STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Joseph Kelly Levasseur

v.

City of Manchester, et al.

No. 216-2014-CV-0125

ORDER

The petitioner, Joseph Kelly Levasseur, seeks preliminary and permanent injunctive relief prohibiting disclosure of certain email communications by the City of Manchester (the "City") to respondent Richard Girard. This action arises out of the City distributing copies of several thousand emails between the petitioner and his constituents to Girard pursuant to a Right-to-Know request under RSA 91-A. Respondents Girard and City Solicitor Thomas Clark have filed motions to dismiss. The court held a hearing on March 25, 2014. After consideration of the parties' arguments, pleadings, and the applicable law, the court finds and rules as follows.

Factual Background

The petitioner is a duly elected Alderman at Large for the City. In that capacity, he sends emails to and receives emails from his constituents on a regular basis. The petitioner utilizes a personal AOL email account for both his public and private communications. His AOL email address by his choice is listed on the City's website.

When a member of the public sends an email via the City's website, the communication is routed through the City's computer server, even though it goes to the petitioner's personal email account.

On July 31, 2013, the petitioner himself made a Right-to-Know request for emails from his account to the Manchester Building Department and anyone those emails were forwarded to during the year 2011. On August 21, 2013, the Union Leader made a request for information and correspondence sent to or from all city departments and employees to or from the petitioner. On September 6, 2013, the Union Leader made a second request, seeking duplicates of what the petitioner sought in July. On November 19, 2013, respondent Girard requested all emails between the petitioner and various individuals, including all members of the Board of Mayor and Aldermen relating to a Manchester dog park from June 1, 2013 to the present. On November 20, 2013, another alderman requested all emails relating to the petitioner generally. Finally, on January 6, 2014, Girard requested duplicates of the Union Leader's August 21 request.

The City collected all emails responsive to Girard's January request and allowed him to visit the City Solicitor's office and copy them onto a flash drive. Girard obtained approximately 1,800 emails, totaling approximately 11,000 pages, although many are duplicative because they were sent to numerous recipients. The City is also poised to release the emails responsive to Girard's November 19, 2013 request.[1] The petitioner now seeks to enjoin the review and publication of emails already released, as well as the release of any further documents.

Analysis

[1] The City maintains that these emails are subject to disclosure. However, after informal discussion with the petitioner prior to this action being filed, the City agreed to withhold disclosure until the court has ruled on the preliminary injunction.

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." New Hampshire Dept. of Envtl Servs. v. Mottolo, 155 N.H. 57, 63 (2007). The purpose of a preliminary injunction is to maintain the status quo pending a final determination of the case on the merits. Kukene v. Genualdo, 145 N.H. 1, 4 (2000). The party seeking an injunction must show that there is a reasonably likelihood of success on the merits. Id. "An injunction should not issue unless there is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." Murphy v. McQaude Realty, Inc., 122 N.H. 314, 316 (1982). Issuance of an injunction is a matter of discretion for this Court. Mottolo, 155 N.H. at 63.

As a preliminary matter, the petitioner offered no objection to Solicitor Clark's motion to dismiss provided it did not diminish his ability to pursue his requested relief against the City. Therefore, the court granted the motion to dismiss at the hearing. In addition, the petitioner conceded that any emails that were forwarded from his office to another department for review or action are discoverable pursuant to RSA 91-A. Therefore, the remainder of this order solely concerns emails exchanged between the petitioner and his constituents that were not shared with other City agents or employees.

I. Disclosure of Emails

The petitioner argues that emails sent to him individually from a constituent do not constitute discoverable material under RSA 91-A because he alone is not a public body, and thus the emails do not constitute governmental records. RSA 91-A:4, I provides that "[e]very citizen . . . has the right to inspect all governmental records in the

possession, custody, or control of [all] public bodies or agencies . . . except as otherwise prohibited by statute or RSA 91-A:5." RSA 91-A:1-a, III defines "governmental records" as "any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function."

The statutory definition of "public body" includes the general court, the governor and executive counsel, boards and commissions of state agencies, and any other legislative or governing bodies, commissions, boards, or agencies of counties, towns, municipal corporations, and school districts, among other things. See RSA 91-A:1-a, VI(a)-(d). This definition references these entities as a whole, rather than to their individual members. Therefore, while the petitioner is a member of a public body, namely the Board of Mayor and Aldermen, he is not a public body by himself. Indeed, in its answer to the petition, the City admits that a single alderman is not a public body. Answer ¶14. Therefore, the court finds that an email sent to a single alderman does not, on its own, constitute a record created, accepted or obtained by, or on behalf, of a public body.

Nevertheless, the court is not persuaded that, because a communication does not constitute a "governmental record" under RSA 91-A, it becomes a protected communication generally or as a result of the RSA 91-A exemptions. RSA 91-A, by its express terms, sets forth the parameters by which the government *must* disclose governmental records upon request, with certain exemptions set forth at RSA 91-A:5. The statute does not, however, prohibit or limit the disclosure of records beyond RSA 91-A:5. Absent a valid claim of privilege or confidentiality, the City has the discretion to

voluntarily disclose any non-governmental record in its possession or control pursuant to its own policies.

