THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0206

Union Leader Corporation and
The American Civil Liberties Union of New Hampshire
(Petitioners/Appellants)

v.

Town of Salem
(Respondent/Appellee)

Salem Police Relief, NEPBA Local 22
(Intervenor Respondent/Appellee)

Rule 7 Mandatory Appeal from the New Hampshire Superior Court, Rockingham County
Case No. 218-2018-cv-01406

REPLY BRIEF FOR PETITIONER/APPELLANT AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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INTRODUCTION

This case embodies why this Court needs to reconsider *Fenniman*.[1] Here, the Superior Court appeared concerned that *Fenniman* was shielding valuable information from the public, noting that "[a] balance of the public interest in disclosure against the legitimate privacy interests of the individual officers and higher-ups strongly favors disclosure of all but small and isolated portions of the Internal Affairs Practices Section of the audit report." *See* Superior Ct. Decision at 3 (emphasis in original). Indeed, portions of the Culture Report previously withheld by the Town under this exemption, but ordered released by the Superior Court, indicate the following: (i) former Deputy Chief Robert Morin, according to at least one employee, personally created a culture within the Department where employees are afraid to talk because, if they do, "he's going to go and get them," *see* Culture Add. 6, APXII 236; (ii) Deputy Chief Morin made statements on Facebook that, according to the auditors, were "inaccurate" and "insubordinate," *see* Culture Add. 5, APXII235; and (iii) a Salem officer—possibly Deputy Chief Morin[2]—allegedly threatened his sister's boyfriend by flashing his firearm at a defendant while in a Massachusetts courtroom and continued to work while this criminal investigation was pending, *see* Culture Add. 7-8, 11, APXII 237-38, 241. The Town's actions seem to be insulating Mr. Morin from full public scrutiny.

But the ramifications of *Fenniman* go beyond police practices and even include how agencies have responded to allegations of sexual abuse. For example, relying on *Fenniman* and fearing "embarrassment," the Concord School District recently refused to release non-identifying portions of a September 23, 2019, 100-page report submitted to the Concord School Board authored by an investigator hired to examine the District's response to complaints of inappropriate sexual behavior by former teacher Howie Leung.[3] There is

[1] Petitioners made clear in their Petition that they "are not seeking the names of any private citizens to the extent they are included in the Internal Affairs Report." *See* APXI014 (Petition p. 10, ¶ 29).

[2] Recently received responses to Massachusetts public records requests indicate that this allegation may concern Deputy Chief Morin, though this identifying information in the Report remains redacted by the Town. *See* Reply Addendum ("Reply ADD") 16-34 (Haverhill, Massachusetts Police Department Public Records).

[3] The ACLU of New Hampshire's Chapter 91-A request seeking this report (excluding identifying information concerning victims and non-governmental witnesses) is attached, along with the Concord School District's response. *See* Reply ADD 35-38 (Sept. 30, 2019 ACLU-NH Chapter 91-A Request to Concord School District,

reason to believe that this secret report documents a failure in how the District responded to allegations that Mr. Leung was abusing children, as the District's Superintendent was soon placed on paid administrative leave and later forced to resign.[4] The principal of Concord High School was also placed on paid administrative leave and subsequently resigned.[5] This secrecy has undermined public confidence in the District.

Unfortunately, *Fenniman* has enabled government agencies like Salem, the Concord School District, and others to use the "internal personnel practices" exemption as an escape hatch to hide volumes of information concerning government employees, including potential misconduct, that would allow the public to hold the government accountable. Pages 17-19 of Petitioner Union Leader's Opening Brief documents numerous recent examples of agencies withholding valuable information apparently under this exemption. But Chapter 91-A is designed to be a critical check against a government entity's instinct to insulate its officials from public scrutiny for their official actions. *Fenniman* was wrong when it was decided and it is wrong now.

ARGUMENT

I. THE PORTIONS OF THE AUDIT REPORT AT ISSUE DO NOT CONSTITUTE AN "INTERNAL PERSONNEL PRACTICE."

Relying on *Fenniman*, the Town argues that the redacted portions of the Report are an "internal personnel practice," in part, because they discuss disciplinary investigations of individual officers. Town's Br. at 15. The Town is wrong for two independent reasons.

First, consistent with FOIA Exemption 2 as explained in *Milner v. Department of the Navy*, 562 U.S. 562 (2011), the "internal personnel practices" exemption does not apply here because this exemption deals only with rules and practices governing employee relations or human resources, not with individual employee information like that contained

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and District's Oct. 4, 2019 Response); *see also* Leah Willingham, "School Board Lawyer Warns of 'Public Embarrassment, Humiliation and Retaliation' if Concord report is Released," *Concord Monitor*, Oct. 7, 2019, https://www.concordmonitor.com/Oct-7-school-board-meeting-29166122.

[4] *See* Alyssa Dandrea, "Forsten Out as Concord School District Superintendent," *Concord Monitor*, Nov. 1, 2019, https://www.concordmonitor.com/Concord-School-Board-meeting-interim-superintendent-29946305.

[5] *See* Leah Willingham, "Tom Sica Resigns as Concord High Principal Following Investigation," *Concord Monitor*, Nov. 4, 2019, https://www.concordmonitor.com/School-board-meeting-after-superintendent-s-resignation-30031978.

in the Report. *Id.* at 570. As explained in the ACLU-NH's Opening Brief, *Fenniman*'s application of this exemption to personnel information related to individual employees was in error and should be overruled. Appellees do not significantly acknowledge the quandary identified in *Reid v. N.H. Attorney General*, 169 N.H. 509 (2016), where this Court recognized that two separate exemptions in RSA 91-A:5, IV have been interpreted in ways that appear to make them redundant. *Id.* at 520.

Second, even if *Fenniman* is correct that the "internal personnel practices" exemption includes individual employee information like that in the Report, the question of whether a record is "personnel" related does not focus on whether any portion of its contents contains employee disciplinary or personnel information, but rather on whether the "nature and character" of the record itself is or was "generated in the course of an investigation of claimed employee misconduct." *See Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 10 (2003); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1, 4 (2006). As the *Worcester Telegram* Court explained, information may confidentially exist in a personnel file for employment purposes, but that same information may exist elsewhere in a separate document that has no employment purpose and therefore is a public record. *Id.* at 10. This is precisely the case here. Here, while the Report's contents may reference disciplinary investigations concerning individual employees, the Report itself is <u>not</u> a "personnel" document because, unlike *Hounsell*, it was <u>not</u> generated in the course of individual employees being investigated for claimed misconduct. As the Report notes, its focus was rather to "review the [internal affairs] process[] in its entirety," not to "conduct[] an independent review of facts or circumstances surrounding individual complaints filed against Salem PD personnel." APXI 38; APXII 113 (IA Report 4).

II. SEVERAL AMENDMENTS TO RSA 91-A:5 OFFER NO MEANINGFUL GUIDANCE IN INTERPRETING THE EXEMPTIONS AT ISSUE IN THIS CASE.

Appellees argue that *Fenniman* should not be overruled by pointing to several post-*Fenniman* amendments to RSA 91-A:5, and its failure to amend the two exemptions at

issue here, as evidence that "the legislature has assuredly spoken." Union Br. at 12. These amendments, however, do not help the Appellees for the reasons explained on Pages 6-8 in the Reply Brief filed in *Seacoast Newspapers, Inc.*, No. 2019-0135. Indeed, it is "'impossible to assert with any degree of assurance that [a legislative] failure to act represents' affirmative [legislative] approval of" one of this Court's decisions. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n. 1 (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cty*., 480 U.S. 616, 672 (1987) (Scalia, J., dissenting)); *see also Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law"); *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle"). There are many reasons the legislature might not have acted on *Fenniman*, and most of them have nothing at all to do with the legislature's desire to preserve the decision. *See Johnson*, 480 U.S., at 672 (Scalia, J., dissenting) (listing various kinds of legislative inertia, including an "inability to agree upon how to alter the status quo" and "indifference to the status quo"); *see also Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 826 (2014) (Thomas, J., dissenting; joined by Scalia, J., Ginsburg, J. and Alito, J.).[6]

III. IF THE REPORT CONSTITUTES AN "INTERNAL PERSONNEL PRACTICE" BECAUSE IT CONTAINS INDIVIDUAL EMPLOYEE INFORMATION—AND IT DOES NOT—IT IS STILL SUBJECT TO A PUBLIC INTEREST BALANCING ANALYSIS.

Both the Town and the Municipal Association argue that *Fenniman*'s categorical application of the "internal personnel practice" exemption is correct because RSA 91-A:5, IV's use of semicolons—which the legislature inserted in 1986—transformed this statute by causing the phrase "whose disclosure would constitute invasion of privacy" to be severed and no longer modify the exemptions for "internal personnel practices" or

[6] The Union's argument that House Bill 153 assists its position, *see* Union Br. at 14-15, is to no avail for all the reasons explained on Pages 8-10 in the Reply Brief filed by Seacoast Online Newspaper, Inc. in *Seacoast Newspapers, Inc. v. City of Portsmouth*, No. 2019-0135.

"confidential, commercial, or financial information." *See* NHMA Amicus Br. at 10; Town Br. at 18. This interpretation is wrong for at least two reasons.

First, this Court has already rejected this statutory interpretation, including after the 1986 amendments to Chapter 91-A. For example, despite's RSA 91-A:5, IV's use of semicolons, this Court has, on at least six occasions since 1986, interpreted the exemption for "confidential, commercial, or financial information" as textually being modified by the statute's "invasion of privacy" language. *See Union Leader Corp. v. N.H. Hous. Fin. Auth.*, 142 N.H. 540, 552 (1997) ("We have interpreted our statute, however, as requiring analysis of both whether the information sought is 'confidential, commercial, or financial information,' *and* whether disclosure would constitute an invasion of privacy.") (emphasis in original); *Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551, 554 (2002) (same); *Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 679 (2011) (same); *Chambers v. Gregg*, 135 N.H. 478, 481 (1992); *Brent v. Paquette*, 132 N.H. 415, 426-27 (1989); *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 707 (2010). This interpretation is correct because the semicolons in RSA 91-A:5, IV act as a delineation of specific records, with each category still subject to an "invasion of privacy" balancing analysis. And this balancing analysis does not just consider privacy implications, but also considers the governmental interest in nondisclosure balanced against the public interest in disclosure. *See Mans v. Lebanon School Bd.*, 112 N.H. 160, 162 (1972). This Court interpreted the use of semicolons in a similar fashion in the context of a will. *See Kellom v. Beverstock*, 100 N.H. 329, 333 (1956) (the phrase referring to the "statutes of the state" applies to both gifts in a will despite use of semicolons). What Appellees fail to meaningfully address is that, if "confidential, commercial, or financial information" is subject to a public interest balancing analysis despite being surrounded by semicolons—as this Court has held—then so to ***must*** "internal personnel practices" which are similarly surrounded by semicolons. RSA 91-A:5, IV provides no textual basis to treat these exemptions differently. If this Court adopts the (incorrect) textual interpretation of the Town and Municipal Association, then this Court would effectively be overruling all of its

cases since 1972 applying a balancing test to the "confidential, commercial, or financial information" exemption.

Second, a review of the 1986 legislative history of the amendments to RSA 91-A demonstrates that the legislature never intended to make the exemptions in RSA 91-A:5, IV categorical or sever the statute's balancing analysis from its preceding exemptions. The Ad Hoc Committee on the Right to Know Law appeared to contemplate these legislative changes to RSA 91-A:5, IV simply to "clarify [the] meaning of exempted records" and to add "test questions" to the list of exemptions. *See* Reply ADD 42 (1986 HB 123 Legislative History, final version of bill), 62 (discussing clarification), 65 (discussing "test questions"); *see id.* at 59 (version of RSA 91-A:5 being amended from 1967). Many stakeholders provided input on and were supportive of these amendments memorialized in House Bill 123, including the Municipal Association, the ACLU-NH, and media outlets. *See id.* at 69-70. If the legislature truly intended to, by inserting semicolons, overrule *Mans* and transform RSA 91-A:5, IV by rendering categorical many of its exemptions, then surely legislators or stakeholders would have said so at some point during the extensive discussions on this legislation. They did not.[7]

To the contrary, the legislative history of the 1986 amendments supports Petitioners' interpretation, and makes clear that there was an explicit legislative desire to preserve—not upend—the balancing analysis in RSA 91-A:5, IV required in *Mans* and its progeny. The Deputy Attorney General at the time specifically informed the Senate Judiciary Committee of the balancing test applied to "confidential" information. *Id.* at 93-94 (Deputy Attorney General Bruce Mohl stating that the "court has developed standards" in order to protect confidential information and "[i]t has not been a problem that I'm aware of in terms of courts interpreting that provision"). The Deputy Attorney General also advised the Ad Hoc Committee that drafted HB 123 that it would be best to avoid a "complete overhaul of RSA 91-A because we would lose all the case law that has developed to specifically

[7] The only discussion in the legislative history of RSA 91-A:5, IV's punctuation concerns whether this section should include as an exemption "confidential, commercial, or financial information" or "confidential commercial, or financial information," with the comma deleted. *See* Reply ADD 74, 91, 93, 98 (1986 HB 123 Legislative History).

preserve this Court's case law that has been developed around it." *Id*. at 63. This legislative history fatally undercuts *Fenniman*'s decision applying this exemption categorically.

IV. THE POLICE DO NOT HAVE A PRIVACY RIGHT TO BE ANONYMOUS, ESPECIALLY WITH RESPECT TO THEIR OWN CONDUCT DONE IN AN OFFICIAL CAPACITY.

The Town appears to argue that the public may be entitled to know that an officer engaged in misconduct, but just not who engaged in such misconduct. *See* Town Br. at 24-31. This is an extraordinary position that is not only incorrect as a matter of law but, if adopted, would damage the public's ability to hold the government accountable.

As many courts have held, in most instances police officers have little privacy interest with respect to their official acts, especially where potential misconduct is implicated. *See, e.g.*, *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003) ("[t]he public has a strong interest in disclosure of information pertaining to its government activities"; deeming public photos taken by police of private citizens); *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) (ordering disclosure of employee names); *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press*, L.L.C., 4 So.3d 807, 809-10, 821-822 (La. Ct. App. 1st Cir. 2008) (names of officers who were subject of internal investigations disclosed); *Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004). The information sought in this case simply does not constitute the "kinds of facts [that] are <u>*regarded as personal*</u> because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*, 169 N.H. at 530 (emphasis added). Rather, this case concerns acts done in an official capacity, including of high level employees.

The accountability value of attaching the names of specific police officers—and other government officials—to official behavior is obvious. For example, if the public does not know the specific identities of an officer who engaged in misconduct, then how can the public evaluate whether a government entity has taken appropriate action—whether it be discipline or termination—against that officer? While the Town effectively says "trust us," Chapter 91-A favors transparency. This is why this Court has required that salary

information be tied to the names of individual employees. *See e.g.*, *Union Leader Corp.*, 162 N.H. at 684.

Assuming that *Fenniman* correctly applied the "internal personnel practices" exemption to individual employee information (again, it did not), whatever privacy concerns individual employees—including police officers—may have in individual cases can and should be considered on a case-by-case basis as part of this balancing analysis. In some cases, the privacy interests may predominate. But it cannot be said that such privacy interests will trump the public interest in disclosure in <u>*all*</u> cases, especially where—as is the case here—the acts in question are official in nature, may implicate misconduct, and do not involve personal information. This only highlights the overbreadth of *Fenniman*'s categorical application of this exemption.

Similarly, any fear that disclosing internal personnel investigations "would deter the reporting of misconduct by public employees, or participation in such investigations, for fear of public embarrassment, humiliation, or even retaliation" constitutes a governmental interest in nondisclosure, *see Hounsell*, 154 N.H. at 5, that can and should be considered as part of this balancing analysis. In some cases this governmental interest in nondisclosure may trump. But in others, the public interest in disclosure may be so significant that it prevails. This balancing test is not "subtle and elusive," nor does it "jeopardize the sound administration of local government employment practices." *See* Town. Br. at 13; NHMA Amicus Br. at 6, 16. This is the same balancing test that this Court has required government entities to apply to "confidential, commercial, or financial information" and "personnel files."

Finally, the Town's argument that the recent privacy protections added to the New Hampshire Constitution provide the officers in the Report with a right to privacy is wrong. *See* Town's Br. at 32. By its own terms, this constitutional amendment—like other provisions of the Bill of Rights—protects individual citizens from governmental intrusion; it does not, as the Town seeks, protect the government and its actors from scrutiny by individual citizens. The amendment's sponsor and chief legislative proponent—former

Representative Neal Kurk—made clear that this amendment was a tool to protect individuals from the government, not the other way around. *See* APXII 69-78.

Respectfully Submitted,

THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION,

By its attorneys,

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Dated: November 5, 2019

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no reply brief shall exceed 3,000 words … exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 2,996 words (including footnotes).

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 5th day of November 2019 through the electronic-filing system on counsel for the Respondent/Appellee Town of Salem (Barton L. Mayer Esq.), Intervenor Respondent/Appellee Salem Police Relief, NEPBA Local 22 (Peter J. Perroni, Esq.), *Amicus Curiae* New Hampshire Municipal Association (Cordell Johnston, Esq.), and Petitioner/Appellant Union Leader Corporation (Gregory Sullivan, Esq.).

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

REPLY ADDENDUM

1

Haverhill, Massachusetts Police Department Public Records

HAVERHILL PD
HAVERHILL, MA

INCIDENT # / REPORT #	OFFICER	RANK	REVIEW STATUS
16057695 / 1	FOGARTY, G	PATROLMAN	COMPLETED

Not For Public Release Date/Time Printed: **Wed Jul 17 15:21:40 EDT 2019** By: **dchampagne**

INCIDENT # 16057695 DATA

As Of 07/17/2019 08:57:23

BASIC INFORMATION

CASE TITLE
[redacted]

LOCATION
[redacted]

APT/UNIT #

DATE/TIME REPORTED
12/12/2016 12:26:37

DATE/TIME OCCURRED
On or about 12/12/2016 12:26

INCIDENT TYPE(S)/OFFENSE(S)
(275/2)THREAT TO COMMIT CRIME c275 S2
(MISC)MISCELLANEOUS REPORT

PERSONS

ROLE	NAME	SEX	RACE	AGE	DOB	PHONE
VICTIM	[redacted]	MALE	WHITE	45	[redacted]	(HOME) [redacted]
	ADDRESS: [redacted] HAVERHILL, MA					(CELL) [redacted]
WITNESS	[redacted]	MALE	WHITE	65	[redacted]	(HOME)
	ADDRESS: [redacted] HAVERHILL, MA					(CELL) [redacted]
WITNESS	[redacted]	MALE	WHITE			(HOME)
	ADDRESS: [redacted] N ANDOVER, MA					(CELL) [redacted]
WITNESS	[redacted]	MALE	WHITE	65	[redacted]	(HOME)
	ADDRESS: [redacted] HAVERHILL, MA					(CELL) [redacted]

OFFENDERS

STATUS	NAME	SEX	RACE	AGE	DOB	PHONE
SUSPECT	MORIN, ROBERT	MALE	WHITE	47	[redacted]	(HOME)
	ADDRESS: [redacted] SALEM, NH					(CELL) [redacted]

[NO VEHICLES]

[NO PROPERTY]

OFFICER REPORT: 16057695 - 1 / FOGARTY, G (91)

DATE/TIME OF REPORT	TYPE OF REPORT	REVIEW STATUS
12/12/2016 15:11:23	INVESTIGATIONS	COMPLETED

NARRATIVE

Detective Glenn Fogarty will testify to the following facts that took place in the City Of Haverhill.

August 11, 2016 [redacted] was in custody at Rockingham County Jail and waived extradition back to Massachusetts. Detective's G. Fogarty and Sean Scharneck transported [redacted] back to Haverhill Police Station in a marked transport van. During the transport [redacted] stated the reason [redacted] was on the run and did not turn [redacted] in was because [redacted] is in fear for [redacted] life. [redacted] stated that one of [redacted] warrants involved a case [redacted] Robert Morin. [redacted] stated this cop has made threats to kill [redacted] and pulled a gun on [redacted]. [redacted] stated the cop also made threats to [redacted], [redacted]. [redacted] stated [redacted] has evidence on video. [redacted] stated that [redacted] will be sending all [redacted] evidence to the Department of Justice. [redacted] stated that [redacted] did not want any services from the Haverhill Police at this time. I told [redacted] if [redacted] needed any help in the future to call and the Haverhill Police would investigate the report.

