Censabella v. Hillsborough County Atty.

Supreme Court of New Hampshire

March 21, 2018, Argued; October 17, 2018, Opinion Issued

No. 2017-0429

Reporter
171 N.H. 424 *; 197 A.3d 74 **; 2018 N.H. LEXIS 201 ***; 2018 WL 5019747

LISA CENSABELLA v. HILLSBOROUGH COUNTY ATTORNEY

Notice: THIS OPINION IS SUBJECT TO MOTIONS FOR REHEARING UNDER NEW HAMPSHIRE PROCEDURAL RULES AS WELL AS FORMAL REVISION BEFORE PUBLICATION IN THE NEW HAMPSHIRE REPORTS.

Prior History: **[***1]** Hillsborough–southern judicial district.

Disposition: Reversed and remanded.

Core Terms

disclosure, aggrieved

Case Summary

Overview

HOLDINGS: [1]-The trial court erred in ruling that petitioner was not a "person aggrieved" under RSA 91-A:7 and therefore lacked standing to pursue an action under the Right-to-Know Law, as nothing in the statute required petitioner to request inspection of government records directly instead of through her attorney, and it was not necessary that petitioner disclose her identity in the request.

Outcome
Reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

HN1 **Standards of Review, De Novo Review**

Generally, in ruling upon a motion to dismiss, the trial

court is required to determine whether the allegations contained in the petitioner's pleadings are sufficient to state a basis upon which relief may be granted. To make this determination, the court would normally accept all facts pled by the petitioner as true, construing them most favorably to the petitioner. When the motion to dismiss does not challenge the sufficiency of the petitioner's legal claim but, instead, raises certain defenses, the trial court must look beyond the petitioner's unsubstantiated allegations and determine, based on the facts, whether the petitioner has sufficiently demonstrated her right to claim relief. A jurisdictional challenge based upon a lack of standing is such a defense. When the relevant facts are not in dispute, the appellate court reviews the trial court's determination on standing de novo.

Administrative Law > Governmental Information > Freedom of Information

Governments > Legislation > Interpretation

HN2[] Governmental Information, Freedom of Information

The ordinary rules of statutory construction apply to review of the Right-to-Know Law, RSA ch. 91-A.

Governments > Legislation > Interpretation

HN3[] Legislation, Interpretation

The New Hampshire Supreme Court is the final arbiter of the legislature's intent as expressed in the words of a statute considered as a whole. When examining the language of a statute, the court ascribes the plain and ordinary meaning to the words used. The court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. The court also interprets a statute in the context of the overall statutory scheme and not in isolation.

Administrative Law > Governmental Information > Freedom of Information

Governments > Legislation > Interpretation

HN4[] Governmental Information, Freedom of Information

The purpose of the Right-to-Know Law, RSA ch. 91-A, 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. RSA 91-A:1 (2013). Thus, the Right-to-Know Law furthers the state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. While the court looks to other jurisdictions construing similar statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA), 5 U.S.C.S. § 552 et seq., it resolves questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objectives.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > ... > Enforcement > Judicial Review > Reviewability

HN5[] Costs & Attorney Fees, Grounds for Recovery

The Right-to-Know Law, RSA ch. 91-A, provides every citizen with a right to inspect and copy government records except as otherwise prohibited by statute. *RSA 91-A:4, I (2013)*. *RSA 91-A:4, IV (Supp. 2017)* requires public bodies and agencies to make such government records available upon request. RSA 91-A:8, I (2013) provides that public bodies, agencies, or officials who violate the provisions of the chapter shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under the chapter, provided that the court finds the lawsuit was necessary in order to enforce compliance with the provisions of the chapter or to address a purposeful violation of the chapter. The statute allows any person aggrieved to petition for injunctive relief, and appear with or without counsel.

RSA 91-A:7.

Administrative Law > Judicial Review > Reviewability > Standing

HN6 **Reviewability, Standing**

Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN7 **Methods of Disclosure, Record Requests**

Nothing in the Right-to-Know Law, RSA ch. 91-A, requires a claimant to directly request inspection of government records. Indeed, the statute specifically anticipates that a claimant may appear with counsel when pursuing a remedy. RSA 91-A:7. It follows that a claimant may make his or her request for records through counsel.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN8 **Methods of Disclosure, Record Requests**

The requester's motives in seeking disclosure under the Right-to-Know Law, RSA ch. 91-A, are irrelevant to the question of access. There are no restrictions on the use of the records, once disclosed. As a general rule, if the information is subject to disclosure, it belongs to all. Thus, with respect to requests for access to such information, there would be little reason to engraft a disclosure requirement upon the requester — when a request is made by an attorney on a client's behalf, the client's identity, at that point, is irrelevant. Allowing the client to enforce such a records request does not prejudice the public agency holding the records — public bodies have a statutory duty to respond diligently to all records requests, regardless of who makes the request.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1. 1.

Pleading > Motion to Dismiss > Standard for Granting

Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the petitioner's pleadings are sufficient to state a basis upon which relief may be granted. To make this determination, the court would normally accept all facts pled by the petitioner as true, construing them most favorably to the petitioner. When the motion to dismiss does not challenge the sufficiency of the petitioner's legal claim but, instead, raises certain defenses, the trial court must look beyond the petitioner's unsubstantiated allegations and determine, based on the facts, whether the petitioner has sufficiently demonstrated her right to claim relief. A jurisdictional challenge based upon a lack of standing is such a defense.

NH2. 2.

Records > Right to Inspect > Generally

The ordinary rules of statutory construction apply to review of the Right-to-Know Law.

NH3. 3.

Records > Right to Inspect > Generally

The purpose of the Right-to-Know Law 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. Thus, the Right-to-Know Law furthers the state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. While the court looks to other jurisdictions construing similar statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA), it resolves questions regarding the Right-to-Know Law

with a view to providing the utmost information in order to best effectuate the statutory and constitutional objectives. 5 U.S.C. § 552 et seq.; RSA 91-A:1.

NH4.[] 4.

Records > Right to Inspect > Procedure

The trial court erred in ruling that petitioner was not a "person aggrieved" and therefore lacked standing to pursue an action under the Right-to-Know Law, as nothing in the statute required petitioner to request inspection of government records directly instead of through her attorney, and it was not necessary that petitioner disclose her identity in the request. RSA 91-A:7.

NH5.[] 5.

Administrative Law > Judicial Review > Standing

Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis.

NH6.[] 6.

Records > Right to Inspect > Procedure

Nothing in the Right-to-Know Law requires a claimant to directly request inspection of government records. Indeed, the statute specifically anticipates that a claimant may appear with counsel when pursuing a remedy. It follows that a claimant may make his or her request for records through counsel. RSA 91-A:7.

NH7.[] 7.

[*425] Records > Right to Inspect > Procedure

The requester's motives in seeking disclosure under the Right-to-Know Law are irrelevant to the question of access. There are no restrictions on the use of the records, once disclosed. As a general rule, if the information is subject to disclosure, it belongs to all. Thus, with respect to requests for access to such information, there would be little reason to engraft a disclosure requirement upon the requester — when a request is made by an attorney on a client's behalf, the client's identity, at that point, is irrelevant. Allowing the client to enforce such a records request does not prejudice the public agency holding the records — public bodies have a statutory duty to respond diligently to all records requests, regardless of who makes the request.

Counsel: *The MuniLaw Group*, of Epsom (*Tony F. Soltani* on the brief and orally), for the petitioner.

Carolyn M. Kirby, of Goffstown, on the brief and orally, for the respondent.

Judges: HANTZ MARCONI, J. LYNN, C.J., and HICKS and BASSETT, JJ., concurred.

Opinion by: HANTZ MARCONI

Opinion

[75]** HANTZ MARCONI, J. The petitioner, Lisa Censabella, appeals the Superior Court's (*MANGONES*, J.) dismissal of her petition for relief against Hillsborough County Attorney Dennis Hogan under the *Right-to-Know Law*, RSA chapter 91-A. The petitioner argues that the trial court erred in ruling that she was not a "person aggrieved" under RSA 91-A:7 (2013) and, therefore, lacked standing to pursue this action. We reverse and remand.

The record establishes the following facts. In March 2017, the petitioner, by and through her attorney, filed a petition seeking, among other things, to enjoin the respondent from further violations of the *Right-to-Know Law*. The petitioner claimed to be a person aggrieved, under RSA 91-A:7, by the respondent's alleged violations of RSA chapter 91-A occurring between December 28, 2015 and November **[**76]** 29, 2016. The petition alleges that Attorney Tony Soltani filed a *Right-to-Know Law* request on her behalf with the

respondent **[***2]** seeking information regarding another individual, but that the response to the request and to follow-up requests made by Soltani over the ensuing eleven months was late and incomplete. At no time during the exchange did Soltani reveal that the petitioner was his client for the purpose of the request, nor did the respondent inquire for whom the requests were being made. The first time the petitioner's name was revealed was in the petition filed in the superior court.

The respondent moved to dismiss, asserting that, because the petitioner was not identified directly or indirectly in any of the requests made by Soltani, she lacked standing to bring the petition. The trial court granted the respondent's motion. This appeal followed.

NH[1][↑] [1] HN1[↑] Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the petitioner's pleadings are sufficient to state a basis upon which relief may be granted. K.L.N. Construction Co. v. Town of Pelham, 167 N.H. 180, 183, 107 A.3d 658 (2014). To **[*426]** make this determination, the court would normally accept all facts pled by the petitioner as true, construing them most favorably to the petitioner. *Id.* When the motion to dismiss does not challenge the sufficiency of the petitioner's legal **[***3]** claim but, instead, raises certain defenses, the trial court must look beyond the petitioner's unsubstantiated allegations and determine, based on the facts, whether the petitioner has sufficiently demonstrated her right to claim relief. *Id.* A jurisdictional challenge based upon a lack of standing is such a defense. *Id.* Since the relevant facts are not in dispute, we review the trial court's determination on standing *de novo. Id.*

NH[2][↑] [2] Addressing the standing issue requires us to interpret RSA chapter 91-A. HN2[↑] The ordinary rules of statutory construction apply to our review of the *Right-to-Know Law*. N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 102-03, 143 A.3d 829 (2016). Thus, HN3[↑] we are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. Id. at 103. When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used. *Id.* We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* We also interpret a statute in the context of the overall statutory scheme and not in isolation. *Id.*

NH[3][↑] [3] HN4[↑] The purpose of the *Right-to-Know Law* "is to ensure both the greatest possible public access to the **[***4]** actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1 (2013); *see* N.H. Right to Life, 169 N.H. at 103. Thus, the *Right-to-Know Law* furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. N.H. Right to Life, 169 N.H. at 103. While we look to other jurisdictions construing similar statutes for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq., we resolve questions regarding the *Right-to-Know Law* with a view to providing the utmost information in order to best effectuate the statutory and constitutional objectives. *Id.*

HN5[↑] The *Right-to-Know Law* provides "[e]very citizen" with a right to inspect and copy government records except as otherwise **[**77]** prohibited by statute. *RSA 91-A:4, I* (2013). *RSA 91-A:4, IV* (Supp. 2017) requires public bodies and agencies to make such government records available upon request. RSA 91-A:8, I (2013) provides that public bodies, agencies, or officials who violate the provisions of this chapter shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under the chapter, provided that the court finds the lawsuit was "necessary in order to enforce compliance with the provisions **[***5]** of this chapter or to address a purposeful **[*427]** violation of this chapter." The statute allows "[a]ny person aggrieved" to petition for injunctive relief, and appear "with or without counsel." RSA 91-A:7.

NH[4][↑] [4] Thus, our decision turns on whether the petitioner was a "person aggrieved" within the meaning of the statute. *See* RSA 91-A:7. The respondent argues that standing requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress, Duncan v. State of N.H., 166 N.H. 630, 642-43, 102 A.3d 913 (2014), and that a party must demonstrate harm to maintain a legal challenge, Birch Broad. v. Capitol Broad. Corp., 161 N.H. 192, 199, 13 A.3d 224 (2010). Applying these tests, we conclude that the petitioner has standing.

NH[5][↑] [5] HN6[↑] "Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." Golf Course Investors of NH v. Town of Jaffrey, 161 N.H. 675, 680,

20 A.3d 846 (2011). Both the petitioner in her petition, and her attorney in representations to the trial court, confirmed that the requests at issue were made to the respondent by Attorney Soltani on the petitioner's behalf. The respondent argues that the petitioner is not a "person aggrieved" because she "never directly requested inspection of government records, nor was she **[***6]** ever identified as a citizen upon whose behalf a request was made." We discern no such requirements in the *Right-to-Know Law*.

NH[6][↑] [6] At the outset, HN7[↑] nothing in the statute required the petitioner to "directly" request inspection of government records. Indeed, the statute specifically anticipates that a claimant may appear with counsel when pursuing a remedy. *See* RSA 91-A:7. It follows that a claimant may make his or her request for records through counsel.

NH[7][↑] [7] At issue is whether the identity of the petitioner must be disclosed in the request. HN8[↑] The requester's motives in seeking disclosure are irrelevant to the question of access. Lambert v. Belknap County Convention, 157 N.H. 375, 383, 949 A.2d 709 (2008). There are no restrictions on the use of the records, once disclosed. *Id.* "As a general rule, if the information is subject to disclosure, it belongs to all." *Id.* Thus, with respect to requests for access to such information, there would be little reason to engraft a disclosure requirement upon the requester — when a request is made by an attorney on a client's behalf, the client's identity, at that point, is irrelevant. Allowing the client to enforce such a records request does not prejudice the public agency holding the records — "[p]ublic bodies have a statutory duty to **[*428]** respond **[***7]** diligently to all records requests, regardless of who makes the request." San Juan Agr. Water Users Ass'n v. KNME-TV, 2011- NMSC 011, 150 N.M. 64, 257 P.3d 884, 892 (N.M. 2011).

Furthermore, given the competing interests inherent in a request to the government for disclosure, it would not be unreasonable for a requester to desire anonymity in the early stages when making a *Right-to-Know Law* request. Such requests may implicate political, policy, or **[**78]** public interest considerations, particularly when the request is pursued by a whistleblower or advocacy organization. Practical considerations also weigh in favor of requests made by attorneys on behalf of clients who are not able to participate directly. Moreover, a construction which allows an undisclosed client to seek disclosure through counsel is consistent with our common law of agency, which permits undisclosed principals to act through agents. *See* Bryant v. Wells, 56 N.H. 152, 155 (1875); Chandler v. Coe, 54 N.H. 561, 576 (1874).

Relying upon federal case law interpreting the FOIA, the trial court concluded that as an unidentified requester, the petitioner did not have standing to bring this action. *See* McDonnell v. United States, 4 F.3d 1227, 1236-37 (3d Cir. 1993) ("We think a person whose name does not appear on a request for records has not made a formal request for documents within the meaning of the statute."). We do not construe our state statute, however, in so limited **[***8]** a fashion.

Notably, the FOIA derives from a legislative effort to promote government transparency, not from a constitutionally mandated public right to open government and accountability. *Cf.* McBurney v. Young, 569 U.S. 221, 232, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013) ("This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws."). As such, the rights conferred by the FOIA are limited to those defined by the federal statute. "[T]he question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." Davis v. Passman, 442 U.S. 228, 241, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (emphasis omitted). The FOIA outlines a statutory process for agency responses to persons making a "request for records" which, among other things, distinguishes, by identity of the requester, the level of fees permitted to be charged for the response. 5 U.S.C. §§ 552(a)(3)(C), (a)(4)(A). The FOIA provides a remedy to a "complainant" who has had agency records improperly withheld from him or her. 5 U.S.C. §§ 552(a)(4)(B), (F). Thus, it is not surprising that the federal courts have developed a more restricted definition of standing under the FOIA. Although we find federal law interpreting the FOIA to provide helpful guidance when interpreting analogous exemptions under **[***9]** our law, *see* Montenegro v. City of Dover, 162 N.H. 641, 645-46, 34 A.3d 717 (2011) (police investigatory **[*429]** files); N.H. Right to Life, 169 N.H. at 103 (confidential, commercial, or financial information and other files the disclosure of which would constitute invasion of privacy), we conclude that it is of little assistance in determining standing. *Accord*, *e.g.*, San Juan Agr. Water Users Ass'n, 257 P.3d at 892-93 (citing cases).

Accordingly, we conclude that the trial court erred in granting the respondent's motion to dismiss for lack of standing. Whether the agency relationship actually

existed at the time of the request is a factual matter, which, if challenged, would need to be decided by the trial court, as would the merits of the petitioner's claim. *Id. at 884*. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

LYNN, C.J., and HICKS and BASSETT, JJ., concurred.

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Ettinger v. Town of Madison Planning Bd.

Supreme Court of New Hampshire

October 13, 2011, Argued; December 8, 2011, Opinion Issued

No. 2010-688

Reporter
162 N.H. 785 *; 35 A.3d 562 **; 2011 N.H. LEXIS 178 ***

THOMAS ETTINGER *& a.* v. TOWN OF MADISON PLANNING BOARD

Prior History: **[***1]** Carroll.

Disposition: Affirmed.

Core Terms

session, advice, attorney-client, disclosure, nonpublic

Case Summary

Procedural Posture

Defendant, a town planning board, filed an appeal, and plaintiff abutting property owners (APOs) filed a cross-appeal, from a decision of the Superior Court, Carroll (New Hampshire), which held that a private session of the board violated the Right-to-Know Law (RKL), *RSA 91-A:2* (2001 and Supp. 2010), and which denied the APOs' request for attorney's fees.

Overview

A landowner (LO) received conditional approval from the board to, inter alia, convert the buildings on its property to a condominium ownership form. The APOs requested a public hearing in order to challenge the approval. At the scheduled time of the hearing, the board went into a private session for 30 minutes. Thereafter, it reopened the hearing, heard the APOs' attorney on the matter, and granted final approval to the LO. The APOs filed suit, and the trial court determined that the private session violated the RKL. However, it refused to either invalidate the board's approval or to award the APOs' attorney's fees. On appeal, the court agreed that the board lacked authority to allow its members to read a letter from counsel and discuss its contents in a private session under the "consultation with legal counsel" exclusion of the RKL pursuant to *§ 91-A:2*, I(b). Rather, in the absence of an applicable exception, the RKL required that the board hold its discussion in the open. However, written communications from the board's counsel could have been protected from disclosure under *RSA 91-A:5*. Attorney's fees were not warranted under *RSA 91-A:8, I*.

Outcome
The court affirmed the decision of the trial court.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Public Information > General Overview

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Interpretation

HN1[] Governmental Information, Public Information

The interpretation of the Right-to-Know Law is to be decided ultimately by the New Hampshire Supreme Court. Courts apply the ordinary rules of statutory construction to review of the Right-to-Know Law, RSA 91-A:2 (2001 and Supp. 2010), and accordingly first look to the plain meaning of the words used. Words and phrases are construed according to the common and approved usage of the language unless from the statute it appears that a different meaning was intended. RSA 21:1, 21:2 (2000). Courts resolve questions regarding the Right-to-Know Law with a view to best effectuate the statutory objective of facilitating open access to the actions and decisions of public bodies. As a result, courts broadly construe provisions favoring disclosure and interpret the exemptions restrictively. A public body bears the burden of proving that it may hold a nonpublic assembly of its members.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN2[] Public Information, Sunshine Legislation

The Right-to-Know Law, RSA 91-A:2 (2001 and Supp. 2010), provides that all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. § 91-A:2, II (Supp. 2010). RSA 91-A:1 (2001) expresses the legislative policy of the statute: 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. The statute defines a meeting as the convening of a quorum of the membership of a public body for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. § 91-A:2, I. "Consultation with legal counsel," however, is excluded from that definition and is therefore not subject to the various requirements for open meetings contained in § 91-A:2, II and I(b).

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN3[] Public Information, Sunshine Legislation

With respect to the meaning of the "consultation with legal counsel" exclusion under RSA 91-A:2, I(b) (Supp. 2010), a "consultation" is a council or conference (as between two or more persons) usually to consider a special matter. Read together with the phrase "with legal counsel," a "consultation" does not encompass a situation in which the public body convenes a quorum of its membership, as set out in § 91-A:2, I, only to discuss a legal memorandum prepared by, or at the direction of, the public body's attorney where that attorney is unavailable at the time of the discussion. At the very least, that clause requires the ability to have a contemporaneous exchange of words and ideas between the public body and its attorney.

Evidence > Privileges > Attorney-Client Privilege > Scope

HN4[] Privileges, Attorney-Client Privilege

The attorney-client privilege is an evidentiary rule allowing an attorney or client to withhold information shared in the course of the attorney-client relationship. The classic articulation of the privilege is as follows: Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives.

Evidence > Privileges > Attorney-Client Privilege > Scope

HN5[] Privileges, Attorney-Client Privilege

See N.H. R. Evid. 502(b).

Evidence > Privileges > Attorney-Client Privilege > Scope

Legal Ethics > Client Relations > Duties to Client > Duty of Confidentiality

HN6[] Privileges, Attorney-Client Privilege

N.H. R. Prof. Conduct 1.6(a) prohibits lawyers from revealing information "relating to the representation of a client."

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

Evidence > Privileges > Attorney-Client Privilege > Scope

Governments > Legislation > Interpretation

HN7[] Public Information, Sunshine Legislation

The Right-to-Know Law (RKL), RSA 91-A:2 (2001 and Supp. 2010), is a statute mandating that all public bodies open their meetings to the public unless one of several specific, enumerated exceptions or exclusions applies. Courts do not, in general, interpret a statute to abrogate the common law absent a clear legislative expression of intent to do so. However, there is no reason why the attorney-client evidentiary privilege (ACP) and the RKL cannot coexist. Whereas the common law ACP reflects a policy of encouraging clients to consult with lawyers by enabling the free and open exchange of information between the two, the RKL expresses a more specific policy - namely, a public body meeting to discuss matters within its purview. Moreover, to the extent that the ACP helps prevent a public body's adversary in litigation from gaining an unfair advantage, the legislature has safeguarded that interest by its enactment of RSA 91-A:3, II(e) (Supp. 2010), authorizing nonpublic sessions to consider or negotiate pending claims or litigation which has been threatened in writing or filed against the body, or against any member thereof because of his membership in such body or agency. In any case, the ACP is the client's to waive, and § 91-A:2 operates as a statutory public waiver of any possible privilege of the public client except in the narrow circumstances stated in the statute.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

Governments > Legislation > Interpretation

HN8[] Public Information, Sunshine Legislation

The Legislature's decision to enumerate specific exceptions to the open-meetings requirement compels the conclusion that these provisions provide the only circumstances in which a public body may enter into a private session for discussion. Exceptions are not to be implied. Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. Notably, RSA 91-A:3, II (Supp. 2010) allows public bodies to consider or act upon “only” certain matters in nonpublic session. The legislature contemplated the need for private discussions among the board members when it enacted these 10 exceptions to the open meetings mandate. The terms “discussed” in § 91-A:3, II(c) and “consideration” in § 91-A:3, II(d)-(j) stand in marked contrast to the narrower phrase “consultation with legal counsel” in RSA 91-A:2, I(b). Whereas the former provisions allow government bodies to consider and discuss the enumerated matters, the latter provision permits a far narrower category - consultation with legal counsel. When the legislature uses different language in the same statute, courts assume that the legislature intended something different.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN9[] Freedom of Information, Defenses & Exemptions From Public Disclosure

RSA 91-A:2 governs whether a meeting of a public body must be held in the open; nothing in that provision requires public bodies to share internal legal documents with the meeting's public attendees. *RSA 91-A:4* and 91-A:5 concern the disclosure of public records. Indeed, the public records disclosure law contains an exemption, in § 91-A:5, IV, for any “confidential”

information - further evidence that the legislature did not intend the consultation with legal counsel exclusion of § 91-A:2 to allow a public body to close a meeting whenever its discussion turns to advice received from its attorney who is neither physically present nor present telephonically and is therefore unable to participate in the discussion.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > General Overview

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN10[] **Sanctions Against Agencies, Costs & Attorney Fees**

RSA 91-A:8, I (Supp. 2010) allows courts to award attorney's fees to a person who has been refused access to a public proceeding after reasonably requesting such access if the lawsuit was necessary in order to make the proceeding open to the public and the agency knew or should have known that its conduct violated the Right-to-Know Law, RSA 91-A:2 (2001 and Supp. 2010).

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1.[] 1.

Statutes > Maxims and Rules of Construction

The interpretation of the Right-to-Know Law is to be decided ultimately by the New Hampshire Supreme Court, which applies the ordinary rules of statutory construction and first looks to the plain meaning of the words used. RSA 21:1, :2.

NH2.[] 2.

Administrative Law > Meetings > Public Right To Attend and Know

Courts resolve questions regarding the Right-to-Know Law with a view to best effectuate the statutory objective of facilitating open access to the actions and decisions of public bodies. As a result, provisions favoring disclosure are construed broadly and the exemptions are interpreted restrictively.

NH3.[] 3.

Administrative Law > Meetings > Public Right To Attend and Know

The Right-to-Know Law provides that all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public, but "consultation with legal counsel" is excluded from the definition of meeting and is therefore not subject to the statutory requirements for open meetings. RSA 91-A:2, I(b); II.

NH4.[] 4.

Administrative Law > Meetings > Public Right To Attend and Know

Based on the definition of a "consultation" and when read with the phrase "with legal counsel," the "consultation with legal counsel" exclusion does not encompass a situation in which the public body convenes a quorum of its membership only to discuss a legal memorandum prepared by, or at the direction of, the public body's attorney where that attorney is unavailable at the time of the discussion. At the very least, that clause requires the ability to have a contemporaneous exchange of words and ideas between the public body and its attorney. RSA 91-A:2, I.

NH5.[] 5.

Attorneys > Privileged Communications > Generally

The attorney-client privilege is an evidentiary rule allowing the attorney or client to withhold information shared in the course of the attorney-client relationship. N.H. R. Ev. 502(b).

NH6.[] 6.

Administrative Law > Meetings > Public Right To Attend and Know

There is no reason why the attorney-client evidentiary privilege and the Right-to-Know Law cannot coexist, as to the extent that the attorney-client privilege helps prevent a public body's adversary in litigation from gaining an unfair advantage, the legislature has safeguarded that interest by its authorization of nonpublic sessions. *RSA 91-A:3, II(e)*; :2.

NH7.[] 7.

Administrative Law > Meetings > Public Right To Attend and Know

The specific exceptions to the open-meetings requirement provide the only circumstances in which a public body may enter into a private session for discussion. *RSA 91-A:3, II*; :2, I(b).

NH8.[] 8.

Administrative Law > Meetings > Public Right To Attend and Know

Where a town planning board met in a private session not only to read a memorandum prepared at the direction of an attorney, but also to discuss and consider the memorandum without counsel present, the clear legislative mandate of the Right-to-Know Law requires that they do so in the open, as there were no applicable exceptions. *RSA 91-A:2, I(b)*; II.

NH9.[] 9.

Administrative Law > Meetings > Public Right To Attend and Know

There is no statutory provision that requires public bodies to share internal legal documents with a meeting's public attendees, and the public records disclosure law contains an exemption for any "confidential" information, which further supports the determination that the "consultation with legal counsel exclusion" of the Right-to-Know Law is not to allow a public body to close a meeting whenever its discussion turns to advice received from its attorney who is neither physically present nor present telephonically and is therefore unable to participate in the discussion. *RSA 91-A:2*; :4; 5.

NH10.[] 10.

Administrative Law > Meetings > Public Right To Attend and Know

A statutory provision allows courts to award attorney's fees to a person who has been refused access to a public proceeding after reasonably requesting such access if the lawsuit was necessary in order to make the proceeding open to the public and the agency knew or should have known that its conduct violated the Right-to-Know Law. *RSA 91-A:8, I*.

NH11.[] 11.

Administrative Law > Meetings > Public Right To Attend and Know

Attorney's fees were not warranted to abutting property owners who were refused access to a town planning board's meeting when it went into a private session for a period of time, as the issue of whether the board's actions fit within the "consultation with legal counsel" exception to the open meeting requirement was a matter of first impression. *RSA 91-A:2, I(b)*; :8, I.

Counsel: *Hastings Law Office, P.A.*, of Fryeburg, Maine (*Peter J. Malia, Jr.* on the brief and orally), for the plaintiffs.

Mitchell Municipal Group, P.A., of Laconia (*Laura A. Spector* on the brief and orally), for the defendant.

Judges: LYNN, J. DALIANIS, C.J., and DUGGAN, HICKS and CONBOY, JJ., concurred.

Opinion by: LYNN

Opinion

[*787] [564]** LYNN, J. The defendant, Town of Madison Planning Board (the Board), appeals, and the plaintiffs, Thomas and Margaret Ettinger, cross-appeal, the decision of the Superior Court (*HOURAN*, J.), which: (1) held that a private session by the Board on March 3, 2010, violated the Right-to-Know Law, RSA 91-A:2 (Supp. 2010); and (2) denied the plaintiffs' request for attorney's fees. We affirm.

I

The trial court found the following facts. In June 2009, the Pomeroy Limited Partnership (Pomeroy) received conditional approval from the Board to convert the buildings on its property to a condominium ownership form and to convey part of the property to the Nature Conservancy. In January 2010, the plaintiffs, whose property abuts the Pomeroy property, requested a public hearing to allow them to challenge the approval of the condominium plan. The Board scheduled a public hearing for March 3, 2010, to **[***2]** consider whether to grant final approval of the Pomeroy application. The plaintiffs' attorney appeared at that hearing.

At 7:00 p.m., the scheduled time of the hearing, the Board, joined by its administrative assistant, went into a private session for thirty minutes. In that session, they read and discussed emails from the Board's attorney, a memorandum summarizing legal advice relayed over the phone from the Board's attorney to the Board's administrative assistant, and letters from the plaintiffs' attorney. The Board then reopened the hearing at 7:34 p.m. and, after hearing the plaintiffs' attorney on the matter, granted final approval to the Pomeroy application.

The plaintiffs filed a petition in superior court, arguing that the private session violated New Hampshire's Right-to-Know Law, RSA ch. 91-A (2001 & Supp. 2010), and seeking an award of attorney's fees under RSA 91-A:8, I (Supp. 2010). The superior court agreed that the private session violated the Right-to-Know Law, but refused either to invalidate the Board's approval of the Pomeroy application or to award the plaintiffs attorney's fees. This appeal followed.

[*788] II

The Board argues that its members were permitted to read a letter **[***3]** from counsel and discuss its contents in a private session under the "consultation with legal counsel" exclusion from the definition of a "meeting" in the Right-to-Know Law. *See* RSA 91-A:2, I(b). The Board's view is that a consultation with legal counsel encompasses discussions of the advice of its attorney even when the attorney is not present at the discussion, or, in the alternative, that the legislature intended nothing more than to "codify the common law attorney client privilege as it applies to public bodies." The meaning of the Right-to-Know Law in this context is a question of first impression.

NH[1,2][↑] [1, 2] HN1[↑] The interpretation of the Right-to-Know Law is to be decided ultimately by this court. Murray v. N.H. Div. of State Police, 154 N.H. 579, 581, 913 A.2d 737 (2006). We apply the ordinary rules of statutory construction to our review of the Right-to-Know Law, and we accordingly first look to the plain meaning of the words used. Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475, 686 A.2d 310 (1996). Words and phrases are construed according to the common and approved usage of the language unless from **[**565]** the statute it appears that a different meaning was intended. RSA 21:1, :2 (2000). We resolve questions regarding **[***4]** the Right-to-Know Law with a view to best effectuate the statutory objective of facilitating open access to the actions and decisions of public bodies. *See* Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 546, 705 A2d 725 (1997). As a result, we broadly construe provisions favoring disclosure and interpret the exemptions restrictively. Goode v. N.H. Legislative Budget Assistant, 145 N.H. 451, 453, 767 A.2d 393 (2000). A public body bears the burden of proving that it may hold a nonpublic assembly of its members. *Cf.* Hampton Police Assoc. v. Town of Hampton, 162 N.H. 7, 14, 20 A.3d 994 (2011); Lambert v. Belknap County Convention, 157 N.H. 375, 379, 949 A.2d 709 (2008).

NH[3][↑] [3] HN2[↑] The Right-to-Know Law provides that "all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public." RSA 91-A:2, II (Supp. 2010). RSA 91-A:1 (2001) expresses the legislative policy of the statute: "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." The statute defines a **[***5]** meeting as the convening of a quorum of the

membership of a public body "for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power." RSA 91-A:2, I (Supp. 2010). "Consultation with legal counsel," however, is excluded from **[*789]** that definition and is therefore not subject to the various requirements for open meetings contained in RSA 91-A:2, II. RSA 91-A:2, I(b) (Supp. 2010).

With this statutory scheme in mind, we must determine whether the Board's private session qualifies as a "consultation with legal counsel" under RSA 91-A: 2, I(b). At the outset, we note that, although the Board members merely read the memoranda and emails containing the advice of counsel during the first twenty-five minutes of their private session, they also discussed the contents of those documents at the end of the session. Since any part of the private session found to violate the Right-to-Know Law would be grounds for affirming the superior court's decision, and since the statute defines a meeting as convening a quorum "for the purpose of discussing or acting upon" matters within a public body's purview, RSA 91-A:2, I, we **[***6]** focus here only on whether the Board's brief discussion violated the Right-to-Know Law.

NH[4] [4] We agree with the trial court that HN3 the literal meaning of the "consultation with legal counsel" exclusion does not encompass the discussion among the board members and its administrative assistant that occurred here. A "consultation" is "a council or conference (as between two or more persons) usually to consider a special matter." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 490 (unabridged ed. 2002); *accord* BALLENTINE'S LAW DICTIONARY 257 (3d ed. 1969) ("The deliberation of two or more persons on some matter; a council or conference to consider a special case."). Read together with the phrase "with legal counsel," a "consultation" does not encompass a situation in which the public body convenes a quorum of its membership, as set out in RSA 91-A:2, I, only to discuss a legal memorandum prepared by, or at the direction of, the public body's attorney where that attorney is unavailable at the time of the discussion. At the very least, that clause requires the ability to have a contemporaneous exchange **[**566]** of words and ideas between the public body and its attorney.

Anticipating the difficulties a literal **[***7]** construction of the statute poses for its argument, the Board argues that a consultation with legal counsel is coextensive with the common-law attorney-client privilege, and therefore allows public bodies to enter nonpublic sessions to discuss the written advice of counsel. We disagree.

NH[5] [5] As an initial matter, HN4 the attorney-client privilege is an evidentiary rule allowing the attorney or client to withhold information shared in the course of the attorney-client relationship. The classic articulation of the privilege is as follows:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to **[*790]** that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives.

Riddle Spring Realty Co. v. State, 107 N.H. 271, 273, 220 A.2d 751 (1966) (citing 8 J. WIGMORE, EVIDENCE §§ 2292, 2327-2329, at 554, 634-41 (McNaughten rev. 1961)). New Hampshire Rule of Evidence 502 embodies that rule, providing that HN5 "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential **[***8]** communications made for the purpose of facilitating the rendition of professional legal services to the client … ." N.H. R. EV. 502(b); *accord* HN6 N.H. R. Prof. Conduct 1.6(a) (prohibiting lawyers from revealing information "relating to the representation of a client").

NH[6] [6] By contrast, HN7 the Right-to-Know Law is a statute mandating that all public bodies open their meetings to the public unless one of several specific, enumerated exceptions or exclusions applies. We do not, in general, interpret a statute to abrogate the common law absent a clear legislative expression of intent to do so. *See* State v. Hermsdorf, 135 N.H. 360, 363, 605 A.2d 1045 (1992). Here, however, we discern no reason why the attorney-client evidentiary privilege and the Right-to-Know Law cannot coexist. *See* 1A N. SINGER & J.D. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 23.10, at 481 (7th ed. 2009) ("The presumption against implied repeals is overcome … by a showing that two acts are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that they cannot have concurrent operation."); *see also* State v. Wilton Railroad, 89 N.H. 59, 61-62, 192 A. 623 (1937) (requiring a "positive repugnancy" between **[***9]** two provisions before repealing by implication). Whereas the common law attorney-client privilege reflects a policy of encouraging

clients to consult with lawyers by enabling the free and open exchange of information between the two, the Right-to-Know Law expresses a more specific policy governing the disputed situation in this case — namely, a public body meeting to discuss matters within its purview. Moreover, to the extent that the attorney-client privilege helps prevent a public body's adversary *in litigation* from gaining an unfair advantage, the legislature has safeguarded that interest by its enactment of RSA 91-A:3, II(e) (Supp. 2010), authorizing nonpublic sessions to consider or negotiate "pending claims or litigation which has been threatened in writing or filed against the body … , or against any member thereof because of his membership in such body or agency … ." In any case, the privilege is the client's to waive, and RSA 91-A:2 operates "as a statutory public waiver of any possible privilege of the public client … except in the narrow circumstances stated in the statute." **[*791]** District Atty. v. Bd. of Selectmen, 395 Mass. 629, 481 N.E.2d 1128, 1131 (Mass. 1985); *accord* **[**567]** Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328, 333 (Tenn. 1984).

NH[7,8][↑] [7, 8] HN8[↑] Our **[***10]** legislature's decision to enumerate specific exceptions to the open-meetings requirement compels our conclusion that these provisions provide the only circumstances in which a public body may enter into a private session for discussion. "[E]xceptions are not to be implied… . Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied." 2A N. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.11, at 328-30 (7th ed. 2007) (footnotes omitted). Notably, RSA 91-A:3, II (Supp. 2010) allows public bodies to consider or act upon "[o]nly" certain matters in nonpublic session. The legislature contemplated the need for private *discussions* among the board members when it enacted these ten exceptions to the open meetings mandate. The terms "discussed" in RSA 91-A:3, II(c) and "consideration" in RSA 91-A:3, II(d)-(j) stand in marked contrast to the narrower phrase "consultation with legal counsel" in RSA 91-A:2, I(b). Whereas the former provisions allow government bodies to *consider* and *discuss* the enumerated matters, the latter provision permits a far narrower category — consultation *with* legal **[***11]** counsel. When the legislature uses different language in the same statute, we assume that the legislature intended something different. *See* State Employees Assoc. of N.H. v. N.H. Div. of Personnel, 158 N.H. 338, 345 (2009), 965 A.2d 1116. Had the legislature intended the exclusion in RSA 91-A:2, I(b) to cover not just consultations with legal counsel but also "consideration or discussion of the advice of counsel," the statute would have said as much. In this case, the Board met in a private session not only to read the memorandum prepared at the direction of the attorney, but also to "discuss" and "consider" the memorandum without counsel present. In the absence of an applicable exception, the clear legislative mandate of the Right-to-Know Law requires that they do so in the open. *See* District Atty. v. Bd. of Selectmen, 481 N.E.2d at 1131.

NH[9][↑] [9] Finally, we disagree with the Board's contention that, because the written communications from the Board's counsel may be protected from disclosure under RSA 91-A:5 (Supp. 2010), the meeting itself need not have been open to the public. HN9[↑] RSA 91-A:2 governs whether a meeting of a public body must be held in the open; nothing in that provision requires public bodies **[***12]** to share internal legal documents with the meeting's public attendees. *RSA 91-A:4* and RSA 91-A:5 concern the disclosure of public records. Indeed, as the Board correctly observes, the public records disclosure law contains an exemption, in RSA 91-A:5, IV, for any "confidential" information **[*792]** — further evidence that the legislature did not intend the consultation with legal counsel exclusion of RSA 91-A:2 to allow a public body to close a meeting whenever its discussion turns to advice received from its attorney who is neither physically present nor present telephonically and is therefore unable to participate in the discussion.

III

NH[10,11][↑] [10, 11] In their cross-appeal, the plaintiffs argue that they are entitled to attorney's fees under RSA 91-A:8, I (Supp. 2010). HN10[↑] That provision allows courts to award attorney's fees to a person who has been refused access to a public proceeding after reasonably requesting such access if the lawsuit was necessary in order to make the proceeding open to the public and the agency knew or should have known that its conduct violated the Right-to-Know Law. RSA 91-A:8, I. The plaintiffs contend that **[**568]** the Board should have known as "a matter of common sense" that their private **[***13]** session violated RSA 91-A:2. We agree with the superior court, however, that attorney's fees are not warranted here. As is evident from this decision, we have had no occasion, before today, to answer the particular question presented by the Board's actions: whether a public body's closed session to discuss the written advice of counsel who is absent fits within the "consultation with

legal counsel" exclusion of *RSA 91-A:2, I(b)*. *See Goode, 145 N.H. at 455* (concluding that defendant neither knew nor should have known that its conduct violated *RSA chapter 91-A* due, in part, to the state of case law). We cannot say that, lacking guidance from this court on the narrow issue before it, the Board should have known that its nonpublic session violated the Right-to-Know Law.

Affirmed.

DALIANIS, C.J., and DUGGAN, HICKS and CONBOY, JJ., concurred.

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Martin v. City of Rochester

Supreme Court of New Hampshire

February 12, 2020, Argued; June 9, 2020, Opinion Issued

No. 2019-0150

Reporter
2020 N.H. LEXIS 109 *

PAUL MARTIN v. CITY OF ROCHESTER

Notice: THIS OPINION IS SUBJECT TO MOTIONS FOR REHEARING UNDER NEW HAMPSHIRE PROCEDURAL RULES AS WELL AS FORMAL REVISION BEFORE PUBLICATION IN THE NEW HAMPSHIRE REPORTS.

Prior History: **[*1]** Strafford

Disposition: Affirmed.

Core Terms

advisory, municipal, photocopy, recommendations, appointing, open-meeting, machines, advice, e-mail

Case Summary

Overview

HOLDINGS: [1]-A city's technical review group was not an "advisory committee" or a "public body" under RSA 91-A:1-a, I and VI(d), and thus was not subject to the open meeting requirement of RSA 91-A:2, II, as it did not, as a group, render advice or make recommendations; rather, each member reviewed land use applications for compliance with the codes and concerns of the municipal department represented by the member; [2]-The trial court properly concluded that the city's copy fee schedule was commensurate with the "actual cost" of producing photocopies, as required by *RSA 91-A:4, IV*, as the statute did not mandate use of a formula for determining "actual cost," and the trial court received evidence of copy fee schedules from other municipalities and heard testimony from the city manager as to the costs considered in establishing the fee schedule.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Governmental Information, Freedom of**

Information

Interpretation of the Right-to-Know Law, RSA chapter 91-A, is a question of law that is reviewed de novo. When interpreting a statute, the appellate court first looks to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous. The ordinary rules of statutory construction apply to the court's interpretation of the Right-to-Know Law.

Administrative Law > ... > Public Information > Sunshine Legislation > Open Meetings

HN2 **Sunshine Legislation, Open Meetings**

Pursuant to the statute's plain meaning, the phrase "primary purpose" in RSA 91-A:1-a, I, limits which committees, councils, commissions, or other like bodies are advisory committees under the statute. The legislature has accomplished this limitation with the use of the phrase "so as to," which qualifies the verb "consider" that precedes it. Thus, a body's consideration of issues designated by the appointing authority in and of itself is not determinative of whether the body is an advisory committee. Rather, it is the purpose of the body's consideration that is the deciding factor — i.e., whether the body's primary purpose is to consider issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation. RSA 91-A:1-a, I.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review

HN3 **Standards of Review, De Novo Review**

When a trial court renders a decision after a trial on the merits, the appellate court upholds its factual findings and rulings unless they lack evidentiary support or are legally erroneous. The court does not decide whether it would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence. Thus, the appellate court defers to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence. Nevertheless, the appellate court reviews the trial court's application of the law to the facts de novo.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Processing Fees

Governments > Legislation > Interpretation

HN4 **Compliance With Disclosure Requests, Processing Fees**

In *RSA 91-A:4, IV*, the legislature did not mandate use of a formulaic method for determining actual cost, and the New Hampshire Supreme Court will not impose a requirement that the legislature did not see fit to include. The court will not consider what the legislature might have said or add language that the legislature did not see fit to include.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1. 1.

Notice > Generally > Open Meetings Law

A city's technical review group was not an “advisory committee” or a “public body,” and thus was not subject to the open meeting requirement of the Right-to-Know Law, as it did not, as a group, render advice or make recommendations; rather, each member reviewed land use applications for compliance with the codes and concerns of the municipal department represented by the member. RSA 91-A:1-a, I, VI(d); :2, II.

NH2. 2.

Notice > Generally > Open Meetings Law

Pursuant to the statute's plain meaning, the phrase “primary purpose” in the statute defining “public

proceedings" limits which committees, councils, commissions, or other like bodies are advisory committees under the statute. The legislature has accomplished this limitation with the use of the phrase "so as to," which qualifies the verb "consider" that precedes it. Thus, a body's consideration of issues designated by the appointing authority in and of itself is not determinative of whether the body is an advisory committee. Rather, it is the purpose of the body's consideration that is the deciding factor — *i.e.*, whether the body's primary purpose is to consider issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation. *RSA 91-A:1-a, I*.

NH3.[] 3.

Records > Right to Inspect > Procedure

In the statute governing minutes and records available for public inspection, the legislature did not mandate use of a formulaic method for determining actual cost of copying, and the court will not impose a requirement that the legislature did not see fit to include. The court will not consider what the legislature might have said or add language that the legislature did not see fit to include. *RSA 91-A:4, IV*.

NH4.[] 4.

Records > Right to Inspect > Procedure

The trial court properly concluded that the city's copy fee schedule was commensurate with the "actual cost" of producing photocopies, as the statute did not mandate use of a formula for determining "actual cost," and the trial court received evidence of copy fee schedules from other municipalities and heard testimony from the city manager as to the costs considered in establishing the fee schedule. Further, the city manager testified that the fee schedule was based upon the actual cost of copying, and not the labor associated with making the copies. *RSA 91-A:4, IV*.

Counsel: *Douglas, Leonard & Garvey, P.C.*, of Concord (*Jared Bedrick* on the brief), and *The MuniLaw Group*, of Epsom (*Tony F. Soltani* orally), for the plaintiff.

The Office of the Rochester City Attorney, of Rochester (*Terence M. O'Rourke*, city attorney, on the memorandum of law and orally), for the defendant.

Judges: BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

Opinion by: HICKS

Opinion

HICKS, J. The plaintiff, Paul Martin, appeals an order of the Superior Court (*HOURAN*, J.) denying his request for declaratory and injunctive relief against the defendant, City of Rochester (city), and ruling that the city's technical review group (TRG) is not a public body for purposes of the Right-to Know Law, *see* *RSA ch. 91-A*, and that the city's copy fee schedule is in compliance with *RSA 91-A:4, IV* (Supp. 2016). On appeal, the plaintiff argues that: (1) the TRG is a "public body," as defined by *RSA 91-A:1-a, VI(d)* (2013), because it is an "advisory committee," and is therefore subject to the open-meeting requirement of *RSA 91-A:2* (Supp. 2019); and (2) the city's copy fee schedule is prohibited by *RSA 91-A:4, IV*, as it charges citizens requesting a copy of a public record more than the "actual cost" of making the copy. For the reasons that follow, we affirm.

*I. Factual Background **[*2]** & Procedural History*

A. The Technical Review Group

The following facts were found by the court after a bench trial, or are otherwise derived from the record. The TRG is a "self-directed work team"[1] in the city,

[1] A self-directed work team is a staff committee formed by the chief executive, or in the city's case, the city manager. The

originally established by a former city manager. According to its statement of purpose, “the TRG is to review projects that are submitted for review to the Planning Board, including site plans and subdivisions.” The TRG is made up of city employees, including the chief planner or designee, city engineer, director of code enforcement, fire marshal, police captain, economic development manager or a designee (who chairs the group), and a representative of the conservation commission. The TRG does not have a separate budget and is funded by the departments from which the representatives come.

The city manager is the sole appointing authority for the TRG and has the ability to dissolve or expand the TRG without the approval of the city council. The city manager can appoint or remove TRG members at will. Neither the city council nor the planning board has any input or authority over the TRG. The TRG is not included in the city's charter or any city ordinance.

TRG meetings are not considered **[*3]** public meetings by the city for public notice purposes, and therefore no notices are sent and no minutes are taken at the meetings, although dates and times of the meetings are usually listed on the city's website. Participation and observation by the public are not permitted at TRG meetings. The secretary for the planning department is responsible for scheduling TRG meetings and sending electronic copies of the meeting agenda, applications to be reviewed, and accompanying plans to members of the TRG. The applications and project plans are placed in the planning board file and are available for inspection by the public. TRG members typically communicate using their city e-mail addresses, and although they communicate frequently in their capacity as city employees, they rarely communicate about TRG matters. E-mails sent using city e-mail addresses are captured on the city e-mail server and can be requested by the public for inspection.

At trial, the city manager testified that the TRG members advise applicants as well as the planning board, although the TRG has no binding decision-making authority. The director of planning and development for the city testified that neither the TRG as **[*4]** a whole nor its individual members have the authority to grant or deny conditional use permits, waivers, or variances. The director of planning further testified that the city has a constitutional duty to assist applicants preparing to go before the planning board, and that the TRG is part of the city's process in meeting that obligation. To that end, the applicant, or the applicant's agent, presents the application to the TRG. Its members then comment on the plans and suggest changes in accordance with various city regulations, laws, and policies. The TRG does not act as a group; each member makes suggestions based upon that person's specific knowledge. The applicant is free to disregard the TRG's recommendations, and is also free to request additional meetings with the TRG before presenting plans to the planning board. Similarly, the applicant may also contact individual members of the TRG after the TRG meeting.

The city's economic development director testified that the TRG is a group of city employees who work in an informal setting where the applicant can ask questions to prepare for presentations to the planning board. Additionally, the economic development director explained **[*5]** that if the TRG did not exist, the applicant would still have to speak to each one of the staff members comprising the TRG separately before going in front of the planning board. The TRG streamlines the process by having all of the department representatives available to an applicant in one place at the same time. The economic development director further testified that the planning board is not a “rubber stamp” for the TRG. She stated that she has witnessed instances in which the planning board has rejected a project that members of the TRG believed was ready for approval, approved a project that members of the TRG expressed concerns about, and ignored the TRG's comments altogether. The TRG can neither advance nor stop a project from moving forward.

Following a TRG meeting, the city's chief planner prepares a summary of comments made by TRG members during the meeting that is provided to the applicant and placed in the planning board file, which is available for public inspection. The city's economic development director testified that the TRG does not have records of its own, as its only function is to review applications and assist applicants. However, she stated that the comments **[*6]** made on a project by members of the TRG are loaded into a database, which can then be seen by the planning board. This database is a cloud-based system used by city staff to view applications and their respective comments. It is accessible to the public, and an individual interested in accessing the system can create a free account to view comments made on applications, including those made

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staff committee is given a charge with a specific purpose, and its members are self-directed to determine how they are going to achieve the directive they have been given. Rochester's city manager provided two examples, aside from the TRG, of self-directed work teams that exist within the city.

by TRG members.

B. Copy Fee Schedule

The plaintiff requested copies of certain documents from the city relating to the planning board and the TRG. The city charges a fee for making copies of city records or files: for black and white photocopies, the fee is fifty cents per page for the first ten pages and ten cents per page thereafter. At trial, the city presented evidence of fee schedules from New Hampshire municipalities that are similar to its own. The city manager testified that the city charges only for the cost of copying, not for the labor associated therewith, and that the cost of copying includes the cost of leasing copy machines, machine maintenance, capital costs, and the cost of paper. Based on his history and experience as finance director for the city, the city manager also testified **[*7]** that he believes the city is charging a reasonable approximation of the actual cost to the city for producing a photocopy, and that payments for copying are not a revenue source and do not produce a profit.

C. Procedural History

In October 2017, the plaintiff sent an e-mail to the city's attorney claiming that the city's practice of prohibiting the public from attending TRG meetings violates the Right-to-Know Law's open-meeting requirement. The city's attorney responded that the TRG does not hold "meetings" as defined in the Right-to-Know Law because the TRG is not a "public body" subject to its mandate. Subsequently, in May 2018, the plaintiff filed this suit seeking declaratory and injunctive relief from the city's practice of prohibiting the public from attending TRG meetings. The plaintiff's petition also challenged the city's copy fee schedule, claiming that it is excessive and chills or deters public access to government records. After a bench trial, the court denied the plaintiff's prayers for relief. This appeal followed.

II. Discussion

HN1[↑] Resolution of this case requires us to interpret the Right-to-Know Law, RSA chapter 91-A, which is a question of law that we review *de novo*. *Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 703 (2010)*. When interpreting **[*8]** a statute, we first look to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous. *Id.* The ordinary rules of statutory construction apply to our interpretation of the Right-to-Know Law. *Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475, 686 A.2d 310 (1996)*.

A. TRG as a "Public Body"

The plaintiff first argues that the TRG is a "public body" because it is an "advisory committee," and, therefore, its meetings must be open to the public. *See* RSA 91-A:2, I (defining a "meeting" as "the convening of a quorum of the membership of a public body"); *II* (stating that "all meetings … shall be open to the public"). The definition of "public body" includes five categories. *See* RSA 91-A:1-a, VI(a)-(e) (2013). Relevant to this appeal is the category defining a "public body" as: "Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto." *RSA 91-A:1-a, VI(d)*. The statute defines an "advisory committee" as:

> [A]ny committee, council, commission, or other like body whose primary purpose is to **[*9]** consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

RSA 91-A:1-a, I (2013).

