THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS.

Marianne Salcetti, et al.

v.

City of Keene

No. 213-2017-CV-00210

ORDER ON RIGHT-TO-KNOW PETITION

Marianne Salcetti, a journalism professor at Keene State College, brought this petition against the City of Keene ("the City"), alleging the City has violated RSA Chapter 91-A, New Hampshire's Right-to-Know law, when it denied several requests made by five of her students. Professor Salcetti has been certified under Super. Ct. R. 20 as a non-attorney representative for the students. On June 5, 2018, the Court held a hearing on the merits of Professor Salcetti's petition. The Court makes the following findings of fact and rulings of law.

FACTS

Professor Salcetti taught a Public Affairs Reporting class in the fall 2017 semester at Keene State College, in which she assigned her students to write and submit Right-to-Know requests to two public entities on topics of the public interest. (Compl., Salcetti Aff.) The City was the recipient of several of these requests, and denied requests made by the five students Professor Salcetti has come to represent in this case: Alex Fleming, Abbygail Vasas, Grace Pecci, Meridith King, and Colby Dudal. (Id.)

I. *Alex Fleming's Request*

On September 25, 2017, Mr. Fleming emailed William Dow, Records Manager/Deputy City Clerk at the Keene Office of City Clerk, requesting "All documents including, but not limited to, printed document and electronic documents police (sic) citations involving infractions resulting from violations of" RSA 179:10 (Unlawful Possession and Intoxication) and RSA 644:18 (Facilitating a Drug or Underage Alcohol House Party) from 2012 to 2016. (Ex. 4.) Mr. Fleming's request cited to the Right-to-Know law, and asked that a denial of any portion of his request be justified with a citation to a specific exemption. (Id.) Mr. Dow replied to Mr. Fleming the following day and stated that he was in receipt of the request, that the Office of the City Clerk would process the request, that it is the City's policy to require a written request with original signatures, and that Mr. Fleming's request was comprehensive and may take up to 30 days to determine whether the specific records are available under the Right-to-Know law. (Id.) Mr. Fleming provided a written and signed request, but added language such that the request was for "documents . . . of police citations involving the total number of infractions" of the two statutes. (Ex. 7.)

On October 23, Mr. Fleming emailed Mr. Dow to check the progress on his request. (Ex. 4.) Mr. Dow replied the next day:

> The City of Keene NH has determined that there is no existing governmental record listing all citations pertaining to violations of NH RSA 179:10 or NH RSA 644: 18 between the dates of January 1, 2012 and December 31, 2016. NH RSA Ch. 91-A does not require the City of Keene to create a record that does not already exist, therefore your request is denied.

(Id.)

On November 15, Mr. Fleming emailed City Manager Elizabeth Dragon about his request, copying his original request to the email, reiterating that Mr. Dow had told him "that there are no governmental records relating to my request," and stating that he had "been advised to bring this issue to you." (Ex. 36.) There has been no evidence to show that City Manager Dragon replied to Mr. Fleming.

On November 20, Mr. Fleming replied to Mr. Dow's email and asked for further explanation, stating, "These are state laws. Shouldn't there be a record of when they are violated?" (Ex. 4.) Mr. Dow replied the following day:

> The Keene Police Department records all incidents and arrests in various recordkeeping systems maintained in their department. The Keene Police Department staff have reviewed the record systems containing governmental records in their possession for a report listing all citations pertaining to violations of NH RSA 170:10 and NH RSA 644:18 that occurred between the dates of January 1, 2012 and December 31, 2016. It has been determined by the Keene Police Department that the requested governmental record does not exist. It has been further determined that in order to satisfy this request, it is required to compile various recorded information into a form that is not already maintained by the department. NH RSA Ch. 91-A:4, VII states that "Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency"; therefore because this record does not exist, your request is denied.

(Id.)

On December 29, a string of emails between City employees concerning Professor Salcetti's lawsuit against the City contained an email from Chief of Keene Police Department ("KPD") Steven Russo that states, "We never received a request reference (sic) the Fleming [request]." (Ex. 46.) Chief Russo continues: "Perhaps I or

someone else here did have a conversation with the City Clerk's Office concerning it but without the actual request to look at I don't know." (Id.)

II. *Abbygail Vasas' Request*

On September 25, 2017, Ms. Vasas submitted a hard-copy and signed request to the City Clerk's Office, which sought "[a]ll charges of Aggravated Felonious Sexual Assault" and "[a]ll charges of Drug/Alcohol Facilitated Sexual Assaults" from 2013 to 2017, as well as "[a] Copy of KPD's protocol for sexual assault incidents." (Ex. 6.) Mr. Dow replied to Ms. Vasas' request the next day, stating that her request was comprehensive and that it may take up to 30 days to determine whether the specific records are available under the Right-to-Know law. (Ex. 8.)

On October 19, Mr. Dow emailed Chief Russo and inquired whether the KPD had "a protocol or standard procedure for processing sexual assault crimes?" (Ex. 23.) Chief Russo replied that, yes, the KPD used the New Hampshire Attorney General's protocol and its own policy that points to the New Hampshire Attorney General's, and Chief Russo attached both to the email. (Id.)

On October 30, Ms. Vasas emailed Mr. Dow to check for an update on her request for the KPD's protocol for sexual assault incidents. (Ex. 24.) Mr. Dow replied that same day, stating, in regard to Ms. Vasas' requests for records of specific charges:

> The City of Keene has determined that there are no existing governmental records listing all charges of aggravated felonious sexual assaults for the years 2013 through 2017 or charges of drug-alcohol facilitated sexual assaults from 2013 through 2017. NH RSA Ch. 91-A:4, VII states that "Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into to a form in which it is not already kept or reported by that body or agency", therefore these requests for access are denied.

(Ex. 24.) Mr. Dow's email also stated that, in regard to her request for the KPD's sexual assault protocol, there were "existing governmental records relating to protocol or standard procedures for processing sexual assault crimes," and that the records were being reviewed by the City Attorney to determine if they were subject to disclosure. (Id.) The following day, Mr. Dow again emailed Ms. Vasas and informed her that there was one responsive governmental record available for her inspection at the Office of the City Clerk. (Ex. 26.) Ms. Vasas and Mr. Dow then coordinated a time for Ms. Vasas to view the record, and Ms. Vasas viewed the record that week. (Id.; Ex. 44.)

On November 15, Ms. Vasas emailed City Manager Dragon about her Right-to-Know request for governmental records. (Ex. 37.) Ms. Vasas explained that Mr. Dow had informed her that there were "no existing governmental records listing all charges of aggravated felonious sexual assault or drug/alcohol facilitated sexual assaults," and that Professor Salcetti spoke to Mr. Dow, who suggested that Ms. Vasas contact City Manager Dragon. (Id.) There has been no evidence to show that City Manager Dragon replied to Ms. Vasas.

On November 16, City employee Barbara DiNapoli emailed Ms. Vasas' request to Chief Russo, Mr. Dow, and City Manager Dragon inquiring about Ms. Vasas' Right-to-Know request and whether a response was sent to her. (Ex. 22.) Chief Russo replied that, "From looking at this and several of us doing searches of our [Right-to-Know] lists/requests, we don't have this woman's name. So, that leads me to believe we didn't get the original request (can't be positive)." (Id.) Chief Russo noted, however, that he did send "our policies" to Mr. Dow before, but that he did not correlate that response to a specific request, which he would have sent to records to fill. (Id.)

On November 20, Ms. Vasas emailed Mr. Dow, stating she was following up on a conversation the two had when Ms. Vasas was at the Office of the City Clerk. (Ex. 44.) Ms. Vasas' email notes that she and Mr. Dow had a "brief conversation about the potential for the Police Chief of her detectives to grant me access to their information gathered on aggravated felonious sexual assault and drug/alcohol facilitated sexual assaults in the city of Keene." (Id.) Mr. Dow replied with the same explanation he had provided before regarding the denial of her request for such records, quoting RSA 91-A:4, VII and noting that the City is not required to compile various recorded information into a form that it is not already maintained. (Id.)

III. *Grace Pecci's Request*

On September 24, 2017, Ms. Pecci emailed Mr. Dow, requesting "[a]ny and all documents from August 1, 2012- September 22, 2017 that are in the Keene Police Department, the Keene City Attorney's office, and the Keene City Manager's office regarding: any and all citizen complaints, logs, calls, and emails regarding charges of excessive police force and/ or police brutality." (Ex. 3.) She also requested "a list of every officer who worked for KPD and was reprimanded for using excessive force and or brutality from August 1, 2012 until September 22, 2017." (Id.) Mr. Dow replied on September 25, confirming receipt of the request and informing Ms. Pecci of the City's policy to require a written request with original signatures. (Id) Mr. Dow attached the request form to his response, and told Ms. Pecci that he would "begin processing" her request in the meantime. (Id.) Also on September 25, Mr. Dow emailed Ms. Pecci an acknowledgment of her request and stated that her request was comprehensive and

may take up to 30 days to determine whether the specific records are available under the Right-to-Know Law. (Ex. 5.)

On September 27, Ms. Pecci hand-delivered a written request to the Office of the City Clerk, but it was not signed. (Pl.'s Mem. 10; Ex. 10.)

On October 16, Ms. Pecci emailed Mr. Dow to follow up with her request. (Ex. 19.) Mr. Dow replied the next day and said he was out of the office but that he would "follow up with KPD and Legal Dept regarding police information requested upon my return to work . . . ." (Id.)

On October 31, Mr. Dow emailed Ms. Pecci that he had yet to receive a written request with original signature from her. (Ex. 3.) Also on October 31, Mr. Dow emailed several City employees, including Chief Russo and City Manager Dragon, informing them of "a request for access to governmental records for all complaints regarding charges of excessive police force and / or police brutality." (Ex. 25.) That same day, Chief Russo replied, including a City employee named Steven Stewart, and suggested that he could use "the citizen complaint log and the IA box list" for responding to the request." (Ex. 28.) Mr. Stewart replied, "I think that's the only way." (Id.)

