LEGISLATIVE COMMITTEE MINUTES

SB342

Bill as Introduced

SB 342 - AS INTRODUCED

2022 SESSION

22-3098
07/10

SENATE BILL ***342***

AN ACT relative to the minutes of nonpublic sessions under the right to know law.

SPONSORS: Sen. Daniels, Dist 11; Rep. Kofalt, Hills. 4

COMMITTEE: Judiciary

ANALYSIS

This bill modifies the list of nonpublic meeting types where minutes of which do not need to be made publicly available within 72 hours.

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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

SB 342 - AS INTRODUCED

22-3098
07/10

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT relative to the minutes of nonpublic sessions under the right to know law.

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

1 Access to Public Records and Meetings; Nonpublic Sessions; Availability of Nonpublic Session Minutes Modified. Amend RSA 91-A:3, III to read as follows:

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

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

Amendments

Sen. Daniels, Dist 11
January 25, 2022
2022-0273s
07/04

Amendment to SB 342

Amend the bill by replacing section 1 with the following:

1 Access to Public Records and Meetings; Nonpublic Sessions; Availability of Nonpublic Session Minutes Modified. Amend RSA 91-A:3, III to read as follows:

III.*(a)* Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence [~~of the information~~]*:*

(1) Likely would affect adversely the reputation of any person other than a member of the public body itself, ***or pertains to the hiring, firing, compensation, promotion, and other personnel discipline and investigations of a public employee;***

(2) Pertains to the consideration of legal advice or pending claims or litigation; [~~, or~~]

(3) [~~Render~~] ***Renders*** the proposed action ineffective***, such as the consideration of the acquisition, lease, sale, or bid for property, or of applications by the business finance authority, or of student or pupil tuition contracts;*** [~~, or~~]

(4) [~~Pertain to terrorism, more specifically,~~] ***Pertains*** to matters relating to the preparation for and the carrying out of all emergency***, safety, and security*** functions, ***including those*** developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions[~~,~~]***; or***

(5) Relates to any other reason for a nonpublic session as listed in RSA 91-A:3, II.

(b) In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. For all meetings held in nonpublic session, where the minutes or decisions were determined to not be subject to full public disclosure, a list of such minutes or decisions shall be kept and this list shall be made available as soon as practicable for public disclosure. This list shall identify the public body and include the date and time of the meeting in nonpublic session, the specific exemption under paragraph II on its face which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the

minutes or decisions from public disclosure, and the date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure. Minutes related to a discussion held in nonpublic session under subparagraph II(d) shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.

Committee Minutes

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: January 13, 2022

HEARINGS

Tuesday	01/25/2022	
(Day)	(Date)	
Judiciary	State House 100	1:00 p.m.
(Name of Committee)	(Place)	(Time)

1:00 p.m.	**SB 336**	relative to family mediator interns.
1:15 p.m.	**SB 339**	relative to meetings of boards and commissions in the department of safety.
1:30 p.m.	**SB 322**	relative to remote meetings under the right-to-know law.
1:45 p.m.	**SB 342**	relative to the minutes of nonpublic sessions under the right to know law.
2:00 p.m.	**SB 344**	relative to the quorum requirements under the right to know law of meetings open to the public.

EXECUTIVE SESSION MAY FOLLOW

Sponsors:

SB 336			
Sen. Prentiss	Sen. Watters	Sen. Whitley	Sen. Soucy
Sen. Gannon	Sen. Kahn	Sen. Cavanaugh	Sen. Sherman
Rep. Nordgren	Rep. Gordon		
SB 339			
Sen. Prentiss	Sen. Watters	Sen. Whitley	Sen. Soucy
Sen. Kahn	Sen. Cavanaugh	Sen. Hennessey	Sen. Sherman
Sen. Rosenwald	Sen. Perkins Kwoka		
SB 322			
Sen. Perkins Kwoka	Sen. Watters	Sen. Rosenwald	Sen. Soucy
Sen. Whitley	Sen. Cavanaugh	Sen. Sherman	Sen. Daniels
Sen. Prentiss	Rep. Vann	Rep. Dolan	Rep. Espitia
SB 342			
Sen. Daniels	Rep. Kofalt		
SB 344			
Sen. Daniels	Sen. Hennessey	Sen. Cavanaugh	Sen. Perkins Kwoka
Rep. Long	Rep. Eaton	Rep. Egan	

Jennifer Horgan 271-7875

Sharon M Carson
Chairman

Senate Judiciary Committee

Jennifer Horgan 271-7875

SB 342, relative to the minutes of nonpublic sessions under the right to know law.

Hearing Date: January 25, 2022

Time Opened: 2:14 p.m. **Time Closed:** 2:52 p.m.

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

Members of the Committee Absent : None

Bill Analysis: This bill modifies the list of nonpublic meeting types where minutes of which do not need to be made publicly available within 72 hours.

Sponsors:
Sen. Daniels Rep. Kofalt

Who supports the bill: Senator Daniels; Natch Greyes, NH Municipal Association; Dave Topham; Barrett Christina, NH School Boards Association; Alvin See; Michele L. Tremblay, Rivers Management Advisory Committee; Colonel Kevin Jordan, NHFG

Who opposes the bill: Katherine Kokko; Laurie Orlolano, RTKNH; Brendan McQuaid, Union Leader; Gilles Bissonnette, ACLU; Laura Colquhoun; Alan Raff

Summary of testimony presented in support:
Senator Daniels (provided written testimony)

- Presented Amendment 0273s and spoke to the amendment.
- There are currently 11 reasons why you can goi into non-public but when it comes to sealing the minutes there are only three reasons given for that.
- With this bill, a local board would be able to seal the minutes under any statute by which they can go into non-public.
- Section V deals with covering any reasons that may be added to RSA 91-A in the future.
- Senator Whitley asked why this is necessary.
    - (a) and (b) deal with employee performance or hiring and firing. Under the three reasons for sealing the minutes, reputation is one of them. There is nothing there that says you can seal the minutes for someone who is disciplined or for candidate that comes in that does not want their employer to know they are looking for a new job. There are holes in the current statute that can be filled up with this bill.

Natch Greys (NH Municipal Association)

- Supports the amendment.
- This causes the provision of RSA 91-A:3, III to reflect the provision in RSA 91-A:3, II.
- Many boards are using the current language as a broad catch all.
- Under this that would be cleaned up and allow the public minutes to include the more specific reasons for the sealing minutes.

Summary of testimony presented in opposition:

Gilles Bissonnette (ACLU) (provided written testimony)

- Opposed to the bill and the amendment on behalf of the ACLU, the Bow Times, and the New England First Amendment Coalition.
- The law in this area is in a state of flux.
- There are two pending court cases regarding this issue.
- The Provenza Case is before the Supreme Court dealing with investigatory reports of law enforcement.
- The court is wrestling with having to balance public interest with the privacy interests.
- The other case is the Union Leader v. Police Standards and Training.
- That case deals with RSA 91-A:3, II.
- The analyses are really the same between RSA 91-A:3, II and III.
- The Merrimack Superior Court held in that case that reputational interest and privacy doesn't create categorical secrecy.
- In the context of police certification, Judge Schulman determined that there is a public interest and that needs to be balanced.
- It is not prudent to weigh into this area of law right now because there are still these two pending cases.
- Thinks this bill could undermine transparency.
- The original bill and the amendment seem to create the impression that there should be categorical secrecy when dealing with things like compensation, personnel discipline, and investigation.
- Sometimes there will be secrecy based on the competing balance.
- With respect to compensation the Supreme Court has already said that is something that should be public.
- Worries this bill undermines these principles; not suggesting that is the intent but that could be one of the consequences.
- For example, there was a case in the Concord School district, where there was a concern that the district did not adequately investigate a teacher who was engaging in some inappropriate behavior with students. There was a clamor in the community to find out what the district knew and when.
- This is the type of bill that could undermine transparency in those kinds of situations because it covers personnel discipline and investigations.

