

REGULAR CALENDAR

February 22, 2022

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

**The Majority of the Committee on Judiciary to which
was referred HB 1073,**

**AN ACT repealing the right-to-know exemption for
attorney-client work product. Having considered the
same, report the same with the following amendment,
and the recommendation that the bill OUGHT TO PASS
WITH AMENDMENT.**

Rep. Kurt Wuelper

FOR THE MAJORITY OF THE COMMITTEE

**MAJORITY
COMMITTEE REPORT**

Committee:	Judiciary
Bill Number:	HB 1073
Title:	repealing the right-to-know exemption for attorney-client work product.
Date:	February 22, 2022
Consent Calendar:	REGULAR
Recommendation:	OUGHT TO PASS WITH AMENDMENT 2022-0689h

STATEMENT OF INTENT

This bill as amended clarifies the right-to-know exemption for the attorney client privilege or the attorney work product doctrine in RSA 91-A by adding the phrase “consistent with the public's right-to-know.” The majority recognizes these privileges are very important for public bodies’ ability to function effectively, but also sees an inherent conflict between those privileges and the constitutional promise of transparency embodied in the public's right-to-know. We believe the addition of this phrase will provide guidance to the courts by establishing both the privilege and the conflict in the law.

Vote 14-5.

Rep. Kurt Wuelper
FOR THE MAJORITY

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

Judiciary

HB 1073, repealing the right-to-know exemption for attorney-client work product. **MAJORITY: OUGHT TO PASS WITH AMENDMENT. MINORITY: INEXPEDIENT TO LEGISLATE.**

Rep. Kurt Wuelper for the **Majority** of Judiciary. This bill as amended clarifies the right-to-know exemption for the attorney client privilege or the attorney work product doctrine in RSA 91-A by adding the phrase “consistent with the public's right-to-know.” The majority recognizes these privileges are very important for public bodies’ ability to function effectively, but also sees an inherent conflict between those privileges and the constitutional promise of transparency embodied in the public's right-to-know. We believe the addition of this phrase will provide guidance to the courts by establishing both the privilege and the conflict in the law. **Vote 14-5.**

REGULAR CALENDAR

February 22, 2022

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

**The Minority of the Committee on Judiciary to which
was referred HB 1073,**

**AN ACT repealing the right-to-know exemption for
attorney-client work product. Having considered the
same, and being unable to agree with the Majority,
report with the following resolution: RESOLVED, that it
is INEXPEDIENT TO LEGISLATE.**

Rep. Rebecca McBeath

FOR THE MINORITY OF THE COMMITTEE

**MINORITY
COMMITTEE REPORT**

Committee:	Judiciary
Bill Number:	HB 1073
Title:	repealing the right-to-know exemption for attorney-client work product.
Date:	February 22, 2022
Consent Calendar:	REGULAR
Recommendation:	INEXPEDIENT TO LEGISLATE

STATEMENT OF INTENT

The minority of the committee believes that repealing or diminishing of attorney-client privilege and attorney communication ethical standards for any group of clients is inconsistent with national best practice principles and against the public good. Attorney-client confidentiality is the basis of the trust that is the hallmark of the client-lawyer relationship and encourages the client to seek legal assistance and to communicate fully and frankly with an attorney. Whether as a private citizen or member of a public body, it is the individual that seeks a relationship and advice from legal counsel. The disclosure of client information is extreme and irrevocable and can bring unintended harm. The minority supports the retention of the current statutory language regarding access to governmental records, adopted in 2021, and further, believes that the addition of the ambiguous language contained in this amended bill will result in encouraging law suits, costly to municipal governments, to determine its proper application.

Rep. Rebecca McBeath
FOR THE MINORITY

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

Judiciary

HB 1073, repealing the right-to-know exemption for attorney-client work product. **INEXPEDIENT TO LEGISLATE.**

Rep. Rebecca McBeath for the **Minority** of Judiciary. The minority of the committee believes that repealing or diminishing of attorney-client privilege and attorney communication ethical standards for any group of clients is inconsistent with national best practice principles and against the public good. Attorney-client confidentiality is the basis of the trust that is the hallmark of the client-lawyer relationship and encourages the client to seek legal assistance and to communicate fully and frankly with an attorney. Whether as a private citizen or member of a public body, it is the individual that seeks a relationship and advice from legal counsel. The disclosure of client information is extreme and irrevocable and can bring unintended harm. The minority supports the retention of the current statutory language regarding access to governmental records, adopted in 2021, and further, believes that the addition of the ambiguous language contained in this amended bill will result in encouraging law suits, costly to municipal governments, to determine its proper application.

Original: House Clerk

Cc: Committee Bill File

Rep. Wuelper, Straf. 3
February 14, 2022
2022-0689h
07/10

Amendment to HB 1073

1 Amend the title of the bill by replacing it with the following:

2

3 AN ACT modifying attorney exemptions under RSA 91-A.

4

5 Amend the bill by replacing section 1 with the following:

6

7 1 Access to Governmental Records and Meetings; Exemptions; Attorney Records. Amend RSA
8 91-A:5, XII to read as follows:

9 XII. Records protected under the attorney-client privilege or the attorney work product
10 doctrine *consistent with the public's right to know*.

Amendment to HB 1073
- Page 2 -

2022-0689h

AMENDED ANALYSIS

This bill narrows the scope of attorney-related records exempt from the right to know law.



2022 SESSION

Judiciary

Bill #: HB1073 Motion: OTPA AM #: 0689 Exec Session Date: 2-18-22

<u>Members</u>	<u>YEAS</u>	<u>Nays</u>	<u>NV</u>
Gordon, Edward M. Chairman	✓		
McLean, Mark Vice Chairman	✓		
Sylvia, Michael J.	✓		
Wuelper, Kurt F. Clerk	✓		
Alexander, Joe H.	✓		
Greene, Bob J.	✓		
Notter, Jeanine M.	✓		
Merner, Troy E.	✓		
Kelley, Diane E.	✓		
Trottier, Douglas R. <u>Doucette, F</u>	✓		
Andrus, Louise	✓		
Smith, Marjorie K.	✓		
Berch, Paul S. <u>ALmy</u>	✓		
Horrigan, Timothy O.			
DiLorenzo, Charlotte I.		✓	
Chase, Wendy		✓	
Kenney, Cam E.			
Langley, Diane M.		✓	
McBeath, Rebecca Susan		✓	
Paige, Mark		✓	
Simpson, Alexis		✓	

14

5



2022 SESSION

Judiciary

Bill #: HB1073 Motion: ~~1~~ AM #: 0689 Exec Session Date: 2-18-22

<u>Members</u>	<u>YEAS</u>	<u>Nays</u>	<u>NV</u>
Gordon, Edward M. Chairman	✓		
McLean, Mark Vice Chairman	✓		
Sylvia, Michael J.	✓		
Wuelper, Kurt F. Clerk	✓		
Alexander, Joe H.	✓		
Greene, Bob J.	✓		
Notter, Jeanine M.	✓		
Merner, Troy E.	✓		
Kelley, Diane E.	✓		
Trottier, Douglas R. <i>Doucette, F</i>	✓		
Andrus, Louise	✓		
Smith, Marjorie K.	✓		
Berch, Paul S. <i>ALmy</i>	✓		
Horrigan, Timothy O.			
DiLorenzo, Charlotte I.	✓		
Chase, Wendy	✓		
Kenney, Cam E.			
Langley, Diane M.	✓		
McBeath, Rebecca Susan	✓		
Paige, Mark	✓		
Simpson, Alexis	✓		

19- 0

COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HB 1073

BILL TITLE: repealing the right-to-know exemption for attorney-client work product

