

THE STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

CHESHIRE, SS.

No. 213-2012-CV-00233

DEBORAH SUMNER

v.

STATE OF NEW HAMPSHIRE

ORDER

The Petitioner, Deborah Sumner ("Sumner"), filed a petition against the State of New Hampshire ("State") under the Right-to-Know Law (RSA 91-A). Sumner requested that the Court 1) order that all ballots cast in the November 2, 2010 general election in the town of Jaffrey (the "Jaffrey ballots") be preserved, 2) allow Sumner to review the Jaffrey ballots, 3) allow her to review ballots in future elections without a court order, and 4) award her the costs of bringing this action. The State filed a motion to dismiss. The Court finds that the State does not have possession of the ballots and is, therefore, not a proper party to the petition. Accordingly, the State's motion to dismiss is GRANTED.

**Background**

On May 14, 2012, Sumner wrote to William M. Gardner, Secretary of State, requesting that she be allowed to review the Jaffrey ballots. On May 17, 2012, Mr. Gardner responded, in part, as follows:

In response to your RSA 91-A "Right to Know" request dated May 14, 2012 this office does not have possession of the ballots to which you request access. Even if it did, you are aware that RSA

659:95 prevents the viewing of ballots outside of a formal recount or court order. The legislature has enacted this longstanding practice to protect the voter from threats, intimidation and fear of retaliation as evidenced by RSA 559:35 through RSA 659:40.

On August 20, 2012, Sumner filed a petition with this Court seeking a court order to allow her to review the Jaffrey ballots and a preliminary injunction against the State. In her petition, Sumner claims that the Legislature erred in exempting ballots from RSA 91-A, and that such an exemption is in violation of Part I, Article 8 of the New Hampshire Constitution.

On August 27, 2012, the State filed a motion to dismiss. On August 27, 2012, the Court held a hearing on Sumner's request for preliminary injunctive relief and denied this relief. On August 29, 2012, Sumner filed a motion to reconsider, an objection to the State's motion to dismiss, and her own motion for summary judgment. On August 30, 2012, this Court denied Sumner's motion to reconsider. On September 6, 2012, Sumner filed a response to the Court's order on her motion to reconsider and an additional memorandum. Currently pending before the Court is the State's motion to dismiss. Both parties request that they be awarded attorney's fees.

### **Analysis**

In ruling on a motion to dismiss, the Court must determine "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court must rigorously scrutinize the facts contained on the face of the complaint to determine whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995). In rendering such a

determination, the Court will “assume the truth of the facts alleged in the plaintiff’s pleadings and construe all reasonable inferences in the light most favorable to [her].” Harrington v. Brooks Drugs Inc., 148 N.H. 101, 104 (2002) (quotation omitted). The Court need not accept as true, however, statements in the complaint “which are merely conclusions of law.” Karch v. Baybank FSB, 147 N.H. 525, 529 (2002) (quotation omitted).

The Right-to-Know Law provides, in part, that every citizen “has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies . . . except as otherwise prohibited by statute or RSA 91-A:5.” RSA 91-A:4, I. In order for Sumner’s petition to survive a motion to dismiss, the following three conclusions must be reasonably inferred from her pleadings: 1) that the Jaffrey ballots are governmental records within the meaning of RSA 91-A; 2) that the Jaffrey ballots are in the possession, custody or control of the State; and 3) that her review of the Jaffrey ballots is not be prohibited by statute or RSA 91-A:5. For the purposes of this order, the Court assumes without deciding that ballots could be consider governmental records under RSA 91-A.<sup>1</sup> The remaining two prongs warrant further analysis.

The State challenges the second prong by arguing that it is not a proper

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<sup>1</sup> "Governmental records" means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."

RSA 91-A:1-a, III.

party to this litigation. By Sumner's own admission, neither the State nor any of its agencies has possession, custody, or control of the ballots at issue. Rather, the Jaffrey ballots are controlled by the town of Jaffrey. Therefore, even construing all of the facts in the light most favorable to Sumner, the Court finds that the State is not a proper party for this Right-to-Know request, and the pleadings are not susceptible of a construction that would permit recovery against the State.

