

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham,ss

Mindi Messmer, Robert Renny Cushing, Philip Bean,
Henry Marsh, Mike Edgar, & James Splaine

v.

Coakley Landfill Group and Robert Sullivan

Case No _____

Petition for Injunctive Relief pursuant to Right-to-Know Law RSA 91-A

Now come Mindi Messmer, Robert Renny Cushing, Philip Bean, Henry Marsh, Mike Edgar, and James Splaine (hereafter, the “Petitioners) who petition this Court to enjoin the non-disclosure of certain information in the possession of the Coakley Landfill Group (hereafter, “CLG”) and Attorney Robert Sullivan, Chair of the Executive Committee of CLG: that is, the Petitioners petition the Court to require the production of said information forthwith pursuant to RSA 91-A.

In support of this petition, the Petitioners state as follows.

Parties

1. Petitioners are as follows:

- A. Petitioner Minda Messmer is a member of the New Hampshire House of Representatives from Rockingham District 24, representing the towns of Rye and New Castle. She lives on Washington Road in Rye.

- B. Petitioner Robert Renny Cushing is a member of the New Hampshire House of Representatives from Rockingham District 21, representing the town of Hampton. He lives on Winnacunnet Road in Hampton.

- C. Petitioner Philip Bean is a member of the New Hampshire House of Representatives from Rockingham District 21, representing the town of Hampton. He lives on Winnacunnet Road in Hampton.

- D. Petitioner Henry Marsh is a member of the New Hampshire House of Representatives from Rockingham District 22, representing the town of North Hampton. He lives on Mill Road in North Hampton.

- E. Petitioner Mike Edgar is a member of the New Hampshire House of Representatives from Rockingham District 21, representing the town of Hampton. He lives on Ann's Terrace in Hampton.

- F. Petitioner James Splaine is a former state senator, state representative and deputy mayor of the City of Portsmouth. He lives on Oriental Gardens in Portsmouth.

G. Respondent Coakley Landfill Group (CLG) is an entity that is a public instrumentality using public funds to carry out the essential government function of protecting public health and welfare and the environment by cleaning up, remediating, and preventing toxins from migrating from a Superfund Site in the town of North Hampton known as the Coakley Dump or Coakley Landfill. In the course of carrying out its essential government function CLG spends millions of taxpayer dollars of taxpayers. CLG is composed of 63% municipalities, including the city of Portsmouth (54%), the Town of North Hampton (4%) and the Town of Newington (5.5%). The mailing address of CLG is c/o City Attorney Robert Sullivan, Portsmouth City Hall, 1 Junkins Ave, Portsmouth, NH 03301. List of CLG members see Attachment 1.

H. Respondent Robert Sullivan is a full time public employee, whose entire salary is paid by the taxpayers of the city of Portsmouth to perform the duties of City Attorney. While being paid by the City of Portsmouth Mr. Sullivan also conducts public business as the Chair of the Executive Committee of Coakley Landfill Group, and directs all operations of CLG, including exercising control over all information about the public business and use of public funds by CLG that is sought by the Petitioners pursuant to RSA 91-A by this petition. Attorney Sullivan's address is Portsmouth City Hall, 1 Junkins Avenue, Portsmouth, NH.

Jurisdiction and Venue

2. This Court has jurisdiction over this matter pursuant to RSA 91-A:7. “Any person aggrieved by a violation of [RSA 91-A] may petition the superior court for injunctive relief. In order to satisfy the purposes of [RSA 91-A], the courts shall give proceedings under [RSA 91-A] high priority on the court calendar. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter” RSA 91-A:7.
3. Venue is proper in this Court pursuant to RSA 507:9 because Petitioners are residents of Rockingham County.

Facts

4. On January 30, 2018, the Petitioners Mindi Messmer, Robert Renny Cushing, Phil Bean and Henry Marsh filed a request for information from the Respondent Coakley Landfill Group under the state’s Right-to-Know Law, RSA 91-A with Respondent Robert Sullivan. The request was as follows:

Under the New Hampshire Right to Know Law R.S.A. Ch. 91-A et seq., we are requesting an opportunity to inspect or obtain copies of public records that pertain to the following:

1. Minutes of non-public meetings between responsible parties including but not limited to those listed in the Participation Agreement dated September 27, 1991 (“Participation Agreement”).

