STATE OF NEW HAMPSHIRE

CARROLL, S.S. **SUPERIOR COURT**

CHRIS SAWYER

v.

CAROLYN SUNDQUIST, TUFTONBORO SELECTMAN, et. al.

Docket No. 212-2015-CV-00118

ORDER ON THE MERITS

The plaintiff, Chris Sawyer ("Sawyer") filed a petition against defendants, Carolyn Sundquist ("Sundquist"), Daniel Duffy ("Duffy") and Lloyd Wood ("Wood") in their capacity as selectmen of the Town of Tuftonboro Board of Selectmen (the "BOS"), asserting various violations of the Right-to-Know Law, see RSA chapter 91-A (2013 & Supp. 2015).[1] (Court index #1.) Sawyer asserts her entitlement to several remedies as a result of the alleged violations. The BOS subsequently filed an answer and counterclaim requesting an award of attorney's fees and costs. (Court index #5.) Sawyer then filed a supplemental petition, to which the BOS responded, as well as a response to the BOS's answer. (Court index #8, 9, 12.) The court held hearings on these matters on September 8, 2015, and October 5, 2015. The parties filed post-hearing memoranda. (Court index #10, 11.) Based on the parties' arguments, the relevant facts, and the applicable law, the court finds and rules as follows. In lieu of articulating the facts by separate section, the court will discuss the facts as relevant to each allegation.

I. Legal Standard and Analysis

Sawyer argues that the BOS violated the Right-to-Know Law (sometimes referred to herein as "the Law"), and that she is entitled to various remedies for those violations.

[1] The court refers to the defendants collectively as "the BOS" for the purposes of this order.

The BOS disagrees, and requests attorney's fees and costs. The court must, therefore, determine: (A) whether the BOS violated the Right-to-Know Law; and (B) if so, what remedies, if any, are appropriate; and (C) whether the BOS is entitled to an award of attorney's fees.

"Resolution of this case [will] require[] [the court] to interpret several statutory provisions, including certain provisions of the Right-to-Know Law." CaremarkPCS Health, LLC v. New Hampshire Dep't of Admin. Servs., 167 N.H. 583, 586–87 (2015) (quotation omitted). When interpreting the law, the court "appl[ies] the ordinary rules of statutory construction . . . and first look[s] to the plain meaning of the words used." Ettinger v. Town of Madison Planning Bd., 162 N.H. 785, 788 (2011) (citing Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475 (1996)). It "interpret[s] 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." CaremarkPCS Health LLC, 167 N.H. at 587 (quotation omitted). It must "also interpret a statute in the context of the overall statutory scheme and not in isolation." Id.

"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." Id. (quotation omitted). "Thus, 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." Hampton Police Ass'n, Inc. v. Town of Hampton, 162 N.H. 7, 11 (2011) (citations omitted). While "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." CaremarkPCS Health, LLC, 167 N.H. at 587 (citing N.H. CONST. pt. I, art. 8) (quotation omitted). Accordingly, the court "construe[s] provisions favoring disclosure broadly, while construing exemptions narrowly." 38 Endicott St. N., LLC v. State Fire Marshal, N.H. Div. of Fire Safety, 163 N.H. 656, 660 (2012). "The party seeking nondisclosure has the burden of proof." CaremarkPCS Health, LLC, 167 N.H. at 587 (quotation omitted).

A. Alleged Violations

Sawyer alleges numerous violations of the Right-to-Know Law. Because many of the allegations are similar in nature, the court will address groups of alleged violations in turn. The court will, therefore, address the parties' arguments relative to: (1) adequacy of notice provided for meetings held on March 10, 2015, March 16, 2015, June 19, 2015, June 29, 2015, July 27, 2015, and August 3, 2015; (2) lawfulness of non-public sessions with the Fire Chief and Police Chief on April 17, 2015, and May 1, 2015, respectively; (3) adequacy of notice provided for the public portion of the meeting held on April 17, 2015; (4) lawfulness of the review of properties to be deeded to the Town for non-payment of taxes during a non-public session held on May 18, 2015; (5) lawfulness of discussions relating to the proposed reorganization of the Transfer Station during a non-public session held on June 1, 2015; (6) lawfulness of the BOS's adoption of an electronic copy policy on August 7, 2015, and enforcement thereof; (7) lawfulness of the BOS's actions relative to making certain non-public, non-sealed minutes available for public review; (8) adequacy of notice relative to a non-public session and "work session" held on August 31, 2015; and (9) lawfulness of the BOS's publication of minutes disclosing personal medical information, the identity of a recipient of Town assistance,

and the identity of a party to a settlement agreement. The court will address each of the alleged violations in turn.

