

LEGISLATIVE COMMITTEE MINUTES

HB1073

Bill as Introduced

HB 1073 - AS AMENDED BY THE HOUSE

16Mar2022... 0689h

2022 SESSION

22-2122
07/04

HOUSE BILL **1073**

AN ACT modifying attorney exemptions under RSA 91-A.

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

COMMITTEE: Judiciary

AMENDED ANALYSIS

This bill narrows the scope of attorney-related records exempt from 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 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT modifying attorney exemptions under RSA 91-A.

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

1 1 Access to Governmental Records and Meetings; Exemptions; Attorney Records. Amend RSA
2 91-A:5, XII to read as follows:

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

5 2 Effective Date. This act shall take effect 60 days after its passage.

Committee Minutes

**AMENDED
SENATE CALENDAR NOTICE
Judiciary**

Sen Sharon Carson, Chair
Sen Bill Gannon, Vice Chair
Sen Harold French, Member
Sen Rebecca Whitley, Member
Sen Jay Kahn, Member

Date: April 7, 2022

HEARINGS

Thursday	04/14/2022
(Day)	(Date)
Judiciary	State House 100
(Name of Committee)	(Place)
	10:30 a.m.
	(Time)

Note: The committee will meet at 10:30 a.m. or 15 minutes following the end of Session.

10:30 a.m.	EXECUTIVE SESSION ON PENDING LEGISLATION	
1:00 p.m.	HB 1036	relative to nonpublic meetings concerning public employees.
1:15 p.m.	HB 1073	modifying attorney exemptions under RSA 91-A.
1:30 p.m.	HB 1343	allowing limited legal services to be provided by certain paraprofessionals.
1:45 p.m.	HB 1448	relative to the pretermitted heir statute.
2:00 p.m.	HB 1579	relative to landowner liability on land authorized for outdoor recreational activities.
2:15 p.m.	HB 238	prohibiting provocations based on a victim's actual or perceived gender, gender identity, gender expression, or sexual orientation from being used as a defense in manslaughter cases.

EXECUTIVE SESSION MAY FOLLOW

Sponsors:

HB 1036

Rep. Wuelper
Rep. Spillane

Rep. M. Smith
Rep. Ford

Rep. P. Schmidt
Rep. Testerman

Rep. Potucek

HB 1073

Rep. Wuelper

Rep. Potucek

Rep. Stapleton

HB 1343

Rep. Gordon
Sen. French

Rep. Rice
Sen. Whitley

Rep. M. Smith

Rep. Wuelper

HB 1448

Rep. Lynn

Rep. Umberger

HB 1579

Rep. Gould

Rep. Stavis

Rep. Cordelli

Rep. S. Pearson

Rep. Creighton
Sen. Prentiss

HB 238

Rep. Query
Rep. Mullen
Rep. Amanda Bouldin

Rep. Notter
Sen. Kahn

Rep. Levesque
Rep. Tanner
Sen. Perkins Kwoka

Rep. Gagne

Rep. Weston
Rep. Alexander Jr.

Rep. Abel

Rep. Bunker
Rep. Toll

Jennifer Horgan 271-7875

Sharon M Carson
Chairman

Senate Judiciary Committee

Jennifer Horgan 271-7875

HB 1073, modifying attorney exemptions under RSA 91-A.

Hearing Date: April 14, 2022

Time Opened: 1:19 p.m.

Time Closed: 1:43 p.m.

Members of the Committee Present: Senators Carson, Gannon, French, Whitley and Kahn

Members of the Committee Absent : None

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

Sponsors:

Rep. Wuelper

Rep. Potucek

Rep. Stapleton

Who supports the bill: Representative Wuelper; Julie Smith; David Saad, Right To Know NH; Tracy Walbridge; Deborah Sumner; Walter Kirsch; Alvin See

Who opposes the bill: Chris Boldt; Kathy Fox, NH Bar Association; Margaret Byrnes, NHMA; Kate Horgan, NHAC; Josh Wyatt, City of Dover; Jennifer Perez, City of Dover; Christina Wilson, NHDOJ; Matt Broadhead, NHDOJ; Kathleen Mulcahey-Hampson, NHDOT

Summary of testimony presented in support:

Representative Wuelper

- This bill deals with a change to the attorney client privilege exemption that was enacted last year.
- The point is to clarify the law that the exemption is not a per se exemption but is subject to the balance against the public's right to know.
- The best example of this need is the Supreme Court case last spring with the Hampstead SAU which asked for an investigation of itself.
- The results of that investigation should have been made public, but the SAU said it was not because it was attorney-client work product.
- The whole point of that report was to find out what was going on at the SAU and the public had a right to know the result.
- The Supreme Court issued a ruling that said it had to be balanced against the public's right to know.
- At the time, the attorney-client privilege exemption wasn't even in the law.

- The current attorney-client privilege is not qualified and therefore is concerned the Court will read that as a blanket exemption.
- Does not think a lot of those interactions should be removed from the public sphere, it should be balanced against the public's right to know.

Summary of testimony presented in opposition:

Senior Assistant Attorney General Matthew Broadhead and Assistant Attorney General Christina Wilson (NH Department of Justice)

- The exemption at issue touches on two concepts in the legal system.
- One the attorney-client privilege, which states when a person seeks legal advice from a lawyer those communications are confidential.
- This protection provides a safe environment for people to obtain legal advice; without it, clients may be less likely to come forward to seek advice, ask questions, and be honest with their attorneys.
- This is considered one of the more sacrosanct and closely guarded privileges in the US legal system, and it is deeply rooted in common law, and it is reflected in court rules, rules of evidence, and rules governing professional conduct of lawyers.
- The second concept is the attorney work product doctrine, which is directed at the material created in anticipation of litigation.
- This allows attorneys to thoroughly prepare for litigation without concern that others will obtain access to that work through discovery.
- These two protections apply in both the civil and criminal context.
- The NHDOJ represents over 100 state agencies, licensing boards and commissions, and under RSA 99-D it represents state employees, officers, trustees, and officials including members of General Court if they are sued for acts committed in the scope of their duties.
- The DOJ further enforces criminal laws and prosecutes criminal cases throughout the State.
- In performing these services and providing counsel the DOJ's communication with their clients are no different in nature than an attorney would have with a client in the private sector.
- Many of the entities the DOJ represents come to them on a nearly a day-to-day basis seeking advice and counsel.
- These privileges in law encourages clients to come forward with ideas and be fully open with the DOJ.
- This protection allows the DOJ and its clients to better serve the State.
- Just like in the private sector, government agencies need to be able to strategize and prepare their cases; their impressions, discussions, and legal strategies are entitled to the same protections as those enacted in the private sector.
- This would place the State at an extreme disadvantage and hinder the ability of the DOJ to litigate criminal and civil cases.
- This bill would apply to all public bodies within the State seeking legal counsel.
- The existing exemption reflects what has been well established in common law.
- The existing exemption in RSA 91-A simply codifies what has been recognized for decades.