The State also challenges the third prong by arguing that ballots are exempted from the Right-to-Know Law by statute, specifically RSA 659:95, II. RSA 659:95, II, states as follows:

Ballots, including cast, cancelled, and uncast ballots and successfully challenged and rejected absentee ballots still contained in their envelopes, prepared or preserved in accordance with the election laws shall be exempt from the provisions of RSA 91-A. This exemption shall apply to any ballots or absentee voter affidavits prepared or used in any election conducted by the state or any political subdivision, including federal elections.

RSA 659:95, II. The Court agrees and finds that the Legislature exempted ballots from the Right-to-Know Law. Sumner apparently concedes this point. However, Sumner argues that the Legislature erred in creating this exemption.

To the extent Sumner alleges that the Legislature erred by violating its own procedures by passing this statute without, as Sumner claims, legislative intent, the Court finds that this issue is not justiciable. "A controversy is nonjusticiable — *i.e.*, involves a political question — where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department." Hughes v. Speaker of the N.H. House of Representatives, 152 N.H. 276, 283 (2005). "Courts generally consider that the

legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution." Id. Although Sumner does not allege a specific rule or procedure she believes the legislature violated in passing RSA 659:95, II, to the extent any may have been violated, it is beyond the Court's power to review. See id. at 288 ("Proper recognition of the respective roles of the legislature and the judiciary requires that we not intervene.") (quotation and brackets omitted).

Sumner also alleges that the exemption of ballots from the Right-to-Know Law violates Part I, Article 8, of the New Hampshire Constitution. The constitutionality of RSA 659:95, II is a justiciable question. See id. (explaining "claims regarding compliance with these kinds of mandatory constitutional provisions are justiciable"). Part I, Article 8, of the New Hampshire Constitution states:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

N.H. CONST. pt. I, art. 8. "To determine whether restrictions are 'reasonable,' we balance the public's right of access against 'the competing constitutional interests *in the context of the facts of each case.*'" Id. at 290 (emphasis in original) (citation omitted).

Sumner alleges that the public "has a significant and substantial interest in being able to review ballots." Right-to-Know Petition, p.9. She claims that

"[c]itizens have a right and duty to participate in oversight of all government activities, including their elections, and neither the Legislature nor any state official can take that right away without a good reason or their consent." Id. at p. 8. She reasons as follows: "Without the ability for members of the public to verify that election results are accurate and expect reasons for any significant discrepancies to be corrected prior to future elections, there is no self-government and no way to make sure elected representative and appointed officials are accountable to them." Id. at p.8-9.

In contrast, the State alleges that "[t]he relief requested by the Petitioner could jeopardize the integrity of New Hampshire's system of elections by ballot." Mot. to Dismiss, p. 7. The State expresses concern that allowing the public to review ballots could result in a loss of voter anonymity, see id. at p. 8 ("If these ballots were subject to disclosure, it might be possible to determine how certain individuals voted."), and could result in "individuals attempting to impact the results of elections by directing voters how to vote through bribery, intimidation and other threats." Id. at p. 7.

In weighing the public's right of access against the concerns of the State, the Court finds that the State has the far stronger argument in this instance. "States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials." Op. of the Justices (Voting Age in Primary Elections II), 158 N.H. 661, 670 (2009) (citation omitted). "A State indisputably [also] has a compelling interest in preserving the integrity of its election process." Id. (brackets in

original). The Court finds that the integrity of the election process depends on voter anonymity. Therefore, the Court finds that the Legislature did not act in violation of the New Hampshire Constitution when it passed RSA 659:95, II, in order to exempt ballots from the Right-to-Know Law.

Finally, the Court notes that both parties request an award of attorney's fees pursuant to RSA 91-A:8. As the Court finds that Sumner did not bring this action against the appropriate party, her request for attorney's fees against the State is denied. Under RSA 91-A:8, I-a, 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." RSA 91-A:8, I-a. The Court does not find that Sumner brought the lawsuit in bad faith, and therefore denies the State's request for attorney's fees.

**Conclusion**

For the foregoing reasons, the State's motion to dismiss is GRANTED.

**SO ORDERED.**

9/24/12  
Date

  
John C. Kissinger  
Presiding Justice