August 12, 2016 I spoke with [redacted] at the Haverhill District Court. I repeated what [redacted] had told me. [redacted] acknowledged that [redacted] received a phone call at [redacted] office, from an unidentified person who [redacted] believed to be that cop that [redacted] referred to, and that it was completely inappropriate. [redacted] did not wish to speak about the incident and stated if [redacted] wished to report the incident [redacted] would contact me at a later date. [redacted] did say that in all [redacted] years [redacted] has never been approached like this before.

December 08, 2016 I received a call from [redacted], [redacted] stated [redacted] wanted to meet with me to report more threats [redacted] received. [redacted] arrived at the Haverhill Police Station. I spoke with [redacted] and [redacted] again stated [redacted] is in fear for [redacted] life and had again been threatened by the same person and this time it happened while [redacted] was at the Haverhill District Court. [redacted] stated [redacted] was at Haverhill District Court on 11-29-2016. [redacted] stated while [redacted] was waiting for [redacted] [redacted] noticed Robert Morin was at the court. [redacted] did not know why Morin was at court because the case that was on did not have any relationship to Morin's

[redacted]'s case ([redacted]). [redacted] stated that Morin was carrying a firearm on his side. [redacted] stated while [redacted] was waiting for [redacted] Morin approached [redacted] and said "do you know what it looks like when a hollow point bullet goes through your head?" [redacted] stated [redacted] called [redacted] and told [redacted] about the incident. [redacted] stated Morin is a Captain at the Salem New Hampshire Police Department. [redacted] stated when [redacted] arrived at the court [redacted] questioned why Morin was allowed to carry a firearm in the court. [redacted] then entered the court room for a motion on [redacted]. The motion would allow [redacted] to leave the state while on GPS bracelet. At the conclusion of the hearing [redacted] stated [redacted] was walking out of the court room and Morin was standing in the back of the court room. [redacted] stated Morin called [redacted] name and when [redacted] looked over at Morin he was slapping his holstered firearm. [redacted] stated that [redacted] witnessed the incident and [redacted] that was in the court also witnessed the incident. At the conclusion of the interview I advised [redacted] of [redacted] rights to apply for a Harassment Order at the Haverhill District Court and advised [redacted] to report the incident to the Chief of Police in Salem New Hampshire. I told [redacted] that I would open an investigation. [redacted] states [redacted] did not know how to report the incident to Salem New Hampshire Police because [redacted]. I advised [redacted] to speak with [redacted] attorney for advice on the mater.

December 12, 2016 I was able to schedule a meeting with [redacted]. [redacted] was reluctant to discuss the case. [redacted] stated that back in August [redacted] received a phone call from a person that [redacted] believes was Morin. [redacted] did not expand on the contents of the conversation but stated that it was completely inappropriate conversation to have. [redacted] states that on 11-29-2016 [redacted]. [redacted]. At approximately 315 PM [redacted] arrived at the court. [redacted] called [redacted] and told [redacted] that Morin was at the court and had again made threats. When [redacted] arrived at the court [redacted] noticed that Morin was carrying a firearm in the court. Due to the previous incidents with Morin and the current incident at the court, [redacted] questioned why Morin was able to carry a firearm in the court. The court officer reported that Morin was on Official Court Business. [redacted] did not believe that was the case and did not understand why Morin was present at the court since he has no connection to the case that was being heard. At the end of the hearing [redacted] to walk out of the court room. [redacted] noticed Morin was standing in the back of the courtroom. [redacted] to just walk past Morin and not to make eye contact. [redacted] stated as [redacted] was walking out of the court, Morin yelled

"[redacted]" and when [redacted] looked over Morin was slapping his holstered firearm. [redacted] stated not only did [redacted] witness this but [redacted] was also present in the court and witnessed this.

December 13, 2016 I spoke to [redacted]. [redacted] stated [redacted] was in the court after the hearing ended and the Judge was in chambers. [redacted] stated that a undercover officer slapped his holstered firearm and looked at [redacted]. [redacted] stated [redacted] immediately asked him "did you just see that". [redacted] stated [redacted] did see the incident but did not hear any exchange of words.

Video has been requested between the hours of 1300 and 1630 on 11/29/2016 from the Haverhill District Court.

December 15, 2016 I spoke with Morin on the telephone. Morin stated that he wanted to meet with me and present his side of the incident. During this conversation Morin stated " I Can't believe that you even listen to this piece of shit, do you know [redacted] criminal history". I explained I was familiar with [redacted]'s history, but [redacted] is still entitled to [redacted] rights and still can become a victim. Morin did not agree. Morin went on to say that [redacted] is [redacted] and [redacted] is also a piece of shit, [redacted] would eat unborn child [redacted] and further more [redacted]. Morin stated I had the ability to end the investigation, it did not need to go any further. I explained due to the allegations, I would have an independent body(Clerk's Hearing) review the case to see if probable cause is found at the conclusion of the investigation. Morin was not happy with this action and stated "[redacted] must have a picture of your Chief Fucking some pig". At the conclusion of the investigation Morin again asked that I interview him at his Police Station, I again explained that I would not interview him on the phone or at his police station but I was more than willing to make myself available in Haverhill. Morin than agreed to come to meet me at 3:00PM. I asked that he come to the Haverhill Police Station in civilian clothing and without a firearm. Morin was upset with this request and asked what he should do if he see's a felony when he is on his way to see me, I suggested that he call the Haverhill Police. Morin then said "are you asking me to commit a crime and leave my gun in my car when I see you" I responded "you should allow you conscious to guide you through this". The conversation was ended.

Morin Called back and stated he would not be in under the advice of his attorney, Jerry LaFlamme. Morin stated that he believes the complaint will issue regardless of what he says.

December 16, 2016 I met with [redacted] at the Haverhill District Court. [redacted] was in the court room during [redacted] hearing. At the conclusion of the hearing [redacted] went into the court room, and [redacted] was yelling in the court, and [redacted] was angry that Morin was allowed in the court with his firearm, and stated he just made a threat towards [redacted] by tapping his firearm. [redacted] states that Morin was no longer in the courtroom. [redacted] had seen Morin in the court throughout the day. [redacted] believed he was on official duty because he was displaying his badge and firearm. [redacted] did notice that Morin watched the [redacted] hearing.

December 22, 2016 Chief DeNaro received a letter from Robert Morin outlining the events. The letter is attached to this report.

January 04, 2017 Robert Morin called me at the Haverhill Police station. Morin stated that he was leaving on training and won't be returning till March 17, 2017. Morin asked if I would give him the courtesy of notice if a complaint issued against him. I told Morin I would call him on his cell phone if a complaint issued. Morin then asked if I would come to his office to hear his version of the events. I told Morin that I would make my self available to hear his version of events but it would have to be at the Haverhill Police Station. Morin was again taken back by the fact that I would not meet him at his office. The conversation was ended.

January 10, 2017 I was informed by the trial courts that the video in the Haverhill Court was not available. The video is only stored for five days.

On January 16, 2016 [redacted] called the Haverhill Police station and spoke with Detective Portalla. [redacted] Morin and stated [redacted] was in the courtroom on 11-29-2016 with [redacted]. [redacted] stated [redacted] was upset that no one has attempted to speak to [redacted] because [redacted] is a witness to the incident. Detective Portalla stated that she was not the investigating officer and refereed [redacted] back to me. Detective Portalla inquired if there was any additional incidents to report, [redacted] stated nothing new had transpired. [redacted] was again refereed to me.

I called [redacted] on January 18, 2017. [redacted] was upset that no one had contacted [redacted] to ask [redacted] about [redacted] version of the events. [redacted] stated I'm a witness and I should be interviewed. [redacted] then stated that [redacted]

Haverhill Court. I asked if [redacted] reported this incident, and [redacted] stated [redacted] reported it to [redacted]. I explained to [redacted] that I was only interested to speak with [redacted] about 11-29-2016 and if [redacted] had any domestic incidents that Detective Portalla would be investigating those incidents. I explained to [redacted] I was in the middle of a homicide trial and would be contacting [redacted] at a later date. [redacted] was not pleased with that response.

February 02, 2017 I contacted [redacted] again. I attempted set up an appointment for [redacted] to come in. [redacted] stated [redacted] would not be available until Monday 02/06/2017. I told [redacted] That I would be available, but if [redacted] had any incidents to report other than what happened [redacted] on 11-29-2016 Detective Portalla would be investigating the incidents, and was not available on 02/06/2017. [redacted] immediately became upset stating that [redacted] is a victim and doesn't understand why we are protecting [redacted]. [redacted] states [redacted] has been victimized and harassed by [redacted] for the past 2 years. [redacted] told me I don't understand. I told [redacted] that I was familiar with [redacted] and the history but I was only investigating the allegations made by [redacted] on 11-29-2016. I explained that if [redacted] had additional incidents to report, Detective Portalla would be available on 02-06-2017, I wanted to minimize [redacted] trips to the police station. [redacted] became enraged stating that [redacted] cant believe no one has talked to [redacted] and this investigation is to get [redacted] off. [redacted] went on a rant saying that the Haverhill Police is siding with [redacted] and [redacted] is the victim. I told [redacted] that I encourage [redacted] to follow through with the criminal case with [redacted], but my involvement is separate from the criminal case (Domestic). I explained that my investigation is solely about the incident [redacted] on 11-29-2016. At this point in the conversation I was unable to even get a word in, I asked several times for only one of us speak at a time. [redacted] was now [redacted] again started to attack the way the investigation was handled and telling me how it should be done. [redacted] stated [redacted] should have been contacted and [redacted] is helping [redacted] through this, and did not do any thing wrong. [redacted] then stated [redacted] demanded an apology because I was being unprofessional. [redacted] continued not allowing me to speak, asking who my supervisor was. I responded Lt. Pistone, [redacted] was unhappy with that response again stating that I was unprofessional and wanted an apology. [redacted] stated [redacted] wanted someone other than Lt. Pistone. I suggested that [redacted] contact Chief DeNaro's office and provided the police number. [redacted] was enraged and impossible to talk to. At the end of the conversation [redacted] called me a social path and hung up the phone. Due to the two conversations I have had with [redacted] I am unable to interview [redacted]. [redacted] will be provided an opportunity at any hearings

to present [redacted] recollection of the events of 11-29-2016.

02/02/2017 [redacted] was interviewed. [redacted]. states the hearing was not heard until late in the afternoon because [redacted]. [redacted] recalls Morin, [redacted] and [redacted] were at the court all day. Morin and [redacted] were sitting towards the back of the court on the prosecution side of the court, and [redacted] was seated towards the front on the defense side. [redacted] recalls [redacted] got up and walked in/out of the court several times throughout the day. [redacted] would have to walk past Morin to exit the court. [redacted] states that he did see Morin and [redacted] make eye contact with each other but did not witness any exchange of words between them. [redacted] states the hearing was conducted and was contentious. At the conclusion of the hearing, [redacted] walked out of the court room with Morin and [redacted]. [redacted] states when the Judge got off the bench and went into her chambers, [redacted] and [redacted] got into a heated argument about Morin being armed in the court room. [redacted] was accusing Morin of "Flashing his Gun", [redacted] understood this to mean the gun being displayed on his hip. [redacted] states the argument was heated and [redacted] asked [redacted] to leave the court room. [redacted] replied "you can't tell me to leave, you're just [redacted] like [redacted]," referring to [redacted]. [redacted] was standing in the back of the court room at this time.

After they left the court room [redacted] told Morin that it would not be a good idea to bring his firearm to court for future hearings, [redacted] stated it would not be "A smart idea". Morin asked what he should do if he's working. [redacted] stated maybe he could secure it in a locker or wear a sports coat to cover the firearm. In the following days [redacted] received calls from Morin, inquiring if anything was going to happen regarding the incident in the court.

Due to the above investigation and the allegations made by [redacted], and the independent witness statements, I request a Clerk's Hearing be held to see if there is probable cause to file a criminal complaint.

I respectfully request the following charges be considered.

265/15B Assault By Means Of A Dangerous Weapon
(firearm)

275/2 Threat To Commit A Crime

REPORT OFFICERS

Reporting Officer:	FOGARTY, G	91
Approving Officer:	PISTONE, R	47

December 22, 2016

Alan R. DeNaro
Chief of Police
Haverhill Police Department
40 Bailey Blvd.
Haverhill, MA 01830

Dear Chief DeNaro:

As I'm sure you are aware, your agency is currently investigating an allegation that I threatened [redacted] with my department issued firearm at Haverhill District Court on 11-29-16. I am writing to you to make you aware of the history, which should lead you and your investigators to the conclusion that the allegation is not only false, but was made with malicious intent and rises to the level of Obstruction and Witness Tampering/Intimidation.

On or about September 26, 2015, my [redacted], [redacted], met and started dating [redacted].

On October 16, 2015, [redacted] went to visit [redacted] at [redacted] residence in Haverhill, MA ([redacted]) after a night out with [redacted] friend. During this meeting, which took place in [redacted]'s vehicle, an argument ensued. [redacted] was using profanity toward [redacted] and accused [redacted] of cheating. [redacted] grabbed [redacted] cell phone out of [redacted] hand and threw it at [redacted] head. The cell phone missed [redacted]'s head but hit the driver's side window and shattered. [redacted] also grabbed [redacted]s face with force.

On October 23, 2015, [redacted] was with a friend at Jamie's Restaurant in North Andover, MA. During this time, [redacted] was receiving continuous text messages from [redacted]. [redacted] and [redacted] friend, [redacted], had met and were speaking to two men, [redacted] and his son, while sitting at the bar, waiting for their table. When [redacted] and [redacted] were seated, they invited the two men to sit with them until their table was ready. At approximately 10 PM, [redacted] entered the restaurant and confronted [redacted]. [redacted] accused [redacted] of "making out" with [redacted]. [redacted] was angry and aggressive, to the point that the restaurant owner, [redacted], walked over and told [redacted] that if [redacted] didn't calm down, [redacted] was going to call the police. [redacted] told [redacted] that [redacted] thought [redacted] could diffuse the situation and would speak to [redacted] in the foyer of the restaurant. Once in the foyer, [redacted] continued to be aggressive and accusatory and spit in [redacted]'s face. [redacted] attempted to walk away from [redacted]. [redacted] grabbed [redacted] wrist and said, "sit down and show me some respect." At this point [redacted] entered the foyer and asked [redacted] if [redacted] wanted [redacted] to call the police. [redacted] then left the restaurant.

On November 12, 2015, [redacted] reported to Brentwood, NH Superior Court for an initial hearing on a restraining order that [redacted] had filed against [redacted]. [redacted] arrived at the court with a male subject, [redacted], who [redacted] had dated approximately 20 years ago and a female named [redacted]. [redacted] asked the court to grant him a continuance, stating that [redacted] attorney, [redacted], advised [redacted] to inform the court that [redacted] ([redacted]) had to attend a funeral. The court granted the continuance and scheduled a new date for November 23, 2015.

[redacted] called me from the courthouse and for the first time, informed me about [redacted] and what had happened in their three week courtship. [redacted] told me that [redacted] was very possessive and overly enthusiastic about their relationship from the very first date. [redacted] also told me that [redacted] believed [redacted] put some type of tracking device on [redacted] phone. [redacted] explained that [redacted] always seemed to know where [redacted] was and had knowledge of text messages and emails [redacted] had received on [redacted] phone. [redacted] asked me if [redacted] needed an attorney. I asked [redacted] if [redacted] reported the assaults to Haverhill PD and North Andover PD. [redacted] told me that [redacted] had gone to Haverhill PD, but was unsure what was being done. I told [redacted] that I would make some phone calls and would get back to [redacted].

On November 12, 2015, I called Haverhill PD to inquire what was happening with [redacted]'s complaint. I believe I spoke to Detective William O'Connell, who told me that he was going to make application for a criminal complaint. He confirmed that [redacted] did report the incident to the Police Department. He also told me that [redacted] was well known to the agency and was a "[redacted]."

On that same day, I also called [redacted]. I asked [redacted] if [redacted] could tell me what was going on. I told [redacted] that [redacted] was my [redacted] and that I was very concerned about [redacted] based on the information that Detective O'Connell had told me about [redacted]. I told [redacted] that I would obtain information on [redacted] by legal means and would not run [redacted] Triple I, rather I was hoping that [redacted] could give me some insight into the type of [redacted] that my [redacted] dated. [redacted] responded, "Oh jeez, I'm sorry. I have to be careful what I say, but if it were my [redacted], I'd be concerned too." [redacted] also said that [redacted] would never question my integrity or professionalism and appreciated me calling [redacted]. I told [redacted] that I simply wanted [redacted] not to contest the restraining order, to save [redacted] the trouble of hiring an attorney. I told [redacted] that I would be taking [redacted] to NAPD to report that assault and that I would ensure that [redacted] followed through. [redacted] told me [redacted] was going to contact [redacted] and advise [redacted] not to contest the restraining order. [redacted] told me that [redacted] would get back to me. Later that same day, [redacted] and I went to Haverhill District Court to request copies of all restraining orders and criminal charges that had been levied against [redacted] in that jurisdiction. We paid the appropriate fees and were provided with all available information from Haverhill District Court.

On or about November 14, 2015, I still had not heard back from [redacted] so I called and left a message for [redacted]. [redacted] never returned my call.

On November 16, 2015, I met [redacted] at NAPD to file the report for the 10-23-15 assault that occurred at Jamie's Restaurant. We met with Lt. Foulds, who took [redacted]'s report and ultimately conducted an investigation and filed application for a criminal complaint. Lt. Foulds interviewed [redacted], [redacted] and [redacted], who all gave similar statements. They all described [redacted]'s aggressive and accusatory disposition in the restaurant. None of them reported seeing the assault and all of them stated [redacted] and [redacted] were alone in the foyer. [redacted] also gave a statement to Lt. Foulds. [redacted] claimed [redacted] went to the restaurant with Matt McAuliffe, [redacted] denied assaulting [redacted]. [redacted] also said there was a [redacted] in the foyer, whose name and number [redacted] came back to get after leaving the restaurant. The [redacted] was identified as [redacted]. [redacted] also gave a statement to Lt. Foulds on 11-19-15 and backed [redacted]'s claims with a very vivid recollection. Lt. Foulds found that odd, since the incident occurred nearly a month prior. He asked [redacted] if it was [redacted] recollection or what [redacted] told [redacted] to say. [redacted] acknowledged that [redacted] spoke to [redacted], a [redacted] had not known until the encounter at Jamie's Restaurant, on 11-17-15, but claimed it was [redacted] recollection. [redacted] never gave a statement to Lt. Foulds nor returned any calls.

On that same day (11-16-15) I contacted Atty. Don Blaszka and asked him to represent [redacted] for the RO. He agreed and made several attempts to contact [redacted], without success. I knew that [redacted] was not licensed to practice in NH and I don't believe [redacted] ever had any intention of sending [redacted], to represent [redacted]. In fact, I do believe that [redacted] did contact [redacted] and told [redacted] not to contest the RO, but [redacted] never had the courtesy to contact Atty. Blaszka.

Atty Blaszka then requested a continuance for the 11-23-15 RO hearing, explaining that he was recently retained and needed to consult with his client. The continuance was granted and rescheduled for January 4, 2016.

On January 4, 2016, Atty. Blaszka's represented [redacted]. [redacted] and [redacted] failed to appear and the order was granted and effective on January 22, 2016.

Since January of 2016, I have attended several court hearings with [redacted], both in Haverhill and Lawrence. On one occasion, for a hearing in Haverhill, [redacted] and I were seated in the courtroom. I was sitting on [redacted]'s left side. [redacted] entered the courtroom and attempted to sit down next to [redacted], on [redacted] right side. [redacted] did not see me. I stood up and said, "I don't think so." [redacted] scurried away, but a court officer noticed what had happened and came over to me to inquire. When I explained what transpired, the court officer ensured that [redacted] was removed until the case was called. [redacted] has an extensive criminal history, which includes witness intimidation. Several of [redacted] victims have failed to testify against [redacted] and therefore, [redacted] has managed to secure several CWOF's or charges have been dismissed altogether. Though my [redacted] wanted to back down on several occasions, I encouraged [redacted] to stay the course and put [redacted] faith in the Criminal Justice System.