The plaintiff argues that the TRG is an "advisory committee" because its primary purpose is to consider land use applications and provide advice or recommendations on them to the planning board, a member of which is the city manager, the TRG's appointing authority. We are not persuaded.

NH[1][↑] [1] Although TRG members make comments on permit applications that may be helpful to the planning board, it does not, as a group, render advice or make recommendations. Rather, each member reviews the application for compliance with the respective department codes and concerns. The record makes clear that, in considering land use applications, the TRG's role is to apprise applicants of the relevant concerns of the municipal departments represented by its members. This process is meant to assist the applicant in preparing the application for the planning

board, consistent with the city's constitutional obligation to provide assistance to all its citizens. **[*10]** *See Richmond Co. v. City of Concord, 149 N.H. 312, 314, 821 A.2d 1059 (2003)*; N.H. CONST. pt. I, art. 1.

The plaintiff, however, reads the phrase "primary purpose" in *RSA 91-A:1-a, I*, as relating only to the TRG's role in "considering" an application, not necessarily "advising" on it. Under this reading, the plaintiff contends that the TRG's primary purpose is to consider whatever "subject matter … the city manager has designated for consideration." We disagree with the plaintiff's reading of the statute.

NH[2][↑] [2] *HN2*[↑] Pursuant to the statute's plain meaning, the phrase "primary purpose" limits which committees, councils, commissions, or other like bodies are advisory committees under the statute. The legislature has accomplished this limitation with the use of the phrase "so as to," which qualifies the verb "consider" that precedes it. Thus, a body's consideration of issues designated by the appointing authority in and of itself is not determinative of whether the body is an advisory committee. Rather, it is the purpose of the body's consideration that is the deciding factor — *i.e.*, whether the body's primary purpose is to consider issues "designated by the appointing authority *so as to* provide such authority with advice or recommendations concerning the formulation of any public policy or legislation **[*11]** . …" *RSA 91-A:1-a, I* (emphasis added). Because the TRG, as a committee, does not provide such advice or recommendations, it is not an advisory committee.

As the city points out, even if the TRG were to be dissolved, its work would still take place by way of a more burdensome process involving a series of individual meetings between applicants and municipal department officials. The city further observes, and the plaintiff does not dispute, that those individual meetings would not be subject to the Right-to-Know Law's open-meeting requirement. Nevertheless, the plaintiff argues that streamlining this process by gathering the municipal officials and the applicant in the same room triggers the open-meeting requirement. *See RSA 91-A:2, II*. In illustration of his position, the plaintiff contends that the TRG is no different from the industrial advisory committee that we concluded was subject to the Right-to-Know Law in *Bradbury v. Shaw, 116 N.H. 388, 389-90, 360 A.2d 123 (1976)*. He contends that both the TRG and the committee in *Bradbury* "merely gathered and disseminated information to get it ready for submission … in a more efficient way," and that the industrial advisory committee did not have "any more influence on decisions of the mayor or city council than the **[*12]** TRG has on the Planning Board."

We disagree with the plaintiff's characterization of the committee in *Bradbury*. The *Bradbury* committee considered matters of policy, including the extension of city water and sewer lines and the construction of new streets, and advised the mayor — the committee's appointing authority — on the sale of city-owned land. *Bradbury, 116 N.H. at 389-90*. Indeed, the mayor submitted one proposal for the sale of city-owned land to the city council with a statement that the committee had approved it. *Id. at 389*. On that record, we concluded that "the trial court properly found that the committee's involvement in governmental programs and decisions brought it within the scope of the right to-know law." *Id. at 390*. By contrast, the TRG, as the trial court explained, "is not constituted to advise or make recommendations concerning formulation of public policy or legislation." Rather, the TRG members consider land use applications and apprise each applicant of the concerns of particular municipal departments that are represented by members of the TRG. This process is meant to assist the applicants in preparing their applications for presentation to the planning board. The TRG simply is not involved in "governmental **[*13]** programs and decisions" as was the committee in *Bradbury. Id.*

Therefore, we conclude that the TRG is neither an "advisory committee" nor a "public body," as defined by *RSA 91-A:1-a, I*, and *RSA 91-A:1-a, VI(d)*, respectively. Accordingly, meetings of the TRG are not subject to the open-meeting requirement contained in *RSA 91-A:2, II*.

B. City Copy Fee Schedule

Next, the plaintiff argues that the trial court erred in concluding that the fees assessed by the city for providing photocopies of public records are commensurate with the actual costs of producing a photocopy, as required by *RSA 91-A:4, IV*. That provision provides, in part, that:

> If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency.

The plaintiff contends that, in drawing its conclusion, the trial court either relied on evidence that does not support its conclusion, or misapplied *RSA 91-A:4, IV* by failing to conduct a formulaic numeric analysis to determine the city's "actual cost" of providing a photocopy. Based upon the plaintiff's calculations, **[*14]** he maintains that the trial court could not have properly concluded that a rate higher than approximately four cents per page complies with the requirements of the *Right-to-Know Law*.

HN3[↑] When a trial court renders a decision after a trial on the merits, we uphold its factual findings and rulings unless they lack evidentiary support or are legally erroneous. *Vention Med. Advanced Components v. Pappas, 171 N.H. 13, 28, 188 A.3d 261 (2018)*. We do not decide whether we would have ruled differently than the trial court, but rather, whether a reasonable person could have reached the same decision as the trial court based upon the same evidence. *Marist Bros. of N.H. v. Town of Effingham, 171 N.H. 305, 309 (2018)*. Thus, we defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence. *Id.* Nevertheless, we review the trial court's application of the law to the facts *de novo*. *Id.*

NH[3][↑] [3] ***HN4***[↑] We note that, in *RSA 91-A:4, IV*, the legislature did not mandate use of a formulaic method for determining "actual cost" and we decline the plaintiff's invitation to impose a requirement that the legislature did not see fit to include. *See Petition of Malisos, 166 N.H. 726, 729 (2014)* ("We … will not consider what the legislature might have said or add language that the legislature did not see fit to include."). **[*15]** Therefore, contrary to the plaintiff's assertion, to prove that the city's copy fee schedule complied with *RSA 91-A:4, IV*, the city was not obligated to proffer either specific numbers in support of its rate, or the city budget.

NH[4][↑] [4] At trial, the court received evidence of copy fee schedules[2] from other municipalities. In addition, the city manager testified to the costs of producing a photocopy that are considered when establishing the fee schedule, including the cost of leasing copy machines, maintenance, capital costs on the machines, and the cost of paper. Further, the city manager testified that the fee schedule is based upon the actual cost of copying, and not the labor associated with making the copies. The trial court found that the city's fee schedule is "commensurate with 'the actual cost of providing the copy,' … as evidenced by testimony of City officials and by comparison with other fees assessed in comparable municipalities across the state." On the record before us, we conclude that the evidence presented to the trial court was sufficient such that a reasonable person could draw the same conclusion that the court did.

III. Conclusion

We affirm the trial court's ruling that TRG meetings **[*16]** are not subject to the open-meeting requirement contained in *RSA 91-A:2*, and that the city's copy fee schedule is commensurate with the "actual cost" of producing photocopies, as required by *RSA 91-A:4, IV*.

Affirmed.

BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

End of Document

[2] Based upon that evidence, the trial court found that "Derry charges twenty-five cents per page for a photocopy; Dover charges fifty cents per page; Portsmouth charges two dollars for the first page and fifty cents thereafter; Somersworth charges ten dollars for up to ten pages and any page beyond that is one dollar per page; Claremont charges twenty-five cents to one dollar per page depending on the paper size; Nashua charges seventy-five cents for the first page and ten cents per page after that; Laconia charges one dollar per page; and Manchester charges one dollar for the first copy and fifty cents for each additional copy."

N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit

Supreme Court of New Hampshire

January 13, 2016, Argued; June 2, 2016, Opinion Issued

No. 2015-0366

Reporter
169 N.H. 95 *; 143 A.3d 829 **; 2016 N.H. LEXIS 55 ***

NEW HAMPSHIRE RIGHT TO LIFE *& a.* v. DIRECTOR, NEW HAMPSHIRE CHARITABLE TRUSTS UNIT *& a.*

Prior History: [*1]** Strafford.

Disposition: Affirmed in part; reversed in part; vacated in part; and remanded.

Core Terms

disclosure, privacy, quotation, clinics, redacted, license, exempt, zone, nondisclosure, buffer, e-mail, messages, withheld, withholding, pharmacist, renewal, reproductive, footage, entity, correspondence, invasion, sidewalk, site, protestors, salaries, harassment, discovery, abortion, entrance, patients

Case Summary

Overview

HOLDINGS: [1]-A declaration by an official of a group that provided abortions was exempt from the Right-to-Know Law as attorney work product pursuant to RSA 91-A:5, IV, as it was prepared at the direction of attorneys for use in buffer-zone litigation, and the entire declaration was exempt even though it arguably contained some purely factual information; [2]-The State properly withheld on privacy grounds under RSA 91-A:5, IV the names of individuals listed in the organization's applications for renewed licenses to distribute medication without a pharmacist on site, given the evidence of protests in New Hampshire against abortion clinics and the history nationally of harassment and violence associated with the provision of abortion services and the attenuated public interest in the names of those individuals.

Outcome
Affirmed in part; reversed in part; vacated in part; and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1[] **Appeals, Appellate Briefs**

Arguments not briefed are waived on appeal.

Administrative Law > Governmental Information > Freedom of Information

Governments > Legislation > Interpretation

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN2[] Governmental Information, Freedom of Information

The ordinary rules of statutory construction apply to review of the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015). Thus, the New Hampshire Supreme Court is the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. When examining the language of a statute, the court ascribes the plain and ordinary meaning to the words used. The court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. The court also interprets a statute in the context of the overall statutory scheme and not in isolation.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Governments > Legislation > Interpretation

Administrative Law > Governmental Information > Freedom of Information

HN3[] Freedom of Information, Defenses & Exemptions From Public Disclosure

The purpose of the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), 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. RSA 91-A:1 (2013). Thus, the Right-to-Know Law furthers the state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. N.H. Const. pt. I, art. 8. Although the statute does not provide for unrestricted access to public records, the appellate court resolves questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives. As a result, the court broadly construes provisions favoring disclosure and interpret the exemptions restrictively. The court also looks to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act. Such similar laws, because they are in pari materia, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Governments > Legislation > Interpretation

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN4[] Enforcement, Burdens of Proof

When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), that entity bears a heavy burden to shift the balance toward nondisclosure. The appellate court reviews the trial court's statutory interpretation and its application of law to undisputed facts de novo.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN5[] Freedom of Information, Defenses & Exemptions From Public Disclosure

RSA 91-A:5 identifies materials that are exempt from disclosure under the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), including confidential, commercial, or financial information and other files whose disclosure would constitute invasion of privacy. RSA 91-A:5, IV.

Business & Corporate Compliance > ... > Healthcare Law > Medical Treatment > Abortion

Healthcare Law > Medical Treatment > Reproductive Services > Reproductive Technology

HN6[] Medical Treatment, Abortion

RSA 132:38, I, provides that during the business hours of a reproductive health care facility, no person shall

knowingly enter or remain on a public way or sidewalk adjacent to such a facility within a radius up to 25 feet of any portion of an entrance, exit, or driveway of that facility. RSA 132:38, IV.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Work Product

HN7 **Interagency Memoranda, Work Product**

Attorney work product, like communications protected by the attorney-client privilege, falls within the exemption from the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), for confidential information. RSA 91-A:5, IV.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Evidence > Privileges

HN8 **Subject Matter Jurisdiction, Federal Questions**

With federal question jurisdiction, courts usually apply federal privilege law to the federal claims and pendent state law claims.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN9 **Standards of Review, De Novo Review**

An appellate court reviews de novo the trial court's application of law to undisputed facts.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Work Product

HN10 **Interagency Memoranda, Work Product**

With regard to freedom of information cases, the work product doctrine safeguards the work of an attorney done in anticipation of, or during, litigation from disclosure to the opposing party. The doctrine encompasses work done by non-lawyers at the direction of lawyers.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Work Product

HN11 **Interagency Memoranda, Work Product**

For Freedom of Information Act (FOIA) purposes, the distinction between "opinion" and "ordinary" work product is immaterial. This is so because the test for disclosure under FOIA is whether the documents would be routinely or normally disclosed upon a showing of relevance. Necessarily, information that is protected from discovery under a qualified privilege is not routinely or normally disclosed upon a showing of relevance. As the United States Supreme Court has explained, for FOIA purposes, it makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under FOIA. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to routine disclosure. This approach prevents the FOIA from being used to circumvent civil discovery rules.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Work Product

HN12 **Interagency Memoranda, Work Product**

The test for disclosure under the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), is whether the documents would be routinely or normally disclosed upon a showing of relevance. Accordingly, because documents protected by work product are not routinely or normally disclosed upon a showing of relevance, they are exempt from disclosure under the Right-to-Know Law.

Civil Procedure > Appeals > Standards of Review

HN13 **Appeals, Standards of Review**

When the trial court reaches the correct result on mistaken grounds, the appellate court will affirm if valid

alternative grounds support the decision.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Work Product

HN14 **Interagency Memoranda, Work Product**

Federal courts in freedom of information cases have held that the work product doctrine encompasses purely factual information.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Work Product

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > Fact Work Product

HN15 **Interagency Memoranda, Work Product**

Although factual materials falling within the scope of attorney work product may be discovered in non-Freedom of Information Act (FOIA) cases upon a showing of substantial need, under FOIA, the test is whether information would routinely be disclosed in private litigation.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Work Product

HN16 **Interagency Memoranda, Work Product**

The work product doctrine in freedom of information cases extends to work performed by non-attorneys at the direction of attorneys.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Interagency Memoranda > Work Product

HN17 **Interagency Memoranda, Work Product**

The prevailing rule is that because work product protection is provided against adversaries, only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection in freedom of information cases.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN18 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), specifically exempts from disclosure files whose disclosure would constitute invasion of privacy. RSA 91-A:5, IV. This section of the Right-to-Know Law means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN19 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

A court engages in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV. First, the court evaluates whether there is a privacy interest that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), mandates disclosure. Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations. Next, the court assesses the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, the court balances the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure. When the exemption is claimed on the ground that disclosure would constitute an invasion of privacy, the court examines the nature of the requested document and its relationship to the basic purpose of

the Right-to-Know Law.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN20 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The purpose of the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), is to provide the utmost information to the public about what its government is up to. The central purpose of the Right-to-Know Law is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN21 **Enforcement, Burdens of Proof**

The party resisting disclosure under the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015), bears a heavy burden to shift the balance toward nondisclosure. Thus, review focuses upon whether the State has shown that the records sought will not inform the public about the State's activities, or that a valid privacy interest, on balance, outweighs the public interest in disclosure. When the facts are undisputed, the appellate court reviews the trial court's balancing of the public's interest in disclosure and the interests in nondisclosure de novo.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN22 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

In our society, individuals generally have a large measure of control over the disclosure of their own identities and whereabouts. The United States Supreme Court has referred to this as an interest in retaining the "practical obscurity" of private information that may be publicly available, but difficult to obtain.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN23 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN24 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

Under some circumstances, individuals retain a strong privacy interest in their identities, and information identifying individuals may be withheld to protect that privacy interest. One such circumstance is when public identification could conceivably subject those identified to harassment and annoyance in the conduct of their official duties and in their private lives. Indeed, individuals have an even stronger privacy interest in avoiding physical danger than in the accepted privacy interest in the nondisclosure of their names and addresses in connection with financial information.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN25 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

With regard to freedom of information acts, prior revelations of exempt information do not destroy an individual's privacy interest.

Healthcare Law > Medical Treatment > Reproductive Services

HN26 **Medical Treatment, Reproductive Services**

RSA 318:42, VII allows registered nurses in clinics of nonprofit family planning agencies under contract with the New Hampshire Department of Health and Human Services to dispense non-controlled prescription drugs provided that certain conditions are met, including that the clinic possesses a current limited retail drug distributor's license. RSA 318:42, VII(d).

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN27 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

When the sole public interest in disclosing the information is derivative, it is entitled to little weight under the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015).

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN28 **Methods of Disclosure, Vaughn Indexes**

Generally, a Vaughn index includes a general description of each document withheld and a justification for its nondisclosure.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN29 **Methods of Disclosure, Record Requests**

RSA 91-A:4, IV provides that when denying a request to produce a public record for inspection and copying, a public body or agency need only put the denial in writing and provide reasons for the denial.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN30 **Methods of Disclosure, Record Requests**

An agency is not required to justify its refusal to disclose on a document-by-document basis, and while the preparation of a Vaughn index may be sufficient to justify an agency's refusal to disclose, doing so is not necessarily required.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN31 **Reviewability of Lower Court Decisions, Preservation for Review**

It is the burden of the appealing party to demonstrate that it raised its issues before the trial court.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN32 **Costs & Attorney Fees, Grounds for Recovery**

Under RSA 91-A:8, I, attorney's fees shall be awarded to a plaintiff if the trial court finds that: (1) such lawsuit was necessary in order to make the information available; and (2) the public body, public agency, or person knew or should have known that the conduct engaged in was a violation of RSA ch. 91-A. An appellate court will defer to the trial court's findings of fact unless they are unsupported by the evidence or erroneous as a matter of law.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

HN33 **Costs & Attorney Fees, Grounds for**

Recovery

Under RSA 91-A:8, I, the trial court must award costs to a plaintiff only when it finds that the plaintiff's lawsuit was necessary in order to enforce compliance with, or to address a purposeful violation of, the Right-to-Know Law, RSA ch. 91-A (2013 & Supp. 2015). RSA 91-A:8, I.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1.[] 1.

Appeal and Error > Questions Considered on Appeal > Matter Not Briefed

Arguments not briefed are waived on appeal.

NH2.[] 2.

Records > Right to Inspect > Generally

The ordinary rules of statutory construction apply to review of the Right-to-Know Law. Thus, the court is the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole. When examining the language of a statute, the court ascribes the plain and ordinary meaning to the words used. The court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. The court also interprets a statute in the context of the overall statutory scheme and not in isolation. RSA ch. 91-A.

NH3.[] 3.

Records > Right to Inspect > Generally

The purpose of the Right-to-Know Law 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. Thus, the Right-to-Know Law furthers the state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. Although the statute does not provide for unrestricted access to public records, the court resolves questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives. As a result, the court broadly construes provisions favoring disclosure and interprets the exemptions restrictively. The court also looks to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act. Such similar laws, because they are in *pari materia*, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved. N.H. CONST. pt. I, art. 8; RSA 91-A:1.

NH4.[] 4.

Records > Right to Inspect > Procedure

When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure. The court reviews the trial court's statutory interpretation and its application of law to undisputed facts *de novo*. RSA ch. 91-A.

NH5.[] 5.

Records > Right to Inspect > Exceptions

Attorney work product, like communications protected by the attorney-client privilege, falls within the exemption from the Right-to-Know Law for confidential information. RSA 91-A:5, IV.

NH6.[] 6.

Discovery > Production of Documents or Objects > Confidential or Privileged

With federal question jurisdiction, courts usually apply federal privilege law to the federal claims and pendent state law claims.

[*96] NH7.[] 7.

Records > Right to Inspect > Exceptions

With regard to freedom of information cases, the work product doctrine safeguards the work of an attorney done in anticipation of, or during, litigation from disclosure to the opposing party. The doctrine encompasses work done by non-lawyers at the direction of lawyers.

NH8.[] 8.

Records > Right to Inspect > Exceptions

For Freedom of Information Act (FOIA) purposes, the distinction between "opinion" and "ordinary" work product is immaterial. This is so because the test for disclosure under FOIA is whether the documents would be routinely or normally disclosed upon a showing of relevance. Necessarily, information that is protected from discovery under a qualified privilege is not routinely or normally disclosed upon a showing of relevance. As the United States Supreme Court has explained, for FOIA purposes, it makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under FOIA. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to routine disclosure. This approach prevents FOIA from being used to circumvent civil discovery rules.

NH9.[] 9.

Records > Right to Inspect > Exceptions

The test for disclosure under the Right-to-Know Law is whether the documents would be routinely or normally disclosed upon a showing of relevance. Accordingly, because documents protected by work product are not routinely or normally disclosed upon a showing of relevance, they are exempt from disclosure under the Right-to-Know Law. RSA ch. 91-A.

NH10.[] 10.

Records > Right to Inspect > Exceptions

A declaration by an official of a group that provided abortions was exempt from the Right-to-Know Law as attorney work product, as it was prepared at the direction of attorneys for use in buffer-zone litigation. Furthermore, the entire declaration was exempt even though it arguably contained some purely factual information; the Right-to-Know Law did not mandate disclosure even if the declaration constituted only "ordinary" work product; and there was no waiver of the doctrine as the declaration was prepared at the request of the attorney general, who was one of the defendants in the buffer litigation. RSA 91-A:5, IV.

NH11.[] 11.

Appeal and Error > Affirmance > Grounds

When the trial court reaches the correct result on mistaken grounds, the court will affirm if valid alternative grounds support the decision.

NH12.[] 12.

Records > Right to Inspect > Exceptions

Federal courts in freedom of information cases have held that the work product doctrine encompasses purely factual information.

NH13.[] 13.

Records > Right to Inspect > Exceptions

Although factual materials falling within the scope of attorney work product may be discovered in non-Freedom of Information Act (FOIA) cases upon a showing of substantial need, under FOIA, the test is whether information would routinely be disclosed in private litigation.

NH14.[] 14.

Records > Right to Inspect > Exceptions

The work product doctrine in freedom of information cases extends to work performed by non-attorneys at the direction of attorneys.

[*97] NH15.[] 15.

Records > Right to Inspect > Exceptions

E-mail messages were exempt from the Right-to-Know

Law as attorney work product when they were created for abortion clinic buffer zone litigation either by attorneys at the Attorney General's Office or at their direction, and the subject of the messages was the preparation of pleadings for that litigation. RSA 91-A:5, IV.

NH16.[] 16.

Records > Right to Inspect > Exceptions

E-mail messages exchanged between the state attorney general (AG) and offices of attorneys general in other states were exempt from the Right-to-Know Law as attorney work product. They were created in connection with a case then pending before the United States Supreme Court and included draft amicus briefs and concerned the process by which the AG decided whether to join or file amicus briefs in that case; the fact that New Hampshire did not ultimately do so did not mean that the work product protection was waived. RSA 91-A:5, IV.

NH17.[] 17.

Records > Right to Inspect > Exceptions

The prevailing rule is that because work product protection is provided against adversaries, only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection in freedom of information cases.

NH18.[] 18.

Records > Right to Inspect > Exceptions

The Right-to-Know Law specifically exempts from disclosure files whose disclosure would constitute invasion of privacy. This section of the Right-to-Know Law means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed. RSA 91-A:5, IV.

NH19.[] 19.

Records > Right to Inspect > Exceptions

A court engages in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy. First, the court evaluates whether there is a privacy interest that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure. Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations. Next, the court assesses the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, the court balances the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure. When the exemption is claimed on the ground that disclosure would constitute an invasion of privacy, the court examines the nature of the requested document and its relationship to the basic purpose of the Right-to-Know Law. RSA 91-A:5, IV.

NH20.[] 20.

Records > Right to Inspect > Exceptions

The purpose of the Right-to-Know Law is to provide the utmost information to the public about what its government is up to. The central purpose of the Right-to-Know Law is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released. RSA ch. 91-A.

NH21.[] 21.

Records > Right to Inspect > Appeals

The party resisting disclosure under the Right-to-Know Law bears a heavy burden to shift the balance toward nondisclosure. Thus, review focuses upon whether the State has **[*98]** shown that the records sought will not inform the public about the State's activities, or that a valid privacy interest, on balance, outweighs the public interest in disclosure. When the facts are undisputed, the court reviews the trial court's balancing of the public's interest in disclosure and the interests in nondisclosure *de novo*. RSA ch. 91-A.

NH22.[] 22.

Records > Right to Inspect > Exceptions

Although non-protesting individuals shown in DVD footage of a public sidewalk by an abortion clinic, or whose vehicles were shown, had at least some privacy interest under the Right-to-Know Law in controlling the dissemination of the footage, remand for additional fact-finding was necessary to determine whether the DVDs implicated heightened privacy concerns. RSA 91-A:5, IV.

NH23.[] 23.

Records > Right to Inspect > Exceptions

In our society, individuals generally have a large measure of control over the disclosure of their own identities and whereabouts. The United States Supreme Court has referred to this as an interest in retaining the "practical obscurity" of private information that may be publicly available, but difficult to obtain.

NH24.[] 24.

Records > Right to Inspect > Exceptions

The fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information.

NH25.[] 25.

Records > Right to Inspect > Exceptions

The State properly withheld on privacy grounds under the Right-to-Know Law the names of individuals listed in an abortion provider's applications for renewed licenses to distribute medication without a pharmacist on site, given the evidence of protests in New Hampshire against abortion clinics and the history nationally of harassment and violence associated with the provision of abortion services and the attenuated public interest in the names of those individuals. Even if the names of the individuals at issue had been previously made available to the public, prior revelations of exempt information did not destroy an individual's privacy interest. RSA 91-A:5, IV.

NH26.[] 26.

Records > Right to Inspect > Exceptions

Under some circumstances, individuals retain a strong privacy interest in their identities, and information identifying individuals may be withheld to protect that privacy interest. One such circumstance is when public identification could conceivably subject those identified to harassment and annoyance in the conduct of their official duties and in their private lives. Indeed, individuals have an even stronger privacy interest in avoiding physical danger than in the accepted privacy interest in the nondisclosure of their names and addresses in connection with financial information.

NH27.[] 27.

Records > Right to Inspect > Exceptions

With regard to freedom of information acts, prior revelations of exempt information do not destroy an individual's privacy interest.

NH28.[] 28.

Records > Right to Inspect > Exceptions

The State properly redacted monetary amounts contained in financial documents of a women's health center under the Right-to-Know Law, as plaintiffs failed to sufficiently develop their argument that the center had little or no privacy interest in the documents and there was a relatively weak public interest in disclosure in that the documents did not demonstrate how state grant money was spent. RSA 91-A:5, IV.

[*99] NH29.[] 29.

Records > Right to Inspect > Exceptions

State properly redacted names from documents from a women's health center, as the individuals had a cognizable privacy interest in controlling the dissemination of their names and their connection to the center and the only public interest, enabling the public to scrutinize whether the individuals had contributed to political campaigns, was derivative. RSA 91-A:5, IV.

NH30.[] 30.

Records > Right to Inspect > Exceptions

When the sole public interest in disclosing the information is derivative, it is entitled to little weight in Right-to-Know Law cases. RSA ch. 91-A.

NH31.[] 31.

Records > Right to Inspect > Procedure

Generally, a *Vaughn* index includes a general description of each document withheld and a justification for its nondisclosure.

NH32.[] 32.

Records > Right to Inspect > Procedure

The State's written responses to plaintiffs' Right-to-Know requests satisfied the requirements of the Right-to-Know Law. In response to each request, the State cited statutory provisions, case law, or applicable privileges; it was not required to provide a *Vaughn* index. *RSA 91-A:4, IV*.

NH33.[] 33.

Records > Right to Inspect > Procedure

An agency is not required to justify its refusal to disclose on a document-by-document basis, and while the preparation of a *Vaughn* index may be sufficient to justify an agency's refusal to disclose, doing so is not necessarily required.

NH34.[] 34.

Appeal and Error > Preservation of Questions > Failure to Raise Issue

It is the burden of the appealing party to demonstrate that it raised its issues before the trial court.

NH35.[] 35.

Records > Right to Inspect > Attorney Fees

The trial court did not err by denying plaintiffs attorney's fees when it found that the lawsuit was not necessary to enforce one agency's compliance with the law, when the State sufficiently justified its exemptions and withholdings with regard to certain documents, and when the trial court found that certain redactions and withholdings were not so unreasonable under current New Hampshire case law that the State knew or should have known that disclosure was required. RSA 91-A:8

NH36.[] 36.

Records > Right to Inspect > Generally

Because the trial court found, and the record supported its finding, that plaintiffs' lawsuit was not necessary to enforce compliance with the Right-to-Know Law, it properly denied plaintiffs' request for costs. RSA 91-A:8, I.

Counsel: *Wadleigh, Starr & Peters, PLLC*, of Manchester (*Michael J. Tierney* on the brief and orally), for the plaintiffs.

Joseph A. Foster, attorney general (*Megan A. Yaple*, attorney, and *Lynmarie Cusack*, assistant attorney general, on the brief, and *Ms. Yaple* orally), for the defendants.

Judges: BASSETT, J. DALIANIS, C.J., and CONBOY and LYNN, JJ., concurred.

Opinion by: BASSETT

Opinion

[836]** BASSETT, J. The plaintiffs, New Hampshire Right to Life and Jackie Pelletier, appeal orders by the Superior Court (*MANGONES*, J.) granting in part and

denying in part their petition for an order requiring the **[*100]** defendants, the Director, Charitable Trusts Unit (CTU), the Office of the New Hampshire Attorney General (AG), the New Hampshire Board of Pharmacy (Board of Pharmacy), and the New Hampshire Department of Health and Human Services (DHHS), collectively referred to as "the State," to produce, under the *Right-to-Know Law*, without redaction, all documents and other materials responsive to the plaintiffs' prior requests. *See* RSA ch. 91-A (2013 & Supp. 2015). The trial court ordered the State to produce certain documents, but upheld the State's withholding or redactions of other documents **[***2]** because it determined that they were exempt from disclosure under the *Right-to-Know Law*. *See* RSA 91-A:5, IV (2013). On appeal, the plaintiffs argue that in so deciding and in denying their associated requests for attorney's fees and costs, the trial court erred. We affirm in part, reverse in part, vacate in part, and remand.

[837]** *I. Background*

The relevant facts follow. New Hampshire Right to Life "is a New Hampshire non-profit organization opposed to government support, by taxpayer subsidies, of medical clinics that provide abortion services." *Appeal of N.H. Right to Life, 166 N.H. 308, 310, 95 A.3d 103 (2014)*. At issue are three Right-to-Know requests that the plaintiffs made of the State in July 2014 and September 2014 for documents and materials related to Planned Parenthood of Northern New England (PPNNE) and/or its New Hampshire clinics. At oral argument, the parties agreed that any issues regarding a fourth Right-to-Know request are now moot. According to a declaration (a sworn statement filed as a pleading with a court), and not apparently disputed by the plaintiffs, PPNNE is a private, non-profit organization affiliated with Planned Parenthood Federation of America (Planned Parenthood). *See Right to Life v. Dept. of Health & Human Serv's, 778 F.3d 43, 49 (1st Cir.)*, *cert. denied*, *136 S. Ct. 383, 193 L. Ed. 2d 412 (2015)*; see also Ramelb, Note, *Public Health Care Funding: **[***3]** The Battle Over Planned Parenthood*, *47 Val. U. L. Rev. 499, 510 (2013)*. Planned Parenthood provides "medical services related to family planning, men and women's sexual health, and abortions." Ramelb, *supra at 510*. PPNNE operates reproductive health care clinics in six New Hampshire municipalities — Claremont, Derry, Exeter, Keene, Manchester, and West Lebanon. *Right-to-Life, 778 F.3d at 46*.

The first request, sent on July 14, 2014, sought "copies of all of [PPNNE's] 2014-2015 [Limited Retail Drug Distributorship] licenses for its six New Hampshire clinics" and "any documents related to these clinics either sent or received by the Board [of Pharmacy]." (Bolding omitted.) *See* RSA 318:42, VII, :51-b (2015). PPNNE has operated in New Hampshire for **[*101]** a number of years as a licensed limited retail drug distributor pursuant to a contract with DHHS. *Appeal of N.H. Right to Life, 166 N.H. at 310*; *see* RSA 318:42, VII, :51-b. As a limited retail drug distributor, PPNNE must reapply annually to the Board of Pharmacy to renew its licenses, the terms of which run from July 1 to June 30 of each year. *Appeal of N.H. Right to Life, 166 N.H. at 310*.

The State responded to this request on July 31, 2014, by producing certain documents and withholding others as "exempt from disclosure under RSA 91-A:5 and RSA 318:30, I." *See* RSA 91-A:5 (Supp. 2015) (setting forth categories of information that are exempt from disclosure under the *Right-to-Know Law*); **[***4]** *see also* RSA 318:30, I (2015) (exempting from disclosure, under the *Right-to-Know Law*, Board of Pharmacy investigations and information discovered pursuant to such investigations "unless such information becomes the subject of a public disciplinary hearing"). The State's decision to exempt certain documents from disclosure pursuant to RSA 318:30, I, is not at issue in this appeal.

The second request, sent on July 28, 2014, sought "all documents, no matter what form, including but not limited to, printed documents, electronic documents, e-mails, or any other form of documents," that constitute: (1) communications "by, from or regarding" certain reproductive health centers and individuals representing such centers; (2) "[a]ny and all documents in the possession of the [AG] regarding any reproductive health facility"; (3) certain specific materials, including "DVDs containing security camera footage from July 10, 2014 and July 17, 2014 outside the Manchester clinic"; and (4) "[a]ny and all documents in the possession of the [AG] regarding abortion clinic buffer **[**838]** zones, reproductive health center patient safety zones, RSA 132:37 to 39 in New Hampshire or in any other State." The State responded to the plaintiffs' second request **[***5]** on September 4, 2014, producing some documents and informing the plaintiffs that other documents had been redacted or withheld because they contained information exempt from disclosure under RSA 91-A:5, IV.

The third request, made on September 11, 2014, sought specified financial information about certain reproductive

health clinics. The State produced some information, but, with regard to the 2010 financial statements of the Joan G. Lovering Health Center (Feminist Health Center), it redacted certain monetary amounts.

The plaintiffs filed the within complaint for injunctive relief, attorney's fees, and costs on October 20, 2014. Subsequently, the State provided to the trial court for *in camera* review approximately 1,500 pages of documents and three DVDs. The documents and materials provided to the trial court comprised those that had been produced to the plaintiffs and those that had been withheld from disclosure. The State also provided to the court and to **[*102]** the plaintiffs a "Table of Contents," listing the previously-produced documents with corresponding "bates-stamp" numbers[1] and the withheld documents with corresponding bates-stamp numbers. Following its *in camera* review of the information withheld **[***6]** or redacted, and after holding a hearing, the trial court ordered the State to produce certain documents and information, but upheld most of the State's decisions to redact or withhold. This appeal followed. The parties have not provided a transcript of the trial court hearing as part of the appellate record. The record does not indicate whether the hearing was an evidentiary hearing.

After this appeal was filed, we ordered the plaintiffs to identify, by bates-stamp number, information that had been submitted to the trial court for *in camera* review, but which they assert should have been, and was not, disclosed. In a January 12, 2016 letter, the plaintiffs identified the following as the documents and materials "at issue, addressed and argued in the Briefs": (1) three DVDs containing security footage of the area outside of the Manchester office of PPNNE; and (2) documents bates-stamped W305-06 (declaration of Meagan Gallagher), W1475-76 (e-mail communications **[***7]** between AG and clinic officials), W36-294 (e-mail communications between AG and such offices in other states), W33-35 (correspondence regarding the DVDs), P31-56 (license renewal applications filed with the Board of Pharmacy), and P105-20 (documents related to the Feminist Health Center).

NH[1][↑] [1] Thereafter, we ordered the superior court to transfer to this court the unredacted versions of the documents and materials so identified. Our analysis in this case is limited to the DVDs and documents that the plaintiffs identified by bates-stamp number in their January 12, 2016 letter. Although, in their January letter, the plaintiffs also objected to the State's claim of work product and attorney-client privilege for unknown withheld documents, they have not briefed that issue, and, accordingly, we deem it to be waived on appeal. *See* Aubert v. Aubert, 129 N.H. 422, 428, 529 A.2d 909 (1987) (**HN1**[↑] "Arguments not briefed are waived on appeal.").

[839]** *II. Analysis*

A. General Law and Standard of Review

NH[2][↑] [2] Resolution of this case requires that we interpret the *Right-to-Know Law*. **HN2**[↑] "The ordinary rules of statutory construction apply to our review of **[*103]** the *Right-to-Know Law*." CaremarkPCS Health v. N.H. Dep't of Admin. Servs., 167 N.H. 583, 587, 116 A.3d 1054 (2015) (quotation omitted). "Thus, we are the final arbiter of the legislature's intent as expressed in the words **[***8]** of the statute considered as a whole." *Id.* (quotation omitted). "When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used." *Id.* (quotation omitted). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* (quotation omitted). "We also interpret a statute in the context of the overall statutory scheme and not in isolation." *Id.* (quotation omitted).

NH[3][↑] [3] **HN3**[↑] The purpose of the *Right-to-Know Law* "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." RSA 91-A:1 (2013); *see* CaremarkPCS Health, 167 N.H. at 587. Thus, the *Right-to-Know Law* furthers "our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Montenegro v. City of Dover, 162 N.H. 641, 645, 34 A.3d 717 (2011); *see* N.H. CONST. pt. I, art. 8. "Although the statute does not provide for unrestricted access to public records, we resolve questions regarding the *Right-to-Know Law* with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." CaremarkPCS Health, 167 N.H. at 587

[1] A bates-stamp number is "[t]he identifying number or mark affixed to a document or to the individual pages of a document in sequence, usu[ally] by numerals but sometimes by a combination of letters or numerals." BLACK'S LAW DICTIONARY 181 (10th ed. 2014).

(quotation **[***9]** omitted). "As a result, we broadly construe provisions favoring disclosure and interpret the exemptions restrictively." *Id.* (quotation omitted). We also look to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA). 38 Endicott St. N. v. State Fire Marshal, 163 N.H. 656, 660, 44 A.3d 571 (2012). Such similar laws, because they are *in pari materia*, are "interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved." Montenegro, 162 N.H. at 645 (quotation omitted).

NH[4][↑] [4] HN4[↑] "When a public entity seeks to avoid disclosure of material under the *Right-to-Know Law*, that entity bears a heavy burden to shift the balance toward nondisclosure." Id. at 649. We review the trial court's statutory interpretation and its application of law to undisputed facts *de novo*. 38 Endicott St. N., 163 N.H. at 660.

At issue in this case is HN5[↑] RSA 91-A:5, which identifies materials that are exempt from disclosure under the *Right-to-Know Law*, including "confidential, commercial, or financial information … and other files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. The **[*104]** plaintiffs contend that the trial court misapplied RSA 91-A:5, IV when it upheld the State's withholding of information that the **[***10]** State contended: (1) comprised attorney work product; or (2) if disclosed, would constitute an invasion of privacy.

B. Information Withheld as Attorney Work Product

The information that the State withheld on work product grounds is related to a pending federal civil rights action brought **[**840]** pursuant to 42 U.S.C. § 1983 (2012) challenging the constitutionality, facially and as applied, of RSA 132:38 (2015). *See* Verified Complaint at 13-22, *Mary Rose Reddy & a. v. Joseph Foster & a.*, No. 1:14-cv-00299-JL (D.N.H. July 7, 2014), ECF No. 1.[2] HN6[↑] RSA 132:38, I, provides that, during the business hours of a reproductive health care facility, "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to" such a facility "within a radius up to 25 feet of any portion of an entrance, exit, or driveway of" that facility. *See* RSA 132:38, IV. For ease of reference, we refer to the federal litigation as the "buffer zone litigation."

The documents and materials at issue were created in anticipation of a preliminary injunction hearing in that litigation. However, the hearing never took place because the litigation was stayed before it could be held. Pelletier, a plaintiff in this case, is also a plaintiff in the buffer zone litigation. *See* Verified Complaint, *supra* at 1.

The plaintiffs specifically challenge the trial court's determination that the following are exempt from disclosure because they constitute attorney work product: (1) a signed, undated draft declaration of Meagan Gallagher, President and Chief Executive Officer of PPNNE, (the Gallagher declaration) (W305-06); (2) July 2014 e-mail messages between the AG and Jennifer Frizzell, Vice-President for Public Policy of PPNNE, and between the AG and Dalia Vidunas, the Executive Director of the Concord Feminist Health Center (W1475-76); and (3) e-mail messages between the AG and counterparts in other States (W36-294).

1. Summary of Work Product Law

NH[5][↑] [5] The parties do not **[***12]** dispute, and we agree with the trial court, that HN7[↑] attorney work product, like communications protected by the attorney-**[*105]** client privilege, falls within the *Right-to-Know Law* exemption for "confidential" information. RSA 91-A:5, IV; *see* Prof. Fire Fighters of N.H. v. N.H. Local Gov't Ctr., 163 N.H. 613, 614-15, 44 A.3d 542 (2012) (explaining that "[c]ommunications protected under the attorney-client privilege fall within the exemption for confidential information"); *see also* FTC v. Grolier Inc., 462 U.S. 19, 23, 103 S. Ct. 2209, 76 L. Ed. 2d 387 (1983) (interpreting FOIA to exempt from disclosure information subject to the attorney work product doctrine).

NH[6][↑] [6] The trial court applied New Hampshire common law to determine whether the challenged documents were subject to the work product doctrine. In so doing, the trial court erred. The buffer zone litigation was pending in the Federal District Court for the District

[2] On April 1, 2016, the Federal District Court for the District of New Hampshire dismissed the plaintiffs' complaint on the ground that they lacked standing to bring it. *See* Corrected Opinion and Order at 35-36, Mary Rose Reddy & a. v. Joseph Foster & a., No. 1:14-cv-00299-JL, 2016 U.S. Dist. LEXIS 44965 (D.N.H. Apr. 1, 2016), ECF No. 83. **[***11]** The plaintiffs have appealed that decision to the First Circuit Court of Appeals. *See* Notice of Appeal, *Mary Rose Reddy & a. v. Joseph Foster & a.*, No. 16-1432 (1st Cir. Apr. 21, 2016), ECF No. 86.

of New Hampshire under that court's federal question jurisdiction. *See* Verified Complaint, *supra* at 3. Accordingly, federal common law governs whether the documents challenged by the plaintiffs are subject to the work product doctrine. *See* Gargiulo v. Baystate Health, Inc., 826 F. Supp. 2d 323, 325 (D. Mass. 2011) (observing that HN8[↑] "[w]ith federal question jurisdiction, courts usually apply federal [privilege] law to the federal claims and pendent state law claims"); Smith v. Alice Peck Day Memorial Hosp., 148 F.R.D. 51, 53 **[**841]** (D.N.H. 1993) (same); Fed. R. Ev. 501. Thus, as a matter of comity with the federal court, and to ensure that the Right-to-Know **[***13]** Law is not used as a means of circumventing the civil discovery rules that govern the buffer zone litigation, we apply federal common law. Although the trial court did not apply federal common law in its analysis, we do so in the first instance because HN9[↑] we review *de novo* the trial court's application of law to undisputed facts. 38 Endicott St. N., 163 N.H. at 660.

NH[7][↑] [7] HN10[↑] The work product doctrine safeguards the work of an attorney done "in anticipation of, or during, litigation from disclosure to the opposing party." State of Maine v. U.S. Dept. of Interior, 298 F.3d 60, 66 (1st Cir. 2002); *see* Hickman v. Taylor, 329 U.S. 495, 508-13, 67 S. Ct. 385, 91 L. Ed. 451 (1947) (declaring that witness interviews conducted by opposing counsel in preparation for litigation are protected by a qualified privilege); *see also* Fed. R. Civ. P. 26(b)(3). The doctrine encompasses work done by non-lawyers at the direction of lawyers. United States v. Nobles, 422 U.S. 225, 238-39, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

Outside the FOIA context, federal courts "distinguish between 'opinion' work product and 'ordinary' work product," and they "typically afford ordinary work product only a qualified immunity, subject to a showing of substantial need and undue hardship, while requiring a hardier showing to justify the production of opinion work product." In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007, 1014, 1015 (1st Cir. 1988); *see* Hickman, 329 U.S. at 511-13. Opinion work product "encompass[es] **[*106]** materials that contain the mental impressions, conclusions, opinions or legal theories of an attorney," **[***14]** and ordinary work product "embrac[es] the residue." In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d at 1014; *see* Hickman, 329 U.S. at 511-13.

NH[8][↑] [8] However, HN11[↑] for FOIA purposes, the distinction between "opinion" and "ordinary" work product is immaterial. *See* FTC, 462 U.S. at 26-27; 38 Endicott St. N., 163 N.H. at 660 (explaining that we look to federal interpretations of the federal FOIA when construing the *Right-to-Know Law*). This is so because the test for disclosure under FOIA "is whether the documents would be routinely or normally disclosed upon a showing of relevance." FTC, 462 U.S. at 26 (quotations omitted). Necessarily, information that is protected from discovery under a qualified privilege is not "routinely or normally disclosed upon a showing of relevance." *Id.* (quotations omitted). As the Supreme Court has explained, for FOIA purposes, "[i]t makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under [FOIA]. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to routine disclosure." Id. at 27 (quotation omitted); *see* A. Michael's Piano, Inc. v. F.T.C., 18 F.3d 138, 146 (2d Cir. 1994). "This approach prevents … FOIA from being used to circumvent civil discovery rules." U.S. Dep't of Justice, *Guide to the* **[***15]** *Freedom of Information Act, Exemption 5*, at 3 (2013 ed.), available at https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5.pdf; *see* United States v. Weber Aircraft Corp., 465 U.S. 792, 801, 104 S. Ct. 1488, 79 L. Ed. 2d 814 (1984) (explaining that a party cannot "obtain through … FOIA material that is normally privileged" because this "would create an anomaly in that … FOIA could **[**842]** be used to supplement civil discovery," which is a construction of FOIA that the Court has "consistently rejected").

NH[9][↑] [9] We adopt this paradigm in the context of the *Right-to-Know Law* based upon similar concerns that the *Right-to-Know Law* could be used to circumvent civil discovery rules. Indeed, at oral argument, the plaintiffs agreed that the *Right-to-Know Law* should not be used to circumvent civil discovery rules. Thus, we hold that HN12[↑] the test for disclosure under the *Right-to-Know Law* "is whether the documents would be routinely or normally disclosed upon a showing of relevance." FTC, 462 U.S. at 26 (quotations omitted). Accordingly, because documents protected by work product are not "routinely or normally disclosed upon a showing of relevance," they are exempt from disclosure under the *Right-to-Know Law*. *Id.* (quotations omitted).

[*107] *2. Gallagher Declaration*

The Gallagher declaration contains factual assertions

about PPNNE, interpretations of RSA 132:38 (the buffer zone statute), statements **[***16]** about Gallagher's authority within PPNNE, and statements about PPNNE's intentions with regard to creating buffer zones as authorized by statute. The record on appeal establishes that the declaration was prepared at the direction of attorneys at the Attorney General's Office for use in the buffer zone litigation.

Applying state law, the trial court found that the Gallagher declaration is subject to the work product doctrine because, although it "includes some purely factual information," it "also contains [Gallagher's] policy statements and opinions." *See* State v. Chagnon, 139 N.H. 671, 676, 662 A.2d 944 (1995) (explaining, in the context of a criminal case, that "[w]itness statements that contain purely factual information should not be considered work product," but "[i]f a report also includes notes of the investigator or attorney recording his or her analysis, mental process, impressions of what the witness said, or reflecting trial strategy, such notes would fall within the work product doctrine and could be redacted"). The trial court determined that, although the opinions were not those of the attorney who prepared the declaration, the inclusion of such statements "in a draft pleading may provide insight into the [AG's] litigation strategy in the **[***17]** ongoing federal litigation." The trial court further determined that the declaration was "not merely a witness statement or notes from a witness interview," but, instead, was "essentially a draft pleading for submission into evidence at a hearing in … pending litigation." The court noted that the plaintiffs in the buffer zone litigation "would likely not have been able to discover this [declaration] prior to its introduction into evidence in that litigation."

NH[10,11][↑] [10, 11] We conclude that the Gallagher declaration is subject to the work product doctrine under federal law, and, therefore, agree with the trial court that it is exempt from disclosure under the *Right-to-Know Law*. *See* Doyle v. Comm'r, N.H. Dep't of Resources & Economic Dev., 163 N.H. 215, 222, 37 A.3d 343 (2012) (acknowledging that **HN13**[↑] when "the trial court reaches the correct result on mistaken grounds, we will affirm if valid alternative grounds support the decision" (quotation omitted)). The declaration was prepared at the direction of attorneys at the Attorney General's Office for use in the buffer zone litigation and, as such, constitutes attorney work product. *See* In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d at 1016; **[**843]** **[***18]** *see also* Nobles, 422 U.S. at 238-39 (determining that the work product doctrine protects documents drafted by non-attorneys at an attorney's direction). Accordingly, although we apply federal law and the trial court applied state **[*108]** law, we reach the same conclusion as the trial court reached — the Gallagher declaration is subject to the work product doctrine. We, therefore, agree with the trial court that the Gallagher declaration was properly withheld from disclosure under the *Right-to-Know Law*. *See* FTC, 462 U.S. at 26-27; *see also* Doyle, 163 N.H. at 222.

NH[12][↑] [12] Contrary to the plaintiffs' assertions, the *entire* Gallagher declaration is exempt from disclosure under the *Right-to-Know Law*, even though it arguably contains some "purely factual information." **HN14**[↑] Federal courts have held that the work product doctrine encompasses purely factual information. *See* Norwood v. F.A.A., 993 F.2d 570, 576 (6th Cir. 1993) (acknowledging that the work product doctrine protects factual material); *see also* Church of Scientology Intern. v. U.S. Dept. of Justice, 30 F.3d 224, 237 n.20 (1st Cir. 1994) (noting that "factual material contained within a document subject to the work product privilege often will be embraced within the privilege").

NH[13][↑] [13] Moreover, even if the Gallagher declaration constitutes only "ordinary" work product, and, therefore, would be discoverable under federal rules of civil procedure **[***19]** upon a showing of substantial need, the *Right-to-Know Law* does not mandate disclosure. *See* A. Michael's Piano, Inc., 18 F.3d at 146 (explaining that **HN15**[↑] "[a]lthough factual materials falling within the scope of attorney work product" may be discovered in non-FOIA cases upon a showing of substantial need, under FOIA, "the test is whether information would routinely be disclosed in private litigation" (quotations omitted)); Martin v. Office of Special Counsel, MSPB, 819 F.2d 1181, 1187, 260 U.S. App. D.C. 382 (D.C. Cir. 1987) (ruling that FOIA exemption for attorney work product protects documents regardless of whether they contain purely factual information and concluding that FOIA did not mandate disclosure of signed witness statements or of attorney's interview notes because such documents constituted attorney work product); Manna v. U.S. Dept. of Justice, 815 F. Supp. 798, 814 (D.N.J. 1993) (observing that "factual work-product materials are immune from disclosure" under FOIA), *aff'd*, 51 F.3d 1158 (3d Cir. 1995); United Technologies Corp. v. N.L.R.B., 632 F. Supp. 776, 781 (D. Conn. 1985) (ruling that, if a document is attorney work product, then the entire document is privileged from disclosure under FOIA,

even though it contains non-privileged factual material).[3]

[*109] NH[14][ ] [14] The plaintiffs further assert that any privilege was waived when PPNNE "shared" the Gallagher declaration with the AG, which did not represent PPNNE in the federal litigation. As previously discussed, however, PPNNE prepared the declaration at the direction of the AG. Moreover, although PPNNE was not a party in the buffer zone litigation, the attorney general was one of the defendants. In this context, there was no "waiver" of the work product doctrine. *See Nobles, 422 U.S. at 238-39* (explaining **[**844]** that HN16[ ] the work product doctrine extends to work performed by non-attorneys at the direction of attorneys).

3. E-mail messages to and from Frizzell and Vidunas

The July 2014 e-mail messages between the AG and Frizzell concerned the preparation of the Gallagher declaration. The e-mail messages between the AG and Vidunas concerned the preparation, for the buffer zone litigation, of an affidavit of another individual. The trial court found that the e-mail messages were properly withheld because they were subject to the attorney-client privilege and/or because they constituted attorney work product.

NH[15][ ] [15] The plaintiffs conclude, without any analysis, that the messages do not constitute **[***21]** attorney work product. The plaintiffs contend that, even if they do constitute attorney work product, "any privilege [was] waived" because they were communications between the AG and individuals who are not parties to the buffer zone litigation. We disagree. The e-mail messages were created for the buffer zone litigation either by attorneys at the Attorney General's Office or at their direction. The subject of the e-mail messages was the preparation of pleadings for that litigation. The e-mail messages, thus, constituted attorney work product, and, in this context, no "waiver" occurred. *See Nobles, 422 U.S. at 238-39*. Given our conclusion, we need not address whether the e-mail messages were also subject to the attorney-client privilege.

4. E-mail messages to and from AG and Offices of Attorneys General in Other States

NH[16][ ] [16] The e-mail messages at issue, which were exchanged between the AG and offices of attorneys general in other States, were created in connection with a case then pending before the United States Supreme Court: *McCullen v. Coakley, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014)*. The e-mail messages include draft amicus briefs prepared for *McCullen* and concern the process by which the AG decided whether to join or file amicus briefs in that case.