- Senator Whitley asked if this bill would create secrecy and prohibit that balancing of interests.
    - It would in the context of nonpublic meeting minutes. Fears that would have a spillover effect in section II, when meetings should be closed. and in how records are managed. The analyses for those three buckets should be the same. This bill would upend that by creating categorical secrecy in the context of non-public meeting minutes.
- Senator Whitley pointed out that municipalities are run by volunteers in a large part. Is not sure if they able to get a legal opinion every time they go non-public, but there is also an interest in providing clarity on the issue.
    - Is sympathetic to that. Over time educated judgment calls will be made and sometimes they may be right and sometimes wrong. The public has the opportunity to challenge that in court. Through that process, the court decisions get into the nitty-gritty of these cases and will help draw those lines. It is harder to do that legislatively because you can't contemplate every scenario. Hopefully, we get greater clarity over time. That's why we have the superior court system.
- Senator French asked if this would darken the room for everyone instead of bringing the light of transparency.
    - It will, especially with respect to non-public meeting minutes where there might be some information that was discussed that would be reflected in those minutes where there would be a public interest.
- Senator Carson asked on section III it talks about student/pupil tuition contracts, would that be a violation of privacy for the student especially if a student was a special needs student and they were having an out-of-state placement.
    - Would like to look into that a little more. Knows elsewhere in RSA 91-A and maybe other statutes there are specific carve outs and protections for information dealing with students. Any information that outs minors or students almost always has a compelling privacy interest. Would have to think about it more as to whether that is covered elsewhere.
- Senator Carson asked if the section dealing with the carrying out of emergency functions should be sealed.
    - That would depend on the circumstances. In the public records context, there is a case Lodge v. Knowlton regarding law enforcement investigation techniques. There is a whole set of criteria that needs to be shown to justify secrecy. It would depend.
- Senator Carson asked if this amendment is too vague.
    - Thinks so. Principal objection is respect to section I. Would need to give more thought to lines 16-18. Thinks this all needs a bit more thought and stakeholder input would be necessary
- Senator Whitley asked when making these considerations should that nuance be done by the public body that is thinking about this.

- Municipal counsel is often involved in these decisions. They will go into nonpublic or go into nonpublic for the purpose of getting legal advice with respect to that balance.

Brendan McQuaid (NH Union Leader) (provided written testimony)

- Is involved in a pending case that covers some of this area.
- Opposed to the bill and the amendment makes the bill even worse.
- Transparency is core to NH, and it is in the Constitution as a right to know.
- Anything that blows holes in the right should be looked at very skeptically.
- In the news media, whenever they hear the words 'personnel matter' it is the worst thing to hear.
- That is used as a big catch all and the entity is not going to say anything.
- This bill creates giant holes for transparency.
- Under this the entity doesn't even have to say the non-public happened.
- Creates a problem for the news media's job of trying to inform the public on what the government is doing.
- Sometimes in these instances of 'can' become 'should'.
- People read into this legislation, and they think they should always seal the minutes because it falls under one of those categories.
- Every exception to RSA 91-A creates a potential problem, and this creates way to many exceptions.
- In the example of an employee that may not want their employer to know they are looking for a new job. If this was in statute, then Manchester would not know their superintendent is apply for a job in Carson City, NV.
- It is those kinds of things that are important for everyone to know.
- Transparency is difficult but that doesn't mean it is not the right thing to do and we should always strive for transparency as the default.
- Concerned volunteers don't know how this stuff works so they look at the language and default to the language rather than their options under that language.
- Senator Gannon asked if the Manchester superintendent should have some right to privacy.
    - He is a public employee looking for a public job somewhere else.

Kathrine Kokko (provided written testimony)

- Public bodies are required to provide minutes of nonpublic sessions within 72 hours unless the information contained in those minutes meets one of three criteria.
- The allowable reasons involve whether or not releasing that information are 1) will adversely affect the reputation of someone other than a member of the public body, 2) render the proposed action ineffective, or 3) pertain to terrorism.
- A public body cannot currently seal minutes for reasons that do not qualify under those three specific exclusions.
- The public has a right to some summary of what has occurred in non-public session as quickly as possible.

- For the sake of transparency, some amount of accountability is required.
- If this is meant to link section II and III, the language should encompass all 12 reasons that allow a public body to enter nonpublic, not sure that it does.
- It appears the intent of this legislation is to make non-public sessions, for certain reasons, automatically eligible for those sealed minutes.
- This approach would render the need to carefully consider whether the public has a right to know what happened during that session completely moot.
- There are three pieces of language that were originally altered with very specific consequences.
- The addition of the language hiring, firing, and personnel investigations is unnecessary, as the scenarios are likely to be covered under the reputation exemption.
- Believes any personnel actions with negative connotations tend in good conscience to be covered by the existing statute.
- Broader personnel issues that pertain to the management of and by the public body, which do not harm an individual's reputation, should not qualify for a broad exemption under 'personnel'
- The inclusion of this language will encourage that misinterpretation.
- The term "consideration of legal advice" was added initially as an example of the reputation example.
- Consultation with legal counsel itself is considered a non-meeting and therefore is not subject to RSA 91-A.
- A public body's deliberation about legal advice is a valid reason for going into non-public.
- Despite that the public body is still accountable for any actions taken during that session, and such actions should be recorded and released to the public.
- If actions would be rendered ineffective by such a release or it would damage the reputation of someone, the public body may evoke the exemption.
- Otherwise, there is not reason to not release the minutes.
- The term 'terrorism' is removed in the bill and the addition of broader language is alarming.
- By using and defining the term 'terrorism' the current RSA identifies the scope and the intent of the exemption.
- Broadening it potentially and unnecessarily restricts the ability of a citizen to gather information about public safety actions taken by a municipality. The amendment is much broader on this.
- Many routine public safety actions can be loosely interpreted to be 'an attempt to thwart an act'.
- The objective of the right to know law is to ensure that a body's actions are transparent.
- The proposed changes here are unnecessary or work to restrict that objective.

Laurie Ortolano (Right to Know NH) (provided written testimony)

- This is overly broad language and involves creating situations of non-disclosure without clear justification.
- Currently there is a tendency amongst boards to not unseal their minutes appropriately.
- There is a lot of information in those records that could be unsealed.
- Entities must have a 2/3 vote to seal minutes and a 2/3 vote to release them.
- The reputation exemption does not mean any discussion that could damage an individual's reputation, and when adding in the language of hiring and firing, interpersonal discipline, or investigation, this could be withholding information that should be sealed.
- The amendment separates out legal advice from hiring and firing and discipline, which is fine, but legal advice obtained in non-public session can be made public.
- Currently you are able to not disclose an employee obtaining legal advice about something that effects their reputation or contract negotiations until the agreement is completed or legal advice regarding security to avoid acts of terrorism.
- To not disclose any legal advice is a total lack of transparency.
- Nashua has an attorney, and they always come to the board of alderman meetings. They should also come to the assessing meetings and the board of public health meetings to provide legal advice.
- Non-public advice could be recorded and released in 72 hours.
- Very opposed to striking the 'terrorism' because that is tied to a clause that connects the terrorism issue to the safety issue.
- Would striking 'terrorism' mean 'emergency acts' would cover fire and police planning emergency drills for public safety not related to terrorism and therefore not be disclosed?
- Would changing the frequencies of radio communications for police departments not be disclosed?
- Does not want all 12 reasons for going into nonpublic being rolled into sealing minutes.
- We should be working to opening disclosure up more and not increasing it.
- A law went into effect on January 1, 2022, that requires a lists all non-public public meetings be made available to the public.
- This is a starting point to fix the law and look at unsealing more minutes.

jch
Date Hearing Report completed: January 28, 2022

Speakers

Senate Judiciary Committee
SIGN-IN SHEET

Date: 01/25/2022 **Time:** 1:45 p.m.

