

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

Donna M. Green

v.

School Administrative Unit #55, et al

No. 218-2015-CV-00090

VERIFIED MOTION TO DISMISS

COMES NOW Defendants, Timberlane Regional School District, SAU #55, Dr. Earl F. Metzler II and Nancy Steenson, represented by Jeanne M. Kincaid of Drummond Woodsum, and files this motion to dismiss. Plaintiff Donna M. Green's Complaint is based upon alleged violations of RSA Chapter 91-A (hereafter referred to as New Hampshire's "Right-to-Know law").

I. COUNT ONE – ALLEGED VIOLATION OF RSA 91-A:4, I AND IV

A. Factual Background

Plaintiff's first allegation does not suggest that the Defendants failed to timely make governmental records available for her inspection and review. Rather, Plaintiff appears to be asserting that Defendants are obligated to provide documents in the format she wishes, in this instance, via electronic format and delivery.

On January 21, 2015, Plaintiff filed a request for copies of public documents with Defendant Nancy Steenson. *See* Complaint ¶5.¹ Plaintiff serves on the Timberlane Regional School Board (hereafter referred to as "TRSB"). *See* Complaint ¶1. Defendant Steenson serves as the Chair of TRSB. *See* Complaint ¶3. In Plaintiff's initial email request, she did not indicate that her request for information was being made pursuant to RSA 91-A:4, rather than as a school

¹ In this section, referenced paragraphs pertain to Count One of Plaintiff's Complaint.

board member seeking information from the TRSB Chair. *See* Complaint ¶5. Indeed, Plaintiff's request is to provide her "and the school board" with certain documents. Accordingly, Defendant Steenson replied in kind to Plaintiff via email suggesting that if "copies" were to be made for all the school board members, then Plaintiff should ask the board to weigh in on her request. *See* Complaint ¶6. Furthermore, Plaintiff acknowledges to the Court that "the original request was not a formal Right to Know Request . . ." *See* Plaintiff's Argument, page 7, ¶7.

On January 23, 2015, Plaintiff clarified that she was making her request pursuant to RSA 91-A:4. *See* Complaint ¶7. On January 26, 2015, Ms. Cathy Belcher, an Executive Assistant to Defendant SAU #55 Superintendent Dr. Earl F. Metzler II, sent Plaintiff an email informing her that the requested information was available for her inspection and review, but requested the courtesy of making an appointment. *See* Complaint ¶14. After receiving a reply, Ms. Belcher again wrote to Plaintiff on January 29, 2015 informing her that the information requested was "immediately available for public inspection." *See* Complaint ¶16.

B. Argument

RSA 91-A:4 authorizes the citizenry "the right to inspect . . . and to copy" governmental records. However, this right to inspect and copy is limited to "the regular or business hours . . . and on the regular business premises" of said public body. *Id.* Asking the requester to schedule the inspection at a mutually agreeable time does not violate RSA 91-A:4. *See Brent v. Paquette*, 132 N.H. 415, 422, 567 A.2d 976, 980 (1989).

Furthermore, the Right-to-Know law lacks any provision requiring a public body to produce documents in an electronic format. Indeed, RSA 91-A:4, VII expressly disavows such an obligation.

Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

See Hawkins v. New Hampshire Dept. of Health and Human Serv., 147 N.H. 376, 379, 788 A2d 255, 258 (2001) ("RSA Chapter 91-A does not require HHS to compile data into a format specifically requested by a person seeking information under the statute.") *See also Nolen v. City of Keene*, Cheshire Cty. Sup. Ct. (09-E-0152) (Arnold J., November 23, 2009)

(denying demand for records to be sent via email; “as long as the records are made available for inspection and copying, a public body or agency has satisfied its duties under the statute”). This view is supported by the New Hampshire Attorney General’s Office. *See* Right to Know Memorandum, at page 37.² RSA 91-A:4, V *permits* in certain circumstances complying with a request via copying electronic records. However, the provision does not require a governmental body to reproduce records in an electronic format.

Plaintiff Green does not deny that the Defendants made the records available to her in a timely manner for her inspection and review. Rather, Plaintiff’s claim appears to be that Defendants are obligated to provide the records in the format she desires, but cites no authority for such a proposition.

II. COUNT TWO – ALLEGED VIOLATION OF RSA 91-A:4, I AND IV

A. Factual Background

In Count Two, Plaintiff appears to be asserting that Defendants violated the Right-to-Know law by failing to release upon demand a copy of a videotape made by its security cameras. As the Complaint supports, on July 24, 2014, Plaintiff admits that she had a verbal disagreement with Ms. Belcher at the SAU #55 offices. *See* Complaint ¶1.³ On July 25, 2014, Defendant Metzler notified Plaintiff that given her disrespectful and harassing conduct of SAU employees, he would be conducting an investigation and consulting with the Plaistow Police Department. *See* Complaint ¶3.