2. Minutes of non-public meetings between the Coakley Landfill Group, City of Portsmouth, Department of Defense and regulatory agencies including but not limited to the USEPA and New Hampshire DES.

3. *Copies of all reports to the New Hampshire Attorney General on behalf of Coakley Landfill Group or the City of Portsmouth.*

4. *Copies of all submittals to the New Hampshire Division of Charitable Trust including all annual financial reports (IRS Form 990, or functional equivalent).*

5. *Copies of all Coakley Landfill Group bank records.*

6. *Copies of annual audited financial reports of the operations of the parties listed in the Participation Agreement and other responsible parties from 1991 to current.*

7. *All correspondence from 1991 to present relating to Coakley Landfill Group meetings concerning moneys paid by the Department of Defense (DOD) to carry out the pump and treat system for the Coakley Landfill Superfund Site.*

8. *A copy of the Memorandum of Agreement and any other correspondence between the Department of Defense, the USEPA and/or state regulators regarding the allocation of \$5.25M referenced in Section 6.3 of the Participation Agreement. Copies of any documents relating or referencing the payment for the pump and treat system installation and following correspondences relating to the decision made by Coakley Landfill Group and regulators regarding the decision not to install said system and the response form the DOD about that decision.*

9. *Any and all correspondence relating to the Coakley Landfill Group notification to the Department of Defense that the pump and treat system would not be installed.*

10. *Coakley Landfill Group is to provide an estimate of the current liabilities for the all towns listed in the Participation Agreement for payback of all money owed upon closure of the Coakley Landfill Superfund site.*

11. *Any and all correspondence relating to any waiving of the refund of monies received from the Department of Defense for the pump and treat system, if not installed.*

12. *Any and all correspondence relating to the abandonment of the pump and*

treat installation.

13. Any and all correspondence regarding waiving liability for off-site migration for contamination to responsible parties.

14. Any and all correspondence with government officials regarding Coakley Landfill Superfund Site, including but not limited to, former Senator Bob Smith.

See Attachment 2.

5. On February 2, 2018, the same Petitioners filed a similar request for information with the City of Portsmouth, the Town of North Hampton and the Town of Newington.
6. On January 31, 2019, Petitioner James Splaine filed a request under the Right-to-Know law with Bob Sullivan that joined the request of Petitioners Messmer, Cushing, Bean, and Marsh and requested additional information under RSA 91-A. See Attachment 3.
7. On February 7, 2018, Respondent Sullivan wrote to the Petitioners. His letter addressed the original request to CLG by the petitioners Messmer, Cushing, Marsh and Bean, as well as their subsequent request submitted to the City of Portsmouth by the respondents, and the request from Jim Splaine. In the portion of his letter that addressed the Petitioners request for information from CLG, Mr. Sullivan wrote:

“Because the Coakley Landfill Group is a voluntary association of parties and not a governmental entity the Right-to-Know law would not apply to the Coakley Landfill Group.”

See Attachment 4.

8. Respondent Sullivan is being paid by the City of Portsmouth and using public resources to respond to the Right-To-Know requests made by the Petitioners to the Coakley Landfill Group. Ironically, government funds are being used by Coakley Landfill Group to assert that the New Hampshire Right-to-Know law does not apply to Coakley Landfill Group as CLG denies the Petitioners requests for information about how CLG is conducting the public's business of cleaning up the superfund site to protect public health, safety and the environment.

9. Coakley Landfill Group is a hybrid entity using public funds to carry out the essential governmental function of protecting public health and safety, drinking water, and the environment in the area near the Coakley Superfund site. CLG is a public instrumentality controlled by the municipalities which make up 63% of CLG. GLG does not own the Coakley Landfill; it is the vehicle, the organizational arrangement, by which the government gets its business done and meets its fundamental obligation to protect the public from harm and carries out the business of the cleaning-up and remediation of the hazards of the site. The day-to-day operations and management of the CLG are done by a government employee whose salary is paid for solely by taxpayer dollars.

10. Press reports that the Coakley Landfill Group has spent millions of dollars of taxpayer funds but "does not have a bank account", is paying a lobbyist \$4000 a month to defeat legislation in the State House, and has not provided "at least annually, a formal accounting of monies received, spent and obligated" add to the urgency of the need for openness and transparency required under law and the need for this petition to be granted.