SB 342 AN ACT relative to the minutes of nonpublic sessions under the right to know law.

Name/Representing *(please print neatly)*

Name/Representing	Support	Oppose	Speaking?	Yes	No
PRIME: SEN. GARY DANIELS - SD #11	☑	☐		☑	☐
Katherine Hoskins	☐	☑		☑	☐
Nath Greyes NHMA	☒	☐		☒	☐
Laurie Orlando RTKNH	☐	☒		☒	☐
Brendan McQuaid	☐	☒		☒	☐
[illegible]	☐	☐		☐	☐
Gilles Bissonnette	☐	☑		☑	☐
CORONER KEVIN JORDAN NH FG.	☑	☐		☐	☑
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Senate Remote Testify

Judiciary Committee Testify List for Bill SB342 on 2022-01-25

Support: 4 Oppose: 2

Name	Title	Representing	Position
Colquhoun, Laura	A Member of the Public	Myself	Oppose
Raff, Alan	A Member of the Public	Myself	Oppose
Topham, Dave	A Member of the Public	Myself	Support
Christina, Barrett	A Lobbyist	New Hampshire School Boards Association	Support
See, Alvin	A Member of the Public	Myself	Support
Tremblay, RMAC Chair, Michele L.	A Member of the Public	Rivers Management Advisory Committee	Support

Testimony

ACLU New Hampshire

The Bow Times "Of the People, By the People, For the People"

nefac New England First Amendment Coalition

Statement by Gilles Bissonnette, Legal Director of the ACLU-NH
Senate Judiciary Committee
Senate Bill 342
January 25, 2022

I am the Legal Director of the American Civil Liberties Union of New Hampshire (ACLU-NH)—a non-profit organization working to protect civil liberties throughout New Hampshire for over fifty years. I appreciate the opportunity to testify today in opposition to SB342, which could be construed to expand the circumstances under which governing bodies can prevent disclosure of meeting minutes of nonpublic sessions—including with respect to "personnel discipline and investigations."

I am also testifying on behalf of the New England First Amendment Coalition and the *Bow Times*, whose editor is Attorney and former New Hampshire Supreme Court Justice Chuck Douglas. The New England First Amendment Coalition defends, promotes, and expands public access to government and the work it does. The Coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, librarians, and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment.

We believe that this Committee should deem this bill *inexpedient to legislate* for two reasons.

First, this area of law concerning how public "personnel discipline and investigation" information should be handled is currently in flux. There are two pending cases potentially implicating the interpretation of RSA 91-A:3. For example, the Merrimack Superior Court held on June 10, 2021 that RSA 91-A:3, II's closed meeting provisions—which are analogous to the provisions of RSA 91-A:3, III at issue here concerning the secrecy of nonpublic meeting minutes—should be construed to make Police Standards and Training de-certification hearings presumptively public. There, the Court held that, in deciding when an official's reputational interest warrants closure of a public meeting, this statute should be construed to require a balancing of the public interest against the harm to reputations which would likely result from permitting transparency. The Court explained that "[w]ithout such a balancing test, any information that might mar a person's reputation would suffice to close a hearing from public view. This would be the case regardless of the weight of the public interest and regardless of whether the likely harm to reputation would be defamatory or deserved." This case is still pending, and this decision is attached.

The second case is *Provenza v. Town of Canaan* where the New Hampshire Supreme Court is considering in the public records context how the privacy interests of a police officer should be balanced against the public interest in disclosure in the context of a police investigatory report. *See Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that an internal investigation report concerning an allegation that an officer engaged in excessive force and that found the misconduct unsustained is a public document, in part, because "the public has a significant interest in knowing how the police investigate such complaints"; currently on appeal to N.H. Supreme Court at No. 2020-0563 and argued on Oct. 20, 2021). This case too may shed light on how these interests should and will be balanced in the context of public meeting transparency under RSA 91-A:3. In short, as the courts are still considering how to balance these competing interests in the Chapter 91-A context, we feel that this Committee should await these decisions before taking final action.

Second, though this may not be the intent, we are concerned that this bill would weaken the law—and the recent *Union Leader Corp. v. N.H. Police Standards and Training Council* decision—in making information concerning "personnel discipline and investigations" less public, particularly insofar as this bill could be construed to eliminate *Union Leader Corp.*'s public interest balancing test in construing RSA 91-A:3's transparency provisions, thereby mandating secrecy of this information in meeting minutes without examining the public's interest. In the public records context, this information is not categorically secret. Rather, as the New Hampshire Supreme Court held in two decisions issued in May 2020, the disclosure of this personnel/disciplinary information is determined by a public interest balancing test. *See Union Leader Corp. v. Salem*, 173 N.H. 345 (2020); *Seacoast Newspapers, Inc. v. Portsmouth*, 173 N.H. 325 (2020). This test balances the public interest in disclosure against any privacy or governmental interests in nondisclosure. In other words, the public interest must be considered, and this test explicitly evaluates whether an employee has a legitimate privacy interest at stake.

Though it may not be the intent, this bill, however, seems to suggest in the context of non-public session minutes under RSA 91-A:3, III that such information should never be public and that there is never a public interest in disclosing this information. This is inconsistent with Chapter 91-A, which presumes transparency. Public officials, after all, work for us and are paid by taxpayer dollars. If they have engaged in misconduct that relates to their official duties and this is presented to and discussed by a public body, we believe that information should generally made public. However, this bill potentially would ignore this public interest and presume that such information is categorically secret. Moreover, transparency in how public bodies adjudicate investigatory and personnel discipline is vital. As the New Hampshire Supreme Court has explained, "[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate." *See Reid v. N.H. Att'y Gen.*, 169 N.H. 509, 532 (2016).

For these reasons, we respectfully urge members of this Committee to vote *inexpedient to legislate* on this bill.

NEW HAMPSHIRE
UNION LEADER

Brendan J. McQuaid
President and Publisher

January 25, 2022

Senate Judiciary Committee
NH Statehouse

Dear Committee Members,

I am the President and Publisher of the largest newspaper in the Granite State, the New Hampshire Union Leader. It is from this position and that of a concerned citizen that I write to you today.

I am in strong opposition of SB342 or any attempt to erode transparency in New Hampshire government. This state has a long tradition of the right to know as recognized in the New Hampshire Constitution:

"Government, therefore, should be open, accessible, accountable, and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."

RSA 91-A attempts to codify this right and put a framework around it. Attempts to poke holes in the public's constitutional right to know, such as SB342, should be looked at very skeptically. 91-A purposefully has very few and narrow exceptions. SB342 expands one of these exceptions to a degree that should not be accepted by this committee.

According to the language in the bill, it attempts to take government business that is already occurring away from public view and obscure it even further by allowing even the minutes of such sessions to be hidden. This keeps the public in the dark about what is going on with their government and their money. This is an "unreasonable restriction" that goes directly against the spirit and letter of the New Hampshire Constitution, the public has a right to know.

Sincerely,

Brendan J. McQuaid
President and Publisher
bmcquaid@unionleader.com

SB 342 – This bill modifies the list of nonpublic meeting types where minutes of which do not need to be made publicly available within 72 hours

Dear Honorable Members of the Senate Judiciary Committee

My name is Laurie Ortolano. I live in Nashua. I am the Vice President of Right to Know New Hampshire (RTKNH) and we are opposed to SB342, the changes in disclosing nonpublic meeting minutes within 72 hours as required by law.

The change to RSA 91-A:3 III may have the consequences of broadening the reasons for nondisclosure without clear justification. As it stands, there appears to be a lack of prudent management of nonpublic meeting minutes to periodically review the records to determine if public dissemination is warranted.