The trial court found **[***22]** that these e-mail messages were properly withheld as "confidential" information because they constituted attorney work **[*110]** product and/or privileged attorney-client communications. *RSA 91-A:5, IV*. Because these e-mail messages contain the "mental impressions, conclusions, opinions or legal theories of an attorney," *In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d at 1014* (quotation omitted); *see Hickman, 329 U.S. at 511-13*, in connection with the *McCullen* litigation, we hold that they constitute opinion work product, and were properly withheld from disclosure under the *Right-to-Know Law*.

NH[17][ ] [17] To the extent that the plaintiffs argue that any work product privilege was waived because "the state of New Hampshire did not ultimately join other States in filing an amicus brief" in the *McCullen* litigation, we disagree. HN17[ ] "The prevailing rule is that, because work product protection is provided against adversaries, only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection." *Bourne v. Arruda, Civil No. 10-cv-393-LM, 2012 U.S. Dist. LEXIS 97986, *10, 2012 WL 2891099, at *3 (D.N.H. July 16, 2012)* (quotations and ellipsis omitted); *see United States v. Massachusetts Institute of Technology, 129 F.3d 681, 687 (1st Cir. 1997)*. Based upon the record before us, we cannot say that the exchange of e-mail messages between the AG and such offices in other states was inconsistent **[***23]** with keeping those messages, and the documents **[**845]** they referenced, from the plaintiffs in the buffer zone litigation. Having decided that these e-mail messages constitute attorney work product, we need not address whether they also constitute privileged attorney-client communications.

[3] Although the First Circuit has not ruled directly upon this issue, it has cited *A. Michael's Piano, Inc., 18 F.3d at 146*, and *Martin, 819 F.2d at 1186*, with approval. *See Church of Scientology Intern., 30 F.3d at 237 n.20* (explaining that "factual material contained within a document subject to the work product privilege often will be embraced within the **[***20]** privilege, and thus be exempt from disclosure").

C. Information Withheld on Privacy Grounds

NH[18] [18] The plaintiffs next assert that the State wrongfully withheld certain information on privacy grounds. HN18 The *Right-to-Know Law* specifically exempts from disclosure "files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. This section of the *Right-to-Know Law* "means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed." Lamy v. N.H. Public Utils. Comm'n, 152 N.H. 106, 109, 872 A.2d 1006 (2005) (quotation omitted).

NH[19] [19] HN19 We engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV. *Id.* First, we evaluate whether there is a privacy interest that would be invaded by the disclosure. *Id.* If no privacy interest is at stake, the *Right-to-Know Law* mandates disclosure. *Id.* Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective **[***24]** expectations. *Id.*

[*111] Next, we assess the public's interest in disclosure. *Id.* Disclosure of the requested information should inform the public about the conduct and activities of their government. *Id.*

Finally, we balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure. *Id.* "When the exemption is claimed on the ground that disclosure would constitute an invasion of privacy, we examine the nature of the requested document and its relationship to the basic purpose of the *Right-to-Know Law*." N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 440, 821 A.2d 1014 (2003) (quotation and ellipsis omitted).

NH[20] [20] HN20 The purpose of the *Right-to-Know Law* is to provide the utmost information to the public about what its "government is up to." Union Leader Corp. v. City of Nashua, 141 N.H. 473, 476, 686 A.2d 310 (1996) (quoting EPA v. Mink, 410 U.S. 73, 105, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973) (DOUGLAS, J., dissenting), *superseded by statute on other grounds*); *see* Department of Defense v. FLRA, 510 U.S. 487, 497, 114 S. Ct. 1006, 127 L. Ed. 2d 325 (1994) (explaining that "the only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to" (quotations and brackets omitted)). "[T]he central purpose of the *Right-to-Know Law* is to ensure that the **[***25]** *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." Lamy, 152 N.H. at 113 (quotation omitted); *see* U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749, 774, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989) (same under FOIA). "If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." Lamy, 152 N.H. at 111 (quotation omitted).

NH[21] [21] HN21 "The party resisting disclosure bears a heavy burden to shift the balance toward nondisclosure." N.H. Civil Liberties **[**846]** Union, 149 N.H. at 440. Thus, in this case, our review focuses upon whether the State "has shown that the records sought will not inform the public" about the State's activities, "or that a valid privacy interest, on balance, outweighs the public interest in disclosure." *Id.* When the facts are undisputed, "we review the trial court's balancing of the public's interest in disclosure and the interests in nondisclosure *de novo*." Lamy, 152 N.H. at 109 (quotation omitted).

The plaintiffs specifically challenge the State's decision to withhold the following on privacy grounds: (1) three DVDs; (2) correspondence regarding **[*112]** the DVDs (W33-35); (3) the names of employees contained in license renewal **[***26]** applications filed with the Board of Pharmacy (P31-56); and (4) information contained in documents from the Feminist Health Center (P105-20).

1. DVDs

The DVDs contain footage from several security cameras at the Manchester office of PPNNE. According to the State, it obtained the DVDs from PPNNE in connection with the buffer zone litigation.

The DVDs show three different views of the sidewalk adjacent to the PPNNE parking lot on July 10, 2014, and July 17, 2014, for a few hours on each day. The DVDs show individual protestors walking on the sidewalk. The protestors are shown talking to individuals, who appear to be in the parking lot and are not seen on camera. The parking lot is partially bordered by a fence. The protestors are shown walking

on the sidewalk next to the parking lot. The DVDs do not show protestors in the parking lot or near the building entrance. The building entrance is on the opposite side of the parking lot from the sidewalk on which the protestors are shown walking.

The DVDs also show passersby walking on the sidewalk who have no apparent connection to PPNNE. Occasionally, individuals are shown walking into the parking lot, however, the nature of their connection to **[***27]** PPNNE, if any, is not obvious. The only individuals whose relationship to PPNNE is readily ascertainable from the DVD footage are the protestors.

The DVDs also show vehicles that are entering, exiting, or parked in the lot or adjacent to the lot. The license plates of some, but not all, of those vehicles are visible. The DVDs show only the entrance to the parking lot. They do not show the building entrance.

The trial court concluded that "the DVDs should be protected from disclosure based on concerns for the personal privacy of individuals depicted in the videos." The trial court found that the State had articulated "a valid privacy interest at stake — the identity of [PPNNE] patients and clients." It also found that the PPNNE patients and clients shown on the DVDs "have a privacy interest in the health care providers from whom they choose to seek treatment."

The trial court further found that there was no "sufficient specific public interest in the disclosure of the DVD footage." The trial court stated that it could not "discern how the contents of th[e] DVDs would shed light on the activities and conduct" of the AG or of any other governmental entity. Accordingly, the trial court determined **[***28]** that "[t]he privacy interest[s] of individual[s] seeking treatment" from PPNNE substantially outweighed "this minor or nonexistent public interest."

[*113] NH[22] [22] We begin by assessing whether there is a privacy interest at stake. We conclude that the non-protesting individuals shown, **[**847]** or whose vehicles are shown, on the DVDs have at least some privacy interest in controlling the dissemination of the DVD footage. *See* id. at 110; *see also* Planned Parenthood v. Town Bd., 154 Misc. 2d 971, 587 N.Y.S.2d 461, 463 (Sup. Ct. 1992) (concluding that disclosure of police department photos of members of "Operation Rescue" would not constitute an unwarranted invasion of privacy because "[t]hese individuals seek notoriety in order to highlight and publicize their position against abortion"). However, absent further fact-finding by the trial court, we cannot determine whether those individuals have a heightened privacy interest at stake in the nondisclosure of the DVD footage. Accordingly, we vacate the trial court's order upholding the State's decision to withhold the DVDs and remand for further proceedings consistent with this opinion.

NH[23] [23] HN22 "In our society, individuals generally have a large measure of control over the disclosure of their own identities and whereabouts." Lamy, 152 N.H. at 110 (quotation omitted); *see* National Ass'n of Retired Federal Emp. v. Horner, 879 F.2d 873, 875, 279 U.S. App. D.C. 27 (D.C. Cir. 1989). The United States Supreme Court has referred to **[***29]** this as an interest in retaining the "practical obscurity" of private information that may be publicly available, but difficult to obtain. Reporters Committee, 489 U.S. at 762 (quotation omitted). Thus, in *Lamy*, we recognized that residential customers of Public Service Company of New Hampshire had a privacy interest in controlling access to their names and home addresses, even though such information is "often publicly available." Lamy, 152 N.H. at 110; *see* FLRA, 510 U.S. at 500 (finding privacy interest in federal employees' home addresses even though they "often are publicly available through sources such as telephone directories and voter registration lists"); *see also* Reporters Committee, 489 U.S at 762, 771 (holding that an individual has a substantial privacy interest in maintaining the practical obscurity of his or her "rap sheet" even though events summarized therein "have been previously disclosed to the public").

NH[24] [24] Here, the non-protesting individuals shown, or whose vehicles are shown, on the DVDs have a privacy interest in controlling access to the DVD footage. *See* Lamy, 152 N.H. at 110; *see also* Advocates for Highway v. Federal Highway Admin., 818 F. Supp. 2d 122, 129 (D.D.C. 2011) (holding that drivers in a federal highway administration study had more than a *de minimis* privacy interest in their videotaped images because they revealed "personal details, captured up close and over a prolonged **[***30]** period of time, [which] are not generally available in the ordinary course of daily life"). Although the DVDs show views from a public sidewalk, HN23 "the fact that **[*114]** an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." Reporters Committee, 489 U.S. at 770 (quotations omitted). We, thus, disagree with the plaintiffs who assert that "[t]here is no privacy interest in what can be seen from a public sidewalk."

The fact that vehicle license plate numbers are publicly displayed is similarly not dispositive of whether disclosure of the DVD footage implicates privacy interests. *See* Jones v. U.S. Dept. of Justice, C/A No. 0:09-2802-RBH-PJG, 2011 U.S. Dist. LEXIS 17351, *11 n.5, 2011 WL 704510, at *4 n.5 (D.S.C. Jan. 24, 2011) (observing that a license plate number "without any context or private information" does not constitute "a clearly unwarranted invasion of privacy as contemplated by FOIA"). The vehicles with visible license plates are shown entering, exiting, parked in, or near, **[**848]** the parking lot of a reproductive health care facility. If those vehicles belong to PPNNE patients, then the disclosure of the DVDs reveals an intimate detail about their lives — namely, that they sought medical treatment at PPNNE. *See* National Sec. News Service v. U.S. Dept. of Navy, 584 F. Supp. 2d 94, 96 (D.D.C. 2008) (ruling that the patients **[***31]** listed in hospital admission records "have a substantial privacy interest in avoiding disclosure of the fact that they sought medical treatment"); *cf.* Mans v. Lebanon School Bd., 112 N.H. 160, 164, 290 A.2d 866 (1972) (ruling that, in light of the legislature's finding that disclosure of the salaries of public school teachers is not a disclosure of "intimate details," such a disclosure does not "constitute an invasion of privacy" (quotations omitted)). If those vehicles belong to PPNNE employees, then disclosure of the DVDs could subject the employees to harassment. *See* Sensor Systems Support, Inc. v. F.A.A., 851 F. Supp. 2d 321, 333 (D.N.H. 2012). On the other hand, if those vehicles belong to PPNNE vendors, then disclosure of the DVDs does not implicate heightened privacy concerns. *See* Lamy, 152 N.H. at 109 (analyzing whether the business customers of a public utility have a privacy interest in the nondisclosure of their names and addresses).

Absent additional information about the individuals shown, or whose license plates are shown, on the DVDs, we cannot assess whether, in fact, the DVDs implicate heightened privacy concerns. Nor can we determine the weight to be given to the privacy interests at stake. Accordingly, it would be premature for us to analyze whether there is a public interest in disclosure of the DVDs and, if so, to balance that **[***32]** interest against the privacy interests in nondisclosure. *See* id. at 109-10 (explaining that "[a]bsent a privacy interest, the *Right-to-Know Law* mandates disclosure"). Rather, we vacate the trial court's order upholding the State's decision to withhold the DVDs and remand for additional fact-finding and any further **[*115]** proceedings the trial court deems proper. In those additional proceedings, the parties may address whether the trial court should require the redaction of the DVD footage so as to allow its disclosure without compromising the privacy interests of the non-protesting individuals shown, or whose vehicles are shown, on the DVDs. *Cf.* DeVere v. State of N.H., 149 N.H. 674, 675-79, 827 A.2d 997 (2003) (upholding the determination by the trial court that disclosing the names and home towns of drivers with low-digit license plates did not constitute an unwarranted invasion of privacy because the plaintiff had been ordered not to publish or disclose the information or to contact the drivers and because individuals with low-digit license plates were given an opportunity to opt out of the disclosure).

2. Correspondence About the DVDs

The correspondence about the DVDs consists of an undated envelope addressed to the AG from a Concord law firm and pieces of mostly blank paper **[***33]** demonstrating that the envelope contained the DVDs. The trial court ruled that this correspondence was properly withheld for the same reasons as the DVDs themselves. We conclude that, in so ruling, the trial court erred. The State does not argue that the correspondence implicates any privacy concerns. Accordingly, it was not properly withheld on that basis. "If no privacy interest is at stake, then the *Right-to-Know Law* mandates disclosure." Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 707, 992 A.2d 582 (2010).

3. Individuals' Names on Licensing Documents

a. Documents

The documents at issue are applications for the renewal of limited retail drug distributor **[**849]** licenses for the July 1, 2014 to June 30, 2015 licensing period, filed with the Board of Pharmacy by the Claremont, Derry, Exeter, Keene, Manchester, and West Lebanon offices of PPNNE and the Greenland office of the Feminist Health Center. Such licenses allow the clinics to distribute medication without a pharmacist on site.

Each application lists the name and location of the clinic, its telephone and fax numbers, whether the clinic's "specialty" is family planning or sexually transmitted disease prevention or some other specialty, whether it proposes to administer or dispense non-

controlled drugs, its **[***34]** hours of operation, the address and telephone number of its medical director, the job title of the person in charge of drug purchasing, drug dispensing records, and the security provided at the particular clinic. It requires the **[*116]** signature, under penalties of perjury, of the responsible party. The PPNNE applications are signed by the Chief Financial Officer of PPNNE; the Feminist Health Center application is signed by the center's executive director.

On each of the PPNNE license renewal applications, the State has redacted the names of PPNNE's site managers, medical directors, and consultant pharmacists. In place of names, the State has inserted titles, such as "Medical Director" or "Licensed Pharmacist," or the name "John Doe," and a corresponding number designation so that the plaintiffs could identify whether individuals worked at more than one reproductive health care facility.

The Feminist Health Center application includes the name of the site manager but does not include the name of the medical director, registered nurse, or consultant pharmacist. The medical director, registered nurse, and licensed pharmacist are identified as "Medical Director #2," "Registered Nurse #1," and **[***35]** "Licensed Pharmacist #2," respectively.

b. Prior State Litigation

The 2012-2013 renewal applications submitted by PPNNE locations were the subject of prior state court litigation between plaintiff New Hampshire Right to Life and the Board of Pharmacy. In that litigation, as in the instant litigation, in response to requests under the *Right-to-Know Law*, the State provided copies of PPNNE's license renewal applications with the names of PPNNE's site managers, medical directors, and consultant pharmacists for its Claremont, Derry, Exeter, Keene, and Manchester locations redacted for privacy reasons. The Superior Court (*McNamara*, J.) concluded that the State had "met its burden to demonstrate that there is a privacy interest at stake in the disclosure of the identities of PPNNE's site managers, consultant pharmacists, and medical directors," because such individuals "have a privacy interest in their identities." The court observed that the "release of their identities could result in harassment, from any member of the public, and/or safety concerns."

With respect to the public interest in disclosure, the court concluded that "[d]isclosing the names of the employees and independent contractors at issue **[***36]** only provides … limited information" with regard to the activities of the Board of Pharmacy. In response to the assertion that the public had an interest in knowing "how PPNNE spends the tax money it receives through subsidies," the court noted that "PPNNE has not received any State subsidies since 2011 and has ceased receiving Federal subsidies beginning January 1, 2013." Accordingly, the court denied the request for the names of site managers, medical directors, and consultant pharmacists listed in **[*117]** PPNNE's applications for renewed licenses to distribute medication without a pharmacist on site, but it ordered the **[**850]** State to "provide copies of [those] applications with said employees labeled appropriately as John Doe 1, John Doe 2, Jane Doe 1, etc." This decision was not appealed.

c. Current Litigation

Like the court in the prior state litigation, the trial court in this case found that the individuals whose names are redacted have a privacy interest "in their identities and safety." The court concluded that "[t]his privacy interest" was "not negated by [the plaintiffs'] arguments." The trial court then determined that there was only "an attenuated public interest in the specific identities **[***37]** of employees." The trial court found that "[e]ven assuming that some [PPNNE] salaries are being paid by … state grant funds, [the plaintiffs have] not articulated how knowing the identities of particular employees who may or may not be paid with state funding would shed light on the [Board of Pharmacy's] or … DHHS's operations except with respect to how these agencies are enforcing *RSA 318:42, VII*." Because it found that the privacy interest was "substantial" and the public interest in disclosure was "attenuated," the court determined that disclosure of individual employee and independent contractor names is not required by the *Right-to-Know Law*. However, because "regulatory requirements … specify that a clinic must identify its consultant pharmacist and medical director on the [license renewal] application," the court decided that "disclosure of such persons' professional designation (e.g., M.D. or R.N.) would suffice to demonstrate the extent to which [the Board of Pharmacy] is approving [license renewal] applications according to law."

d. Analysis

1. Privacy Interest

NH[25] [25] We agree with the trial court that individuals whose names were redacted have a privacy interest in the nondisclosure of their **[***38]** identities as employees or independent contractors of the reproductive health care facilities.

NH[26] [26] HN24 "Under some circumstances, individuals retain a strong privacy interest in their identities, and information identifying individuals may be withheld to protect that privacy interest." *Sensor Systems Support, Inc., 851 F. Supp. 2d at 333*. One such circumstance is when public identification "could conceivably subject" those identified to "harassment and annoyance in the conduct of their official duties and in their private lives." *Id.* **[*118]** (quotations omitted); *see also Lesar v. United States Dept. of Justice, 636 F.2d 472, 487, 204 U.S. App. D.C. 200 (D.C. Cir. 1980)* (FBI agents and informants involved in investigating Dr. Martin Luther King, Jr. have a privacy interest in the nondisclosure of their names because publicly identifying them "conceivably could subject them to annoyance or harassment in either their official or private lives"); *Bigwood v. U.S. Agency for Intern. Development, 484 F. Supp. 2d 68, 77 (D.D.C. 2007)* (concluding that "a person avoiding harm to his life or liberty has a clear interest in the withholding" of information that would identify him publicly (quotation omitted)); *cf. National Archives and Records Admin. v. Favish, 541 U.S. 157, 171, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004)* (citing *Lesar* with approval); *National Sec. News Service, 584 F. Supp. 2d at 96* (ruling that, in the context of a request for individual names contained in hospital admission records, "the privacy interest of an individual in avoiding the unlimited disclosure of his or her name **[***39]** is significant" (quotations and ellipsis omitted)). Indeed, as one court has observed, "individuals have an even stronger privacy interest in avoiding physical danger than in the accepted privacy interest in the **[**851]** nondisclosure of their names and addresses in connection with financial information." *Bigwood, 484 F. Supp. 2d at 77* (quotation omitted); *see Judicial Watch, Inc. v. Food & Drug Admin., 449 F.3d 141, 153 (D.C. Cir. 2006)*.

The plaintiffs argue that the record does not support the trial court's finding that the clinic employees have a privacy interest in their "identities and safety." To the contrary, the record includes a police incident report from March 2013 regarding a "Pro-life Protest Event" in which "somewhere between 150 and 200" individuals protested at the entrance to PPNNE's Manchester office. (Bolding omitted.) The report indicates that the sidewalk around the perimeter of the office was "congested" and that the employee entrance was "somewhat obstructed by [a] circulating group of protester[s]." Additionally, the plaintiffs' own exhibits include a newspaper article regarding New Hampshire Right to Life's 2015 "March for Life" in Concord, in which "hundreds of supporters from across the state … marched down Main Street past the Concord Feminist Health Center." When it passed the **[***40]** buffer zone statute in 2014, the New Hampshire Legislature found that "[r]ecent demonstrations outside of reproductive health care facilities have caused patients and employees of these facilities to believe that their safety and right to privacy are threatened." Laws 2014, 81:1.

Moreover, as one court has recognized, the "history of violence associated with the provision of [such] services is undeniable." *Glenn v. Maryland Dept. of Health and Mental Hygiene, 446 Md. 378, 132 A.3d 245, 251 (Md. 2016)*; *see Judicial Watch, Inc., 449 F.3d at 153* (holding that the agency "fairly **[*119]** asserted abortion-related violence as a privacy interest for both the names and addresses of persons and businesses" associated with the approval of an abortion-related drug). The record includes a 2013 declaration from the director of health center operations for PPNNE describing "a series of recent incidents involving threats and/or harassment of PPNNE employees." In one incident, "anti-abortion protestors took photographs and video recordings of staff and patients." In another, an activist entered a PPNNE clinic, asked to speak to someone about "baby killing," and, while pointing at a PPNNE staff member, stated that PPNNE employees "would go to hell." (Quotation omitted). The declaration averred that the incidents at PPNNE "are part of a larger pattern **[***41]** of threats, harassment, and sometimes physical violence, including murder," and described some of the more recent examples of such conduct in Arizona and Florida.

Given evidence of the protests at the Manchester PPNNE office and the Concord Feminist Health Center and evidence of "the history nationally of harassment and violence associated with the provision of abortion services," *Glenn, 132 A.3d at 253*, we cannot agree with the plaintiffs that the trial court's finding that the individuals at issue have a privacy interest in their identities and safety is based upon mere speculation. *See id. at 252-53* (finding that the "risk of violence is not speculative and is based on the ample evidence presented" where affidavit "presented facts regarding the history of violence that is associated too frequently

with a career in providing surgical abortion services" and facts regarding events in Maryland, including an incident in which anti-abortion protestors appeared "at the middle school of a child of the landlord of a surgical abortion facility" (quotation omitted)).

NH[27][↑] [27] The plaintiffs assert that because the identities of the individuals whose names were redacted "have been publicly disclosed by the clinics themselves" in **[**852]** newspaper **[***42]** articles, the "State cannot assert a privacy interest" on behalf of the clinics and their employees. However, the record on appeal does not support the plaintiffs' underlying factual assertion. The articles contained in the record do not include the names of any of the individuals whose names were redacted on the documents at issue. Further, according to the director of health center operations for PPNNE, "employee information, including provider and staff names, is not public record," and "[p]roviders and staff are not identified on PPNNE's website or in other publicly-disclosed materials." *See* Planned Parenthood of Northern New England, https://www.plannedparenthood.org/planned-parenthood-northern-new-england (last visited May 4, 2016). More importantly, even if the names of the individuals at issue had been previously made available to **[*120]** the public, HN25[↑] "prior revelations of exempt information do not destroy an individual's privacy interest." Moffat v. U.S. Dept. of Justice, 716 F.3d 244, 251 (1st Cir. 2013); *see* FLRA, 510 U.S. at 500 (explaining that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form").

2. Public Interest

We also agree with the trial court that the public interest in the names of the individuals at **[***43]** issue is attenuated at best. The plaintiffs argue that "the identities of the individuals being granted an exemption by the Board of Pharmacy to dispense prescription drugs without a pharmacist will inform the public whether the Board of Pharmacy is properly applying RSA 318:42(VII)." The trial court concluded that "disclosure of such persons' professional or licensing designation is sufficient to demonstrate the extent to which the [Board of Pharmacy] is approving [licensing] applications according to the law." We agree.

HN26[↑] RSA 318:42, VII allows registered nurses "in clinics of nonprofit family planning agencies under contract with [DHHS]" to dispense non-controlled prescription drugs provided that certain conditions are met, including that the clinic "possesses a current limited retail drug distributor's license." RSA 318:42, VII(d). Disclosure of the names of PPNNE's site managers, medical directors, and consultant pharmacists at each of the six clinics does not further the public interest in assuring that the requirements of RSA 318:42, VII are met.

The plaintiffs also assert that disclosure of the names of individuals on the license renewal applications is necessary to show "who is running" the clinics and "whose salary is being paid by taxpayer **[***44]** funds," and to allow the public to discover whether there is "corruption, incompetence, inefficiency, prejudice and favoritism" at the Board of Pharmacy. (Quotation omitted.) To support these assertions, the plaintiffs rely upon Professional Firefighters, 159 N.H. at 709. That reliance is misplaced.

At issue in *Professional Firefighters* was whether, under the *Right-to-Know Law*, the Local Government Center, Inc. (LGC) could be compelled to disclose the names and salaries of its employees. Prof'l Firefighters of N.H., 159 N.H. at 702. LGC conceded that it was "a governmental entity subject to the *Right-to-Know Law*." Id. at 709. Although LGC argued that its employees were private, and not public, employees, we disagreed, explaining that "[w]hether records are subject to public disclosure depends upon whether the entity itself is subject to the *Right-to-Know Law*." Id. at 706-07. **[**853]** We also rejected LGC's assertion that **[*121]** the employees' privacy interest in nondisclosure outweighed the public interest in disclosure. Id. at 707-10. We explained that, because LGC is a governmental entity and because "the bulk of [its] income" comes from public funds, public access to the requested information directly served "the very purpose underlying the *Right-to-Know Law*." Id. at 709. Public access to the salary information allowed scrutiny of "how **[***45]** a public body is spending taxpayer money in conducting public business." *Id.*; *see* Union Leader Corp. v. N.H. Retirement Sys., 162 N.H. 673, 684, 34 A.3d 725 (2011) (holding that disclosure of records related to the retirement benefits of public employees is required by the *Right-to-Know Law* because "[t]he public has an interest both in knowing how public funds are spent and in uncovering corruption and error in the administration" of the New Hampshire Retirement System, which is a public body, administering public funds).

PPNNE is a private, non-profit organization, not a governmental entity like LGC. *See* Right to Life, 778 F.3d at 49. In addition, there is no evidence in the record that PPNNE, like LGC, receives the "bulk" of its income from public funds. Prof'l Firefighters of N.H., 159 N.H. at 709. Moreover, the record does not demonstrate that State funds pay the salaries of any of the employees whose names were redacted. In contrast to Professional Firefighters, disclosure of the individual employee names in this case would reveal nothing about the government and its activities. *See id.* Therefore, any asserted public interest in the names of PPNNE employees is attenuated.

3. Balancing

Because the public interest in disclosing the names of PPNNE employees is, at best, attenuated and is based upon the plaintiffs' "hypothetical assessment" **[***46]** of the Board of Pharmacy's performance, Lamy 152 N.H. at 113, and because PPNNE employees have a cognizable privacy interest in nondisclosure that outweighs such a negligible and speculative public interest, we conclude that disclosure is not required by the *Right-to-Know Law*. *See id.*; *see also* Favish, 541 U.S. at 174 (concluding that when information is sought to show that an agency acted negligently, requester must produce "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred"); Right to Life v. Dept. of Health & Human Svcs., 976 F. Supp. 2d 43, 64 (D.N.H. 2013), *aff'd*, 778 F.3d 43 (1st Cir.), *cert. denied*, 136 S. Ct. 383, 193 L. Ed. 2d 412 (2015).

4. Feminist Health Center Documents

a. Financial Documents

The plaintiffs next assert that the trial court wrongfully upheld the State's redaction of monetary amounts contained in financial documents of **[*122]** the Feminist Health Center. Those documents are: (1) a document that lists the assets and liabilities of the Feminist Health Center for calendar year 2010 (P105-06); (2) a document that shows the center's income and expenses for calendar year 2010 (P107-09); (3) a document that lists the center's cash flow from operating, investing, and financing activities, the net increase/decrease in cash during the year, how much was paid for interest, and how much was paid **[***47]** for income taxes (P110-11); and (4) two copies of the same budget form for the budget period July 1, 2012, to June 30, 2013, submitted with a request for "STD/HIV/HCV Clinical Services" and "HIV/HCV Targeted Testing" (P119-20).

[854]** The trial court found that the center "has a privacy interest in the redaction of [the] financial information as it relates to [the center's] commercial activities and competitive stance in the market relative to other health clinics." The court found that the public had an interest to the extent that the clinic received State money, but that "even assuming that the clinic received [such] funding during [the] time periods" reflected on the documents, "the financial documents do not provide information about how the state grant money specifically was spent." Accordingly, the court concluded, because these documents "primarily show the conduct of the clinic," and "not any government conduct," the State had properly redacted them.

NH[28][↑] [28] The plaintiffs declare, without any analysis, that the Feminist Health Center has "little or no privacy interest" in the monetary amounts listed on the financial documents. Such a bare assertion is not a sufficiently developed argument. **[***48]** *See* Wyle v. Lees, 162 N.H. 406, 414, 33 A.3d 1187 (2011). Accordingly, we uphold the trial court's determination. *See* Right to Life, 778 F.3d at 47, 50-51 (upholding trial court's determination that PPNNE's Manual of Medical Standards and Guidelines, a letter describing the manual, policies about collecting and setting fees, and a document outlining PPNNE's operations and fees were exempt from disclosure as confidential commercial information).

With regard to the public interest in disclosure, the plaintiffs argue that the trial court erred when it held that the financial documents "primarily show the conduct of the clinic, not any government conduct." (Quotation omitted.) We find no error in the trial court's interpretation of the financial documents. As the trial court found, the documents do not demonstrate how State grant money was spent. Given the center's strong privacy interest in nondisclosure and the relatively weak public interest in disclosure, we conclude that the State has met its heavy burden of demonstrating that the financial information is exempt from disclosure under the *Right-to-Know Law*.

[*123] *b. Other Documents*

The plaintiffs also challenge the redactions of individual names from certain other produced documents from the Feminist Health Center: (1) a June **[***49]** 2012 list of board members (P113); (2) a form identifying the clinic's key administrative personnel for fiscal years 2013 and 2014 (key administrative personnel form) (P114); (3) the resume of the center's director of STD/HIV and outreach services (P117); and (4) the resume of the center's staff nurse (P118).[4] Although individual home addresses and private telephone numbers were also redacted from some of these documents and from the resume of the center's executive director (P115), the plaintiffs appear to concede that redaction of an individual's home address was lawful, and do not argue that the State was required to disclose an individual's private telephone number. Thus, we confine our analysis to the redactions of names from these documents.

The trial court found that **[***50]** individual board members and employees had a privacy interest in their identities and their association with the Feminist Health Center. **[**855]** Because the court did not find a sufficient public interest in disclosing the names from employee resumes, it upheld the redaction of those names. With regard to board members, the court found that the asserted public interest in disclosing the names was not entitled to great weight. *See* Lamy, 152 N.H. at 111-13. Thus, the court found that the board members' privacy interest outweighed any public interest in the disclosure of their names, and upheld the redaction of names from the board member list.

With respect to the key administrative personnel form, the court found that there "is a privacy interest at stake in the disclosure of this information as these employees work for a private entity that is not itself subject to the *Right-to-Know Law*." However, the court also found that the public had "some interest in the finances of the clinics that receive state grant funding because taxpayer dollars are flowing to the entity and funding certain services." The court determined that because the Feminist Health Center is not a governmental entity or a "surrogate[ ]" thereof, the **[***51]** public need not know the names of the individuals holding the positions at issue, but that the public did have a right to know the salaries associated with those positions. Thus, the court ordered the State to redact the individuals' names, but to disclose the salary information.

[*124] *1. Privacy Interest*

NH[29][ ] [29] We begin by assessing whether the individuals have a privacy interest in the nondisclosure of their names. The individuals at issue, like the PPNNE employees whose names were redacted from the license renewal applications submitted to the Board of Pharmacy, have a cognizable privacy interest in controlling the dissemination of their names and their connection to the Feminist Health Center. *See* Sensor Systems Support, Inc., 851 F. Supp. 2d at 333.

2. Public Interest

We next address the public interest in disclosure of the names of the individuals. The public interest that matters for the *Right-to-Know Law* is whether disclosure of the otherwise private information will provide the public "the utmost information … about what its government is up to." Lamy, 152 N.H. at 111 (quotation omitted). Here, the disclosure of the individuals' names will not tell the public anything directly about what the State "is up to." *Id.* (quotation omitted). The disclosure of these **[***52]** names will reveal nothing about the State's own conduct. *See id.*; *see also* Right to Life, 976 F. Supp. 2d at 62-64 (ruling that federal agency had met its burden to justify nondisclosure of the names and other identifying information of PPNNE middle- and lower-level employees when such employees "do not even work for the federal government, but for a private organization that receives part of its funding from the federal government," and the court could not "conceive of[ ] any public interest in that kind of information").

NH[30][ ] [30] "The asserted public interest" upon which the plaintiffs rely for disclosing the names "stems not from the disclosure of the redacted information itself, but rather from the hope that [the plaintiffs], or others, may be able to use that information to obtain additional information outside the Government files." Department of State v. Ray, 502 U.S. 164, 178, 112 S. Ct. 541, 116 L. Ed. 2d 526 (1991); *see* Lamy, 152 N.H. at 111-12. The plaintiffs argue that there is "a great public interest" in disclosing the names of the individuals because doing so will enable the public to scrutinize whether the

[4] Although in their January 12, 2016 letter to this court, the plaintiffs identified documents bates-stamped P112 and P116 as being at issue in this appeal, the record indicates that those documents were produced without redaction. Moreover, the plaintiffs have not included those documents in the record on appeal and have not briefed any argument about them. Accordingly, we deem any such argument to be waived. *See* Aubert, 129 N.H. at 428.

individuals have contributed to political campaigns and whether those contributions have resulted **[**856]** in the State "showing undue favoritism" to the Feminist Health Center. This kind of public interest is derivative, and in ***[***53]*** *Lamy*, we held that HN27[] when, as in this case, "the sole public interest in disclosing the information" is derivative, it is entitled to little weight. *Lamy, 152 N.H. at 113*.

3. Balancing

Because the only public interest in disclosing the names of the individuals is derivative and because these individuals have a cognizable privacy **[*125]** interest in nondisclosure that outweighs such a negligible public interest, we conclude that disclosure is not required by the *Right-to-Know Law*. *See id.*; *see also Favish, 541 U.S. at 174*.

D. Specificity of State's Responses

NH[31][] [31] The plaintiffs next argue that the trial court erred when it failed to conclude that the State's initial responses to the plaintiffs' Right-to-Know requests violated *RSA chapter 91-A*. The State counters that the plaintiffs have "confuse[d] the requirements for an agency's initial response to a Right-to-Know request under *RSA 91-A:4* with the requirements for a[ ] *Vaughn* [i]ndex." *See Vaughn v. Rosen, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973)*. HN28[] "Generally, a *Vaughn* index … include[s] a general description of each document withheld and a justification for its nondisclosure." *Union Leader Corp., 142 N.H. at 548*. The State contends that its initial responses to the plaintiffs' requests complied with *RSA 91-A:4, IV* (2013) and that greater specificity is not required by that statute. We agree with the State.

NH[32,33][] [32, 33] HN29[] *RSA 91-A:4, IV* provides that, when denying a request to **[***54]** produce a public record for inspection and copying, a public body or agency need only put the denial "in writing" and provide "reasons" for the denial. As the trial court found, and as the record supports, "[i]n response to each Right-to-Know request, … the State cited statutory provisions, case law, or applicable privileges indicating the exemption or other reason for non-disclosure." Although a *Vaughn* index requires more specificity than the State provided in its initial responses, the State was not required to provide such an index in this case. *See Murray v. N.H. Div. of State Police, 154 N.H. 579, 583, 913 A.2d 737 (2006)* (explaining that HN30[] an agency "is not required … to justify its refusal [to disclose] on a document-by-document basis" and that "[w]hile … the preparation of a *Vaughn* index may be sufficient to justify an agency's refusal to disclose," doing so is not "necessarily required"). We, therefore, uphold the trial court's implicit ruling that the State's written responses to the plaintiffs' Right-to-Know requests satisfied the requirements of *RSA 91-A:4, IV*.

NH[34][] [34] The plaintiffs next assert that the court erred "in only requiring the State to provide [them] with a table of contents of withheld documents two months after the February 2, 2015 deadline" for briefing, **[***55]** and in finding that the entries in the table were sufficiently specific. (Emphasis omitted.) We decline to address this assertion substantively because the plaintiffs have not demonstrated that they preserved it for our review. *See J & M Lumber & Constr. Co. v. Smyjunas, 161 N.H. 714, 718, 20 A.3d 947 (2011)*. HN31[] It is the **[*126]** burden of the appealing party, here the plaintiffs, to demonstrate that they raised their issues before the trial court. *See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250, 855 A.2d 564, (2004)*.

On March 27, 2015, the trial court ordered the State to provide it "with two parallel packets of documentation, one as redacted and the other as unredacted." **[**857]** The order required that each packet "contain readily identifiable and parallel page numbering" and include "a table of contents which identifies the documents by a reasonable brief description and by reference to the numbering stamp numbers or equivalent numbering." The State was ordered to provide the table of contents to the court and to the plaintiffs.

To the extent that the plaintiffs believed that the trial court erred by ordering the State to provide the table and by finding its entries to be sufficiently specific, it was incumbent upon them to so inform that court. *See LaMontagne Builders v. Bowman Brook Purchase Group, 150 N.H. 270, 274, 837 A.2d 301 (2003)*; *N.H. Dep't of Corrections v. Butland, 147 N.H. 676, 679, 797 A.2d 860 (2002)*. However, the record submitted on appeal does not demonstrate that the plaintiffs ever **[***56]** informed the court, in a motion for reconsideration or otherwise, that the trial court erred by requiring the State to provide a table of contents or in finding the entries in that table to be sufficiently specific. Thus, because the plaintiffs have failed to demonstrate that they preserved their argument regarding the table of contents for our review, we decline to review it

substantively. *See* Smyjunas, 161 N.H. at 718.

E. Costs and Attorney's Fees

The plaintiffs next contend that the trial court erred by failing to award them attorney's fees and costs. We first address their request for attorney's fees.

RSA 91-A:8 governs remedies for violations of the *Right-to-Know Law*. RSA 91-A:8 (2013). **HN32**[↑] Under RSA 91-A:8, I, attorney's fees shall be awarded to a plaintiff if the trial court finds that: (1) "such lawsuit was necessary in order to make the information available"; and (2) "the public body, public agency, or person knew or should have known that the conduct engaged in was a violation of RSA chapter 91-A." Prof'l Firefighters of N.H., 159 N.H. at 710 (quotations and brackets omitted). We will defer to the trial court's findings of fact unless they are unsupported by the evidence or erroneous as a matter of law. *Id.*

The plaintiffs argue that they are entitled to fees because: (1) the Director, Charitable **[***57]** Trusts Unit (CTU) took 12 weeks to provide them with the financial records they requested; (2) with regard to the buffer zone litigation documents, the State "repeatedly refused to provide reasons for its withholdings until ordered by the Superior Court in April 2015"; and (3) **[*127]** the State knew or should have known that its conduct violated RSA chapter 91-A. The plaintiffs contend that "[t]he State's failure to provide the hundreds of pages of financial records until 12 weeks after the request and [its] failure to identify the documents it was withholding and the reasons for the withholding until 9 months after [the] request were both knowing violations of RSA 91-A," and entitled them to an attorney's fee award.

NH[35][↑] [35] The trial court rejected these arguments. With regard to the CTU, the court found that, although the CTU had received one of the requested documents in August 2014, "it is unclear when [it received] the other documents responsive to the [plaintiff's September 11, 2014] request." The court further found that the CTU produced the responsive documents in December 2014, "upon completion of the agency's internal processing." The court concluded that "[a]lthough this lawsuit was pending at the time of production," it was **[***58]** not "necessary in order to enforce compliance." (Quotation omitted.) We uphold these factual findings because the plaintiffs have failed to persuade us that the record does not support them or that they are **[**858]** legally erroneous. *See id.* The trial court, having found that the plaintiffs' lawsuit was not necessary to enforce the CTU's compliance with RSA chapter 91-A, did not err by denying the plaintiffs attorney's fees with regard to the documents requested from the CTU. *See* ATV Watch, 155 N.H. at 442.

With regard to the buffer zone litigation documents, the trial court found that, contrary to the plaintiffs' assertions, the State sufficiently justified "its exemptions and withholdings" by citing "statutory provisions, case law, or applicable privileges indicating the exemption or other reason for non-disclosure." The record supports this finding. As previously discussed, no more was required under *RSA 91-A:4*. *See RSA 91-A:4, IV*. Thus, the trial court correctly denied the plaintiffs' attorney's fee request with regard to the State's production of the buffer zone litigation documents.

With regard to the State's response in general, the trial court found that although it had "concluded that certain redactions or withholdings by the State did not meet Right-to-Know **[***59]** requirements, they were not so unreasonable under current New Hampshire case law that the State knew or should have known that disclosure was required." The court, therefore, found that the plaintiffs were "not entitled to an award of reasonable attorney's fees as a consequence of the specific disclosures mandated by [its] order." We concur with this reasoning. We hold, based upon "the record, the trial court's findings, and the law in this area," that the State "neither knew nor should have known that its conduct violated the statute." **[*128]** Goode v. N.H. Legislative Budget Assistant, 145 N.H. 451, 455, 767 A.2d 393 (2000). Accordingly, we hold that the trial court properly denied the plaintiffs' request for attorney's fees. *See id.*

We next address the plaintiffs' request for costs. The trial court denied the plaintiffs costs because they had "not specifically requested" such an award. Even if we assume without deciding that the trial court erred in this respect, we affirm its denial of costs. *See* Catalano v. Town of Windham, 133 N.H. 504, 508, 578 A.2d 858 (1990) (explaining that "when a trial court reaches the correct result, but on mistaken grounds, [we] will sustain the decision if there are valid alternative grounds to support it." (quotation and brackets omitted)).

NH[36][↑] [36] The plaintiffs argue that they are entitled to costs, as a matter **[***60]** of law, because "[t]he Superior Court found that the State violated RSA 91-A in responding to [their] right to know requests in several respects." However, **HN33**[↑] under RSA 91-A:8, I, the

trial court must award costs to a plaintiff only when it "finds that [the plaintiff's] lawsuit was necessary in order to enforce compliance with," or "to address a purposeful violation of," the *Right-to-Know Law*. RSA 91-A:8, I; *see* *ATV Watch, 155 N.H. at 439* (explaining that costs must be awarded if State violated the *Right-to-Know Law* "and a lawsuit was necessary in order to make the information available"). As previously discussed, the trial court found, and the record supports its finding, that the plaintiffs' lawsuit was not necessary to enforce compliance with *RSA chapter 91-A*. Therefore, we uphold the trial court's denial of costs to the plaintiffs.

Affirmed in part; reversed in part; vacated in part; *and remanded*.

DALIANIS, C.J., and CONBOY and LYNN, JJ., concurred.

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Reid v. N.H. AG

Supreme Court of New Hampshire

June 9, 2016, Argued; December 23, 2016, Opinion Issued

No. 2015-0499

Reporter
169 N.H. 509 *; 152 A.3d 860 **; 2016 N.H. LEXIS 238 ***

THOMAS REID v. NEW HAMPSHIRE ATTORNEY GENERAL

Prior History: [*1]** Merrimack.

Disposition: Vacated and remanded.

Core Terms

exemption, personnel, disclosure, privacy, Right-to-Know, invasion, misconduct, pertaining, quotation, nondisclosure, confidential, harassment, precinct, redacted, interviews, elected, embarrassment, interviewees, retaliation, discipline, salaries, sexual

Case Summary

Overview

HOLDINGS: [1]-Because defendant New Hampshire Attorney General was not the employer of a county attorney in that their relationship did not have the attributes of an employer-employee relationship such as to ability to set a salary and to hire and fire, and because defendant's supervisory authority over criminal law enforcement by the county attorney was not sufficient to warrant treating defendant as the employer, the trial court erred in applying *RSA 91-A:5, IV*'s "internal personnel practices" exemption from the Right-to-Know Law to records of defendant's investigation into the county attorney's alleged wrongdoing; [2]-As the trial court's decision appeared to be based exclusively on the "internal personnel practices" exemption, the trial court on remand could consider whether any of the disputed materials were exempt as personnel files under *RSA 91-A:5, IV*.

Outcome
Vacated and remanded.

LexisNexis® Headnotes

Constitutional Law > ... > Case or Controversy > Constitutional Questions > Necessity of Determination

HN1[] **Constitutional Questions, Necessity of Determination**

A court decides cases on constitutional grounds only when necessary.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Governments > Legislation > Interpretation

Administrative Law > Governmental Information > Freedom of Information

HN2[] Freedom of Information, Defenses & Exemptions From Public Disclosure

The interpretation of a statute is to be decided ultimately by the New Hampshire Supreme Court. The ordinary rules of statutory construction apply to review of the Right-to-Know Law, RSA ch. 91-A, and the court accordingly looks to the plain meaning of the words used. To advance the purposes of the Right-to-Know Law, the court construes provisions favoring disclosure broadly and exemptions narrowly.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN3[] Defenses & Exemptions From Public Disclosure, Internal Personnel Rules

RSA 91-A:5, IV, provides, in part, an exemption from disclosure under the Right-to-Know Law, RSA ch. 91-A, for 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, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN4[] Defenses & Exemptions From Public Disclosure, Internal Personnel Rules

Although the New Hampshire Supreme Court generally interprets the exemptions in RSA ch. 91-A restrictively to further the purposes of the Right-to-Know Law, the plain meanings of the words "internal," "personnel," and "practices" are themselves quite broad. Although the court has often applied a balancing test to judge whether the benefits of nondisclosure outweigh the benefits of disclosure, such an analysis is inappropriate where the legislature has plainly made its own determination that certain documents are categorically exempt.

Governments > Legislation > Interpretation

HN5[] Legislation, Interpretation

When interpreting a statute, the court does not consider words and phrases in isolation, but rather within the context of the statute as a whole.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Governments > Legislation > Interpretation

Administrative Law > Governmental Information > Freedom of Information

HN6[] Freedom of Information, Defenses & Exemptions From Public Disclosure

In interpreting the Right-to-Know Law, RSA ch. 91-A, the court looks to the decisions of other jurisdictions, since other similar acts, because they are in pari materia, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved. Specifically, the court has looked to federal law, having noted that the exemption provisions of New Hampshire's right-to-know law, RSA 91-A:5, IV, are similar to the Federal Freedom of Information Act, 5 U.S.C.S. § 552(b)(2), (4) and (6).

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN7[] Defenses & Exemptions From Public Disclosure, Internal Personnel Rules

The Freedom of Information Act (FOIA) exemption contained in 5 U.S.C.S. § 552(b)(2) is worded similarly to a portion of RSA 91-A:5, IV; specifically, it exempts from disclosure under the FOIA matters related solely to the internal personnel rules and practices of an agency. 5 U.S.C.S. § 552(b)(2). Nevertheless, the New Hampshire Supreme Court's construction of the "internal personnel practices" exemption in RSA 91-A:5, IV is markedly broader than the United States Supreme Court's interpretation of that exemption's federal counterpart.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

Governments > Legislation > Interpretation

HN8 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

When interpreting a statute, the court first looks to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous. The terms "internal" and "personnel" in RSA 91-A:5, IV, modify the word "practices," thereby circumscribing the provision's scope.

The New Hampshire Supreme Court construes "internal personnel practices" to mean practices that exist or are situated within the limits of employment. Accordingly, while the court follows Fenniman and Hounsell in treating an investigation into employee misconduct as a personnel practice, the investigation must take place within the limits of an employment relationship. In other words, the investigation must be conducted by, or on behalf of, the employer of the investigation's target. Such a construction is not only consistent with the plain language of RSA 91-A:5, IV, but also follows the court's practice of resolving questions regarding the Right-to-Know Law, RSA ch. 91-A, with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN9 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

In construing the term "personnel" as used in the Freedom of Information Act (FOIA), the United States Supreme Court noted that when used as an adjective, the term refers to human resources matters. "Personnel," in this common parlance, means the selection, placement, and training of employees and the formulation of policies, procedures, and relations with or involving employees or their representatives. The United States Supreme Court accordingly determined that an agency's personnel rules and practices, for purposes of exemption 2 of the FOIA, are its rules and practices dealing with employee relations or human resources. They concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits. In general, then, the term "personnel" relates to employment. "Internal" is defined to mean "existing or situated within the limits. of something."

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN10 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

Criminal Law & Procedure > Counsel > Prosecutors

Governments > Local Governments > Employees & Officials

HN11 **Counsel, Prosecutors**

The attorney general does not hire county attorneys. Rather, each county attorney is elected biennially by the voters of the county. RSA 7:33 (2013). Vacancies or temporary absences in the office of county attorney are filled either by the superior court or by majority vote of the members of the county convention, in accordance with the provisions of RSA 7:33 and RSA 661:9 (2016). Nor does the attorney general have the authority to fire a county attorney. The attorney general may temporarily suspend a county attorney from exercising his criminal law enforcement authority, but the power to remove a county attorney from office is vested in the superior court. RSA 661:9, IV (providing that any officer of a county may be removed by the superior court for official misconduct). Finally, the attorney general neither sets nor pays the county attorneys' salaries. RSA 23:7 (2000) (providing, in part, that every county convention shall have the power to establish salaries, benefits and other compensation paid to elected county officers including the county attorney"); RSA 23:5 (2000) (providing that the salaries of county attorneys shall be paid from the county treasury in equal payments as determined by the county commissioners).

Criminal Law & Procedure > Counsel > Prosecutors

Governments > Local Governments > Employees &

Officials

HN12[] Counsel, Prosecutors

The attorney general does possess some supervisory authority over county attorneys. RSA 7:6 provides, in part, that the attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state. RSA 7:6. RSA 7:11 provides that officers charged with enforcing criminal law shall be subject to the control of the attorney general whenever in the discretion of the latter he shall see fit to exercise the same. RSA 7:11. Similarly, RSA 7:34 specifies that the county attorney of each county shall be under the direction of the attorney general. RSA 7:34. Construed together, these provisions demonstrate a legislative purpose to place ultimate responsibility for criminal law enforcement in the Attorney General, and to give him the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where he deems it in the public interest. Nevertheless, the prosecution of criminal cases under the supervision of the attorney general is not the sole duty or function of a county attorney. Although the county attorney may be engaged primarily in criminal prosecutions, his duties and functions also include civil litigations for the county and other miscellaneous civil matters.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN13[] Defenses & Exemptions From Public Disclosure, Internal Personnel Rules

An investigation is "internal" for purposes of RSA 91-A:5, IV, if conducted on behalf of the employer of the investigation's target. Mere joint participation is not sufficient.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN14[] Defenses & Exemptions From Public Disclosure, Medical & Personnel Files

Although the New Hampshire Supreme Court has not specifically interpreted the exemption for personnel files whose disclosure would constitute invasion of privacy, RSA 91-A:5, IV, it has had occasion to define with some specificity the statutory exemption for confidential, commercial, or financial information in the same provision. The court has interpreted the statute as requiring analysis of both whether the information sought is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy. Similarly, the determination of whether material is subject to the exemption for personnel files whose disclosure would constitute invasion of privacy, RSA 91-A:5, IV, also requires a two-part analysis of: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy. Accordingly, in analyzing the "personnel files" exemption, the trial court must first determine whether any of the disputed material is, or is contained in, a personnel file. If not, the "personnel files" exemption does not apply.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN15[] Defenses & Exemptions From Public Disclosure, Internal Personnel Rules

The analysis of whether the exemption for "personnel files" applies requires determining whether disclosure of any material meeting the first prong of the inquiry would constitute an invasion of privacy. Unlike materials pertaining to "internal personnel practices," for which the court has eschewed the customary balancing test in Fenniman, "personnel files" are not automatically exempt from disclosure. RSA 91-A:5, IV. For those materials, the categorical exemption in RSA 91-A:5, IV, means not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure. Specifically, the court engages in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public

Disclosure > Medical & Personnel Files

HN16[] Defenses & Exemptions From Public Disclosure, Medical & Personnel Files

The three-step analysis used when considering whether disclosure of public records constitutes an invasion of privacy under the "personnel files" exemption of RSA 91-A:5, IV, is well-established: First, the court evaluates whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law, RSA ch. 91-A, mandates disclosure. Second, the court assesses the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, the court balances the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Law Enforcement Records > Personal Information

HN17[] Defenses & Exemptions From Public Disclosure, Medical & Personnel Files

The privacy inquiry under Exemption 6 of the Freedom of Information Act (FOIA) has been noted to be essentially the same as the privacy inquiry under the FOIA's exemption for investigatory records compiled for law enforcement purposes to the extent their production could reasonably be expected to constitute an unwarranted invasion of personal privacy, 5 U.S.C.S. § 552(b)(7)(C).