I attended a Clerk Magistrate Hearing with [redacted] for the North Andover case in Lawrence District Court. When [redacted] was called into the hearing, I accompanied [redacted]. [redacted] was already in the room with [redacted]. The Clerk Magistrate explained that [redacted] offered to resolve the case, explaining that the offer was the case would be Continued without a Finding, but [redacted] would not contest further restraining orders. [redacted] looked at me and I shook my head, indicating "No". At this point, [redacted] got upset and objected to my presence. [redacted] told the Clerk Magistrate I had no standing in the case. The Clerk Magistrate informed [redacted] that [redacted] objection was noted, but he had no issue with my presence. It should be noted, that I never spoke to [redacted], [redacted] or the Clerk Magistrate. I simply shook my head, when the offer was presented to [redacted].

I believe I attended at least three hearings with [redacted] at Haverhill District Court and one other Hearing at Lawrence District Court. Each time, I left work to meet [redacted] at the courthouse to be a support for [redacted]. Due to the fact I was on duty, I had my department issued firearm on my hip, along with my badge prominently displayed on my belt next to my firearm. Lawrence District Court has a lock box right next to the metal detector and I stored my firearm in a lock box for those hearings, though I was never asked to surrender my firearm. Haverhill District Court also has a small lock box, but it is not prominent (located on a desk off to the side of the metal detector) and I didn't know that it existed until recently. Further, each time I went to Haverhill District Court, Court Security, recognizing that I was a law enforcement officer, waived me through, without asking me to go through the metal detector, nor did anyone ever ask me to surrender my firearm. I would not leave my firearm at my office and drive to court in a department owned vehicle, without a firearm. I believe the reason for that does not require explanation. I also would

not leave my firearm in my department vehicle unattended, I believe that is not only unwise but also a crime in the Commonwealth.

In May of 2016, [redacted] was charged with assaulting another woman in Haverhill. The victim in this case was [redacted], and is the same woman that accompanied [redacted] to Brentwood, NH Superior Court on November 12, 2015. [redacted] told Haverhill Police that [redacted] had been dating [redacted] for about a year and a half and that [redacted] had been "physically and mentally abusive since [redacted] can remember." [redacted] reported that [redacted] "pulled [redacted] hair, slapped [redacted] and punched [redacted] four or five more times until [redacted] stopped counting." [redacted] also claimed that [redacted] told [redacted] on several occasions that [redacted] "was not allowed to leave the house or [redacted]."

In July of 2016 Methuen Police received a call from [redacted], the same [redacted] who told NAPD that [redacted] was present in the foyer of Jamie's Restaurant on 10-23-15. [redacted] told MPD that [redacted], who [redacted] dated for a short time, continued to come by [redacted] house on [redacted] Ave. in Methuen. [redacted] told the police that [redacted] didn't want anything to do with [redacted] and advised that [redacted] had an active warrant out of Haverhill for the assault on [redacted]. MPD Detectives spotted [redacted] on July 15, 2016, while doing surveillance in the [redacted] Ave area. The detectives called for a marked unit, who located the vehicle that [redacted] was driving. The marked unit attempted to stop [redacted], who refused to stop until he pulled up in front of [redacted] [redacted] Ave., [redacted]'s residence. [redacted] then fled on foot and was able to allude capture. After an extensive search with negative results, MPD received an anonymous tip that [redacted] made [redacted] way back to the Quick Stop on Lowell St. and entered a white Ford F 150 pick-up truck, driven by an unknown female. Though I don't have proof, I suspect that unknown female was [redacted]. The vehicle that [redacted] had been driving was registered to [redacted]. [redacted] did not cooperate with MPD further. [redacted] was eventually arrested on August 9, 2016 by Hampton, NH Police. [redacted] barricaded [redacted] self in a residence but was eventually arrested. [redacted] was held in Middleton until [redacted] next scheduled court date. The story was reported in the August 16, 2016 edition of the Lawrence Eagle Tribune.

On August 22, 2016, [redacted] and I were again in Haverhill District Court. On this date, [redacted] pled guilty to the assault on [redacted] in Haverhill. He received a 2 1/2 year sentence with 90 days to be sewed in Middleton. The balance, 27 months, would be suspended until August 22, 2018. [redacted] was credited with 10 days of pre-trial credit and was also ordered to serve 90 days in a "locked down" batterer's program upon release from Middleton. Further [redacted] agreed not to contest any further restraining orders filed by [redacted]. A restitution hearing was also scheduled for February of 2017.

[redacted] was released from Middleton on November 9, 2016. [redacted] was not transferred to a "locked down" batterer's program, because [redacted] status as a level 2 sex offender disqualified [redacted]. On this date, [redacted] also pled guilty to the May 2016 assault on [redacted]. [redacted] received probation and [redacted] did not testify against [redacted].

On November 29, 2016, [redacted] and I were at Haverhill District Court again to contest [redacted]'s request to work in Plaistow, NH. [redacted] was objecting to this request due to the fact that [redacted] place of business is in Plaistow. We arrived at Haverhill District Court at 0845 for a 0900 hearing. We were taken to a witness room and met with ADA [redacted] a short time later. ADA [redacted] explained that the docket was extremely heavy and the hearing would need to be re-scheduled to 2PM that same day. I met [redacted] and [redacted] friend, Anna Sideri, at Haverhill District Court when I returned at 2 PM. The three of us waited in the witness room. At 2:45 PM, I walked up to the court room to see if [redacted]

and [redacted] had arrived yet. I saw [redacted] walk into the courtroom, but there was no sign of [redacted]. I did not speak to [redacted], nor did I acknowledge [redacted] presence. [redacted] and I were alone in the courtroom for several minutes. I received and email on my cell phone from my PD, I stepped out of the courtroom, into the lobby, to make a phone call. I spoke to one of my Lieutenants for approximately 5 minutes. As I was speaking to my co-worker on the phone, I noted that [redacted] had walked out of the courtroom and was now standing in the stairwell speaking to an unknown woman.

When I concluded my phone call, the court officer at the metal detector asked me what brought me to court. I replied "I'm here for that piece of shit [redacted]." The Court Officer put his finger to his lips and pointed to a male subject sitting on the bench, outside the court room. The gentlemen was dressed in a suit and though I don't know his name, he looked like he could have been a lawyer. I later noticed that [redacted] was speaking to that same Court Officer. I didn't hear the conversation but it appeared that [redacted] heard my comment and took exception to it and was attempting to see if the Court Officer was going to do anything about it.

[redacted] and Anna were brought up to the courtroom a few minutes later. Atty. [redacted] still had not arrived. [redacted], Anna and I struck up a conversation with Court Officer [redacted]. He told me that he had worked with a former colleague of mine, Sgt. Mike Rogers (Ret.). Sgt. Rogers began his law enforcement career at Haverhill PD. The four of us continued to speak for several more minutes and at one point, Court Officer [redacted] called another gentleman over to us. The unknown gentleman had told Court Officer [redacted], earlier, he thought [redacted] was of Greek decent. [redacted] and I informed the gentleman that we were Italian. The entire conversation was jovial and good natured. Finally at approximately 3:15 PM, [redacted] arrived to court.

The hearing was eventful, Judge Dowling learned that her order that [redacted] report directly to a "locked down" Batterer's program after release from Middleton, had been amended by a visiting judge. The new order allowed [redacted] to attend a ten month program, which [redacted] attends one weekend per month. [redacted] stated that [redacted] was not eligible for the locked down facility due to [redacted] status as a sex offender. ADA [redacted] argued that his office was never notified. It was also revealed that on or about November 9, 2016, [redacted] pled guilty to the assault on [redacted]. We learned that [redacted] did not testify and that [redacted] was ordered to wear an ankle bracelet as part of the sentencing. I am unsure why [redacted], who required re-constructive surgery, did not testify. Judge Dowling listened to arguments from both attorneys. She suggested that [redacted] be paid $1,000 for the change that was made to the sentencing order. Judge Dowling then took a recess in order to allow ADA [redacted] and [redacted] time to come to an agreement. ADA [redacted] called me up to the prosecution table when Judge Dowling entered chambers. [redacted] asked for my input and after a few minutes of discussion, [redacted] left the courtroom to find [redacted]. A moment or two later, [redacted] entered the courtroom, I informed [redacted] that ADA [redacted] had just left to find [redacted]. [redacted] said, "Oh" and turned around and exited the courtroom.

A few minutes later, both attorneys entered the courtroom and moments after that, the court was called back to order. Judge Dowling denied [redacted]'s request to work in Plaistow, ordered [redacted] to pay $1,000 in restitution for the sentencing change and stated she would revisit [redacted] request to work in Plaistow at the Restitution Hearing scheduled for February 2017. Judge Dowling was very blunt with [redacted], stating that she did not believe [redacted] could be rehabilitated and if she saw [redacted] again for anything other than positive reasons, she would send [redacted] back to jail.

When Judge Dowling left the bench, [redacted] left the defense table and went to the back of the courtroom, [redacted] remained at the defense table. [redacted] spoke to ADA [redacted] and the Victim/Witness advocate for a few moments at the Prosecution table. When [redacted] was ready to leave, I got up from the pew in the front row, followed [redacted] and kept my eyes glued on [redacted], who was standing by the courtroom exit. The Victim/Witness Advocate, Terry, walked us to the courtroom exit. At no point in time, did I speak to [redacted], call [redacted] name, point to my gun or tap my gun. I may have adjusted my holster, as the weight of the gun often causes my pants to drop below the waistline, but at no time did I ever threaten [redacted] or make any aggressive or threatening gesture with or toward my firearm. I do not wear a uniform and my uniform of the day is business casual. I do not wear a duty belt. My weapon is secured in a paddle holster, with my badge prominently displayed next to my weapon. Any police officer will understand adjusting of our holsters and as a matter of weapon security, officers often rest their hand, forearm on top of their weapon. [redacted] and I then exited the courthouse, walked to the rear parking lot, got into my car and exited the court parking lot. As we drove by the front of the courthouse, [redacted] and [redacted] were on the sidewalk in front of the courthouse.

On 12-05-16, I received a phone call from ADA [redacted]. He told me that if I ever attended another hearing with [redacted] at Haverhill District Court, I should leave my firearm behind. He explained that [redacted] and another attorney, whose name he did not reveal, had accused me of threatening [redacted] by "tapping my gun." He didn't want to give me too many details but explained that he and [redacted] were yelling at one another, in the courtroom, after [redacted] and I had left. He told me that he didn't believe it was going to go anywhere, but wanted me to be careful because [redacted] is a "sociopath." I thanked him for his concern and stated that the allegation was ridiculous.

On 12-12-16, my Chief, Paul Donovan, received a phone call from Deputy Chief Tony Haugh from the Haverhill Police Department. Haugh told my Chief that he was calling to give my Chief a "heads up" on what had transpired on 11-29-16 and he wasn't sure where the complaint was going. Chief Donovan informed Haugh that he was already made aware of the situation and was not concerned. Chief Donovan came to see me in my office to tell me about his conversation with Haugh. I immediately called ADA [redacted] to inform [redacted]. ADA [redacted] told me that [redacted] attempted to obtain a restraining order against me at Haverhill District court on 12-06-16. [redacted] stated that the order was denied. I asked [redacted] if [redacted] came to the court with [redacted] or if [redacted] was alone. ADA [redacted] stated that [redacted] was alone. I pointed out that it was fairly obvious that [redacted] went to Haverhill PD after [redacted] attempt at a restraining order was denied. [redacted] told me [redacted] would call Deputy Chief Haugh to inquire about what had transpired. ADA [redacted] called me back several minutes later and informed me that [redacted] had led Haverhill PD to believe that I was involved in the argument that transpired in the courtroom. [redacted] said, "I'm not going to say [redacted] lied, [redacted] is smart enough not to do that, but [redacted] certainly misled them and I set them straight."

On 12-13-16, I received another phone call from ADA [redacted], [redacted] told me that [redacted] didn't want me to worry about the complaint. [redacted] told me that [redacted] spoke to [redacted], who agreed to "let it go." [redacted] said, "I just didn't want you to be worrying about this, this is dead, there is like a 5% chance that it goes anywhere." I told [redacted] that I was not worried, because it didn't happen, rather I was annoyed.

On 12-14-16, Chief Donovan received another call from Deputy Chief Haugh. Haugh asked Chief Donovan for my date of birth and home address. Chief Donovan refused to provide that information and was told that NM would be making application for a criminal complaint on me. Chief Donovan came to my office again and told me about his conversation with Haugh.

At approximately 3:50 PM on 12-14-16, I called Deputy Chief Haugh. I asked him to tell me what was going on. He was very vague. I asked him if he felt it was important to talk to me before filing an application for a criminal complaint. He replied, "We didn't think you would talk to us." I pointed out that he hadn't asked. He took my phone number and informed me that he would pass the number on to the investigating detective, Glen Fogarty.

On 12-15-16, at approximately 9 AM, I received a phone call from Detective Fogarty. As I started to tell him my side of the story, he cut me off, stating that he was directed not to talk to me on the phone. I invited him to my office and he informed me that I would need to report to HPD. I asked him to tell me the allegation. He said that it was alleged that I threatened [redacted] by "pointing" at my gun. I told Detective Fogarty that was a total fabrication and asked him if the courtroom was equipped with video surveillance. He advised that the video had been requested. I asked him if he had viewed it. He advised that he had not. I asked him when he intended to do that. He replied, "I'm not at liberty to say." He told me several times that this was "above his pay grade" and he took no pleasure in it. He asked if I was willing to talk to him. We tentatively set up a 3 PM interview and he told me to report in "civilian clothes without my firearm." I told him that I would be happy to secure my firearm in any lock box. He informed me that he was directed to tell me that I would not be admitted into the station with a firearm. I asked him if he would prefer that I commit a crime in his jurisdiction by leaving my gun in my car unattended. He told me that he would prefer that I leave my firearm at Salem PD. I asked Detective Fogarty if he would drive around in a department owned vehicle without a firearm. He replied, "I will leave it to your discretion, but you can't come in the building with a gun."

Later that afternoon, I spoke to Atty. Jerry Laflamme. I have known Atty. LaFlamme professionally for nearly 20 years. Atty. Laflamme agreed to represent me and recommended that I not speak to Detective Fogarty. He told me that nothing I told him was going to prevent HPD from filing an application for a Criminal Complaint. He advised that I would be summoned to a Clerk Magistrate's Hearing and we would take it from there. I expressed concern that I was going to be out of town from Jan. 9, 2017 to March 17, 2017 at the FBI National Academy in Quantico, VA. He assured me that he would be able to continue the matter until I was back in town. He also told me that he was going to call [redacted] and ADA [redacted]. He stated that he would call me later in the day, after he spoke to them.

After getting off the phone with Atty. LaFlamme, I called Detective Fogarty to inform him that Atty. LaFlamme advised me not to speak to him. He replied, "I totally understand and I have a lot of respect for Atty. LaFlamme." I asked Detective Fogarty if he was aware that [redacted] attempted to obtain a restraining order against me on 12-06-16. He stated he was aware. I asked him if he was aware that the order was not granted. He confirmed that he was aware of that as well. I asked him if it was [redacted] or [redacted] that was pushing the complaint. He told me that it was [redacted]. I asked why it was that he was unable to see through the smoke screen. He said, "I'm sorry, it's above my pay grade."

At approximately 9 PM on 12-15-16, I received a phone call from Atty. LaFlamme. He told me that I had done the right thing by not speaking to HPD. He said that [redacted] told him that [redacted] heard me say, "Hey [redacted]" and then "tap" my gun. I told him that was an absolute lie. He went on to say that [redacted] claimed that a public defender, Atty. [redacted], also saw and heard me threaten [redacted]. He said that [redacted] also intimated that Court Officer [redacted] saw it. I asked Atty. LaFlamme if any or all of them had put their claims in writing. Atty. LaFlamme was unsure. He told me that Judge Dowling was made aware of the incident and therefore a Clerk Magistrate's Hearing would likely be

moved to another court. He also stated that if it went beyond a Magistrate's Hearing, he would not be comfortable representing me against another Haverhill Lawyer, especially one he has known for years. I told Atty. LaFlamme that it was blatantly obvious, to me, that this was being done as an effort to spook me, thereby causing me to tell my [redacted] to drop the North Andover charge, which is scheduled for trial on December 22, 2016. Atty. LaFlamme told me that [redacted] did mention that [redacted] was scheduled for trial. He told me he would continue to do some groundwork, as he was unable to reach ADA [redacted], Atty. [redacted] or Court Officer [redacted].

Later that same evening, I sent Atty. LaFlamme a text, stating that I firmly believed if [redacted] dropped the North Andover charge or did not testify, [redacted] would drop complaint against me. I firmly believe that [redacted]'s ethical bar is that low.

I received a text message from Atty. LaFlamme later that evening, advising that he left a message for [redacted], but did not expect to hear back from [redacted] until Monday, December 19, 2016.

On December 19, 2016, I received a phone call from Atty. LaFlamme. He told me that [redacted] was going to object to Atty. LaFlamme representing me due to the fact that one of Atty. LaFlamme's partners represented [redacted] and [redacted] father in a civil hearing. He also told me that [redacted] once again claimed that he saw me "tap" my gun after saying "Hey [redacted]." [redacted] stated that [redacted] thought [redacted] client might be interested in dropping the complaint on me if [redacted] didn't have to stand trial on 12-22-16 for the assault on [redacted] in North Andover on 10-23-15. [redacted] stated that [redacted] would speak to [redacted] client and get back to Atty. LaFlamme.

On December 20, 2016 at approximately 10 AM, I received a phone call from Atty. LaFlamme, who had just left Haverhill District Court. He told me that he spoke to Court Officer [redacted]. Atty. LaFlamme stated that [redacted] told him that the courtroom is not equipped with video surveillance and that Detective Fogarty and HPD know that the only place there is video surveillance is the holding cells in the basement. [redacted] also told Atty. LaFlamme that [redacted] had spoken to [redacted], who said that he didn't hear me say anything to [redacted]. [redacted] told [redacted] that [redacted] saw me put my hand on my holster, which is obviously when I must have adjusted my holster after rising from a seated position. [redacted] further stated that when [redacted] attempted to obtain a restraining order against me on 12-06-16, [redacted] claimed that I "chased [redacted] up the street in my vehicle and [redacted] was forced to hide under a house." [redacted] also told the court that I have a criminal record. Atty. LaFlamme advised me to go to Haverhill District Court to request a copy of the affidavit. He told me that I am entitled to a copy of it and he also told me to request a transcript of the hearing. Atty. LaFlamme also told me he spoke to ADA [redacted], who told him that [redacted] told [redacted] that if he called me to give me a "tongue lashing" the matter would be resolved. ADA [redacted] informed Atty. LaFlamme that [redacted] did call me on 12-05-16 to advise me of the allegation. Atty. LaFlamme agreed with me that [redacted]'s efforts, at a minimum, may warrant an investigation into a potential Witness Tampering or Obstruction charge. I told Atty. LaFlamme that, based on recent experience, I did not have much faith in Haverhill PD, but I would now being doing some leg work.

On December 20, 2016 at approximately 3 PM, I received a call from [redacted], [redacted] told me that [redacted] had spoken to the Victim/Witness Advocate at Lawrence District Court. [redacted] said that [redacted] implored the Victim /Witness Advocate to relay to the ADA what was going on and ask him not to assent to any attempts to continue the case scheduled for 12-22-16, which has already been continued three times. [redacted] called back about an hour later to inform me that [redacted] did request a continuance and

despite objection, the judge granted a continuance to 2-23-17 due to [redacted] having a scheduling conflict.

