THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Donna M. Green

v.

School Administrative Unit #55, Earl F. Metzler II,
Timberlane Regional School District, Nancy Steenson

Case No. 2015-0274

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# BRIEF FOR DONNA M. GREEN

APPELLANT

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**ORAL ARGUMENT BY:**
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## I. INTRODUCTION

This appeal involves a simple misreading of the Right to Know law by the trial court. The case involves the right of a member of the public to obtain public records in electronic format. Ironically, the trial judge expressed sympathy with Ms. Green's request to receive electronically stored data in an electronic format, indicating that her request was reasonable and that in civil litigation parties routinely provide electronically stored data in an easily usable electronic format. However, despite the court's recognition of the merits of her request, it read the right to know law in a way that allowed the defendants to shield data from public disclosure in a manner consistent with the letter and the spirit of RSA 91-A.

## II. QUESTION PRESENTED

Whether the trial court erred in holding that RSA 91-A:4, V, gives the government the unfettered discretion to provide document stored electronically in either electronic or hard-copy form?

## III. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE CASE

RSA 91-A

## IV. STATEMENT OF THE CASE

By verified petition filed February 3, 2015, App. at 5, Donna Green petitioned the superior court for an order requiring SAU 55, Superintendent Earl F. Metzler, and School Board Chairman Nancy Steenson, to be ordered to "provide an electronic file in a mutually agreeable format of the Timberline Regional School District 2014-2015 and

2015-2016 budget." App. at 13-14. The petition sought additional forms of relief that are not the subject of this appeal.

The defendants filed a motion to dismiss, to which the petitioner timely objected. App. at 30-35.

A hearing on the defendant's motion to dismiss was held on March 6, 2015. The hearing proceeded by offers of proof. The court issued an order granting the motion to dismiss on March 9, 2015. App. at 1. The petitioner made a timely motion for reconsideration on March 19, 2015. App. at 36-45. The court denied reconsideration. App. at 45. This appeal followed.

## V. STATEMENT OF FACTS

Donna Green is a duly elected member of the Timberlane Regional School Board. (Hereinafter "TRSB"). App at 1. On January 21, 2015, Green sent an email to Nancy Steenson, Chair of the Timberlane School Board requesting that:

> the administration provide me and the school board with the financial system's salary detail output for the 2014-2015 budget. I similarly request the same for the proposed 2015-2016 budget as per that which is given the Hampstead Budget Committee….
>
> As I am sure you are aware, the salaries of all public employees are a matter of public record in New Hampshire.

App. at 17.

Steenson replied in an email as follows:

> If you feel that board members would be interested in this report, please make a motion to request it on behalf of the board during other business tonight. The Hampstead and Timberlane distracts may share SAU administration, but are run completely separately, as you know. We have done many things differently for many

> years. Nobody at the SAU is depriving the Timberlane board of documents; the reports you reference have not been requested nor needed by the Timberlane board in the past. Perhaps you'd like to briefly explain why they would be of use for the benefit of the rest of the board tonight.

App. at 17. The clear import of Steenson's reply email is that Green would only be able to access the basic information that she sought about her school district if a majority of the school board voted to allow her to have that information

The chairman of the school board, Nancy Steenson, advised Green that she would not "authoriz[e] hundreds of pages of documents to be distributed to all board members at your request. That would be a tremendous waste of district resources." App. at 19. While it is somewhat remarkable that that school board members were not provided copies of district salary information in the ordinary course of business, Ms. Green subsequently sent an email amending her request, stating, "Well, in that case, give me the file electronically and we will all save money and time. I await receipt of the file." App. at 20.

Although Green's original request for financial school district information was made in her capacity as a school board member, she promptly amended her request to include a claim to information under RSA 91-A.[1] App. at 1, 17. Rather than simply provide Green with an electronic copy of school district salary information, the district,

[1] The Right to Know claim filed in the superior court also included a request for attorneys fees expended obtaining a copy of a videotape of an alleged confrontation between Green and a school employee in the SAU office. The district filed a complaint against Green for disorderly conduct, provided the police with a copy of the video file, and refused to provide a copy of the same to Ms. Green. The school asserted a Right to Know exemption for law enforcement investigations. No charges were ever brought against Green and a copy the electronic video file was subsequently provided to her.

as has been its practice, made a print out of the school salary information and advised Green as follows:

> Thank you for your email dated January 25th regarding your request to inspect and possibly copy salary information for the years 2014-15 and 2015-16. This information is available for public inspection immediately; however, we ask that as a courtesy to the operation of this office, you call for an appointment.