RSA 91-A:3 III states that a 2/3 vote is required to not release nonpublic minutes within 72 hours under three conditions:

[1] Affect adversely the reputation
[2] or render the proposed action ineffective
[3] pertain to terrorism

Condition [1] that allows withholding minutes because of an adverse effect on the reputation of a person other than a member of the board, does not necessarily mean that any discussion involving a person would result in damage to their reputation. Adding the language for hiring, firing, or other personnel discipline or investigations might not be necessary to withhold from disclosure.

Of the specific language added by this bill, four of the items, hiring, firing, discipline and investigation, regard reputation and, a new condition was added, consideration of legal advice. This could be interpreted as a broadening of non-disclosure for legal advice.

As it stands, legal advice obtained in nonpublic sessions can be made public. The words, "consideration of legal advice" is too broad and would allow any legal advice voted on by two-thirds of the board to be eliminated from disclosure within 72 hours. Based on the three conditions above, legal advice about an employee that would affect their reputation, legal advice about contract negotiation (like abatement appeals in assessing that would render the negotiation ineffective if the information were released before the settlement was determined) and legal advice on security to avoid an act of terrorism are included for potential non-disclosure if

there is a 2/3 vote to do so. Legal advice only in the context of those 3 conditions can be withheld. We do not want to see the language broadened.

There are many times when legal advice provided to Boards is public information. Nashua legal counsel attends all board of Aldermen meetings, assessing meetings, and now public health meetings. The legal advice provided when a board member asks for a legal reading is all public and no doubt, some of the legal advice in nonpublic could be made public, if not within 72 hours, then certainly after a negotiation is completed.

We are opposed to striking the words, "to terrorism, more specifically", the clause after more specifically in intended to relate to terrorism. Why is the bill sponsor recommending these words be eliminated? Would striking the language mean that emergency acts for fire and police planning emergency drills for public safety not related to terrorism would be non-disclosed? Would changing the band frequency of radio communication for the police department be non-disclosed? In Nashua, there was a public discussion about the change in radio frequency to enhance emergency calls. Telecommunication companies are often relocating and changing communication towers. Would the government now be able to throw this into a nonpublic session and not release the minutes in 72 hours?

We are recommending that no changes be made to the language in Section III. The RTKNH amendment redlined below.

Sincerely,
Laurie Ortolano
41 Berkeley St.
Nashua, NH
603-930-2853

AN ACT relative to the minutes of nonpublic sessions under the right to know law.

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

1 Access to Public Records and Meetings; Nonpublic Sessions; Availability of Nonpublic Session Minutes Modified. Amend RSA 91-A:3, III to read as follows:
III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session,

it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, ~~*including hiring, firing, and other personnel discipline and investigations, or consideration of legal advice,*~~ or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. For all meetings held in nonpublic session, where the minutes or decisions were determined to not be subject to full public disclosure, a list of such minutes or decisions shall be kept and this list shall be made available as soon as practicable for public disclosure. This list shall identify the public body and include the date and time of the meeting in nonpublic session, the specific exemption under paragraph II on its face which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the minutes or decisions from public disclosure, and the date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure. Minutes related to a discussion held in nonpublic session under subparagraph II(d) shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.

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

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Merrimack, ss

UNION LEADER CORPORATION

v.

NEW HAMPSHIRE POLICE STANDARDS AND TRAINING COUNCIL

217–2020-CV-613

ORDER

This matter is a statutory petition for injunctive relief brought by a newspaper publisher under the Right To Know Act, RSA 91-A:7. The petition seeks:

1. A permanent injunction requiring the New Hampshire Police Standards And Training Council ("the Council") to conduct all future law enforcement officer decertification hearings in public.[1]

2. An order requiring the Council to provide the plaintiff with copies of the sealed minutes of decertification hearings relating to two specific police officers;

[1]The court uses the short-hand phrase "decertification hearing" to apply to all Council hearings regarding the possible suspension or revocation of a regulated law enforcement officer's certification pursuant to RSA 106-L:5:V and N.H. Admin. Rules 402.02. This includes probable cause hearings, informal conferences, and final hearings. The court uses the broader term "decertification *proceeding*" to apply to both hearings before the Council and investigations by Council staff.

3. An order requiring the Council to provide the plaintiff with copies of documents Council staff received, reviewed, relied on or created in connection with one of the two decertification proceedings.

For the reasons set forth below, the court enters the following order:

1. The court rejects the plaintiff's argument that all future decertification hearings must be held in public. However, the court also finds that the Council's unwritten policy of allowing the respondent officer to unilaterally decide that a hearing will be non-public violates RSA 91-A:3. Therefore, the court issues the following narrowly tailored injunction:

> **The Council is permanently enjoined from holding non-public decertification hearings, and from sealing the minutes of non-public decertification hearings, if the only reason for prohibiting public access is that the respondent in the decertification hearing has so requested.**
>
> **However, the Council may consider a respondent's request, along with all of the other relevant facts and factors, in making an independent, case-specific and fact-based determination to hold a decertification hearing in non-public session. The Council may also consider a respondent's request as one factor in the determination of whether the minutes of a sealed decertification hearing should be sealed.**
>
> **Nothing in this injunction prohibits the Council from adopting a rule, pursuant to RSA 541-A, that would make the probable cause phase of a decertification hearing non-public.**

2. With respect to the sealed minutes described on page 16 of this order, and with respect to all related documents that have been actually requested by the plaintiffs but withheld (or redacted), as described on page 14 of this order, the Council shall, within 30 days, either:

(a) unseal the minutes and documents, and provide copies to the plaintiff, except to the extent that any social security numbers, dates of birth, personal phone numbers and home addresses may be redacted, or in the alternative,

(b) submit the minutes and contested documents to the court *in camera* review pursuant to Orford Teachers Association v. Watson, 121 N.H. 118, 122 (1981).

If the Council opts for an *in camera* review, it may file a memorandum of law in support of its position that the minutes and/or records should remain sealed in whole or in part.

Pursuant to Superior Court Rule 13B, any portions of the memorandum that describes the factual substance of contested minutes and/or records may be sealed. However: (a) a motion to seal must be filed, (b) if the Council believes that it is necessary for some of the sealed portions of the memorandum to be reviewed by the court *ex parte*, this should be specifically requested in the motion to seal, and (c) a redacted publicly available version of the memorandum must be filed.

If the Council files a memorandum of law, the plaintiff shall have 30 days to file a responsive memorandum of law. Further memoranda are discouraged but will be allowed on motion.

3. This order is not a final order, because the Council may yet submit minutes or documents for an *in camera* review. This order does, however, resolve the claim for injunctive relief with respect to future non-public hearings.

The issue of attorneys' fees will be addressed at the conclusion of the case.

4. If the Council does not submit documents for *in camera* review within 30 days, the Council shall instead file a notice stating that it has provided plaintiff with the contested minutes and documents.

I. Procedural Posture

Pursuant to RSA 91-A:7, Right To Know petitions may be adjudicated on in an almost summary fashion based on (a) the Complaint, (b) the documents attached to the Complaint, (b) the Answer, and (c) the documents attached to the Answer. As Superior Court Rule 1(a) makes clear, the ordinary rules governing civil actions do not apply to the extent that a statute, like RSA 91-A:7, requires something different.

To be sure, RSA 91-A:7 does not prohibit the court from ordering either discovery or evidentiary hearings when appropriate. However, in this case the parties do not dispute

the salient facts (and the plaintiff is limited to the facts it alleged, and the case that it framed). Therefore, as the Council acknowledged in its Answer, this dispute may be resolved based on the state of the record.

