

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.:

**GLEN MACLEOD, WILLIAM
BRUNDAGE, ARMAND "DAN" APARO,
CRAIG MORRILL, KENNETH
KNOWLES, WILLIAM TOBIN, BROCK
HALE CURRIER, JANELLE
FAVALORO, PATRICK KEATING,
KATHY MILBURY, and BARBARA
STAVROPOULOS,
Plaintiffs,**

v.

**TOWN OF ROCKPORT; and SARAH
WILKINSON, DONALD CAMPBELL,
RUTH GEORGE, PAUL MURPHY, and
ROSS BRACKET as They Are Members
of the ROCKPORT BOARD OF
SELECTMEN,**

Defendants.

FILED
ESSEX SUPERIOR COURT
21 JAN 25 AM 10:01

COMPLAINT

Introduction

Plaintiffs, all taxpayers of the Town of Rockport, pray this Court asserts its authority over the Town of Rockport and its Board of Selectmen, ordering the Town to comply with the law. The future of the Rockport Fire Department has been put in uncertain waters for the past several months, culminating in early November when members of the Rockport Fire Department sent a letter to Rockport's Board of Selectmen, demanding the removal of Assistant Police Chief/Emergency Services Director Mark Schmink from his unlawful takeover of the RFD's command structure and the return of the RFD to the lawful command of Fire Chief James Doyle. The firefighters' demands went unanswered; instead, the Selectmen delegated the problem to

Town Administrator Mitch Vieira, who placed Fire Chief Doyle on administrative leave the day after the Firefighter's letter was sent to the Selectmen.

Rockport's Town Meeting is the Town's gatekeeper, not a Town Administrator whose purported powers come from a contract negotiated behind closed doors, which include authorities the Town Meeting never approved. In only 18-months, the Town Administrator was assigned a badge and an unmarked police car, the Asst. Police Chief replaced the Board of Engineers and took over command of the Fire Department, the Police Chief's spouse, an attorney, was hired to investigate various firefighters (including the Fire Chief), the Police Chief's wife was appointed to the Town Government and Bylaw Committee to rewrite the Town's Bylaws, and the these same officials used taxpayer funds to purchase an email encryption software to communicate with.

The Selectmen are accountable for the actions that have brought us to this point, but are unwilling to fix it. Plaintiffs pray that this Court will.

Parties

1. Plaintiff Glen MacLeod is a taxpayer in Rockport, Massachusetts and seasonally inhabits 21 Atlantic Avenue, Rockport, Massachusetts.
2. Plaintiff William Brundage is a taxpayer in Rockport, Massachusetts and inhabits 24 Main Street, Rockport, Massachusetts.
3. Plaintiff Armand "Dan" Aparo is a taxpayer in Rockport, Massachusetts and inhabits 8 Brooks Road, Rockport, Massachusetts.
4. Plaintiff Craig Morrill is a taxpayer in Rockport, Massachusetts and inhabits 3 Worcester Place, Rockport, Massachusetts.
5. Plaintiff Kenneth Knowles is a taxpayer in Rockport, Massachusetts and inhabits 102

Main Street, Rockport.

6. Plaintiff William Tobin is a taxpayer in Rockport, Massachusetts and inhabits 24 Beach Street, Rockport, Massachusetts.
7. Plaintiff Brock Hale Currier is a taxpayer in Rockport, Massachusetts and inhabits 30 Pigeon Hill Street, Rockport, Massachusetts.
8. Plaintiff Janelle Favaloro is a taxpayer in Rockport, Massachusetts and inhabits 37 Squam Hill Road, Rockport, Massachusetts.
9. Plaintiff Patrick Keating is a taxpayer in Rockport, Massachusetts and inhabits 13 Highview Road, Rockport, Massachusetts.
10. Plaintiff Kathy Milbury is a taxpayer in Rockport, Massachusetts and inhabits 10 Stone Barn Lane, Rockport, Massachusetts.
11. Plaintiff Barbara Stavropoulos is a taxpayer in Rockport, Massachusetts and inhabits 10 Stone Barn Lane, Rockport, Massachusetts.
12. Defendant Town of Rockport (the “Town” or “Rockport”) is an independent municipality of Massachusetts, with a principal address at 34 Broadway, Rockport, Massachusetts.
13. Defendant Sarah Wilkinson resides at 23 Highview Road, Rockport, Massachusetts, is a Member of the Board of Selectmen.
14. Defendant Donald Campbell resides at 5 King Street Court, Rockport, Massachusetts, is a Member of the Board of Selectmen.
15. Defendant Ruth George who resides at 86 Granite Street, Rockport, Massachusetts, is a Member of the Board of Selectmen.
16. Defendant Paul Murphy who resides at 21R Pleasant Street, Rockport, Massachusetts, is a Member of the Board of Selectmen.

17. Defendant Ross Brackett who resides at 27 Main Street, Rockport, Massachusetts, is a Member of the Board of Selectmen.

Facts

18. Rockport is governed by a legislative charter. *See* St. 1959, c. 242, and amendments at St. 1987, c. 619 and St. 1995, c. 133 (collectively the “Town Charter”).

19. The Town’s executive consists of an elected Board of Selectmen (the “Selectmen”), and pursuant to the Town Charter, the Selectmen have the option “in their discretion [to] appoint an administrator or executive secretary . . .” St. 1995, c. 133, § 5(b).

20. The Town Charter does not define the role of the Selectmen’s said discretionary employee.

21. The Town of Rockport Code of By-laws, approved by Annual Town Meeting on April 6, 2013 (the “Bylaws”), similarly does not define ‘administrator,’ ‘executive secretary,’ or ‘Town Administrator,’ but does allow for the Selectmen to appoint a Town Administrator. *See* Bylaws, c. 6, § 6.

22. The Town Charter provides the authority for the Selectmen to appoint a Board of Engineers, of which the Board of Engineers authority and duties are defined by Massachusetts Law.

23. The Town’s legislative branch is a traditional open town meeting.

24. The Selectmen have hired a full-time Town Administrator for several years, at present the Town Administrator is Mitch Vieira, who was appointed in June of 2019.

25. Town Admin. Vieira’s authorities and duties are not enumerated within the Bylaws; rather, they are within his contract executed between he and the Selectmen in executive session. *See* Town Admin. Vieira’s contract attached hereto as Exhibit 1.

26. In June of 2019, the same month of Town Admin. Vieira's appointment, the Selectmen appointed Rockport Police Department Lieutenant Mark Schmink to be Assistant Police Chief and Emergency Services Director. Both positions were new to Rockport, as having never been in existence before then.
27. In June of 2019, the same month of the appointments described above, the Town (unknown as to who) "in anticipation of conducting the decennial review of the by-laws in 2020¹" appointed Rockport Police Chief Jonathan Horvath's spouse, Attorney Dinamary Horvath, to the Town Government and Bylaw Committee.
28. In June of 2019, the same month as above, the Town (unknown as to who) hired Rockport Police Chief Horvath's spouse, Attorney Dinamary Horvath to serve as some form of purported quasi-'Special Counsel' to conduct external investigations into various firefighters (including Rockport Fire Chief James "Jimmy" Doyle²).
29. In June of 2019, Asst. Police Chief/Emergency Services Director Schmink, as Chairmen of a search committee³ to replace the retiring Board of Fire Engineer member (Asst. Fire Chief), recommended to the Selectmen that then Rockport Fire Department Captain Stephen Abell be appointed to the Board of Fire Engineers.
30. In June of 2019, the Selectmen appointed Captain Abell to the Board of Fire Engineers.
31. In June of 2019, Asst. Police Chief/Emergency Services Director Schmink took over command of the Rockport Fire Department, both administratively and operationally.
32. In addition to Mr. Schmink's salary as then LT for the Rockport Police Department and

¹ 2019 Annual Town Report of Rockport.

² Fire Chief James Doyle has been on the Board of Fire Engineers for over twenty-years, having been a volunteer fireman in Rockport for forty-six years and its Chief Fire Engineer for over ten years.

³ It is not known who appointed Asst. Police Chief/Emergency Services Director Schmink to lead the search committee, but the committee also included the Gloucester Fire Chief and the Town of Rockport Treasurer/Collector Carrie Arnaud.

his stipend as Director of Emergency Management, he received a salary increase for becoming the first ever Assistant Chief for the RPD⁴, and an additional stipend as Emergency Services Director.

33. The Emergency Services Director position was never publicly advertised or offered to any Town employee, except for Asst. Police Chief Schmink.

34. Asst. Police Chief/Emergency Services Director Schmink was placed in charge of the Rockport Fire Department, becoming the supervisor of both the Board of Fire Engineers and its Chief Fire Engineer (Fire Chief Doyle). *See* Job Description of Emergency Services Director attached hereto as Exhibit 2.

35. Asst. Police Chief/Emergency Services Director Schmink has never been a firefighter and has no firefighting training or experience.

36. At the same time, the Selectmen stopped assigning each other as ‘Liaisons’ to the Public Safety Departments, including the Fire Department, which they had previously done for decades.

37. Town Admin. Vieira’s contract, from June of 2019, provides for the following duty and authority:

Serving as the Public Safety Commissioner and overseeing all Public Safety functions and ensuring the orderly and efficient provisions of services of same.” Exhibit 1 at 12.

38. On Rockport’s website, the Town Administrator’s page states: *“The Town Administrator also serves as the Public Safety Commissioner, ADA Coordinator, and Municipal Ethics Liaison.”*

39. The Public Safety Commissioner is a role defined by Massachusetts Law:

⁴ Rockport Police Department, up until 2012 when the Town created the Lieutenant position, only had a Chief and three (3) Sergeants. The RPD now has a Chief, Asst. Chief, Lieutenant, and three (3) Sergeants.

If a town so votes under section twenty-one the selectmen shall appoint a suitable person as chief of the police and fire departments who may be designated as commissioner of public safety. He shall have authority, subject to the approval of the selectmen, to appoint a deputy as chief of the police and one or more deputy chiefs of the fire department. He shall have all the authority of constables and police officers in towns and also the powers and duties of fire engineers, and, subject to the approval of the selectmen, shall fix the compensation of police officers and permanent and call members of the fire department. Such compensation shall not exceed, however, in the aggregate the amount appropriated therefor by the town. The deputy chiefs of the fire department shall under him have the powers of fire engineers relative to the extinguishing of fires in the town and the protection of life and property in case of fire. (emphasis added). G.L. c. 41, § 101.

40. In order for the Selectmen to legally appoint Town Admin. Vieira as Public Safety Commissioner, such appointment powers must be approved by a vote of Rockport's legislature: its Town Meeting pursuant to G.L. c. 41, § 21.
41. The Town Meeting has not voted on giving the Selectmen the authority to appoint a Public Safety Commissioner.
42. The Town Charter vests the authorities and duties of the Rockport Fire Department with its Board of Engineers.
43. The Town Charter would need to be amended to allow for a Public Safety Commissioner to legally have the authority and duties of the Board of Engineers.
44. To date, the Town Charter has not been amended to allow the Rockport Fire Department to be operated in any other way; other than, by the Board of Fire Engineers in accordance with Massachusetts Law.
45. This added and illegal authority, of Public Safety Commissioner, was simply 'vested' upon Town Admin. Vieira within his contract which was negotiated in executive session.
46. None of the previous Town Administrators were Public Safety Commissioners.
47. Upon information and belief, Town Admin. Vieira wears a badge.

