

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2020-CV-00133

Laurie Ortolano

v.

The City of Nashua

ORDER ON PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff, Laurie Ortolano, has brought a petition in which she seeks access to records from the City of Nashua's (the "City") assessing department (the "Department"). Currently pending before the Court is the plaintiff's second motion for partial summary judgment, to which the City objects. On November 18, 2020, the Court held a hearing on the plaintiff's motion. After consideration of the evidence, arguments, and the applicable law, the Court finds and rules as follows.

Standard of Review

The Court decides summary judgment motions by considering "the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party." SegTEL, Inc. v. City of Nashua, 170 N.H. 118, 120 (2017) (quotation omitted). If this "review of the evidence does not reveal any genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law," then summary judgment is proper. Id. (quotation omitted); see also RSA 491:8-a, III.

Analysis

"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." N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit, 169

N.H. 95, 103 (2016) (quotation omitted). "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.* (quotation and citation omitted). "Although the statute does not provide for unrestricted access to public records, [the Court] resolve[s] 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 a result, [the Court] broadly construe[s] provisions favoring disclosure and interpret[s] the exemptions restrictively." *Id.* (quotation omitted).

Here, the plaintiff seeks summary judgment related to three distinct types of records: (F) Department meeting notes; (G1) Field Data Collection Cards; and (G2) policy and procedure documents.¹ During the hearing, the plaintiff withdrew her motion for summary judgment related to the (G2) policy and procedure documents. (Hr'g at 1:56–57.) As such, the plaintiff's motion for summary judgment regarding those documents is MOOT. The Court will address the remaining records in turn.

F. Department Meeting Notes

The plaintiff's claim related to these documents stems from her November 14, 2018 Right-to-Know request. (Pl.'s Mem. Supp. Summ. J. at 2.) The plaintiff requested "[a]ll communications between the Assessing Department and KRT Appraisal (including Rob Tozier, KRT's Vice President) related to the state-required five-year full statistical re-evaluation of all properties in the City of Nashua for 2018." (App. 200–201.) On November 19th, the City informed the plaintiff that responsive documents would be

¹ The Court will refer to the letters as used in the plaintiff's pleadings.

assembled and available for inspection on December 3, 2018. (Id. at 201.1) The City then produced a total of 1,951 pages for the plaintiff's review, including one document consisting of 1,383 pages. (Lloyd Aff. ¶¶ 8–9.)

After reviewing the produced documents, the plaintiff learned about notes created during an October 11, 2018 meeting between Rob Tozier and members of the Department. (Ortolano Aff. ¶ 9.) Additionally, in June 2019, the plaintiff found a copy of the meeting notes while looking through unrelated Department documents. (Id. ¶ 10.) After learning of the meeting notes, the plaintiff filed another Right-to-Know request specifically seeking the meeting notes as part of the Board of Assessors packet distributed on October 18, 2018. (App. 220.) In response to the plaintiff's request, on September 4, 2019, the City provided two versions of the notes taken during the October 11, 2018 meeting. (Id. 222–227.)

The plaintiff argues that the meeting notes were responsive to the November 14, 2018 Right-to-Know request. She asserts that the notes should have been produced by the City. (Pl.'s Mem. Supp. Summ. J. at 5.) The plaintiff maintains that the City failed to produce the notes when she first requested them because the City failed to conduct an adequate search. (Id.) In response, the City asserts that the November 14, 2018 Right-to-Know request did not adequately describe the meeting notes. (Def.'s Obj. ¶¶ 20–21.) Rather, the City argues that it reasonably understood the November 14, 2018 request for "all communications" to mean only letters, memorandums, and emails, and not minutes or notes of meetings. (Id. ¶ 29.) Additionally, the City points out that it produced the notes at issue once the plaintiff reasonably described them in her subsequent Right-to-Know request. (Id. ¶ 36.)

The threshold issue for the Court to decide is whether the plaintiff's November 14, 2018 Right-to-Know demand actually requested the meeting notes at issue, i.e. whether the demand "reasonably described" the meeting notes. As the supreme court has never defined the term "reasonably described" as used under RSA 91-A, the Court "look[s] to other jurisdictions construing similar statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq., [and] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objectives." Censabella v. Hillsborough County Atty., 171 N.H. 424, 426 (2018). Under FOIA, a reasonably described request "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." Marks v. United States (Dep't of Justice), 578 F.2d 261, 263 (9th Cir. 1978).