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Law Enforcement Records > Personal Information

HN18[] Defenses & Exemptions From Public Disclosure, Medical & Personnel Files

There may be strong privacy interests in law enforcement investigatory records. Disclosure of such records could subject individuals to stigma, embarrassment, and reputational injury. Similarly, the Freedom of Information Act's Exemption 6 has been held to apply to the kinds of facts that are regarded as personal because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends. Thus, in determining whether any privacy interests are at stake in the disputed materials, the trial court should consider whether disclosure would subject an individual to the kind of embarrassment or reputational harm described above.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN19[] Defenses & Exemptions From Public Disclosure, Medical & Personnel Files

Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations; however, the nature of the information itself may bear upon whether it can be considered private for purposes of the "personnel files" exemption of RSA 91-A:5, IV. Thus, information that, under an objective standard, would be expected to become public in due course, should not give rise to the same privacy interest as information for which public exposure would, objectively, never be anticipated. It may be that certain information regarding allegations of misconduct potentially rising to the level of criminal actions by an elected official could objectively have been expected to become public as or after an investigation ran its course.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN20[] Freedom of Information, Defenses & Exemptions From Public Disclosure

Case law holds that a clear privacy interest under the Right-to-Know Law, RSA ch. 91-A, exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available, and that a witness does not waive his or her interest in personal privacy even by

testifying at a public trial. Nevertheless, the privacy interest in a witness's or investigation interviewee's name and identifying information will likely differ from the privacy interest in the substantive information the witness or interviewee imparts.

Administrative Law > Governmental Information > Freedom of Information

HN21[] **Governmental Information, Freedom of Information**

Even information imbued with a legitimate privacy interest is subject to disclosure if, on balance, that interest is outweighed by the public's cognizable interest in disclosure. Accordingly, a fact-specific inquiry is required in each case.

Administrative Law > Governmental Information > Freedom of Information

HN22[] **Governmental Information, Freedom of Information**

The public has a significant interest in knowing that a government investigation is comprehensive and accurate. The rank of the official being investigated and the seriousness of the alleged misconduct will bear upon the strength of the public interest for purposes of the Right-to-Know Law, RSA ch. 91-A.

Administrative Law > Governmental Information > Freedom of Information

HN23[] **Governmental Information, Freedom of Information**

The legitimacy of the public's interest in disclosure is tied to the purpose of the Right-to-Know Law, RSA ch. 91-A, which is to provide the utmost information to the public about what its government is up to. If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released. Conversely, an individual's motives in seeking disclosure are irrelevant to the question of access.

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Administrative Law > Governmental Information > Freedom of Information

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN24[] **Enforcement, Burdens of Proof**

The third step when considering whether disclosure of public records constitutes an invasion of privacy under the "personnel files" exemption of *RSA 91-A:5, IV*, requires balancing the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. The legislature has provided the weight to be given one side of the balance by declaring the purpose of the Right-to-Know Law, RSA ch. 91-A, in the statute itself. Specifically, the preamble to RSA ch. 91-A provides: "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." *RSA 91-A:1 (2013)*. Thus, when a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1.[] 1.

Constitutional Law > Judicial Powers and Duties > Disposition on Other Grounds

[*509] A court decides cases on constitutional grounds only when necessary.

NH2.[] 2.

Records > Right to Inspect > Generally

The interpretation of a statute is to be decided ultimately by the court. The ordinary rules of statutory construction apply to review of the Right-to-Know Law, and the court accordingly looks to the plain meaning of the words used. To advance the purposes of the Right-to-Know Law, the court construes provisions favoring disclosure broadly and exemptions narrowly. RSA ch. 91-A.

NH3.[] 3.

Records > Right to Inspect > Exceptions

Although the court generally interprets the exemptions in the Right-to-Know Law restrictively to further the purposes of the law, the plain meanings of the words "internal," "personnel," and "practices" are themselves quite broad. Although the court has often applied a balancing test to judge whether the benefits of nondisclosure outweigh the benefits of disclosure, such an analysis is inappropriate where the legislature has plainly made its own determination that certain documents are categorically exempt. RSA 91-A:5, IV.

NH4.[] 4.

Statutes > Generally > Interpretation as a Whole

When interpreting a statute, the court does not consider words and phrases in isolation, but rather within the context of the statute as a whole.

NH5.[] 5.

Records > Right to Inspect > Exceptions

In interpreting the Right-to-Know Law, the court looks to the decisions of other jurisdictions, since other similar acts, because they are *in pari materia*, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved. Specifically, the court has looked to federal law, having noted that the **[*510]** exemption provisions of New Hampshire's Right-to-Know Law are similar to the Federal Freedom of Information Act. 5 U.S.C. § 552(b)(2), (4) and (6); RSA 91-A:5, IV.

NH6.[] 6.

Records > Right to Inspect > Exceptions

The Freedom of Information Act (FOIA) exemption for internal personnel rules is worded similarly to the New Hampshire exemption; specifically, it exempts from disclosure under the FOIA matters related solely to the internal personnel rules and practices of an agency. Nevertheless, the court's construction of the "internal personnel practices" exemption in the Right-to-Know Law is markedly broader than the United States Supreme Court's interpretation of that exemption's federal counterpart. 5 U.S.C. § 552(b)(2); RSA 91-A:5, IV.

NH7.[] 7.

Statutes > Generally > Unambiguous Statutes and Plain Meaning

When interpreting a statute, the court first looks to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous. The terms "internal" and "personnel" in the exemption to the Right-to-Know Law for internal personnel practices modify the word "practices," thereby circumscribing the provision's scope. RSA 91-A:5, IV.

NH8.[] 8.

Records > Right to Inspect > Exceptions

In construing the term "personnel" as used in the Freedom of Information Act (FOIA), the United States Supreme Court noted that when used as an adjective, the term refers to human resources matters. "Personnel," in this common parlance, means the selection, placement, and training of employees and the formulation of policies, procedures, and relations with or involving employees or their representatives. The United States Supreme Court accordingly determined that an agency's personnel rules and practices, for purposes of exemption 2 of the FOIA, are its rules and practices dealing with employee relations or human resources. They concern the conditions of employment in federal agencies — such matters as hiring and firing, work rules and discipline, compensation and benefits. In general, then, the term "personnel" relates to employment. "Internal" is defined to mean "existing or situated within the limits … of something."

NH9.[] 9.

Records > Right to Inspect > Exceptions

With regard to the exemption to the Right-to-Know Law for internal personnel practices, the court construes "internal personnel practices" to mean practices that exist or are situated within the limits of employment. Accordingly, while the court follows *Fenniman* and *Hounsell* in treating an investigation into employee misconduct as a personnel practice, the investigation must take place within the limits of an employment relationship. In other words, the investigation must be conducted by, or on behalf of, the employer of the investigation's target. Such a construction is not only consistent with the plain language of the provision, but also follows the court's practice of resolving questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents. RSA 91-A:5, IV.

NH10.[] 10.

Attorneys > Government Attorneys

The attorney general does not hire county attorneys. Rather, each county attorney is elected biennially by the voters of the county. Vacancies or temporary absences in the office of county attorney are filled either by the superior court or by majority vote of the members of the county convention. Nor does the attorney general have the authority to fire a county attorney. The attorney general may temporarily suspend a county attorney from exercising his criminal law enforcement authority, but the power to remove a county attorney from **[*511]** office is vested in the superior court. Finally, the attorney general neither sets nor pays the county attorneys' salaries. RSA 7:33; 23:5, :7; 661:9.

NH11.[] 11.

Attorneys > Government Attorneys

State statutes demonstrate a legislative purpose to place ultimate responsibility for criminal law enforcement in the Attorney General, and to give him the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where the Attorney General deems it in the public interest. Nevertheless, the prosecution of criminal cases under the supervision of the Attorney General is not the sole duty or function of a county attorney. Although the county attorney may be engaged primarily in criminal prosecutions, the county attorney's duties and functions also include civil litigation for the county and other miscellaneous civil matters. RSA 7:6, :11, :34.

NH12.[] 12.

Records > Right to Inspect > Exceptions

Because defendant New Hampshire Attorney General was not the employer of a county attorney in that their relationship did not have the attributes of an employer-employee relationship such as the ability to set a salary and to hire and fire, and because defendant's supervisory authority over criminal law enforcement by the county attorney was not sufficient to warrant treating defendant as the employer, the trial court erred in applying the "internal personnel practices" exemption from the Right-to-Know Law to records of defendant's investigation into the county attorney's alleged wrongdoing. RSA 91-A:5, IV.

NH13.[] 13.

Records > Right to Inspect > Exceptions

An investigation is "internal" for purposes of the "internal personnel practices" exemption from the Right-to-Know Law if conducted on behalf of the employer of the investigation's target. Mere joint participation is not sufficient. RSA 91-A:5, IV.

NH14.[] 14.

Records > Right to Inspect > Exceptions

Although the court has not specifically interpreted the exemption from the Right-to-Know Law for personnel files whose disclosure would constitute invasion of privacy, it has had occasion to define with some specificity the statutory exemption for confidential, commercial, or financial information in the same provision. The court has interpreted the statute as requiring analysis of both whether the information sought is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy. Similarly, the determination of whether material is subject to the exemption for personnel files whose disclosure would constitute invasion of privacy also requires a two-part analysis of: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion

of privacy. Accordingly, in analyzing the "personnel files" exemption, the trial court must first determine whether any of the disputed material is, or is contained in, a personnel file. If not, the "personnel files" exemption does not apply. RSA 91-A:5, IV.

NH15.[] 15.

Records > Right to Inspect > Exceptions

The analysis of whether the exemption from the Right-to-Know Law for "personnel files" applies requires determining whether disclosure of any material meeting the first prong of the inquiry would constitute an invasion of privacy. Unlike materials pertaining to "internal personnel practices," for which the court has eschewed the customary balancing test in *Fenniman*, "personnel files" are not automatically exempt from disclosure. For those materials, the categorical exemption means not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure. Specifically, the court engages in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy. RSA 91-A:5, IV.

NH16.[] 16.

Records > Right to Inspect > Exceptions

[*512] The three-step analysis used when considering whether disclosure of public records constitutes an invasion of privacy under the "personnel files" exemption to the Right-to-Know Law is well-established: First, the court evaluates whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure. Second, the court assesses the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government. Finally, the court balances the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. RSA 91-A:5, IV.

NH17.[] 17.

Records > Right to Inspect > Exceptions

The privacy inquiry under Exemption 6 of the Freedom of Information Act (FOIA) has been noted to be essentially the same as the privacy inquiry under the FOIA's exemption for investigatory records compiled for law enforcement purposes to the extent their production could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C).

NH18.[] 18.

Records > Right to Inspect > Exceptions

There may be strong privacy interests in law enforcement investigatory records. Disclosure of such records could subject individuals to stigma, embarrassment, and reputational injury. Similarly, the Freedom of Information Act's Exemption 6 has been held to apply to the kinds of facts that are regarded as personal because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends. Thus, in determining whether any privacy interests are at stake in the disputed materials, the trial court should consider whether disclosure would subject an individual to the kind of embarrassment or reputational harm described above. 5 U.S.C. § 552(b)(6).

NH19.[] 19.

Records > Right to Inspect > Exceptions

Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations; however, the nature of the information itself may bear upon whether it can be considered private for purposes of the "personnel files" exemption to the Right-to-Know Law. Thus, information that, under an objective standard, would be expected to become public in due course, should not give rise to the same privacy interest as information for which public exposure would, objectively, never be anticipated. It may be that certain information regarding allegations of misconduct potentially rising to the level of criminal actions by an elected official could objectively have been expected to become public as or after an investigation ran its course. RSA 91-A:5, IV.

NH20.[] 20.

Records > Right to Inspect > Generally

Case law holds that a clear privacy interest under the Right-to-Know Law exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available, and that a witness does not waive his or her interest in personal privacy even by testifying at a public trial. Nevertheless, the privacy interest in a witness's or investigation interviewee's name and identifying information will likely differ from the privacy interest in the substantive information the witness or interviewee imparts. RSA ch. 91-A.

NH21.[] 21.

Records > Right to Inspect > Generally

[*513] Even information imbued with a legitimate privacy interest is subject to disclosure if, on balance, that interest is outweighed by the public's cognizable interest in disclosure. Accordingly, a fact-specific inquiry is required in each case.

NH22.[] 22.

Records > Right to Inspect > Generally

The public has a significant interest in knowing that a government investigation is comprehensive and accurate. The rank of the official being investigated and the seriousness of the alleged misconduct will bear upon the strength of the public interest for purposes of the Right-to-Know Law. RSA ch. 91-A.

NH23.[] 23.

Records > Right to Inspect > Generally

The legitimacy of the public's interest in disclosure is tied to the purpose of the Right-to-Know Law, which is to provide the utmost information to the public about what its government is up to. If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released. Conversely, an individual's motives in seeking disclosure are irrelevant to the question of access. RSA ch. 91-A.

NH24.[] 24.

Records > Right to Inspect > Exceptions

The third step when considering whether disclosure of public records constitutes an invasion of privacy under the "personnel files" exemption from the Right-to-Know Law requires balancing the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. The legislature has provided the weight to be given one side of the balance by declaring the purpose of the Right-to-Know Law, in the statute itself. Specifically, the preamble provides: "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." Thus, when a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure. *RSA 91-A:1*; :5, IV.

Counsel: *Reid Law, PLLC*, of Concord (*Thomas Reid* on the brief and orally), for the plaintiff.

Joseph A. Foster, attorney general (*Francis C. Fredericks*, assistant attorney general, and *Nancy Smith*, senior assistant attorney general, on the brief, and *Mr. Fredericks* orally), for the defendant.

Judges: LYNN, J. HICKS, CONBOY, and BASSETT, JJ., concurred.

Opinion by: LYNN

Opinion

[862]** LYNN, J. The plaintiff, Thomas Reid, appeals the decision of the Superior Court *(SMUKLER*, J.) denying his petition under the Right-to-Know Law, *RSA chapter 91-A*, to compel the defendant, New Hampshire Attorney General Joseph Foster, to produce unredacted

records of the Attorney General's investigation into alleged wrongdoing by former Rockingham County Attorney James Reams. We vacate and remand.

I

The pertinent facts are as follows. Prior to November 6, 2013, the plaintiff served as the Deputy County Attorney for Rockingham County **[*514]** under County Attorney Reams. On that date, the defendant, claiming to act under authority granted by RSA 7:6 (2013), 7:11 (2013), and 7:34 (2013), suspended the criminal law enforcement authority of the county attorney.

Simultaneously, the defendant placed the plaintiff on paid suspension. At the defendant's request, the **[***2]** Rockingham County Commissioners barred Reams from entering his office. It appears from the plaintiff's allegations and a memorandum of law filed by the county commissioners in a related case that the plaintiff also was barred from the Rockingham County Attorney's Office at the defendant's behest. Also at the defendant's request, the superior court appointed an assistant attorney general to serve as interim county attorney for Rockingham County. *See* RSA 7:33 (2013). The defendant, acting in conjunction with the U.S. Attorney's Office and the Federal Bureau of Investigation, conducted a criminal investigation of Reams that lasted until approximately March of 2014. The plaintiff resigned his position as deputy county attorney on January 17, 2014.

While the criminal investigation was ongoing, Reams instituted lawsuits against the defendant and the county commissioners, asserting that their actions were unlawful and seeking reinstatement to his **[**863]** position as county attorney and access to his office. Based, in part, on the ongoing criminal investigation, the Superior Court *(McNamara*, J.) denied Reams's requests for preliminary injunctive relief and to conduct discovery.

On March 11, 2014, the defendant **[***3]** and the county commissioners filed a complaint asking the superior court to remove Reams from office pursuant to RSA 661:9, IV (2008). On March 26, the defendant informed the trial court that the criminal investigation had been concluded and that no criminal charges had been or would be brought against Reams. Because the criminal investigation was concluded, the trial court determined that there was no need for discovery in Reams's lawsuits seeking reinstatement to office.

By order of April 10, 2014, the court ruled that Reams's continued suspension from office was unlawful, and that he must be reinstated as Rockingham County Attorney and allowed access to his office. The court stayed its order for thirty days so as to permit the attorney general and the county commissioners to appeal and request a further stay from this court. The attorney general and the county commissioners did appeal to this court and sought an extension of the stay — relief which we denied.[1] On June 18, 2014, both proceedings were settled.

[*515] On April 17, 2014, the plaintiff submitted a request for disclosure **[***4]** of the defendant's records concerning the investigation of Reams. Specifically, the plaintiff sought the following materials:

- investigative reports, interview notes, memos, emails, recordings or other records relied upon as the basis for suspending the plaintiff's law enforcement authority;
- a recitation of all information possessed by the defendant on November 6, 2013, that led him to conclude that a criminal investigation of Reams should be initiated;
- all information, documents and records that justified the assignment of a state trooper to the Rockingham County Courthouse over the evening of November 6 - 7, 2013, to prevent tampering with records;
- information clarifying whether the county commissioners barred him from his office on their own initiative or at the request of the attorney general;
- copies of any and all warrants, consents, or reports pertaining to the search of the plaintiff's office and the seizure of items therefrom, a listing of the seized items, and return of said items to the plaintiff;
- records, interviews or reports reflecting any acts of discrimination that occurred at the Rockingham

[1] *See Rockingham County Attorney v. Rockingham County Commissioners; Rockingham County Attorney v. New Hampshire Attorney General*, No. 2014-0247 (N.H. April 24, 2014). Our order did, however, stay processing of the appeal pending the conclusion of the removal action in the superior court. We ruled that if the court's final decision in the removal action was appealed to this court, we would consolidate the appeals in both cases, and that if the removal action was not appealed, we would then reactivate the appeal in Case No. 2014-0247 at the request of the appellants.

County Attorney's Office during the years 2012 and 2013;

- any **[***5]** and all information related to a 2012 call to the Attorney General's Office by Rockingham County Commissioner Barrows with respect to a referral to the County Human Resources Department of a retaliation claim against a County Attorney's Office employee for an earlier discrimination **[**864]** complaint made by the employee's girlfriend (also a County Attorney's Office employee) against Reams, as well as information concerning leaks about the Human Resources investigation made to the press and/or to State Representative Laura Pantelakos; and
- any and all documents, interviews or records showing that Reams had retaliated against any County Attorney's Office employee as a result of the 2012 County Human Resources Department investigation or showing **[*516]** that there was reason to believe employees of the County Attorney's Office would be retaliated against if Reams was allowed to return to his position.

In a second request to the defendant, dated April 24, 2014, the plaintiff sought additional materials, including:

- all records, reports or interviews related to Reams's alleged modification of the supervisory duties of a County Attorney's Office employee who, in 1999, had complained to the Attorney General's **[***6]** Office about the sexual harassment of female employees by Reams, as well as records regarding Reams's alleged actions in causing this employee to be terminated from another job she held after leaving the County Attorney's Office; and
- the return to the plaintiff of the personal and supervisory notes he had compiled during his tenure as Deputy County Attorney.

The defendant timely responded to the requests, indicating that he would require a minimum of 30 days to compile and review the requested records. *See RSA 91-A:4, IV* (2013). When no further response was received from the defendant for a period of approximately seven months, the plaintiff instituted the present action. The defendant moved to dismiss, acknowledging that he had not timely supplemented his initial response, but arguing that he had otherwise acted reasonably and had not improperly withheld any information. The defendant represented that, as of December 20, 2014, he had begun the first phase of a "rolling production" of materials that consisted of the disclosure of 1293 pages of documents. The defendant requested that the court review *in camera* materials that he had submitted or proposed to submit in redacted form, so as to determine **[***7]** the propriety of the redactions.

By order dated January 14, 2015, the trial court ruled that the defendant had violated the Right-to-Know Law by failing to timely supplement his response to the plaintiff's requests. As relief, the court awarded the plaintiff his costs. However, the court declined to review redacted documents *in camera*. Instead, it directed the defendant to provide a "thorough affidavit" supporting his redactions, which the court indicated it would review to determine whether the defendant had sustained his burden of proof.[2]

[*517] The defendant responded by filing a final status report, affidavit, and request for dismissal on February 13, 2015. The affidavit, by Associate Attorney General Anne Edwards, identified the following nine legal bases upon which information had been withheld or redacted: (1) personnel information, under RSA 91-A:5, IV; (2) medical information, under RSA 91-A:5, IV; (3) grand jury records, under RSA 91-A:5, I; (4) financial information, under RSA 91-A:5, IV; (5) "[i]ndividual citizens' private information," the disclosure of which would **[**865]** constitute an invasion of privacy, under RSA 91-A:5, IV; (6) drafts, under RSA 91-A:5, IX; (7) notes, under RSA 91-A:5, VIII; (8) attorney work product, under RSA 91-A:5, IV and VII; and (9) confidential records, under RSA 91-A:5, IV and RSA 651:5. A master list of **[***8]** Bates-numbered documents, submitted as an exhibit to the affidavit, indicated which one or more of the foregoing legal bases for exemption was claimed for each document or category of documents listed. Finally, the defendant requested that the case be dismissed because, it claimed, it had "now responded fully to Mr. Reid's request and the Court Order" of January 14, 2015.

The plaintiff objected, and requested, among other things, additional time "to review the voluminous materials and provide a more comprehensive status report." The request for additional time was granted and,

[2] The court also denied the plaintiff's request for the assessment of a civil penalty, finding that the defendant had not acted in bad faith. In addition, the court denied the plaintiff's request for attorney's fees on the grounds that the plaintiff was self-represented.

thereafter, the plaintiff filed a motion to compel production of a complete index of records and a motion to compel production of unredacted documents. In his motion to compel production of documents, the plaintiff specifically challenged only one of the defendant's asserted bases of exemption; namely, the exemption claimed under RSA 91-A:5, IV for "personnel information." The defendant objected to both motions.

On July 10, 2015, the trial court denied the plaintiff's motions. The court denied the motion for production of a more detailed index "[b]ecause the defendant has already complied with a previous court order requiring production **[***9]** of an index." It denied the motion to compel production of unredacted documents on the basis that the documents sought were exempt from disclosure under the Right-to-Know Law. Specifically, the court ruled:

> Here, the records at issue relate to the defendant's investigation into misconduct alleged to have been committed by Reams. This investigation, which was conducted jointly with Rockingham County, consisted of interviews with present and former employees. The subject directly involved the Rockingham County Attorney's Office's personnel practices, including specific instances of conduct involving employee discipline and certain reports to the Rockingham County … human resources office.

[*518] The court concluded that "[t]he defendant's redactions fall within the purview of RSA 91-A:5, IV." This appeal followed.

II

NH[1,2][↑] [1, 2] On appeal, the plaintiff argues: (1) that the trial court's ruling violates Part I, Article 8 of the New Hampshire Constitution; (2) that the trial court erred in determining that the investigative records at issue were "[r]ecords pertaining to internal personnel practices," RSA 91-A:5, IV (2013), because the attorney general's investigation cannot be considered "internal"; and (3) that the trial court erred in finding that the attorney general's investigation of Reams was "conducted jointly with Rockingham County." "Because HN1[↑] we decide cases on constitutional grounds only **[***10]** when necessary," Chatman v. Strafford County, 163 N.H. 320, 322, 42 A.3d 853 (2012), we will first address the plaintiff's second argument, which raises an issue of statutory interpretation.

> HN2[↑] The interpretation of a statute is to be decided ultimately by this court. The ordinary rules of statutory construction apply to our review of the Right-to-Know Law, and we accordingly look to the plain meaning of the words used. To advance the purposes of the Right-to-Know Law, we construe provisions favoring disclosure broadly and exemptions narrowly.

[866]** Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475, 686 A.2d 310 (1996) (quotation and citations omitted).

At issue is the interpretation of HN3[↑] RSA 91-A:5, IV, which provides, in pertinent part, an exemption from disclosure under the Right-to-Know Law for:

> 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, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.

RSA 91-A:5, IV. The trial court, relying upon our decisions in Union Leader Corp. v. Fenniman, 136 N.H. 624, 620 A.2d 1039 (1993), and Hounsell v. North Conway Water Precinct, 154 N.H. 1, 903 A.2d 987 (2006), found that the subject of the investigative records at issue "directly involved the Rockingham **[***11]** County Attorney's Office's personnel practices."

The plaintiff argues that the trial court erroneously "applied a subject matter exemption contrary to the plain language of RSA 91-A:5[,] IV." In **[*519]** particular, the plaintiff contends that the "operative term" in the exemption at issue is "internal," and argues that the trial court both "failed to give weight" to that term and interpreted the statute so as to render the term superfluous. Fundamentally, the plaintiff's argument is that records of the defendant's investigation of Reams do not "pertain[ ] to *internal* personnel practices," RSA 91-A:5, IV (emphasis added), because "[t]he Attorney General is simply not the County Attorney's employer." We agree with the plaintiff's statutory interpretation and, therefore, we vacate and remand for further proceedings. To explain our reasoning, however, we must first examine the two cases upon which the trial court relied.

The first is *Fenniman*, in which the plaintiff sought the disclosure under the Right-to-Know Law of "certain investigatory documents under the control of" the Dover

Police Department and its chief. Fenniman, 136 N.H. at 625. The documents had been "compiled during an internal investigation of a department lieutenant accused of making **[***12]** harassing phone calls." *Id.* We held that the documents fell within the exemption for "[r]ecords pertaining to internal personnel practices" under RSA 91-A:5, IV. Id. at 626 (quotation omitted).

NH[3][↑] [3] We noted that "[t]his particular portion of … [the statute had] not been construed by this court and is neither explained nor defined by the statute," and, therefore, we relied upon the plain meaning of the words used. *Id*. We stated that HN4[↑] "[a]lthough we generally interpret the exemptions in RSA chapter 91-A restrictively to further the purposes of the Right-to-Know Law, the plain meanings of the words 'internal,' 'personnel,' and 'practices' are themselves quite broad." Id. at 626 (citation omitted). *But cf*., *e.g*., Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 552, 705 A.2d 725 (1997) (stating that "[a]n expansive construction of the[ ] terms ['confidential, commercial, or financial' in RSA 91-A:5, IV] must be avoided, since to do otherwise would allow the exemption to swallow the rule and is inconsistent with the purposes and objectives of RSA chapter 91-A" (quotation and brackets omitted)). We then concluded that the files at issue "plainly 'pertain[ ] to internal personnel practices' because they document procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice." Fenniman, 136 N.H. at 626. We further held that "[a]lthough we have **[**867]** often applied **[***13]** a balancing test to judge whether the benefits of nondisclosure outweigh the benefits of disclosure, such an analysis is inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt." Id. at 627 (citations omitted).

NH[4][↑] [4] As the foregoing demonstrates, in interpreting the "internal personnel practices" exemption in Fenniman, we twice departed from our **[*520]** customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly and declining to employ a balancing test in determining whether to apply the exemption. In addition, we did not interpret the portion of RSA 91-A:5, IV at issue in the context of the remainder of the statutory language — in particular, the language exempting "personnel … and other files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV; *see* Appeal of Cover, 168 N.H. 614, 618, 134 A.3d 433 (2016) (noting that HN5[↑] when interpreting a statute, "we do not consider words and phrases in isolation, but rather within the context of the statute as a whole" (quotation omitted)). Thus, we did not examine whether a broad, categorical interpretation of "internal personnel practices" might render the exemption for "personnel … files whose disclosure would constitute **[***14]** invasion of privacy" in any way redundant or superfluous. *See* Winnacunnet Coop. Sch. Dist. v. Town of Seabrook, 148 N.H. 519, 525-26, 809 A.2d 1270 (2002) (noting that "[w]hen construing a statute, we must give effect to all words in [the] statute and presume that the legislature did not enact superfluous or redundant words"); *cf.* Shapiro v. U.S. Dept. of Justice, 153 F. Supp. 3d 253, 280 (D.D.C. 2016) (noting that "Exemption 6 [of the federal Freedom of Information Act], which shields 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal [privacy]' … would have little purpose if agencies could simply invoke Exemption 2 [which shields, *inter alia*, records that relate solely to internal personnel rules and practices] to protect any records that are used only for 'personnel'-related purposes").

NH[5][↑] [5] Moreover, although the practice of consulting decisions from other jurisdictions interpreting similar statutes is common in our Right-to-Know Law jurisprudence, we did not conduct such an inquiry in *Fenniman. See*, *e.g*., Murray v. N.H. Div. of State Police, 154 N.H. 579, 581, 913 A.2d 737 (2006) (noting that HN6[↑] in interpreting the Right-to-Know Law, "[w]e also look to the decisions of other jurisdictions, since other similar acts, because they are *in pari materia*, are interpretatively helpful, especially in understanding the necessary accommodation of the competing **[***15]** interests involved" (quotation omitted)). Specifically, we have looked to federal law, *see*, *e.g*., Montenegro v. City of Dover, 162 N.H. 641, 650, 34 A.3d 717 (2011), having noted that "[t]he exemption provisions of our right-to-know law, RSA 91-A:5, IV (supp.), are similar to the Federal Freedom of Information Act, 5 U.S.C.A. [§] 552(b)(2), (4) and (6)," Mans v. Lebanon School Bd., 112 N.H. 160, 162-63, 290 A.2d 866 (1972).

NH[6][↑] [6] HN7[↑] The Freedom of Information Act (FOIA) exemption contained in 5 U.S.C. § 552(b)(2) is worded similarly to the portion of RSA 91-A:5, IV at issue here; specifically, it exempts from disclosure under the FOIA matters "related solely to the internal personnel rules and practices of an agency." **[*521]** 5 U.S.C. § 552(b)(2) (2012). Nevertheless, our construction of the "internal personnel practices" exemption in RSA 91-A:5, IV is markedly broader than the United States Supreme Court's interpretation of that

exemption's federal counterpart. *See* Dept. of Air Force v. Rose, 425 U.S. 352, 369-70, 96 S. Ct. 1592, 48 L. Ed. 2d 11 **[**868]** (1976) (noting that "the general thrust of the [5 U.S.C. § 552(b)(2)] exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest");[3] Milner v. Department of Navy, 562 U.S. 562, 566, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) (reaffirming the narrow scope of Exemption 2 by rejecting a line of federal cases recognizing a so-called "High 2" exemption for "any predominantly internal materials whose disclosure would significantly risk circumvention of agency regulations or statutes" **[***16]** (quotations, citation, footnote and brackets omitted)).[4]

We continued our broad interpretation of RSA 91-A:5, IV's "internal personnel practices" exemption in the second case relied upon by the trial court: *Hounsell v. North Conway Water Precinct. Hounsell* involved a Right-to-Know Law request for an investigative report prepared for the defendant North Conway Water Precinct (precinct) by outside investigators. Hounsell, 154 N.H. at 2-3. Specifically, following an allegation by a precinct employee "that he had been threatened and harassed by a co-worker," the precinct's legal counsel "retained Jack Hunt and John Alfano to investigate the complaint." Id. at 2. Hunt and Alfano interviewed precinct employees and then "prepared a report in which they summarized the investigation and made findings and recommendations (Hunt-Alfano report)." *Id.*

We affirmed the trial court's denial of the Right-to-Know petition, id. at 7, holding, in relevant part, that, "as in *Fenniman*, the Hunt-Alfano report, which was generated in the course of an investigation of claimed employee misconduct, was a record pertaining to 'internal personnel practices.'" Id. at 4. We also rejected the petitioners' contention that "the investigation lost its 'internal **[***17]** status' because," among other things, "the precinct contracted with outside investigators." Id. at 5. We found that argument **[*522]** "unpersuasive … because nothing in the plain language of RSA 91-A:5, IV restricts a public body or agency from asserting an exemption under these circumstances, and the petitioners have presented no legal authority in support of their contentions." Id. at 5.

Against this legal backdrop, we now consider whether the "internal personnel practices" portion of RSA 91-A:5, IV exempts the materials at issue. Neither party has asked us to reconsider *Fenniman* or *Hounsell*, and we will not do so *sua sponte*. At this juncture, *stare decisis* impels us to follow *Fenniman* and *Hounsell* in treating "procedures leading up to internal personnel discipline" — in particular, an investigation into employee misconduct — as a personnel **[**869]** practice. Fenniman, 136 N.H. at 626. Nevertheless, we decline to extend Fenniman and Hounsell beyond their own factual contexts and, in further interpreting RSA 91-A:5, IV herein, we return to our customary standards for construing the Right-to-Know Law.

The plaintiff distinguishes *Hounsell* by noting that in that case, "the investigators had been retained by the employer and acted on behalf of the employer." He argues that "[t]he mere fact **[***18]** that an investigation could result in disciplinary action, standing alone, is not enough to qualify an investigation as a record pertaining to 'internal personnel practices.' We agree that Hounsell is distinguishable and that the distinction turns upon the statutory term "internal." RSA 91-A:5, IV.

NH[7][↑] [7] **HN8**[↑] "When interpreting a statute, we first look to the plain meaning of the words used and will consider legislative history only if the statutory language is ambiguous." Union Leader Corp. v. N.H. Retirement Sys., 162 N.H. 673, 676, 34 A.3d 725 (2011) (quotation omitted). In *Fenniman*, we stated that "the plain meanings of the words 'internal,' 'personnel,' and 'practices' are … quite broad," but went no further in defining or examining those terms. Fenniman, 136 N.H. at 626. Looking now to how the words are used in the statute, we note that the terms "internal" and "personnel" modify the word "practices," thereby circumscribing the provision's scope. *Cf.* Milner, 562 U.S. at 569 (observing that 5 U.S.C. § 552(b)(2) uses the term "'personnel' … as an adjective … to modify 'rules and practices'" and

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[3] The *Rose* Court relied upon the Senate Report on the bill enacted and codified as 5 U.S.C. § 552(b)(2), Rose, 425 U.S. at 367, which gave, as examples of material covered by Exemption 2, "'rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like.'" Id. at 363 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965)).

[4] In so holding, the Court stated that "Exemption 2, consistent with the plain meaning of the term 'personnel rules and practices,' encompasses only records relating to issues of employee relations and human resources." Milner, 562 U.S. at 581. While this statement may appear to suggest a broader interpretation of Exemption 2 than that in *Rose*, it has been noted that "[t]he modest difference in judicial approaches taken in the *Rose* and *Milner* decisions does not come close to undermining the *Rose* holding." Shapiro, 153 F. Supp. 3d at 279.

that the term is "the one that most clearly marks the provision's boundaries").

NH[8] [8] HN9 In construing the term "personnel" as used in the FOIA, the Supreme Court noted that "[w]hen used as an adjective, … th[e] term refers to human resources matters. 'Personnel,' **[***19]** in this common parlance, means 'the selection, placement, and training of employees and … the formulation of policies, procedures, and relations with [or involving] employees or their representatives.' " *Id.* (quoting Webster's Third New International Dictionary 1687 (1966)). The Court accordingly determined that "[a]n agency's 'personnel rules and practices,' " for purposes of **[*523]** exemption 2 of the FOIA, "are its rules and practices dealing with employee relations or human resources… . They concern the conditions of employment in federal agencies — such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id. at 570*. In general, then, the term "personnel" relates to employment. Indeed, this is the meaning we implicitly gave the term in *Fenniman* and *Hounsell. See*, *e.g.*, *Hounsell, 154 N.H. at 4* (noting that, "as in *Fenniman*, the Hunt-Alfano report, which was generated in the course of an investigation of claimed *employee* misconduct, was a record pertaining to 'internal personnel practices' " (emphasis added)).

NH[9] [9] "Internal" is defined to mean "existing or situated within the limits … of something." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1180 (unabridged ed. 2002). Employing the foregoing **[***20]** definitions, HN10 we construe "internal personnel practices," to mean practices that "exist[ ] or [are] situated within the limits" of employment. *Id.* Accordingly, while we follow *Fenniman* and *Hounsell* in treating an investigation into employee misconduct as a personnel practice, we now clarify that the investigation must take place within the limits of an employment relationship. In other words, the investigation must be conducted by, or as in *Hounsell*, on behalf **[**870]** of,[5] the employer of the investigation's target. *See Hounsell, 154 N.H. at 2, 4-5*. Such a construction is not only consistent with the plain language of *RSA 91-A:5, IV*, but also follows our practice of "resolv[ing] questions regarding the Right-to-Know law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *N.H. Retirement Sys., 162 N.H. at 676* (quotation and brackets omitted).

The plaintiff argues that the investigation into Reams's alleged misconduct was not an "internal" one because it was conducted by the defendant, who was not Reams's employer. The defendant neither directly asserts that he was Reams's employer nor explicitly concedes that he was not. Rather, the defendant contends that **[***21]** the attorney general's interests "in the effective operation of the [Rockingham County Attorney's Office] do not differ from the interests of an employer." The defendant further asserts that the plaintiff's "argument that the records are not exempt because the [Attorney General's Office] did not employ the witnesses at issue is … in error because an investigation into management and operational issues that **[*524]** impact the office's prosecutorial effectiveness is within the [Attorney General's Office's] statutory authority."

We have not previously decided whether the county attorneys are employees of the attorney general. *Cf. State v. Dexter, 136 N.H. 669, 673, 621 A.2d 435 (1993)* (finding it unnecessary to decide, even assuming attorney's fees were recoverable for county attorney's alleged bad faith litigation, whether such fees would be "properly recoverable from the State or the county"). In *Samaha v. Grafton County, 126 N.H. 583, 493 A.2d 1207 (1985)*, we held that the plaintiff, when employed as clerk of superior court sitting in Grafton County, "was not an employee of Grafton County." *Samaha, 126 N.H. at 586*. We reasoned:

> In determining whether an employer-employee relationship exists, courts generally consider factors such as managerial and fiscal control. During his service there, the county did not have the right **[***22]** to exercise fiscal or managerial control over the plaintiff, nor the power to set his salary, hire or fire him. These functions were performed by the superior court, acting as a body. *RSA 499:1*, *:12*. N.H. CONST. pt. II, art. 82.

Id. (citations omitted).

NH[10] [10] Considering the factors we employed in *Samaha* with respect to the instant case, we note that HN11 the attorney general does not hire county attorneys. Rather, each county attorney is "elected biennially by the voters of the county." *RSA 7:33* (2013); *see also RSA 653:1, V* (2016). Vacancies or temporary absences in the office of county attorney are filled either

[5] In *Hounsell*, the precinct's legal counsel "retained" the outside third parties "to investigate [an employee's] complaint of harassment" by a co-worker. *Hounsell, 154 N.H. at 2*. The implication is that the outside investigators neither initiated the investigation nor conducted it for their own purposes, but rather, that they acted solely on behalf of the precinct. *See id.*

by the superior court or by majority vote of the members of the county convention, in accordance with the provisions of RSA 7:33 and RSA 661:9 (2016). Nor does the attorney general have the authority to fire a county attorney. *See* Eames v. Rudman, 115 N.H. 91, 93, 333 A.2d 157 (1975) (noting that attorney general has no power to remove the county attorney from office). The attorney general may "temporarily suspend [a] **[**871]** county attorney from exercising his criminal law enforcement authority," but the "power to remove [a] county attorney from office … is vested in the superior court." *Id. at 91, 93*; RSA 661:9, IV (providing that "[a]ny officer of a county … may be removed by the superior court for official **[***23]** misconduct"). Finally, the attorney general neither sets nor pays the county attorneys' salaries. *See* RSA 23:7 (2000) (providing, in part, that "[e]very county convention shall have the power to establish salaries, benefits and other compensation paid to elected county officers including the county attorney"); RSA 23:5 (2000) (providing that "[t]he salaries of county attorneys … shall be paid from the county treasury in equal payments as determined by the county commissioners").

[*525] ***NH[11]***[↑] [11] As the defendant points out, however, ***HN12***[↑] the attorney general does possess some supervisory authority over county attorneys. *See* Wyman v. Danais, 101 N.H. 487, 490, 147 A.2d 116 (1958). RSA 7:6 provides, in part, that "[t]he attorney general shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state." RSA 7:6. "RSA 7:11 provides that officers charged with enforcing criminal law 'shall be subject to the control of the attorney general whenever in the discretion of the latter he shall see fit to exercise the same.' " *Wyman, 101 N.H. at 489* (quoting RSA 7:11) (emphasis omitted); *see* RSA 7:11. Similarly, RSA 7:34 specifies that "[t]he county attorney of each county shall be under the direction of **[***24]** the attorney general." RSA 7:34. "Construed together," the above-cited provisions "demonstrate a legislative purpose to place ultimate responsibility for criminal law enforcement in the Attorney General, and to give him the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where he deems it in the public interest." *Wyman, 101 N.H. at 490*. Nevertheless, the prosecution of criminal cases under the supervision of the attorney general is not the sole duty or function of a county attorney. "Although the county attorney … may be engaged primarily in criminal prosecutions, his duties and functions also include civil litigations for the county and other miscellaneous civil matters." *New Hampshire Bar Ass'n v. LaBelle, 109 N.H. 184, 185, 246 A.2d 826 (1968)* (citation omitted); *see* RSA 7:34 (providing that "[i]f no other representation is provided, under the direction of the county commissioners [the county attorney] shall prosecute or defend any suit in which the county is interested").

NH[12][↑] [12] Because the relationship between the attorney general and a county attorney lacks the usual attributes of an employer-employee relationship, such as the "power to set [the] salary, hire or fire," *Samaha, 126 N.H. at 586*, we agree with the plaintiff that the defendant was not Reams's employer. We **[***25]** further conclude that the attorney general's supervisory authority over criminal law enforcement by the county attorney is not sufficient, in light of the absent characteristics noted above, to warrant treating the defendant as Reams's employer for purposes of the "internal personnel practices" exemption.

NH[13][↑] [13] We need not decide, and express no opinion upon, whether the Rockingham County Commissioners could be considered Reams's employer for purposes of the "internal personnel practices" exemption as applied in *Hounsell*, nor must we address the plaintiff's argument that the trial court erred in finding that the defendant's investigation of Reams was **[*526]** "conducted **[**872]** jointly with Rockingham County." As noted above, ***HN13***[↑] an investigation is "internal," as applied in *Hounsell*, if conducted on behalf of the employer of the investigation's target. *See* Hounsell, 154 N.H. at 2, 4-5. Mere joint participation is not sufficient. *Cf. id*.

The defendant makes no argument on appeal that it acted as agent or outside counsel to the Rockingham County Commissioners such that its investigation should be treated as conducted on their behalf for purposes of the "internal investigation exemption" as applied in *Hounsell*. Rather, although the defendant **[***26]** maintains that it viewed its investigation as "a joint investigation with Rockingham County," it "does not claim that the fact that the investigation was conducted with Rockingham County is what justifies the application of RSA 91-A:5, IV's personnel exemptions." Accordingly, because a finding of joint participation with the county commissioners would not affect our decision, we decline to address the plaintiff's third claim of error; moreover, because the trial court applied RSA 91-A:5, IV's "internal personnel practices" exemption to records of an investigation

conducted outside the limits of an employment relationship, we vacate its decision.

The defendant nevertheless contends that "the protection provided by the RSA chapter 91-A personnel exemptions is not for the benefit of the employer, but for the benefit of protecting the privacy rights of the employee." Thus, he argues: "[T]he fact that the [Attorney General's Office's] investigation occurred does not divest the affected [Rockingham County Attorney's Office] employees of their right to have their personnel information protected."

The defendant's argument does not alter our above conclusion, but, rather, highlights that whether the disputed material may be withheld should **[***27]** more properly be addressed under the portion of RSA 91-A:5, IV that exempts "personnel, medical, … and other files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV; *see* N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 110, 143 A.3d 829 (2016) (noting that "[t]his section of the Right-to-Know Law means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed" (quotation omitted)). Similarly, we decline to consider at this time the defendant's contention that the "transfer of personnel information from the [Rockingham County Attorney's Office] to the [Attorney General's Office] does not alter the fact that the information is substantively personnel in nature," because we believe that argument, too, is more suited to an analysis under the "personnel, medical … and other files" exemption. RSA 91-A:5, IV; *cf.* U.S. Dept. of State v. Washington Post Co., 456 U.S. 595, 601, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982) (stating, in broadly construing the term "similar files" in the FOIA's Exemption 6, that **[*527]** "information about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than 'personnel' or 'medical' files").

As previously noted, the defendant claimed a number of exemptions for the information he withheld or redacted, including an exemption for a **[***28]** category of materials he called "Personnel Information." (Bolding omitted.) The defendant asserted: "Under RSA 91-A:5, IV, records related to internal personnel practices are exempt from disclosure under Right to Know. In addition, personnel records are also exempt." Thus, it appears that the defendant claimed exemption under both personnel-related exemptions in RSA 91-A:5, IV — the exemption for "[r]ecords pertaining **[**873]** to internal personnel practices" — and the exemption for "personnel … files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV.

The trial court also seems to have recognized two personnel-related exemptions, as it noted that RSA 91-A:5, IV exempts "'[r]ecords pertaining to internal personnel practices,' as well as employees' personnel files." The court's decision, however, appears to be based exclusively on the "internal personnel practices" exemption, and it is not evident that the court considered whether any of the disputed materials were exempt as "personnel … files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. Accordingly, on remand, the parties may litigate whether any of the disputed materials fall within the latter exemption and we leave it to the trial court to make that determination in the first **[***29]** instance.

NH[14][↑] [14] For the benefit of the parties and the court on remand, we provide the following guidance. **HN14**[↑] Although we have not specifically interpreted the exemption for "personnel … files whose disclosure would constitute invasion of privacy," RSA 91-A:5, IV, we have had occasion to "define with some specificity the statutory exemption for 'confidential, commercial, or financial information'" in the same provision. N.H. Housing Fin. Auth., 142 N.H. at 552. We noted that "[w]e have interpreted our statute … as requiring analysis of both whether the information sought is 'confidential, commercial, or financial information,' and whether disclosure would constitute an invasion of privacy." *Id*. Similarly, we now hold that the determination of whether material is subject to the exemption for "personnel … files whose disclosure would constitute invasion of privacy," RSA 91-A:5, IV, also requires a two-part analysis of: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy. *Cf.*, *e.g.*, Rugiero v. U.S. Dept. of Justice, 257 F.3d 534, 550 (6th Cir. 2001) (describing similar two-part test for exemption under the FOIA for personnel, medical and similar files); Rocque v. Freedom of Information Com'n, 255 Conn. 651, 774 A.2d 957, 963-64 **[*528]** (Conn. 2001) (describing similar two-part test for exemption **[***30]** under Connecticut's Freedom of Information Act for personnel, medical or similar files). Accordingly, in analyzing the "personnel … files" exemption on remand, the trial court must first determine whether any of the disputed material is, or is contained in, a personnel file. If not, the "personnel …

files" exemption does not apply.[6] *Cf.* Abbott v. Dallas Area Rapid Transit, 410 S.W.3d 876, 883-84 (Tex. App. 2013) (noting that exemption under Texas Public Information Act for "'information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy'" did not apply to information at issue where there was "no evidence in the record before us that [Dallas Area Rapid Transit's] investigation report [regarding an employee's racial discrimination **[**874]** complaint against two co-employees] is in the interviewees' personnel files").

NH[15,16][↑] [15, 16] **HN15**[↑] The analysis of whether the exemption for "personnel … files" applies next requires determining whether disclosure of any material meeting the first prong of the inquiry would constitute an invasion of privacy. We now clarify that, unlike materials pertaining to "internal personnel practices," for which we eschewed the customary balancing test in *Fenniman*, "personnel … files" **[***31]** are not automatically exempt from disclosure. RSA 91-A:5, IV. For those materials, "th[e] categorical exemption[ ] [in RSA 91-A:5, IV] mean[s] not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." N.H. Housing Fin. Auth., 142 N.H. at 553 (discussing RSA 91-A:5, IV exemption for "confidential, commercial, or financial information"). Specifically, "[w]e engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV." N.H. Right to Life, 169 N.H. at 110.

HN16[↑] The three-step analysis is well-established:

> First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure… . If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.
>
> **[*529]** Second, we assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government… .
>
> Finally, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.

Lambert v. Belknap County Convention, 157 N.H. 375, 382-83, 949 A.2d 709 (2008) (citations omitted).

The defendant does not appear to assert a privacy interest on behalf of Reams,[7] but rather cites "the privacy rights of **[***32]** the former and present [Rockingham County Attorney's Office] employees who provided their [employment-related] information, including allegations of sexual harassment, pregnancy discrimination, discipline, and retaliation to [Attorney General's Office] investigators." Looking to cases from other jurisdictions for guidance, *see* Murray, 154 N.H. at 581, we note that federal courts applying the FOIA have recognized that "[w]itnesses who cooperate with internal investigations concerning alleged employee violations do have privacy interests at stake." Fine v. U.S. Dept. of Energy, 823 F. Supp. 888, 897 (D.N.M. 1993); *see also* Cappabianca v. Commissioner, U.S. Customs Service, 847 F. Supp. 1558, 1564 (M.D. Fla. 1994) (noting that "[w]itnesses and co-workers have legitimate privacy interests in the nondisclosure of their identities and in keeping their participation in an investigation confidential"). In addition, a *public* interest in nondisclosure has been noted where records relate to the investigation of alleged wrongdoing by public employees. Thus, in analyzing the FOIA exemption for " 'investigatory records compiled for law enforcement purposes,' " whose production would **[**875]** " 'constitute an unwarranted invasion of personal privacy,' " the court in *Fine* recognized "a strong public interest in protecting the privacy of persons who have cooperated with internal investigations of possible improper **[***33]** conduct by fellow employees." Fine, 823 F. Supp. at 907-08 (quoting 5 U.S.C. § 552(b)(7)(C)(1977)). Although these cases provide helpful guidance, we note that they are arguably

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[6] We again note that the defendant claimed a number of exemptions for its withholding and redaction of information subject to the plaintiff's Right-to-Know Law request, including an exemption for "Personal Information." (Bolding omitted.) In particular, the defendant claimed an exemption for "records whose disclosure would constitute an invasion of privacy." (Quotation omitted.) To the extent that claim was intended to be an invocation of the exemption for "*other* files whose disclosure would constitute invasion of privacy," we express no opinion upon the scope or application of that claimed exemption and our decision herein has no effect upon the defendant's ability to assert such a claim on remand. RSA 91-A:5, IV (emphasis added).

[7] Because the trial court appears not to have engaged in the balancing test for an exemption involving an asserted invasion of privacy, or made any ruling on that issue that is now before us on appeal, we do not address whether the defendant's brief fully develops his privacy claim. Thus, nothing in the guidance we provide herein is intended to constrain the scope of the defendant's claims or arguments on remand.

distinguishable from this case because, as explained above, the investigation by the attorney general's office was not an "internal" one.

NH[17][↑] [17] We have not yet considered the nature of any privacy interest that might be asserted under the precise circumstances at issue here. HN17[↑] The **[*530]** privacy inquiry under the comparable provision of the FOIA (Exemption 6), however, has been noted to be "essentially the same," Judicial Watch, Inc. v. Dept. of Justice, 365 F.3d 1108, 1125, 361 U.S. App. D.C. 183 (D.C. Cir. 2004), as the privacy inquiry under the FOIA's exemption for investigatory records "compiled for law enforcement purposes," to the extent their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C) (2012). *Cf.* Judicial Watch, Inc., 365 F.3d at 1125 (also noting, however, that the Supreme Court has construed the 7C exemption to be broader than Exemption 6).

NH[18][↑] [18] We addressed a law enforcement exemption under the Right-to-Know Law in *City of Nashua*, where we recognized "that HN18[↑] there may be strong privacy interests … in law enforcement investigatory records." City of Nashua, 141 N.H. at 477. We cited cases from other jurisdictions noting that disclosure of such records could subject individuals **[***34]** to stigma, embarrassment, and reputational injury. Id. at 477-78. Similarly, the FOIA's Exemption 6 has been held to apply to the "kinds of facts [that] are regarded as personal because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." Brown v. Federal Bureau of Investigation, 658 F.2d 71, 75 (2d Cir. 1981) (determining whether documents were "similar files" under Exemption 6 of the FOIA); *see also* Washington Post Co., 456 U.S. at 599 (noting that legislative history suggests that the "primary purpose … [of] Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information"). Thus, in determining whether any privacy interests are at stake in the disputed materials, the trial court should consider whether disclosure would subject an individual to the kind of embarrassment or reputational harm described above.

NH[19][↑] [19] Moreover, HN19[↑] "[w]hether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations." N.H. Retirement Sys., 162 N.H. at 679 (quotation omitted); *cf.* Lambert, 157 N.H. at 383 (noting that candidate for an elected office "could not have reasonably expected to keep his or her 'application' private"). As *Lambert* suggests, **[***35]** however, the nature of the information itself may bear upon whether it can be considered private for purposes of RSA 91-A:5, IV. *See* Lambert, 157 N.H. at 383. Thus, information that, under an objective standard, would be expected to become public in due course, should not give rise to the same privacy interest as information for which public exposure would, objectively, never be anticipated. Here, it may be that certain information regarding allegations of misconduct potentially **[*531]** rising to the level of criminal actions by an elected official could objectively have been expected to become **[**876]** public as or after an investigation ran its course.

