

Re

STATE OF
NEW HAMPSHIRE
SUPREME COURT

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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2017 TERM
DECEMBER SESSION

NO. 2017-0429

Lisa Censabella
v.
Hillsborough County Attorney

RULE 7 MANDATORY APPEAL FROM THE SUPERIOR COURT

BRIEF OF HILLSBOROUGH COUNTY ATTORNEY

HILLSBOROUGH COUNTY

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Explanation of References:

Citation to the official certified transcript of the Superior Court is referred to herein as “OCT” followed by the reference and page number.

QUESTION PRESENTED

Whether the Superior Court erred in determining that Lisa Censabella is not an aggrieved person pursuant to RSA 91-A:4 and therefore does not have standing to pursue a claim.

TEXT OF RELEVANT AUTHORITIES

NH Constitution Part 1 Article 8. [Accountability of Magistrates and Officers; Public's Right to Know.] All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

NH Constitution Part 1 Article 14. [Legal Remedies to be Free, Complete, and Prompt.] Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

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

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

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

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

III. Each public body or agency shall keep and maintain all governmental records in its

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

III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.

III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

IV. Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release. If a public body or agency is unable to make a governmental record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.

VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.

VII. Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

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

105:13-b Confidentiality of Personnel Files. –

I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.

II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.

III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer

Lab. 802.08. "Personnel file" as used in RSA 275:56 means any personnel records created and maintained by an employer and pertaining to an employee including and not limited to employment applications, internal evaluations, disciplinary documentation, payroll records, injury reports and performance assessments, whether maintained in one or more locations, unless such records are exempt from disclosure under RSA 275:56, III or are otherwise privileged or confidential by law. The term does not include recommendations, peer evaluations, or notes not generated or created by the employer.

Supreme Court Rule 16(3)(b) The questions presented for review, expressed in terms and circumstances of the case but without unnecessary detail. While the statement of a question need not be worded exactly as it was in the appeal document, the question presented shall be

the same as the question previously set forth in the appeal document. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. The moving party may argue in his brief any question of law not listed in his appeal document, but only if the supreme court has granted a motion to add such question, and he has presented a record that is sufficient for the supreme court to decide the questions presented. Motions to add a question may be filed only by a party who filed an appeal document (including a party who filed a cross-appeal), and shall be filed at least 20 days prior to the due date of the moving party's brief.

After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule.

STATEMENT OF THE CASE AND FACTS

Lisa Censabella, filed a petition for statutory and injunctive relief pursuant to RSA 91-A against the Hillsborough County Attorney. (Plaintiff's Brief Appendix page 1-8). The petition claimed that Censabella was aggrieved by violations of RSA 91-A between December 25, 2016 and November 29, 2016. (Plaintiff's Brief Appendix page 2). The petition goes on to describe requests for information issued by Attorney Tony Soltani to County Attorney Dennis Hogan regarding an individual identified as Kimberly McSweeney. (Plaintiff's Brief Appendix page 2-6). The County Attorney had received and responded to 4 correspondences from Attorney Soltani issued as so-called "right to know" requests seeking production of information regarding Kimberly McSweeney. (Plaintiff's Brief Appendix page 144). The Plaintiff was never identified or referenced, directly or indirectly, in any of the documents issued or directed to the County Attorney. The plaintiff filed the underlying petition as an aggrieved party. (Plaintiff's Brief Appendix page 2). The County Attorney moved to dismiss the petition on the grounds that the Plaintiff was not aggrieved and had no standing to pursue the claim in her name. (Plaintiff's Brief Appendix page 24-26).

Documents exchanged between Attorney Soltani and the Hillsborough County Attorney were comprised of 13 recorded interactions summarized below:

- A 12/28/15 "Right to Know Request" from Tony Soltani to County Attorney Hogan regarding Kimberley McSweeney, received 12/31/17. (Plaintiff's Brief Appendix page 145). The County Attorney responded to Mr. Soltani 1/8/16, cited personnel information, inquired as to whether Soltani represented Mc Sweeney, and requested clarification on the information sought while providing a screen shot of the case management system query.¹ (Appendix Page 30).

