

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

Nate Pardue and
Bruno Matarazzo

v.

City of Rochester and
Acting City Manager Kenn Ortmann

Docket No.: 04-E-040

ORDER ON PETITION FOR ACCESS TO PUBLIC PROCEEDINGS

The plaintiffs, Nate Pardue and Bruno Matarazzo, are reporters at *Foster's Daily Democrat*. They petition this court to enjoin Rochester's Police Station Construction Committee ("the Committee") from conducting non-public meetings. On February 26, 2004, temporary relief was granted to the plaintiffs on an ex parte basis by the court (Fauver, J.).¹ After review of the parties' pleadings and the applicable law, the court finds and rules as follows.

The Committee meets on a weekly basis to advise the Acting Rochester City Manager, Kenn Ortmann, on matters relating the construction of the Rochester Police Station ("the project"). The Committee consists of City officials under the City Manager, staff of the City Manager, and representatives of the project's general contractor, the project's architect, and/or its design team members. The City chooses to call the group an "Administrative Construction Session" to address construction issues that arise during the construction of the new police station. Acting City

¹ The City has moved to dissolve the restraining order issued by the court on February 26, 2004, primarily on the basis that Superior Court Rule 161(a)(2) was not followed with respect to notice to the City and in certain other respects. Although it appears from the record in this case that Rule 161(a)(2) was not complied with in the pro se filing by the plaintiff reporters, as a practical matter, the issue is moot as the court's order today supplants the restraining order of February 26, 2004, which is **VACATED**.

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Manager Ortmann moved the meetings, which began prior to his appointment, from the general contractor's office to the conference room adjacent to the City Council Chamber. From January 15, 2004 until February 13, 2004, on various occasions, the Rochester Mayor and/or a city councilor attended the meetings. Additionally, on February 13 and 20, 2004, quorums of both the Rochester Police Commission and the Building Needs Committee of the Rochester City Council were in attendance, apparently in response to statements made by a City councilor at a prior meeting. The City maintains no member of the Rochester City Council or Rochester Police Commission was ever invited to attend the meetings.

The plaintiffs contend the meetings are subject to the right to know law, and they therefore cannot be denied access to the meetings. The defendants assert the meetings are merely administrative meetings, and therefore do not fall within the ambit of the right-to-know law.

Under the right-to-know law, "meetings" are open to the public. RSA 91-A:2 (Supp. 2003). A meeting is "the convening of a quorum of the membership of a public body . . . to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power." *Id.* at I. However, meetings do not include "any chance meeting or social meeting neither planned or 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." *Id.* at I(a). Meetings of advisory committees to "[a]ny board, commission, agency or authority, of any county, town, municipal corporation, school district, school administrative unit, charter school, or other political subdivision" are deemed public proceedings. RSA 91-A:1-a, II (Supp. 2003).

"Enacted in 1967, the right-to-know law . . . was intended to increase public access to governmental proceedings in order to augment popular control of government and to encourage agency responsibility. Since its enactment, this court has broadly construed the statute's provisions

in order to further these objectives.” Society for Protection of N.H. Forests v. Water Supply & Pollution Control Comm’n, 115 N.H. 192, 194 (1975). The City acknowledged that violations of the right-to-know law occurred at the February 13 and 20, 2003 meetings of the Committee. See Def.’s Mem. Law at 7, fn. 4. Quorums of two public bodies were present and the meeting was not open to the public, nor was notice of the meeting given in accordance with the right-to-know law. However, this does not address the larger issue of whether, apart from the presence of a quorum of another public body, the Committee meetings themselves are subject to the right-to-know law. The City asserts that prospectively no more than one city councilor or police commissioner will attend the construction updates, thus maintaining full compliance with the right-to-know law.

In its seminal case on advisory committees, the New Hampshire Supreme Court held the trial court “properly found that the committee’s involvement in governmental programs and decisions brought it within the scope of the right to know law.” Bradbury v. Shaw, 116 N.H. 388, 390 (1976). In that case, the committee was formed by the mayor and participated, among other things, in the purchase and sale of City owned land. The court reasoned that advisory committees derive their power from the executives who create them. Id. at 389.

The defendants argue the Committee in this case was formed solely to assist the City Manager in making decisions on construction issues such as the type of stair tread to place in the new police station or the location of “doggy doors” to facilitate K-9 access to the station. While other issues, such as whether bullet-proof glass should be installed in front of the sergeant’s desk at the station, are more controversial, the essence of the Committee’s function is to advise the City Manager on decisions relating to the construction of the new building. Were the City Manager to make these decisions on his own, the meetings between him and the general contractor would certainly not be open to the public. See RSA 91-A:1-a (Supp. 2003); RSA 91-A:2 (Supp. 2003). Moreover, the court is guided by Bradbury that “not all organizations that work for or with the

government are subject to the right-to-know law,” 116 N.H. at 389, and “each new arrangement must be examined anew and in its own context.” Id. at 390.

The court finds the Committee meetings, or “Administrative Construction Sessions,” as the City would call them, in their true form are not subject to the right-to-know law. However, unresolved is whether the “uninvited” attendees of the meetings, City Councilors and Police Commissioners, convert the meetings into public sessions. The defendants may not utilize administrative staff meetings to circumvent the right-to-know law by allowing what is, in essence, an advisory committee of public officials to conduct its business behind closed doors. But where the City Manager and his staff meet with the general contractor and/or the architect on an existing building project so that the City Manager can make executive decisions concerning the project, the meetings do not become public meetings under the right-to-know law.

Regular meetings between the City Manager and his staff with the project construction managers and/or the project architect do not fall within the right-to-know law. However, once additional participants, who are neither staff nor officials under the direction of the City Manager, nor employees of the general contractor, are in attendance at the meeting, the meeting takes on a different character, much like the advisory committee in Bradbury. In defining an “advisory committee,” the legislature, in 2001 included

... any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

RSA 91-A:1-a, II (Supp. 2003).

It is unrealistic to think that a member of the City Council or a member of the Police Commission would attend such a meeting but not offer his or her advice or opinion on the issues being discussed. Such involvement of these individuals quite plainly expands the meeting or

session to something other than the chief executive of the city discussing the project with his staff and the contractor. In these circumstances, the meeting consists of a group of individuals, well beyond officials under the City Manager, providing advice to the City's chief executive on public policy matters concerning the construction of the police station. Such a meeting is subject to the right-to-know law.

Accordingly, in the absence of compliance with the requirements of the right-to-know law, the defendants are enjoined from conducting regular weekly meetings on the construction of the new police station between the City Manager, his staff, and the representatives of the contractor, if members of the City Council or Police Commission are in attendance.

So Ordered.

3/11/2004

Date



Bruce E. Mohl
Presiding Justice