1. Adequacy of notice relative to meetings held on March 10, 2015, March 16, 2015, June 19, 2015, June 29, 2015, July 27, 2015 and August 3, 2015

The court first considers the parties' arguments relating to the adequacy of notice provided for certain BOS meetings. Under the Right-to-Know Law, "[s]ubject to the provisions of RSA 91-A:3, all meetings . . . shall be open to the public." RSA 91-A:2, II (2013). The Law also requires that the public must be provided notice of these meetings. Id. "The fundamental purpose of these [notice] requirements is to advise all affected parties of their opportunity to be heard in public meeting and to be apprised of the relief sought." Carter v. City of Nashua, 113 N.H. 407, 414 (1973) (citations omitted). RSA 91-A:2, II states, in relevant part:

> Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings.

a) *March 10, 2015, and June 19, 2015*

The BOS held meetings on March 10, 2015, and June 19, 2015. (Defs.' Answer, Exs. A–C; Compl., App. at 10.) Prior to the adjournment of each of these meetings, the BOS entered into a "work session." (Defs.' Answer, Exs, Ex. B at 3; Compl., App. at 10.) Sawyer does not assert that the BOS failed to notice the public meetings; rather, she argues only that the BOS violated RSA 91-A:2, II by failing to separately notice the "work sessions." (Compl. at 5.) In response, the BOS argues that RSA 91-A:2, II does not require it to issue separate notice of "work sessions." (Defs.' Answer at 2.) The court agrees with the BOS. Assuming without deciding that a "work session" meets the

definition of "meeting" under the statute, see RSA 91-A:2, I, the public meeting had already been noticed. Sawyer did not cite, and this court could not find, any provision of the Right-to-Know Law requiring separate notice under these circumstances.

Accordingly, Sawyer's petition is DENIED on this basis.

b) *March 16, 2015*

On March 16, 2015, the BOS held a special meeting for a vote recount following an election. (Compl., App. at 3.) After addressing the recount, the BOS heard from the Town's Road Agent, and discussed and approved the purchase of a new truck. (Id.) Sawyer appears to argue that, although the meeting itself was noticed, the issue of the truck was not detailed in a meeting agenda. In response, the BOS argues that notice of the meeting was posted, and that the statute does not require the BOS to post an agenda or adhere to agendas it chooses to post.

The court agrees with the BOS. First, it is apparent from the evidence presented at the hearing that the meeting was properly noticed. At the September 8, 2015 hearing, counsel for the BOS made an offer of proof that Lynn Brunelle ("Brunelle"), secretary to the BOS, was present in the courtroom and was available to testify that the notice was posted in two public places, and on the Town's website. (Sept. 8, 2015 Hr'g at approx. 9:35:00–9:36:51; see also Defs.' Answer, Ex. D (copy of the notice posted on the Town's website).) Second, Sawyer did not cite, and this court could not find, any provision of the Right-to-Know Law requiring public bodies to post agendas for their meetings. Similarly, Sawyer did not cite, and this court could not find, any provision of the Right-to-Know Law requiring public bodies to limit its discussion at a public meeting to topics listed in an agenda it chooses to post. The court declines to read such a requirement into the statute.

Accordingly, Sawyer's petition is DENIED on this basis.

c) *June 29, 2015, July 27, 2015, and August 3, 2015*

The BOS held meetings on June 29, 2015, July 27, 2015, and August 3, 2015. (See Compl., App. at 11–13.) Sawyer contends that, in these meetings, the BOS entered into non-public sessions, which it had not separately noticed. (Id. at 5.) In response, the BOS contends that RSA 91-A:2 does not require the BOS to notice non-public sessions where public sessions have already been noticed.

The court agrees with the BOS. As noted above, RSA 91-A:2, II states that "a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places . . . ." By its plain language, the statute requires that notice be posted for all meetings, whether public or non-public. It does not, however, require that notices be posted for both public and non-public sessions occurring at a single meeting. See Attorney General's Mem. on Right-to-Know Law 10 (March 20, 2015) ("If the body decides to go into non-public session during an open meeting, the notice for the open meeting will suffice"). The court will not "add language [to the statute] that the legislature did not see fit to include." See CaremarkPCS Health LLC, 167 N.H. at 587 (quotation omitted). This interpretation is consistent with the general purpose of the Right-to-Know Law, and with the purpose of the Law's notice requirements. Providing notice of a public meeting where a public body enters into both public and non-public sessions does not impede the "public['s] access to the actions, discussions and records of all public bodies, and their accountability to the people." Id. Likewise, it does not frustrate the purpose of notice, which is "to advise all affected parties of their opportunity to be heard in public meeting and to be apprised of the relief sought." Carter, 113 N.H. at 414 (1973) (citations omitted).

Accordingly, Sawyer's petition is DENIED on this basis.

2. Lawfulness of non-public sessions with the Fire Chief and Police Chief on April 17, 2015 and May 1, 2015, respectively

The court next considers the parties' arguments relating to meetings where the BOS entered into non-public session to perform evaluations of the Town's Police Chief and Fire Chief. Under the Right-to-Know Law, "[s]ubject to the provisions of RSA 91-A:3, all meetings . . . shall be open to the public." RSA 91-A:2, II. As the New Hampshire Supreme Court has recognized, "the Right-to-Know Law is a statute mandating that all public bodies open their meetings to the public unless one of several specific, enumerated exceptions or exclusions applies." Ettinger, 162 N.H. at 790. "A public body bears the burden of proving that it may hold a nonpublic assembly of its members." Id. at 788 (citations omitted). The specific exceptions to the open session requirement are set forth in RSA 91-A:3, II (Supp. 2015). Here, the BOS maintains that it entered into non-public session pursuant to one of these exceptions—RSA 91-A:3, II(a). Under RSA 91-A:3, II(a), a public body may enter nonpublic session for the purpose of considering "[t]he dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her . . . ."

