THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS 09-E-0152

WALLACE S. NOLEN

v.

CITY OF KEENE

ORDER

Mr. Nolen filed a petition for relief under New Hampshire's Right to Know Law, RSA 91-A, claiming the City of Keene ("City") failed to turn over public records that were responsive to his requests. The City filed a Motion to Dismiss, contending (1) Mr. Nolen lacked standing or, alternatively, (2) the City had already adequately responded to Mr. Nolen's requests. Mr. Nolen objects. A hearing occurred on November 2, 2009. The Court finds and rules as follows.

On March 3, 2009, Mr. Nolen made the following request through the City's website:

> I hereby am making a formal request under NH's "Right to Know Law" that I be provided in computer format (i.e. a copy of [a] computer file(s) which contain some/ all of the following information

with respect to each and every employee of the City of Keene NH irregardless [sic] of their status (i.e. part-time, full-time, per-diem, on-leave, suspended, etc.):

1) Each employee's full name (not merely initials) [separate fields for last first, middle];
2) The employee's official title;
3) The employee's physical work location including a generic (i.e. 123 Main St) and suit/room/floor where he/she performs his/her official duties or has an office;
4) The voice telephone number for such employee;
5) The fax telephone number for such employee;
6) The email address for such employee;
7) The salary for such employee;
8) Any other information contain [sic] in the computer file(s) which is not explicitly exempt pursuant to statute;

I further certify that such information shall not under any circumstances be used for commercial and/ or fund-raising purposes. Once the file preferably in a spread-sheet or database (i.e. csv, dbf, etc. file) is ready for transmittal to me, please email it to me [I do not wish a CD/DVD nor will I accept such information in paper format] please send it to me as an email attachment to my email address of wallacenolen2@yahoo.com.

(Pet., Ex. A; City's Memo. Law Support Mot. Dismiss, Ex. 1.)

Mr. Nolen made a second request, also on March 4, 2009, through the Keene Police Department's website. He asked for

> a copy of anything that relates to any criminal complaint filed against a David Ridley on charges of disorderly conduct which took place on March 3rd, 2009 and which took place at the Keene NH courthouse at approximately 8:30 am and which relates to Ridley's alleged refusal to obey a lawful order [to stop video/audio taping] in the lobby of the Keene Courthouse lobby.

(Pet., Ex. B; City's Memo. Law, Ex. 2.) Mr. Nolen did not request to be provided with these police records in a particular format.

The City responded to both requests. With regard to the request for personnel records, Deputy City Clerk William Dow responded to Mr. Nolen via email on March 4. He wrote:

> The nature of this right-to-know request is comprehensive and will require assistance from other Departments. It is our intent to commence collecting the information requested at the earliest possible opportunity; however it may take as much as 30 days to determine whether all the specific records are covered under the right-to-know law and make available for your review.

(City's Memo. Law, Ex. 3.) On April 3, the City Clerk sent a letter to Mr. Nolen, stating that the personnel records he had requested were available for inspection at the Office of the City Clerk, or would be mailed to him upon payment of the copying and mailing charges. (City's Memo. Law, Ex. 9.) The records provided most of the information Mr. Nolen sought, including employee names, titles, voice telephone numbers, email addresses and gross salary information. (City's Memo. Law, Ex. 10.) The City denied Mr. Nolen's requests for records listing the physical work locations or addresses for each of its employees, explaining that such records do not exist. Further, the City denied Mr. Nolen's request for "any other information" because the request was too vague.

With regard to the request for police records, a representative from the Keene Police Department replied to Mr. Nolen via email on March 4, the same day he made his request. This email informed him that the "current status of the reports you have requested are 'open' and under investigation at this time, and does not fall under the 'Right to Know Law' until the case is adjudicated through the Court." (Pet., Ex. B; City's Memo. Law, Ex. 4.)

On the evening of March 4, Mr. Nolen emailed the City Attorney's office, objecting to the response that he had received from the police department. (City's Memo. Law, Ex. 5.) The City Attorney agreed with his objection that the total denial of the request was improper, and on March 5, the City Attorney

emailed Mr. Nolen and indicated that records not otherwise deemed confidential under the statutory law would be available for his inspection at the Office of the City Clerk. (City's Memo. Law, Ex. 6.) On March 9, the City sent a letter to Mr. Nolen, stating that the police records were available and that the City would mail the records to him upon payment of the costs for copying and mailing. (City's Memo. Law, Ex. 7.)