Argument

11. New Hampshire's Right-to-Know law under Chapter 91-A is designed to create transparency with respect to how the government interacts with its citizens. The preamble to the law 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." 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." *Goode v. N.H. Legislative, Budget Assistant*, 148 N.H. 551, 553 (2002).

12. Chapter 91-A has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: "Government . . . 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." *Id.* New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8's language was included upon the recommendation of the Bill of Rights Committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire already had RSA 91-A to address the public and the press's right to access information, the Committee argued that the right was "extremely important and

ought to be guaranteed by a constitutional provision.” LAWRENCE FRIEDMAN, *THE NEW HAMPSHIRE STATE CONSTITUTION* 53 (2d ed. 2015).

13. Consistent with these principles, courts resolve questions under Chapter 91-A “with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents.” *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe “provisions favoring disclosure broadly, while construing exemptions narrowly.” *Goode*, 148 N.H. at 554 (citation omitted); *see also Scott v. City of Dover*, No. 05-E-170, 2005 N.H. Super. LEXIS 57, at *3–4 (N.H. Super. Ct., Strafford Cty. Oct. 11, 2005) (same) (Fauver, J.).

14. Coakley Landfill Group falls within the ambit of the Right-to-Know Law because: it is an organization which is composed of a majority of municipalities which are subject to the Right-to-Know law; it is controlled by municipalities and is run by a public employee; it provides an essential government function of cleaning up and remediating a superfund site to protect public health and safety; it uses public funds to carry out its business. Accordingly, because CLG performs an essential government function using government funds, this honorable court must find that CLG is subject to the right-to-know law. To hold otherwise would create an anomaly in which a citizen’s statutory and constitutional right to access to documents to review how a municipality meets its responsibility and spends money to protect the public health and safety could be thwarted by the municipality banding with other municipalities to form another entity to carry out the

public business that would not be subject to 91-A. Or, a municipality could thwart members of the public from exercising their constitutional and statutory right to public information by entering into an agreement with a private party to carry out an essential government function, use municipal employees to run the endeavor, and claiming activities under the participation agreement would not be subject to 91-A. [Union Leader Corp.](#), 142 N.H. at [547](#) , Professional Firefighters of N.H. v. Healthtrust, Inc., 151 N.H. 501, 505 (2004)

Conclusion and Request

WHEREFORE, Mindi Messmer, Robert Renny Cushing, Phillip Bean, Henry Marsh, Mike Edgar and James Splaine respectfully pray that this Honorable Court:

- A. Schedule a hearing on this petition as a high priority as provided for by RSA 91-A.
- B. Declare that the respondent Coakley Landfill Group, an entity established to carry out the essential government function of protecting public health and welfare and the environment that uses public funds and operated under the direction and control of a full-time employee of the City of Portsmouth, is subject to the provisions of RSA 91-A,
- C. Preliminarily and permanently enjoin the respondents Coakley Landfill Group and Robert Sullivan from refusing to respond to and process requests for public information made to respondents pursuant to the Right-to-Know law, RSA 91-A,
- D. Order the CLG and Robert Sullivan to immediately produce information requested by the Petitioners in their letter of January 31, 2018,
- E. Award Petitioners reasonable fees and costs; and
- F. Grant such other and further relief as may be deemed just and equitable.

Respectfully submitted,

Mindi Messmer
291 Washington Rd
Rye, New Hampshire 03870
603

Robert Renny Cushing
395 Winnacunnet Rd
Hampton, NH 03842
603 926 2737
reprennycushing@gmail.com

Phillip Bean
PO Box 660
Hampton, NH 03842

Henry Marsh
101 Mill Road
North Hampton, NH 03862

Mike Edgar
7 Anne's Terrace
Hampton, NH 03842

James Splaine
Oriental Gardens
Portsmouth, NH

Dated: March 16, 2018

MUNICIPAL MEMBERS (63.077%)

City of Portsmouth (53.553%) 551
Town of North Hampton (4.062%) 463
Town of Newington (5.462%) 463

~~53.553
4.062
5.462
63.077~~

GENERATOR MEMBERS (20%)