DATE: 1/13//2022

LOB ROOM: 206-208

Time Public Hearing Called to Order: 3:45 PM

Time Adjourned: 5:01 PM

Committee Members: ~~Reps. Gordon, McLean, Wuelper, Sylvia, Alexander Jr., Notter, Merner, Greene, D. Kelley, Andrus, Trottier, M. Smith, Berch, Horrigan, DiLorenzo, Chase, Kenney, Langley, McBeath, Paige and Simpson~~

Bill Sponsors: Rep Wuelper, Straf. 3; Rep. Potucek, Rock. 6; Rep. Stapleton, Sull. 5,
TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

***Rep. Wuelper Sponsor** This bill would repeal the RSA91-A 5 XII exemption for attorney-client privilege and attorney-work product. This exemption was added to last year's attorney-client privilege and attorney-work product, not explicit in RSA 91-A, was to be read as all other exemptions in the statute: not as "per se", but subject to a test balancing the long-assumed exemption against the purpose of the statute, the public's right to know. Apparently, some thought the world would end if such a balancing test were to actually take effect, so the Senate ginned up this exemption and the Supreme Court withdrew its decision and here we are. A "per se" exemption for these categories means that no document, no communication, nothing said, written, or done by or in consultation with an attorney will ever, ever, be a public document or record. You will hear more about how ridiculous that really is from another, but I want you to consider how much of the public work could be concealed from the citizens, not for some unspecified time as in the existing opportunity to seal minutes of non-public meetings, but forever. Perhaps hidden to the extent that some current or future member of a board or other body might be prohibited from ever allowing even innocuous documents to become public just because an attorney had some part in it. This cannot stand. We must protect our right to know what our officials do and how they do it. I urge you to repeal this newly added subversion of the Right to Know law.

Laurie Ortalanor Right to Know NH Supports This bill came out of a Supreme Court ruling in April of 2020 that ruled there should be a balancing test between the public right to know and the attorney-client privilege protection. The case involved a school board was refused access to a report generated by their SAU. We have had many Right to Know abuses in Nashua. This exemption will sweep away our ability to get information that we have paid for. I submitted a 91-A request which was denied under attorney client privilege. After two public officials reviewed the requested documents and reported they contained nothing confidential, the documents were released. With this law in place, we never could have gotten the documents. I asked to see how many RTK requests were coming to the city after they hired an attorney solely for Right to Know. The request was denied under this exemption. RTK Nh strongly supports repeal.

Q Paige: Is the practical effect of removing this exemption a return to the Hampstead ruling balancing test?

Ans: Yes, and I am very comfortable with that. There may be cases where the work should be exempt, but those are rare compared to the total amount of attorney work product.

Q Horrigan: Wasn't there a Senate hearing on this provision?

Ans: Yes. We referred to the House not having a hearing.

Q Chase: who is responsible for RTK requests in Nashua?

Ans: It is unclear. Citizens often do not know where a request should be directed.

Christina Wilson Attorney General Opposed This exemption touches on attorney-client privilege that provides a safe way for officials to have protected communication with attorneys. The second is attorney work product which applies to preparation for trials. In providing services to the public, the AG office has protected communication with clients just as attorneys do. This protection is needed for Gov't attorneys just as it is for private attorneys. The existing law simply codifies current case law.

***Margaret Burns NHMA Opposed** This legislature was supported by a lot of legal organizations including the Attorney General and the NHMA, if all legal advice given to public officials is open to the public it will have a significant chilling effect of their seeking legal counsel. The exemption under the meeting do not cover cases where the attorney has submitted written material to a public body. Just like a private entity, a municipality is different from the public and is any other private entity.

Q Paige: Are there efficiencies that benefit the public from this exemption?

Ans: The attorney client privilege does not block the client from releasing information, even legal advice. But that is at their option not forced upon them.

Q how about giving advice confidentially that could avoid potentially costly actions?

Ans: If I were advising a municipality about something, I would be reluctant to give frank advice as to risks of differing options.

Tom Mullins City of Keene Opposed I am city attorney for Keene. The Attorney-client privilege is critical for that role. It allows me to have candid conversations and to prepare documents for the city. If this exemption were repealed, I would probably produce many fewer written documents. If the public were the client, the ethics would become impossible to deal with. the privilege is absolutely important to us. Practically, it will be very hard for me to review stuff I created to determine if the balance between the right to know and other concerns.

***Jennifer Perez City of Dover Opposed** part of my job is working with Right to Know so I understand the importance of transparency. As for written records 91-A:5 has been understood to protect them without exception. After the Hampstead case this legislature acted quickly to reinstate the full protections that had existed prior to that case. Attorney work product doctrine is narrow as is the Attorney-Client Privilege. Removing the exemption would allow people to get through 91-A what they could not get in court. Public bodies will see a flood of requests seeking current and past attorney-client documents.

Kate Horgan Exec Dir NH Assoc of Counties Opposed I won't repeat the reasons you have heard before.

Shawn Jasper Commissioner of Agriculture Right to Know law is very important to me. I have walked out of many meetings where I thought 91-A was being violated. I have brought the AG into my current organization for training on the Right to Know law. I doubt this repeal is the solution to the problem. Attorney-client privilege is one of the oldest principles in law, The attorney client work product is very important to us as we prepare for much of what we do. Removing the protection of work product would be extremely problematic. We often don't know what the right answer is. Just because you want to know does not give you the right to know. I want as much information out there as possible, but this repeal goes too far.

Q Why is it necessary to keep this in Statute?

Ans: The legislature is presumed to have acted in good faith, so taking it out would send the message that we don't think the work product should be confidential. Removing it will cost the taxpayers a lot of money in litigation. I urge you to be very careful and clear as to what you intend to do.

Q Do you know when these protections were added to 91-A?

Ans: They have always been part of 91-A to my memory.

Q DiLorenzo: Do you know what the Supreme Court said that prompted this law?

Ans: No and in my experience, it is usually a bad thing to change the law due to one decision.

Q Gordon: In your experience has attorney client opinion always been protected?

Ans: Yes

Q: The only change is the recent court decision?

Ans: I Was curious about why it was put in and today I find out it was the result of a court decision.

James Kennedy **City of Concord** Opposed The attorney-client and attorney work product are critical doctrines. With respect to the Hampstead decision, I was concerned about how it would be interpreted. There was no “per se” exemption in 91-A, it was simply assumed. When the decision came down, we wondered if they had effectively eliminated this privilege and doctrine. I filed a request for reconsideration and the Court has pulled the decision back. I would still rely on that common law privilege and doctrines. It is consistent with 91-A. Attorney client meetings are already totally exempt and that is perfectly consistent with attorney-client privilege. We are far more transparent in government than we were even a few years ago. Repealing this section creates a very uneven playing field.

Q Sylvia: Leaving this in place having such strong exemption seems to be on contrast with the Right to Know. Are you concerned about the potential loss of transparency?

Ans : Bad things are always possible, but the attorney-client privilege is critical. Is it against transparency? I guess so, but denying the privilege is a disservice to government. Remember, the privilege does not apply to the client who remains free to disclose what they want.

Q Paige: If I feel I am an aggrieved citizen by abuse of this privilege, what is my remedy? **Ans:** Any document has to be identified according to the specific exemption. Often a Vaughan index is created. Maybe the court would have to assess the classification of those documents. Courts have done that. **Q DiLorenzo:** Could you review what happened with the Court Case?

Ans: I filed for reconsideration and enough was provided to the Supreme Court for them to agree to reconsider. The decision has been withdrawn as the case was settled amicably.



