The State of New Hampshire
Superior Court

Rockingham

MINDI MESSMER, ET AL.

V.

COAKLEY LANDFILL GROUP AND ROBERT SULLIVAN

No. 218-2018-CV-0316

ORDER ON PETITION FOR INJUNCTIVE RELIEF PURSUANT TO RIGHT-TO-KNOW LAW RSA 91-A

FACTUAL BACKGROUND

The plaintiffs are residents of Rye, Hampton, North Hampton, and Portsmouth who have filed a petition with this Court pursuant to RSA 91-A:7 seeking public access to the records and meetings of the Coakley Landfill Group ("CLG"). The Town of Hampton has moved, without objection, to intervene in support of the plaintiffs' position. The Court has granted the motion to intervene. The Court held a hearing on the petition on August 2, 2018. The parties subsequently filed a series of post-hearing pleadings. The Court has reviewed and considered all of the oral and written arguments made by the parties. Accordingly, the parties' various motions to submit subsequent additional responses are granted. See N.H. R. Civ. P. 13A (parties must receive permission of the court to file a surreply).

The issue before the Court is whether CLG is a "public body," as that term is used in RSA chapter 91-A. Because the formation, structure, and operation of CLG are not in dispute, the Court relies on the offers of proof contained in both the oral and

written submissions in setting forth the facts that form the background for this legal dispute.

In 1986, the Coakley Landfill located in North Hampton was designated by the United States Environmental Protection Agency ("EPA") as a superfund site based on contamination at the site. See Pre-Hearing Brief of the Coakley Landfill Group and Robert Sullivan (hereinafter "CLG Brief") at 2. The EPA notified 59 potential contributors to the contamination that they might be liable for the clean-up. Id. These entities included municipalities, companies allegedly responsible for creating the contamination, those who transported it to the Coakley Landfill, and three municipalities which used the landfill for their solid waste disposal. Ultimately 31 parties, which included three municipalities and 28 private companies, settled the EPA's claims by entering into Consent Decrees in 1992 and 1999. Id. at 2-3. By entering into the Consent Decrees the 31 parties assumed joint and several liability for the cleanup at the Coakley Landfill Superfund Site. Id. at 3. These 31 parties then entered into a series of agreements amongst themselves about how to accomplish the remediation. Id. That collective endeavor was set forth in the CLG Participation Agreements. The plaintiffs claim that these agreements created a "public body" subject to the Right-to-Know requirements of RSA chapter 91-A. Understanding the salient terms of the Participation Agreements is therefore essential to the resolution of this case.[1]

[1] The parties have not included the Consent Decrees as part of the record. CLG's Brief proffers that the contamination migrated and the EPA filed a second case regarding liability for that contamination. CLG Brief at 2 n.1. The two Participation Agreements, both of which are attached as Exhibit A to CLG's Brief, contain the same salient provisions. The Court will, therefore, refer to the provisions of the 1998 Participation Agreement when describing the terms of the resulting organization.

Currently, CLG consists of 28 members: three municipalities and 25 corporations. CLG Brief at 1; Participation Agreement § 1 and Attachment 1. The members are grouped into three categories: Municipal Members, Generator Members, and Transporter Members. Participation Agreement § 1. As part of the negotiations to establish the Participation Agreements, the parties "agreed on the apportionment of costs and obligations to perform the cleanup, the administration of the process, and the representation on the Executive Committee that oversaw all CLG activities." CLG Brief at 3. The members of CLG agreed to allocate responsibility for costs and cleanup unequally. Participation Agreement § 6.1 and Attachment 3.1. The members' voting power in CLG decision-making appears to be allocated as an approximate percentage of each member's share of the cost. Compare id. at Attachment 3.1 with id. at Attachment 3.2. As a result, the three municipal members of CLG share 63.077% of the voting authority, with the City of Portsmouth alone having 53.551% of the voting power. See id. at § 3.5 and Attachment 3.2. CLG may conduct business through the Executive Committee or through a meeting of members. Id. at § 3.2. Portsmouth, any member of the Executive Committee, or any six members of CLG may call for a meeting. Id. at §3.3. In order to convene a meeting, members holding 67.7% of the voting power must be represented either in person or by proxy. Id. at § 3.7. Any decision made by the membership of CLG requires a vote of 67.7% of the total voting power. Id. at § 3.5.