On November 2, Chief Russo forwarded the email to the KPD supervisors and asked them "to search for any e-mails or other documents you may have in reference to the attached request. I will handle the complaints themselves from the files I have." (Id.)

On November 15, Ms. Pecci emailed City Manager Dragon about her request, explaining the delay in addressing her request because of the requirement that it be handwritten and originally signed, and that she had not yet received the documents she requested. (Ex. 38.) There has been no evidence to show that City Manager Dragon

replied to Ms. Pecci. However, the next day, City Manager Dragon forwarded Ms. Pecci's email to Ms. DiNapoli, who replied to City Manager Dragon that same day with Mr. Dow's email to Ms. Pecci attached. (Id.) Ms. DiNapoli also wrote that, in regard to Ms. Pecci's request for KPD records, "I have a packet of material received from KPD earlier this week to go through. Ms. Pecci has been advised of that." (Id.) Also on November 15, three minutes after Ms. Pecci emailed City Manager Dragon, Chief Russo emailed Mr. Dow with a PDF or records responsive to Ms. Pecci's request and stated, "I will also be sending hard copies up in the event that is easier to use/redact, etc." (Ex. 25.)

On November 16, Mr. Dow emailed Ms. Pecci and informed her that, "regarding Keene Police Department complaints and investigations of Keene Police Personnel for excessive force and/or police brutality," the City's legal department was reviewing the responsive governmental records to determine if they are subject to disclosure under RSA 91-A:5. (Ex. 32.)

On November 20, Ms. DiNapoli emailed Mr. Dow with a PDF of redacted records, stating:

> Attached are the records that may be released in response to Grace Pecci's right-to-know request for KPD records relative to excessive force complaints. These records consist of statistical summaries of citizen complaints for the years requested. You will note that in accordance with RSA 91-A:5, IV, and the Attorney General's Memorandum on New Hampshire Right-to-Know Law, officers' names have been redacted as this information is exempt from disclosure.
>
> In addition, while KPD also provided the records for formal complaints filed through its internal investigation process, those records are also not released for the reasons stated here.

(Ex. 38.)

On November 21, Mr. Dow emailed Ms. Pecci and informed her that there were existing governmental records responsive to her request that were available for public access, and informed her of the redactions as explained in Ms. DiNapoli's email citing to RSA 91-A:5, IV. (Ex. 12.) Mr. Dow also stated that formal complaints made through the KPD's internal investigation process were not being released for the same reasons. (Id.) Mr. Dow then stated that the records responsive to her request consisted of "a report by the former Keene Police Chief, Kenneth Meola, which contains statistical summaries of citizen complaints of brutality/excessive by (sic) by police officers for the years requested and this record contains a total of 18 pages." (Id.) This, he wrote, was available for Ms. Pecci's inspection at the Office of the City Clerk and that Ms. Pecci should contact him to schedule a mutually convenient date and time for them to meet for her to review them. (Id.) On December 7, Ms. Pecci replied to this email and suggested dates for the inspection. (Id.) On December 11, Ms. Pecci reviewed the responsive record, which Mr. Dow memorialized in writing and repeating the explanation for redacting the officers' names. (Ex. 51.) Professor Salcetti has alleged that these redactions completely blacked-out a column of a table in each report, including the heading of the column. (Pl.'s Mem. 13.)

IV. *Meridith King's Request*

On September 27, 2017, Ms. King emailed Mr. Dow and requested: "A list of the out of the 275 (sic) listed in Keene that received a score of less than 85 from Jan. 1 – Aug. 31, 2017," and "A list of the violations from any and all food establishments Class IV, V, and Vi in Keene from Jan. 1 2012 – Aug. 31, 2017 received (sic) scores of 85 or less, and the checklist of the inspection accompany each score." (Ex. 15.) This request

was hand-delivered and signed. (Id.) Mr. Dow replied to Ms. King by email on September 29, 2017 and stated that he was in receipt of the request, that the Office of the City Clerk would process the request, that it is the City's policy to require a written request with original signatures, and that Ms. King's request was comprehensive and may take up to 30 days to determine whether the specific records are available under the Right-to-Know law. (Ex. 13.)

On October 5, Mr. Dow emailed Ms. King that there were governmental records that were responsive to her request, that the records are organized by property address, and that they may be inspected in the Code Enforcement/Health Department ("CED") at no charge. (Ex. 14.) As for copying the records, Mr. Dow wrote, the City of Keene is authorized to charge fifty cents for the first page and twenty-five cents for each additional page. (Id.) Mr. Dow instructed Ms. King to contact the CED to arrange a mutually convenient date and time for her to inspect the records. (Id.)

Ms. King coordinated with Mr. Dudal, who had also requested access to food inspection records, and on October 26, they both went to the CED office and met with CED Administrative Assistant Corrine Marcou. (Dudal Aff.; King Aff.; Marcou Aff. ¶ 7.) Though Ms. Marcou has communicated with Mr. Dudal previously, she was unaware of Ms. King's request. (Marcou Aff. ¶¶ 2–7.) During this meeting, Ms. Marcou provided property records to Mr. Dudal and Ms. King. (Id. at ¶ 8.) Mr. Dudal and Ms. King asked Ms. Marcou if the property records contained information on restaurant inspections, and she advised them that they did not as food establishment records are kept in a database and no governmental records containing that information existed nor was she required to create one. (Id. at ¶ 9.)

On November 13, Ms. King made a second records request to Mr. Dow, seeking any emails that the City sent to "any restaurant in Keene about Health Inspections" from January 1, 2016 to August 31, 2017. (Ex. 35.)

On November 15, Ms. King emailed City Manager Dragon about her two requests. (Ex. 40.) Ms. King explained that Mr. Dow had instructed her that she could view restaurant inspection records at the CED but was told by Ms. Marcou that these records did not exist, and that Professor Salcetti had spoken with Mr. Dow regarding her request and he had recommended contacting the city manager. (Id.)

Also on November 15, Mr. Dow emailed Professor Salcetti, including Ms. King and Mr. Dudal as recipients, and reiterated information contained in an email from CED staff sent to Mr. Dudal regarding the database containing information on Keene food establishments. (Ex. 34.) Mr. Dow explained that the CED "now maintains their restaurant inspection records solely in an electronic database," and that this "database software change currently does not provide City staff with the capability to create or print custom reports at this time." (Id.) And, the previous database did allow for posting general restaurant inspection scores on the City website for public access but that the new one does not; "this issue is currently being addressed by City staff," Mr. Dow wrote. (Id.) Further, Mr. Dow acknowledged that the City had no obligation to create a governmental record as per RSA 91-A, but that "it may be easier to create a custom report than to provide a copy of the entire database to satisfy a record request." (Id.) However, before such a summary could be created, Mr. Dow explained, "The entire inspections database will need to be reviewed by the City Attorney before release of any database copies can be authorized" because RSA 91-A:5, IV exempts information

that may be contained in the database, such as personal telephone numbers and addresses. (Id.)

The next day, November 16, 2017, City Manager Dragon replied to Ms. King and explained that the Right-to-Know Law creates no obligation for the City staff "to conduct research and compile information in a specific format requested," something that would be "time consuming, overly burdensome for communities and beyond the cope, purpose, intent of the law." (Ex. 40.) "So if we have documents available that you would like to view you may make an appointment to do so. If the information is available in the format requested than (sic) it is available to view for free," City Manager Dragon wrote. (Id.) She also wrote that she spoke with Ms. Marcou and that the documents Ms. King had requested "are not currently available in hard copy." (Id.) In regard to Ms. King's second request, City Manager Dragon asked for Ms. King to be more specific with the date range of her request, but that if the date range was the three years also requested in her first request, that there would be between 800 and 1,000 responsive emailed reports that would be 1 to 3 pages long each. (Id.) Because of the City's charge for copying records, this would amount to approximately $300, City Manager Dragon said. (Id.)

V. *Colby Dudal's Request*

On September 26, 2017, Mr. Dudal hand-delivered his request to the Office of the City Clerk. (Ex. 9.) Mr. Dudal's request sought two items: "A list of the of the (sic) food establishments that are a part of license class I, license class II, and license class III in Keene that received a score of less than 85 from Jan. 1, 2012 – Aug. 31, 2017," and "A list of the violations for any and all food establishments that are a part of license

class I, license class II, and license class III in Keene that received scores of 85 or less, and the checklist of the inspection accompanying each score from Jan. 1, 2012 – Aug. 31, 2017." (Id.) Mr. Dow replied the following day, and stated that he was in receipt of the request, that the Office of the City Clerk would process the request, that it is the City's policy to require a written request with original signatures, and that Mr. Dudal's request was comprehensive and may take up to 30 days to determine whether the specific records are available under the Right-to-Know law. (Ex. 11.)

On October 4, Mr. Dudal called Mr. Dow, who instructed Mr. Dow to contacted Ms. Marcou about his request. (Dudal Aff.) On October 5, Mr. Dudal then emailed Ms. Marcou his Right-to-Know request, though the language of the requests sent to Ms. Marcou differed from that sent to Mr. Dow: "All food establishments' scores and dates of inspections for the city of Keene, NH within the past there years for food establishments that are in classes I, II and III. This timeframe includes September, 2014 – September, 2017"; and "The criteria in which the food establishments were scored and graded." (Ex. 16; Dudal Aff.) Ms. Marcou responded that she was out of the office and would respond the following week. (Dudal Aff.)

On October 5, Mr. Dow notified Mr. Dudal that there were existing governmental records responsive to his request for licensed food establishments and violations, and that they would be available for inspection at the CED. (Ex. 17.) Mr. Dow informed Mr. Dudal of the fee for providing copies of records. (Id.)

