The State of New Hampshire

ROCKINGHAM **SUPERIOR COURT**

David K. Taylor

v.

School Administrative Unit #55

218-2016-CV-00800

Final Order

Plaintiff David K. Taylor seeks relief under RSA c. 91-A, New Hampshire's Right-to-Know Law, claiming that School Administrative Unit #55 ("SAU 55") violated the statute in connection with a non-public session (the "Session") held on May 12, 2016. For the reasons stated below, the Court awards partial judgment to Taylor and otherwise rules in SAU 55's favor.

Facts

The following facts are largely undisputed. On May 12, 2016, SAU 55's Board (the "Board") held a regularly scheduled meeting. During the meeting, the Board voted to go into the Session to discuss two topics: the superintendent's evaluation and "emergency functions." During the course of the Session, the Board voted to seal the minutes of this non-public session. SAU 55 acknowledges that in doing so the Board violated RSA 91-A:3 III, which requires that votes to seal minutes of non-public sessions be "taken in public session." This requirement that votes to seal minutes be taken in public session became effective on January 1, 2016.

Subsequent to the May 12, 2016 meeting, Taylor submitted two requests under RSA c. 91-A. On June 23, 2016, Taylor asked Cathy Belcher, executive assistant to

Superintendent Dr. Earl Metzler, to send him by email the minutes from the May 12, 2016 Session. Belcher informed him that she could not provide those minutes because they were sealed. Thereafter, on July 15, 2016, Taylor again emailed Belcher, asking her to forward by email an email that had been sent to the Board by Mary-Jo Thomas-Conlon on June 22, 2016 concerning the Session. Belcher again refused the request, referring Taylor to the SAU's Right to Know Procedure, which requires members of the public seeking electronic records to come to the SAU offices with a thumb drive in sealed original packaging or to purchase a thumb drive from the SAU at a cost of $7.49, which, according to evidence produced by the SAU, is its actual cost. Taylor lives 25 miles from the SAU offices.

Thereafter, on August 1, 2016, Taylor filed the above complaint alleging that SAU 55 violated RSA c. 91-A by voting in closed session to seal the minutes of the Session and by refusing to forward emails. Taylor also challenges SAU 55's practice of charging 50 cents per page for hard copies of public records. Taylor's complaint seeks a release of the sealed minutes, invalidation of the vote to seal the Session, a declaration that the SAU's thumb drive policy is in violation of RSA c. 91-A, an order requiring transmission of the requested emails by email, other injunctive relief, and costs.

Subsequent to Taylor's filing of his complaint, SAU 55 agreed that its vote to seal the minutes of the Session violated RSA 91-A:3 III. The Board voted on August 29, 2016 in public session to seal only the portion of the minutes addressing emergency procedures or functions and thereafter released the portions of the minutes addressing the superintendent's evaluation (with one sentence redacted as discussed below).

Analysis

"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." RSA 91-A:4, IV. "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." *38 Endicott Street North, LLC v. State Fire Marshal, N.H. Div. of Fire Safety*, 163 N.H. 656, 660 (2012) (citation and quotation omitted). "It thus furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.*

I. USB Thumb Drives Versus Email

With respect to the manner of transmission of public records, RSA 91–A:4, *V* provides:

> In the same manner as set forth in RSA 91–A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91–A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.

RSA 91–A:4, IV, provides in relevant part:

> 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.... 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 government records, whether in paper, electronic, or other form.

In *Green v. School Administrative Unit #55*, 168 N.H. 796 (2016), the New Hampshire Supreme Court held that the foregoing statutory provisions were ambiguous and, after consulting legislative history and considering the policies behind RSA 91-A, concluded that these provisions require government entities to produce records in "electronic format" when requested as part of a Right-to-Know Law request. *Green*, 168 N.H. at 802. In reaching this decision, the court noted that producing documents in electronic format "advances the purpose of the Right-to-Know law, which is to improve public access to governmental records and provide the utmost information to the public about what [the] government is up to." *Id.* The court emphasized that electronic formatting allows recipients to search documents more easily and avoid the cumbersome nature of mass copying. *Id.*

The court in *Green* did not distinguish between various forms of electronic formatting. So long as the manner of electronic production chosen by the municipality does not diminish the ease of use (i.e. functionality including the ability to search the

document) of the information produced or the public's access to the information sought, *Green* does not counsel in favor of one method over another.

