

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Brian D. Lamy

v.

New Hampshire Public Utilities Commission

No. 04-E-041

ORDER

This case arises out of a dispute between Mr. Brian Lamy (“petitioner”) and the Public Utilities Commission (“PUC”), in which the PUC denied the petitioner’s request to disclose the names and addresses of Public Service of New Hampshire (“PSNH”) customers who had submitted voltage complaints to PSNH between July 1, 1999 and August 1, 2003. Before the Court is the petitioner’s request for injunctive relief to require disclosure of those names and addresses, pursuant to New Hampshire’s Right-to-Know Law. Also before the Court is the petitioner’s supplemental request for the PUC to release documents related to a Request for Proposals (“RFPs”) issued in connection with the PUC’s investigation of PSNH service in the Town of Bedford, New Hampshire.

The PUC objects to both of the petitioner’s requests, although it has recently, with the award of the pertinent contract, made the RFP materials available to the petitioner. See Supp. Answer of the PUC. The interveners, Granite State Electric Company (“GSE”), Unitil Energy Systems, Inc. (“UES”), Northern Utilities Inc. (“Northern”) and PSNH also interposed objections. The Court held a hearing on this matter on February 5, 2004. For the reasons stated below, the Court finds and rules as follows.

I. BACKGROUND

The PUC is a state regulatory body with responsibility for oversight of public utilities. As a part of its regulatory function, the PUC requires public utility companies like PSNH to submit quarterly reports, known as E-1 reports, regarding customer voltage complaints. See N.H.R. PUC. 304.03(e) and 308.01.

The E-1 forms contain the following information relating to a utility's follow-up testing upon receipt of customer voltage complaints: the nominal voltage and length of test; minutes below or above nominal voltage; the voltage recorded; the present regulation in percent; and the names and addresses of PSNH customers who have made the complaints. They also show, in some instances, other information.

On or about August 1, 2003, the petitioner requested, among other things, that the PUC disclose the E-1 forms that PSNH had submitted between July 1, 1999 and August 1, 2003. On August 18, 2003, the PUC informed the petitioner that he could have access to redacted E-1 forms. The redacted E-1 forms that the PUC made available to petitioner did not reveal customer-specific information, such as customer names and street addresses.

In May of 2003, prompted by alleged problems regarding the quality of electric service that PSNH was providing in the town of Bedford¹, the PUC hired Vantage Consulting ("Vantage") to conduct an investigation. In August, 2003, the PUC published Vantage's findings and solicited comments from Bedford customers. On October 31, 2003, the PUC announced it would be issuing a RFP for an independent engineering consultant to assist in the evaluation of the adequacy of the Vantage report.

¹ PSNH is currently the sole public utility providing electric service in the town of Bedford, New Hampshire.

In a letter dated January 6, 2004, the petitioner requested that the PUC disclose un-redacted E-1 forms. On January 21, 2004, the PUC denied this request and informed petitioner that customer-specific information was confidential information. The PUC's confidentiality policy for electric utilities provides that:

(a) No . . . electric distribution company shall release confidential customer information without written authorization from the customer, unless otherwise required by law.

(b) Confidential customer information shall include but not be limited to:
1) Customer name, address and telephone number; 2) Customer usage data; and 3) Customer payment information.

Puc 2004.08.

On January 26, 2004, the petitioner filed a petition for injunctive relief pursuant to RSA chapter 91-A, seeking, among other things, the disclosure of the un-redacted E-1 forms.² In addition to the disclosure of un-redacted E-1 forms, on January 27, the petitioner requested disclosure of responses to the RFP the PUC had issued to retain an independent engineering consultant to assist in review of the Vantage report.

II. DISCUSSION

The petitioner argues that New Hampshire's Right-to-Know Law requires the disclosure of the information that he has requested because disclosing the names and addresses of complainants will shed light on whether the PUC is sufficiently performing its regulatory function. He raises what he terms "electrical safety concerns." See Petition ¶ 6 and 9.³ The PUC and the interveners counter that such information is exempt from

² The petitioner also seeks to have the PUC broadly enjoined "from future violations of RSA 91-A." See Prayer C of the Petition. However, the Court focuses on the actual disputes here raised - - disputes which are legitimate. The Court declines, in the circumstances of this case, to enter the broad relief requested by the petitioner.

³ The Court notes that the petition appears to invoke language in RSA 91-A:5 which provides that a body or agency may disclose otherwise exempt "information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected." The PUC made no such disclosure here,

public disclosure under RSA 91-A:5, IV because disclosing the names and addresses of PSNH customers would constitute an unjustified “invasion of privacy” and release of “confidential, commercial or financial information.” The PUC and interveners further contend that the redacted E-1 forms already released adequately meet the public’s interest for information, and disclosure of names and addresses on E-1 forms would operate to put the pertinent public utility at a competitive disadvantage with other public utilities seeking to offer electric service within New Hampshire and also work to competitively injure certain customers.

