

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DW 20-117

HAMPSTEAD AREA WATER COMPANY, INC.

Request for Change in Rates

**Order on Motions for Confidential Treatment and Protective Orders
and Motion to Compel**

O R D E R N O. 26,584

February 17, 2022

In this order, the Commission directs Hampstead Area Water Company, Inc. to file additional information to support its motions for confidential treatment and protective orders. The Commission further directs the parties in this proceeding to pursue a protective agreement or agreements, as appropriate, to facilitate the discovery process in furtherance of this proceeding prior to the upcoming hearings scheduled for March 23 and 24, 2022.

I. BACKGROUND

Hampstead Area Water Company, Inc. (HAWC or the Company) is a regulated water utility that provides water service to approximately 3,620 customers in thirteen New Hampshire communities, including the Town of Atkinson (Town). In this docket, HAWC seeks an increase in service rates. The Town of Atkinson Board of Selectmen and Karen Steele, a resident and taxpayer of Atkinson, petitioned to intervene in this proceeding and were granted intervention on April 9, 2021. Petitions for intervention were also granted for the Town of Danville; the Town of Hampstead; and Sarah Theriault, a residential customer of HAWC. The Office of the Consumer Advocate (OCA) filed a letter of participation in this proceeding.

II. PROCEDURAL HISTORY

On September 28, 2020,¹ HAWC filed a notice of intent to petition for a change in rates. On November 24, 2020, HAWC filed its petition.

As part of the discovery process pursuant to Puc 203.09, HAWC provided data responses to party requests for information regarding, *inter alia*: (1) HAWC employee salaries and pay, and (2) industry standards for certain elements of HAWC's water system. HAWC provided parties with responses to each of the requests but made no apparent assertion of confidentiality, as required for confidential treatment under Puc 203.08.

HAWC filed two motions pursuant to Puc 203.09 on September 27 and 28, 2021 to protect certain information provided to parties as part of the discovery process. Specifically, on September 27, 2021, HAWC filed: (1) a Motion for Confidential Treatment and Protective Order, and (2) a Motion for Protective Order to Prevent Publication of Data Requests and Data Request Responses. On September 28, 2021, HAWC refiled its Motion for Confidential Treatment and Protective Order to attach a copy of a case decision cited in the motion.

On September 28, 2021, the Office of the Consumer Advocate (OCA) filed its Opposition to HAWC's Motion for Protective Order to Prevent Publication. In a footnote to its Opposition, the OCA stated that it takes no position on HAWC's separate Motion for Confidential Treatment and Protective Order seeking confidential treatment of information provided in discovery regarding HAWC employee salary information.

On October 6, 2021, Atkinson filed objections to each of HAWC's motions.

¹ HAWC filed an initial letter of intent to file rate schedules on July 23, 2020; that filing was withdrawn on September 21, 2020; a revised letter of intent was filed on September 28, 2020. See www.puc.nh.gov/Regulatory/Docketbk/2020/20-117.html for relevant docket filings.

On October 11 and 12, 2021, respectively, the Town of Hampstead and the Town of Danville each submitted statements in support of The Town of Atkinson Board of Selectmen's intent to publish all documents, including discovery, pertaining to the rate increase discussions conducted in this proceeding.

On October 28, 2021, the Town of Atkinson filed a Motion to Compel HAWC "to respond to two data requests the Town made of HAWC" on September 24, 2021 during the discovery process in this docket and to which HAWC had provided objections to the Town on October 7 and October 22, 2021. The Town attached to its motion the two data requests at issue, with HAWC's responses and objections to each. Specifically, the Town requested copies of the Company's "vulnerability assessment and emergency response plan," and a copy of the American Water Works Association (AWWA) standards relied on by the Company to design and install fire hydrants in Atkinson.

On November 8, 2021, HAWC filed an objection to the Town's motion to compel.

The Department of Energy filed no position on any of the motions.

In this order, the Commission addresses each motion and related filings.

III. POSITIONS OF THE PARTIES

A. HAWC Motion for Confidential Treatment and Protective Order

1. HAWC

In its Motion for Confidential Treatment and Protective Order (HAWC Motion 1), HAWC argues that information regarding 2020 payroll *pro forma* adjustments, including salary and pay information for a list of named employees, was provided in response to Data Request Staff 3-8 served by the Department of Energy and should be deemed confidential because it is "confidential commercial or financial information that reveals employee pay and salary information and that all employees work for a private employer and therefore the information is not subject to disclosure under RSA

91-A,” citing to *Prof'l Firefighters of N.H. v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 708 (2010). HAWC Motion 1 at DR003, ¶10.

