STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

James M. Knight

v.

School Administrative Unit #16, et al.

Docket No. 00-E-307

ORDER ON PETITION FOR INFORMATION

The petitioner, James M. Knight, has brought a Petition for Injunctive Relief and Request for Attorney's Fees pursuant to RSA 91-A. The petitioner seeks injunctive relief requiring the respondents, School Administrative Unit ("SAU") #16, Dr. Arthur Hanson - Superintendent of SAU #16, Exeter Region Cooperative School District ("ERCSD"), and Exeter School District ("ESD"), to provide the petitioner with access to the respondents School Districts' Internet History Log Files from January 1, 1998, and to enjoin the respondents from withholding any and all such data the School Districts collect in the future. The petitioner also seeks costs and attorney's fees as provided in RSA 91-A:8. The respondents object. The Court held a trial on the merits on September 19, 2000.

The issue before the Court is whether RSA 91-A, popularly known as the 'Right-to-Know Law' (Herron v. Northwood, 111 N.H. 324, 282 (1971)), entitles the petitioner to a list of the internet sites or addresses visited by computer users within the ERCSD and the ESD ("School Districts") from January 1, 1998. The School

16

Districts have saved and maintained this information in a file referred to as an Internet History Log File ("IHLF"). The preamble to the Right-to-Know Law, RSA 91-A:1, provides the purpose of the chapter.

> Openness in the conduct of public business is essential to a democratic society. 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. RSA 91-A:1.

The Right-to-Know Law was intended to increase public access to governmental proceedings in order to augment popular control of government and encourage administrative agency responsibility. Society for Protection of New Hampshire Forests v. Water Supply and Pollution Control Comm'n, 115 N.H. 192, 194 (1975). The theory underlying the enactment of the Law is that public knowledge of the considerations upon which governmental action is based and of the decisions taken is essential to the democratic process. Carter v. City of Nashua, 113 N.H. 407, 408 (1973).

The School Districts offer internet access to students, faculty and staff at their schools. The School Districts have each adopted Acceptable Use Policies in accordance with RSA 194:3-d, and require students and their parents to sign permission forms before they are allowed access to the internet.

ERCSD's Internet and Electronic Mail Permission Form includes the following language.

> We believe that the benefits to students from access to the Internet, in the form of information resources and opportunities for collaboration, exceed any disadvantages. As a school we have set up procedures that should minimize this risk. All students who access the Internet in school will be supervised by an adult. ...

> Network storage area may be treated like school lockers. Network administrators or school administrators may review files and communications to maintain system integrity and insure that users are using the system responsibly. Users should not expect that files stored on district servers will always be private. However, keeping in accordance with current federal law, information will not be disclosed to third parties. (Resp't Ex. E).

ESD's Internet & Acceptable Use Policy includes the following language.

> All network users will be granted free and equal access to as many network services as their technology allows; however, the use of the Exeter School District's computer networks is a privilege, not a right, and inappropriate use will result in cancellation of that privilege. ... Specifically, we expect that, when using or accessing the school's computers ...[e]ach person will follow the directions of the adult in charge of the room where computers are in use. ... From time to time the Exeter School District will make determinations on whether specific uses of the network are consistent with the acceptable use practice. ... After lengthy discussions, the technology committee decided against using blocking or filtering software. ... Please be aware that the District cannot guarantee the privacy of electronic communication. Confidential matters should not be discussed electronically. (Pet'r Ex. 1)(emphasis omitted).

Dr. Hanson testified that the purpose of offering computers in the School Districts' schools was to fulfill a core educational purpose and that their use was central to the students' education.

The computers at the School Districts access the internet through computers known as "proxy servers". The proxy servers record information electronically in an IHLF. The IHLF's recorded information includes the internet sites visited, the internet protocol address of the computer used to visit the site, the date and time of the site visit, and, for some sites, a username and a password needed to visit the site.