Applying these principles to the issue at hand, the Court concludes that SAU 55 did not violate the Right-to-Know law by insisting on providing requested documents on thumb drives. Providing documents on thumb drives does not in any way limit the recipient's ability to review or search the requested documents and therefore serves all of the interests identified by the Supreme Court in *Green.* Taylor's complaints about the thumb drive focus on its costs and the requirement that he travel to SAU 55's offices, issues that are addressed below. But Taylor does not argue that having the requested document on a thumb drive rather than transmitted by email would in any way inhibit his ability to analyze or review the requested document.

Moreover, SAU 55 has articulated legitimate reasons for not wanting its employees to receive or respond by email to people requesting documents under c. 91-A. SAU 55 argues that emails would introduce unreliability into the process because sometimes emails are too big to be received and there is no way for SAU 55 to confirm receipt of emails it sends.

SAU 55 has also suggested that email communications may pose a cyber-security risk. While Taylor may be correct that the simple forwarding of one email poses a very small cyber-security risk, the greater potential risk comes from repeated email exchanges with multiple parties making Right-to-Know Law requests. Those individuals may include attachments along with their requests to SAU 55 or in response to emails from SAU 55. For example, were this Court to require the forwarding of emails upon request, a recipient might respond to an email from SAU 55 and forward an attachment to an SAU administrator with a note stating that the recipient is confused and asking

whether the attached email is what SAU 55 intended to send. The cyber-security risk to SAU 55 and every other government entity would come from this back and forth exchange of emails and, potentially, attachments.

As SAU 55's thumb drive policy does not diminish the usefulness of the electronic documents obtained and serves important governmental interests of ensuring reliability and protecting the security of government IT systems, the Court concludes that this policy does not violate RSA 91-A.

Furthermore, SAU's requirement that an individual travel to the SAU 55 office to hand over a sealed USB thumb drive is supported by RSA 91-A:4 I, which requires the inspection of records "on the regular premises of such public bodies or agencies." This language is contained in the same statute that has the language concerning electronic copies that the supreme court found requires provision of electronic copies. The Court does not see any language in the statute that would render the "regular premises" language ambiguous. Taylor argues that this requirement is anachronistic in light of modern technology and the ease of mailing a thumb drive. However, the legislature left in the language requiring inspections to take place at the "regular business premises" of government agencies when it added the foregoing language concerning electronic copies. Accordingly, this Court views the question of whether to require government entities to respond to mailings requesting electronic copies as a policy question for the legislature. Under the current statute, the Court finds that requiring individuals to travel to the regular premises to obtain a copy of requested documents on a thumb drive does not violate the Right-to-Know Law.

II. The Vote to Seal Minutes of the Session

The next issue Taylor raises is the sealing of the minutes from the Session. He challenges two aspects of this decision: (1) the fact that the vote to seal took place during the Session rather than in open session and (2) the decision to seal the portion of the minutes concerning the superintendent's evaluation. As to the first issue, SAU 55 has acknowledged that the Board violated RSA 91-A:3 III by voting to seal the minutes during the Session. Thereafter, however, it voted on August 29, 2016 in public session to seal only the portion of the minutes concerning emergency functions. In so doing, it has largely cured both of the foregoing issues. As of that vote, the portion of the minutes addressing the superintendent's evaluation were public (except for one redacted sentence) and the vote to seal the portion of the minutes addressing emergency procedures has been sealed by a vote taken during a public session. Accordingly, the Court finds that Taylor's complaint in connection with the vote to seal the minutes of the Session is moot in all but one respect.