On October 16, Mr. Dudal called Ms. Marcou and left a voicemail, and also emailed her copies of his requests. (Ex. 16.) On October 17, Mr. Dudal emailed

another CED employee, Matthew O'Brien, with his requests and asked if he could set up a time for Mr. Dudal to inspect the records he was looking for. (Ex. 20.)

On October 18, Mr. Dudal emailed Ms. Marcou that he was following up with her because "I spoke with my professor and she expressed concerns regarding why I have not received information about my requests, when other student colleagues making similar requests have received their information." (Ex. 21.) Later that day, Ms. Marcou replied and explained that she was out of the office due to unforeseen family events. (Id.) In her email, Ms. Marcou instructed Mr. Dudal on how to access multifamily home housing inspections completed by the City that are provided on a voluntary basis through the Keene State College website. (Id.) She also explained that there were "248+/- food establishments" in the classes he was requesting and that she was "more than willing to make copies of this information for your project and it will take a day or two." (Id.) She then stated the City's fees for making these copies: fifty cents for the first copy and twenty-five cents for each subsequent copy. (Id.) Ms. Marcou also told Mr. Dudal:

> If you would like to come in to look at any of the property files we have for any of these addresses, you are welcome to do that. Remember that we will only have anything on file if the property owner has submitted for any projects such as a building permit or if there is any communication between the City and the owner.

(Id)

On October 19, Mr. Dudal replied to Ms. Marcou and asked if he could inspect the documents for the food establishments the following day. (Id.) Ms. Marcou replied later that day and said he was welcome to come to the office to "review any of the property files in your housing inspection request," but she also said, "After much

conversations with William Dow and our City Attorney, the information from our data system isn't a government document and as there is no report currently created with this specific request criteria, the City isn't obligated to create one." (Id.) Mr. Dudal replied on October 23and said he would be in that Thursday to inspect the records and thanked her for the link to the City website. (Id.) Ms. Marcou replied on October 24, noting that she believed she overlooked an item and informed him that he could access "the criteria used for all food inspections at Keene food establishments" on the City website. (Id.)

On October 26, Mr. Dudal went to the CED with Ms. King to review the property records. (Marcou Aff. ¶¶ 2–7.) While meeting with Ms. Marcou at the CED, Mr. Dudal and Ms. King asked Ms. Marcou if the property records contained information on restaurant inspections, and she advised them that they did not as food establishment records are kept in a database and no governmental records containing that information existed nor was she required to create one. (Id. at ¶ 9.)

On November 8, Mr. Dudal emailed the Division of Public Health Services at New Hampshire's Department of Health and Human Services ("NHDHHS") and requested "information about food establishment inspection information in the city of Keene" and to "receive the information in some form." (Ex. 33.) Colleen Smith, an administrator in the Food Protection Section within NHDHHS, replied to Mr. Dudal and informed him that Keene is a self-inspecting city and the local health officer would inspect and license food establishments; Ms. Smith attached the contact information for John Rogers, the local health officer in Keene. (Id.; Dudal Aff.) Mr. Dudal emailed Mr. Rogers on November 13, reiterating his request for "information regarding food inspection results in

the town of Keene." (Ex. 34.) Mr. Rogers replied on November 15, writing, "I do not have a way to get you the information you are requesting. As the department stated before the information on the food establishments are compiled on our data base and we don't have reports comp[il]ed that have the information you are asking for." (Id.) Mr. Rogers also stated that the City was "working on getting [food inspection scores] back up on the website." (Id.) Later that day, on November 15, 2017, Mr. Dudal received Mr. Dow's email to Professor Salcetti. (See supra Part IV; Ex. 34.)

ANALYSIS

New Hampshire's Right-to-Know law provides that "[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief." RSA 91-A:7. 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." N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438–39 (2003) (quoting RSA 91-A:1). 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." Id. at 438–39 (quoting Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 553 (2002)) (citing N.H. CONST. pt. I, art. 8). In addressing a Right-to-Know petition, the Court will resolve questions "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. Thus, we construe provisions favoring disclosure broadly, while construing exemptions narrowly." Id. at 439 (quoting Goode, 148 N.H. at 554). "The party seeking nondisclosure has the burden of proof." N.H. Civil Liberties Union, 149 N.H. at 439

(citing Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 549 (1997)). "When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." Montenegro v. City of Dover, 162 N.H. 641, 649 (2011) (quoting Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006)).

New Hampshire courts may rely on federal Freedom of Information Act ("FOIA") law when interpreting Chapter 91-A and will "look to the decisions of other jurisdictions, since other similar acts, because they are in *pari materia*, are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved." Montenegro, 162 N.H. at 645 (quoting Murray, 154 N.H. at 581).

Professor Salcetti's Right-to-Know petition requires this Court to interpret statutory provisions of the Right-to-Know Law. The ordinary rules of statutory construction apply to this Court's review. Lambert v. Belknap Cty. Convention, 157 N.H. 375, 378 (2008). When examining the language of a statute, the Court is required to ascribe the plain and ordinary meaning to the words used and interpret the legislative intent from the statute as written, not considering what the legislature might have said or adding language that the legislature did not see fit to include. Id. The Court interprets a statute in the context of the overall statutory scheme and not in isolation. Id.

VI. *Alleged Chapter 91-A Violations*

In her brief, Professor Salcetti has made more than a dozen arguments of how the City violated Chapter 91-A. (See Pl.'s Mem.) Some are specific to one student's request and others are related to just some of students' requests, and still some are related to all of the students' requests. The Court therefore addresses the Plaintiff's

arguments delineated by what records were requested, rather than by student, and within those sections the Court will address each argument the Plaintiff has made regarding the City's response to that requested record. The Court then addresses the Plaintiff's arguments related to the City's response to all of the students' requests.

A. Food Establishment Inspection Records

Ms. King and Mr. Dudal made separate requests for food establishment inspection records, and both received similar explanations in the denials of their requests. The Plaintiff has formed arguments concerning the City's responses to each student's individual requests but also concerning the City's common reasoning in its denials to Ms. King and Ms. Dudal.

1. Records Requested Do Not Exist As Requested

Professor Salcetti has argued that the City violated RSA 91-A:4, I by denying Ms. King's and Mr. Dudal's requests and claiming that the records they requested were electronically kept in a database and thus not subject to public disclosure. (Pl.'s Brief 34–37.) Professor Salcetti continues in her brief to explain that electronic records are not exempt from the Right-to-Know law or federal FOIA. (Id.)

Professor Salcetti is correct that electronic records are subject to public access laws. See Hawkins v. N.H. Dep't of Health & Human Servs., 147 N.H. 376, 379 (2001). However, she misconstrues the City's denials. The City did not deny Ms. King's or Mr. Dudal's requests by claiming electronic records are not subject to disclosure; the City explained to Professor Salcetti and her students several times that the requests were denied because the electronic database could not produce reports with the information they had requested. (Ex. 21; Ex. 34; Ex. 40.) The City's denials to Ms. King and Mr.

Dudal articulated that the requests were being denied because the information in the City's database did not exist as the students had requested. (Ex. 21; Ex. 34; Ex. 40.) Mr. Dudal and Ms. King received Mr. Dow's explanation of the CED's database and that, even though the City could provide a copy of the entire database, the difficulty with responding to Mr. Dudal's request was that the new electronic database is not capable of printing custom reports, and even if it were, the City is not required to create custom reports. (Ex. 34.) It is unreasonable to construe the City's denials of Ms. King's and Mr. Dudal's requests as denied for the improper reasoning of exemption of electronic documents or electronic data. Also, Ms. King's emails to other City employees demonstrates that that she understood her request was denied because the records she requested "did not exist." (Ex. 40.)

The Court recognizes that while Ms. Marcou's denial to Mr. Dudal used unclear phrasing—"the information from our data system isn't a government document and there is no report currently created with this specific request criteria"—her explanation did not say that the database is not available to the public because it is an electronic database, but rather because it does not contain an existing report with the data Mr. Dudal requested. (Ex. 21.) The City's database is subject to disclosure, as the City indicated by stating it could be required to provide a copy of the entire database. (Ex. 34.) However, the database is made up of data, and the Right-to-Know law cannot obligate the City to compile requested pieces of data into a new record. RSA 91-A:4, VII. Ms. Marcou's denial was a poorly phrased way of saying that the data in the database cannot be cherry-picked into creating a government document, as is made

clear by the rest of her statement to Mr. Dudal: "[T]here is no report currently created with this specific request criteria, the City isn't obligated to create one." (Ex. 21.)

Both Ms. King's and Mr. Dudal's requests initially requested "lists" that sought specific parts of reports for specifically classed restaurants between specific dates. (Ex. 9; Ex. 15.)

> [A] FOIA request for a listing or index of a database's contents that does not seek the contents of the database, but instead essentially seeks information about those contents, is a request that requires the creation of a new record, insofar as the agency has not previously created and retained such a listing or index.

Nat'l Sec. Counselors v. C.I.A., 898 F. Supp. 2d 233, 271 (D.D.C. 2012). The law is clear that a public body or agency has no obligation to create a "list" of existing data. Brent v. Paquette, 132 N.H. 415, 426 (1989) ("[T]he statute does not require public officials to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist."); Nat'l Sec. Counselors, 898 F. Supp. 2d at 271 ("Producing a listing or index of records, however, is different than producing particular points of data (i.e., the records themselves)."). The City's denials fall squarely into RSA 91-A:4, VII: "Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency."

The City made it clear to both Ms. King and Mr. Dudal that their requests could not be met without compiling information that it is not obligated to compile. (Ex. 34.) And, City Manager Dragon reiterated this to Ms. King and explained that the emailed reports she requested that could be obtained would include 800 to 1,000 pages, costing

approximately $300.[1] (Ex. 40.) The City was properly abiding by the Right-to-Know law, offering to assemble existing documents it has in their original form and denying requests that required it to create new documents.