On December 21, 2017, I went to Haverhill District Court to request a copy of the affidavit that [redacted] wrote in [redacted] attempt to obtain a restraining order on me. The claims are outrageous, stating that I threatened to shoot [redacted] in the head, in the courtroom with several witnesses present. On the application page, [redacted] claimed that I have been threatening [redacted] since 12-31-15, yet this is the first time [redacted] has filed complaint. I also spoke to Court Officer [redacted], who confirmed that [redacted] never said that [redacted] heard me threaten [redacted]. [redacted] told [redacted] that [redacted] did see my hand on my holster at one point. [redacted] also advised that HPD has spoken to [redacted] and [redacted] told them that [redacted]'s claims are utterly outrageous. Lastly, [redacted] informed me that [redacted] went to Haverhill District Court on 12-20-16 to see if the judge would reconsider [redacted] restraining order request. This is the same day that [redacted] later requested a continuance for the 12-22-16 trial. [redacted] stated that Judge told [redacted], "Capt. Morin is not a threat to you." Prior to leaving the courthouse, I requested a copy of the transcript from December 6, 2016.

I spoke to Atty. LaFlamme on 12-22-16 at approximately 11:00 AM. Atty. LaFlamme had just met with [redacted], who informed him the [redacted] was not willing to talk about anything. If [redacted] would like to take out complaint on me then [redacted] should be encouraged to do that. I'm a bit perplexed why the Haverhill Police Department would act as [redacted] vehicle. It is important to know that Atty. LaFlamme and [redacted] met at Lawrence District Court this morning. [redacted] was granted a continuance for the trial that was scheduled today because [redacted] told the court [redacted] had a conflict in scheduling. I will address that matter and [redacted] other ethical issues with the Ethics Board. It should be abundantly clear what [redacted] is trying to do and [redacted] is allowing it to happen and thus far, so is the Haverhill Police Department.

I have been a police officer for nearly twenty years, I am a high ranking and highly decorated officer in my agency. I have had my [redacted] follow the law and put [redacted] faith in the Criminal Justice System. I have attended hearings with [redacted] to support [redacted]. [redacted] is terrified of [redacted] and has continuously said that [redacted] fears retribution because [redacted] stood up to [redacted] and followed through. This malicious attack on my character, professionalism and reputation is appalling. The manner in which Haverhill PD has conducted the investigation is equally appalling. I believe it is very clear to see what is going on and why this is being done. I do believe that [redacted] is a sociopath and is extremely dangerous. I also concur with Judge Dowling, [redacted] can't be rehabilitated and will offend again. I hope that [redacted] next victim is not the one that [redacted] finally kills. [redacted] criminal record has well over 80 charges on it. [redacted] has been convicted of some very violent crimes and is a level 2 sex offender.

I know exactly who was in the courtroom on 11-29-16...[redacted], [redacted], Judge Dowling, Court Clerk, Court Officer [redacted], ADA [redacted], Victim/Witness Advocate, [redacted], the unknown gentleman that spoke earlier with me, another gentleman, who I believe is a probation officer and myself. I also know where everyone was as I was exiting the courtroom. I know this because I am trained to be aware of my surroundings and have been doing this job for nearly half my life. I did not and would not jeopardize my career and everything I have worked for over the past twenty years for someone like [redacted]. I have ensured that my [redacted] follow every step in the criminal justice process and have encouraged [redacted] to stay the course and assured [redacted] that justice would be served. [redacted] has already received justice on the Haverhill assault and if convicted on the North Andover charge, I'm confident that [redacted] will go back to jail. There is absolutely no reason for me to take matters into my own hands,

we have prevailed at every step. However, [redacted] has much to gain because [redacted] is the one who faces trial on the second assault on [redacted] I do not believe the witnesses for [redacted] will show up to testify. McAuliffe never contacted NAPD, and he has his own legal issues to worry about. If [redacted] does show up, a first year law student would be able to discredit [redacted]

I have provided you with ample information to discredit this claim. You and your agency have a duty to due diligence. From where I sit, your agency and this investigation is one sided. Detective Fogarty treated me like a criminal and said several times "it's above my pay grade." Though, as investigators, we always want to get subjects on our 'home turf" to conduct an interview, in what training did he learn that you refuse to take a statement either on the phone or by going to them? Lastly, by Haverhill PD continuing this investigation in this manner, you are empowering a convicted batterer, encouraging witness intimidation and further victimizing my [redacted] who is already a victim of domestic violence. I implore you to end this now, you and your agency can certainly dismiss this complaint in the investigative stage. I have provided enough information for your agency to look at charging [redacted] for Obstruction and/or Witness Tampering/Intimidation and certainly enough information to determine that this complaint has no merit.

Respectfully,

Robert R. Morin, Jr.

2

September 30, 2019 ACLU-NH Chapter 91-A Request to Concord School District, and District's October 4, 2019 Response Citing *Fenniman*

September 30, 2019

VIA EMAIL (deggert@wadleighlaw.com; sbennett@wadleighlaw.com)

Dean B. Eggert
Stephen M. Bennett
Wadleigh, Starr & Peters, P.L.L.C.
95 Market St.
Manchester, NH 03101

Re: Right-to-Know Request Regarding Report

Dear Attorneys Eggert and Bennett:

This is a Right-to-Know request to the Concord School District ("the District") pursuant to RSA 91-A and Part I, Article 8 of the New Hampshire Constitution by the American Civil Liberties Union of New Hampshire ("ACLU-NH"). I understand that you represent the Concord School District. If you do not, please let me know immediately.

The ACLU-NH defends and promotes the fundamental principles embodied in the Bill of Rights and the U.S. and New Hampshire Constitutions, including the right to free speech. In furtherance of that mission, the ACLU-NH regularly conducts research into government activities in New Hampshire. We ask that your District waive fees associated with responding to this request. Please contact me to discuss the fee waiver in advance of preparing any copies.

Below is the specific request:

1. The complete report submitted to the Concord School Board on September 23, 2019 by an investigator hired to examine the District's response to complaints of inappropriate behavior by former teacher Howie Leung. This request specifically excludes any identifying information concerning (i) victims and (i) witnesses who are/were not employed by the District.

In responding to this request, please consider the time limits mandated by the Right-to-Know law. In discussing those limits in *ATV Watch v. N.H. Dep't of Res. & Econ. Dev.*, 155 N.H. 434 (2007), the New Hampshire Supreme Court has stated that RSA 91-A:4, IV requires that a public body or agency, "within 5 business days of the request, make such records available, deny the request in writing with reasons, or to furnish written acknowledgement of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied." *Id.* at 440.

If produced, these records must be produced irrespective of their storage format; that is, they must be produced whether they are kept in tangible (hard copy) form or in an electronically-stored format, including but not limited to e-mail communications. If any records are withheld, or any portion redacted, please specify the specific reasons and statutory exemption relied upon. *See* RSA 91-A:4, IV (official must "make such record available" or "deny the request in writing *with reasons*") (emphasis added).

Thank you for your anticipated cooperation. I look forward to hearing from you as soon as possible. Of course, if you have any questions or concerns, do not hesitate to contact me.

Very truly yours,

/s/ Gilles Bissonnette

Gilles Bissonnette
ACLU-NH, Legal Director
Gilles@aclu-nh.org

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October 4, 2019

Gilles Bissonnette, Esq.
ACLU-NH, Legal Director
Via email: Gilles@aclu-nh.org

Re: Chapter RSA 91-A Request dated September 30, 2019

Dear Atty. Bissonnette:

Please accept this letter as the Concord School Board's response to your request pursuant to Chapter RSA 91-A for a copy of an internal personnel investigative report prepared for the Concord School Board. The Concord School Board respectfully declines your request.

The report constitutes "[r]ecords pertaining to internal personnel practices" and is exempt from disclosure. RSA 91-A:5,IV; see *Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1,4 (2006). Disclosure of this report would also violate the prohibitions against disclosure of personal school records (RSA 91-A:5, III) and student education records. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g(b).

This internal personnel investigative report is separate and distinct from a forthcoming report which will address the adequacy of School District policies and practices regarding how incidents of sexual misconduct are reported, investigated and resolved. The School Board intends to release this second report to the public.

Sincerely,

Stephen M. Bennett, Esq.
On behalf of the Concord School Board

SMB/pad
cc: Jennifer Patterson, President, Concord School Board

3

Legislative History to House Bill 123/1986 Amendments to Chapter 91-A

CHAPTER 83 (HB 123)

AN ACT AMENDING THE RIGHT TO KNOW LAW.

Be it Enacted by the Senate and House of Representatives in General Court convened:

83:1 New Chapter Heading. Amend RSA 91-A by striking out the title of said chapter and inserting in place thereof the following:

ACCESS TO PUBLIC RECORDS AND MEETINGS

83:2 Trustees of the University System Included. Amend RSA 91-A:1-a, III (supp) as inserted by 1977, 540:2 by striking out said paragraph and inserting in place thereof the following:

III. Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire;

83:3 Chance Meetings; Negotiation, Consultation. Amend RSA 91-A:2 (supp) as inserted by 1967, 251:1 as amended by striking out said section and inserting in place thereof the following:

91-A:2 Meetings Open to Public.

I. For the purpose of this section, a "meeting" shall mean the convening of a quorum of the membership of a public body, as provided in RSA 91-A:1-a, to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power. "Meeting" shall not include:

(a) Any chance meeting or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business and at which no decisions are made; however, no such chance or social meeting shall be used to circumvent the spirit of this chapter;

(b) Strategy or negotiations with respect to collective bargaining; or

(c) Consultation with legal counsel.

II. All public proceedings shall be open to the public, and all persons shall be permitted to attend any meetings of those bodies or agencies. Except for town meetings, school district meetings and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras and videotape equipment, at such meetings. Minutes of all such meetings, including names of members, persons appearing before the bodies or agencies, and a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to public inspection within 144 hours of the public meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any body or agency, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including an executive session, shall be posted in 2 appropriate places or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the body or agency who shall employ whatever means are available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or guidelines or rules of order of any body or agency described in RSA

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123)

TO KNOW LAW.

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as provided in RSA 91-A:1-a, to
vhich the public body has supervi-
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official business and at which no
or social meeting shall be used to

to collective bargaining; or

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dies or agencies. Except for town
ms, no vote while in open session
nall be permitted to use recording
recorders, cameras and videotape
such meetings, including names of
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man or presiding officer of the body
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e meeting shall clearly spell out the
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91-A:1-a require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter.

83:4 Matters Discussed in Executive Session. Amend RSA 91-A:3, II (supp) as inserted by 1967, 251:1 as amended by striking out said paragraph and inserting in place thereof the following:

II. A body or agency may exclude the public only if a recorded roll call vote is taken to go into executive session. The matters discussed during the executive session shall be confined to the matters stated in the motion. A motion to go into executive session stating which exemption under this paragraph is claimed shall be made only when the body or agency is considering or acting upon the following matters:

(a) The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him, unless the employee affected requests an open meeting.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the body or agency itself, unless such person requests an open meeting.

(d) Consideration of the acquisition, sale or lease of property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the body or agency or any subdivision thereof, or against any member thereof because of his membership in such body or agency, until the claim or litigation has been fully adjudicated or otherwise settled.

(f) Consideration of applications by the adult parole board under RSA 651-A.

83:5 Photostatic Copies; Access to Computer-Stored Records. Amend RSA 91-A:4 by inserting after paragraph II the following new paragraphs:

III. Each body or agency shall keep and maintain all public records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the public records pertaining to such body or agency shall be kept in an office of the political subdivision in which such body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

IV. Each public body or agency shall, upon request for any public record reasonably described, make available for inspection and copying any such public record within its files when such records are immediately available for such release. If a public body or agency is unable to make a public record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a photocopying machine or other device maintained for use by a body or agency is used by the body or agency to copy the public record or document requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any body or agency which maintains its records in a computer storage system may, in lieu of providing original documents, provide a printout of any record reasonably described and

which the agency has the capacity to produce in a manner that does not reveal information which is confidential under this chapter or any other law. Access to work papers, personnel data and other confidential information under RSA 91-A:5, IV shall not be provided.

83:6 Additional Exemption. Amend RSA 91-A:5, IV as inserted by 1967, 251:1 by striking out said paragraph and inserting in place thereof the following:

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

83:7 Invalidation. Amend RSA 91-A:8 (supp) as inserted by 1973, 113:1 as amended by striking out said section and inserting in place thereof the following:

91-A:8 Remedies.

I. If any body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a public record or refuses access to a public proceeding to a person who reasonably requests the same, such body, agency, or person shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available or the proceeding open to the public. Fees shall not be awarded unless the court finds that the body, agency or person knew or should have known that the conduct engaged in was a violation of this chapter or where the parties, by agreement, provide that no such fees shall be paid. In any case where fees are awarded under this chapter, upon a finding that an officer, employee, or other official of a public body or agency has acted in bad faith in refusing to allow access to a public proceeding or to provide a public record, the court may award such fees personally against such officer, employee, or other official.

II. The court may invalidate an action of a public body or agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation.

III. In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter.

83:8 Effective Date. This act shall take effect January 1, 1987.

[Approved May 19, 1986.]
[Effective Date January 1, 1987.]

CHAPTER 84 (HB 134)

AN ACT RELATIVE TO THE RANNIE WEBSTER FOUNDATION, ALLOWING THE LAKE SUNAPEE YACHT CLUB TO REVIVE ITS CHARTER, AND RELATIVE TO THE REINSTATEMENT OF TRI-STATE MEDICAL SERVICES, INC.

Be it Enacted by the Senate and House of Representatives in General Court convened:

84:1 Rannie Webster Foundation Exempt from Taxation. Amend RSA 72 by inserting after section 23-h the following new section:

3282D
86-0221
01

HOUSE BILL NO. 123

INTRODUCED BY: Rep. Johnson of Sullivan Dist. 2; Rep. Sylvia of Hillsborough Dist. 1

REFERRED TO: Judiciary

AN ACT amending the right to know law.

ANALYSIS

This bill amends the right to know law. Specifically, the bill:

(a) Excludes chance meetings or social meetings which are not planned nor intended for the purpose of discussing official business from the definition of a public meeting under RSA 91-A:2, I.

(b) Adds two new exceptions to RSA 91-A:3, II to allow executive sessions to discuss pending litigation and applications by the adult parole board under RSA 651-A.

(c) Requires that a printout of properly identified data shall be provided if a body or agency maintains its records in a computer storage system, but computer access to confidential data or information shall not be provided.

(d) Includes test questions, scoring keys and other examination data in confidential information under RSA 91-A:5, IV.

(e) Allows a court to invalidate an action taken at a meeting held in violation of the right to know law.

3282D
86-0221
01

HB 123

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand
nine hundred and eighty-six

AN ACT

amending the right to know law.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Chapter Heading. Amend RSA 91-A by striking out the title of said chapter and inserting in place thereof the following:

ACCESS TO PUBLIC RECORDS AND MEETINGS

2 Trustees of the University System Included. Amend RSA 91-A:1-a, III (supp) as inserted by 1977, 540:2 by striking out said paragraph and inserting in place thereof the following:

III. Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire;

3 Chance Meetings; Negotiation, Consultation. Amend RSA 91-A:2 (supp) as inserted by 1967, 251:1 as amended by striking out said section and inserting in place thereof the following:

91-A:2 Meetings Open to Public.

I. For the purpose of this section, a "meeting" shall mean the convening of a quorum of the membership of a public body, as provided in RSA 91-A:1-a, to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power. "Meeting" shall not include:

(a) Any chance meeting or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business and at which no decisions are made; however, no such chance or

social meeting shall be used to circumvent the spirit of this chapter;

(b) Strategy or negotiations with respect to collective bargaining; or

(c) Consultation with legal counsel.

II. All public proceedings shall be open to the public, and all persons shall be permitted to attend any meetings of those bodies or agencies. Except for town meetings, school district meetings and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras and videotape equipment, at such meetings. Minutes of all such meetings, including names of members, persons appearing before the bodies or agencies, and a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to public inspection within 144 hours of the public meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any body or agency, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including an executive session, shall be posted in 2 appropriate places or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the body or agency who shall employ whatever means are available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives shall be sufficient notice. If the charter of any city or guidelines or rules of order of any body or agency described in RSA 91-A:1-a require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter.

4 Matters Discussed in Executive Session. Amend RSA 91-A:3, II (supp) as inserted by 1967, 251:1 as amended by striking out said paragraph and inserting in place thereof the following:

II. A body or agency may exclude the public only if a recorded roll call vote is taken to go into executive session. The matters discussed during the executive session shall be confined to the matters stated in the motion. A motion to go into executive session stating which exemption under this paragraph is claimed shall be made only when the body or agency is considering or acting upon the following matters:

(a) The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him, unless the employee affected requests an open meeting.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the body or agency itself, unless such person requests an open meeting.

(d) Consideration of the acquisition, sale or lease of property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

(e) Consideration or negotiation of pending claims or litigation which has been threatened or filed against the body or agency or any subdivision thereof, or against any member thereof because of his membership in such body or agency, until the claim or litigation has been fully adjudicated or otherwise settled.

(f) Consideration of applications by the adult parole board under RSA 651-A.

5 Photostatic Copies; Access to Computer-Stored Records. Amend RSA 91-A:4 by inserting after paragraph II the following new paragraphs:

III. Each body or agency shall keep and maintain all public records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the public records pertaining to such body or agency shall be kept in an office of the political subdivision in which such body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

IV. Each public body or agency shall, upon request for any public record reasonably described, make available for inspection and copying any such public record within its files when such records are immediately available for such release. If a public body or agency is unable to make a public record available for immediate inspection and copying, it shall,

within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a photocopying machine or other device maintained for use by a body or agency is used by the body or agency to copy the public record or document requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any body or agency which maintains its records in a computer storage system shall provide a printout of any record reasonably described; however, computer access to personnel data and other confidential information under RSA 91-A:5, IV shall not be provided.

6 Additional Exemption. Amend RSA 91-A:5, IV as inserted by 1967, 251:1 by striking out said paragraph and inserting in place thereof the following:

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a

body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

7 Invalidation. Amend RSA 91-A:8 (supp) as inserted by 1973, 113:1 as amended by striking out said section and inserting in place thereof the following:

91-A:8 Remedies.

I. If any body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a public record or refuses access to a public proceeding to a person who reasonably requests the same, such body, agency, or person shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available or the proceeding open to the public. Fees shall not be awarded unless the court finds that the body, agency or person knew or should have known that the conduct engaged in was a violation of this chapter or where the parties, by agreement, provide that no such fees shall be paid. In any case where fees are awarded under this chapter, upon a finding that an officer, employee, or other official of a public body or agency has acted in bad faith in refusing to allow access to a public proceeding or to provide a public record, the court may award such fees personally against such officer, employee, or other official.

II. The court may invalidate an action of a public body or agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation.

III. In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter.

7.

8 Effective Date. This act shall take effect January 1, 1987.

Amendment to HB 123

Amend RSA 91-A:4, IV as inserted by section 5 of the bill by striking out same and inserting in place thereof the following:

IV. Each public body or agency shall upon request for any public record reasonably described, make available for inspection and copying any such public record within its files. When such records are immediately available for such release, if a public body or agency is unable to make a public record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a photocopying machine or other device maintained for use by a body or agency is used by the body or agency to copy the public record or document requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

Rep. Raiche
2/20/86

Amendment to HB 123

Amend RSA 91-A:4, IV as inserted by section 5 of the bill by striking out same and inserting in place thereof the following:

IV. Each public body or agency shall, upon request for any public record reasonably described, make available for inspection and copying any such public record within its files when such records are immediately available for such release. If a public body or agency is unable to make a public record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a photocopying machine or other device maintained for use by a body or agency is used by the body or agency to copy the public record or document requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

Amend RSA 91-A:5, IV as inserted by section 6 of the bill by striking out same and inserting in place thereof the following:

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examinations; and personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

Amend RSA 91-A:8 as inserted by section 7 of the bill by striking out same and inserting in place thereof the following:

91-A:8 Remedies.

I. If any body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a public record or refuses access to a public proceeding to a person who reasonably requests the same, such body, agency, or person shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available or the proceeding open to the public. Fees shall not be awarded unless the court finds that the body, agency or person knew or

should have known that the conduct engaged in was a violation of this chapter or where the parties, by agreement, provide that no such fees shall be paid. In any case where fees are awarded under this chapter, upon a finding that an officer, employee, or other official of a public body or agency has acted in bad faith in refusing to allow access to a public proceeding or to provide a public record, the court may award such fees personally against such officer, employee, or other official.

