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Office of the Right to Know Ombudsman

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In Re: City of Rochester -002

Docket Number: RKO 2023-018

DECISION

I. Background

The Office of the Right to Know Ombudsman ("RKO") is a quasi-judicial state agency created by Laws 2022, Ch. 250, to "provide the public with a simpler, less expensive, and faster alternative process to resolve complaints under RSA 91-A." Laws 2022, Ch. 250: 1. It was not established as part of the state's judicial system, but rather as an agency within the executive branch of government, a branch that is generally charged with administering, rather than establishing, the law of New Hampshire. It is charged only with addressing whether a complaint brought before it states facts sufficient to show a violation of RSA 91-A, the "Access to Governmental Records and Meetings Law," commonly known as the "Right to Know" law. The office was first staffed by a single individual on January 27, 2023 and remains so staffed today. This case was filed on August 4, 2023, as the 18th formal complaint (and 66th "inquiry") since the staffing of the office.

In the opinion of the RKO, the matter at hand presents the aspect of RSA 91-A that has been most in need of clarification since the United States Supreme Court's dicta in McBurney v. Young, 569 US 221 (2013).¹ It also highlights principles of institutional authority, and implicates subsidiary legal and practical concerns which warrant full consideration by those with the institutional authority and/or resources to do so.

II. Procedural History

In accordance with RSA 91-A: 7-b, II, the respondent was notified of this claim by a procedural letter from the RKO dated August 7, 2023. On August 23, the RKO received the appearance of Harrison Thorp on behalf of the claimant. On August 25, the RKO received the appearance of Terrence O'Rourke, Esq. on behalf of the City of Rochester. Also on that date, the respondent filed its response, as well as a motion to dismiss. On August 28, 2023, the RKO issued an Order of Notice scheduling an adjudicative proceeding for October 4, 2023 and setting a prehearing conference for September 22, 2023. In that order, the claimant was

¹ "Dicta" are "opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself." BLACK'S LAW DICTIONARY 409 (5th ed. 1979).

invited to respond to the motion to dismiss by no later than September 5, 2023 and it was noted that oral argument on the motion would be heard at the prehearing conference of September 22. The order also instructed the claimant to advise whether this matter was being pursued in the claimant's personal capacity or instead on behalf of the "*Rochester Voice*." Based upon the pleadings, the issue identified for the RKO's consideration was "[w]hether the City of Rochester violated RSA 91-A: 4, I and/or RSA 91-A: 4, IV in regard to its denial of a request made to it on or about April 12, 2023, on the basis that the requester was not a 'citizen of New Hampshire.'" See Order of Notice. No modification of the issue to be determined has subsequently been made, although the respondent's motion to dismiss appears to argue for dismissal on an additional, somewhat connected, basis that was mentioned in response to the complaint: that the claimant may be seeking documents in an electronic format. The argument appears to suggest that a "New Hampshire citizen" would have the right under RSA 91-A to receive copies of materials in electronic format (if the requested materials already exist in that format and can be provided in that format), but that a person who is not a "citizen of New Hampshire" would have no similar right to either existing electronic documents in electronic format, or to the provision of copies of non-electronic documents in electronic format. The RKO notes at the outset that he believes that if person who is not a "citizen of New Hampshire" has privileges under RSA 91-A, neither they nor "New Hampshire citizens" have a statutory right to receipt of nonelectronic documents in electronic format, or to have them e-mailed to them.

Harrison Thorp clarified that he was appearing as a non-attorney representative for the claimant, the "*Rochester Voice*." Mr. O'Rourke participated in the prehearing conference in his capacity as counsel for the respondent, the City of Rochester. Also present at the prehearing were two observers. They chose to introduce themselves as the paralegal for the City of Rochester and as the "president" of the *Rochester Voice*.