2. Duty to Maintain Accessible Records

Professor Salcetti next asserts that the City has a duty to provide access to its food inspection records on its public website or, if the records are not available on the website, then to maintain its food inspection record software in such a way that all its records are "accessible" at its "regular business premises." (Pl.'s Mem. 27–29.) Professor Salcetti relies on RSA 91-A:4, I, generally; on New Hampshire Department of Health and Human Services ("NHDHHS") regulations; and on Hawkins v. N.H. Dept. of Health and Human Services, 147 N.H. 376 (2001). (Pl.'s Mem. 27–29.)

Professor Salcetti's arguments misconstrue the function of public records law. The City is not obligated to keep records because of the public's right to know, rather the City has an obligation to allow the public to access the record that it keeps, and then only those that qualify within the Right-to-Know law. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980) (decided under federal FOIA) ("The Act does not obligate agencies to create or retain documents; it only obligates them to

[1] Professor Salcetti takes issue with City Manager Dragon's statement that "the documents you were requesting are not currently available in hard copy," and alleges that the City's only reason for denying Ms. King's and Mr. Dudal's requests was because electronic records are not subject to public disclosure. (Pl.'s Mem. 34; Ex. 40.) First, City Manager Dragon's statement does not suggest that Ms. King may only have access to hard-copies but rather said that Ms. Marcou did not have hard-copies of the records Ms. King had requested. (Ex. 40.) Preceding that statement, City Manager Dragon explains that the City is not obligated to create records it does not have. (Id.) Second, immediately succeeding the statement, City Manager Dragon offers Ms. King the option of accessing emailed reports, which are undeniably electronic records. (Id.) The Court also notes that RSA 91-A:4, III-a requires public bodies and agencies to maintain or retain electronic records the same period as than their hard-copy counterpart, and thus a policy that retains electronic records the same as hard-copies would be proper. See N.H. DOJ, Attorney General's Mem. on N.H.'s Right-to-Know Law, RSA Ch. 91-A (Mar. 20, 2015), 23.

provide access to those which it in fact has created and retained."); Landmark Legal Found. v. E.P.A., 272 F. Supp. 2d 59, 63 (D.D.C. 2003) (citation omitted) ("FOIA does not require an agency to reorganize its files in anticipation of or in response to a FOIA request. Rather, the agency may keep its files in a manner best designed to suit its internal needs."). However, the Court addresses whether the City violated Chapter 91-A in regard to its food inspection records electronic database and the confusion surrounding its transition to a new system.

At the hearing on the merits, Professor Salcetti emphasized that she has taught this same Public Affairs Reporting class in the past, during which her students requested the same records Ms. King and Mr. Dudal did, and had not been denied access. The City explained that Ms. King's and Mr. Dudal's requests for food inspection records were received during a transition period between two records-management software: Oracle and iWorQ. Thus, in the relevant time period, data from the older system, Oracle, was being migrated to the new system, iWorQ, and there was not one system that contained the data in its entirety. This made it impossible for the City to run a query for the years the students had requested. Mr. Dow informed Ms. King, Mr. Dudal, and Professor Salcetti that the City did not have "the capability to create or print custom reports at this time." (Ex. 34.) Instead, the City could only print individual reports that existed, on both systems; determining individual restaurant scores would require the requestor to take the raw data within those reports and score the restaurants themselves. Also, the City reiterated that even if it were able to run a query of all its data, the students had requested a list that the City was not obligated to create.

In Hawkins, plaintiffs had requested NHDHHS make available records of dental services that had been provided to New Hampshire Medicaid recipients under the age of 21 and of Medicaid reimbursement payments made to their dental healthcare providers from 1993 to 1998. 147 N.H. at 377. NHDHHS denied the requests, and argued in the suit that "the information was stored in the Medicaid claims processing system as 'input data,' which are discrete bits of information, and therefore did not constitute existing documents subject to disclosure under RSA 91–A:4," and that "none of its programs was capable of generating the information in the format requested." Id. at 378. The Court held that NHDHHS was not required "to compile data into a format specifically requested by a person seeking information under the statute" thus the denial was proper. Id. However, while NDHHS was not required to compile data from the public records that it had to make new public records, it was required to maintain the public records it did have in an accessible format: "public records received by HHS [must] be maintained in a manner that makes them available to the public." Id.; see N.H. Civil Liberties Union, 149 N.H. at 439 (citing Hawkins, 147 N.H. at 379) ("We note that the Right-to-Know Law requires governmental agencies to maintain public records in a manner that makes them available to the public.").

First, Professor Salcetti's argument is not supported by Hawkins, because the "records" the students seek from the City are not existing records that the City keeps or maintains; the data compilations they have requested do not exist in a form they requested, but rather exist as uncollected data in a database, and for the data to be in a form that the students were entitled to have, the City would need to create a new record. See supra Part VI.A.1. In Hawkins, the plaintiffs sought for NHDHHS to compile new

records from records it already had and the Court's mandate to maintain records in accessible format was in regard to those already existing records; there was no obligation to create records. Hawkins, 147 N.H. at 379. Here, the City does not possess reports as the students have requested it with specific data from specific date ranges in a "list," and it is not obligated to create any.

Second, there is no evidence that the City has not provided access to its records according to Chapter 91-A's requirements. The City has explained that even during the transition period between the two software it was capable of accessing and producing the individual reports and records that are subject to disclosure; Ms. King's and Mr. Dudal's requests were denied because the City was not able to run a query across both software. More importantly, the City is only required to provide the existing, non-exempt records that it already has. The City has represented that both were functional and could produce reports, thus if the students had requested reports that the City had available, from either software, their requests would have been granted. The transition period between systems, therefore, was not the reason for the City's denying Ms. King's and Mr. Dudal's request. The City also stated that, if desired, it could provide a copy of the entire database. (Ex. 34.)

Furthermore, it cannot be said that the City has an affirmative duty to provide its records on its website as it has elected to do. The City explained that, though Oracle allowed the general inspection scores to be posted on the City's website, iWorQ did not at the time the students made their requests.[2] Professor Salcetti does not cite to any

[2] Professor Salcetti submitted screenshots of the City's website as it existed in December 2017, and the City represented that these images illustrate the City's website as it currently exists and not as it did when the students made their requests. (Ex. 47–50.) They are thus not relevant to the Court's analysis.

law or valid regulation[3] that requires the City to post its inspection reports online, nor has the Court found any. Further, the Court has already determined that the City's database and its ability to provide inspection reports and other records that it has, rather than lists that it does not have, complies with Chapter 91-A. The City's website is unrelated to its obligation to provide the public with access to its records. Therefore, the City's response to Ms. King and Mr. Dudal complies with Chapter 91-A.

3. $\underline{\$300 \text{ Fee}}$

Professor Salcetti next argues that the $300 fee City Manager Dragon quoted to Ms. King for copies of emailed food inspection reports violated RSA 91-A:4, IV. (Pet.'s Mem. 49.) The provision states, in relevant part:

> If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, 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. No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form.

RSA 91-A:4, IV. Specifically, Professor Salcetti notes that City Manager Dragon did not offer Ms. King a free option for only accessing these records without having specified a particular format, and that the City did not need to print the records to provide access. (Pl.'s Mem. 49.)

The Court understands Professor Salcetti's argument and agrees with the premise: government agencies should not quote a cost to a requestor for a format that she did not request when a cheaper or free option is available. However, the nature of

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[3] Professor Salcetti relies on outdated regulations, as the cited provision was repealed in 2011. See He-P 2300 (2018) (lacking a section 2302.25 as cited, and section 2302 ending at 2302.02). The Court thus does not address the regulatory obligations Professor Salcetti alleges binds the City to maintain its records.

Ms. King's request mandated the City's response. The City is not required to provide the reports to Ms. King electronically or in any avenue other than through an in-person meeting on the City's office premises. Chapter 91-A:4, I provides that the right of access for purposes of inspection and copying of governmental records exists "during the regular or business hours" and "on the regular business premises" of all "public bodies or agencies." See Taylor v. Sch. Admin. Unit #55, 170 N.H. 322, 328 (2017) ("[T]here is no provision of RSA chapter 91-A that requires a governmental body to 'deliver' records to any location other than its regular place of business."); see also id. at 328–29 (holding that plaintiff did not have right under Chapter 91-A to have records emailed to him so long as the alternative manner of electronic production chosen by the municipality did not "diminish the ease of use of the information produced or the public's access to the information sought").

Neither could the City have provided these emailed reports without either providing Ms. King with computer access to the email account or accounts that sent the reports or printing the emails. There is no reasonable argument that the City should provide Ms. King with access to a City employee's account or access to a City computer to view these emails. Therefore, Ms. King's only option of receiving these emailed reports was for them to be printed out. City Manager Dragon's offer to Ms. King did not violate any provision of Chapter 91-A.

4. Verbal Denial of Ms. King's Request

Professor Salcetti has also alleged that Ms. Marcou improperly verbally denied Ms. King's request on October 26, 2017 while RSA 91-A:4, IV requires a written denial when a public body or agency is unable to fulfill a request. (Pet.'s Mem. 40–41.) The

undisputed facts do not support this argument however, as Ms. Marcou was entirely unaware of Ms. King's request before Ms. King arrived at the CED with Mr. Dudal. (Marcou Aff. ¶¶ 2–7.) It is also undisputed that the City's practice for receiving Right-to-Know requests is to require a written request form, which Ms. King provided to Mr. Dow.[4] (Ex. 3; Ex. 15.) Therefore, Ms. Marcou was not a recipient of Ms. King's Right-to-Know request and could not effectively deny it as Professor Salcetti alleges. The undisputed facts reflect that Ms. King arrived at the CED with Mr. Dudal without informing Mr. Dow and without coordinating a visit with Ms. Marcou or any other City employee that she would be appearing at the CED in relation to her already filed written request. (Dudal Aff.; King Aff.; Marcou Aff. ¶ 7.) At the time she went to the CED, Ms. King had no reason to believe that Ms. Marcou was handling her Right-to-Know request when she had only been in correspondence with Mr. Dow and Mr. Dow had assured her he would handle her request. (Ex. 13; Ex. 14.) Ms. King's conversation with Ms. Marcou could best be characterized as informational, touching on what records the CED has, what property records are subject to a Right-to-Know request, and what the property records contained. (Marcou Aff. ¶¶ 2–9.) Ms. Marcou's explanation to Ms. King about what records are and are not available at the CED cannot be construed as a denial of her written request made to Mr. Dow.