Primary responsibility of carrying out the obligations of the Consent Decree lies with the Executive Committee. Id. §§ 2.1, 3.1, 4. The Executive Committee consists of three individuals: one representative from each of the three categories of members. Id. § 4.1. A quorum of the Executive Committee requires the participation of two members,

one of whom must be the Municipal Member representative. Id. § 4.5. Portsmouth City Attorney Robert Sullivan represents the Municipal Members. CLG Brief at 4. Attorney Seth Jaffe represents the Generator Members and Attorney Curtis Shipley represents the Transporter Members. Id. Any action of the Executive Committee must have a majority vote. Id. § 4.6(a). Even though they only have one representative on the Executive Committee, the Municipal Members have two votes on the Executive Committee. Id. The other two classes of members each have one vote. Id. If the Executive Committee reaches a deadlock on an issue, any member of the Executive Committee may call a meeting of all CLG members to decide the issue. Id. § 4.6(b).

LEGAL ANALYSIS

I. Constitutional and Statutory Guarantees of the Public Access to Hybrid Entities

The issue in this case is whether CLG is subject to the requirements of the Right-to-Know Law. All parties recognize that CLG is not, strictly speaking, a government agency. Rather, it is a hybrid organization comprised of both public and private members. The application of the Right-to-Know Law to these kinds of public-private partnerships is a challenging issue. None of the parties pointed to any case in New Hampshire or elsewhere where a court had analyzed the application of public access laws to an entity that resembled CLG. Indeed, this Court has reviewed scores of cases that analyze the application of the federal Freedom of Information Act (FOIA) or other sunshine statutes to hybrid organizations. See generally 1 ANN TAYLOR SCHWING, OPEN MEETING LAWS §§ 4.100-4.120 at 230-270 (3d ed. 2011) (citing numerous cases involving public-private organizations). The entities in each of those cases have some

salient feature that distinguishes them from CLG. Therefore, the Court will begin with a survey of the law in this area to lay the groundwork for its analysis.

Part I, Article 8 of the New Hampshire Constitution recognizes that "magistrates and officers of the government" are merely representatives of the people. As a result, these public officials must "at all times be accountable to them." N.H. Const. pt. I, art. 8. To ensure this, the constitution provides: "Government, therefore, should be open, accessible, and accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Id. To implement these lofty goals, the New Hampshire Legislature has enacted the Right-to-Know Law, RSA chapter 91-A. Taylor v. Sch. Admin. Unit #55, 170 N.H. 322, 326 (2017). When interpreting the provisions of RSA chapter 91-A, this Court is tasked with "resolv[ing] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. (quotation omitted).

As noted, Part I, Article 8 of the New Hampshire Constitution applies to the "public's right of access to governmental proceedings and records." Similarly, RSA 91-A requires the meetings of a "public body" to be open and the records of "public bodies or agencies" to be available for inspection. RSA 91-A:2 and A:4. RSA 91-A:1-a, V defines "public agency" as "any agency, authority, department, or office of the state or of any county, town, municipal corporation, . . . or other political subdivision." RSA 91-A:1-a, VI(d) defines "public body," in relevant part, as "[a]ny legislative body, governing body, board, commission, committee, agency, or authority of any county town,

municipal corporation, . . . or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto."