At the prehearing, arguments on the motion to dismiss were heard on the record. Given the nature of the case, the RKO noted that his role is that of a neutral decision-maker, whose statutory charge is to view this matter solely from the perspective of whether a violation of the statutory language of RSA 91-A has occurred. See Laws 2022, Ch. 250:1 (the purpose of this office is to provide the public with a "simpler, less expensive and faster alternative process [*to the superior court*] to *resolve complaints* under RSA 91-A" [emphasis added]) Thus, he noted that his job was to *resolve disputes* arising under RSA 91-A, and not to make law, further noting that he does not decide constitutional issues and that the motion hearing would focus upon what the New Hampshire Legislature meant by the use of the word "citizen" in RSA 91-A: 4, I. Additionally, the RKO observed that he is an agency within the executive branch of government, which administers/applies the law as it is made and defined by two other branches (the legislative and judicial), whom he believed might wish to have a say in the issue presented to this office in the motion to dismiss. He stated that he would not issue a decision on the motion by October 4 (the date scheduled for the adjudicative proceeding), cancelled that proceeding, and granted the parties until October 4, 2023 to submit any additional memoranda or briefing that they wished. Accordingly, the RKO views Friday, November 3, 2023 as the date by which a decision is to be issued in this case. See RSA 91-A: 7-b, V (RKO has 30 calendar days from the

“deadline for receipt of the parties’ submissions” to issue a ruling, unless extended for “good cause”).

Before proceeding with arguments on the motion to dismiss, the RKO observed that if there were disputed facts in this case, the parties were requested to highlight them. It appears that there are none. Neither the claimant nor respondent claim that Mr. Thorp might not be a citizen of the United States of America. In addition, Mr. Thorp is a resident of the State of Maine, specifically the town of Lebanon, Maine. Under RSA 541-A: 33, V, the RKO officially notices that Lebanon, Maine partially borders Rochester, NH. The *Rochester Voice* is a tradename registered to Mr. Thorp with the New Hampshire Department of State as an “Online Newspaper.” The *Voice* is an electronic publication, with a place of business at Mr. Thorp’s address in Lebanon, Maine and a mailing address (a post office box) in Milton, NH. The *Voice* focuses upon matters of interest to the greater Rochester community. The September 27 Order on Prehearing Conference, p. 2, noted that the parties appeared to agree that it “does” make a difference for the purposes of the definition of “citizen” whether or not a requester is a member of the press. That was a typographical error on the part of the RKO, who at that time intended to say that the parties appeared to agree that it “does not” make a difference to their arguments whether or not a requester is a member of the press. Further review of the record of the arguments of 9/22/23 shows that while the claimant agreed that his ostensible press status made no difference to the “citizenship” argument, the claimant also contends that the respondent’s approach places an “undue hardship on the *Rochester Voice* as a news entity;” that it serves to “hamstring a news entity;” and that “Freedom of the Press” is tangentially involved in this matter. Thus, the issue of “Freedom of the Press” hovers as a concern of potentially constitutional magnitude when undertaking any analysis of this case.

After arguments on the motion to dismiss, the parties and the RKO engaged in informal discussions, on the record. The RKO focused upon the office’s statutory obligation to resolve disputes under RSA 91-A and, pursuant to RSA 541-A: 38, encouraged the parties to continue to speak with each about the possibility of informally resolving this matter. In the course of informal conversations, the respondent expressed concern regarding “settlement” of the legal issue at the root of this case, but expressed its willingness to allow the claimant access to requested documents if the claimant simply came to the town offices to review them. Mr. Thorp inquired whether the matter might be addressed by his incorporation of the *Rochester Voice* in the State of New Hampshire. No further discussion was held at the conference regarding these suggestions, but the RKO encouraged the parties to communicate further about possibilities for the informal resolution of this matter. He also noted that appeal of the RKO’s decision is to the Superior Court and that any party was free to speak to the legislature about any statutory clarification that they wished to suggest.

After the prehearing conference, on September 25, 2023, the claimant forwarded the respondent an email (copied to the RKO) stating: “This email is to inform the City of Rochester that if it is interested in putting this matter behind us to contact The *Rochester Voice* editor Harrison Thorp for the purpose of discussing The *Rochester Voice* incorporating in the state of

New Hampshire. To Ms Ambrose [*the city manager*] and Attorney O'Rourke: Please acknowledge receipt of this email upon your viewing it and contact Harrison Thorp by Wednesday if you are interested in pursuing a resolution to this matter." Attorney O'Rourke responded on Wednesday, September 27, stating that "[i]t is clear that you are seeking legal advice from the City on how to incorporate in New Hampshire and the impact of so doing. The City cannot provide this advice to you. I suggest that you contact a attorney licensed in the State of New Hampshire." On the same date, the claimant replied: "I did as the Ombudsman's Office encouraged us to do, which was for us to seek a resolution to this matter." The RKO is himself unable to address these informal discussions, and (like Mr. O'Rourke) is unable to provide the claimant with what might potentially be construed as legal advice. He notes that if the parties should ultimately reach a resolution, both are instructed to so advise this office. To the best of the RKO's knowledge, no informal resolution has been reached as of the date of this decision.