Kate Horgan (Association of Counties) (provided written testimony)

- Echoes the statements of the Attorney General's Office.
- The county's ability to have appropriate legal advice in a non-public session is very important.
- Often the counties are discussing personal information of their employees, and they do not think that should be released to the public.
- We should be protecting our employees' rights.
- Spoke to several county attorneys and none of them could determine what "subject to the public's right to know" from a legal standpoint means, and they said they would not know how to apply it.

Margaret Byrnes (Municipal Association)

- The NH Supreme Court issued a decision last year that ruled that confidential attorney-client communication and attorney work product were not per se subject to disclosure, but instead were subject to a balancing test under the Right-to-Know law.
- This overruled longstanding precedent and practice.
- In the wake of that decision, the Legislature passed HB108 to make clear that records protected by attorney-client privilege and attorney-client work product were per se exempt from disclosure
- That legislation was supported by the NH Attorney General, the NH Bar Association, the NH Association of Counties, municipal attorneys, municipal officials, and the NH Municipal Association.
- The bill is deeply problematic and in effect repeals the exemption currently in law.
- The terminology used does not have any legal meaning.
- There is no definition for "consistent with the public's right to know" in the law and there is no guidance for public agencies or bodies in how to implement it.
- The ambiguity in this language would certainly require litigation to interpret what the statute meant and to determine on a case-by-case basis how records should be treated under this language.
- The intent of this bill is clearly to weaken or dilute the current exemption.
- Enacting this would have a devastating effect on municipal and governmental clients and their attorneys by making them feel cautious and concerned about having frank discourse and discussions and receiving frank legal advice and guidance from their attorneys.
- This chilling effect would not be good public policy.
- In reference to the Supreme Court case from last year, in a very unusual turn of events a number of attorneys and the Attorney General requested the case be reconsidered. The Supreme Court vacated that decision, but when HB108 was passed there was no longer a need for the Court to reconsider that decision.
- This bill would put the State back in the position it was in before the Legislature acted last year.

City Attorney Josh Wyatt and Deputy City Attorney Jennifer Perez (City of Dover) (submitted written testimony)

- Needs these protections in order to be able to do their job for the City of Dover.
- Thinks this bill is the result of a misunderstanding about the law.

- It is not the case that these are entirely exempt from disclosure, but these doctrines are inherently limited.
- Attorney-client privilege has exemptions, one of them being the crime-fraud exception.
- If an attorney is assisting an individual to commit a crime that document is not privileged.
- The work product is not an absolute protection.
- If someone has sufficient need for attorney work product, they can get it if they make the required showing.
- Attorneys are ethically bound to not counsel people to commit a crime.
- Attorneys help people make their decisions, and to do that sometimes people need to tell an attorney the mistaken or misguided or bad idea they had in mind.
- Does not see an upside with this bill.
- This will likely interfere with good faith efforts to comply with the law.
- The work product doctrine is meant to create a zone of privacy to prepare for litigation. Why would we allow people to discover that?
- The confidentiality of communications is one that attorneys are bound to through their rules of ethics.
- The attorney-client privilege and the attorney work product doctrine are two distinct principles that are important for the public to ensure their representatives are getting the best possible legal counsel.

Chris Boldt (Donahue Tucker & Ciandella)

- Echoes the testimony of those in opposition.
- The Hampstead case was the epitome of bad facts making bad law.
- The trial court expressly did not reach the question of was that report work product.
- This bill only confuses the situation.
- Represents private clients, individuals, and municipal entities.
- If there was a requirement to have a balancing test for each document, the bills to the municipalities would be enormous.
- However, many member folks are asking for something, there is an equal number of folks who liked the selectman's decision.
- Senator French asked if a client wanted this information to be made public, they could release it without a problem.
 - Correct. Attorney-client privilege can be waived by the client, it cannot be waived by the attorney. Rule of Professional Conduct 1.6 puts the obligation on attorneys to protect the confidentiality. Does not have two classes of clients, the body of clients are all protected by the attorney-client privilege. When a person is going into a conference with their lawyer that is confidential.

Speakers

Senate Remote Testify

Judiciary Committee Testify List for Bill HB1073 on 2022-04-14

Support: 6 Oppose: 3

<u>Name</u>	<u>Title</u>	<u>Representing</u>	<u>Position</u>
Smith, Julie	A Member of the Public	Myself	Support
Saad, David	A Member of the Public	Right To Know NH	Support
Walbridge, Tracy	A Member of the Public	Myself	Support
Sumner, Deborah	A Member of the Public	Myself	Support
kirsch, walter	A Member of the Public	Myself	Support
McEachern, Deaglan	An Elected Official	City of Portsmouth	Oppose
See, Alvin	A Member of the Public	Myself	Support
Meuse, David	An Elected Official	Rockingham 29	Oppose
Stapleton, Walter	An Elected Official	Constituents	Oppose

Testimony

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



Association of Counties

29 School St., Ste. 200
Concord, NH 03301

info@nhcounties.org

www.nhcounties.org

Immediate Past President

Chuck Weed
Cheshire County Commissioner

Treasurer

Suzanne Collins
Coos County Treasurer

Bylaws Chair

Chris Coates
Cheshire County Administrator

April 12, 2022

The Honorable Sharon Carson
Chair
Senate Judiciary
State House
Concord, NH 03031

Chair Carson and Members of the Senate 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.