Although Plaintiff requested a copy of the surveillance tape, the Defendants informed her that the Police Department had advised them not to release the tape while they investigated the matter. *See* Complaint ¶6. Plaintiff’s representation is supported by a letter dated August 4, 2014 from Defendant Metzler to the Plaistow Police Department. *See* Plaintiff’s Exhibit #2. Accordingly, the Defendants were under a law enforcement directive not to release a copy of the video surveillance tape until the police had an opportunity to investigate the matter. In fact, Plaintiff Green’s failure to respond to the police department’s inquiry delayed the investigation. *See* Defendants’ Exhibit #1.

² Available at: <http://doj.nh.gov/civil/documents/right-to-know.pdf>

³ In this section, referenced paragraphs pertain to Count Two of Plaintiff’s Complaint, beginning at page 8.

As of August 25, 2014, the Plaistow Police Department had an open investigation. *See* Plaintiff's Exhibit #1. Defendant Metzler informed Plaintiff to contact the police department to make inquiry as to the availability of inspecting and obtaining a copy of the tape. *Id.* On September 24, 2014, Ms. Belcher sent an email to the police department to confirm that they were now authorizing school officials to release a copy of the video recording. *See* Defendants' Exhibit #2. On September 25, 2014, the police department confirmed the authorization. *Id.* On September 26, 2014, Defendant SAU #55 provided Plaintiff with a copy of the videotape. *See* Complaint ¶9.

B. Argument

Defendants do not dispute that a videotape recording may be subject to RSA 91-A. *See* RSA 91-A:4, I. However, the New Hampshire Supreme Court has exempted investigatory documents for law enforcement purposes from disclosure. *See Murray v. State Police*, 154 N.H. 579, 913 A.2d 737 (2006). To qualify for such an exemption, proceedings do not have to be pending or even imminent. *See Murray v. State Police (Murray II)*, No. 2007-0459, at 1 (Supreme Court Order, April 16, 2008).

The “*Murray* exemption” is based on language contained in the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(7), and authorizes law enforcement records to be exempt from disclosure for any one of six reasons. One justification is for records or information compiled for law enforcement purposes to the extent that the production of such law enforcement records or information “could reasonably be expected to interfere with enforcement proceedings.”

Although the *Murray* exemption expressly applies to law enforcement authorities, the New Hampshire Supreme Court has expanded its reach to other governmental bodies working with law enforcement. In *38 Endicott Street North*, 163 N.H. 656, 44 A.3d 571 (2012), the Court applied the interference with enforcement proceedings *Murray* exemption to a request for records from a fire department which had been working with law enforcement in the investigation of a possible crime.

Defendant Metzler notified Plaintiff the same day as the harassing incident occurred that he would be notifying the police department. The police, in turn, directed Defendant Metzler not to release a copy of the video surveillance tape until the police had an opportunity to investigate

the matter, which they made known to Plaintiff. *See* Plaintiff's Exhibit #2 (August 4, 2014 correspondence from Dr. Metzler to Lieutenant Baldwin; page 2 of September 18, 2014 correspondence from Attorney Lehmann to Defendant Metzler (acknowledging that Ms. Belcher had notified Plaintiff that videotape would not be released). The Defendants promptly released the video once the police department authorized them to do so. Accordingly, Plaintiff's claim fails under the Right-to-Know law.

Secondly, the claim is moot. Plaintiff does not dispute that Defendants provided her with a copy of the videotape in question.

III. Plaintiff Has No Right to Attorney Fees

Plaintiff should be awarded no remedy as her claims lack merit. To be eligible for attorney fees, Plaintiff must first demonstrate that the school district "knew or should have known that the conduct engaged in was in violation of this chapter . . ." RSA 91-A:8, I. Since Plaintiff cannot establish a violation, let alone actual or imputed knowledge, her claim fails.

Second, Plaintiff has incurred no fees in this action as she is appearing pro se. The statute only authorizes a remedy for reasonable attorney's fees and costs "incurred in a lawsuit under this chapter . . ." *Id.* Given that Plaintiff has incurred no attorney's fees in this lawsuit prosecution, she is not entitled to any such award, regardless of the merits of her underlying claims.