Rep Kurt Wuelper

House Remote Testify

Judiciary Committee Testify List for Bill HB1073 on 2022-01-13

Support: 1 Oppose: 1 Neutral: 0 Total to Testify: 0

Export to Excel

<u>Name</u>	<u>City, State</u> <u>Email Address</u>	<u>Title</u>	<u>Representing</u>	<u>Position</u>	<u>Testifying</u>	<u>Non-Germane</u>	<u>Signed Up</u>
Ortolano, Laurie	Nashua, NH lauricortolano@gmail.com	A Member of the Public	Myself	Support	No	No	1/6/2022 9:55 PM
Sumner, Deborah	Jaffrey, NH dsumner@myfairpoint.net	A Member of the Public	Myself	Support	No	No	1/7/2022 10:37 AM
Notinger, Steve	Concord, NH steve.m.notinger@ins.nh.gov	State Agency Staff	NH Insurance Department	Oppose	No	No	1/7/2022 4:11 PM
Johnson, Neil	Framington, NH neilj@inbox.com	An Elected Official	Myself	Oppose	No	No	1/7/2022 4:29 PM
Kudlik, Cindy	Grafton, NH CindyKudlik@protonmail.com	An Elected Official	Myself	Oppose	No	No	1/9/2022 2:13 AM
Green, Donna	Oldsmar, FL donnagre@gmail.com	A Member of the Public	Myself	Support	No	No	1/10/2022 12:26 PM
Cahill, Michael	Newmarket, NH michael.cahill@leg.state.nh.us	An Elected Official	Myself	Oppose	No	No	1/11/2022 7:46 AM
Gould, Rep. Linda	Bedford, NH lgouldr@myfairpoint.net	An Elected Official	Myself	Support	No	No	1/11/2022 11:28 AM
Bryfonski, John	Bedford Police Chief, NH jbryfonski@bedfordnh.org	A Member of the Public	Myself	Oppose	No	No	1/11/2022 12:53 PM
Walbridge, Tracy	Rochester, NH tracywalbridge@gmail.com	A Member of the Public	Myself	Support	No	No	1/12/2022 3:37 PM
Horgan, Kate	Concord, NH khorgan@dupontgroup.com	A Lobbyist	NH Association of Counties	Oppose	No	No	1/12/2022 4:10 PM
Bashaw, Christopher	Kingston, NH bashaw333@mac.com	A Member of the Public	Myself	Oppose	No	No	1/13/2022 9:30 AM
Levesque, Brian	Manchester, NH blevesque@merrimacknh.gov	A Member of the Public	Myself	Oppose	No	No	1/13/2022 10:23 AM

Reynolds, Charles	Dover, NH reynolds.charles@comcast.net	A Member of the Public	Myself	Oppose	No	No	1/13/2022 11:16 AM
Tarleton, Matthew	Merrimack, NH jonsered910@gmail.com	A Member of the Public	Myself	Oppose	No	No	1/13/2022 12:12 PM
Hoebeke, Joseph	Hollis, NH jhoebeke@hollisnh.org	A Member of the Public	NH Association of Chiefs of Police	Oppose	No	No	1/13/2022 1:01 PM
Frew, Jerome	Concord, NH jerry@nhsaa.org	A Lobbyist	NHSAA	Oppose	No	No	1/13/2022 2:02 PM
Nichols, Rad	Durham, NH rad.nichols@me.com	A Member of the Public	Myself	Neutral	No	No	1/13/2022 3:18 PM
Ahlberg, Ingrid	Newmarket, NH inkyjapan@yahoo.com	A Member of the Public	Myself	Oppose	No	No	1/13/2022 8:15 PM

HB10173 Written testimony

Date: January 10, 2021

To: Honorable Members of the House Judiciary Committee

Re: HB1073

My name is David Saad. I live in Rumney NH. I am also the President of Right to Know New Hampshire (RTKNH). I ask you to support HB1073.

Part I, Article 8 of the New Hampshire Constitution and the Right-to-Know law are the fundamental prerequisites for a self-governing people. As the legislature made clear in the preamble to the Right-to-Know law: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." The 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."

To ensure the 'greatest possible access', the determination of whether certain records should be exempt often comes down to a balance between privacy interests and a public's interest in disclosure. The courts use the following 3 steps to evaluate whether disclosure of confidential information is warranted:

1. Is there a privacy interest at stake that would be invaded by the disclosure?
2. Would disclosure inform the public about the conduct and activities of its government?
3. Balance the public interest in disclosure against the government's interest in non-disclosure and the privacy interest in non-disclosure.

A per se exemption for records protected under attorney-client privilege or attorney work product unnecessarily inflates the reasons for confidentiality for the purpose of deflating a citizen's right to know. For attorney-Client privilege and attorney work product, ultimately, the client are the citizens. The citizens, and not the public body members, pay the legal bill. Ultimately, the citizens benefit from good legal advice or suffer from poor legal advice. In many cases, ultimately, the public's interest in disclosure will outweigh the government's interest in non-disclosure.

How does a citizen measure the actions public officials take based on legal advice received if they are never allowed to see the legal advice given?

The Supreme Court's ruling in *Hampstead School Board v. SAU #55*, requiring a balancing test instead of a per se exemption for attorney work product records is the reasonable way to ensure the public's right of access to these governmental records is not unreasonably restricted.

Please vote this bill OTP so that a balancing test is used to determine when attorney-client privilege or attorney work product should be kept confidential or should be available to the public.

Support HB 1073, Jan. 13, 2022

Dear Honorable Members of the House Judiciary Committee,

I am a former teacher and reporter and have been involved with election law issues in NH since 2010. I am a member of Right to Know NH and I ask you to support this bill.

My example of “attorney client privilege” involves the attorney general and the secretary of state. Communication of Oct. 16 and 21, 2020 is copied below.

The question was,” Did the Deputy SoS have the legal authority to send the Sept. 12 letter? (RSA 666:32) “

The answer is no, he didn't. Moderators had been doing these checks for years with support from both the AG and SoS.

The Attorney General declined to investigate the alleged violation of law because both public officials claimed the Secretary of State was the Attorney General's client.

Individuals, voters, candidates and the public were harmed by the Attorney General's abuse of his position of public trust. Instead of protecting NH voters and candidates on the ballot, he protected and enabled a state official's abuse of his position of public trust. As a teacher, I know reasonable rules have to be enforced or the kids know it's not a real rule. There will always be one student who intentionally pushes to see where the line is. Fourth graders are great little lawyers in arguing their cases.

There appears to be NO LINE for the Secretary of State. State laws the legislature passes to make sure public servants are doing their job for us don't apply to him. This also raises the question of whether the Attorney General protects and enables other state officials in the same way.

If this culture of impunity is normal at the state level, we can be sure it is happening in municipalities and school districts.

I hope that requiring a reasonable balance in determining the legitimacy of an attorney-client privilege claim will make public officials and attorneys think about whose interest they are serving and who their true clients are. I am sure there are many NH public officials who work hard to do the right thing, earn the public's trust and acknowledge and attempt to correct unintentional mistakes. They would have no reason to object to this bill. That's the culture the NH legislature should be promoting, not what I have experienced.

I welcome any questions from your committee.

Please include this written testimony in the legislative record for this bill.

Thank you.

Respectfully,

Deborah Sumner

474A Great Rd.

Jaffrey, NH 03452

603-532-8010

Dear Committee members,

Not sure if your executive session was Feb. 2 or will be Feb. 18, but some more “reality” of what we ordinary peeps have to deal with.

Main questions were:

"Did Scanlan violate RSA 641:31? The evidence I have found and given your office says he did.

“Did someone in the AG’s office advise him to violate that law, contradicting the legal opinions Fitch, Mavrogeorge and LaBonte had given previously re: the moderator’s constitutional and legal authority?”

The answer from Mr. Formella is “we’re not going to deal with it” either the SoS violation of law or the possibility an attorney advised him to do so.

Reason Chong Yen “closed” the case originally was "This Office advised the Secretary of State’s Office on this matter. We do not and cannot share our legal advice with the public as it is subject to attorney-client privilege.” See Oct. 21, 2020 email below.

