Appendix

THE SUPREME COURT OF NEW HAMPSHIRE

Grafton
No. 2020-0563

SAMUEL PROVENZA

v.

TOWN OF CANAAN

Argued: October 20, 2021
Opinion Issued: April 22, 2022

Milner & Krupski, PLLC, of Concord (John S. Krupski on the brief and orally), for the plaintiff.

Town of Canaan, filed no brief.

American Civil Liberties Union of New Hampshire Foundation, of Concord (Gilles R. Bissonnette and Henry R. Klementowicz on the brief, and Henry R. Klementowicz orally), for the intervenor, Valley News.

Malloy & Sullivan, Lawyers Professional Corporation, of Hingham, Massachusetts (Gregory V. Sullivan, on the brief) for Union Leader Corporation and New England First Amendment Coalition as amici curiae.

MACDONALD, C.J. The plaintiff, Samuel Provenza, formerly employed as a police officer by the defendant, Town of Canaan (Town), appeals an order of the Superior Court (Bornstein, J.) that: (1) denied his petition for declaratory judgment and "request for temporary and permanent injunctive and other relief"; and (2) granted the cross-claim of the intervenor, the Valley News. Provenza sought to bar public disclosure of an investigative report commissioned by the Town as a result of a motor vehicle stop in which he was involved while still employed by the Town as a police officer; the Valley News sought release of the report under RSA chapter 91-A, the Right-to-Know Law. See RSA ch. 91-A (2013 & Supp. 2021). We affirm.

I. Background

We summarize the pertinent facts found by the trial court or supported by the record. On November 30, 2017, Provenza was involved in a motor vehicle stop that received media coverage in the Upper Valley. Provenza was responding to a call received by police dispatch about a suspicious vehicle following a town school bus. He did not activate the camera in his cruiser before responding. When he arrived at the location of the bus, he observed a vehicle closely following the bus and initiated a traffic stop. The driver explained that she was following the bus because her daughter had been having issues with the school bus operator. When Provenza attempted to arrest the driver of the vehicle, she physically resisted.

The driver subsequently filed a formal complaint against Provenza in which she alleged that he had used excessive force. The Town commissioned Municipal Resources, Inc. to investigate the encounter. Municipal Resources filed a report (Report) with the Town. In February 2019, the Valley News filed a Right-to-Know Law request seeking disclosure of the Report. The Town denied the request, citing the "internal personnel practices" exemption set forth in RSA 91-A:5, IV (2013) and this court's opinion in Union Leader Corp. v. Fenniman, 136 N.H. 624 (2007).

In June 2020, the Valley News renewed its request following our decisions in Union Leader Corp. v. Town of Salem, 173 N.H. 345 (2020), and Seacoast Newspapers v. City of Portsmouth, 173 N.H. 325 (2020). The Town informed Provenza of the request and he then filed this lawsuit against the Town seeking declaratory and injunctive relief under a variety of theories to prevent the Town from releasing the Report. The Valley News filed a motion to intervene, which the trial court granted. The Valley News then filed an objection to Provenza's request for injunctive relief and a cross-claim seeking a ruling that the Report is subject to disclosure under the Right-to-Know Law. The Valley News also argued that, because Provenza was not a "person aggrieved" under RSA 91-A:7 (Supp. 2021), he did not have standing to bring this action.

In September 2020, the trial court held a hearing during which counsel for Provenza, the Town, and the Valley News participated. At that hearing, the parties agreed that the order to be issued by the trial court would serve "as a final adjudication on the merits of both [Provenza]'s requests for declaratory judgment and for preliminary and permanent injunctions and on the merits of Valley News's crossclaim."

In its order, the trial court "assume[d] without deciding that [Provenza] is a 'person aggrieved' within the meaning of RSA 91-A:7," and "further rule[d] that [Provenza] has standing to maintain this action under RSA 491:22 and RSA 498:1." After a detailed discussion of the analysis to be applied when determining whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV, see Union Leader Corp. v. Town of Salem, 173 N.H. 345, 355 (2020), the court concluded that the Report was subject to disclosure under the Right-to-Know Law. The Town requested that certain medical information, license plate numbers, and the names of minors be redacted from the Report. The Valley News did not object. The trial court agreed that the information should be redacted, concluding that the privacy interest in this information outweighed any public interest. Provenza then filed this appeal.

II. Standard of Review

We defer to the trial court's findings of fact if they are supported by the evidence and are not erroneous as a matter of law. Town of Lincoln v. Chenard, 174 N.H. ___, ___ (decided Jan. 22, 2022) (slip op. at 3). We review the trial court's interpretation of statutes, including the Right-to-Know Law, de novo. 38 Endicott St. N., LLC v. State Fire Marshall, 163 N.H. 656, 660 (2012); N.H. Ctr. for Pub. Interest Journalism v. N.H. Dep't of Justice, 173 N.H. 648, 652 (2020). 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. Ctr. for Pub. Interest Journalism, 173 N.H. at 653. Accordingly, we construe provisions favoring disclosure broadly, while construing exemptions restrictively. Id. When the facts are undisputed, we review the trial court's balancing of the public interest in disclosure and the interests in nondisclosure de novo. N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 111 (2016). The party resisting disclosure bears a heavy burden to shift the balance toward nondisclosure. Id.

III. Analysis

The Right-to-Know Law provides: "Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief." RSA 91-A:7. The Valley News argues that Provenza is not a "person aggrieved" under this statute. The Valley News further contends that the exemptions set forth in the Right-to-Know Law do not create statutory privileges that can be invoked to

prevent a public body from disclosing information. It argues that exemptions in the Right-to-Know Law "merely provide a license to a public body to withhold information" — they do not prevent the public body "from voluntarily disclosing any records, even if they are exempt." Thus, the Valley News asserts, Provenza lacked standing to bring this action.

In this case, the trial court granted the motion to intervene filed by the Valley News. The Valley News then filed its claim against the Town pursuant to RSA 91-A:7 in which it sought a ruling that the Report is a public record that must be made available for inspection by the public under RSA chapter 91-A. The trial court's order reflects that Provenza's petition and the Valley News' claim were considered together at a hearing on September 15, 2020, with agreement by the parties that the order of the trial court resulting from that hearing would act as a final adjudication on the merits of both Provenza's petition and the Valley News' Right-to-Know request.

In its order addressing whether disclosure of the Report would constitute an invasion of privacy under RSA 91-A:5, IV, the trial court determined that Provenza, "as the party opposing disclosure," bore the heavy burden of demonstrating that the materials should not be disclosed. See Union Leader Corp. v N.H. Housing Fin. Auth., 142 N.H. 540, 554 (1997) (placing burden on the private developer opposing release by the New Hampshire Housing Finance Authority of documents sought by two newspapers pertaining to developer's housing developments). Thus, Provenza was treated as a party in the proceedings in the claim filed by the Valley News. Accordingly, we conclude that he was entitled to appeal the order granting the Valley News' request. See id. at 544-45 (deciding appeal filed by private developer of order requiring disclosure of documents under Right-to-Know Law); cf. Seacoast Newspapers v. City of Portsmouth, 173 N.H. 325, 330 (2020) (where newspaper sought copy of arbitration decision involving former police officer and City answered that it did not object to release of the decision, Union that represented officer allowed by trial court to intervene in order to oppose newspaper's Right-to-Know Law petition). Provenza is able to raise all of his arguments under the Right-to-Know Law in his appeal from the grant of the Valley News' request. Therefore, given the specific procedural history of this case, we need not decide whether he was a "person aggrieved" under RSA 91-A:7.

We have not yet addressed whether RSA 91-A:7 provides a remedy for, and grants standing to, an individual who seeks to prevent disclosure of information pursuant to the Right-to-Know Law. Compare Campaign for Accountability v. CCRF, 815 S.E.2d 841 (Ga. 2018) (holding that parties with an interest in nondisclosure of public records pertaining to them may pursue a lawsuit to seek compliance with the state Open Records Act), and Beckham v. Bd. of Educ. of Jefferson Cty., 873 S.W.2d 575 (Ky. 1994) (holding that a party affected by the decision of a public agency to release records pursuant to state Open Records Act had standing to contest the agency decision in court), with

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (holding that federal Freedom of Information Act does not provide a remedy for one who seeks to prevent disclosure), and R.I Federation of Teachers v. Sundlun, 595 A.2d 799 (R.I. 1991) (holding that state Access to Public Records Act does not provide a reverse remedy to prevent disclosure). The legislature may wish to consider whether clarification as to who is entitled to seek relief under RSA 91-A:7 is warranted.

We now turn to the question of whether the Report is subject to release under the Right-to-Know Law. The purpose of RSA chapter 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). We note that no party argues that the Report is not a governmental record. See RSA 91-A:1-a, III (2013). The legislature has recognized that certain governmental records are exempt from disclosure under this chapter. See RSA 91-A:4, I (2013) (every citizen has right to inspect governmental records "except as otherwise prohibited by statute or RSA 91-A:5").

Although, in his brief, Provenza lists fifteen questions "presented for review," we conclude that determining whether the Report is subject to disclosure requires resolution of the following: (1) whether RSA 105:13-b bars disclosure; (2) whether RSA 516:36 and/or State Personnel Rules bar disclosure; and (3) whether RSA 91-A:5, IV bars disclosure.

We begin by setting forth the language of RSA 91-A:5, IV in its entirety. Provenza relies upon the emphasized language to support his claim that the Report is exempt.

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

Provenza also argues that the trial court erred by failing to properly consider RSA 105:13-b and RSA 516:36, II in its analysis. RSA 105:13-b (2013), entitled "Confidentiality of Personnel Files," 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 chapter 516, "Witnesses," is found in Title LIII of the Revised Statutes Annotated, which is entitled "Proceedings in Court." RSA 516:36 (2021) provides:

516:36 Written Policy Directives to Police Officers and Investigators.

I. In any civil action against any individual, agency or governmental entity, including the state of New Hampshire, arising out of the conduct of a law enforcement officer having the powers of a peace officer, standards of conduct embodied in policies, procedures, rules, regulations, codes of conduct, orders or other directives of a state, county or local law enforcement agency shall not be admissible to establish negligence when such standards of conduct are higher than the standard of care which would otherwise have been applicable in such action under state law.

II. 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. Nothing in this paragraph shall preclude the admissibility of otherwise

> relevant records of the law enforcement agency which relate to the incident under investigation that are not generated by or part of the internal investigation. For the purposes of this paragraph, "internal investigation" shall include any inquiry conducted by the chief law enforcement officer within a law enforcement agency or authorized by him.

A. RSA 105:13-b

Provenza argues that RSA 105:13-b creates an exception to the Right-to-Know Law that applies to the Report. However, by its express terms, RSA 105:13-b "pertains only to information maintained in a police officer's personnel file." N.H. Ctr. for Pub. Interest Journalism, 173 N.H. at 656. As we stated in N.H. Center for Public Interest Journalism, "[h]ad 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." Id. Here, the trial court found that "there is nothing in the record to suggest that the Report is contained in or is a part of [Provenza's] personnel file." On appeal, Provenza has not demonstrated that this finding is unsupported by the evidence or erroneous as a matter of law. Accordingly, the Report is not exempt from disclosure under the Right-to-Know Law by RSA 105:13-b.

Provenza also relies upon Pivero v. Largy, 143 N.H. 187 (1998), which considered an officer's right under RSA 275:56 (1987) to obtain a copy of an internal investigation that concluded that complaints against the officer were unfounded. After concluding that the records were not covered by that statute, we observed in dicta that "[u]ntil an internal investigation produces information that results in the initiation of a disciplinary process, public policy requires that internal investigation files remain confidential." Pivero, 143 N.H. at 191. The public policy considerations included "instilling confidence in the public to report, without fear of reprisal, incidents of police misconduct to internal affairs," and preventing disclosure of confidential internal affairs matters that could seriously hinder an ongoing investigation or future law enforcement efforts. Id.

In Pivero, we observed that police internal investigative files were categorically exempt from disclosure under RSA 91-A:5, citing Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993). Fenniman had so held, based upon the court's belief that the legislature had "plainly made its own determination" that such documents should be categorically exempt. Fenniman, 136 N.H. at 627. Accordingly, we had no cause to consider the appropriate analysis to apply under the Right-to-Know Law, as that issue had been previously settled in Fenniman.

In Union Leader Corp. v. Town of Salem, 173 N.H. 345 (2020), we overruled Fenniman to the extent that it decided that records are categorically

exempt from disclosure under the Right-to-Know Law instead of being subject to a balancing test to determine whether they are exempt from disclosure. Thus, the statement in Pivero that police internal investigative files were categorically exempt from disclosure under RSA 91-A:5, which was supported by citation to Fenniman, is no longer good law. Understood in that light, the public policy considerations identified in Pivero may still support maintaining the confidentiality of internal investigation files, see Union Leader Corp., 173 N.H. at 355 (noting one test to determine whether material is "confidential" is whether disclosure is likely to impair the government's ability to obtain necessary information in the future), but no longer are such files categorically exempt from disclosure under the Right-to-Know Law. Establishing that records are "confidential" by itself does not result in their being exempt from disclosure under the Right-to-Know Law — rather, that determination involves the three-step analysis that the trial court undertook in this case. See id.

B. RSA 516:36 and State Personnel Rules

Nor does RSA 516:36 support Provenza's request for relief. The language of this statute makes clear that it governs information sought for use in the course of civil litigation. Petition of N.H. Div. of State Police, 174 N.H. 176, 185 (2021). It is limited to questions of admissibility. As the Valley News notes in its brief, information can be both inadmissible in court under RSA 516:36, and public under the Right-to-Know Law. Contrary to Provenza's argument, we agree with the trial court that because RSA 516:36 governs admissibility, it "has no bearing on the Right-to-Know analysis."

Provenza also argues that, because he is currently employed as a State Trooper with the New Hampshire Department of Safety, rules adopted by the New Hampshire Division of Personnel that require the State to keep investigations confidential and separate from a State employee's personnel file unless discipline is issued prevent disclosure of the Report. See N.H. Admin. R. Per 1501.04. We disagree. Given that there is no dispute that the Report was commissioned by the Town to investigate actions taken by Provenza while employed by the Town and also prepared during his employment with the Town, we conclude that the State's personnel rules also do not apply. See N.H. Admin. R. Per 101.02.

C. RSA 91-A:5, IV

Turning to RSA 91-A:5, IV, as we earlier observed, 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. "The party resisting disclosure bears a heavy burden to shift the balance toward nondisclosure." Union Leader v. N.H. Housing Fin. Auth., 142 N.H. at 554 (quotation omitted). We have previously recognized that an "expansive construction" of the language in RSA 91-A:5, IV

that establishes exemptions would allow "the exemption to swallow the rule and is inconsistent with the purposes and objectives of the right-to-know law." Mans v. Lebanon School Bd., 112 N.H. 160, 162 (1972); see Herron v. Northwood, 111 N.H. 324, 327 (1971) (observing that the legislature "has placed a high premium on the public's right to know").

Here, Provenza contends that the trial court erred in its balancing of the public right to access governmental information against his privacy interests. Courts must engage in a three-step analysis when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV. Union Leader Corp. v. Town of Salem, 173 N.H. at 355. This balancing test applies to all categories of records enumerated in RSA 91-A:5, IV. See id. at 357; N.H. Ctr. for Pub. Interest Journalism v. N.H. Dep't of Justice, 173 N.H. at 659. First, the court evaluates whether there is a privacy interest that would be invaded by the disclosure. Union Leader, 173 N.H. at 355. Second, the court assesses the public interest in disclosure. Id. Third, the court balances the public interest in disclosure against the government's interest in nondisclosure and the individual's interest in nondisclosure. Id. On appeal, in the absence of disputed facts, we review the trial court's balancing of the public interest in disclosure and the interests in nondisclosure de novo. Union Leader v. N.H. Housing Fin. Auth., 142 N.H. at 555.

We conclude that Provenza's privacy interest here is not weighty. As the trial court explained, the Report does not reveal intimate details of Provenza's life, see N.H. Civil Liberties Union v. City of Manchester, 149 N.H. 437, 441 (2003), but rather information relating to his conduct as a government employee while performing his official duties and interacting with a member of the public. Cf. Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 113 (2005) (noting that purpose of Right-to-Know Law is to ensure that government's activities be open 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); Kroeplin v. Wis. Dep't of Natural Resources, 725 N.W.2d 286, 301 (Wis. App. 2006) (stating that when an individual "becomes a law enforcement officer, that individual should expect that his or her conduct will be subject to greater scrutiny. That is the nature of the job.").

With respect to the government's interest in nondisclosure, we first note that the Town makes no argument on appeal that it has any interest in nondisclosure. Indeed, the Town has filed neither a brief nor a memorandum of law in this court. Rather, before the trial court, the Town requested that certain information — specifically, medical information, license plate numbers, and the names of minors — be redacted from the Report. Without objection, the trial court agreed that those redactions would be made. To the extent that Provenza argues that the government has an interest in nondisclosure because disclosure will have a chilling effect on future investigations, we agree with the Valley News that Provenza has not carried his burden of demonstrating that

disclosure, in light of the facts of this case, is likely to have any such chilling effect. Cf. Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551, 556 (2002) (stating that there was no evidence establishing a likelihood that disclosure would lead auditors to refrain from being candid and forthcoming).

As for the public interest in disclosure, we conclude that it is significant. The public has a substantial interest in information about what its government is up to, see Lamy, 152 N.H. at 111, as well as in knowing whether a government investigation is comprehensive and accurate, see Reid v. N.H. Attorney Gen., 169 N.H. 509, 532 (2016). In balancing the interests in disclosure and nondisclosure, the trial court concluded that Provenza failed to carry his heavy burden of shifting the balance toward nondisclosure. After considering all of the arguments of the parties, we reach the same result.

Lastly, we note that Provenza argues that disclosure of the Report will violate his right to procedural due process. We conclude that this argument lacks merit, and warrants no further discussion. See Garrison v. Town of Henniker, 154 N.H. 26, 35 (2006). Accordingly, the decision of the trial court is affirmed.

Affirmed.