On April 17, 2015, the BOS convened in non-public session to perform an employee evaluation of the Town's Fire Chief. (Compl., App. at 5–6.) The notice for this meeting stated that the BOS would perform the evaluation, "review[]/prepar[e]" employee evaluations, "and . . . address other business, if necessary." (Id., App. at 4.) At the meeting, the BOS first met with the Fire Chief in non-public session, and engaged in a discussion of "the budget and vision going forward." (Id., App. at 5–6.) On May 1,

2015, the BOS convened in non-public session with the Police Chief to discuss the Police Chief's performance review. (Pl.'s Ex. 7.) During the non-public session, "Selectman Wood asked the Chief if he could provide the Selectmen with a breakdown of the department's hours into categories— patrol, traffic, accidents, medical emergency, etc." (Id.) "Selectmen Wood also inquired about having accident reporting training." (Id.)

Sawyer appears to concede that the BOS is entitled to enter non-public session to discuss and perform employee evaluations. See RSA 91–A:3, II(a). However, she contends that requests for department information, as well as discussions regarding budgeting, long-range planning, and accident reporting fall outside the scope of an employee evaluation.

To the extent Sawyer disputes that a public body is permitted to enter into non-public session to discuss an employee evaluation, the court disagrees. RSA 91–A:3, II(a), allows a public body to enter nonpublic session for the purpose of considering "[t]he dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her . . . ." Here, the BOS's evaluation of the Police Chief's and Fire Chief's performances is directly related to this purpose. An inherent purpose of an employee evaluation is to determine the dismissal, promotion, or compensation of an employee. See J. Hirsch & H. Burns, Labor and Employment in New Hampshire § 6-1 (LEXIS 2015) ("companies are often put in the position of defending their employment decisions regarding promotions, raises, leave requests, and layoffs, through the use of performance appraisals of the affected employees"). The court, therefore, concludes that the BOS was permitted to enter into non-public session to discuss the employee evaluations at issue here.

The court also finds that the BOS's discussions with the Fire Chief and Police Chief were within the scope permitted by statute. Budgeting and long-range planning, as it relates to the Fire Chief's duties, are matters closely related to the Fire Chief's employment. Similarly, the BOS's request for information from the Police Chief, and the BOS's discussion with him relating to accident reporting, are matters closely related to the Police Chief's employment. The court, therefore, determines that these discussions did not fall outside the scope of the exception authorized by the statute.

Accordingly, Sawyer's petition is DENIED on this basis.

3. Adequacy of notice provided for the public portion of the April 17, 2015 meeting

The court next considers the parties' arguments relating to the public session entered into on April 17, 2015. As noted above, on April 17, 2015, the BOS convened in non-public session to perform an employee evaluation of the Town's Fire Chief. (Compl., App. at 5–6.) The notice for this meeting provides: "The [BOS] will hold a Non-Public Session . . . at Central Fire Station . . . for the purposes of performing an employee evaluation. The Board will reconvene at the Town Offices . . . , and continue with a Non-Public Session . . . , for purposes of reviewing/preparing employee evaluations and to address other business, if necessary." (Id., App. at 4.) Although the notice did not state that the BOS would enter a public session at the meeting, the BOS did enter into a public session. (Id., App. at 5.) After doing so, it discussed and approved a contract, which appears to relate to a construction project regarding Lang Pond Road. (Id.)

Sawyer argues that the BOS's discussion and approval of a construction contract violated the Right-to-Know Law because the notice for the meeting did not indicate that

the BOS would enter a public session. She maintains that the BOS scheduled the April 17, 2015 meeting "in such a manner as to preclude public attendance," and contends that "no one can reasonably be expected to attend the 'public session' not knowing even approximately when it would begin, or if, in fact, one was to begin." (Pl.'s Resp. to Defs.' Answer at 3.) The BOS admits that the notice "could have been better," but maintains that the statute does not require it to post notice of public session where it has already posted notice of a nonpublic session.

The court agrees with Sawyer that the BOS was required to post notice of the public session. As noted above, RSA 91-A:2, II, requires public bodies to publish "notice of the time and place of a [meeting], including nonpublic session . . . in 2 appropriate places . . . ." Although the statute does not explicitly detail the requirements of that notice—and, therefore, does not expressly require publication of separate notices when a public body wishes to move from non-public session into a public meeting—the court must construe the statute in light of the Law's purpose. Ettinger, 162 N.H. at 788. The Law's purpose is to "ensure . . . the greatest possible public access to the actions . . . of all public bodies." RSA 91-A:1 (2013). Considering this purpose, the court concludes that, under RSA 91-A:2, II, where a meeting will be public, notice of the meeting must reasonably apprise the public that the meeting will be open to it. As Sawyer argues, because the public cannot attend non-public sessions, the public is unlikely to attempt to do so. Therefore, a notice that does not reasonably apprise the public that it can attend a meeting discourages public attendance. Such a notice would operate to circumvent the notice requirements of RSA 91-A:2, II and impede the public's right to access public information. The court cannot interpret RSA 91-A:2, II, so broadly.