Furthermore, Ms. King continued to pursue her request with Mr. Dow and City Manager Dragon even after her encounter with Ms. Marcou, indicating that she did not believe that her request had been denied. (Ex. 35; Ex. 40.) And, Ms. King received detailed explanations of why her request was denied from both Mr. Dow and City

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[4] The Court does not reach the merits of the City's requirement for a written request. See infra Part VI.C.2.

Manager Dragon. (Ex. 34; Ex. 40.) The facts therefore do not support that Ms. Marcou verbally denied Ms. King's request in violation of RSA 91-A:4, IV.

B. KPD Records

1. Records Do Not Exist As Requested (RSA 91-A:5, IV Exemption)

Professor Salcetti argues that the City improperly denied Mr. Fleming's and Ms. Vasas' requests by construing them to be requests for single records. (Pl.'s Mem. 30–33.) Professor Salcetti points to Mr. Fleming's use of plural nouns in his request to the City: "records," "documents," "citations," and "infractions." (Id.; Ex. 4.) Professor Salcetti then compares these words to the City's response that contains a singular noun: "there is no existing governmental record . . . ." (Ex. 4; Ex. 8.) She also points to Ms. Vasas' request for "All charges of Aggravated Felonious Sexual Assault" and "Drug/Alcohol Facilitated Sexual Assaults" and to the City's response that "there are no existing governmental records for all charges listing" charges of the two crimes. (Ex. 8; Ex. 24.)

Professor Salcetti's grammatical comparison fails to evidence that the City improperly construed Mr. Fleming's or Ms. Vasas' request. Whether the students requested one record or a thousand, a response indicating that not one responsive record existed would have been phrased the same way. The City's response to Mr. Fleming clearly equates to saying that not even one responsive record exists. It is unreasonable to read the City's response to be indicative of a narrow interpretation. Significantly, Mr. Fleming himself construed Mr. Dow's response to his request to mean "that there are no governmental records relating to my request." (Ex. 36.) And Mr. Fleming's response to Mr. Dow's denial of his request, in which he asked, "Shouldn't

there be a record of when [these laws] are violated?", signifies that he did not read Mr. Fleming's response to misconstrue his original request. (Ex. 4.) The Court also notes that Mr. Fleming replied to Mr. Dow asking for clarification, indicating that if he felt the need to clarify that his request was understood or was construed properly that he would have.

The City replied to Ms. Vasas that it had no responsive "governmental records listing all charges" of the two statutes. (Ex. 8; Ex. 24). Similarly, the Court does not find this response evidences that the City misconstrued her request to be for only one record, as the City used the plural word "records." And, significantly, the City's response to Ms. Vasas demonstrates that it interpreted her second request, for "[a] copy of KPD's protocol for sexual assault incidents," as a request for "governmental records relating to protocols or standard procedures for processing sexual assault crimes." (Compare Ex. 6 with Ex. 24.) There is no basis to conclude that the City improperly construed Ms. Vasas' requests too narrowly as requests for singular documents.

The Court also finds that the City did not act improperly in construing the students' requests as requests for lists. In regard to Mr. Fleming's request, he first requested "all documents including, but not limited to, printed document and electronic documents police citations [sic] involving infractions pertaining to" RSA 179:10 and RSA 644:18. (Ex. 4.) Mr. Fleming then submitted a written request that changed the phrasing of this request to "All documents including, but not limited to, printed documents of police citations involving the total number of infractions resulting from violations of" the same two statutes. (Ex. 7.) It is clear from Mr. Fleming's written request that he sought documents reflecting the "total number" of infractions, rather than

the individual case files that would contain the "infractions" themselves. (Ex. 4.) The City's construction of his request was proper.

In regard to Ms. Vasas' request, the Court cannot find that the City improperly determined that she requested a list when Ms. Vasas' request asked for "All charges" of two statutes. (Ex. 6.) The rhetoric of criminal procedure make Ms. Vasas' request impossible to respond to literally, as a "charge" is not a record but rather an accusation, sometimes one of several, made against a defendant that may or may not result in a conviction. And, a "charge" could pertain to an indictment or a complaint filed by the state against a defendant; it may or may not include information about the defendant and the victim, or it could include no information other than what law was alleged to be violated, depending on what form a "charge" is in. It would be reasonable for the City, or any individual familiar with criminal procedure and law, to find Ms. Vasas' request too vague to respond to at all.[5] The City had an obligation to interpret her request liberally and with common sense but not to mean something the requestor did not intend.

> The government must use some semblance of common sense in interpreting FOIA requests, and an agency also has a duty to construe a FOIA request liberally. However, the linchpin inquiry when determining whether a request reasonably describes records is whether the agency is able to determine precisely what records are being requested. The agency is not obliged to look beyond the four corners of the request for leads to the location of responsive documents, and ultimately it is the requester's responsibility to frame requests with sufficient particularity.

Hall & Assocs. v. U.S. Envtl. Prot. Agency, 83 F. Supp. 3d 92, 101 (D.D.C. 2015) (citations and quotations omitted). Rather than deny her request as vague, the City

[5] Indeed, the vagueness of Ms. Vasas' request would have been a basis to deny it. See RSA 91-A:4, IV (emphasis added) ("Each public body or agency shall, 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."); see also Kowalczyk v. Dep't of Justice, 73 F.3d 386, 388–90 (D.C. Cir. 1996) (citing 5 U.S.C. §§ 552(a)(3)(A) & 552(b)) (affirming denial of FOIA request because it was vague).

interpreted Ms. Vasas' request to be one for a list of charges of the two statutes, a reasonable interpretation because of the nature of a "charge" and the lack of detail in Ms. Vasas' request: she detailed the time frame from which she wanted these "charges" and what statutes she was interested in, but did not explain what she meant by "charges." (Ex. 6.) The best that could be garnered from this request is that Ms. Vasas was interested in a list of how many times any prosecutorial body in New Hampshire made, against any defendant, a charge of violating either statute, regardless of whether the defendant was ultimately acquitted or convicted. This interpretation would be a reasonable interpretation whether it would include grand jury indictments or not. The most obvious way to obtain such information would be through a list, rather than pulling each individual file that contains any mention of the two statutes. Professor Salcetti has not suggested any other form of records Ms. Vasas could have meant with her request. The Court finds the City's interpretation was reasonable.

The Court next notes that Professor Salcetti does not argue that the City has a duty to create a list in response to a Right-to-Know request, thus aligning with recognized and undisputed law. RSA 91-A:4, VII. She therefore does not dispute that, if the students' requests were properly construed to be requests for the City to create lists that the City did not have, that a denial would be proper. While the Court finds the City properly construed both Mr. Fleming's and Ms. Vasas' requests as requests for a list, the Court also addresses the City's duty to perform an adequate search, which Professor Salcetti argues was not fulfilled. The Right-to-Know provision that relieves state agencies from creating lists in response to requests does not relieve them from responding to requests with lists that it already has. See N.H. Civil Liberties Union, 149

N.H. at 440 (finding compilation exception from Brent, 132 N.H. at 426, did not apply because plaintiff's request did not actually require defendant to compile a list); id. at 439–40 ("While the Brent rule shields agencies from having to create a new document in response to a Right-to-Know request, it does not shelter them from having to assemble existing documents in their original form.").

2. City Denied Requests Before Contacting KPD

Professor Salcetti has argued that the City improperly denied Mr. Fleming's and Ms. Vasas' requests before an adequate search for responsive governmental records was performed. (Pl.'s Mem. 46.) The City responds that it construed Mr. Fleming's and Ms. Vasas' requests lists that the City did not have or maintain, and that the City is not obligated to create such lists under RSA Ch. 91-A:4, VII. Having found that the City properly construed both Mr. Fleming's and Ms. Vasas' requests as requests for lists, the Court only analyzes whether the City adequately searched for responsive records that already existed in the form of lists.

The Right-to-Know law obligates public bodies or agencies to allow inspection, or must make available for inspection, only the "governmental records in [its] possession, custody, or control." RSA 91-A:4, I. "Under the federal Freedom of Information Act (FOIA), 'the adequacy of an agency's search for documents . . . is judged by a standard of reasonableness. The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents.'" ATV Watch v. New Hampshire Dep't of Transp., 161 N.H. 746, 753 (2011) (quoting Church of Scientology Intern. v. United States Dept. of Justice, 30 F.3d 224, 230 (1st Cir.1994)). The burden to show that a search was adequate is on the agency.

Id. (quoting Lee v. United States Atty. for S. Dist. of Fla., 289 Fed.Appx. 377, 380 (11th Cir.2008)) ("[T]he agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents."); see also Truitt v. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990).

In regard to Mr. Fleming's request, Mr. Dow explained in two emails that the request was denied because there was no existing governmental record listing all citations pertaining to violations of RSA 179:10 and RSA 644:18, that the KPD had "reviewed the record systems containing governmental records in their possession for a report . . . [and] the requested governmental record does not exist," and that the City had no obligation to create such a record. (Ex. 4.) Professor Salcetti points to emails sent after the filing of this lawsuit that reflect Chief Russo could not affirmatively say that the KPD received Mr. Fleming's request at all.[6] (Ex. 46.)

