

**STATE OF NEW HAMPSHIRE PUBLIC
UTILITIES COMMISSION**

DW 20-064

PENNICHUCK WATER WORKS, INC.

**Emergency Petition for financing Approval Under SBA Paycheck Protection
Program and Motion for Waiver**

Order on Motion for Protective Order and Confidential Treatment

O R D E R N O. 26,616

April 27, 2022

This order grants in part and denies in part the Motion for Protective Order and Confidential Treatment filed by the Petitioner on July 28, 2021, and grants the Supplemental Motion for Protective Order and Confidential Treatment filed by the Petitioner on August 11, 2021.

I. PROCEDURAL HISTORY

On July 28, 2021, Pennichuck Water Works, Inc. (“PWW” or “Petitioner”) provided a copy of its Small Business Association (“SBA”) application for Loan Forgiveness, Form 3508, revised January 19, 2021, (“Loan Forgiveness Application”) in response to the New Hampshire Public Utility Commission’s (“Commission”) requests in Order Nos. 26,354 (May 6, 2020), 26,424 (Nov. 24, 2020), and 26,477 (April 30, 2021). The Petitioner contemporaneously filed a motion for protective order and confidential treatment of business and loan forgiveness information (“Motion”) requesting that the Commission issue a protective order preventing public disclosure of the confidential financial and business information in the Loan Forgiveness Application. On August 11, 2021, the Petitioner supplemented its July 28th filing to include Schedule A, Table 1 and Table 2, containing salary, wages, and compensation information of the Petitioner’s employees. The Petitioner contemporaneously filed a

supplemental motion for protective order and confidential treatment of private employee and loan forgiveness information (“Supplemental Motion”) requesting that the Commission prevent public disclosure of the salary, wage, and compensation information in Schedule A, Table 1 and Table 2. The Motion and Supplemental Motion are unopposed.

The Motion, Supplemental Motion, and other docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission’s website at:

<https://www.puc.nh.gov/Regulatory/Docketbk/2020/20-064.html>.

II. POSITION OF THE PETITIONER

A. July 28, 2021 Motion

The Petitioner argues that the issuance of a protective order and confidential treatment of the redacted information in the Loan Forgiveness Application is warranted because it includes the Petitioner’s tax identification number, its SBA Paycheck Protection Program (“PPP”) loan number, and other confidential business information. At the time of filing, The Loan Forgiveness Application was pending before TD Bank and the SBA. The Petitioner contends that the information included in the Loan Forgiveness Application is confidential commercial or financial information. It argues that public disclosure may affect its ability to negotiate with TD Bank, SBA, and future lenders or expose the Petitioner to potential fraud by outside parties. Lastly, the Petitioner contends that it is in the public interest to allow such review and approval processes by TD Bank and the SBA to occur in a manner consistent with the lender’s and the SBA’s procedures and practices.

B. August 11, 2021 Supplemental Motion

The Petitioner seeks a protective order and confidential treatment of the salary,

wage, and compensation information in Schedule A, Tables 1 and 2. The Petitioner contends that public disclosure of such information would constitute an invasion of privacy. The Petitioner argues that since its employees are private employees not employed by a public body as defined by RSA 91-A:1-a, IV, the Right-to-Know law does not apply to them and public disclosure of the salary, wage, and compensation information would violate the reasonable expectation of privacy private employees have in their salary information. The Petitioner additionally asserts that release of such information would affect its ability to recruit and retain employees and its future negotiations with TD Bank, the SBA, and other lenders.

II. COMMISSION ANALYSIS

A. Right-to-Know Law Standard

As a general matter, the Right-to-Know Law provides members of the public with the right to inspect records in the possession of the Commission. See RSA 91-A:4, I. The Right-to-Know Law is interpreted by the New Hampshire Supreme Court “with a view toward disclosing the utmost information in order to best effectuate [the] statutory and constitutional objective of facilitating access to public documents.” *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 330 (2020). “Accordingly, although the statute does not provide for unfettered access to public records,” its provisions are broadly construed in favor of disclosure and its exemptions are interpreted restrictively. *Id.* at 330-31.