As amended, 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 is also concerned about the terminology 'subject to the public's right to know' as it is ambiguous and has no legal definition.

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

NEW HAMPSHIRE BAR ASSOCIATION

Equal Justice Under Law



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Director of Marketing, Communications & Member Outreach

April 13, 2022

Sharon Carson, Chair
Senate Judiciary Committee
State House, Room 106
107 North Main Street
Concord, NH 03301

Re: House Bill 1073

Dear Senator Carson,

Last year the Legislature added an exemption to the Right to Know for "records protected under the attorney-client privilege or the attorney work product doctrine." RSA 91-A:5, XII. Based on a vote of the Board of Governors at that time, the New Hampshire Bar Association supported the addition of that exemption to the law. House Bill 1073 proposes repealing that exemption. Considering the Board of Governors support of the addition of the exemption last year, the Bar maintains its position and opposes House Bill 1073.

The amendment proposed by Representative Wuelper does not change our opposition, as it creates express ambiguity as to what is protected under the attorney-client privilege.

The attorney-client privilege is the foundation of the relationship between any client and any lawyer. It prompts and protects candid conversations that are necessary for clients to make appropriate decisions. The prospect of making public the legal advice provided by an attorney to a client, in a confidential communication, would undermine the lawyer's ability to competently represent the client and harm the interests of the client.

The New Hampshire Bar Association maintains its previously stated position in favor of the exemption in RSA 91-A:5, XII, and therefore opposes the proposed legislation in House Bill 1073.

Sincerely,

Richard Guerriero, President
New Hampshire Bar Association



CITY OF CONCORD

New Hampshire's Main Street™

**Legal Department
City Solicitor's Office**

James W. Kennedy
City Solicitor

Danielle L. Pacik
Deputy City Solicitor

March 28, 2022

Honorable Senator Sharon Carson, Chair
Senate Judiciary Committee
State House, Room 100
107 North Main Street
Concord, New Hampshire 03301

Re: Opposition to HB 1073

VIA EMAIL

Dear Honorable Senator Carson,

On behalf of the City of Concord administration, I am writing to express opposition to House Bill 1073 relative to amending the attorney-client privilege and the attorney work product exemption under New Hampshire's Right-to-Know law as set forth in RSA 91-A:5, XII. As you may know, this section was created during New Hampshire's 2021 legislative session and provides that "[r]ecords protected under the attorney-client privilege or the attorney work product doctrine" are exempt from disclosure. The proposed amendment under HB 1073 provides "[r]ecords protected under the attorney-client privilege or the attorney work product doctrine *consistent with the public's right to know.*" The purpose of this proposed amendment is unclear, but seems to undue the 2021 legislation, and should be rejected.

The attorney-client privilege and the attorney work product doctrine are essential to the successful operation of government. Public bodies and agencies often require confidential legal advice from their attorneys to function effectively. The attorney-client privilege affords public bodies and government officials the opportunity to obtain legal guidance regarding matters such as the operation of government; defense in civil and equitable cases; contract drafting, interpretation and negotiation; construction of statutes, ordinances and rules; defense and guidance in labor and employment matters; and arbitrations and mediations. Attorney-client privileged communications commonly occur between legal counsel and the Governor; the New Hampshire Attorney General and Executive Council; the Attorney General and State agencies; general counsel and the State Senate and House of Representatives; general counsel for the Administrative Office of the Courts and the New Hampshire courts; and municipal counsel and its municipal clients (including city, town, village, school, fire and water districts), as well as their boards and commissions.

In recognition of this fundamental need, prior to the inclusion of the attorney-client privilege and the work product exemption in 2021, the New Hampshire legislature had already carved out exemptions to specifically allow attorney-client communications between public bodies and their attorneys to remain confidential. RSA 91-A:2, I (a “meeting” shall not include “consultation with legal counsel”); RSA 91-A:3, II (I) (a non-public session may be held for “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.”). Moreover, it is well accepted that governmental agencies may enter into privileged attorney-client relationships with their lawyers. N.H. R. Ev. 502(a)(1) (defining “client” to include public officers and public entities); *see also Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980) (holding under federal law it is “clear” that an agency can be a client and agency lawyers can function as attorneys within the privilege); *Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 870 N.E.2d 33 (Mass. 2007) (attorney-client privileged communications are protected from public disclosure because withdrawal of the privilege is “not required by the plain terms of the public records law” and would “severely inhibit the ability of government officials to obtain quality legal advice essential to the faithful discharge of their duties, place public entities at an unfair disadvantage vis-a-vis private parties with whom they transact business and for whom the attorney-client privilege is all but inviolable, and impede the public’s strong interest in the fair and effective administration of justice”).

The attorney-client privilege and the work product exemption are essential to the successful operation of government in New Hampshire. The City of Concord administration respectfully requests that RSA 91-A:5, XII be maintained in its current form and that HB 1073 be rejected.

Thank you for your consideration.

Very Best Regards,

/s/ James W. Kennedy
James W. Kennedy, Esquire

cc:
Senator William Gannon
Senator Harold French
Senator Becky Whitely
Senator Jay Kahn
Concord, NH City Council
City of Concord NH, City Manager Thomas J. Aspell, Jr.

Jennifer Horgan

From: dsaad <dsaad@infonetics-usa.com>
Sent: Monday, April 11, 2022 10:31 AM
To: Sharon Carson; William Gannon; Harold French; Becky Whitley; Jay Kahn; Jennifer Horgan
Subject: HB1073 - Please support this bill

To: Honorable Members of the Senate 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?

Before withdrawing their opinion, 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

Jennifer Horgan

From: Laura Colquhoun <lauracolquhoun2@gmail.com>
Sent: Monday, April 11, 2022 12:27 PM
To: Sharon Carson; William Gannon; Harold French; Becky Whitley; Jay Kahn; Jennifer Horgan
Subject: In support of HB 1073

To: Honorable Members of the Senate Judiciary Committee

Re: HB1073

My name is Laura Colquhoun and I live in Nashua NH. I am in support of HB 1073. I am asking you to please support this bill 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.

