THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2021-CV-00163

Laura Colquhoun

v.

City of Nashua

ORDER

The plaintiff, Laura Colquhoun, has brought a petition in which she seeks access to records from the City of Nashua's (the "City") assessing department (the "Department"). On April 5, 2021, the Court held a hearing on the plaintiff's petition. After consideration of the evidence, arguments, and the applicable law, the Court finds and rules as follows.

Background

On March 11, 2021, the plaintiff made a written request for access to public records relating to the Department. (See Compl. at Ex. A.) The request stated, in part: "[u]nder NH Right-to-Know, please provide me with all email communications between Ms. Kleiner [the City's Administrative Services Director] and Mr. Richard Vincent [the City's Chief of Assessing] for the period of January 1, 2021 to March 1, 2021." (Id.) The City denied the request on March 18, 2021, stating: "[t]his request for 'all email' is overbroad and not reasonably described under RSA 91-A:4, IV." (Id. at Ex. B.) This action followed on March 25, 2021. (Id.)

In its answer, the City clarified that the request was not reasonably described because it was unreasonably burdensome to locate 'all emails' as were requested. (See Answer ¶¶ A–I.) The City also included a letter its attorney wrote to the plaintiff

dated March 31, 2021. (Answer Unmarked Attach.) In the letter, the City stated that its search for the requested records produced "547 email messages, equivalent to roughly 937 printed pages, sent by and between Kim Kleiner and Rick Vincent during the period of January 1, 2021 and March 1, 2021." (Id.) Given the large number of potentially responsive documents, the City asked the plaintiff if she could provide further clarification about the subject-area of her request. Additionally, the City stated that it had "no way to confirm that any response by the City will consist of 'all email communications'" and that it could "confirm to no level of certainty what fraction of 'all email communications'" were located in its search. (Id.) By way of further explanation, the City stated its "default email retention period" is 45 days, however "it is possible Ms. Kleiner or Mr. Vincent personally retained emails beyond that period (such as by printing them, or filing them electronically–but not by date) thereby making it difficult to search for those emails without further description." (Id.)

Six days later, on April 5, 2021, the Court held a hearing on the plaintiff's petition. During the hearing, the plaintiff argued that the request was sufficiently described to allow the City to locate the requested documents. Alternatively, the City argued that the request was not "reasonably described" for two reasons. (Hr'g at 9:24–25, 9:43). First, the City noted that emails that may be responsive to the request could be found in any of the approximately 29,000 files related to the individual parcels assessed by the Department. (Id. at 9:24–25.) Thus, the City had no easy way to ensure that its response would capture all of the requested emails. Second, the City argued, as a general matter, that Right-to-Know requests for "any and all" documents are overbroad. (See, e.g., id. at 9:20–22.)

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).

A. Reasonably Described

The issue before the Court is whether the plaintiff's Right-to-Know demand "reasonably described" the requested information. See RSA 91-A:4, IV (requiring a public body to make available any "reasonably described" governmental record upon request). As the supreme court has never defined the term "reasonably described" as used in RSA 91-A:4, IV, 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 Just.), 578 F.2d 261, 263 (9th Cir. 1978). Indeed, "FOIA does not authorize [a governmental body] to deny a FOIA email request categorically, simply and solely because the request does not reference the sender, recipient, subject, and time frame." MuckRock, LLC v. Cent. Intelligence Agency, 300 F. Supp. 3d 108, 136 (D.D.C. 2018). However, the determination of whether a request is reasonably described "is highly context-specific." Am. Oversight v. U.S. Envtl. Prot. Agency, 386 F. Supp. 3d 1, 15 (D.D.C. 2019). "While the linchpin inquiry is whether the agency is able to determine precisely what records are being requested, an agency need not honor a request that requires an unreasonably burdensome search or would require the agency to locate, review, redact, and arrange for inspection vast quantities of material." Id. (internal quotations and citations omitted). "This is so because FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Id. (internal quotations omitted). "Thus agencies . . . often engage in cooperative discussion to narrow and focus requests for the benefit of both the agency and the requester." Id.