48. Upon information and belief, Town Admin. Vieira was assigned an unmarked police cruiser (with lights and police department license plates).
49. Town Admin. Vieira purports to have quasi-constable authority by serving No Trespass Orders on Town residents, restraining their ability to be on any Town property, unless the resident receives his express authority.
50. Asst. Police Chief/Emergency Services Director Schmink, through Town Admin. Vieira acting as purported Public Safety Commissioner,⁵ starting in June of 2019, usurped the Board of Fire Engineers' and the Chief Fire Engineer's authority in violation of the Town Charter and Massachusetts Law.
51. The Selectmen, Town Admin. Vieira, Police Chief Horvath, and Asst. Police Chief Schmink created a situation where all of the Town's public safety departments were/are under the authority of the Police Chief and Asst. Police Chief.
52. This aforementioned setup was/is legally untenable and Rockport's legislative branch, its Town Meeting, was kept in the dark.
53. In accordance with the Town Charter, the Selectmen appoint a Board of Fire Engineers pursuant to G.L. c. 48, § 45.
54. In accordance with the Town Charter, the Board of Fire Engineers selects a Chief Fire Engineer pursuant to G.L. c. 48, § 46.
55. Fire Chief Doyle has been selected by the Board of Fire Engineers to serve as Chief Fire Engineer unanimously every year since 2010.

⁵ The Town's (new) Office of Emergency Services' letterhead includes Town Admin. Vieira and Asst. Police Chief/Emergency Services Director Schmink. The Town of Rockport created a situation, at all times relevant herein, where Police Chief Horvath was in charge of the Police Department and Asst. Police Chief Schmink was placed in charge of the remaining public safety departments, including the RFD, vesting all of the public safety departments under the control of the Rockport Police Department.

56. In accordance with the Town Charter, the Board of Fire Engineers “shall have the powers of firewards and, in the nomination and appointment of such firefighters as necessary therefor, shall exercise the powers and perform the duties of selectmen.” G.L. c. 48, § 47.
57. In accordance with the Town Charter, The Board of Fire Engineers, alone, have the power to ‘appoint’ firemen and ‘constitute’ the engine, hose, and hook and ladder companies. *See id.*
58. In accordance with the Town Charter, the Board of Fire Engineers may establish policies and regulations pursuant to G.L. c. 48, § 48.
59. In accordance with the Town Charter, the Board of Fire Engineers “shall have the care and superintendence of fire apparatus and related equipment, buildings, fixtures, and equipment . . . and shall cause the same to be kept in repair” pursuant to G.L. c. 48, § 52.
60. Starting in June of 2019, Asst. Police Chief/Emergency Services Director Schmink, usurped the authority of the Board of Fire Engineers and the Chief Fire Engineer, in nearly every way.
61. Asst. Police Chief/Emergency Services Director Schmink’s enumerated duties as Emergency Services Director, “under the direction of the Town Administrator,” includes:
- a. Supervises the Fire Department, “including recommending hiring, training, disciplining, and dismissal of employees.”
 - b. Responsible for “fiscal responsibility for the [Fire] department including buildings, equipment, and staffing utilization.”
 - c. “Organizes, directs and controls all resources to establish . . . tasks for all [Fire] personnel . . . including the . . . utilization of [Fire] department resources.”
 - d. Provides and oversees the organizational structure and employee performance . . . including . . . training, discipline, maintenance of equipment . . .”

- e. “Provides information and reports regarding the [Fire Department’s] activities and operations as required by the Town Administrator.”
- f. Responsible for communication with the public, media . . . related to all activities of the [Fire Department].
- g. “Promulgates all General, Personnel, and Special Orders of the [Fire Department].”

See copy the Emergency Services Director ‘job description’ attached hereto at Exhibit 2.

62. The Emergency Services Director’s authorities and duties are nearly identical to the authorities and duties of the Board of Engineers under the Town Charter and Massachusetts Law.

63. The Town made the Board of Fire Engineers and Fire Chief the Asst. Police Chief ‘s subordinates.

64. Shortly after Asst. Police Chief/Emergency Services Director Schmink’s appointment, he scheduled a meeting with his new reports: the Board of Engineers and the four (4) Captains of the RFD, where he declared that ‘within three years, I will make this a full-time department.’

65. Asst. Police Chief/Emergency Services Director Schmink, took it upon himself to begin controlling every aspect of the Rockport Fire Department, including but not limited to:

- a. Mandating that any of the RFD’s companies get his sole and express permission before the companies conduct any training.
- b. Took over all RFD disciplinary matters;⁶
 - i. which has resulted in the termination of three firefighter’s; and
 - ii. firefighters being placed on administrative leave (including the Fire Chief).
- c. Ordering firefighters to work for the Board of Health (for free) giving out flu shots.

⁶ This includes written counseling to Fire Chief James Doyle, eleven (11) days after the Asst. Police Chief/Emergency Services Director was created.

- d. Ordering Fire Chief Doyle to call him “Chief,” after Fire Chief Doyle addressed him as “Director,” an order Fire Chief Doyle refused to comply with.
 - e. Made himself the sole authority for deciding if any fire apparatus could be operated (for training and/or maintenance).
 - f. Refusing to allow the entire RFD from conducting any training or even from operating the equipment (even for maintenance), after the Volunteer Firefighters did not sign up to work “COVID-mask details,” enforcing Board of Health rules on Rockport’s Bearskin Neck in Spring of 2020.
 - g. Issued various unlawful orders to firefighters at active fire scenes.
66. After the Volunteer Firefighters (who all have full-time jobs) failed to sign up to work “COVID-mask details” for the Board of Health, Asst. Police Chief/Emergency Services Director Schmink repudiated against the firefighters by illegally preventing them to conduct any training for over eight (8) months.⁷
67. Fire Chief Doyle communicated his and the members of the RFD’s concerns to Town Admin. Vieira numerous times, but he was ignored.
68. Fire Chief Doyle, with no longer having a Selectmen ‘liaison’ assigned to the RFD, communicated his and the firefighters’ concerns to one of the Selectmen, but he was ignored.
69. Fire Chief James Doyle refused to take orders from Asst. Police Chief/Emergency Services Director Schmink, as they were unlawful and placed the members of the RFD and the Town at risk; especially once Schmink prevented the firefighters from training (which ended up lasting for over eight (8) months).
70. After Fire Chief Doyle began refusing to comply with Asst. Police Chief/Emergency Services Director Schmink’s unlawful orders, Schmink began to issue orders directly to

⁷ Training was not allowed to continue until November, after the Members of the RFD sent their November 9, 2020 letter to the Selectmen (garnering national news attention). See ¶ 74 herein.

Asst. Fire Chief Abell, usurping the lawful authority and organization of the Board of Engineers and its Chief Fire Engineer (Fire Chief Doyle).

71. In the Summer of 2020, upon the recommendations made by Town Admin. Vieira, the Selectmen reappointed both Assistant Fire Chiefs (including Abell) to the Board of Fire Engineers.

72. In the Summer of 2020, the Selectmen did not reappoint Fire Chief Doyle to the Board of Fire Engineers and only remains in that position as a 'holdover;' despite, Town Admin. Vieira repeatedly telling Fire Chief Doyle that his 'appointment was delayed due to COVID.'

73. There are no Selectmen meeting agenda items (executive or opens session) or meeting minutes which refer to any possible discussion held by the Selectmen pertaining to why Fire Chief Doyle was not reappointed.

74. On November 9, 2020, after over eight (8) months of not being able to train, and countless other grievances between the firefighters and Asst. Police Chief/Emergency Services Director Schmink, the volunteer firefighters sent a letter to the Selectmen, demanding:

- a. the removal of Asst. Police Chief/Emergency Services Director Schmink;
- b. the removal of Asst. Fire Chief Abell; and
- c. the return of the control of the fire department to the Board of Fire Engineers and its Fire Chief James Doyle.

See copy of Nov. 9, 2020 Letter from RFD Members attached hereto as Exhibit 3.

75. The following day, November 10, 2020, Fire Chief Doyle was placed on Administrative Leave by Town Admin. Vieira,⁸ was served a 'No Trespass Order' on all Town property

⁸ Fire Chief James Doyle was placed on Administrative Leave a few hours after submitting a Public Records Request. *See* copy of Public Records Request Appeal submitted to the Commonwealth Secretary of State on January 14, 2021 attached hereto as Exhibit 4 (exhibits therein omitted), in part appealing the Town's denial of

(signed by Town Admin. Vieira), and told he had twenty-four (24) hours to retire or he would be terminated.

76. That night, the Selectmen voted to go into executive session (*via Zoom*); citing the following reasoning in accordance with G.L. c. 30A, § 21(a)(4): “to discuss the deployment of security personnel or devices, or strategies with respect thereto; votes may be taken.”⁹
77. Fire Chief Doyle, despite given only 24-hours to make one of the biggest decisions of his life (the following day being a Holiday: Veterans Day, November 11, 2020), did not retire.¹⁰
78. The following week, November 17, 2020, the Selectmen held a public meeting and immediately ‘suspended’ the position of Emergency Services Director, but not Mr. Schmink or his additional pay.
79. During the November 17, 2020 Selectmen meeting, but after placing Fire Chief Doyle on Administrative Leave, Town Admin. Vieira told the firefighters they could continue training immediately, but the Fire Department had to coordinate all training with Town Admin. Vieira (who has no firefighting training or experience).
80. During the November 17, 2020 Selectmen meeting, the Selectmen tasked Town Admin. Vieira with drafting a Request for Proposal (the “RFQ”) for the hiring of an outside

records sought pertaining to an email encryption software (‘Virtru’) which the Town Admin., Police Chief Horvath, and Asst. Police Chief/Emergency Services Director used in communicating about to Town business, including Fire Chief James Doyle. To date, the Town has charged Fire Chief Doyle \$1,200.00, but have only disclosed 4 documents (no emails).

⁹ During the Selectmen’s January 12, 2021 meeting, a member of the public asked the Selectmen why the November 10, 2021 executive session meeting minutes were not yet available as required under the Selectmen’s own rules; Town Counsel responded and stated ‘the reason for entering executive session is still ongoing,’ having to later explain, ‘but, I want to make it clear there is no ‘Active Threat.’

¹⁰ Fire Chief Doyle, pursuant to Massachusetts Law, must retire at age sixty-five (65). Fire Chief Doyle turns sixty-five (65) in 2021.

Auditor/Assessor to review the RFD.

81. Prior to the November 17, 2020 Selectmen meeting, but after placing Fire Chief Doyle on administrative leave, Town Admin. Vieira had already reached out to ‘approved vendor,’ Municipal Resources Inc. (MRI), to provide a proposal for an interim staff fill for Fire Chief Doyle.¹¹

82. The RFQ, which was not publicly available; rather one had to email Town Admin. Vieira to receive a copy, provides in relevant part that the ‘approved vendor:’

shall conduct an in-depth review of the Town’s Fire Department[’s] . . . Management Structure, including relationship with Director of Emergency Services position . . . [and said differently] [r]eview department organizational structure for appropriateness, including relationship with the Director of Emergency Services position.

