

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

American Civil Liberties Union of New Hampshire
18 Low Ave. # 12
Concord, NH 03301

v.

Town of Salem
33 Geremonty Drive
Salem, NH 03079

**VERIFIED PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE
RELIEF PURSUANT TO RSA 91-A**

HEARING REQUESTED

NOW COMES the Petitioner, the American Civil Liberties Union of New Hampshire (“ACLU-NH”), and respectfully petitions this Honorable Court for a declaratory judgment and injunctive relief pursuant to RSA 491:22 and Chapter 91-A.

Introduction

The Town of Salem, per a fee schedule attached as *Exhibit A*, will only produce police reports under Chapter 91-A if the requester pays \$15 per report. This is a clear violation of Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution. Consistent with the constitutional principle that government be open and accessible, Chapter 91-A only authorizes public agencies to charge for the “actual cost of providing the copy,” whether it be the true cost of copying a specific document or a rate set by the municipality approximating the cost of copying/production. *See* RSA 91-A:4, IV. Here, Salem’s policy of charging a \$15 fee per police report is untethered to the “actual cost” of providing the police report. Petitioner experienced this unlawful policy firsthand when it requested various police reports under Chapter 91-A. Salem

then informed Petitioner that, to obtain these public documents, it must pay this exorbitant fee that is unrelated to copying costs. Accordingly, Petitioner requests that the Court: (1) declare the Town of Salem's fee schedule charging \$15 per report unlawful under RSA 91-A:4, IV; (2) preliminarily and permanently enjoin the use of this fee schedule in relation to accessing public documents; and (3) order the Town of Salem to immediately produce responsive reports under Chapter 91-A to Petitioner pursuant to its Chapter 91-A records request. In support thereof, Petitioner states as follows:

Parties

1. Petitioner American Civil Liberties Union of New Hampshire is a non-profit organization with an address of 18 Low Ave # 12, Concord, NH 03301. The ACLU-NH routinely submits Chapter 91-A requests to municipalities in New Hampshire and will continue to do so in the future, including to the Town of Salem.

2. Respondent Town of Salem is a public body of the state of New Hampshire with an address of 33 Geremonty Drive, Salem, NH, 03079. Respondent is authorized by law to maintain a police department, which acts as its agent and for which it is ultimately responsible.

Jurisdiction and Venue

3. This Court has jurisdiction over this matter pursuant to RSA 491:22 and RSA 91-A:7. "Any person aggrieved by a violation of [RSA 91-A] may petition the superior court for injunctive relief. In order to satisfy the purposes of [RSA 91-A], the courts shall give proceedings under [RSA 91-A] high priority on the court calendar. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter" RSA 91-A:7.

4. Venue is proper in this Court pursuant to RSA 507:9 because Respondent Town of Salem is located in Rockingham County.¹

Facts

5. On May 25, 2017, the ACLU-NH sent the Salem Police Department (the “Department”) a Right-to-Know request seeking records regarding immigration policies, as well as records pertaining to immigration enforcement. Request No. 1 encompassed police reports to the extent they referenced federal immigration law enforcement. This request, which also sought a fee waiver, is attached as *Exhibit B*.

6. On May 30, 2017, the Department’s records supervisor emailed the ACLU-NH, stating that each report would be subject to a non-waiveable \$15 fee. *See Exhibit C*.

7. That day, the ACLU-NH replied referencing RSA 91-A’s requirement that all costs charged to the requester must be tailored to the actual costs of production (i.e., copy costs). *See Exhibit D*.

8. Also that day, the Department answered, stating that “[e]ach report (record) will cost \$15.00” and that “it will take extensive research by [the Department’s] staff to [comply with the request].” *See Exhibit D*.

9. Through subsequent communications, the Department disclosed that it was withholding eight (8) responsive police reports subject to a \$15 per report payment under a fee schedule approved by the Salem Board of Selectmen, and that the fee schedule was designed to

¹ Furthermore, “[i]f any public body or public agency or officer, employee, or other official thereof, violates any provisions of [RSA 91-A], such public body or public agency shall be liable for reasonable attorney’s fees and costs incurred in a lawsuit under [RSA 91-A], provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of [RSA 91-A] or to address a purposeful violation of [RSA 91-A].” RSA 91-A:8. However, “[f]ees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this [RSA 91-A]” RSA 91-A:8.

compensate the Department for labor costs. *See, e.g., Exhibit D.* This fee schedule is attached as *Exhibit A.*

10. On July 14, 2017, the ACLU-NH wrote the Department again stating that:

From my review of Chapter 91-A, I do not see such labor fees permitted under the statute (in fact, the legislature most recently declined to adopt such a law). RSA 91-A:4(IV) provides for costs relating only to the actual costs incurred in physically producing the information, which typically constitutes photocopy production fees. Of course, we are willing to pay for a reasonable photocopying rate on a per page basis.