New Hampshire legislature have made it clear that “openness in the conduct of public business is essential to a democratic society”. It is the right of the public to be able to assess governmental proceedings and records without the records being 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.

The attorney-client privilege or attorney work product unnecessarily inflates the reasons for confidentiality for the purpose depressing a citizen’s right to know and it is the citizen’s who are paying the legal bills. One must look at the fact that the public’s interest in disclosure will outweigh the government’s interest in non-disclosure.

Please support HB 1073. Thank you.

Very truly yours,
Laura Colquhoun
30 Greenwood Dr
Nashua, NH 03062

--

Jennifer Horgan

From: Deborah Sumner <dsumner@myfairpoint.net>
Sent: Tuesday, April 12, 2022 11:08 AM
To: Sharon Carson; William Gannon; Harold French; Becky Whitley; Jay Kahn; Jennifer Horgan
Subject: Support for HB 1073 (re: Attorney-Client Privilege)
Attachments: Scanlan Letter 91216.pdf

Support HB 1073, April 14, 2022

Dear Honorable Members of the Senate 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 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 (and another one related to the SoS action) because both officials claimed the Secretary of State was the Attorney General's client.

Individuals, voters and the public were harmed by the Attorney General's abuse of his position of public trust. Instead of protecting our interests, he protected and enabled a state official's abuse of his position of public trust.

This example raises a question for the legislature to investigate: **does the Attorney General use the attorney-client relationship to protect and enable other state officials when they act contrary to the public interest?** As our representatives, is this what you believe the public should pay him to do?

There has long been a crime-fraud exemption to the attorney-client privilege.

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.

That's how the public develops trust in government and in individuals.

I welcome any questions from your committee and a full independent investigation of my claim. If the attorney general advised the Secretary of State to violate at least two laws or didn't stop him from doing so, NH Const. pt. 1, art. 8 says both individuals should be held accountable for that action.

If the legislature chooses to look the other way, it is complicit in allowing the current culture of impunity in the Secretary of State-Attorney General relationship to continue.

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

PS I have been unsuccessful in my attempts to resolve this issue informally with the current attorney general. Would a member of your committee be willing to help mediate?

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

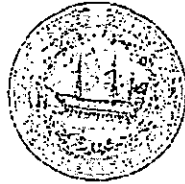
Gerhard Bedding
Keene, NH 03431

Tod Davis
Nashua, NH

Carol Wyndham
Peterborough, NH

NEW HAMPSHIRE
DEPARTMENT OF STATE

William M. Gardner
Secretary of State



Robert P. Ambrose
Senior Deputy Secretary of State
David M. Scanlan
Deputy Secretary of State

September 12, 2016

Mary Till, Moderator
Town of Derry, NH
c/o Town Clerk
14 Manning Street
Derry, NH 03038

Dear Mary:

We have become aware of an article in the August 17, 2016 Union Leader that you intend to conduct audit handcounts of the optical scan counting devices for selected races on the ballot after the polls close during the September 13, 2016 State Primary Election.

Be advised that there is no statutory authority for you to conduct such an exercise. Please see the attached letter from the Attorney General's Office to Mr. Gerhard Bedding of Keene who was requesting the same action you are contemplating.

Sincerely,

A handwritten signature in black ink, appearing to read "David Scanlan".

David Scanlan
Deputy Secretary of State

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL



ANN M. RICE
DEPUTY ATTORNEY GENERAL

March 8, 2016

Gerhard F. Bedding
25 Ivy Drive # 43
Keene, N.H. 03431

Re: Hand Counts Not Authorized

Dear Mr. Bedding:

I am writing in response to your recent letter. Under the New Hampshire Constitution, the Legislature has plenary control over municipalities. *City of Manchester School Dist. v. City of Manchester*, 150 N.H. 664, 666 (2004). As such, municipalities have only the powers delegated to them by the State. *Id.* The New Hampshire Legislature delegated municipalities the authority to use electronic ballot counting devices through the enactment of RSA 656:40. Once a municipality has adopted the use of electronic ballot counting devices, the municipality has no statutory authority to conduct hand counts on election night.

Sincerely,

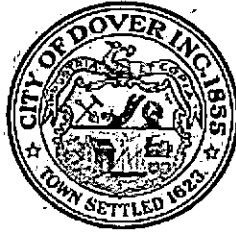
A handwritten signature in black ink, appearing to read "Stephen G. LaBonte".

Stephen G. LaBonte
Assistant Attorney General
Civil Bureau
(603) 271-3658
Fax: (603) 223-6296

Cc: David Scanlan, Deputy Secretary of State

Joshua M. Wyatt
City Attorney
j.wyatt@dover.nh.gov

Jennifer R. Perez
Deputy City Attorney
J.Perez@dover.nh.gov



288 Central Avenue
Dover, New Hampshire 03820-4169
(603) 516-6520
www.dover.nh.gov

City of Dover, New Hampshire
OFFICE OF CITY ATTORNEY

April 12, 2022

VIA EMAIL

Sharon.Carson@leg.state.nh.us
William.Gannon@leg.state.nh.us
Harold.French@leg.state.nh.us
Becky.Whitley@leg.state.nh.us
Jay.Kahn@leg.state.nh.us
Jennifer.Horgan@leg.state.nh.us

Senate Judiciary Committee
Legislative Office Building
Room 208
107 N. Main Street
Concord, NH 03301

RE: Written Testimony Opposing HB 1073

Madam Chair and Committee Members,

We are writing to you on behalf of the City of Dover in opposition to House Bill 1073. This bill proposes to amend an express exemption in RSA chapter 91-A enacted just last year to protect the attorney-client privilege and attorney work product protection. The exemption enacted last year needs no amendment and, as written, fulfills a crucial function by allowing New Hampshire governmental entities legal advice to ultimately better serve the public.