II. Discussion and Conclusion

The "*Rochester Voice*," which was organized in 2017, exists solely as a trade name registered in the State of Hampshire to Harrison Thorp, who is a resident of Lebanon, Maine. The *Rochester Voice* has a principal office address which is identical to Mr. Thorp's and a mailing address in Milton, NH. See Motion to Dismiss, Exhibits D and E. It focuses upon matters of interest to the residents of the greater Rochester area.

At the root of this case before this executive branch agency is the meaning of the word "citizen" in RSA 91-A: 4, I. That statute provides that:

Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording. (emphasis added)

Also at issue is that provision's relationship to RSA 91-A: 4, IV (a) and (b), which (without reference to the phrase "every citizen") provides a directive to governmental agencies:

- (a) *Each public body or agency shall, upon request* for any governmental record reasonably described, make available for inspection and

copying any such governmental record within its files when such records are immediately available for such release. (emphasis added)

(b) If a public body or agency is unable to make a governmental record available for immediate inspection and copying the public body or agency shall, within 5 business days of a request:

(1) Make such record available;

(2) Deny the request; or

(3) Provide a written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay.

Also implicated is RSA 91-A: 1, which states:

Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter 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. (emphasis added)

The RKO observes that the statute does not say “so as to provide accountability to the people.” It appears to be a general admonition to public bodies regarding the manner in which the statute should be administered, without an overlay of citizenship.

Behind all of these provisions, of course, lies NH CONST., Pt 1, Art. 8, which provides:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. *Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.* The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding

(emphasis added). See N.H. Right to Life v. Director, NH Charitable Trusts Unit, 169 NH 95, 103 (2016) (the Right to Know Law furthers constitutional requirements, and thus broadly favors disclosure).

The constitutional provision cited above did not always read as it does today. The first sentence dates to 1784. The highlighted portion became part of the State Constitution almost 200 years later, in 1976.² In fact, the highlighted constitutional provision was adopted to add a constitutional dimension to a law which was by then already on the books: RSA 91-A. See S. MARSHALL, THE NEW HAMPSHIRE CONSTITUTION: A REFERENCE GUIDE (2004), at 50.

At the time of its adoption in 1967, RSA 91-A:4 read in full:

Every citizen during the regular or business hours of all such bodies or agencies, and on the regular business premises of such bodies or agencies, has the right to inspect all public records, including minutes of meetings of meetings the bodies or agencies, and to make memoranda abstracts, photographic or photostatic copies, of records or minutes so inspected, except as otherwise prohibited by statute or section 5 of this chapter.
(emphasis added)

In short, the word "citizen" has always been a portion of what is now RSA 91-A: 4, I. It has never been a portion of NH CONST. Pt. 1, Art. 8, which, in 1976; opted for to use the word "public." In 1977, after the adoption of the constitutional provision, the Legislature voted to amend RSA 91-A by adding what is now the purpose clause found in RSA 91-A: 1. That statute provides that the Right to Know Law is designed to ensure both the *greatest possible public access* to the actions, discussions and records of all public bodies, and their accountability to the people. See Laws 1977, Ch. 540:1. The respondent's well-presented argument maintains that the "people" - the "citizens" - in question are necessarily solely the people of the State of New Hampshire, essentially positing that while other individuals might be entitled to some form of access to documentary materials used in furtherance of the operations of a New Hampshire governmental unit, those persons - be they a New York resident representing the *New York Times* or an individual from a neighboring town in Maine who operates an on-line newspaper - are not entitled to such statutory benefits as a response to a request within 5 business days (a clear requirement when dealing with "citizens of New Hampshire." See RSA 91-A: 4, IV (b)).

Neither RSA 91-A nor RSA 21 (providing general statutory definitions) define the word "citizen." In argument, the respondent suggested that the word essentially means a resident of New Hampshire, presumably at least if they are eligible to vote in this state. RSA 21:6 defines a "Resident; Inhabitant" as follows: "[a] resident or inhabitant or both *of this state* and of any city, town, or other political subdivision of this state shall be a person who is domiciled or has a place of abode or both in this state and in any city, town, or other political subdivision of this

² The final three sentences, relating to taxpayer standing, were added in 2018.

state, and who has, through all of his or her actions, demonstrated a current intent to designate that place of abode as his or her principal place of physical presence to the exclusion of all others" (emphasis added).

