THE STATE OF NEW HAMPSHIRE
SUPREME COURT
Case No. 2019-0135

Seacoast Newspapers, Inc.
Plaintiff – Appellant
v.
City of Portsmouth
Defendant – Appellee

Rule 7 Mandatory Appeal from the New Hampshire Superior Court, Rockingham County
Case No. 218-2018-CV-01254

REPLY BRIEF FOR PLAINTIFF – APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND AUTHORITIES

ARGUMENT

I. THE UNION HAS NOT EVEN ATTEMPTED TO PERSUADE THIS COURT THAT ITS PRIOR DECISIONS CONSTRUING THE "INTERNAL PERSONNEL PRACTICES" EXEMPTION IN RSA 91-A:5 WERE WELL-REASONED AND CORRECTLY DECIDED.

The thrust of the opening Brief of the plaintiff/appellant, Seacoast Newspapers, Inc. ("Seacoast Newspapers"), is that two prior decisions of this Court construing the exemption in RSA 91-A:5, IV for "internal personnel practices," *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), and *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006), were based on flawed reasoning and incorrectly decided.

In its opposing Brief, the Portsmouth Police Ranking Officers Association, NEPBA, Local 220 (the "Union"), as intervenor, does not challenge or even address this argument directly. Specifically, the Union's Brief fails to address the plaintiff's argument setting forth the apparent genesis of RSA 91-A:5, IV in counterpart exemptions contained in the federal Freedom of Information Act ("FOIA"), as explained in *Department of Air Force v. Rose*, 425 U.S. 352, 369-70 (1976). *See Confidential Brief for Plaintiff-Appellant ("Opening Brief")* at 19-21. Nowhere does the Union's Brief challenge or contradict the assertion that "this Court, in *Fenniman* and again in *Hounsell*, misapprehended the 'internal personnel practices' exemption and departed, without justification, from the apparent purpose and scope of the exemption as demonstrated by its FOIA counterpart." *Id.* at 21.

The Union focuses instead on the rationale of *Fenniman*, which relied in part on the legislative history of a different statute, RSA 516:36, purportedly to convince this Court that, despite the clear derivation of the "internal personnel practices" exemption, its reasoning in *Fenniman* was sound. In particular, the Union points to the Court's reference to the hearing testimony of Rep. Sytek, who noted in passing that certain records of internal police investigations "*will remain confidential under the Right-to-Know law.*" *Fenniman*, 136 N.H. at 627 (emphasis in original); *Union Brief* at 9-10. Seacoast Newspapers has questioned the Court's reliance on the legislative history of a different statute. *Opening Brief* at 18 n.5, but it is also important to note that Rep. Sytek did not refer specifically to the exemption for "internal personnel practices." In referring generally to "the Right-to-Know law," she may well have been

thinking of the exemption for "personnel ... and other files whose disclosure would constitute invasion of privacy." Her testimony, as cited in *Fenniman*, is not clear on this point.

The Union also focuses on the Court's prior recognition of a policy argument in favor of exempting records of internal personnel investigations; *i.e.*, that disclosing such records "would deter the reporting of misconduct by public employees, or participation in such investigations, for fear of public embarrassment, humiliation, or even retaliation." *Hounsell*, 154 N.H. at 5; *Union Brief* at 11. This "policy" apparently was first recognized in *Fenniman*, based on the same legislative hearing testimony noted above. Again, however, the balancing of competing interests under the exemption for "personnel ... and other records whose disclosure would constitute invasion of privacy" would be a more appropriate way to take such concerns into account, as opposed to the exemption for "internal personnel practices."

II. THIS COURT SHOULD NOT ADHERE TO POORLY REASONED PRECEDENT IN THE NAME OF STABILITY IN THE LAW.

The Union devotes much of its Brief to the argument that "decades worth of precedent" should not be overturned "merely for the sake of changing the result in this case." *Union Brief* at 20. Seacoast Newspapers casts the question in terms of whether two decisions decided incorrectly should continue to dictate the application of the exemptions contained in RSA 91-A:5, IV – for this case and those that will follow.

