alleged assignment to

meetings may not be used to circumvent the spirit of the Right-to-Know law. Therefore, [1] if official deliberations occur *or* [2] if decisions are made at such gatherings *or* [3] if the gatherings occur on a regular basis, a court may determine that they constitute improper 'meetings' under the Right-to-Know law." Id. (citing RSA 91-A:2, I(a)) (emphasis added).

As set forth above, less than a quorum of members met on several occasions to discuss public relations issues. For example, on May 22, 2011 members Brackett, Turnbull, and O'Quinn held a conference call with Arthur Hanson of the New England Secondary School Consortium ("NESSC") and Duke Albanese of the Great School Partnership to interview this public relations firm. They "deliberated and decided whether to keep this firm as a candidate and discussed other candidate firms and public relations issues." (Pl. Am. Pet. ¶ 18; Def. Ans. ¶ 18.) During this call, a quorum of members was not present, no notice was posted, the meeting was not public, and no minutes were posted. (Id.) "There is no recorded vote at a posted meeting of the Board giving them authority to meet." (Id.)

On May 23, 2011, "the [same] Board members interviewed [Raymond Mitchell of Trident Communications Group] for public relations and deliberated and decided on a recommendation to the full board on public relations firms." (Pl. Am. Pet. ¶ 19; Def.'s Ans. ¶ 19.) The full Board later met, non-publicly and without posting notice, to discuss public relations issues. (Id.)

The Court finds that these gatherings constituted planned meetings of less than a quorum of members intended for the purpose of discussing matters relating to official

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research the superintendent issues.

business. In addition, the Court finds that deliberations occurred at such meetings, circumventing the spirit of the Right-to-Know law. The Court concedes that the subject of these meetings might well fall within an exception to the Right to Know Law (RSA 91-A:3, II (a) and (b) as the dismissal and hiring of a public employee). However, the Board did not vote to exercise its right to go into non-public meeting prior to the smaller groups' gathering, interviewing potential interim superintendents, and discussing such topics as public relations, the hiring of an interim superintendent, and the termination agreement. These gatherings violated RSA chapter 91-A; any documents related to these meetings are within the scope of Plaintiff's Right-to-Know request.

At the June 15, 2011 regular meeting the Board delegated authority to Board members Butts and O'Quinn to meet with the press regarding the separation agreement and interim superintendent search. As such, any communications between these two Board members and the press regarding the separation agreement after June 15, pursuant to their delegated authority, did not violate RSA chapter 91-A.

d) Interim Superintendent Subcommittee

Plaintiff alleges that Board members Brackett, Turnbull, and Kach convened on several occasions to search for an interim superintendent. He argues that these meetings constituted a subcommittee, falling within the definition of a public body under the statute. Plaintiff asks the Court to find that these activities violated RSA chapter 91-A and that any documents related to these meetings are within the scope of his Right-to-Know request.

"It is the position of the [Board] that the work undertaken by members of the Board to begin exploring an interim superintendent search process was [] outside the

scope of RSA 91-A." (Def.'s Trial Mem. 2.) As noted above, isolated conversations among less than a quorum "may not be used to circumvent the spirit of the Right-to-Know law. Therefore, [1] if official deliberations occur *or* [2] if decisions are made at such gatherings *or* [3] if the gatherings occur on a regular basis, a court may determine that they constitute improper 'meetings' under the Right-to-Know law." AG Mem. at 7 (citing RSA 91-A:2, I(a)).

As set forth above, less than a quorum of Board members met on several occasions to discuss the superintendent issue. For example, on June 6, 2011 Board members Brackett, Turnbull, and Kach met at the Durham Police Station. They "interviewed Arthur 'Skip' Hanson for interim superintendent and they deliberated and decided to keep him as a candidate." (Pl. Am. Pet. ¶ 23; Def.'s Ans. ¶ 23.) In addition, the members "discussed the interim superintendent search process and discussed names of potential candidates." (Id.) On June 13, 2011 Brackett, Turnbull, and Kach met at the Durham Police station regarding the search for an interim superintendent. They interviewed one "candidate for interim superintendent." (Pl. Am. Pet. ¶ 28; Def.'s Ans. ¶ 28.) There was no vote taken giving them authority to meet, no notice posted for these non-pubic meetings, and no minutes were released. (Id.) It was only at the June 15, 2011 regular meeting that the Board authorized certain Board members to begin searching for candidates for interim superintendent.