New Hampshire’s Right-to-Know Law, codified as RSA chapter 91-A provides that “[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief RSA 91-A:7. “The party seeking nondisclosure has the burden of proof.” NH Civil Liberties Union v. City of Manchester, 149 N.H. 437, 439 (2003) (citing Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 549 (1997)).

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." NH Civil Liberties Union, 149 N.H. at 438 (quoting RSA 91-A:1)). “The Right-to-Know Law helps further our State Constitutional requirement that the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.” Id. (quoting Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 553 (2002)); see also N.H. CONST. Pt. I, art. 8. “We resolve questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to

and asserts that the language does not apply to the circumstances of this case. The Court makes its ruling here without reference to this language.

all public documents.” Id. (quoting Goode, 148 N.H. at 554). “Thus, we construe provisions favoring disclosure broadly, while construing exemptions narrowly.” Id. (emphasis added).

The PUC maintains that it is not required to release customer names and addresses appearing on the E-1 forms here at issue because such disclosure would reveal “confidential, commerce and financial information,” and constitute an “invasion of privacy” under RSA 91-A:5, IV. Therefore, the PUC argues that such information is exempt from disclosure under the Right-to-Know Law.

The New Hampshire Supreme Court has adopted the premise that “the disclosure of an individual's name and address is . . . an invasion of privacy because it serves as a “conduit into the sanctuary of the home.” Brent v. Paquette, 132 N.H. 415, 428 (1989) (quoting Kestenbaum v. Michigan State University, 414 Mich. at 524-25(1982)). In Brent, the Court denied petitioner’s Right-to-Know request for students’ and parents’ names and addresses in the Alton School District. Id. at 426-430. The Court held, in part, that such information was exempt under RSA 91-A, IV, because it constituted an invasion of privacy and the benefit in releasing such information did not outweigh the benefit of protecting individual student and parent names and addresses from public disclosure. Id. at 428.

Here, the petitioner also seeks names and addresses. Consistent with Brent, the Court deems such disclosure to implicate privacy interests, and thus be subject to a balancing test to determine whether the benefit of releasing the requested information outweighs the benefit of keeping such information confidential or non-disclosed. This

balancing test has been described by the Supreme Court as involving a three step analysis:

[1] First, we evaluate whether there is a privacy interest at stake that would be invaded by disclosure. If there is not, the Right-to-Know Law mandates disclosure. [2] Next, we assess the public's interest in disclosure. While an individual's motives in seeking disclosure are irrelevant, in the privacy context, disclosure of the requested information should serve the purpose of informing the public about the conduct and activities of their government. [3] Finally, we balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure.

N.H. Civil Liberties Union, 149 N.H. at 440 (citations omitted); see also United States Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 762 (1989).

The Supreme Court emphasized in the N.H. Civil Liberties Union case that “[t]he party resisting disclosure bears a heavy burden to shift the balance toward non-disclosure.” Id.

The balancing analysis requires that the Court “examine the nature of the requested document or material and its relationship to the basic purpose of the Right-to-Know Law.” N.H. Housing Fin. Auth., 142 N.H. at 554 (quotation and citation omitted).

The Court has already recognized that “there is a privacy interest at stake that would be invaded by disclosure.” It thus goes on to consider or assess “the public’s interest in disclosure.” Id.

The petitioner specifically asserts that the release of the customer names and addresses would enable the public to better assess and review the PUC’s quality of response to voltage complaints coming from areas within the Town of Bedford.⁴ The names and addresses of complainants would better pinpoint the exact areas within the Town where power quality issues had been occurring. The petitioner avers that, absent

⁴ Petitioner asserts that the PUC has not properly considered the large volume of E-1 complaints coming from the Bedford area which petitioner alleges to be 29% of the voltage complaints in the southern zone.

such disclosure, the public is left without needed information in finding out whether the PUC is properly responding to public utility complaints within particular areas of the Town.

The PUC and the interveners contend that the disclosed redacted E-1 forms suffice to meet the public's disclosure interests here. The Court disagrees. The petitioner is right when he contends that the redacted E-1's fail to allow for full evaluation of the PUC's response to claimed power quality or voltage issues within the Town of Bedford. As redacted, the E-1's fail to show the precise locations within the Town from where the complaints originated, i.e., the exact locations of reported voltage problems. The petitioner thus seeks information that would shed light on the PUC's regulatory performance as it relates to power quality issues within the Town. This is not a case where the customer name and address information which the petitioner seeks "reveals little or nothing about an agency's own conduct." N.H. Housing Fin. Auth., 142 N.H. at 554 (quoting Reporters Comm., 489 U.S. at 773); see also Union Leader v. City of Nashua, 141 N.H. 473, 476 (1996).