The Union argues that Seacoast Newspapers has engaged in a "superficial application" of the factors this Court first articulated in *Jacobs v. Dir., N.H. Div. of Motor Vehicles*, 149 N.H. 502, 505 (2003), for determining whether to overturn precedents. *Union Brief* at 20. Yet, other than citing the four factors this Court has identified and proclaiming that "[n]one of these factors weigh in favor of this Court overturning decades worth of precedent," the Union itself engages in virtually no analysis of these factors whatsoever.[1] *Id.* By contrast, Seacoast Newspapers anticipated this argument by the Union in its Opening Brief, directly addressing the factors enumerated in *Jacobs*. *See Opening Brief* at 21-23.

[1] The Union does argue in a footnote that *Fenniman* and *Hounsell* are "clearly not unworkable," in light of other instances in which they were applied. The Union fails to acknowledge, however, the quandary identified by this Court in *Reid*, where the Court recognized that two separate exemptions in RSA 91-A:5, IV had been interpreted in a way that appeared to make them redundant. *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 520 (2016).

As this Court has repeatedly emphasized, "the doctrine of stare decisis is not one to be either rigidly applied or blindly followed." *State v. Quintero*, 162 N.H. 526, 533 (2011) (quoting *State v. Ramos*, 149 N.H. 118, 127 (2003)). The words that follow in *Ramos* are particularly relevant: "The stability of the law does not require the continuance of recognized error." *Ramos*, 149 N.H. at 127-28 (quotation omitted). Thus, even absent a separate, enumerated factor for whether a precedent is "well-reasoned," this Court has considered, as part of its holistic approach to *stare decisis*, the strength of the precedent's reasoning. As the Court has stated, "[t]he doctrine is not a barrier which prevents us from correcting prior judicial errors." *Amoskeag Tr. Co. v. Trustees of Dartmouth College*, 89 N.H. 471, 200 A. 786, 788 (1938).

In fact, this Court has held that, "[a]lthough stare decisis generally has more force in statutory analysis than in constitutional adjudication because, in the former situation, [the legislature] can correct our mistakes through legislation, that is not always the case." *State v. Duran*, 158 N.H. 146, 157 (2008) (quotation omitted). In light of this consideration, the Court was "unwilling to mechanically apply the principles of stare decisis to allow a decision that was wrong when it was decided to perpetuate as a rule of law." *Id.* Nor would it "always place on the shoulders of the legislature the burden to correct our own error." *Id.*

As addressed with respect to post-decision amendments, below, the Union's rigid analysis is antithetical to these principles. This Court's prior decisions make clear that it will not follow precedent blindly, or rigidly, but rather take into consideration well-reasoned arguments to overturn it. Seacoast Newspapers respectfully submits that it has presented this Court with ample reasons, including the *Jacobs* factors, to overturn *Fenniman* and *Hounsell*.

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

The Union characterizes the Opening Brief as amounting to "empty pleas for this Court to correct what it believes the legislature did or did not intend in enacting RSA 91-A:5." *Union Brief* at 21. Indeed, Seacoast Newspapers has focused on the intent of the legislature precisely because this Court has recognized that it is "the final arbiter of the intent of the legislature." *State v. Etienne*, 163 N.H. 57, 71 (2011) (quotation omitted). In *Etienne*, the Court further observed that the Court's role is "to apply statutes in light of the legislature's intent in enacting them." *Id.* at 72 (quotation omitted).

Yet, rather than directing this Court to contemporaneous evidence of the legislature's intentions *at the time of enactment* of RSA 91-A:5, the Union points to eight[2] 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 Brief* at 21.

In the cases in which the Court *has* looked to legislative inaction as a guide, it has made clear that the history of amendments to a statute was only an aid to statutory construction and not an edict. In *Etienne*, after an extensive discussion regarding legislative intent, the Court introduced the concept of legislative inaction in the face of unrelated amendments following the Court's prior decision as a "further indication" of the legislature's intent. *Etienne*, 163 N.H. at 76. Likewise, in *State v. Moran*, 158 N.H. 318 (2009), the notion was introduced near the end of the opinion as something that "support[ed]" its own statutory analysis. *Id.* at 323; *cf. Wenke v. Gehl Co.*, 682 N.W.2d 405, 417 (Wisc. 2004) ("The doctrine of legislative acquiescence is merely a presumption to aid in statutory construction."); *State v. Spencer Gifts, LLC*, 374 P.3d 680, 688 (Kan. 2016) ("[M]ore important [than legislative acquiescence] is the application of the doctrine of statutory interpretation that directs us to consider the plain language of the statutes."). Here, this Court can and must focus on the plain language of RSA 91-A:5, its statutory presumption in favor of disclosure, and contemporaneous FOIA law, which has acted as a guide to this Court in interpreting the Right-to-Know Law.