II. Legal Background

The Council is an executive branch council, RSA 106-L:4, that functions as the professional training and licensure authority for police officers and other law enforcement officers described in RSA 106-L:2. With the exception of certain probationary employees, no person may perform the duties of a regulated law enforcement officer without first being certified the Council.

The Council promulgates standards for certification including standards relating to (a) preparatory training, RSA 106-L:6, I; (b) minimum age, physical fitness and mental fitness, RSA 106-L:6, III, and (c) "citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of their offices." RSA 106-L:6, III. See N.H. Admin. Rules Pol Chapter 300.

The Council is also charged with the responsibility for decertifying law enforcement officers when they either (a) breach the standards set by the Council or (b) are no longer able to meet those standards. RSA 106-L:5, V; N.H. Admin Rules

Pol Chapter 400. An officer who has been decertified, or whose certification has been suspended, "shall not be allowed to work in a capacity that would allow them to exercise the same authority as a certified officer, or that would give the appearance that they have the same authority as a certified officer during the period of suspension or revocation." Pol 402.02(m).

Although most of the grounds for decertification or suspension of certification involve criminal or other serious misconduct, some do not. See, e.g., Pol 402.02(a)(6)(a) (marijuana use regardless of its legality under state law)[2]; 402.02(a)(7) (severe mental illness); 402.02(a)(12) (pleas of not guilty to criminal offenses that are resolved by diversion in lieu of a determination of guilt or innocence); 402.02(d) (suicide attempts, requiring suspension of certification until evaluation by a psychologist).

The Council's organic statute, RSA Chapter 106-L, does not limn the procedure the Council must follow in conducting decertification hearings. There is nothing in Chapter 106-L

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[2]Pol 402.02(6)(a) categorically forbids "marijuana use." RSA Chapter 126-X allows for medical marijuana use. The laws of several other States, including every neighboring state, allow recreational marijuana use by persons present within their borders.

that specifically requires, forbids or even discusses when such hearings may be closed to the public.

RSA 106-L:5, V empowers the Council to promulgate its own procedural rules pursuant to the Administrative Procedure Act, RSA Chapter 541-A. Using this authority the Council has adopted a lengthy set of rules governing all hearings before the Council including decertification hearings. See Pol Chapter 200. However, those Rules do not address the criteria that the Council must or may consider prior to a conducting a non-public decertification hearing. The Rules say only that all oral proceedings shall be recorded and that "any person entitled by RSA 91-A" may request a copy of the recording. Pol 205.04(c). There is likewise no statute or administrative rule that specifically addresses the confidentiality *vel non* of any of the Council's records.

Thus, the only controlling statute regarding public access to the Council's decertification hearings and records is the Right To Know Act, RSA Chapter 91-A. Relying on the general language RSA 91-A:3, II and III and RSA 91-A:5, IV, the Council has adopted an unwritten, unpublished, yet hard and fast policy that, upon receipt of a request from an officer charged with misconduct or other grounds for decertification: (a) a decertification hearing will be automatically held in non-public session, (b) the minutes of the proceeding will be forever

sealed, and (c) most of the underlying documents will be kept confidential. See Answer, ¶41 ("[The Council] has always treated discipline hearings as non-public at the option of the officer, and withheld most records related to officer discipline as personnel matters, because of concerns of privacy and confidentiality, and to protect the integrity of its own work"); Id, ¶9 ("The PSTC admits that it routinely permits police officers to elect whether to proceed with their disciplinary hearings in public or non-public session."); and Affidavit of David Parenteau, Bureau Commander for the Council and former Interim Director of the Council, attached as Exhibit 1 to the Council's Answer, ¶¶ 35-26 ("With respect to discipline hearings, the Council's practice has historically been to allow the officer to decide whether to proceed in public or non-public session. We provide that option to the officer because, almost always, the reasons for suspending or revoking a certification involve matters that, if discussed in public, would likely affect the officer's reputation adversely.").

Although the existence of this unwritten policy is conceded by the Attorney General and by the Council's Bureau Commander and former Interim Director, the Council nonetheless warns respondents in decertification proceedings that:

> If you choose to have your hearing held in non-public session, please be advised that if the council issues an order finding cause to take action on your

> certification, they will consider whether the testimony offered at the hearing will remain sealed. The authority to hear cases involving public employees in non-public session is contained in RSA 91-A:3, III and is not automatic.

See Notice of Hearing (Complaint Ex. 2). This boilerplate seemingly acknowledges that it is the Council's statutory responsibility, rather than the officer's personal and plenary prerogative, to decide whether, and to what extent, a decertification proceeding may be sealed.

The general statutes upon which the Council's policy is grounded provide in pertinent part as follows:

RSA 91-A:3, II

> Only the following matters shall be considered or acted upon in nonpublic session:
>
> (a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
>
> * * *
>
> (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.

RSA 91-A:,III

> Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. . . . Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions. . . .

RSA 91-A:5, IV

> The following governmental records are exempted from the provisions of this chapter:
>
> > IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

III. Factual Background

This case involves two separate decertification proceedings against two separate police officers from different departments.

A. The Manchester Officer's Case

One case involves a former Manchester officer. In the Manchester officer's case, the Council provided the plaintiff with three pertinent documents:

(a) A Notice dated April 13, 2020 which stated that the Council reviewed information relating to the officer for the purpose of making a preliminary determination of probable cause to hold a decertification hearing.[3] The Notice went on to advise the officer that a summary of the facts was presented to the Council. Those facts revealed that the officer was terminated by the Manchester Police Department but that the termination was later reversed by an arbitration decision. The Notice concluded by informing the officer that the Council would hold a hearing to determine whether there was probable cause to hold a final decertification hearing.

(b) A Notice dated August 10, 2020 advising the officer that the Council would hold a decertification hearing.[4] The

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[3]The Council reviewed this information during a non-public hearing. Parenteau Affidavit, ¶¶58, 59. The public minutes do not disclose the officer's name, department, rank or status and do not describe the facts relating to his case. See, Council Minutes of March 24, 2020, p. 10 (attached to Parenteau Affidavit as Ex. A). The non-public minutes were sealed. Id.

[4]On July 28, 2020 the Council had determined in public session that a probable cause hearing was unnecessary and that case could proceed to a final decertification hearing. See Council Minutes of 7/28/2020 at p. 6 (attached to Parenteau Affidavit as Ex. B). The minutes do not disclose the officer's name, department or rank. The substance of the accusations

Notice stated that the Council learned the officer had been terminated from the Manchester Police Department because he committed acts (plural) of criminal mischief while conducting searches of apartments. According to the Notice, the Manchester Police Department also discovered that the officer made racist remarks in text conversations while on duty and using a Department issued cell phone. The Notice went on to state that the Council learned that the officer's termination was later changed to a thirty day suspension as a result of an arbitration decision. The Notice advised the officer that his certification was suspended pending the decertification hearing.

(c) A letter from the officer's attorney dated October 22, 2020. The letter informed the Council that, due to his "illegal" termination, the officer had been unable to complete the firearms training necessary to maintain his certification. The letter also informed the Council that the officer would agree to remain suspended until such time as he might satisfy this training requirement. The officer's attorney opined that, because the officer agreed to an indefinite suspension, albeit

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against the officer are not mentioned in the minutes and, presumably, were not discussed at the public hearing. Rather, the Council discussed only a procedural anomaly resulting from the officer's termination and subsequent reinstatement, as it related to the need for a probable cause hearing under the Council's procedural rules. The public discussion related solely to the Council's interpretation of its rules.

with the right to later seek reinstatement, there was no need for any further hearing. The officer's attorney requested the Counsel to consider this possibility in a non-public session.

The Council held the following hearings in the Manchester officer's case:

(a) A March 24, 2020 non-public hearing, described above in footnote 3.

(b) A July 28, 2020 public hearing, described above in footnote 4.