Third, count II is moot. Accordingly, initiating this lawsuit was not "necessary in order to enforce compliance", one of the conditions in which attorney fee's could be awarded. *Id.*

Finally, Plaintiff's request for attorney fees is admittedly related to her securing an attorney to seek a lifting of what she deems a "no trespass order", *see* Complaint ¶8, a claim that the Right-to-Know law does not regulate in any manner.

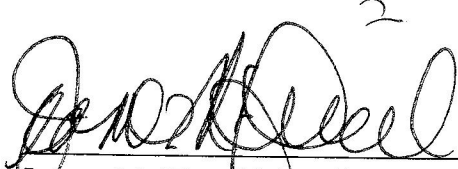
Conclusion

Plaintiff has failed to establish that any Defendant has violated the Right-to-Know law. Accordingly, her claim should be dismissed with prejudice.

Respectfully submitted,

March 4, 2015

By:

²

 Jeanne M. Kincaid, NH #10013
 Drummond Woodsum
 100 International Drive, Suite 340
 Portsmouth, NH 03801
 603-433-3317, ext. 203
Jkincaid@dwmlaw.com

VERIFICATION

I, Dr. Earl f. Metzler II, in my capacity as Superintendent of SAU 55, being duly sworn, verify that the attestations set forth in the foregoing Motion to Dismiss are true to the best of my knowledge and belief.

3/4/15
Date




 Dr. Earl F. Metzler II

STATE OF NEW HAMPSHIRE

COUNTY OF ROCKINGHAM, ss

On this 4th day of March, 2015, before me, personally appeared Dr. Earl F. Metzler II, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.



 Notary Public/Justice of the Peace

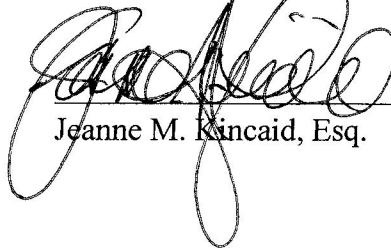
Printed Name: Heather Degnan

My Commission expires: 10/29/2019

HEATHER DEGNAN
 Commissioner of Deeds - New Hampshire
 My Commission Expires October 29, 2019

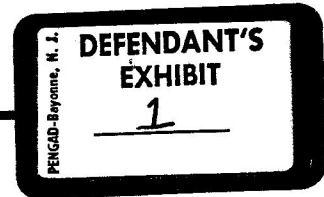
CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading has been forwarded, postage prepaid, on the date set forth above to Donna M. Green.

A handwritten signature in black ink, appearing to read "Jeanne M. Kincaid", is written over a horizontal line. The signature is highly stylized and cursive.

Jeanne M. Kincaid, Esq.

Belcher, Catherine



From: William Baldwin [wbaldwin@plaistow.com]
Sent: Monday, August 04, 2014 12:18 PM
To: Belcher, Catherine
Subject: RE: Info need

I am still waiting for Mrs. Green to return my call. I e-mailed her today as a follow up and still no response. I gave a deadline to return call so I can finish this investigation.



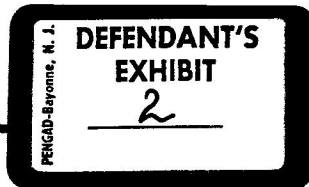
Lt. William M. Baldwin

Operations Lieutenant/Emergency Management Director
Plaistow Police Department
27 Elm Street
Plaistow, New Hampshire 03865
Dispatch: (603) 382-1200
Office: (603) 382-1200 ext. 326
Fax: (603) 382-4172
Cell: (603)-819-1640
Email: wbaldwin@plaistow.com

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Belcher, Catherine



From: Kathleen Jones [kjones@plaistow.com]
Sent: Thursday, September 25, 2014 9:03 AM
To: Belcher, Catherine
Cc: Metzler, Earl; Diane Gorrow
Subject: Re: Video Recording

Yes - from the police department standpoint, I have no issue with release of the video recording.

Sent from my iPhone

On Sep 24, 2014, at 5:05 PM, "Belcher, Catherine" <Catherine.Belcher@timberlane.net> wrote:

Hello Chief Jones,

Please allow this email to serve as confirmation that you have authorized the Superintendent of Schools to release the video recording of an incident that occurred at the SAU office on July 24, 2014.

We will be notifying the requesters of this video of its availability.

Thank you for your assistance in this matter,

Cathy

<Picture (Device Independent Bitmap) 1.jpg>

Cathy Belcher
Executive Assistant to the Superintendent
and Assistant Superintendent of Schools
(603) 382-6119 ext. 2217
catherine.belcher@timberlane.net

SCHOOL ADMINISTRATIVE UNIT NO 55
Serving the Hampstead and
Timberlane Regional School Districts