The Court finds that the gatherings occurring prior to June 15, 2011 (where less than a quorum of members met and decided the Board would enter into a separation agreement with the current superintendent Colter and hire an interim superintendent; and began meeting with potential candidates) violated the spirit of the Right-to-Know

law. However, any research and preliminary discussions between Board members and potential candidates after June 15, pursuant to delegated authority, did not violate RSA chapter 91-A. As noted earlier, the Court concedes that the subject of the meetings prior to June 15th might well fall within an exception to the Right to Know Law (RSA 91-A:3, II (a) and (b) as the dismissal and hiring of a public employee). However, the Board did not vote to exercise its right to go into non-public meeting prior to the smaller groups' gathering, interviewing potential interim superintendents, and discussing such topics as public relations, the hiring of an interim superintendent, and the termination agreement.

e) Meetings with Legal Counsel

Plaintiff alleges that the Board convened on several occasions to hire and consult with legal counsel. Plaintiff asks the Court to find that these activities violated RSA chapter 91-A and that any documents related to these meetings are within the scope of his Right-to-Know request. "It is the position of the Board that the non-meetings which occurred with counsel surrounding the effort to negotiate a separation agreement with former superintendent Colter are specifically exempted from the mandates of RSA 91-A" under RSA 91-A:2, I(b). (Def.'s Trial Mem. 2.)

On March 24, 2011, Brackett contacted Attorney Kim Memmesheimer to retain her services for Board related business. (Pl. Am. Pet. ¶ 8; Def.'s Ans. ¶ 8.) There was no vote at a posted meeting of the Board granting Brackett authority to retain an attorney. (Id.)

On April 19, 2011 Brackett began arranging a meeting with Attorneys Hoefle and Memmesheimer without first obtaining authorization by vote at a posted Board meeting. (Pl. Am. Pet. ¶ 10; Pl. Am. Pet. Ex. 2; Def.'s Ans. ¶ 10.) The meeting was held on April

21, 2011 where the full Board met with the attorneys. (Id.) At this meeting, the Board also deliberated and decided to accept the fee schedule for the attorneys. (Pl. Am. Pet. ¶ 11; Def.'s Ans. ¶ 11.)

On April 29, 2011 Brackett met with Attorney Kim Memmesheimer. (Pl. Am. Pet. ¶ 13; Pl. Am. Pet. Ex 2; Def.'s Ans. ¶ 13.) The full Board then met with Attorneys Memmesheimer and Hoefle. At this meeting "they [also] deliberated about alternatives in the Superintendent contract and decided to negotiate with the Superintendent to consummate a separation agreement. These deliberations and decisions did not occur at a posted meeting." (Id.)

On May 20, 2011 the Board met with Attorney Hoefle. (Pl. Am. Pet. ¶ 17; Pl. Am. Pet. Ex.5; Def.'s Ans. ¶ 17.) They also deliberated and decided on terms of the separation agreement, press release, and how to begin the search for an interim superintendent. (Id.) "These deliberations and decisions did not occur at a posted meeting." (Id.) On May 23, 2011 members Brackett, Turnbull, and O'Quinn met with an attorney to interview a public relations firm. (Pl. Am. Pet. ¶ 19; Def.'s Ans. ¶ 19.)

"Consultation with legal counsel is neither a 'meeting' under RSA chapter 91-A, nor does it fall within the 'non-public' meeting provisions. If a public body is meeting in public session and wants to consult with legal counsel, it should vote on the record to adjourn the meeting." AG Mem. at 8. "Minutes are not required or appropriate for consultation with legal counsel. Consultation with legal counsel should be limited to discussion of legal issues. Deliberation about the matter on which advice is sought may not occur during consultation with legal counsel." Id.

In Ettinger v. Town of Madison Planning Board, the Court addressed whether a

planning board could enter non-public session to discuss e-mails from the Board's attorney, a memorandum summarizing legal advice relayed over the phone from the Board's attorney to the Board's administrative assistant, and letters from the plaintiffs' attorney. Ettinger v. Town of Madison Planning Bd., No. 2010-688, 2011 N.H. LEXIS 178 (N.H. December 8, 2011). Under the Right-to-Know law, consultation with legal counsel is excluded from the definition of a meeting. RSA 91-A:2, I(c).

The Court held that "questions regarding the Right-to-Know Law [must be resolved] with a view to best effectuate the statutory objective of facilitating open access to the actions and decisions of public bodies. As a result, [courts must] broadly construe provisions favoring disclosure and interpret the exemptions restrictively." Id. at *3–4. The Court noted that the exception at issue is a narrow exception that applies only to *consultation with* legal counsel.