The New Hampshire Supreme Court first addressed the application of these principles to a hybrid entity in Union Leader v. N.H. Housing Fin. Auth., 142 N.H. 540 (1997). In that case two newspapers sought records regarding housing developments funded by the New Hampshire Housing Finance Authority. Id. at 544–45. The intervenors, whose projects were funded by the Finance Authority and whose records were subject to disclosure, argued that the Finance Authority was not subject to the Right-to-Know Law because the Housing Authority was "a private entity that functions independently of the State." Id. at 547. The Court noted that, for the first time, it was "confronted with an entity that is not easily characterized as solely private or entirely public." Id. The Court "recognize[d] that any general definition can be of only limited utility to the court confronted with one of the myriad of organizational arrangements for getting the business of government done . . . ." Id. (quotation omitted). The Court concluded that the Finance Authority was subject to the Right-to-Know law by reasoning that it was required to interpret the law "to further the statutory objectives of increasing public access to governmental proceedings." Id. (quotation omitted). The Court did not, however, develop any specific test to apply to hybrid public-private entities. Rather, it pointed to the Finance Authority's enabling legislation to support its holding in that case. In that situation, the Legislature proclaimed that the Finance Authority was a "*public instrumentality*" created to exercise the powers conferred on it by the Legislature. Id. (quoting RSA 204-C:2 (emphasis added to statute but original in opinion)). In addition, the Legislature declared that the Finance Authority was performing "*public* and

essentially governmental functions of the state." Id. (quoting RSA 204-C:2 (emphasis added to statute but original in opinion)). The Court also observed that the Legislature implicitly characterized the Finance Authority as a state agency by noting that it was "empowered to 'work with *other* state and federal agencies.'" Id. (quoting RSA 204-C:8, V (emphasis added to statute but original in opinion)). For these reasons, the Court held that the Finance Authority was subject to the Right-to-Know Law. Id.

The next opportunity the New Hampshire Supreme Court had to address the application of RSA chapter 91-A to a hybrid entity was in Professional Firefighters of N.H. v. HealthTrust, Inc., 151 N.H. 501 (2004). In that case, HealthTrust appealed an order finding that it was subject to the Right-to-Know Law. Id. at 502. HealthTrust is a non-profit corporation formed under New Hampshire law. Id. All 322 of its members are governmental entities, including cities, towns, and school districts. Id. It was formed to provide various forms of insurance to public employees. Id. HealthTrust's entire board of trustees is comprised of public employees or public officials. Id. at 503. Nonetheless, it was not obviously a governmental organization because, much like other insurance companies, it was incorporated as a separate entity, provided services that private entities provide, and actually competed in the private marketplace with non-government entities for those insurance products. Id. at 504. Based on these factors, HealthTrust argued that it was not a "public body" within the meaning of RSA 91-A:1-a, I(d) because it was "more akin to that of a private entity." Id. at 503.

The Supreme Court disagreed and found that HealthTrust was a "public body" subject to the provisions of RSA chapter 91-A even though it was only a "quasi-public entity." Id. at 504. As in N.H. Housing Fin. Auth., the Court did not establish a definitive

test for determining when a hybrid organization is subject to the Right-to-Know Law. Nonetheless, it outlined the following facts that were relevant to its determination that HealthTrust was a "public body" within the meaning of RSA chapter 91-A:

1. The entire membership of HealthTrust is comprised of government organizations, id.;
2. The governing board of HealthTrust has only public officials or public employees on it, id.;
3. The Legislature had declared that responsibility for providing pooled risk management services, which HealthTrust provided, is an "essential governmental function," id. (quoting RSA 5-B:1);
4. HealthTrust provided these services "for the sole benefit" of its governmental members and their public employees, id.;
5. HealthTrust managed money collected entirely from governmental entities and enjoyed a tax-exempt status like other public entities, id.; and
6. Failing to treat HealthTrust as a "public body" would "create an anomaly in which the constituent political subdivisions of pooled risk management programs would be, in the same situation, individually subject to the Right-to-Know Law, but could avoid the law by forming an association under RSA chapter 5-B," id. at 505.

For the reasons set forth in more detail below, these two cases provide little guidance for evaluating the case at bar. Unlike either of the earlier Supreme Court cases, CLG is truly a public-private partnership. The Supreme Court has not had occasion to analyze this type of hybrid entity. In other contexts, the Supreme Court has

stated, "We also look to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)." New Hampshire Right to Life v. Dir., New Hampshire Charitable Trusts Unit, 169 N.H. 95, 103 (2016). The case at bar requires this Court to examine similar sunshine laws in other jurisdictions to determine how courts treat public-private joint ventures like that presented by CLG here.