II. The court may invalidate an action of a public body or agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation.

III. In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter.

Judiciary
February 19, 1986
4819D
01

Each public body or agency shall upon request

Pipe 4-0

Amendment to HB 123

Amend RSA 91-A:4, IV as inserted by section 5 of the bill by striking out same and inserting in place thereof the following:

IV. ~~Each public body or agency shall, upon written request,~~ for any public record reasonably described, make available for inspection and copying any such public record within its files. If a public body or agency is unable to make a public record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. ~~Nothing in this section shall be construed to preclude the release of a public record upon an oral request to the public body when such records are immediately available for such release.~~ If a photocopying machine or other ~~mechanical~~ device maintained for use by a body or agency is used by the body or agency to copy the public record or document requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

Amendment proposed
by T. Gerber
Jan'y 15, 1986

HB 123

Revision to Section 7.

7 Invalidation. Amend RSA 91-A:8 (Supp.) as inserted by 1973, 113:1 as amended by striking out said section and inserting in place thereof the following:

91-A:8 Remedies.

* * *

II. The court may invalidate an action of a public body or agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation. Such circumstances shall include, but not be limited to, the nature of the action taken and its effect on members of the public; the nature of the violation; and whether the violation was intentional or inadvertent.

Submitted by Thomas W. Gerber

HB-123 Amend current RSA 91-A. Right to Know Law

CHAPTER 91-A

ACCESS TO PUBLIC RECORDS

[*New Sections*]

ANNOTATIONS

Library references

New Hampshire Right to Know Law, 20 N.H.B.J. 98 (March 1979).

91-A:1 Preamble. Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

Source. 1967, 251:1. 1971, 327:1. 1977, 540:1, eff. Sept. 13, 1977.

Amendments—1977. Amended section generally; for provisions formerly covered by this section see RSA 91-A:1-a.

ANNOTATIONS

Library references

What constitutes an agency subject to application of state freedom of information act. 27 ALR4th 742.

1. "Public proceedings"—Generally

Where there was no statute or ordinance establishing mayor's industrial advisory committee consisting of prominent businessmen, newspapermen, and city council members, which met monthly on call of mayor and performed variety of functions including contacting concerns which might locate in city, gathering information which might be useful to potential concerns, discussing of sale of city-owned land to commercial developers and extension of city water and sewer lines and construction of new streets, advisory committee's involvement in governmental programs brought it within scope of right-to-know law. Bradbury v. Shaw (1976) 116 NH 388, 360 A2d 123.

2. Scope

Not all organizations that work for or with the government are subject to the right-to-know law. Bradbury v. Shaw (1976) 116 NH 388, 360 A2d 123.

3. Cited

Cited in Orford Teachers Assoc. v. Watson (1981) 121 NH 118, 427 A2d 21; Gallagher v. Town of Windham (1981) 121 NH 156, 427 A2d 37.

Patient's right to disclosure of his or her own medical records under state freedom of information act. 26 ALR4th 701.

2. Cited

Cited in State v. LaFrance (1983) 124 NH 171, 471 A2d 340.

91-A:1-a Definition of Public Proceedings. The term "public proceedings" as used in this chapter means the transaction of any functions affecting any or all citizens of the state by any of the following:

I. The general court including executive sessions of committees;

II. The governor's council;

III. Any board or commission of any state agency or authority;

IV. Any board, commission, agency or authority, of any county, town, municipal corporation, school district, or other political subdivision, or any committee, subcommittee or subordinate body thereof, or advisory committee thereto.

Source. 1977, 540:2, eff. Sept. 13, 1977.

91-A:2 Meetings Open to Public.

I. For the purpose of this section, a "meeting" shall mean the convening of a quorum of the membership of a public body, as provided in section 91-A:1-a, to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power.

II. All public proceedings shall be open to the public, and all persons shall be permitted to attend any meetings of those bodies or agencies. Except for town meetings, school district meetings and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including but not limited to, tape recorders, cameras and videotape equipment, at such meetings. Minutes of all such meetings, including names of members, persons appearing before the bodies or agencies, and a brief description of the subject matter discussed and final decisions shall be promptly recorded and open to public inspection within 144 hours of the public meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any body or agency, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including an executive session, shall be posted in 2 appropriate places or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the body or agency who shall employ whatever means are available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives shall be sufficient notice. If the charter of any city or guidelines or rules of order of any body or agency described in RSA 91-A:1-a requires a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. [Amended 1983, 279:1, eff. Aug. 17, 1983.

Source. 1967, 251: 1. 1969, 482: 1. 1971, 327: 2. 1975, 383: 1. 1977, 540: 3. 1983, 279: 1, eff. Aug. 17, 1983.

Amendments—1977. Paragraph I: Added.

Paragraph II: Designated existing section as par. II and added second sentence which read: "Except for town meetings, school district meetings and elections, no vote while in open session may be taken by secret ballot."

—1983. Paragraph II: Substituted "144" for "72" following "inspection within" in the fourth sentence and deleted "of this chapter" following "91-A: 6" in the fourth sentence.

ANNOTATIONS

Library references

What constitutes newspaper of "general circulation" within meaning of state statutes requiring publication of official notices and the like in such newspaper. 24 ALR4th 822.

2. Public dissemination

Where newspaper sought to compel clerk of New Hampshire House of Representatives to turn over to it under Right-to-Know Law a certain tape recording of the proceedings of the house, for the purpose of duplicating and using it for a so-called voice stress analysis, case would not be viewed as a true Right-to-Know Law case because the legislative session in question was open to the public and press, an official journal was prepared of the proceedings, and written transcripts were available if the newspaper or anyone else wished to obtain them. Union Leader Corp. v. Chandler (1979) 119 NH 442, 402 A.2d 914.

Where newspaper sought to compel clerk of N.H. House of Representatives to turn over to it under Right-to-Know Law a certain tape recording of the proceedings of the house, for the purpose of duplicating and using it for a so-called voice stress analysis, house could properly decide, consistent with the right of reasonable public access, that its official tape should not be duplicated or subjected to a voice stress analysis. Union Leader Corp. v. Chandler (1979) 119 NH 442, 402 A2d 914.

Where notice was published in a newspaper of general circulation that town planning board would consider adoption of subdivision regulations on January 5, and at such time only one-half of the proposed regulations were discussed and the hearing was recessed until January 12 with no further notice of the new hearing published, and where on January 12 planning board met and approved all proposed subdivision regulations, recess of hearing from January 5 to January 12, the January 12 hearing having been a continuation of the January 5 meeting, without posting of additional notice was not violative of any of defendant's rights under this chapter or under RSA 36: 23. Town of Nottingham v. Harvey (1980) 120 NH 889, 424 A2d 1124.

3. Notice and hearing

Where two probationary teachers employed pursuant to individual written contracts for the school year 1980–81 were not offered contracts for the upcoming school year after a regularly scheduled school board meeting, the provisions of this section governing meetings open to the public did not require personal notice to be given for the teachers' nominations; because the school board had not agreed to provide such personal notice pursuant to a collective bargaining agreement and the teachers' association was the exclusive representative of the two teachers, the school board was prohibited from discussing the terms and conditions of the teachers' employment with them directly and personal notice was inappropriate. Brown v. Bedford School Board (1982) 122 NH 627, 448 A2d 1375.

6. Cited

Cited in Orford Teachers Assoc. v. Watson (1981) 121 NH 118, 427 A2d 21.

91-A: 3 Executive Sessions.

I. Bodies or agencies may meet in executive session for deliberations only after a majority vote of members present, which shall be recorded in the minutes of the meeting. All sessions at which information, evidence or testimony in any form is received, except as provided in paragraph II, shall be open to the public. No ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official actions shall be finally approved in executive session except as provided in paragraph II. The record of all

actions shall be available for public inspection promptly, except as provided in paragraph II.

II. A body or agency may exclude the public only if a recorded roll call vote is taken to go into executive session. A motion to go into executive session stating which exemption under this paragraph is claimed shall be made only when the body or agency is considering or acting upon the following matters:

(a) The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him, unless the employee affected requests an open meeting.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, likely would affect adversely the reputation of any person, other than a member of the body or agency itself, unless such person requests an open meeting.

(d) Consideration of the acquisition, sale or lease of property which if discussed in public, likely would benefit a party or parties whose interests are adverse to those of the general community. [Amended 1983, 184: 1, eff. Aug. 9, 1983.]

III. Minutes of Executive Sessions. Minutes of proceedings in executive session shall be kept, at least to the extent of recording any decisions made therein. Decisions reached in executive session must be publicly disclosed within 72 hours of the meeting, unless, in the opinion of ⅔ of the members present, divulgence of the information likely would affect adversely the reputation of any person other than a member of the body or agency itself or render the proposed action ineffective. In event of such circumstances information may be withheld until, in the opinion of a majority of members the aforesaid circumstances no longer apply.

Source. 1967, 251: 1. 1969, 483: 2. 1971, 327: 3. 1977, 540: 4. 1983, 184: 1, eff. Aug. 9, 1983.

Amendments—1977. Amended section generally.

—1983. Paragraph II: Rewrote the introductory paragraph and deleted subpar. (e), which related to matters discussed by a legislative committee sitting in executive session.

ANNOTATIONS

½. Construction

Statutory exemption from public access to executive sessions contained in this chapter, like all other exemptions, must be construed narrowly. Orford Teachers Assoc. v. Watson (1981) 121 NH 118, 427 A2d 21.

4a. Minutes—Right of inspection

Construing the provisions of the right-to-know law for withholding minutes narrowly, supreme court concluded that there is no blanket exemption for minutes of executive sessions, and that they are public records covered by RSA 91-A: 4 Orford Teachers Assoc. v. Watson (1981) 121 NH 118, 427 A2d 21.

4b. —In camera review

When there is a question under the right-to-know law whether minutes are exempt from public access, trial judge should conduct an in camera review to determine whether portions of the minutes meet any of the other statutory exemptions. Orford Teachers Assoc. v. Watson (1981) 121 NH 118, 427 A2d 21.

6. Cited

Cited in Orford Teachers Assoc. v Watson (1981) 121 NH 118, 427 A2d 21

91-A: 4 Minutes and Records Available for Public Inspection.

I. Every citizen during the regular or business hours of all such bodies or agencies, and on the regular business premises of such bodies or agencies, has the right to inspect all public records, including minutes of meet

ings of the bodies or agencies, and to make memoranda, abstracts, and photographic or photostatic copies of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5.

II. After the completion of a meeting of such bodies or agencies, every citizen, during the regular or business hours of all such bodies or agencies, and on the regular business premises of such bodies or agencies, has the right to inspect all notes, materials, tapes or other sources used for compiling the minutes of such meetings, and to make memoranda, abstracts, photographic or photostatic copies, or tape record such notes, materials, tapes or sources inspected, except as otherwise prohibited by statute or RSA 91-A:5.

Source. 1967, 251:1. 1983, 279:2, eff. Aug. 17, 1983.

Amendments—1983. Designated the existing provisions of the section as par. I, made minor stylistic changes in that paragraph, and added par. II.

CROSS REFERENCES

Access to analysis and compilations of data prepared by cancer registry, see RSA 141-B:9.

Library references

What are "records" of agency which must be made available under state freedom of information act. 27 ALR4th 680.

ANNOTATIONS

1a. Salary information

Where public employee labor relations board's orders were within its jurisdiction and were supported by ample evidence in the record, superior court properly ordered enforcement of board's order that school board produce specific salary information for school year so that public employee labor relations board could determine which teachers were entitled to back pay and amount owing to each one under master agreement, because this information was contained in records which any citizen had a right to examine. Rochester School Bd. v. N.H. PELRB (1979) 119 NH 45, 398 A2d 823.

2a. Furnishing of copies

This section does not contain language imposing an absolute duty on towns or agencies to provide copies of public records to citizens; it contemplates that the records be made available for inspection and reproduction. Gallagher v. Town of Windham (1981) 121 NH 156, 427 A2d 37.

Where record did not demonstrate that plaintiff offered to pay town for copies of town records were they provided to her by photocopying them on town's photocopier, and the parties' briefs were silent on the issue, finding below that town did not violate this section when town did not provide copies of the record to plaintiff was amply supported by the evidence. Gallagher v. Town of Windham (1981) 121 NH 156, 427 A2d 37.

2b. Minutes of executive sessions

Construing the provisions of the right-to-know law for withholding minutes narrowly, supreme court concluded that there is no blanket exemption for minutes of executive sessions, and that they are public records covered by this section. Orford Teachers Assoc. v. Watson (1981) 121 NH 118, 427 A2d 21.

2c. Construction plans

Where town resident asked town building inspector for plans for proposed industrial park, the latter said the chairman of the planning board had them out for the day on official business, and town otherwise at all times provided resident with access to the plans, town did not deny resident access to the plans in violation of statute providing that every citizen has the right to inspect all public records and make memoranda and copies. Gallagher v. Town of Windham (1981) 121 NH 156, 427 A2d 37.

91-A:5 Exemptions. The records of the following bodies are exempted from the provisions of this chapter:

I. Grand and petit juries.

II. Parole and pardon boards.

III. Personal school records of pupils.

IV. Records pertaining to internal personnel practices, confidential, commercial, or financial information, personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy.

ANNOTATIONS

Library references

Discovery or inspection of state bar records of complaints against or investigations of attorneys. 83 ALR3d 777.

Payroll records of individual government employees as subject to disclosure to public. 100 ALR3d 699.

Restricting access to records of disciplinary proceedings against attorneys. 83 ALR3d 749.

What constitutes personal matters exempt from disclosure by invasion of privacy exemption under state freedom of information act. 26 ALR4th 666.

What constitutes preliminary drafts or notes provided by or for state or local governmentals, exempt from disclosure or inspection under state freedom of information acts. 26 ALR4th 639.

What constitutes "trade secrets" exempt from disclosure under state freedom of information act. 27 ALR4th 773.

2a. Grand juries

The legislature has protected the secrecy of grand jury proceedings by specifically exempting them from the purview of this otherwise expansive statute. State v. Purrington (1982) 122 NH 458, 446 A2d 451.

3. Cited

Cited in Appeal of Portsmouth Trust Co. (1980) 120 NH 753, 423 A2d 603; Orford Teachers Association v. Watson (1981) 121 NH 118, 427 A2d 21; Gallagher v. Town of Windham (1981) 121 NH 156, 427 A2d 37.

91-A: 6 Employment Security. This chapter shall apply to RSA 282-A, relative to employment security; however, in addition to the exemptions under RSA 91-A: 5, the provisions of RSA 282-A: 117–123 shall also apply, this provision shall be administered and construed in the spirit of that section, and the exemptions from the provisions of this chapter shall include anything exempt from public inspection under RSA 282-A: 117–123 together with all records and data developed from RSA 282-A: 117–123.

Source. 1967, 251: 1. 1981, 576: 5, eff. July 9, 1981.

Amendments—1981. Deleted the exclusion to RSA 282.

Revision note. Pursuant to 1981, 408: 9, substituted "RSA 282-A" for "RSA 282" and "RSA 282-A: 117–123" for "RSA 282: 9(M)".

ANNOTATIONS

1. Dept. of Employment Security

With the exception of the department of employment security, all state executive branch agencies and departments are included within the provisions of the state right to know law. Lodge v. Knowlton (1978) 118 NH 574, 391 A2d 893.

91-A: 7 Violation. Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief. The courts shall give proceedings under this chapter priority on the court calendar. Such a petitioner may appear with or without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter, and may be filed by the petitioner or his counsel with the clerk of court or any justice thereof. Thereupon the clerk of court or any justice shall order service by copy of the petition on the person or persons charged. When any justice shall find that time probably is of the essence, he may order notice by any reasonable means, and he shall have authority to issue an order ex parte when he shall reasonably deem such an order necessary to insure compliance with the provisions of this chapter.

Source. 1967, 251: 1. 1977, 540: 5, eff. Sept. 13, 1977.

Amendments—1977. Provided that the petitioner may appear with or without counsel and added provisions relating to action taken upon the petition.

91-A: 8 Remedies. If any body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a public document or refuses access to a public proceeding to a person who reasonably requests the same, such body, agency or person may be liable for reasonable attorney's fees and costs incurred in making the information available or the proceeding open to the public, at the discretion of the court. In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter.

Source. 1973, 113: 1. 1977, 540: 6, eff. Sept. 13, 1977.

Amendments—1977. Rephrased section and added last sentence which read, "In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter".

ANNOTATIONS

1. Purpose

Provision for award of attorney's fees is critical to securing rights guaranteed by this section; attorney fee provision was enacted so that public's right-to-know law would not depend upon individual's ability to finance litigation. Bradbury v. Shaw (1976) 116 NH 388, 360 A2d 123.

2. Particular cases

Where plaintiff petitioned to secure access to records of mayor's industrial advisory committee under this section, and trial court ruled that committee was subject to right-to-know law although certain records of its meetings were exempt from disclosure, plaintiff was substantially successful and thus entitled to recover his counsel fees. Bradbury v. Shaw (1976) 116 NH 388, 360 A2d 123.

Because no abuse of discretion on the part of the trial court appeared on the record, its decision denying plaintiffs' petition for an award of attorney's fees under this section governing remedies for violations of the chapter governing access to public records was affirmed. Orford Teachers Association v. Watson (1982) 122 NH 803, 451 A2d 378.

3. Liability for payment

Where mayor was sued in his official capacity, award of attorney's fees was properly chargeable to city. Bradbury v. Shaw (1976) 116 NH 388, 360 A2d 123.

Amendment proposed by T. Gerber Jan'y 15, 1986

HB 123

RSA 651-A.

Revision to Section 5

5 Photostatic Copies; Access to Computer-Stored Records. Amend RSA 91-A:4 by inserting after paragraph II the following new paragraphs:

* * *

IV. Each public body or agency, within 3 days of a written request for a record reasonably described, shall make such record available, acknowledge in writing that such record is presently unavailable but will be made available on a date certain not to exceed 5 days, or deny the request in writing citing the reasons therefor; provided that nothing in this section shall be construed to preclude the release of a public record upon oral request to the public body when such record is immediately available for release. If a photocopying machine or other mechanical device maintained for use by a body or agency is used by the body or agency to copy the public record requested, the person requesting the copy may be charged the actual cost of making the copy, which cost may be collected by the body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of public records or documents; but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any body or agency which maintains its records in a computer storage system shall provide a printout of any record reasonably described; however, the body or agency may excise from such printout any record that is exempt from disclosure under RSA 91-A:5.

Submitted by Thomas W. Gerber

HB123

Ad Hoc Committee on Right to Know Law

July 22, 1985 Room 208 - L.O.B. 2:15 p.m.

Members Present: Reps. Donna Sytek, Chairman, Maureen Raiche, Dean Dexter, William McCain, Paul Johnson, Marc Chretien. Also in attendance were: Deputy Attorney General Bruce Mohl and Attorney Charles Morang.

The committee convened to look into problem areas in the application of RSA 91-A. Charlie Morang, former city attorney for Keene made the following suggestions for possible improvement to the law.

1. Separate the chapter into two sections, one for meetings and one for records.

2. Clarify that all deliberations should occur in public except when one of the four exemptions in 91-A:3,II are involved. There was some disagreement on the part of the subcommittee about the legislative intent of this section. Some members held that the 1983 amendment already required that deliberations occur only under exemptions, but the attorney general's office interpreted it otherwise allowing any deliberations to be conducted in private.

3. Amend RSA 676:4 to require planning boards to state reasons for granting a petition. Current law requires reasons only for denial of petition. There was discussion of requiring all public bodies to state reasons for their decisions. Bruce Mohl suggested drawing a distinction between quasi-judicial bodies and purely administrative bodies if we were going to require reasons for decisions.

4. Spell out some guidelines for availability and cost of providing information subject to 91-A that is on computer. Printout should be available but computer access to personnel and other confidential data should be prevented.

5. Designate a public place for records of public bodies that have no "regular business premises." Make sure copy machine is available and allow town or state to charge reasonable fee for providing copies of documents.