The court is not persuaded by the BOS's argument that the inclusion of the phrase "and to address other business, if necessary," (Compl., App. at 4), in the notice reasonably apprised the public that the BOS may hold a public meeting. As noted above, the notice states: "The Board will reconvene at the Town Offices . . . , and continue with a Non-Public Session . . . , for purposes of reviewing/preparing employee evaluations and to address other business, if necessary." (Id., App. at 4.) This statement indicates that the BOS planned to continue its non-public session for, potentially, more than one purpose; it does not state that it would hold a public session.

Accordingly, the court finds the BOS violated RSA 91-A:2, II. Sawyer's petition is GRANTED on this basis.

4. Lawfulness of the review of properties to be deeded to the Town for non-payment of taxes during non-public session

The court next considers the parties' arguments relating to the BOS's entering into non-public session to discuss the execution of tax deeds on a number of properties resulting from the property owners' non-payment of taxes. As noted above, "the Right-to-Know Law is a statute mandating that all public bodies open their meetings to the public unless one of several specific, enumerated exceptions or exclusions applies." Ettinger, 162 N.H. at 790. "A public body bears the burden of proving that it may hold a nonpublic assembly of its members." Id. at 788 (citations omitted). The specific exceptions to the open session requirement are set forth in RSA 91–A:3, II. Here, the BOS maintains that it entered into non-public session pursuant to one of these exceptions—RSA 91–A:3, II(c). Under RSA 91–A:3, II(c), a public body may enter nonpublic session for the purpose of considering "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person . . ."

According to the meeting minutes, during a public meeting on May 18, 2015, the BOS entered into "non-public session as per RSA 91-A:3, II(c) to discuss matters which, if discussed in public, may likely affect the reputation of any person." (Compl., App. at 8.) During the non-public session, "Tax Collector Jackie Rollins presented a list of properties . . . to be deeded to the Town for non-payment of taxes." Id. "The Selectmen discussed specific properties to be deeded and others that may be resolved by payment arrangements." Id.

Sawyer argues that the BOS's discussion of properties to be deeded to the Town for non-payment of taxes did not meet the public meeting exception contained in RSA 91-A:3, II(c). Conversely, the BOS asserts that "persons who are about to have their property deeded to the town [sic] for non-payment of taxes are experiencing some level of financial distress." (Defs.' Answer at 5.) It contends that the reasons for "financial distress may be highly personal in nature (e.g., mental illness[,] . . . alcohol addiction, etc.)," and that it is, therefore, permissible to hold the discussion in non-public session pursuant to RSA 91-A:3, II(c). (Id.)

The court agrees with the BOS. By its plain language, RSA 91-A:3, II(c) allows a public body to enter into non-public session for the purpose of considering "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person . . ." The court finds that the BOS's discussions regarding properties to be deeded to the Town for non-payment of taxes fall squarely within this exception. As argued by the BOS, a party's non-payment of taxes may be related to personal and/or financial matters. Public disclosure that a person is facing difficulties of this nature is likely to adversely affect that individual's reputation. Moreover, regardless of the underlying cause of non-payment, non-payment of taxes itself implies an inability to pay

or poverty to some degree, which is plainly encompassed by RSA 91-A:3, II(c) ("This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant."). The court, therefore, finds that the BOS was permitted to enter non-public session to discuss plans to execute tax deeds on certain properties.

Accordingly, Sawyer's petition is DENIED on this basis.

5. Lawfulness of discussions relating to the proposed reorganization of the Transfer Station during non-public session

The court next considers the parties' arguments relating to the propriety of discussing the reorganization of the Transfer Station during nonpublic session. As noted above, "the Right-to-Know Law is a statute mandating that all public bodies open their meetings to the public unless one of several specific, enumerated exceptions or exclusions applies." Ettinger, 162 N.H. at 790. "A public body bears the burden of proving that it may hold a nonpublic assembly of its members." Id. at 788 (citations omitted). The specific exceptions to the open session requirement are set forth in RSA 91-A:3, II. Here, the BOS maintains that it entered into non-public session pursuant to two of these exceptions—RSA 91-A:3, II (a) and (b). These exceptions allow a public body to enter nonpublic session for the purpose of discussing "[t]he... promotion, or compensation of any public employee . . . [and] [t]he hiring of any person as a public employee." RSA 91-A:3, II(a)–(b).

On June 1, 2015, the BOS held a meeting at which it entered into non-public session "per RSA 91-A:3, II(b) to discuss the hiring of a public employee with [the] Transfer Station Supervisor . . . ." (Compl., App. at 9.) During the non-public session, the Transfer Station Supervisor proposed a reorganization of the Transfer Station to the

BOS. Id. Gallagher proposed two possible courses of action: "[d]o nothing and risk . . . fines and costs . . . [or] [c]hange the 30-hour attendant position . . . to a 35-hour full-time benefitted position and hire two per diem attendants." Id. After considering the proposal, the BOS "authorized [Gallagher] to discuss the promotion with the [current attendant] and pursue the hiring of two per diem attendants." Id.