In dicta, McBurney v. Young, certainly identified New Hampshire as one of the states whose "freedom of information laws . . . are available only to *their* citizens" (emphasis added). McBurney, 569 US at 226. Nonetheless, it is axiomatic that only the justices of the Supreme Court of the State of New Hampshire are the "final arbiters of the legislature's intent as expressed in the words of . . . [a] statute considered as a whole." State v. Mfataneza, 172 NH 166, 169 (2019). When possible, the Court construes language according to its plain and ordinary meaning, but where a statutory provision is ambiguous – that is, when there is more than one reasonable interpretation – it will consult the statute's legislative history. Neither party has pointed the RKO to any deep legislative history showing that the use of the word "citizen" was critically examined by the General Court, the members of which might well have held differing views on the meaning of the word "citizen" in the context of RSA 91-A. It is not inconceivable that the majority of our "citizen legislators" might even have viewed the word simply as a method by which a governmental entity broadly refers to a member of the public – a "person" - who makes a document request. The RKO himself has only had the opportunity to independently review the published Journals of the New Hampshire House and Senate. Those volumes indicate that HB 48 (the original 1967 bill adopting RSA 91-A: 4) was the product of a Committee of Conference, but the Journals themselves contain no discussion of the any agreed-upon meaning for the phrase "every citizen."

The RKO recognizes that some seemingly unusual results would stem from acceptance of either the argument that the language in question means "citizen of the United States" or "citizen of New Hampshire." In either case, a property-owning, taxpaying resident of Rochester who is deeply involved in local civic affairs, who is not a citizen of United States but rather a permanent resident alien, would presumably not be entitled to any benefits which might stem from RSA 91-A. On the other hand, a citizen of the United States who is a Rochester voter, without local taxable property, but who has been abroad for some time, who has little concern for local civic affairs and who occasionally votes in national elections by absentee ballot, would be afforded a special status under RSA 91-A. The RKO is skeptical that this result was intended by the General Court when it considered the language of RSA 91-A. In addition, the RKO questions how either proposition can fully and logically be squared with the Supreme Court's general view that an individual making a request under RSA 91-A need not so much as provide his or her name to the governmental agency, and that public bodies have a statutory duty to respond diligently to all records requests, regardless of who makes the request, See Censabella v. Hillsborough County Attorney, 171 NH 424, 427 -428 (2018).

A host of legal questions, some of potentially constitutional magnitude, underly the core issue identified in this case. As a matter of institutional authority and the sound structure of government, the RKO believes that his agency is not the suitable forum in which to address such matters. He is nonetheless charged with speedily resolving cases presented to him. On

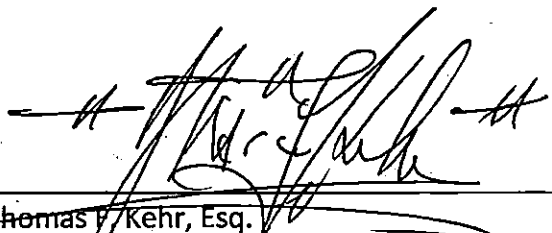
the facts of this particular case, where an individual residing in a Maine municipality neighboring Rochester operates a local "online newspaper" under a registered New Hampshire trade name and who, in that capacity, possesses a Milton, NH mailing address, the RKO concludes that (whatever the word "citizen" might ultimately be declared to mean by those with the definitive authority to make such a multi-faceted determination) the term would likely be viewed as sufficiently expansive to encompass the enterprise undertaken by Mr. Thorp in this case.

Although this decision constitutes the RKO's conclusion in this case, it does not establish the "law" on this topic. Neither this office nor federal dicta establish the law of RSA 91-A. Interpretations of statute which are binding across this state are questions for the New Hampshire Supreme Court alone to decide. Bel Air Associates v. N.H. Department of Health and Human Services, 154 NH 228, 232 (2006). The Legislature may, of course, clarify its intended meaning at any time. The parties are welcome to solicit the involvement of the New Hampshire General Court and/or the New Hampshire Supreme Court in the definitive resolution of the issue presented to the RKO. More precisely, assuming that the parties do not informally resolve this matter, the RKO encourages the parties to solicit those institution's involvement.

So Ordered.

Date:

11/3/23


Thomas V. Kehr, Esq.
Right to Know Ombudsman

Copies to:

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Terence O'Rourke