¹ Plaintiff's Brief Appendix omits Hogan's January 8th letter responding to Soltani.

- A 1/26/16 letter from Tony Soltani to County Attorney Hogan captioned “Renewed Right to Know Request-Kimberley McSweeney” indicating Soltani did not represent Mc Sweeney in “my right to know request.” (Plaintiff’s Brief Appendix page 147).
- A letter dated 2/4/16 from County Attorney Hogan to Tony Soltani outlining Hogan’s understanding of the request. (Plaintiff’s Brief Appendix page 149-148²).
- A 3/31/16 confirmatory Letter to Soltani from County Attorney Hogan with the estimated page numbers and the price per page. Hogan again invited Soltani to contact him regarding questions or modifications to the request. (Plaintiff’s Brief Appendix page 150).
- A letter dated 3/8/16 (not received until April 18, 2016), from Soltani to County Attorney Hogan identifying “my Right to Know Request of Kimberly Mc Sweeney.” (Plaintiff’s Brief Appendix page 151).
- A 5/16/16 County Attorney Hogan responsive follow up letter to Soltani with attachments. (Plaintiff’s Brief Appendix page 152-166).
- A 7/22/16 letter from Attorney Soltani on behalf of *the MuniLaw Group* to County Attorney Hogan (received 7/28/16), referencing “Renewed Requests for /91-A Request(s)” citing five (5) Right to Know requests from MuniLaw Group between 3/2/16 and 3/7/16 for **John Velleca, Frank Hebert, Brandon Montpalisir, Sheila Savaria and Neil(sic) Kurk** with enclosed copies of four (4) letters dated 3/2/16 and one (1) letter dated 3/7/16. There was no letter referencing McSweeney. (Plaintiff’s Brief Appendix page 167-172).
- A 8/4/16 letter with responsive information from County Attorney Hogan to Attorney Soltani’s 7/22/16 letter on behalf of MuniLaw addressing the 7/22/16 request while noting that the County Attorney had not previously received the enclosures that were dated in March, 2016. (Plaintiff’s Brief Appendix page 173-174).
- A 10/24/16 seven (7) Page Fax from James Carney, Esquire of MuniLaw to County Attorney Hogan that included a 10/24 cover letter from James Carney referencing attached “Right to Know requests” (Appendix page 177). The fax contained a 9/29/16 Letter from Soltani to Hogan regarding “Right to Know Requests of March 2, 7, July 27, March 8 and January 28, 2016” in which he states in part: “**This Office has been retained to represent former Chief John Valleca**”. The Soltani letter also references “my (Soltani’s) letter dated July 22, 2016 regarding Kimberly McSweeney”. (Plaintiff’s Brief Appendix page 178-179). The fax included a 7/22/16 Letter from Soltani to Hogan regarding “Right to Know Request – Kimberley McSweeney” that Hogan had not received, (Appendix page 180); and a copy of the 8/4/16 Hogan response to Soltani’s

² The reverse side of Hogan’s 2/4/16 response contains a handwritten lists of cases in which McSweeney is a witness. That page improperly precedes the 2/4/16 letter in the Appendix to Plaintiff’s Brief.

July 22, 2016 letter to the previously referenced five (5) Right to Know requests from MuniLaw Group for John Velleca, Frank Hebert, Brandon Montpalisir, Sheila Savaria and Neil(sic) Kurk. (Plaintiff's Brief Appendix page 167-172 and Appendix page 181).