State and federal courts in other jurisdictions have had many occasions to analyze the application of public record laws to a myriad of different types of public-private joint ventures. In N.H. Housing Fin. Auth., the New Hampshire Supreme Court cited to a decision of the Connecticut Supreme Court for the proposition that New Hampshire Courts may look to state statutes when interpreting RSA chapter 91-A. 142 N.H. at 546 (citing Bd. of Trustees of Woodstock Acad. v. Freedom of Info. Comm'n, 436 A.2d 266, 270–71 (Conn. 1980)). In the Connecticut case, that state's high court adopted what has become known as the "functional equivalent" test for evaluating the application of right-to-know laws to hybrid organizations. The Connecticut Supreme Court described the test as follows:

> The major and discrete criteria which federal courts have utilized in employing a functional equivalent test are: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.

Bd. of Trustees of Woodstock Acad., 436 A.2d at 270–71. On another occasion, the Connecticut Supreme Court has observed, "the determination of whether a hybrid public/private entity is a public agency subject to the FOIA requires a balanced case-by-case consideration of various factors . . . ." Connecticut Humane Soc. v. Freedom of

Info. Comm'n, 591 A.2d 395, 397 (Conn. 1991). "All relevant factors are to be considered cumulatively, with no single factor being essential or conclusive." Id. (quotation omitted). Other courts have likewise followed the "functional equivalent" test because it furthers the goals of public records acts. See Fortgang v. Woodland Park Zoo, 387 P.3d 690, 695-96 & n.4 (Wash. 2017) (citing other states which have also adopted the test).

New York courts have developed a similar but slightly more nuanced multifactorial approach to evaluating whether an entity is a "public body" for that state's Open Meetings Law. In New York, courts consider:

> various criteria, including the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.

Thomas v. New York City Dep't of Educ., 40 N.Y.S.3d 74, 78 (N.Y. App. Div. 2016). At least one commentator has identified as many as 21 factors that courts consider in evaluating whether a public-private entity is subject to sunshine laws. See SCHWING, supra § 4.100 at 233–41 (3d ed. 2011). This multi-factorial approach, which involves the application of a gestalt analysis to determining whether an entity qualifies as a "public body," furthers the goals of statutes like New Hampshire's Right-to-Know Law "by preventing governments from evading public oversight through creative contracting." See Fortgang, 387 P.3d at 693.

II. Application of the Gestalt Factors To CLG

Because there is no factual dispute in this case, the issue of whether CLG satisfies the definition of a "public agency" or "public body" within the meaning of RSA

91-A:1-a, V or RSA 91-A:1-a, VI(d) is a question of law. Both parties recognize that CLG does not cleanly meet the description of any of the entities mentioned in RSA 91-A:1-a, V or VI. All parties rely on N.H. Housing Fin. Auth. or HealthTrust to make their case. Neither decision, however, is particularly helpful in deciding the case at bar because both cases are readily distinguishable.

In N.H. Housing Fin. Auth., the Legislature all but declared the Finance Authority to be a public agency by describing it as "*public instrumentality*" vested with power to perform "*public* and *essentially* governmental functions of the state." 142 N.H. at 547 (quoting RSA 204-C:2 (emphasis added to statute but original in opinion)). Likewise, in HealthTrust, the Legislature authorized governmental entities to join together to create pooled risk management groups. See RSA 5-B. As noted, the Legislature determined that such a service is an "essential governmental function." RSA 5-B:1. No similar legislative declaration of purpose exists with respect to the creation of entities like CLG. In fact, unlike both the Finance Authority and HealthTrust, CLG is not a creature of statute, but the result of a settlement of environmental litigation. There are also other important distinctions between CLG and the hybrid entities at issue in N.H. Housing Fin. Auth. and HealthTrust. For example, in both cases, the entities were funded entirely by public money and were governed solely by public officials. Indeed, the Court long ago recognized that "[n]ot all organizations that work for or with the government are subject to the right-to-know law." Bradbury v. Shaw, 116 N.H. 388, 389 (1976). This Court, therefore, must conduct an analysis of all relevant factors identified in the case law from other jurisdictions to determine whether CLG is subject to the requirements of RSA chapter 91-A.