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

User Name: Geoffrey Gallagher
Date and Time: Tuesday, May 3, 2022 1:14:00 PM EDT
Job Number: 170282976

Document (1)

1. *Baer v. Leach, 2015 U.S. Dist. LEXIS 158774*
   Client/Matter: 4532-18
   Search Terms: 2015 U.S. Dist. LEXIS 158774
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

Baer v. Leach

United States District Court for the District of New Hampshire

November 24, 2015, Decided; November 24, 2015, Filed

Civil No. 15-cv-065-JD

Reporter
2015 U.S. Dist. LEXIS 158774 *; 2015 DNH 214

William Baer v. James Leach

Core Terms

arrest, disorderly conduct, qualified immunity, probable cause, argues, probable cause to arrest, summary judgment, interrupted, video recording, lawful order, state court, reasonable officer, public comment, preclusive, questions, responded, contends, minutes, merits, prong, school board, assessing, session, spoke, disruption, comments, grounds, orderly, attend, courts

Case Summary

Overview

HOLDINGS: [1]-Where an arrestee was arrested for disorderly conduct at a school board meeting, the state court's order dismissing the criminal complaints against him had no preclusive effect regarding the arrestee's false arrest claim because the officer was not a party to the arrestee's criminal prosecution, the arrestee could not rely on privity doctrine, and the issues in the criminal proceeding were not identical to the issues presented in the false arrest suit; [2]-The officer was entitled to qualified immunity as to the arrestee's *Fourth Amendment* false arrest claim because it was at least arguable that the officer had probable cause to arrest him for disorderly conduct under *RSA 644:2, III(b)* and *(c)* since, inter alia, the arrestee interfered with both the orderly business of the school board and the school board chair's efforts to run an orderly school board meeting.

Outcome
Officer's motion for summary judgment granted.

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN1 **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A genuine issue is one that can be resolved in favor of either party and a material fact is one which has the potential of affecting the outcome of the case. In deciding a motion for summary judgment, the court draws all reasonable factual inferences in favor of the nonmovant.

Criminal Law & Procedure > ... > Crimes Against Persons > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace

HN2 **Disruptive Conduct, Disorderly Conduct & Disturbing the Peace**

RSA 644:2, II(e) prohibits knowingly refusing to comply with a lawful order of a peace officer to move from any public place; *RSA 644:2, III(b)* prohibits disrupting the orderly conduct of business in any public or government facility; and *RSA 644:2, III(c)* prohibits disrupting any lawful assembly or meeting of persons without lawful authority.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

HN3 **Preclusion of Judgments, Law of the Case**

The law of the case doctrine only applies to prior decisions made in the same litigation.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships

Civil Procedure > Judgments > Preclusion of Judgments

HN4 **Preliminary Considerations, Federal & State Interrelationships**

When assessing whether a state court order has preclusive effect, federal courts apply the law of the state that issued the order. Federal courts must give preclusive effect to state court judgments in accordance with state law.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Evidence > Burdens of Proof > Allocation

HN5 **Estoppel, Collateral Estoppel**

Under New Hampshire law, collateral estoppel, the doctrine barring relitigation of issues that have been previously decided in other proceedings, is appropriate when the following requirements are met: The issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared in the first action, or have been in privity with someone who did so. Further, the party to be estopped must have had a full and fair opportunity to litigate the issue, and the finding must have been essential to the first judgment. The party seeking to assert collateral estoppel bears the burden of showing that these requirements are met.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN6 **Estoppel, Collateral Estoppel**

In its broadest sense, res judicata encompasses all the various ways in which a judgment in one action will have a binding effect in another; collateral estoppel prevents the same parties, or their privies, from contesting in a subsequent proceeding on a different cause of action any question or fact actually litigated in a prior suit.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN7 **Estoppel, Collateral Estoppel**

Under New Hampshire law there is no privity between a government and its officials who are later sued in their individual capacity.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN8 **Estoppel, Collateral Estoppel**

Findings cannot be a basis for collateral estoppel unless they were essential to the judgment in the prior proceeding.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN9 **Estoppel, Collateral Estoppel**

Most precedent indicates that individual state officials are not bound, in their individual capacities, by determinations adverse to the state in prior criminal cases.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN10 **Immunity From Liability, Defenses**

Qualified immunity shields government officials performing discretionary functions from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. This doctrine gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN11 **Immunity From Liability, Defenses**

When assessing whether qualified immunity applies, courts employ a two-prong analysis. Under the first prong, the court must assess whether the facts alleged or shown by the plaintiff

make out a violation of a constitutional right. Under the second prong, the court determines whether the right was "clearly established" at the time of the defendant's alleged violation. If either prong is not satisfied, qualified immunity applies, and the plaintiff's claim fails.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN12[] **Immunity From Liability, Defenses**

Courts have the discretion to decide which step of the qualified immunity analysis to conduct first. The Supreme Court has cautioned that courts assessing qualified immunity should avoid answering the constitutional question in the first prong when the analysis would rest on "uncertain interpretation of state law" or when the case is so "factbound" that the precedential value would be meaningless.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN13[] **Search & Seizure, Probable Cause**

The probable cause inquiry is "fact-dependent" and in most of these situations precedent will take a court only so far.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN14[] **Immunity From Liability, Defenses**

Determining whether a right is clearly established for qualified immunity purposes requires assessing the right in light of the specific context of the case, not as a broad general proposition. As a result, the inquiry focuses on whether the violative nature of the particular conduct is clearly established.

Civil Rights Law > Protection of Rights > Immunity From Liability > Defenses

HN15[] **Immunity From Liability, Defenses**

To be clearly established, the contours of aright must have been sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. To meet this standard, the plaintiff must identify then-existing precedent that placed the statutory or constitutional question beyond debate. In the context of a false arrest claim, that means that the qualified immunity standard is satisfied so long as the presence of probable cause is at least arguable.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN16[] **Search & Seizure, Probable Cause**

Probable cause exists when police officers, relying on reasonably trustworthy facts and circumstances, have information upon which a reasonably prudent person would believe the suspect had committed or was committing a crime. Probable cause does not require certainty or a high degree of assurance, but only a fair probability to believe that the arrestee has committed a crime. The probable cause inquiry is an objective one, meaning that the only relevant facts are those known to the officer. When those facts are in reasonable dispute, the fact-finder must resolve the dispute. But when the facts that the officer knew are not reasonably in dispute, evaluating whether probable cause was present is a question of law.

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

HN17[] **Disorderly Conduct & Disturbing the Peace, Elements**

Under *RSA 644:2, III(b)* and *(c)*, a person is guilty of disorderly conduct if he purposely causes a breach of peace, public inconvenience, annoyance or alarm, or recklessly creates a risk thereof by (b) disrupting the orderly conduct of business in any public or governmental facility or (c) disrupting any lawful assembly or meeting of persons without lawful authority.

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

HN18[] **Disorderly Conduct & Disturbing the Peace, Elements**

RSA 644:2, III(b) is a permissible and reasonable time, place,

and manner restriction as it applies to all speech because the statute prohibits only that speech whose exercise, as distinct from its contents, interferes with the government's interest in preserving order in its business.

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

HN19[] **Disorderly Conduct & Disturbing the Peace, Elements**

RSA 644:2, II(e) provides that a person is guilty of disorderly conduct if he or she knowingly refuses to comply with a lawful order of a peace officer to move from or remain away from any public place. *RSA 644:2* further defines a "lawful order" as a command issued to any person for the purpose of preventing said person from committing any offense set forth in this section when the officer has reasonable grounds to believe that said person is about to commit any such offense, or when the said person is engaged in a course of conduct which makes his commission of such an offense imminent. *RSA 644:2, V(a)(1)*.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

HN20[] **Search & Seizure, Probable Cause**

An officer's subjective intent during an arrest is irrelevant to the probable cause inquiry.

Civil Rights Law > ... > Scope > Law Enforcement Officials > Arrests

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN21[] **Law Enforcement Officials, Arrests**

The central and dispositive inquiry in a false arrest claim under the *Fourth Amendment* is whether the officer had probable cause to arrest the plaintiff. An arrest does not contravene the *Fourth Amendment's* prohibition on unreasonable seizures so long as the arrest is supported by probable cause. That inquiry is no different where *First Amendment* concerns may be at issue.

Counsel: **[*1]** For William Baer, Plaintiff: Charles G. Douglas, III, Douglas Leonard & Garvey PC, Concord, NH.

For James Leach, Defendant: Andrew B. Livernois, LEAD ATTORNEY, Ransmeier & Spellman, Concord, NH.

Judges: Joseph A. DiClerico, Jr., United States District Judge.

Opinion by: Joseph A. DiClerico, Jr.

Opinion

ORDER

William Baer brings suit under *42 U.S.C. § 1983* against Gilford, New Hampshire, police officer, Lieutenant James Leach, alleging that Leach violated his *Fourth Amendment* rights when he arrested him for disorderly conduct. Leach has moved for summary judgment on the merits and on qualified immunity. Baer objects.

Standard of Review

HN1[] Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Santangelo v. New York Life Ins. Co., 785 F.3d 65, 68 (1st Cir. 2015)*. "A genuine issue is one that can be resolved in favor of either party and a material fact is one which has the potential of affecting the outcome of the case." *Gerald v. Univ. of Puerto Rico, 707 F.3d 7, 16 (1st Cir. 2013)* (quoting *Perez-Cordero v. Wal-Mart Puerto Rico, Inc., 656 F.3d 19, 25 (1st Cir. 2011)*). In deciding a motion for summary judgment, the court draws all reasonable factual inferences in favor of the nonmovant. *Kenney v. Floyd, 700 F.3d 604, 608 (1st Cir. 2012)*.

Background

The events at issue in this suit occurred at the May 5, 2014, meeting of the school board for the town of Gilford, New Hampshire. Prior to the meeting, **[*2]** a group of parents were upset about a book assigned to ninth-grade students that contained sexually graphic material. Kent Hemingway, the superintendent of schools, and Susan Allen, the chair of the school board, expected that many parents would attend the meeting and voice their concern about the book. Hemingway

asked Leach to attend the meeting because he wanted to maintain order. It is undisputed that Leach did attend the meeting and was present during the events at issue in this dispute.

The meeting began with roughly thirty minutes devoted to other school board business. Allen then announced that she would open the meeting to public comment. Before doing that, however, Allen stated that due to the number of people in attendance, public comment would be limited to one two-minute speaking period per person. Allen also informed the audience that the public comment session was an opportunity for citizens to provide their opinions to the school board, but that it was not a question and answer session, and that any specific questions could be directed to the appropriate school administrator during school hours. Allen then asked if any members of the public wanted to speak.

Baer was the **[*3]** first member of the public to speak. He began by expressing his concern that the book was assigned without any notice to parents. Baer then asked Hemingway to read from a notice that the school sent to parents after the book was assigned. Allen interjected and reminded Baer that the public comment period was not the proper forum to pose questions. Baer then stated "okay, I won't ask a question, please read it, is that okay?" Video Recording, at 35:07-09.[1] Allen informed Baer that Hemingway would not read the notice, again reminding him that the public comment session was only an opportunity for Baer to make a comment.

Baer then began questioning Allen about the legitimacy of prohibiting questions during the public comment session. In response, Allen reiterated multiple times that the public could state their views for the school board, but that it was not a forum for a question and answer session. Allen also provided Baer with the names of school administrators that he could contact if he wanted answers to his questions.

This colloquy continued for nearly a minute until Joseph Wernig, a school **[*4]** employee sitting in the audience, interrupted Baer and informed the board that Baer's two minutes had expired. After being interrupted, Baer asked once again why no one would read the notice aloud. At that point, Allen informed Baer that his two minutes for speaking were over. Baer briefly argued against the two-minute limit, and Allen replied that she wanted to give everyone an opportunity to speak. Baer then concluded his remarks. In total, Baer spoke for around two minutes and forty-five seconds. See Video Recording, 34:10-36:55.

After Baer spoke, two more parents spoke and expressed concern about the book. During this time, Baer can be seen on a video recording of the meeting handing out sheets of yellow paper to members of the audience unimpeded. Wernig, who identified himself as a father of children in the Gilford school district, spoke next. As Wernig was finishing his comments, he stated that "these people will be dictating what you can and cannot read and what my kids cannot read." Video Recording, at 41:05-11.

Baer then interrupted Wernig, calling Wernig's statement "absurd." Id. at 41:11-17. Baer then proceeded to rebut Wernig's comments. Allen attempted to regain order of **[*5]** the meeting, saying "please sir" multiple times. Baer spoke over Allen in a raised voice, continuing his rebuttal to Wernig's comments and addressing Allen's interjections directly by saying "please sir, that's fine, please sir, it's absurd. Why don't you have me arrested? Why don't we do that as a civics lesson? Nice *First Amendment* lesson, right? It's absurd." Video Recording, at 41:16-41:23. While Baer was saying this, Allen signaled to Leach. Leach interpreted Allen's gesture as a request for him to intervene and regain order.

Allen asked Baer to respect the other speakers. Baer responded in a raised voice, "like you're respectful of my daughter, right? And my children? And you . . . . put this book out. Why don't we read the notice that was put out?" Video Recording, at 41:35-41:44.

At this time, Leach approached Baer and asked him to leave the meeting. Video Recording, at 41:16. Baer asked Leach why he had to leave and whether he was under arrest. Baer can be heard on the video recording asking "because I violated the two-minute rule?" Video Recording, at 41:52-53. Leach then responded that Baer had to leave and that "they're asking you to leave." Id. at 41:54. Baer responded by saying "I guess **[*6]** you're gonna have to arrest me." Id. at 41:05-41:11. Leach then grabbed Baer by the wrist and escorted him out of the meeting. In total, Baer's interruption of the meeting (from the time that Baer began speaking out of order until Leach approached him and asked him to leave) lasted around thirty-five seconds.

Leach then placed Baer under arrest. Baer was later charged with disorderly conduct under ***HN2***[⬆] *RSA 644:2, II(e)*, which prohibits "knowingly refus[ing] to comply with a lawful order of a peace officer to move from . . . any public place;" *RSA 644:2, III(b)*, which prohibits "[d]isrupting the orderly conduct of business in any public or government facility;" and *RSA 644:2, III(c)*, which prohibits "[d]isrupting any lawful assembly or meeting of persons without lawful authority."

[1] Defendant attached a complete video recording of the meeting as Exhibit D to his motion. See Video Recording, Dkt. 9-5.

Baer moved to dismiss the criminal complaints in state court. The court granted Baer's motion to dismiss, finding that there was a lack of evidence for a "reasonable trier of fact [to] find the Defendant guilty beyond a reasonable doubt." Dismissal Order (Plaintiff's Objection to Motion for Summary Judgment, Dkt. 12-2, Ex. 1,) at 4.

Baer then brought this *§ 1983* action against Leach, alleging that Leach violated his *Fourth Amendment* rights by arresting him without probable cause.

Discussion

Leach **[*7]** moves for summary judgment on two grounds. First, Leach argues that the undisputed material facts show that he had probable cause to arrest Baer for disorderly conduct under *RSA 644:2, II(e)*, *III (b)* & *(c)*, the sections of the New Hampshire disorderly conduct statute that Baer was charged with violating. Second, Leach argues that even if he is not entitled to summary judgment on the merits, he is entitled to qualified immunity.

Baer objects, arguing that Leach did not have probable cause to arrest him for disorderly conduct at the school board meeting. Baer further contends that Leach is not entitled to qualified immunity because the *Fourth Amendment's* prohibition against arrests absent probable cause is a clearly established right, and because a reasonable officer would have known that Baer's conduct did not meet the elements of disorderly conduct. Baer also argues that Leach is not entitled to summary judgment on the merits or on qualified immunity grounds because his comments at the meeting were protected under the *First Amendment*.

I. *Fourth Amendment*

Leach argues that based on Baer's conduct at the meeting he had probable cause to believe that Baer violated the disorderly conduct statute. He also argues that he is entitled to qualified immunity **[*8]** because the presence of probable cause to arrest Baer at the meeting was at least arguable.

Baer responds with three principal arguments. First, he argues that the state court's order dismissing the criminal complaints against him contained findings that are preclusive and determinative of the probable cause and qualified immunity inquiries at issue here. Second, he argues that Leach did not have probable cause because a reasonable officer would have known that his conduct was not prohibited under *RSA 644:2*. Finally, Baer argues that Leach cannot be entitled to qualified immunity because the right to be free from arrests unsupported by probable cause is clearly established, and because a reasonable officer would have known that there was no probable cause to arrest him.

A. Preclusive Effect of Criminal Proceeding

The state court held that no reasonable fact finder could determine beyond a reasonable doubt that Baer committed disorderly conduct. Dismissal Order, at 4. In doing so, the state court judge also questioned the constitutionality of Baer's arrest and made certain findings about whether Baer's conduct was actionable under New Hampshire's disorderly conduct law. Baer argues that these findings **[*9]** preclude summary judgment.[2]

HN4[↑] When assessing whether a state court order has preclusive effect, federal courts apply the law of the state that issued the order. *SBT Holdings, LLC v. Town of Westminster, 547 F.3d 28, 36 (1st Cir. 2008)* ("Federal courts must give preclusive effect to state court judgments in accordance with state law."). ***HN5***[↑] Under New Hampshire law, collateral estoppel, the doctrine barring relitigation of issues that have been previously decided in other proceedings,[3] is appropriate when the following requirements are met:

> The issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared in the first action, or have been in privity with someone who did so. Further, the party to be estopped must have had a full and fair opportunity to litigate the issue, and the finding must have been essential to the first judgment.

Simpson v. Calivas, 139 N.H. 1, 7, 650 A.2d 318 (1994). Although Baer bears the burden of showing that these requirements are met, see *Thomas v. Contoocook Valley School Dist., 150 F.3d 31 (1st Cir. 1998)*, he does not discuss

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[2] Baer also briefly argues that the state court's rulings are "law of the case." ***HN3***[↑] The law of the case doctrine is inapplicable here because it only applies to prior decisions made in the same litigation. See *Negron-Almeda v. Santiago, 579 F.3d 45, 52 n. 4 (1st Cir. 2009)*.