Mr. Nolen made no attempt to inspect or obtain either the personnel or the police records he had requested until September 16, 2009, when he traveled to the City offices and demanded records from Deputy Clerk Dow. (See Pet. ¶ 7.) Mr. Dow handed Mr. Nolen paper copies of the personnel records responsive to his request. (See Pet., Ex. C.) Mr. Nolen asserts in his petition that "Dow refused to provide [him] with the computer files(s) that comprised the records for which it is were [sic] contained on the [city's] computer system(s)." (Pet. ¶ 10.) The City maintains that Mr. Dow offered to copy the information for him in electronic format on a computer disk. (City's Memo. Law at 5.) The City also maintains that Mr. Nolen refused this offer and also did not inspect or copy the materials responsive to his request for police records. (Id.) Mr. Nolen indicated at the hearing that he had never been offered electronic copies of records.

On September 18, 2009, Mr. Nolen filed his petition with this Court. He contends that he has not been provided with the records he requested or with an explanation that would justify nondisclosure. In response to Mr. Nolen's petition, the City filed a Motion to Dismiss. The City contends that under RSA 91-A, only New Hampshire citizens may bring a petition to compel the disclosure of public

information. Since Mr. Nolen lives in Vermont, the City argues he lacks standing. Alternatively, regardless of whether Mr. Nolen has standing as a non-resident, the City maintains his petition should be dismissed because the City properly responded to Mr. Nolen's requests and complied with its statutory obligations.

At the hearing, the City provided Mr. Nolen with paper copies of certain personnel and police records. (See City's Memo. Law, Exs. 8, 10.) Mr. Nolen continues to maintain, however, that he is entitled to records in electronic format. It is unclear whether he claims entitlement to electronic copies of just the personnel records or of both the personnel and police records.

For the reasons set forth below, the Court denies Mr. Nolen's petition as moot. The City has responded appropriately to his requests, and thus, he is not entitled to relief. The Court declines to rule on the issue of whether Mr. Nolen, as a non-resident of New Hampshire, has standing to file the instant petition.

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." RSA 91-A: 1. To this end, the law ensures that "[e]very citizen . . . has the right to inspect all public records" of public bodies and agencies. RSA 91-A: 4, I. In addition, each public body or agency "shall, upon request for any public record reasonably described, make available for inspection and copying any such public record within its files when such records are immediately available for such release." RSA 91-A: 4, IV. Also,

> [i]f a public body or agency is unable to make a public record available for immediate inspection and copying, it shall, within 5 business days of the request, make such record available, 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.

Id. The law further provides that "[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief." RSA 91-A: 7.

Here, the City satisfied the requirements of RSA 91-A. The City initially responded to both of Mr. Nolen's requests within five days. The police records were made available on March 9, five days after his initial request. On March 4, the City indicated it would need thirty days to compile the personnel records, and it made such records available for inspection on April 3.

Moreover, the records provided were responsive to each of Mr. Nolen's requests. The City's response was not inadequate simply because the records it provided did not list the physical work locations or direct dial extension numbers of each City employee, or because the records did not respond to Mr. Nolen's request for "any other information." The City explained that it had no list of its employees' physical work locations. If a record does not exist, the government need not create one. RSA 91-A: 4, VII. The City also explained that the request for "any other information" was too vague. A right-to-know request must reasonably describe the record sought. RSA 91-A: 4, IV. Finally, in his original request, Mr. Nolen asked for "voice telephone numbers" only. This request does not clearly communicate a desire to inspect or obtain records of direct dial extension numbers.

With regard to the police records, the City conceded that the police department's initial response, that none of the police records requested could be

released, was not accurate. An individual may gain access to police investigative files, unless they are exempt from disclosure, as discussed in Murray v. N.H. Div. of State Police, 154 N.H. 579, 582 (2006). After realizing the police department's error, the City Attorney emailed Mr. Nolen and indicated that the records would be available for inspection at the Office of the City Clerk, with the exception of confidential information contained therein, which would be redacted. (City's Memo. Law, Ex. 6.) Pursuant to RSA 91-A: 5, IV, "[r]ecords pertaining to . . . confidential . . . information" are exempt from the provisions of chapter 91-A. "The determination of whether information is confidential for purposes of our Right-to-Know Law is assessed objectively . . . ." Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 554 (2002). In this case, the City redacted information including dates of birth and firearm permit information. Mr. Nolen did not appear to challenge these redactions at the hearing.