- A 10/31/16 County Attorney Hogan response to the September 29, 2016 Soltani letter contained in the 10/24/16 fax with enclosures. (Plaintiff's Brief Appendix page 182-185).
- A letter dated 11/21/16 from Attorney Soltani to County Attorney Hogan referencing "Right to Know Request – Kimberley McSweeney/Your Response of October 31, 2016" with attached Affidavit and Exhibits a-e. The letter states "I am in receipt of your response dated October 31, 2016 regarding *my Right to Know requests involving Kimberley McSweeney*", "There should be no misunderstanding of what *I am seeking*", "*I am requesting a definitive response*", and "*I am requesting that you supply me with the proper documentation as previously indicated in my prior requests concerning Kimberley McSweeney.*" (emphasis added). (Plaintiff's Brief Appendix page 186-87).
- A response dated 11/29/16 from County Attorney Hogan to Attorney Soltani with 6 pages and reference to an internal personnel investigation of McSweeney. (Plaintiff's Brief Appendix page 200-206).

The Superior Court held a hearing on the Plaintiff's petition for relief pursuant to RSA 91-A.

The Court heard argument on the County Attorney's Motion to Dismiss. The trial court accepted offers of proof, copies of the correspondence between the parties, and allowed for the submission of post hearing pleadings and arguments. (Plaintiff's Brief Appendix page 29-133). The Plaintiff argued that any issue of standing could be cured through substitution of a party. (OCT, Page 20 and Page 21).

On June 23, 2017 the Superior Court issued an order concluding that the Plaintiff was not a "person aggrieved" under RSA 91-A and therefore did not have standing. (Plaintiff's Brief Appendix page 134-143). The Court found that the Plaintiff never proffered a request directly, nor was a request issued in any way referencing her by name or otherwise on her behalf. (Plaintiff's Brief Appendix page 141). The June 23rd Court order allowed the Plaintiff thirty (30) days from the date of the Clerks of Court's notification of the order to file a motion to correct the issue of standing, noting "absent a successful correction of the issue of standing, as determined

by the Court, defendant's motion to dismiss shall be granted." (Plaintiff's Brief Appendix page 143). No motion was filed. No correction or substitution of party was pursued by Plaintiff.

On July 19, 2017, County Attorney Hogan, through counsel, re-issued responsive material to Attorney Soltani and enclosed a specific Privilege Log/Vaughn Index that identified precise bates stamped pages for documents redacted or withheld and included any documents obtained and/or related to an internal evidence audit that in any way referenced or identified Kimberly McSweeney. (Brief Appendix Page 33). This appeal followed.

SUMMARY OF THE ARGUMENT

New Hampshire's Right to Know Law conveys the right to "[A]ny person aggrieved by a violation of this chapter" to file a petition in the Superior Court for injunctive relief. RSA 91-A:7. The Plaintiff in this action suffered no personalized injury and is not an aggrieved party.

Lisa Censabella, did not file a request under RSA 91-A, nor was a request tendered on her behalf. She did not have her right to inspect or copy purportedly public records denied.³ The Plaintiff was not aggrieved by the County Attorney's letters and responsive material to requests for documents and thus was not a proper party to the action. The Plaintiff was never identified directly or indirectly in any of the documents issued or directed to the County Attorney. "In evaluating whether a party has standing to sue, we focus on whether the plaintiff suffered a legal injury against which the law was designed to protect." Roberts v. General Motors Corp., 138 N.H. 532, 535 (1994) (citation omitted). In this case the Plaintiff suffered no legal injury. The Plaintiff cannot stand upon the rights of another person who requested information.

³ At the hearing, counsel indicated the information sought related to an investigation of Police Officer McSweeney during her employment with the Weare Police Department. To the extent the Plaintiff or her counsel seek the police agency's internal investigation of an employee/officer, that information is exempt and under RSA 91-A and RSA 105.

The Superior Court order permitted the Plaintiff an opportunity to amend the petition. Despite being provided 30 days in which to cure the issue of standing, the Plaintiff never filed a pleading to substitute a party or correct the deficiency. The Superior Court correctly ruled in favor of the County Attorney.

