

APR 11 2014

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2013-0205, Law Warehouses, Inc. v. New Hampshire State Liquor Commission, the court on April 10, 2014, issued the following order:**

Having considered the briefs, the memorandum of law, and the record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm in part, vacate in part, and remand.

The petitioner, Law Warehouses, Inc. (LWI), appeals an order of the superior court denying its petition pursuant to RSA chapter 91-A (2013 & Supp. 2013), the Right-to-Know Law, seeking to obtain the contract between the respondent, the New Hampshire State Liquor Commission (NHSLC), and the intervenor, Exel, Inc., and other materials relating to the awarding of the contract. LWI contends that the trial court erred by: (1) ruling that provisions in a public contract may contain information that is exempt from disclosure under RSA 91-A:5, IV; (2) “holding that NHSLC was not required to demonstrate the withheld information was exempt from disclosure”; (3) failing “to address other issues raised by LWI’s Petition, including NHSLC’s failure to produce the Evaluation Committee’s scoring records, and other requested information concerning NHSLC’s handling of the bid process and its selection of Exel”; (4) failing to find that NHSLC did not respond to its Right-To-Know requests in accordance with RSA 91-A: 4, IV; and (5) denying its motion for attorney’s fees, see RSA 91-A:8, I.

We review the trial court’s interpretation of the Right-to-Know Law and its application of the law to undisputed facts de novo. 38 Endicott St. N. v. State Fire Marshal, 163 N.H. 656, 660 (2012). We construe provisions favoring disclosure broadly, while construing exemptions narrowly. Id. A public entity seeking to avoid disclosure under the Right-to-Know Law bears a heavy burden to shift the balance toward nondisclosure. Id.

At the outset, we reject LWI’s argument that the trial court erred by ruling that provisions in a public contract may contain information that is exempt from disclosure under RSA 91-A:5, IV. As the trial court correctly observed, implicit in our analysis in Professional Firefighters of N.H. v. HealthTrust, 151 N.H. 501, 506-07 (2004) is the proposition that public contracts may contain information that is exempt from disclosure under RSA 91-A: 5, IV. See Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 555 (1997) (applying balancing test pursuant to RSA 91-A:5, IV to documents agency claimed confidential).

LWI next contends that the trial court erred by failing to address whether the information that NHSLC withheld was exempt under RSA 91-A:5, IV. We have held that when there is a question whether materials are exempt from public access, the trial judge should conduct an in camera review. Prof'l Firefighters, 151 N.H. at 506. The purpose of this review is to balance the asserted private interest in confidential, commercial, or financial information against the public's interest in disclosure. Union Leader, 142 N.H. at 552-53. In large document cases, a Vaughn index may facilitate this review. Id. at 549; see Vaughn v. Rosen, 484 F.2d 820, 823-25 (D.C. Cir. 1973) (describing Vaughn index). The burden of proof regarding confidentiality rests with the party asserting it. Union Leader, 142 N.H. at 549.

NHSLC asserts that LWI did not preserve this claim because at the hearing before the trial court, "[w]hen asked whether the State needed to review materials submitted by vendors to determine if there's confidential information, LWI argued that no analysis was necessary because it contended that RSA 91-A:5, IV does not apply to any documents incorporated into a contract with the State." (Quotation omitted.)

Similarly, the trial court concluded that this issue was not properly before it. In its initial order, the trial court stated that, if NHSLC produced a Vaughn index or documents with "only a few words excised, and the content is sufficient to establish the basis for the withholding of information," LWI

would be able to challenge the claim of confidentiality. But that issue is not currently before the Court, since Law's claim is that the entire document must be produced as a matter of law . . . . Moreover, at the hearing on December 18, counsel for the Commission and Exel advised the Court that they were still attempting to narrow the information that they claimed was confidential. It follows that under the present circumstances of this case, Law is not entitled to relief.

In its subsequent order on LWI's motion to reconsider, the trial court reiterated that LWI's challenge to NHSLC's redaction of information from documents it released was not before the court.

However, the record shows that LWI challenged NHSLC's right to withhold specific information under RSA 91-A:5, IV. This argument was discussed at the hearing before the trial court. The court observed that if LWI lost its argument that a public contract was not subject to the exemptions from disclosure in RSA 91-A:5, IV, it "still gets to challenge [NHSLC's withholding of allegedly] confidential information."