Instead, Mr. Nolen objected to the City's response to his request on the grounds that he was not provided with mug-shots or video and audio records. However, Mr. Nolen never requested such records, and it appears that the City provided materials it possessed which it believed were responsive to Mr. Nolen's request. The Court concludes that the City satisfied its duty under RSA 91-A.

Although the City made paper copies of the records available for inspection and did so in a timely fashion, Mr. Nolen contends he is entitled to receive copies of the records via email. To the extent Mr. Nolen contends he is entitled to receive electronic copies of police records because he requested the records in this format, this argument fails. Mr. Nolen never requested these

records in a particular format. (See City's Memo. Law, Ex. 2.) Moreover, although Mr. Nolen did specify that he wanted the personnel records "in computer format" or as a "copy of a computer files(s)", which he wanted emailed to him (See City's Memo. Law, Ex. 1.), the provisions of RSA 91-A only require the City to provide the records for inspection. RSA 91-A does not require that the City send the records to Mr. Nolen via email.

Part I, article 8 of the New Hampshire Constitution provides that "the public's right to access to governmental proceedings and records shall not be unreasonably restricted." This provides the basis for New Hampshire's Right to Know Law, which states that "[e]very citizen . . . has the right to inspect all governmental records in the possession, custody, or control of . . . public bodies or agencies . . . and to copy . . . the records . . . except as otherwise prohibited by statute or RSA 91-A: 5." RSA 91-A: 4, I (Supp. 2008). 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." RSA 91-A: 1 (2001). Moreover, questions regarding the law are resolved "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." Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 546 (1997). The courts of this state have historically looked to the decisions of other state and federal jurisdictions for guidance in interpreting the Right to Know Law. Id.

The question before the Court in this case is whether Mr. Nolen is entitled to receive records in the format he has requested. The language of the statute is silent on this issue. It is worth noting, however, that the statute does not compel the government to provide copies to a person making a request. "RSA 91-A: 4 does not contain language imposing an absolute duty on towns or agencies to provide copies of public records to citizens. Rather, the statute contemplates that public records be made available to individual members of the public for their inspection and reproduction." Gallagher v. Town of Windham, 121 N.H. 156, 159 (1981); see RSA 91-A: 4, I, IV. A public body or agency "may, in lieu of providing original records, copy governmental records requested to electronic media," but it is not required to do so. RSA 91-A: 4, V. Thus, as long as the records are made available for inspection and copying, a public body or agency has satisfied its duties under the statute.

It is true that the court in Menge v. Manchester, 113 N.H. 533 (1973) determined that the plaintiff had a right to obtain a copy of a computerized tape of 35,000 field record cards that the City of Manchester used in assessing real estate taxes. The court's decision was influenced by the fact that making paper copies or examining each card by hand would be far more costly and time-consuming than copying the information to a computer tape. In Gallagher, the court also observed that while the government is not required to provide copies, "they should assist the members of the community in obtaining public documents whenever it is reasonable to do so." Gallagher, 121 N.H. at 160. As noted above, the Right to Know Law was intended to provide citizens with the greatest

possible access. See RSA 91-A: 1. However, greatest possible access does not necessarily mean entitlement to records in a particular format. See Dismukes v. Dep't of the Interior, 603 F. Supp. 760, 761–63 (D.C. Cir. 1984) (noting the federal Freedom of Information Act does not focus on the physical format of the record by its contents, and government has no obligation to accommodate a requester's format preference unless the format provided by the government affects the requester's access to the information); Chapin v. Freedom of Information Com'n, 577 A.2d 300, 302–3 (Conn. 1990) (freedom of information statute provides right to inspect, and "[t]o dictate the format is to go beyond the essence of the act, which is to provide for inspection of public records.")