ARGUMENT

I. Standard of Review

An order of the Superior Court will only be overturned where there are errors of law or where a clear preponderance of the evidence demonstrates the order is unjust or unreasonable. Appeal of Town of Newport, 140 N.H. 343, 345-6 (1995). The Superior Court order contains no error of law in ruling on the County's motion to dismiss for lack of standing. The County challenged the Plaintiff's standing as an initial defense in its motion to dismiss the underlying action and thus raised a jurisdictional challenge.

"Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiffs'] pleadings are sufficient to state a basis upon which relief may be granted." K.L.N. Constr. Co. v. Town of Pelham, 167 N. H. 180, 183 (2014). "When the motion to dismiss does not challenge the sufficiency of the [plaintiffs'] legal claim but, instead, raises certain defenses, the trial court must look beyond the [plaintiffs'] unsubstantiated allegations and determine, based on the facts, whether the [plaintiffs'] unsubstantiated allegations and determine, based on the facts, whether the [plaintiffs'] have sufficiently demonstrated their right to claim relief." *Id.* "A jurisdictional challenge based on lack of standing is such a defense." *Id.*

II. The Plaintiff is Not an Aggrieved Party

RSA 91-A carries out New Hampshire's constitutional requirement of access to governmental proceedings. N.H. Const. Pt. I, art. 8. The purpose of the law "is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1. But that access is not absolute, "it must yield to reasonable restrictions." Hughes v. Speaker of the New Hampshire House of Representatives, 152 N.H. 276, 290 (2005) (citing Petition of Union Leader, 147 N.H. 603, 604-05(2002)).

The Right to Know law provides that every citizen has the right to inspect governmental records, except as otherwise prohibited by statute or RSA 91-A:5. RSA 91-A:4. The legislature created a right of action for individuals aggrieved by a violation of the law, to wit: "Any person aggrieved by a violation" of RSA 91-A may petition the superior court for injunctive relief. RSA 91-A:7. The trial court noted that the issue in this case was whether the Plaintiff was a "person aggrieved" under RSA 91-A. The trial court determined that under a reasonable and objective interpretation of that statute, she was not. (Appendix to Plaintiff's Brief , Page 140-141).

"On appeal, questions of statutory interpretation are reviewed de novo." State v. Guay, 164 N.H. 696, 699 (2013). This Court "will first examine the language of the statute, and, where possible, give the words used their plain and ordinary meanings." *Id.* When a statute's language is plain and unambiguous, this Court will look no further for indications of legislative intent, and will not add language that the legislature did not see fit to use. *Id.* The Court interprets "a statute in the context of the overall statutory scheme and not in isolation". *Id.*

"[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical,

dispute, which is capable of judicial redress.” Duncan v. State of N.H., 166 N.H. 630, 642-3 (2014). The court’s jurisdiction over cases and controversies requires “a party to demonstrate harm to maintain a legal challenge” and is based on the constitutional principle that the power of the judicial branch does not ordinarily include the issuance of advisory opinions Birch Broad, Inc. v. Capitol Broad., Corp., Inc., 161 N.H. 192, 199 (2010) and N.H. const. Pt.1, art.14. The Plaintiff has suffered no actual concrete or particularized injury of her legal interest. She is not an aggrieved party.

The Plaintiff herself never directly requested inspection of government records, nor was she ever identified as a citizen upon whose behalf a request was made. As the trial court noted, “there’s about 300 million people in the US...” (OCR Page 12, Line 19). The Plaintiff, herself, did not request inspection of records. (Appendix to Plaintiff’s Brief, Page 141). Likewise, of all residents in the 29 towns and 2 cities in Hillsborough County, Lisa Censabella was never identified as a citizen upon whose behalf a request for inspection or production of public documents was made. (OCR Page 9, Line 1-5). She is not a “person aggrieved” and she has no standing to pursue a claim.