The City first argues that the request was not reasonably described because it was asking for all email communications. (See, e.g., H'rg at 9:20–22.) The City pointed to a footnote in the Court's order on another matter as the basis for this belief. (Hr'g at 9:20–21); see Ortolano v. City of Nashua, Hills. Cnty. Super. Ct. S. Dist., No. 226-2020-

CV-00133, at 4 n.2 (Jan. 12, 2021) (Order, Temple, J.). However, the plaintiff's request is distinguishable from the request posed in Ortolano. In Ortolano, a request was made for "[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." Ortolano, No. 226-2020-CV-00133, at 4 n.2. In ruling on the plaintiff's motion for summary judgment, the Court found that the aforementioned request did not, for the purposes of the plaintiff's motion, reasonably describe the requested meeting notes at issue. Id. at 4. Additionally, the Court noted that "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.'" Id. at 4 n.2 (quoting Freedom Watch, Inc. v. Dep't of State, 925 F. Supp. 2d 55, 62 (D.D.C. 2013)). For further explanation, as discussed in Freedom Watch, a request can be found to be broad and sweeping if it is for "all records" that "relate" to a certain topic without further reference to a time period or subject matter of such communication. 925 F.Supp.2d at 62. The present request does not pose similar concerns. The plaintiff's request identifies a finite timeframe of 59 days (January 1, 2021 to March 1, 2021) and limits the scope of the request (emails between Ms. Kleiner and Mr. Vincent). Moreover, the plaintiff's request is for a specific type of communications (emails). The fact that the plaintiff is requesting copies of all of the emails does not render her request to be so broad or sweeping that a professional employee of the agency who was familiar with the subject area of the request is unable

to locate the record with a reasonable amount of effort. Accordingly, the Court finds that the plaintiff's request was reasonably described.

The City next argues that the request is not reasonably described because the request would be extremely burdensome and therefore the request should be deemed overbroad. The Court disagrees. Although it is true that "an agency need not honor a request that requires an unreasonably burdensome search or would require the agency to locate, review, redact, and arrange for inspection a vast quantity of material," Am. Oversight, 386 F. Supp. 3d at 15, the mere fact "that a request is burdensome does not deem it overbroad, although it may be considered as a factor in such a determination," Com., Dep't of Envtl. Prot. v. Legere, 50 A.3d 260, 265 (Pa. Commw. Ct. 2012). Here, the plaintiff's request is not overbroad. Indeed, it seeks a clearly delineated group of documents. The City even states that the burden comes not from the request itself but from its method of organizing its records. (See Hr'g at 9:24–25, 9:42–43.) However, a requestor cannot control how an agency catalogues or organizes its files. "As such, an agencies failure to maintain the files in a way necessary to meet its obligations under the [Right-to-Know Law] should not be held against the requestor." Legere, 50 A.3d at 265; see also Salcetti v. City of Keene, No. 2019-0217, 2020 WL 3167669, at *8 (N.H. 2020) ("Right-to-know requests often require a public official to retrieve multiple documents . . .") (non-precedential). "To so hold would permit an agency to avoid its obligations . . . simply by failing to orderly maintain its records." Legere, 50 A.3d at 265. Moreover, the City's argument that a request must be reasonably described based on how the City keeps its records is unpersuasive. (See Hr'g at 9:43); see Hawkins v. N.H. Dep't of Health & Human Services, 147 N.H. 376, 379 (2001) (records must be

"maintained in a manner that makes them available to the public"). The request must only be sufficient to enable 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, which does not require the requestor to have knowledge of the City's particular filing system. The fact that the City does not organize or store the responsive emails in a way that permits them to be easily located does not render the request overbroad.