Maybe you need to ask Mr. Formella some follow up questions about WHY he has chosen to look the other way on this.

Debbie Sumner

Jaffrey, NH

Begin forwarded message:

From: Deborah Sumner <dsumner@myfairpoint.net>

Subject: Re: Report of Violation of RSA 641: 31, Request to reopen complaint

Date: February 11, 2022 at 3:38:49 PM EST

To: donna.soucy@leg.state.nh.us, chuck.morse@leg.state.nh.us, sherman.packard@leg.state.nh.us, renny.cushing@leg.state.nh.us, David Cote <david.cote@leg.state.nh.us>, barbara.griffin@leg.state.nh.us, James Gray <james.gray@leg.state.nh.us>, Steve Shurtleff <steve.shurtleff@leg.state.nh.us>, Melanie Levesque <mlevesque1@charter.net>

Cc: "Young, Jane" <jane.e.young@doj.nh.gov>, "Edwards, Anne" <anne.m.edwards@doj.nh.gov>, "ChongYen, Nicholas" <Nicholas.ChongYen@doj.nh.gov>, "Matteson, Myles"

<Myles.B.Matteson@doj.nh.gov>, "Tracy, Richard" <Richard.Tracy@doj.nh.gov>, John.Formella@doj.nh.gov, attorneygeneral@doj.nh.gov

Dear Legislators,

Mr. Formella and his assistants have chosen not to reopen this case. If someone in the AG's office advised Mr. Scanlan to violate the law (since I provided evidence he did), I believe the AG's office should make both individuals accountable. Lawyers, especially ones working for the public, are expected to meet high standards (I believed).

They gave no reason for why they chose not to re-open it. Looks to me like they are protecting one of their attorneys who may have violated his/her professional conduct standards in advising David Scanlan. They are definitely protecting David Scanlan and Bill Gardner, who should have been supervising him.

Debbie Sumner

Jaffrey, NH

PS to legislators, evidence of latest abuse of the state the public is paying for coming next!

On Feb 1, 2022, at 9:06 AM, Deborah Sumner <dsumner@myfairpoint.net> wrote:

Dear Mr. Formella,

The pattern and practice of the Attorney General protecting and enabling those in the Secretary of State's office has been true in my experience since 2010 (Details available if requested.) I hope you will decide to change that and communicate that being "the people's attorney" is your office's top priority.

Did Scanlan violate RSA 641:31? The evidence I have found and given your office says he did.

Did someone in the AG's office advise him to violate that law, contradicting the legal opinions Fitch, Mavrogeorge and LaBonte had given previously re: the moderator's constitutional and legal authority?

If so, the public has the right and responsibility to know WHO and WHY that occurred. There has been, and continues to be, considerable harm to individuals and the public stemming from the AG's decision to look the other way.

I ask your office to reconsider its (case closed) opinion and if your investigation finds Mr. Scanlan violated the law and someone from the AG's office advised him to do so, both individuals will be held accountable as NH law requires.

Thank you for considering the request to reopen this complaint. It is an ongoing issue and I can give more details of what has happened in the last year. Mary Till, who is copied on this communication, can also fill you in.

Respectfully,

Deborah Sumner

474A Great Rd.

Jaffrey, NH 03452

603-532-8010

copies: AG attorneys

On Oct 21, 2020, at 1:38 PM, ChongYen, Nicholas <Nicholas.A.ChongYen@doj.nh.gov> wrote:

Good afternoon Ms. Sumner,

This Office advised the Secretary of State's Office on this matter. We do not and cannot share our legal advice with the public as it is subject to attorney-client privilege.

The matter is closed.

Regards,

Nicholas Chong Yen

Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
Tel. (603) 271-3650
Fax (603) 271-2110

From: Deborah Sumner <dsumner@myfairpoint.net>
Sent: Friday, October 16, 2020 9:09 AM
To: DOJ-Election Law <electionlaw@doj.nh.gov>
Cc: Edwards, Anne <Anne.Edwards@doj.nh.gov>; Young, Jane <Jane.Young@doj.nh.gov>
Subject: Reporting Violation of RSA 641:31

Alleged violation of RSA 641:311 re: Deputy Secretary of State David Scanlan in Sept. 2016 (see attached). Because he has continued to mislead legislative committees about the constitutional authority of moderators, most recently in 2020, this is an ongoing issue that the AG needs to resolve.

I ask for an investigation to be assigned to the appropriate Attorney General unit.

Questions for you to consider:

1. Did the Deputy SoS consult with anyone in the AG's office
 - A. about the legal authority of the Derry moderator to conduct hand-count verification checks of the computer count before sending her his Sept. 12, 2016 letter?
 - B. before he sent the Sept. 12, 2016 letter to the Derry moderator? (see attached)

2. Did the Deputy SoS have the legal authority to send the Sept. 12 letter? (RSA 666:32)

Below are Mr. Scanlan's responses to me (as approved by his attorney, Bud Fitch, on Aug. 29, 2019.)
The Attorney General needs to answer Question 2 above.

“Before Sept. 13, was Stephen LaBonte or anyone else in the AG’s office asked to give a legal opinion re: the authority of the Derry moderator to conduct a hand count verification of the computer count?”

Response: “Consultations [with the AG’s office] are generally attorney-client privileged and confidential...”

“Did Brian Buonamano or anyone else in the AG office approve David Scanlan’s Sept. 12, 2016 communication to Mary Till that included Mr. LaBonte’s March 8, 2016 letter to Gerhard Bedding of Keene?” Response: “The Secretary of State’s Office generally does not seek approval by the Attorney General’s Office for communications.”

Under state election laws consistent with NHCONST. pt. 2, art 32, local election officials have the duty to oversee elections to ensure as accurate a count as possible on election night. RSA 659:603

In Saucedo et al v. Secretary of State, Defendant’s Memorandum filed April 18, 2018, the Attorney General stated:

“New Hampshire’s elections are a decentralized operation and are managed locally by each town and city ward. Although the Secretary of State is the chief election officer in the state pursuant to RSA 652:23, the local clerks and moderators are responsible for overseeing the operations of elections in their towns or city wards. See RSA 659:9; RSA 652:14-a; RSA 659:9- a; RSA 657:23.” p. 2

“Moderators and clerks hold elected offices and are accountable to the voters of their towns and wards, and are not employees of the Department of State. RSA 41:16-b; RSA 40:1....

“Indeed, voters have various recourses to hold moderators accountable whom they believed violated their constitutional rights: they may seek redress against the town or individual moderator for any constitutional violations under 42 U.S.C. § 1983 or vote them out of office. RSA 40:1.” p 32

Conclusion: My investigation showed that Mr. Scanlan, contrary to established NH AG and SoS policy and the spirit and intent of state election laws, violated RSA 641: 3 in knowingly trying to misinform the Derry moderator about her authority to perform her constitutional duty to Derry voters and candidates on that town’s ballot.

I. He or she makes a written or electronic false statement which he or she does not believe to be true, on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable; or

II. With a purpose to deceive a public servant in the performance of his or her official function, he or she:

(a) Makes any written or electronic false statement which he or she does not believe to be true; or

(b) Knowingly creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading; or

(c) Submits or invites reliance on any writing which he or she knows to be lacking in authenticity; or

(d) Submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he or she knows to be false.

III. No person shall be guilty under this section if he or she retracts the falsification before it becomes manifest that the falsification was or would

be exposed

2RSA 666:3 Official Misconduct. – Any public officer upon whom a duty relating to elections is imposed who shall knowingly fail to perform such duty or who shall knowingly perform it in such a way as to hinder the objects thereof shall be guilty of a misdemeanor if no other penalty is provided by law.

3RSA 659:60 Duties of Moderator. – The moderator, or the moderator pro tempore if the moderator is disqualified under RSA 658:24, shall oversee the counting of votes by other election officers, including the selectmen and the town clerk, and may discharge any other duties relating to the counting of votes.