6. Permit imposition by court of civil contempt fines for deliberate withholding of records or deliberate denial of access to meeting. This will put some teeth into the law. Bruce Mohl suggested codifying court decision that states that any action taken by public body in violation of right-to-know is nullified. Also, consider making awarding of attorneys fees mandatory instead of optional.

7. Clarify meaning of exempted records listed in 91-A:5. "Records pertaining to internal personnel practices, confidential, commercial, or financial information, personnel, medical, welfare, and other files whose disclosure would constitute an invasion of privacy."

Bruce Mohl said he had asked the attorney general's staff to identify potential problems in this area. They recommend some statement on access to environmental investigation files. Occasionally some information concerning contamination to abutters is discovered and the attorney general would like to alert them to the problem without otherwise compromising the confidentiality of the file.

It was suggested that a new exception be added to 91-A:3,II to allow executive sessions to discuss pending litigation. Currently these meetings are protected only under the blanket provision that attorney - client meetings are closed. This modification would allow board members to discuss a case even in the absence of their attorney.

Deputy Attorney General Mohl said the current law is sound and has worked well for over 10 years. While some modifications may be necessary, it would be unwise to undertake a complete overhaul of RSA 91-A because we would lose all the case law that has been developed around it.

The committee agreed to meet again August 20 at 2:00 p.m. to hear from Bart Moyer of the New Hampshire Municipal Association.

This meeting was adjourned at 4:00 p.m.

Respectfully submitted,

Donna P. Sytek
Chairman

HB 123

Ad Hoc Committee on Right-to-Know Law

August 20, 1985 Room 208 LOB 2:00 p.m.

Members Present: Rep. Donna Sytek, Chairman, Reps. Maureen Raiche, Peter Zis, Frank Sylvia, Paul Johnson and Shawn Jasper. Also attending were Deputy Attorney General Bruce Mohl, Candy Franks and Tom Kearney.

The Committee assembled to review a draft of proposed legislation suggested at the previous meeting. Prior to this, they agreed to hear suggestions from members of the press.

Candy Franks of the New Hampshire Press Association and the **Derry News** had several areas of concern:

1. There is no requirement that records be kept for any specific length of time. She has had difficulty getting records of past meetings in towns that keep their records in the active file only for a few years.

2. Current interpretation of 91-A:3 requires that deliberations are open if anyone other than a board member is present. Apparently there is an assumption that the extra person is there for information, evidence or testimony, all of which must be received in an open meeting. This would seem to bar staff from sitting in on executive sessions.

Rep. Jasper said it is valuable and advisable to allow town manager, or administrative assistant, or executive director to be present when boards are deliberating so that they understand reasons for decisions. Bruce Mohl said that it might be helpful to add some reference to permit presence of a "chief administrative officer."

3. Ms Franks questioned why hiring is secret and doesn't have to be made public for 3 days. She knew of a case where police officers were hired and out on patrol before the decision was released. It was suggested that the intent here was to allow time to notify those who were not hired.

4. She had a concern about disciplining groups of employees in executive session. The law allows disciplinary hearings to be private, but she thought that if 20 department heads were being chastised by the Derry Board of Selectmen, the press should be allowed in.

5. Ms. Franks said the Press Association would like to see some type of fine for violation of the Right-to-Know Law.

Tom Kearney, of the **Keene Sentinel**, said that Keene has a local Right-to-Know ordinance that is more restrictive than 91-A. He presented a series of proposals (attached) for revising the current law:

1. Spell out that D.E.S. and University System are covered by the chapter.

2. Improve definition of meeting to include all meetings, especially those held by Governor and Council before session. Include requirement that an agenda be posted in advance.

3. Make clear that information distributed at public meetings becomes part of public record.

4. Minutes and record should be available at a reasonable cost.

5. Require public and fire departments to keep logs. Currently, these logs are public if they are maintained, but some departments don't keep these logs. The Committee felt that this was beyond the scope of the current bill.

The Committee then turned to a review of the first draft of proposed legislation. (see attached)

1. Title of chapter has been changed to make clear that it applies to meetings as well as records.

2. Exemption is made for chance or social meetings of members of public body. There it is easy to achieve a quorum of a public body by chance (e.g. 2 of a 3 member board) members should not be barred from talking to each other about matters of concern. They should not deliberate or reach any decisions, however.

3. Collective bargaining strategy and consultation with legal counsel are excluded from definition of meeting.

4. Consideration of pending claims and litigation either filed or threatened may be held in executive session because the body's position could be compromised if the strategy were made public.

5. Bruce Mohl suggested clarifying that adult parole board consider applications for parole in private. Since it was legislative intent that these sessions be confidential, there was no objection.

6. Records of a body with no regular place of business should be kept in some town office, not necessarily that of town clerk. Candy Franks suggested using New York's language relative to the length of time allowed to provide records.

7. Cost of copies is addressed. Agency may charge actual cost unless statute (not rules) provides otherwise.

8. Computer records will be available in printout form. This prevents hackers from tapping into a public agency's files with their own computer and possibly getting confidential information.

9. Test questions and examination data are added to list of exemptions. This area is not covered under existing language.

10. Attorney General can share information from environmental investigation files with affected parties without making whole file public.

11. Civil penalty is provided for willful failure to provide record or denial of access (N. B. not for any violation of chapter, just these two). Fine of up to $500 permitted. This figure was chosen because of the right to jury trial for greater amounts.

12. Case law (Carter v. Nashua) is codified. Any action taken in violation of chapter may be nullified by court.

13. The Committee debated whether to require reason in writing for denial or approval of planning board or other town board decisions. We decided this was beyond the scope of the Right-to-Know and recommend that the Municipal and County Government Committee look into it.

14. While we would like to see improvements to the chapter as soon as possible, we left the effective data at Jan. 1, 1987 to allow everyone time to get copies of the new law.

The Committee will meet again Monday, August 26 at 10:00 a.m. to review the second draft and to meet with Bart Mayer of the Municipal Association.

Meeting was adjourned at 4:50 p.m.

Respectfully submitted,

Rep. Donna P. Sytek
Chairman

HB 123

Ad Hoc Committee on the Right to Know Law

August 26, 1985 Room 208 LOB 10:10 a.m.

Members Present: Reps. Donna Sytek, Chairman, Maureen Raiche, Paul Johnson, Shawn Jasper, Dean Dexter, and Frank Sylvia.

Also attending: Deputy Attorney General Bruce Mohl, Barton Mayer of New Hampshire Municipal Association.

Committee met to review a second draft of proposed legislation and to receive input from Bart Mayer of the Municipal Association.

The members agreed to hear some concerns from other interested parties.

Philip Kennedy, lobbyist for the New Hampshire Hospitality Association suggested that the bill include a section requiring state agencies to share certain information. He said that during the EDB scare Public Health was unable to get a list of grocers, vending machine companies and other food distributors from the Division of Revenue Administration to enable the state to notify them of possible contamination of some foods.

Bruce Mohl said later that while certain tax information is protected by the DRA statute it didn't seem that a list of such distributors should be kept from another state agency in such a situation.

Mr. Kennedy also said that his association had been unable to acquire a list of liquor licensees from the Liquor Commission. The Committee thought that this information was already required to be released under 91-A and perhaps there was a compliance problem rather than a statutory problem.

Rod Paul, a freelance journalist pointed out some problems that are likely to develop as computer technology interfaces with the right to know. Currently reporters can "thumb through" files without looking for anything in particular. He questions how one would go "fishing" through computerized information. While the Committee's attempt to address the computer issue (allowing printout versions of information only) was a good first step, he thought we should look at the long range problem. He suggested setting up a committee of interested parties to address the problem. The press, state agencies, political, judicial and computer interests should be represented. He envisioned an ideal system in the future would have user friendly computers at each agency to allow the public access to information.

Bart Mayer of NHMA was invited by the Committee to review the most recent draft legislation. He prefaced his comments with the admonition that while there may be problems with the applicaton of law by some boards or agencies, it doesn't necessarily mean the statute itself needs revision.

Turning to the second draft, he said he was concerned with the phrase on page 6, RSA 91-A:8, III allowing the court to "treat any willful violation of any such order as contempt". He pointed out that this might create a presumption

that there will be contempt and questioned whether future violations of the chapter even of a different provision should be contempt. After a lengthy discussion, the Committee agreed to delete the contempt language.

Also on page 6, RSA 91-A:8, I, Mr. Mayer said he feared that changing the "may be liable for attorney's fees" to "shall be liable....at the discretion of the court" would profoundly change the dynamics of the current system. He felt the possibility of attorney's fees would drive this whole section and pointed to the experience under federal §1983 and 1988 as an example of how litigation increases where attorney's fees are available. Committee members said the intent here was not to have any major change in the current setup which allows attorney's fees, but rather a shift in presumption. They agreed to add some language to give some guidance to the court as to when attorney's fees are appropriate. Bruce Mohl was recruited to do this task.

Mr. Mayer applauded the inclusion of the "chance or social meetings" section of the bill. There was considerable discussion of what was allowed to be discussed at social meetings recognizing how easy a technical violation of the law could occur if, for example, information was received by two planning board members meeting by chance at town hall and encountering a local contractor. It was agreed that on such occasions the board members should refrain from receiving new information. The Committee struggled to find some more satisfactory language but was unable to do so.

Members then reviewed changes from the previous draft. The new version includes these provisions:

1. University System is expressly included to remove any doubt that they are covered (p. 1)

2. Notice of a meeting shall include an agenda (p. 2)

3. Matters discussed in executive session now include parole application (p. 4)

4. Language from New York statute concerning request for documents and 5 day lead time was viewed as allowing agencies to "drag their feet". Bruce Mohl agreed to improve the wording so records easily accessible are promptly available to the public (p. 4)

5. Agencies are allowed to release information affecting health and safety on a limited basis from <u>any</u> investigation files, not just environmental files. To be consistent with <u>Lodge v. Knowlton</u>, word was changed from "investigation" to "investigative". (p. 5)

The Committee decided to have the agreed on changes made and a third draft circulated, with no future meeting necessary unless the draft was unsatisfactory.

The meeting was adjourned at 12:20 p.m.

Respectfully submitted,

Donna Sytek
Chairman

Judiciary Committee Minutes

Public hearing on HB 123, amending the right-to-know law.

January 15, 1986, at 11:00 a.m. at LOB 208

Members present: Rep. Sytek in the chair; Reps. Bass, Chretien, Cote, Eaton, Gage, Healy, Hollingworth, Jacobson, Jasper, William Johnson, Paul Johnson, Lown, Lozeau, Raiche, Robinson, Sylvia, Watson and Zis.

Rep. Maureen Raiche spoke in support of it. She said it is a product of an ad hoc study of the right-to-know law and makes improvements in the law.

Rep. Marian Harrington spoke in support of the bill. She said that the law helps common citizens to access their government and, therefore, it should be improved.

Messrs. Thomas Flygare and Eugene Savage of the University of New Hampshire spoke in favor of the bill but urged modifications as it applies to the UNH Board of Trustees. They said the Board takes up delicate personal matters and functions more like a corporate board than a public body.

John M. Disko of Concord, speaking for the N.H. Association of Counties, said that while he favors the bill, he hopes the law will not overly restrict county commissioners.

Bart Mayer of N.H. Municipal Association also spoke in favor but cautioned against unnecessary restrictions on local officials.

Ms. Elizabeth Dunn of Windham spoke in favor of the bill. She is not for Sec. (A) of the bill.

Candy Franks of the Concord Monitor and the Associated Press spoke in favor of the bill. She said the law needs tightening in such areas as the maintenance of records by government bodies.

Tom Kearney of Keene and the Keene Sentinel newspaper spoke in favor of the bill. He said the law needs better provisions for notice of public meetings.

Richard Osborne of Concord, WKXL, and the N.H. Association of Broadcasters, said he is generally supportive of the bill and the law, but does not support a portion of the bill.

Claire Ebel of the NHCLU spoke in support of the bill and the law. She said her group has concern about the "chance or social meeting" language but has no suggestions for improvement. The NHCLU is very concerned about the delegation of police powers to civilians and opposes the part of the bill which deals with this.

Bruce E. Mohl, Deputy Attorney General of New Hampshire, spoke in favor of the bill. He discussed its legal ramifications.

Thomas Gerber of Concord, editor emeritus of the Concord Monitor, spoke in favor of the bill. He submitted a prepared paper.

Respectfully submitted,

Thomas U. Gage, Clerk

HB 123

TESTIMONY OF

THOMAS W. GERBER
Editor Emeritus, Concord Monitor

before the

N.H. House Judiciary Committee

January 15, 1986

My name is Thomas W. Gerber. I'm the retired editor of the Concord Monitor. I'm here to testify on House Bill 123, amendments to the Right-to-Know law, and House Bill 49, a proposed shield law for reporters.

A bit of background. This is my 20th year working on, and with, New Hampshire's Right-to-Know law. If my arithmetic is correct, this is the eighth time I've appeared before the House Judiciary Committee on Right-to-know legislation. I've watched the law evolve over the years and I've witnessed, with wonderment, the machinations of a comparatively few persons in public life ~~seek~~ who ought to dance around the law's provisions. I once obtained an injunction against a school board six minutes after I presented a petition to a Superior Court judge.

I favor some of the changes proposed in House Bill 123, and oppose others. On the first page of the bill, under Roman numeral III, I would eliminate the words "board of trustees of the" so that the clause reads, "including the university system of New Hampshire."

The University is a vast organization which should, as any other department or agency, be responsible to the public. It is not just the board of trustees that should adhere to this principle, but all components of the entire system.

At the bottom of the same page, section 91-A:2, the definition of a meeting is expanded to exclude chance meetings or social gatherings. This provision, the last four lines of that prargraph, creates a means for circumventing the intent of the Right-to-Know law (which is to

assure that the public's business will be conducted openly, and that the public shall have a means of determining how its affairs are conducted.

It is conceivable that members of a board, commission or agency could plan to meet, perhaps at a social gathering, with no intention of discussing the public's business. But, once in the same room, a question or issue is mentioned and a discussion takes place. Any agreement reached under such circumstances would not be on the public record nor available for public scrutiny or input. Members of the body did not "intend" to enter into such a discussion.

A town's three selectmen may gather to watch the Superbowl football game together 11 days hence. For the purpose of their get-together, they are interested in football -- until halftime when they agree upon a course of action on some major town issue. If this bill were law, it would not be a violation, though the intent and spirit of the law would have been fractured.

This provision provides a loophole for evading the principle of open government larger than any I have experienced in two decades. It does not deal with reality. It creates a circumstance where members of a public body CAN act without public notice or accountability if they meet by chance.

The last clause of the chance meeting provision, concerning collective bargaining, already is covered by a New Hampshire Supreme Court decision, Talbot V. School Board, and there's no need for it in the law. Consultation with legal counsel is covered in the Attorney General's 1980 memorandum on the Right-to-Know law, and is a "problem" that never has arisen. To my knowledge, no newspaper, radio or television station, or even a private citizen, ever has claimed that a public

body's meeting with its legal counsel falls under the provisions of the information, evidence or testimony clause. An old axiom applies here: if it ain't broke, don't fix it.

My earnest recommendation to you is that the four lines be eliminated from the bill. I believe the public would be far better served to challenge the RESULTS of chance meetings on a case-by=case basis.

At the bottom of page 2 is a new sentence which jumps to page 3. I am opposed to the provisions of this sentence. It would allow a board, commission or agency to discuss or act upon matters which were not included in the publicly-announced agenda. This provision would emasculate the Right-to-Know law, deny citizens the right to a hearing and constitute an invitation to abuse. If there are matters other than those on the agenda that critically need to be considered, there are provisions for emergency meetings already in the law. I'm sure the intent of the provision is entirely innocent -- to allow for minor oversights. But the possible consequences of this one sentence could be devastating. I strongly suggest that it be eliminated from the bill.

On page 4, paragraph (e), I suggest substituting the word "resolved" for the last line. It's clear, and it's brief.

At the bottom of the page 4, Roman numeral IV, I have some suggested new language. The last option in responding to a written request for a record would allow an endless delay. I believe my recommended change would clarify this provision by spelling out the exact nature of the response.

On page 5, in the same paragraph, I would eliminate the word "otherwise" because there is no previous reference to an alternative. And in the next sentence, line 8 on the page, I would change "providing" to "making." The actual cost of "providing" a copy of a public document might be construed to include a labor charge. Time expended for

(MORE)

such clerical work is legitimate governmental activity under the principles of open administration of the public's business. "Making" a copy restricts the charges to the cost of operating the machine and materials used.

In the middle of the page 5, concerning printouts of computer-stored records, I have some suggested changed language which I believe would clarify the final clause of that paragraph. The change would give the body or agency authority to excise any information on the printout that is deemed confidential under section 5 of the law.

At the bottom of page 5, under Roman numeral IV, the second line, delete the comma after ~~"commercial.~~ confidential" That's an obvious error in the original law, because the comma doesn't make sense.

At the top of page 6, the first full sentence on the page would allow authorities to release certain information to some persons, and not to others. This is patently unfair and discriminatory. I have here copies of an exchange of letters between counsel for the Concord Monitor and the assistant attorney general on this issue. It is more complex than this one sentence in the law depicts. I'd be delighted to provide the committee with copies of the correspondence. Meanwhile, I recommend the sentence be deleted.

Finally, under "remedies" on page 6, subparagraph Roman numeral II, I have a suggested addition to this sentence. It would spell out more fully the reasons a court might invalidate an action taken in violation of this chapter. I'll distribute the suggestion.

* * *

This is in regard to HB 49, the proposed reporters' shield law.

I must acknowledge at the outset that I am ambivalent about the need for such a law. I have been through the meat grinder during my career on source disclosure issues. Twenty-three states have shield

laws in one form or another, and this proposal, I believe, has some serious defects. It does not apply to scholars or authors, for instance, who may be in the position of acquiring sensitive information in the public interest on a confidential basis. HB 49 mentions only judicial proceedings, where legislative and administrative proceedings would be just as pertinent.The bill mentions only contempt of court as a punishment for refusal to identify a source, where, in fact,a case can be defaulted in favor of the plaintiff if the defendant refuses to identify a source. Or, as in the case of Myron Farber of the New York Times, the defendant can be fined on a daily basis for such refusal.

Ladies and gentlemen, my inclination is to suggest this issue be submitted to interim study. It is profoundly complex, as a review of legislation in other states will show.

Meanwhile, the distinguished lawyer for the Concord Monitor, Attorney William L. Chapman, has prepared for your consideration a possible alternative to HB 49, closing some of the loopholes and ambiguities. I'll distribute copies. And I'd be glad to answer any questions the committee might have.

JUDICIARY COMMITTEE MINUTES
EXECUTIVE SESSION ON HB 123
2/26/86 LOB 208

Members Present: Rep. Sytek in the Chair. Reps. Jasper, Eaton, W. Johnson, Watson, Healy, Raiche, Bass, Gage, Robinson, P. Johnson, Chretien, Lown and Lozeau.

Rep. Raiche moved seconded by Rep. Lown that the bill Ought to Pass with Amendment. Rep. Raiche explained the amendment which appears in the committee file under the title of Raiche Amendment dated February 20, 1986. She said that the amendment should be slightly corrected to state that on Page 2 after the word "business" that the phrase "at which no information is received or decisions are made" be inserted.

Rep. Jasper said that the phrase "information is received" would make it impossible for people to meet socially since any such meeting would be considered a chance meeting under this statute.

Rep. Jasper moved, seconded by Rep. Lown that the phrase" information is received" be stricken from the amendment. They reasoned that these meetings occur and shouldn't be made expressly illegal. The Jasper amendment was adopted.

Rep. Raiche explained the rest of the amendment. She said that town officials who were acting in bad faith will not be indemnified by the town and will be personally liable.

Rep. Lown said that the law should not discourage people from serving in town offices.

Rep. Paul Johnson said that the law does not contemplate the way small towns are run.

Rep. Healy said that the Right to Know law has created more problems than it solved.

There was discussion. The Right to Know law is impractical in small towns in the opinion of many committee members.

The committee seemed to believe that decisions should be made in public. However, chance meetings cannot be avoided.