Finally, the City argues that the request is overbroad because its searches are unlikely to be able to discover every responsive record. (Hr'g at 9:26.) However, this misconstrues the City's burden. "[T]he adequacy of an agency's search for documents . . . is judged by a standard of reasonableness." ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 753 (2011) (quoting Church of Scientology Intern. v. U.S. Dep't of Just., 30 F.3d 224, 230 (1st Cir. 1994) (analyzing FOIA)). Accordingly, "[t]he crucial issue is not whether the relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents." Id. Therefore, the mere possibility that the City may not locate and produce all responsive documents does not render the request overbroad.

In conclusion, Right-to-Know "requests are not a game of Battleship. The requester should not have to score a direct hit on the records sought based on the precise phrasing of his request." Gov't Accountability Project v. U.S. Dep't of Homeland Security, 355 F.Supp.3d 7, 12 (D.D.C. 2018). Here, the Court finds that the request reasonably described the records such that 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, 578 F.2d at 263. Accordingly, the Court orders

the City to conduct a reasonable search for responsive records in accordance with its burden under the Right-to-Know law. See ATV Watch, 161 N.H. at 753. Before doing so, the Court orders the parties to meet and confer within fourteen days and engage in a good faith effort "to narrow and focus requests for the benefit of both the [City] and the requester." Am. Oversight, 386 F. Supp. 3d at 15; see also Gov't Accountability Project, 355 F. Supp. 3d at 13.

B. Costs and Attorney's Fees

The applicable portion of RSA 91-A:8, I provides:

> If any body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a public record . . . such body, agency, or person shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available to the proceeding open to the public. Fees shall not be awarded unless the court finds that the body, agency or person knew or should have known that the conduct engaged in was a violation of this chapter.

In other words, "an agency shall be liable for reasonable attorney's fees and costs incurred if the trial court finds that: (1) the agency violated any provision of RSA chapter 91–A; (2) the lawsuit was necessary in order to make the information available; and (3) the agency knew or should have known that the conduct engaged in was a violation of RSA chapter 91–A." 38 Endicott Street North, LLC v. State Fire Marshal, N.H. Div. of Fire Safety, 163 N.H. 656, 669 (2012) (internal quotations omitted).

Here the Court cannot make such a finding. As stated above, the supreme court has never defined the limits of a reasonably described request. See Ettinger v. Town of Madison Planning Bd., 162 N.H. 785, 792 (2011) (affirming denial of attorney's fees where court had never previously interpreted exemption at issue). Indeed, the legislature unsuccessfully considered a bill to re-define the term in more specific

language. See Adding a Definition of "Reasonably Described" to the Right-To-Know Law, HB 1170, 2019 Session (N.H. 2019) ("'Reasonably described' means a document is identified with necessary specificity to allow a public employee to retrieve it without making an extensive search and, at a minimum, by date or range of dates not exceeding 30 days, by type, which means by letter minutes or a report, and by title or subject matter." (emphasis added)). Additionally, such a determination is highly context specific. See Am. Oversight, 386 F. Supp. 3d at 15. For example, courts have found a request for all emails that fails to identify a subject matter to be overbroad. See, e.g., Pa. Dep't of Educ. v. Pittsburgh Post-Gazette, 119 A.3d 1121, 1127 (Pa. Commw. Ct. 2015) (finding request for all emails of a single individual as they pertain to her duties for a year overbroad). Alternatively, a similar request with a short timeframe may be found to be sufficiently described. See, e.g., Easton Area Sch. Dist. v. Baxter, 35 A.3d 1259, 1265 (Pa. Commw. Ct. 2012) (finding request for all emails sent or received by any school board member in thirty-day period to be sufficiently specific because of short timeframe). This is not to say that a plaintiff cannot be awarded attorney's fees after a request under the Right-to-Know Law is denied for not being reasonably described. The Court merely finds that, in this instance, it has not been shown that the City knew or should have known that the plaintiff's request was reasonably described. Accordingly, the Court does not find that the plaintiff is entitled to an award of attorney's fees or costs.

So ordered.

Date: May 12, 2021

Hon. Charles S. Temple,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 05/14/2021