The petitioner is requesting access to the IHLF for each school under RSA 91-A. The respondents refuse, arguing the following five reasons: first, that SAU #16 is not a proper respondent in this case; second, that the IHLF is not a public record under 91-A:4; third, that even if the IHLF is a public record, it meets a statutory exemption to the Right-to-Know Law; fourth, that even if the IHLF does not meet a statutory exemption, the respondents are prohibited from disclosing it under state and federal privacy laws; fifth, that even if the law permits the respondents to disclose a modified IHLF, the respondents have no duty to modify the IHLF to create a record in conformance with the law. The court will address each argument in turn under the standard articulated by the Supreme Court.

> 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. Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996).

First, the Court considers whether SAU #16 is a proper respondent. The respondents claim that SAU #16 is not a proper respondent "because SAU #16 is governed by a different board than ERCSD and ESD" and because "SAU #16 could not possibly comply with a court order directing it to produce records under the control of ERCSD and ESD." (Defs.' Mem. at 1). As a preliminary matter, the Court notes that SAU #16, through Dr. Hanson, responded to the merits of the petitioner's requests for information on five separate occasions. SAU #16 neither alleged that it lacked the control or authority to respond to the requests nor referred the

Second, the Court considers whether the IHLF is a public record. RSA 91-A does not define public records. The New Hampshire Supreme Court has addressed this inadequacy in Menge v. Manchester.

> The statute itself contains no definition of a public record and definitions for other purposes predating the "right to know" law are not helpful. ... While not determinative of the question of what constitutes public records, references appearing elsewhere in the statutes are helpful. RSA 48:9 directs the city clerk in the preservation of public records not needed for present use and refers to **public records as "[a]ll records, books, papers, vouchers and documents of every kind which shall be in the hands of any officer, committee, or board of officers of the city, not their individual property,...."** RSA 41:58 contains a similar reference to public records to be preserved by town clerks. RSA ch. 8-B which is directed to the management and preservation of state and local records contains the following definition: **"'Record' means document, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business...."** RSA 8-B:7
> We have recently noted that amendments to the "right to know" law in Laws 1969, 482:2 and Laws 1971, ch. 327 "indicate a disposition to broaden the statute's scope and application" and our intention to resolve questions "with a view to providing the utmost information". Certainly the legislative listing in the "right to know" law of specific exemptions and exceptions argues against the narrow interpretation urged by the defendants as do the broad descriptions of materials given in other New Hampshire statutes referring to public records. Menge v. Manchester, 113 N.H. 533, 536-7 (1973) (emphasis added) (citations omitted).

The respondents argue that the IHLF is not a public record because the "students using school computers to access the Internet are not doing the official business of any public body." (Defs.' Mem. at 2). The respondents' logic is flawed for the following five reasons. One, the "transaction of official business" would not pertain to the students' use, but to the School Districts' creating a record of such use. Two, the students are not using the internet

for their own personal use but as an integral part of their education curriculum. Three, the faculty and staff's internet access is also monitored on the IHLF and their use may be categorized as official business. Four, the conjunctive "or" in RSA 8-B:7 allows the public record to be any type of document that is "made or received pursuant to law **or** in connection with the transaction of official business." The law requires the School Districts to adopt an appropriate Acceptable Use Policy of the internet under RSA 194:3. Thus arguably, the respondents have a statutory duty to implement these policies and the IHLF was made pursuant to law. Five, another definition from Menge does not require the record to be an official document but rather that it not be a personal record. The respondents claim that the IHLF "reflect the personal activity of students and not actions of [the School Districts]." (Defs.' Mem. at 2). As stated above, Dr. Hanson testified that internet use is an integral part of the students education; the students' internet use was not for their personal enjoyment but for their education. Furthermore, the School Districts acted within their official capacity when they instituted the proxy servers to collect the data now in the IHLF. For the foregoing reasons, the Court finds the IHLF to be a public record under RSA 91-A.

Third, the Court considers whether the IHLF meets a statutory exception to the Right-to-Know Law. The respondents argue that the IHLF is exempt under RSA 91-A:4, V because it includes confidential

information, under RSA 91-A:5, III because it is "personal records of pupils", and under RSA 91-A:5, IV because it is a "library user" file.