HAWC also notes in its motion that, after its submission of data responses, it learned that the Town of Atkinson plans to post all discovery requests and responses submitted in this docket on the Town's public website. HAWC seeks to protect the payroll and salary information from public disclosure. HAWC Motion 1 at DR002, ¶¶4, 12.

2. Town of Atkinson – Objections to HAWC Motion for Confidential Treatment

The Town objects to HAWC's motion, asserting that the information in question should not be protected from disclosure under Puc 203.08 or RSA 91-A:5, IV. The Town argues that HAWC did not seek confidential treatment of the information at issue when it was first provided through discovery responses, as required under Puc 203.08(d), and failed to establish that disclosure would constitute an invasion of a privacy interest. Town Objection at 1, ¶1 and 4, ¶4. The Town further argues that Atkinson is a New Hampshire municipality under RSA 31:11, “a public body within the meaning of the right to know law under RSA 91-A:1-a, VI, and a governmental body subject to the New Hampshire Constitution, Part 1, Article 8, which requires that government be ‘open, accessible, accountable and responsive.’” Town Objection at 2, ¶2.

The Town argues that “information about the salaries of employees of a public utility are essential for the transparency of the ratemaking process in order to assess whether the rates that a public utility is requesting, and the rates that are ultimately approved by the Commission, are just and reasonable,” adding that the Company “has failed to establish that the salaries of its individual employees comprise intimate details that are exempt from disclosure under RSA 91-A:5,IV.” *Id.* at 3, ¶4, *citing Prof'l*

Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 710 (2010). The Town also notes *Re Pennichuck Water Works, Inc.*, 91 NH PUC 562, 563 (2006) (motion for confidential treatment granted with respect to information pertaining to employees not officers of the corporation), which came to a conclusion contrary to *Prof'l Firefighters of N.H.*, but was rendered by the Commission in 2006, prior to the N.H. Supreme Court's issuance of *Prof'l Firefighters of N.H.*

3. OCA

As noted above, the Office of the Consumer Advocate (OCA) takes no position on this motion. OCA Opposition to Motion for Protective Order at 2, fn. 1.

B. HAWC Motion for Protective Order to Prevent Publication of Data Requests and Data Request Responses

1. HAWC

HAWC filed a Motion for Protective Order to Prevent Publication of Data Requests and Data Request Responses on September 27, 2021 (HAWC Motion 2). In this motion, HAWC reiterates that, on September 24, 2021 it first learned of the Town's plan to publish on the Town website all discovery requests and responses submitted in this docket. Through this motion, HAWC seeks a protective order to prevent the Town of Atkinson from doing so.

HAWC argues that data requests "served and submitted to *intervenors* such as the Town of Atkinson do not qualify as the public record because they are not submitted to either the Commission or staff as specified in Puc 201.04(a)" and, because the law has changed and "PUC Staff" are no longer "staff," any data requests served by the Department of Energy would not qualify as part of the public record exemption. HAWC Motion 2 at M002, ¶5. HAWC "concedes" [to the Town's argument] that data requests served by the Department of Energy and the Company's responses

thereto “fall within the public record definition in Puc 201.04(a), but that the long-established practice is that neither those data request[s] nor the responses thereto are published on the virtual file room docket unless done so as part of either settlement or trial submissions.” HAWC Motion 2 at M003, ¶8.

HAWC seeks a protective order to prevent the Town from publishing “all data requests served to date by all parties, and the Company’s respective responses.” HAWC Motion 2 at M003, ¶10. HAWC asked, in the alternative, that the Commission provide the Company fourteen days from the date of any order on this motion “to review its past data request responses for confidential treatment pursuant to Puc 201.04(b) and 201.04(c).

2. *Town of Atkinson – Objection to Motion for Protective Order to Prevent Publication of Data Requests and Data Request Responses*

The Town of Atkinson objects to HAWC’s motion, arguing that it is a New Hampshire municipality, “a body corporate and politic, pursuant to RSA 31:11, a public body within the meaning of the right to know law (RSA 91-A:1-a, VI), and a governmental body subject to the provisions of the New Hampshire Constitution, Part 1, Article 8,” which “requires that government be ‘open, accessible, accountable and responsive.’” Town Objection at 2, ¶2. The Town further states that its “interests in this docket are as a commercial customer and municipal fire protection customer of HAWC that would be adversely affected by the proposed rate increase.” Id.

