THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Town of Tuftonboro v Maxim Blowen-Ledoux, A.A.L. and Robert McWhirter**
Case Number: **212-2016-CV-00201**

Enclosed please find a copy of the court's order of August 08, 2017 relative to:

Final Order

August 08, 2017

Abigail Albee
Clerk of Court

(406)

C: Richard Dean Sager, ESQ; James P. Cowles, ESQ

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

Town of Tuftonboro

v.

Maxim Blowen-Ledoux, A.A.L. and Robert McWhirter

212-2016-CV-0201

ORDER

The plaintiff, Town of Tuftonboro ("Town"), filed a complaint on December 7, 2016, against defendants Maxim Blowen-Ledoux and Robert McWhirter, seeking guidance regarding payment for production of e-mail records requested by the defendants pursuant to RSA 91-A. The defendants filed a counterclaim on February 6, 2017, seeking the e-mail records electronically at no charge, plus attorneys fees and costs, and for the Selectmen to undergo remedial training at their own expense. By agreement, production of records has been held in abeyance pending order of the Court.

After scheduling delays requested by the parties, the Court conducted a trial on June 12, 2017, at which the parties appeared with counsel. Upon consideration of the evidence and arguments, the Court finds and rules as follows.

BACKGROUND AND FACTS

The following facts do not appear to be in dispute. The defendants are residents of the Town. Between them they requested an estimated 11,000 to 13,000 e-mails to and from Town officials. The defendants seek electronic transfer of the records, with no hard copies produced.

The Town responded by stating it would produce the e-mails after evaluating whether they contained confidential information that would have to be redacted. Further, if files were to be produced electronically, "metadata"[1] containing identifying information would have to reviewed and stripped out as necessary on each electronical record. According to the Town, this would involve both the application of a software program to block certain metadata and, more importantly, individual review by a Town employee viewing each document. The Town stated it would charge its standard $0.25 per page for production, whether in hard copy or electronic file. The charge was later reduced to $0.15 per page when a new policy was adopted on April 1, 2017.

The defendants objected, arguing there should be no charge for electronic files as there was no use of a copier, paper or other supplies. They also narrowed the request to approximately 1,000 to 1,750 e-mails. Faced with the potentially large charge for the records as well as legal fees, they undertook a fundraising effort from other supporters. The Town sought names of the donors to this fundraising campaign, which the defendants refused to provide.

The testimony and arguments at hearing centered on metadata and the process of its removal. The Town presented testimony of Patrick Harvie, a computer specialist, who explained the various ways to remove metadata revealing information regarding the sender and the sender's computer. For example, an electronic record would reveal the sender's e-mail address, the computer's Internet Protocol (IP) address, the network used, software and programs used, and whether a particular software program is the most current version. The identity and vintage of a software program would make it easier for a hacker to infiltrate the sender's account. The Town argues it would be

[1] "Metadata" is often defined as "data that provides information about other data."

irresponsible to release documents electronically without first "scrubbing" them to remove metadata. The Town asserts that the costs in scrutinizing files to redact confidential information from electronic copies should be recovered in the same way that the cost of production of hard copies is recovered. The Town does not seek recovery for employee time but does seek recovery of costs of use of equipment, including computers and software. The Town did not introduce its revised documents policy and did not testify to the calculations leading to the $0.15 per page charge.

The defendants assert the Town has no authority to request an advisory opinion. Further, they argue any computers used in the redaction process have already been purchased and thus there are no incremental costs to be recovered, as there would be with hard copies that consume paper, toner and the like.

ANALYSIS

The Court is mindful of its jurisdiction and is not issuing an advisory opinion. See N.H. Const. Part 2, Art. 74; Piper v. Meredith, 109 N.H. 328 (1969). RSA 491:22 grants the Superior Court jurisdiction to adjudicate petitions for declaratory judgments brought by "a person claiming a present legal or equitable right or title." This Court has not been presented with a hypothetical or "future" issue for determination. The evidence presented herein addresses a specific issue in dispute with identified parties, claims, counterclaims and alleged harms. The parties agreed that they would obtain a court order on costs before moving forward with the discovery request. To the extent the defendants ask the Court to withhold ruling for lack of jurisdiction, the request is DENIED.

The Supreme Court has addressed the delivery of electronic copies, holding that the person seeking records may opt for electronic or hard copies. Green v. Sch. Admin.

Unit #55, 168 N.H. 769 (2016). Construing RSA 91-A:4, the Court found that because electronic transfer did not require the provider in Green to "compile or assemble the documents into a new form" there was no cost to be recovered. Id. at 802-803.

The Town is understandably concerned about the potential for disclosure of confidential information such as personal e-mails, IP addresses or other identifying computer information.[2] This step would be required whether the document was delivered electronically or in hard copy.

Complying with the documents request in this case involves not simply the transfer of an electronic record, as in Green, but the scrutiny and manipulation of that record before it is transferred, to ensure that confidential information is not transmitted within the file's metadata. For example, a document may appear in hard copy only to show a name, but when reviewed in the electronic file one can see the sender's e-mail address, IP address, and the software program used to create the file. As noted by the Town, revealing a program and its vintage allows a "hacker" some of the information needed to gain access to the sender's internet account. Software tools available to the Town allow certain metadata to be redacted but, according to the Town's witness, there remains a need for an individual to scrutinize each file. Other than the time of one or more employees to view and "scrub" each file, however, there is no cost to produce the records electronically and the Town has stated it does not seek the per page charge on the basis of employee time.

While one might argue the "form" of the document has changed, the Court does not find these redactions to be the type of format change Green envisioned. For example,

[2] By this order the Court does not conclude that an e-mail address is necessarily confidential. Whether a private or official e-mail address or other identifying information is "confidential" under RSA 91-A is likely a fact specific inquiry; for purposes of this order, such information is presumed confidential, as neither party has objected to the intention of the Town to react, but only to the cost, if any, to be recovered.

data contained in text is not being compiled into a chart format, or resorted to analyze a different time period or category of information. The Town asserted the computer the Town employs to scrutinize the electronic files is a cost of document disclosure. It did not testify, however, that a new computer, hardware, or software program had been purchased to respond to these requests. Because the Town provided no evidence of actual costs incurred in preparing these documents, other than employee time, which the Town does not seek to recover, the Court finds no actual cost to be recovered from the defendants.

Regarding disclosure of the defendants' supporters and donors, the Court finds no basis under RSA 91-A or otherwise to compel such disclosure. It is unclear from the record if the Town still seeks this information. To the extent the Town still seeks the names of supporter and donors, the Town has made no persuasive showing why this information is needed and its request is DENIED.

Regarding the argument that the Town violated RSA 91-A in seeking cost recovery, it must be noted that from the state the Town agreed to make the requested documents available. The only issue has been what charge, if any, is appropriate. The Court does not find its uncertainty regarding costs, in an evolving field, to constitute a violation of RSA 91-A. That being the case, the Court finds no basis to award attorneys fees and costs to the defendants. ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746 (2011). The defendant's request for attorneys fees and costs is DENIED. Similarly, the Court finds no basis to require the Selectmen to undergo remedial training in RSA 91-A compliance; the defendants' request for training is DENIED.

So Ordered.

August 8, 2017

Amy L. Ignatius
Presiding Justice