There are myriad reasons why any legislative body may fail to act following a court's interpretation of a statute. "These variables include the possibility that the legislature did not have its attention directed to a decision, had other priorities, or was passive or indifferent because the legislators who authored the original legislation were no longer present." *Wenke*, 682 N.W.2d at 416. For this reason, many courts have refused to divine legislative intent from inaction. *See, e.g., McCahan v. Brennan*, 822 N.W.2d 747, 757 (Mich. 2012) ("[L]egislative acquiescence has been repeatedly repudiated by this Court because it is as an exceptionally poor indicator of legislative intent."); *see also Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940); *Pennsylvania v. Dickson*, 918 A.2d 95, 101 (Pa. 2007).

In fact, this is a case where legislative inaction does *not* serve as a meaningful guide to the legislature's intent. An examination of the amendments to RSA 91-A:5 cited by the Union

[2] It appears that the amendments listed by the Union actually number nine and not eight.

effectively demonstrates why this is so. In the order listed by the Union, these amendments accomplished the following: (i) added a new exemption for "[r]ecords pertaining to information technology systems;" (ii) clarified the exemption for "[p]ersonal school records of pupils;" (iii) added an exemption for recordings from police body cameras; (iv) changed a reference to the "master jury list;" (v) tweaked RSA 91-A:5 as part of a general update to the Right-to-Know Law;[3] (vi) added an exemption for "pupil identification information;" (vii) added exemptions for "notes or other materials made for personal use," and for "preliminary drafts...;" (viii) added an exemption for records pertaining to "emergency functions;" and (ix) added an exemption for teacher certification records. *See Union Brief* at 21.

In the twenty-five years since *Fenniman,* then, the legislature has had no occasion whatsoever to revisit the two "personnel" exemptions at issue here. These exemptions, in fact, exist today in the form in which they were originally enacted over fifty years ago. *See plaintiff's Appendix*, Vol. I, at 77. Where the legislature has not had its attention called to these two exemptions or the way this Court has interpreted them, its failure to act in the wake of *Fenniman* and its progeny is hardly surprising and signifies nothing with respect to legislative intent.

Seacoast Newspapers has presented this Court with compelling evidence of how the exemptions contained in RSA 91-A:5, IV came into being and what the New Hampshire legislature must have intended in enacting them. Additionally, it has parsed the two exemptions in question and demonstrated that they were intended to apply to entirely different categories of records. The plaintiff respectfully submits that these indicia of legislative intent are far more reliable, and should be accorded more weight, than suppositions about possible messages contained in the legislature's failure to correct the Court's interpretation of these two exemptions.

IV. THE LEGISLATURE'S RECENT CONSIDERATION OF A BILL PERTAINING TO CERTAIN POLICE INVESTIGATIVE RECORDS SHEDS NO LIGHT ON THE CORRECT INTERPRETATION OF RSA 91-A:5.

After encouraging this Court to rely on the fact that the legislature has enacted amendments to RSA 91-A:5 without amending or clarifying the two exemptions at issue here,

[3] The only change to RSA 91-A:5, IV was to insert "public" before "body or agency" in the last sentence.

the Union steps further out on the limb by suggesting that the Court consider what the legislature did *not* do during the most recent legislative session.

In its Brief, the Union refers this Court to a bill introduced in the last session, HB 153. According to the Union, HB 153 did not pass and was re-referred. *Union Brief* at 24. Nevertheless, the Union suggests that this Court should avoid fulfilling its duty to interpret and apply this state's statutory law because the legislature might still act on a related issue.