> Had the legislature intended the exclusion in RSA 91-A:2, I(b) to cover not just consultations with legal counsel but also "consideration or discussion of the advice of counsel," the statute would have said as much. In this case, the Board met in a private session not only to read the memorandum prepared at the direction of the attorney, but also to "discuss" and "consider" the memorandum without counsel present. In the absence of an applicable exception, the clear legislative mandate of the Right-to-Know Law requires that they do so in the open.

Id. at *11.

The Court's decision in Ettinger demonstrates that exceptions to the requirement for public meetings will be construed narrowly. The exception for "consultation with counsel" applies only to the discussions regarding legal issues *with* counsel. The decision to hire an attorney; how much to pay the attorney; and deliberations regarding the issues on which advice was sought, do not fall within this narrow exception because the Board is not *consulting* with counsel at those times. To the extent the Board took

such actions outside of a public meeting or acted during a non-public meeting without first voting to enter such a meeting as required by RSA chapter 91-A, the Court finds that the Board violated RSA chapter 91-A. Any non-privileged documents related to these meetings are within the scope of Plaintiff's Right-to-Know request.

The Board's decision to hire specific attorneys; decision to accept fee schedules; decision to consummate a separation agreement; decision to issue a press release; interviews with public relations firms; and decisions on how to begin searching for an interim superintendent—all without authorization granted during a public or non-public meeting—did not fall within the "consultation with legal counsel" exception. Admittedly, certain actions taken by the Board fell within the exception. For example, the Board could properly consult with legal counsel to discuss the possibility of separating with superintendent Colter and the legal implications of such decisions. However, as noted, the Board exceeded the scope of the exception when it took actions beyond consulting with counsel.

f) E-mails

On April 30, 2011 member Wright sent an e-mail acknowledging that the Board effectively voted to move forward with the separation agreement during a meeting with an attorney. (Pl. Am. Pet. Ex. 3.) She provided some of her thoughts and opinions on the matter and expressly acknowledged that she sent virtually identical e-mails in "two batches so [she didn't] send to a quorum of the board." (Id.) On June 14, 2011, Board member Wright also indicated by e-mail that she intended to make a motion at the next meeting and implied which way she would vote, and why. (Pl.'s Ex. 48.) Plaintiff argues that the e-mails sent by Brackett to a quorum of the Board, leading to the decision to

meet with an attorney for a separation agreement constitutes communications outside of a meeting that circumvents the spirit and purpose of RSA 91-A. (Pl.'s Ex. 12.)

"No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern the meeting discussion contemporaneously at the meeting location specified in the meeting notice." AG Mem. at 12. E-mails "to a quorum of [the Board] discussing, proposing action on, or announcing how one will vote on a matter within the jurisdiction of the body would constitute an improper meeting. Sequential e-mail communications among members. . . similarly should not be used to circumvent the public meeting requirement." Id. at 7.

The June 14, 2011 e-mail by Brackett to a quorum of the Board setting up a meeting with an attorney to discuss the superintendent issue did not violate the Right-to-Know law. (Pl.'s Ex. 12.) As noted above, meetings to consult with an attorney do not fall within the definition of a meeting under the Right-to-Know law. As such, using e-e-mail to arrange a gathering with counsel does not circumvent the spirit of the law. However, sending e-mails in two batches in order to avoid a quorum of members violates the law because it "circumvent[s] the public meeting requirement." AG Mem. at 7. Member Wright's e-mail indicating that she intended to make a motion at the next meeting and implying which way she would vote, and why, improperly "discuss[ed], propos[ed], [and] announc[ed] how [she] will vote on a matter" and thus constituted an improper meeting. Id.

g) Public Records

Regarding public records,

> Every citizen during the regular business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5.

RSA 91-A:4, I.

> On June 20, 2011, Taylor filed a Right-to-Know request pursuant to RSA 91-A for "all records of communications ([e-mails], etc.) from 1 Jan. 2011 involving school board members, other government officials such as selectmen or state officials, or administrators of the school district or towns of Durham, Lee or Madbury concerning any arrangements for non-meetings as defined in the [New Hampshire] Right-to-Know law. . . . Please also send any such records of communications involving the search for or selection of an attorney involved in any such non-meetings."

(Pl. Am. Pet. ¶ 39; Pl. Am. Pet. Ex. 11.)

RSA 91-A:4 provides that each public body "shall, upon request for any governmental record reasonably described" make the requested records immediately available for inspection, "deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied." Plaintiff argues that that Board and Brackett failed to respond to his request within a reasonable time and failed to release all documents necessary under the law. Plaintiff asks the Court to compel the Board and Brackett to comply with RSA chapter 91-A and produce the requested information. The Court grants this request consistent with the analysis set forth above.