[3] Baer argues that the facts of the state court order "are barred from being re-decided pursuant to res judicata." ***HN6***[↑] Although in its broadest sense, res judicata encompasses "all the various ways in which a judgment in one action will have a binding effect in another," the court interprets the precise argument here as seeking collateral estoppel, "which prevents the same parties, or their privies, from contesting in a subsequent proceeding on a different cause of action any question or fact actually litigated in a prior suit." *Appeal of Hooker, 142 N.H. 40, 43, 694 A.2d 984, 986 (1997)* (quoting *Scheele v. Village District, 122 N.H. 1015, 1019, 453 A.2d 1281) (1982)*).

the majority of **[*10]** these factors and only argues that the order is preclusive because it is final.

The state court findings are not preclusive under this standard. Leach was not a party to Baer's criminal prosecution. Baer cannot rely on privity doctrine because ***HN7***[] under New Hampshire law there is no privity between a government and its officials who are later sued in their individual capacity. See *Daigle v. City of Portsmouth, 129 N.H. 561, at 569-574, 534 A.2d 689 (1987)*.[4] Furthermore, the issues in the criminal proceeding are not identical to the issues presented here. The state court determined "whether a reasonable trier of fact could find, beyond a reasonable doubt, the Defendant guilty." Dismissal Order, at 3. That standard is more stringent **[*11]** than the standards at issue here. Finally, to the extent that the state court's order touched on the constitutionality of Baer's arrest, that discussion was not "essential" to the decision. See *Calivas, 139 N.H. at 9* (holding that ***HN8***[] findings cannot be a basis for collateral estoppel unless they were essential to the judgment in the prior proceeding). Therefore, the state court order has no preclusive effect here.

B. Claim on the Merits

Leach contends that Baer's claim fails because Leach had probable cause to arrest Baer. Baer argues that probable cause was lacking. The court need not resolve the question on the merits as to whether probable cause existed to arrest Baer because, as explained below, qualified immunity bars the claim.

C. Qualified Immunity

HN10[] Qualified immunity "shields government officials performing discretionary functions from liability for civil damages . . . **[*12]** [if] their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Fernandez-Salicrup v. Figueroa-Sancha, 790 F.3d 312, 325 (1st Cir. 2015)* (internal quotations omitted). "This doctrine 'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Hunt v. Massi, 773 F.3d 361, 367 (1st Cir. 2014)* (quoting *Carroll v. Carman, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311 (2014))*.

HN11[] When assessing whether qualified immunity applies, courts employ a two-prong analysis. *Fernandez-Salicrup, 790 F.3d at 325 (1st Cir. 2015)*. Under the first prong, the court must assess "whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right." Id. (internal quotations omitted). Under the second prong, the court determines "whether the right was 'clearly established' at the time of the defendant's alleged violation." Id. (internal quotation marks omitted). If either prong is not satisfied, qualified immunity applies, and the plaintiff's claim fails. *Rivera-Corraliza v. Morales, 794 F.3d 208, 215 (1st Cir. 2015)*.

HN12[] Courts have the discretion to decide which step of the qualified immunity analysis to conduct first. Id. The Supreme Court has cautioned that courts assessing qualified immunity should avoid answering the constitutional question in the first prong when the analysis would rest on **[*13]** "uncertain interpretation of state law" or when the case is so "factbound" that the precedential value would be meaningless. *Pearson v. Callahan, 555 U.S. 223, 238, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)*; see also *Rivera-Corraliza, 794 F.3d at 215 (1st Cir. 2015)*. Because this case involves the fact-intensive inquiry of probable cause and whether it existed to arrest Baer for state law violations, the court will assess the "clearly established" prong first. See *Cox v. Hainey, 391 F.3d 25 (1st Cir. 2004)* (explaining that ***HN13***[] the probable cause inquiry is "fact-dependent" and "in most of these situations precedent will take a court only so far.").

1. Clearly Established Prong

Baer asserts that his claim satisfies the second prong because it is well-settled that arrests made without a warrant must be supported by probable cause. Although this statement is a correct recitation of well-settled *Fourth Amendment* law, it "sweeps so broadly . . . that it bears very little relationship to the objective legal reasonableness" of Leach's actions. *Iacobucci v. Boulter, 193 F.3d 14, 21-22 (1st Cir. 1998)*. ***HN14***[] Determining whether a right is clearly established for qualified immunity purposes requires assessing the right "in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015)* (per curiam). As a result, the inquiry focuses on "whether the violative nature of [the] particular conduct is clearly established." Id.

Accordingly, **[*14]** ***HN15***[] "[t]o be clearly established, the contours of [a] right must have been 'sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" *Hunt, 773 F.3d at 368* (quoting *Plumhoff v. Rickard, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014))*. To meet this standard, Baer must identify "then-existing precedent . . . [that] placed the statutory or constitutional question . . . beyond debate."

[4] This approach is consistent with the one adopted by most courts in *§ 1983* cases. See *Bilida v. McCleod, 211 F.3d 166 (1st Cir. 2001)* (applying Rhode Island law) ("Although no Rhode Island case in point has been cited to us, ***HN9***[] most precedent indicates that individual state officials are not bound, in their individual capacities, by determinations adverse to the state in prior criminal cases.").

Rivera-Corraliza, 794 F.3d at 215 (quoting *Plumhoff, 134 S. Ct. at 2023*)). In the context of a false arrest claim, such as the one Baer brings here, that means that the qualified immunity standard is satisfied "so long as the presence of probable cause is at least arguable." *Glik v. Cunniffe, 655 F.3d 78, 88 (2011)* (quoting *Ricci v. Urso, 974 F.2d 5, 7 (1st Cir. 1992)*).

i. Probable Cause Standard

HN16[↑] "Probable cause exists when police officers, relying on reasonably trustworthy facts and circumstances, have information upon which a reasonably prudent person would believe the suspect had committed or was committing a crime." *United States v. Pontoo, 666 F.3d 20, 31 (1st Cir. 2011)*. Probable cause does not require certainty or a high degree of assurance, but only a fair probability to believe that the arrestee has committed a crime. See *Holder v. Town of Sandown, 585 F.3d 500, 504 (1st Cir. 2009)*. The probable cause inquiry is an objective one, meaning that the "only relevant facts are those known to the officer." Id. When those facts are in reasonable dispute, the fact-finder must resolve the dispute. **[*15]** Id. But when the facts that the officer knew are not reasonably in dispute, evaluating whether probable cause was present is a question of law. Id.

Leach contends that he is entitled to qualified immunity because he arguably had probable cause under *RSA 644:2, II(e)*, and *RSA 644:2, III(b)* & *(c)* to arrest Baer.

ii. Disturbing Government Business or Assembly

HN17[↑] Under *RSA 644:2, III (b)* & *(c)*, a person is guilty of disorderly conduct if he "purposely causes a breach of peace, public inconvenience, annoyance or alarm, or recklessly creates a risk thereof by . . . [b] [d]isrupting the orderly conduct of business in any public or governmental facility . . . or [c] [d]isrupting any lawful assembly or meeting of persons without lawful authority." Leach contends that based on Baer's conduct it is at least arguable that he had probable cause to arrest Baer for disorderly conduct under *RSA 644:2, III (b)* & *(c)*. Baer, on the other hand, argues that his interference was short and limited, and therefore, his conduct did not constitute a "disruption" under *RSA 644:2, III*.

In support of this contention, Baer cites *State v. Comley, 130 N.H. 688, 546 A.2d 1066 (1988)*. In Comley, the New Hampshire Supreme Court affirmed the conviction of a protestor for disorderly conduct under *RSA 644:2, III (b)* for running down the aisle at Governor **[*16]** Sununu's inaugural while the Sergeant-at-Arms was announcing arriving guests, causing the proceedings to stop for one to one and a half minutes while security officers removed him. *Id. at 690*. Baer argues that because his conduct was not as disruptive as the defendant's in Comley, namely that it only lasted around half a minute and did not cause a formal recess, Leach could not have had probable cause to arrest him under *RSA 644:2, III*. Additionally, Baer argues that under Comley "for speech to amount to the crime of disorderly conduct . . . a person must cause a disturbance significant enough to halt or alter orderly proceedings, thereby justifying the State's restriction of his or her free speech." Pltff's. Mem., Dkt. 12-1, at 8.

Comley, however, only determined that the conviction of the defendant in that case, based on those facts, was supported by the evidence. In Comley, the New Hampshire Supreme Court did not suggest (let alone clearly establish) that a defendant's conduct need be at least as disruptive as the Comley defendant's to constitute a disturbance under *RSA 644:2, III*. Nor does Comley establish a rule requiring a "significant" disturbance to justify regulating speech as disorderly conduct, as Baer **[*17]** argues. To the contrary, in upholding the constitutionality of *RSA 644:2, III*, as applied to the Comley defendant, the Comley court specifically relied on the law's incidental effect on speech, which it held already operated as a permissible time, place, and manner restriction. *Id. at 691-93*.[5] Thus Comley does not, as Baer argues, establish a minimal threshold of conduct required to establish a violation under *RSA 644:2, III*.

In this situation, the length of time and type of disruption **[*18]** are merely factors to be weighed and considered when determining probable cause, along with all of the other attendant circumstances. Based on the factual record, it is undisputed that Leach observed the following events at the school board meeting. Baer disregarded the rules governing public comment by first repeatedly posing questions to the board and then interrupting the meeting by speaking after he had already used his allotted time. After Baer interrupted the meeting, Allen tried multiple times to regain order and to provide others the opportunity to speak. Instead of coming to order, however, Baer spoke loudly over Allen and responded to her requests by mocking them and

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[5] To the extent Baer argues that *RSA 644:2, III(b)*, as interpreted by Comley, requires an additional *First Amendment* inquiry into whether the speech being restricted was compatible with the environment in which it was made, the court disagrees. In Comley, the New Hampshire Supreme Court held that ***HN18***[↑] *RSA 644:2, III(b)* is a permissible and reasonable time, place, and manner restriction as it applies to all speech because "the statute prohibits only that speech whose exercise, as distinct from its contents, interferes with the government's interest in preserving order in its business." *130 N.H. at 691-92*. In any event, Baer has cited no authority supporting the proposition that speaking out of order and violating time restrictions are acts "compatible" with the normal functioning of a school board.

stating "why don't you arrest me?" During this time, Allen signaled to Leach for his assistance.

These facts, observed by Leach, demonstrate that Baer interfered with both the orderly business of the school board and Allen's efforts to run an orderly school board meeting. Although, as Baer argues, his comments may have been short in duration, he has cited no authority that would have made it clear to Leach that such a disruption was too short to constitute a violation under *RSA 644:2, III*. This lack of clarity is further **[*19]** supported by Baer's prior violation of the rules and antagonistic refusal to come to order, both of which weighed in favor of arresting Baer for disorderly conduct, despite the short duration of his interruption.

Under these circumstances, it was at least arguable that Leach had probable cause to arrest Baer for disorderly conduct under *RSA 644:2, III (b)* & *(c)*. In other words, it was not the case that any reasonable officer in Leach's shoes would have understood that arresting Baer violated his *Fourth Amendment* rights.

iii. Failure to Comply with a Lawful Order

In addition, Leach is entitled to qualified immunity for the arrest under *RSA 644:2, II(e)*. ***HN19***[↑] *RSA 644:2, II(e)*, provides that a person is guilty of disorderly conduct if "he or she . . . knowingly refuses to comply with a lawful order of a peace officer to move from or remain away from any public place." *RSA 644:2* further defines a "lawful order" as "a command issued to any person for the purpose of preventing said person from committing any offense set forth in this section . . . when the officer has reasonable grounds to believe that said person is about to commit any such offense, or when the said person is engaged in a course of conduct which makes his commission of such an offense **[*20]** imminent." *RSA 644:2, V (a) (1)*.

Leach argues that Baer's course of conduct provided reasonable grounds for him to believe that he would imminently commit disorderly conduct. Because of that conduct, Leach contends that Baer's refusal to comply with his lawful order made probable cause to arrest under *RSA 644:2, II(e)* at least arguable. Baer, however, contends that probable cause did not exist because Leach's order requiring him to leave the meeting was not a "lawful order" under *RSA 644:2, II(e)*.

In support of this argument, Baer cites *State v. Dominic, 117 N.H. 573, 575, 376 A.2d 124 (1977)*. In Dominic, the New Hampshire Supreme Court, responding to a question transferred to it by the Superior Court, held that a town selectman could be found guilty for refusing to comply with a lawful order of a police officer to leave a selectmen's meeting. *Id. at 576*. The court in Dominic determined that the officer's order was "lawful" because the defendant continually interrupted another speaker, argued with the chairman concerning his rulings, and ignored the chairman's attempts to regain order. *Id. at 575*. Baer, however, points out that the defendant in Dominic was asked to leave only after he interrupted the meeting on multiple occasions and was warned that continuing to do so would result in **[*21]** his removal.

In Dominic, the New Hampshire Supreme Court only determined that the evidence at issue could support a conviction for disorderly conduct. Dominic does not hold that there is a specified number of interruptions required before a police officer can lawfully order a person to leave a public meeting. Dominic also does not hold that a warning is a prerequisite for an officer to issue a "lawful order." In fact, the chair's warning to the defendant in Dominic does not even appear to be material to the court's analysis. See *Dominic, 376 A.2d at 126*.[6]

More importantly, however, Dominic was decided in 1977, before the New Hampshire legislature defined "lawful order" under *RSA 644:2*. See *State v. Biondolillo, 164 N.H. 370, 378, 55 A.3d 1034 (2012)*. Pursuant to that definition, Leach needed "reasonable grounds to believe" that Baer was engaged in a course of conduct that made his **[*22]** commission of disorderly conduct imminent. See *RSA 644:2, V(a)(1)*. As discussed above, Leach observed Baer violate the rules governing the public comment session multiple times and refuse to come to order despite Allen's request that he allow others the opportunity to speak. Based on Baer's course of conduct and his persistence in the face of entreaties by Allen to respect other speakers, a reasonable officer could have determined that Baer would continue interfering with the school board meeting, making his disorderly conduct under sections *RSA 644:2, III (b)* & *(c)* imminent.[7]

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[6] Baer also argues that Leach's order was not lawful because, unlike in Dominic, there was no formal recess after he refused to comply with Leach's order. Baer, however, does not explain how a subsequent event has any bearing on whether an officer's order was "lawful" at the time it was made. In addition, the court in Dominic did not rely on the meeting's formal recess in its lawful order analysis. See *117 N.H. at 575-76*.

[7] Baer argues briefly that Leach's order could not have been lawful because it violated Baer's right under the New Hampshire Constitution that his "access to governmental proceedings and records shall not be unreasonably restricted." See N.H. Const., I, Art. 8. Baer cites no authority, nor has the court identified any, to support the proposition that removing a person who continually speaks out of order at a public meeting is an unreasonable restriction on the New Hampshire Constitution's right to access governmental proceedings.

Accordingly, when Baer responded **[*23]** to Leach's order by saying "I guess you're gonna have to arrest me," see Pltff's. Mem. at 3, probable cause to arrest Baer under *RSA 644:2, II(e)* was at least arguable, i.e., it was not the case that any reasonable officer in Leach's shoes would have understood that arresting Baer violated his *Fourth Amendment* rights.[8]

II. *First Amendment*

Baer also contends that Leach is not entitled to summary judgment on the merits or on qualified immunity because a reasonable officer would have known that his speech was protected under the *First Amendment*, and therefore could not serve as the basis for probable cause to arrest. Baer did not bring a claim alleging a violation of the *First Amendment*. Therefore, he has not properly raised a *First Amendment* issue. Further, Baer's *First Amendment* theory is not persuasive.

HN21[↑] The central and dispositive inquiry in a false arrest claim under the *Fourth Amendment*, like the one **[*24]** Baer brings in this lawsuit, is whether the officer had probable cause to arrest the plaintiff. See *United States v. McFarlane, 491 F.3d 53, 56 (1st Cir. 2007)* ("An arrest does not contravene the *Fourth Amendment's* prohibition on unreasonable seizures so long as the arrest is supported by probable cause"). That inquiry "is no different where *First Amendment* concerns may be at issue." *United States v. Brunette, 256 F.3d 14, 17 (1st Cir. 2001)* (considering probable cause in the search context); *McCabe v. Parker, 608 F.3d 1068, 1077 (8th Cir. 2010)* (making the same point in arrest context).[9] Therefore, Baer's attempt to conflate these standards is contrary to the applicable legal standard.

Conclusion

Because Leach at least arguably had probable cause under *RSA 644:2, II(e)*, *III(b)* & *(c)*, he is entitled to qualified immunity. Based on qualified immunity, Leach is entitled to summary judgment on Baer's *§ 1983* false arrest claim.

For the foregoing reasons, the defendant's motion for summary judgment (document no. 9) is granted.

The clerk of court shall enter judgment **[*25]** accordingly and close the case.

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.

Joseph A. DiClerico, Jr.

United States District Judge

November 24, 2015

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The court finds that removing Baer was reasonable under the circumstances.

[8] Baer also argues that probable cause could not have existed because Leach admitted in his deposition that he only arrested Baer because Baer consented to arrest. As discussed above, however, ***HN20***[↑] Leach's subjective intent during the arrest is irrelevant to the probable cause inquiry. *Morelli v. Webster, 552 F.3d 12, 22 (1st Cir. 2009)* (holding that police officer's statement "I'm not arresting you, I can't arrest you" is irrelevant to probable cause inquiry).

[9] Furthermore, to the extent that Baer argues that Leach violated the *First Amendment* by arresting him because of his speech, Leach would be entitled to qualified immunity so long as the arrest was supported by probable cause. See *Reichle v. Howards, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012)* (holding that as of 2006, "it was not clearly established that an arrest supported by probable cause could give rise to a *First Amendment* violation").

User Name: Geoffrey Gallagher
Date and Time: Tuesday, May 3, 2022 1:14:00 PM EDT
Job Number: 170282928

Document (1)

1. *Lamb v. Danville Sch. Bd., 102 N.H. 569*
   Client/Matter: 4532-18
   Search Terms: 102 N.H. 569
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

Lamb v. Danville Sch. Bd.