NH[20][↑] [20] We recognize HN20[↑] case law holding that "[a] clear privacy interest exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available," Rugiero, 257 F.3d at 550, and that "[a] witness does not waive his or her interest in personal privacy [even] by testifying at a public trial," Sellers v. U.S. Dept. of Justice, 684 F. Supp. 2d 149, 160 (D.D.C. 2010) (discussing the FOIA exemption for records compiled for purposes of law enforcement). Nevertheless, we note that the privacy interest in a witness's or investigation interviewee's name and identifying information will likely differ from the privacy interest **[***36]** in the substantive information the witness or interviewee imparts. *Cf.* CREW v. U.S. Dept. of Justice, 978 F. Supp. 2d 1, 11 (D.D.C. 2013) (*CREW I*) (finding, with respect to investigative files on senator's alleged criminal actions taken to cover up an extramarital affair, that third parties mentioned in files, such as informants, witnesses, and investigators, "lack a privacy interest in the *substance* of the files, unless the substance could reveal their identities").

NH[21][↑] [21] In contrast to CREW I, *id.*, however, and given the nature of Reams's alleged misconduct, we cannot say as a matter of law that third party witnesses and interviewees in this case will have *no* privacy interest in *any* of the substantive information. *Cf.* Rocque, 774 A.2d at 959 (agreeing with trial court "that the identity of the complainant in the sexual harassment investigation at issue … [and] certain other information concerning the investigation is exempt from disclosure" but "limit[ing] the exempt portions of the records to those comprising sexually descriptive information"). On the other hand, HN21[↑] even information imbued with a

legitimate privacy interest is subject to disclosure if, on balance, that interest is outweighed by the public's cognizable interest in disclosure. *Cf.* CREW I, 978 F. Supp. 2d at 12 (noting that "[a]lthough the [defendant, Department **[***37]** of Justice (DOJ),] argues that Senator Ensign's alleged misconduct 'is of a highly personal nature,' the public has a substantial interest in DOJ's decision not to prosecute him, considering the circumstances"). Accordingly, we emphasize that a fact-specific inquiry is required in each case. *Cf.* Rocque, 774 A.2d at 959 (disagreeing with "trial court's ruling that the identity of a complainant in a sexual harassment complaint and related information are *always* exempt from disclosure, irrespective of the particular facts of a case").

[*532] NH[22][↑] [22] Turning to the second step of the balancing test, the plaintiff claims a "public interest in determining if the Attorney General had grounds to unilaterally remove an elected official … [and] in disclosing the information relied upon by the Attorney General." We recognize that HN22[↑] "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." Fine, 823 F. Supp. at 898. We also note that the rank of the official being investigated and the seriousness of the alleged misconduct will bear upon the strength of the public interest. *Cf.* Coleman v. Lappin, 680 F. Supp. 2d 192, 199 (D.D.C. 2010) (stating that "[t]he Court ordinarily considers, when balancing the public interest in disclosure against the private interest in exemption, **[***38]** the rank of the public official involved and the seriousness of the misconduct alleged" (quotation and brackets omitted)). Thus, for instance, the court in CREW v. U.S. Dept. of Justice, 840 F. Supp. 2d 226 (D.D.C. 2012) (*CREW II*), found it "difficult to understand how there could not be a substantial public interest in disclosure of documents **[**877]** regarding the manner in which the [Department of Justice] handled high profile allegations of public corruption about an elected official." CREW II, 840 F. Supp. 2d at 234.

NH[23][↑] [23] HN23[↑] The legitimacy of the public's interest in disclosure, however, is tied to the Right-to-Know Law's purpose, which is "to provide the utmost information to the public about what its government is up to." N.H. Right to Life, 169 N.H. at 111 (quotation omitted). "If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 111, 872 A.2d 1006 (2005) (quotation omitted). Conversely, "an individual's motives in seeking disclosure are irrelevant to the question of access." Lambert, 157 N.H. at 383.

NH[24][↑] [24] HN24[↑] The third step requires balancing "the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure." *Id.* We have stated that "[t]he legislature has provided **[***39]** the weight to be given one side of the balance[ ] [by] declaring the purpose of the Right-to-Know Law in" the statute itself. City of Nashua, 141 N.H. at 476. Specifically, the preamble to RSA chapter 91-A provides: "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." RSA 91-A:1 (2013). Thus, "[w]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." City of Nashua, 141 N.H. at 476.

[*533] The foregoing considerations are not intended to be either comprehensive or exhaustive, and we leave it to the trial court, in the first instance, to determine and weigh the applicable interests as the case may require on remand.

In light of the foregoing, our decision is not undermined by the defendant's contention, and the trial court's consonant finding, that this case implicates the policy concern noted in *Hounsell*; namely, that "disclosure of records underlying, or arising from, internal personnel investigations would deter the reporting of misconduct by public employees, or participation **[***40]** in such investigations, for fear of public embarrassment, humiliation, or even retaliation." Hounsell, 154 N.H. at 5. We are confident that the proper balancing of the employees' interests in privacy and the State's interest in nondisclosure against the public's interest in disclosure under our established test adequately addresses any concerns about deterrence. *Cf.* Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 556, 813 A.2d 381 (2002) (acknowledging "a possibility that an audit investigation may be compromised if interviewees are reluctant to disclose information to investigators" out of concern "that their responses could be released to the public," but finding that this possibility did "not … outweigh[ ] the public's interest in disclosure").

In light of our decision, we need not address the plaintiff's constitutional argument. *See* *Chatman, 163 N.H. at 326*.

Vacated and remanded.

HICKS, CONBOY, and BASSETT, JJ., concurred.

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Salcetti v. City of Keene

Supreme Court of New Hampshire

June 3, 2020, Issued

Case No. 2019-0217

Reporter
2020 N.H. LEXIS 106 *; 2020 WL 3167669

MARIANNE SALCETTI *& a.* v. CITY OF KEENE

Core Terms

e-mailed, redacted, exempt, quotation, inspections, food, infractions, disclosure, assault, license, printed, scores, sexual, unredacted

Disposition: Affirmed in part; reversed in part; vacated in part; and remanded.

Judges: **[*1]** HICKS, BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

Opinion

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is unnecessary in this case. The petitioners, Professor Marianne Salcetti and her journalism students at Keene State College — Colby Dudal, Alex Fleming, Meridith King, Grace Pecci, and Abbygail Vasas — appeal several orders of the Superior Court (*Ruoff*, J.) granting, in part, and denying, in part, their petition under the *Right-to-Know Law*, *RSA chapter 91-A* (2013 & Supp. 2019). The petitioners argue that the trial court erred when it: (1) interpreted certain of their Right-to-Know requests filed with the respondent, the City of Keene, as requests for "lists"; (2) found that the City conducted a reasonable search for certain requested records; (3) allowed the City to withhold and redact certain information regarding citizen complaints of excessive force used by City police officers; (4) upheld the City's proposed $300 charge for access to certain records; (5) found that the petitioners lacked standing to challenge the City's requirement that requesters submit signed, written requests; and (6) found that the City's response times **[*2]** to the requests were reasonably necessary. We affirm, in part, reverse, in part, vacate, in part, and remand.

The pertinent facts are as follows. In the Fall of 2017, Salcetti taught a journalism class at Keene State College during which she instructed her students to file Right-to-Know requests with public entities seeking information on topics of public interest. Several of these requests were submitted to the City, and five of them were denied in full or in part. In December 2017, Salcetti, as a non-attorney representative for her students, *see* Super. Ct. Civ. R. 20, filed a petition in the superior court requesting that the court order the City to fulfill the students' Right-to-Know requests. The trial court held a hearing in June 2018, and issued a series of orders in August 2018, December 2018, and January 2019, which resolved the issues raised by the petitioners primarily in favor of the City. The petitioners filed a motion to reconsider. The motion was denied, and this appeal followed.

Resolution of this appeal requires that we interpret the Right-to-Know Law, RSA chapter 91-A. "The ordinary rules of statutory construction apply to our review of the Right-to-Know Law." N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 102-03, 143 A.3d 829 (2016) (quotation omitted). **[*3]** Thus, "we are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole." Id. at 103 (quotation omitted). "When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used." *Id.* (quotation omitted). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Id.* (quotation omitted). "We also interpret a statute in the context of the overall statutory scheme and not in isolation." *Id.* (quotation omitted).

The purpose of the Right-to-Know Law "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." RSA 91-A:1 (2013). "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Right to Life, 169 N.H. at 103 (quotation omitted); *see also* N.H. CONST. pt. I, art. 8. "Although the statute does not provide for unrestricted access to public records, we resolve questions regarding the Right-to-Know Law with a view to providing the **[*4]** utmost information in order to best effectuate these statutory and constitutional objectives." N.H. Right to Life, 169 N.H. at 103 (quotation omitted). "As a result, we broadly construe provisions favoring disclosure and interpret the exemptions restrictively." *Id.* (quotation omitted). "We also look to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)." *Id.* "Such similar laws, because they are *in pari materia*, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved." *Id.* (quotation omitted).

"When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure." *Id.* (quotation omitted). "We review the trial court's statutory interpretation and its application of law to undisputed facts *de novo*." *Id.*

I. Interpretation of the Right-to-Know Requests

The petitioners first argue that the trial court erred when it interpreted the Right-to-Know requests filed by Dudal, Fleming, and Vasas as requests for "lists," rather than as requests for the responsive governmental **[*5]** *records* themselves. The City counters that the trial court did not err in finding that the students had requested "lists," and that the City is not required to compile, cross-reference, or assemble governmental records into a form that does not already exist. We examine each student's request in turn.

We first consider Dudal's Right-to-Know request. On September 26, 2017, Dudal hand-delivered a request to the City seeking "[a] list of the … food establishments that are a part of license class I, license class II, and license class III in Keene that received a score of less than 85" during a specified time period, and "[a] list of the violations for any and all food establishments that are a part of license class I, license class II, and license class III in Keene that received scores of 85 or less, and the checklist of the inspection accompanying each score," during the same time period. The City's deputy clerk and records manager, William Dow, acknowledged receipt of the request the following day. On October 4, Dudal called Dow, who instructed him to contact the City's Code Enforcement Department regarding his request. On October 5, Dudal e-mailed a second Right-to-Know request **[*6]** to the Code Enforcement Department. This request sought "[a]ll food establishments' scores and dates of inspections for the city of Keene, NH within the past [three] years for food establishments that are in classes I, II and III," and "[t]he criteria in which the food establishments were scored and graded." Also on October 5, Dow notified Dudal that

there were existing governmental records responsive to his request.

On October 19, Corinne Marcou, an administrative assistant at the City's Code Enforcement Department, e-mailed Dudal, stating that "[a]fter much conversation[ ] with William Dow and our City Attorney, the information from our data system isn't a government document and as there is no report currently created with this specific request criteria, the City isn't obligated to create one." On October 26, while at the Code Enforcement Department, Dudal was told that the information regarding food establishment inspections was not available because "food establishment records are kept in a database and no governmental records containing that information existed nor was [the City] required to create one."

The trial court found that "the 'records' [Dudal] seek[s] from the City are **[*7]** not existing records that the City keeps or maintains; the data compilations [he has] requested do not exist in a form [he] requested, but rather exist as uncollected data in a database, and for the data to be in a form that [he was] entitled to have, the City would need to create a new record." Thus, because "[t]he law is clear that a public body or agency has no obligation to create a 'list' of existing data," the trial court found that the City properly denied Dudal's requests.

We agree with the trial court's decision upholding the City's denial of Dudal's first request, which explicitly sought "lists" that were not compiled or maintained by the City. "[T]he statute does not require public officials to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist." *Brent v. Paquette, 132 N.H. 415, 426, 567 A.2d 976 (1989)*; *see also RSA 91-A:4, VII* (2013) ("Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.").

However, we disagree that Dudal's second request was similarly deficient. Dudal's second request sought "[a]ll **[*8]** food establishments' scores and dates of inspections for the city of Keene, NH within the past [three] years for food establishments that are in classes I, II and III." In Dudal's second request, he did not seek a compiled list of information; rather, he sought governmental *records* that would themselves be responsive to his request. *See RSA 91-A:4, IV* (2013) (amended 2016 & 2019) (providing that a request need only "reasonably describe[ ]" the records sought). Thus, the trial court erred when it upheld the City's denial of Dudal's second request.

Next, we consider Fleming's Right-to-Know request. On September 25, 2017, Fleming e-mailed a request to the City seeking "[a]ll documents including, but not limited to, printed document and electronic documents police citations involving infractions pertaining to" *RSA 179:10* (2014) (Unlawful Possession and Intoxication) and *RSA 644:18* (2016) (Facilitating a Drug or Underage Alcohol House Party), from 2012 through 2016. On September 26, Dow acknowledged receipt of the request, informing Fleming that the City requires that requests be in writing and signed by the requester. Nonetheless, Dow stated that the City would begin to process the request. Thereafter, Fleming submitted **[*9]** a signed, written request seeking "documents … of police citations involving *the total number of* infractions" of the two statutes. (Emphasis added.)

On October 23, Fleming e-mailed Dow to inquire about the status of his request. Dow responded the following day, stating that, with regard to Fleming's request "received by this office on September 25, 2017[,] [t]he City … has determined that there is no existing governmental record listing all [such] citations." On November 20, Fleming appealed to Dow for an explanation, stating: "These are state laws. Shouldn't there be a record of when they are violated?" Dow responded the following day, stating that "[t]he Keene Police Department records all incidents and arrests in various recordkeeping systems maintained in their department," and that the "Police Department staff have reviewed the record systems … for a report listing all citations[,] … [and determined] that the requested governmental record does not exist."

The trial court found that "[i]t is clear from Mr. Fleming's written request that he sought documents reflecting the 'total number' of infractions, rather than the individual case files that would contain the 'infractions' **[*10]** themselves." Thus, the trial court upheld the City's denial of Fleming's request, finding that the City properly construed it as seeking a list of all such infractions, which was not a record maintained by the City.

On appeal, the petitioners argue that the trial court erred because "Dow did not ever receive [Fleming's second] request referring to the 'total number' [of infractions] prior to denying Fleming's [first] request," and because Fleming's first request cannot reasonably be construed

as seeking a "list." We agree.

The record reflects that the City's denial of Fleming's Right-to-Know request was premised solely upon his initial e-mailed request. On October 24, the City specifically denied Fleming's initial "September 25, 2017" request. The City's denial was part of the same e-mail chain as Fleming's initial request, and contained no reference to Fleming's second, written, request. Indeed, Dow confirmed in his affidavit submitted to the trial court that "Mr. Fleming's written request was never received." Therefore, the trial court erred when it looked to the language of Fleming's second request, which the City never received, to uphold the City's rejection of Fleming's first request, **[*11]** which contained no such "total number" language.

Additionally, we find that Fleming's first request could not reasonably be interpreted as seeking a list. Fleming sought "[a]ll documents including, but not limited to, printed document and electronic documents police citations involving infractions pertaining to" certain statutes during a certain time period. Thus, Fleming did not seek a list, but rather the responsive "documents" themselves. Indeed, after trial, the City admitted that Fleming's request "could have been interpreted differently by the City upon initial review, and that governmental records responsive to [his] request[ ] are contained in the City's Police Department files, subject to appropriate redaction." Accordingly, we find that the trial court erred in upholding the City's denial of Fleming's initial request.

We now consider Vasas's request. On September 25, Vasas delivered a signed, written request to the City seeking "[a]ll charges of Aggravated Felonious Sexual Assault" and "[a]ll charges of Drug/Alcohol Facilitated Sexual Assaults" from 2013 to 2017, as well as "[a] [c]opy of [Keene Police Department's] protocol for sexual assault incidents." On September 26, Dow **[*12]** acknowledged receipt of the request. On October 30, Vasas e-mailed Dow to inquire about the status of her request. Dow replied the same day, stating that "[t]he City … has determined that there are no existing governmental records listing all charges of aggravated felonious sexual assaults for the years 2013 through 2017 or charges of drug-alcohol facilitated sexual assaults from 2013 through 2017." Dow also informed her that the Keene Police Department's sexual assault protocol was being reviewed by the city attorney, and that it would be made available to her. The protocol was indeed made available later that week.

The trial court upheld the City's denial of the remainder of Vasas's request, finding that "[t]he rhetoric of criminal procedure make[s] Ms. Vasas' request impossible to respond to literally, as a 'charge' is not a record but rather an accusation … that may or may not result in a conviction." The trial court observed that "a 'charge' could pertain to an indictment or a complaint filed by the state against a defendant," and thus found that "[i]t would be reasonable for the City … to find Ms. Vasas' request too vague to respond to at all." However, the trial court **[*13]** continued, "[r]ather than deny her request as vague, the City interpreted Ms. Vasas' request to be one for a list of charges of the two statutes, a reasonable interpretation because of the nature of a 'charge' and the lack of detail in Ms. Vasas' request." The trial court concluded that, because the petitioners "[have] not suggested any other form of records Ms. Vasas could have meant with her request[,] [t]he Court finds the City's interpretation was reasonable."

On appeal, the petitioners observe that the City did not deny Vasas's request on the basis that her request was too broad or too vague, but rather because the City did not maintain a list of all charges of the specified crimes. They contend that "[t]his is not a valid or reasonable basis for denial, as Vasas clearly never asked for anything like a list," and that "Vasas is entitled to each and every document, not otherwise exempt, that could reasonably be construed as a 'charge.' " We agree.

Vasas sought governmental records regarding "[a]ll charges" of certain crimes during a specified time period. Nowhere in her request did she seek a "list." Plainly read, Vasas's request was not for a *list* of charges, but was a request for **[*14]** the charges themselves. Although we recognize that Vasas's request could have been clearer, it still "reasonably described" the governmental records sought, as required by *RSA 91-A:4, IV*. Indeed, the trial court itself identified potentially responsive documents — indictments and complaints — which should have been provided in response to the request, provided that the City maintained such records. Moreover, the City admitted, as it had with regard to Fleming's request, that Vasas's request "could have been interpreted differently by the City upon initial review, and that governmental records responsive to [her] request[ ] are contained in the City's Police Department files, subject to appropriate redaction." Accordingly, we find that the trial court erred in upholding the City's denial of Vasas's request.

II. Adequacy of Search for Requested Documents

The petitioners argue that the trial court erred by finding that the City did not violate *RSA chapter 91-A* in regard to the adequacy of its search for the records requested by Fleming and Vasas. In the trial court's August 2018 order, it stated that, "[h]aving found that the City properly construed both Mr. Fleming's and Ms. Vasas' requests as requests for lists, the **[*15]** Court only analyzes whether the City adequately searched for responsive records that already existed in the form of lists." Thus, because we have determined that the trial court erred in construing Fleming's and Vasas's requests as requests for lists, we vacate the trial court's decision with regard to the adequacy of the City's search, and remand for reconsideration.

III. Redaction and Withholding of Information

Next, the petitioners argue that the trial court erred when, in response to Pecci's request for documents related to police use of excessive force, it allowed the City to redact officer names that were listed in a summary report, and did not order the City to produce the underlying citizen complaints which provided the basis for the report.

On September 24, 2017, Pecci e-mailed a request to the City, seeking "[a]ny and all documents from August 1, 2012-September 22, 2017 … regarding: any and all citizen complaints, logs, calls, and emails regarding charges of excessive police force and/or police brutality." Pecci also requested "a list of every officer who … was reprimanded for using excessive force and or brutality" during the same time period. On September 25, Dow acknowledged **[*16]** receipt of the request, informing Pecci that the City requires that requests be in writing and signed by the requester. Nonetheless, Dow stated that he would begin processing the request, and informed her that fulfilling the request may take up to 30 days. Thereafter, Pecci hand-delivered an unsigned, written request to the City.

On October 16, Pecci e-mailed Dow inquiring about the status of her request. He replied the following day, informing her that he was out of the office, but that he would follow up on her request. On October 31, Dow e-mailed Pecci advising her that he had not yet received a signed, written request from her. Dow also e-mailed the police chief and city manager to inform them of the request and ask them to search for responsive records. On November 2, Pecci submitted a signed, written request. On November 15, Pecci e-mailed the city manager regarding her request, but did not receive a response. The following day, Dow e-mailed Pecci, informing her that the City had located responsive documents, and that the City's legal department was reviewing them to determine whether they were subject to disclosure. On November 21, Dow e-mailed Pecci and informed her that documents **[*17]** were available for her review, but he noted that, pursuant to exemptions found in *RSA 91-A:5, IV* (2013), the City had redacted police officers' names, and withheld copies of formal complaints made through the police department's internal investigation process. Thus, the only record provided to Pecci was a report created by the former police chief, which contained statistical summaries of citizen complaints of excessive force during the requested time period. In the report, the City redacted certain columns and headings within the tables. On December 11, Pecci reviewed the documents.

In its August 2018 order, the trial court found that the City failed to carry its burden to show that the records it withheld and redacted were subject to the exemption for "internal personnel practices," as provided by *RSA 91-A:5, IV*. However, the trial court could not determine whether the documents were, in fact, exempt from disclosure without viewing them in their entirety. It therefore ordered the City to submit within 30 days "the unredacted records Ms. Pecci requested for in-camera review with explanation of why the privacy interest supporting redactions outweigh the public's interest in access."

In its January 2019 order, the **[*18]** trial court observed that "[d]espite the Court's direct order to provide the unredacted Summary Reports Tables that Ms. Pecci requested, the City did not provide them, redacted or unredacted. The City has instead submitted 119 pages of citizen complaints … and stated that these documents are responsive to Ms. Pecci's request." The trial court found that, "even with two opportunities, the City has failed to explain why the redactions on the summary reports were proper and in compliance with *RSA 91-A:5, IV*." Nonetheless, the trial court found that it "cannot order disclosure of records that are exempt under the Right-to-Know law," and proceeded to analyze whether the redactions were proper based on the information available to it.

In its analysis, the trial court first considered the scope of the information sought by the petitioners. The trial court found that the petitioners had not requested the

officers' names in their petition, and, moreover, that they had conceded that the officers' names were properly redacted. However, because the trial court determined that the column headings in the Summary Reports Tables would not fall within the "internal personnel practices" exemption, or the "personnel **[*19]** file" exemption under RSA 91-A:5, IV, it concluded that the City must "provide Ms. Pecci with the Summary Reports Tables with *no* redactions *other than* the officer names, which must be replaced with an anonymous signifier so as to permit the reader to observe repeated entries." Separately, with regard to the underlying citizen complaints, the trial court reasoned that, although they were responsive to Pecci's request, the petitioners had not requested the documents in their petition to the court, and, therefore, the documents were not at issue in the case. Regardless, the trial court noted, citing Union Leader Corp. v. Fenniman, 136 N.H. 624, 627, 620 A.2d 1039 (1993), even if the citizen complaints were at issue, they would be exempt under RSA 91-A:5, IV.

On appeal, the petitioners argue that the trial court erred in failing to order that the unredacted report be released, because the City failed to meet its burden to show that its redactions were lawful. Further, the petitioners argue that the officers' names were clearly requested by both Pecci's request and the petition to the court, and that the petitioners did not concede that the redaction of the names was proper. Separately, the petitioners also argue that the citizen complaints were clearly sought by Pecci's request and by **[*20]** their petition. Additionally, they contend that the trial court's alternative reasoning — that, pursuant to *Fenniman*, the citizen complaints were exempt under RSA 91-A:5, IV — is also erroneous. Lastly, the petitioners argue that *Fenniman* should be overruled.

The City counters that governmental records related to, or arising from, an internal police department investigation of alleged police officer misconduct are categorically exempt from public disclosure under *Fenniman*. The City admits that the summary report was not submitted to the trial court "through inadvertence and mistake but not intentionally," but notes that it adhered to the trial court's order and released the summary report to Pecci with non-identifying letters in place of the redacted officers' names.

We agree with the petitioners that the trial court erred in finding that the petitioners, in their petition, failed to request the officers' names that the City had redacted in the summary report. Pecci's Right-to-Know request sought documents regarding "any and all citizen complaints, logs, calls, and emails regarding charges of excessive police force and/or police brutality," and "a list of every officer who worked for KPD and was reprimanded **[*21]** for using excessive force and or brutality." Because Pecci's request specifically sought the officers' names, the petitioners' petition — requesting that the court "fulfill these 5 Right-to-Know requests" — sought the officers' names as well.

Moreover, we agree with the petitioners that they did not concede that the City's redaction of the officers' names in the summary report was proper. In their memorandum of law, the petitioners argued that "[w]hile the specific names of the officers *may* be properly exempted, their identity would still be protected by replacing each name with an arbitrary but consistent identifier, such as Officer #1." (Emphasis added.) We do not read this statement as a concession, but rather as an alternative argument that, even if the officers' names were properly redacted, the use of arbitrary identifiers would protect the officers' identities while still enabling "officers with multiple complaints [to] stand out." Indeed, the petitioners took that position in their motion to reconsider the trial court's second order: "when [the petitioners] wrote 'the names of the officers *may* be properly exempted,' they did not inten[d] to concede this point, but to anticipate **[*22]** that as a possible position taken by [the City]. The [petitioners] were trying to argue in the alternative."

Separately, with regard to the citizen complaints underlying the summary report, we find that the complaints were unquestionably within the scope of Pecci's request, and, therefore, for the same reasons discussed above with regard to the officers' names, were also, by extension, within the scope of the petitioners' petition to the trial court.

Accordingly, having found that the petitioners indeed requested the officers' names, that they did not concede that the redaction of the names was proper, and that they also requested the underlying citizen complaints, we reverse the trial court's rulings to the contrary. However, because the remainder of the trial court's analysis regarding the redacted summary report and the underlying citizen complaints was inexorably intertwined with those contrary rulings, and because our recent decisions in *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. ___, ___ A.3d ___ (2020), and *Union Leader Corporation & a. v. Town of Salem*, 173 N.H. ___, ___ A.3d ___ (2020), overruled Fennimgan, thereby changing the nature of the exemption analysis,

we vacate the remainder of the trial court's order on these issues, and remand for **[*23]** reconsideration in light of *Seacoast Newspapers*, *Union Leader*, and this decision. On remand, the City shall provide the trial court with the unredacted summary report for *in camera* review.

IV. Charge for Access to Requested Records

The petitioners argue that the trial court erred when it upheld the City's proposed $300 charge for access to the records requested by King. King requested "[a]ny and all email correspondence[ ]" between the City and local restaurants regarding food safety inspections during 2016 and 2017. The City responded that it had conducted between 800 and 1,000 inspections during the time period, and that, because the City "would need to retrieve and print these emails[,] … the cost to provide this information would be approximately $300." The City urges us to adopt the reasoning of the trial court, which found that

> the City [could not have] provided these emailed reports without either providing Ms. King with computer access to the email account or accounts that sent the reports[,] or printing the emails. There is no reasonable argument that the City should provide Ms. King with access to a City employee's account or access to a City computer to view these emails. **[*24]** Therefore, Ms. King's only option of receiving these emailed reports was for them to be printed out.

We agree with the petitioners that the trial court erred. The Right-to-Know Law provides that "[n]o fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form." *RSA 91-A:4, IV* (amended 2019). King did not request *copies* of the e-mails; rather, she requested that the e-mails be made available to her for inspection. The City is obligated to provide access to non-exempt governmental records free of charge. *Id.* Furthermore, the City is required to maintain its records "in a manner that makes them available to the public." *Hawkins v. N.H. Dep't of Health & Human Services, 147 N.H. 376, 379, 788 A.2d 255 (2001)*. Thus, even if we were to accept the questionable proposition that printing the e-mails is the only acceptable means of making them available to King for inspection — a proposition that does not appear to reflect the realities of the digital age — King is not obligated to pay the City merely to inspect these records. *See RSA 91-A:4, IV*.

The City also argues that, because "the governmental records requested by Ms. King are numerous, and exist in various email accounts and potentially across several City agencies," providing **[*25]** access to the responsive records would — in contravention of the Right-to-Know Law — require the City to "compile, cross-reference, or assemble information into a form in which it is not already kept." *RSA 91-A:4, VII*; *see also Brent, 132 N.H. at 426* ("[T]he statute does not require public officials to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist."). We disagree. "Right-to-Know requests often require a public official to retrieve multiple documents. … While the *Brent* rule shields agencies from having to create a new document in response to a Right-to-Know request, it does not shelter them from having to assemble existing documents in their original form." *N.H. Civil Liberties Union, 149 N.H. at 439-40*.

V. Signed, Written Requests

Next, the petitioners argue that the trial court erred when it found that they lacked standing to challenge the City's requirement that requesters submit signed, written requests. The trial court found that the petitioners "failed to allege that any of the students were prohibited from receiving responsive records because of the City's practice or that their rights to access were otherwise affected by the practice." Therefore, the trial court **[*26]** declined to consider whether the City's "signed, written request" requirement was a violation of *RSA chapter 91-A* because "no particularized harm ha[d] been alleged," and the court "[did] not have a sufficient allegation before it to adjudicate the issue." The petitioners contend that it was improper for the trial court to ignore "technical" or "harmless" violations that did not result in prejudice to the requester. *See ATV Watch v. N.H. Dept. of Resources & Econ. Dev., 155 N.H. 434, 440-41, 923 A.2d 1061 (2007)*. The City counters that the trial court did not err because the City never relied on the policy when denying the requests for records, and none of the petitioners allege that they were prejudiced or harmed by the policy. We agree with the City.

"Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." *Censabella v. Hillsborough Cnty. Attorney, 171 N.H. 424, 427, 197 A.3d 74 (2018)* (quotation omitted). To have standing under *RSA 91-A:7*, the parties must have "personal legal or equitable rights that

are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress," and "a party must demonstrate harm to maintain a legal challenge." *Id.*

Here, none of the petitioners' requests were denied on the ground that they **[*27]** failed to provide a signed, written Right-to-Know request. Although the City's response to Pecci's request was delayed as a result of her failure to adhere to the City's policy, she did receive responsive documents, and there is no allegation that she was harmed by the delay.

Although we have held that "[t]he plain language of [*RSA 91-A:4, IV*] does not allow for consideration of the factors … such as 'reasonable speed,' 'oversight,' 'fault,' 'harm,' or 'prejudice,' " *ATV Watch, 155 N.H. at 440-41*, that case dealt with a clear violation of the five-day response deadline set forth in *RSA 91-A:4, IV*. *See id*. Here, the City satisfied that requirement when it provided an initial response to each request — whether written, or signed, or unsigned — within the five-day period. We need not address the issue of whether a delay in responding to a request could pose harm and, in and of itself, give rise to standing, because the petitioners have not alleged that they, in fact, suffered any harm. Thus, we conclude, as did the trial court, that the petitioners lack standing to challenge the City's policy.

Nonetheless, we observe that the City's practice of requiring signed, written Right-to-Know requests may be susceptible to challenge. As we observed **[*28]** in *Censabella*, "it would not be unreasonable for a requester to desire anonymity in the early stages when making a Right-to-Know Law request. Such requests may implicate political, policy, or public interest considerations, particularly when the request is pursued by a whistleblower or advocacy organization." *Censabella, 171 N.H. at 428*. For these reasons, the City may wish to revisit its policy.

VI. Response Times

Lastly, the petitioners argue that the trial court erred when it found that the City's response times to their Right-to-Know requests were "reasonably necessary." Specifically, the petitioners contend that "Pecci was told by Dow that she would have a response by October 25th, thirty (30) days from receipt of her request. She received her response on November 21st, after she appealed to the City Manager on November 15th." The petitioners argue that this delay was unreasonable because it was caused by the City's policy of requiring signed, written Right-to-Know requests. The City counters that we should adopt the trial court's reasoning. The trial court found that

> [t]he plain language of the statute requires the responding public body or agency to send receipt to a request with a statement of the time **[*29]** reasonably necessary to determine whether the request shall be granted or denied. It is required that an estimate be given; what that estimate is, however, is explicitly left to the responding public body or agency to determine what is reasonable.

(Citations and quotations omitted.) We agree with the City.

"[P]ublic bodies have a statutory duty to respond diligently to all records requests, regardless of who makes the request." *Censabella, 171 N.H. at 427-28* (quotation omitted).

> The time period for responding to a Right-to-Know request is absolute. The statute mandates that an agency make public records available when they are immediately available for release, or otherwise, it must within five business days of the Right-to-Know request: (1) make the records available; (2) deny the request in writing with reasons; or (3) acknowledge receipt of the request in writing with a statement of the time reasonably necessary to determine whether the request will be granted or denied.

ATV Watch, 155 N.H. at 440-41 (emphasis omitted); *see also RSA 91-A:4, IV*.

As noted above, the City responded to each student's request within five business days. However, we have not previously considered the outer limits of what constitutes a "reasonably necessary" response time for providing **[*30]** documents that are not immediately available. *RSA 91-A:4, IV*. Such a determination must be made on a case-by-case basis. Here, the circumstances are unusual if not unique: within a short period of time, the City received numerous and expansive requests from Salcetti's students raising complicated issues under the Right-to-Know Law, and requiring careful analysis by the City. Only some of those requests are the subject of this litigation. Pecci's request, in particular, required careful analysis by the city attorney in a notably complex and sensitive area of the Right-to-Know Law. Accordingly, under the circumstances, we conclude that the City's response

time was not unreasonably long. *See* *ATV Watch, 161 N.H. at 756* (finding that an initial response within five business days, coupled with an estimated response time of 50 days for the requested documents, complied with the Right-to-Know Law "[o]n its face").

In conclusion, we observe that this dispute has consumed an inordinate amount of time, energy, and resources — judicial and otherwise. The salutary purpose of the Right-to-Know Law — to "ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability **[*31]** to the people," *RSA 91-A:1* — is best served when the members of the public and the governmental bodies are guided by a spirit of collaboration. We take this opportunity to encourage all public bodies, and members of the public making Right-to-Know requests, to embrace that spirit, and work together to efficiently and effectively resolve disputes involving *RSA chapter 91-A*. This case, on remand, presents just such an opportunity.

Affirmed in part; reversed in part; vacated in part; and remanded.

HICKS, BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

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Seacoast Newspapers, Inc. v. City of Portsmouth

Supreme Court of New Hampshire

November 20, 2019, Argued; May 29, 2020, Opinion Issued

No. 2019-0135

Reporter
2020 N.H. LEXIS 103 *

SEACOAST NEWSPAPERS, INC. v. CITY OF PORTSMOUTH

Notice: THIS OPINION IS SUBJECT TO MOTIONS FOR REHEARING UNDER NEW HAMPSHIRE PROCEDURAL RULES AS WELL AS FORMAL REVISION BEFORE PUBLICATION IN THE NEW HAMPSHIRE REPORTS.

Prior History: **[*1]** Rockingham.

Disposition: Vacated and remanded.

HOLDINGS: [1]-Contrary to the court's prior broad interpretation in Fenniman, the "internal personnel practices" exemption to the Right-to-Know Law contained in RSA 91-A:5, IV, was intended to apply only to records pertaining to the internal rules and practices governing an agency's operations and employee relations, not to information concerning the performance of a particular employee; thus, the arbitration decision at issue here did not fall under the exemption, as it did not relate to defendant city's personnel rules or practices, but to the conduct of a specific employee; [2]-Plaintiff was not entitled to attorney's fees, because in light of the court's decision in Fenniman, it could not be said that defendant should have known that refusing to disclose the arbitration decision would violate the Right-to-Know Law.

Outcome
Vacated and remanded.

Core Terms

exemption, personnel, disclosure, arbitration, pertaining, quotation, narrowly, discipline, colleagues, decisis, categorically, disciplinary, superfluous, termination, misconduct, grievance

Case Summary

Overview

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

Governments > Legislation > Interpretation

Administrative Law > Governmental

Geoffrey Gallagher

Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN1[] Freedom of Information, Compliance With Disclosure Requests

The ordinary rules of statutory construction apply to interpretation of the Right-to-Know Law, and the court therefore looks to the plain meaning of the words used when interpreting the statute. Ultimately, the court interprets the Right-to-Know Law with a view toward disclosing the utmost information in order to best effectuate its statutory and constitutional objective of facilitating access to public documents. Accordingly, although the statute does not provide for unfettered access to public records, the court broadly construes provisions in favor of disclosure and interprets the exemptions restrictively. The court also considers the decisions of courts in other jurisdictions because similar acts are in pari materia and interpretatively helpful.

Governments > Courts > Judicial Precedent

HN2[] Courts, Judicial Precedent

Stare decisis, the idea that today's court should stand by yesterday's decisions, commands great respect in a society governed by the rule of law, and the court does not lightly overrule a prior opinion, Thus, when asked to reconsider a holding, the question is not whether the court would decide the issue differently de novo, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed.

Governments > Courts > Judicial Precedent

HN3[] Courts, Judicial Precedent

The court will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. Although these factors guide the court's judgment, no single factor is dispositive.

Governments > Courts > Judicial Precedent

HN4[] Courts, Judicial Precedent

For purposes of determining whether to overrule a prior decision, reliance interests are most often implicated when a rule is operative in the commercial law context where advance planning of great precision is most obviously a necessity.

Governments > Courts > Judicial Precedent

HN5[] Courts, Judicial Precedent

In determining whether to overrule a prior decision, the court asks whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. The court is sometimes able to perceive significant facts or understand principles of law that eluded its predecessor and justify departures from existing decisions.

Governments > Legislation > Interpretation

HN6[] Legislation, Interpretation

The legislature is presumed not to use superfluous language and, therefore, a broad interpretation that renders statutory language irrelevant ignores legislative prerogatives.

Governments > Legislation > Interpretation

HN7[] Legislation, Interpretation

The court owes somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations.

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN8[] Legislation, Interpretation

Legislative inaction does not preclude the court from revisiting its interpretation of a statute in all circumstances. Although stare decisis generally has more force in statutory analysis than in constitutional adjudication because, in the former situation, the legislature can correct the court's mistakes through legislation, that is not always the case. The court is unwilling to mechanically apply the principles of stare decisis to allow a decision that was wrong when it was decided perpetuate as a rule of law. Neither will the court always place on the shoulders of the legislature the burden to correct its own error.

Governments > Legislation > Interpretation

Governments > Courts > Judicial Precedent

HN9 **Legislation, Interpretation**

The court will not be deterred from correcting an error of its own creation because the legislature considered, but did not enact, a bill relating to the same subject matter in a recent legislative session.

Governments > Legislation > Interpretation

HN10 **Legislation, Interpretation**

When asked to reexamine a prior holding, the court's task is to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN11 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

The broad interpretation of the "internal personnel practices" exemption set forth in *Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993)*, substantially undermines the guarantees protected by the Right-to-Know Law and reduces its defining goals to lip service. Such an expansive construction would justify the criticism that the act, although promising, is weak and easily evaded. The costs of overruling Fenniman's interpretation are insubstantial and heavily outweighed by the rewards. As stated by the preamble of the Right-to-Know Law: "Openness in the conduct of public business is essential to a democratic society." *RSA 91-A:1* (2013). An overly broad construction of the "internal personnel practices" exemption has proven to be an unwarranted constraint on a transparent government. The New Hampshire Supreme Court overrules Fenniman to the extent that it broadly interpreted the "internal personnel practices" exemption and its progeny to the extent that they relied on that broad interpretation.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN12 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

The "internal personnel practices" exemption of the Right-to-Know Law applies narrowly to records pertaining to internal rules and practices governing an agency's operations and employee relations.

Administrative Law > Governmental Information > Freedom of Information

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN13 **Governmental Information, Freedom of Information**

Together with N.H. Const. pt. I, art. 8, the Right-to-Know Law is the crown jewel of government transparency in New Hampshire.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

Governments > Legislation > Interpretation

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN14[] Freedom of Information, Compliance With Disclosure Requests

The purpose of the Right-to-Know Law is to provide the utmost information to the public about what its government is up to. Accordingly, the statute furthers the state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The court therefore resolves questions regarding the Right-to-Know Law with a view to providing the utmost information, broadly construing its provisions in favor of disclosure and interpreting its exemptions restrictively. For these reasons, a narrow interpretation of the "internal personnel practices" exemption accords with the constitution and the Right-to-Know Law's underlying purpose.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Governments > Legislation > Interpretation

HN15[] Freedom of Information, Defenses & Exemptions From Public Disclosure

When interpreting a statute, the court first looks to the plain meaning of the words used. Furthermore, the court often looks to federal case law for guidance when interpreting the exemption provisions of the Right-to-Know Law, because its provisions closely track the language used in the Freedom of Information Act's exemptions.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN16[] Defenses & Exemptions From Public Disclosure, Internal Personnel Rules

The terms "internal" and "personnel" modify the word "practices" in RSA 91-A:5, IV (2013), thereby circumscribing the provision's scope. As the New Hampshire Supreme Court explained in Reid, relying on the United States Supreme Court's interpretation of the Freedom of Information Act's internal personnel rules and practices exemption, known as Exemption 2, "personnel" in this context refers to human resources matters. "Internal" means existing or situated within the limits of something. Therefore, in Reid the court construed "internal personnel practices" to mean practices that exist or are situated within the limits of employment. The United States Supreme Court has further explained that Exemption 2 relates to records that an agency must typically keep to itself for its own use. The general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest. Thus, Exemption 2 concerns an agency's rules and practices dealing with employee relations or human resources, including such matters as hiring and firing, work rules and discipline, compensation and benefits. Examples of practices falling within Exemption 2 include personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

Governments > Legislation > Interpretation

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN17[] Defenses & Exemptions From Public Disclosure, Internal Personnel Rules

Using Reid and the United States Supreme Court's interpretation of the Freedom of Information Act as its lodestars, the New Hampshire Supreme Court concludes that the internal personnel practices exemption was intended to apply only to records pertaining to the internal rules and practices governing an agency's operations and employee relations, not information concerning the performance of a particular employee. This narrow interpretation is consonant with the New Hampshire Constitution and the purpose of the Right-to-Know Law. Furthermore, this narrow interpretation recognizes the legislature's decision to enact a separate exemption for personnel, medical, and other files. RSA 91-A:5, IV.

Governments > Legislation > Interpretation

HN18[] **Legislation, Interpretation**

The court interprets a statute in the context of the entire statutory scheme, and the legislature is presumed not to use superfluous language.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN19[] **Defenses & Exemptions From Public Disclosure, Medical & Personnel Files**

Like the exemption for personnel files in *RSA 91-A:5, IV*, the Freedom of Information Act contains an exemption, known as Exemption 6, for personnel and medical files and similar files. *5 U.S.C.S. § 552(b)(6)*. As the United States Supreme Court has explained, Exemption 6 shields from disclosure, in certain circumstances, an employee's personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, and evaluations of his work performance. Simply put, Exemption 6 protects employee files which are typically maintained in the human resources office — otherwise known as the personnel department.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN20[] **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

Records documenting the history or performance of a particular employee fall within the exemption for personnel files. *RSA 91-A:5, IV*. Such records pertain to an employee's work performance and are therefore typically maintained by the personnel department. Records relating to internal policies pertaining to an agency's operations and employee relations, on the other hand, would not be maintained in an employee's personnel file. Thus, narrowly interpreting the exemption for "internal personnel practices" gives full effect to both exemptions that the legislature chose to enact.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Medical & Personnel Files

HN21[] **Defenses & Exemptions From Public Disclosure, Medical & Personnel Files**

To determine whether a record is exempt from disclosure under the Right-to-Know Law pursuant to the two-part analysis for personnel files, the trial court must determine: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

HN22[] **Costs & Attorney Fees, Grounds for Recovery**

To award attorney's fees for a violation of the Right-to-Know Law, the trial court must find that the petitioner's lawsuit was necessary to make the requested information available and that the respondent knew or should have known that its conduct violated the statute.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1.[] 1.

Records > Right to Inspect > Generally

The ordinary rules of statutory construction apply to interpretation of the Right-to-Know Law, and the court therefore looks to the plain meaning of the words used

when interpreting the statute. Ultimately, the court interprets the Right-to-Know Law with a view toward disclosing the utmost information in order to best effectuate its statutory and constitutional objective of facilitating access to public documents. Accordingly, although the statute does not provide for unfettered access to public records, the court broadly construes provisions in favor of disclosure and interprets the exemptions restrictively. The court also considers the decisions of courts in other jurisdictions because similar acts are *in pari materia* and interpretatively helpful.

NH2. 2.

Common Law > Application of Stare Decisis > Generally

Stare decisis, the idea that today's court should stand by yesterday's decisions, commands great respect in a society governed by the rule of law, and the court does not lightly overrule a prior opinion, Thus, when asked to reconsider a holding, the question is not whether the court would decide the issue differently *de novo*, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed.

NH3. 3.

Common Law > Application of Stare Decisis > Generally

The court will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. Although these factors guide the court's judgment, no single factor is dispositive.

NH4. 4.

Common Law > Application of Stare Decisis > Generally

For purposes of determining whether to overrule a prior decision, reliance interests are most often implicated when a rule is operative in the commercial law context where advance planning of great precision is most obviously a necessity.

NH5. 5.

Common Law > Application of Stare Decisis > Generally

In determining whether to overrule a prior decision, the court asks whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. The court is sometimes able to perceive significant facts or understand principles of law that eluded its predecessor and justify departures from existing decisions.

NH6. 6.

Statutes > Generally > Presumptions

The legislature is presumed not to use superfluous language and, therefore, a broad interpretation that renders statutory language irrelevant ignores legislative prerogatives.

NH7. 7.

Common Law > Application of Stare Decisis > Generally

The court owes somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations.

NH8. 8.

Common Law > Application of Stare Decisis > Generally

Legislative inaction does not preclude the court from revisiting its interpretation of a statute in all circumstances. Although stare decisis generally has more force in statutory analysis than in constitutional adjudication because, in the former situation, the legislature can correct the court's mistakes through legislation, that is not always the case. The court is unwilling to mechanically apply the principles of stare decisis to allow a decision that was wrong when it was decided perpetuate as a rule of law. Neither will the court always place on the shoulders of the legislature the burden to correct its own error.

NH9.[] 9.

Common Law > Application of Stare Decisis > Generally

The court will not be deterred from correcting an error of its own creation because the legislature considered, but did not enact, a bill relating to the same subject matter in a recent legislative session.

NH10.[] 10.

Common Law > Application of Stare Decisis > Generally

When asked to reexamine a prior holding, the court's task is to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.

NH11.[] 11.

Records > Right to Inspect > Exceptions

The broad interpretation of the "internal personnel practices" exemption set forth in *Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993)*, substantially undermines the guarantees protected by the Right-to-Know Law and reduces its defining goals to lip service. Such an expansive construction would justify the criticism that the act, although promising, is weak and easily evaded. The costs of overruling *Fenniman*'s interpretation are insubstantial and heavily outweighed by the rewards. As stated by the preamble of the Right-to-Know Law: "Openness in the conduct of public business is essential to a democratic society." An overly broad construction of the "internal personnel practices" exemption has proven to be an unwarranted constraint on a transparent government. The court overrules *Fenniman* to the extent that it broadly interpreted the "internal personnel practices" exemption and its progeny to the extent that they relied on that broad interpretation. *RSA 91-A:1*.

NH12.[] 12.

Records > Right to Inspect > Exceptions

The "internal personnel practices" exemption of the Right-to-Know Law applies narrowly to records pertaining to internal rules and practices governing an agency's operations and employee relations.

NH13.[] 13.

Records > Right to Inspect > Generally

Together with Article 8 of the New Hampshire Constitution, the Right-to-Know Law is the crown jewel of government transparency in New Hampshire. N.H. CONST. pt. I, art. 8.

NH14.[] 14.

Records > Right to Inspect > Exceptions

The purpose of the Right-to-Know Law is to provide the utmost information to the public about what its government is up to. Accordingly, the statute furthers the state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The court therefore resolves questions regarding the Right-to-Know Law with a view to providing the utmost information, broadly construing its provisions in favor of disclosure and interpreting its exemptions restrictively. For these reasons, a narrow interpretation of the "internal personnel practices" exemption accords with the constitution and the Right-to-Know Law's underlying purpose.

NH15.[] 15.

Records > Right to Inspect > Exceptions

When interpreting a statute, the court first looks to the plain meaning of the words used. Furthermore, the court often looks to federal case law for guidance when interpreting the exemption provisions of the Right-to-Know Law, because its provisions closely track the language used in the Freedom of Information Act's exemptions.

NH16.[] 16.

Records > Right to Inspect > Exceptions

The terms "internal" and "personnel" modify the word "practices" in the "internal personnel practices" exemption of the Right-to-Know Law, thereby circumscribing the provision's scope. As the court explained in *Reid*, relying on the United States Supreme

Court's interpretation of the Freedom of Information Act's internal personnel rules and practices exemption, known as Exemption 2, “personnel” in this context refers to human resources matters. “Internal” means existing or situated within the limits of something. Therefore, in *Reid* the court construed “internal personnel practices” to mean practices that exist or are situated within the limits of employment. The United States Supreme Court has further explained that Exemption 2 relates to records that an agency must typically keep to itself for its own use. The general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest. Thus, Exemption 2 concerns an agency's rules and practices dealing with employee relations or human resources, including such matters as hiring and firing, work rules and discipline, compensation and benefits. Examples of practices falling within Exemption 2 include personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like. RSA 91-A:5, IV.

NH17. [] 17.

Records > Right to Inspect > Exceptions

Using *Reid* and the United States Supreme Court's interpretation of the Freedom of Information Act as its lodestars, the court concludes that the internal personnel practices exemption was intended to apply only to records pertaining to the internal rules and practices governing an agency's operations and employee relations, not information concerning the performance of a particular employee. This narrow interpretation is consonant with the New Hampshire Constitution and the purpose of the Right-to-Know Law. Furthermore, this narrow interpretation recognizes the legislature's decision to enact a separate exemption for personnel, medical, and other files. RSA 91-A:5, IV.

NH18. [] 18.

Statutes > Generally > Interpretation as a Whole

The court interprets a statute in the context of the entire statutory scheme, and the legislature is presumed not to use superfluous language.

NH19. [] 19.

Records > Right to Inspect > Exceptions

Like the exemption for personnel files in the Right-to-Know Law, the Freedom of Information Act contains an exemption, known as Exemption 6, for personnel and medical files and similar files. As the United States Supreme Court has explained, Exemption 6 shields from disclosure, in certain circumstances, an employee's personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, and evaluations of his work performance. Simply put, Exemption 6 protects employee files which are typically maintained in the human resources office — otherwise known as the personnel department. 5 U.S.C. § 552(b)(6); RSA 91-A:5, IV.

NH20. [] 20.

Records > Right to Inspect > Exceptions

Records documenting the history or performance of a particular employee fall within the exemption for personnel files in the Right-to-Know Law. Such records pertain to an employee's work performance and are therefore typically maintained by the personnel department. Records relating to internal policies pertaining to an agency's operations and employee relations, on the other hand, would not be maintained in an employee's personnel file. Thus, narrowly interpreting the exemption for “internal personnel practices” gives full effect to both exemptions that the legislature chose to enact. RSA 91-A:5, IV.

NH21. [] 21.

Records > Right to Inspect > Particular Records

An arbitration decision did not fall within the “internal personnel practices” exemption to the Right-to-Know Law, as it did not relate to defendant city's personnel rules or practices, but to the conduct of a specific employee. Accordingly, remand was required to determine whether the arbitration decision was exempt from disclosure pursuant to the two-part analysis for personnel files. RSA 91-A:5, IV.

NH22. [] 22.

Records > Right to Inspect > Exceptions

To determine whether a record is exempt from disclosure under the Right-to-Know Law pursuant to the two-part analysis for personnel files, the trial court must determine: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy.

NH23. 23.

Records > Right to Inspect > Attorney Fees

To award attorney's fees for a violation of the Right-to-Know Law, the trial court must find that the petitioner's lawsuit was necessary to make the requested information available and that the respondent knew or should have known that its conduct violated the statute.

NH24. 24.

Records > Right to Inspect > Attorney Fees

Plaintiff, who sought disclosure of an arbitration decision under the Right-to-Know Law, was not entitled to attorney's fees, because in light of the Court's decision in *Fenniman*, which the court now overruled to the extent that it broadly interpreted the "internal personnel practices" exemption, it could not be said that defendant should have known that refusing to disclose the arbitration decision would violate the Right-to-Know Law.

Counsel: *Bernstein, Shur, Sawyer & Nelson, P.A.*, of Manchester (*Richard C. Gagliuso* on the brief and orally), and American Civil Liberties Union of New Hampshire, of Concord (*Gilles R. Bissonnette* and *Henry R. Klementowicz* on the brief), for the plaintiff.

Jackson Lewis P.C., of Portsmouth (*Thomas M. Closson* on the brief and orally), for the defendant.

Nolan Perroni, PC, of North Chelmsford, Massachusetts (*Peter J. Perroni* on the brief and orally), for the intervenor, New England Police Benevolent Association, Local 220.

Judges: DONOVAN, J. HICKS and BASSETT, JJ., concurred; HANTZ MARCONI, J., concurred in part and dissented in part.

Opinion by: DONOVAN

Opinion

DONOVAN, J. The plaintiff, Seacoast Newspapers, Inc., appeals an order of the Superior Court (*Messer*, J.) denying its petition to disclose an arbitration decision concerning the termination of a police officer by the defendant, the City of Portsmouth. Seacoast primarily argues that we have previously misconstrued the "internal personnel practices" exemption of our Right-to-Know Law. *See* RSA 91-A:5, IV (2013). Today, we take the opportunity to redefine what falls under the "internal personnel practices" exemption, overruling our prior interpretation **[*2]** set forth in *Union Leader Corp. v. Fenniman, 136 N.H. 624, 620 A.2d 1039 (1993)*. As explained below, we conclude that only a narrow set of governmental records, namely those pertaining to an agency's internal rules and practices governing operations and employee relations, falls within that exemption. Accordingly, we hold that the arbitration decision at issue here does not fall under the "internal personnel practices" exemption, vacate the trial court's order, and remand for the trial court's consideration of whether, or to what extent, the arbitration decision is exempt from disclosure because it is a "personnel … file[ ]." *RSA 91-A:5, IV*. We also deny Seacoast's request for attorney's fees.

