THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Michael Miller and Susan Miller

v.

Joseph Dreyer, Chairman
Fremont School Board

No. 03-E-152

ORDER

On April 16, 2003, the court issued an order denying the requested relief under RSA 91-A (the "right-to-know law") of the petitioners, Michael Miller and Susan Miller. The respondent has since filed a motion for clarification. Without stating any reason, the petitioners object to the respondent's motion. The petitioners have also filed their own motion for reconsideration. The court will address each motion in turn.

At the April 11, 2003 hearing, the respondent's counsel appeared to concede that certain e-mail communications between board members are public records under RSA 91-A. The discussion involved substantive e-mail communications sent by one member of the board to other board members—either directly or as a copy ("cc")—where the number of members sending and receiving the e-mail would constitute a quorum. Counsel appeared to concede that such e-mails are public records subject to RSA 91-A and the court so indicated in its order of April 16, 2003.

In his motion for clarification, the respondent agrees that e-mail communications copied to the administration or employees of the school district are public; however, he "clarifies" his apparent concession at hearing about e-mail communication between a quorum of the school board. Citing *Webster v. Town of Candia*, 146 N.H. 430 (2001), the respondent now claims that e-

mail communication between a quorum of the board is not public unless a the board makes a decision during the communication. The respondent's reliance on *Webster* is misplaced.

In *Webster*, the petitioner, apparently relying on RSA 91-A:2, I, asserted that a board violated the right-to-know law when one of its members contacted other individual members to lobby them about a pending action. The court disagreed, holding:

> Even if true, this allegation did not establish a violation of the Right-to-Know Law. The Right-to-Know Law does not apply to isolated conversations among individual members outside of public meetings, unless the conversations were "planned [or] intended for the purpose of discussing matters relating to official business" and the public entity made decisions during them. *See* RSA 91-A:2 , I (Supp. 2000). Although [the petitioner] alleged that the conversations were intended to discuss matters related to official business, she did not allege that any decisions were made during them.

Webster, 146 N.H. at 444.

As is apparent, the court was considering a claim under RSA 91-A:2, which provides, in pertinent part:

> I. For the purpose of this section, a 'meeting' shall mean the convening of a quorum of the membership of a public body, as provided in RSA 91-A:1-a, to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power. 'Meeting' shall not include:
>
> > (a) Any chance meeting or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business and at which no decisions are made; however, no such chance or social meeting shall be used to circumvent the spirit of this chapter....

The statute defines the term "meeting" and provides that certain chance or social encounters are not to be construed as falling within the definition. To the extent that the respondent is claiming that the e-mail correspondence in question is not a "meeting," the court agrees.

The RSA 91-A:2 exception recognizes that members of public bodies may talk with each other or encounter each other in chance or social situations—such as a chance contact at a town general store. It would be absurd to require public bodies to provide "notice" of such social or

chance encounters and to provide for public access to them. So long as such situations are genuine and not used to circumvent the spirit of the right-to-know law, substantive discussions do not transform such an encounter into a meeting unless a decision is made. *Webster*, 146 N.H. at 444.

The foregoing is not dispositive, however, because, e-mail correspondence is not a chance meeting or social encounter; rather it is more akin to letters or memoranda circulated between board members. Thus, such written communications between board members are more in the nature of public records governed by RSA 91-A:4. Consequently, the petitioners are entitled to access, not because such communications constitute a "meeting," but rather because the substantive written communications between board members are RSA 91-A:4 public records.

Two issues raised in the respondent's motion for clarification require additional amplification. First, the respondent claims that certain substantive e-mail discussions are privileged as work product. This privilege was asserted neither in the respondent's written response to the petition nor at the April 11, 2003 hearing. Thus, the court will not consider the claim of privilege raised for the first time in the context of the motion for clarification. *Cf. Keshishian v. CMC Radiologists*, 142 N.H. 168 (1997) and *Brown v. John Hancock Mut. Life Ins. Co.*, 131 N.H. 485, (1989) (a party filing a motion for reconsideration under superior court rule 59-A is not authorized to submit further evidence bearing on the motion and the court may reject such evidence outright). Second, the court's April 16, 2003 order addressed the issue under discussion—whether e-mails between a quorum of the Freemont school board must be disclosed under the right-to-know law. It did not address the issue of whether substantive e-mail communication between members must be disclosed when no quorum is involved. As that issue was not adjudicated, the court makes no ruling, leaving a decision for another day.

The foregoing is dispositive of the petitioners' motion for reconsideration. In their motion, the petitioners complain that the respondent's April 11, 2003 representation of its e-mail disclosure policy was not accurate. As the court has now clarified the matter and as the court expects that the respondent will comply with its obligations under RSA 91-A:4 as clarified herein, no further action is warranted.

Accordingly, the respondent's motion for clarification is GRANTED. The court's April 16, 2003 order is clarified as provided herein. The petitioners' motion for reconsideration is GRANTED to the extent addressed in the court's adjudication of the respondent's motion for clarification and DENIED in all remaining respects.

So ORDERED.

Date: May 16, 2003

LARRY M. SMUKLER
PRESIDING JUSTICE