Deborah Sumner

474A Great Rd.

Jaffrey, NH 03452

603-532-8010

The following individuals support this request for AG enforcement of RSA 641:31 and are receiving bccs. Please let me know if they should contact you to verify their support. (Note: 1/12/22, have removed contact info for individuals below.

Barbara Glassman

Nashua, NH

Michelle Sanborn

Alexandria, NH 03222

Gerhard Bedding

Keene, NH 03431

Tod Davis

Nashua, NH

Carol Wyndham

Peterborough, NH

<Scanlan Letter 9:12:16.pdf>

Archived: Wednesday, March 16, 2022 11:12:20 AM

From: Christopher Boldt

Sent: Monday, January 10, 2022 9:35:29 AM

To: ~House Judiciary Committee

Subject: Objection to HB 1703

Importance: Normal

Attachments:

2022 01 10 clb ltr to hjc on hb 1703.pdf 

Good Morning Judge Gordon and Members of the House Judiciary Committee:

Attached is my signed letter in opposition to HB 1703. If you have any concerns on opening my PDF, I am including the full text of my letter below.

Please respond to our Meredith Offices

January 10, 2022

VIA EMAIL TO HouseJudiciaryCommittee@leg.state.nh.us

The Honorable Judge Edward Gordan

House Judiciary Committee

The General Court of New Hampshire

107 North Main St.

Concord, NH 03301

Re: HB 1703 – concerning repeal of 91-A:5 (XII) protecting Attorney Client/Attorney Work Product Privilege Materials

Judge Gordon and Members of the House Judiciary Committee:

I am writing in opposition to HB 1073 and ask that this Committee recommend that this Bill is Inexpedient to Legislate. I also ask that this letter be read into and made part of the Record concerning this Bill.

My Law Firm and I handle hundreds of separate matters for our business, individual and municipal clients over the course of any given year, with over 900 separate billing entries made each month. As a Firm, we represent over one-third of our State's municipalities as either General or Special Counsel. Under the New Hampshire Rules of Professional Conduct, our 16 lawyers are obligated to protect the confidential information of ALL of our Clients; and this obligation is a foundation stone of our American legal system. These Rules do not allow New Hampshire lawyers to have "two classes" of Clients – those for whom lawyers keep Client information and advice confidential and those for whom lawyer can breach such confidences. Public policy should encourage all entities to seek advice from their lawyers – both to avoid violations of the Law and to resolve matters where legitimate disputes have been raised.

This proposed Bill to repeal the exemption for Attorney-Client/Attorney Work Product Materials from RSA 91-A:5 (XII) would work a disservice to all of our citizens by eroding the legal community's obligations to all Clients. This Bill would also force municipal lawyers to advise their clients only by phone (or more expensively in person) – without anything in writing whether via correspondence, memo or email. Any person with any business or personal experience with any legal issues can well understand that such a practice would create confusion

on the part of Selectmen, City Councilors and Board members who look to their lawyers to provide them sound legal advice. I have served as a Selectman in my Town and can state unequivocally that, even with my 35-years' experience as a lawyer, I looked to the written memos and correspondence of our Town Attorney to advise our Select Board on a host of issues. I suggest that you would not hesitate to kill a companion bill that took away the Attorney-Client or Work Product Privilege from any of our corporate or individual citizens. I ask that you swiftly kill this Bill. Please, recommend that this Bill is "ITL".

Thank you for your time, attention and service to our great State.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC

Christopher L. Boldt, Esq.
cboldt@dtclawyers.com

Please let me know if you have any questions.

Thank you for your time, attention and service to our great State.

Very truly yours,

Christopher L. Boldt, Esq.
Donahue, Tucker & Ciandella, PLLC
164 N.H. Route 25
The Towle House, Unit 2
Meredith, New Hampshire 03253

Check out our website: www.dtclawyers.com

Please Note: Our Exeter office street name has changed to Acadia Lane, Exeter, NH 03833-4924 (WE HAVE NOT MOVED).

The information in this transmission contains information from the law firm of DONAHUE, TUCKER & CIANDELLA, PLLC which is privileged and confidential. It is intended to be used for the use of the individual or entity named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents is prohibited. If you receive this transmission in error, please notify us by telephone at (603) 778-0686 so that we can take appropriate steps to protect confidentiality and/or attorney-client privilege of this information. Thank you.

Archived: Wednesday, March 16, 2022 10:52:09 AM

From: [Perez, Jennifer](#)

Sent: Friday, January 14, 2022 10:35:07 AM

To: ~House Judiciary Committee

Cc: [Wyatt, Joshua](#); [Moniello, Patricia](#)

Subject: City of Dover Written Statement HB 1073

Importance: Normal

Attachments:

[City of Dover Written Statement HB 1073.pdf](#) 

Mr. Chairman and Committee Members,

Thank you for taking the time to hear my testimony on HB 1073 at the Committee Hearing on January 13, 2022. Attached please find a written statement of that testimony.

Thank you for your consideration,

Jennifer Perez

Jennifer Perez
Deputy City Attorney
City of Dover, NH
288 Central Avenue
Dover, NH 03820-4169
e: j.perez@dover.nh.gov
p: 603.516.6520

Please consider conserving our natural resources before printing this e-mail and/or any attachments.

This electronic message and any attachments may contain information that is confidential and/or legally privileged in accordance with NH RSA 91-A and other applicable laws or regulations. It is intended only for the use of the person and/or entity identified as recipient(s) in the message. If you are not an intended recipient of this message, please notify the sender immediately and delete the material. Do not print, deliver, distribute or copy this message, and do not disclose its contents or take any action in reliance on the information it contains unless authorized to do so. Thank you.

Archived: Wednesday, March 16, 2022 10:39:08 AM

From: [David1 _](#)

Sent: Wednesday, January 12, 2022 7:19:38 PM

To: [~House Judiciary Committee](#)

Subject: Please support HB1073

Importance: Normal

Date: January 12, 2021

To: Honorable Members of the House Judiciary Committee

Re: HB1073

My name is David Saad. I live in Rumney NH. I am also the President of Right to Know New Hampshire (RTKNH). I ask you to support HB1073.

Part I, Article 8 of the New Hampshire Constitution and the Right-to-Know law are the fundamental prerequisites for a self-governing people. As the legislature made clear in the preamble to the Right-to-Know law: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." The 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."

To ensure the 'greatest possible access', the determination of whether certain records should be exempt often comes down to a balance between privacy interests and a public's interest in disclosure. The courts use the following 3 steps to evaluate whether disclosure of confidential information is warranted:

1. Is there a privacy interest at stake that would be invaded by the disclosure?
2. Would disclosure inform the public about the conduct and activities of its government?
3. Balance the public interest in disclosure against the government's interest in non-disclosure and the privacy interest in non-disclosure.

A per se exemption for records protected under attorney-client privilege or attorney work product unnecessarily inflates the reasons for confidentiality for the purpose of deflating a citizen's right to know. For attorney-Client privilege and attorney work product, ultimately, the client are the citizens. The citizens, and not the public body members, pay the legal bill. Ultimately, the citizens benefit from good legal advice or suffer from poor legal advice. In many cases, ultimately, the public's interest in disclosure will outweigh the government's interest in non-disclosure.

How does a citizen measure the actions public officials take based on legal advice received if they are never allowed to see the legal advice given?

The Supreme Court's ruling in *Hampstead School Board v. SAU #55*, requiring a balancing test instead of a per se exemption for attorney work product records is the

reasonable way to ensure the public's right of access to these governmental records is not unreasonably restricted.

Please vote this bill OTP so that a balancing test is used to determine when attorney-client privilege or attorney work product should be kept confidential or should be available to the public.