Supreme Court of New Hampshire

July 14, 1960, Argued ; July 19, 1960, Decided

No. 4872

Reporter
102 N.H. 569 *; 162 A.2d 614 **; 1960 N.H. LEXIS 83 ***

Edward R. Lamb v. Danville School Board

Disposition: [*1]** Petition dismissed.

All concurred.

Core Terms

moderator, school district, parliamentary, meetings, prescribe a rule, town meeting, no question, void

Headnotes/Summary

Headnotes

Vote at special school district meeting to appropriate particular sum for construction of school and to issue bonds therefor was not rendered invalid by fact that moderator had previously permitted those attending meeting to vote upon other proposed sums which were defeated, where no statutory duty of moderator was violated and no appeal from his ruling was taken by any voter in course of meeting.

Moderator of school district meeting is granted wide discretion in prescribing rules for government and conduct of such meetings and parliamentary rules in all their detail are not required to be observed thereat.

Petition, by the plaintiff, a voting resident of the town of Danville and representing other members of the school district of that town, seeking an order to restrain the defendant school board of Danville from pledging credit of the town by a bond issue for the purpose of securing funds to build a new elementary school. Pursuant to a decree of the Superior Court allowing the Danville school district to hold a special meeting the school district on June 6, 1960, voted to raise, appropriate and to issue bonds in the amount of $ 95,000 for the construction, equipment and furnishing of a new elementary school. This affirmative vote by ballot received the necessary two-thirds vote, 97 yes and 46 no, but is challenged by the plaintiff as illegal. Trial by the Court on June 14, 1960, resulted in a decree favorable to the school district. The plaintiff's exceptions to the Court's findings and rulings were reserved and transferred by *Griffith*, J.

The motion on which the balloting occurred read as follows: "To see if the District will vote to raise and appropriate a sum of $ 95,000.00 for the construction, equipment and furnishing of such new elementary school and the acquisition of any real property that may be necessary for its location; and whether the district will vote to raise such sum through the issuance of serial notes or bonds upon the credit of the district for all or any portion of the sum so raised and appropriated; and to authorize the school board to determine the terms and condition upon which the notes or bonds shall be issued including their sale and the time and place of payment of principal and interest, in accordance with the provisions of the Municipal Finance Act, New Hampshire Revised Laws Annotated, Chapter 33, and any amendments thereto.'"

This vote contained the same language as the article in the warrant except that the amount in the latter was "a sum not to exceed $ 98,000" instead of $ 95,000. The ballot vote to raise $ 95,000 prevailed only after motions to appropriate $ 60,000 and $ 98,000 had been defeated. It is the contention of the plaintiff that after the initial defeat of the motions to appropriate $ 60,000 and $ 98,000 it was illegal for the school district meeting to take a subsequent vote to raise, appropriate and issue bonds in the sum of $ 95,000. Additional facts are stated in the opinion.

Counsel: *Robert Shaw* (by brief and orally), for the plaintiff.

George H. Grinnell (by brief and orally), for the defendant.

Opinion by: KENISON

Opinion

[*571] **[**616]** Mr. Justice *Holmes'* reminder "that the machinery of government would not work if it were not allowed a little play in its joints" (*Bain Peanut Co. of Texas v. Pinson, 282 U.S. 499, 501, 75 L. Ed. 482, 51 S. Ct. 228*), has had particular application in this jurisdiction to town and school meetings. More than three-quarters of a century ago it was established in *Hill v. Goodwin, 56 N.H. 441, 447*, that parliamentary rules in all their detail were not required to be followed in town meetings. "However wise or necessary such rules may be for legislative bodies, they are not adapted to the successful or prompt dispatch of business in town-meetings; and the statute therefore wisely allows the moderator a large discretion in prescribing rules for the government of his meeting, subject only to revision by the town." *Hill v. Goodwin, supra.* While this statement was made in regard to a town meeting, a similar statute and a similar rule applies in the conduct of school district meetings. *RSA 40:4* **[***2]** and *RSA 197:19*. The latter statute reads as follows: "The moderator shall have the like power and duty as a moderator of a town meeting to conduct the business and to preserve order, and may administer oaths to district officers and in the district business. In case of a vacancy or absence a moderator *pro tempore* may be chosen." These sections give the moderator a wide discretion in prescribing rules for the government of a school district meeting. *Leonard v. School District, 98 N.H. 296, 99 A.2d 415*.

It has been the consistent practice of the courts of this state to construe liberally votes at town and school meetings without regard to technicalities or the strict rules of parliamentary procedure. *New London v. Davis, 73 N.H. 72, 59 A. 369*; *Amey v. Pittsburg School District, 95 N.H. 386, 64 A.2d 1*; *Mace v. Salomon, 99 N.H. 370, 111 A.2d 528*. Irregularities "where a moderator failed to observe the niceties of parliamentary procedure involving no violation of statutes" (*Leonard v. School District, 98 N.H. 296, 298, 99 A.2d 415*) are not sufficient to void the action of a school district meeting. In the present dispute there is no question about official neglect of duty on the part of the moderator. **[***3]** *State v. Waterhouse, 71 N.H. 488, 53 A. 304*. **[*572]** Likewise there is no question that no appeal was taken by any voter from the rulings of the moderator during the course of the meeting. Since it does not appear that the procedure adopted by the school district violated any statutory duty but at most was a violation of parliamentary procedure, there is no basis for holding that the resulting vote was void or illegal. *Wood v. Milton, 197 Mass. 531, 84 N.E. 332*.

Petition dismissed.

All concurred.

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User Name: Geoffrey Gallagher
Date and Time: Tuesday, May 3, 2022 1:13:00 PM EDT
Job Number: 170282875

Document (1)

1. *State v. Dominic, 117 N.H. 573*
   Client/Matter: 4532-18
   Search Terms: 117 N.H. 573
   Search Type: Natural Language
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

State v. Dominic

Supreme Court of New Hampshire

July 11, 1977

No. 7544

Reporter
117 N.H. 573 *; 376 A.2d 124 **; 1977 N.H. LEXIS 384 ***

The State of New Hampshire v. John Dominic

Prior History: [*1]** Appeal from Belknap County.

Disposition: *Remanded*.

Core Terms

district court, find guilty, interrupt, removal, police officer, lawful order, public inconvenience, board of selectmen, disorderly conduct, right to freedom, orderly manner, superior court, public place, town hall, transferred, annoyance, ordering, decree, alarm, floor

Case Summary

Procedural Posture

Defendant appealed the order from the Laconia District Court (New Hampshire), which convicted him of disorderly conduct for his failure to comply with a police officer's order to move from a public place in violation of *N.H. Rev. Stat. Ann. § 644:2* I. Defendant appealed to the Superior Court, Belknap County, which reserved and transferred to the court the question of whether, based upon the record and the facts, defendant could be found guilty.

Overview

During a meeting of the selectmen for the town of Belmont at the town hall, defendant, who was one of three selectmen, got into a shouting argument with the chairman. The chairman left the room and returned with a police officer who, pursuant to the chairman's request, asked defendant to step out of the room. Defendant refused and said that he would not leave unless he was arrested. At that point the meeting was recessed. Defendant was charged with causing public inconvenience and with refusing to comply with a police officer's lawful order. The district court found that defendant was acting as a duly elected member of the Board of Selectmen and thus there was no basis for a conviction for public inconvenience. However, it convicted him of refusing to comply with the lawful order of a police officer. On appeal, the case was transferred and the court found that based on the record and the facts, defendant could be found guilty of the offense charged. The court found that the police officer's order, at the direction of the chairman, was a lawful order, and by refusing to comply defendant could be found guilty of disorderly conduct in violation of *§ 644:2* I.

Outcome
The court found that based upon the record and the facts, defendant could be found guilty of disorderly conduct by refusing to comply with the lawful order of a police officer.

Headnotes/Summary

Headnotes

1. Breach of the Peace--Disorderly Conduct

Where a town selectman continually interrupted another selectman who had the floor according to the chairman's ruling, argued with the chairman and refused to come to order, chairman had authority to order him from the room, and since chairman could properly ask for assistance of a police officer in removing him, officer's order to defendant to step outside was lawful order, and on basis of these facts, defendant could properly be found guilty of disorderly conduct. *RSA 644:2 I*.

2. Constitutional Law--Freedom of Speech and Press--Public Officials

Actions of chairman of board of selectmen and police officer in ordering a selectman's removal from board meeting for continually interrupting another selectman who had the floor and arguing with the chairman did not violate his right to freedom of speech under United States and New Hampshire Constitutions, where selectman, by his conduct, had prevented

meeting from continuing, and chairman was acting to maintain order and to protect rights of others to speak in orderly manner as well as rights of offending selectman.

Counsel: *David H. Souter*, attorney general, waived brief and oral argument for the state.

Decker & Hemeon, of Laconia (*Mr. Robert L. Hemeon* orally), for the defendant.

Wescott, Millham & Dyer of Laconia (*Mr. Peter V. Millham* orally), for the prosecution.

Judges: Lampron, J. All concurred.

Opinion by: LAMPRON

Opinion

[*574] **[**125]** Defendant was found guilty in the Laconia District Court (*Snierson*, J.) of disorderly conduct for his failure to comply with the lawful order of a police officer to move from a public place in violation of *RSA 644:2 I*. Defendant appealed his conviction to the superior court. The Superior Court (*Batchelder*, J.) reserved and transferred to this court the question "whether or not based upon the record and the facts as found in the decision of the District Court the Defendant could be found guilty of the offense."

According to the decree of the district court, the facts are as follows. The incident occurred in the course of a meeting of the selectmen for the town of Belmont at the town hall. Defendant was one of the three selectmen. The complainant in this case, Romeo Clairmont, **[***2]** was chairman of the board of selectmen. The third selectman was Louis Wuelper. Also present at the meeting were two highway department employees and two members of the general public. After Mr. Wuelper had been discussing an issue before the board at some length, defendant attempted to interrupt him. When Mr. Wuelper asked for a ruling as to whether he could continue to speak he was told by Chairman Clairmont to "go ahead." Defendant continued to interrupt, although Clairmont announced that he was chairman of the meeting and that Mr. Wuelper had the floor. Defendant interrupted to request a ruling to limit a speaker's time. At that point a shouting argument developed between Chairman Clairmont and defendant, during which Clairmont told defendant he would be ordered out of the meeting room if he did not quiet down and come to order. Clairmont then left the room and returned with Police Officer Bennett who asked defendant to "step out [of the room] for a minute, please." Defendant refused. Although Officer Bennett explained to defendant that he had been ordered by the chairman to leave, defendant answered that he had no intention of leaving unless he was arrested. At that **[***3]** point the meeting was recessed for approximately one-and-one-half **[*575]** hours. Defendant was not present when the meeting reconvened.

The initial complaint, signed by Mr. Clairmont, charged that defendant "did with a purpose to cause public inconvenience, annoyance or alarm, engage in tumultous [sic] behavior" and that he refused to desist therefrom after being so ordered by the chairman. The district court found that defendant neither purposely nor recklessly created a risk of public inconvenience, annoyance, or alarm. In its decree the court further stated, "[h]owever abrasive and obtrusive he was, he was acting as a duly elected member of the Belmont Board of Selectmen and his remarks although clearly offensive both to Mr. Wuelper and to the chairman could be found to be consistent with the performance of his duties as a Selectman as he saw it." The court therefore found no basis for a conviction under any of the provisions of paragraph II of *RSA 644:2*. *See State v. Oliveira, 115 N.H. 559, 347 A.2d 165 (1975)*.

By amendment to the complaint, defendant was also charged with refusal "to comply with the lawful order of James Bennett, a police officer, to move from **[***4]** a public place, to wit: the Belmont Selectmen's Office in the Belmont Town Hall. . . ." in violation of *RSA 644:2 I*. Defendant was found guilty under this provision. The court found that "the disorder at the Selectmen's meeting . . . became so great that the Board ceased to be a deliberative body and could not at that time perform its **[**126]** proper function of a consideration of the affairs of the Town." The court considered the chairman's action in ordering defendant out of the room to be within his authority as chairman, seeking to conduct an orderly meeting. *See* P. Mason, Manual of Legislative Procedure § 120 (1970). The court further found that "[w]hen the defendant refused to leave and continued to deny the authority of the Chairman, the latter was left no reasonable alternative than to seek police assistance in the removal."

As Officer Bennett was acting under the direction of Chairman Clairmont at the time, the issue before us is whether Chairman Clairmont could lawfully order defendant's removal from the selectmen's meeting. As presiding officer of the board of selectmen, Chairman Clairmont had the responsibility of conducting the meeting in an orderly manner. **[***5]** 4 E. McQuillin, Municipal Corporations § 13.21 (3d ed. 1968). When defendant continued to interrupt Mr. Wuelper, who had the floor according to the chairman's ruling, and when defendant continued to argue with the

chairman **[*576]** and refused to come to order, the chairman had the authority to order him from the room. *See* *Attorney-General v. Remick, 73 N.H. 25, 29, 58 A. 871, 873 (1904)*; *Arrington v. Moore, 31 Md. App. 448, 460-61, 358 A.2d 909, 916 (1976)*; *Doggett v. Hooper, 306 Mass. 129, 27 N.E.2d 737 (1940)*. When defendant refused to leave, the chairman could properly ask for the assistance of Officer Bennett in removing him. *See* *Arrington v. Moore supra.* Officer Bennett's order to defendant to step outside was therefore a lawful order, and on the basis of these facts defendant could properly be found guilty of disorderly conduct in violation of *RSA 644:2 I*.

The actions of the chairman and of Officer Bennett in ordering defendant's removal from the meeting did not violate his right to freedom of speech under the United States and New Hampshire Constitutions. The district court found that defendant, by his conduct, had prevented the selectmen from continuing **[***6]** their meeting. The chairman was acting to maintain order, as was his duty, and to protect the rights of others to speak in an orderly manner as well as those of the defendant. Such reasonable regulation of the manner in which one may speak does not violate any right to freedom of expression. *State v. Albers, 113 N.H. 132, 139, 303 A.2d 197, 202 (1973)*; *State v. Derrickson, 97 N.H. 91, 93, 81 A.2d 312, 313 (1951)*; *Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)*; *Cox v. Louisiana, 379 U.S. 536, 554 (1965)*.

We hold that the answer to the transferred question is "Yes." Based upon the record and the facts as found in the decision of the district court, the defendant could be found guilty of the offense charged. *RSA 644:2 I*.

Remanded.

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TITLE VI
PUBLIC OFFICERS AND EMPLOYEES

Chapter 91-A
ACCESS TO GOVERNMENTAL RECORDS AND MEETINGS

Section 91-A:1

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

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

Section 91-A:1-a

91-A:1-a Definitions. –
In this chapter:
I. "Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to 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.
II. "Governmental proceedings" means the transaction of any functions affecting any or all citizens of the state by a public body.
III. "Governmental records" means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."
IV. "Information" means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.
V. "Public agency" means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.
VI. "Public body" means any of the following:
(a) The general court including executive sessions of committees; and including any advisory committee established by the general court.
(b) The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.
(c) Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.
(d) 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.
(e) Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

Source. 1977, 540:2. 1986, 83:2. 1989, 274:1. 1995, 260:4. 2001, 223:1. 2008, 278:3, eff. July 1, 2008 at 12:01 a.m.; 303:3, eff. July 1, 2008; 303:8, eff. Sept. 5, 2008 at 12:01 a.m.; 354:1, eff. Sept. 5, 2008.

Section 91-A:2

91-A:2 Meetings Open to Public. –

I. For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include:

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

(b) Consultation with legal counsel;

(c) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

II. Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings. Minutes of all such meetings, including nonpublic sessions, shall include the names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions. The names of the members who made or seconded each motion shall be recorded in the minutes. Subject to the provisions of RSA 91-A:3, minutes shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. For the purposes of this paragraph, a business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays.

II-a. If a member of the public body believes that any discussion in a meeting of the body, including in a nonpublic session, violates this chapter, the member may object to the discussion. If the public body continues the discussion despite the objection, the objecting member may request that his or her objection be recorded in the minutes and may then continue to participate in the discussion without being subject to the penalties of RSA 91-A:8, IV or V. Upon such a request, the public body shall record the member's objection in its minutes of the meeting. If the objection is to a discussion in nonpublic session, the objection shall also be recorded in the public minutes, but the notation in the public minutes shall include only the member's name, a statement that he or she

objected to the discussion in nonpublic session, and a reference to the provision of RSA 91-A:3, II, that was the basis for the discussion.
II-b. (a) If a public body maintains an Internet website or contracts with a third party to maintain an Internet website on its behalf, it shall either post its approved minutes in a consistent and reasonably accessible location on the website or post and maintain a notice on the website stating where the minutes may be reviewed and copies requested.
(b) If a public body chooses to post meeting notices on the body's Internet website, it shall do so in a consistent and reasonably accessible location on the website. If it does not post notices on the website, it shall post and maintain a notice on the website stating where meeting notices are posted.
III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.
(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.
(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.
(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.
(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.
(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.

Source. 1967, 251:1. 1969, 482:1. 1971, 327:2. 1975, 383:1. 1977, 540:3. 1983, 279:1. 1986, 83:3. 1991, 217:2. 2003, 287:7. 2007, 59:2. 2008, 278:2, eff. July 1, 2008 at 12:01 a.m.; 303:4, eff. July 1, 2008. 2016, 29:1, eff. Jan. 1, 2017. 2017, 165:1, eff. Jan. 1, 2018; 234:1, eff. Jan. 1, 2018. 2018, 244:1, eff. Jan. 1, 2019.

Section 91-A:2-a

91-A:2-a Communications Outside Meetings. –
I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III.
II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

Source. 2008, 303:4, eff. July 1, 2008.

Section 91-A:2-b

91-A:2-b Repealed by 2012, 232:14, eff. Dec. 1, 2012. –

Section 91-A:3

91-A:3 Nonpublic Sessions. –

I. (a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.

(b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.

(c) All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion.

II. Only the following matters shall be considered or acted upon in nonpublic session:

(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.

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

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.

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

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph.

(f) [Repealed.]

(g) Consideration of security-related issues bearing on the immediate safety of security personnel or inmates at the county or state correctional facilities by county correctional superintendents or the commissioner of the department of corrections, or their designees.