I. *Factual and Procedural History*

The following facts are undisputed or supported by the record. In 2015, the City of Portsmouth terminated the employment of Aaron Goodwin, a former police officer with the Portsmouth Police Department. Following Goodwin's termination, the Portsmouth Police Ranking Officers Association, New England Police Benevolent

Association, Local 220 (Union) filed a grievance on his behalf challenging the termination and seeking his reinstatement. Arbitration of the grievance was conducted in accordance with the Union's collective bargaining agreement **[*3]** and administered by an independent arbitrator. The final decision was issued in 2018.

Goodwin's alleged misconduct while employed by the Department has been the subject of significant media attention throughout New Hampshire and beyond, given the public's significant interest in learning about how its public officials resolve matters involving alleged breaches of trust and conflicts of interest by public employees and, in particular, police officers. To that end, a reporter employed by Seacoast submitted a written request to the City seeking access to a copy of the arbitration decision. The City agreed that it should be released to the public. However, the City's attorney informed the reporter that the City would not release the decision in light of the position taken by the Union that it was exempt from disclosure under the Right-to-Know Law's exemptions for "internal personnel practices" and "personnel … files." *See* RSA 91-A:5, IV.

In response, Seacoast filed a petition in superior court seeking to compel disclosure of the decision and requesting attorney's fees. It argued that the City had "not demonstrated any reasonable valid basis for denying access" to the decision. The City answered that **[*4]** it did not object to the relief sought by Seacoast with the exception of its request for attorney's fees. However, the Union moved to intervene and the trial court granted its motion. The Union opposed Seacoast's petition, reiterating its position that both exemptions precluded disclosure of the decision. After a hearing and *in camera* review of the decision, the trial court concluded that it was exempt from disclosure under the "internal personnel practices" exemption. *See* RSA 91-A:5, IV. The trial court reasoned that the arbitration grievance "process was conducted internally and was performed for the benefit of … Goodwin and his former employer" and therefore bore "all the hallmarks of an internal personnel practice." The trial court therefore did not determine whether the decision is also exempt from disclosure because it is a personnel file. *See* RSA 91-A:5, IV. This appeal followed.

II. *Standard of Review*

At the outset, we describe the appropriate standard of review in Right-to-Know Law matters. Part I, Article 8 of the New Hampshire Constitution provides that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." The Right-to-Know Law states that "[e]very citizen … has the right to inspect all governmental **[*5]** records … except as otherwise prohibited by statute or RSA 91-A:5." *RSA 91-A:4, I* (2013).

NH[1] [1] ***HN1*** The ordinary rules of statutory construction apply to our interpretation of the Right-to-Know Law, and we therefore look to the plain meaning of the words used when interpreting the statute. *Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475, 686 A.2d 310 (1996)*. Ultimately, this court interprets the Right-to-Know Law with a view toward disclosing the utmost information in order to best effectuate our statutory and constitutional objective of facilitating access to public documents. *Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 546 (1997)*. Accordingly, although the statute does not provide for unfettered access to public records, we broadly construe provisions in favor of disclosure and interpret the exemptions restrictively. *Id.* We also consider the decisions of courts in other jurisdictions because similar acts are *in pari materia* and interpretatively helpful. *Id.*

III. *Analysis*

At issue here are two exemptions from disclosure set forth in the Right-to-Know Law for records pertaining to: (1) "internal personnel practices"; and (2) "personnel … files." *RSA 91-A:5, IV*. The trial court relied on the progeny of *Fenniman* in ruling that the arbitration decision is exempt because it is an internal personnel practice.

A. *"Internal Personnel Practices" Jurisprudence* ***[*6]***

In *Fenniman*, we broadly construed the "internal personnel practices" exemption to categorically exclude from disclosure records documenting a public agency's internal discipline of an employee. *Fenniman, 136 N.H. at 626-27*. Although we recognized that "we generally interpret the exemptions in [the Right-to-Know law] restrictively," we also stated that "the plain meanings of the words 'internal,' 'personnel,' and 'practices' are themselves quite broad." *Id. at 626*. As a result, we held that documents compiled during an internal investigation of a police department lieutenant accused of making harassing phone calls were "categorically exempt" from disclosure under the "internal personnel practices" exemption because "they document[ed] procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice." *Id. at 625-27*.

Our interpretation of the "internal personnel practices" exemption in *Fenniman* departed from our customary Right-to-Know Law jurisprudence in two significant ways. Reid v. N.H. Attorney General, 169 N.H. 509, 519-20 (2016). First, we failed to interpret the exemption narrowly and, second, we declined to employ a balancing test. Id. at 520; *see*, *e.g.*, Lambert v. Belknap County Convention, 157 N.H. 375, 382-86, 949 A.2d 709 (2008) (describing the balancing test employed to determine whether public records are exempt from disclosure **[*7]** because their release would constitute invasion of privacy). Our analysis in *Fenniman* had additional shortcomings, including its failure to consult decisions from other jurisdictions interpreting similar statutes, in particular, cases interpreting the federal Freedom of Information Act (FOIA) — an inquiry we make in cases requiring us to interpret certain provisions of the Right-to-Know Law and its failure to consider whether a broad interpretation of the "internal personnel practices" exemption might render any of the remaining statutory language redundant or superfluous — in particular, the language exempting "personnel … files." Reid, 169 N.H. at 520; *see* RSA 91-A:5, IV.

We subsequently applied the "internal personnel practices" exemption in Hounsell v. North Conway Water Precinct, 154 N.H. 1, 903 A.2d 987 (2006). There, we concluded that an internal investigatory report regarding allegations of threats and harassment made by an employee of the North Conway Water Precinct fell under the "internal personnel practices" exemption. Id. at 2, 4. Although the report was prepared by outside investigators, we relied on *Fenniman* and reasoned that "the investigation could have resulted in disciplinary action," and thus the report pertained to "internal personnel practices." Id. at 4. The *Hounsell* Court failed **[*8]** to analyze the "internal personnel practices" language or consider the import of RSA 91-A:5's other exemptions.[1]

Then, in Reid, 169 N.H. at 523, we limited the application of *Fenniman*'s broad interpretation of the exemption. Although neither party in *Reid* asked us to overrule *Fenniman*, we pointed out the shortcomings of *Fenniman*'s analysis of the exemption's language, as described above. Id. at 519-22. Accordingly, we declined to extend the holding of either *Fenniman* or *Hounsell* "beyond their own factual contexts" and instead "return[ed] to our customary standards for construing the Right-to-Know Law." Id. at 521-22. We clarified that to qualify "an investigation into employee misconduct as a personnel practice, … the investigation must take place within the limits of an employment relationship." Id. at 523. Applying this interpretation of the exemption, we held that the records of an investigation by the attorney general of a county attorney did not fall within the exemption because the attorney general was not the employer of the county attorney. Id. at 515, 525-26. We remanded for the trial court to determine whether the records fell under the exemption for personnel files. Id. at 527.

Most recently, in Clay v. City of Dover, 169 N.H. 681, 684, 688, 156 A.3d 156 (2017), we held that the completed rubric forms from a school superintendent **[*9]** search committee fell under the "internal personnel practices" exemption. Relying primarily on Reid, we concluded that "the completed rubric forms relate to hiring, which is a classic human resources function," and therefore "pertain to 'personnel practices.' " Id. at 686. We also determined that the forms were "internal" because "they were filled out by members of the school board's superintendent search committee on behalf of the school board, the entity that employs the superintendent." Id. at 687. Nowhere in *Clay* did we indicate that the parties had requested that we overrule our prior interpretation of the "internal personnel practices" exemption.

B. *Stare Decisis Analysis*

On appeal, Seacoast argues that we misconstrued the Right-to-Know Law's "internal personnel practices" exemption in *Fenniman* and urges us to overrule that case. We have acknowledged that, in *Fenniman*, we departed from our customary Right-to-Know Law analysis. *See* Reid, 169 N.H. at 519-22. That recognition, in conjunction with Seacoast's request that we overrule *Fenniman*, triggers our stare decisis analysis. *See* State v. Quintero, 162 N.H. 526, 539, 34 A.3d 612 (2011).

NH[2][↑] [2] **HN2**[↑] Stare decisis, "the idea that today's Court should stand by yesterday's decisions," Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015), commands great respect in a society governed by the rule of **[*10]** law, and we do not lightly overrule a prior opinion, State

[1] In Montenegro v. City of Dover, 162 N.H. 641, 649-50, 34 A.3d 717 (2011), we applied, for the first time, the "internal personnel practices" exemption outside the context of employee misconduct or discipline. Relying in part on *Fenniman*, we concluded that "the job titles of persons who monitor [a] City's surveillance equipment" did not fall within the exemption. Id. at 650.

v. Duran, 158 N.H. 146, 153, 960 A.2d 697 (2008). "Thus, when asked to reconsider a holding, the question is not whether we would decide the issue differently *de novo*, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." *Id.*

NH[3] [3] HN3 We will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. Ford v. N.H. Dep't of Transp., 163 N.H. 284, 290 (2012). Although these factors guide our judgment, no single factor is dispositive. *Id.*

First, we recognize that a broad interpretation of the "internal personnel practices" exemption, which leads to a subset of public documents being categorically exempt from disclosure, is easily applied. Although Reid, 169 N.H. at 522-23, limited *Fenniman*'s broad interpretation of the "internal personnel **[*11]** practices" exemption, we cannot conclude that the rule, as it stands, defies practical workability.

NH[4] [4] Second, we consider whether *Fenniman*'s interpretation is subject to a kind of reliance that would lend a special hardship to the consequence of overruling it. *See* Ford, 163 N.H. at 290. HN4 "Reliance interests are most often implicated when a rule is operative 'in the commercial law context … where advance planning of great precision is most obviously a necessity.' " Quintero, 162 N.H. at 537 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 855-56, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)) (brackets omitted)). Such interests are not present here and the Union has identified no reliance interest implicated by *Fenniman*'s interpretation.

Third, we consider whether related principles of law have developed such that the old rule is no more than a remnant of an abandoned doctrine. Ford, 163 N.H. at 290. *Fenniman* is an outlier in our Right-to-Know Law jurisprudence, in part, because it broadly interpreted one of the statutory exemptions. Despite our broad interpretation of "internal personnel practices" in *Fenniman*, we have otherwise advanced a narrow construction of the other exemptions set forth in our Right-to-Know Law. *See* Montenegro, 162 N.H. at 649-50 (narrowly interpreting the "internal personnel practices" exemption to not include job titles); Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 707-10 (2010) (narrowly interpreting **[*12]** the exemption for "confidential, commercial, or financial information" the disclosure of which would constitute an invasion of privacy); Lambert, 157 N.H. at 379-86 (narrowly interpreting various exemptions); N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 439-42 (2003) (narrowly interpreting the exemption for records "whose disclosure would constitute invasion of privacy"); Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 554-58 (2002) (narrowly interpreting the exemption for "[r]ecords pertaining to … confidential … information").

That our Right-to-Know Law jurisprudence since *Fenniman* has narrowly construed other exemptions within RSA chapter 91-A supports our conclusion that a broad interpretation of the "internal personnel practices" exemption is, at the very least, an abandoned principle.[2] *See* State v. Matthews, 157 N.H. 415, 420, 951 A.2d 155 (2008) (concluding that a rule was "a remnant of an abandoned doctrine," in part, because it was "inconsistent with … our current jurisprudence"). Although in *Reid* we limited the application of *Fenniman* to its own factual context, overruling *Fenniman*'s interpretation of the exemption would further allow us to "return to our customary standards for construing the Right-to-Know Law." Reid, 169 N.H. at 522.

NH[5] [5] HN5 Fourth, we ask whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. **[*13]** Ford, 163 N.H. at 290. " '[We] are sometimes able to perceive significant facts or understand principles of law that eluded [our] predecessor and justify departures from existing decisions.' " Duran, 158 N.H. at 154, (quoting Casey, 505 U.S. at 866). We see the interpretation of the "internal personnel practices" exemption differently now than we did when *Fenniman* was decided. As noted above, in *Fenniman*, we failed to consider a number of factors that we typically analyze when interpreting the Right-to-Know Law. In particular, the *Fenniman* Court failed to consider: (1) the principles compelling

[2] Although we recently applied *Fenniman*'s interpretation of the "internal personnel practices" exemption in Clay, 169 N.H. at 686, we were not asked at that time to reconsider *Fenniman*'s interpretation.

transparent governance integrated into our constitution and the Right-to-Know Law's purpose; (2) the meaning of the exemption's words when read together; (3) the federal courts' interpretation of a similar exemption in FOIA; and (4) whether a broad interpretation of the exemption renders another exemption redundant.

As a threshold matter, the *Fenniman* Court failed to consider the import of our constitution and the Right-to-Know Law's purpose, both of which compel us to interpret the statute "with a view to providing the utmost information" and "facilitating access to all public documents." Prof'l Firefighters of N.H., 159 N.H. at 703 (quotation omitted); *see* Orford Teachers Assoc. v. Watson, 121 N.H. 118, 119-20, 427 A.2d 21 (1981). Thus, our broad interpretation of the exemption **[*14]** in *Fenniman*, which has resulted in a broad category of governmental documents being withheld from public inspection, is contradictory to our state's principles of open government. *See* Reid, 169 N.H. at 532 (recognizing the public's significant interest in knowing that a government investigation is comprehensive and accurate); Prof'l Firefighters of N.H., 159 N.H. at 709 ("[K]nowing how a public body is spending taxpayer money in conducting public business is essential to the transparency of government, the very purpose underlying the Right-to-Know Law."); N.H. Civil Liberties Union, 149 N.H. at 441 ("Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know Law.").

Furthermore, in *Fenniman* we simply noted that the meanings of the individual words in the "internal personnel practices" exemption were "quite broad," Fenniman, 136 N.H. at 626, but did not consider how, when read together, the words modify one another, thereby limiting the scope of the exemption, *cf*. Reid, 169 N.H. at 522. Thus, we failed to consider the meaning of the phrase "internal personnel practices" taken as a whole. *See* Fenniman, 136 N.H. at 626 (noting that "the dictionary does not explicitly include documents such as internal police investigatory files within the[ ] definitions" of the individual **[*15]** words).

The *Fenniman* Court also did not consider the federal courts' interpretation of a similar exemption in FOIA. RSA chapter 91-A was enacted just one year after FOIA, and the language of the "internal personnel practices" exemption closely tracks the language of a similar FOIA exemption. *Compare* RSA 91-A:5, IV (exempting from disclosure records pertaining to "internal personnel practices"), *with* 5 U.S.C. § 552(b)(2) (2018) (exempting from disclosure matters "related solely to the internal personnel rules and practices of an agency"). Accordingly, we have often looked specifically to federal case law for assistance when interpreting the "internal personnel practices" exemption, although we did not do so in *Fenniman. See*, *e.g.*, Montenegro, 162 N.H. at 650; Mans v. Lebanon School Bd., 112 N.H. 160, 162-63, 290 A.2d 866 (1972). As a result, our construction of the exemption in *Fenniman* was "markedly broader than the United States Supreme Court's interpretation of that exemption's federal counterpart." Reid, 169 N.H. at 521.

NH[6][↑] [6] Finally, in *Fenniman* we failed to consider whether broadly construing the "internal personnel practices" exemption, such that the exemption applies to internal investigations of an employee's misconduct, renders the exemption for "personnel … files" superfluous. *See* RSA 91-A:5, IV. **HN6**[↑] The legislature is presumed not to use superfluous language **[*16]** and, therefore, a broad interpretation that renders statutory language irrelevant ignores legislative prerogatives. *See* Duran, 158 N.H. at 155.

NH[7][↑] [7] Today, as discussed below, we consider these factors and how they circumscribe our interpretation of the "internal personnel practices" exemption. "'**HN7**[↑] [W]e owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations.'" Duran, 158 N.H. at 155 (quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 709 n.6, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) (*Powell*, J., concurring)). Departure from precedent was justified in *Duran* because the precedent failed to give full consideration to the plain language of the statute and rendered other statutory language superfluous. *See* id. at 154. Similar concerns are present here.

NH[8][↑] [8] The Union argues that we should not disturb our construction of the "internal personnel practices" exemption in *Fenniman* because the legislature has not corrected our prior rulings by amending RSA 91-A:5, IV, and has therefore tacitly endorsed *Fenniman*'s broad interpretation. **HN8**[↑] However, legislative inaction does not preclude us from revisiting our interpretation of a statute in all circumstances. "Although stare decisis generally 'has more force in statutory analysis than in constitutional adjudication because, in the former situation, **[*17]** [the legislature] can correct our mistakes through legislation,' that is not always the case." Duran, 158 N.H. at 157 (quoting Monell, 436 U.S. at 695). "We are unwilling to

mechanically apply the principles of stare decisis to allow a decision that was wrong when it was decided perpetuate as a rule of law." *Id.* (citing *Monell, 436 U.S. at 695*). "Neither will we always place on the shoulders of the legislature the burden to correct our own error." *Id.*

NH[9][↑] [9] The Union also argues that we should be particularly cautious of overruling *Fenniman* because, during the last legislative session, the legislature re-referred a bill to committee that seeks to categorize certain internal disciplinary records of police departments as public records for purposes of the Right-to-Know Law. **HN9**[↑] We will not be deterred, however, from correcting an error of our own creation because the legislature considered, but did not enact, a bill relating to the same subject matter in a recent legislative session. Moreover, we have no basis on which to conclude that any such legislation, if passed, would address the situation presented by this case.

NH[10,11][↑] [10, 11] **HN10**[↑] "When asked to reexamine a prior holding, our task is 'to test the consistency of overruling a prior decision with the ideal of the rule of law, **[*18]** and to gauge the respective costs of reaffirming and overruling a prior case.'" *Quintero, 162 N.H. at 539* (quoting *Casey, 505 U.S. at 854*). **HN11**[↑] *Fenniman*'s broad interpretation of the "internal personnel practices" exemption substantially undermines the guarantees protected by the Right-to-Know Law and reduces its defining goals to lip service. "[S]uch an expansive construction would justify the criticism that our act, although promising, is 'weak and easily evaded.'" *Mans, 112 N.H. at 162* (quoting THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, at 672 (1970)). The costs of overruling *Fenniman*'s interpretation are insubstantial and heavily outweighed by the rewards. As stated by the preamble of the Right-to-Know Law: "Openness in the conduct of public business is essential to a democratic society." *RSA 91-A:1* (2013). An overly broad construction of the "internal personnel practices" exemption has proven to be an unwarranted constraint on a transparent government. For the reasons stated above, we overrule *Fenniman* to the extent that it broadly interpreted the "internal personnel practices" exemption and its progeny to the extent that they relied on that broad interpretation.

C. *The Arbitration Decision*

NH[12][↑] [12] Freed from the constraints imposed by *Fenniman*, we now consider the proper scope of the "internal personnel **[*19]** practices" exemption and whether the arbitration award at issue here is subject to that exemption. **HN12**[↑] We conclude that the exemption applies narrowly to records pertaining to internal rules and practices governing an agency's operations and employee relations. Accordingly, the arbitration decision does not fall within the exemption. In light of this conclusion, we need not decide in this case whether *Fenniman* should also be overruled to the extent that it applied a *per se* rule, as opposed to a balancing test, prohibiting the disclosure of records that fall under the "internal personnel practices" exemption.

NH[13][↑] [13] **HN13**[↑] Together with Part I, Article 8 of our Constitution, the Right-to-Know Law is the crown jewel of government transparency in New Hampshire. Part I, Article 8 of the New Hampshire Constitution provides that:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

N.H. CONST. pt. I, art. 8.

NH[14][↑] [14] The preamble of the Right-to-Know Law contains **[*20]** a similar principle, stating, in part, that "[t]he 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." *RSA 91-A:1*. **HN14**[↑] The purpose of the Right-to-Know Law is to "provide the utmost information to the public about what its government is up to." *Goode, 148 N.H. at 555* (quotation omitted). Accordingly, the statute furthers "our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Clay, 169 N.H. at 685* (quotation omitted). We therefore resolve questions regarding the Right-to-Know Law with a view to providing the utmost information, broadly construing its provisions in favor of disclosure and interpreting its exemptions restrictively. *Id.*; *see also Dept. of Air Force v. Rose, 425 U.S. 352, 361 (1976)* (noting that FOIA exemptions must be narrowly construed). For these reasons, a narrow interpretation of the "internal personnel practices" exemption accords with our constitution and the Right-to-Know Law's underlying purpose.

NH[15][↑] [15] **HN15**[↑] "When interpreting a statute,

we first look to the plain meaning of the words used." Reid, 169 N.H. at 522 (quotation omitted). Furthermore, we often look to federal case law **[*21]** for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions. Reid, 169 N.H. at 520.

NH[16][↑] [16] HN16[↑] "[T]he terms 'internal' and 'personnel' modify the word 'practices,' thereby circumscribing the provision's scope." Id. at 522. As we explained in *Reid*, relying on the Supreme Court's interpretation of FOIA's "internal personnel rules and practices" exemption, known as Exemption 2, "personnel" in this context "'refers to human resources matters.'" *Id.* (quoting Milner v. Department of Navy, 562 U.S. 562, 569 (2011)). "Internal" means "existing or situated within the limits of something." Reid, 169 N.H. at 523 (quotation and ellipsis omitted). Therefore, in *Reid* we construed "internal personnel practices" "to mean practices that exist or are situated within the limits of employment." [3] *Id.* (quotation and brackets omitted). The Supreme Court has further explained that Exemption 2 relates to records that an agency "must typically keep … to itself for its own use." Milner, 562 U.S. at 570-71 n.4. "[T]he general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." Rose, 425 U.S. at 369-70. Thus, Exemption 2 concerns an agency's **[*22]** "rules and practices dealing with employee relations or human resources," including "such matters as hiring and firing, work rules and discipline, compensation and benefits." Milner, 562 U.S. at 570. Examples of practices falling within Exemption 2 include "personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." Rose, 425 U.S. at 363 (quotation omitted).

Pursuant to its interpretation of Exemption 2, in *Rose*, the Supreme Court held that one-page case summaries of honor and ethics hearings maintained by the United States Air Force did not fall within the exemption. Id. at 369-70. The Court reasoned, in part, that the case summaries did "not concern only routine matters" of "merely internal significance." Id. at 370. Similarly, in Milner, 562 U.S. at 572, the Court held that data and maps which helped store explosives at a naval base were not subject to Exemption 2 because they did not concern "workplace rules" or the "treatment of employees."

NH[17][↑] [17] HN17[↑] Using *Reid* and the Supreme Court's interpretation of FOIA as our lodestars, we conclude that the "internal personnel practices" exemption was intended to apply only to records pertaining to the internal rules and practices governing an agency's operations **[*23]** and employee relations, not information concerning the performance of a particular employee. *See* Milner, 562 U.S. at 569-70; Rose, 425 U.S. at 363; Reid, 169 N.H. at 523. As we have explained above, this narrow interpretation is consonant with our constitution and the purpose of the Right-to-Know Law.

NH[18][↑] [18] Furthermore, our narrow interpretation recognizes the legislature's decision to enact a separate exemption for "personnel, medical, … and other files." RSA 91-A:5, IV; *see* Reid, 169 N.H. at 520. HN18[↑] We interpret a statute in the context of the entire statutory scheme, N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 103 (2016), and the legislature is presumed not to use superfluous language, Duran, 158 N.H. at 155.

NH[19][↑] [19] HN19[↑] Like the exemption for personnel files in RSA 91-A:5, IV, FOIA contains an exemption, known as Exemption 6, for "personnel and medical files and similar files." 5 U.S.C. § 552(b)(6) (2018). As the Supreme Court has explained, Exemption 6 shields from disclosure, in certain circumstances, an employee's "personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, [and] evaluations of his work performance." Rose, 425 U.S. at 377. Simply put, Exemption 6 protects employee files which are "typically maintained in the human resources office — otherwise known … as the 'personnel department.'" **[*24]** Milner, 562 U.S. at 570.

NH[20][↑] [20] HN20[↑] We conclude that records documenting the history or performance of a particular employee fall within the exemption for personnel files. *See* RSA 91-A:5, IV; Rose, 425 U.S. at 377. Such records pertain to an employee's work performance and are therefore typically maintained by the personnel department. *See* Milner, 562 U.S. at 570; Rose, 425

[3] In *Reid*, we remained bound by *Fenniman*'s construction of "internal personnel practices" as extending to investigations into employee misconduct, and therefore our analysis in that case could not further limit the construction of "internal personnel practices." *See* Reid, 169 N.H. at 523.

U.S. at 377. Records relating to internal policies pertaining to an agency's operations and employee relations, on the other hand, would not be maintained in an employee's personnel file. Thus, narrowly interpreting the exemption for "internal personnel practices" gives full effect to both exemptions that the legislature chose to enact. *See* Shapiro v. U.S. Dept. of Justice, 153 F. Supp. 3d 253, 280 (D.D.C. 2016) (commenting that "Exemption 6 … would have little purpose if agencies could simply invoke Exemption 2 to protect any records that are used only for 'personnel'-related purposes").

NH[21][↑] [21] Applying this interpretation to the arbitration decision at issue here, we conclude that the decision does not fall within the "internal personnel practices" exemption. The decision does not relate to the personnel rules or practices of the City of Portsmouth. *See* Rose, 425 U.S. at 363 (listing use of parking facilities, regulation of lunch hours, and statements of policy regarding sick leave as examples of internal personnel practices); **[*25]** Shapiro, 153 F. Supp. 3d at 281 (holding that Federal Bureau of Investigation FOIA request evaluation forms did not come within Exemption 2 because, in part, they did not "relate solely to trivial or minor matters, akin to the use of parking facilities or lunch hours"); *cf*. Rojas v. F.A.A., 941 F.3d 392, 402 (9th Cir. 2019) (holding that "rules and practices for scoring tests relating to the selection of employees" fell within Exemption 2). Rather, the arbitration and the consequent decision are products of the application of those rules and practices and, because the decision relates to the conduct of a specific employee, it would be the type of information preserved in an employee's personnel file. *See* Rose, 425 U.S. at 363; *see also* Vaughn v. Rosen, 523 F.2d 1136, 1139, 1143, 173 U.S. App. D.C. 187 (D.C. Cir. 1975) (concluding that reports evaluating how federal agencies' managers and supervisors carry out their personnel management responsibilities were not subject to Exemption 2 because, in part, they "deal with the compliance of federal agencies with policies").

NH[22][↑] [22] Given that the trial court applied the "internal personnel practices" exemption as interpreted in *Fenniman*, it had no need to determine whether the decision was exempt from disclosure because it is a "personnel … file[ ]." RSA 91-A:5, IV. Accordingly, we remand this issue to the trial court for its consideration, **[*26]** in the first instance, as to whether the arbitration decision arising from the grievance provision of the collective bargaining agreement is exempt from disclosure pursuant to the two-part analysis for personnel files. **HN21**[↑] To that end, the trial court must determine: "(1) whether the material can be considered a 'personnel file' or part of a 'personnel file'; and (2) whether disclosure of the material would constitute an invasion of privacy." Reid, 169 N.H. at 527. We provided extensive guidance in *Reid* as to that analysis, and need not elaborate further on it here. *See* id. at 527-33.

D. *Attorney's Fees*

NH[23,24][↑] [23, 24] Finally, Seacoast has renewed the request it made to the trial court for attorney's fees. **HN22**[↑] To award attorney's fees for a violation of the Right-to-Know Law, "the trial court must find that the petitioner's lawsuit was necessary to make the requested information available and that the [City] knew or should have known that its conduct violated the statute." Goode, 148 N.H. at 558 (quotation omitted). The City argues that, although it may agree with Seacoast that the arbitration award should be disclosed, the Union had a colorable argument that releasing the award would violate RSA 91-A:5, IV. We agree with the City. As the City points out, the trial court found **[*27]** the Union's argument more than colorable. In light of *Fenniman*, we can hardly conclude that the City "should have known" that refusing to disclose the arbitration award violated the Right-to-Know Law. Therefore, Seacoast's request for attorney's fees is denied.

IV. *Conclusion*

For the foregoing reasons, we vacate the trial court's finding that the arbitration award is exempt from disclosure under the "internal personnel practices" exemption and remand to the trial court for further proceedings consistent with this opinion. We also deny Seacoast's request for attorney's fees.

Vacated and remanded.

HICKS and BASSETT, JJ., concurred; HANTZ MARCONI, J., concurred in part and dissented in part.

Concur by: HANTZ MARCONI (In Part)

Dissent by: HANTZ MARCONI (In Part)

Dissent

HANTZ MARCONI, J., concurring in part and dissenting in part. I agree with my colleagues that the arbitration decision in this case is not a record pertaining to "internal personnel practices," and, therefore, does not fall under the "internal personnel practices" exemption to the Right-to-Know Law. *See* RSA 91-A:5, IV (2013). I also agree with my colleagues that this case should be remanded so that the trial court may consider whether, or to what extent, the arbitration **[*28]** decision at issue is exempt from disclosure under the exemption for personnel files. *See id.* I write separately because I believe that to reach this result, it is unnecessary to consider whether to overrule *Union Leader Corp. v. Fenniman, 136 N.H. 624, 620 A.2d 1039 (1993)*. I believe that, as a matter of law, the arbitration decision at issue does not fall within the "internal personnel practices" exemption to the Right-to-Know Law as interpreted in *Fenniman*. Thus, I concur in the result my colleagues reach, but write separately because I disagree with their reasoning. To the extent that my colleagues have overruled *Fenniman*, I dissent for the reasons set forth in my dissent in *Union Leader Corp. v. Town of Salem*, 173 N.H. ___, ___ (2020) (HANTZ MARCONI, J., dissenting).

Fenniman concerned a petition by Union Leader Corporation for access to documents compiled during an internal investigation of a police lieutenant accused of making harassing phone calls. *Fenniman, 136 N.H. at 625*. The police department released information including the lieutenant's name and the results of the investigation, but withheld "memoranda and other records compiled during the investigation." *Id. at 625-26*. We held that the withheld records pertained to "internal personnel practices" because "they document procedures leading up to internal personnel **[*29]** discipline, a quintessential example of an internal personnel practice." *Id. at 626* (quotation omitted). We also decided that the balancing test we had applied "to judge whether the benefits of nondisclosure outweigh the benefits of disclosure" was "inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt" from disclosure under the Right-to-Know Law. *Id. at 627*.

In *Fenniman*, we noted that, at the same time that the legislature was "overhauling *RSA chapter 91-A* into its modern form," it was also "considering passage of what is now *RSA 516:36, II*," which provides that records pertaining to internal investigations of "any officer, employee, or agent" of a state or local law enforcement agency are inadmissible in any civil action "other than in a disciplinary action between the agency" and the officer, employee, or agent. *Id. at 626*; *see* *RSA 516:36, II* (2007). We also observed that when considering passage of what is now *RSA 516:36, II*, the legislature had apparently assumed "that *RSA chapter 91-A* exempted police internal investigatory files from public disclosure." *Fenniman, 136 N.H. at 627*.

We next addressed the interplay between *RSA 516:36, II* and the exemption for "internal personnel practices" under the Right-to-Know Law in *Pivero v. Largy, 143 N.H. 187, 722 A.2d 461 (1998)*. In that case, a police **[*30]** officer sought a copy of an internal investigative file that related to him. *Pivero, 143 N.H. at 188*. To decide the case, we considered *RSA 516:36, II* and *Fenniman*, in addition to other statutes not relevant to the instant matter. *Id. at 189-92*. We explained that "[u]ntil an internal investigation produces information that results in the initiation of disciplinary process, public policy requires that internal investigation files remain confidential and separate from personnel files." *Id. at 191* (citations omitted). We further explained that "these policy considerations include instilling confidence in the public to report, without fear of reprisal, incidents of police misconduct to internal affairs" as well as the need not to "seriously hinder an ongoing investigation or future law enforcement efforts." *Id.*

Fenniman focused upon exempting from disclosure records documenting "the procedures leading up to internal personnel discipline." *Fenniman, 136 N.H. at 626*. That remained our focus in *Hounsell v. North Conway Water Precinct, 154 N.H. 1, 903 A.2d 987 (2006)*. At issue in that case was a report prepared by individuals who had been retained by counsel for the North Conway Water Precinct (Precinct) to investigate an employee's complaint of co-worker harassment. *Hounsell, 154 N.H. at 2*. The report summarized the investigation and made findings and recommendations. **[*31]** *Id.* We upheld the trial court's determination that the report was exempt from disclosure under the Right-to-Know Law because, similar to the documents in *Fenniman*, the report concerned an investigation that "could have resulted in disciplinary action." *Id. at 4*. Although we recognized that the report was not part of an internal police investigation, such as the report in *Fenniman*, we explained that its disclosure would implicate "policy concerns similar to those underlying the disclosure of an internal police investigatory file." *Id. at 5* (quotation omitted). As the Precinct in *Hounsell* had argued, "the

disclosure of records underlying, or arising from, 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." *Id.*

In *Clay*, we expanded *Fenniman* to address records documenting procedures leading to an employer's hiring decision, but did not disturb *Fenniman*'s central holding or the policy concerns underlying it. *Clay v. City of Dover, 169 N.H. 681, 156 A.3d 156 (2017)*. Although we had previously criticized *Fenniman*, *see Reid v. N.H. Attorney General, 169 N.H. 509, 519-22 (2016)*, in *Clay* we confirmed that it remained good law. *Clay, 169 N.H. at 687*.

The arbitration decision at issue in the instant **[*32]** matter does not meet the *Fenniman* definition of records pertaining to "internal personnel practices." Unlike the records in *Fenniman* and *Hounsell*, the arbitration decision was rendered *after* internal discipline had already been meted out. The police officer in this case was terminated from employment in 2015; the arbitration decision was not issued until 2018. Accordingly, the arbitration decision, unlike the records in *Fenniman* and *Hounsell*, does not document procedures "leading up to internal personnel discipline," *Fenniman, 136 N.H. at 626*, but rather constitutes the review of the discipline after it was imposed.

Moreover, disclosure of the arbitration decision in this case does not implicate the same policy concerns underlying our decision in *Fenniman. See Pivero, 143 N.H. at 191*; *Hounsell, 154 N.H. at 5*. Rather, disclosure of the arbitration decision implicates different policy considerations because it is part of an employee grievance proceeding, considerations that may be more appropriately addressed under the exemption for personnel files.

Because I believe that the arbitration decision does not fall within the "internal personnel practices" exemption, as construed in *Fenniman* and its progeny, I see no reason to consider, in this case, whether to **[*33]** overrule that line of cases. Nor do I believe, for the reasons set forth in my dissent in *Union Leader Corp. v. Town of Salem*, that our established stare decisis factors compel overruling *Fenniman* and its progeny. *See Union Leader Corp.*, 173 N.H. at ___ (HANTZ MARCONI, J., dissenting).

Although I would not overrule *Fenniman* in this case, to the extent that the *Fenniman* definition of "internal personnel practices" has been overruled and a new, narrower definition has been adopted, I agree with my colleagues that the arbitration decision at issue fails to meet that new definition as a matter of law. Like my colleagues, I would remand for the trial court to consider, in the first instance, whether the arbitration decision is exempt from disclosure pursuant to the two-part analysis for personnel files. *See Reid, 169 N.H. at 527-33*.

End of Document

Union Leader Corp. v. Fenniman

Supreme Court of New Hampshire

February 17, 1993, Decided

No. 91-517

Reporter
136 N.H. 624 *; 620 A.2d 1039 **; 1993 N.H. LEXIS 4 ***; 21 Media L. Rep. 1222

Union Leader Corporation v. William W. Fenniman, Jr., Chief and Dover Police Department

Prior History: **[***1]** Appeal from Hillsborough County.

Disposition: *Reversed*.

Core Terms

exempt, personnel, disclosure, pertaining, investigatory, confidential, disciplinary, Dictionary, discipline, ambiguous, dishonest, precursor, plainly, harass

Case Summary

Procedural Posture
Defendants, police department and police chief, sought review of a judgment from the Superior Court, Hillsborough County (New Hampshire), which granted plaintiff corporation's petition under the Right-to-Know Law, N.H. Rev. Stat. Ann. ch. 91-A, for access to certain documents.

Overview
The police department conducted an internal investigation regarding one of its lieutenants. The police department released the disposition forms to the corporation. The corporation filed suit to require that defendants disclose the memoranda and other records that defendants compiled during the investigation. The trial court granted the corporation's petition for disclosure. Defendants appealed. The court held that the documents were exempt from disclosure under *N.H. Rev. Stat. Ann. § 91-A:5(IV)* (Supp. 1992), which provided that records pertaining to internal personnel practices were not subject to the disclosure requirements of N.H. Rev. Stat. Ann. ch. 91-A.The legislative history of *N.H. Rev. Stat. Ann. §§ 516:36(II)*, *91-A:5(IV)*, (Supp. 1992), demonstrated that the legislature intended for *§ 91-A:5(IV)* to protect from public disclosure investigation and discipline records of dishonest or abusive police officers. Because the legislature intended for such documents to be exempt from disclosure, the court did not apply a balancing test to judge whether the benefits of nondisclosure outweighed the benefits of disclosure.

Outcome
The court reversed the judgment.

LexisNexis® Headnotes

Administrative Law > Governmental

Information > Freedom of Information > General Overview

HN1 **Governmental Information, Freedom of Information**

N.H. Rev. Stat. Ann. § 91-A:5(IV) (Supp. 1992) provides that records pertaining to internal personnel practices are not subject to the disclosure requirements of N.H. Rev. Stat. Ann. ch. 91-A.

Governments > Legislation > Interpretation

HN2 **Legislation, Interpretation**

When a statute has not been construed by Supreme Court of New Hampshire and is neither explained nor defined by the statute, the Court relies on the plain meaning of the words and turns to the legislative history only if the language is ambiguous.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

HN3 **Governmental Information, Freedom of Information**

Although a court generally interprets the exemptions in N.H. Rev. Stat. Ann. ch. 91-A restrictively to further the purposes of the Right-to-Know Law, the plain meanings of the words "internal," "personnel," and "practices" in N.H. Rev. Stat. Ann. § 91-A:5(IV) (Supp. 1992) are themselves quite broad.

Governments > Local Governments > Administrative Boards

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

Governments > State & Territorial Governments > Employees & Officials

HN4 **Local Governments, Administrative Boards**

N.H. Rev. Stat. Ann. § 516:36(II) (Supp. 1992) states: All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be admissible in any civil action other than in a disciplinary action between the agency and its officers, agents, or employees.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN5 **Governmental Information, Freedom of Information**

Although a balancing test is often applied to judge whether the benefits of nondisclosure outweigh the benefits of disclosure, such an analysis is inappropriate where the legislature has plainly made its own determination that certain documents are categorically exempt.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Local Governments > Employees & Officials

Governments > State & Territorial Governments > Employees & Officials

HN6 **Governmental Information, Freedom of Information**

Documents concerning the internal investigation of a police officer's conduct are exempt under N.H. Rev. Stat. Ann. § 91-A:5(IV) (Supp. 1992).

Counsel: *Malloy & Sullivan, P.C.*, of Manchester (*Gregory V. Sullivan* on the brief and orally), and *Law*

Office of Donald A. Kennedy, of Manchester (*Donald A. Kennedy* on the brief), for the plaintiff.

George E. Wattendorf and *Scott E. Woodman*, of Dover (*Mr. Wattendorf* orally), for the defendants.

H. Bernard Waugh, Jr., of Concord, legal counsel, by brief for New Hampshire Municipal Association, as *amicus curiae*.

Douglas & Douglas, of Concord (*Charles G. Douglas, III* on the brief), by brief for New Hampshire Police Association, as *amicus curiae*.

John P. Arnold, attorney general (*Daniel J. Mullen*, assistant attorney general, on the brief), by brief for the State, as *amicus curiae*.

New Hampshire Association of Chiefs of Police, by brief, as *amicus curiae*.

Judges: Johnson, J. Thayer, J., did not sit; the others concurred.

Opinion by: JOHNSON

Opinion

[*625] **[**1040]** This case involves a petition filed by the plaintiff, Union Leader **[***2]** Corporation (Union Leader), under the Right-to-Know Law, RSA chapter 91-A, for access to certain investigatory documents under the control of the defendants, the Dover Police Department (the department) and William W. Fenniman, Jr., the department's chief. The Superior Court (*Sullivan*, J.) granted the Union Leader's petition, and the defendants appeal. We reverse, holding the documents exempt from disclosure as "[r]ecords pertaining to internal personnel practices," under RSA 91-A:5, IV (Supp. 1992).

The documents in question were compiled during an internal investigation of a department lieutenant accused of making harassing phone calls. The department ultimately concluded that the lieutenant made the calls, but without an intent to harass. The department, however, determined that the lieutenant had been dishonest during the investigation and therefore suspended him from duty without pay for six pay periods. Because the department eventually released **[*626]** its "Internal Investigation Disposition Forms" to the Union Leader, detailing the facts related above along with the lieutenant's name, the only documents at issue in this appeal are the department's memoranda **[***3]** and other records compiled during the investigation.

We begin our analysis by examining the words of the statute under which the defendants claim exemption, RSA 91-A:5, IV (Supp. 1992). *See* Chambers v. Geiger, 133 N.H. 149, 152, 573 A.2d 1356, 1357 (1990). **HN1**[] The statute provides that "[r]ecords pertaining to internal personnel practices" are not subject to the disclosure requirements of chapter 91-A. This particular portion of RSA 91-A:5, IV (Supp. 1992) has not been construed by this court and is neither explained nor defined by the statute. **HN2**[] We therefore rely on the plain meaning of the words and turn to the legislative history only if the language is ambiguous. *See* State v. Johnson, 134 N.H. 570, 575-76, 595 A.2d 498, 502 (1991).

HN3[] Although we generally interpret the exemptions in RSA chapter 91-A restrictively to further the purposes of the Right-to-Know Law, *see* Mans v. Lebanon School Bd., 112 N.H. 160, 162-63, 290 A.2d 866, 867 (1972), the plain meanings of the words "internal," "personnel," and "practices" are themselves quite broad, *see* Webster's Third New International Dictionary 1180, 1687, 1780 (unabridged ed. 1961). The most we can say for the Union **[***4]** Leader's position is that the dictionary does not explicitly include documents such as internal police investigatory files within these definitions. These files plainly "pertain[] to internal personnel practices" because they document procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice.

[1041]** Moreover, even if the statute could be

deemed ambiguous, a look at the relevant legislative history only weakens the Union Leader's case. The legislature's intent with regard to RSA 91-A:5, IV (Supp. 1992) is revealed in the history of another statute, RSA 516:36, II (Supp. 1992), which states:

> HN4[] "All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be admissible in any civil action other than in a disciplinary action between the agency and its officers, agents, or employees."

[*627] At the same time the legislature was considering passage of what is now RSA 516:36, II (Supp. 1992), it was also overhauling **[***5]** RSA chapter 91-A into its modern form. *Compare* N.H.H.R. Jour. 615-18 (1986) (discussing judiciary committee report of House Bill 123, precursor to current RSA chapter 91-A, and approving amendments) *with* N.H.H.R. Jour. 620-22 (1986) (discussing judiciary committee report of House Bill 269, precursor to RSA 516:36 (Supp. 1992), and approving amendments). Moments after Representative Donna Sytek gave the judiciary committee's report on the Right-to-Know bill, *see* N.H.H.R. Jour. 615-18 (1986) (House Bill 123 approved and ordered to third reading), she gave a report from the same committee on what is now RSA 516:36, II (Supp. 1992). Speaking in favor of the latter bill, she stated: "[It] provides that proceedings of internal police investigations may not be introduced as evidence in a civil suit other than a disciplinary action. Protection for these files, *which will remain confidential under the Right-to-Know law* will encourage thorough investigation and discipline of dishonest or abusive police officers." N.H.H.R. Jour. 621 (1986) (emphasis added) (House Bill 269 approved and ordered to third reading). The House of Representatives passed both bills later that day. **[***6]** N.H.H.R. Jour. 645 (1986).

Representative Sytek's remarks indicate an assumption that RSA chapter 91-A exempted police internal investigatory files from public disclosure. As there have been no relevant changes to the Right-to-Know Law since 1986, we must honor the expressed intent of the legislature as expressed in the statute itself and reverse the superior court's ruling. HN5[] Although we have often applied a balancing test to judge whether the benefits of nondisclosure outweigh the benefits of disclosure, *see* Chambers v. Gregg, 135 N.H. 478, 481, 606 A.2d 811, 813 (1992) (construing the phrase "[r]ecords pertaining to . . . confidential . . . information"); Mans, 112 N.H. at 162, 290 A.2d at 867 (deciding whether teachers' salaries were exempt "as financial information or as private information"), such an analysis is inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt. We hold HN6[] the documents **[***7]** at issue exempt under RSA 91-A:5, IV (Supp. 1992) and, therefore, reverse.

Reversed.

End of Document

Union Leader Corp. v. New Hampshire Hous. Fin. Auth.

Supreme Court of New Hampshire

December 31, 1997, Decided

Nos. 95-802 96-008

Reporter
142 N.H. 540 *; 705 A.2d 725 **; 1997 N.H. LEXIS 132 ***; 26 Media L. Rep. 1865

UNION LEADER CORPORATION v. NEW HAMPSHIRE HOUSING FINANCE AUTHORITY

Subsequent History: [*1]** Released for Publication January 13, 1998.

Prior History: Hillsborough-northern judicial district.

Disposition: Affirmed in part; reversed in part; remanded.

Core Terms

disclosure, intervenors, exempt, Right-to-Know, confidential, camera, quotation, finance, privacy, nondisclosure, withheld, outweighs, pertaining, Monitor, invasion, columns, entity, rent

Case Summary

Procedural Posture
In a consolidated appeal, intervenor community development group challenged a series of orders from the Superior Court of Hillsborough-Northern Judicial District (New Hampshire), which ordered a document index and the disclosure of documents as a sanction for noncompliance. Plaintiff publisher filed a cross-appeal and challenged the trial court's ruling that certain documents were exempt from disclosure by defendant state housing authority.

Overview
The trial court ordered the summary disclosure of certain documents as a sanction for a violation of its order to produce a document index, and also ordered certain documents to be produced for its in camera review. The disposition of this case centered on the court's interpretation and application of the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990). The court held that: 1.) The authority was subject to the Right-to-Know Law, N.H. Rev. Stat. Ann. § 91-A (1990); 2.) The trial court's ordering the preparation of a document index was appropriate under the facts of this case; 3.) The court's de novo review of each of the group's disputed entries revealed that the trial court correctly found the disputed entries inadequate; 4.) It was not improper for the trial court to have ordered summary disclosure of all documents inadequately described by the index; and 5.) Under the facts, the trial court did not abuse its discretion by ordering summary disclosure, and the imposition of heavy penalties for violating the Right-to-Know Law, N.H. Rev. Stat. Ann. § 91-A (1990), was appropriate to ensure the broadest possible access to public records.

Outcome
The court affirmed all of the rulings issued by the trial court, with the exception of four of the exhibits reviewed

in camera, which the court ordered disclosed and reversed the order of the trial court. The court remanded the matter for further proceedings consistent with its opinion.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information > General Overview

Constitutional Law > ... > Freedom of Speech > Free Press > Public Access

Constitutional Law > State Constitutional Operation

HN1[] **Governmental Information, Freedom of Information**

N.H. Const. part. I, art. 8, provides that the public's right to access to governmental proceedings and records shall not be unreasonably restricted. The Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), provides that every citizen has the right to inspect all public records except as otherwise prohibited by statute or *N.H. Rev. Stat. Ann. § 91-A:5* (1990). *N.H. Rev. Stat. Ann. § 91-A:4*, I (1990), is enacted to ensure the greatest possible public access to the actions, discussions, and records of all public bodies, pursuant to *N.H. Rev. Stat. Ann. § 01-A:1* (1990).

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

HN2[] **Governmental Information, Freedom of Information**

The interpretation of the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), is to be decided ultimately by the court. The court resolves questions regarding the law with a view to providing the utmost information, in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents. Thus, while the statute does not provide for unrestricted access to public records, the court broadly construes provisions favoring disclosure and interprets the exemptions restrictively. The court also looks to the decisions of other jurisdictions, since other similar acts, because they are in pari materia, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Civil Procedure > Parties > Intervention > General Overview

HN3[] **Governmental Information, Freedom of Information**

The Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), applies to any board or commission of any state agency or authority, pursuant to *N.H. Rev. Stat. Ann. § 91-A:1-a*, III (1990).

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

HN4[] **Governmental Information, Freedom of Information**

The ordinary rules of statutory construction apply to the court's review of the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), and the court accordingly looks to the plain meaning of the words used.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

HN5[] **Governmental Information, Freedom of Information**

In classifying the New Hampshire Housing Finance Authority, it is recognized that any general definition can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of government done, and the court must construe the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), to further the statutory objectives of increasing public access to governmental proceedings.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Separation of Powers > Legislative Controls > General Overview

HN6[] Governmental Information, Freedom of Information

The balance of factors favors a finding that the New Hampshire Housing Finance Authority is subject to the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990). The authority is created to encourage the investment of private capital through the use of public financing, pursuant to 1981 N.H. Laws 466:1, X. It is deemed to be a public instrumentality and the exercise by the authority of the powers conferred by N.H. Rev. Stat. Ann. § 204-C (1989), shall be deemed and held to be the performance of public and essential governmental functions of the state, pursuant to N.H. Rev. Stat. Ann. § 204-C:2 (1989). It is empowered to work with other state and federal agencies, pursuant to N.H. Rev. Stat. Ann. § 204-C:8, V (1989). The authority performs the essential government function of providing safe and affordable housing to the elderly and low income residents of the state, pursuant to 1981 N.H. Laws 466:1, X. Accordingly, it is subject to the Right-to-Know Law.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Evidence > Types of Evidence > Documentary Evidence > Summaries

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN7[] Governmental Information, Freedom of Information

The document index is a procedure developed by the federal courts to effectuate the goal of broad disclosure of public documents and assist trial courts in cases involving a large number of documents. It enjoys almost "universal" acceptance. Generally, a document index will include a general description of each document withheld and a justification for its nondisclosure. The index safeguards the adversary process in a setting where one party, the party resisting disclosure, has exclusive control of vital information: It forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN8[] Governmental Information, Freedom of Information

In camera review of all documents in a document index is not mandatory, even in large document cases. It is true that the court shall separately examine each document in question in camera on the record to determine whether disclosure is appropriate. However, when appropriate, the document's subject matter can be described in general terms such that persons objecting to disclosure can present an adequate argument to the court.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Evidence > Types of Evidence > Documentary Evidence > Summaries

HN9[] Governmental Information, Freedom of Information

The trial court does not abdicate its responsibilities under prior caselaw when it orders preparation of a document index. The overriding aim of the document index is to maximize disclosure of public documents--a purpose consistent with the aims of the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990). A document index is particularly useful in large document cases. While in theory the court could examine a document in sufficient depth to test the accuracy of a government characterization, where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Evidence > Burdens of Proof > Burden Shifting

Evidence > Inferences & Presumptions > General Overview

HN10[] **Governmental Information, Freedom of Information**

The burden of proof rests with the party seeking nondisclosure. Requiring in camera inspection of all documents in a large document case would undermine this holding since it would shift the burden of proof from the party resisting disclosure, to the party, who with limited knowledge must argue that a document is not exempt, while straining the resources of the court, which is forced to "wade through" potentially voluminous documents to determine whether an exemption applies. Consequently, in large document cases, where the imbalance of information distorts the adversary process such that neither the plaintiffs nor the court can effectively review disputed evidence, use of a document index is entirely appropriate.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN11[] **Governmental Information, Freedom of Information**

The court reviews de novo whether a party's explanation is full and specific enough to afford a petitioner a meaningful opportunity to contest, and the superior court an adequate foundation to review, the soundness of the withholding. For an entry in the index to be sufficient, it must provide the connective tissue between the document, the deletion, the exemption and the explanation. Specificity is the defining requirement of the document index, and unless the agency discloses as much information as possible without thwarting the claimed exemption's purpose, the adversarial process is unnecessarily compromised.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN12[] **Governmental Information, Freedom of Information**

The court reviews each disputed entry individually in order to evaluate whether they contain the hallmarks of an adequate document index; namely, whether the entry contains a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN13[] **Governmental Information, Freedom of Information**

Bare assertions do little to instruct the court as to why certain documents may contain information that is exempt from disclosure. For example, entries including supporting affidavits are inadequate if they contain only general and conclusory assertions, and make only broad statements essentially explaining that the documents are withheld because they contain a type of information generally protected by that particular exemption. Simply put, such descriptions for the documents are too cursory to permit debate, or an informed judgment, about whether they properly may be withheld, and the intervenors fall short of providing the petitioners with a meaningful opportunity to challenge a substantial number of their unilateral decisions to withhold documents.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN14 **Governmental Information, Freedom of Information**

In camera examination is not a substitute for an intervenor's obligation to provide detailed public indexes and justifications whenever possible. Rather it will assist the courts as a supplement to the detailed public record and adversary testing of their justifications for withholding information.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN15 **Governmental Information, Freedom of Information**

It is not improper for the court to order summary disclosure of all documents inadequately described by the document index. The judicial remedy of summary disclosure may be appropriate where a public agency improperly withholds agency records, including when an agency fails, after adequate notice, to supply the court with a proper document index. This remedy is also available to trial courts where a party, who controls the documents in question but is not the public agency, fails to supply an adequate document index. When a party violates a statute or court rule, it is within the discretion of the trial court to impose a reasonable sanction.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN16 **Governmental Information, Freedom of Information**

Imposition of heavy penalties for violating the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), may be appropriate to ensure the broadest possible access to public records, and thus summary disclosure is one remedy available to trial courts where a non-public body fails to reasonably comply with an order for a document index. Where the intervenors are given more than one opportunity to comply with the court's order, and are informed that noncompliance would result in summary disclosure, then in such a case the trial court does not abuse its discretion by ordering summary disclosure.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN17 **Governmental Information, Freedom of Information**

The Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), provides that records pertaining to internal personnel practices; confidential, commercial, or financial information; and other files whose disclosure would constitute invasion of privacy are exempt from disclosure, pursuant to *N.H. Rev. Stat. Ann. § 91-A:5*, IV (1996).