The import of this proposed amendment is unclear, but seems to be to undo, or, at a minimum, create significant confusion about the current exemption for governmental records in RSA 91-A:5, XII, which applies to “[r]ecords protected by the attorney-client privilege or the attorney work product doctrine.” However, it is well-established by now that such communications deserve to be protected. For example, a public body’s consultation with legal counsel in person is not a “meeting” to which RSA 91-A applies. *See* RSA 91-A:2, I(b). Public bodies can enter non-public session to consider legal advice. *See* RSA 91-A:3, II(1).

By way of reminder, the legislation last year came after an April 2021 decision of the New Hampshire Supreme Court in *Hampstead School Board v. School Administrative Unit No. 55*, which, for the first time, threatened to upend decades of understanding about the attorney-client privilege and attorney work product protection by recognizing new balancing requirements applicable to these types of records. Importantly, this opinion never became final and has since

been withdrawn by the Court. That is because, following the public release of this decision, numerous public entities, including various municipalities and the New Hampshire Department of Justice, none of which had been parties or likely were even unaware of the case and the prospect of any ruling on attorney-related records, moved to intervene and ask the Court to reconsider its decision, after which the New Hampshire Supreme Court took the extraordinary step of withdrawing its original opinion pending further action on the appeal. Before any further briefing or action occurred, the New Hampshire Supreme Court dismissed the appeal as moot, given that the two original school district parties to the appeal/dispute had merged and eliminated the controversy over the exemptions.

Meanwhile, however, this Legislature prudently acted to nonetheless pass House Bill 108 last year, which in part protected attorney-client or attorney work product materials by relying on the inherent limitations in those doctrines (discussed below) without balancing. Now, House Bill 1073 proposes to add ambiguous language to the statute, which at a minimum cast doubt upon or even reverses the necessary and prudent exemption enacted last year.

There is significant concern that this new legislation is being prompted by a misunderstanding about the attorney-client and attorney work product doctrines, each of which is quite narrow and has built-in protections against abuse, as set forth below.

First, the attorney-work product doctrine is far narrower than it sounds. Contrary to its broad-sounding name and what many may believe, the work product doctrine does not protect everything an attorney does. By Court rule, the doctrine applies only to records “prepared in anticipation of litigation or for trial.” *Super. Ct. R. 21(e)*. Moreover, the doctrine itself is inherently qualified—not absolute. New Hampshire Superior Court Rule 21(e) states that a person may obtain attorney work product “upon a showing that the party seeking discovery has substantial need of the materials in preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” To vitiate this protection in the way proposed by House Bill 1073 would not serve the public interest—it would in fact put public entities and officials at significant disadvantage in litigated disputes by harming their ability to conduct the type of trial preparation activities enabled by the attorney work product doctrine.

As for attorney-client privilege, that doctrine too is inherently narrow and does not protect every email or letter to or from an attorney. The requirements for the privilege to apply are set forth in New Hampshire Rule of Evidence 502 and include that the communication is “confidential” as well as that it be “made for the purpose of facilitating the rendition of professional legal services.” *N.H. R. Ev. 502(b)*. In practical terms, that means the secure channel of communication only exists for seeking and receiving legal advice—not for non-legal communications or pure business matters. Moreover, the privilege is withdrawn in several circumstances, including “[i]f the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit in the future what the client knew or reasonably should have known to be a crime or fraud.” *N.H. R. Ev. 502(b)(d)(1)*.

The existence of the attorney-client privilege is “the oldest of the privileges . . . known to the common law,” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), and is necessary to effectuate the rendition of legal advice and the ethical duties of attorneys, including the duty of confidentiality in Rule 1.6 of the New Hampshire Rules of Professional Conduct. To withdraw or impair the privilege for public entities and officials would “severely inhibit the ability of

government officials to obtain quality legal advice essential to the faithful discharge of their duties, place public entities at an unfair disadvantage vis-à-vis private parties with whom they transact business. . . ., and impede the public's strong interest in the fair and effective administration of justice." *Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 446 (2007), available at <http://masscases.com/cases/sjc/449/449mass444.html>.

In short, the ambiguous language proposed by House Bill 1073 will unquestionably interfere with the careful balances already struck in these existing protections, as well as the discharge of duties by public entities and officials and their ability to access efficacious legal advice, the receipt of which ultimately benefits the public they serve.

Sincerely,

/s/ Joshua M. Wyatt

Joshua M. Wyatt
City Attorney

/s/ Jennifer R. Perez

Jennifer R. Perez
Deputy City Attorney

JRP/pm

cc: J. Michael Joyal, Jr., City Manager



City of Keene

New Hampshire

April 13, 2022

VIA EMAIL:

Sharon.Carson@leg.state.nh.us
William.Gannon@leg.state.nh.us
Harold.French@leg.state.nh.us
Becky.Whitley@leg.state.nh.us
Jay.Kahn@leg.state.nh.us
Jennifer.Horgan@leg.state.nh.us

Senate Judiciary Committee
State House, Room 100
107 North Main Street
Concord, New Hampshire 03301

Re: Opposition to HB 1073

Dear Honorable Senator Carson,

On behalf of the City of Keene, I am writing to oppose HB 1073 (2022), which presently seeks to undo the recently added provision in New Hampshire's Right-to-Know Law, RSA 91-A:5, XII, an exemption to disclosure for attorney-client privileged documents and attorney work product. The law currently provides that "[r]ecords protected under the attorney-client privilege or the attorney work product doctrine" are exempt from disclosure. The proposed amendment under HB 1073 provides "[r]ecords protected under the attorney-client privilege or the attorney work product doctrine *consistent with the public's right to know.*"

As you know, RSA 91-A:5, XII was added to the Right-to-Know Law during New Hampshire's 2021 legislative session through HB 108 (2021). The exemption in RSA 91-A:5, XII quickly became essential following the New Hampshire Supreme Court's decision in *Hampstead Sch. Bd. v. Sch. Admin. Unit No. 55*, No. 2020-0268, slip. op. (N.H. 2021), which challenged the long-accepted principle that attorney-client privileged and work-product material are exempt from disclosure under the Right-to-Know Law. See *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95, 104-05 (2016); *Hampton Police Ass'n Inc. v. Town of Hampton*, 162 N.H. 7, 12-14 (2011); *Prof'l Fire Fighters of N.H. v. N.H. Local Gov't Ctr.*, 163 N.H. 613, 614-15 (2012).