App. at 24.

In response, Green replied to the district in an email as follows:

> How is the salary information stored/ Does it have a separate access function code?
>
> Are you going to print it so it can be inspected? That seems obviously counterproductive.
>
> Please email me an electronic copy when the office reopens. If you will not comply with this request, I require the specific provision in the law by which you are refusing to provide this information. The people of Sandown, whom I represent, expect your office to do everything possible to facilitate my requests for public information.

App at 25.

The district replied:

> Thank you for your email response regarding the District's notification to you that the salary information you requested is available for public inspection. As indicated in my email dated January 26th, the information you requested is immediately available for public inspection.

App at 26.

Green's response included the following:

> Please provide the electronic file associated with this information via email today. This is public information and should be given to

> me in whatever output file format is supported by your financial software, e.g. pdf, export to spreadsheet, export to c.s.v.
>
> If you will not comply with this request, I require the specific provision in the law by which you are refusing to provide this information. The people of Sandown, whom I represent, expect your office to do everything possible to facilitate my requests for public information.

App. at 27.

Notwithstanding Green's repeated pleas for access to the district's budget in electronic format, the district refused to provide her with access to an electronic copy of the record. Green's *pro se* Right to Know petition was subsequently filed in the superior court, pursuant to RSA 91-A.

The transcript of the hearing reveals that the court did not fully address all of the relief requested in Green's Right to Know request. Specifically, Green's email correspondence, incorporated into her petition as described above, requested access to information in any of several forms, including .pdf, CSV, excel, or other common electronic file format. The district asserted that Green's request would have required it to compile data that did not otherwise exist. The hearing, however, came to focus on whether the district budget was maintained in PDF format. T. 19-22. Dr. Metzler and the school district counsel only denied that the budget was stored as a PDF. The court never learned whether the requested files were stored in any electronic file formats <u>other</u> than PDF, or even what format the records were maintained in. The notion that the school district does not have its budget stored in any electronic format strains credulity.

The trial court's Order is remarkable for the extent to which it finds Green's request reasonable and appropriate, yet still declines relief. The heart of the court's order reads as follows:

> Green's argument is based largely on the language in a 1973 New Hampshire Supreme Court case, Menge v. Manchester, 113 N.H. 533, in which the court held that the plaintiff was entitled to make copies of a "computerized tape" containing field record cards associated with each parcel of property in Manchester. The court emphasized that it read amendments to the RSA 91-A as an instruction to resolve questions under the law "with a view to providing the utmost information."
>
> The language in Menge is undoubtedly supportive of Green's position but it is limited by subsequent amendments to RSA 91-A, which in fairly plain language state that it is the choice of the public entity whether to produce documents in electronic or conventional format. RSA 91-A:4, V, states that any "public body or agency which maintains governmental records in electronic format may, in lieu of producing original records, copy governmental records requested to electronic media…." By using the word "may" rather than "shall" the legislature clearly decided to give governmental units the discretion to provide documents stored electronically in either electronic or hard-copy form. For that reasons, the Court rules that Green is not entitled to electronic copies. See also Nolen v. City of Keene, 09-E-0152 (J. Arnold)(holding that RSA 91-A did not require the City to provide records to the plaintiff by email).
>
> The court notes in passing that if finds persuasive Green's argument that the refusal of SAU 55 to provide by email electronic copies of budgets already in existence creates considerably more work for her. In civil litigation, it has become routine for parties to insist that documents be produced in native format for the very same reasons articulated by Green. If litigants are entitled to electronic documents, there may be a strong policy argument to be made for extending that same privilege to the public under RSA 91-A.. But as noted by the counsel for the SAU, that is a decision for the legislature.

App. 2-3.

## VI. SUMMARY OF THE ARGUMENT

The trial court erred in finding that, "it is the choice of the public entity whether to produce documents in electronic or conventional format." App. at 3. Rather, RSA 91-A:4, V, narrowly restricts the discretion of a public body to produce printout of electronic records. Pursuant to the statute, when a citizen requests access to an electronically stored governmental record, the public body may grant the citizen direct access to the governmental record or may reproduce the governmental record in a commonly used file format. Only if reproducing the record in a common file format is not reasonably practicable, or if the citizen requests a paper printout, may the public agency or body allow access in printed form.