David Saad

President

Right To Know New Hampshire (RTKNH) *Promoting Open Government*

Email: RightToKnowNH@gmail.com

Blog: www.RightToKnowNH.org

Archived: Tuesday, March 15, 2022 11:38:51 AM
From: [Deborah Sumner](#)
Sent: Friday, February 11, 2022 4:16:21 PM
To: [~House Judiciary Committee](#)
Cc: [rightToKnow NH](#)
Subject: Re: HB 1073 (repealing attorney-client privilege)
Importance: Normal

Dear Committee members,

Not sure if your executive session was Feb. 2 or will be Feb. 18, but some more “reality” of what we ordinary peeps have to deal with.

Main questions were:

"Did Scanlan violate RSA 641:31? The evidence I have found and given your office says he did.

“Did someone in the AG’s office advise him to violate that law, contradicting the legal opinions Fitch, Mavrogeorge and LaBonte had given previously re: the moderator’s constitutional and legal authority?”

The answer from Mr. Formella is “we’re not going to deal with it” either the SoS violation of law or the possibility an attorney advised him to do so.

Reason Chong Yen “closed” the case originally was "This Office advised the Secretary of State’s Office on this matter. We do not and cannot share our legal advice with the public as it is subject to attorney-client privilege." See Oct. 21, 2020 email below.

Maybe you need to ask Mr. Formella some follow up questions about WHY he has chosen to look the other way on this.

Debbie Sumner
Jaffrey, NH

Begin forwarded message:

From: Deborah Sumner <dsumner@myfairpoint.net>
Subject: Re: Report of Violation of RSA 641: 31, Request to reopen complaint
Date: February 11, 2022 at 3:38:49 PM EST
To: donna.soucy@leg.state.nh.us, chuck.morse@leg.state.nh.us, sherman.packard@leg.state.nh.us, renny.cushing@leg.state.nh.us, David Cote <david.cote@leg.state.nh.us>, barbara.griffin@leg.state.nh.us, James Gray <james.gray@leg.state.nh.us>, Steve Shurtleff <steve.shurtleff@leg.state.nh.us>, melanie Levesque <mlevesque1@charter.net>
Cc: "Young, Jane" <jane.e.young@doj.nh.gov>, "Edwards, Anne" <anne.m.edwards@doj.nh.gov>, "ChongYen, Nicholas"

<Nicholas.ChongYen@doj.nh.gov>, "Matteson, Myles"
<Myles.B.Matteson@doj.nh.gov>, "Tracy, Richard"
<Richard.Tracy@doj.nh.gov>, John.Formella@doj.nh.gov,
attorneygeneral@doj.nh.gov

Dear Legislators,

Mr. Formella and his assistants have chosen not to reopen this case. If someone in the AG's office advised Mr. Scanlan to violate the law (since I provided evidence he did), I believe the AG's office should make both individuals accountable. Lawyers, especially ones working for the public, are expected to meet high standards (I believed).

They gave no reason for why they chose not to re-open it. Looks to me like they are protecting one of their attorneys who may have violated his/her professional conduct standards in advising David Scanlan. They are definitely protecting David Scanlan and Bill Gardner, who should have been supervising him.

Debbie Sumner
Jaffrey, NH

PS to legislators, evidence of latest abuse of the state the public is paying for coming next!

On Feb 1, 2022, at 9:06 AM, Deborah Sumner
<dsumner@myfairpoint.net> wrote:

Dear Mr. Formella,

The pattern and practice of the Attorney General protecting and enabling those in the Secretary of State's office has been true in my experience since 2010 (Details available if requested.) I hope you will decide to change that and communicate that being "the people's attorney" is your office's top priority.

Did Scanlan violate RSA 641:31? The evidence I have found and given your office says he did.

Did someone in the AG's office advise him to violate that law, contradicting the legal opinions Fitch, Mavrogeorge and LaBonte had given previously re: the moderator's constitutional and legal authority?

If so, the public has the right and responsibility to know WHO and WHY that occurred. There has been, and continues to be, considerable harm to individuals and the public stemming from the AG's decision to look the other way.

I ask your office to reconsider its (case closed) opinion and if your investigation finds Mr. Scanlan violated the law and someone from the AG's office advised him to do so, both individuals will be held accountable as NH law requires.

Thank you for considering the request to reopen this complaint. It is an ongoing issue and I can give more details of what has happened in the last year. Mary Till, who is copied on this communication, can also fill you in.

Respectfully,

Deborah Sumner
474A Great Rd.
Jaffrey, NH 03452
603-532-8010

copies: AG attorneys

On Oct 21, 2020, at 1:38 PM, ChongYen, Nicholas
<Nicholas.A.ChongYen@doj.nh.gov> wrote:

Good afternoon Ms. Sumner,

This Office advised the Secretary of State's Office on this matter. We do not and cannot share our legal advice with the public as it is subject to attorney-client privilege.

The matter is closed.

Regards,

Nicholas Chong Yen
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
Tel. (603) 271-3650
Fax (603) 271-2110

From: Deborah Sumner <dsumner@myfairpoint.net>
Sent: Friday, October 16, 2020 9:09 AM
To: DOJ-Election Law <electionlaw@doj.nh.gov>
Cc: Edwards, Anne <Anne.Edwards@doj.nh.gov>; Young, Jane <Jane.Young@doj.nh.gov>
Subject: Reporting Violation of RSA 641:31

Alleged violation of RSA 641:31¹ re: Deputy Secretary of State David Scanlan in Sept. 2016 (see attached). Because he has continued to mislead legislative committees about the constitutional authority of moderators, most recently in 2020, this is an ongoing issue that the AG needs to resolve.

I ask for an investigation to be assigned to the appropriate Attorney General unit.

Questions for you to consider:

1. Did the Deputy SoS consult with anyone in the AG's office

A. about the legal authority of the Derry moderator to conduct hand-count verification checks of the computer count before sending her his Sept. 12, 2016 letter?

B. before he sent the Sept. 12, 2016 letter to the Derry moderator? (see attached)

2. Did the Deputy SoS have the legal authority to send the Sept. 12 letter? (RSA 666:3²)

Below are Mr. Scanlan's responses to me (as approved by his attorney, Bud Fitch, on Aug. 29, 2019.) The Attorney General needs to answer Question 2 above.

"Before Sept. 13, was Stephen LaBonte or anyone else in the AG's office asked to give a legal opinion re: the authority of the Derry moderator to conduct a hand count verification of the computer count?"

Response: **"Consultations [with the AG's office] are generally attorney-client privileged and confidential..."**

"Did Brian Buonamano or anyone else in the AG office approve David Scanlan's Sept. 12, 2016 communication to Mary Till that included Mr. LaBonte's March 8, 2016 letter to Gerhard Bedding of Keene?" Response: **"The Secretary of State's Office generally does not seek approval by the Attorney General's Office for communications."**

Under state election laws consistent with NHCONST. pt. 2, art 32, local election officials have the duty to oversee elections to ensure as accurate a count as possible on election night. RSA 659:60³

In *Saucedo et al v. Secretary of State*, Defendant's Memorandum filed April 18, 2018, the Attorney General stated:

"New Hampshire's elections are a decentralized operation and are managed locally by each town and city ward. Although the Secretary of State is the chief election officer in the state pursuant to RSA 652:23, the local clerks and moderators are responsible for overseeing the operations of elections in their towns or city wards. See RSA 659:9; RSA 652:14-a; RSA 659:9- a; RSA 657:23." p. 2

“Moderators and clerks hold elected offices and are accountable to the voters of their towns and wards, and are not employees of the Department of State. RSA 41:16-b; RSA 40:1....