Sawyer argues that "RSA 91-A does not allow [the BOS to hold] a non-public session to discuss reorganization of an entire department . . . ." (Pl.'s Resp. to Defs.' Answer at 4.) Conversely, the BOS asserts that both RSA 91-A:3, II (a) and (b) authorize a non-public session under these circumstances.

The court agrees with Sawyer. First, the court is not persuaded by the BOS's argument that the non-public session was authorized by RSA 91-A:3, II(a). Although that provision excludes "[t]he... promotion, or compensation of any public employee" from the public meeting requirement, the BOS did not rely on this provision in entering into nonpublic session. (Compl., App. at 9 (entering into non-public session "per RSA 91-A:3, II(b) to discuss the hiring of a public employee with [the] Transfer Station Supervisor . . . ." (emphasis added)).) In order to rely on this exception, the BOS would have needed to identify it when moving to enter non-public session. See RSA 91-A:3, I(b) ("Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session.").

The court is also not persuaded by the BOS's argument that the non-public session was authorized by RSA 91-A:3, II(b), which permits non-public sessions to discuss "[t]he hiring of any person as a public employee." Here, the BOS's discussion went beyond the consideration of, or action upon, the hiring of public employees. Here,

the BOS discussed not only who should fill a position, but whether it should create a position to fill. The BOS discussed multiple courses of action, weighed budgetary impacts against current labor necessities, and considered additional topics potentially implicated by the decision, including but not limited to the reduction of staff turnover and training expenses, stabilization of the workforce, an upward mobility path for employees, and increased bale production. (Compl., App. at 9.) The legislature has not enacted public meeting exceptions for these types of discussions. See RSA 91-A:3, II; Ettinger, 162 N.H. at 791 ("Our legislature's decision to enumerate specific exceptions to the open-meetings requirement compels our conclusion that these provisions provide the only circumstances in which a public body may enter into a private session for discussion.")

Accordingly, the court finds the BOS violated RSA 91-A:2, II. Sawyer's petition is GRANTED on this basis.

6. Lawfulness of the BOS's adoption or enforcement of an electronic copy policy

The court next considers the parties' arguments relating to the legality of the BOS's adoption and enforcement of an electronic copy policy. During a "work session" on August 7, 2015, the BOS agreed on a "draft electronic copy policy" which states that the Town:

> [Will not] provide electronic copies of requested documents, with the exception of tax assessment cards. A citizen may inspect public records during office hours of operation. If a copy is requested, it will be provided at a cost of $.50 per page. Some records or documents may be provided on USB or disk at a cost of $25.

(Supp. Compl., Ex. 2.) This policy has not been formally accepted by the BOS. (See id.) During a subsequent "work session" on August 28, 2015, the BOS "discussed and

decided that copies of records by e[-]mail would no longer be provided . . . until the new copy policy is adopted[.]" (Defs.' Supp. Answer, Ex. 1.)

Sawyer argues that the BOS is unlawfully enforcing the draft policy discussed at the August 7, 2015 "work session." (Supp. Compl. at 2.) Conversely, the BOS asserts that it merely adopted an "interim policy" on August 28, 2015.

The court declines to find a violation of the Right-to-Know Law under these circumstances. Although Sawyer argues that the BOS is currently enforcing the draft electronic copy policy and the e-mail policy, she has not identified a particular instance where the BOS actually did so. Even if she had identified such an instance, the Right-to-Know Law does not require the Town to provide the public with electronic copies of governmental records. See RSA 91-A:4, V (2013) (stating that a public body "may, in lieu of providing original records, copy governmental records requested to electronic media" (emphasis added)). Rather, the Town must, "upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release." RSA 91-A:4, IV (emphasis added). Sawyer does not contend that the draft electronic policy and the e-mail policy violate this provision, and the court finds that both policies satisfy the provision's requirements.

To the extent Sawyer takes issue with the BOS's decision to charge individuals $.50 per page, or $25 per USB drive or disk, for the documents requested, the Right-to-Know Law contemplates the assessment of a fee for the provision of governmental records. Specifically, RSA 91-A:4, IV provides that, if a Town maintains a computer, photocopier or similar device to generate the requested copies, "the person requesting the copy may be charged the actual cost of providing the copy, which cost may be

collected by the public body or agency." Sawyer does not argue that the fees proposed to be charged exceed actual cost. Thus, the court finds that Sawyer has not demonstrated that the BOS violated the Right-to-Know Law by charging this fee.

Accordingly, Sawyer's petition is DENIED on this basis.

7. Lawfulness of the BOS's actions relative to making certain non-public, non-sealed minutes available for public review

The court next considers the parties' arguments regarding whether the BOS has made the minutes of certain non-public, unsealed minutes available for review. Under the Right-to-Know Law, "[e]very citizen has the right to inspect and to copy" all public records "except as otherwise prohibited by statute." Prof'l Fire Fighters of N.H. v. N.H. Local Gov't Ctr., 163 N.H. 613, 614 (2012) (quoting RSA 91-A:4, I (brackets and ellipses omitted)). RSA 91-A:3, III requires, with limited exceptions not relevant here, that:

> Minutes of meetings in non-public session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of ⅔ of the members present, it is determined that [the records can be withheld].