83. During the December 2, 2020 Selectmen meeting, they approved a preliminary draft of the RFQ and allowed Town Admin. Vieira to turn it into a final version, with no further public review or votes taken by the Selectmen.

84. The final version of the RFQ, which was eventually used in acquiring proposals, was not authorized by the Selectmen during a noticed public meeting.

85. During the January 12, 2021 Selectmen meeting, the Selectmen hired ‘approved vendor,’ MRI, to provide an assessment of the RFD; including one of the assessment’s main tasks: ‘to evaluate the Emergency Services Director’s position in the organizational and managerial structure of the RFD.’

86. Additionally, after the motion had been made to hire MRI, Selectmen Murphy stated he ‘supported moving forward with contract negotiations with MRI,’ but Selectmen Wilkinson quickly stated they were not ‘entering contract negotiations;’ instead, they

¹¹ It is presumed that this was discussed during an Executive Session of the November 10, 2020 Selectmen Public Meeting (which was held after Fire Chief Doyle was placed on Administrative Leave).

were 'moving forward in hiring MRI.'

Count I – G.L. c. 44, § 59
Enjoin illegality: Town Administrator's Contracted Position

87. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.
88. This Court has jurisdiction pursuant to G.L. c. 44, § 59, and has the authority to order the Town of Rockport to conform to G.L. c. 44.
89. Pursuant to G.L. c. 44, § 14, the Town of Rockport can only pay debts for purposes Selectmen purposes "to pay debts contracted for purposes which it may lawfully expend money."
90. Pursuant to G.L. c. 44, § 31, the Town of Rockport cannot incur a liability for more than what the Town Meeting appropriated for each department.
91. Rockport's Town Meeting never voted on paying for a Public Safety Commissioner pursuant to G.L. c. 41, § 101.
92. The Town Charter has never been amended to allow for a Public Safety Commissioner to replace the Board of Engineers and the Chief Fire Engineer.
93. The Town of Rockport cannot lawfully expend money on Town Admin. Vieira's existing contract as it is in violation of the Town Charter, Massachusetts Law, and the Bylaws.

Count II – G.L. c. 44, § 59
Enjoin illegality: Emergency Services Director Position

94. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.
95. This Court has jurisdiction pursuant G.L. c. 44, § 59, has the authority to order the Town of Rockport to conform to G.L. c. 44.

96. Pursuant to G.L. c. 44, § 14, the Town of Rockport can only pay debts for purposes Selectmen purposes “to pay debts contracted for purposes which it may lawfully expend money.”
97. Pursuant to G.L. c. 44, § 31, the Town of Rockport cannot incur a liability for more than what the Town Meeting appropriated for each department.
98. The Town Charter has never been amended to allow for the Asst. Police Chief, or an Emergency Services Director to replace the Board of Engineers and the Chief Fire Engineer.
99. Massachusetts Law does not allow for anyone other than the Board of Engineers and its Chief Fire Engineer to be in command of the Rockport Fire Department.
100. The Town of Rockport cannot lawfully expend money on the Asst. Police Chief Schmink for his Emergency Services Director stipend, as this position as designed, promulgated, and executed by the Town is in violation of the Town Charter, Massachusetts Law, and the Bylaws.

Count III – G.L. c. 44, § 59

Enjoin illegality: Rockport Police Chief’s Spouse as quasi-‘Special Counsel’

101. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.
102. This Court has jurisdiction pursuant G.L. c. 44, § 59, has the authority to order the Town of Rockport to conform to G.L. c. 44.
103. Pursuant to G.L. c. 44, § 14, the Town of Rockport can only pay debts for purposes Selectmen purposes “to pay debts contracted for purposes which it may lawfully expend money.”

104. Pursuant to G.L. c. 44, § 31, the Town of Rockport cannot incur a liability for more than what the Town Meeting appropriated for each department.

105. The Town of Rockport cannot lawfully expend money on Rockport Police Chief Horvath's spouse, Attorney Dinamary Horvath, purporting to act as some form of quasi-'Special Counsel,' as the hiring of Mrs. Horvath was in violation of the Town Charter, Massachusetts Law, and the Bylaws.

Count IV – G.L. c. 44, § 59
Enjoin illegality: Hiring of Outside Assessor per the RFQ

106. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.

107. This Court has jurisdiction pursuant G.L. c. 44, § 59, has the authority to order the Town of Rockport to conform to G.L. c. 44.

108. Pursuant to G.L. c. 44, § 14, the Town of Rockport can only pay debts for purposes Selectmen purposes "to pay debts contracted for purposes which it may lawfully expend money."

109. Pursuant to G.L. c. 44, § 31, the Town of Rockport cannot incur a liability for more than what the Town Meeting appropriated for each department.

110. The Selectmen hired the Town's 'approved vendor,' Municipal Resources Inc., to conduct an unappropriated assessment of the RFD (with no public budget).

111. One of the main criteria for the 'approved vendor' is to evaluate the Emergency Services Director's position in the organizational and managerial structure of the RFD.

112. The Town of Rockport cannot lawfully expend money on hiring a consulting firm to evaluate how the organizational and managerial structure of the RFD can be set-up in violation of the Town Charter, Massachusetts Law, and the Bylaws.¹²

Count V: G.L. c. 231A
Declaratory Judgment: Public Safety Commissioner Illegal

113. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.

114. An actual controversy exists between the parties to this action.

115. The controversy is ripe and appropriate under G.L. c. 231A for resolution by this Court.

116. Town Admin. Vieira's contract, as it pertains to his purported authority and duties as Public Safety Commissioner, was/is in violation of the Town Charter, Massachusetts Law, and the Bylaws.

Count VI: G.L. c. 231A
Declaratory Judgment: Emergency Services Director Illegal

117. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.

118. An actual controversy exists between the parties to this action.

119. The controversy is ripe and appropriate under G.L. c. 231A for resolution by this Court.

¹² Members of the Rockport Fire Department have submitted an administrative appeal pursuant to G.L. c. 44, § 53G, citing conflicts of interest; due in part, Town Admin. Vieira's communications with the hired consulting firm regarding an interim fill for Fire Chief Doyle, prior to the Selectmen ever mentioning an assessment of the RFD. A copy of the firefighter's appeal letter is attached hereto as Exhibit 5.

120. The position of Rockport’s Emergency Services Director, as designed, promulgated, executed, and in operation was/is in violation of the Town Charter, Massachusetts Law, and the Bylaws.

**Count VII: G.L. c. 231A
Declaratory Judgment: Police Chief’s Spouse as quasi-‘Special Counsel’**

121. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.

122. An actual controversy exists between the parties to this action.

123. The controversy is ripe and appropriate under G.L. c. 231A for resolution by this Court.

124. It is still unknown what authority Attorney Dinamary Horvath was/is purported to be operating under, as there is no public record yet disclosed which establishes who hired her.

125. The Town is in violation of Massachusetts Conflict of Interest Law (G.L. c. 268A), as Police Chief Horvath’s spouse, Attorney Dinamary Horvath, at all relevant times herein, has had a known and obvious conflict. While she was investigating him, Fire Chief Doyle’s direct supervisor was/is Asst. Chief of Police Schmink who reports to Rockport Police Chief Horvath.

126. The Town was/is in violation of Massachusetts Conflict of Interest Law (G.L. c. 268A), as Attorney Dinamary Horvath acting as quasi-‘Special Counsel,’ at all relevant times herein, was/is an appointed member of the Town Government and Bylaw Committee.

127. The Town is in violation of its own Bylaws, as the Selectmen “may employ special counsel to assist the Town Counsel whenever, in their judgment, it is necessary,”

Bylaws c. 6, § 3(c) (emphasis added); as Attorney Dinamary Horvath did not ‘assist the Town Counsel’ in investigating Fire Chief James Doyle.

128. The Town of Rockport violated Massachusetts Law and the Bylaws in hiring Rockport Police Chief’s spouse, Attorney Dinamary Horvath, to investigate members of the Rockport Fire Department, including Chief Doyle.

Count VIII: G.L. c. 231A

Declaratory Judgment: Police Chief’s Spouse on Town Government and Bylaw Committee

129. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.

130. An actual controversy exists between the parties to this action.

131. The controversy is ripe and appropriate under G.L. c. 231A for resolution by this Court.

132. The Town of Rockport violated the Town Charter, Bylaws, and Massachusetts Law in appointing Rockport Police Chief’s spouse, Attorney Dinamary Horvath, to the Town Government and Bylaw Committee in June of 2019.

133. The Town is in violation of Massachusetts Conflict of Interest Law (G.L. c. 268A), as Attorney Dinamary Horvath, at all relevant times herein, has had a known and obvious conflict; to wit, her spouse is the Rockport Police Chief.

134. The Town is in violation of Massachusetts Conflict of Interest Law (G.L. c. 268A), as Attorney Dinamary Horvath, at all relevant times herein, has had a known and obvious conflict; to wit, being hired as a purported ‘quasi-Special Counsel.’

135. The Town is in violation of its Bylaws, which state in relevant part “The Town Government and By-law committee shall consist of five (5) members who shall hold no other Town Office.” Bylaws c. 2, § 5(b) (emphasis added); but, at all relevant times

herein, Dinamary Horvath, was employed as purported 'quasi-Special Counsel' for the Town.

Count IX – G.L. c. 40, § 53
Restraint of Illegal Appropriations: Public Safety Commissioner Salary

136. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.
137. The Town of Rockport is about to expend money and/or incur obligations for the Town Admin. Vieira's salary, which includes his duties as purported Public Safety Commissioner.
138. This expenditure and/or obligation is one that the Town of Rockport does not have the "legal and constitutional right and power to . . . expend or incur obligations [for.]," G.L. c. 40, § 53, as his role as purported Public Safety Commissioner is in violation of the Town Charter, Massachusetts Law, and the Bylaws.

Count X – G.L. c. 40, § 53
Restraint of Illegal Appropriations: Emergency Services Director Stipend

139. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.
140. The Town of Rockport is about to expend money and/or incur obligations for the Asst. Police Chief/Emergency Services Director Schmink's Emergency Services Director stipend.
141. This expenditure and/or obligation is one that the Town of Rockport does not have the "legal and constitutional right and power to . . . expend or incur obligations [for.]," G.L. c. 40, § 53, as his role as purported Emergency Services Director is in violation of the Town Charter, Massachusetts Law, the Bylaws, and is unconstitutional.

Count XI – G.L. c. 40, § 53
Restraint of Illegal Appropriations: Fees for Police Chief’s spouse
as quasi-‘Special-Counsel’

142. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.

143. The Town of Rockport is about to expend money and/or incur obligations for the fees associated with hiring Police Chief Horvath’s spouse, Attorney Dinamary Horvath, to serve as quasi-‘Special-Counsel’ to conduct investigation into town employees, including Fire Chief James Doyle.

144. This expenditure and/or obligation is one that the Town of Rockport does not have the “legal and constitutional right and power to . . . expend or incur obligations [for.]” G.L. c. 40, § 53, as Attorney Dinamary Horvath’s role as purported quasi-‘Special- Counsel’ is in violation of the Town Charter, Massachusetts Law, the Bylaws, and is unconstitutional.