“The commission shall upon motion issue a protective order providing for the confidential treatment of one or more documents upon a finding that the document or documents are entitled to such treatment pursuant to RSA 91-A:5, or other applicable law based upon the information submitted.” Puc 203.08(a). The exemption that is commonly implicated by motions for confidential treatment is contained in RSA 91-

A:5, IV. As relevant here, that paragraph exempts “[r]ecords pertaining to . . . confidential, commercial, or financial information . . . and other files whose disclosure would constitute an invasion of privacy” from public disclosure. *See* RSA 91-A:5, IV. Determining whether the exemption for “confidential, commercial, or financial information” applies requires an “analysis of both whether the information sought is confidential, commercial, or financial information and whether disclosure would constitute an invasion of privacy.” *Union Leader Corp. v. Town of Salem*, 173 N.H. 345, 355 (2020) (quoting *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 552 (1997)).

The New Hampshire Supreme Court has not adopted a single test to determine whether material is “confidential,” although the Court has found “the standard test employed by the federal courts” instructive. *Union Leader Corp.*, 173 N.H. at 355. Under that standard, to establish that information is sufficiently “confidential” to justify nondisclosure, “the party resisting disclosure must prove that disclosure is likely: (1) to impair the [government]’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* (quotation omitted).

Whether documents are “commercial or financial” depends on the character of the information sought. *N.H. Housing Fin. Auth.*, 142 N.H. at 553. “Information is commercial if it relates to commerce.” *Id.* Thus, “information may qualify as commercial even if the provider’s . . . interest in gathering, processing, and reporting the information is noncommercial.” *Id.* (quotation omitted). “Conversely, not all information generated by a commercial entity is financial or commercial.” *Id.* (citation omitted).

Even if certain records are determined to be confidential, commercial, or financial information, “these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public’s interest in disclosure.” *Id.* Accordingly, whether the disclosure of “confidential, commercial, or financial information” results in an invasion of privacy involves a three-step analysis. *See Union Leader Corp.*, 173 N.H. at 355. First, we must evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. *Id.* Second, we assess the public’s interest in disclosure. *Id.* Third, we balance the public interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure. *Id.* If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. *Id.* Further, “whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party’s subjective expectations.” *Id.* The party resisting disclosure bears the burden of proving that the records should not be disclosed. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996).

B. Analysis

i. July 28, 2021 Motion

The business and loan information in the Loan Forgiveness Application is “relate[d] to commerce” and therefore the information is “commercial or financial” within the meaning of RSA 91-A:5, IV. *N.H. Housing Fin. Auth.*, 142 N.H. at 553. As commercial or financial information, the Petitioner’s privacy interest in the information must be balanced against the public’s interest in disclosure. *See id.*

To establish that the information is sufficiently confidential to justify nondisclosure, the Petitioner must show that disclosure is likely “to cause substantial harm to the competitive position of the person from whom the information was

obtained.” *Union Leader Corp.*, 173 N.H. at 355. The Petitioner contends that public disclosure of its tax identification number, SBA PPP Loan number, and other confidential business information would affect its ability to negotiate with TD Bank, the SBA, and future lenders and may expose the Petitioner to potential fraud by outside parties. The Petitioner’s contention is sufficient to turn to the balancing test under the Right-to-Know analysis.

To begin the analysis, we must evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. *See id.* The privacy interest advanced by the Petitioner’s Motion is that disclosure of the redacted information in the Loan Forgiveness Application may harm its negotiations with TD Bank, the SBA, and other future lenders and may subject it to potential fraud by outside parties.

Next, we must assess the public’s interest in disclosure. *See id.* The Petitioner asserts that it is in the public interest to allow review and approval from TD Bank and the SBA to occur in a manner consistent with their procedures and practices. The Petitioner does not elaborate on how this benefits the public’s interest nor how public disclosure would adversely impact TD Bank’s or the SBA’s procedures and practices. The purpose of the Right-to-Know Law is to provide the utmost information to the public and “what its ‘government is up to.’” *See New Hampshire Right to Life v. Director, N.H. Charitable Trust Unit*, 169 N.H. 95, 111 (2016). The Commission requested the Loan Forgiveness Application “to ensure that the direct benefit of the financing flows to PWW’s ratepayers.” *Pennichuck Water Works, Inc.*, Order No. 26,354, at 9 (May 6, 2020). This is the public interest that must be balanced against the Petitioner’s interest in nondisclosure. Notably, whether or not the Petitioner’s Loan Forgiveness Application is successful, it contends that ratepayers will still receive savings on the average customer bill. *Id.* at 7.