It is the City's burden to demonstrate by affidavit or other evidence that it undertook a search reasonably calculated to discover the requested documents. Conkey v. Town of Dorchester, No. 2014-0343, 2015 WL 11077804, at *4 (N.H. Mar. 16, 2015); ATV Watch, 161 N.H. at 753. Mr. Dow's email denying Mr. Fleming's request is the only evidence suggesting a search was made in response to Mr. Fleming's request; Mr. Dow, by affidavit, does not state that any effort was made to search the City's records. (Dow Aff. ¶ 3.) There is thus no evidence of how a search was made, such as its search terms or what City employees or agencies were contacted in response to the

[6] The Court does not find this evidences that the KPD never received Mr. Fleming's request, since the KPD partially fulfilled Ms. Vasas' request when Chief Russo provided the KPD sexual assault protocol to Mr. Dow yet also did not have her name on file. (Ex. 22.)

request, or even that a search was made at all.[7] The City has fallen short of its obligation to show "beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." Lee, 289 Fed.Appx. at 380; see also Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (internal citations omitted) ("There is no requirement that an agency search every record system. . . . However, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. . . . At the very least, State was required to explain in its affidavit that no other record system was likely to produce responsive documents.").

Neither has the City demonstrated that it conducted a search in response to Ms. Vasas' request for "[a]ll charges of Drug/Alcohol Facilitated Sexual Assaults" from 2013 to 2017. (Ex. 6.) Mr. Dow's denial of Ms. Vasas' request also only stated that the City had "determined that there are no existing governmental records listing all charges of aggravated felonious sexual assaults for the years 2013 through 2017 or charges of drug-alcohol facilitated sexual assaults from 2013 through 2017." (Ex. 24.) The City did evidence that Mr. Dow inquired with the KPD regarding Ms. Vasas' request for KPD's protocol for sexual assault incidents, but offers no evidence that the City conducted as search in response to her request for the lists she requested. (Ex. 23.) The City has not demonstrated that it made an adequate search in response to Ms. Vasas' request.

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[7] The Court need not address the likelihood of the City finding the lists Mr. Fleming and Ms. Vasas requested, but notes the comparison of Mr. Dow's responses to Mr. Fleming and Ms. Vasas to the responsive governmental records provided to Ms. Pecci. Ms. Pecci also had requested records from the KPD and had made a similarly broad request for all documents related to excessive police force or police brutality. (Ex. 3.) Despite how this request could have been construed as a "list," a search resulted in a record responsive to her request. (Ex. 12; Ex. 38.)

The New Hampshire Supreme Court has utilized language in line with federal FOIA burden-shifting practice when analyzing whether an agency has adequately searched for responsive documents: in both ATV Watch and Conkey, the Supreme Court explained that an agency carries the burden to show beyond a reasonable doubt that it conducted a search reasonably calculated to uncover all relevant documents, and that once such a showing is made, "the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith." Conkey, 2015 WL 11077804, at *4 (quoting ATV Watch, 161 N.H. at 753). Within this same vein of federal FOIA law, there is guidance on what an agency must show to shift the burden and why such a showing is necessary:

> The adequacy of an agency's search for documents requested under FOIA is judged by a reasonableness standard. The search need not be exhaustive. Rather, the agency must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents. This burden can be met by producing affidavits that are relatively detailed, nonconclusory, and submitted in good faith. Once the agency meets its burden to show that its search was reasonable, the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith.

Lee, 289 F. App'x at 380 (citations and quotations omitted).

> A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.

Oglesby, 920 F.2d at 68. The City has failed to provide any evidence or affidavit that contains such information. The Court cannot presume the City acted reasonably in denying Mr. Fleming's and Ms. Vasas' requests, even if their requests were for lists, without any evidence of conducting a search or of why foregoing a search was

reasonable; doing so would circumscribe the purpose of the Right-to-Know law: accountability to the public. N.H. Civil Liberties Union, 149 N.H. at 438–39 (quoting RSA 91-A:1). Therefore, the Court finds that the City has failed to provide sufficient evidence to meet its burden. However, within 30 days, the City shall provide an explanation of how it searched for records responsive to Mr. Fleming's request and Ms. Vasas' request.[8] If the City did not conduct a search in response to these requests, then it has the obligation to articulate why foregoing a search was reasonable.

3. City's Offer to Provide Responsive Records

Professor Salcetti asserts that the City possesses police records responsive to Mr. Fleming's, Ms. Vasas', and Ms. Pecci's requests. (Pl.'s Mem. 29.) She points to an exhibit submitted at the hearing on the merits of an email that she alleges memorializes a conversation with the City—specifically, with its counsel—about what records the City would provide to the three students. (Ex. 52.) At the hearing, the City did not contest the authenticity of the email but contested what it symbolizes.

The email, sent from Professor Salcetti to the City's counsel, contains a reiteration of the City's counsel's representations of what records the City possesses,[9] including "600 items regarding RSA:179:10. Minors in Possession of Alcohol from 1-1-2012 to 12-31-16" as records relevant to Mr. Fleming's request; "17 cases of Aggravated Felonious Sexual Assault under RSA 632-A:2 from 2013-2017," relevant to Ms. Vasas' request; and information that could "somewhat address[]" Ms. Pecci's "requests regarding KPD for the time period: Aug. 1, 2012 to Sept. 22, 2017 of all citizen

[8] Because the City provided Ms. Vasas with records responsive to her request for the KPD sexual assault protocol, only an explanation regarding the remainder of her request is necessary.
[9] The Court assumes, for the sake of this issue, that the City does have the described records.

complaints regarding charges of excessive police force or police brutality." (Ex. 52.) Each student's request is reiterated numerically, and under each Professor Salcetti states that he or she "would like the following" and continues to list specific information such as "Number of violations for each month of every year"; "number by Gender"; "Number of Pleas for all 600 [files]"; "Injuries Reported or Not Reported"; "Victim's residential town and state"; "Age breakdown by following categories: Under 16, 16-17; 18-23; 24-30; 31-40; 41-50; 51 and over"; "That all charges include all category headings and are not redacted"; and others. (Ex. 52.)

The Right-to-Know law obligates public bodies or agencies to allow inspection, or must make available for inspection, only the "governmental records in [its] possession, custody, or control." RSA 91-A:4, I. An agency cannot be held liable for failing to make available records that it does not possess. See Hart v. F.B.I., No. 94 C 6010, 1995 WL 170001, at *2 (N.D. Ill. Apr. 7, 1995), *aff'd, 91 F.3d 146* (7th Cir. 1996) ("Since the government has not withheld any responsive documents, an indispensable prerequisite to this Court's jurisdiction is missing."); see also Nolen v. Rumsfeld, 535 F.2d 890, 891 (5th Cir. 1976) ("The Act compels disclosure only of existing records."); Nichols v. United States, 325 F. Supp. 130, 137 (D. Kan. 1971), *aff'd, 460 F.2d 671* (10th Cir. 1972) ("[T]he Court may not require production of records not in custody or control of an agency.")

As concluded above, the City properly construed Mr. Fleming's and Ms. Vasas' requests as requests for lists of violations of certain statutes within specific time frames. See Part VI.B.1. Professor Salcetti's assertion that the City possessed records responsive to Mr. Fleming's and Ms. Vasas' requests for lists is not evidenced by this

email, which only represents that the City possessed 600 items that Mr. Fleming may find useful and 17 cases Ms. Vasas may find useful. (Ex. 52.) The email does not evidence that the City had or has a list containing the information the students wanted. What is "available" does not meet what the City believed would satisfy the students' requests before, as demonstrated by its emails and explanations for why such records didn't exist. According to the interpretation of the requests, and the Court's affirmation of those interpretations, the 600 files and 17 files would not have been responsive.

In regard to Ms. Pecci's request, Professor Salcetti concedes that Ms. Pecci received responsive records but that the City possesses documents that are "less redacted." (Pl.'s Mem. 29.) Because the City did provide records to Ms. Pecci, the Court, thus the Court cannot find that the City improperly withheld records from Ms. Pecci. See Hart, 1995 WL 170001, at *2. However, the Court does address whether the City acted properly in redacting certain information that Ms. Pecci received.

4. Redactions (RSA 91-A:5, IV Exemption)

Next, the Court addresses the City's response to Ms. Pecci and whether the redactions on the responsive reports violated Chapter 91-A. (Pet.'s Mem. 29–30.) Professor Salcetti takes issue with the redaction of headings on the charts Ms. Pecci received, but concedes that the names of officers likely could have been properly redacted. The City echoes its original purpose of redacting police officer names, which was that "in accordance with RSA 91-A:5, IV, and the Attorney General's memorandum on New Hampshire Right-to-Know Law, officers' names have been redacted as this information is exempt from disclosure." (Ex. 38.)

RSA 91-A:5, IV exempts "[r]ecords pertaining to internal personnel practices . . . whose disclosure would constitute invasion of privacy" from disclosure. "When the exemption is claimed on the ground that disclosure would constitute an invasion of privacy, we examine the nature of the requested document or material and its relationship to the basic purpose of the Right-to-Know Law." Union Leader Corp, 141 N.H. at 476. "When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." New Hampshire Right to Life v. Dir., New Hampshire Charitable Trusts Unit, 169 N.H. 95, 103 (2016) (quoting Montenegro, 162 N.H. at 649). To meet this burden, the non-disclosing party must show "that the records sought will not inform the public about the department's activities, or that a valid privacy interest, on balance, outweighs the public interest in disclosure." New Hampshire Civil Liberties Union, 149 N.H. at 440.

Despite bearing the "heavy burden," the City has provided no evidence that the records it withheld are subject to the exemption in RSA 91-A:5, IV. Instead, the City has made an argument regarding RSA 516:36, II "subsum[ing]" the exemption and also its "independen[ce]" from the exemption, creating "its own terms to preclude disclosure of the governmental records defined by that statute." The Court first notes that this reason for nondisclosure was never provided to Ms. Pecci. (Ex. 38.) The Court then notes that the City provides no authority for its proposed statutory interpretation. Rather, the statute itself is limited to "any civil action other than in a disciplinary action between the agency and its officers, agents, or employees." RSA 516:36, II. This statute therefore provides no basis for withholding records responsive to a Right-to-Know request.