A. Whether CLG has the power to perform public and essentially governmental functions of the state.

At the core of the gestalt analysis must be the question of whether the entity has the "power to perform public and essentially governmental functions of the state." N.H. Housing Fin. Auth., 142 N.H. at 547 (quoting and emphasis omitted). The reason to begin the inquiry at this point is because Part I, Article 8 of the New Hampshire Constitution limits its mandate to protect "the public's right of access to governmental proceedings and records . . . ." (Emphasis added). Likewise, through RSA 91-A:1 the New Hampshire Legislature has recognized that "[o]penness in the conduct of public business is essential to a democratic society." (Emphasis added). If an organization is not operating as the functional equivalent of a governmental entity, neither constitutional nor statutory principles of open access apply.

Like CLG itself, this factor is not easy to categorize. CLG was created to clean up environmental contamination at the Coakley Landfill and to prevent its future spread. See CLG Brief Ex. B at 1-2 (describing the creation and purpose of CLG). There can be little doubt that environmental protection is a public and essentially governmental function. See, e.g., RSA 21-O:1 (creating the Department of Environmental Services ("DES") and establishing duties and responsibilities of the agency). Cf. New Jersey Dep't of Envtl. Prot. v. Nestle USA, Inc., No. CIV. 06-4025 (FLW), 2007 WL 703539, at *2 (D.N.J. Mar. 2, 2007) (recognizing for purposes of federal court diversity jurisdiction that state agency which is "vested with authority to conserve and protect natural resources, prevent pollution and protect the public health and safety" and "authorized to 'represent the State' in meetings with alleged dischargers, and to approve and pay cleanup and removal costs incurred by the DEP" performs "essential government

functions carried out on behalf of the State for the ultimate benefit of New Jersey's citizens").

That said, the actual environmental clean-up generally occurs through consent decrees and other enforcement mechanisms, such as civil or criminal penalties, by which DES or the EPA compels the polluter to remediate the contamination. See generally Gretchen C. Rule, Environmental Enforcement by the New Hampshire Department of Environmental Services, 32 N.H.B.J. 86 (1991) (describing the range of enforcement options). The Court is unaware of any New Hampshire laws whereby the Legislature has created the authority for a government agency to proactively remediate pollution created by another.

Coakley Landfill was a privately owned facility located in North Hampton, which accepted waste from both municipalities and private entities. CLG Brief Ex. B at 1. Portsmouth, North Hampton, Newington, and at least 28 private businesses transported and/or deposited their waste to the site. All of the potential polluters were faced with an enforcement action by the EPA and DES. Id. at 5. The potentially responsible parties ("PRPs") were confronted with compulsory court orders if they did not voluntarily band together to pool their resources and come up with a solution to remediate the contamination. Id. Thus, CLG was "created to provide private benefits to its members." Id. In other words, CLG was the most expedient and economical way for the PRPs to share their resources and avoid a court-mandated solution to the clean-up of the landfill site. The participation of Portsmouth, North Hampton, and Newington in the clean-up of this Superfund site is no different from any other large, private industrial polluter. Cf. Goodrich Corp. v. Town of Middlebury, 311 F.3d 154, 171 (2d Cir. 2002) (upholding

allocation of responsibility to municipal polluters where other private PRPs sued municipalities for contribution to the cost to clean up a landfill Superfund site).

While the end result of CLG's actions is, hopefully, a cleaner and safer environment, CLG is not accomplishing that goal in the traditional way governments protect the public resources like water, land, and air: *i.e.*, through environmental regulation and enforcement. Rather, CLG is a group of PRPs who are the subjects of a joint federal and state environmental enforcement action. The types of consent decrees and Participation Agreements at issue in this case are common in environmental enforcement actions. The involvement of municipal members does not change the essential character of the organization from one in which only private polluters participated. CLG is a mechanism for the PRPs to hire experts and fund the clean-up and monitoring of the landfill. While CLG's objective of a cleaner, safer environment is a "public and essentially governmental function," the mechanism of accomplishing that goal is not typical for a state actor. Because this factor does not tip strongly in favor of a finding in either direction, the Court will consider other factors to determine whether CLG should be characterized as a "public body."