Count XII – G.L. c. 40, § 53
Restraint of Illegal Appropriations: Consulting Fees for
Municipal Resources Inc. to conduct Assessment of RFD pursuant to the Town’s RFQ

145. Plaintiffs reallege and incorporate as if stated herein the allegations contained in the foregoing paragraphs.

146. The Town of Rockport is about to expend money and/or incur obligations for the fees associated with hiring consulting firm Municipal Resources Inc. to assess the RFD in accordance with the Town’s RFQ.

147. This expenditure and/or obligation is one that the Town of Rockport does not have the “legal and constitutional right and power to . . . expend or incur obligations [for.]” G.L. c. 40, § 53, as the forthcoming assessment by Municipal Resources Inc., in

accordance with the RFQ, is in violation of the Town Charter, Massachusetts Law, the Bylaws, and is unconstitutional.

WHEREFORE, the Plaintiff respectfully requests that this Court issue an Order:

1. For a Preliminary Injunction, enjoining the Town of Rockport from operating in violation of the Town Charter, Massachusetts Law, and the Bylaws;
2. For a Preliminary Injunction, enjoining the Town of Rockport from expending any monies or incurring any liabilities that are related to any purposes that are not lawful and in keeping with the Town Charter, Massachusetts Law, and the Bylaws; and
3. For a Preliminary Injunction, enjoining the Town of Rockport from relying on any of the actions and/or omissions created as a consequence of the Town operating in violation of the Town Charter, Massachusetts Law, and the Bylaws.

WHEREFORE, the Plaintiff respectfully requests that this Court issue a Judgment that:

1. Enjoin the Town of Rockport from incurring any debts or expending moneys which are not lawful, including but not limited to funds and debts associated with Town Administrator Vieira's contract and purported authorities and duties as Public Safety Commissioner, and Order the Town of Rockport to conform to G.L. c. 44;
2. Enjoin the Town of Rockport from incurring any debts or expending moneys which are not lawful, including but not limited to funds and debts associated with Asst. Police Chief/Emergency Services Director Schmink's stipend as Emergency Services Director, and Order the Town of Rockport to conform to G.L. c. 44;
3. Enjoin the Town of Rockport from incurring any debts or expending moneys which are not lawful, including but not limited to funds and debts associated with contracts between the Town of Rockport and Rockport Police Chief Jonathan Horvath's spouse, Attorney Dinamary Horvath's, purporting to be quasi-'Special Counsel' and/or external investigator, and Order the Town of Rockport to conform to G.L. c. 44;
4. Enjoin the Town of Rockport from incurring any debts or expending moneys which are not lawful, including but not limited to funds and debts associated with contracts between the Town of Rockport and any consultant hired to be an Assessor in accordance with the Town's RFQ, purporting to be quasi-'Special Counsel' and/or external investigator, and Order the Town of Rockport to conform to G.L. c. 44;

5. Declare Town Admin. Vieira's contract, or the relevant portion thereto relating to his authorities and duties as Public Safety Commissioner, in violation of the law and *void ab initio*;
6. Declare Asst. Police Chief/Emergency Services Director Schmink's role as Emergency Services Director for the Town of Rockport, or as it relates to the authorities and duties of overseeing the Rockport Fire Department, in violation of the law and *void ab initio*;
7. Declare any and all contracts between the Town of Rockport and Rockport Police Chief Jonathan Horvath's spouse, Attorney Dinamary Horvath's, purporting to act as some form of quasi-'special counsel, in violation of the law and *void ab initio*;
8. Declare any and all contracts between the Town of Rockport and any consultant (including Municipal Resources Inc.) to conduct an Assessment of the RFD in accordance with the Town's RFQ, in violation of the law and *void ab initio*;
9. Declare any and all appointments of Rockport Police Chief Jonathan Horvath's spouse, Attorney Dinamary Horvath, on the Rockport Town Government and Bylaw Committee, as this appointment was in violation of the law and *void ab initio*; and
10. Grants such other relief as justice or equity may require.

Respectfully submitted,
**GLEN MACLEOD, WILLIAM BRUNDAGE,
ARMAND "DAN" APARO, CRAIG MORRILL,
KENNETH KNOWLES, BROCK HALE CURRIER,
JANELLE FAVALORO, WILLIAM TOBIN, PATRICK KEATING,
KATHY MILBURY, and BARBARA STAVROPOULOS,**
By their attorney,

/s/ Liam T. O'Connell
Liam T. O'Connell, BBO # 694477
Farrell Smith O'Connell
46 Middle Street, Second Floor
Gloucester, MA 01930
(978) 309-9243
(978) 231-8303
loconnell@fsofirm.com

EXHIBIT 1

CONTRACT of EMPLOYMENT

between

The ROCKPORT BOARD of SELECTMEN

and

MITCHELL R. VIEIRA

THIS AGREEMENT is made by and between the Rockport Board of Selectmen, hereinafter referred to as the “Board” and Mitchell R. Vieira, hereinafter referred to as the “Town Administrator”. WHEREAS, Chapter 242 of the acts of 1959, as amended by Chapter 619 of the Acts of 1987 and Chapter 133 of the Acts of 1995, authorize the Board to appoint a Town Administrator; and,

WHEREAS, G.L. c.41, s. 108N, authorizes the Board to establish an employment contract for a Town Administrator for a period of time, to provide for salary, fringe benefits and other conditions of employment; and,

WHEREAS, the Board has voted to hire a Town Administrator;

Therefore, the Board hereby appoints Mitchell R. Vieira to serve as Town Administrator and Mitchell R. Vieira hereby accepts employment subject to the following terms and conditions:

SECTION 1 – TERM

The term of employment and this contract shall be for sixty-one (61) months commencing on June 1, 2019 and terminating on June 30, 2024. This term may be extended for additional terms by written agreement, signed by the Town Administrator and the Board.

SECTION 2 – RESPONSIBILITIES

Both parties agree that said Town Administrator shall perform faithfully and competently the duties of the Town Administrator as prescribed by the laws of the Commonwealth of Massachusetts and by the Charter (Special Act) and Bylaws of the Town of Rockport as amended. The Town Administrator shall perform the duties set forth in the Town Administrator Job Description, a copy of which is attached hereto and incorporated by reference, and as may be amended by mutual consent from time to time, and such other duties as may be assigned by the Board at their discretion.

SECTION 3 – INDEMNIFICATION

To the extent allowed under G.L. c.258, the Town shall defend, save harmless and indemnify the Town Administrator against any tort, professional liability, claim or demand, or other legal action, whether groundless or otherwise, arising out of *the* performance as the Town Administrator, even if said claim has been made following termination from employment, provided that the Town Administrator acted within the scope of the position. The Town shall pay the amount of any settlement or judgment rendered thereon; though in no case will individual Board members be considered personally liable for any demands, claims, suits, actions and legal proceedings. The Town may compromise and settle any such claim or suit and will pay the amount of any settlement or judgment rendered thereon without recourse to the Town Administrator.

To the extent allowed under G.L. c.258, the Town shall reimburse the Town Administrator for any attorneys' fees and costs incurred by the Town Administrator in connection with such claims or suits involving the Town Administrator while acting in the professional capacity. This Section shall survive the expiration of this agreement.

This section does not apply to any disciplinary action, proceeding or appeal being brought by the Board against the Town Administrator.

SECTION 4 – PERFORMANCE APPRAISAL

At the commencement of the term of this Agreement, the Board and Town Administrator will develop a mutually acceptable performance appraisal plan based upon mutually agreed upon goals and objectives. Such performance appraisal plan shall address at least the following areas: (1) budgetary/financial administration; (2) personnel administration; (3) supervision/leadership; (4) staff development; (5) public relations; (6) employee and labor relations; (7) policy execution; (8) interaction with selectmen and other town boards; and (9) and those responsibilities set forth in the job description and such other duties as have been assigned by the Selectmen. The Board should conduct a performance review of the Town Administrator annually in November covering the previous fiscal year. There shall be a written composite performance appraisal prepared and signed by both Members of the Board and the Town Administrator. Failure by the Board to timely conduct a performance evaluation shall not be considered breach of this Agreement and shall not affect the Boards ability to discipline or not reappoint the Town Administrator.

SECTION 5 – SALARY

The Town agrees to pay the Town Administrator for services rendered under this Agreement, an annual base salary as follows:

Year 1 (FY20): \$145,000.00

Years 2-5: The Town Administrator shall be paid two percent (2%) above the highest paid direct reporting position. The Town Administrator shall be ineligible for the Town's merit bonus system.

SECTION 6 – VACATION

Vacation time shall be earned at the rate of 2.08 days per month worked for a total of twenty-five (25) vacation days per year.

The parties agree that the Town Administrator may carry over unused vacation time to a succeeding year or years; however, in no event shall the Town Administrator carry more than five (5) days into a succeeding year without the express approval of the Board of Selectmen.

SECTION 7 – RETIREMENT, HOLIDAY, PERSONAL DAYS AND SICK LEAVE BENEFITS

The Town Administrator shall be entitled to retirement benefits, as provided for in G.L. c.32, holidays, three (3) personal days and thirteen (13) sick days. Personal and sick leave may be used in hourly increments. The Town Administrator may utilize sick days to care for immediate family members, which shall be defined as: spouse, child, parent, spouse's parent, and grandparent. However, the Town Administrator shall not be entitled to any annual or retirement buyback of any sick time, holidays or other days off except for previously accrued but unused vacation benefits. The Town Administrator shall provide the Chair of the Board with a quarterly accounting of vacation and sick time accrued and used.

SECTION 8 – INSURANCE BENEFITS

The Town Administrator shall be entitled to participate in all insurance programs (health, dental, and life) available to other Town employees (excluding the Rockport School Department), at the same rate of contribution as those employees.

SECTION 9 – TRAVEL ALLOWANCE

The Town shall budget for and reimburse the Town Administrator for tolls, parking fees and mileage actually traveled for work related business. Mileage shall be reimbursed at the rate currently in effect as determined by the Internal Revenue Service for all out of Town miles actually

traveled. The Town Administrator shall submit travel expense vouchers for payment as necessary, which will list the pertinent information of each trip.

SECTION 10 – PROFESSIONAL DEVELOPMENT

The Board shall budget for and pay reasonable expenses for professional development programs and courses, including money for travel and subsistence expenses, when necessary subject to appropriation. Any out of state or over-night travel, including registration costs, shall first be approved by the Board.

SECTION 11 – PROFESSIONAL DUES AND SUBSCRIPTIONS

The Board shall budget for and pay reasonable expenses for professional dues and subscriptions subject to appropriation.

SECTION 12 – DISABILITY

If during the term of this Agreement, the Town Administrator becomes permanently disabled, or is otherwise unable to perform the essential functions of the job, with or without reasonable accommodation, for sixty (60) days beyond any accrued sick leave, the Board may terminate this Agreement without any prejudice to the Town Administrator's rights to disability benefits through the Essex County Regional Retirement System. However, the Town Administrator shall be compensated for any vacation benefits previously accrued but unused as of the date of termination.