(c) A September 11, 2020, non-public "informal conference." An informal conference provides the respondent officer and the Council the opportunity to discuss both the prospects for settlement and the scope of the decertification hearing if settlement proves elusive. See Pol 205.04. The Manchester officer asked for the conference to be conducted in non-public session and to have the transcript sealed. The Council agreed to do so. The Council's Rules governing informal settlement conferences say only that (a) the conference must be recorded verbatim and (b) any person entitled by RSA 91-A thereto may obtain a copy of the audio. Id.

(d) An October 27, 2020 public hearing. Plaintiff sent one of its reporters to the hearing (via Zoom due to the pandemic). The hearing had been scheduled to serve as the final decertification hearing. However, after reading portions of the

officer's attorney's letter, the Council voted to suspend the decertification proceeding. In short, this meant that the officer's certification would remain indefinitely suspended due to the failure to complete firearms training. The officer is free to apply for reinstatement if he completes training.

Plaintiff sent the Council as 91-A request for the documents that had been reviewed and created by the Council and Council staff in connection with the Manchester Officer's case. The Council provided plaintiff with the three documents described above. The Council withheld all of the other documents from the proceeding citing RSA 91-A:5.

Later—after this lawsuit was filed—the Council provided the plaintiff with what it describes as "most of the records previously withheld." Parenteau Affidavit, ¶107. The Council opined that additional disclosure was warranted because (a) the Council's proceedings had concluded, and (b) other governmental agencies had already disclosed "a significant amount of records." Id.

B. The Ossipee/Loudon Officer's Case

At its October 27, 2020 hearing the Council also held an unrelated decertification hearing regarding a different police officer. The Complaint alleges that the officer worked for the Ossipee Police Department. However, the Council's Public Minutes state that the officer was employed by the Loudon Police

Department at the time of the hearing. See Council Minutes of 10/27/2020 (Parenteau Exhibit B). The Court infers from the record that the Officer was earlier employed by the Ossipee Police Department and that the decertification proceeding related to matters that occurred during his tenure at Ossipee.

The officer appeared before the Council for a final decertification hearing. At the officer's request, and over the plaintiff's oral objection, the Council went into non-public session and later sealed the minutes. The Council then deliberated briefly in public session.

The public minutes indicate that (a) a civil stalking petition against the officer had been filed but later dismissed, (b) the civil talking petition was no longer a ground for decertification, (c) the only remaining ground was a "SPOTS violation",[5] and (d) the officer was not criminally charged in connection with the SPOTS violation and the police department did not believe he had engaged in any criminal conduct. The Council unanimously voted to suspend the officer's certification for thirty days.

[5] "SPOTS" is an acronym for the State Police On-Line Telecommunication System. This is a database used by law enforcement. A "SPOTS violation" likely refers to the unauthorized use of SPOTS for personal or other unapproved reasons.

IV. The Relief Requested In The Complaint

As the Court construes the Complaint, the plaintiff is seeking the following:

-A permanent injunction requiring the Council to hold all future decertification hearings in public session; and

-A copy of the sealed minutes of the non-public portion of the March 24, 2020 Council meeting pertaining to the Manchester officer;

-A copy of the sealed audio or transcript of the September 11, 2020 informal conference pertaining to the Manchester officer;

-The underlying records relating to the Manchester Officer that were received by or created by the Council; and

-A copy of the sealed transcript of the non-public portion of the October 27, 2020 Council meeting pertaining to the Ossipee/Loudon officer; and

-Attorneys' fees and costs.

V. Legal Analysis

A. Guiding Principles

As originally enacted in 1784, Part 1, Article 8 of the New Hampshire Constitution consisted of a single sentence that eloquently describes the social compact that forms the cornerstone all just societies:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them.

In 1976, Article 8 was amended by the addition of a second and third sentence.

> Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

If every word in our Constitution is important, none is more important that the conjunctive adverb "therefore" in the 1976 Amendment to Article 8. It is that word—"therefore"-that links the right to access government proceedings and records to the very purpose of government itself.

The Right To Know Act, RSA Chapter 91-A, provides the prose by which this Constitutional right is enforced. See, Murray v. New Hampshire Division of State Police, 154 N.H. 579, 581 (2006) ("[T]he 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."); Lambert v. Belknap County Convention, 157 N.H. 375, 378 (2008). The preamble to the statute says as much:

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

RSA 91-A:1.

Accordingly, the New Hampshire Supreme Court "resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information" and "construe[s] provisions favoring disclosure broadly, while construing exemptions narrowly." Murray, 154 N.H. at 581.

At the same time, privacy is a human right that also finds protection in the New Hampshire Constitution, see Part 1, Articles 2-b, and 19, as well as state common law. The right of reasonable access to government proceedings and records must make some accommodation for the justifiable privacy and reputational interests of identifiable individuals. This is especially true for government employees and licensed professionals who may be required to share otherwise off-limits details of their private lives with their employers or regulators. This accommodation is spelled out in RSA 91-A:3 and 5.

With these thoughts in mind, the court turns to the specific questions presented.

B. The Request For A Permanent Injunction Requiring All Future Decertification Hearings To Be Public

Introduction: The court rejects the plaintiff's overbroad request for an injunction requiring the Council to hold all phases of all future law enforcement officer decertification

hearings in public. As a threshold matter, the adjudication of such a broad and far reaching claim for relief, regarding *future* hearings, requires a more fulsome record than the truncated process the court follows in Right To Know disputes over existing records.

The plaintiff's argument for deciding the issue here and now is grounded on the false supposition that no future case can involve facts warranting a non-public hearing. Plaintiff's rationale is that (a) "police officers have no privacy interest in records implicating the performance official duties," Complaint, ¶36 and (b) the privacy interests of third parties can never matter.

The suggestion that police officers can never have a legitimate privacy interest at stake in a decertification hearing is absurd. No doubt, a police officer's on-the-job conduct is generally a matter of public concern for which there should be a minimal expectation of privacy. The term "officer," lest we forget, means agent, and police officers are literally and figuratively clothed as the public's agents to enforce the public's laws. But that does not mean that the humans who serve as police officers have "no privacy interests" connected to their jobs.

The plaintiff's proposed injunction would not distinguish between cases that are dismissed at the probable cause stage and

cases that progress towards a final hearing or settlement. A police officer clearly has a legitimate interest in avoiding unfounded infamy resulting from bad faith, specious accusations or good faith misunderstandings. Thus, if the Council determines that there is no probable cause, an officer's privacy interest could be at its zenith, and the public interest could be at its nadir.

Further, a police officer's certification may be suspended or revoked for matters other than misconduct. Consider the following hypotheticals:

-An officer suffers from severe depression and takes a medical leave of absence, without doing anything improper on the job. During his leave of absence the officer attempts suicide. The Council's rules require suspension of the officer's certification pending a psychological examination. However, the officer may regain his or her health and later resume work as an exemplary member of his or her department. The privacy interest is palpable. The public interest is minimal.

-An officer, who does nothing wrong on the job, develops an alcohol problem that morphs into abuse of prescription drugs.

-An officer uses medical marijuana as permitted by RSA 126-X.

The plaintiff also gives short shrift to the potential privacy concerns of third parties in future cases. For example,

an intra-departmental case of workplace sexual harassment could simultaneously raise licensure concerns and privacy concerns for the reporting employee.

However, the Council's unwritten rule permitting the officer to unilaterally make a final decertification hearing non-public is contrary to RSA 91-A:3, I and II. Therefore, a more limited injunction is both warranted and supported by the record.

RSA 91-A:3,I(a) provides that "(a)Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II." The council relies on two exemptions in paragraph II, i.e. the exemptions for disciplining public employees, RSA 91-A:3,II(a), and the exemption for matters that would likely adversely affect a person's reputation, RSA 91-A:3,II(c).