B. The level of government funding for CLG activities.

The second factor in the functional equivalency test is the level of government funding for the organization. Section 2.3 of the Participation Agreement requires each member of CLG to represent that it has the financial resources to fulfill its responsibilities to remediate the environmental damage at the site. CLG Participation Agreement § 3.2. The total financial assurances of all members are $1,798,200. Id. at Attachment 5. At the time the Participation Agreement was drafted, the municipal

members were responsible for $1,134,251 or 63.077% of the total. Id. at Attachments 3.2 & 5. CLG has acknowledged that the true cost to the City of Portsmouth alone has been at least $17 million since CLG's inception. See Coakley Landfill Group's and Robert Sullivan's Reply to Intervenor Town of Hampton's Pre-Hearing Memorandum of Law at 7. Thus, the fact that CLG is predominately funded by the three municipalities weighs in favor of a finding that CLG is a public body. See Fortgang, 387 P.3d at 701 (citing cases that stand for the proposition that where a majority of the entity's funding comes from the government, this weighs in favor of public access). This consideration, however, is by no means dispositive. Courts have recognized that the amount of public funding alone does not determine whether an organization of a public body subject to sunshine statutes. See Freedom Foundation v. SEIU Healthcare Northwest, 2018 WL 4075920, 10-11 (Wash. Ct. App. Aug. 27, 2018) (finding a joint venture was not a public body even though 75% of its funding came from the government); Frederick v. City of Fall City, 857 N.W.2d 569, 577-78 (Neb. 2015) (organization which received 63% of its funding from local governments is not a public entity).

In the case at bar, although nearly 2/3 of CLG's funding comes from the municipalities, this figure cannot be viewed in the abstract. It is the result of an agreement that each PRP would be responsible for its share of the cost in proportion to its potential responsibility. Presumably, Portsmouth, as the largest municipality that used the landfill, was also the largest source of contamination. Therefore, its share of CLG funding is simply a function of its potential liability for the overall problem.

This factor, nonetheless, weighs in favor of finding that CLG is a public body because, as discussed below, the level of government funding is directly tied to the amount of control the Municipal Members exercise in the organization.

C. The extent of government involvement or regulation of CLG.

The third factor in the functional equivalency test is the extent of government involvement or regulation of the entity. This factor also is a mixed bag, albeit weighing, on balance, in favor of a finding that CLG is a public body.

As detailed above, Portsmouth alone controls more than 50% of the voting power. No decision can be made without Portsmouth's consent because all votes require 67.7% of the voting power. Indeed, Portsmouth could prevent a meeting of the members simply by staying away because a quorum would not be present to conduct business.

Portsmouth's dominance on the Executive Committee is likewise pervasive. While the Committee consists of three members—Portsmouth and two private members—the voting power is allocated to give Portsmouth two votes while the private members each only have one. Because decisions of the Executive Committee must be by a majority vote, Portsmouth can prevent decisions. It can even block a meeting of the Executive Committee by staying away, thereby defeating a quorum.

Another important consideration is the involvement of municipal employees in the affairs of CLG. Robert Sullivan, a defendant in this case and long-time Portsmouth City Attorney, has been the municipal representative since CLG's inception. In addition, the Portsmouth engineer has acted as the project coordinator for 16 years. Joint Response of Plaintiffs and Plaintiff Intervener Town of Hampton to Defendants' Reply (hereinafter

"Plaintiffs' Joint Response" at 2. His services to CLG are reimbursed by CLG. Id. Therefore, each member pays its proportional share of his services. Id. The Municipal Members, of course, bear the largest proportion of this bill. Moreover, the engineer's office and support staff are paid for by the City of Portsmouth. Id.