(h) Consideration of applications by the business finance authority under RSA 162-A:7-10 and 162-A:13, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application.

(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

(j) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A.

(k) Consideration by a school board of entering into a student or pupil tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations. A contract negotiated by a school board shall be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, shall be made public. Approval of a contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate.

(l) Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.

(m) Consideration of whether to disclose minutes of a nonpublic session due to a change in circumstances under paragraph III. However, any vote on whether to disclose minutes shall take place in public session.

III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. For all meetings held in nonpublic session, where the minutes or decisions were determined to not be subject to full public disclosure, a list of such minutes or decisions shall be kept and this list shall be made available as soon as practicable for public disclosure. This list shall identify the public body and include the date and time of the meeting in nonpublic session, the specific exemption under paragraph II on its face which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the minutes or decisions from public disclosure, and the date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure. Minutes related to a discussion held in nonpublic session under subparagraph II(d) shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.

Source. 1967, 251:1. 1969, 482:2. 1971, 327:3. 1977, 540:4. 1983, 184:1. 1986, 83:4. 1991, 217:3. 1992, 34:1, 2. 1993, 46:1; 335:16. 2002, 222:2, 3. 2004, 42:1. 2008, 303:4. 2010, 206:1, eff. June 22, 2010. 2015, 19:1; 49:1; 105:1, eff. Jan. 1, 2016; 270:2, eff. Sept. 1, 2015. 2016, 30:1, eff. Jan. 1, 2017; 280:1, eff. June 21, 2016. 2021, 48:7(I), eff. May 25, 2021; 163:1, eff. Jan. 1, 2022; 172:1, eff. Jan. 1, 2022.

Section 91-A:4

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

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

I-a. Records of any payment made to an employee of any public body or agency listed in RSA 91-A:1-a, VI(a)-(d), or to the employee's agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3.

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

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

III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in

accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.
III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.
IV. (a) Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release.
(b) If a public body or agency is unable to make a governmental record available for immediate inspection and copying the public body or agency shall, within 5 business days of a request:
(1) Make such record available;
(2) Deny the request; or
(3) Provide a written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay.
(c) A public body or agency denying, in whole or part, inspection or copying of any record shall provide a written statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.
(d) 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. No cost or fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.
V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.
VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.
VII. 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.

Source. 1967, 251:1. 1983, 279:2. 1986, 83:5. 1997, 90:2. 2001, 223:2. 2004, 246:2. 2008, 303:4. 2009, 299:1, eff. Sept. 29, 2009. 2016, 283:1, eff. June 21, 2016. 2019, 107:1, eff. Jan. 1, 2020; 163:2, eff. Jan. 1, 2020 at 12:01 a.m.

Section 91-A:5

91-A:5 Exemptions. –
The following governmental records are exempted from the provisions of this chapter:
I. Records of grand and petit juries.
I-a. The master jury list as defined in RSA 500-A:1, IV.
II. Records of parole and pardon boards.
III. Personal school records of pupils, including the name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the assessment under RSA 193-C:6.

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public 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.
V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.
VI. Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.
VII. Unique pupil identification information collected in accordance with RSA 193-E:5.
VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.
IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.
X. Video and audio recordings made by a law enforcement officer using a body-worn camera pursuant to RSA 105-D except where such recordings depict any of the following:
(a) Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.
(b) The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.
(c) An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure.
XI. Records pertaining to information technology systems, including cyber security plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed.
XII. Records protected under the attorney-client privilege or the attorney work product doctrine.

Source. 1967, 251:1. 1986, 83:6. 1989, 184:2. 1990, 134:1. 1993, 79:1. 2002, 222:4. 2004, 147:5; 246:3, 4. 2008, 303:4, eff. July 1, 2008. 2013, 261:9, eff. July 1, 2013. 2016, 322:3, eff. Jan. 1, 2017. 2018, 91:2, eff. July 24, 2018. 2019, 54:1, eff. Aug. 4, 2019. 2021, 163:2, eff. July 30, 2021.

Section 91-A:5-a

91-A:5-a Limited Purpose Release. – Records from non-public sessions under RSA 91-A:3, II(i) or that are exempt under RSA 91-A:5, VI may be released to local or state safety officials. Records released under this section shall be marked "limited purpose release" and shall not be redisclosed by the recipient.

Source. 2002, 222:5, eff. Jan. 1, 2003.

Section 91-A:6

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

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

Section 91-A:7

91-A:7 Violation. – Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief. In order to satisfy the purposes of this chapter, the courts shall give proceedings under this chapter high priority on the court calendar. Such a petitioner may appear with or without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter, and may be filed by the petitioner or his or her counsel with the clerk of court or any justice thereof. Thereupon the clerk of court or any justice shall order service by copy of the petition on the person or persons charged. Subject to objection by either party, all documents filed with the petition and any response thereto shall be considered as evidence by the court. All documents submitted shall be provided to the opposing party prior to a hearing on the merits. When any justice shall find that time probably is of the essence, he or she may order notice by any reasonable means, and he or she shall have authority to issue an order ex parte when he or she shall reasonably deem such an order necessary to insure compliance with the provisions of this chapter.

Source. 1967, 251:1. 1977, 540:5. 2008, 303:5, eff. July 1, 2008. 2018, 289:1, eff. Jan. 1, 2019.

Section 91-A:8

91-A:8 Remedies. –

I. If any public body or public agency or officer, employee, or other official thereof, violates any provisions of this chapter, such public body or public agency shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter. Fees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter or if the parties, by agreement, provide that no such fees shall be paid.

II. The court may award attorney's fees to a public body or public agency or employee or member thereof, for having to defend against a lawsuit under the provisions of this chapter, when the court finds that the lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive.

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

IV. If the court finds that an officer, employee, or other official of a public body or public agency has violated any provision of this chapter in bad faith, the court shall impose against such person a civil penalty of not less than $250 and not more than $2,000. Upon such finding, such person or persons may also be required to reimburse the public body or public agency for any attorney's fees or costs it paid pursuant to paragraph I. If the person is an officer, employee, or official of the state or of an agency or body of the state, the penalty shall be deposited in the general fund. If the person is an officer, employee, or official of a political subdivision of the state or of an agency or body of a political subdivision of the state, the penalty shall be payable to the political subdivision.

V. The court may also enjoin future violations of this chapter, and may require any officer, employee, or other official of a public body or public agency found to have violated the provisions of this chapter to undergo appropriate remedial training, at such person or person's expense.

Source. 1973, 113:1. 1977, 540:6. 1986, 83:7. 2001, 289:3. 2008, 303:6. 2012, 206:1, eff. Jan. 1, 2013.

Section 91-A:8-a

91-A:8-a Repealed by 2017, 126:2, eff. November 1, 2017. –

Section 91-A:9

91-A:9 Destruction of Certain Information Prohibited. – A person is guilty of a misdemeanor who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter. If a request for inspection is denied on the grounds that the information is exempt under this chapter, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending.

Source. 2002, 175:1, eff. Jan. 1, 2003.

Procedure for Release of Personal Information for Research Purposes

Section 91-A:10

91-A:10 Release of Statistical Tables and Limited Data Sets for Research. –
I. In this subdivision:
(a) "Agency" means each state board, commission, department, institution, officer or other state official or group.
(b) "Agency head" means the head of any governmental agency which is responsible for the collection and use of any data on persons or summary data.
(c) "Cell size" means the count of individuals that share a set of characteristics contained in a statistical table.
(d) "Data set" means a collection of personal information on one or more individuals, whether in electronic or manual files.
(e) "Direct identifiers" means:
(1) Names.
(2) Postal address information other than town or city, state, and zip code.
(3) Telephone and fax numbers.
(4) Electronic mail addresses.
(5) Social security numbers.
(6) Certificate and license numbers.
(7) Vehicle identifiers and serial numbers, including license plate numbers.
(8) Personal Internet IP addresses and URLs.
(9) Biometric identifiers, including finger and voice prints.
(10) Personal photographic images.
(f) "Individual" means a human being, alive or dead, who is the subject of personal information and includes the individual's legal or other authorized representative.
(g) "Limited data set" means a data set from which all direct identifiers have been removed or blanked.
(h) "Personal information" means information relating to an individual that is reported to the state or is derived from any interaction between the state and an individual and which:
(1) Contains direct identifiers.
(2) Is under the control of the state.
(i) "Provided by law" means use and disclosure as permitted or required by New Hampshire state law governing programs or activities undertaken by the state or its agencies, or required by federal law.
(j) "Public record" means records available to any person without restriction.
(k) "State" means the state of New Hampshire, its agencies or instrumentalities.
(l) "Statistical table" means single or multi-variate counts based on the personal information contained in a data set and which does not include any direct identifiers.
II. Except as otherwise provided by law, upon request an agency shall release limited data sets and statistical tables with any cell size more than 0 and less than 5 contained in agency files to requestors for the purposes of research under the following conditions:
(a) The requestor submits a written application that contains:
(1) The following information about the principal investigator in charge of the research:
(A) name, address, and phone number;
(B) organizational affiliation;
(C) professional qualification; and

(D) name and phone number of principal investigator's contact person, if any.
(2) The names and qualifications of additional research staff, if any, who will have access to the data.
(3) A research protocol which shall contain:
(A) a summary of background, purposes, and origin of the research;
(B) a statement of the general problem or issue to be addressed by the research;
(C) the research design and methodology including either the topics of exploratory research or the specific research hypotheses to be tested;
(D) the procedures that will be followed to maintain the confidentiality of any data or copies of records provided to the investigator; and
(E) the intended research completion date.
(4) The following information about the data or statistical tables being requested:
(A) general types of information;
(B) time period of the data or statistical tables;
(C) specific data items or fields of information required, if applicable;
(D) medium in which the data or statistical tables are to be supplied; and
(E) any special format or layout of data requested by the principal investigator.
(b) The requestor signs a "Data Use Agreement" signed by the principal investigator that contains the following:
(1) Agreement not to use or further disclose the information to any person or organization other than as described in the application and as permitted by the Data Use Agreement without the written consent of the agency.
(2) Agreement not to use or further disclose the information as otherwise required by law.
(3) Agreement not to seek to ascertain the identity of individuals revealed in the limited data set and/or statistical tables.
(4) Agreement not to publish or make public the content of cells in statistical tables in which the cell size is more than 0 and less than 5 unless:
(A) otherwise provided by law; or
(B) the information is a public record.
(5) Agreement to report to the agency any use or disclosure of the information contrary to the agreement of which the principal investigator becomes aware.
(6) A date on which the data set and/or statistical tables will be returned to the agency and/or all copies in the possession of the requestor will be destroyed.
III. The agency head shall release limited data sets and statistical tables and sign the Data Use Agreement on behalf of the state when:
(a) The application submitted is complete.
(b) Adequate measures to ensure the confidentiality of any person are documented.
(c) The investigator and research staff are qualified as indicated by:
(1) Documentation of training and previous research, including prior publications; and
(2) Affiliation with a university, private research organization, medical center, state agency, or other institution which will provide sufficient research resources.
(d) There is no other state law, federal law, or federal regulation prohibiting release of the requested information.
IV. Within 10 days of a receipt of written application, the agency head, or designee, shall respond to the request. Whenever the agency head denies release of requested information, the agency head shall send the requestor a letter identifying the specific criteria which are the basis of the denial. Should release be denied due to other law, the letter shall identify the specific state law, federal law, or federal regulation prohibiting the release. Otherwise the agency head shall provide the requested data or set a date on which the data shall be provided.
V. Any person violating any provision of a signed Data Use Agreement shall be guilty of a violation.
VI. Nothing in this section shall exempt any requestor from paying fees otherwise established by law for obtaining copies of limited data sets or statistical tables. Such fees shall be based on the cost of providing the copy in the format requested. The agency head shall provide the requestor with a written description of the basis for the fee.

Source. 2003, 292:2, eff. July 18, 2003.

Right-to-Know Oversight Commission

Section 91-A:11 to 91-A:15

91-A:11 to 91-A:15 Repealed by 2005, 3:2, eff. Nov. 1, 2010. –

THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 2020-0036

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE & a.

v.

CITY OF CONCORD

Argued: February 11, 2021
Opinion Issued: December 7, 2021

American Civil Liberties Union of New Hampshire Foundation, of Concord (Gilles R. Bissonnette and Henry R. Klementowicz on the brief, and Henry R. Klementowicz orally), for the plaintiffs.

City Solicitor's Office, of Concord (James W. Kennedy, city solicitor, on the brief and orally), for the defendant.

BASSETT, J. The plaintiffs, the American Civil Liberties Union of New Hampshire (ACLU) and the Concord Monitor, appeal an order of the Superior Court (Kissinger, J.) ruling that portions of a contract between an equipment vendor and the defendant, the City of Concord, for the purchase of "covert communications equipment" are exempt from disclosure under the Right-to-Know Law. See RSA ch. 91-A (2013 & Supp. 2020). The plaintiffs argue that the City failed to meet its burden of demonstrating that the redacted portions of the contract are exempt from disclosure, and that the trial court erred when

it held an ex parte in camera hearing, during which the City presented evidence supporting exemption. We affirm in part, reverse in part, and remand.

The following facts are undisputed or are otherwise supported by the record. On May 10, 2019, the Concord City Manager submitted a proposed 2019-2020 operating budget to the Mayor and the City Council. Included under the proposed police budget was a $5,100 line item for "Covert Communications Equipment." On May 24, the Monitor published a news article titled "Concord's $66.5M budget proposal has its secrets," which discussed the line item. The Monitor reported that one of the City Councilors had asked the City Manager if he could provide a "hint" as to the nature of the equipment, but that the Manager had responded, "I don't know how to answer that question[] without 'answering it.'" The City Manager did not publicly identify the equipment, saying only that it was not body cameras or a drone. The Monitor reported that the Chief of Police had stated that the City has a non-disclosure agreement with the equipment's vendor that prevents the City from publicizing the nature of the equipment.

Shortly thereafter, the ACLU and the Monitor filed separate Right-to-Know requests with the City. The ACLU requested "[d]ocuments sufficient to identify the specific nature of the 'covert communications equipment' sought by the Concord Police Department," and "[a]ny contracts or agreements between the Concord Police Department or the City of Concord and the vendor providing the 'covert communications equipment.'" The Monitor similarly requested "documents related to the $5,100 'covert communications equipment' sought by the Concord Police Department," including "any contracts or agreements between the Concord Police Department or the City of Concord and the vendor providing the equipment, documents that detail the nature of the equipment, and the line items associated with the equipment in the department's budget."

The City responded to both requests by disclosing a partially-redacted 29-page, single-spaced "License & Services Agreement" between the City and the equipment vendor. The redactions included the name of the vendor, the state law that governs the agreement, the nature of the equipment, the type of information gathered by the vendor, and how the vendor uses that information. Most pages had fewer than 20 words redacted, and most of the redactions were either one or a few words. Representative of the redactions is the following: "Law enforcement agencies may direct us to collect a wide variety of information from your [redacted] when you use the [redacted] services. The information may include: [multiple clauses redacted]." The disclosed portions of the agreement included the following: (1) the vendor would provide a "Website, Applications, [and] Services"; (2) the City would maintain ownership of "location information" and "other data" generated from its use of the Website, Applications, and Services; (3) the vendor would be indemnified for any losses

or damages incurred by the City due to a "suspension" of the Application; and (4) the City agreed to abide by the vendor's "Acceptable Use Policy and Privacy Policy."

In a letter accompanying the redacted agreement, the City explained that the redactions were necessary because the agreement "contains confidential information relative to surveillance technology that is exempt from disclosure under the law enforcement exemption" in Murray v. New Hampshire Division of State Police, 154 N.H. 579, 582 (2006). In Murray, we observed that the Right-to-Know Law does not explicitly address requests for law enforcement records or information, and we adopted the six-prong test under the federal Freedom of Information Act (FOIA) for evaluating requests for law enforcement records. Murray, 154 N.H. at 582. Under FOIA, the government may exempt from disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual . . . .

5 U.S.C. § 552(b)(7) (2018). We have referred to the six prongs collectively as the Murray exemption. See 38 Endicott St. N. v. State Fire Marshal, 163 N.H. 656, 661 (2012). In its letters to the plaintiffs, the City quoted Murray and invoked prong (E).

In response, the plaintiffs filed a petition in the superior court seeking disclosure of the redacted portions of the agreement. See RSA 91-A:7 (Supp. 2020). The City responded that the redacted information was exempt from disclosure under Murray, and that it would not disclose "the name of the vendor or any of the information redacted from the documents as such

disclosure could reasonably be expected to interfere with pending enforcement proceedings, disclose techniques and procedures for law enforcement investigations, risk circumvention of the law and endanger the life or physical safety of any individual." In effect, the City invoked prongs (A), (E), and (F) of the Murray exemption. See Murray, 154 N.H. at 582.

Shortly thereafter, the plaintiffs served a request for production of documents, see Super. Ct. R. 24, seeking an unredacted copy of the agreement, as well as other documents and contracts responsive to their Right-to-Know requests. The plaintiffs proposed that the documents be produced "subject to a mutually agreeable protective order." The City filed a motion to quash, arguing that a "petitioner cannot be allowed to circumvent the Right-to-Know Law exemptions simply by filing a Right-to-Know lawsuit and obtaining exempted materials through discovery." The City reiterated its position that the redacted information was "not subject to disclosure under [prongs] A, E and F," and submitted a two-page affidavit from the Chief of Police in which he stated that disclosure of the information could reasonably be expected to interfere with pending investigations, risk circumvention of the law, and endanger the life or physical safety of officers. See Murray, 154 N.H. at 582. With the plaintiffs' assent, the City also submitted an unredacted copy of the agreement to the trial court for in camera review. In addition, the City filed a motion for an ex parte in camera hearing, offering to make a police department representative available to answer the court's questions regarding the redactions. The plaintiffs objected.

In October 2019, the court held a 45-minute hearing on the pending motions. During the hearing, the court characterized the Chief's affidavit as "conclusory." In a subsequent written order, the court ruled that the City had failed to demonstrate that the redacted information was exempt from disclosure but that the court needed additional information before reaching a final decision. It therefore granted the City's motion for an ex parte in camera hearing. Neither the plaintiffs, nor their counsel, were permitted to attend.