In determining whether certain records are public records subject to the disclosure requirements of the Right-to-Know Law, the Court must balance the benefits of disclosure to the public[1] against the benefit of nondisclosure to the state agency whose records are requested. Lodge v. Knowlton, 118 N.H. 574, 576 (1978). Although the statute does not provide for unrestricted access to public records, the Court must construe provisions favoring disclosure and interpret the exemptions restrictively. Union Leader Corp. v. New Hampshire Hous. Fin. Aut, 142 N.H. 540 (1997) (citing to Orford Teachers Assoc. v. Watson, 121 N.H. 118, 120 (1981)).

RSA 91-A:4, V: The respondents' concern for the students' confidentiality stems mainly from some usernames and passwords appearing in the IHLF. The law is clear on this subject.

---

[1] The respondents have incorrectly equated the petitioner's benefit to the public's benefit. "Even if that information is not disclosed, the plaintiff and others can still engage in the important public debate about monitoring use of school computers to access the Internet. On the other hand, the benefits of non-disclosure are..." (Defs.' Mem. at 4). The New Hampshire Supreme Court has stated:

> In Right-to-Know Law cases, the plaintiff's motives for seeking disclosure are irrelevant. This is because the Right-to-Know Law gives any member of the public as much right to disclosure as one with a special interest in a particular document, and accordingly the motivations of any member of the public are irrelevant to the question of access. Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476 (1996) (citations, quotations and brackets omitted).

The Court disregards the petitioner's motives in seeking the information contained in the IHLF.

> In the same manner as set forth in RSA 91-A:4, IV, any body or agency which maintains its records in a computer storage system may, in lieu of providing original documents, provide a printout of any record reasonably described and which the agency has the capacity to produce in a manner that does not reveal information which is confidential under this chapter or any other law. RSA 91-A:4, V.

The respondents acknowledge that the information the petitioner requests is stored in the log files of the proxy servers at the School Districts. (Defs.' Mem. at 1). The respondents and the petitioner each had a witness who testified that an expert could "write script" that would delete any confidential information.[2] (Defs.' Mem. at 1). Since the respondents have "the capacity to produce [the record] in a manner that does not reveal [confidential] information", the IHLF is not exempt under RSA 91-A:4, V.

RSA 91-A:5, III: The respondents' argument that the IHLF are "personal records of students" is untenable. Under the Information Practices Act:

> "Personal information" means any information that by some specific means of identification, including but not limited to any name, number, description, and including any combination of such characters, it is possible to identify with reasonable certainty the person to whom such information pertains. RSA 7-A, IV.

The IHLF does not contain the names, addresses, or descriptions of students. The respondents argued at trial that, in some cases, students might have used usernames or passwords that may potentially identify them. A modified IHLF, with the usernames and

---

[2] Assuming, arguendo, that a "username and password" is confidential information.

passwords redacted, would not reveal any personal information and thus would not qualify as an exemption under RSA 91-A:5, III.

RSA 91-A:5, IV: The respondents' argument comparing the IHLF to "library user" files is also without merit. The relevant statute is as follows:

> I. Library records which contain the names or other personal identifying information regarding the users of public or other than public libraries shall be confidential and shall not be disclosed except as provided in paragraph II. Such records include, but are not limited to, library, information system, and archival records related to the circulation and use of library materials or services.
>
> II. Records described in paragraph I may be disclosed to the extent necessary for the proper operation of such libraries and shall be disclosed upon request by or consent of the user or pursuant to subpoena, court order, or where otherwise required by statute.
>
> III. Nothing in this section shall be construed to prohibit any library from releasing the statistical information and other data regarding the circulation or use of library materials provided, however, that the identity of the users of such library materials shall be considered confidential and shall not be disclosed to the general public except as provided in paragraph II.
> RSA 201-D:11.