Plaintiff further alleges that the Board redacted the names and other personal

information for the interim superintendent candidates in violation of RSA chapter 91-A. The Right-to-Know law provides an "exemption . . . for 'other files whose disclosure would constitute invasion of privacy.'" Lambert v. Belknap County Convention, 157 N.H. 375, 382 (2008). The Court must conduct "a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy." Id.

> First, [courts] evaluate whether there is a privacy interest at stake . . . . Whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations. If no privacy interest is at stake, the Right–to–Know Law mandates disclosure. Second, [courts] assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. If disclosing the information does not serve this purpose, disclosure will not be warranted . . . . Finally, [courts] balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.

Id. 383–84 (citations omitted).

In this case, the Court finds that the interim superintendent applicants do not have a privacy interest in their application. "The [U.S.] Supreme Court has rejected the position that 'disclosure of a list of names and other identifying information is inherently and always a significant threat to the privacy of the individuals.'" Physicians Committee for Resp. Medicine v. Glickman, 117 F.Supp.2d 1, 3, 6 (D.D.C.2000) (finding that nonappointed applicants for membership on advisory committee for United States Department of Agriculture had minimal privacy interests in their curricula vitae). Second, this Court finds that the public has a strong interest in disclosure in order "to understand the [Board's] selection process. Knowing the names of who was selected and who was not, and learning their qualifications and affiliations, would advance that public interest." Id. at 6. Third, when balancing the public's interest in disclosure against

the government and the individual's interest in nondisclosure, the Court finds "that the public's interest in disclosure significantly outweighs the privacy interests of the candidates." Lambert, 157 N.H. at 386. The public has a significant interest in understanding the Board's selection of a candidate to fill this vacancy. The Board used public funds to terminate the previous superintendent and will use additional public funds to replace this official. In addition, the superintendent plays an important role in the community because he/she will have a direct influence over the education system.

Therefore, the Court holds that the Board must release the names of the applicants. Since Plaintiff did not specifically identify what additional personal information he seeks, the Court cannot address whether the candidates "have more than a minimal privacy interest in" the other redacted information. Id. As such, the Court only orders the names of individuals that have been redacted to be released.

h) Findings of Fact and Rulings of Law

Plaintiff filed extensive requests for findings of fact and rulings of law on November 16 and 23, 2011. Defendant filed a request for findings of fact and rulings of law on November 14, 2011. At the Court's urging, Plaintiff submitted a substantially shortened list on November 23, 2011. The Court has considered all of the parties' submissions and the requested findings and rulings are granted or denied consistent with the above order. See Clinical Lab Products, Inc. v. Martina, 121 N.H. 989, 991 (1981); R.J. Berke & Co. v. J.P. Griffin, Inc., 116 N.H. 760, 766–67 (1976). Any of the requests for findings and rulings not granted herein either expressly or by necessary implication are hereby denied or determined to be unnecessary in light of the Court's decision.

III. Conclusion

The Court **GRANTS** Plaintiff's request for documents and redacted information under RSA chapter 91-A consistent with the analysis above. The Board and Brackett must comply with RSA 91-A:4 by responding to Plaintiff's request, with an effective date of his request being the date of the issuance of this order. The Court **DOES NOT ENJOIN** the Board from committing any future violations of RSA chapter 91-A described above as the Board has already indicated its willingness to comply with it. The Court **GRANTS** Plaintiff's request for fees and costs under RSA 91-A:8, I, finding that (1) Plaintiff was refused access to a public documents from the Board and Brackett after reasonably requesting such access, (2) this lawsuit was necessary in order to make proceedings open to the public, and (3) the Board and Brackett knew or should have known that their conduct violated the Right-to-Know Law. Ettinger, 2011 N.H. LEXIS at *12. See also, New Hampshire Challenge v. Commissioner, New Hampshire Dept. of Educ., 142 N.H. 246 (1997). The Court finds that the most of the Board substantially complied with Plaintiff's request for information. However, since Brackett is a member of the Board, the Board is liable for his failure to respond in a timely fashion and his failure to disclose all of the requested information. Insofar as Brackett was sued in his official capacity, the fees are properly chargeable to the Board. Bradbury v. Shaw, 116 N.H. 388 (1976).

Plaintiff shall submit a sworn to accounting of his fees and costs to the Court for approval within fifteen days of the issuance of this order. Plaintiff shall simultaneously provide a copy of his accounting to Defendants, and Defendants will have ten days from the date of its receipt to object to Plaintiff's accounting by filing such objection with the

Court.

SO ORDERED.

January 17, 2012
Date

Hon. Marguerite L. Wageling
Presiding Justice