The Court observes that, in balancing the competing interests here, the privacy or confidentiality interests which have been advanced, while certainly existent, have not been shown to be strongly compelling. After all, the petitioner is not seeking the disclosures in a context where the persons to be identified would be subject to embarrassment, or serious reputational harm, or be put in any negative light, as, for example, being "associated with unwarranted identification with alleged criminal activity." N.H. Civil Liberties Union, 149 N.H. at 441. Rather, the disclosure would pertain only to a limited group of persons who have themselves come forward to

affirmatively make complaints to the public utility providing them with electricity. Such persons would be much less surprised at being publicly identified than would, for example, PSNH customers who never made complaints.

The PUC and the interveners, however, argue that the customer-specific disclosures which the petitioner seeks should not be allowed as they are sufficiently confidential to justify non-disclosure. They argue that disclosure likely would “impair . . . ability to obtain necessary [customer] information in the future,” and would “cause substantial harm to the competitive position of the person from whom the information was obtained.” See N.H. Housing Fin. Auth., 142 N.H. at 554. The Court is not persuaded.

The assurance of high quality electrical service is of major interest to us all. The PUC and the interveners make no convincing showing that persons who feel they are not receiving proper electrical service would likely be deterred from complaint because they may have their identities or locations publicly disclosed. Such customers are certainly aware that the provision of electrical service strongly and generally implicates the public interest.

Nor has the Court been shown how the disclosure here at issue would likely put PSNH or any other public utility, at an unfair competitive advantage. Of course, PSNH may lose customers if it is not properly providing service - - but the utility can hardly complain if that occurs.

Finally, the PUC and the interveners suggest that some of the complaining customers to be identified, i.e. small businesses, may sustain business loss with publicity. Its hard to understand, however, why the likely reaction of the public would be at all

negative to those who, using proper channels, seek better electrical service for their businesses. No convincing showing in that regard has been presented.

To be sure, the PUC and the public utilities have maintained for some time certain policies or practices oriented to generally prohibit disclosure of customer-specific information. These, however, may not defeat disclosure called for by the Right-to-Know Law.

The Court concludes that the PUC and the interveners have failed to meet the “heavy burden of shifting the balance toward nondisclosure in this case.” N.H. Civil Liberties Union, 149 N.H. at 442. The Court **GRANTS** the petitioner’s request for injunctive relief insofar as it seeks disclosure of the pertinent customer names and addresses.

As to the petitioner’s supplemental petition or request to review the responses to the PUC’s RFP, RSA 21-I: 13-a, II provides:

No information shall be available to the public, the members of the general court or its staff, notwithstanding the provisions of RSA 91-A: 4, concerning specific invitations to bid or other proposals for public bids, from the time the invitation or proposal is made public until the bid is actually awarded, in order to protect the integrity of the public bidding process.

The PUC had not yet finalized a contract with a bidder in response to the RFP in question when the petitioner first sought relief in Court. The RFP – related materials were thus not ripe for disclosure at that time. The Court has recently been informed that the bidding process is complete, the contract has been awarded, and the petitioner has been given access to the requested materials and information. In these circumstances, the Court **DENIES** the petitioner’s request, recognizing that the PUC properly withheld disclosure until the pertinent contract was awarded.

With respect to the petitioner's request for attorney's fees and costs, RSA 91-A:8 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 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 or where the parties, by agreement, provide that no such fees shall be paid. In any case where fees are awarded under this chapter, upon a finding that an officer, employee, or other official of a public body or agency has acted in bad faith in refusing to allow access to a . . . public record, the court may award such fees personally against such officer, employee, or other official.

RSA 91-A:8 (Supp. 2002) (emphasis added). Here, the petitioner represented himself pro se, and did not incur attorney's fees in this matter. The Court awards no such fees. As to costs, the Court finds that it was necessary for the petitioner to bring this lawsuit in order to obtain disclosure of the un-redacted E-1s and the PUC should have known that the petitioner's request was justified under the Right-to-Know Law. The petitioner is entitled to costs.

III. CONCLUSION

In sum, the Court **GRANTS** the petitioner's request for injunctive relief pursuant to RSA chapter 91-A insofar as it orders and directs the PUC to release the names and addresses of the pertinent PSNH customers who had submitted voltage complaints to PSNH and had been reported on the pertinent PUC E-1 forms. Further, the Court **DENIES** the petitioner's supplemental request to review responses to the RFP that the PUC issued relative to carrying out a review of the findings contained in the Vantage

report, and also **DENIES** the petitioner's request for broader injunctive relief and for attorney's fees. The petitioner is allowed costs.

So Ordered.

April 14, 2004

John Lewis,
Presiding Justice