It is uncontested that Lisa Censabella was never referenced as the individual requesting information pursuant to RSA 91-A. It is equally uncontested that there was never any indication that requests were made on her behalf:

“**Court:** Do you agree or disagree with the allegation by the Defense that your correspondence to the defendant in this case, to Mr. Hogan, did not make reference to Lisa Censabella?”

Mr. Soltani: I agree completely.” (OCT Page 11, Lines 12-16).

Her counsel also noted:

“Mr. Soltani: It is uncontested in my requests to Mr. Hogan I did not identify Lisa Censabella as my client on behalf of whom I was making the requests.” (OCT Page 19, Lines 21-23).

Likewise, counsel did not indicate, suggest or hint that the requests at issue were propounded on behalf of even an unidentified client. There was a complete absence of demographic information indicating that the request was made by or on behalf of a citizen.

Standing requires the plaintiff to have an injury in fact, fairly traceable to the defendant’s conduct that can be redressed by a judicial decision. Bank of America v. City of Miami, Florida, 581 U.S. ____ (2017). Individuals do not have standing when they “have suffered no wrong but instead seek to advance the interests of others who have not themselves complained. The guiding principle is one often encountered in daily life; no harm, no foul.” Revbney v. Wells Fargo Bank, 220 Cal. App. 3rd 1117,1132 (1990). In New Hampshire “a party will not be heard... unless he shows some right of his is impaired or prejudiced...” Asmussen v. Comm’r, N.H. Dep’t of Safety, 145 N.H. 578, 587 (2000). Plaintiff’s function as a citizen, alone, and without a direct injury or impairment of rights, is not sufficient standing to bring a claim. Compare Baer v. N. H. Dep’t of Education, 160 N.H. 727, 731 (2010). The Plaintiff cannot simply subsume standing as a purported guardian of public rights.

III. Plaintiff Waived the Opportunity to Substitute a Party

The trial court concluded that the Plaintiff was not an aggrieved person under RSA 91-A and thus did not have standing to proceed with the action. (Appendix to Plaintiff’s Brief, Page 142). The Court invited the Plaintiff to proceed with the action by filing a motion to correct the issue of standing within 30 days of the date of the Clerks notification of the dismissal. (Appendix to Plaintiff’s Brief, Page 143). The decision to grant or deny a motion to amend rests in the

sound discretion of the trial court, and will not be overturned absent an unsustainable exercise of discretion. Keshishian v. CMC Radiologists, 142 N.H. 168, 176 (1997); and State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard). The trial court indicated a willingness to exercise that discretion by allowing the Plaintiff 30 days to file a pleading. The Plaintiff knew that substituting a party was a remedy available.

Mr. Soltani: “If you say that I’m supposed to disclose even when they don’t ask...Remedy, substitute proper party.” (OCT Page 20, Line 8-10);

Mr. Soltani: “I don’t think the question of party improper is dispositive at most. If you choose, you could grant me leave and I think with the New Hampshire Supreme Court rulings grant leave to a substitute party.” (OCT Page 21, Line 6-9); and

Mr. Soltani: “Anyway judge, I think that’s – that is a non-starter. You can remedy it according to what you believe.” (OCT Page 23, Line 18-20).

The Plaintiff neither filed a motion to amend or substitute a party nor sought leave of the Court to stay a decision pending interlocutory appeal. The Plaintiff failed to file a motion for reconsideration in order to provide the trial court with additional law to consider in analyzing the motion to dismiss for lack of standing. The Plaintiff waived the opportunity to amend and substitute a party.

IV. The Appeal is Limited to the Issue of Standing

The Plaintiff improperly argues the merits of the underlying petition in her brief. (Plaintiff’s Brief, Page 9-13). Supreme Court Rule 16(3)(b) provides that the statement of a question presented in the notice of appeal will be deemed to include every subsidiary question fairly comprised therein, however, “[a]n argument that is not raised in a party’s notice of appeal is not preserved for appellate review.” State v. Blackmer, 149 N.H. 47, 49 (2003).