You may recall that I testified before the Senate Judiciary Committee in support of that bill, as did the New Hampshire Attorney General's Office, counsel from dozens of New Hampshire municipalities, and members of the public. Despite its vague terms, the express intent of HB 1073 (2022) is to "narrow[] the scope of attorney-related records exempt from the right to know law." As was exhibited in the support for HB 108 (2021), the protection of attorney-client privileged and work-product material is critical to the functions of local and state governments and, therefore, for the same sound reasons that HB 108 (2021) was passed, HB 1073 (2022) should be rejected.

“(T)he essence of a privileged communication between attorney and client and likewise the basis of its exemption from discovery is its confidentiality.” *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273–74 (1966) (quoting *Monier v. Chamberlain*, 213 N.E.2d 425, 433 (1966)).

“The work product doctrine safeguards the work of an attorney done ‘in anticipation of, or during, litigation from disclosure to the opposing party.’” *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95, 105 (2016) (quoting *State of Maine v. U.S. Dept. of Interior*, 298 F.3d 60, 66 (1st Cir. 2002)).

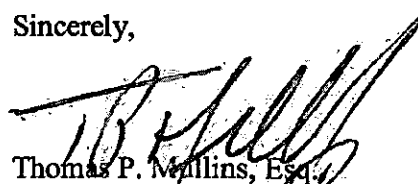
In the private sector, both doctrines function to protect an attorney’s clients. In the public sector, they function to protect the public. A public body’s or agency’s essential functions regularly rely upon the legal advice from its legal counsel. Local governments depend on legal advice in their operating and administering the various parts of their governments, developing litigation strategy or considering settlement, complying with statutes and regulations, addressing personnel and employment matters, and drafting or entering into contracts.

Further, a significant role of counsel to local governments is interpreting and advising on the Right-to-Know Law. Under the proposed amendment in HB 1073 (2022), because communications with counsel might not remain confidential, public employees and custodians may be incentivized to withhold documents from disclosure to their legal counsel. To the extent HB 1073 (2022) seeks to expand the public’s access to government records, infringing on the protections of the attorney-client privilege and work-product doctrine as they apply to public bodies may have the adverse effect.

Because the proposed amendment in HB 1073 (2022) poses a serious threat to the operation of government in New Hampshire, the City of Keene respectfully requests that the bill be rejected and RSA 91-A:5, XII be maintained in its current form.

Thank you for your consideration.

Sincerely,



Thomas P. Mullins, Esq.
City Attorney
City of Keene



CITY OF PORTSMOUTH

Municipal Complex
1 Junkins Avenue
Portsmouth, New Hampshire 03801
mayor@cityofportsmouth.com
(603) 610-7200

Deaglan McEachern
Mayor

Honorable Senator Sharon Carson, Chair
Senate Judiciary Committee
State House, Room 100
107 North Main Street
Concord, New Hampshire 03301

April 13, 2022

Madam Chair Carson and Members of the Senate Judiciary Committee:

On behalf of the City of Portsmouth, I am writing in opposition to House Bill 1073 relative to amending the attorney-client privilege and the attorney work product exemption under New Hampshire's Right-to-Know law.

As you are aware, last year the legislature amended RSA 91-A:5, XII, exempting from disclosure under the Right-To-Know law "records protected under the attorney-client privilege or the attorney work product doctrine". This legislation was adopted in response to the New Hampshire Supreme Court case of *Hampstead School Board v. School Administrative Unit No. 55. Hampstead* imposed a new balancing requirement for municipalities to apply to the attorney-client privilege and work product doctrine. After the decision, numerous public entities and municipalities intervened by filing a Motion to Reconsider. The Supreme Court withdrew its opinion, and the Legislature, recognizing the importance of protecting the attorney-client privilege, amended RSA 91-A:5, XII, by adding records created through attorney-client privilege or the attorney work product doctrine as documents exempt from disclosure under the Right-To-Know law. HB 1073 amends RSA 91-A:5, XII by adding the phrase "**consistent with the public's right to know**". This amended language creates ambiguity the Supreme Court sought to avoid by withdrawing its opinion and appears to attempt to reverse the exemption enacted last year.

The attorney-client privilege and the attorney work product doctrine preserve confidential communications between public bodies and their attorneys. Governmental bodies need to seek the advice of counsel for a wide variety of legal issues, including but not limited, interpreting local and state laws, negotiating and interpreting contracts and legal advice on threatened or pending litigation. Removing or creating ambiguity regarding the attorney-client privilege for municipalities, as this bill does, could impede the efficient operation of government by having a chilling effect of public officials seeking legal advice, which would potentially expose cities and towns to unnecessary litigation and increase costs.

The attorney-client privilege and the work product exemption are essential to the successful operation of government in New Hampshire. Passing HB 1073 would thwart the efficient operation of government. As such, for the reasons set forth above, the City of Portsmouth respectfully requests that the Committee vote HB 1073 Inexpedient to Legislate. Thank you for your consideration.

Sincerely,



Deaglan McEachern, Mayor of the City of Portsmouth

cc: Portsmouth City Council
City Manager Karen Conard
Portsmouth Legislative Delegation



April 14, 2022

Hon. Sharon Carson
Senate Judiciary Committee
State House Room 100
Concord, NH
Via electronic delivery only

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

Dear Chair Carson and Members of the Committee:

I am writing to express the New Hampshire Municipal Association's strong opposition to HB 1073, which would essentially 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 NH Attorney General's Office, the NH Bar Association, the Association of Counties, the NH School Boards Association, municipal attorneys, municipal officials, and the New Hampshire Municipal Association.

HB 1073 as originally introduced completely repealed this important exemption, but the bill has been amended in the House to say that records protected by attorney-client privilege or the attorney work product doctrine are exempt "consistent with the public's right to know." As such, the amended analysis states that it merely "narrows" the scope of the attorney-client privilege. However, this bill is still deeply problematic and has essentially the same effect as the original version of the bill.