SECTION 13 – TERMINATION, SEVERANCE PAY, RESIGNATION AND NON-RENEWAL

A. During the term of this Agreement, the Board may terminate the Town Administrator as follows:

1). In the event Town Administrator is terminated by a super-majority vote of the entire Board of Selectmen (at least 4 votes to terminate) for any reason during such time that the Town Administrator is willing and able to perform the duties of Town Administrator, then in that event the Town agrees to pay the Town Administrator a lump sum cash severance payment equal to nine (9) months aggregate salary; provided, however, that in the event that the Town Administrator is terminated for cause by a majority vote of the entire Board (at least 3 votes to terminate), the Town shall only have an obligation to pay six (6) months' severance; provided further, however, that in the event that the Town Administrator is terminated by a majority vote of the entire Board (at least 3 votes to terminate), for conduct that would constitute illegal, immoral or criminal behavior, the Town shall have no obligation to pay any severance. The Town's obligation to make any severance payment is expressly conditioned upon the Town Administrator executing a General Release waiving his right with prejudice to appeal the Board's decision to terminate employment and/or sue the Town and/or any of its agents, employees, or officials regarding any issue related in any way to his employment with the Town. The Town Administrator shall also receive the value of any previously accrued but unused vacation leave.

2). The Board shall provide the Town Administrator with written notice by hand or certified mail of its intent to possibly terminate his services and the contemplated reasons therefore. The Town Administrator may request a hearing within ten calendar days of receipt of said letter.

3). In the event the Town Administrator voluntarily resigns before the expiration of this Agreement, the Town shall have no obligation to pay any amount due beyond the effective date of the resignation. The Town Administrator shall give the Board written notice

of the resignation at least ninety (90) days before the effective date unless the parties agree to a shorter time period.

4). If the Board of Selectmen does not wish to reappoint the Town Administrator at the end of the term of this agreement, the Board shall provide the Town Administrator with nine (9) months written notice of such intent not to reappoint. Failure to provide timely notice of non-reappointment shall entitle the Town Administrator to severance under part (1) of this section.

5). If at the end of the term the Town Administrator has not received a notice not to reappoint or a successor Agreement has not been signed, the terms of this agreement shall be extended for a one (1) year period or until a successor Agreement has been executed, whichever is shorter.

SECTION 14 – REOPENING FOR MODIFICATION

The Board and Town Administrator may annually, before the submission of the Selectmen's budget for the fiscal year, open and consider modification of any Section of this Agreement relating to salary and benefits. By mutual agreement, the parties may, at any time, reopen and modify any other provision of the Agreement.

SECTION 15 – CONFLICTS WITH PERSONNEL REGULATIONS

Unless a provision of the Personnel Regulations is specifically referenced and included in this Agreement, the terms of this contract shall cover any and all benefits and terms of conditions of employment of the Town Administrator and to the extent there is a conflict, the terms of this Agreement shall prevail.

SECTION 16 – ABILITY TO CONSULT AND/OR TEACH

The Town Administrator, using compensatory, vacation and/or personal time, may consult for up to ten (10) days per year, provided that said consulting does not interfere with his performance of duties as Town Administrator and is consistent with Chapter 268A, as amended from time to time. Further, the Town Administrator, using compensatory, vacation and/or personal time, may teach up to three (3) credits per college semester, provided that said teaching does not interfere with his performance of duties as Town Administrator and is consistent with Chapter 268A, as amended from time to time.

SECTION 17 – ENTIRE AGREEMENT

This Agreement embodies the whole agreement between the Board and the Town Administrator and there are no inducements, promises, terms, conditions or obligations made or entered into by either party other than those contained herein. The Agreement may not be modified except by written agreement signed by both the parties. This Agreement supersedes all prior agreements between the parties and any and all prior written agreements between the parties are rendered null and void.

SECTION 18 – SEVERABILITY

This Agreement is subject to the laws of Massachusetts. If any portion of this Agreement is deemed to be invalid, unconstitutional, or unenforceable, it shall not affect the remainder of said Agreement, but said remainder shall be binding and effective against all parties.

SECTION 19 – NO REDUCTION IN BENEFITS

The Town shall not at any time during the term of this Agreement reduce the salary, compensation or other benefits of the Town Administrator, except to the degree such a reduction is across the board for all other employees of the Town.

Position Title:	Town Administrator	Grade Level:	N/A
Department	Selectmen	Date:	March, 2019
Reports to:	Board of Selectmen	FLSA Status	Exempt

Statement of Duties: Serves as the Chief Administrative, Financial, & Operating Officer of the Town for the Board of Selectmen [Chief Executive Authority]. In such capacity, provides professional administrative, technical and supervisory work in managing and directing all town activities, departments and projects on behalf of the Board of Selectmen including the establishment of departmental goals and objectives, policies and regulations. Researches, analyzes and recommends changes in Town policies, personnel, systems and procedures, and serves as liaison and coordinator between Town officials, employees and citizens; all other related work as required including reports to the Board of Selectmen as the Board may direct. Responsible for the safety of all Town employees and building operations.

Supervision Required: Works under the general policy direction of the Board of Selectmen in accordance with town bylaws, policies and procedures as well as state and federal statutes. Functions with considerable independence and is directly accountable for actions.

Supervisory Responsibility: Performs highly responsible work of a complex nature requiring the exercise of independent judgment and initiative in providing professional guidance to the Board of Selectmen and professional management and oversight of departments heads, Town departments, boards and committees, concerning the long range planning, development, implementation and administration of policies, goals, regulations and statutory requirements related to the administration and operation of the Town. Position involves analyzing administrative problems and recommending and implementing solutions.

Has direct supervisory responsibility for all department heads reporting to the Board of Selectmen, staff within these departments and several part-time positions. Responsible for coordinating the work and administrative activities of those employees not report directly to the Board of Selectmen. Evaluates department heads; manages labor relations issues and recommends disciplinary actions to the Board of Selectmen. Recruits, screens and recommends personnel to the Board of Selectmen for appointment.

Confidentiality: Has access to a wide variety of confidential information.

Accountability: Errors in judgment could have a significant and continuous effect on the Town's ability to deliver services and may have direct financial and legal repercussions, loss of revenue, damage to buildings or equipment, injury to employees and cause considerable adverse public relations and potential liability to the Town.

Judgment: Position requires the use of extensive good judgment and initiative within policies and procedures that may require interpretation and direction to others and developing appropriate responses.

Complexity: The work consists of employing many different concepts, theories, principles, techniques and practices relating to a professional field. Assignments typically concern such matters as studying trends in the field for application to the work; assessing services and recommending

improvements; planning long range projects; devising new techniques for application to department operations, recommending policies, standards or criteria.

Work Environment: Employee performs work in a municipal office setting subject to frequent interruptions. Operates a computer and associated technical software and general office equipment. Position requires frequent night meetings and work on weekends as needed; may be contacted at home at any time to respond to important situations and emergencies. May be required to attend community and civic events to represent the Town.

Nature and Purpose of Relationships: Makes constant and direct contact with the public requiring significant perceptiveness and discretion with all departments and boards, members of the business and civic community, labor union representatives, attorneys, and state, federal and local officials as well as the media. Contacts require excellent customer services skills, persuasiveness and resourcefulness.

Occupational Risk: Duties of the job present little potential for injury to the employee.

Essential Functions:

The essential functions or duties listed below are intended only as illustrations of the various type of work that may be performed. The omission of specific statements of duties does not exclude them from the position if the work is similar, related, or a logical assignment to the position.

The Town Administrator is the Chief Administrative, Financial, and Operating Officer of the Town for the Board of Selectmen as Chief Executive Authority and is responsible for the administration of Town affairs. In addition, the Town Administrator is responsible for:

- Setting guidelines for budget parameters in consultation with the Board of Selectmen;
- Preparing and administering the operating and capital budgets of the Town;
- Preparing, formatting and presenting the annual operating budget for all departments, boards and committees;
- Assisting in the development and submission of the annual capital plan;
- Presenting the total budget package to the Finance Committee;
- Overseeing, and is responsible for, the planning, administration, personnel management, procurement and coordination of the daily operation of the Town;
- Providing leadership and direction in the development of short and long range plans;
- Gathering, interpreting and preparing data for studies, reports and recommendations;
- Providing professional advice to Selectmen, and oversight of boards and committees and department heads;
- Making presentations to boards, Town Meeting and the general public as needed;
- Preparing the agenda and attending all meetings of the Board (unless otherwise excused), and briefing board members on meeting discussion, alternatives and resolutions;
- Receiving and making appropriate disposition or referral of all Board correspondence and communications;
- Advising and assisting the Board of Selectmen in carrying out their responsibilities as promulgated in MGL, Regulations, or Town By-Laws through active assistance or delegation;
- Anticipating the needs of the Selectmen for information and back ground materials;
- Ensuring that all decisions of the Board are carried out;
- Keeping the Board advised regarding departmental operations and financial health;
- Establishing goals, objectives and policies based on the needs of the Town;

- Providing supervision, direction and guidance, including regular communication and development of said goals and objectives for all Town staff and department heads;
- Overseeing all departments in any administrative or operational areas to ensure regulatory, statutory or procedural compliance;
- Responsible for managing the collective bargaining process and negotiating employment contracts subject to the approval of the Board of Selectmen. Developing bargaining concepts and strategies for the Board's approval. Managing all bargaining sessions and grievance hearings. Advising officials on the impact of contract terms on personnel system, wage administration and fiscal objectives;
- Serving as the Town Personnel Officer managing and overseeing all Human Resources & Personnel functions and addressing issues;
- Serving as the Public Safety Commissioner and overseeing all Public Safety functions and ensuring the orderly and efficient provision of services of same;
- Serving as the Board of Selectmen's representative to Town boards committees, local, state and federal agencies;
- Negotiating and assisting citizens in their interaction with all Town departments, boards and committees;
- Investigating complaints and developing responses and, when appropriate, directing corrective action after consultation with the Board of Selectmen;
- Preparing all Town meeting warrants and motions. Develops and compiles background materials for Town Meeting and shall be available at Town Meeting to assist as needed;
- Overseeing all Town automated information systems and making recommendations for improvements relative to systems;
- Overseeing the coordination and compilation of annual Town reports;
- Facilitating annual license renewals and board and committee appointments, as well as any other procedures which are under the statutory authority of the Board of Selectmen;
- Approving grant applications for all departments consistent with state statute;
- Interviewing and recommending to the Board of Selectmen individuals for appointment to the Town's Boards/Committees/Commissions;
- As the agent of the Board of Selectmen, may inquire, with or without notice, into the conduct of office of any officer, employee, Board/Committee/Commission, or department;
- Undertaking special projects; and
- Serving as the Chief Information Officer and responds to crises or matters of public relations.

Recommended Minimum Qualifications:

Education and Experience: Master's degree in finance, public/business administration or related field; minimum of five (5) years of successful municipal management experience as a Chief Administrative Officer or Deputy/Assistant Chief Administrative Officer, or a related field; municipal management strongly preferred, or any equivalent combination of education and experience. Knowledge of Massachusetts General Laws, labor relations, personnel administration, municipal finance and town meeting process. Experience with elected officials and volunteer committees a plus.

Knowledge, Abilities and Skill

Knowledge: Thorough knowledge of Massachusetts General Laws (i.e., Chapters 30B, 32B) and federal statutes (i.e., FLSA, FMLA, AA/EEO, ADA), pertaining to municipal government including finance budget, personnel policies and practices, collective bargaining, IT management and

operations. Sufficient knowledge of emerging technologies and to recognize their value to the Town. Expertise in the operation and organization of municipal government. Comprehensive knowledge of the various financial requirements of municipal government.