The court agrees that the City's policies are matters of politics. If the Aldermanic body decides that the disclosure policy is not good government and chills the ability of its citizens to freely communicate with their representatives, collectively the Alderman can change the policy. If the Board chooses not to change the policy or is unable to do so with its present composition and the citizens object, the majority of citizens may vote in new representatives. The emails in question were sent via the City's computer server, placing them within the City's possession and control. Therefore, while the City may not be required to disclose the emails under RSA 91-A, it may choose to do so if it wishes. The court is not in a position to question or alter the City's internal policy decisions.

The petitioner failed to articulate a convincing reason why the City is not able to disclose documents that do not fall under RSA 91-A, with one exception. At the hearing, the petitioner indicated that at least one of the emails at issue was a communication to him in his capacity as a private attorney. To the extent that any of the emails at issue contain attorney-client privileged information, they are exempt from production. Because the petitioner uses the same personal email address for both his public and private communications, there is a risk that such privileged communications are contained on the City's servers and are thus at risk of disclosure. However, simply because the petitioner may discuss a law with a constituent does not automatically cloak that communication with confidentiality.

In light of this, the court orders the City to provide or make available all emails that have been disclosed to Mr. Girard and which are pending disclosure within five (5) days of the clerk's notice of this order. The petitioner shall thereafter have fourteen (14) days to review the emails to cull out those that he believes contain privileged communications. Should the petitioner believe any email is exempt from disclosure due to the attorney-client privilege and the parties cannot agree that the email should not be disclosed, the petitioner shall submit a privilege log to the court, together with an affidavit attesting to its privileged status, with the unredacted email for *in camera* review. If nothing is submitted within twenty (20) days of the clerk's notice of this order, the emails that have not yet been provided may be disclosed by the City and any email provided may be utilized by Mr. Girard with the following limitations.

II. Privacy Interests

Beyond the question of privilege, the petitioner raises the privacy concerns of his constituents, arguing that they have an interest in not having their names and other identifying information disclosed to the public. RSA 91-A:5, VI exempts from disclosure "files whose disclosure would constitute invasion of privacy." In analyzing such matters, the New Hampshire Supreme Court has articulated the following test. First, the court determines whether disclosure of the documents does implicate a privacy interest. See New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003). If it does, the court then assesses the public's interest in disclosure of the documents, being mindful of the fact that "disclosure of the requested information should serve the purpose of informing the public about the conduct and activities of their government." Id. Finally, the court balances the public interest in disclosure against the privacy

interest in nondisclosure. Id. Given the frequency these days of identity fraud and harassment, the court finds it prudent to protect the constituents' identities.

The petitioner argues that his constituents have a privacy interest in the nondisclosure of their names, home addresses, email addresses, and phone numbers. Although the court has determined that RSA 91-A does not control the disclosure of the emails at issue, it takes some guidance from the exemption set forth in RSA 91-A:5, VI and the supreme court's balancing test derived from it. The respondents have offered no substantive objections to protecting personal information nor can the court see any reason why the personal information under these circumstances benefits the public.

Accordingly, the court orders that the respondents shall, before any further publication of the emails in question, redact names, home addresses, email addresses, and telephone numbers, as applicable, from all emails disclosed. To the extent such information is in the hands of Mr. Girard as a result of the early disclosure, that information shall not be further disclosed or published without further order of this court.

III. Payment of Reasonable Costs

Finally, the petitioner seeks an order requiring Girard to pay the reasonable cost of copying the information he has already received. RSA 91-A:4, IV provides that "[i]f a computer . . . maintained for use by a public body . . . 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 . . . ." (emphasis added). Even if the City could have assessed reasonable costs for the electronic copies Girard made, the statutory language is discretionary. The City represented that it made an interpretation of the statutory language that did not call for assessing costs, and that it

was the City's belief that it could not charge for the physical effort involved in gathering the documents responsive to Right-to-Know requests. The City further represented that it applied this policy to all requests, not just to Girard's. The court finds this to be reasonable and in compliance with the statute, and therefore will not disturb the City's decision.

IV. Conclusion

In light of the foregoing, the court finds that the petitioner has failed to demonstrate a reasonable likelihood of success on the merits. Accordingly, his request for preliminary injunction is DENIED, except to the extent that the private information of the constituents shall be redacted and shall not be disclosed. Thomas Clark's motion to dismiss is GRANTED. Respondent Girard's motion to dismiss with respect to petitioner's requests B, C, and D is GRANTED. Finally, because the petitioner wished this temporary order to serve as the final order, it shall and no further hearings will be scheduled.

SO ORDERED.

Date: 3/31/14

Diane M. Nicolosi
Presiding Justice