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Public Lands > National Parks

Trade Secrets Law > Federal Versus State Law > Freedom of Information Act Exemptions

Administrative Law > Governmental Information > Recordkeeping & Reporting

Governments > Public Lands > General Overview

HN18 **Governmental Information, Freedom of Information**

The court defines with some specificity the statutory exemption for "confidential, commercial, or financial information" pursuant to *N.H. Rev. Stat. Ann. § 91-A:5*,

IV (1996). Section § 91-A:5, IV, unlike its federal counterpart, which exempts "commercial or financial information obtained from a person and privileged or confidential," pursuant to 5 U.S.C.S. § 552(b)(4), is not expressly conjunctive. The court interprets N.H. Rev. Stat. Ann. § 91-A:5, IV (1996), 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. Federal precedent is instructive in defining the terms "confidential, commercial, or financial."

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN19 **Governmental Information, Freedom of Information**

An expansive construction of the terms "confidential, commercial, or financial information" must be avoided, since to do otherwise would allow the exemption to swallow the rule and is inconsistent with the purposes and objectives of N.H. Rev. Stat. Ann. § 91-A. Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, id., since these categorical exemptions mean not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure. But other cases state that the balancing test is inappropriate where the legislature plainly determines that certain documents are categorically exempt, under N.H. Rev. Stat. Ann. § 91-A:5, IV (1996).

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

HN20 **Governmental Information, Freedom of Information**

The court begins statutory interpretation by examining the words of a statute, giving them their plain meaning whenever possible. The terms "commercial or financial" encompass information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition. Whether documents are commercial depends on the character of the information sought. Information is commercial if it relates to commerce. Thus information may qualify as "commercial" even if the provider's interest in gathering, processing, and reporting the information is noncommercial. Conversely, not all information generated by a commercial entity is "financial or commercial."

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN21 **Governmental Information, Freedom of Information**

To best effectuate the purposes of the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), whether information is "confidential" must be determined objectively, and not based on the subjective expectations of the party generating it. To determine whether records are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government. The standard test employed by the federal courts is instructive: To show that information is sufficiently "confidential" to justify nondisclosure, the party resisting disclosure must prove that disclosure is likely: (1) to impair the state's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information is obtained.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN22 **Governmental Information, Freedom of Information**

The standard test employed by the federal courts is not adopted as the exclusive test for "confidential." In this context, the federal test is instructive simply because it illustrates that the emphasis should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the

information is customarily regarded as confidential.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN23[] Governmental Information, Freedom of Information

When exemption is claimed on privacy grounds, the court examines the nature of the requested document or material and its relationship to the basic purpose of the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990). The party resisting disclosure bears a heavy burden to shift the balance toward nondisclosure. Furthermore, the motivations of any member of the public are irrelevant to the question of access. The obvious public purpose that may be served by disclosure of disputed exhibits is to increase public knowledge about how the authority operates.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Personal Information > General Overview

HN24[] Governmental Information, Freedom of Information

Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990). That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct. Thus, the court's review must necessarily focus on whether an intervenor shows that the information sought would not inform the public about the authority's activities, or that a valid privacy interest, on balance, outweighs the public interest in disclosure.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN25[] Governmental Information, Freedom of Information

When reviewing exemptions from the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990), the court balances the public's interest in disclosure against the intervenors' interest in nondisclosure. In the absence of disputed facts, the court reviews the trial court's balancing the public's interest in disclosure and the interests in nondisclosure de novo.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Real Property Law > Common Interest Communities > Condominiums > Purchase & Sale

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN26[] Governmental Information, Freedom of Information

Even if the information contained in an exhibit is of a commercial nature, it is not exempt unless the intervenor's competitive interest in protecting the information from disclosure outweighs the public's interest in disclosure.

Administrative Law > Governmental Information > Personal Information > General Overview

HN27[] Governmental Information, Personal Information

Even commercially generated credit reports are found to be exempt from disclosure.

Administrative Law > Governmental Information > Personal Information > General Overview

HN28[] Governmental Information, Personal Information

While personal financial information may implicate privacy concerns insofar as it contains embarrassing disclosures or involves sufficiently intimate details, even those cases do not say that embarrassing personal financial information is exempt only that such information is sufficiently private so that it must be balanced against disclosure interests to determine if the invasion of privacy is clearly unwarranted.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN29[] **Governmental Information, Freedom of Information**

The strong public interest in understanding the terms of a series of large transactions involving the state housing finance authority tips the balance in favor of disclosure.

Administrative Law > Governmental Information > Freedom of Information > General Overview

HN30[] **Governmental Information, Freedom of Information**

If a letter regarding a loan sheds light on the activities of the state housing finance authority, its disclosure would further the essential purpose of the Right-to-Know Law, codified at N.H. Rev. Stat. Ann. § 91-A (1990). On balance, the public interest in obtaining information about favorably priced loans extended by the authority outweighs the intervenors' interest in keeping private pricing and marketing information developed in the past. An agency's argument that a decreased public benefit in learning decade old marketing and pricing information should be recognized is not convincing. The public benefit from disclosure does not depend solely on the marketing information itself, but rather in the process used and considerations made by the authority in negotiating the terms of a loan.

Counsel: Malloy & Sullivan, of Manchester (Gregory V. Sullivan on the brief and orally), for plaintiff Union Leader Corporation.

Hill & Barlow, P.C., of Boston, Massachusetts (Joseph D. Steinfield and Robert A. Bertsche on the brief, and Mr. Steinfield orally), and Backus, Meyer, Solomon & Rood, of Manchester (Jon Meyer on the brief), for plaintiff Monitor Publishing Co. Stein, Volinsky & Callaghan, of Concord (Peter G. Callaghan and Diane Perin Hock on the brief, and Mr. Callaghan orally), for intervenors Northeast Community Development Group and Stephen M. Duprey.

Bell & Falk, P.A., of Keene (Arnold R. Falk on the brief), and Jane E. Kirtley of Arlington, Virginia, by brief, for the Reporters Committee for Freedom of the Press, as amicus curiae. Defendant New Hampshire Housing Finance Authority filed no brief.

Judges: JOHNSON, J. BRODERICK, J., did not sit; the others concurred.

Opinion by: JOHNSON

Opinion

[*544] **[**729]** JOHNSON, J. This consolidated **[***2]** appeal arises from petitions filed by the Union Leader Corporation (Union Leader) and Monitor Publishing Company (Monitor) (collectively the petitioners) seeking to gain access to documents under New Hampshire's Right-to-Know Law, RSA ch. 91-A (1990 & Supp. 1996), pertaining to housing developments financed by the New Hampshire Housing Finance Authority (authority). The intervenors, Northeast Community Development **[*545]** Group (Northeast) and Stephen M. Duprey, appeal a series of orders of the Superior Court (*Sullivan*, J.), arguing that the court: (1) erred when it ordered the intervenors to prepare a detailed document index pursuant to *Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C. Cir 1973)*, *cert. denied*, *415 U.S. 977, 39 L. Ed. 2d 873, 94 S. Ct. 1564 (1974)*, (*Vaughn* index); (2) arbitrarily and capriciously determined that the intervenors did not comply with its order; (3) impermissibly ordered summary disclosure of numerous documents as a sanction for noncompliance; and (4) erroneously ordered disclosure of certain

documents that the court reviewed *in camera*. The intervenors also challenge the court's finding that the authority is subject to the Right-to-Know **[***3]** Law. The Union Leader filed a cross-appeal challenging the trial court's ruling that certain documents were exempt from disclosure. We affirm in part and reverse in part.

In March and April 1995, reporters for the Union Leader and Monitor filed requests pursuant to RSA chapter 91-A with the authority seeking documents pertaining to two housing developments, known as Woodland Green and Saco Woods, which had been partially financed by the authority. Northeast was the developer responsible for both projects, and Duprey is a principal in that firm. When the authority refused to turn over certain documents requested by the petitioners, each filed a petition for injunctive relief with the superior court seeking disclosure of the documents. *See* RSA 91-A:7 (1990). The petitions were consolidated, and the court subsequently allowed Northeast and Duprey to intervene in the litigation.

After many weeks had passed with no discernable progress in the litigation, the Monitor, in July 1995, filed a motion to compel the intervenors to produce a *Vaughn* index of the withheld documents for review by the trial court. As a result, the trial judge ordered the intervenors to produce a *Vaughn* **[***4]** index describing the withheld documents and offering an explanation of why such documents were exempt from disclosure under RSA chapter 91-A. The purpose of the index was to assist the court in determining which of the over 5,000 pages of requested documents should be reviewed *in camera*. While the intervenors did produce an index containing over 478 entries, the court concluded that the descriptions were too general and ordered the intervenors to prepare a second, more detailed index. The trial court warned that if it found the revised index was not in compliance, then the court would order summary disclosure. After the intervenors produced a "Further Memorandum" in early August 1995 to supplement the first *Vaughn* index, the Monitor moved to compel summary disclosure. In response, the intervenors filed a **[*546]** third version of the index, entitled a "Revised Further Memorandum." The court found that the intervenors had, for **[**730]** the most part, failed to comply with its order, and consequently ordered summary disclosure of most of the indexed documents. The court did review, *in camera*, a series of documents it found to be adequately described in the *Vaughn* index. In October 1995, **[***5]** the court issued a final order requiring disclosure of certain documents and finding the remainder exempt. The consolidated appeals and cross-appeal followed.

I. Standard of Review

HN1[↑] Part I, article 8 of the New Hampshire Constitution provides that "the public's right to access to governmental proceedings and records shall not be unreasonably restricted." The Right-to-Know Law provides that "every citizen . . . has the right to inspect all public records . . . except as otherwise prohibited by statute or RSA 91-A:5." *RSA 91-A:4, I* (1990). It was enacted "to ensure . . . the greatest possible public access to the actions, discussions and records of all public bodies." RSA 91-A:1 (1990).

HN2[↑] The interpretation of the Right-to-Know Law is to be decided ultimately by this court. *See* Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475, 686 A.2d 310, 312 (1996). We resolve questions regarding the law with a view to providing the utmost information, *see* Menge v. Manchester, 113 N.H. 533, 537, 311 A.2d 116, 118 (1973), in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents. *See* Lodge v. Knowlton, 118 N.H. 574, **[***6]** 575, 391 A.2d 893, 894 (1978). Thus, while the statute does not provide for unrestricted access to public records, *see* Orford Teachers Assoc. v. Watson, 121 N.H. 118, 120, 427 A.2d 21, 23 (1981), we broadly construe provisions favoring disclosure and interpret the exemptions restrictively. *See*, *e.g.*, Society for Protection of N.H. Forests v. Water Supply and Pollution Control Comm'n, 115 N.H. 192, 194, 337 A.2d 788, 789 (1975).

We also look to the decisions of other jurisdictions, since "other similar acts, because they are *in pari materia*, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved." Wilson v. Freedom of Information Com'n, 181 Conn. 324, 435 A.2d 353, 359 (Conn. 1980); *see* Board of Trustees v. Freedom of Info. Com'n, 181 Conn. 544, 436 A.2d 266, 270 (Conn. 1980); *cf.* Lodge, 118 N.H. at 576-77, 391 A.2d at 895 (this court followed federal test in absence of legislative standard for police investigation file).

[*547] *II. State Agency*

HN3[↑] The Right-to-Know Law applies to "any board or commission of any state agency or authority." RSA 91-A:1-a, III (1990); *see* Lodge, 118 **[***7]** N.H. at 575,

391 A.2d at 893. The intervenors argue that the authority is not subject to the Right-to-Know Law because it is a private entity that functions independently of the State. HN4[] "The ordinary rules of statutory construction apply to our review of the Right-to-Know Law, and we accordingly look to the plain meaning of the words used." Union Leader Corp. v. City of Nashua, 141 N.H. at 475, 686 A.2d at 312. Here, however, we are confronted with an entity that is not easily characterized as solely private or entirely public. While the declared intent of the statute is to create a "*state* housing finance authority," *see* Laws 1981, 466:1, X (emphasis added), it is also a "body politic and corporate having a distinct legal existence separate from the state and not constituting a department of state government." RSA 204-C:2 (1989). Moreover, in many of its day-to-day operations, the authority functions independently of the State. *See* RSA 204-C:8 (1989 & Supp. 1996), :9, :26, :44, :52 (1989).

HN5[] In classifying the authority, we recognize that "any general definition can be of only limited utility to a court confronted with one of the myriad organizational arrangements for **[***8]** getting the business of government done," Bradbury v. Shaw, 116 N.H. 388, 390, 360 A.2d 123, 125 (1976) (quotation and brackets omitted), and that we must "construe[] the right-to-know law to further the statutory objectives of increasing public access to governmental proceedings." Orford Teachers Assoc., 121 N.H. at 120, 427 A.2d at 23. Here, HN6[] the balance favors a finding that the authority is subject to the Right-to-Know Law. The authority was created "to encourage the investment of private capital **[**731]** . . . through the use of public financing." Laws 1981, 466:1, X. It is deemed "to be a *public instrumentality* and the exercise by the authority of the powers conferred by [RSA chapter 204-C] shall be deemed and held to be the performance of *public* and *essential governmental* functions of the state." RSA 204-C:2 (emphasis added). It is empowered to "work with *other* state and federal agencies." RSA 204-C:8, V (1989) (emphasis added). The authority performs the essential government function of providing safe and affordable housing to the elderly and low income residents of our State. *See* Laws 1981, 466:1, X. Accordingly, we hold that it is subject to the Right-to-Know **[***9]** Law. *Cf.* Doe v. Sears, 245 Ga. 83, 263 S.E.2d 119, 121-22 (Ga.), *cert. denied*, *446 U.S. 979, 64 L. Ed. 2d 836, 100 S. Ct. 2958 (1980)*; Bradbury, 116 N.H. at 390, 360 A.2d at 125 (holding that "committee's involvement in governmental programs and decisions **[*548]** brought it within the scope of the right-to-know law"); A.R. Bldg Co. v. Pa. Housing Finance, 93 Pa. Commw. 140, 500 A.2d 943, 944 (Pa. Commw. Ct. 1985).

III. Vaughn Index

The intervenors next argue that the court improperly abdicated its responsibility to review *in camera* the thousands of pages of documents at issue when it ordered preparation of a *Vaughn* index. HN7[] The *Vaughn* index is a procedure developed by the federal courts to effectuate the goal of broad disclosure of public documents and assist trial courts in cases involving a large number of documents. *See* Vaughn, 484 F.2d at 823-25. It has enjoyed almost "universal" acceptance. *See* Wiener v. F.B.I., 943 F.2d 972, 978 n.5 (9th Cir. 1991), *cert. denied*, *505 U.S. 1212, 120 L. Ed. 2d 886, 112 S. Ct. 3013 (1992)*. Generally, a *Vaughn* index will include a general description of each document withheld and a justification **[***10]** for its nondisclosure. *See* Church of Scientology Intern. v. U.S. Dept. of Justice, 30 F.3d 224, 228 (1st Cir. 1994). The index safeguards the adversary process in a setting where one party, the party resisting disclosure, has exclusive control of vital information:

> It forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applicability of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court.

Id. (quotation and brackets omitted).

The intervenors argue that our opinion in Petition of Keene Sentinel, 136 N.H. 121, 130, 612 A.2d 911, 917 (1992), makes HN8[] *in camera* review of all documents mandatory, even in large document cases such as this. We disagree. It is true that we stated in *Keene Sentinel* that "the court shall separately examine each document in question *in camera* . . . on the record" to determine whether disclosure is appropriate. Keene Sentinel, 136 N.H. at 130, 612 A.2d at 917. We also stated, however, that "when appropriate, the document's **[***11]** subject matter . . . can be described in general terms such that persons objecting to closure can present an adequate argument to the court." *Id.*

We hold that HN9[] the trial court did not abdicate its responsibilities under *Keene Sentinel* when it ordered preparation of a *Vaughn* index. The overriding aim of the *Vaughn* index is to maximize disclosure of public

documents -- a purpose consistent with the aims of the Right-to-Know Law. *Cf.* Union Leader Corp. v. City of Nashua, 141 N.H. at 476, 686 A.2d at 312. A *Vaughn* index is **[*549]** particularly useful in large document cases. While in theory the court could "examine a document in sufficient depth to test the accuracy of a government characterization, ... where the documents in issue constitute hundreds or even thousands of pages, it is unreasonable to expect a trial judge to do as thorough a job of illumination and characterization." Vaughn, 484 F.2d at 825.

Furthermore, *Keene Sentinel* emphasizes that HN10[↑] the burden of proof rests with the party seeking nondisclosure. Keene Sentinel, 136 N.H. at 128, 612 A.2d at 914-15. Requiring *in camera* inspection of all documents in a large document case would undermine **[***12]** this holding since it would shift the burden of proof from the party resisting disclosure, *see* Union Leader Corp. v. City of Nashua, 141 N.H. at 476, 686 A.2d at 313, to the petitioners, who with limited knowledge **[**732]** must argue that a document is not exempt, Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 984 (3d Cir. 1981), while straining the resources of the court, which is forced to "wade through" potentially voluminous documents to determine whether an exemption applies. Powell v. United States Dept. of Justice, 584 F. Supp. 1508, 1512 (N.D. Cal. 1984). Consequently, we hold that in large document cases, where the imbalance of information distorts the adversary process such that neither the plaintiffs nor the court can effectively review disputed evidence, use of a *Vaughn* index is entirely appropriate.

The intervenors next argue that even if use of a *Vaughn* index was appropriate in this case, the superior court's finding of noncompliance was erroneous. We disagree. HN11[↑] We review *de novo* "whether the [intervenor's] explanation was full and specific enough to afford the [petitioners] a meaningful opportunity to contest, and the [superior] **[***13]** court an adequate foundation to review, the soundness of the withholding." Davin v. U.S. Dept. of Justice, 60 F.3d 1043, 1049 (3d Cir. 1995) (quotation omitted); *see* Church of Scientology Intern., 30 F.3d at 228. For an entry in the index to be sufficient, it must "provide the connective tissue between the document, the deletion, the exemption and the explanation." Davin, 60 F.3d at 1051 (quotation omitted). "Specificity is the defining requirement of the *Vaughn* index, [and] unless the agency discloses as much information as possible without thwarting the claimed exemption's purpose, the adversarial process is unnecessarily compromised." Wiener, 943 F.2d at 979 (quotations, citations, and brackets omitted).

The intervenors "Further Memorandum" included 478 entries purporting to explain why the nondisclosed documents were exempt from disclosure. The trial court found that most of the entries **[*550]** lacked sufficient legal and factual information to enable either the court or the petitioners to determine why the documents should be exempt from disclosure. HN12[↑] We have reviewed each disputed entry individually in order to evaluate whether they contained the hallmarks of an **[***14]** adequate *Vaughn* index; namely, whether the entry contains "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." Church of Scientology Intern., 30 F.3d at 231 (quotations and emphasis omitted); *see*, *e.g.*, King v. U.S. Dept. of Justice, 265 U.S. App. D.C. 62, 830 F.2d 210, 225 (D.C. Cir. 1987) (goal of a *Vaughn* index is descriptive accuracy).

Our review reveals that the trial court correctly found the disputed entries inadequate. As the intervenors themselves noted in their brief, "the court wanted the intervenors to state their factual and legal bases for their position." The disputed entries fail to meet this standard. These entries, while stating the legal bases upon which the exemptions are claimed, fail to give the slightest factual reference that would enable the court to determine whether the claimed legal exemption applies. For example, entry 187 while listing a number of legal bases upon which the document could be excluded, states only that it is a "NHHFA memorandum from Richards to Monier dated **[***15]** 1/10/89 discussing issues and proposing solutions." Entry 220 states merely that it is a "handwritten memo dated 3/27/90" before listing a series of legal claims upon which this unspecified "handwritten memo" should be deemed exempt. Entry 224 states merely that it is a "letter of a financial institution dated 6/7/88 to NCDG." These HN13[↑] bare assertions do little to instruct the court as to why the documents may contain information that is exempt from disclosure. *Cf.* Church of Scientology Intern., 30 F.3d at 231 (entries including supporting affidavits inadequate because they "contain only general and conclusory assertions," and make "only broad statements essentially explaining that the documents were withheld because they contain a type of information generally protected by that particular exemption"). Simply put, "the descriptions for many of the documents are too cursory to permit debate, or an informed judgment, about whether they properly may be

withheld," *id. at 230*, and the intervenors "fell short of providing the [petitioners] with a meaningful opportunity to challenge a substantial number of [their] unilateral **[**733]** decisions to withhold documents." *Id. at 233* (quotation **[***16]** omitted).

Nonetheless, the intervenors argue that the trial court's findings were erroneous because the "trial court had no basis for deciding **[*551]** whether the index did in fact fairly describe the document" until it conducted an *in camera* review. ***HN14***[⬆] "*In camera* examination is not a substitute for the [intervenor's] obligation to provide detailed public indexes and justifications whenever possible. Rather it will . . . assist the [courts] as a supplement to the detailed public record and adversary testing of [their] justifications for withholding information." *Lykins v. United States Dept. of Justice, 233 U.S. App. D.C. 349, 725 F.2d 1455, 1463 (D.C. Cir. 1984)*.

The intervenors also complain that the trial court erred because it was "inconsistent and confusing in identifying its *Vaughn* index requirements." This assertion is without merit. The court's order regarding preparation of the *Vaughn* index stated that "the intervenors are ordered to provide to the court . . . an itemized, detailed explanation in connection with each document that they claim is exempt from production," and instructed the intervenors to consult *Vaughn* and its progeny. The order set forth **[***17]** specific requirements for each entry. We note that the intervenors conceded in their brief that they understood that the court wanted them "to state their factual and legal bases for their position," a task they largely failed to accomplish.

The intervenors also argue that ***HN15***[⬆] it was improper for the court to order summary disclosure of all documents inadequately described by the *Vaughn* index. We disagree. The judicial remedy of summary disclosure may be appropriate where a public agency has improperly withheld agency records, *cf.* *Coastal States Gas Corp. v. Department of Energy, 644 F.2d at 974*, including when an agency has failed, after adequate notice, to supply the court with a proper *Vaughn* index, *see* *Church of Scientology Intern., 30 F.3d at 240*. We find that this remedy is also available to trial courts where a party, who controls the documents in question but is not the public agency, fails to supply an adequate *Vaughn* index. When a party violates a statute or court rule, it is within the discretion of the trial court to impose a reasonable sanction. *Cf.* *Breagy v. Stark, 138 N.H. 479, 483, 642 A.2d 329, 333 (1994)*. ***HN16***[⬆] Imposition of heavy penalties **[***18]** for violating the Right-to-Know Law may be appropriate to ensure the broadest possible access to public records, *cf.* *Hardiman v. Dover, 111 N.H. 377, 380, 284 A.2d 905, 907 (1971)*, and thus summary disclosure is one remedy available to trial courts where a non-public body has failed to reasonably comply with an order for a *Vaughn* index. Here, the intervenors were given more than one opportunity to comply with the court's order, *cf.* *Powell, 584 F. Supp. at 1515 n.5*, and were informed that noncompliance would result in summary disclosure. **[*552]** We conclude that in this case the trial court did not abuse its discretion by ordering summary disclosure.

IV. In Camera Review

The final issue raised by the intervenors, and the only issue raised by the Union Leader, is whether the trial court properly ruled upon the documents it reviewed *in camera*. ***HN17***[⬆] The Right-to-Know Law provides that "records pertaining to internal personnel practices; confidential, commercial, or financial information; . . . and other files whose disclosure would constitute invasion of privacy" are exempt from disclosure. *RSA 91-A:5, IV* (Supp. 1996). The trial court reviewed *in camera* several hundred **[***19]** pages of documents grouped into seventeen exhibits to determine whether they were discoverable pursuant to *RSA 91-A:5, IV*. While both the Union Leader and the intervenors now dispute the trial court's findings, their legal arguments concern the proper interpretation of the exemptions for "confidential, commercial, or financial information," and for "other files whose disclosure would constitute invasion of privacy."

A. "Confidential, Commercial, or Financial Information"

HN18[⬆] The parties' arguments require us to define with some specificity the statutory exemption for "confidential, commercial, or financial information." *RSA 91-A:5, IV*. **[**734]** Our statute, unlike its federal counterpart, which exempts "commercial or financial information obtained from a person *and* privileged or confidential," *see* *5 U.S.C. § 552(b)(4) (1982)* (emphasis added), is not expressly conjunctive. *See* *National Parks and Conservation Ass'n v. Morton, 162 U.S. App. D.C. 223, 498 F.2d 765, 766 (D.C. Cir. 1974)* (*National Parks I*). We have interpreted our statute, however, as requiring analysis of both whether the information sought is "confidential, commercial, or financial information," *and* whether **[***20]** disclosure would constitute an invasion of privacy. *See* *Perras v.*

Clements, 127 N.H. 603, 605, 503 A.2d 843, 844 (1986); Menge, 113 N.H. at 537-38, 311 A.2d at 119; *cf.* Mans v. Lebanon School Bd., 112 N.H. 160, 162, 290 A.2d 866, 867 (1972) ("Subsection IV means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed."). Federal precedent is instructive in defining the terms "confidential, commercial, or financial." *See* Wilson, 435 A.2d at 359; *cf.* Lodge, 118 N.H. at 577, 391 A.2d at 895. **HN19**[↑] An expansive construction of these terms must be avoided, since to do otherwise would "allow[] the exemption to swallow the rule and is inconsistent with the purposes and objectives of [RSA chapter 91-A]." Mans, 112 **[*553]** N.H. at 162, 290 A.2d at 867. Furthermore, the asserted private confidential, commercial, or financial interest must be balanced against the public's interest in disclosure, *id.*, since these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure. **[***21]** *See* Union Leader Corp. v. City of Nashua, 141 N.H. at 475-76, 686 A.2d at 312; Brent v. Paquette, 132 N.H. 415, 426-27, 567 A.2d 976, 983-84 (1989); Mans, 112 N.H. at 162, 290 A.2d at 867; *cf.* Washington Post v. U.S. Dept. of Health, Etc., 223 U.S. App. D.C. 139, 690 F.2d 252, 261 (D.C. Cir. 1982). *But cf.* Union Leader Corp. v. Fenniman, 136 N.H. 624, 627, 620 A.2d 1039, 1041 (1993) (balancing test inappropriate where legislature has plainly determined that certain documents are categorically exempt under RSA 91-A:5, IV).

HN20[↑] We begin by examining the words of the statute, giving them their plain meaning whenever possible. Union Leader Corp. v. Fenniman, 136 N.H. at 626, 620 A.2d at 1040; *see* Public Citizen Health Research Group v. F.D.A., 227 U.S. App. D.C. 151, 704 F.2d 1280, 1290 (D.C. Cir. 1983). The terms "commercial or financial" encompass information such as "business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition." Landfair v. United States Dept. of Army, 645 F. Supp. 325, 327 (D.D.C. 1986); *see* Comstock Intern. v. Export-Import Bank of U.S., 464 F. Supp. 804, **[***22]** 806 (D.D.C. 1979) (loan agreements are financial or commercial information). Whether documents are commercial depends on the character of the information sought. Information is commercial if it relates to commerce. *See* American Airlines, Inc. v. Nat. Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978). Thus "information may qualify as 'commercial' even if the provider's . . . interest in gathering, processing, and reporting the information is noncommercial." Critical Mass Energy Project v. N.R.C., 265 U.S. App. D.C. 130, 830 F.2d 278, 281 (D.C. Cir. 1987), *vacated on other grounds*, 298 U.S. App. D.C. 8, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, *507 U.S. 984 (1993)*. Conversely, not all information generated by a commercial entity is "financial or commercial." *See* British Airports Authority v. U.S. Dept. of State, 530 F. Supp. 46, 49 (D.D.C. 1981).

HN21[↑] To best effectuate the purposes of our Right-to-Know Law, whether information is "confidential" must be determined objectively, and not based on the subjective expectations of the party generating it. *See* Washington Post, 690 F.2d at 268; *cf. 9 to 5* Organ. v. Board of Governors of Fed. Res., 721 F.2d 1, 9, (1st Cir. 1983). "To **[***23]** determine whether [records] . . . are exempt as confidential, the benefits of disclosure to the public must be weighed against the **[*554]** benefits of non-disclosure to the government." Chambers v. Gregg, 135 N.H. 478, 481, 606 A.2d 811, 813 (1992). We find instructive the standard test employed by the federal courts: To show that information is sufficiently "confidential" to justify nondisclosure, the party resisting disclosure must prove that disclosure "is likely: (1) to impair the [State's] ability to obtain necessary information in the **[**735]** future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Ass'n v. Kleppe, 178 U.S. App. D.C. 376, 547 F.2d 673, 677-78, (D.C. Cir. 1976) (quotations omitted) (*National Parks II*).

HN22[↑] We do not, however, adopt this as the exclusive test for "confidential." *See 9 to 5 Organ.*, 721 F.2d at 9-10. In this context, the federal test is instructive simply because it illustrates that "the emphasis . . . should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information **[***24]** has customarily been regarded as confidential." Id. at 10.

B. Privacy Exemption

The intervenors argue on appeal that disclosure of many of the disputed exhibits would constitute an unwarranted intrusion into personal or private affairs. **HN23**[↑] When exemption is claimed on privacy grounds, "we examine the nature of the requested document or material and its relationship to the basic purpose of the Right-to-Know Law." Union Leader Corp.

v. City of Nashua, 141 N.H. at 476, 686 A.2d at 312. The party resisting disclosure "bears a heavy burden to shift the balance toward nondisclosure." Id. at 476, 686 A.2d at 313. Furthermore, "the motivations of . . . any member of the public . . . are irrelevant to the question of access." Petition of Keene Sentinel, 136 N.H. at 128, 612 A.2d at 915.

The obvious public purpose that may be served by disclosure of the disputed exhibits is to increase public knowledge about how the authority operates.

> HN24[] Official information that sheds light on an agency's performance of its statutory duties falls squarely within [the] statutory purpose [of the Right-to-Know Law]. That purpose, however, is not fostered by disclosure of information **[***25]** about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct.

Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989); *see* Union Leader Corp. v. City of Nashua, 141 N.H. at 477, 686 A.2d **[*555]** at 313. Thus, our review must necessarily focus on whether the intervenors have shown that the information sought would not inform the public about the authority's activities with respect to the Saco Woods and Woodland Green developments, or that a valid privacy interest, on balance, outweighs the public interest in disclosure. *See* Department of Defense v. F.L.R.A., 510 U.S. 487, 497, 127 L. Ed. 2d 325, 114 S. Ct. 1006 (1994); Brent, 132 N.H. at 427, 567 A.2d at 983-84 (balancing test used to determine whether public inspection would constitute an invasion of privacy).

C. Contested Rulings

We now determine whether the disputed exhibits were properly exempted or disclosed by the trial court. HN25[] When reviewing exemptions from the Right-to-Know Law, we balance the public's interest in disclosure against the intervenors' interest in nondisclosure. Union Leader Corp. v. City of Nashua, 141 N.H. at 475-76, **[***26]** 686 A.2d at 312. "In the absence of disputed facts, we review the trial court's balancing the public's interest in disclosure and the interests in nondisclosure *de novo*." Id. at 476, 686 A.2d at 312.

Exhibit 1

The Union Leader challenges the court's finding that this exhibit, consisting of a market analysis of potential condominium sales at Saco Woods, is exempt as commercial information. HN26[] While the information contained in this exhibit is of a commercial nature, it is not exempt unless the intervenor's competitive interest in protecting the information from disclosure outweighs the public's interest in disclosure. We find that disclosure is warranted. The negative competitive impact of disclosing market information regarding potential condominium sales that was gathered in 1987 is blunted by time, *see* Comstock Intern., 464 F. Supp. at 810, and does not, on balance, outweigh the public interest in understanding the market conditions that gave rise to the authority's role in the Saco Woods project. We accordingly reverse the ruling of the trial court and order disclosure of the documents contained in this exhibit (pages 1-45).

[736]** *Exhibit 10*

The Union Leader **[***27]** next challenges the finding that certain financial statements included in exhibit 10 are exempt as financial information. The documents in this exhibit are financial in that they contain balance sheets and income statements of the intervenors and related corporations for the years 1985 through 1989. On **[*556]** balance, we believe that the public's interest in disclosure outweighs the intervenor's interest in keeping the documents private. These documents were provided in conjunction with the loans advanced by the authority, and as such, shed additional light on two large transactions involving a public agency. The benefit, in terms of understanding the conduct of the authority, that the public would derive from review of these documents outweighs the intervenors' interest in keeping financial data, most of which was generated a decade ago, confidential. *Cf. id*. We reverse the trial court's ruling with respect to these documents and order them disclosed (pages 425-433, 1252-1271, 1272-1283, 1284-1293, 1294-1309, 1310-1321, 1322-1341, 1342-1350, 1351-1372, 1373-1393, 1394-1414, and 1760-1781).

The intervenors challenge the ruling that commercially generated credit reports are not exempt **[***28]** from disclosure. This information is commercial and financial because it includes credit history and financial statistics, and was generated for use by creditors and other parties in the course of conducting their business affairs. While HN27[] even commercially generated credit reports have been found to be exempt, *see* Benson v.

General Services Administration, 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969), in this case, the balance tips in favor of disclosure. The public interest in disclosure of this data is the same as set forth in the preceding paragraph. The intervenors' interest in keeping this information exempt is slight because, as the trial court correctly found, "the reports . . . are generally readily accessible to many entities which subscribe to various credit reporting agencies." Therefore, we affirm the trial court's ruling with respect to these documents (pages 434-456 and 1574-1584).

Exhibit 12

The intervenors challenge the court's finding that a letter of credit issued at the request of Northeast by another financial institution is not exempt. The intervenors assert that the public interest in reviewing documents pertaining **[***29]** to the Saco Woods and Woodland Green transactions does not apply to the letter of credit because it "contains information regarding the intervenors' financial relationships with third parties, not the housing authority . . . [and] reveals nothing about the terms of any transaction involving the housing finance authority." This is simply incorrect. The authority is the *named beneficiary* of this letter of credit, which was issued in conjunction with the Woodland Green project. Accordingly, the **[*557]** public interest in disclosure outweighs the intervenors' interest in nondisclosure, and we affirm the trial court's ruling with respect to the letter of credit (pages 651-652).

The Union Leader challenges the trial court's determination that a "construction finance activity sheet" and financial projections pertaining to the Saco Woods development were exempt as financial information. This information falls within the statutory exemption for financial information because it contains financial data concerning the Saco Woods development. We find, however, that on balance this information must be disclosed. The "construction finance activity sheet" details payments made on a two million dollar **[***30]** loan extended by the authority, while the financial projections discuss projected gains or losses on the Saco Woods loan under five different scenarios. We disagree with the trial court that the public interest in overseeing the financial activities of the authority does not prevail because disclosure "would subject the intervenors to unfair competition as the information would reveal the intervenors' financing strategy and thought process." This information pertains solely to the Saco Woods project and repayment sources for that loan based on *then existing* market conditions. Accordingly, we reverse the trial court's ruling and order disclosure of these documents (pages 4592-4593 and 4649-4650).

[737]** *Exhibit 13*

The Union Leader challenges the court's determination that information contained in columns entitled "rent/credit" and "fees" on a list of scheduled closings was exempt. The "rent/credit" column sets forth the amount of rent the developer could have collected on the unit, and the amount of the cash down payment each purchaser would bring to the closing. The "fees" column sets forth brokerage, referral, or "incentive" fees to be paid on the sale. We hold that this information **[***31]** is not exempt from disclosure. This is financial information within the meaning of the statute because it includes business sales statistics regarding the Saco Woods development. However, we believe the public interest in disclosure is greater than the intervenors' interest in keeping the information confidential because this information was provided to the authority and was used to monitor the progress of the loan. We reverse the determination of the trial court that the information listed under the "rent/credit" and "fees" columns be redacted before disclosure of page 4594 and order disclosure.

[*558] *Exhibit 14*

The intervenors challenge the court's finding that a development agreement and construction loan agreement between Northeast, the authority, and private lenders are not exempt. We find that even if the information contained in this exhibit qualifies as confidential, commercial, or financial information, the public interest in disclosure mandates a finding that the information is not exempt. The authority was a named party in both agreements, and the trial court correctly found that there is a "strong public policy interest in disclosing to the public the terms of such a large **[***32]** transaction to which a public entity is a party" that overrides the intervenors' interest in nondisclosure. The intervenors argue that because one of the exhibits to the development agreement involves an "attorney in fact agreement" between Northeast and a "third party," the entire exhibit is exempt. However, this attorney in fact agreement was an attachment to the development agreement between the authority, Northeast, and the so-called "third party," and as such is an integral part of

the challenged document. We affirm and order pages 461-494 and 622-650 disclosed.

Exhibit 15

The intervenors challenge the court's finding that this exhibit, containing a series of personal guarantees granted to the authority by partners of Northeast, is not exempt. The federal courts have recognized that ***HN28*** while

> personal financial information *may* implicate privacy concerns *insofar* as it contains embarrassing disclosures or involves sufficiently intimate details, . . . even those cases do not say that embarrassing personal financial information *is* exempt . . . only that such information is sufficiently private so that it must be balanced against disclosure interests to determine **[***33]** if the invasion of privacy is clearly unwarranted.

Washington Post, 690 F.2d at 262 (quotations and citations omitted). We affirm and order this entire exhibit disclosed (pages 388-395, 396-403, and 413-424) because the guarantees of the partners of Northeast were an integral part of the financing arrangements between Northeast and the authority. Given ***HN29*** the strong public interest in understanding the terms of a series of large transactions involving the authority, the balance tips in favor of disclosure.

[*559] *Exhibit 16*

The intervenors challenge the court's ruling that a letter from Northeast to the authority containing market and price information is not exempt. This letter discusses the details of negotiations between the authority and the intervenors with respect to a then pending "no points, no interest construction loan" to be extended by the authority to Northeast. ***HN30*** Because it sheds light on the activities of the authority, its disclosure would further the essential purpose of the Right-to-Know Law. *See Union Leader Corp. v. City of Nashua, 141 N.H. at 477, 686 A.2d at 313*. On balance, the public interest in obtaining information about favorably priced loans extended **[***34]** by the authority outweighs the intervenors' interest in keeping **[**738]** private pricing and marketing information developed in 1986. We are not persuaded by the intervenors' argument that we should recognize a "decreased public benefit in learning decade old marketing and pricing information" (quotations omitted). The public benefit from disclosure does not depend solely on the marketing information itself, but rather in the *process* used and considerations made by the authority in negotiating the terms of a loan. Accordingly, we agree with the trial court and order disclosure of the letter (pages 611-613).

In sum, we affirm all of the rulings of the trial court in this case with the exception of four of the exhibits reviewed *in camera*, exhibit 1 (pages 1-45), exhibit 10 (pages 425-433, 1252-1271, 1272-1283, 1284-1293, 1294-1309, 1310-1321, 1322-1341, 1342-1350, 1351-1372, 1373-1393, 1394-1414, and 1760-1781), exhibit 12 (pages 4592-4593 and 4649-4650), and exhibit 13 (the columns entitled "rent/credit" and "fees" on page 4594), which we order disclosed. Accordingly, we remand for further proceedings consistent with this opinion.

Affirmed in part; reversed in part; remanded.

[*35]** BRODERICK, J., did not sit; the others concurred.

End of Document

THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough-southern judicial district
No. 2019-0279

NEW HAMPSHIRE CENTER FOR PUBLIC INTEREST JOURNALISM & a.

v.

NEW HAMPSHIRE DEPARTMENT OF JUSTICE

Argued: September 16, 2020
Opinion Issued: October 30, 2020

American Civil Liberties Union of New Hampshire, of Concord (Gilles R. Bissonnette and Henry R. Klementowicz on the brief, and Mr. Bissonnette orally), and Moir & Rabinowitz, PLLC, of Concord (James H. Moir on the brief), for plaintiffs New Hampshire Center for Public Interest Journalism, The Telegraph of Nashua, Newspapers of New England, Inc., Seacoast Newspapers, Inc., Keene Publishing Corporation, and American Civil Liberties Union of New Hampshire.

Malloy & Sullivan, Lawyers Professional Corporation, of Hingham, Massachusetts (Gregory V. Sullivan on the brief and orally), and Douglas, Leonard & Garvey, P.C., of Concord (Charles G. Douglas, III on the brief), for plaintiff Union Leader Corporation.

Gordon J. MacDonald, attorney general (Daniel E. Will, solicitor general, on the brief and orally), for the New Hampshire Department of Justice.

Milner & Krupski, PLLC, of Concord (John S. Krupski on the memorandum of law), for the New Hampshire Police Association and Matthew Jajuga, as amici curiae.

Daniel M. Conley, of Goffstown, on the brief for the New Hampshire Association of Chiefs of Police, as amicus curiae.

Brennan, Lenehan, Iacopino & Hickey, of Manchester (Jaye L. Rancourt on the memorandum of law) for the New Hampshire Association of Criminal Defense Lawyers, as amicus curiae.

HICKS, J. The New Hampshire Department of Justice (DOJ) appeals an order of the Superior Court (Temple, J.) denying its motion to dismiss the petition of the plaintiffs, New Hampshire Center for Public Interest Journalism, The Telegraph of Nashua, Union Leader Corporation, Newspapers of New England, Inc., Seacoast Newspapers, Inc., Keene Publishing Corporation, and American Civil Liberties Union of New Hampshire, seeking a declaration that the "Exculpatory Evidence Schedule" (EES), excluding the names of police officers with pending requests to be removed from the list, must be made public pursuant to the Right-to-Know Law, RSA chapter 91-A, and Part I, Article 8 of the New Hampshire Constitution. In denying the motion to dismiss, the trial court rejected the DOJ's arguments that the EES is "confidential" under RSA 105:13-b (2013) and that it is exempt from disclosure under the Right-to-Know Law either because it is an "internal personnel practice" or a "personnel file" under RSA 91-A:5, IV (2013). We uphold the trial court's determinations that the EES is neither "confidential" under RSA 105:13-b nor exempt from disclosure under the Right-to-Know Law as an "internal personnel practice" or a "personnel file." Nonetheless, we vacate the trial court's decision and remand for it to determine, in the first instance, whether as the DOJ contends, the EES constitutes an "other file[] whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV.

I. Facts

The trial court recited the following facts. The DOJ currently maintains a list of police officers who have engaged in misconduct reflecting negatively on

their credibility or trustworthiness. The list, formerly known as the "Laurie List," is now called the EES. See State v. Laurie, 139 N.H. 325, 327, 330, 333 (1995) (overturning a defendant's murder conviction because the State failed to disclose certain employment records of a testifying detective that "reflect[ed] negatively on the detective's character and credibility"). The EES is a spreadsheet containing five columns of information: (1) officer's name; (2) department employing the officer; (3) date of incident; (4) date of notification; and (5) category or type of behavior that resulted in the officer being placed on the list. The DOJ asserts that the EES "offers no precise information as to the specific conduct of any officer," but rather "contains a succinct, often one-word label capturing at a categorical level the behavior that placed the officer on the EES."

The EES does not physically reside in any specific police officer's personnel file. Rather, according to the DOJ, the EES "functions solely as a reference point, to alert a prosecutor to the need to initiate an inquiry into whether an officer's actual personnel file might contain exculpatory evidence."

The plaintiffs filed requests under the Right-to-Know Law for the most recent version of the EES. The DOJ responded by providing a version of the EES that redacted any personal identifying information of the officers on the list. Some of the plaintiffs then requested an unredacted version of the EES that would exclude information concerning officers with pending requests to be removed from the EES. The DOJ denied those requests, and the plaintiffs brought the instant petition seeking, among other things, a declaration that "the unredacted EES list," excluding officers who have "challenged their placement on the EES list" or for whom there has not "been a sustained finding of misconduct affecting the officer's credibility or truthfulness," is "a public record that must be made public under RSA Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution."

The DOJ subsequently moved to dismiss the plaintiffs' action on the ground that they failed to state a legal basis for the relief sought. The DOJ argued that disclosure of the EES is barred by RSA 105:13-b. Alternatively, the DOJ maintained that the EES is exempt from disclosure under the Right-to-Know Law, either because it relates to "internal personnel practices," or because it constitutes a "personnel" or "other file[] whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. The trial court denied the motion. The parties subsequently stipulated that the trial court's order constituted a final decision on the merits in favor of the plaintiffs, and the trial court so ordered. This appeal followed.

II. Analysis

A. Standards of Review

In reviewing a trial court's ruling on a motion to dismiss, we consider whether the allegations in the pleadings are reasonably susceptible of a construction that would permit recovery. Weare Bible Baptist Church v. Fuller, 172 N.H. 721, 725 (2019). We assume the pleadings to be true and construe all reasonable inferences in the light most favorable to the plaintiffs. Id. We then engage in a threshold inquiry that tests the facts in the complaint against the applicable law. Id. When the facts alleged by the plaintiffs are reasonably susceptible of a construction that would permit recovery, we will uphold the denial of a motion to dismiss. Id. at 725-26.

Resolving the issues in this appeal requires that we engage in statutory interpretation. We review the trial court's statutory interpretation de novo. Darbouze v. Champney, 160 N.H. 695, 697 (2010). We are the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. Id. We first examine the language of the statute, and, where possible, we ascribe the plain and ordinary meanings to the words used. Id. When the language of the statute is clear on its face, its meaning is not subject to modification. Id. We will neither consider what the legislature might have said nor add words that it did not see fit to include. Id.

We resolve questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate the law's statutory and constitutional objectives. N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 103 (2016). The purpose of the Right-to-Know Law "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." RSA 91-A:1 (2013). "Thus, the Right-to-Know Law furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Right to Life, 169 N.H. at 103 (quotation omitted); see also N.H. CONST. pt. I, art. 8. Accordingly, when interpreting the Right-to-Know Law, we broadly construe provisions favoring disclosure and interpret exemptions restrictively. N.H. Right to Life, 169 N.H. at 103. We also look to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA). Id. "Such similar laws, because they are in pari materia, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved." Id. (quotation omitted).

B. The Background of the EES

Before addressing the specific issues on appeal, we briefly discuss the background and operation of the EES. See Duchesne v. Hillsborough County

Attorney, 167 N.H. 774, 777-80 (2015); Gantert v. City of Rochester, 168 N.H. 640, 645-47 (2016). As relevant here, prosecutors have a duty to disclose exculpatory information and information that may be used to impeach the State's witnesses. Duchesne, 167 N.H. at 777; see Brady v. Maryland, 373 U.S. 83, 87 (1963); see also United States v. Bagley, 473 U.S. 667, 675 (1985). The duty to disclose such information applies regardless of whether the defendant requests it. Duchesne, 167 N.H. at 777. Moreover, the duty is not satisfied merely because an individual prosecutor is unaware that exculpatory information exists; rather, we impute knowledge among prosecutors in the same office. Id. at 778. Accordingly, individual prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995); see Duchesne, 167 N.H. at 778.

After we granted the criminal defendant in Laurie a new trial due to the prosecution's failure to disclose information found in a police detective's employment files and records, see Laurie, 139 N.H. at 327, 330, 333, New Hampshire law enforcement authorities began developing "Laurie Lists" to share information about officer conduct with prosecutors. Gantert, 168 N.H. at 645. In 2004, the attorney general placed responsibility on county attorneys to compile a confidential, comprehensive list of officers in each county who are subject to possible Laurie disclosure. Id. at 645-46. In a 2004 memo to all county attorneys and law enforcement agencies, the attorney general identified categories of conduct that generally should be considered potential Laurie material, and the memo required that such material be retained in an officer's personnel file, "so that it is available for in camera review by a court and possible disclosure to a defendant in a criminal case." Id. at 646 (quotation omitted). The memo included a sample policy and procedure for police departments to identify and retain Laurie material in their files. Id. Under that procedure:

> First, the deputy chief reviews all internal investigation files, including investigations conducted by other police personnel, and determines whether the incident involves any of the categories of conduct identified as potential Laurie material. If so, the deputy chief sends a memorandum to the chief, who reviews it and determines whether the incident constitutes a Laurie issue. If it does, the chief notifies the officer involved, who may request a meeting with the chief to present facts or evidence. After the chief makes a final decision, the chief notifies the county attorney if the incident is ultimately determined to constitute a Laurie issue.

Id.

According to the DOJ, in early 2017, the attorney general updated the "Laurie List" procedure and, for the first time, created the state-wide EES

maintained by the DOJ. The DOJ asserts that the process for putting a police officer's name on the list is "similar to the county Laurie lists, except that names to be added to the EES come to the DOJ from police chiefs after review of their officers' personnel files." The DOJ contends that only "sustained" findings against an officer warrant placement on the EES, meaning that "the evidence obtained during an investigation was sufficient to prove that the act occurred." (Quotations omitted). According to the DOJ, an officer may obtain relief from a sustained finding through union grievance procedures, arbitrations, or other appeals provided to police officers in collective bargaining agreements. The DOJ maintains that it "has not publicly disclosed identifying information on the EES, such as a name or information that might inadvertently reveal an identity," and that it has never deemed the former county-level Laurie lists to be public documents.

C. RSA 105:13-b

The DOJ first argues that RSA 105:13-b precludes the disclosure of the EES. RSA 105:13-b provides:

> I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.
>
> II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.
>
> III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

RSA 105:13-b.

The DOJ reasons that the Right-to-Know Law grants every citizen "the right to inspect all government records in the possession, custody, or control of such public bodies . . . except as otherwise prohibited by statute," RSA 91-A:4, I (2013), and avers that RSA 105:13-b is "just such a statute." According to the DOJ, "RSA 105:13-b makes police personnel files strictly confidential with two narrow exceptions," the first requiring that exculpatory evidence in a testifying officer's personnel file be disclosed to a criminal defendant and the second allowing non-exculpatory evidence in a testifying officer's personnel file to be disclosed to a criminal defendant under certain circumstances. Otherwise, the DOJ maintains, police personnel files are "cloak[ed] . . . with the maximum confidentiality that the United States and New Hampshire Constitutions allow." Although the DOJ concedes that "the EES itself does not reside in any one police officer's personnel file," the DOJ maintains that the "physical location of the EES in no way alters the fact that it contains personnel information from the officer's personnel file."

For the purposes of this appeal, we assume without deciding that RSA 105:13-b constitutes an exception to the Right-to-Know Law and that it applies outside of the context of a specific criminal case in which a police officer is testifying. Nonetheless, we reject the DOJ's overly broad interpretation of the statute.

By its express terms, RSA 105:13-b pertains only to information maintained in a police officer's personnel file. RSA 105:13-b addresses three situations involving the personnel files of police officers who appear as witnesses in criminal cases. See Duchesne, 167 N.H. at 781. "First, insofar as the personnel files of such officers contain exculpatory evidence, paragraph I requires that such information be disclosed to the defendant." Id. "Next, paragraph II covers situations in which there is uncertainty as to whether evidence contained within police personnel files is, in fact, exculpatory." Id. Paragraph II "directs that, where such uncertainty exists, the evidence at issue is to be submitted to the court for in camera review." Id. "Finally, paragraph III covers evidence that is non-exculpatory but may nonetheless be relevant to a case in which an officer is a witness." Id. at 782. "Consistent with our case law, this paragraph prohibits the opening of a police personnel file to examine the same for non-exculpatory evidence unless the trial judge makes a specific finding that probable cause exists to believe that the file contains evidence relevant to the particular criminal case." Id.