The Public Employee Discipline Exception: A public body may hold a non-public hearing to consider "[t]he dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted." RSA 91-A:4,II(a).

The Council argues that decertification proceedings fall within this exception because they involve the "disciplining" of

"public employees". The court disagrees and construes the exemption to apply only to employees of the public body that is holding the hearing. Thus, the court does not believe the exception allows state licensing boards to go into non-public session whenever they consider professional disciplinary charges against licensees who happen to be public employees.

The interpretation of a statute is a question of law. Dichiara v. Sanborn Regional School District, 165 N.H. 694, 696 (2013); Kenison v. Dubois, 152 N.H. 448, 451 (2005). The court's responsibility is to determine the intent of the legislature as expressed in the words of the statute considered as a whole. Dichiara, 165 N.H. at 696. If possible, the court must give the language used by the Legislature its plain and ordinary meaning. Id.; see also, Petition Of Carrier, 165 N.H. 719, 721 (2013). However, the court does not read statutory phrases and provisions in isolation, but rather "interpret[s] a statute in the context of the overall statutory scheme." State v. Kousounadis, 159 N.H. 413, 423 (2009).

The exception at issue applies to "dismissal," "promotion," "compensation" and "discipline" of a public employee. The first three terms apply to decisions that can only be made by the public employee's employer. The term "discipline" must be read in this context to apply to workplace discipline by an employer. Cf: Home Gas Corp. v. Strafford Fuels, Inc., 130 N.H. 74, 82,

(1987) (discussing the cannon of construction known as *noscitur a sociis* (literally "it is known by its associates"), under which the meaning of a "broader term . . . takes on the more specialized character of its neighbors."); State v. Hodgkiss, 132 N.H. 376, 380 (1989) (applying *noscitur a sociis* to construe the terms in a local ordinance).

Putting the Council's own staff to the side, the Council does not employ law enforcement officers. It does not make hiring decisions for the myriad of local police departments, sheriff's offices, and state law enforcement agencies. It does not decide which officers in a department should be promoted or demoted. It does not negotiate compensation. It cannot impose ordinary workplace discipline, such as suspension with or without pay. The Council is a training and licensing authority.

The Council's reliance on the public employee discipline exception is misplaced.

The Reputation Exception: A public body may hold a non-public meeting to consider "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting." RSA 91-A:3,II(c). The Council argues that this exception applies to every decertification hearing because the grounds for decertification are such that an officer's reputation may be blemished (or

worse) by public disclosure. The court disagrees with the Council's broad and promiscuous interpretation of the exception.

In construing our Right To Know Act, the New Hampshire Supreme Court looks to case law construing similar provisions in other jurisdictions. See, e.g., Lambert v. Belknap County Conventin, 157 N.H. 375, 379(2008) (discussing the Right To Know Act and noting that, "[w]e also look to the decisions of other jurisdictions, since other similar acts, because they are *in pari materia*, are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved."); Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 N.H. 540, 546 (1997).

This court finds the opinion of the Wisconsin Supreme Court in Wisconsin Newspress, Inc. v. School District of Sheboygan Falls, 546 N.W.2d 143, 146 (1996) helpful. Like this case, Wisconsin Newspress involved a statute requiring public bodies to have open hearings unless a specific statutory exception allows for a non-public hearing. One exception at issue in Wisconsin Newspress allowed for non-public hearings to consider matters "which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person." The issue before the court was whether records used in a hearing held in non-public session pursuant to this exception could be accessed by the public. Reyling on earlier caselaw, the court

held that the exception "requires a balancing of the interest of the public to be informed on public matters against the harm to reputations which would likely result from permitting inspection." Wisconsin Newspress, Inc. 546 N.W. 2d 143.

Without such a balancing test, any information that might mar a person's reputation would suffice to close a hearing from public view. This would be the case regardless of the weight of the public interest and regardless of whether the likely harm to reputation would be defamatory or deserved.

The public interest in police officer decertification hearings, at least when such hearings are grounded on misconduct, is significant. The privacy and reputational interest of the respondent in such a proceeding is less pronounced after a finding of probable cause than before such a finding is made. Therefore, non-public final decertification hearings should be the exception rather than the rule.

In any event, the determination is one that must be made on the facts of the specific case. The exception for reputational harm does not grant the respondent police officer plenary authority to make the hearing non-public.

B. The Request For Copies Of The Sealed Minutes

RSA 91-A:3,III requires public bodies to publish public minutes of non-public meetings unless, as applicable and pertinent to this case, "it is determined that divulgence of the

information likely would affect adversely the reputation of any person other than a member of the public body itself[.]" The Council maintains that the sealed minutes at issue in this case fall within this exception.

For the reasons set forth above, in connection with the court's analysis of the same wording as it applies to the decision to go into a non-public meeting, the court construes the exception to require a balancing of the public interest against the likely reputational harm. Arrcordingly, the court concludes that RSA 91-A:3, III does not allow the Council to seal the minutes of its non-public decertification hearings just because the respondent officer makes such a request.

If, exercising its independent judgment, the Council applies the required balancing test and decides to unseal the minutes, then those minutes must be provided to the plaintiff.

Alternatively, if the Council does not provide the minutes to the plaintiff within 30 days, then the minutes shall be submitted to this Court for an *in camera review*. See Orford Teachers Association v. Watson, 121 N.H. 118, 122 (1981) (holding that "[w]hen there is a question whether minutes are exempt from public access, the trial judge should conduct an *in camera* review.").

C. The Request For Records

The Council has provided the Court with an affidavit stating that "most" of the contested records have been provided to the plaintiff. However, the nature of the remaining records has not been described in a manner that allows the court to determine whether they fall within the exceptions to public disclosure set forth in RSA 91-A:5.

It is possible that the court's analysis of the other issues in this case might moot any remaining dispute, in which case the remaining records should be provided to the plaintiff.

Alternatively, the records should be submitted to the court for an *in camera* review. In undertaking an *in camera* review, the court will act with the understanding that the Council no longer believes the records may be withheld on the grounds that there is an on-going investigation or proceeding. Therefore, the court will apply the balancing test required by the Supreme Court's recent decision in Union Leader Corporation v. Town of Salem, 13 N.H. 345, 357 (2020).

June 10, 2021

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/10/2021

Good Afternoon Madam Chair and Members of the Senate Judiciary Committee,

My name is Katherine Kokko and I am a resident of the Town of Milford, NH. I am here on my own behalf, to speak in opposition to this bill. My apologies if I am a bit rusty on protocol this afternoon. My last similarly motivated visit to the statehouse was 20 years ago. I have timed myself and hope you will indulge me for about six minutes.

I want to make sure that we are starting from the same understanding of what this bill is about. As Senator Daniels has referenced, RSA 91:A has requirements for entering non-public session that differ from those that allow minutes of those non-public sessions to be withheld. This bill is about releasing minutes detailing what happened in non-public session. This bill is not about a public body's ability to enter non-public session.

Currently, while the public body may enter into non-public session for a myriad of reasons, they are required to provide minutes of those sessions within 72 hours, unless the information contained in the minutes meets one of three criteria. This practice of withholding minutes for one of the reasons allowed is commonly referred to as "sealing" the minutes, although that term is not used in any NH RSA. I will refer to "sealing the minutes" in my testimony as it is the simplest way to describe the action involved.

I won't read them verbatim here, but the allowable reasons for sealing minutes of non-public sessions involve whether or not releasing the information would:

1. "adversely affect the reputation of someone other than a member of the public body
2. "render the proposed action ineffective
3. "pertain to terrorism" which is defined within the RSA itself, in part, as "directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life."