At the ex parte in camera hearing, the Chief of Police testified as to the nature of the equipment and how it is used by the department. He explained how disclosing the name of the vendor and the nature of the equipment would undermine law enforcement investigations, risk circumvention of the law, and endanger lives. Although the transcript of the hearing is part of the record on appeal, the plaintiffs have never had access to the transcript. The trial court ruled that the redacted portions of the agreement are exempt from disclosure under prongs (A), (E), and (F) of the Murray exemption. This appeal followed.

On appeal, the plaintiffs argue that the trial court erred when it ruled that the redacted information is exempt from disclosure under prongs (A), (E), and (F), and also erred when it conducted the ex parte in camera hearing. The

City counters that it met its burden to demonstrate exemption under all three prongs, and that it was within the discretion of the trial court to hold the ex parte in camera hearing. We conclude that the court did not err when it conducted the hearing, and that it properly determined that most of the redacted information was exempt from disclosure. However, we also conclude that it erred by not disclosing one provision of the agreement.

"We review the trial court's interpretation of the Right-to-Know Law and its application of the law to undisputed facts de novo." 38 Endicott St. N., 163 N.H. at 660. "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." Montenegro v. City of Dover, 162 N.H. 641, 645 (2011) (quotation omitted). "Thus, the Right-to-Know Law helps further our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." Id. We construe provisions favoring disclosure broadly, while construing exemptions narrowly. Murray, 154 N.H. at 581. Therefore, 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. Reid v. N.H. Attorney Gen., 169 N.H. 509, 532 (2016). "In interpreting provisions of the . . . Right-to-Know Law, we often look to the decisions of other jurisdictions interpreting similar provisions of other statutes for guidance, including federal interpretations of [FOIA]." 38 Endicott St. N., 163 N.H. at 660; see Murray, 154 N.H. at 581.

We first address the plaintiffs' argument that the trial court erred when it conducted the ex parte in camera hearing. The plaintiffs assert that the court erred because it is a "standard requirement that all evidence and argument presented to a judge should be presented to opposing counsel," and no statute or rule authorizes a "deviation" from that requirement in a Right-to-Know Law case. They contend that holding the hearing was antithetical to the adversarial process, and that the hearing was a fundamentally unfair and unreliable procedure because it denied them the opportunity to cross-examine the City's witnesses and highlight shortcomings in the City's evidence.

The Right-to-Know Law requires "the necessary accommodation of . . . competing interests." Clay v. City of Dover, 169 N.H. 681, 686 (2017) (quotation omitted). On one hand, when the government seeks to withhold requested documents, it has "exclusive control of vital information." Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 548 (1997). Because only the government has possession of the withheld documents, the petitioner must argue that a document is not exempt from disclosure with only "limited knowledge" of the document's contents. Id. For that reason, the government bears the burden of demonstrating that a document is exempt from disclosure, see Murray, 154 N.H. at 581, and it must provide a justification for exemption

sufficient for the trial court to determine the applicability of the claimed exemption and for the petitioner to argue against exemption with some specificity. See N.H. Housing Fin. Auth., 142 N.H. at 548-50 (explaining the purpose of a Vaughn index, a procedure often used in cases with a large number of documents potentially responsive to a Right-to-Know request, in which the government produces a general description of each document withheld and a justification for nondisclosure). Unless the government discloses "as much information as possible without thwarting the claimed exemption's purpose, the adversarial process is unnecessarily compromised." Id. at 549 (quotation omitted).

On the other hand, we have recognized that the government may take precautionary measures in order to prevent disclosure of the very information that it hopes to keep confidential. We approved the government submitting an affidavit to the court in order to justify its withholding of documents, and deemed that affidavit sufficient when it "fairly describe[d] the content of the material withheld and adequately state[d] the grounds for nondisclosure." 38 Endicott St. N., 163 N.H. at 667 (quotation and brackets omitted). We have also explained that when the government seeks to justify withholding documents under prong (A), "generic determinations of likely interference [with enforcement proceedings] often will suffice," and the government's description of the withheld information should not be so detailed "as to reveal the nature and scope of the investigation." Murray, 154 N.H. at 583. Thus, the government's justification for exemption need not be so specific as to reveal the withheld information, and the requesting party is not entitled to learn all of the information that forms the basis for the withholding. See id.

To balance these competing interests, the trial court may, in some circumstances, utilize in camera procedures before reaching a decision regarding disclosure. In Union Leader Corp. v. City of Nashua, we reviewed the trial court's denial of a Right-to-Know petition based upon prong (C) of the Murray exemption, which exempts from disclosure records or information compiled for law enforcement purposes when disclosure would "constitute an unwarranted invasion of privacy." Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475 (1996) (quotation omitted). We affirmed the trial court's in camera review of the documents at issue without counsel present, explaining that "ex parte in camera review of records whose release may cause an invasion of privacy is plainly appropriate," but that this procedure should "be used cautiously and rarely." Id. at 478. We explained that, to facilitate appellate review, when the trial court conducts an in camera review under such circumstances, "a record must be taken of any hearings that are held, whether counsel for one or both parties are present." Id. (emphasis added). Accordingly, although City of Nashua involved only in camera review of documents and not an ex parte in camera hearing, we suggested that there may be circumstances when the trial court may hold an ex parte in camera hearing before applying the Murray exemption. See id.

Since City of Nashua, we have not addressed the use of ex parte in camera hearings in Right-to-Know Law cases. In the absence of controlling New Hampshire precedent construing RSA chapter 91-A, we look to federal FOIA cases for guidance. See 38 Endicott St. N., 163 N.H. at 660. FOIA expressly permits trial courts to examine documents in camera before determining whether they may be withheld. See 5 U.S.C. § 552(a)(4)(B) (2018). Many federal circuit courts have recognized that trial courts may utilize procedures that are "necessary to prevent the litigation process from revealing the very information the agency hopes to protect." American Civil Liberties Union v. C.I.A., 710 F.3d 422, 432-33 (D.C. Cir. 2013) (noting that, in some circumstances, a court may permit the government to submit a Vaughn index in camera). Those procedures include the consideration of ex parte affidavits and the conduct of ex parte proceedings. See, e.g., New York Times Co. v. U.S. Dept. of Justice, 806 F.3d 682, 685, 689 (2d Cir. 2015) (allowing government to present ex parte in camera oral argument to the court immediately before hearing arguments from all parties in open court); Manna v. U.S. Dept. of Justice, 51 F.3d 1158, 1163 (3d Cir. 1995) (explaining that, if public disclosure of the information needed to reach a decision would frustrate the exemption, the court may permit the government to submit sealed affidavits); Long v. United States I.R.S., 742 F.2d 1173, 1182 (9th Cir. 1984) (observing that, under certain circumstances, a court may accept "nonpublic affidavits" or "proceed ex parte to the extent it deems necessary to protect the integrity" of the information claimed to be exempt from disclosure).

At the same time, federal circuit courts emphasize that these procedures should be used in only limited circumstances, and have held that, prior to employing ex parte procedures, the trial court must first require the government to submit public affidavits or testimony providing "as detailed public disclosure as possible of the government's reasons for withholding documents." Lion Raisins v. U.S. Dept. of Agriculture, 354 F.3d 1072, 1082-84 (9th Cir. 2004) (reversing trial court's withholding of documents under law enforcement exemption where government submitted no public affidavits justifying application of the exemption and court relied solely on government's ex parte affidavit), overruled on other grounds by Animal Legal Defense Fund v. U.S. F.D.A., 836 F.3d 987, 989-90 (9th Cir. 2016); see also Lykins v. United States Dept. of Justice, 725 F.2d 1455, 1465 (D.C. Cir. 1984). Detailed public disclosure is "necessary to restore, to the extent possible, a traditional adversarial proceeding by giving the party seeking the documents a meaningful opportunity to oppose the government's claim of exemption." Lion Raisins, 354 F.3d at 1083. Only if the government's detailed public disclosures fail to "provide a sufficient basis for a decision" may the trial court accept ex parte affidavits or conduct ex parte proceedings, and it may do so only to the limited extent necessary to protect the information from disclosure. Pollard v. F.B.I., 705 F.2d 1151, 1154 (9th Cir. 1983); Long, 742 F.2d at 1182.

This approach, drawn from federal law, is consonant with our Right-to-Know Law jurisprudence. See, e.g., N.H. Housing Fin. Auth., 142 N.H. at 551 ("In camera examination is not a substitute for the [defendant's] obligation to provide detailed public indexes and justifications whenever possible." (quotation omitted)); City of Nashua, 141 N.H. at 478 (implying that ex parte in camera hearings may be appropriate under some circumstances involving the Murray exemption). We therefore hold that, in cases involving the Murray exemption, a trial court may exercise its discretion to hold an ex parte in camera hearing — but only after it has required the government to make as complete and detailed a public disclosure justifying exemption as possible, and determined that the disclosure nonetheless fails to provide a sufficient basis for it to make a decision. This threshold determination will ensure that ex parte in camera hearings are "used cautiously and rarely." City of Nashua, 141 N.H. at 478. We will review both a trial court's finding that this threshold has been met and its decision to hold an ex parte in camera hearing under our unsustainable exercise of discretion standard. See Larson v. Department of State, 565 F.3d 857, 869-70 (D.C. Cir. 2009) (reviewing trial court's decision about whether to conduct in camera review of documents and ex parte declaration for abuse of discretion); State v. Lambert, 147 N.H. 295, 296 (2001) (explaining that we refer to the abuse of discretion standard as the unsustainable exercise of discretion standard and describing the requirements of that standard).

The plaintiffs argue that, although federal cases such as New York Times Co. support the proposition that a court may conduct an ex parte in camera hearing under certain circumstances, those cases are distinguishable because they involve national security concerns that are not present here. The plaintiffs contend that, although a court may hold an ex parte in camera hearing when the withheld documents contain highly sensitive national security information, such as information regarding terrorism investigations, the information withheld in this case does not warrant such protection. We are not persuaded.

The government is not required to publicly disclose information that would undermine the very purpose of the exemption, see N.H. Housing Fin. Auth., 142 N.H. at 549, and procedures such as ex parte hearings and affidavits are designed to safeguard the interests protected by the exemption, while still providing the court with a "reasonable basis to evaluate the claim of privilege." American Civil Liberties Union, 710 F.3d at 432-33 (quotation omitted); see New York Times Co., 806 F.3d at 689. Regardless of whether the government claims exemption for national security or law enforcement reasons, an ex parte in camera hearing is sometimes necessary to "accommodat[e] . . . the competing interests involved." Clay, 169 N.H. at 686 (quotation omitted); see Manna, 51 F.3d at 1164-65 (concluding, based in part on government's ex parte affidavits, that requested documents were exempt from disclosure because disclosure could reasonably be expected to interfere with law enforcement proceedings).

Having articulated the applicable standard, we now analyze whether the court erred when it conducted the ex parte in camera hearing in this case. Prior to the ex parte in camera hearing, the City had publicly disclosed a partially redacted copy of the "License & Services Agreement" between the City and the equipment vendor. In its response to the plaintiffs' requests, the City explained that the redacted portions of the agreement contained "confidential information relative to surveillance technology," and asserted that disclosure "could compromise the effectiveness of the technology and allow individuals who are the subjects of investigations to employ countermeasures." The City subsequently filed a public affidavit from the Chief of Police, in which he asserted that disclosure of the redacted information "could tip off those persons who are subject to the pending investigations as to the strategy in implementing the specific techniques in the investigations," and provide "those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection." In effect, through the Chief's affidavit and during the hearing on the City's motion for an ex parte in camera hearing, the City represented that additional public disclosure of the reasons for the redactions would undermine the interests protected by the Murray exemption.

After its review of this information and the unredacted agreement, the trial court concluded that the City's representations and public disclosures were inadequate to justify the redactions, and that "it need[ed] further information before reaching a decision." The trial court therefore granted the City's motion for an ex parte in camera hearing. In making that determination, the court credited the City's claims that additional public disclosure of the reasons for the redactions might undermine the purpose of the claimed exemptions. See 38 Endicott St. N., 163 N.H. at 659, 666-68 (ruling that documents related to State Fire Marshal's investigation of a fire were exempt from disclosure under Murray prong (A) based upon representations made in fire investigator's affidavit, which "the trial court was entitled to credit"); Citizens for Resp. & Ethics v. Dept. of Justice, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (observing that courts "give deference to an agency's predictive judgment of the harm that will result from disclosure"); Long, 742 F.2d at 1182 (explaining that, in cases involving "sensitive areas" such as national security and law enforcement, "courts have accorded special deference to an agency's detailed affidavits"). The court also considered the possibility of holding a closed hearing with only counsel for all parties present, but rejected that approach due to the "sensitive nature of the information in question," and the potential for harm if the court did not "keep disclosure of the information to a minimum."

We conclude that the trial court satisfied the standard we set forth above: as a threshold matter, the court required the City to make as detailed a public disclosure as possible without compromising the purpose of the claimed exemption, and it then concluded that the public disclosure was insufficient for

it to reach a decision. After the court observed that ex parte proceedings should rarely be used, it reasoned that, because it could not reach a decision "without learning more about . . . the covert communications equipment," and due to the risks posed by additional public disclosure, an ex parte in camera hearing was appropriate. Under these circumstances, we conclude that the trial court's decision to conduct an ex parte in camera hearing was a sustainable exercise of discretion.

Nonetheless, we take this occasion to emphasize that ex parte in camera hearings "should be used cautiously and rarely." City of Nashua, 141 N.H. at 478. If a trial court is unsatisfied with a defendant's public disclosures, it may "require [the defendant] to submit more detailed public affidavits before resorting to in camera review" of the withheld documents or ex parte affidavits. Pollard, 705 F.2d at 1154. Trial courts should also carefully consider whether other steps short of an ex parte in camera hearing — such as holding a closed hearing with only counsel present, or with only counsel and all parties present — would "accommodat[e] . . . the competing interests involved." Clay, 169 N.H. at 686.

Having affirmed the trial court's decision to conduct the ex parte in camera hearing, we now turn to the court's ruling that the redacted information is exempt from disclosure under prongs (A), (E), and (F) of the Murray exemption. See Murray, 154 N.H. at 582. The plaintiffs are in a difficult position because they have not had access to the unredacted agreement. They do not dispute that the redacted information was "compiled for law enforcement purposes," id.; however, they argue that the City failed to meet its burden of demonstrating that the redacted information is exempt from disclosure under any of the three identified prongs of the Murray exemption. They contend that any harm that could result from disclosure is speculative, that the City's public explanations for exemption were conclusory, and that the information withheld by the City is materially different from the information that we ruled was exempt from disclosure in Montenegro. The City counters that it met its burden of demonstrating that all of the redacted information is exempt under prongs (A), (E), or (F) of the Murray exemption.

We note that both parties make blanket arguments regarding the redacted information — the City asserts that all of the redactions are justified, while the plaintiffs contend that none of them are. But whether the City met its burden as to the redacted information is not an all-or-nothing proposition. Our task is to examine each redaction in turn in light of the applicable law. After doing so, we conclude that the trial court did not err in ruling that the following information is exempt from disclosure under prong (E) of the Murray exemption: the name of the vendor, the nature of the equipment, the type of information gathered by the vendor, and how the vendor uses that information. And we affirm, by an equally divided court, the trial court's nondisclosure of the choice-of-law provision. However, we also conclude that the court erred in

upholding the redaction of a clause in the agreement giving the vendor certain rights should the possibility of public disclosure of the technology arise. That provision of the agreement shall be disclosed on remand.

We first address the redactions concerning the name of the vendor, the nature of the equipment, the type of information gathered by the vendor, and how the vendor uses that information. In Montenegro, we considered the extent to which the City of Dover could withhold information about the nature and implementation of surveillance equipment that it used for law enforcement purposes. See Montenegro, 162 N.H. at 643. Looking to federal cases construing FOIA for guidance, we explained that information is exempt from disclosure under prong (E) if disclosure "could lead to decreased effectiveness in future investigations by allowing potential subjects to anticipate and identify [investigation] techniques as they are being employed." Id. at 647 (quotations omitted). We therefore concluded that "the precise locations of the City's surveillance equipment, the recording capabilities for each piece of equipment, the specific time periods each piece of equipment [was] expected to be operational, and the retention time for any recordings" were exempt from disclosure under prong (E) because that information was "of such substantive detail that it could reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection." Id. at 647-48.

Montenegro establishes that information may be exempt from disclosure under prong (E) even if it is not certain that disclosure would result in circumvention of the law. Rather, information is exempt if disclosure "could lead to decreased effectiveness in future investigations" by providing those who wish to engage in criminal activity with the "ability" to avoid detection. Id. (quotation omitted and emphasis added). The federal courts have similarly recognized that, under FOIA, information may be exempt under prong (E) even if it is not certain that disclosure would result in circumvention of the law. The federal courts have explained that prong (E) "sets a relatively low bar for the agency to justify withholding." Blackwell v. F.B.I., 646 F.3d 37, 42 (D.C. Cir. 2011). Prong (E) requires only that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law. Mayer Brown LLP v. I.R.S., 562 F.3d 1190, 1193-94 (D.C. Cir. 2009) (ruling that information about what the IRS considered to be acceptable settlement ranges for tax evasion was exempt because disclosure might lead some taxpayers to conclude that the financial benefits of evasion would outweigh the risks from being caught). Thus, to meet its burden, the City was required to establish only that disclosure could reasonably be expected to risk circumvention of the law.