The Court is not persuaded that in this case, the City was required to provide Mr. Nolen with email attachments of the records he had requested in order to fulfill its duty of assisting a member of the community or to provide Mr. Nolen with the greatest possible access to public records. The evidence in this case demonstrates that the records he requested were not so numerous that the cost of copying or inspection was burdensome. In fact, it appears that there were only thirty to forty pages of records, at most. (See City's Memo. Law, Exs. 8, 10.) Also, while there may be some merit to Mr. Nolen's argument that it was burdensome for him to travel from his home in Barre, Vermont, to Keene, New Hampshire to inspect records at the Office of the City Clerk, the City in this case apparently recognized this fact. The City explicitly informed Mr. Nolen that it would be willing to send him paper copies if he paid the cost to copy and mail.

For both sets of records, the total cost was less than twenty dollars. (See id., Exs. 7, 9.)

Mr. Nolen points to a New York case, Brownstone Publishers, Inc. v. New York City Dep't of Bldgs., 550 N.Y.S.2d 564 (N.Y. Sup. Ct. 1990), to support his argument that the City must make the information available in the format he seeks. In that case, the court concluded that the requester was entitled to an electronic copy of the records because (1) the cost of reproducing the information in a hard copy form would be very expensive and time consuming given the quantity of the records, and (2) because the requester sought to input the information into his own computer, a hard copy would be far less valuable to him, as he would have to reconvert all of the information back into electronic format. The court there found that the hard copy did not provide him with reasonable access to the information. See also State ex rel. Athens County Property Owners Ass'n v. Athens, 619 N.E.2d 437, 439 (Ohio Ct. App. 1992) (noting the law does not require members of the public to exhaust energy and ingenuity to gather information that is already compiled, and here there were over 600 records); see also State, ex. rel. Margolius v. Cleveland, 584 N.E.2d 665, 669–70 (Ohio 1992) (holding a governmental agency must allow copying of portions of computer tapes electronically if person requesting information presents a legitimate reason why a paper copy of the records would be insufficient or impracticable and assumes cost of copying). However, the court in Margolius also noted: "it should be the rare instance in which a party making such a request would be able to demonstrate a need for the record stored on a magnetic

medium in lieu of a paper copy." Id. Further, as noted above, the records in the instant case were not so numerous such that hard copy reproduction would be very costly or would otherwise limit his access to the information.

The City also provided logical reasons for providing paper copies of the records. First, the City noted that it has no obligation to provide a requester with the computer application needed to open a computer file, and if the requester lacks the same application used by the City, his or her access would be limited. Paper copies avoid this problem. The City also cited its concerns with regard to the problem of individuals "mining for metadata," or studying an electronic document to see what changes had been made prior to the final version. Given these reasons, plus the fact that Mr. Nolen's access to the records was not limited by the manner in which the City provided the records, the Court concludes the City satisfied its duties under RSA 91-A.

Mr. Nolen is not entitled to monetary or injunctive relief. The City has demonstrated that it provided Mr. Nolen with the opportunity to inspect the records he requested. The Right to Know Law does not require the government to furnish copies, paper or electronic, in response to a records request. "Fees shall not be awarded [to the petitioner] 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 . . . ." RSA 91-A: 8, I (Supp. 2008). Since the Court cannot conclude that the City engaged in conduct that violated RSA chapter 91-A, Mr. Nolen's request for injunctive relief and attorney's fees and costs is DENIED.

Finally, the City contends it is entitled to an award of attorney's fees under RSA 91-A: 8, I-a (Supp. 2008), which states:

> The court may award attorney's fees to a public body or public agency or employee or member thereof, for having to defend against a person's lawsuit under the provisions of this chapter, when the court makes an affirmative finding that the lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive.

The Court is not persuaded Mr. Nolen's suit was brought in bad faith. While his interactions with City employees may have been confrontational and aggressive (See City's Memo. Law, Ex. 11.), the law regarding right-to-know requests is not well developed, and whether a requester is entitled to receive records in a particular format is an issue of first impression in this jurisdiction. The issue is by no means settled in other jurisdictions either. Thus, Mr. Nolen's action to determine whether he was entitled to receive electronic records was not frivolous or unjust. Accordingly, the Court declines to award the City its attorney's fees.

For the reasons provided above, the City's Motion to Dismiss Mr. Nolen's petition is GRANTED, but the City's request for attorney's fees is DENIED.

SO ORDERED.

December 23, 2009
Date

John P. Arnold
Presiding Justice