Abilities: Ability to direct and evaluate the work of department heads as well as professionals and other subordinates including office staff. Ability to plan, organize and direct the development of projects, the preparation of reports, analysis of problems and formulation of solutions. Ability to bring people together around complex goals and develop consensus among community groups and individuals that may not share common priorities. Ability to establish and maintain harmonious and effective working relationships and deal appropriately with employees, board/committee members, agencies, officials, media and the public. Ability to prioritize and manage multiple tasks and delegate authority in a prompt and effective manner. Ability to negotiate contracts, agreements and appropriate working arrangements and achieve timely results under stressful circumstances. Must be comfortable with public speaking and possess meeting presentation skills.

Skills: Strong oral communications skills and the ability to represent the Town before an array of organizations including providing statements to the media. Excellent writing skills required to prepare various reports and position papers. Strong organizational skills and the ability to manage a large number of projects and tasks. Skill in the utilization of technology as a means of strengthening the organization and its services. Professional skills related to customer service. Skill in remaining non-political, yet understanding local government politics.

Physical and Mental Requirements

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the position's essential functions.

Physical Skills: Minimal physical effort generally required in performing duties under typical office conditions.

Motor Skills: Position requires the ability to operate and view a keyboard and standard office equipment. The employee is frequently required to use hands to finger, handle objects, tools or controls and reach with hands and arms. The employee is frequently required to sit, talk and hear. Incumbent may be required to lift up to 10 pounds.

Visual Skills: Position requires the employee to constantly read documents, computer screens, and reports for understanding and analytical purposes. Employee is rarely required to determine color differences.

EXHIBIT 2

**Town of Rockport, Massachusetts
Job Description**

Position Title:	Director of Emergency Services	Grade Level:	
Department	Emergency Services Division	Date:	06/01/19
Reports to:	Town Administrator	FLSA Status:	Exempt

Statement of Duties: The Director of Emergency Services, under the direction of the Town Administrator, is responsible for the administration and supervision of the Town's Emergency Services Division including short and long-term planning, administration, staffing, rules and regulations within the Division and for the enforcement of all laws and by-laws within the Town of Rockport's legal jurisdiction. This position includes and incorporates the duties and responsibilities of the Emergency Management Director. Ensure compliance with State and Federal mandates and standards. Plans for and coordinates every significant event and critical incident, which occurs in the Town at any given time. Oversight is provided for the Town's Comprehensive Emergency Management Plan and seeks resources and collaborates with other communities to maximize effectiveness for all services. Interface and formulate plans with various departments, such as Fire, Forest Fire, Ambulance, Animal Control, Shellfish Constable, and Harbormaster. Providing a foundation for long term sustainability by continuously refining strategic plans with executive management to meet the needs of the organization and community. Employee is required to perform all similar or related duties.

Supervision Required: Under the direction of the Town Administrator, working from municipal policies and objectives and in accordance with local, state and federal regulations and laws; The Emergency Services Director is required to establish short and long-range divisional plans and objectives; establishes Division and employee performance standards and assumes direct accountability for division results. Consults with the Town Administrator where direction, clarification, interpretation, or exception to municipal policy may be required; provides regular updates on the work of the Division. The employee exercises responsibility in the general development and oversight of division operating and capital budgets and the recruitment and training of employees. The employee is expected to resolve all conflicts, which arise and coordinate with others as necessary.

Supervisory Responsibility: The employee is accountable for the direction and success of division programs and services accomplished through others. The Emergency Services Director is responsible for analyzing program objectives, determining the various work operations needed to achieve them, estimating the financial and staff resources required, allocating the available funds and staff, reporting periodically on the achievement and status of the program objective; and recommending new goals. The employee typically formulates or recommends program goals and develops plans for achieving short and long-range objectives; determines organizational structure operating guidelines and work operations; formulates, prepares and defends budget and manpower requests and accounts for effective use of funds and staff provided; coordinates program efforts within the unit and with other departments; delegates authority to subordinate supervisors and holds them responsible for the performance of their unit's work; reviews work in terms of accomplishment of program objectives and progress reports, approves standards establishing quality and quantity of work; and assists or oversees the personnel function,

Emergency Services Division
Director of Emergency Services
9/3/19

Town of Rockport, Massachusetts
Job Description

including recommending hiring, training, disciplining, and dismissal of employees.

The employee supervises the following departments: Fire, Forest Fire, Ambulance, Harbormaster, Shellfish Constable, Animal Control, and Emergency Management. Work operations are subject to frequent, abrupt, and unexpected changes in deadlines, volume of work, sudden emergencies, and goals due to uncontrollable or unpredictable circumstances. Large numbers of employees are physically separated for substantial portions of time due to multiple work shifts or concurrent work.

Confidentiality: Employee has regular access at the divisional level to a wide variety of confidential information, including official personnel files, CORI/SORI records, client or department records, collective bargaining, criminal investigations, and court records.

Judgment: Guidelines only provide limited guidance for performing the work. They may be in the form of administrative or organizational policies, general principles, legislation or directives that pertain to a specific department or functional area. Extensive judgment and ingenuity are required to develop new or adapt existing methods and approaches for accomplishing objectives or to deal with new or unusual requirements within the limits of established guidelines, laws (state or federal), regulations or policies. The employee is recognized as the division's authority in interpreting the guidelines, in determining how they should be applied, and in developing operating policies.

Complexity: The work consists of the practical application of a variety of concepts, practices and specialized techniques relating to a professional or technical field. Assignments typically involve evaluation and interpretation of factors, conditions or unusual circumstances; inspecting, testing or evaluating compliance with established standards or criteria; gathering, analyzing and evaluating facts or data using specialized fact finding techniques; or determining the methods to accomplish the work.

Work Environment: The work performed requires a high degree of individual tolerance to combinations of extremely unpleasant elements, or mental stress from constant conflicting urgent time and attention demands of the utmost priority. The nature of the physical environment may be such that the employee's personal well being and/or safety may be compromised such as Fire and Police personnel. Employee is required to work beyond normal business hours in response to emergency situations and to attend evening meetings.

Public Contact: Employee has constant interaction with local, state, and federal government officials, community leaders and any other individuals to protect and promote government relations and the municipality's overall interest. Employees must possess a high degree of diplomacy and judgment. Duties require a well-developed sense of strategy and timing in representing the municipality effectively in critical and important situations that may influence the well being of the municipality.

Accountability: Duties include division level responsibility for technical processes, service

Emergency Services Division
Director of Emergency Services

9/3/19

Town of Rockport, Massachusetts
Job Description

delivery, contribution to municipal wide plans and objectives, and fiscal responsibility for the department including buildings, equipment and staffing utilization.—Consequences of errors, missed deadlines or poor judgment could severely jeopardize department programs or services, have adverse public relations, personal injury, extensive financial and/or legal repercussions to the Town, and danger to public health/safety.

Occupational Risk: Duties may involve exposure to hazardous life threatening conditions conditions. Job duties may entail the possibility for serious personal injury or exposure to conditions that could result in total permanent disability or loss of life such as when restraining violent persons. For example, danger of physical attack or work during extreme weather conditions. Extreme care and safety precautions are required at all times in order to prevent personal injury.

Essential Functions:

The essential functions or duties listed below are intended only as illustrations of the various type of work that may be performed. The omission of specific statements of duties does not exclude them from the position if the work is similar, related, or a logical assignment to the position.

1. Plans, coordinates, controls, and directs the provision of emergency services operations as well as the development of the division's organization structure including staffing in order to enforce all laws which the Division or its officers have the authority to execute including emergency management, Homeland Security, medical and fire services and in accordance with applicable laws, regulations, and directives from the Town Administrator.
2. Organizes, directs and controls all resources to establish a daily routine and tasks for all personnel of the Division including the most effective utilization of all subordinate department resources.
3. Responsible for indentifying, evaluating, and managing the risks and hazards impacting emergency services and the quality of life in the community.
4. Provides and oversees the organizational structure and employee performance of all division staff including professional development, training, discipline, maintenance of equipment, as well as maintaining the efficiency and effectiveness of all division personnel.
5. Prepares and coordinates the presentation of the division's annual operating and capital budgets; plans for and reviews specifications for new or replaced equipment, and controls the expenditures of the division within annual budgeted appropriations.
6. Responds to incidents and ensures command at the scene of emergencies in accordance with division polices; National Incident Command System (NIMS) and Incident Command System (ICS).
7. Represents the Town at various local and/or state ceremonial events.
8. Communicates with and attends public events as requested by various local organizations, service clubs and civic groups.
9. Initiates the investigations of alleged or apparent misconduct by Division personnel as

Emergency Services Division
Director of Emergency Services
9/3/19

**Town of Rockport, Massachusetts
Job Description**

required.

10. Oversees the design and implementation of the division's community relations, press releases, relations with the media, and community policing programs; attends related meetings as required.
11. Provides information and reports regarding the division's activities and operations as required by the Town Administrator and for the Department's relations with local citizens, the local government and other related agencies.
12. Conducts independent research and prepares various reports for local, state and federal authorities as required regarding department operations.
13. Coordinates and cooperates with State and federal law enforcement authorities such as Emergency Management and Homeland Security as necessary.
14. Responsible for communication with the public, media, local, state, and federal officials relating to all activities of the department; coordinates with other local, state, and federal agencies as situations dictate.
15. Establishes a routine of daily duties to be performed by subordinate departments as designated by the Town Administrator; ensures that all members of the department have available to them copies of the individual Department's Rules, Regulations, Policies, and Procedures.
16. Promulgates all General, Personnel, and Special Orders of the Division and issues orders, written and oral consistent with the powers, duties and responsibilities of the Director of Emergency Services position.
17. Informs himself/herself of the affairs of the division including the analysis of reports, statistics, professional journals and other information to recognize trends and develop response measures to be assured that the duties and responsibilities of subordinates are being properly discharged.
18. Ensures that all division personnel are kept abreast of new statutes or changes in existing laws, techniques, methods of safety and other developments in the applicable emergency services field.

Recommended Minimum Qualifications:

Education and Experience: Master's Degree in Criminal Justice, Fire Science, Public Administration or a related field; more than ten (10) years of successful experience in the law enforcement or Fire Services field with at least five (5) years experience at a command or supervisory level; or any equivalent combination of education, training and experience which provides the required knowledge, skills and abilities to perform the essential functions of the job.

Special Requirements:

Valid Massachusetts Class D Motor Vehicle Operator License
CPR/First Responder Certification
Incident Command (ICS 100, 200, 300, 400, 700 and 800)

Knowledge, Abilities and Skills

Emergency Services Division
Director of Emergency Services
9/3/19

Town of Rockport, Massachusetts
Job Description

Knowledge: Extensive knowledge of pertinent Mass. General Laws, Town By-laws, federal, constitutional, and statutory laws, Town Bylaws and Ordinances, as well as the principles and practices of modern public safety administration and law enforcement methods and techniques ; extensive knowledge of the standards by which the quality of public safety services are evaluated; thorough knowledge of statutes and ordinances relating to law enforcement, Fire Service, and Emergency Medical Services; the ability to plan, organize, and direct the work of a large number of subordinates performing varied operations connected with police, fire, and emergency medical activities. Working knowledge of budgeting, personnel management, fleet management, facility management, and occupational risk management. Knowledge of technology in support of division operations and administration including the Internet.