## VII. ARGUMENT

The trial court erred in finding that, "it is the choice of the public entity whether to produce documents in electronic or conventional format." App. at 3. Resolution of this matter is a matter of statutory construction. Concerning interpretation of the Right-to-Know law, this Court recently stated as follows:

> Resolving the issues on appeal requires that we interpret the Right–to–Know Law, which is a question of law that we review de novo. ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011). When interpreting a statute, including the Right–to–Know Law, we first look to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Lambert v. Belknap County Convention, 157 N.H. 375, 378 (2008). We also interpret a statute in the context of the overall statutory scheme and not in isolation. Id. We resolve 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. ATV Watch, 161 N.H. at 752. Therefore, we construe provisions favoring disclosure broadly, while construing exemptions narrowly. Hampton Police Assoc. v. Town of Hampton, 162 N.H. 7, 11 (2011).

Premium Research Services v. New Hampshire Dept. of Labor, 162 N.H. 741, 743 (2011).

The language of the statue at issue in the trial court, RSA 91-A:4, reads as follows:

> V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.

The trial court erroneously failed to consider the statute as a whole and to consider the relevant provision in its proper context. The trial court focused exclusively on part of the first sentence of the statute. It found that the use of the word "may" in the first sentence indicates that that "the legislature clearly decided to give governmental units the discretion to provide documents stored electronically in either electronic or hard-copy form." App. at 3. This was error.

The first sentence of the section cannot be read without reference to the second section. The second sentence clearly indicates that the governmental unit is not given

unfettered discretion to produce information in any way it chooses. Rather, the authority to produce electronically stored information in "hard-copy" form is narrowly prescribed. The second sentence of the statute makes it clear that the authority to produce a hard-copy form of an electronically stored document arises only, "if copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records.…" RSA 91-A:4, V (emphasis added). Thus, the discretion given to the public body or agency is conditional, not absolute.

The trial court's analysis should have tracked the language of the statute. The first sentence of the paragraph reads:

> [A]ny public body or agency which maintains governmental records in electronic format….

Clearly the defendants are a "public body or agency" and they maintain their governmental records in "electronic format." The defendants never denied either of these facts. Having established that the statute applies to the defendants, the statute next indicates that the defendants:

> may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential….

The use of the construction, "may, in lieu of," clearly provides the defendants with a choice. However, that choice does not include producing a paper printout of electronic records. Rather, the choice the law gives the defendants is whether to provide "original records," or, in the alternative, "copy governmental records requested to electronic

media using standard or common file formats…." Merely producing a paper printout of the electronic records is not an option permitted under the statute.

The "original record" in this case resides on a computer in the SAU. There are several reasons the SAU may not want to provide Ms. Green, or any other member of the public, access to the original record via the computer on which it resides. Indeed, the statute itself anticipates one of these concerns where it states that the record must be produced, "in a manner that does not reveal information which is confidential…." Further, there could be security issues involved in maintaining the integrity of the original electronic document. Additionally, members of the public granted access to the "original document" may also be placed in a position to access other non-public information. However, these concerns do not authorize a governmental body to reduce the efficacy of public access by creating expensive-to-reproduce hard copy printouts of records it maintains electronically.

Finally, the statute reads that only if the "copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested…." Neither of those preconditions exist in this case. The trial court never considered whether "copying to electronic media [was] reasonably practicable," and Ms. Green clearly did not request "a different method" than that set forth in the statute. Indeed, her emails back-and-forth with the school district clearly reflect that she made substantial effort to receive the information electronically, rather than as a printout or even as a PDF.

The statutory construction advanced by Ms. Green is consistent with the purpose of the Right to Know law. RSA 91-A:1 states:

> Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter 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.

Further, "the Right to Know law "helps further our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003)(quoting Goode. v. N.H. Legislative Budget Assistant, 148 N.H. 551 (2002)). Dissemination of public, non-confidential information in commonly used file formats ensures the greatest degree of openness and the greatest amount of public access to the decisions made by the public officials. Were this Court to adopt the statutory construction advanced by the defendants, it would effectively permit a governmental body avoid accountability to the people by intentionally restricting access to data by making citizens seeking to obtain access incur costs of reproduction of $.50 per page pursuant to school district policy. App. at 29. Further, in order to disseminate or share this information by electronic means, citizens would be required to undertake the burden of converting photocopies into electronic formats. These additional, completely unnecessary steps are contrary to the purposes of the Right to Know law. Thus, by adopting policies intended to limit dissemination of information, the defendants have violated not only the letter, but also the spirit of the law.