RSA 91-A:3, III (amended 2015).

Sawyer argues that, because the minutes were not approved within the 72-hour time frame established by RSA 91-A:3, III, certain BOS meeting minutes—those dated July 27, 2015 and August 24, 2015—were not "made available" in accordance with the statute. (See Supp. Compl., Exs. 3–4 (meeting minutes of August 10, 2015 and August 24, 2015, adopting minutes of July 27, 2015, and August 24, 2015 meetings).) In response, the BOS asserts that there is a difference between approving minutes and making them available, and argues that the BOS makes draft minutes available within 72 hours—including those referenced by Sawyer—with the BOS approving the minutes

"at some point after the draft minutes are made available to the public." (Defs.' Supp. Answer at 2.)

The court agrees with the BOS. First, adopting meeting minutes is not the same as making minutes available for inspection. Second, Sawyer has offered no evidence showing that the BOS failed to make the minutes in question available to the public within 72 hours. Indeed, at the hearing, she complained only that the approved minutes were not posted to the Town's website within that time frame, and that the public needed to go to the town hall to obtain them. Contrary to Sawyer's contention, the statute does not require the Town to post minutes to its website within 72 hours. Because Sawyer has not established that the minutes were not made available within the requisite time period, the court finds that Sawyer has failed to establish a violation of RSA 91-A:3, III.

Accordingly, Sawyer's petition is DENIED on this basis.

8. Adequacy of notice relative to a non-public session and "work session" held on August 31, 2015

The court next considers the parties' arguments regarding whether the BOS is required to post notice of meetings on the Town's website. Sawyer argues that, "[a]fter summons was served, [a] non-public posting appears on [the] Town Website [sic] thereby asking the question where were the notices previously posted?" (Supp. Compl. at 2.) It appears as though this comment refers to the BOS's online posting regarding its August 31, 2015 non-public session and "work sessions." The court interprets Sawyer's argument as an assertion that the Town should have been posting notices of meetings on its website, and that it only corrected its procedure after service of Sawyer's complaint. The BOS disagrees with Sawyer's argument, asserting that public bodies are

not required to post notices online, and that Sawyer, therefore, fails to establish a violation of the Right-to-Know Law on this basis. (Defs.' Supp. Answer at 2.)

The court agrees with the BOS. As previously noted, RSA 91-A:2, II states, in relevant part:

> Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings.

(emphasis added). The unambiguous language of the statute gives public bodies the option of posting notices on their websites, but does not require them to do so—so long as notices are otherwise posted in two appropriate places in conformance with the statute. See Lambert v. Belknap Cnty. Convention, 157 N.H. 375, 381 (2008) (noting the term "may" is generally interpreted as permissive). Because Sawyer does not identify any meeting for which the BOS failed to post notice in two appropriate places, the court finds that she has failed to establish a violation of RSA 91-A:2, II.

Accordingly, Sawyer's petition is DENIED on this basis.

9. Lawfulness of the BOS's publication of minutes which include: (a) personal medical information; (b) reference to a recipient of Town assistance; and (c) the name of the party of a settlement agreement

The court next considers the parties' arguments regarding the disclosure of confidential information. The Right-to-Know Law exempts certain governmental records from disclosure, including "confidential . . . information[.]" RSA 91-A:5, IV (Supp. 2015). "The determination of whether information is confidential for purposes of our Right-to-Know Law is assessed objectively, not based upon the subjective expectations of the party generating that information." Hampton Police Ass'n, Inc., 162

N.H. at 14 (citation omitted). However, not all confidential records are per se exempt from disclosure. Id. The New Hampshire Supreme Court has articulated the test for determining whether to disclose confidential information as follows:

> [T]o determine whether records are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government. To show that information is sufficiently confidential to justify nondisclosure, the party resisting disclosure must prove that disclosure is likely to: (1) impair the information holder's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. This test emphasizes the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential. The burden of proving whether information is confidential rests with the party seeking nondisclosure.

Id. (quotation and citations omitted).

Sawyer argues that the BOS unlawfully published minutes of several BOS meetings, asserting that the minutes contained confidential information. Specifically, she asserts that: (A) the BOS unlawfully disclosed meeting minutes containing Brunelle's medical information[2]; (B) the BOS unlawfully disclosed meeting minutes containing the name of a person seeking Town assistance[3]; and (C) the BOS unlawfully disclosed meeting minutes containing the name of a party to a settlement agreement

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[2] On June 19, 2015, the BOS held a non-public session. (Supp. Compl., Ex. 6 at 1.) The meeting minutes contain a detailed description of the medical conditions, testing, and treatment of the Town's administrative secretary, Brunelle, as well as her proposed leave of absence. (Id.) The BOS did not vote to seal the minutes. (Id.) Brunelle then posted these minutes to the Town's website. Then, on August 10, 2015, the BOS held a non-public session. (Supp. Compl., Ex. 6 at 3.) In this session, the BOS discussed Brunelle's "performance on the job and how to handle covering her position when and if she takes medical leave." (Id.) Here, although the BOS voted to seal the minutes for this meeting, (see id.), Brunelle subsequently posted these minutes to the Town's website.