Booth Fisheries Corporation (5.03%)
Custom Pools, Inc. (0.481%)
J. Edwards, Inc. (0%)
Erie Scientific Company
Division of Fybron (1.389%)
Gary W. Blake, Inc. (0%)
Goss Lincoln Mercury Isuzu (0%)
GTE Products Corporation (0%)
Gypsum Haulage, Inc. (0.302%)
Jet-Line Services, Inc. (4.241%)
John Iafolla Company, Inc. (0%)
K mart Corporation (0.481%)
Mobil Oil Corporation (0%)
Montgomery Ward & Co., Incorporated (2.219%)
Newington Midas Muffler Shops (0%)

New England Telephone and Telegraph Co. (0%)
Northern Utilities, Inc. (0%)
Pike Associates, Inc. (0.302%)
Post Machinery Company, Inc. (0%)
Public Service Company of New Hampshire (1.978%)
K.J. Quinn & Co., Inc. (0.302%)
S&H Precision Manufacturing Co., Inc. (0.302%)
Sanel Auto Parts, Inc. (0%)
Seacoast Volkswagen, Inc. (0%)
Simplex Wire and Cable Company (2.973%)
United Technologies Corporation (0%)

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Sanel Auto Parts, Inc. (0%)
Seacoast Volkswagen, Inc. (0%)
Simplex Wire and Cable Company (2.973%)
United Technologies Corporation (0%)

EVERSOURCE

TRANSPORTERS (16.923%)

Browning-Ferris Industries of New Hampshire, Inc. and Seacoast Trucking and Moving Co. (12.308%)
Waste Management of Maine, Inc. and Waste Management of New Hampshire, Inc. (4.615%)



State of New Hampshire

HOUSE OF REPRESENTATIVES

CONCORD

January 30, 2018

Coakley Landfill Group
c/o Attorney Robert Sullivan
City of Portsmouth
City Hall, 1 Junkins Avenue, 3rd Floor
Portsmouth, NH 03801

To Attorney Sullivan:

Under the New Hampshire Right to Know Law R.S.A. Ch. 01-A et seq., we are requesting an opportunity to inspect or obtain copies of public records that pertain to the following:

1. Minutes of non-public meetings between responsible parties including but not limited to those listed in the Participation Agreement dated September 27, 1991 ("Participation Agreement").
2. Minutes of non-public meetings between the Coakley Landfill Group, City of Portsmouth, Department of Defense and regulatory agencies including but not limited to the USEPA and New Hampshire DES.
3. Copies of all reports to the New Hampshire Attorney General on behalf of Coakley Landfill Group or the City of Portsmouth.
4. Copies of all submittals to the New Hampshire Division of Charitable Trust including all annual financial reports (IRS Form 990, or functional equivalent).
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12. Any and all correspondence relating to the abandonment of the pump and treat installation.
13. Any and all correspondence regarding waiving liability for off-site migration for contamination to responsible parties.
14. Any and all correspondence with government officials regarding Coakley Landfill Superfund Site, including but not limited to, former Senator Bob Smith.

We would also like to request a waiver of all fees in that the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of the Coakley Landfill Group. This information is not being sought for commercial purposes.

The New Hampshire Right to Know Law requires a response time of five business days. If access to the records we are requesting will take longer than this amount of time, please contact us with information about when we might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify us of the appeal procedures available to us under the law. Thank you for considering our request.

Sincerely,



Rep. Mindi Messmer
Rep. Renny Cushing
Rep. Phil Bean

Cc: Portsmouth City Council
North Hampton Board of Selectmen
Newington Board of Selectmen
Hampton Board of Selectmen
Rye Board of Selectmen
Greenland Board of Selectmen
New House Judiciary Committee
Senator Jeanne Shaheen
Senator Maggie Hassan
Rep. Carol Shea-Porter
Attny Mark Gearrald
Gordon McDonald, N.H. Attorney General

Wednesday, January 31, 2018

The Portsmouth City Council
City Attorney Robert Sullivan
City Hall, 1 Junkins Avenue
Portsmouth, NH 03801

To the Portsmouth City Council and Attorney Robert Sullivan

I have agreed to join New Hampshire State Representatives Mindi Messmer, D-Rye, Renny Cushing, D-Hampton and Phil Bean, R-Hampton in their request for information, billings, and files about the Coakley Landfill matter and the Coakley Landfill Group, all of which should be publicly available under provisions of the N.H. Right-to-Know Law.