Rep. Bass called for the question. This motion carried and debate was limited. The vote was on the amendment presented by Rep. Raiche and amended by Rep. Jasper. The amendment was adopted 10 Yes 3 No.

Rep. Raiche moved, seconded by Rep. Lozeau that in Section 3 Roman I, all references to chance and social meetings be struck from the bill. Rep. Raiche said that this language now makes the bill more relaxed because of the Jasper amendment.

Rep. Eaton said that in small towns "we will do what has to be done". The motion to amend by Rep. Raiche seconded by Rep. Lozeau failed.

The question was then on the main motion Ought to Pass with Amendment. This motion carried 9 Yea 5 Nay.

Respectfully submitted,

Thomas W. Sytek

Monadnock Ledger
Box 36, 26 Main Street, Peterborough, New Hampshire 03458 / (603) 924-7172

January 14, 1986

Donna Sytek, Chairman
Judiciary Committee
Room 208, LOB
Concord, N.H. 03301

Dear Rep. Sytek;

I moved to this state in October 1985, relocating from Wisconsin and bringing more than 15 years experience in news reporting. I see a need to strengthen certain parts of the New Hampshire Right to Know Law, and offer the following comments for the committee's consideration as it reviews HB 123.

NOTICE --

A notice must include the time, date and place of a public meeting, and be given in such manner as is likely to apprise the public and news media of the specific items to be covered at the meeting, including any contemplated closed session.

The notice must be given at least 24 hours prior to commencement of the meeting. But in emergencies, where for good cause such notice is impossible or impractical, at least two hours notice is required.

A separate and complete notice must be provided for each meeting of the governmental body or any subunit thereof at a time and date reasonably proximate to the meeting date.

The chief presiding officer or designee must communicate to the public; those news media that filed a written request for such notices; and to official newspaper of the municipality, if applicable, or to the news medium likely to give such notice in the area.

Notice to the public can be given by posting in one or more public places, by timely newspaper publication, or by other appropriate means. Notices to the news media may be written or telephonic to members of the news media. There is no requirement for a newspaper to publish a notice except by paid notice ordered by the governing body.

EXECUTIVE SESSIONS --

Eliminate entirely the broad statement that a closed session may be held for deliberations. Instead, restrict such meetings to the other exceptions already in the law.

DISCLOSURE --

To avoid secrecy at an open meeting, authorize members of the public and news media to view, copy or have reproduced any document introduced at such meetings and to have access to the document while at the meeting.

Require disclosure of closed sessions immediately after such sessions, unless the need for secrecy is clearly established and continues to exist.

Reply ADD 077

Sincerely,

John D. Pelton, News Editor

HB 123

IN SUPPORT & SPEAKING:

Rep. Marian Harrington

Tom Flygare
Dunlap Center
Durham, N.H.
868-1800
University System of N. H.

Eugene H. Savage
USNH
Durham
868-1800

Candy Frank
Concord Monitor
224-5301
N. H. Press Assn. (VP)

Barton Mayer
PO Box 617
Concord, N.H.
NH Municipal Assn.
224-7447

Bruce E. Mohl
Deputy Atty. General
Office of the A.G.
271-3657

Tom Kearney
60 West St.
Keene, N. H.
Keene Sentinel
352-1234

Richard Osborne
WKXL Box 875
NH Assoc. of Broadcasters
225-5521
Commenting in favor and oppose in part

Thomas W. Gerber
3 N. State - Concord Monitor
224-5301 224-3114 (home)

Rep. Maureen Raiche
Manchester

Elizabeth A. Dunn
30 Woodvue Rd.
Windham, N.H.
893-8501

John M. Disko
163 N. Main
Concord, N.H.
NH Assn. of Counties
224-9222

James A. Rousmaniere, Jr.
Keene Sentinel
352-1234

Claire Ebel
11 S. Main
225-3080 Civil Liberties

Concern about the "chance or social meeting, but we have no suggestion to improve it.

Concern is with delegation of police powers to civilians. In opposition to this part

SPEAKING:

Barton Mayer
PO Box 617
NH Municipal Assoc.
224-7447

Claire Ebel
11 S. Main
NHCLU
Concord 225-3080
(concerned about the "chance or social" meeting but we have no suggestion to improve it.

Richard Osborne
WKXL Box 875
NH Assoc. of Broadcasters & WKXL
(commenting in favor and opposes in part)

SPEAKING IN SUPPORT

Elizabeth A. Dunn
30 Woodhue Rd.
Windham
893-8501
support in general
opposes Section a

Thomas W. Gerber
3 N. State
Concord
224-5301
224-3114
Rep. Concord Monitor
supports and opposes in part

NOT SPEAKING - SUPPORTS

James A. Rousmaniere, Jr.
Keene Sentinel
352-1234

Eugene A. Savage
USNA
Durham
868-1800

SPEAKING IN SUPPORT

John M. Disko
163 N. Main
Concord
N. H. Assn. of Counties
224-9222

Tom Flygare
Dunlap Center
UNH
868-1800

Candy Frank
Concord Monitor
224-5301

Rep. Marian Harrington

Tom Kearney
60 West St.
Keene Sentinel
352-1234

Bruce E. Mohl
Deputy Atty. General
271-3657

Maureen E. Raiche
Representative
Manchester

JUDICIARY COMMITTEE MINUTES
EXECUTIVE SESSION ON HB 123
3/12/86 LOB 208

Members Present: Rep. Sytek in the Chair. Reps. Gage, Robinson, Watson, P. Johnson, Sylvia, Jacobson, Jasper, W. Johnson, Lown, Lozeau, Pellow, Stonner, Cote, Eaton, Hollingworth and Zis.

Rep. Bass moved, seconded by Rep. Zis that the committee reconisder its action unto HB 123.

Rep. Raiche moved, seconded by Rep. Bass that the bill be reported Ought to Pass with Amendment. The amendment would add to the previously adopted amendment, a clarification of what is not allowed at chance or social meetings.

The question was called for. That motion carried and debate was limited.

The amendment, as proposed by Rep. Raiche, was adopted. The motion Ought to Pass with Amendment carried 12 Y - 1 N.

Respectfully submitted,

Thomas U. Gage

Thomas U. Gage, Clerk

JUDICIARY

1986 SESSION

H BILL # 123, amending the right to know law.

PUBLIC HEARINGS: 1/15/86

EXECUTIVE SESSIONS: 2/26/86

Appeared in favor	Appeared in opposition
Reply ADD 082	

	SEAT	YEAS	NAYS	OTHER	ABSEN
Sytek, Donna P., Ch.	3-16	X			
Bass, Charles F., V.Ch.	3-3	X			
Gage, Thomas U.	3-34		X		
Robinson, Francis E.	5-19	X			
Watson, Geraldine G.	4-32	X			
Johnson, Paul M.	5-24		X		
Jones, Michael E.	4-29				
Sylvia, Frank J.	3-14				
Jacobson, Alf E.	1-34				
Chretien, Marc A.	4-73	X			
Jasper, Shawn N.	2-67	X			
Johnson, C. William	3-77	X			
Lown, Elizabeth D.	4-37	X			
Lozeau, Donnalee M.	3-70		X		
Pellow, William T.	2-73				
Stonner, Richard C.	1-38				
Cote, David E.	3-23				
Eaton, Daniel A.	1-18	X			
Healy, Daniel J.	1-4		X		
Hollingworth, Beverly A.	2-21				
Raiche, Maureen E.	1-17		X		
Zis, Peter J.	4-15				

COMMITTEE REPORT: OTPwA. 9y-5n.

JUDICIARY

1986 SESSION

H BILL # 123 ,

reconsidered

PUBLIC HEARINGS: _____

EXECUTIVE SESSIONS: 3/12/86

Appeared in favor	Appeared in opposition

Reply ADD 083

	SEAT	YEAS	NAYS	OTHER	ABSENT
Sytek, Donna P., Ch.	3-16	X			
Bass, Charles F., V.Ch.	3-3	X			
Gage, Thomas U.	3-34		X		
Robinson, Francis E.	5-19	X			
Watson, Geraldine G.	4-32				
Johnson, Paul M.	5-24	X			
Jones, Michael E.	4-29				
Sylvia, Frank J.	3-14				
Jacobson, Alf E.	1-34				
Chretien, Marc A.	4-73	X			
Jasper, Shawn N.	2-67				
Johnson, C. William	3-77				
Lown, Elizabeth D.	4-37				
Lozeau, Donnalee M.	3-70	X			
Pellow, William T.	2-73	X			
Stonner, Richard C.	1-38	X			
Cote, David E.	3-23				
Eaton, Daniel A.	1-18	X			
Healy, Daniel J.	1-4				
Hollingworth, Beverly A.	2-21	X			
Raiche, Maureen E.	1-17	X			
Zis, Peter J.	4-15	X			

COMMITTEE REPORT: OTPwA. 12-y-1n.

DATE April 15, 1986 TIME 9:15 a.m.

SENATE JUDICIARY COMMITTEE

PUBLIC HEARING
ON

HB 123 amending the right to know law.

APPEARING IN FAVOR (PLEASE PRINT)

NAME	ADDRESS	REPRESENTING
Tom Flygare	Durham	University System of NH
Tom Gerber	Concord	Monitor
Dale Vincent	Manchester	NH Assn of Broadcasters
Rep Paul Thomson	Newport	Hse Judiciary
Tom Kearney	Keene	The Keene Sentinel
Bruce E Mohl	A.G. office	A.G.
Rep Sytek	WALKED THRU	Chairman House Judiciary

APPEARING IN OPPOSITION: (PLEASE PRINT)

Steve Kenney	supports bill except section V on page 5 should be amended	

Date April 15, 1986

The Senate Committee on Judiciary

held its hearing in Room 209 Legislative Office Building, Concord, N.H.

Bill No. HB 123 Title: An act amending the right to know law.

Members of committee present: Senator Richard Boyer, Chairman, Senator John Chandler, Vice Chairman, Senator Rhona Charbonneau, Senator Leo Lessard and Senator Sheila Roberge

Those appearing in favor:

Name and Address	Representing
See attached	

Those appearing in opposition:

Name and Address	Representing
See attached.	

Report of Committee:

Ought to pass		Interim Study	
Ought to pass w/amendment	x	Continued Hearing	
Inexpedient to legislate		Postponed Hearing	

House Bill 123
April 15, 1986
Senate Judiciary Committee

An act amending the right to know law.

COMMITTEE MEMBERS PRESENT: Senator Richard Boyer, Chairman
Senator John Chandler, Vice Chairman
Senator Rhona Charbonneau
Senator Leo Lessard
Senator Sheila Roberge

Senator Boyer: We'll open the hearing on HB 123. Representative Johnson.

Rep. Johnson: I'm Representative Paul Johnson, Sullivan 2 and I'm from the House Judiciary Committee. We have had this bill in interim study for quite a long time. We codified the University of NH system into the right to know law. We excluded chance meetings because we didn't want selectman to meet each other on the street and have it suggested that they were having a full meeting. Also, if you wanted to go to a cook out - small towns have a little problem sometimes. We went to executive sessions and we allowed them to discuss pending litigation and applications for adult parole board that would be personnel management. We also required that any legislation should be provided to people who request it in a timely fashion. This was basically just modifying the right to know law.

Senator Chandler: Timely fashion is kind of indefinite isn't it?

Rep. Johnson: That's not the way it's put in here. If it's immediately available, it will be given out immediately. If it takes a while to get all the printouts, say from a computer because it will be a large amount of printouts, then of course, that would delay it. We wanted to eliminate in this bill any unwarranted delays.

Senator Chandler: Supposing a secretary of a committee is purposely stalling and not getting the transcripts done. Sometimes in the legislature, we're adjourned before the transcripts of a committee hearing are transcribed. Say the town clerk is stalling, what would the recourse be?

Rep. Johnson: The court system. You could go to the court and seek immediate relief. The law requires six days.

Senator Chandler: Aren't the courts behind themselves?

Rep. Johnson: Yes, they are, but we believe 144 hours for a release of committee reports, clerk reports, is sufficient and anything beyond that is illegal.

Senator Boyer: This doesn't change the existing law to the extent of...

Rep. Johnson: No it does not.

Senator Boyer: Any further questions? Thank you. Rep. Sytek.

Rep. Sytek: I'm Representative Donna Sytek from Rockingham District 20 and chairman of the ADHOC committee which developed this bill last summer. I'll walk you through the bill. The first section of the bill changes the title of the chapter to say that it covers both records and meetings. The second part of the bill makes it explicit that the trustees of the University System are covered by the right to know law. There has been some question in the past as to whether or not they did fall into the provisions of the right to know. We thought long and hard before

limiting it to the trustees and we decided that probably teachers meetings shouldn't be open to the public regarding students. The third part of the bill has to do with what is not a meeting. These include chance and social meetings. We've also added consultation with legal counsel. In my town, the selectmen wanted to fire the town manager and didn't want to consult with their legal counsel in public, so the five of them trotted out to a private attorney's office and they were followed intently by the press who said five of you went and were doing official business, we thought we should be there. We put in an exemption for that. We've also said that strategy negotiations with respect to collective bargaining are not coming under the purview of a meeting under the right to know law. Part 4 of the bill on page 4 we've added that consideration of applications by the adult parole board would not be public under the right to know law. That's what we intended when we had the corrections chapter, so we spelled it right out. Section 5 states our policy with regard to getting a record of a meeting. It's been unclear who should pay and what should be charged. I think we've adopted a reasonable policy. If you come in and ask for a document and it's there on the shelf, they have to provide it for you. If you come in and ask for a record that's not readily accessible, they'll have to let you know, I think we settled on within 5 days, when it will be available and how much it's going to cost the producer. Roman V on page 5 is our first attempt to have a state policy with regards to computer stored records. We kept coming up against the problem where computer technology ... the right to know. It's very easy to thumb through a file if you have copies of things on paper. What we've said here is that if there is public data, not confidential tax records or things that shouldn't be public under the right to know law, that which is public would be stored in computer form, should be available in printout form. If you want to go into somebody's office and they can pull up the information you need, you should be able to get a paper copy of it. There is some concern about that by Administrative Services. We didn't intend to create a huge burden on any department providing these computer records. In Section 6, right now when attorney general is conducting an investigation, he may find certain information that because it's part of an investigative file, it wouldn't be public, but they might like to tell people who's health and safety is effected. If they're conducting an environmental investigation and they don't want to blow their cover and having the paper read "three wells in this neighborhood are contaminated", what we have done here is allow them to tell people who's health and safety could be affected about the potential danger, without compromising the confidentiality of the file. The mere fact that they have told those people who's health or safety could be affected does not automatically make that investigation public. With regard to remedies we have codified some case law. There is a case that says an action taken in violation of the right to know law can be invalidated by a court. We've also shifted the burden slightly on who has to prove what in the event you can't get a document that you want and you go to court - there's already a provision for payment of attornies fees. If you had to go to court to get something which is public under the right to know law, you can get attorney's fees. We say attorney's fees shall not be awarded unless the court finds the body agency person knew or should have known the conduct they engaged in was in violation of this chapter. There are alot of close calls that we ask our public officials to make about providing information. A request to a selectman for salary schedules for town employees - certainly salaries are public information, but it's a close call and it isn't clear at all whether you have to provide the name of the person and the actually salary they are receiving or whether you can say the purchasing agent has a pay range of - and establish the range. In the case where a selectman or a public official guesses wrong, provides only the pay range and they get to court and they say, oh no, you should have defined it. That's a close call and I don't think the town should have to pay those kind of attorney's fees. In cases where the agency knew or should have known that it was a violation and if he says I'm not going to give it to you and you know you should have provided the information -

then I think attorney's fees are appropriate. We've also put in a specific penalty for people who deal in bad faith. If a person who is a public official just gives you the run around and will not give you the minutes of the meeting - if they act in bad faith, they should pay for it personally - not make the town. We hold that person personally responsible. We also put in the ability for the court to issue an order to enjoin future violations. Say you go to court to get this information or to make this meeting public, well you don't want people to keep coming to court to make the meetings public, the court can injoin you from closing your meetings in the future. That's good policy. The effective date would be next January to give time to everybody to get into their rules.

Senator Chandler: I noticed that page three is half blank, what was taken out?

Rep. Sytek: I can't remember what was taken out. There used to be a provision to require an agenda of a meeting. The selectmen and members of the planning boards on the committee got real worried with complying with the ten day notice requirement for planning boards. They didn't think they'd have their agenda ready in time. We thought for an agency who really didn't want to comply with the agenda requirements, the agenda would probably boil down to "new business", "old business", "adjourn". So we agreed to go along with the selectmen who were members of the House to take out the provision for the agenda.

Senator Chandler: On page six, roman numeral I, it says "Remedies". "If any body or agency or employee or member thereof, in violation of the provisions..." Supposing when we include any member of a committee or organization, suppose the member doesn't have a copy of what took place?

Rep. Sytek: He wouldn't be liable.

Senator Chandler: Does it say that in here? It doesn't exempt a member.

Senator Boyer: Bruce, can you testify to that when you speak?

Mr. Mohl: Yes.

Senator Boyer: That remedy section is currently in there. You've made some changes to it?

Rep. Sytek: We've just shifted the burden slightly. We have presumption in favor of attorneys fees unless...

Senator Boyer: So if members a problem now, it was a problem before anyway.

Rep. Sytek: Yes. I don't know anyone who didn't have a document and was sued for not producing it.

Senator Boyer: Thank you. Tom Flygare.

Mr. Flygare: (See typed testimony)

Senator Boyer: Thank you. Attorney Mohl.

Mr. Mohl: My name is Bruce Mohl from the Office of the Attorney General. (Refer to his letter to Senator Boyer and proposed amendment) The right to know law has existed for fifteen years or more in this state and I think has worked well and has well served the state. There are a number of places where issues have arisen over

the last ten or fifteen years where questions have come up to whether particular matters were subject to the right to know law or not. There have been a number of court decisions interpreting the various provisions of the right to know law. The committee which worked on this over last summer was an ADHOC committee from both the House Judiciary Committee and House ED & A Committee. That committee met a number of times with representatives from the Attorney General's Office, NH Municipal Association, members of the press and this bill in its present form was hashed out over a very lengthy and heated meeting last summer. I think at its present form it does a number of things I think advance the basic and important principles that underly the states' right to know law. In a number of respects it clarifies provisions, it strengthens provisions of the right to know law where they ought to be strengthened. I think it provides a number of very practical solutions to some problems that existed over the last few years in terms of the openess of meetings and the production of public documents. I think this bill is an important compromise. Important compromise by people who come at this question with different objectives and different interests. I think it balances very fairly and very well. What I guess we might call the dual objectives of the right to know law is the maximum amount of openess in government against the need to maintain a system that's not going to handstring or limit the functioning or practical workings of government. I think this bill does that. Rather than go through the bill as Rep. Sytek has done, perhaps I could just be available for answering questions. Senator Chandler you had a question earlier on page of the bill under "Remedies". That language appears in the statute at its present form and has not posed a problem that I'm aware of. If the member doesn't have the document or doesn't have the authority in terms of producing the document, that member could not be held liable under the provisions of the right to know law. I feel this bill is a compromise. I'm sure you'll hear from the press that they didn't get everything they wanted. You may well hear it from folks in the municipal government who will say that they didn't get everything they wanted. In a way, that's what the process is all about. I think the Attorney General believes this bill will add some important provisions in the states' right to know law. It will make it more affective. Commissioner Kennedy is going to address the committee on one question dealing with records, that I was just discussing with him. I know that is a concern, perhaps in a way the section is presently written as to how broad it may be and how difficult it may be to develop programs in terms of drawing out information that would not be readily available from the computer and perhaps there's a way of amending that language on page five of the bill on the access to records which are kept in a computer storage system. There may be some way to amend that bill to deal with the readily accessible question, which I think Commissioner Kennedy is going to address. I'd be happy to work on that with the committee if you wish.

Senator Boyer: Thank you. I'm going to recess the meeting so I can leave for a meeting and Senator Chandler is going to take over and reconvene the hearing and chair.

Senator Chandler: Tom Kearney.