“Indeed, voters have various recourses to hold moderators accountable whom they believed violated their constitutional rights: they may seek redress against the town or individual moderator for any constitutional violations under 42 U.S.C. § 1983 or vote them out of office. RSA 40:1.” p 32

Conclusion: My investigation showed that Mr. Scanlan, contrary to established NH AG and SoS policy and the spirit and intent of state election laws, violated RSA 641: 3 in knowingly trying to misinform the Derry moderator about her authority to perform her constitutional duty to Derry voters and candidates on that town’s ballot.

¹**641:3 Unsworn Falsification.** – A person is guilty of a misdemeanor if:

I. He or she makes a written or electronic false statement which he or she does not believe to be true, on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable; or

II. With a purpose to deceive a public servant in the performance of his or her official function, he or she:

(a) Makes any written or electronic false statement which he or she does not believe to be true; or

(b) Knowingly creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading; or

(c) Submits or invites reliance on any writing which he or she knows to be lacking in authenticity; or

(d) Submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he or she knows to be false.

III. No person shall be guilty under this section if he or she retracts the falsification before it becomes manifest that the falsification was or would be exposed

²**RSA 666:3 Official Misconduct.** – Any public officer upon whom a duty relating to elections is imposed who shall knowingly fail to perform such duty or who shall knowingly perform it in such a way as to hinder the objects thereof shall be guilty of a misdemeanor if no other penalty is provided by law.

³**RSA 659:60 Duties of Moderator.** – The moderator, or the moderator pro tempore if the moderator is disqualified under RSA 658:24, shall oversee the counting of votes by other election officers, including the selectmen and the town clerk, and may discharge any other duties relating to the counting of votes.

Deborah Sumner
474A Great Rd.
Jaffrey, NH 03452
603-532-8010

The following individuals support this request for AG enforcement of RSA 641:31 and are receiving bccs. Please let me know if they should contact you to verify their support. (Note: 1/12/22, have removed contact info for individuals below.

Barbara Glassman
Nashua, NH

Michelle Sanborn
Alexandria, NH 03222

Gerhard Bedding
Keene, NH 03431

Tod Davis
Nashua, NH

Carol Wyndham
Peterborough, NH

<Scanlan Letter 9:12:16.pdf>

Archived: Wednesday, March 16, 2022 1:00:19 PM
From: Donna Green
Sent: Monday, January 10, 2022 3:14:47 PM
To: ~House Judiciary Committee
Subject: In support of HB 1073
Importance: Normal

Dear Honorable Members of the Judiciary Committee:

I strongly support HB 1073. The ill-conceived provision inserted into RSA 91-A in the last session, that HB 1073 will remove, was a hasty response to *Hampstead School Board v. SAU 55 New Hampshire Supreme Court Case No. 2020-0268*). <https://law.justia.com/cases/new-hampshire/supreme-court/2021/2020-0268.html>

The Supreme Court ruled that a balancing of interests should be made to determine the public availability of legal work product. I agree. The public, who pays for the legal services, has a right to know the product unless there is some compelling institutional reason to withhold it from the public.

For the public, who has been footing tens of thousands of dollars in legal fees for advice that is sometimes in favor of town or school district administration rather than the public's interest, the Supreme Court's ruling was a cause for rejoicing. A school board, for instance, will retain the services of a lawyer, and the lawyer will look out for the wellbeing of the board as a whole all the while the public is paying the bill for advice that may work against the public interest. There is an inevitable divergence of interests between those that pay the bills and those that hire the lawyers in public bodies.

When I was a Timberlane School Board member, and part of SAU 55's board (before the controversy giving rise to the above mentioned Supreme Court case), I learned about a lawsuit between a parent and my district through an article in the newspaper. By long-standing and reprehensible practice, the board was never informed of Special Education disputes. The superintendent of SAU 55 claimed that he held the client/attorney privilege and would sometimes withhold written legal opinions when it did not serve his purpose.

Let me share one more story from my personal experience on the Timberlane School Board. In 2014, my district received a very substantial return of surplus from the LGC Healthtrust. This was unanticipated revenue and by law the receipt of this money required a public hearing. The superintendent and my own board disputed the need for a public hearing and in light of my protests obtained a legal opinion on the matter. This legal opinion was shared with a few members of the school board but was withheld from me despite my demands to see it. Weeks later this letter was read at a special meeting called specifically to address my calls for a public hearing. The legal opinion completely exonerated my position but the chairman and superintendent

misconstrued it to be otherwise. I was censured at that meeting for "eroding the integrity and credibility of the district as well as the trust of the community." All this could have been avoided had the legal opinion, paid for by my constituents, been provided to me and the public when it had been received instead of being used as a piece of political theater.

Even elected officials are sometimes kept in the dark about legal consultations and advice that is paid for by their own constituents. This is why it is imperative that legal advice and work product be subject to disclosure with reasonable protection for things that do truly need privacy.

Please vote in favor of HB 1073 and thereby remove a provision to RSA 91-A that nullifies a very wise Supreme Court ruling.

Please enter this correspondence in the record.

Thank you,

Donna Green

As a member of the public

Former Timberlane Regional School Board Member and SAU 55 board member

Member Right to Know NH

Member School District Governance Association of NH

Honorable Members of the Judiciary Committee,

My name is Laurie Ortolano. I live in Nashua. I am the Vice President for Right-to-Know New Hampshire. RTKNH is strongly supporting HB1073 to repeal the exemption for attorney client privilege information and attorney client work product.

Late in the 2021 legislative session, HB108, was amended to include this exemption language based on a Supreme Court ruling regarding a public records dispute between the Hampstead and Timberlane joint SAU Board , Hampstead v SAU 55, Doc. No. 2020-0268 (April 20, 2021). .

The lower court and Supreme Court ruled that a balancing test should be applied to this privileged information, that is “sufficiently private that it must be balanced against the public’s interest”. This ruling startled Attorneys and created the immediate language change to HB108. If it was the legislature's intention to create a per se exemption for all Attorney Client communications and work product, I am strongly opposed to this. If it was the intention of the legislature to nullify case law and the ruling of the Supreme Court in Hampstead v SAU55, I strongly disagree with this.

I would like to provide an example of the abuse of attorney client privilege and work product that is happening in Nashua. Will the broad language of this exemption create a per se exemption that sweeps away court challenges for attorney client privilege and work product doctrine?

In June 2021, my City conducted voluntary Right-to-Know training. I submitted a request for the records used to perform the training. The City Legal office denied the request under RSA 91-A:5 IV. Believing that this exemption was misapplied, I sought advice and then asked another citizen to file a request and obtain the City response. Again, the records were denied under RSA 91-A:5 IV. I informed the City that I would be requesting the Court to perform an in camera review and asked if the City would assent. I received no response. In an attempt to minimize taxpayer, court and personal costs and time, I requested that two elected officials request the records to conduct an informal “in camera” review.

While these officials could not disclose the content of the records, I asked them to disclose if they believed there was confidential attorney client information or work product. Neither could identify confidential or exempt records.

Within 48 hours, the City emailed the records to the requesters. The City maintained that the records were privileged and work product, but had decided to release them anyway. Attached are the records for your review.

Archived: Wednesday, March 16, 2022 10:52:10 AM

From: [Malizia, Steve](#)

Sent: Wednesday, January 12, 2022 4:43:09 PM

To: [~House Judiciary Committee](#)

Subject: HB 1073

Importance: Normal

Attachments:

[HB1073.pdf](#) 

Members of the Committee;

Attached please find a letter authorized by the Hudson Board of Selectmen asking the House Judiciary Committee to find HB1073 Inexpedient to Legislate.

Thank you for your consideration.

Respectfully,

Steve Malizia
Hudson Town Administrator

Archived: Wednesday, March 16, 2022 11:12:21 AM
From: [Mindy Atwood](#)
Sent: Sunday, January 9, 2022 7:18:34 AM
To: [~House Judiciary Committee](#)
Subject: HB 1073
Importance: Normal

To the House Judiciary Committee:

Please vote to recommend HB 1073 expedient to legislate. My understanding is that should this legislation pass, attorneys will be reluctant to put their advice and guidance in writing. Should this come to pass, the time that attorneys will need to spend with their clients will certainly increase and, with lawyers in particular, time is money.