See Exhibit E.

11. On July 17, 2017, Salem Deputy Chief Chase once again affirmed that the eight police reports would be withheld unless the ACLU-NH paid \$15 per report. He stated: “The Town of Salem—Board of Selectmen—sets the rate that we charge for each report (\$15.00).”

See Exhibit E. That day, the Department further explained that it charges \$15 per report, whether it is an accident report, insurance report, or just a regular police incident report. *See Exhibit F.*

12. Since that time, efforts to resolve this dispute have been unsuccessful, as Salem continues to withhold these documents and enforce its unlawful fee schedule.

Argument

13. New Hampshire’s Right-to-Know law under Chapter 91-A is designed to create transparency with respect to how the government interacts with its citizens. The preamble to the law states: “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 “helps further our State Constitutional requirement that the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” *Goode v. N.H. Legis, Budget Assistant*, 148 N.H. 551, 553 (2002).

14. Chapter 91-A has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: “Government . . . should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” *Id.* New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8’s language was included upon the recommendation of the Bill of Rights Committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire already had RSA 91-A to address the public and the press’s right to access information, the Committee argued that the right was “extremely important and ought to be guaranteed by a constitutional provision.” LAWRENCE FRIEDMAN, *THE NEW HAMPSHIRE STATE CONSTITUTION* 53 (2d ed. 2015).

15. Consistent with these principles, courts resolve questions under Chapter 91-A “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.” *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe “provisions favoring disclosure broadly, while construing exemptions narrowly.” *Goode*, 148 N.H. at 554 (citation omitted); *see also Scott v. City of Dover*, No. 05-E-170, 2005 N.H. Super. LEXIS 57, at *3–4 (N.H. Super. Ct., Strafford Cty. Oct. 11, 2005) (same) (Fauver, J.).

16. Consistent with the constitutional principle that the government be accessible, RSA 91-A:4, IV only authorizes public agencies to charge for the “actual cost of providing the copy,” whether it be the true cost of copying a specific document or a rate set by the municipality approximating the cost of copying/production.²

² RSA 91-A:4, IV also states that municipalities may “establish by law” fees “for obtaining copies of governmental records or documents, but if such fee is established *for the copy*, no additional costs or fees shall be charged.”

17. Despite numerous discussions with Salem regarding its unlawful practice, Salem continues to withhold police reports until a \$15 per report fee is paid—a cost that is completely unrelated to the “actual cost” of providing such reports.

18. It appears that Salem is using this exorbitant fee schedule as a way to extract from requesters money to compensate Salem for labor costs in responding to Chapter 91-A requests. This too violates Chapter 91-A. As multiple courts have concluded, Chapter 91-A bars municipalities from charging for labor costs in responding to records requests because the documents in their possession already belong to the public and are public goods.³

19. The New Hampshire legislature has even rejected efforts to charge labor costs on multiple occasions on the theory that public documents are public goods. In 2015, the House of Representatives tabled HB646, which would have allowed municipalities to obtain labor costs in response to Chapter 91-A requests. *See Exhibit H.*

20. In 2016, the House of Representatives killed a similar bill, HB1611, which required labor costs to be borne in advance by requesters seeking to learn more about the government. Indeed, the House Judiciary Committee, by a vote of 16 to 1, stated that “[t]he bill as written would create a barrier to government transparency.” *See Exhibit I.*

(emphasis added). As drafted, any fee structure established by a municipality must be reasonably tethered to the “actual cost” of providing copies. Thus, municipalities in New Hampshire generally set rates for producing hard copies of documents that amount to a per page copy fee, which is consistent with RSA 91-A:4, IV. These rates generally range from 10 cents to as high as 50 cents per page.

³ *See Taylor v. Sch. Admin. Unit #55*, 170 N.H. 322, 328 (2017) (“[I]f a municipality stores requested records in the basement or attic of the town hall, the statute *would not allow it to charge for the time or effort involved* in having its employee(s) deliver the records to the area of the building where they can be reviewed or inspected (without copying) by a member of the public who requested to see them.”) (emphasis added); *Town of Tufstonboro v. Blowen-Ledoux*, No. 212-2016-CV-201 (Carroll Super. Ct., Aug. 8, 2017) (Ignatius, J.), at p. 5 (“Because the Town provided no evidence of actual costs incurred in preparing these documents, other than employee time, which the Town does not seek to recover, the Court finds no actual cost to be recovered from the defendants.”), attached as *Exhibit G*; *see also* RSA 91-A:10, I (“When providing Statistical Tables and Limited Data Sets for Research, the requestor can be required to pay fees established by law for obtaining copies of limited data sets or statistical tables. Such fees shall be based on *the cost of providing the copy in the format requested.*”) (emphasis added).