It goes without saying that no legislative intent may be drawn from a bill that was considered in committee but never became law. This is particularly so in this case, where HB 153, even if it *had* become law, would not have addressed or resolved the issue here. HB 153 arguably would have eliminated any doubt as to the public nature of three distinct categories of post-investigation records. *See Union Brief* at 24, 35. The bill as written, however, would not have addressed records of investigations into other categories of police misconduct, including the misconduct of Officer Goodwin in this case.

The Union argues that "the legislation clearly presupposes that the categorical exemption applies to records of the type sought herein and confirms the court's interpretation of the legislative history as discussed in *Fenniman*." *Union Brief* at 24. Nothing could be further from the truth. HB 153 would have left intact the ability of an agency to withhold certain personal information pertaining to victims and other "private persons" (meaning, presumably, persons other than the police officer in question) "where disclosure of such information would constitute an invasion of privacy under RSA 91-A:5, IV." *Id.* This explicit reference to the exemption for "personnel ... and other files whose disclosure would constitute invasion of privacy" strongly suggests that the legislature was considering a modification of *that* exemption and *not* the exemption for "internal personnel practices." Accordingly, to the extent the Court is inclined to read anything into the non-passage of HB 153, it might conclude that the drafters of the bill were under the assumption that the police investigative records in question were governed by the "personnel ... files" exemption rather than the "internal personnel practices" exemption.

Seacoast Newspapers notes also that the vague reference in the Senate Journal to an "ongoing court case" is by no means clear. *See Union Brief* at 24, 37. In fact, as the Court is well aware, there are currently three cases on appeal which appear to rest on the interpretation and application of these two exemptions in RSA 91-A:5, IV. There is no indication as to which of these cases Senator Carson of the Senate Judiciary Committee was referencing.

As Seacoast Newspapers has argued in its Opening Brief, it is clear that records of disciplinary proceedings and issues with respect to particular individuals were always intended to be subject to the exemption for "personnel ... and other files whose disclosure would constitute invasion of privacy," rather than the much narrower exemption for "internal personnel practices." Nothing in the Union's discussion of HB 153 suggests otherwise.

V. THERE IS NO NEED FOR A REMAND TO THE SUPERIOR COURT FOR THE PURPOSE OF CONDUCTING A BALANCING TEST.

The Union argues that a remand to the Superior Court will be necessary in the event that the Court concludes that a balancing of competing public and private interests is necessary. To be clear, Seacoast Newspapers *does* contend that a balancing of competing interests is necessary, since the appropriate exemption in RSA 91-A:5, IV calls for such a balancing. Seacoast Newspapers does not agree, however, that a remand for that purpose is necessary.

Seacoast Newspapers devotes nearly five pages of its Opening Brief to the balancing of interests tied to the "personnel files" exemption. As stated therein, the public interest in disclosure of the arbitration award in this case is clear and well established as a matter of law, not to mention conceded by the City of Portsmouth. *Opening Brief* at 29-30. There is no need for the Superior Court to take evidence on this issue.

To the extent there is any opposing privacy interest at stake, it would be the interest of Officer Goodwin.[4] Again, Seacoast Newspapers has included in its Brief a discussion of this issue, citing law from New Hampshire and elsewhere for the proposition that a law enforcement officer, or indeed any public employee or official, has no expectation of privacy in his or her job performance. *Id.* at 28-29. The Union points specifically to the impact of another New Hampshire statute, RSA 105:13-b (III). This is a legal issue that the Union could have argued in its Brief had it chosen to do so. There is no evidence that the trial court must hear in order to weigh the competing interests in this case.

[4] No party has suggested the existence of any other privacy interest.

CONCLUSION

For the foregoing reasons, Seacoast Newspapers again respectfully asks that the judgment of the Superior Court be reversed and that it be awarded its costs and reasonable attorney's fees.

Respectfully submitted,
Seacoast Newspapers, Inc.

By their attorneys,
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Dated: August 27, 2019

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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 Argument and Conclusion sections of this Brief contain 2,990 words (including footnotes).

s/ Richard C. Gagliuso
Richard C. Gagliuso, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I provided a true and exact copy of the foregoing Reply Brief to Thomas M. Closson, Esquire, counsel for City of Portsmouth and Peter J. Perroni, Esquire, counsel for the Union, via the New Hampshire Supreme Court's electronic filing system on August 27, 2019.

/s/ Richard C. Gagliuso
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