Production of the requested information in the requested electronic format is also consistent with this court's prior construction of the Right to Know law. The case Menge v. City of Manchester, 113 N.H. 533 (1973), involved an early request for government information stored on an electronic medium. In Menge, the City of Manchester had hired a private consulting firm to reappraise and revalue properties within the city. Id. at 117. The consultant provided the City with about 35,000 field cards recoding information about the land and buildings, improvements, type of occupancy, and other information indicating how the tax value was arrived at. Id. These cards were kept in hard copy form at the city assessor's office. However, "most of the data on the field record cards was transferred to a property tax information sheet and was caused by the Assessors to be put on a computerized tape" by a local bank. Id.

The plaintiff sought to examine the information on the field record cards. However, rather than review the field record cards at the assessor's office, he sought a reproduction of the electronic data stored on tape.

> To examine 35,000 field cards…would take over 200 man days at a cost of about $10,000.00 as one person could check about 150 cards per day. This would cause great disruption in the Assessor's Office. If the tape were made available, the data could be quickly fed into a computer at Dartmouth College, and nobody in the Assessors' Office would be disturbed. Proving the tape to the plaintiff would not endanger the safety of the record or interfere with the duties of the Assessors who have the custody of the original field records.

Id. Although the case primarily concerned the definition of what constitutes a public record, the Court's analysis properly reflects the importance of the purpose and intent of the Right to Know law, which states that, "[t]he purpose of this chapter 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." RSA 91-A:1. The Court conducted a basic cost-benefit analysis, finding that:

> The ease and minimal cost of the tape reproduction as compared to the expense and labor involved in abstracting the information from the field cards are a common sense argument in favor of the former. RSA 91-A:4 (Supp.1972) provides that every citizen may 'make memoranda abstracts, photographic or photostatic copies' of public records. 'Taking into account the practical realities of the situation, we believe it not only possible, but in accord with our law and what seems to be its basic philosophy, to so construe the statute as to permit' plaintiff to have the reproduced tapes at his expense.

Id. at 119 (citations omitted).

The discussion of its balancing the equities of the facts in Menge should cause this Court's analysis of the present controversy to be decided similarly. Rather than making public information available in a manner that permits maximum utility for the user, and corresponding accountability for the government, the defendants here have plainly attempted to stymie the use of this information by the public. They have done this in a manner that requires Ms. Green to spend extended periods of time in the superintendent's office. They seem to want her to spend extended time in the superintendent's office despite the fact that the defendants apparently felt the need to call the local police and file a crime report against her.[2] Thus, despite the fact that the

[2] Ms. Green continues to deny that she did anything that would cause a reasonable person to believe that she had done anything to justify the call to the police, or that resorting to calling the police was anything other than an attempt to intimidate her into dropping he attempt to obtain information. Indeed, part of one of her Right to Know requests involved attempting to gain access to a videotape of the interaction so that she could release it on her blog and let members of the public decide for themselves.

defendants feel that Ms. Green was sufficiently disruptive that they reported her to the police, they continued to choose a course of conduct that required them to have more, rather than less, face to face interaction with her.

Finally, Ms. Green's request never required the defendant to compile data. Ms. Green requested the school district budget. That document already exists as a complete document on the defendants' computers. This is not a case where a citizen has requested a government agency to compile data from a number of sources. The document sought here exists and Ms. Green simply asked for a copy of it in commonly used, Excel spreadsheet format. The defendants could have given it to her as requested, should have given it to her as requested, and were legally obligated to give it to her as requested.

## VIII. CONCLUSION

For the foregoing reasons, the decision of the lower court should be vacated, and the case remanded to the trial court.

## IX. REQUEST FOR ORAL ARGUMENT

Ms. Green respectfully requests that the Court allow her fifteen (15) minutes oral argument and designates Richard J. Lehmann, Esquire, as the attorney to be heard.

## X. CERTIFICATION OF ATTACHMENT OF APPEALED DECISION

I hereby certify that the appealed decision is in writing and appended to the Brief.

Respectfully Submitted,
DONNA GREEN
By her Attorneys,
DOUGLAS, LEONARD & GARVEY, P.C.

September 21, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by first-class mail this 21st day of September, 2015 to Jeanne M. Kincaid, Esq., Drummond Woodsum, 100 International Drive, Suite 340, Portsmouth, NH 03801.

Richard J. Lehmann