Here, the plaintiff requested "[a]ll communications between the Assessing Department and KRT Appraisal (including Rob Tozier, KRT's Vice President) related to the state-required five-year full statistical re-evaluation of all properties in the City of Nashua for 2018." (App. 200–201.) The Court agrees with the City that a request for "all communications"² between two entities does not reasonably request "meeting notes." See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litig., MDL No. 1532, No. 2007 WL 1668634, at *1 (D. Me. June 5, 2007) (distinguishing between

² The plaintiff arguably invited this problem by using such a broad request. Indeed, courts tend to frown on requests for "all communications" because they do "not describe the records sought sufficiently to allow a professional employee familiar with the area in question to locate responsive records." Freedom Watch, Inc. v. Dep't of State, 925 F.Supp.2d 55, 62 (D.D.C. 2013); see also Dale v. I.R.S., 238 F.Supp.2d 99, 104 (D.D.C. 2002) (noting that "courts have found that FOIA requests for *all* documents concerning a requester are too broad" and collecting cases (emphasis in original)).

meeting notes and communications, and noting that "meeting notes are not communications"). As such, the City could have reasonably found that the October 11th meeting notes at issue here were not responsive to the plaintiff's request. Moreover, it is undisputed that the City produced 1,951 pages of documents which it had deemed to be responsive to the plaintiff's November 14, 2018 request. Additionally, once the plaintiff specifically requested the meeting notes at issue with particularity, the City produced two versions of them. Consequently, given the record before it, the Court finds that summary judgment is not warranted. The plaintiff's motion for summary judgment as to these records is accordingly DENIED.

G1. Field Data Collection Cards

Pursuant to a contract with the City, KRT performed a statistical update for the City for tax year 2018. (Tozier Aff. ¶ 2.) During this process, KRT printed field data collection cards from the AssessPro database in order to perform a field review of each property. (Id. ¶ 3.) While performing the field review, KRT appraisers verified or noted corrections to the data contained on the cards. (Id. ¶ 5.) KRT then used these notations to develop preliminary assessments for the properties. (Id. ¶ 6.) Thereafter, KRT senior appraisers would use the preliminary assessments in combination with the information contained on the collection cards to set the final assessments for each property. (Id. ¶ 7.) During the process, only KRT staff used the data collection cards and the cards were never circulated. (Id. ¶ 10.) After setting the final assessment, the final data elements used to develop the final assessments were transferred to the official Property Record Card for each property in the City's AssessPro database. (Id. ¶ 12.)

On August 13, 2019, the plaintiff requested copies of field data collection cards, worksheets, and other documents used in the valuation process. (Pl.'s Memo. Supp. Summ. J. at 10; see also App. 235.) The City responded that:

There are approximately 31,000 individual printed property record cards . . . and over 1000 printed property record cards for properties sold within the revaluation timeframe which are responsive to this request. These property record cards are exempt from disclosure under RSA 91-A:5, IX as preliminary drafts, notes, and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

(App. 237–38.) The plaintiff claims that the City improperly withheld these documents pursuant to RSA 91-A:5, IX and now moves for summary judgment on that issue.


RSA 91-A:5, IX provides that “[p]reliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body” are exempt from disclosure. The object of the exemptions found in RSA 91-A:5, IX “is to strike a balance between the public's right to know and the government's need to function effectively.” *ATV Watch v. N.H. Dep't of Trans.*, 161 N.H 746, 758 (2011) (quotation omitted).

The plaintiff argues that the redacted information does not meet the requirements of RSA 91-A:5, IX because there “was simply no decision to be made, no deliberations to be conducted, and no policy to be determined.” (Pl.'s Post Hr'g Mem. at 10.) In response, the City contends that “the facts clearly show that the field cards were ‘pre-decisional’ notes not circulated to a quorum or a majority of any public body and not the final form of the property record card.” (Def.'s Obj. Summ. J. ¶ 62.) Moreover, the City asserts that “[t]he inquiry is not whether the information itself would be confidential if in a document final form, it's how the documents and information were used.” (*Id.* ¶ 45.)

Here, on the one hand, the plaintiff claims that the information on the "Field Data Collection Cards" merely represents data collected by the KRT employees during the review process and it is not related to any decision or deliberation. See Chicago Tribune Co. v. Cook County Assessor's Office, 109 N.E.3d 872, 880 (Ill. App. Ct. 2018) (finding that "[d]ocuments reflecting data . . . are not subject to exemption . . . because they are not part of the predecisional, deliberative process"). On the other hand, the City claims that the cards include the thoughts and assessments of the KRT employees, which may or may not be reflected in the final assessed value of the property. See id. (finding opinions or deliberations of employees, including internal debates or discussions, as opposed to data, may be protected under the deliberative process exemption); see also Hearst Corp. v. Hoppe, 580 P.2d 246, 252 (Wash. 1978). It further argues that the cards are the very definition of drafts, as they were preliminary notes made by KRT assessors in making preliminary assessments before being reviewed by KRT senior assessors in making a final decision. See ATV Watch, 161 N.H. at 759–60 (distinguishing between predecisional, decisional, and postdecisional documents). There is a significant factual dispute as to the substance, character and purpose of these cards. Accordingly, given the record before it, the Court finds that summary judgment is not warranted as there are genuine issues of material fact as to the nature of the information on the Field Data Collection Cards. The plaintiff's motion for summary judgment for these records is therefore DENIED.

So ordered.

Date: January 12, 2021



Hon. Charles S. Temple,
Presiding Justice