First, the terminology "consistent with the public's right to know" is meaningless. There is no definition or explanation elsewhere in RSA chapter 91-A explaining what this means or how it should be

interpreted by public bodies and agencies presented with a request for governmental records. This ambiguity would guarantee litigation to determine the meaning of the statute if HB 1073 became law.

Second, despite the ambiguity in the amended language, it is clear that the purpose is to dilute or weaken the protection for records that are covered by attorney-client privilege or the attorney work product doctrine. Such a change in the law 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 municipal and governmental 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 the representation of a client." As a result, governmental attorneys will be extremely cautious about 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. In other words, the attorney-client privilege and work product doctrine that is sacred and fundamental to the attorney-client relationship and is established by law would be entirely compromised.

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,



Margaret M.L. Byrnes
Executive Director

Jennifer Horgan

From: Barrett Christina <bchristina@nhsba.org>
Sent: Thursday, April 14, 2022 11:16 AM
To: Becky Whitley; Harold French; Jennifer Horgan; Sharon Carson; William Gannon; Jay Kahn
Cc: Becky Forrestall
Subject: HB 1073 - comments from the NH School Boards Association

Dear Chair Carson and Members of the Committee:

Please accept this email as written testimony on behalf of the New Hampshire School Boards Association is firm opposition to HB 1073, repealing the exemption under the Right to Know law relative to records protected by the attorney-client privilege or the attorney work product doctrine.

The genesis of this issue stems from a New Hampshire Supreme Court (Hampstead School Board v. School Administrative Unit No. 55) issued just last year. In that case, NH Supreme Court ruled that confidential communications between a public body and its legal counsel are not necessarily exempt from disclosure under the Right to Know Law. The Court stated 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.

In response to the NH Supreme Court opinion, the legislature took quick action to avoid the consequences of this decision. HB 108 (2021) 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 NH Attorney General’s Office, the NH Bar Association, the Association of Counties, the NH School Boards Association, municipal attorneys, municipal officials, and the New Hampshire Municipal Association.

NHSBA believes that HB 1073, as amended, will restore the NH Supreme Court case mentioned above. NHSBA believes this would be in error.

First, the Right to Know law already recognizes that communications between public bodies and their attorneys are otherwise private or confidential. RSA 91-A:2, I(b) allows public bodies, including school boards, to meet and consult with legal counsel outside of the public eye in a “non-meeting” that does not require notice, posting or minutes.

Second, RSA 91-A:3, II(I) allows public bodies to enter non-public session for the purpose of discussing “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.”

Third, RSA 91-A:5 exempts certain records from public disclosure. The primary gist of this statute recognizes that some documents and records contain confidential or private information – student records, staff records, and so forth. These long-standing principles often relate directly to legal advice and legal documents from an attorney as public bodies fulfill their obligations.

And just last year, the legislature amended RSS 91-A:5 to include or affirmatively state that “Records protected under the attorney-client privilege or the attorney work product doctrine.”

Clearly, read in totality, the legislature has repeatedly recognized and confirmed that communications between public bodies and their respective legal counsel are exempt from public disclosure.

Further, in the school context, attorney-client privilege, many of these documents are going to relate to students and will inherently be private and confidential – student discipline, family circumstances, special education issues and considerations, and so forth. Requiring that communications between a school board and its attorney be subject to a balancing test relative to the disclosure of such records would be contrary to the notion, already in law, that student matters are not disclosable.

For these reasons, the New Hampshire School Boards Associations opposes HB 1073 and urges the Committee to find this bill inexpedient to legislate.

Thank you for your consideration.

Respectfully,



Barrett M. Christina

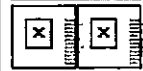
Executive Director

NH School Boards Association

P: (603) 228-2061 x307F: (603) 228-2351

A: 25 Triangle Park Drive, Suite 101, Concord, NH 03301

W: nhsba.orgE: bchristina@nhsba.org



Disclaimer:

The information in this electronic message, including any attachment(s), may include confidential or privileged information, a draft, or legal guidance which is intended for the exclusive use of the intended recipient. NHSBA provides legal education and information as a general service to NHSBA members. The information provided to members does not alone establish an attorney client relationship. Additionally, the information provided should not be interpreted or used as a substitute for a legal opinion from a school attorney. Before making legal decisions, school boards and administrators should consult with their attorney or other qualified counsel. If you are not the intended recipient and have received this message in error, do not use or rely on this information. Please notify the New Hampshire School Boards Association by reply e-mail or by telephone at (603) 228-2061. Please destroy all copies of this message and any attachments thereto.

Jennifer Horgan

From: Walt Stapleton <waltstapleton@comcast.net>
Sent: Thursday, April 14, 2022 3:39 PM
To: Sharon Carson; William Gannon; Harold French; Becky Whitley; Jay Kahn; Jennifer Horgan
Subject: In Opposition to HB-1073, request it be ITL
Importance: High

Honorable Senators in Judiciary Committee,

While I am listed as a co-sponsor of HB-1073, after further research, reading, and listening to the livestream proceeding in your hearing room today, 04/14/2022, on this bill, I am swayed by the very competent testimonies of the many witnesses against it, and therefore withdraw my support for the bill, in spite of the somewhat improving aspects of Amendment 2022-0689h.

Attorney-Client Privilege and Attorney-Client Work Product are established doctrines essential for constitutional jurisprudence and so must not be diluted or endangered by any attempt at "balancing" with entirely separate right-to-know public access under RSA-91A.

Accordingly, please decide HB-1073 as Inexpedient To Legislate.

Walter Stapleton

--

=====

WALTER A. STAPLETON,
NH HOUSE REP, Sullivan Dist.5,
Claremont Ward 3
Environment & Agriculture Committee

90 Veterans Park Road
Claremont NH 03743

Cell: 603-995-1034
Home: 603-542-8656
Email: WaltStapleton@comcast.net
Email: Walt.Stapleton@leg.state.nh.us



This email has been checked for viruses by Avast antivirus software.

www.avast.com

Hb1073rules

Listening to your hearing on my HB 1073, one would think the qualification of RSA 91-A:5, XII, relative to the exemption for records protected under the attorney client privilege or the attorney work product doctrine would virtually end the ability of public bodies to get information from attorneys.