We have reviewed the unredacted agreement and the transcript of the ex parte in camera hearing. We agree with the trial court that disclosing the name of the vendor, the nature of the equipment, the type of information

gathered by the vendor, and how the vendor uses that information, could reasonably be expected to risk circumvention of the law by allowing individuals to learn about the surveillance technology and take evasive measures against it. See Montenegro, 162 N.H. at 647-48. The surveillance technology at issue here was described by the trial court as a "confidential technique," unlike the surveillance cameras at issue in Montenegro. See id. at 643; see also ACLU of Northern CA v. U.S. Dept. of Justice, 880 F.3d 473, 491 (9th Cir. 2018) (explaining that prong (E) of FOIA's law enforcement exemption "exempts investigative techniques not generally known to the public" (quotation omitted)). Moreover, even if the surveillance technology were publicly known as a law enforcement technique, the redacted material would still be exempt because it would reveal the specific means by which the technology is employed by the City. See ACLU of Northern CA, 880 F.3d at 491; see also Blackwell, 646 F.3d at 42 (specific techniques used by FBI to conduct forensic computer examinations were exempt from disclosure). Accordingly, the redacted information that falls within the categories listed above is exempt from disclosure.

In addition, as to the choice-of-law provision, the court is equally divided as to whether the City met its burden of proving that the provision is exempt from disclosure under prongs (A), (E), or (F) of the Murray exemption. Therefore, the trial court's ruling that this information is exempt from disclosure is affirmed. See PK's Landscaping, Inc. v. N.E. Telephone Co., 128 N.H. 753, 754, 758 (1986) (affirming, by an equally divided court, order granting summary judgment).

However, as to one specific provision, we conclude that the trial court erred when it found that the City had met its burden to justify nondisclosure. See Reid, 169 N.H. at 532. The City failed to offer, in either its public disclosures or at the ex parte hearing, any rationale for the redaction of a clause in the agreement giving the vendor certain rights should the possibility of public disclosure of the technology arise. Given the City's failure to carry its burden as to this provision, the trial court committed error in ruling that the provision was exempt from disclosure. When, after receiving adequate notice and having multiple opportunities to justify withholding the information, a public entity fails to meet its burden, disclosure of the withheld information is appropriate. See N.H. Housing Fin. Auth., 142 N.H. at 551-52 (affirming trial court's decision to order summary disclosure of documents inadequately described in Vaughn index, when party had repeatedly failed to comply with court's order to produce an adequate index). Accordingly, we remand to the trial court and order that the clause described above be disclosed.

Finally, two of the redactions contain information that the City subsequently disclosed in its responses to the plaintiffs' Right-to-Know requests and in the Chief's affidavit. Accordingly, the City has waived its right

to claim that the information is exempt from disclosure, and we order that the information be disclosed on remand. See American Civil Liberties Union, 710 F.3d at 426 (recognizing that, under FOIA, "when an agency has officially acknowledged otherwise exempt information through prior disclosure, the agency has waived its right to claim an exemption with respect to that information").

Affirmed in part; reversed in part; and remanded.

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

Towle v. Comm'r N.H. Dep't of Corr.

Supreme Court of New Hampshire

February 26, 2021, Issued

No. 2020-0221

Reporter
2021 N.H. LEXIS 26 *; 2021 WL 861731

ROBERT V. TOWLE v. COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS

Notice: THE COURT HAS AUTHORIZED THE PUBLICATION OF THESE ORDERS, FOR INFORMATIONAL PURPOSES ONLY. READERS SHOULD BE AWARE THAT *SUPREME COURT RULE 20(2)* STATES THAT AN ORDER, DISPOSING OF ANY CASE THAT HAS BEEN BRIEFED BUT IN WHICH NO OPINION IS ISSUED, SHALL HAVE NO PRECEDENTIAL VALUE:

> AN ORDER DISPOSING OF ANY CASE THAT HAS BEEN BRIEFED BUT IN WHICH NO OPINION IS ISSUED, WHETHER OR NOT ORAL ARGUMENT HAS BEEN HELD, SHALL HAVE NO PRECEDENTIAL VALUE AND SHALL NOT BE CITED IN ANY PLEADINGS OR RULINGS IN ANY COURT IN THIS STATE; PROVIDED, HOWEVER, THAT SUCH ORDER MAY BE CITED AND SHALL BE CONTROLLING WITH RESPECT TO ISSUES OF CLAIM PRECLUSION, LAW OF THE CASE AND SIMILAR ISSUES INVOLVING THE PARTIES OR FACTS OF THE CASE IN WHICH THE ORDER WAS ISSUED. SEE ALSO *RULE 12-D(3)*.

Disposition: Affirmed.

Core Terms

disclosure, e-mails, trial court, public interest, exempt, confidential, disclose information, invasion of privacy, privacy interest, minor child, nondisclosure, disclosing, records, confidential information, circumstances, redactions, argues, identify information, public entity, in camera, well-being, benefits, ordering, inspect, Prison, inform

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

Opinion

Having considered the plaintiff's brief, the defendant's memorandum of law, and the record submitted on appeal, we conclude that oral argument is unnecessary in this case. *See SUP. CT. R. 18(1)*. The plaintiff, Robert V. Towle, appeals an order of the Superior Court (*Kissinger*, J.), following a hearing, denying his petition pursuant to *RSA chapter 91-A* (2013 & Supp. 2020), in which he sought to compel the disclosure of an e-mail exchange between an official of the New Hampshire State Prison, where he is currently incarcerated, and the parent of a minor child with whom the plaintiff has no legal relationship and to whom he sought to send a book. After reviewing the e-mail exchange *in camera*, the trial court concluded that it was exempt from disclosure under *RSA 91-A:5, IV*. On appeal, the plaintiff argues that the trial court misapplied the applicable balancing test and erred by ruling that information in the e-mails was confidential, by relying upon the personal nature of the e-mails and the "penological concerns" of the defendant, by determining that disclosing the e-mails would result in an invasion of privacy, by not making sufficient findings of fact, and by not ordering **[*2]** disclosure of the e-mails with redactions to the identifying information. We affirm.

RSA 91-A:4, I, provides "[e]very citizen" with "the right to inspect all governmental records in the possession, custody, or control of … public bodies or agencies … and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or *RSA 91-A:5*." *RSA 91-A:5, IV*, in turn, exempts from disclosure any "[r]ecords pertaining to … confidential information … and other files whose disclosure would constitute invasion of privacy." We construe provisions of the Right-To-Know law favoring disclosure broadly and exemptions from disclosure narrowly, mindful that the purpose of the statute is to

ensure the greatest possible public access to the actions, discussions, and records of public entities and the accountability of such public entities to the people. *Lambert v. Belknap County Convention, 157 N.H. 375, 378-79, 949 A.2d 709 (2008)*.

When reviewing exemptions from the Right-To-Know law, we balance the public's interest in disclosure against relevant interests in nondisclosure of the information at issue, and absent disputed facts, we review the trial court's balancing of such interests *de novo*. *Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 555 (1997)*. Whether information is "confidential" for purposes of **[*3]** *RSA 91-A:5, IV* is determined objectively, and turns upon the potential harm that will result from disclosure of the information after weighing the benefits of disclosing the information against the benefits of nondisclosure. *Id. at 553-54*. Relevant factors in assessing the confidentiality of information include whether disclosing the information is likely to impair the State's ability to obtain necessary information in the future and whether disclosure is likely to cause substantial harm to the person from whom the information was obtained. *See id. at 554*. Similarly, in determining whether disclosure of records would constitute an "invasion of privacy" under *RSA 91-A:5, IV*, we: (1) determine whether there is, objectively, a privacy interest that would be invaded by the disclosure; (2) consider the public's interest in disclosure, that is, whether disclosing the information will in fact inform the public about the conduct and activities of the government; and (3) balance the public's interest in disclosure against the interest of the government and the privacy interest of the individual in nondisclosure. *Lambert, 157 N.H. at 382-83*.

In this case, the trial court, after reviewing the e-mails *in camera*, determined that: (1) the e-mails contain confidential information; **[*4]** (2) the content of the e-mails was personal in nature and revealed the parent's concern regarding the well-being of her minor child; (3) the public's interest in disclosure of the e-mails, based upon their content, was "very low"; (4) because the content of the e-mails concerned the welfare of a minor child, the government's interest in nondisclosure was high; and (5) disclosing the e-mails would violate the privacy interests of the parent and her minor children. Having reviewed the e-mails, we agree with the trial court that they are exempt both because they concern confidential information and because their disclosure would constitute an invasion of privacy. As the trial court correctly determined, the content of the e-mails concerns objectively confidential privacy interests regarding a parent's concerns for the safety and well-being of her child. *See Lambert, 157 N.H. at 382-83*; *Union Leader Corp., 142 N.H. at 553*. Disclosing such information to the public would not serve the public interest by informing it about the conduct and activities of its government, but would only reveal the private concerns of the parent regarding the welfare of her child to the detriment of the parent and child, and might dissuade parents from sharing similar concerns **[*5]** with prison officials in the future. *See Lambert, 157 N.H. at 383*; *Union Leader Corp., 142 N.H. at 554*. Under these circumstances, we conclude that the public's interest in disclosure is substantially outweighed by the interests of the prison, the parent, and the child in not disclosing the emails. *See Lambert, 157 N.H. at 383*; *Union Leader Corp., 142 N.H. at 553-54*. Accordingly, we conclude that the trial court did not err by denying the plaintiff's *Right-To-Know* law claim.

To the extent the plaintiff argues that the trial court's findings of fact were deficient, we conclude that they were sufficient, under the circumstances of this case, to allow for appellate review. *See Birch Broad. v. Capitol Broad. Corp., 161 N.H. 192, 201, 13 A.3d 224 (2010)*. To the extent he argues that the trial court erred by not ordering the disclosure of the e-mails with redactions to identifying information, we agree with Commissioner of the New Hampshire Department of Corrections that redacting such information, under the circumstances of this case, would have neither excised all exempt information nor protected the privacy and confidentiality interests at issue. In light of this order, we need not address the plaintiff's remaining arguments.

Affirmed.

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

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169 N.H. 502
152 A.3d 878

CITY OF ROCHESTER
v.
MARCEL A. PAYEUR, INC. & a.

No. 2016–0212

Supreme Court of New Hampshire.

Argued: October 6, 2016
Opinion Issued: December 13, 2016

Primmer Piper Eggleston & Cramer PC, of Manchester (Thomas J. Pappas, Matthew J. Delude, and Adam R. Mordecai on the brief, and Mr. Pappas orally), for the plaintiff.

Preti, Flaherty, Beliveau, & Pachios LLP, of Concord (Kenneth E. Rubinstein and Nathan R. Fennessy on the brief, and Mr. Rubinstein orally), for defendant Chicago Bridge & Iron n/k/a CB & I, Inc.

[152 A.3d 880]

McLane Middleton, Professional Association, of Manchester (Jennifer L. Parent and Nicholas F. Casolaro on the brief, and Ms. Parent orally), for defendant Whitman & Howard n/k/a AECOM Technical Services, Inc.

Morrison Mahoney, LLP, of Manchester (Ralph N. Suozzo), for defendant Marcel A. Payeur, Inc., filed no brief.

Sheehan, Phinney, Bass & Green, P.A., of Manchester (Peter S. Cowan), for defendant Wright–Pierce, filed no brief.

Gagliuso & Gagliuso Professional Association, of Merrimack (Richard C. Gagliuso on the brief), for Associated Builders and Contractors, New Hampshire/Vermont Chapter, as amicus curiae.

LYNN, J.

[169 N.H. 503]

This is an interlocutory appeal by the plaintiff, the City of Rochester (City), from an order of the Superior Court (Houran, J.) dismissing the City's claims against two of the four defendants it sued for damages. On appeal, the City asserts that the trial court erred in refusing to apply the doctrine of nullum tempus occurrit regi ("time does not run against the king") so as to exempt the City's claims against defendants Chicago Bridge & Iron n/k/a CB & I, Inc. (CB & I) and Whitman & Howard n/k/a AECOM Technical Services, Inc. (AECOM) from the bar of the six-year statute of limitations that was in effect when CB & I and AECOM substantially completed their contract with the City. See RSA 508:4, I (1983) (amended 1986). We affirm and remand.

I

The following facts are drawn from the interlocutory appeal statement. The City's Department of Public Works owns and operates the Rochester Water System, which provides water to residents of the City. The City operates three water storage tanks, one of which is the Rochester Hill Water Storage Tank (the Tank). AECOM designed the Tank and oversaw its construction by CB & I. CB & I completed the Tank in 1985, and it was placed into service that same year.

[169 N.H. 504]

In June 2009, the City contracted defendant Marcel A. Payeur, Inc. (Payeur) to service the Tank by recoating the Tank's interior and exterior, installing a mixer, and modifying the Tank to accommodate the mixer. Defendant Wright–Pierce, a Maine corporation, performed the engineering and design work for the modification project. Payeur substantially completed the modification, under Wright–Pierce's supervision, in November 2009.

In December 2011, the Tank developed a leak. The City had to evacuate nearby residents, drain the Tank, and remove it from service. The City inspected the Tank and discovered that Payeur

had failed to properly construct the modifications in accordance with Wright–Pierce's design.

The City filed suit against Payeur in November 2012, alleging breach of contract, breach of warranty, negligence, and unjust enrichment. In April 2014, the City named CB & I, AECOM, and Wright–Pierce as additional defendants. The City's amended complaint alleged that Wright–Pierce had failed to properly supervise Payeur's 2009 modification work; it also alleged that, in 1985, CB & I had failed to properly construct the Tank in accordance with AECOM's design, and AECOM had failed to adequately monitor CB & I.

CB & I and AECOM moved to dismiss the City's claims against them, arguing that the claims were time-barred by RSA 508:4. The City objected, arguing that the doctrine of nullum tempus precluded the statute of limitations from running against the City. The trial court granted CB & I and AECOM's motions to dismiss. Thereafter, the trial court approved, and we accepted, this interlocutory appeal.

II

The statute of limitations is an affirmative defense and thus a matter as to which defendants CB & I and AECOM bear the burden of proof. Glines v. Bruk, 140 N.H. 180, 181, 664 A.2d 79 (1995). However, in ruling on the motion to dismiss, the trial court assumed the factual allegations of the complaint to be true, and ruled as a matter of law that the doctrine of nullum tempus was inapplicable and that the statute of limitations barred the City's claims against CB & I and AECOM. Therefore, our review is de novo. See State v. Lake Winnipesaukee Resort, 159 N.H. 42, 45, 977 A.2d 472 (2009) ("Because the trial court rejected the statute of limitations defense as a matter of law, our review is de novo.").

The City submits two issues for our review: (1) "Whether the doctrine of nullum tempus applies to municipalities to bar the application of statutes of limitation[s] to claims brought by a municipality"; and (2) "Whether the doctrine of nullum tempus bars the application of RSA 508:4 to the City's claims here."

[169 N.H. 505]

[152 A.3d 881]

III

"The doctrine of nullum tempus is a common law rule excepting the sovereign from general limitations periods." Lake Winnipesaukee Resort, 159 N.H. at 45, 977 A.2d 472. Although "nullum tempus endures as a recognized doctrine of law in New Hampshire," id. our case law applying the doctrine is sparse.[1] We applied the doctrine in Lake Winnipesaukee Resort, when we held that nullum tempus exempted a state civil enforcement action from the current three-year statute of limitations for personal actions, RSA 508:4, I (2010). Lake Winnipesaukee Resort, 159 N.H. at 45–49, 977 A.2d 472. In In re Dockham Estate, 108 N.H. 80, 82, 227 A.2d 774 (1967), we declined to apply nullum tempus to bar the application of a non-claim statute of limitations to a state action to recover an inmate's cost of care from his estate. But see Reconstruction Finance Corp. v. Faulkner, 100 N.H. 192, 194, 122 A.2d 263 (1956) (holding that a non-claim statute did not preclude a federal government agency from asserting its claim after the running of the limitations period). Additionally, we note that the New Hampshire legislature has codified the doctrine with respect to adverse possession and prescriptive easements. See RSA 236:30 (2009) (prohibiting prescriptive periods from running against public highways); RSA 477:33 (2013) (prohibiting, in some circumstances, the acquisition of prescriptive rights in state waters); RSA 477:34 (2013) (prohibiting the acquisition of prescriptive rights in public grounds); RSA 539:6 (2007) (prohibiting adverse possession of state lands).

We have not previously determined whether nullum tempus applies to claims asserted by municipalities.[2]

[169 N.H. 506]

[152 A.3d 882]

IV

The City urges us to apply the doctrine of nullum tempus to its contract claims against the defendants. We decline to do so because applying nullum tempus to a municipality's contract claims is not supported by the public policy underlying nullum tempus and undermines the public policy underlying statutes of limitations.[3]

The public policy supporting application of nullum tempus to adverse possession claims against public property and state civil enforcement actions does not support extending the doctrine to a municipality's contract claims. In cases of adverse possession, the very basis for the claim is that the claimant has committed a trespassory invasion of the owner's property rights that continued for the applicable limitations period. See, e.g., Bonardi v. Kazmirchuk, 146 N.H. 640, 642, 776 A.2d 1282 (2001). "[T]he nature of the use must have been such as to show that the owner knew or ought to have known that the right was being exercised, not in reliance upon the owner's toleration or permission, but without regard to the owner's consent." Sandford v. Town of Wolfeboro, 143 N.H. 481, 484, 740 A.2d 1019 (1999) (emphasis added; brackets and quotation omitted). Given the vast extent and wide variety of publicly-owned land, water and easement rights, as well as governmental bodies' need to rely on the finite universe of public employees, who are otherwise occupied with their regular duties, to detect encroachments on these rights, application of the doctrine of nullum tempus to adverse possession claims serves the important purpose of protecting public property rights from loss that could otherwise result from failure to detect unknown encroachments.

Similarly, in the case of enforcement actions to recover fines or penalties for violations of state statutes or local ordinances, governmental agents are not always able to promptly discover the existence of such violations. State agents "do not generally institute proceedings to punish violations of the laws, except at the instigation of individuals." State v. Franklin Falls Co., 49 N.H. 240, 252 (1870). As a result, "it may be doubted whether [government officials] are ever aware of a very large proportion of the infringements on

[169 N.H. 507]

the rights of the state." Id. Thus, again in this context, nullum tempus operates to protect the public good by preventing wrongdoers from benefitting from the limitations inherent in governmental bodies' enforcement prowess, to the detriment of public rights.