The influence of the Municipal Members in CLG business is not entirely one-sided, however. While the Municipal Members have the ability to block CLG actions with which they disagree, the Municipal Members cannot unilaterally dictate the decisions of CLG. For example, if the two private members disagree with actions proposed by Attorney Sullivan, they can vote together to block that action. Faced with such a deadlock, any one of the Executive Committee members could call a meeting of the full membership of CLG. In order to carry the day in that setting, the Municipal Members would have to convince at least some of the private members to join their cause. As noted above, 67.7% of the voting power must approve a measure. The Municipal Members control only 63.0077% of the voting power. Thus, while the Municipal Members certainly have significant influence on the direction of CLG, they do not have absolute control of the organization. See Massachusetts Bay Transp. Auth. Ret. Bd. v. State Ethics Comm'n, 608 N.E.2d 1052, 1057 (Mass. 1993) (finding no government control of organization where "both the MBTA appointees and the employee appointees (appointed by Local 589 and members of the fund) have veto power over board actions because affirmative action by the board requires at least two votes from both groups"); Globe Newspaper Co. v. Massachusetts Bay Transp. Auth. Retirement Bd., 622 N.E.2d 265, 267 (Mass. 1993) (re-affirming earlier decision). Thus,

it would be simplistic to view CLG as a mere proxy to carry out the Municipal Members' decisions.

D. Whether CLG was created by the government.

The fourth factor in the functional equivalency test is whether the organization was created by the government. In evaluating this factor, some courts "consider whether a disputed entity was created pursuant to 'special legislation,' indicating that this characteristic weighs in favor of functional equivalency." Fortgang, 387 P.3d at 702 (citing cases). This was certainly a relevant consideration in both N.H. Housing Fin. Auth. and HealthTrust. In the former case, legislation specifically created the Finance Authority to carry on governmental functions. In the latter decision, a statute expressly authorized the creation of pooled insurance programs like HealthTrust for the benefit of public employees.

No similar special legislation authorized the creation of CLG in this case. Indeed, CLG came into existence as a result of an agreement between the municipalities and private PRPs. The Participation Agreements that formed CLG were the result of litigation and regulatory enforcement directed against the municipalities. CLG was not a government-created entity designed to shift government functions to a private entity. Rather it was a strategic response to litigation liability much like any private defendant would make. It was truly a public-private partnership to limit exposure and share the costs of the environmental clean-up. This factor weighs against a finding that CLG is a public body.

E. Other relevant factors.

The four criteria set forth in the functional equivalency test are not talismanic. Indeed, as this Court has noted, a more apt inquiry is to take a gestalt view of the entity to evaluate whether the whole is different than the sum of its parts. CLG presents an extremely close case. Nonetheless, the Supreme Court has directed courts to look to "the purpose of the Right–to–Know Law, which is to increas[e] public access to all public documents and governmental proceedings, and to provide the utmost information to the public about what its government is up to." Green v. Sch. Admin. Unit #55, 168 N.H. 796, 801 (2016) (quotation omitted). In this case, that perspective tips the scales in favor of a finding that CLG is a public body subject to the requirements of RSA chapter 91-A.

Attorney Sullivan is a public official representing his city and the other two municipalities on CLG's Executive Committee. As noted above, through the power he wields as a result of the Participation Agreement he exercises significant influence over the direction of CLG's actions. In addition, the Portsmouth City Engineer acts as the official consultant to CLG. Although his services are reimbursed by all CLG members, he relies on municipal resources including its offices and support staff to carry out his functions on behalf of CLG. Portsmouth alone has spent more than $17 million in taxpayer money on CLG. As noted, by virtue of the voting power of the Municipal Members and the fact that the City Engineer also acts as the group's technical expert, Attorney Sullivan and the City Engineer have considerable influence on how that public money is spent. While it is true that Portsmouth cannot unilaterally force CLG to take action, Portsmouth alone does have the power to block decisions both on the Executive