Abilities: Ability to supervise subordinates and delegate authority as required in a positive and effective manner and to delegate authority efficiently; ability to establish and maintain harmonious and productive working relationships and maintain discipline and morale with employees in a union environment; maintain effective working relationships with town officials, town departments, local, county, state, and federal law enforcement and fire/medical services officials, and the public; ability to plan, assign, direct and review the work of subordinates and to direct large scale operations of personnel and equipment making sound judgments under stressful life-threatening situations; ability to deal with disgruntled members of the public in a diplomatic and effective manner and to deescalate violent situations and combative individuals. Ability to operate equipment including motor vehicles in emergency situations under adverse weather and/or road conditions. Ability to exercise sound judgment and to enforce local ordinances, state and/or federal laws and regulations in an impartial manner.

Skill: Proficient oral and written communication skills. Effective leadership and supervisory and personal computer software skills in support of department operations. Effective budget management skills.

Physical and Mental Requirements

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the position's essential functions.

Physical and Mental Requirements: Work involves frequent and recurring assignments requiring strenuous effort and endurance or quick reflexes to perform the work, such as lifting and carrying on a continuous basis for extended periods of time, or regular travel on foot or bicycle over rough terrain or barriers, or the potential need to subdue or restrain violent persons or animals.

Motor Skills: Duties may involve close hand and eye coordination and physical dexterity. Manipulation and motor control under conditions that may require extreme accuracy may be critical. The manual skills required are comparable to those which might be needed to safely operate emergency vehicles at high rates of speed and to fire a gun.

Emergency Services Division
Director of Emergency Services
9/3/19

**Town of Rockport, Massachusetts
Job Description**

Visual Skills: Visual demands require the employee to constantly read documents for general understanding and analytical purposes, as well as to review non-written materials such as maps or blue prints. Employee is required to determine color differences.

**Emergency Services Division
Director of Emergency Services
9/3/19**

EXHIBIT 3

We, the undersigned members of the Rockport Fire Department, hereby make the following demands of the Board of Selectmen:

1. The immediate removal of Mark Schmink as Director of Emergency Services;
2. The immediate removal of Steven Abell, Jr. as Assistant Fire Chief (C3);
3. The immediate elimination of the position of Director of Emergency Services in the Town of Rockport;
4. The immediate return of control of the Fire Department to the Fire Chief, James Doyle (C1); and,
5. The immediate return to training for all members of the Fire Department, in a Covid-19 safe manner.

The reasons for these demands are as follows:

1. **Lack of Leadership:** We have **no faith** that Director Schmink and Asst. Chief Abell care for the well-being of the officers and firefighters of the department, as they have stripped control from our Chief and Captains.
2. **Poor Management:** Director Schmink and Asst. Chief Abell have removed several members for issues without previously addressing them in a less severe manner, short of termination. Not only have these people been terminated (or forced to resign), Director Schmink has added long forgotten, minor transgressions (pulled from his private, personnel files) that had nothing to do with the issue at hand to bolster his case for these dismissals. In addition, Director Schmink has responded to active fire-scenes, ordered fire staff around and removed members from the fire scene (including those who were medically cleared to return to service by the Ambulance Department). Director Schmink took these actions even though he does **NOT** have any Fire Command training or EMT training to override Fire Department officers or EMT's on the ground.
3. **Poor Morale:** In the two years Director Schmink and Asst. Chief Abell have been in their positions, we have sadly watched 10+ of our brothers be dismissed/leave the department. During the same time, essentially no new personnel have joined the ranks. Director Schmink has also sat on applications for new applicants to deter more people joining the department.
4. **Elimination of Training:** Director Schmink eliminated all fire department training to punish the department since members did not want to participate in Director Schmink's Covid-19 mask enforcement program. This stands in stark contrast to other fire departments across the Commonwealth (who continue to train safely) and our own Rockport Police officers who were allowed to qualify on the range, recertify in person at a CPR class at the fire station, and participate in a training video downtown, when not wearing masks. Clearly Director Schmink thinks our training is **not** as important as the police. Without fire department training, our lives (and your property) are in jeopardy. Further complicating things, even when we could train (before Covid-19), Director Schmink put in place an overly burdensome, bureaucratic, operation report the Chief and Officers had to draft and submit to him before he would allow any and all

company/department meetings and trainings. This has effectively stripped the Chief and Captains of the ability to call meetings and train with their crews as they see fit.

5. **Long-term plan to terminate the volunteer Rockport Fire Department:** Director Schmink and Asst. Chief Abell plan to slowly dismiss members one at a time so that there will no longer be enough members to operate the department. Their intent is either to require Rockport to hire the City of Gloucester to provide “professional” fire services to the Town or worse yet, to force the town to establish its own costly, full-time fire department run by Asst. Chief Abell and controlled by Director Schmink. Director Schmink has repeatedly told fire personnel he prefers either option over the longstanding, volunteer structure. Either move would not only eliminate the department’s proud volunteer tradition, but force a huge tax bill (possibly larger than the annual school budget), upon the residents of Rockport without any public discussion by the Board of Selectmen and the taxpayers in Town.

If these demands, listed above, are not met by the Board of Selectmen, the following members intend to retire at 6pm on Friday November 13, 2020.

Sincerely,

Frank J. Favaloro, Captain
Rockport Fire Department

EXHIBIT 4



David J. Farrell, Jr.
David S. Smith*
Liam T. O'Connell
Kirby L. Aarsheim**
Olaf Aprans

*Also admitted in Maine

**Also admitted in Rhode Island

ATTORNEYS AT LAW & PROCTORS IN ADMIRALTY

January 14, 2021

via email: pre@sec.state.ma.us

Secretary of the Commonwealth
Supervisor of Records
McCormack Building
One Ashburton Place, Room 1719
Boston, MA 02108

Re: Appeal of Town of Rockport's Responses to Public Records Requests

To Whom it May Concern:

This firm submitted a Public Records Request (PRR) with the Town of Rockport on November 10, 2020, *see* copy attached hereto as Exhibit 1, seeking disclosure of the following:

Any and all records, regarding James Doyle and his employment as Fire Inspector and/or service as Fire Chief, beginning from January 1, 2018 until present, including but not limited to reports, notes, statements, documents, and emails from, to, and/or between any combination of the following:

- *Stephen Abell (Assistant Fire Chief);*
- *Chief John Horvath (Chief of Police);*
- *LT Mark Schmink (Assistant Chief of Police);*
- *Mitchell Vieira (Town Administrator); and/or*
- *Rockport Board of Selectmen (any Selectmen).*

Exhibit 1 ("PRR 1"). The PRR stated that this firm agreed to pay "the fees incurred in the search for and copying of the requested records." *Id.* It is worth noting that this firm has submitted numerous PRRs with the Town over the past several years, and any fee associated with the PRRs were all timely paid.

FARRELL SMITH O'CONNELL AARSHEIM APRANS LLP

Offices in Massachusetts and Rhode Island

46 Middle Street, Gloucester, MA 01930
(978) 744-8918 loconnell@fsofirm.com www.fsofirm.com

On November 17, 2020, this firm submitted a second PRR, *see* copy attached hereto as Exhibit 2, seeking the disclosure of the following:

Any and all records, including but not limited to invoices, order forms, contracts, agreements, user names, administrator names, and email addresses associated with any and all encryption software (email or otherwise) purchased by the Town of Rockport or Town of Rockport employee including but not limited to Virtru software.

Exhibit 2 (“PRR 2”) (emphasis in original). Again, the PRR stated that this firm agreed to pay “the fees incurred in the search for and copying of the requested records.” *Id.*

PRR 1

Town of Rockport’s Counsel responded to PRR 1 on November 25, 2020, with a four-page letter, *see* copy attached hereto as Exhibit 3, but no responsive documents. The Town’s response to PRR 1 included a number of potential exemptions, as the Town “expected that some responsive records will be withheld or redacted . . .” Exhibit 3 at 3. Additionally, the Town included a fee estimate, of \$600.00, and cautioned that it was likely going to increase its fee:

This additional charge cannot be calculated until the initial search fee is paid, and the Town conducts the initial search of the Town’s e-mail servers, in order to ascertain the total number of potentially privileged communications. Should you proceed with this request, you will be provided with a supplemental fee estimate for the time necessary to perform redactions required by law.

Exhibit 3 at 4 (emphasis added). This firm remitted payment (\$600.00)¹ to the Town the week after the Town’s response, on December 3, 2020.

Despite not receiving any records in response to PRR 1, on December 24, 2020, the Town responded with a supplemental fee estimate, now demanding an additional \$400.00 in order for PRR 1 to be fulfilled. *See* copy of December 24, 2020 letter attached hereto as Exhibit 4. This firm remitted payment (\$400.00)² to the Town on January 5, 2021.

To date, this firm has not received one document from the Town in response to PRR 1, which was submitted more than two-months ago and this firm has tendered \$1,000.00 to the Town for its response.

¹ Portion of an \$800.00 check provided on December 3, 2020.

² Portion of a \$1,000.00 check provided on January 5, 2021. To date this firm has tendered \$1,800.00 to the Town for PRRs, and only received four (4) documents: (3) Town Administrator employment contracts (previous Town Admin. and current), and (1) work order which were all provided on December 23, 2020.

The Town has failed to comply with the Massachusetts Public Records Law as it failed to timely respond. A municipality must respond within the required timeframe, unless:

*[T]he . . . magnitude or difficulty of the request, or of multiple requests from the same requestor, unduly burdens the other responsibilities of the [] municipality such that the [] municipality is unable to do so within [ten business days], **the [] municipality shall inform the requestor in writing not later than 10 business days after the initial receipt of the request for public records.***

G.L. c. 66, § 10(b); *see also* 950 CMR 32.06(2)(i). The only other exception to the timeliness requirements, is if and when a municipality, “within 20 business days after initial receipt of the request . . . petitions the supervisor of records [Secretary of State] for an extension of the time.” G.L. c. 66, § 10(c); *see also* 950 CMR 32.06(4). The Town has not petitioned for an extension of time, and the Town’s response to PRR 1, *see* Exhibit 3, is insufficient and not in keeping with the law. Pursuant to G. L. c. 66, § 10(b), the Town’s response **shall:**

*identify any public records . . . that the . . . municipality intends to produce, and **provide a detailed statement** describing why the magnitude or difficulty of the request unduly burdens the other responsibilities of the . . . municipality and therefore requires additional time to produce the public records sought; [and]*

identify a reasonable timeframe** in which the . . . municipality shall produce the public records sought; provided, that for . . . **a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records . . .