In addition, prior to the trial court's decision, LWI filed a post-hearing memorandum arguing that NHSLC had the burden of proving that information it withheld under RSA 91-A:5, IV was, in fact, exempt, that NHSLC had not yet carried its burden, and that "[t]o determine whether information is exempt under RSA 91-A:5, IV," the court would need to balance the asserted private confidential, commercial, or financial interest against the public's interest in disclosure under Union Leader.

Similarly, in its motion for reconsideration, LWI argued that

a ruling on whether any part of the Contract is exempt from disclosure should not occur unless or until the Commission (a) identifies the information it has withheld; (b) meets its burden of proving that the withheld information constitutes "confidential, commercial or financial information" under RSA 91-A:5, IV; and (c) demonstrates that any harm caused by the release of this information outweighs the compelling public interest in obtaining full disclosure of the terms of a 20 year, \$200 million public contract.

Finally, in both its memorandum and its motion to reconsider, LWI reiterated its claim to the other classes of documents that it sought in its Right-To-Know request and in its petition. Therefore, the issue of whether information withheld by NHSLC, both in the contract and in the other classes of documents sought, was exempt under RSA 91-A:5, IV was properly before the trial court and was preserved for our review.

NHSLC argues that LWI raised this issue prematurely. It agrees that "the balancing test would be appropriate had NHSLC completed its review and then refused to produce particular documents as 'confidential, commercial, or financial information,' and LWI then chose to challenge the classification of the documents as exempt under RSA 91-A:5, IV." It notes that "[a]t the time of the hearing, NHSLC had not refused to produce any documents. Instead, it was in the process of producing documents on a rolling basis." (Citations to record omitted.)

However, this argument ignores the requirement in RSA 91-A:4, IV that within five business days of a Right-to-Know request, an agency must: (1) make the requested records available; (2) deny the request in writing with reasons; or (3) acknowledge receipt of the request in writing with a statement of the time reasonably necessary to determine whether the request will be granted or denied. See ATV Watch v. N.H. Dep't. of Resources & Econ. Dev., 155 N.H. 434, 440-41 (2007). The time period for responding to a Right-to-Know request is absolute; delayed disclosure violates the statute. Id. at 440-41.

NHSLC did not inform LWI when it would complete its determination of what information it would release and withhold. Therefore, LWI had no alternative but to petition the court to require production and to determine whether information withheld was exempt under RSA 91-A:5, IV. See ATV Watch, 155 N.H. at 441 (holding that delayed disclosure violates the statute). Moreover, the record establishes that the contract NHSLC produced contained numerous redactions, purportedly on grounds that the redacted material was confidential. If, as NHSLC contends, its “rolling” production satisfies RSA 91-A:4, IV, LWI has the right to challenge NHSLC’s assertions of confidentiality in the documents it has produced on a rolling basis.

Therefore, we vacate the trial court’s denial of LWI’s Right-To-Know petition, and we remand for further proceedings consistent with this order. The scope of the trial court’s consideration on remand shall include all the information identified in LWI’s Right-To-Know request, and not just the information redacted from the contract.

To the extent LWI contends that the trial court erred by not finding that NHSLC violated RSA 91-A:4, IV by producing documents on a “rolling basis,” we note that neither the trial court’s order on the merits nor its order on reconsideration expressly addressed whether a “rolling” production of documents can satisfy RSA 91-A:4, IV. The trial court addressed this issue in an abbreviated fashion only in the context of deciding the issue of attorney’s fees. Since we have vacated the denial of LWI’s petition due to the trial court’s failure to address whether NHSLC properly withheld information under RSA 91-A:5, IV, we will defer addressing, at this point, whether NHSLC’s “rolling” production satisfied RSA 91-A:4, IV. We direct the trial court, upon remand, to address this issue expressly, to set forth its legal analysis, and to make factual findings regarding the timing and nature of NHSLC’s disclosures.

Likewise, we decline to address LWI’s argument that the trial court erred by denying attorney’s fees. Since the merits of the petition remain unresolved, a ruling on attorney’s fees would be premature, and we vacate the trial court’s order denying attorney’s fees. See Fowler v. Town of Seabrook, 145 N.H. 536, 541 (2000) (declining to address attorney’s fees because premature where merit of plaintiff’s claims still undetermined).

Affirmed in part; vacated in part; and remanded.

Dalianis, C.J., and Hicks, Conboy, Lynn, and Bassett, JJ., concurred.

**Eileen Fox,  
Clerk**