Mr. Kearney: My name is Tom Kearney. I'm Executive Editor of the Keene Sentinal. I would like to plead for restoration of one point that was knocked out. I would like to urge the Senate to tinker with some of the wording in parts of this bill. I would like to urge the Senate to take the same step that the legislature took two years ago to widen the publics' access to discussions - a step that was negated because the bills' language was blocked. First, in the section who's covered by this law specifically the trustees of the University System. I would recommend that it stay the University System of New Hampshire. Twice in documents filed in Cheshire County Superior Court and that a part of the House record on this bill, the University System maintained that it is not subject to the right to know law.

I believe that that is an error. I believe the courts would find it as an error. The University System is indeed a public agency, much as our public schools systems are public agencies. The right to know law would be no more problematical than the University System (US) would be to a public school system. However, if the law said to apply only to the trustees, it's possible that a court would find that the legislature, had in fact, specifically excluded the US from the law. If that happens that's going to give the US budgets, contracts, list of courses, size of the work force, who's on the payroll, enrollment - these would no longer be public record unless they went to the trustees. I believe that would be a mistake. Second, posting of agendas was deleted by the House. The clause that was originally in the bill would require that agendas be posted for meetings, although those agendas would not have to be all inclusive. To me that's simple curtesy. If a Board knows it's taking up my zoning case tonight, why not let people know about it? If something comes up last minute, the clause allows the Board to add it to the agenda. I would urge you to restore that clause. Third, opening most deliberations to the public. There are two sections of this law - 91-A:3, I, II, that are somewhat at conflict. Roman I is not listed in the amendments that I got, but 91-A:1 allows executive sessions for deliberations on any topics whatsoever except those of which information is presented. Paragraph II, which is here in this bill, outlines the circumstances under which decisions can be made in closed sessions. I would recommend that the circumstances listed here, exceptions listed under which decisions can be made in closed sessions, also be the circumstances under which a board can close its doors to discuss and that other deliberations be open to the public. The point is that how a decision is made, how elected officials arrive at a decision is often as important as what's decided. Keene's city and school governments have operated this way for years. The Keene City charter says specifically that this is the way to do it. Only dilberations that fit the exceptions can be closed to the public. The same thing is true of all the school boards in school administrative unit 29, there have been no problems along these lines. The result, I believe, has been an increase in public trust. The people can see how the government makes their decisions and everything is above board. A similar proposal was passed by the legislature two years ago, but had no affect because the wording was flawed. (Refer to the rest of his testimony which is attached)

Senator Chandler: Thank you. Tom Gerber.

Mr. Gerber: My name is Thomas Gerber. I'm editor emeritus of the Concord Monitor. I have just a jew exceptions to the House passed version of the bill, which does not mean I don't have unvarnished admiration for the way the House Judiciary Committee conducted this thing. Under the chance meeting provision on the first page of HB 123, this circumstance is already covered in the law. I think it stems from the fact that alot of local officials feel very uneasy about somebody challenging them if they meet at the local supermarket. What this does is encourage chance meetings or encourages clandestine meetings where the members can say - oh we didn't intend to meet. They can cover that up. The latter part of that sentence also says, social meeting shall not be used to circumvent the spirit of this chapter. If what they mean is that no public business should be discussed, then why not say no public business shall be discussed? Circumvent the spirit of this chapter suggest that a court somewhere along the line is going to have to determine what the spirit of the chapter is. Further, on page two of the bill, Tom Kearney has already testified to the fact that the clause together with an agenda of such meeting that was in the original House Bill has been excised on this and I would strongly urge that the Senate restore that clause. The law already provides for posting of meetings of bodies and agencies. If local people have no idea what's going to be discussed, they thereby will be discouraged from attending. If you say that they're

going to discuss a change in the zoning, or as part of the agenda we're going to talk about the sewer system - the public would be encouraged to participate and I think that is in keeping with the intent of this whole law. I can sympathize with local officials who say that they don't have places to post things and so forth, but I think in terms of the larger public interest, there really should be an agenda of every public meeting. On page four, (e) "Consideration or negotiationof pending claims or litigation which has been threatened..." Law suit threats are as common as flies in June and I think either that forward phrase should be extracted or as Mr. Kearney testified, "which has been threatened in writing". It's just incredible the number of off-hand threats of litigation. That would give a body or agency another excuse for going in behind closed doors to discuss public business. On page five of the bill, at the top, a very good addition to the law on the accessibility or the availability of records. The House passed version says that a body or agency must make such records available, deny the request in writing with reasons, or furnish written acknowledgement of the receipt fo the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. I would much prefer specific time element there, such as 3 days. Reasonably necessary, again calls for some sort of judicial determination. I don't think that contributes to the intent of the law. Further down on page five, Mr. Kearney already testified about the comma after confidential. That has been there since 1967. I think frankly that it was somebody's grammatical error in writting the law, but it does create a whole classification of information - of confidential information. I think what the intent was at the time the law was passed in 1967 is that a record pertaining to confidential commercial information - not confidential comma. That suggests that the state has a security system similar to that of the defense department. The law is replete with confidential information, but where it is I believe, it is clearly marked in the law. I would strongly recommend removal of that comma after the word confidential. On page six I have some misgivings at first two lines, the second line on that page on the disclosure of investigative files on a limited basis to persons whose health and safety may be affected. That's what's known as selective disclosure. I have some problems with that. If an agency is investigating water quality in a certain neighborhood and they find that a well has been contaminated and they tell the person who's living in the nearby house, I don't see why that information shouldn't be made public. What this does is allow them to tell the families affected, but nobody else, on the basis of the investigative file. I don't see why we have to have selective disclosure. Under "Remedies", midway down the page, there's a sentence that says "Fees shall not be awarded unless the court finds that the body, agency or person knew or should have known that the conduct engaged in was a violation of this chapter..." What this does is make ignorance of the law an excuse. It's like somebody going by a red light and getting picked up by a police officer and saying, "Oh Officer, I didn't know a red light meant stop". "Oh, you didn't? Okay, go your way". I can see where the parties by agreement should provide that no fees should be paid, but for the individual to say I didn't know what the right to know law provided, I think is no excuse. Earlier in this same bill there is a provision that a body or agency has five days to provide a record that's not immediately available. Certainly in those five days the person who's looking for that record can determine by talking to other persons in the agency or counsel to determine whether there's some possible violation of the law. That's all I have. I'd be delighted to answer any questions.

Senator Chandler: Thank you. Dale Vincent.

Ms. Vincent: My name is Dale Vincent and I'm here on behalf of the New Hampshire Association of Broadcasters. There are basically four points that we are concerned about and in some cases a matter of support. The inclusion of the UNH trustees, we

are very much in support of that. We are also supportive of and pleased with the idea of penalties for bad faith on the part of various officials. Ignorance in this case should not be an excuse. There is an opportunity to find out what your requirements are. We are also concerned with the agenda. Obvious a journalists we're concerned because when you want to know what's going on and going to go on at a meeting, but as individuals and it's important for the people to know what generally is going to go on. It isn't the argument about, well we don't know specifically that far in advance. It is enough if you can state the general topics. We have enough trouble getting people out to meetings. This clearly would help that process. I don't think it should be considered too difficult for selectmen to get out something.

Senator Chandler: Do you think that would preclude or prevent the committee from picking up some other subject?

Ms. Vincent: There are always late things that come up.

Senator Chandler: If they issue a formal agenda and then they start talking about something else, you might say, well that wasn't on the agenda, you can't take it up.

Ms. Vincent: If you're going to have an emergency situation, that's provided for. If you have something that has to acted upon so quickly that you can't put anything on the agenda, there is a provision for an emergency meeting to discuss something that has to be dealt with immediately. The last item that we're very concerned with is the chance meeting. If indeed it is a chance meeting at a social occasion, there is certainly protection there, if indeed you were not planning to discuss something. If the current law takes care of that, I note there is a portion in there that says if these chance or social meetings occur on such a regular basis, there might be some concern about it. If indeed, there's no discussion then it isn't a formal meeting. It weakens it considerably, we feel. It rather encourages to people almost to violate it. There is definitely sufficient protection in the current law.

Senator Chandler: It also says, at which no decisions are made. You might meet somebody out in the parking lot and they say something about a bill in passing and there's no decisions or anything made. That would be a chance meeting that wouldn't seem to be in violation.

Ms. Vincent: We're talking about a meeting where we're going to be discussing - if you ran into somebody by chance, it would meet a quorum anyway.

Senator Chandler: What would you consider a chance meeting?

Ms. Vincent: The same kind of chance meetings that we were talking about in the original law. If you regularly by chance meet.

Senator Chandler: Thank you. Steve Kennedy.

Mr. Kennedy: My name is Stephen Kennedy and I'm the Commissioner of Administrative Services. I basically support the entire bill with the exception of V on page 5. It deals with the maintaince of records and computer storage. The authority to maintain public records also requires the responsibility to make those records available to the public because it's public information. The problem comes in the mechanisim in which we store it and here is the situation that I have the objection to. I don't think it would be fair to charge for that initial programming to make information available to a memeber of the public requiring public information. It

makes it very difficult to support that activity at very low cost. It wouldn't be very efficient. Example: For efficiency sake in any office, if you're going to hold a record on Steve Kennedy, you would put all the information you had on Steven Kennedy in one file folder and store it in a file cabinet. Because we work in a public environment, you would maybe ask from time to time you'd like to see information about Steve Kennedy. At that particular time, they'd pull out my file and go through that file and pull out those items that are confidential information. Presently my position, my name and my salary is public information. My home address isn't. So you would take out my home address from that particular file and you would give the information to the person who requested it. That same condition exists in an electronic median. Currently we have that backed up with paper documents and so consequently, to be frank, it's easier for us to give the paper documents then it is to computer access it, because we have know got to go through that same purging. The tendency, however, in a computer environment is to browse. It is the ability then to look at things that are not yet public record or the things or decisions that we store in a computer environment, are those processes that dig up a final record. Basically that's a work sheet. Quite often we have an input as a record and a record is not necessarily a piece of paper but a collection of figures and that updates a journal entry which updates and additional journal entry, which becomes a final report or an official document showing the summary total. We're talking about billions and billions of these transactions that are stored in six mainframes that the state of New Hampshire has. The importance of this bill to deal with the modifications to the right to know law are very important, however, the responsibility to adequately deal with how we're going to make this available to the public. Please understand that I am interested in making this information available to the public. But we have to develop more than three sentences in which this method can be done in an efficient manner. The federal government makes it very expensive to extraculate information from their data base. We're basically setting up a situation that would allow me by rule to make this a very expensive process for those people as they go through this programming effort. I would think that item V is either an area to be studied or an area to be amended so that those costs will not directly affect them.

Senator Chandler: Thank you. Is there anyone else who wishes to speak?

Mr. Mohl: I would like to respond to Mr. Gerber and Mr. Kearney. Every issue that that raised was raised in the House work sessions and was debated and argued for hours by the House Judiciary Committee and each of those issues resulted, I think, in a compromise that produced a bill that is before this committee today.

Senator Chandler: How about that comma?

Mr. Mohl: I spent about fifteen minutes with the House Judiciary Committee talking about that comma and why it's a very significant portion of the bill. When it was passed in 1967, the supreme court has construed that provision on a number of occassions and they consider that information as a separate class of information. They've developed standards around how that information was made available. There is essentially a balancing test the court has employed as to when a confidential information should be released, when it should be withheld and I think to take that comma out is not a minor change in the law, it is a significant change which goes against 19 years of a practice and interpretation by the supreme court.

Senator Chandler: Confidential information isn't described anywhere is it?

Mr. Mohl: It's not and the supreme court has developed some standards around the question of confidential information - that is balancing the confidentiality

the interests that are served by protecting that information - privacy interests that are preserved by protecting that confidential information against the public right to know. The court has developed standards in order to do that. It has not been a problem that I'm aware of in terms of courts interpreting that provision. I think to suggest that it was simply a grammatical correction or something mistakenly done a number of years ago is simply not accurate.

Senator Charbonneau: I don't understand why the University System should be excluded and just have the trustees included. I don't understand why they should have a special privilege.

Mr. Mohl: I'm not sure that they do have a special privilege. This was not a provision that we were instrumental in developing. I think Rep. Sytek addressed some of the concerns about the University System and if you simply said the University System as opposed to trustees, subcommittees - that in affect you deal with the problem of having every faculty group or committee or student group, in affect become subject to the right to know law and I think the House Judiciary Committee looked at this and said, it's the University System governing body that is most like a state agency, not a group of students, faculty or some other group at one of the colleges within the system. That, in affect would simply go too far down in the system. That's my understanding of it why the committee cut the way they did, which again, I think was a compromise. A compromise between opening up the entire University System and faculty meetings, student groups and soforth, compared to having none of their functions covered at all and this is a compromise.

Mr. Flygare: I think the University System is treated exactly like other divisions of state government. If you look at paragraph 3, any board or commission of any state agency or authority, including the board of trustees. It's simply treating the University System like any other division of state government by bringing the governing board within the right to know law. So rather than characterize it as an exception, I would chose to characterize it as being entirely consistent with the way other divisions of state government are treated.

Senator Chandler: Does anyone else wish to testify? We'll close the hearing.

Hearing closed at 11:25 a.m.

SENATE JUDICIARY COMMITTEE
Room 209 - Legislative Office Building

STATEMENT ON HOUSE BILL 123
AMENDING THE RIGHT-TO-KNOW LAW

by
Thomas J. Flygare
Vice Chancellor and General Counsel
University System of New Hampshire

April 15, 1986

Ladies and gentlemen of the Judiciary Committee. Although there has been some ambiguity about whether the Right-to-Know Law applies to the Board of Trustees of the University System of New Hampshire (See Paragraph I A 1g of the memorandum by the Attorney General on the Right-to-Know Law dated 2 May 1980, updated in 1983.), the Board has consistently exerted its best efforts to comply with the law. Regardless of whether this bill passes, I believe the Board of Trustees would continue to comply fully with the Right-to-Know Law by conducting its meetings in public session and making its records available to the public.

The University System of New Hampshire, is a very large and complex organization with almost 3,000 employees and 25,000 students. There are a multitude of committees, boards, task forces, working groups, made up of faculty, administrative staff, and students that meet frequently to handle a variety of issues and problems in the area of academics, administration, research, staffing, student discipline, etc. Requiring that all these groups post public notice and maintain minutes of their meetings and other records for public inspection would not contribute significantly to the public's knowledge of the University System but would make the operations more expensive and time-consuming.

Accordingly, we are here today to reaffirm our understanding that if this Bill passes and is enacted into law, it would be applicable only to the Board of Trustees as the governing board of the University System and not to student and faculty committees, the offices of the Chancellor and the Presidents, other administrative offices, or other aspects of the University System. This understanding is most important to the University System as it attempts to operate its institutions in the best interest of the people of New Hampshire.

Thank you very much for your kind attention.

ATTORNEY GENERAL
STEPHEN E. MERRILL

DEPUTY ATTORNEY GENERAL
BRUCE E. MOHL

THE STATE OF NEW HAMPSHIRE

ASSOCIATE ATTORNEYS GENERAL
BRIAN T. TUCKER
JEFFREY R. HOWARD

THE ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

April 17, 1986

The Honorable Richard E. Boyer, Chairman
Senate Judiciary Committee
Room 209, Legislative Office Building
Concord, New Hampshire 03301

Re: House Bill 123, Amendments to the Right-to-Know Law

Dear Senator Boyer:

Enclosed please find a draft of an amendment to section 5 of House Bill 123, which addresses some of the concerns raised by Commissioner of Administrative Services Stephen Kennedy, about the practical application of the amendments dealing with computerized records. Essentially this proposed amendment to the bill states that computer print-outs may be provided "in lieu of providing original documents," so that if the original documents are available, they may be produced rather than generating a computer program to produce a printout of the material. In addition, Mr. Kennedy was concerned that workpapers, which may form the basis of computer generated reports, be protected as confidential documents.

I would be happy to answer any questions you may have concerning this amendment, and as I testified, on balance we think these amendments in their entirety will generally advance the important goals of the State's Right-to-Know Law.

Sincerely,

R Shl

Bruce E. Mohl
Deputy Attorney General

BEM/der
Encl.
cc: Members, Senate Judiciary Comm.
The Honorable Donna Sytek
Mr. Stephen Kennedy

HB 123

STATE OF NEW HAMPSHIRE

In the year of Our Lord one thousand nine hundred and eighty-six

AN ACT

amending the right to know law.

Be it Enacted by the Senate and House of Representatives in General Court convened:

Amend section 5 of the bill by striking subparagraph V of RSA 91-A:4 and substituting therefore the following:

V. In the same manner as set forth in RSA 91-A:4, IV any body or agency which maintains its records in a computer storage system may, in lieu of providing original documents, provide a printout of any record reasonably described and which the agency has the capacity to produce in a manner that does not reveal information which is confidential under this chapter or any other law. Access to work papers, personnel data and other confidential information under RSA 91-A:5, IV shall not be provided.

Senate Judiciary Committee
House Bill 123
Tuesday, April 15, 1986, 9:30 a.m.
LOB 209

From:
Tom Kearney
Executive editor
The Keene Sentinel

Honorable members of the Judiciary Committee:

I would like to plead for restoration of one point knocked out of this bill in the House.

I would also like to urge the Senate to tinker with the wording of a couple of parts of this bill.

Finally, I would also like to urge the Senate to take the same step that the Legislature took two years ago to widen the public's access to discussions, a step that was negated because the bill's language was flawed.

First: RSA 91-A:1-A, III: who is covered by this law. The bill now says "including the board of trustees of the University System of New Hampshire." I would recommend that it say, "including the University System of New Hampshire."

Twice, in documents filed in Cheshire County Superior Court, and that are part of the House record on this bill, the university system has maintained that it is not subject to the right-to-know law. I believe that is an error, that the university system is indeed a public agency, much as all of our public school systems are public agencies.

The right-to-know law would be no more problematical to the university system than it would a public school system. However, if the law is said to apply only to the board of trustees, it's possible that a court would find that the Legislature had, in fact, *excluded* the university system from the law. If that happened, such things as the university system's budgets, contracts, courses, the size of the work force, enrollment — these would no longer be public records. I believe that would be a mistake.

Second: posting of agendas. The House decided to drop a clause in the bill — RSA 91-A:2, II — that would require that agendas be posted for meetings, even though there was no requirement that the agendas be all-inclusive. To me, this is simply courtesy. If a board knows it is taking up my case tonight, why not let people know about it? If something comes up at the last minute, the clause still allowed the board to consider it. I urge you to restore the clause about agendas.

Third: opening most deliberations to the public. RSA 91-A:3, I and II, are somewhat at conflict here. Paragraph I allows executive sessions for deliberations on any topic, except those at which information, evidence or testimony is presented. Paragraph II outlines the circumstances under which decisions can be made in closed session.

I would recommend that those circumstances also apply to deliberations — that, unless the topic fit into one of the exceptions, the deliberations would have to be open. The point is, HOW a decision is made is often as important as WHAT is decided.

Keene's city and school governments have operated this way for years, with no problems. The result, I feel, has been an increase in public trust: People can see how the government makes its decisions, and that everything is above-board. A similar proposal was passed by the Legislature two years ago, but it had no effect because the wording was flawed.

Fourth, in the same section, I recommend adding two words to the exception about pending claims or litigation. Talk about lawsuits has become as common as dandelions, and it makes sense to set some threshold for taking these things seriously. So, I suggest that the bill talk about litigation "which has been threatened IN WRITING or filed ..." We all know talk is cheap; this way, a person would at least have to threaten a lawsuit in writing before that could fit into the right-to-know law.

Fifth, and finally: I recommend deleting two commas in RSA 91-A:6, IV: Records pertaining to internal personnel practices; confidential, commercial, or financial information ..." What, exactly, is *confidential* information in New Hampshire government? Our laws outline restrictions on personnel records and police investigative files and sensitive commercial matters that could unfairly give one business a leg up on another. But there is no class of information that is simply "confidential." I believe this clause refers to "commercial or financial information that is confidential," and it ought to read that way.

With these changes, I would support approval of HB 123. It continues with the New Hampshire tradition of attempting to strike a balance between reasonably efficient government and the public's right to know just what is going on.

Thank you.