Though we are a small library in a small town, we have worked with an attorney who has advised us on a number of issues ranging from youth volunteers, to drafting MOUs, to interpretations of RSA 202-A as it relates to snow removal! Increased time and therefore costs would be an undue burden on our operating budget.

Thank you for your consideration,
Mindy Atwood

Mindy Atwood, Director
Abbott Library
11 Soonipi Circle/PO Box 314 :: Sunapee, NH 03782
director@abbottlibrary.org
603-763-5513 :: www.abbottlibrary.org
Follow us @AbbottLibraryNH and like us on Facebook!

“Whatever the cost of our libraries, the price is cheap compared to that of an ignorant nation.” ~Walter Cronkite



January 12, 2022

Hon. Edward Gordon
House Judiciary Committee
Legislative Office Building Room 208
Concord, NH

Via electronic delivery only

Re: HB 1073, repealing the right-to-know exemption for attorney-client work product.

Dear Chair Gordon and Members of the Committee:

I am writing to express the New Hampshire Municipal Association's strong opposition to HB 1073, which would repeal the exemption under the Right-to-Know Law, RSA Chapter 91-A, for records protected by the attorney-client privilege or the attorney work product doctrine.

Last year, the New Hampshire Supreme Court issued a stunning decision (*Hampstead School Board v. School Administrative Unit No. 55*), in which the Court ruled that confidential communications between a governmental client (such as a city, town, or state agency) and its legal counsel are not necessarily exempt from disclosure under the Right-to-Know Law. The Court overruled its own precedents and held that rather than being per se exempt, attorney-client communications are subject to a "balancing test" that compares the public's right to know against the government's interest in non-disclosure and the importance of any privacy interest involved.

Fortunately, the legislature took quick action to avoid the consequences of this decision. HB 108 was amended to codify the long-standing rule that records protected by attorney-client privilege or the attorney work product doctrine are exempt from disclosure. This legislation established RSA 91-A:5, XII, exempting from disclosure "records protected under the attorney-client privilege or the attorney work product doctrine." It was supported by the New Hampshire Attorney General's Office, the New Hampshire Bar Association, municipal attorneys, municipal officials, and the New Hampshire Municipal Association.

HB 1073 seeks to completely repeal this important exemption, which would be devastating for both state and local government. It will not only jeopardize the ability of government agencies, departments, and public bodies to seek legal advice confidentially and appropriately, but it will also create a conundrum for government attorneys, who, like all attorneys, have an ethical obligation to protect a client's confidential information. N.H. R. of Prof. Cond. R. 1.6(c) states that a lawyer "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to

N E W H A M P S H I R E M U N I C I P A L A S S O C I A T I O N

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the representation of a client.” As a result, governmental attorneys will be extremely cautious of providing legal advice in a written or otherwise ascertainable format that could be publicly disclosed. Anyone who has ever tried to follow legal advice on a complicated issue understands how essential a written opinion is. The chilling effect this will have on the attorney-client relationship is daunting, creating an environment where governmental clients and their attorneys will be cautious about receiving and providing written legal advice.

Finally, some opponents of the attorney-client privilege and work product exemption have argued that attorney-client communications involving a governmental entity and its attorney should be subject to public disclosure because the “citizens” are actually the “client.” A simple example is all that is needed to underscore how inaccurate and problematic this position is. If a resident of a town were suing the town, this would mean that the individual suing would be both the plaintiff and the defendant, entitling him/her to all legal advice, strategy, and other communications between the town and its attorney relative to the lawsuit. This not only undermines the attorney-client privilege and the legal process, but it also leads to a patently absurd result. Just like a corporation or organization, a municipality is a legal entity with the ability to enter into an attorney-client relationship. It is the elected officials/management of a municipality—not the citizens—who obtain legal advice and hold the privilege, just as it is the board of directors and upper management, not the shareholders, who do so in a corporation.

HB 1073 would not only create bad public policy, but it would also force municipal and governmental attorneys into a dilemma—stuck between an obligation to provide competent and thorough legal advice to their clients and compliance with the New Hampshire Rules of Professional Conduct that govern the practice of law, including not revealing the confidential information of a client.

We urge the committee to recommend HB 1073 as Inexpedient to Legislate.

Sincerely,

A handwritten signature in black ink, reading "Margaret M.L. Byrnes". The signature is written in a cursive style with a long horizontal flourish at the end.

Margaret M.L. Byrnes
Executive Director

Archived: Wednesday, March 16, 2022 10:52:09 AM

From: [Kathy Corey Fox](#)

Sent: Thursday, January 13, 2022 1:33:36 PM

To: ~House Judiciary Committee

Cc: Jennifer Foor

Subject: HB 1073, repealing the right-to-know exemption for attorney-client work product.

Importance: Normal

Attachments:

[2022-01-13 HB 1073 Memo to House Judiciary.docx](#) 

Good afternoon Members of the Committee,

On behalf of the New Hampshire Bar Association, I submit testimony (see attached) expressing their opposition to HB 1073, *repealing the right-to-know exemption for attorney-client work product*. In 2021, the NH Bar Association endorsed the addition of the exemption to the law. Hence, we oppose legislation which would repeal that exemption.

I will be attending the hearing if you have any questions.

I thank you for your time and consideration.

Kathy Corey Fox

Kathy Corey Fox

Project Manager

6036658831 direct

603 623-8700 main

603 623-7775 fax

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HB 1073

President
Wendy Piper
Grafton County Commissioner

Vice President
Tom Tombarello
Rockingham County Commissioner

At Large Member
Toni Pappas
Hillsborough County Commissioner

At Large Member
Cathy Stacey
Rockingham County Register of Deeds



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Immediate Past President
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Coos County Treasurer

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Chris Coates
Cheshire County Administrator

January 12, 2022

The Honorable Edward Gordon
Chair
House Judiciary
Legislative Office Building
Concord, NH 03031

Chairman Gordon and Members of the House Judiciary Committee,

The NH Association of Counties would like to register its opposition to HB 1073, repealing the right-to-know exemption for attorney-client work product.

This bill removes the attorney-client privilege in its entirety and puts at risk the ability of political subdivisions to receive accurate and competent legal advice. Allowing for honest and open discussion between the county and their attorney ensures competent legal advice is provided, allowing a county to make the best decisions for their citizens. Discussions with legal counsel can include legal advice on litigation, which could include an employee's personnel information and sharing that discussion in public may be harmful to both sides.

The Association asks for your opposition to HB 1073. If you have any questions, please feel free to reach out to our Executive Director, Kate Horgan at khorgan@dupontgroup.com.

Sincerely,

Wendy Piper
President
NH Association of Counties

HB 1073 - AS INTRODUCED

2022 SESSION

22-2122

07/04

HOUSE BILL **1073**

AN ACT repealing the right-to-know exemption for attorney-client work product.

SPONSORS: Rep. Wuelper, Straf. 3; Rep. Potucek, Rock. 6; Rep. Stapleton, Sull. 5

COMMITTEE: Judiciary

ANALYSIS

This bill removes records protected under the attorney-client privilege and the attorney work product doctrine from the list of governmental records exempted under the right-to-know law.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struckthrough.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 1073 - AS INTRODUCED

22-2122

07/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT repealing the right-to-know exemption for attorney-client work product.

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

- 1 1 Repeal. RSA 91-A:5, XII, relative to the exemption for records protected under the attorney-
- 2 client privilege or the attorney work product doctrine within the right to know law, is repealed.
- 3 2 Effective Date. This act shall take effect 60 days after its passage.