Citing the three-step analysis articulated in *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008) and *Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005) to assess “whether there is a privacy interest at stake, ‘whether the information is confidential, commercial or financial information,’ and ‘whether disclosure would constitute an invasion of privacy’”, the Town argues that HAWC’s

motion fails to establish that publication of the data requests would constitute an invasion of a privacy interest. Town Objection at 2, ¶3 and 4, ¶4, citing *Prof'l Firefighters of N.H.*, 159 N.H. 699 (2010).

The Town further argues that “[r]elease of this information will clearly inform the public of the government’s conduct and activities, i.e., the complicated process of evaluating a rate increase requested by a public utility... Public disclosure of this information would materially advance the public’s understanding of the Commission and how it operates...” Town Objection at 4, ¶5. The Town further argues, “there are significant questions about whether any harm would occur to HAWC’s interests.” Town Objection at 4, ¶5.

Finally, the Town opposes the Company’s request that it be given fourteen days from the date of a Commission order to review past discovery responses for confidential treatment, mirroring OCA’s argument that “there is no basis in the rules for an after-the-fact confidentiality bid, and a two-week delay would be inconsistent with RSA 91-A:4.” Town Objection at 7, ¶10 (citing OCA’s objection to HAWC’s motion).

3. OCA

In its Opposition to Motion for Protective Order (OCA Opposition), OCA notes HAWC’s reliance on Puc 201.04 and “what HAWC characterizes as the ‘long-established practice’ of the Commission,” but argues that neither the rule nor the Company’s reliance on the “‘long-established practice’ of the Commission” provides a valid basis for the relief requested. OCA Opposition at 2. The OCA argues that RSA 91-A, the ‘Right-to-Know Law,’ governs how “state agencies and other instrumentalities of government in New Hampshire will make their records available for public inspection and copying,” but that “if the Commission grants a motion for confidential treatment,

then the confidential information ‘shall not be subject to public disclosure’” under Puc 203.08(h). OCA Opposition at 2-3. OCA further argues that the Commission cannot grant the Company’s request that it be permitted fourteen days “to review its past data request responses for confidential treatment,” as Puc 203.08(d) “requires that such a request must *accompany* the provision of the data request in question” and there is “no basis for an after-the-fact confidentiality bid grounded in the utility’s newfound fear of adverse publicity or scrutiny.” OCA Opposition at 5.

The OCA concludes that the Commission should deny HAWC’s motion for confidential treatment, as well as its request that it be granted an opportunity “to seek confidential treatment of materials already circulated in discovery.” OCA Opposition at 6-7.

C. Town Motion to Compel

1. Town of Atkinson Motion to Compel HAWC to Provide Responses to Data Requests

The Town of Atkinson and intervenor Karen Steele jointly filed a Motion to Compel HAWC to respond to two specific data requests propounded by the Town (Town Motion). Both data requests, along with the Company’s responses, were attached to the Motion to Compel. The data requests at issue sought a copy of the Company’s vulnerability assessment and emergency response plan, and a copy of the AWWA standards referenced in HAWC’s responses to the Town’s data requests 5-40 through 5-44.

According to the Town Motion, HAWC objected on October 7, 2021 to the Town’s request for a copy of the Company’s vulnerability assessment and emergency response plan, citing RSA 91-A:5 and Commission and NH Department of Environmental Services rules, generally. Further, according to the Town Motion, the Company subsequently submitted a supplemental data response objecting to

providing the emergency response plan, despite the Town's effort to resolve the issue under Puc 203.09(i) (concerning motions to compel discovery). Motion to Compel at 1, ¶1. The Town also asserts that the Company "first objected [to providing the Town with a copy of AWWA industry standards], on the basis of publishing laws and then subsequently based on copyright laws." *Id.*

The Town Motion argues that part of the current rate request in this proceeding is "for an increase in the per hydrant rate charged to the Town from \$200 per year to \$1,419 per year." Motion to Compel at 2, ¶2. The Town further argues that the Commission has broad discretion regarding the management of discovery and typically will allow "wide-ranging discovery," denying discovery requests only when it "can perceive of no circumstance in which the requested data would be relevant," citing *Re Lower Bartlett Water Precinct*, 85 NH PUC 371, 372 (2000). Motion to Compel at 2, ¶3. The Town contends that a "party in a legal proceeding in New Hampshire is entitled to 'be fully informed and have access to all evidence favorable to his side of the issue . . . whether the evidence is in the possession of his opponent or someone else,'" *Id.* (citing *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969)).