21. Salem's insistence upon charging \$15 per police report directly infringes upon citizens' statutory rights under Chapter 91-A, as well as the rights guaranteed under Part I, Article 8 of the New Hampshire Constitution. This practice damages government transparency and accountability by deterring citizens, non-profit groups, and media outlets from making requests pursuant to Chapter 91-A. Further, it allows public agencies to encourage requesters to limit their proper requests to avoid burdensome and unlawful fees. See Exhibit D ("If you are changing your RTK request and do not want any police reports (records) included, please send us a revised RTK request.").

COUNT I

(Declaratory Judgment under RSA 491:22 and Injunctive Relief Enjoining Salem's Use of the Fee Schedule under Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution)

22. Petitioner incorporates all previous paragraphs into this Count.

23. Petitioner seeks a declaratory judgment pursuant to RSA 491:22 stating that Salem's fee schedule, as it pertains to public documents, is unlawful under RSA 91-A and Part I, Article 8 of the New Hampshire Constitution.

24. Consistent with the constitutional principle that the government be accessible, under RSA 91-A:4, IV, a municipality is authorized to only charge for the "actual cost of providing the copy," whether it be the true cost of copying a specific document or a rate set by the town approximating the cost of copying/production. Salem's fee schedule, however, is untethered to the "actual cost" of providing copies.

25. Accordingly, Salem's fee schedule violates Chapter 91-A, as well as Part I, Article 8 of the New Hampshire Constitution. Despite numerous discussions with Salem regarding its unlawful practice, Salem continues to enforce this unlawful fee schedule, including against Petitioner.

26. Thus, Petitioner is entitled to a preliminary and permanent injunction enjoining the use of this fee schedule in relation to accessing public documents.

27. Indeed, as a result of this violation of Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution, Petitioner suffered and continues to suffer actual and irreparable harm.

28. The issuance of such a declaration and injunction entitle Petitioner to all reasonable attorneys' fees, as it would confer a substantial benefit on the public who would no longer be required to comply with an unlawful and burdensome fee schedule. *See Claremont School District v. Governor*, 144 N.H. 590, 595 (2000).

COUNT II

(Claim Under Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution That the Requested Documents Must Be Immediately Produced to the ACLU-NH)

29. Petitioner incorporates all previous paragraphs into this Count.

30. Despite numerous discussions with Salem regarding its unlawful practice, Salem continues to withhold police reports from the ACLU-NH until a \$15 per report fee is paid—a cost that is completely unrelated to the “actual cost” of providing such reports. *See RSA 91-A:4, IV*

31. Salem's refusal to disclose these reports to the ACLU-NH absent this unlawful fee violates the letter and the spirit of New Hampshire's constitutional, statutory, and case law preference for governmental access and transparency.

32. Therefore, the Court should compel Salem to release these eight (8) withheld police reports immediately to the ACLU-NH.

33. Petitioner is also entitled to reasonable attorneys' fees and costs. Under RSA 91-A:8, I, costs shall be awarded if “the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter.” Attorneys' fees are required to be awarded if “the court finds that the public body, public agency,

or person knew or should have known that the conduct engaged in was in violation of this chapter.”
See RSA 91-A:8, I. Here, Petitioner has, on multiple occasions, explained the clear law in this area and how Salem’s practices violate Chapter 91-A. Nonetheless, Salem has persisted in willfully, purposefully, and knowingly refusing to produce the requested documents in violation of Chapter 91-A.

Conclusion

WHEREFORE, the American Civil Liberties Union of New Hampshire respectfully prays that this Honorable Court:

- A. Declare the Town of Salem’s fee schedule charging \$15 per report unlawful under RSA 491:22 and RSA 91-A:4, IV;
- B. Preliminarily and permanently enjoin the use of this fee schedule in relation to accessing public documents where the cost of production is not otherwise dictated by statute;
- C. Order the Town of Salem to produce all responsive police reports immediately to the ACLU-NH pursuant to the ACLU-NH’s May 25, 2017 Chapter 91-A request;
- D. Award Petitioner its reasonable attorneys’ fees and costs; and
- E. Grant such other and further relief as may be deemed just and equitable.

Respectfully submitted,



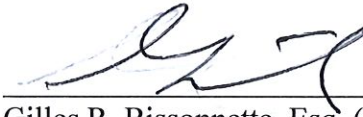
Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)
American Civil Liberties Union of New Hampshire
18 Low Ave. # 12
Concord, NH 03301
Tel. (603) 225-3080

Date: February 9, 2018

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on February 9, 2018

A handwritten signature in black ink, appearing to read 'G. Bissonnette', written over a horizontal line.

Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)
American Civil Liberties Union of New Hampshire
18 Low Ave. # 12
Concord, NH 03301
Tel. (603) 225-3080