The City has failed to provide adequate evidence to satisfy its burden. When a public body or agency denies a request based on privacy interests, as the City has done here by citing to RSA 91-A:5, IV, determination of whether the redacted information "is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations. If no privacy interest is at stake, the Right–to–Know Law mandates disclosure." Lambert, 157 N.H. 382–83 (citations omitted). The City bears the burden of proving the characteristics of the requested documents and the contents that have been redacted. The only evidence before the Court of what was redacted and why is an email from Ms. DiNapoli to Mr. Dow that explained, "These records consist of statistical summaries of citizen complaints for the years requested . . . . the officers' names have been redacted as this information is exempt from disclosure." (Ex. 38.) Again, the Court is without context or evidence of what headings are at issue and what interests the parties may have in the headings.

Neither party has provided evidence or arguments of whether "a valid privacy interest, on balance, outweighs the public interest in disclosure"; the City ultimately bears this burden, however. Lambert, 157 N.H. at 386. The correct procedure for proving to the Court that redacted information is not subject to disclosure is submitting the evidence for in-camera review, which the City has not done. See New Hampshire Right to Life, 169 N.H. at 113 ("[A]bsent further fact-finding by the trial court, we cannot determine whether those individuals have a heightened privacy interest at stake in the nondisclosure of the DVD footage."); Lambert, 157 N.H. at 386 (remanding a case to the trial court because it did not conduct an in camera review of unredacted documents nor was the Supreme Court provided with them, thus "while the candidates may have

more than a minimal privacy interest . . . , we have no means of assessing whether redaction might be warranted for such information"); ATV Watch v State of New Hampshire Department of Transportation, No. 08-E-0030, 2008 WL 8820249 (N.H. Super. Feb. 21, 2008) ("The Court would note that an *in camera* procedure for review of materials that are asserted to be exempt or privileged is a recognized means for a Court to weigh issues of confidentiality and public disclosure.")

For this reason, the Court has no evidence upon which to make this decision and allows the City with 30 days to provide the Court with the unredacted documents Ms. Pecci requested, as well as any arguments about weighing the privacy interest and the public interest in disclosure. Professor Salcetti is also allowed 10 days to respond to any such arguments.

5. City Required to Specify Reasons for Denying Pecci's Request

Professor Salcetti argues that the City did not adequately explain its denial of Ms. Pecci's request when it cited RSA 91-A:5, IV and the Attorney General's Memorandum on New Hampshire Right-to-Know Law, thus violating RSA 91-A:4, V. (Pet.'s Mem. 42–44; Ex. 12.) This argument is misplaced in two regards.

First, the City's explanation for its denial was clear. Professor Salcetti argues that citing to RSA 91-A:5, IV and to the Attorney General's Memorandum on New Hampshire Right-to-Know Law was too general. (Pet.'s Mem. 43.) However, the City's citation to RSA 91-A:5, IV alone would have sufficed because the provision contains only one practical reason for denial: because disclosure "would constitute invasion of privacy." RSA 91-A:5, IV. Whether the requested documents pertain to internal personnel practices, financial information, test questions, scoring keys, academic

examinations or medical information, the exemption only applies to such documents when their disclosure would be an invasion of privacy. Indeed, disclosure of a requested document could not be prevented simply by stating that the document was "pertaining to internal personnel practices," rather it would only be exempt if it constituted an invasion of privacy. Id. Therefore, the City's explanation that it was withholding disclosure because of RSA 91-A:5, IV, within which there is only one justification for withholding disclosure, was adequately clear.

And, second, RSA 91-A:4, V contains no obligation for the City to articulate a reason for a denial beyond providing a minimal reason in writing. See New Hampshire Right to Life, 169 N.H. at 125; Murray, 154 N.H. at 583 ("A denial should 'be distinct enough to allow meaningful judicial review.'"); Curran v. Dep't of Justice, 813 F.2d 473, 475 (1st Cir. 1987) ("Although generic determinations are permitted, . . . there must nevertheless be some minimally sufficient showing."). In Murray, the Supreme Court found that the State's denial that included only "statutory provisions, case law, or applicable privileges indicating the exemption or other reason for non-disclosure" was sufficient under RSA 91-A:4, IV. Murray, 154 N.H. at 583. Here, the City has cited to a specific exemption—which, as explained above, contains only one reason for denying a request—as well as reference to what was being redacted. (Ex. 12.) Because citation to the exemption and explanation of what was being redacted was sufficient to convey the reason for the reaction, the City satisfied its obligation.[10]

[10] This conclusion is only in regard to the City's explanation to Ms. Pecci for the redactions and is separate from the Court's conclusion that the City must evidence that these redactions were proper.

6. City Improperly Delayed Response to Requests

Professor Salcetti next argues that the City improperly delayed access to records that Ms. Pecci requested. (Pet.'s Mem. 44–47.) Citing to the preamble to Chapter 91-A, Professor Salcetti asserts that the City is bound to give Right-to-Know requests priority even after acknowledging receipt of the request. (Id.) The City did not respond to this argument.

RSA 91-A:4, IV requires that, "upon request for any governmental record reasonably described," a public body or agency shall "make available for inspection and copying any such governmental record within its files when such records are immediately available for such release"; or, if unable to do so, then a public body or agency "shall, within 5 business days of 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." RSA 91-A:4, IV.

In each of its responses to the students, the City provided receipts of the requests within either one or two days. Supra Part I. The City's ultimate denials or granting of the students' requests varied. Professor Salcetti focuses on the City's response to Ms. Pecci's request, stating that even though the City "established" a 30-day period when it estimated how long it may take "to gather and determine whether all of the specific records are covered under the right-to-know law" and to make them "available for review," the City didn't "respond . . . to Pecci that certain requested records were available" until nearly two months later. (Pet.'s Mem. 45; Ex. 5.) This, she alleges, was a violation of RSA 91-A:4, IV or the Right-to-Know law generally.

The Court does not read RSA 91-A:4, IV to have such a requirement. The plain language of the statute requires the responding public body or agency to send receipt to a request with "a statement of the time reasonably necessary to determine whether the request shall be granted or denied." RSA 91-A:4, IV. It is required that an estimate be given; what that estimate is, however, is explicitly left to the responding public body or agency to determine what is "reasonable." Id. The Court notes that the New Hampshire Supreme Court has interpreted RSA 91-A:4, IV without such an additional requirement. In ATV Watch, the Court determined that sending a receipt within five days of receiving a request, "[o]n its face," satisfied the agency's requirements under RSA 91-A:4, IV. 161 N.H. at 756. The Supreme Court did not consider when the request was satisfied to determine that the agency met its duty; neither will this Court.

Professor Salcetti provides no authority to support her reading of the statute, but the Court understands her argument as the practical remark that if the statute did not require more than sending a "receipt" within five days then a public body or agency could create unchecked, self-imposed deadlines and circumvent any timing requirement. The Court acknowledges this concern and emphasizes the controlling phrase in the statute: "reasonably necessary." The Supreme Court has indicated, though not explicitly expressed, that this phrase is not arbitrary. In ATV Watch, the petitioner argued that the DOT violated the Right-to-Know law by withholding documents that were immediately available. 161 N.H. at 756. The Supreme Court stated that it had no reason to assess whether the responding agency satisfied the statute when the petitioner failed to identify what documents it believed were being improperly withheld or to "elaborate as to why they were 'probably' available for immediate release." Id. at

756–57. Thus, if a petitioner alleges that an agency is improperly withholding responsive records—and can articulate what records are being withheld and why he or she believes such records exist but are being withheld—a court may inquire further than whether a receipt was sent. However, it is clear that the "reasonably necessary" requirement does not force a public body or agency to provide responsive records immediately after they are requested. Brent, 132 N.H. at 425.

Professor Salcetti alleges that the City violated the Right-to-Know law by failing to abide by its 30-day timeline estimated to Ms. Pecci. Professor Salcetti has highlighted Mr. Dow's failure to notify the KPD of Ms. Pecci's request until October 31, 2017, which was beyond the 30-day estimation Mr. Dow provided to Ms. Pecci.[11] (Ex. 5; Ex. 25.) Even treating this evidence as an articulation of what records the City is alleged to have improperly withheld and as support for why this allegation is being made, thus satisfying the ATV Watch requirement, the Court does not find that the City violated the Right-to-Know law despite the delayed response.

First, though the City has not alleged that Ms. Pecci misfiled her request, the Court notes that Mr. Dow informed Ms. Pecci twice of the requirement for a signed written request form. (Ex. 3.) Despite this and despite her failure to provide the form, Mr. Dow contacted KPD with Ms. Pecci's request on October 31, 2017. (Ex. 25.) Because Ms. Pecci was aware of the requirement but had not submitted the form yet, the Court finds that the City's delay in sending the request to KPD was reasonable. Mr. Dow's sending the request to KPD even without having received the request form could indicate that it is an unenforced requirement, but it could also indicate that he was

[11] The Court notes that Mr. Dow emailed Ms. Pecci on that day, ten minutes before he emailed the request to the KPD, stating that he had yet to receive a signed written request from her. (Ex. 3; Ex. 28.)

attempting to search for responsive records in anticipation of Ms. Pecci submitting the request form. It is unclear what Mr. Dow intended, but the evidence before the Court does not suggest that the City improperly withheld responsive records.