Finally, we must balance the public's interest in disclosure against the government's interest and the individual's privacy interest in nondisclosure. *See New Hampshire Right to Life*, 169 N.H. at 111. Here, we note what information the Petitioner has redacted from its Loan Forgiveness Application, as it is informative to our analysis. The Petitioner redacts *all* inputted information from its Loan Forgiveness Application, including, inter alia, its business name, contact information, SBA PPP loan number and loan amount (both of which are public information), and all amounts relevant to the loan forgiveness calculation. The Petitioner redacts information in the Loan Forgiveness Application that it leaves non-redacted in the subsequently filed Schedule A, Tables 1 and 2. The Petitioner has a significant interest in nondisclosure of confidential information included in the Loan Forgiveness Application not otherwise publicly accessible. Information publicly accessible, either through the Petitioner's subsequent filing or other means, precludes nondisclosure because the Petitioner has no privacy interest at stake in otherwise publicly available information. *See Union Leader Corp.*, 173 N.H. at 355.

Accordingly, the Petitioner's Motion is DENIED in part as to the otherwise publicly accessible information included in the Loan Forgiveness Application and GRANTED in part as to the remaining information which shall receive confidential treatment.

ii. August 11, 2021 Supplemental Motion

In its Supplemental Motion, the Petitioner seeks confidential treatment for the salary, wages, and compensation information included in its subsequent filing of Schedule A, Tables 1 and 2. The redacted salary information in the Tables is "relate[d] to commerce" and is therefore "commercial or financial" within the meaning of RSA 91-A:5, IV. *N.H. Housing Fin. Auth.*, 142 N.H. at 553. As commercial or financial

information, the Petitioner's privacy interest in the information must be balanced against the public's interest in disclosure. *See id.*

To establish that the information is sufficiently confidential to justify nondisclosure, the Petitioner must show that disclosure is likely "to cause substantial harm to the competitive position of the person from whom the information was obtained." *Union Leader Corp.*, 173 N.H. at 355. The Petitioner contends that the salary, wages, and compensation information is sufficiently confidential because public disclosure of that information could impact future negotiations with TD Bank, the SBA, and other lenders or affect its ability to recruit and retain employees. The Petitioner's contention is sufficient to turn to the balancing test under the Right-to-Know analysis.

We first evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. *See id.* There is certainly a privacy interest held by the Petitioner's employees and the Petitioner itself. As Petitioner articulated, public disclosure of the redacted information in Schedule A, Tables 1 and 2 would constitute an invasion of privacy because Petitioner's employees are not public employees whose compensation information is public under Right-to-Know Law. The Petitioner's employees' privacy interest in the redacted information is sufficient and reasonable. The Petitioner itself has an interest in keeping its compensation information confidential to recruit, retain, and successfully negotiate with employees.

Next, we must assess the public's interest in disclosure. *See id.* The Petitioner does not articulate a competing public interest and we are similarly unable to identify one. The Petitioner does not redact the totals in each Table, providing the public insight on the Petitioner's total compensation amounts. The specific details regarding particular employees and their compensation do little for the public's interest.

Finally, we must balance the public's interest in disclosure against the government's interest and the individual's privacy interest in nondisclosure. *See id.* The Petitioner articulated significant interests in nondisclosure compared to the negligible public interest in the redacted information in Schedule A, Tables 1 and 2. For the reasons explained in the foregoing paragraphs, we conclude that the Petitioner's and its employees' interests in nondisclosure outweigh the public's interest in disclosure.

Accordingly, the Petitioner's Supplemental Motion is GRANTED.

Based upon the foregoing, it is hereby

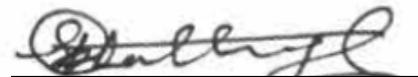
ORDERED, that the Petitioner's Motion for Protective Order and Confidential Treatment is GRANTED IN PART AND DENIED IN PART as set forth herein above; and it is further

ORDERED, that the Petitioner's Supplemental Motion for Protective Order and Confidential Treatment is GRANTED.

By order of the Public Utilities Commission of New Hampshire this twenty-seventh day of April, 2022.



Daniel C. Goldner
Chairman



Pradip K. Chattopadhyay
Commissioner



Carleton B. Simpson
Commissioner

Service List - Docket Related

Docket#: 20-064

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