A public body currently cannot seal minutes of non-public sessions for reasons that don't qualify under these specific exclusions. The proposed changes to this RSA revise that criteria. The reason for these limited exemptions is very straightforward. The public has a right to some summary of what has occurred in non-public session as quickly as possible. For the sake of transparency, some amount of accountability is required. After a non-public session, the minutes provide that accountability to the public within 72 hours.

According to Senator Daniels, this legislation attempts to align the reasons for going into non-public session with the reasons for sealing minutes of those sessions. Following that logic, this language should encompass all 12 reasons that allow the public body to enter non-public session. With the new amendments, I have not been able to confirm this, but as originally worded, it did not. However, if you extrapolate from the Senator's explanation, it appears that the intent is to essentially make non-public sessions for certain reasons, automatically eligible for "sealed" minutes. This approach would render the need to carefully consider whether or not the public has a right to know what happened during that session, moot. The assumption would be that if they went into nonpublic for a particular reason, there is simply no need to release minutes.

A considered thought process about what needs to be protected, combined with a priority on transparency, are both important elements of good governance. The proposed approach negates the need for that thought process and does not prioritize transparency.

The language added to, and deleted from, this RSA by the original draft of this bill was very specific. Again, I have not been able to evaluate the additional text provided today. As originally written, there are three pieces of text that were altered with varying consequences. I can only speak to those today.

1. The language "Hiring, firing and personnel discipline and investigations" was added to the original draft of the bill. The addition of this language is unnecessary. These scenarios are likely to be covered under the exemption of "reputation" when they apply to an individual. While I would like to see the use of "reputation" constrained by a less broad interpretation than I see in actual practice, I think that any personnel action with negative connotations can, in good conscience be covered by this existing exemption. However, broader personnel issues that pertain more to management of and by the public body, which do not harm an individual's reputation, should not qualify for a broad exemption under "personnel". It is extremely likely that inclusion of this draft language will encourage that misinterpretation. I have already seen where the "personnel" exemption for entering non-public session is interpreted loosely to cover administrative personnel issues that don't impact individuals in this way. For that reason, I oppose the inclusion of this added language.

2. The term "Consideration of legal advice" was originally added as an example of a "reputation" exemption but has been changed. Legal advice does not, in most cases, constitute a reputation issue. Consultation with legal counsel itself is considered a non-meeting and therefore not subject to 91:A. A public body's *deliberation regarding* legal advice is, however, a valid reason for going into non-public session. Despite that, the public body is still accountable for any actions taken during that session. Such actions must be recorded and released to the public. If actions taken would be rendered ineffective by such a release, as in those related to a pending lawsuit, the public body may invoke the second exemption for releasing minutes until such time as that is no longer the case. If release would damage the reputation of someone other than a member of the public body, an exemption would also apply. Otherwise, there is no reason that a public body should not account for the discussion and actions that took place when deliberating legal advice.

3. Finally, the original language removes the reference to "terrorism" from the language outlining what I refer to as the "public safety" exemption. The removal of the term terrorism from the original draft text alarmed me. The new proposed language is even more alarming because it is even broader than originally proposed. By using the term terrorism, and then defining it, the original RSA text clearly identifies both the *scope* and *intent* this exemption. Broadening the "public safety" exemption so that it is not constrained by the context provided with the term "terrorism" potentially and unnecessarily restricts the ability of a citizen to gather information about public safety-related actions taken by their municipality, even when they *tangentially* relate to public safety. Many routine public safety actions can be very loosely interpreted to be taken in an attempt to "thwart a deliberate act." This is not the intent of the exemption.

The objective of the Right to Know Law is to ensure that public officials' deliberations and actions are transparent to citizens. The proposed changes here are either unnecessary or work to restrict that objective rather than move it forward. Furthermore, if I understand the logic presented, they remove the requirement that our elected officials carefully consider their reasons for sealing minutes every time, rather than defaulting to an automatic eligibility. The public deserves better than this. They deserve thoughtful decision-making. They deserve accountability for what happens in non-public. The existing three exemptions make this thought-process a requirement.

I would ask that this body identify this piece of legislation as "inexpedient to legislate" and move on to address RTK opportunities that will increase transparency and citizen engagement, such as that offered by the enactment of an Ombudsman's office under HB 481.

Voting Sheets

Senate Judiciary Committee
EXECUTIVE SESSION RECORD
2021-2022 Session

Bill # SB342

Hearing date: 1/25

Executive Session date: 1/26

Motion of: ITL **Vote:** 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☐	☐	☒	☐
Sen. Gannon, V-Chair	☐	☐	☒	☐
Sen. French	☒	☐	☒	☐
Sen. Kahn	☐	☐	☒	☐
Sen. Whitley	☐	☒	☒	☐

Motion of: Consent **Vote:** 5-0

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☐	☐	☒	☐
Sen. Gannon, V-Chair	☐	☒	☒	☐
Sen. French	☒	☐	☒	☐
Sen. Kahn	☐	☐	☒	☐
Sen. Whitley	☐	☐	☒	☐

Motion of: _____ **Vote:** _____

Committee Member	Made by	Second	Yes	No
Sen. Carson, Chair	☐	☐	☐	☐
Sen. Gannon, V-Chair	☐	☐	☐	☐
Sen. French	☐	☐	☐	☐
Sen. Kahn	☐	☐	☐	☐
Sen. Whitley	☐	☐	☐	☐

Reported out by: Whitley

Notes: needs work, worthy of discussion balancing tests, nuanced determinations better left to the courts

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE
FOR THE CONSENT CALENDAR

Wednesday, January 26, 2022

THE COMMITTEE ON Judiciary

to which was referred **SB 342**

AN ACT relative to the minutes of nonpublic sessions under the right to know law.

Having considered the same, the committee recommends that the Bill

IS INEXPEDIENT TO LEGISLATE

BY A VOTE OF: 5-0

Senator Rebecca Whitley
For the Committee

This bill would modify the list of nonpublic meeting types where minutes of which do not need to be made publicly available within 72 hours. The Committee agrees that this issue is worthy of further discussion but believes the nuanced balancing of interests of each unique situation should remain with the courts at this point in time.

Jennifer Horgan 271-7875

FOR THE CONSENT CALENDAR

JUDICIARY

SB 342, relative to the minutes of nonpublic sessions under the right to know law.
Inexpedient to Legislate, Vote 5-0.
Senator Rebecca Whitley for the committee.

This bill would modify the list of nonpublic meeting types where minutes of which do not need to be made publicly available within 72 hours. The Committee agrees that this issue is worthy of further discussion but believes the nuanced balancing of interests of each unique situation should remain with the courts at this point in time.

SB342

Bill Details

Title: relative to the minutes of nonpublic sessions under the right to know law.

Sponsors: ***(Prime)*** Daniels (R), Kofalt (r)

LSR Number: **22-3098**
General Status: **SENATE**
Senate:
Committee: Judiciary
Floor Date: 2/3/2022
Status: INEXPEDIENT TO LEGISLATE

Bill Docket

Body	Description
S	To Be Introduced 01/05/2022 and Referred to Judiciary; **SJ 1**
S	Hearing: 01/25/2022, Room 100, SH, 01:45 pm; **SC 3**
S	Committee Report: Inexpedient to Legislate; Vote 5-0; CC; 02/03/2022; **SC 5**
S	Inexpedient to Legislate, MA, VV --- BILL KILLED ---; 02/03/2022; **SJ 2**

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: SB342 **Senate Committee:** Judiciary

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

X Final docket found on Bill Status

Bill Hearing Documents: {Legislative Aides}

X Bill version as it came to the committee

X All Calendar Notices

X Hearing Sign-up sheet(s)

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

X 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):

X - amendment # 0273s ___ - amendment #_____

___ - amendment #_____ ___ - amendment #_____

X Executive Session Sheet

X 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 Hayes
Committee Aide

3/12/22
Date

Senate Clerk's Office AK