Second, the Court points out that Ms. Pecci ultimately did receive responsive records. (Ex. 38; Ex. 12.). The Court will not read a prejudice requirement into Chapter 91-A. ATV Watch, 155 N.H. at 441 ("The plain language of the provision does not allow for consideration of the factors applied by the trial court, such as 'reasonable speed,' 'oversight,' 'fault,' 'harm,' or 'prejudice.'"). But if a delay is found reasonable, there is no violation of Chapter 91-A. See Brent, 132 N.H. at 430 (finding that a delay in responding to petitioner's request, caused by school officials' reasonable concern about "whether specific records should be released to the public" and the temporary absence of a particular official who would make the decision, was reasonable and the petitioner's rights were not violated). Here, the Court finds that the City was reasonable in its delay of responding to Ms. Pecci's request, which is all RSA 91-A:4, IV requires.

C. Issues Relevant to City's Responses to All Five Students

The Court next addresses issues Professor Salcetti has raised generally and in regard to multiple students' requests or the City's practices.

1. City's Procedural Rules and Internal Policies

Professor Salcetti takes issue with the City's alleged nonadherence to its own Right-to-Know policies, citing to case law that requires administrative agencies follow their own regulations. (Pet.'s Mem. 23–26; Ex. 1.) The City's policies are contained in Exhibit 1, which is an administrative directive from May 21, 2009. (Ex. 1.) Specifically, Professor Salcetti argues that the City failed to "immediately . . . notify . . .the

appropriate staff responsible for the requested record." (Pet.'s Mem. 23–26.) The City failed to address this issue.

The City is not an administrative agency, and its policies do not equate to regulations. See RSA 91-A:1-a, V & VI (defining "public agency" and "public body," enumerating "agency" and "office of the state or . . . town" separately). An administrative agency is a government body created by statute and assigned a regulatory role. In re Town of Bethlehem, 154 N.H. 314, 327 (2006) (quoting In re Town of Nottingham, 153 N.H. 539, 554–55 (2006)); Agency, Black's Law Dictionary (10th ed. 2014) ("An official body, esp[ecially] within the government, with the authority to implement and administer particular legislation."); Regulation, Black's Law Dictionary (10th ed. 2014) ("An official rule or order, having legal force, usu[ually] issued by an administrative agency.").

There is no evidence that the City's policies for responding to Right-to-Know requests are enforceable by this Court or are anything beyond best-practices guidelines for the City's employees and requestors. The City's policies themselves cite to "RSA 91-A: City Charter Section 45" as their authority; but RSA 91-A does not charge cities or towns to create such policies, thus the policies cannot be said to be enabled or mandated by state statute. And, the Court notes, the Right-to-Know law only allows the Court to order a remedy for violation of "any provisions of this chapter." RSA 91-A:8, I. Because Chapter 91-A does not contain a requirement, the Court cannot address this issue. Therefore, the Court need not analyze whether the City violated its own policies.

2. City's Requirement for Written Requests

Professor Salcetti challenges the City's practice of requiring Right-to-Know requests be submitted as written requests. (Pet.'s Mem. 47–49.) The City has failed to respond to this issue.

The Court does not have a sufficient allegation before it to adjudicate the issue. Professor Salcetti has failed to allege that any of the students were prohibited from receiving responsive records because of the City's practice or that their rights to access were otherwise affected by the practice. See Montenegro, 162 N.H. at 651 (not addressing the petitioner's argument under Right-to-Know law because he failed to allege that he attempted to exercise the right he claimed was violated and he thus did not have standing); Gen. Elec. Co. v. Comm'r, N.H. Dep't of Revenue Admin., 154 N.H. 457, 461 (2006) ("The general rule in New Hampshire is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected."). Professor Salcetti argues the policy affected Ms. Pecci because she was required "to resubmit her request, signed and in writing," and that Mr. Fleming experienced the same violation. However, there is no allegation that this requirement as applied to either of the students led to a denial of records or a delay of access to those records. Though Mr. Dow reminded Ms. Pecci twice to submit the form, he began searching for records responsive to her request before she submitted it. (Ex. 3; Ex. 28.) There is also no allegation that Mr. Fleming was at all affected by the practice, and the Court notes that Mr. Fleming provided the written request one day after his emailed request. (Ex. 4; Ex. 7.) Therefore, the Court will not analyze whether the City's practice violates Chapter 91-A.

3. Summary Reports vs. Voluminous Responses

Professor Salcetti has alleged that the City has violated Chapter 91-A by failing to provide summary reports when it is more efficient and by failing to be more responsive to the students' requests by clarifying with them what information was sought. (Pet.'s Mem. 50–51.) The City has replied that, while this is a "fine aspiration[]," "it fails to recognize the practical reality faced by the municipality" including hundreds of Right-to-Know requests that oftentimes involves multiple departments and City employees. (Resp't's Mem. 4.)

Both parties' arguments may be true, but neither provides legal force. First, Professor Salcetti relies on dicta language involving responses to federal FOIA requests, which the issuing court did not intend to be law or binding language. Nat'l Sec. Counselors v. C.I.A., 898 F. Supp. 2d at 272 ("The Court pauses, however, to note the perverse practical consequences of the CIA's choice to refuse to provide database listings in response to FOIA requests."). The D.C. Court clarified that while the CIA "can continue to escape the production of database listings under the FOIA if it wishes, the CIA may nevertheless find it more efficient to begin producing such database listings upon request because failing to do so may prompt requesters to seek the reams of data underlying such listings instead." Id. This Court cannot enforce language intended as guidance for best practices or as a call on Congress to adjust the actually binding legal requirements. Id. at n. 29 (prompting Congress). Neither is there a legal requirement under Chapter 91-A for the City to provide summary information, or any other streamlined information, simply because it would be more efficient to do so. The Court notes that while this pursuit would be theoretically beneficial to both requestors and

recipients of requests, it also would provide public bodies and agencies with complete discretion of what to provide or not provide, and how to provide it, to requestors based on what it determines is more efficient. This is not the intent of the Right-to-Know law, which obligates a responding state entity to grant access and has delineated, narrow exceptions that a responding state entity may claim on by satisfying the burden of proof. RSA 91-A:1 ("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."); N.H. Civil Liberties Union, 149 N.H. at 439 (citing Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 549 (1997)).

Second, while the Court recognizes the City's predicament, it notes that the City's shortage of resources or overwhelming amount of requests should encourage the City to provide summary reports or streamlined responsive records. The City has conceded that it could have responded more efficiently to Mr. Fleming's and Ms. Vasas' requests. (Resp't's Mem. 3.) The Court, however, is without authority to enjoin the City to act more efficiently, nor would doing so be in the spirit of Chapter 91-A. As the D.C. Court encouraged the CIA to take a more practical approach to requests, so does the Court encourage the City to provide more discernment and attention to Right-to-Know requests.

4. Duty to Read Requests Broadly

Professor Salcetti has also argued that the City violated Chapter 91-A by failing to read the students' requests liberally so as to provide "the greatest possible access to . . . records." (Pet.'s Mem. 20–21.)

Having already found that the City's responses to each of the students' requests were either reasonable or that the Court has insufficient evidence before it to determine whether they were reasonable or not, the Court need not address this general argument.

The Court also notes that a responding state entity's interpretation of a Right-to-Know request can greatly depend on the requestor's knowledge of what is being requested and how its kept, thus affecting how the request is made. As the Court explained during the hearing on the merits, it is undeniable that specialized knowledge of laws and criminal proceedings would aid making a request for KPD records. A requestor should not be burdened with understanding the intricacies of the State's file storage systems, but a requestor can greatly increase his or her chances of receiving responsive records if he or she forms an understanding of how a request could be granted. Several of the students' requests and communications in this case demonstrated a lack of understanding of not just how responsive records are kept but also what is and is not required under the Right-to-Know law, such as asking for lists or questioning why the City's legal department would review governmental records before their release. A Right-to-Know request is available to an average person of the citizenry, and granting a request should never be dependent on the requestor's specialized knowledge. However, as a practical matter, the more a requestor understands about what is and is not subject to disclosure and what procedures are involved in retrieving that information, the more likely that individual will maximize his or her right to access.

VII. *Conclusion*

The Court has addressed each of Professor Salcetti's arguments and has instructed the City to submit materials within 30 days on three additional points: an

explanation of how it searched for responsive records to Mr. Fleming's request, a similar explanation in regard to Ms. Vasas' request, and the unredacted records Ms. Pecci requested for in-camera review with explanation of why the privacy interest supporting redactions outweigh the public's interest in access. Supra Part VI.B.2 & VI.B.4. The Court also allows Professor Salcetti 10 days from the City's submission to respond. For the issues that this order has adjudicated, the Court has found the City did not violate the students' rights under Chapter 91-A.

The Court commends Professor Salcetti and her students for their willingness to hold the State and its entities accountable and for their enthusiastic efforts to ensure their rights as New Hampshire citizens and their duties as journalists. The function of the Right-to-Know law is best embodied when journalists and the citizenry act as watchdogs of their government, seeking information on what the government is doing and how those actions affect themselves and their community. Journalists are lauded for the diligence they put into gathering, compiling, and analyzing records and holding public officials and the government accountable on behalf of the rest of the citizenry. In their pursuit of this case, Professor Salcetti, as a pro se litigant and her students have demonstrated tenacity and passion crucial to the practice of journalism and to the functioning of a free, democratic society.

The Court also must note the City's inadequate response to Professor Salcetti's petition. While the City complains of the "unfortunate language" and "length" of Professor Salcetti's post trial memorandum, the City's four-page, heading-less memorandum is itself unfortunate considering the City bears the burden of proof in this case. N.H. Civil Liberties Union, 149 N.H. at 439 (citing Union Leader Corp. v. N.H.

Housing Fin. Auth., 142 N.H. 540, 549 (1997)). The City has failed to respond to many of Professor Salcetti's arguments, causing the evidence to speak for itself without contextualization or further explanation. This method failed the City in several instances, which has forced the Court to seek additional evidence to properly address the issues. It also creates the impression that the City does not take these cases very seriously. Obviously, the Court does.

SO ORDERED.

8-29-18
DATE

David W. Ruoff
Presiding Justice