Taylor challenges the redaction of the single sentence in the minutes concerning the superintendent's evaluation. According to Taylor, SAU 55 has represented that this sentence identifies and refers to one employee who is subordinate to the superintendent. Without additional information, the Court cannot conduct the weighing analysis outlined in *Union Leader Corp. v. N.H. Retirement System*, 162 N.H. 673, 679 (2011). Accordingly, the Court orders SAU 55 to provide the Court with an un-redacted copy of the public minutes for *in camera* review (with a copy of the redacted minutes for comparison).

The Court also awards costs to Taylor. Under RSA 91-A:8, costs shall be awarded if the Court finds that the lawsuit was necessary to ensure compliance with the

statute. Here, it was not until after the complaint was served on August 12, 2016 that the Board convened an emergency meeting, two days before the hearing in this case, to correct the mistake concerning the vote during the Session to seal the minutes. Based on the timing of these events, the Court finds that the filing of this lawsuit was probably necessary to ensure compliance with the Right-to-Know Law and therefore awards Taylor his costs.

III. The Cost of the Thumb Drive and Copies

As previously noted, SAU 55 charges $7.49 for thumb drives its sells to individuals making Right-to-Know law requests. SAU presented evidence that this is its actual costs and Taylor provided no evidence to challenge this contention. Accordingly, the Court finds that the SAU 55 is charging members of the public its actual costs for the thumb drives. RSA 91-A:4 IV states specifically that "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." This statutory provision clearly authorizes SAU 55 to charge members of the public its actual cost for providing a thumb drive with electronic copies of documents. Taylor focuses on the next sentence of the statute which states that there shall be no charge for delivery of documents without copying. But this argument assumes that he will prevail on his claim that SAU 55 is required to provide documents by email and it is only in that context that the $7.49 cost for thumb drives is exorbitant. In view of the prior finding in this order that SAU 55 does not violate RSA c. 91-A by requiring requesting parties to provide or purchase a thumb drive, the Court holds that SAU 55 is not violating this statute by

selling thumb drives at its actual cost especially given the ability of requesting parties to provide their own thumb drive in a sealed package.

As for the cost of paper copies, Taylor has failed to establish standing to make this challenge. There is no evidence in the record that he asked for or paid for paper copies. Accordingly, he does not have standing to challenge SAU's practice of charging 50 cents per page for paper copies on the grounds that this figure does not represent SAU 55's actual costs. *Cf. Silver Bros. Co., Inc. v. Wallin*, 122 N.H. 1138, 1139 (1982) (affirming dismissal for lack of standing and noting that standing to object to a law or practice requires some right that is prejudiced).

IV. The Revised Minutes and the Requested Injunction

Taylor also complains that the Board violated the Right-to-Know Law by producing two sets of minutes for the May 12, 2016 Session, one containing the public portion and one containing the sealed portion. RSA 91-A:3 III governs disclosure of minutes; it does not set out a procedure for how minutes that are deemed not subject to disclosure shall be kept or whether one redacted document or two separate documents shall be retained so long as no content is altered. Accordingly, the Court finds no merit in Taylor contention that SAU 55 violated the Right-to-Know Law in the manner in which it segregated public from private minutes.

The Court also declines to enter the injunctive relief sought by Taylor. As to his request that the Board be enjoined from future violations of RSA c. 91-A, the Board is already under an obligation to follow this law and it is not the practice of this Court to enter general injunctions against future violations of law. Moreover, although RSA 91-A:8 V authorizes injunctions against future violations, the Court does not conclude that the single violation in this case warrant such relief.

Conclusion

For the foregoing reasons, the Court awards partial judgment to Taylor on his Right-to-Know Law claims against SAU 55 as outlined above and in all other respects awards judgment to SAU 55.

So Ordered.

October 24, 2016
Date

David A. Anderson
Associate Justice