G. L. c. 66, § 10(b)(v-vi). The Town neither provided a detailed statement describing why the magnitude or difficulty of PRR 1 burdened the Town, nor did it identify a reasonable timeframe within its response. *See* Exhibit 3. Rather, the Town has flouted the Public Records Law with excessive fees, most likely in hopes that this firm would not pay them; and stonewalled this firm from receiving public records it has paid for, without providing any of the required information under the law in its response as to why they have missed their deadline under the law. *See id.*

PRR 2

Town of Rockport’s Counsel responded to PRR 2 on December 2, 2020, with a three-page letter, *see* copy attached hereto as Exhibit 5, but no responsive documents. The Town’s response to PRR 2 included a fee estimate, of \$125.00:

The employee search time to locate existing records that are not being withheld pursuant to Exemption (n), i.e., invoices, order forms, contracts, and agreements, is as follows:

Town Administrator: 2 hours

Town Administration Office Manager: 1 hour

Accounting Dept.: 1 hour

IT Personnel: 1 hour

Total search time: 5 hours @ \$25/hour = \$125.00

The Town asserted the following, averring the records were exempt from public disclosure pursuant to G.L. c. 4, §7(26)(n):

After careful review of this specific request and Town records, the records custodian has determined in his³ reasonable discretion that the disclosure of such records would likely jeopardize the Town's cyber security and potentially expose it to cyber-attacks or infiltration based on the information being sought.

The Massachusetts Supreme Judicial Court (SJC) held that when analyzing an exemption under G.L. c. 4, §7(26)(n), it must be examined using the following two prongs:

1. “[W]hether, and to what degree, the record sought resembles the records listed as examples in the statute; [specifically, **the inquiry is whether, and to what degree, the record is one a terrorist ‘would find useful to maximize damage.’**” *People for the Ethical Treatment of Animals (PETA) v. Dep’t of Agric. Res.*, 477 Mass. 280, 289-90 (2017) (emphasis added).
2. Whether “the factual and contextual support for the proposition that disclosure of the record is ‘likely to jeopardize public safety.’” *Id.* The SJC further provides that

[b]ecause the records custodian must exercise ‘reasonable judgment’ in making that determination, the primary focus on review is whether the custodian has provided sufficient factual heft for the supervisor of public records or the reviewing court to conclude that a reasonable person would agree with the custodian’s determination given the context of the particular case.

Id. Curiously claiming that somehow “the disclosure of such records would likely jeopardize the Town’s cyber security and potentially expose it to cyber-attacks or infiltration” falls far short of providing “sufficient factual heft for the supervisor of public records . . . to conclude that a reasonable person would agree with the custodian’s determination.” *PETA v. Dep’t of Agric. Res.*, 477 Mass. at 289-90.

In fact, the Town has provided zero “‘factual heft’ to establish how disclosure of the information in the plan is likely to jeopardize public safety or cyber security,”⁴ because there is a high degree of likelihood a terrorist ‘would find [the records] useful to maximize damage.’” *PETA*, at 289-90.

³ Town of Rockport’s Public Records Access Officer (RAO) is its duly elected Town Clerk, Patricia E. Brown, who is not a ‘he;’ thus, it is unclear who Town Counsel is referring to when stating “in his reasonable discretion.” Note: the Town Administrator, who is a ‘he,’ is not the RAO, and the Town did not provide any information on who the custodian is for the records requested.

⁴ Commonwealth of Mass. Secretary, *A Guide to Massachusetts Public Records Law*, at 28 (March 2020).

This firm requested the following, specifically related or associated to the Town's use of Virtru email encryption software: invoices; order forms; contracts; agreements; user-names; administrator names; and email addresses. *See Exhibit 2.* It ebbs the tide of reason how the Town's (presumably the Town Administrator, and not the RAO, *see supra* at n.3), response denying the public records request, is anywhere close to being reasonable:

- What terrorist is even interested in Rockport?
- Why are certain Town officials sending emails using encryption software?
- Does the Town's email encryption software, as used (past and present) even comply with the Public Records Law? Specifically:
 - o Are the encrypted emails searchable in order to comply with the Public Records Law?
 - o How can the Town fulfill Public Records Requests, in accordance with the law, if an unknown quantity of emails from unknown sources, are encrypted in the Town's archive?
- How could the invoice for the purchase of Virtru email encryption software jeopardize the public safety and cyber security of the Town of Rockport?
- How could the name of the email encryption software's 'administrator' and those Town officials who use the email encryption software jeopardize the public safety and cyber security of the Town of Rockport?

Simply put, the records requested are public records. They are not akin to "blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, [or] threat or vulnerability assessments." G.L. c. 4, § 7(26)(n). Because the records requested do not come close to "resemble[ing] the records listed as examples in the [above] statute," *PETA, v.* at 289-90., they cannot be exempted and are in fact and law, public records, as "the more the record sought resembles the records enumerated in exemption (n), the lower the custodian's burden in demonstrating 'reasonable judgment' — and vice versa." *Boston Globe Media Partners, LLC v. Department of State Police*, No. 16-P-638, 2017 Mass. App. Unpub. LEXIS 971, at *3 (App. Ct. Nov. 3, 2017).

The Town charged a \$125.00 fee, for five (5) hours of labor, to produce one record; to wit, a copy of the Town's work-order showing Virtru software was purchased for \$999.00. *See copy attached hereto as Exhibit 6.* Clearly charging this firm five (5) hours to produce the "*existing record[] that [was] not [] withheld,*" *see Town's response at Exhibit 5,* is exorbitant. But this appeal is about much more than fees paid for nothing. This firm, and the public, need a good faith response with substantive documents. Remarkably, of the five (5) hours spent on searching for this one 'work order,' sixty percent (60%) of this time was spent by the Town Administrator's office, and only twenty percent (20%) of the search time was spent by IT

Farrell Smith O'Connell

Page 6

January 14, 2021

Personnel. Which begs another question, is the Virtru email encryption software used by the IT department or the Town Administrator, and why, if the Town purports this software is used for 'cyber security'? Which Town Official is the custodian?

Conclusion

Due to the Town's complete disregard for its obligations under the Public Records Law, this firm respectfully requests an Order from the Secretary of State for the immediate release of all public records pursuant to PRR 1 and 2, and the immediate return of the \$1,125.00 tendered for the same. Note the analysis herein is in keeping with Town Counsel [KP Law's] own analysis of the law;⁵ thus, it is not clear why Town Counsel sent this firm two separate responses not in keeping with its own analysis.

Furthermore, this firm respectfully requests the Supervisor of Records to determine whether or not the Town's Record Access Officer is complying with the Public Records Law, specifically relating to the Virtru email encryption software, as the RAO is required to:

- in cooperation with the custodian (still unknown as to the Virtru email encryption software), ensure that when designing or acquiring an electronic record keeping system or database:
 - o that newly acquired or implemented electronic record keeping systems or databases (such as Virtru's software in its relationship to existing email archives) are capable of providing data in a commonly available electronic, machine readable format; and
 - o the newly acquired or implemented electronic record keeping system (such as Virtru's software in its relationship to existing email archives) **allows for information storage and retrieval methods permitting retrieval of public portions of records to provide maximum public access.**

See 950 CMR 32.07(1)(e)(1-2) (emphasis added). The Town is treating a very common and presumably simple PRR; to wit, emails pertaining to/from certain Town Officials that reference or relate to another Town Official (Rockport Fire Chief, James Doyle), differently than any other PRRs submitted to the Town. See screen-shot copy of the Town's PRR portal attached hereto as Exhibit 7 (Various PRR request submitted, which relate to similar Rockport Fire Department topics, but for some unknown reason this firm's PRRs are still "On-Hold"). This firm, on behalf

of our client, and the public deserve answers and transparency. The disclosure of the requested records is in the public interest, as the issue relating to Rockport's Fire Department made

⁵ See KP Law, *The New Public Records Law: Technical Requirements and Practical Implications*, <http://www.k-plaw.com/wp-content/uploads/2017/01/Public-Records-Training-Powerpoint-Presentation.pdf> (last visited January 14, 2021); and KP Law, *New Public Records Law, Responding to a Public Records Request: Municipal Timeline*, <http://www.k-plaw.com/wp-content/uploads/2017/01/Revised-Public-Records-Exemptions-Card-effective-1-1-17.pdf> (last visited January 14, 2021) ("25 BUSINESS DAYS [is the] [I]ast day to produce records absent Supervisor [Secretary of State] approved extension").

Farrell Smith O'Connell

Page 7

January 14, 2021

national news the week of November 9, 2020 – a day before PRR 1 and a week before PRR 2 were submitted.

Thank you for your assistance in this matter. Please do not hesitate to contact me with any questions.

Very truly yours,



Liam T. O'Connell

Enclosures

cc: Town of Rockport RAO Patricia Brown *via* email: pbrown@rockportma.gov

cc: Town Counsel Michele Randazzo of KP Law *via* email: MRandazzo@k-plaw.com

EXHIBIT 5

Since we wrote our November 2020 demand letter, it has become clear the Selectmen and Mr. Vieira are using this Auditor selection process to ignore the demands of the Department. During the Jan. 12th, 2021 Selectmen's meeting, Mr. Vieira presented two seriously flawed Auditor candidates to the Selectmen. While the Selectmen chose Municipal Resources, Inc. (MRI), we, the members of the Town's Volunteer Fire Department, object to both candidates due to serious Conflicts of Interest.

Here is why we object to the potential Auditors and you should too:

The first candidate, MRI, has a major Conflict of Interest centering on the Town Administrator, Mitch Vieira. Mr. Vieira previously contacted MRI back in November to price out various interim fire services after we sent our initial complaint letter. Mr. Vieira stated he had several conversations with MRI officials at that time. The MRI presenters also admitted to these previous communications with Mr. Vieira. We find it suspect that with Mr. Vieira's past relations with MRI, somehow 4 of the 5 Selectmen then voted in favor of MRI. We also find it disturbing that MRI stated during their presentation that they helped move volunteer departments to full-time departments. Again, this is neither what the Fire Department needs nor what Rockport can afford. Remember, Mr. Vieira, along with Director of Emergency Services Mark Schmink and Assistant Fire Chief Stephen Abell were pushing for a full-time department. It seems clear, from MRI's presentation, they have already formed an opinion how they will proceed with their review. For these reasons, we believe it is a mistake to grant MRI the contract.

Even if the Selectmen had chosen the second candidate, Jack Parow, there is a major Conflict of Interest with him too. Simply put, Mr. Parow is Assistant Chief Abell's professor at the college he currently attends. Mr. Parow wanted to be placed on the Board of Fire Engineers, which would have allowed him to work alongside Mr. Abell, while reviewing the Department. As we stated in our original letter back in November, we wanted the Assistant Fire Chief removed. The Selectmen refused. So, clearly this Auditor option would fail too.

For these reasons, we cannot and will not accept either candidate or the Audit process.

We believe the actions of the Selectmen and Mr. Vieira are only distracting the town from the real issues we raised in November about the abysmal leadership of Director of Emergency Services Schmink and Assistant Fire Chief Abell. It is very important to remember that the Fire Department is NOT the issue here. The Department ran well up until Mr. Vieira appointed Mr. Schmink and Mr. Abell to these power positions. The real issues are the same ones we raised in our November letter and they remain. The Selectmen need to: (1) formally remove Mark Schmink as Emergency Service Director; (2) formally eliminate the position of Emergency Services Director; (3) formally remove Stephen Abell as Assistant Fire Chief; and (4) formally return James Doyle as our Fire Chief.

We are dedicated to our jobs as Volunteer Call Fire Fighters. We are happy to be back training together again and we are still waiting for the Selectmen to act in the best interests of the department and the Town.

Members Rockport Fire Department