Conversely, public bodies such as municipalities are aware of the contracts into which they enter. Thus, a municipality's contractual undertakings are unlikely to lead to unknown violations of public rights. Rather, municipalities generally are as equipped as private individuals to vigilantly enforce their contract rights in a timely fashion. Furthermore, when a municipality enters into a contract, it acts as does any private party: "[A] municipal corporation is bound by, and may sue and be sued on, all contracts which it may legally enter into in the same manner as a private corporation or an individual." Great Lakes Aircraft Co. v. City of Claremont, 135 N.H. 270, 278–79, 608 A.2d 840 (1992) (quotation omitted); see also

[152 A.3d 883]

RSA 31:3 (2000) (authorizing municipal corporations to make contracts); RSA 31:1 (2000) (stating that municipalities may sue and be sued).

Additionally, municipalities cannot raise sovereign immunity as a defense to contract claims. See Great Lakes, 135 N.H. at 279, 608 A.2d 840 ("The immunity of government from liability on contracts has never been regarded as applicable to local governmental units."). Although sovereign immunity and nullum tempus are distinct doctrines, both have their origins as incidents of sovereignty. See Lake Winnipesaukee Resort, 159 N.H. at 45, 977 A.2d 472 ; Sousa v. State, 115 N.H. 340, 342, 341 A.2d 282 (1975).

Thus, a municipality's inability to raise sovereign immunity as a defense to contract claims demonstrates that when a municipality enters a contract, it is acting as does a private party and not as a sovereign.

In sum, municipalities enter into contracts in the same manner as private parties, and they are equally equipped to assert their contract rights as are private parties. Because municipalities are not at a disadvantage to assert their contract rights, the doctrine of nullum tempus is not necessary to protect the public's interest in those rights.[4]

[169 N.H. 508]

Allowing a municipality to bring contract claims notwithstanding RSA 508:4 would undermine the public policy behind statutes of limitations. Statutes of limitations "reflect the fact that it becomes more difficult and time-consuming both to defend against and to try claims as evidence disappears and memories fade with the passage of time." Keeton v. Hustler Magazine, Inc., 131 N.H. 6, 14, 549 A.2d 1187 (1988). Statutes of limitations both insure that defendants receive timely notice of actions against them and protect defendants from stale or fraudulent claims. Id. at 14, 549 A.2d 1187 ; Dupuis v. Smith Properties, Inc., 114 N.H. 625, 629, 325 A.2d 781 (1974). "Such statutes thus represent the legislature's attempt to achieve a balance among State interests in protecting both forum courts and defendants generally against stale claims and in insuring a reasonable period during which plaintiffs may seek recovery on otherwise sound causes of action." Keeton, 131 N.H. at 14, 549 A.2d 1187. Because statutes of limitations are grounded in public policy, parties cannot agree by contract made in advance of the accrual of a cause of action for breach to extend or avoid application of the limitations period. See West Gate Village Assoc. v. Dubois, 145 N.H. 293, 299, 761 A.2d 1066 (2000).

Here, the trial court ruled that the City's claims were time-barred by RSA 508:4 unless nullum tempus operated to exempt the City's claims from that statute of limitations. The former version of

[152 A.3d 884]

RSA 508:4 that governs this case bars contract claims after six years, and the City did not bring its claims until many years after the expiration of the limitations period. Permitting the City to bring its contract claims would unfairly subject the defendants to the harms against which statutes of limitations were designed to protect. Employees of the City and the defendants may have changed jobs, retired, or died. The memories of those witnesses who can still be located will no doubt have faded. Other physical evidence may have been lost or destroyed. Furthermore, because the defendants would not have expected such a stale claim to be enforceable, they had no incentive to preserve evidence. Therefore, because the passage of time has made it more difficult for the defendants to defend against the City's claims, it would be unfair and would undermine the public policy supporting statutes of limitations to allow the City to bring its twenty-nine-year-old contract claims.

Because applying the doctrine of nullum tempus to a municipality's contract claims is not supported by the public policy underlying nullum tempus and undermines the public policy underlying statutes of limitations, we conclude that nullum tempus does not bar the application of RSA 508:4

[169 N.H. 509]

to the City's contract claims. Therefore, we affirm the trial court's grant of the defendants' motions to dismiss. In light of our holding, we need not decide at this time whether municipalities, in other contexts, may properly invoke nullum tempus.

Affirmed and remanded.

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

Notes:

[1] The historical justification for the doctrine is that the king (and, by analogy, modern day sovereigns) cannot be expected to be as vigilant as individuals are in preserving their rights. State v. Franklin Falls Co., 49 N.H. 240, 252 (1870). Sovereigns are impersonal and thus are limited to acting through agents such as state officials, who "are generally few in number and fully occupied with the regular routine of official duties." Id. Therefore, the doctrine is thought to further "the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." Lake Winnipesaukee Resort, 159 N.H. at 45, 977 A.2d 472 (quotation omitted).

[2] Other states faced with this issue have dealt with it in different ways. Some states do not extend nullum tempus to municipalities in any circumstances. See, e.g., City of Lincoln, Neb. v. Windstream Nebraska, Inc., 800 F.Supp.2d 1030, 1035 (D. Neb. 2011) ("[N]ullum tempus ... only applies in favor of the sovereign power, and has no application to municipal corporations ...." (quotation omitted)). Other states extend nullum tempus to municipalities to the same extent that they apply the doctrine to their state government. See, e.g., Enroth v. Memorial Hosp. at Gulfport, 566 So.2d 202, 206 (Miss. 1990) (recognizing that, by state constitution and statute, nullum tempus applies to state and all political subdivisions of state, including municipalities). The remaining states that have addressed the issue apply nullum tempus to municipalities in a limited fashion, using a variety of tests to determine when it applies. See, e.g., Fennelly v. A–1 Machine & Tool Co., 728 N.W.2d 163, 170 (Iowa 2006) ("[N]ullum tempus doctrine does not exempt actions by municipalities and counties in Iowa from a general statute of limitations unless the action involves a public or governmental activity, as opposed to a private or proprietary activity."); State v. Goldfarb, 160 Conn. 320, 278 A.2d 818, 822 (Conn. 1971) ("[A] subdivision of the state, acting within its delegated governmental capacity, is not impliedly bound by the ordinary statute of limitations."); Brown v. Trustees of Schools, 224 Ill. 184, 79 N.E. 579, 579–80 (Ill. 1906) (applying nullum tempus to municipalities with regard to "public rights" and "property held for public use," but declining to apply nullum tempus to municipalities with regard to "contracts or mere private rights").

[3] The City argues that if we apply nullum tempus to municipalities on a limited basis, we should use either an "ultimate right at issue" test or a "discretionary function" test to determine when the doctrine applies. However, in light of our holding, we need not decide at this time whether the ultimate right at issue test, discretionary function test, or another test would be proper.

[4] The City argues that RSA 477:33, RSA 477:34, and our case law support the application of nullum tempus to municipalities. To the extent that the City contends that these authorities support the application of nullum tempus to a municipality's contract actions, we disagree for the reasons stated in the text. Although RSA 477:33 and RSA 477:34 prohibit individuals from acquiring prescriptive rights against public lands and state waters, which mirrors the effects of nullum tempus, the statutes are silent regarding the common-law nullum tempus doctrine, both generally and as applied to contract actions. The City also relies upon our case law for the principle that "[a] public right once acquired cannot be lost to an individual by adverse use." Windham v. Jubinville, 92 N.H. 102, 104, 25 A.2d 415 (1942) ; see also Manchester v. Hodge, 74 N.H. 468, 470, 69 A. 527 (1908) ; Thompson v. Major, 58 N.H. 242, 244 (1878). However, each of these cases involved adverse possession of public highways or lands, which is prohibited by statute. Consequently, these cases provide no support for the application of nullum tempus to a municipality's contract action.

TITLE LII
ACTIONS, PROCESS, AND SERVICE OF PROCESS

CHAPTER 507
ACTIONS

Actions Against Governmental Units

Section 507:17

507:17 Actions Against Governmental Units; Definition; Court Records. –
I. "Governmental unit" means the state and any political subdivision within the state including any county, city, town, precinct, school district, chartered public school, school administrative unit, or departments or agencies thereof.
II. In any action against a governmental unit where the governmental unit has agreed to a settlement of such action, the complete terms of the settlement and the decree of the court judgment shall be available as a matter of public record pursuant to RSA 91-A.
III. The court may redact the names of minor children or any other person the court determines to be entitled to privacy.

Source. 2004, 246:1. 2008, 354:1, eff. Sept. 5, 2008.

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

A. **WHEREAS,** Thomas Hurd of Middleton, NH ("Claimant"), acknowledges and agrees to the terms and conditions set forth in this Settlement Agreement and Release of all claims ("Release");

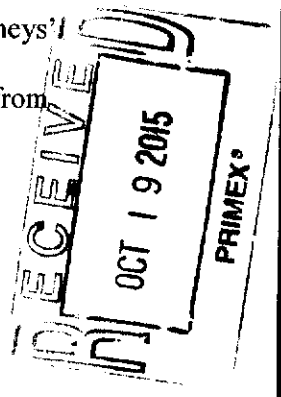
B. **WHEREAS**, Town of Farmington, NH ("Respondent") is a member of the New Hampshire Public Risk Management Exchange ("Primex"), and Primex is a public entity risk pool organized and existing under the laws of the State of New Hampshire pursuant to N.H. RSA 5-B;

C. **WHEREAS**, Claimant asserts a claim of liability against Respondent concerning the alleged use of excessive force against him on or about March 28, 2014, when a Farmington NH police officer responded to an incident involving Respondent ("Claim");

D. **WHEREAS**, Respondent denies all liability, wrongdoing, and responsibility for the Claim;

E. **WHEREAS**, pursuant to N.H. RSA 5-B, Primex investigated, evaluated, managed, and defended the Claim; and

F. **WHEREAS**, Claimant, after an opportunity to consult with independent counsel, and being desirous of resolving the Claim and all claims against Respondent, knowingly and voluntarily agrees to remise, release, discharge, and waive any and all claims, actions, causes of action, suits, administrative charges, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, verdicts, demands, rights, loss of consortium, damages, losses, attorneys' fees, loss of services, costs, expenses, compensation, liabilities and obligations whatsoever, from



the beginning of time to the date of this Release, in law or in equity, at common law or under any statute, regulation or law, whether State or Federal, including but not limited to:

1. all State and Federal civil rights laws, rules, and regulations;

2. all State and Federal tort and contract claims;

3. all State and Federal common law rights;

4. all State and Federal claims for attorney's fees and costs;

5. all State and Federal claims for exemplary, enhanced, and punitive damages; and

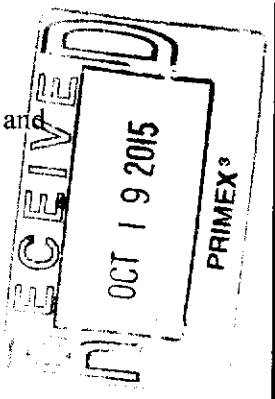
6. any and all other State and Federal claims which he ever had, now has, or which his heirs, beneficiaries, administrators, or executors, can, shall, or may have against Releasees (as "Releasees" is defined below) for, or by reason of, any matter, cause or thing whatsoever, including but not limited to past, present, and future bodily injuries, personal injuries, pain and suffering, mental anguish, economic damages, property damages, psychological and/or emotional distress, loss of consortium, attorneys' fees, costs, expenses, or interest, on account of any matters allegedly arising out of, or in any way associated with (1) an alleged excess force incident on or about March 28, 2014; (2) the Claim; and (3) any and all claims that were, or could have been, asserted against Respondent by Claimant.

The claims and liabilities set forth in Paragraph F are hereinafter collectively referred to as "Claims".

G. WHEREAS, the nature, terms, and conditions of this Release constitute information which is privileged and confidential information pertaining to Primex's claim analysis and claim management under N.H. RSA 5-B:7.

NOW THEREFORE, in consideration of the terms and conditions contained herein, Claimant acknowledges and agrees to the following:

1. **General Release of All Claims**. Claimant, for his executors, administrators, beneficiaries, or assigns, hereby fully remises, releases, and discharges Respondent, Primex and all their past and present agents, representatives, employers, employees, servants, volunteers,



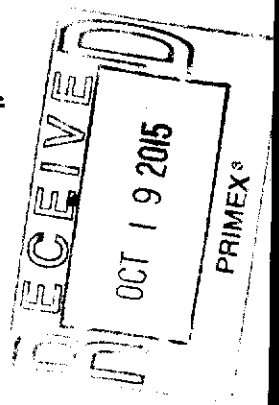
independent contractors, officers, officials, directors, attorneys, insurers, indemnitors, successors, and assigns, in their individual, business, and official capacities, as well as any other person and/or entity to the extent that such other person and/or entity could be deemed liable, by, through or under them (collectively referred to as "Releasees"), from all Claims (as previously defined in this Release) whatsoever, in law or in equity, which he ever had, now has, or which he can, shall, or may have against Releasees, from the beginning of time to the date of this Release for, or by reason of, any matter, cause, or thing whatsoever, arising out of, or in any way associated with (1) an alleged incident on March 28, 2014; and (2) the Claims.

2. **Non-Admission**. This Release and settlement is a compromise of the disputed Claims. This Release and settlement is not to be construed, considered, or understood by Claimant, Respondent, Releasees, any news agencies, the general public, or any other person or entity, as an admission of liability, wrongdoing, or culpability on the part of Respondent , or any other person or entity. Respondent and Releasees expressly deny any and all liability, wrongdoing, and culpability.

3. **Consideration.** Primex will provide the following consideration to Claimant on behalf of Respondent within thirty (30) days of the date Claimant has executed this Release:

> Primex will forward the sum of Twenty Four Thousand Two Hundred Fifty Dollars ($24,250) payable to "*Thomas Hurd and Burns, Bryant, Cox, Rockefeller, and Durkin, P.A.*" With respect to the payment, a W9 will be completed by *Burns, Bryant, Cox, Rockefeller, and Durkin, P.A.*

4. **Responsibility and Indemnification with respect to Tax Treatment, if any.** Claimant acknowledges and agrees that should the consideration set forth above, or any part



thereof, be subject to any taxes, penalties, or interest, Claimant shall be solely responsible for all such taxes, penalties, or interest. Further, Claimant will indemnify, defend, and hold Releasees harmless from any claims by any taxing authority against Releasees concerning such taxes, penalties, or interest. Claimant further agrees that she will not assert, file or make any claims against Releasees for any such taxes, penalties, or interest they may be compelled to pay in connection with any disputes with the Internal Revenue Service or other taxing authority.

5. **Responsibility and Indemnification with Respect to Related Bills and Liens, if any.** Claimant acknowledges and agrees to be responsible for any and all related outstanding bills, liens, statements, rights of subrogation, or reimbursement for services rendered or payments made by any third party to Claimant, if any, including but not limited to legal, insurance providers, hospitals, medical and health care providers, Medicaid, Medicare, unemployment compensation, worker's compensation, or any other services or payments made or received, as a result of the alleged March 28, 2014 incident or Claims. In the event that any such third party asserts any claim against any of the Releasees for outstanding bills, liens, statements, rights of subrogation, or reimbursement for services rendered or payments made to Claimant by such third party, as a result of the alleged March 28, 2014 incident or Claims, then Claimant agrees to indemnify, defend, and hold harmless the Releasees from any such claim.

6. **Waiver/Purpose/Representations.** Claimant represents that (a) no party is a prevailing party ; (b) he is not entitled to request or be awarded attorneys' fees, interest or costs under any Federal, State, or administrative law or regulation; (c) he waives any such claims of attorneys' fees, interest, and costs; (d) the purpose of this Release is to "buy peace" from further dispute and controversy between and among Claimant and Releasees; (e) the consideration

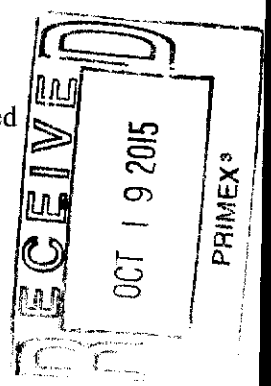
herein may or may not fully compensate Claimant for alleged losses; (f) court approval is not required for any provision of this Release; (g) Claimant has executed this Release with full knowledge of its legal significance; and (h) Claimant has done so to end the Claims.

7. **Confidentiality**. Claimant acknowledges and agrees that this Release may be kept on file at the municipal clerk's office and made available for public inspection, if required by N.H. RSA 507:17 and N.H. RSA 91-A:4 (VI). Except as set forth above, Claimant acknowledges and agrees that this Release and its terms and conditions are otherwise confidential pursuant N.H. RSA 5-B:7. Claimant agrees not to publicly disclose, publish, or otherwise distribute, directly or indirectly, any information concerning this Release, the Claims, or the settlement of the Claims, to any person or entity in the general public, except (1) as required by law; and (2) for specific professional investment planning and tax advice. If any person or entity makes inquiry of Claimant concerning this Release, the Claim, or the settlement of the Claims, Claimant will refer all such inquiries to Scott M. Fogg, Esquire, of Dover, NH; Claimant may respond to any such inquiries with the following, "I have no comment" or "The matter has been resolved."

8. **Consultation with Counsel**. In executing this Release, Claimant acknowledges that he has been advised to, and has consulted with counsel, and that he has executed this Release knowingly, voluntarily, and without undue influence or duress.

9. **Governing Law.** This Release shall be enforced in accordance with the laws of the State of New Hampshire. In the event of litigation regarding this Release, Claimant expressly submits to the jurisdiction of New Hampshire.

10. **Severability**. Claimant agrees that if any provision of this document is deemed



invalid or unenforceable, any such provision shall be divisible, and shall not affect in any way the remainder of this document, which shall remain in full force and effect.

10/15/15
Dated

Thomas Hurd

STATE OF NEW HAMPSHIRE
COUNTY OF

Signed and sworn to (or affirmed) before me on this 15th day of October, 20 15, by Thomas Hurd, whose identity was determined by **(check box that applies and complete blank line, if any)**:

☑ My personal knowledge of the identity of said person **OR**

☐ The following identification documents: _____ (driver's license, passport, other).

Notary Public/~~Justice of the Peace~~

My Commission Expires: MONIQUE WHITE. Notary Public My Commission Expires July 16. 2019

RECEIVED OCT 19 2015 PRIMEX³