I urge you to consider that, prior to last June, there was no explicit recognition of these privileges in RSA 91-A. I believe RSA-91A contains enough explicit protections for government to get the advice they need from lawyers without the addition of these privileges. We've gone for decades without this exemption and, I see no reason it needs to be in law at all.

There was a question of ambiguity in my proposed wording, but I suggest the exemption itself is ambiguous. No non-lawyer can understand what it means. Testimony before your committee was that the privileges are governed by Court rules, which themselves include exceptions. Thus, any application of the exemption already requires some balancing.

I doubt government should have the same rights as private citizens/organizations. Whether a board, Commission, or employee, all are in place to serve the public and that public, per Part I article 8 of our Constitution has a right to know what/when/where/how its servants operate. No private person/organization exists for that purpose. The interest of a board may conflict with the public interest. To suggest that an individual, say a mayor or a School superintendent has the power to keep important information from the public, forever, seems totally at odds with RSA 91-A.

In our fallen world, bad actors can easily abuse this privilege, especially if it is pro se, to conceal bad behavior and deny the public its best, or only, opportunity to uncover such misdeeds. Since the exemption is written without constraint, it may be read to exempt any record touched by an attorney, especially considering its late addition to RSA 91-A. This, also, seems totally at odds with 91-A and the Constitution.

If the privilege belongs to the client, no attorney should be concerned about advice being publicized. Whether any advice needs to be confidential is a decision for the client, not the attorney, So the attorney simply needs to act ethically. i

With these thoughts in mind, I encourage you recognize the inherent conflict between the exemption and adopt the clarifying language of HB 1073.

Voting Sheets

Senate Judiciary Committee
EXECUTIVE SESSION RECORD
2021-2022 Session

Bill # 1073

Hearing date: _____

Executive Session date: _____

Motion of: ITL Vote: 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: consent Vote: 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Motion of: _____ Vote: _____

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Gannon, V-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. French	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Kahn	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sen. Whitley	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Reported out by: Carson

Notes: _____

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Thursday, April 14, 2022

THE COMMITTEE ON Judiciary

to which was referred **HB 1073**

AN ACT modifying attorney exemptions under RSA 91-A.

Having considered the same, the committee recommends that the Bill

IS INEXPEDIENT TO LEGISLATE

BY A VOTE OF: 5-0

Senator Sharon Carson
For the Committee

This bill would narrow the scope of attorney-related records exempt from the Right-to-Know law. Last year the Legislature passed language to address the Supreme Court's decision to remove the exemption of attorney-client privilege from the Right-to-Know law. This would undo that legislation, once again unnecessarily damaging the State's, local governments', and all other public bodies' ability to provide and obtain appropriate legal counsel, by eliminating attorney-client privilege from the exemption of the Right-to-Know law for all public bodies.

Jennifer Horgan 271-7875

FOR THE CONSENT CALENDAR

JUDICIARY

HB 1073, modifying attorney exemptions under RSA 91-A.

Inexpedient to Legislate, Vote 5-0.

Senator Sharon Carson for the committee.

This bill would narrow the scope of attorney-related records exempt from the Right-to-Know law. Last year the Legislature passed language to address the Supreme Court's decision to remove the exemption of attorney-client privilege from the Right-to-Know law. This would undo that legislation, once again unnecessarily damaging the State's, local governments', and all other public bodies' ability to provide and obtain appropriate legal counsel, by eliminating attorney-client privilege from the exemption of the Right-to-Know law for all public bodies.

HB1073

Bill Details

Title: (New Title) modifying attorney exemptions under RSA 91-A.

Sponsors: (Prime)Wuelper (R), Potucek (R), Stapleton (R)

LSR Number: **22-2122**

General Status: **SENATE**

House:

Committee: Judiciary

Due Out: 3/10/2022

Status: PASSED/ADOPTED WITH AMENDMENT

Senate:

Committee: Judiciary

Floor Date: 4/21/2022

Status: INEXPEDIENT TO LEGISLATE

Bill Docket

Body	Description
H	To Be Introduced 01/05/2022 and referred to Judiciary
H	Public Hearing: 01/13/2022 03:45 pm LOB 206-208
H	Executive Session: 02/03/2022 09:00 am LOB 206-208
H	Executive Session: 02/18/2022 09:00 am LOB 206-208
H	Majority Committee Report: Ought to Pass with Amendment # 2022-068gh (NT) <u>(Vote 14-5: RC)</u>
H	Minority Committee Report: Inexpedient to Legislate
H	Amendment # 2022-068gh : AA VV 03/16/2022 <u>HJ 7</u>
H	Ought to Pass with Amendment 2022-068gh: MA VV 03/16/2022 <u>HJ 7</u>
S	Introduced 03/17/2022 and Referred to Judiciary; <u>SJ 6</u>
S	Hearing: 04/14/2022, Room 100, SH, 01:15 pm: <u>SC 15</u>
S	Committee Report: Inexpedient to Legislate; Vote 5-0; CC; 04/21/2022; <u>SC 16</u>
S	Inexpedient to Legislate, MA, VV --- BILL KILLED ---; 04/21/2022; <u>SJ 9</u>

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: HB1073

Senate Committee: Judiciary

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

Final docket found on Bill Status

Bill Hearing Documents: {Legislative Aides}

Bill version as it came to the committee

All Calendar Notices

Hearing Sign-up sheet(s)

Prepared testimony, presentations, & other submissions handed in at the public hearing

Hearing Report

Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

___ - amendment # ___ ___ - amendment # ___

___ - amendment # ___ ___ - amendment # ___

Executive Session Sheet

Committee Report

Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

___ - amendment # ___ ___ - amendment # ___

___ - amendment # ___ ___ - amendment # ___

Post Floor Action: (if applicable) {Clerk's Office}

Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

Enrolled Bill Amendment(s)

Governor's Veto Message

All available versions of the bill: {Clerk's Office}

___ as amended by the senate ___ as amended by the house

___ final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:

Jennifer Hanger
Committee Aide

8/12/22
Date

Senate Clerk's Office AK