As noted above, the IHLF does not contain students' names or other personal information and RSA 201-D:11, I does not apply.[3] The

---

[3] The respondents equate the internet to a library and argue that "[a]ny person, such as another student or other person who observes a student using a computer, who knows when a particular student used a particular computer, could learn from the Log Files the identity of the sites, searches conducted, and web pages visited by the particular student." (Defs.' Mem. at 4). The respondents have clearly misconstrued the purpose of the statute. The purpose of the statute is to protect the confidential identity of the individual using the books and not the books themselves. As the School Districts' respective acceptable use policies clearly state, the students would be supervised and should have no expectation of privacy while accessing the internet. The petitioner deftly eviscerates the argument. "To the extent that someone would

Court finds that the records contained in the redacted IHLF comprise "statistical information and other data regarding the circulation or use of library materials," and therefore RSA 201-D:11, III does apply, as the students use of the internet would be anonymous. Since the confidentiality of students' identity will not be compromised with the release of a redacted IHLF, the Court finds that the files the petitioner requested are not exempt from 91-A:4.

Fourth, the Court considers whether federal and state privacy law prohibit disclosure. The respondents contend that disclosure would violate federal law because "18 U.S.C. §2511(1)(c) prohibits disclosure of the 'contents' of wrongfully intercepted 'electronic communication'". The respondents further contend that disclosure would violate New Hampshire state law because "RSA 570-A:2, I(c), prohibits disclosure of the contents of wrongfully intercepted telecommunication". (Defs.' Mem. at 5). The respondents concede that "[b]y virtue of each district's policy on computer use, students consent to each district (as the provider of this electronic communication service) monitoring computer use and Internet sites visited." (Defs.' Mem. at 5). The policies also state that "[u]sers should not expect that files stored on district servers will always be private" and "[p]lease be aware that the

---

actually stake out the computer room to learn the times that certain people were on certain computers [to then sift through the IHLF], ... they could simply walk over to the computer terminal to look at the screen. (By the same token, if someone wanted to learn which books a person was checking out of the library they could just stand at the check out desk and watch.)" (Plf.'s Mem. of Law at 9).

District cannot guarantee the privacy of electronic communication". (ERCSD's Internet and Electronic Mail Permission Form (Resp't Ex. E) and ESD's Internet & Acceptable Use Policy (Pet'r Ex. 1) respectively). The Court finds that the electronic communication was not wrongfully intercepted and thus 18 U.S.C. §2511(1)(c) and RSA 570-A:2, I(c) do not apply.

Fifth, the Court considers whether the respondents have a duty to create a redacted version of the IHLF. The respondents argue that public officials need not assemble the information to create a record under the Right-to-Know Law. The New Hampshire Supreme Court has held that:

> the [Right-to-Know] 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." Brent v. Paquette, 132 N.H. 415, 426 (1989).

The Supreme Court in Brent contrasted its holding with Menge where "the information plaintiff sought [was] already on single document when request [was] made." Menge v. Manchester, 113 N.H. 533, 534 (1973). *See also* RSA 91-A:4, V (excerpted on page 9 of this order). In this case, a list of this information does already exist and is conveniently located on a computer file.

As previously mentioned, both parties' witnesses testified at trial that an expert could quickly and easily create a computer program that would redact the IHLF to remove any confidential information and the petitioner testified that he was willing to pay for the preparation of such a program.

The respondents rely on a case previously decided in the Rockingham County Superior Court, and maintain that they are not required to "create a new data manipulation program [whose cost exceeds $10,000,] assembling the diverse pieces of data, and encrypting or removing any confidential information." Hawkins v. New Hampshire Department of Health and Human Services, Rockingham Superior Court, 99-E-082 (Coffey, J.)(order dated Dec. 8, 1999). This order is consistent with the order in Hawkins, which found that:

> the presence of some confidential information does not necessarily render void a Right-to-Know request. The removal of confidential information, such as patient names, does not create a "new record" not already in the government's possession. See Family Life League v. Department of Public Aid, 493 N.E.2d 1054, 1058-59 (Ill. 1986) (purpose of Right-to-Know law "would be totally thwarted if an entire record could be kept closed simply by inserting some minute confidential information, particularly when the confidential information can be deleted as in the case at bar"). Generally, records containing discrete pieces of confidential information may be redacted to remove that information, without creating a "new record," and the remaining document may be released. Hawkins, at 1-2.