Additionally, I request to receive, under the N.H. Right-to-Know Law statute, and I believe it is imperative to have the following information. This information will be useful when the City Council receives a presentation at your meeting of Monday, February 5, 2018:

- 1. Invoices from any companies or individuals of work done that has been approved for payment by the Coakley Landfill Group.**
- 2. Copies of contracts issued, as well as any Requests for Proposals submitted, detailing work to be done or requested to be done.**
- 3. Names of companies, contractors, consultants, or individuals who have been paid for any of the work at the Coakley Landfill approved by the Coakley Landfill Group.**
- 4. A description of and any cost assigned to any in-kind work, whether paid or unpaid, that has been completed by the participating (responsible) parties of the consent degree contract, i.e. the municipalities of Portsmouth (53.6%), North Hampton (4%), Newington (5.5%), or any of the Generators (20%) or Transporters (16.9%). That should include any organizations or private businesses or persons being part of the responsible parties list.**

I also believe it is imperative that when the Portsmouth City Council receives a presentation on Monday, February 5, 2018 about the Coakley Landfill and the Coakley Landfill Group, a part of that presentation should detail the process by which work is checked prior to payment being approved. I would assume there is some kind of a process that would usually entail a Clerk Of The

Works, but apparently there is no staff connected with the Coakley Landfill Group -- so who does this task?

I also suggest that it is important for the Portsmouth City Council to join other members of the participating parties of the consent degree in contracting for a thorough audit of all monies paid through approval of the Coakley Landfill Group, an examination of the invoices submitted for payment, and an overview of the work actually accomplished. Not to do this would fail to provide a full accounting of the reported \$27 million paid to date, approximately \$13 million of which is from Portsmouth taxpayers.

I think the Portsmouth City Council must insist on full financial accountability as well as transparency. Much more will have to be done with the Coakley Landfill in years to come, and proper procedures need to be assured.

Lastly, another item that may be discussed at the Monday, February 5, 2018 City Council meeting is House Bill 1766, "relative to remediating the Coakley Landfill in Greenland, sponsored by New Hampshire State Representatives Mindi Messmer, D-Rye; Renny Cushing, D-Hampton; Phillip Bean, R-Hampton; Mike Edgar, D-Hampton; Tamara Le, D-North Hampton; Pamela Gordon, D-Portsmouth; and New Hampshire State Senator Martha Fuller Clark, D-Portsmouth.

That bill, as the formal "analysis" of the legislation states, "requires the Department of Environmental Services to order the parties responsible for dumping hazardous waste in the Coakley Landfill to undertake certain remedial actions." The bill specifically suggests that the parties responsible for placing hazardous waste into the Coakley Landfill examine the implementation of a "ground water extraction and treatment remedy" to more properly and environmentally remediate the impact of the residue into the water table.

By mismanagement and allowing waste to be placed, and buried, at the Coakley Landfill that should never have been there, we contributed to a problem. We have to take responsible action and clean it up. It will not disappear, and the processes currently being used may well not be doing the job -- thus putting more money into work that is not effective.

I believe that we, as citizens and temporary caretakers of our Seacoast Area, have a responsibility to fulfill the goals of this legislation. We caused a problem that any logic even in the less-aware years of twenty, thirty, forty and fifty years ago should have told us not to: putting hazardous waste into the

ground, then burying it, with a "Don't Worry, Be Happy" attitude, is bad practice.

The public hearing on that bill will be held by the House Environment and Agriculture Committee on Tuesday, February 20th at 10:00 AM in room 303 of the Legislative Office Building in Concord. Instead of merely opposing the bill, the Coakley Landfill Group and its newly-paid lobbyist should explore whether current remediation efforts are as successful as they should be, and how other remedial approaches may be more effective and perhaps more cost-effective.

I will add that I think we have a future problem to which we're not paying equal concern in another part of our community: the Jones Avenue Landfill. My warnings and questions about that fell seemed sidelined during the past two years. Residue from the capped Jones Avenue Landfill can affect the Sagamore Creek area and a large watershed affecting our community in decades to come unless significant remedial action is taken. The continued "Don't Worry, Be Happy" approach doesn't work forever.

Thank You,

Jim Splaine

Portsmouth Activist