The Town maintains that its officials "should have access to the standards to which fire hydrants have been built and to the vulnerability assessment and the emergency response plan which the Company has in place..." as both are potentially relevant to this case in that each pertains to the fire hydrants that are the subject of a dramatic rate increase that the Company is seeking." Finally, the Town states that it "would be willing to abide by a non-disclosure agreement or confidentiality order to limit the disclosure of these documents should the Company seek such treatment of these documents and the Commission order such treatment." Motion to Compel at 3, ¶4. Accordingly, the Town requests that the Commission compel the Company to

respond to data requests Atkinson TS 4-5 and 4-6 and provide the requested documents.

2. HAWC Objection to Town Motion to Compel

On November 8, 2021, HAWC filed an objection to the Town's Motion to Compel, requesting that the Commission deny the Town's request that HAWC be required to provide a copy of the AWWA standards referred to in the Company's data responses. HAWC states that it had provided the Town with a copy of the copyright mark on the requested information and informed the Town of how it could obtain its own subscription to the AWWA website to access the standards in question. The Company states that it also offered to request consent from AWWA to provide copies of the standards to the Town. HAWC Objection to Motion to Compel at 2, ¶9.

The Company asks the Commission to deny the Town's Motion to Compel, or, alternatively, that the Commission issue a protective order should it grant the Town's Motion, requiring all Town of Atkinson representatives receiving such information to sign an agreement not to disclose such information to any third party, and further order the Town not to publish such information in any manner. HAWC Objection to Motion to Compel at 3, ¶11.

3. Office of the Consumer Advocate

OCA did not file a response to this motion.

IV. COMMISSION ANALYSIS

1. Right-to-Know Law and Confidential Treatment

The New Hampshire Right-to-Know Law provides each citizen with the right to inspect public information in the possession of the Commission. RSA 91-A:4, I. RSA 91-A:5(1V) exempts from public disclosure requirements "any records pertaining to ... confidential, commercial or financial information...." In determining whether

commercial or financial information should be deemed confidential and private, we consider the three-step analysis applied by the New Hampshire Supreme Court in *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005); and *Lambert v. Belknap County Convention*, 157 N.H. 375, 382 (2008); see also *Public Service Company of New Hampshire d/b/a Eversource Energy*, Order No. 26,350 at 8 (April 22, 2020).

First, we evaluate whether there is a privacy interest at stake that would be invaded by the requested disclosure. When commercial or financial information is involved, this step requires a determination of whether an interest in maintaining the confidentiality of the information is at stake. If no such interest is at stake, the Right-to-Know law requires disclosure. *Lambert* at 382-83. Second, when a privacy interest is at stake, the public's interest in disclosure is assessed. *Id.* at 383. Disclosure should inform the public of the conduct and activities of its government; if the information does not serve that purpose, disclosure is not warranted. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any potential harm to specific privacy interests in non-disclosure. *Id.*

HAWC's motions, filed on September 27, 2021 and September 28, 2021, respectively, relate to: (1) salaries and incidental pay rates of the Company's employees filed in response to discovery requests pertaining to the Company's 2020 payroll *pro forma* adjustments pertaining to 17 employees (two of which are identified only as "New Office Person" and "New Field Person"), and (2) certain copyrighted industry standards information obtained from the American Water Works Association, or AWWA.

The Town of Atkinson's motion to compel pertains to its request that the HAWC provide copies of the Company's "vulnerability assessment and emergency response

plan” and a copy of the AWWA industry standards used by the Company for designing and installing the fire hydrants in Atkinson.

We address the motions below.

1. HAWC Motion for Confidential Treatment and Protective Order regarding Employee Salary and Pay Information

At issue with respect to personnel salary and pay information is a data response produced by the Company during the discovery process in this docket that shows HAWC employee names, their assigned “pay groups,” and certain pay and salary information for the years 2019 and 2020. HAWC has argued that its employees have a privacy interest in not having their salaries and pay information disclosed and that such information is not subject to disclosure under RSA 91-A. Motion at HAWC DR 003, ¶¶ 10-11. However, other than the conclusory assertions noted above, the Company has not provided any evidence or argument regarding the potential harm that would arise by disclosing the salary information of its employees, as required by Puc 203.08(b)(3). We also note that HAWC appears to conflate Commission practice regarding the treatment of information during discovery within a docket proceeding and the protection of discovery information pursuant to a properly supported motion under Puc 203.08.