Justice Coffey granted the petitioner's motion and required the respondents to produce those documents which could have the confidential information redacted at minimal expense. Here, there is no expense to the respondents, as the petitioner has volunteered to absorb this cost.

The respondents argue that providing the petitioner with a paper copy of the redacted IHLF would be extremely costly. The respondents' witness testified to the cost of the paper reams,

printer ink, and manual labor that would be involved in printing out the IHLF for the petitioner. The respondents estimated the IHLF, from January 1998 until July 1999, to consist of 80,000 sheets of paper at a cost of $4,000 to print. Again, the petitioner is willing to pay the costs incurred in producing his request. Relying on Menge, the petitioner requested that, at his expense, the respondent should alternatively produce the record on disk.

> The ease and minimal cost of the tape reproduction as compared to the expense and labor involved in abstracting the information from the field cards are a common sense argument in favor of the former. RSA 91-A:4 (Supp. 1972) provides that every citizen may make memoranda abstracts, photographic or photostatic copies of public records. Taking into account the practical realities of the situation, we believe it not only possible, but in accord with our law and what seems its basic philosophy, to so construe the statute as to permit plaintiff to have the reproduced tapes at his expense. Menge, at 538.

The Court finds the exorbitant cost of a printed copy will have a chilling effect on future requests for information and that the respondents should provide the IHLF on computer disk.

Dr. Hanson is reluctant to provide the public with a disk version. "Obviously, we do not want to release this information in electronic form as it has the potential to be altered." (Pet'r Ex. 1, 6: Letter from respondent Dr. Hanson to the petitioner dated June 14, 1999). This objection was unsubstantiated at trial. The Court finds that a disk copy is consistent with the law and basic philosophy of RSA 91:A.

For the reasons set forth, the petitioner is entitled to a computer disk copy of the requested Internet History Log File. The

respondents will "write script" which will redact usernames and passwords from the IHLF at the petitioner's expense. The respondents will provide the IHLF on either hard disk or CD-Rom at the petitioner's expense. Accordingly, the petition for information is **GRANTED**.

Petitioner's request for attorney's fees is governed by RSA 91-A:8 (I).

> If any body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a public record or refuses access to a public proceeding to a person who reasonably requests the same, such body, agency, or person shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available or the proceeding open to the public. Fees shall not be awarded unless the court finds that the body, agency or person knew or should have known that the conduct engaged in was a violation of this chapter or where the parties, by agreement, provide that no such fees shall be paid. RSA 91-A:8 (I)

The New Hampshire Supreme Court has explained that the attorney's fees provision of the Right-to-Know Law is critical to securing the rights guaranteed under that law; the provision was enacted so that the public's right to know would not depend upon the ability of individuals to finance litigation. Bradbury v. Shaw, 116 N.H. 388, 391 (1976). Thus, the attorney's fees provision was not created to punish respondents but to promote the statutory objectives of the Right-to-Know Law. Id.

The Court finds that, in this instance, it was unreasonable for the respondents to conclude that the records the petitioner requested were exempt from the Right-to-Know Law, as they knew or should have known that the information was not exempt under the

very case they were aware of and relied upon - Hawkins. The respondents knew or should have known that withholding the information contained in the IHLF as requested by the petitioner was a violation of RSA 91-A. Consequently, the petitioner is entitled to attorney's fees under RSA 91-A:8 (I).

The petitioner's request to enjoin defendants from withholding any and all such data the School Districts' Internet History Log Files collect in the future is governed by RSA 91-A:8 (III).

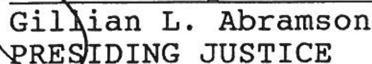
> In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter. RSA 91-A:8 (III).

Accordingly, the petition for injunction is **GRANTED**, consistent with the findings of this order.

The plaintiff has submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. The plaintiff's requests are GRANTED to the extent that they are consistent with this order; otherwise, they are DENIED. See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So Ordered.

11/2/00
Date



Gillian L. Abramson
PRESIDING JUSTICE