[3] The BOS held a second non-public session on August 10, 2015. (Supp. Compl., Ex. 6 at 2.) At the meeting, the BOS reviewed non-public minutes for another non-public session it had held on August 3, 2015. The August 10, 2015 meeting minutes state that the BOS "reviewed non-public minutes of [August 3, 2015] regarding [the] application for town assistance for [J.M.]. . . ." (Id. (stating the full name of the individual seeking Town assistance).) The BOS added the following sentence to the August 3, 2015 minutes: "Ms. M[] has a security deposit on an apartment and when it is refunded, the Selectmen would like repayment." (Id.) The BOS did not vote to seal the minutes of the August 10, 2015 meeting, and the minutes—including the portions referring to the minutes of the August 3, 2105 non-public meeting—were subsequently posted on the Town's website.

with the Town.[4] In response, the BOS appears to concede that the minutes containing Brunelle's medical information and the minutes containing the name of a person seeking Town assistance were improperly posted. It specifically states that those minutes were disclosed "by mistake by [Brunelle] . . . without the knowledge or approval of the [BOS]," and that the same health issues outlined in the minutes "likely contributed to [Brunelle's] lapse in judgment." (Defs.' Supp. Answer at 2.) However, the BOS disagrees with Sawyer's argument that the BOS unlawfully disclosed meeting minutes containing the name of a party to a settlement agreement with the Town. It maintains that these minutes were properly disclosed. It further argues that Sawyer lacks standing to assert violations based upon the improper disclosure of another person's confidential information. (See Defs.' Supp. Answer at 2–3 (arguing that Brunelle was the "only one mentioned or potentially affected by [the] unauthorized disclosure [of her medical information].").)[5]

Assuming without deciding that all three of the alleged disclosures amount to violations of RSA 91-A:5, IV, the court finds that Sawyer lacks standing to assert these violations. "In evaluating whether a party has standing to sue, [the court] focus[es] on whether the party suffered a legal injury against which the law was designed to protect." Sunapee Difference, LLC v. State, 164 N.H. 778, 784 (2013) (quotation omitted). "The requirement that a party demonstrate harm to maintain a legal challenge rests upon the

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[4] The BOS held a "work session" on August 28, 2015. (See Supp. Compl. at 2.) The minutes of the "work session" state, in relevant part, "[t]he McWhirter settlement agreement, previously approved, was signed by Chairman Duffy." (Supp. Compl., Ex. 6 at 4.) As the session was not classified as non-public, (u id.), Brunelle posted the minutes on the Town's website.

[5] Even if the court were not to construe the BOS's argument as asserting that Sawyer lacks standing to assert all three of the claims relating to the improper release of confidential information, "a party's standing is a question of subject matter jurisdiction, which may be addressed at any time." Libertarian Party of New Hampshire v. Sec'y of State, 158 N.H. 194, 195 (2008).

constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." Libertarian Party of New Hampshire v. Sec'y of State, 158 N.H. 194, 195–96 (2008). This concept is consistent with the Right-to-Know Law, which states that "[a]ny person aggrieved by a violation of this chapter may petition the superior court for . . . relief." RSA 91-A:7 (2013) (emphasis added). Here, Sawyer has failed to demonstrate sufficient grounds for asserting claims on behalf of Brunelle, the person seeking Town assistance, or the party to a settlement agreement with the Town. She also fails to demonstrate that she has been personally aggrieved by the disclosure of the allegedly confidential information.

Accordingly, Sawyer's petition is DENIED on this basis.

B. Remedies

Sawyer requests the following relief: (1) an award of attorney's fees and costs; (2) a court order enjoining future violations of the Right-to-Know Law and requiring the BOS to participate in remedial training at its own expense; and (3) that the court ask the New Hampshire Attorney General to investigate the BOS's Right-to-Know Law violations. (Compl. at 4; Pl.'s Resp. Defs.' Answer at 5.) Conversely, the BOS requests an award of attorney's fees and costs. The court will consider Sawyer's claims for relief in turn, and will then consider the BOS's request for attorney's fees and costs.

1. Sawyer's request for attorney's fees and costs

Sawyer requests an award of attorney's fees and costs. RSA 91-A:8 (2013), governs awards of attorney's fees and costs and other remedies for violations of the Right-to-Know Law. RSA 91-A:8, I, provides, in pertinent part:

> 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 (emphasis added). Based on the plain language of the statute, costs may be awarded in a Right-to-Know action if the court finds that: (1) the public agency violated any provisions of the Right-to-Know Law; and (2) the lawsuit was necessary to enforce compliance with the Right-to-Know Law. See id.; ATV Watch v. N.H. Dep't of Res. & Econ. Dev., 155 N.H. 434, 439–40 (2007). Parties must meet a slightly higher burden to obtain an award of attorney's fees under the Right-to-Know Law. In order to award attorney's fees under the Right-to-Know Law, the court must make the same two findings required for an award of costs and additionally find that the public agency "knew or should have known that the conduct engaged in was in violation of" the Right-to-Know Law. RSA 91-A:8, I; ATV Watch, 155 N.H. at 442; Goode v. N.H. Office of the Legislative Budget Assistant, 148 N.H. 551, 558 (2002).