Committee and in a full meeting of the group. The exercise of that authority to thwart CLG's efforts can be as much, if not more of, a matter of public concern than the actions CLG actually undertakes. Most importantly, the decisions of CLG about how it approaches the remediation of the contamination at Coakley Landfill have a substantial impact on residents and businesses in the area. The public has a right to know how its servants are exercising their authority through the CLG. See, e.g., N. Cent. Ass'n of Colleges & Sch. v. Troutt Bros., 548 S.W.2d 825, 826 (Ark. 1977) (holding that a voluntary private non-profit accrediting organization whose members are colleges was a public body because, *inter alia* "the chairman of the State Committee is an employee of the Arkansas Department of Education who uses his state owned office in performing his duties for the NCA. His office secretary works for and is paid by the state. She, also, performs certain functions for the NCA for which the State Committee pays her. Over 90% of the money contributed by Arkansas Schools is public money. . . . [and] NCA's policies and decisions, which are most laudable, have a great impact upon students and parents and are a matter of great public concern.").

The defendants raise the concern that other Superfund sites in the State which have municipal members as part of the PRPs would also be subject to RSA chapter 91-A. The Court's decision today does not stand for the proposition that all such organizations are automatically subject to RSA chapter 91-A. "Each case has to be decided on the particular facts presented." State v. Beaver Dam Area Dev. Corp., 752 N.W.2d 295, 298 (Wis. 2008) (analyzing the particular structure of various economic development entities, some of which were public bodies and others were not depending on their particular characteristics). It is easy to imagine a situation where the

municipality is a minor player who exercises little or no control in the clean-up effort, no public employees are involved in the effort, and the remediation is directed principally by the private PRPs. This Court need not decide whether such an organization is a public body because the circumstances involved with such an organization are a far cry from those presented in the case at bar.

III. Remedy

The plaintiffs have requested injunctive relief pursuant to RSA 91-A:8, including a declaration that CLG is a "public body" subject to the requirements of RSA chapter 91-A, immediate production of records, and costs and attorney's fees. For the reasons set forth above, the Court concludes that CLG is a "public body" subject to the requirements of RSA chapter 91-A, and issues prospective injunctive relief pursuant to RSA 91-A:8, V. Thus, going forward, CLG must comply with the requirements of RSA chapter 91-A.

The parties debate whether and to what extent CLG's meetings with the EPA and other experts will be open to the public. There is no doubt that this Court's decision will have a substantial impact on how CLG conducts its regular meetings. It will now need to ensure that those meetings take place within the confines of RSA chapter 91-A. That said, this Court will not opine on whether meetings between some members of CLG and the EPA or other experts are subject to open access. The Court cannot settle this question in the abstract. The term "meeting" has a precise definition. RSA 91-A:2, I. There are also many exceptions to the need to hold meetings in open session. See RSA 91-A:3, II. The Court cannot offer an advisory opinion about what business transacted by CLG is subject to the open meetings provisions of RSA chapter 91-A, and which business is not.

At the hearing the plaintiffs withdrew their request for immediate production of documents because CLG had voluntarily produced records. Accordingly, this request is moot, although CLG is required prospectively to comply with RSA 91-A:4 and other relevant provisions relating to the production of minutes and records.

In the petition, the plaintiffs have requested an award of costs and attorney's fees. RSA 91-A:8, I, allows a requesting party to recover "costs" and "reasonable attorney's fees." In order to recover either fees or costs, the requesting party must establish that filing a lawsuit was "necessary in order to enforce compliance with the provisions" of RSA chapter 91-A. ATV Watch, 155 N.H. at 441, 442. If the requesting party meets this test, then he or she is automatically entitled to "costs" without regard to whether the public agency or official was at fault or blameless. Id. at 440. On the other hand, in order to obtain compensation for attorney's fees the requesting party must prove that the agency or official "'knew or should have known' that its refusal constituted a Right-to-Know Law violation." Id. at 440, 442.

There is no doubt that this lawsuit was necessary to resolve the issue of whether CLG is a "public body" within the meaning of RSA chapter 91-A. Therefore, the plaintiffs are entitled to reimbursement for "costs." For the reasons set forth above, however, CLG could not have known that it was in violation of RSA chapter 91-A. Accordingly, an award of attorney's fees is not appropriate.

SO ORDERED.

9/12/2018
DATE

N. William Delker
Presiding Justice