We agree with the positions of the Town and the OCA that the public has an interest in understanding how the various expenses incurred by a regulated public utility such as HAWC are established, including labor rates and overhead costs incurred in the Company’s operation. However, because the Commission has not received any evidentiary support to enable it to apply the balancing test required by *Lamy*, we cannot make a determination at this time on the Motion for Confidential Treatment and Protective Order filed by HAWC. Therefore, we deny the motion without prejudice to the Company’s right to re-submit its motion with proper factual support

by no later than February 24, 2022. We further recommend that the Company and the Town discuss the scope of the information that is required to adequately inform the public in this matter and consider a collaborative agreement that would protect the privacy of individual employees while providing the financial information that is relevant to this proceeding.

2. Motion to Compel Production of HAWC's Vulnerability Assessment and Emergency Response Plan and AWWA Industry Standards.

The Town of Atkinson seeks a copy of the Company's "vulnerability assessment and emergency response plan" and a copy of the AWWA industry standards that HAWC used "for designing and installing the fire hydrants in Atkinson" and, based on the filings, the Town intends to publish those standards on its website for the benefit of ratepayers. HAWC argues that the industry standards compiled by AWWA are protected by copyright, and that publication of those standards on the Town's website would violate the protection afforded to AWWA under that copyright.

In a discovery dispute, the Commission applies by analogy the standard applicable to civil litigation, which requires a party seeking to compel discovery to show that the information being sought is relevant to the proceeding or is reasonably calculated to lead to the discovery of admissible evidence. *See Public Service Company of New Hampshire*, Order No. 25,298 (December 7, 2011) (internal citations omitted). The Commission also weighs the effort needed to gather the requested information, the availability of the information from other sources, and other relevant criteria. *See, e.g., Valley Green Natural Gas, LLC.*, Order No. 25,867 at 5 (February 17, 2016). In ruling on a motion to compel, the Commission enjoys "broad discretion in the management of discovery." *Public Service Company of New Hampshire*, Order No. 24,342 at 23 (June 29, 2004) (quoting *YYY Corp. v. Gazda*, 145 N.H. 53, 59 (2000)).

The Commission is aware of no case law in New Hampshire that specifically addresses an objection to producing information during discovery that is in the possession, custody and control of a litigant based on copyright. We note, however, a separate, unrelated docket in which several references to other state jurisdictions were provided in support of the argument that citing to copyright concerns to withhold information during discovery is untenable. *See, e.g., Borum v. Smith, 2017 WL 3014487, at *4 (W.D. Ky. July 14, 2017)* (describing copyright concerns during the discovery process as untenable), and *Religious Technology Center v. Wollersheim, 971 F.2d 364, 367 (9th Cir. 1992)* (finding the reproduction of copyrighted documents for litigation purposes a fair use).

Consistent with our discussion above relating to protective orders, we grant Atkinson's motion to compel, noting that there has been no argument that the information sought is not relevant. Furthermore, we direct the parties to confer regarding adequate protective measures to prevent unauthorized re-publication of any copyrighted materials accessed by the parties during the instant litigation. In the event the parties are unable to reach agreement, we direct them to report back within ten business days from the date of this order.

For the reasons outlined above, we dismiss the motion for confidentiality without prejudice at this time to the Company's right to resubmit its motion with proper support by no later than February 18, 2022. We recommend that the Company carefully review applicable Commission rules and pertinent case law, as well as past Commission decisions and related docket filings regarding this issue prior to its submission.

We further direct the Company and the Town to confer amongst themselves and with other parties, as warranted, regarding the usefulness of one or more protective

agreements to facilitate discovery in this proceeding. Given the upcoming hearing on March 23 and 24, parties are encouraged to pursue agreement(s) governing the release of information required for the purposes of this proceeding. To the extent that parties cannot reach agreement by February 22 or earlier, the Commission will entertain oral argument at the March 23 hearing session.

Based upon the foregoing, it is hereby

ORDERED, that Hampstead Area Water Company file support for its motions for confidential treatment by no later than February 23, 2022; and it is

FURTHER ORDERED, that Hampstead Area Water Company and the Town of Atkinson and Intervenor Steele collaborate on the proper treatment of discovery information as discussed herein and report on such efforts to the Commission by no later than February 25, 2022; and it is

FURTHER ORDERED, that, in the event the discovery issues discussed herein are not resolved by February 25, 2022, parties are directed to prepare for oral argument on discovery at the hearing scheduled for March 23, 2022 in this matter.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of February, 2022.


Daniel C. Goldner
Chairman


Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket# : 20-117

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