The express focus of RSA 105:13-b is on information maintained in the personnel file of a specific police officer. Had the legislature intended RSA 105:13-b to apply more broadly to personnel information, regardless of where it is maintained, it would have so stated. Darbouze, 160 N.H. at 697 ("We will neither consider what the legislature might have said nor add words that it did

not see fit to include." (quotation omitted)). As the DOJ concedes, "the EES itself does not reside in any one police officer's personnel file." Therefore, disclosure of the EES is not governed by RSA 105:13-b.

In arguing for a contrary result, the DOJ relies upon Worcester Telegram & Gazette v. Chief of Police, 787 N.E.2d 602, 606 (Mass. App. Ct. 2003). Its reliance is misplaced. In that case, a newspaper sought access to the contents of a police department internal affairs file under the Massachusetts public records law. Worcester Tel. & Gazette, 787 N.E.2d at 603-04. The issue was whether the documents were exempt under a statutory exemption for "personnel file or information." Id. at 604 (quotation and brackets omitted). To determine whether the documents were exempt, the court examined "the nature or character of the documents," rather than "their label." Id. at 606 (quotations omitted).

The DOJ invites us to do the same, asserting that because the EES "concerns officer misconduct" and "derives from disciplinary records within police officer personnel files," RSA 105:13-b governs. Given the plain meaning of the language used in RSA 105:13-b, we cannot accept the DOJ's invitation. The court in Worcester Telegraph & Gazette was interpreting a statute with broader language than RSA 105:13-b. There, the statute referred to "personnel file or information." Id. at 605 (quotation and brackets omitted; emphasis added). By contrast, RSA 105:13-b refers only to a police officer's "personnel file" and the exculpatory or non-exculpatory evidence contained therein. RSA 105:13-b, I (concerning "[e]xculpatory evidence in a police personnel file"), III (providing that the "personnel file of a police officer" shall not be opened "for the purposes of obtaining or reviewing non-exculpatory evidence" except under certain circumstances). RSA 105:13-b does not refer to personnel "information" or "practices."

We also decline the DOJ's invitation to defer to its longstanding statutory interpretation under the administrative gloss doctrine. The DOJ contends its longstanding practice of keeping the EES confidential coupled with the legislature's "lack of . . . interference" with that practice "comprises 'administrative gloss' on the statute." See New Hampshire Retail Grocers Ass'n v. State Tax Comm'n, 113 N.H. 511, 514 (1973) ("It is a well-established principle of statutory construction that a longstanding practical and plausible interpretation given a statute of doubtful meaning by those responsible for its implementation without any interference by the legislature is evidence that such a construction conforms to the legislative intent."). However, the administrative gloss doctrine applies only when a statute is ambiguous. State v. Priceline.com, Inc., 172 N.H. 28, 38 (2019). The reference to a police officer's "personnel file" is not ambiguous.

Nor is it doubtful whether the term "personnel file" applies to the EES. An employee's "personnel file" is a file that is "typically maintained in the human resources office" of an employer, "otherwise known . . . as the 'personnel department.'" Milner v. Department of Navy, 562 U.S. 562, 570 (2011). The EES is maintained by the DOJ, not by a police department's personnel office, and, as the DOJ concedes, the DOJ does not employ officers on the EES. Accordingly, the EES is not a "personnel file" within the meaning of RSA 105:13-b. See Reid v. N.H. Attorney Gen., 169 N.H. 509, 528 (2016) (discussing the exemption under the Right-to-Know Law for "personnel . . . files" (quotation omitted)); cf. Abbott v. Dallas Area Rapid Transit, 410 S.W.3d 876, 883-84 (Tex. App. 2013) (concluding that the exemption under the Texas Public Information Act for "'information in a personnel file'" did not apply when there was no evidence that the investigation report of an employee's racial discrimination complaint was in the interviewees' personnel files).

D. RSA 91-A:5, IV

The DOJ next argues that RSA 91-A:5, IV exempts the EES from disclosure under the Right-to-Know Law. RSA 91-A:5, IV exempts from disclosure

> [r]ecords 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, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.

RSA 91-A:5, IV. The DOJ asserts that the EES is exempt either because it is a record pertaining to "internal personnel practices" or because it is a "personnel" or "other file[] whose disclosure would constitute invasion of privacy." Id. We address each exemption in turn.

1. Internal Personnel Practices

Until recently, Fenniman had been our seminal case interpreting the "internal personnel practices" exemption. Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), overruled by Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. ___, ___ (decided May 29, 2020) (slip op. at 9) and Union Leader Corp. v. Town of Salem, 173 N.H. ___, ___ (decided May 29, 2020) (slip op. at 2). In that case, the plaintiff sought "memoranda and other records compiled" during a police department's internal investigation of a department lieutenant who had been accused of making harassing phone calls. Fenniman, 136 N.H. at 625, 626. We broadly construed the "internal personnel practices" exemption to apply to those records because "they document[ed] procedures

leading up to internal personnel discipline, a quintessential example of an internal personnel practice." Id. at 626 (quotation omitted). In addition, we adopted a per se rule exempting such materials from disclosure. Id. at 627.

We recently overruled both aspects of Fenniman. See Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 9); Union Leader Corp., 173 N.H. at ___ (slip op. at 2). In Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 9), we overruled Fenniman to the extent that it broadly interpreted the "internal personnel practices" exemption. We concluded that the "internal personnel practices" exemption applies narrowly to records relating to the "internal rules and practices governing an agency's operations and employee relations," and does not apply to "information concerning the history or performance of a particular employee." Seacoast Newspapers, Inc., 173 N.H. at ____ (slip op. at 11). In Union Leader Corp., 173 N.H. at ___ (slip op. at 2, 11), we overruled Fenniman to the extent that it decided that records related to that exemption are categorically exempt from disclosure and are not subject to the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV. See Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 707 (2010) (setting forth a three-step analysis to determine whether disclosure will result in an invasion of privacy).[1]

The DOJ argues that the EES pertains to an "internal personnel practice" under Fenniman. The DOJ's argument is unavailing given that we overruled Fenniman. See Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 9). Because the DOJ does not argue that the EES meets the narrow definition we adopted in Seacoast Newspapers, Inc., we need go no further to reject the DOJ's "internal personnel practice" argument.

2. Personnel and Other Files

The trial court found that the EES is not a "personnel file" within the meaning of RSA 91-A:5, IV. Having so found, the trial court concluded that it "need not conduct a . . . balancing test to determine whether an invasion of privacy would result from disclosure of the EES." See Prof'l Firefighters of N.H., 159 N.H. at 707. On appeal, the DOJ does not directly challenge the trial court's finding that the EES is not a "personnel file" under RSA 91-A:5, IV. Instead, the DOJ presses its alternative argument that the EES constitutes an

[1] Our well-established three-step analysis is as follows. First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Lambert v. Belknap County Convention, 157 N.H. 375, 382 (2008). If no privacy interest is at stake, the Right-to-Know Law mandates disclosure. Id. at 383. Second, we assess the public's interest in disclosure. Id. Disclosure of the requested information should inform the public about the conduct and activities of their government. Id. If disclosing the information would not serve this purpose, disclosure is not warranted. Id. Finally, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. Id.

"other file[] whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. The DOJ then asserts that, under our customary balancing test, disclosure of the EES would constitute an invasion of privacy. See Prof'l Firefighters of N.H., 159 N.H. at 707. The trial court, however, did not rule upon the DOJ's alternative argument, and we decline to do so in the first instance. See Union Leader Corp., 173 N.H. at ___ (slip op. at 11). The parties may litigate this issue on remand.[2]

Affirmed in part; vacated and remanded.

HANTZ MARCONI and DONOVAN, JJ., concurred; ABRAMSON and BROWN, JJ., retired superior court justices, specially assigned under RSA 490:3, concurred.

[2] We observe that RSA 105:13-b was first enacted in 1992, before we decided Laurie, and, therefore, before the "Laurie List" existed. See Laws 1992, 45:1. We further observe that were Fenniman still in effect, the EES might be per se exempt from disclosure under the Right-to-Know Law, see Fenniman, 136 N.H. at 625-26, and that Fenniman was overruled only months ago, see Seacoast Newspapers, Inc., 173 N.H. at ___ (slip op. at 9); Union Leader Corp., 173 N.H. at ___ (slip op. at 2).

Union Leader Corp. v. Town of Salem

Supreme Court of New Hampshire

November 20, 2019, Argued; May 29, 2020, Opinion Issued

No. 2019-0206

Reporter
2020 N.H. LEXIS 102 *

UNION LEADER CORPORATION *& a.* v. TOWN OF SALEM

Notice: THIS OPINION IS SUBJECT TO MOTIONS FOR REHEARING UNDER NEW HAMPSHIRE PROCEDURAL RULES AS WELL AS FORMAL REVISION BEFORE PUBLICATION IN THE NEW HAMPSHIRE REPORTS.

Prior History: Rockingham.

Disposition: Vacated and remanded.

Core Terms

exemption, personnel, disclosure, quotation, confidential, privacy, decisis, Right-to-Know, redactions, invasion, Audit, pertaining, nondisclosure, categorically, colleagues, modifies, scoring

Case Summary

Overview

HOLDINGS: [1]-The court, having overruled its prior decision in Fenniman to the extent that it adopted a per se rule of exemption from disclosure under the Right-to-Know Law for records relating to "internal personnel practices," held that the balancing test used for the other categories of records listed in RSA 91-A:5, IV, would apply to such records; accordingly, remand was required for the trial court to apply the balancing test to the police audit report in question and to decide whether information in the redactions the trial court had upheld satisfied the definition of "internal personnel practices."

Outcome
Vacated and remanded.

LexisNexis® Headnotes

Constitutional Law > ... > Case or Controversy > Constitutional Questions > Necessity of Determination

HN1 **Constitutional Questions, Necessity of Determination**

The appellate court decides cases on constitutional grounds only when necessary.

Administrative Law > Governmental

Geoffrey Gallagher

Information > Freedom of Information > Compliance With Disclosure Requests

Governments > Legislation > Interpretation

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN2 **Freedom of Information, Compliance With Disclosure Requests**

When interpreting the Right-to-Know Law, the court applies its ordinary rules of statutory interpretation. Accordingly, the court looks to the plain meaning of the words used. To advance the purposes of the Right-to-Know Law, the court construes provisions favoring disclosure broadly and exemptions narrowly.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN3 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

RSA 91-A:5, IV, exempts from disclosure under the Right-to-Know Law 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, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. RSA 91-A:5, IV.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN4 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

The internal personnel practices exemption to the Right-to-Know Law applies narrowly to records relating to the internal rules and practices governing an agency's operations and employee relations, and does not apply to information concerning the history or performance of a particular employee.

Governments > Courts > Judicial Precedent

HN5 **Courts, Judicial Precedent**

The court does not lightly overrule a case that has been precedent for over twenty-five years. The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results. When asked to overrule a prior holding, the court does not look at the issues de novo; rather, it reviews whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed.

Governments > Courts > Judicial Precedent

HN6 **Courts, Judicial Precedent**

Several factors inform the court's judgment in determining whether to overrule a prior holding, including: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. No single factor is dispositive because the doctrine of stare decisis is not one to be either rigidly applied or blindly followed.

Governments > Courts > Judicial Precedent

HN7 **Courts, Judicial Precedent**

The first stare decisis factor examines whether a rule has become difficult or impractical for trial courts to apply. The first factor weighs against overruling when a rule is easy to apply and understand. A rule that is a simple rule to apply and understand has retained its practicality and simplicity.

Governments > Courts > Judicial Precedent

HN8 **Courts, Judicial Precedent**

For the second stare decisis factor, the court inquires into the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Reliance interests are most often implicated when a rule operates within the commercial law context, where advance planning of great precision is most obviously a necessity.

Governments > Courts > Judicial Precedent

HN9 **Courts, Judicial Precedent**

The third stare decisis factor concerns whether the law has developed in such a manner as to undercut the prior rule. The fourth factor concerns whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. The court is sometimes able to perceive significant facts or understand principles of law that eluded its predecessor and justify departures from existing decisions.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Governments > Courts > Judicial Precedent

HN10 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The court owes somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN11 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

For purposes of RSA 91-A:5, IV, the New Hampshire case law has consistently applied the balancing test to the disclosure of confidential, commercial, or financial information, even after semicolons were added in 1986. Indeed, the court has construed the fact that confidential, commercial, or financial information is separate from the other categories of information enumerated in RSA 91-A:5, IV as meaning not that the information is per se exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN12 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The New Hampshire Supreme Court does not have a single test to determine whether material is confidential under the Right-to-Know Law, although it has found instructive the standard test employed by the federal courts. To establish that information is sufficiently confidential to justify nondisclosure, the party resisting disclosure must prove that disclosure is likely: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

HN13 **Freedom of Information, Defenses & Exemptions From Public Disclosure**

Determination of whether the disclosure of confidential, commercial, or financial information under the Right-to-Know Law results in an invasion of privacy involves a three-step analysis. First, the court evaluates whether there is a privacy interest at stake that would be invaded by the disclosure. Second, the court assesses the public's interest in disclosure. Third, the court balances the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. Further, whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations. Thus, determining whether the exemption for confidential, commercial, or financial information applies requires analysis of both whether the

information sought is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN14 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

Because the per se rule in *Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993)*, is inconsistent with the historical and current interpretation of the exemption under *RSA 91-A:5, IV*, for confidential, commercial, or financial information, it has become no more than a remnant of abandoned doctrine. The New Hampshire Supreme Court, therefore, overrules Fenniman to the extent that it adopted a per se rule of exemption for records relating to internal personnel practices.

Governments > Legislation > Interpretation

HN15 **Legislation, Interpretation**

Legislative intent, rather than any arbitrary canons of statutory construction, is controlling.

Governments > Courts > Judicial Precedent

HN16 **Courts, Judicial Precedent**

The court is 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.

Governments > Courts > Judicial Precedent

HN17 **Courts, Judicial Precedent**

The court will not be deterred from correcting a wrong of its own creation because the legislature considered, but did not enact, a bill relating to the same subject matter in a previous legislative session.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Internal Personnel Rules

HN18 **Defenses & Exemptions From Public Disclosure, Internal Personnel Rules**

The New Hampshire Supreme Court overrules *Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993)*, to the extent that it adopted a per se rule of exemption for records relating to internal personnel practices and overrules its progeny to the extent that they applied that per se rule of exemption. In the future, the balancing test the court has used for the other categories of records listed in *RSA 91-A:5, IV*, shall apply to records relating to internal personnel practices. Determining whether the exemption for records relating to internal personnel practices applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy.

Headnotes/Summary

Headnotes

NEW HAMPSHIRE OFFICIAL REPORTS HEADNOTES

NH1. 1.

Constitutional Law > Judicial Powers and Duties > Disposition on Other Grounds

The court decides cases on constitutional grounds only when necessary.

NH2. 2.

Records > Right to Inspect > Generally

When interpreting the Right-to-Know Law, the court applies its ordinary rules of statutory interpretation. Accordingly, the court looks to the plain meaning of the words used. To advance the purposes of the Right-to-Know Law, the court construes provisions favoring disclosure broadly and exemptions narrowly.

NH3.[] 3.

Records > Right to Inspect > Exceptions

The internal personnel practices exemption to the Right-to-Know Law applies narrowly to records relating to the internal rules and practices governing an agency's operations and employee relations, and does not apply to information concerning the history or performance of a particular employee.

NH4.[] 4.

Common Law > Application of Stare Decisis > Generally

The court does not lightly overrule a case that has been precedent for over twenty-five years. The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results. When asked to overrule a prior holding, the court does not look at the issues *de novo*; rather, it reviews whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed.

NH5.[] 5.

Common Law > Application of Stare Decisis > Generally

Several factors inform the court's judgment in determining whether to overrule a prior holding, including: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. No single factor is dispositive because the doctrine of stare decisis is not one to be either rigidly applied or blindly followed.

NH6.[] 6.

Common Law > Application of Stare Decisis > Generally

The first stare decisis factor examines whether a rule has become difficult or impractical for trial courts to apply. The first factor weighs against overruling when a rule is easy to apply and understand. A rule that is a simple rule to apply and understand has retained its practicality and simplicity.

NH7.[] 7.

Common Law > Application of Stare Decisis > Generally

For the second stare decisis factor, the court inquires into the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Reliance interests are most often implicated when a rule operates within the commercial law context, where advance planning of great precision is most obviously a necessity.

NH8.[] 8.

Common Law > Application of Stare Decisis > Generally

The third stare decisis factor concerns whether the law has developed in such a manner as to undercut the prior rule. The fourth factor concerns whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. The court is sometimes able to perceive significant facts or understand principles of law that eluded its predecessor and justify departures from existing decisions.

NH9.[] 9.

Common Law > Application of Stare Decisis > Generally

The court owes somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations.

NH10.[] 10.

Records > Right to Inspect > Exceptions

For purposes of the exemptions to the Right-to-Know Law, the New Hampshire case law has consistently applied the balancing test to the disclosure of confidential, commercial, or financial information, even after semicolons were added in 1986. Indeed, the court has construed the fact that confidential, commercial, or

financial information is separate from the other categories of information enumerated in the statute as meaning not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure. RSA 91-A:5, IV.

NH11.[] 11.

Records > Right to Inspect > Exceptions

The court does not have a single test to determine whether material is confidential under the Right-to-Know Law, although it has found instructive the standard test employed by the federal courts. To establish that information is sufficiently confidential to justify nondisclosure, the party resisting disclosure must prove that disclosure is likely: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

NH12.[] 12.

Records > Right to Inspect > Exceptions

Determination of whether the disclosure of confidential, commercial, or financial information under the Right-to-Know Law results in an invasion of privacy involves a three-step analysis. First, the court evaluates whether there is a privacy interest at stake that would be invaded by the disclosure. Second, the court assesses the public's interest in disclosure. Third, the court balances the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. Further, whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations. Thus, determining whether the exemption for confidential, commercial, or financial information applies requires analysis of both whether the information sought is confidential, commercial, or financial information, and whether disclosure would constitute an invasion of privacy.

NH13.[] 13.

Records > Right to Inspect > Exceptions

Because the *per se* rule in Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), is inconsistent with the historical and current interpretation of the exemption for confidential, commercial, or financial information, it has become no more than a remnant of abandoned doctrine. The court, therefore, overrules *Fenniman* to the extent that it adopted a *per se* rule of exemption for records relating to internal personnel practices. RSA 91-A:5, IV.

NH14.[] 14.

Statutes > Generally > Legislative History or Intent

Legislative intent, rather than any arbitrary canons of statutory construction, is controlling.

NH15.[] 15.

Common Law > Application of Stare Decisis > Generally

The court is 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.

NH16.[] 16.

Common Law > Application of Stare Decisis > Generally

The court will not be deterred from correcting a wrong of its own creation because the legislature considered, but did not enact, a bill relating to the same subject matter in a previous legislative session.

NH17.[] 17.

Records > Right to Inspect > Exceptions

The court overrules Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993), to the extent that it adopted a *per se* rule of exemption for records relating to internal personnel practices and overrules its progeny to the extent that they applied that *per se* rule of exemption. In the future, the balancing test the court has used for the other categories of records listed in paragraph IV of the exemptions statute shall apply to records relating to internal personnel practices. Determining whether the exemption for records relating to internal personnel practices applies will require analyzing both whether the

records relate to such practices and whether their disclosure would constitute an invasion of privacy. RSA 91-A:5, IV.

NH18. 18.

Records > Right to Inspect > Exceptions

Instead of a *per se* rule of exemption from disclosure under the Right-to-Know Law for records relating to "internal personnel practices," the balancing test used for the other categories of records listed in paragraph IV of the exemptions statute would apply to such records; thus, remand was required for the trial court to apply the balancing test to the police audit report in question and to decide whether information in the redactions the trial court had upheld satisfied the definition of "internal personnel practices." RSA 91-A:5, IV.

Counsel: **[*1]** *Malloy & Sullivan, Lawyers Professional Corporation*, of Hingham, Massachusetts (*Gregory V. Sullivan* on the brief and orally), and *Douglas, Leonard & Garvey, P.C.*, of Concord (*Charles G. Douglas, III* on the brief), for plaintiff Union Leader Corporation.

American Civil Liberties Union of New Hampshire, of Concord (*Gilles R. Bissonnette* and *Henry R. Klementowicz* on the brief, and *Mr. Bissonnette* orally), and *Richard J. Lehmann*, of Manchester, on the brief, for plaintiff American Civil Liberties Union of New Hampshire.

Upton & Hatfield, LLP, of Concord (*Barton L. Mayer* and *Nathan C. Midolo* on the brief, and *Mr. Mayer* orally), for the defendant.

Nolan Perroni, PC, of North Chelmsford, Massachusetts (*Peter J. Perroni* on the brief and orally), for the intervenor, New England Police Benevolent Association, Local 220.

New Hampshire Municipal Association, of Concord (*Cordell A. Johnston*, *Stephen C. Buckley*, and *Natch Greyes* on the brief), as *amicus curiae*.

Judges: HICKS, J. BASSETT and DONOVAN, JJ., concurred; HANTZ MARCONI, J., dissented.

Opinion by: HICKS

Opinion

HICKS, J. The plaintiffs, Union Leader Corporation and American Civil Liberties Union of New Hampshire (ACLU-NH), appeal an order of the Superior Court (*Schulman*, **[*2]** J.) denying their petition for the release of "complete, unredacted copies" of: (1) "the 120-page audit report of the Salem Police Department … dated October 12, 2018 focusing on internal affairs complaint investigations"; (2) "the 15-page addendum focused on the [Salem Police] Department's culture"; and (3) "the 42-page audit report of the [Salem Police] Department dated September 19, 2018 focusing on time and attendance practices." Collectively, we refer to these documents as the "Audit Report." The trial court upheld many of the redactions made to the Audit Report by the defendant, the Town of Salem (Town), concluding that they were required by the "internal personnel practices" exemption to the Right-to-Know Law, RSA chapter 91-A, as interpreted in Union Leader Corp. v. Fenniman, 136 N.H. 624, 620 A.2d 1039 (1993), and its progeny. *See* RSA 91-A:5, IV (2013).

In a separate opinion issued today, we overruled *FENNIMAN* to the extent that it broadly interpreted the "internal personnel practices" exemption and overruled our prior decisions to the extent that they relied on that broad interpretation. *See Seacoast Newspapers v. City of Portsmouth*, 173 N.H. ___, ___, ___ A.3d ___ (2020). We now overrule Fenniman to the extent that it decided that records related to "internal personnel practices" are categorically exempt from disclosure **[*3]** under the Right-to-Know Law instead of being subject to a balancing test to determine whether such materials are exempt from disclosure. We overrule our prior decisions to the extent that they applied the *per se* rule

established in *Fenniman*. We vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. Facts

The trial court recited the following relevant facts. The Audit Report was prepared by a nationally-recognized consulting firm, which had been retained by the Town's outside counsel at the Town's request. The Audit Report is highly critical of the Town's police department.

The Town publicly released a copy of the Audit Report, but redacted certain information pursuant to two exemptions to the New Hampshire Right-to-Know Law: (1) the "internal personnel practices" exemption; and (2) the exemption for "personnel … and other files." RSA 91-A:5, IV. The plaintiffs brought the instant action to obtain an unredacted copy of the Audit Report. On appeal, they challenge the trial court's decision only to the extent that it sustained the redactions made under the "internal personnel practices" exemption. They do not challenge the trial court's decision to sustain **[*4]** redactions under the "personnel … and other files" exemption.

The trial court reviewed the unredacted Audit Report *in camera* and compared it, line by line, to the redacted version released to the public. Although critical of our decision in *Fenniman*, the trial court properly considered itself bound by it. Applying *Fenniman*, the trial court upheld the following redactions pursuant to the "internal personnel practices" exemption: (1) information to protect the identity of participants in particular internal affairs investigations (names of the accused officer(s) and/or the investigator(s), dates of investigations, specific locations, other facts that could be used to identify a participant officer, investigator, or witness, and dates of alleged misconduct); (2) information relating to a particular employee's scheduling of outside details and time off; (3) the manner by which an employee arranged for vacation leave and other time off from work; and (4) the names of employees who were paid for outside details during hours for which they were also receiving regular pay.

The trial court did not apply a balancing test to determine whether the redacted material should be disclosed, but rather, **[*5]** based upon *Fenniman*, ruled that the redacted material was categorically exempt from disclosure. Nonetheless, the court observed 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."

The trial court ordered the Town to provide the plaintiffs with a copy of the Audit Report containing only the redactions it upheld. The Town complied with the trial court's order on April 26, 2019, shortly after the instant appeal was filed.

II. Discussion

NH[1] [1] On appeal, the plaintiffs urge us to overrule *Fenniman*. Alternatively, they argue that the Audit Report, in its entirety, does not relate to "internal personnel practices" even under *Fenniman*, and that Part I, Article 8 of the State Constitution requires that we employ a balancing test, rather than a *per se* rule, to determine whether records relating to "internal personnel practices" are exempt from disclosure. Finally, the plaintiffs contend that applying a balancing test to the redacted information favors the information's disclosure. Because **[*6]** we decide this case on statutory grounds, we do not reach the plaintiffs' constitutional argument. *See* Chatman v. Strafford County, 163 N.H. 320, 322, 42 A.3d 853 (2012) (explaining that HN1 "we decide cases on constitutional grounds only when necessary").[1]

A. Standard of Review

NH[2] [2] HN2 When interpreting the Right-to-Know Law, we apply our ordinary rules of statutory interpretation. Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475, 686 A.2d 310 (1996). Accordingly, we look to the plain meaning of the words used. *Id.* "To advance the purposes of the Right-to-Know Law, we construe provisions favoring disclosure broadly and exemptions narrowly." *Id.* (quotation omitted).

[1] To the extent that the plaintiffs argue that the Audit Report, as a whole, does not meet the broad definition of "internal personnel practices" that we adopted in *Fenniman*, we conclude that that issue is not properly before us. The trial court did not rule that the Audit Report, in its entirety, was exempt from disclosure under the "internal personnel practices" exemption. Rather, because the Town had released a redacted version of the report, the trial court looked at each redaction in light of what the Town had already disclosed.

B. Fenniman and Stare Decisis

HN3[↑] At issue is the interpretation of RSA 91-A:5, IV, which exempts from disclosure under the Right-to-Know Law

> [r]ecords 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, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.

RSA 91-A:5, IV (emphasis added). *Fenniman* was the first case to interpret the exemption for "internal personnel practices." In that case, the plaintiff sought **[*7]** "memoranda and other records compiled" during a police department's internal investigation of a department lieutenant who had been accused of making harassing phone calls. *Fenniman, 136 N.H. at 625, 626*. We broadly construed the "internal personnel practices" exemption to apply to those records because "they document[ed] procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice." *Id. at 626* (quotation omitted). In addition, we adopted a *per se* rule exempting such materials from disclosure. *Id. at 627*. We explained, "Although we have often applied a balancing test to judge whether the benefits of nondisclosure outweigh the benefits of disclosure, such an analysis is inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt." *Id.* (citations omitted).

In *Reid v. New Hampshire Attorney General, 169 N.H. 509, 152 A.3d 860 (2016)*, we criticized *Fenniman*, but did not decide whether to overrule it because we were not asked to do so. *See Reid, 169 N.H. at 519-22*. In *Reid*, we observed that, in *Fenniman*, we had failed to interpret the "internal personnel practices" exemption narrowly and had adopted a *per se* rule of exemption, which departed from our customary Right-to-Know Law jurisprudence under which a balancing **[*8]** test applies. *Id. at 519-20*; *see Lambert v. Belknap County Convention, 157 N.H. 375, 382-86, 949 A.2d 709 (2008)* (describing the balancing test used to determine whether public records are exempt from disclosure because their release would constitute an invasion of privacy). We also observed that, in *Fenniman*, we "did not interpret the portion of RSA 91-A:5, IV at issue in the context of the remainder of the statutory language — in particular, the language exempting 'personnel … and other files.' " *Reid, 169 N.H. at 520*. We further observed that, in *Fenniman*, we had failed to consult decisions from other jurisdictions, particularly federal courts interpreting "Exemption 2" under the federal *Freedom of Information Act* (FOIA). *Id. at 520-21*; *see 5 U.S.C. § 552(b)(2) (2018)* (exempting from disclosure under FOIA information "related solely to the internal personnel rules and practices of an agency"). Nonetheless, we declined to reconsider *Fenniman sua sponte*. *Reid, 169 N.H. at 522*.

NH[3][↑] [3] *Seacoast Newspapers* represented our first opportunity to consider whether to overrule *Fenniman*. *See Seacoast Newspapers, 173 N.H. at ___*. There, after applying our established stare decisis factors, we overruled *Fenniman* to the extent that it had too broadly defined what constitutes records related to "internal personnel practices." *Id. at ___*. HN4[↑] We concluded that the "internal personnel practices" exemption applies narrowly to **[*9]** records relating to the "internal rules and practices governing an agency's operations and employee relations," and does not apply to "information concerning the history or performance of a particular employee." *Id. at ___*.

Because we concluded in *Seacoast Newspapers* that the arbitration decision at issue did not meet the narrow definition of records relating to "internal personnel practices" adopted in that case, we did not "decide … whether *Fenniman* should also be overruled to the extent that it applied a *per se* rule, as opposed to a balancing test, prohibiting the disclosure of records that fall under the 'internal personnel practices' exemption." *Seacoast Newspapers, 173 N.H. at ___*. We face that issue here.

NH[4,5][↑] [4, 5] HN5[↑] "We do not lightly overrule a case that has been precedent for over twenty-five years." *Alonzi v. Northeast Generation Servs. Co., 156 N.H. 656, 659, 940 A.2d 1153 (2008)*. "The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." *Id. at 659-60* (quotation omitted). "When asked to overrule a prior holding, we do not look at the issues *de novo*; rather, we review whether the ruling has come to be seen so clearly as error **[*10]** that its enforcement was for that very reason doomed." *Id. at 660* (quotation omitted).

HN6[] Several factors inform our judgment, including:

> (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. (quotation omitted). No single factor is dispositive "because the doctrine of stare decisis is not one to be either rigidly applied or blindly followed." Ford v. N.H. Dep't of Transp., 163 N.H. 284, 290, 37 A.3d 436 (2012).

NH[6][] [6] HN7[] The first stare decisis factor "examines whether a rule has become difficult or impractical for trial courts to apply." State v. Cora, 170 N.H 186, 192, 167 A.3d 633 (2017) (quotation omitted). "The first factor weighs against overruling when a rule is easy to apply and understand." *Id.* (quotation omitted). The *per se* rule, exempting from disclosure all material that falls within the "internal personnel practices" exemption, is simple to apply and understand. Thus, the **[*11]** first stare decisis factor weighs against overruling *Fenniman*'s adoption of a *per se* rule. *See* State v. Balch, 167 N.H. 329, 335, 111 A.3d 672 (2015) (deciding that a rule that "is a simple rule to apply and understand … has retained its practicality and simplicity").

NH[7][] [7] HN8[] For the second factor "we inquire into 'the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application.' " State v. Duran, 158 N.H. 146, 157, 960 A.2d 697 (2008) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 855, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)). Reliance interests are most often implicated when a rule operates " 'within the commercial law context, where advance planning of great precision is most obviously a necessity.' " *Id.* (quoting Casey, 505 U.S. at 856). No such interests are implicated by overruling the *Fenniman per se* rule. *See* Seacoast Newspapers, 173 N.H. at ___. The Town's assertions to the contrary do not persuade us that the *Fenniman per se* rule "is subject to a kind of reliance that would lend a special hardship to the consequence of overruling" it. Alonzi, 156 N.H. at 660 (quotation omitted); *see* State v. Quintero, 162 N.H. 526, 538, 34 A.3d 612 (2011).

NH[8][] [8] We consider the third and fourth factors together. HN9[] "The third factor concerns whether the law has developed in such a manner as to undercut the prior rule." Balch, 167 N.H. at 335; *see* State v. Matthews, 157 N.H. 415, 419-20, 951 A.2d 155 (2008) (overruling prior holdings due to evolution of our case law). The fourth factor concerns "whether facts have so changed, or come to be seen so differently, **[*12]** as to have robbed the old rule of significant application or justification." Ford, 163 N.H. at 290. " '[We] are sometimes able to perceive significant facts or understand principles of law that eluded our predecessor and justify departures from existing decisions.' " Duran, 158 N.H. at 154 (quoting Casey, 505 U.S. at 866) (brackets omitted).

NH[9][] [9] After considering the third and fourth factors, "[w]e believe there are principles of law the [*Fenniman*] court did not consider." Duran, 158 N.H. at 154; *see* Reid, 169 N.H. at 520-21; Seacoast Newspapers, 173 N.H. at ___. We conclude that "departure from [*Fenniman*] is justified because the [court] failed to give full consideration" to: (1) our prior case law interpreting RSA 91-A:5, IV and pertinent legislative history; and (2) whether applying a *per se* rule to "internal personnel practices," but not to other categories of information identified in RSA 91-A:5, IV, would nullify those other categories. Duran, 158 N.H. at 154; *see* Reid, 169 N.H. at 520-21; Seacoast Newspapers, 173 N.H. at ___. HN10[] "[W]e owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations." Duran, 158 N.H. at 155 (quotation omitted).

First, *Fenniman* failed to give full consideration to our prior cases interpreting RSA 91-A:5, IV and to relevant legislative history. Before *Fenniman* was decided, we had consistently applied a balancing **[*13]** test to the disclosure of records pertaining to "confidential" and "financial information." *See* Chambers v. Gregg, 135 N.H. 478, 481, 606 A.2d 811 (1992); Menge v. Manchester, 113 N.H. 533, 537-38, 311 A.2d 116 (1973); Mans v. Lebanon School Bd., 112 N.H. 160, 162-64, 290 A.2d 866 (1972).

We first adopted the balancing test in *Mans*. *See* Mans, 112 N.H. at 162. In that case, the issue was whether a Lebanon resident was entitled to "access to the name and salary of each schoolteacher in the Lebanon School District." Id. at 161. At the time, RSA 91-A:5, IV exempted from disclosure "[r]ecords pertaining to internal personnel practices, confidential, commercial, or

financial information, personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy." *Id.* (quotation omitted). We explained that RSA 91-A:5, IV "means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed." Id. at 162. In other words, we interpreted the phrase "whose disclosure would constitute invasion of privacy," as modifying all of the kinds of information identified in RSA 91-A:5, IV, including that "pertaining to internal personnel practices." *Id.* We concluded that the phrase "whose disclosure would constitute invasion of privacy" and the need to interpret exemptions to the Right-to-Know Law narrowly so as to serve the law's purposes and objectives, required balancing "the benefits **[*14]** of disclosure to the public … against the benefits of nondisclosure to the administration of the school system and to the teachers." *Id.*; *see* Perras v. Clements, 127 N.H. 603, 605, 503 A.2d 843 (1986) (explaining that in *Mans* we established "a balancing test in 'right-to-know' cases to determine whether the benefits of disclosure outweigh the benefits of nondisclosure"); Menge, 113 N.H. at 534, 537-38 (applying the balancing test we adopted in *Mans* to "a computerized tape of certain field record cards compiled by the city of Manchester for use in arriving at its real estate tax assessments").

Nevertheless, in *Fenniman*, we eschewed the balancing test we had applied to the disclosure of "confidential" and "financial" information in favor of a *per se* rule of exemption for records pertaining to "internal personnel practices" because, we said, "the legislature [had] plainly made its own determination that [internal personnel practices] documents are categorically exempt." Fenniman, 136 N.H. at 627. In fact, there was nothing in the plain language of RSA 91-A:5, IV demonstrating legislative intent to treat records pertaining to "internal personnel practices" differently from "confidential, commercial, or financial information." RSA 91-A:5, IV (Supp. 1992).

The Town bases its argument that *Fenniman* is consistent with the plain **[*15]** language of RSA 91-A:5, IV upon the fact that semicolons separate the types of information listed therein. The Town contends that the semicolons indicate that the phrase "whose disclosure would constitute invasion of privacy" applies only to the last clause of the statute ("personnel … and other files"). *See* Teeboom v. City of Nashua, 172 N.H. 301, 316, 213 A.3d 877 (2019) (explaining that, under ordinary grammar rules, a modifying clause should be placed next to the clause it modifies); In re Richard M., 127 N.H. 12, 17, 497 A.2d 1200 (1985) (observing that "the legislature is not compelled to follow technical rules of grammar and composition" (quotation omitted)).

NH[10] [10] HN11 However, our case law has consistently applied the balancing test to the disclosure of "confidential, commercial, or financial information," even after semicolons were added in 1986. *See* Laws 1986, 83:6; *see also* Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 707, 992 A.2d 582 (2010); Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 555-56, 813 A.2d 381 (2002); Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 552, 555-59, 705 A.2d 725 (1997); Chambers, 135 N.H. at 481; Brent v. Paquette, 132 N.H. 415, 426-28, 567 A.2d 976 (1989). Indeed, we have construed the fact that "confidential, commercial, or financial information" is separate from the other categories of information enumerated in RSA 91-A:5, IV as meaning "not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public's interest in disclosure." N.H. Housing Fin. Auth., 142 N.H. at 553. Further, the history of the 1986 amendment to RSA 91-A:5, IV does not demonstrate that the legislature intended the **[*16]** semicolons to limit the balancing test established in *Mans* to the last clause of the statute ("personnel … and other files").

NH[11] [11] To the extent that the Town argues that we apply the balancing test to the disclosure of confidential information only to determine whether the material is "confidential," the Town is mistaken. *See* Chambers, 135 N.H. at 481. HN12 We do not have a single test to determine whether material is "confidential," although we have found "instructive the standard test employed by the federal courts." N.H. Housing Fin. Auth., 142 N.H. at 554. To establish that information is sufficiently "confidential" to justify nondisclosure, the party resisting disclosure must prove that disclosure "is likely: (1) to impair the [government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." Id. at 554 (quotation omitted).

NH[12] [12] HN13 The test described above is *not* the balancing test that we use to determine whether the disclosure of "confidential, commercial, or financial" information results in an invasion of privacy. That determination involves a three-step analysis. Prof'l Firefighters of N.H., 159 N.H. at 707. First, we evaluate whether there is a privacy interest at stake that would be invaded **[*17]** by the disclosure. *Id.* Second, we assess the public's interest in disclosure. *Id.* Third, we balance

the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. *Id.* If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. *Id.* Further, "whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations." *Id.* (quotation and brackets omitted). Thus, determining whether the exemption for "confidential, commercial, or financial information" applies "require[s] analysis of both whether the information sought is 'confidential, commercial, or financial information,' *and* whether disclosure would constitute an invasion of privacy." *N.H. Housing Fin. Auth., 142 N.H. at 552*.

Fenniman simply cannot be reconciled with our case law construing the exemption for "confidential, commercial, or financial information." Nor can it be reconciled with the history of the 1986 amendment to *RSA 91-A:5, IV* and the plain meaning of the statutory language, neither of which provides a basis to apply a balancing test to the disclosure of "confidential, commercial, or financial information" **[*18]** but not to apply the same test to the disclosure of records related to "internal personnel practices."

Second, in *Fenniman*, we failed to consider whether adopting a *per se* rule of exemption for "internal personnel practices," while applying a balancing test to the exemption for "personnel … and other files," would render the latter a nullity. We conclude that it does. As ACLU-NH observes, "This is because … a government agency could skirt the public interest balancing analysis required for 'personnel file' information by simply asserting the categorical 'internal personnel practices' exemption, thus leaving the 'personnel file' exemption without effect." *Cf. Shapiro v. U.S. Dept. of Justice, 153 F. Supp. 3d 253, 280 (D.D.C. 2016)* (noting that Exemption 6 under FOIA for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal [privacy] … would have little purpose if agencies could simply invoke Exemption 2," which shields, *inter alia*, records relating solely to the internal personnel rules and practices of an agency).

NH[13][↑] [13] ***HN14***[↑] Because the *Fenniman per se* rule is inconsistent with our historical and current interpretation of the exemption under *RSA 91-A:5, IV* for "confidential, commercial, or financial **[*19]** information," we are persuaded that it has become no more than a remnant of abandoned doctrine. *See Matthews, 157 N.H. at 420*. We, therefore, overrule *Fenniman* to the extent that it adopted a *per se* rule of exemption for records relating to "internal personnel practices."

NH[14,15][↑] [14, 15] In arguing for a contrary result, the Town and the intervenor, New England Police Benevolent Association, Local 220 (the Union), raise arguments that were raised and rejected in *Seacoast Newspapers*. *See Seacoast Newspapers, 173 N.H. at ___*. For instance, the Town and Union argue that we should adhere to the *per se* rule we adopted in *Fenniman* because the legislature has not "overruled" *Fenniman* by legislative enactment. *See Appeal of Phillips, 165 N.H. 226, 232, 75 A.3d 1083 (2013)* (assuming that our prior holding "conforms to legislative intent" when it had "been over four years since we issued our [prior] decision and the legislature [had] not seen fit to amend the statute"); *cf. New Hampshire Retail Grocers Ass'n v. State Tax Comm'n, 113 N.H. 511, 514, 309 A.2d 890 (1973)* (noting that "[i]t is a well-established principle of statutory construction that a longstanding practical and plausible interpretation given a statute of doubtful meaning by those responsible for its implementation without any interference by the legislature is evidence that such a construction conforms to legislative intent"). However, such canons of **[*20]** statutory construction are not controlling. *See Chagnon v. Union Leader Corp., 104 N.H. 472, 474, 190 A.2d 721 (1963)*, *superseded on other grounds by statute as stated in Hanchett v. Brezner Tanning Co., 107 N.H. 236, 221 A.2d 246 (1966)* (explaining that ***HN15***[↑] legislative "intent, rather than any arbitrary canons of statutory construction, is controlling"). Moreover, as we explained in *Seacoast Newspapers*, ***HN16***[↑] "We are 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." *Seacoast Newspapers, 173 N.H. at ___* (quotation omitted). "Neither will we always place on the shoulders of the legislature the burden to correct our own error." *Id. at ___* (quotation omitted).

NH[16][↑] [16] Similarly, the Union argues in this case, as it argued in *Seacoast Newspapers*, that we should decline to overrule *Fenniman* because of legislative activity during the last legislative session. *Id. at ___*. ***HN17***[↑] As we explained in *Seacoast Newspapers*, "we will not be deterred … from correcting a wrong of our own creation because the legislature considered, but did not enact, a bill relating to the same subject matter in a previous legislative session." *Id. at ___*.

NH[17][↑] [17] HN18[↑] Thus, for all of the above reasons, we now overrule *Fenniman* to the extent that it adopted a *per se* rule of exemption for records relating to "internal personnel practices" and **[*21]** overrule its progeny to the extent that they applied that *per se* rule of exemption. In the future, the balancing test we have used for the other categories of records listed in RSA 91-A:5, IV shall apply to records relating to "internal personnel practices." *See* Prof'l Firefighters of N.H., 159 N.H. at 707 (setting forth the three-step analysis required to determine whether disclosure will result in an invasion of privacy). Determining whether the exemption for records relating to "internal personnel practices" applies will require analyzing both whether the records relate to such practices and whether their disclosure would constitute an invasion of privacy. *See* N.H. Housing Fin. Auth., 142 N.H. at 552.

NH[18][↑] [18] Not surprisingly, the plaintiffs contend that, when the balancing test is applied to the redactions the trial court upheld, it favors disclosure, and the Town argues the opposite. However, we agree with the Union that remand is required in this case not only for the trial court to apply the balancing test in the first instance, but for it also to decide whether information in the redactions it upheld satisfies *Seacoast Newspapers* definition of "internal personnel practices." To the extent that the trial court finds that a redaction does not meet that narrow definition, it may, on **[*22]** remand, determine whether the redacted information, nonetheless, is exempt from disclosure under the exemption for "personnel … and other files." RSA 91-A:5, IV. This is so because, as the Union correctly observes, "it is not evident that the [trial] court considered whether any of the disputed materials were exempt 'personnel … files.' "

Vacated and remanded.

BASSETT and DONOVAN, JJ., concurred; HANTZ MARCONI, J., dissented.

Concur by: HANTZ MARCONI (In Part)

Dissent by: HANTZ MARCONI (In Part)

Dissent

HANTZ MARCONI, J., dissenting. In another opinion issued today, the court overruled our decision in Union Leader Corp v. Fenniman, 136 N.H. 624, 620 A.2d 1039 (1993), to the extent that it too broadly interpreted the "internal personnel practices" exemption to the Right-to-Know Law. *See Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. ___, ___, ___ A.3d ___ (2020); *see also* RSA 91-A:5, IV (2013). I concurred in the result in that case because I agreed with my colleagues that the arbitration decision at issue does not fall within the "internal personnel practices" exemption to the Right-to-Know Law. *See* Seacoast Newspapers, 173 N.H. at ___ (HANTZ MARCONI, J., concurring in part and dissenting in part). I saw no need to consider whether to overrule *Fenniman* in that case because I believed that the arbitration decision fails to satisfy the *Fenniman* definition of records pertaining to "internal **[*23]** personnel practices" as a matter of law. Id. at ___.

In the instant case, my colleagues overrule *Fenniman* to the extent that it decided that records pertaining to "internal personnel practices" are categorically exempt from disclosure under the Right-to-Know Law. For the reasons that follow, I respectfully dissent from my colleagues' decision to overrule *Fenniman* in any respect.

"The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." Jacobs v. Director, N.H. Div. of Motor Vehicles, 149 N.H. 502, 504, 823 A.2d 752 (2003) (quotations omitted). "[W]hen asked to reconsider a holding, the question is not whether we would decide the issue differently *de novo*, but whether the ruling has 'come to be seen so clearly as error that its enforcement was for that very reason doomed.'" *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)). Several factors inform our judgment, including: (1) "whether the rule has proven to be intolerable simply in defying practical workability"; (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling"; (3) "whether related principles **[*24]** of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." Id. at

505 (quotations omitted).

Unlike my colleagues, I believe that our established stare decisis factors compel retaining *Fenniman*. As the majority concedes, the first factor weighs in favor of retaining *Fenniman* because the *Fenniman* decision is easy to apply. *See* State v. Cora, 170 N.H. 186, 192, 167 A.3d 633 (2017). As the Town asserts, *Fenniman* "has been applied on numerous occasions in a rational and meaningful way," and, thus, "there is no basis for arguing" that *Fenniman* "defies practical workability."

I also believe that the second factor weighs in favor of retaining *Fenniman*. The second factor concerns "the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." Casey, 505 U.S. at 855. As the Town correctly observes, "Thousands of employees at every level of government, retired and currently employed, have come to rely on *Fenniman*, which has been the law for 26 years." Moreover, governmental administrators also have come to understand that their **[*25]** efforts to investigate, evaluate, and improve operations are protected by *Fenniman*. *See* id. at 856 (explaining that "while the effect of reliance on [a prior Supreme Court decision] cannot be exactly measured, neither can the certain cost of overruling [that decision] for people who have ordered their thinking and living around that case be dismissed").

Although the majority cites factors three and four and claims to have applied them, its actual analysis reveals that it overrules *Fenniman* merely because it finds the case to have been badly reasoned. *See* State v Quintero, 162 N.H. 526, 544 n.1, 34 A.3d 612 (2011) (Lynn, J., specially concurring) (describing the court's analysis in State v. Duran, 158 N.H. 146, 960 A.2d 697 (2008)). That this is so is demonstrated by the following passages, among others, from the decision: "[W]e are sometimes able to perceive significant facts or understand principles of law that eluded our predecessor and justify departures from existing decisions"; "We believe there are principles of law the [*Fenniman*] court did not consider"; "We conclude that departure from [*Fenniman*] is justified because the [court] failed to give full consideration" to our prior case law and to the fact that we apply a balancing test to the disclosure of other information covered by RSA 91-A:5, IV; "[W]e owe **[*26]** somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations"; and "We are unwilling to mechanically apply the principles of stare decisis to allow a decision that was wrong when it was decided perpetuate as a rule of law." (Quotations omitted.). *See id.* (referring to the same or similar passages in *Duran*). When considering whether to overrule a case, we should not consider whether we would have decided it differently *de novo*. Jacobs, 149 N.H. at 504. Yet, that is precisely what my colleagues have done.

Moreover, in my view, *Fenniman* was soundly reasoned. *Fenniman* concerned a petition by Union Leader Corporation for access to documents compiled during an internal investigation of a police lieutenant accused of making harassing phone calls. Fenniman, 136 N.H. at 625. The police department released information including the lieutenant's name and the results of the investigation, but withheld "memoranda and other records compiled during the investigation." Id. at 625-26. We held that the withheld records pertained to "internal personnel practices" because "they document procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice." **[*27]** Id. at 626 (quotation omitted). We also decided that the balancing test we had applied "to judge whether the benefits of nondisclosure outweigh the benefits of disclosure" was "inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt" from disclosure under the Right-to-Know Law. Id. at 627.

Fenniman is consistent with the plain meaning of the language in RSA 91-A:5, IV. When *Fenniman* was decided, RSA 91-A:5, IV exempted:

> 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, library user, videotape sale or rental, and other files whose disclosure would constitute an 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.

RSA 91-A:5, IV (Supp. 1992).

Pursuant to the plain meaning of the statutory language, **[*28]** the clause "whose disclosure would constitute invasion of privacy" modifies only the last category of records enumerated in the statute

("personnel, medical, welfare, library user, videotape sale or rental, and other files"). *See* Teeboom v. City of Nashua, 172 N.H. 301, 316, 213 A.3d 877 (2019) (explaining that, under ordinary grammar rules, a modifying clause should be placed next to the clause it modifies); In re Richard M., 127 N.H. 12, 17, 497 A.2d 1200 (1985) ("Although the legislature is not compelled to follow technical rules of grammar and composition, a widely accepted method of statutory construction is to read and examine the text of the statute and draw inferences concerning its meaning from its composition and structure." (quotation omitted)). As the *amicus* correctly observes:

> This is most apparent with respect to "test questions, scoring keys, and other examination data." It is impossible to imagine how disclosure of test questions or scoring keys could constitute invasion of privacy, so applying the invasion-of-privacy balancing test would render this exemption meaningless — and yet the exemption is there. Clearly the reason for exempting these records is to prevent someone who expects to be taking an academic, licensing, or employment examination from gaining an unfair advantage — it has **[*29]** nothing to do with personal privacy.
>
> If the invasion-of-privacy element does not apply to the test scores exemption, there is no reason, consistent with the construction of the paragraph, to apply it [to] the other categories, either.

Although the majority makes much of the fact that we have applied our traditional balancing test to "confidential, commercial, or financial" information, I agree with the *amicus* that doing so makes sense because "[p]rivacy and confidentiality, while not exactly the same thing, are certainly related." *See* Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 553-54, 705 A.2d 725 (1997) (providing that under one test, to establish that "commercial" or "financial" information is sufficiently "confidential" to justify nondisclosure, the party resisting disclosure must prove that disclosure "is likely: (1) to impair the [government]'s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained" (quotation omitted)). Moreover, although the *Fenniman* Court did not consider federal precedent, doing so is not required when interpreting our Right-to-Know Law for we are the final arbiter of the legislature's intent. Clay v. City of Dover, 169 N.H. 681, 685, 156 A.3d 156 (2017).

Even if I were to agree **[*30]** with my colleagues that *Fenniman* is poorly reasoned, which I do not, "[p]rincipled application of stare decisis requires a court to adhere even to poorly reasoned precedent in the absence of some special reason over and above the belief that a prior case was wrongly decided." Ford v. N.H. Dep't of Transp., 163 N.H. 284, 290, 37 A.3d 436 (2012) (quotation omitted). In other words, "[r]especting stare decisis means sticking to some wrong decisions." Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015). "The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually 'more important that the applicable rule of law be settled than that it be settled right.' " *Id.* (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932) (BRANDEIS, J., dissenting)). "Indeed, stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Id.* "Accordingly, an argument that we got something wrong — even a good argument to that effect — cannot by itself justify scrapping settled precedent." *Id.*

"Judges are not at liberty to follow prior decisions that are well-reasoned and discard those that are not." Quintero, 162 N.H. at 539. "According substantial weight to the poor reasoning of an opinion undermines stare decisis and potentially bestows upon the court expansive authority to overrule any prior **[*31]** decision it determines is poorly reasoned." Id. at 540. "[W]hen governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." Jacobs, 149 N.H. at 504 (quotation omitted).

Stare decisis "is most compelling" when statutory interpretation is at issue. Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197, 205, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991). This is so because the legislature "may alter what we have done by amending the statute." Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), *superseded by statute on other grounds, as stated in* Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305-06 (N.D. Cal. 1992); *accord* Duran, 158 N.H. at 157 ("[S]tare 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." (quotations and brackets omitted)). Toward that end, I find it persuasive that, although the legislature has amended the Right-to-Know Law on many occasions since

Fenniman was decided, it has not seen fit to overrule *Fenniman* by legislative enactment. *See* *Appeal of Phillips, 165 N.H. 226, 232, 75 A.3d 1083 (2013)* (assuming that our prior holding "conforms to legislative intent" when it had "been over four years since we issued our [prior] decision and the legislature [had] not seen fit to amend the statute").

For all of the above reasons, therefore, I would not overrule *Fenniman*.

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