As discussed above, the BOS violated various provisions of the Right-to-Know Law by: (1) failing to provide proper notice for the April 17, 2015 public session; and (2) improperly discussing the reorganization of the Transfer Station in a non-public session. Thus, the first prong of the test has been met. Additionally, as the BOS contested Sawyer's legal position on these issues, the court finds that the suit was necessary to ensure compliance with the Law. Therefore, the second prong is met and Sawyer has established her entitlement to costs.

However, because Sawyer is not represented by an attorney, she is not entitled to recover attorney's fees. Further, even if Sawyer had hired an attorney to represent her,

she has failed to establish that the BOS "knew or should have known that the conduct engaged in was in violation of" the Right-to-Know Law. See RSA 91-A:8, I. The actions forming the basis of the violations have not yet been decided by the New Hampshire Supreme Court, and the legal positions taken by the BOS on the issues were reasonable. See Ettinger, 162 N.H. at 729 (award of attorney's fees not warranted where only issue was one of first impression, and the public body's argument was reasonable).

Accordingly, Sawyer's request for costs is GRANTED, and her request for attorney's fees is DENIED.

2. Remedial Training and Injunctive Relief

Sawyer also requests that the court: (1) enjoin the BOS from future violations of the Right-to-Know Law; and (2) order the Selectmen to participate in remedial training.

> The court may . . . enjoin future violations of this chapter, and may require any officer, employee, or other official of a public body or public agency found to have violated the provisions of this chapter to undergo appropriate remedial training, at such person or person's expense.

RSA 91-A:8, V. Because the term "may" is generally interpreted as permissive, the court has discretion in ordering this as a remedy. See Lambert, 157 N.H. at 381.

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." ATV Watch, 155 N.H. at 437–38 (quotation omitted). "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, there is no adequate remedy at law and the party seeking an injunction is likely to succeed on the merits." Id. (quotation, ellipses, and brackets omitted). "The trial court retains the discretion to decide whether to grant an injunction after consideration of the facts and established principles of equity." Id. (quotation and internal quotation marks omitted).

Considering the factual circumstances of this case, the parties' arguments, equitable principles, and the authority of this court, the court declines to order the BOS to participate in remedial training and declines to enjoin future violations. Even assuming that the elements of an injunction have been met, the decision to enjoin future violations is discretionary. Id. at 438. Nevertheless, the BOS should take care to fully comply with the Right-to-Know Law at all times. Open access to the actions, discussions and records of this public body is paramount under RSA 91-A. CaremarkPCS Health, LLC, 167 N.H. at 587. While the court has declined to order remedial training, the BOS may wish to voluntarily participate in training regarding notice requirements and the exclusions to the public hearing requirement.

Accordingly, Sawyer's request that the court enjoin the BOS from future violations of the Right-to-Know Law and order the BOS to participate in remedial training is DENIED.

3. Recommendation to the New Hampshire Attorney General

Sawyer next requests that the court ask and/or order the New Hampshire Attorney General to investigate the BOS's Right-to-Know Law violations. However, Sawyer cites no authority for this remedy. Upon review of the statute, the court finds that it is not authorized to award such a remedy. See RSA 91-A:8 (listing available remedies as attorney's fees, costs, invalidation of a public body's actions, imposition of civil penalties, and injunction of future violations).

Accordingly Sawyer's request that the court ask and/or order the New Hampshire Attorney General to investigate the BOS's Right-to-Know Law violations is DENIED.

4. The BOS's request for attorney's fees

The BOS also requests an award of attorney's fees. As noted above, RSA 91-A:8 governs awards of attorney's fees and costs and other remedies for violations of the Right-to-Know Law. RSA 91-A:8, II, provides that the court can award attorney's fees to a public body "for having to defend against a lawsuit under the provisions of this chapter, when the court finds that the lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive." Considering the circumstances of this case, the parties' arguments, and applicable law, the court finds that the BOS has not shown its entitlement to attorney's fees. Although Sawyer raised certain arguments that were not based upon violations of RSA chapter 91-A, and certain arguments that were otherwise unsuccessful, she raised several colorable claims under the statute.[6]

Accordingly, the BOS's request for attorney's fees is DENIED.

II. Conclusion

For the foregoing reasons, Sawyer's petition is GRANTED to the extent is asserts that the BOS violated the Right-to-Know Law by: (1) failing to provide proper notice for the April 17, 2015 public session; and (2) improperly discussing the reorganization of the Transfer Station in a non-public session. Her petition is otherwise DENIED. The court GRANTS Sawyer's request for costs, but DENIES her remaining requests for relief. The court also DENIES the BOS's request for attorney's fees.

SO ORDERED.

Dated: 12/10/15

Charles Temple,
Presiding Justice

[6] For these same reasons, the court further finds that the BOS has not established its entitlement to attorney's fees and costs under the judicially-crafted exceptions to the general rule that parties pay their own attorney's fees. See Harkeem v. Adams, 117 N.H. 687, 690 (1977) (explaining exceptions for cases "where one party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . where the litigant's conduct can be characterized as unreasonably obdurate or obstinate . . . and where it should have been unnecessary for the successful party to have brought the action" (quotations omitted)).