Plaintiff's July 20, 2017 Rule 7 Notice of Mandatory Appeal lists the question raised on appeal as follows:

"Did the trial court err in holding that Lisa Censabella does not have standing in this action?"

The Plaintiff challenged the trial court's dismissal based on the finding the plaintiff was not aggrieved party and therefore lacked standing to pursue to complaint. The merits of the underlying RSA 91-A petition are not the subject of this appeal. The pleadings and argument related to the merits of the Right to Know Petition are a red herring in this appeal and distract from the issue at hand. The Plaintiff disregards facts that County Attorney provided the public documents. The remaining information is not available as an internal police personnel investigation.

The underlying Petition alleged that Kimberly McSweeney resigned from the Weare Police Department "[F]ollowing an internal affairs investigation." (Appendix to Plaintiff's Brief, Page 2, Para 12). An internal investigation is a personnel record/file under RSA 275:56 and Lab. 802.08. Internal affairs investigations are exempt under RSA 91-A. Clay v. City of Dover, 170 N.H.____(Decided February 24, 2017) citing Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993). New Hampshire applies a broad interpretation of the internal personnel practice exemption in RSA 91-A:5. Reid v. N.H Attorney General, 169 N.H. 509, 516 (2016). The Petition itself identified and used the term "internal affairs investigation" that was developed in the context of McSweeney's employment in identifying the documents sought. (Appendix to Plaintiff's Brief, Page 2, Para 12). Documents or data which are covered by statutory or common-law privileges or exclusions are excluded from the definition of "public records." See RSA 91-A:4, I. RSA 91-A:5, IV contains an exemption for records pertaining to internal personnel practices and personnel records whose disclosure would constitute an invasion of

privacy. The Petitioner's claim that the referral of that exempt investigation to Hogan made the investigation public is not supported by law. Hounsell v. North Conway Water Precinct, 154 N. H. 1, (2006) (holding an investigation by a 3rd party does not make the investigation public under RSA 91-A). Also, the NH legislature has recognized the special status of police officer's personnel files. The files are generally protected from discovery and disclosure pursuant to RSA 105:13-b.

The trial court did not rule on the merits of the petition and the County Attorney did not fail to respond to Attorney Soltani's requests. The County Attorney declined to release the protected personnel information that was sought. The court did attempt to clarify the dispute and determine the specific outstanding information sought by the Plaintiff through the petition. (OCT Page 4, Line 5-12; Page 6, Line 12-15; Page 7, Line 1-9; Page 37, Line 13-16; Page 40, Line 12-14). Counsel acknowledged that some of the information sought was not available. (OCT Page 41, Line 6-10). The underlying petition was an attempt to obtain a copy of the internal personnel investigation conducted by the Weare Police Department. (OCT Page 4, Line 11-18). The petition seeks to pierce the statutory protections associated with the employment investigation through the use of an RSA 91-A petition. It is a back door approach. The County Attorney objected to disclosure of police personnel file information in his January 8, 2016 response to Soltani's December 28, 2015 request. (Brief Appendix, Page 32).

The County Attorney's role in reviewing internal police personnel investigation files is more direct when considered in conjunction with so-called "Laurie" issues. State v. Laurie, 139 N.H. 325 (1995). Prosecutors have the initial responsibility to gauge what information should be disclosed and whether that information has a reasonable probability of impacting the outcome of a criminal trial. Kyles v. Whitley, 514 U.S. 419, 438 (1995). "[T]he prosecution's responsibility

for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” Id. Protocols, guides and case law suggest that the County Attorney, as a prosecutor, has an obligation to review internal personnel material related to a police officer. *See* March 2017 Attorney General Joseph Foster Exculpatory Evidence Protocol; February 13, 2004 Attorney General Peter Heed Laurie Memo, Petition of State of New Hampshire, 153 N.H. 318, 320 (2006) and State of N.H. v. Lucius, 140 N.H. 60, 63 (1995) (the failure to disclose and turn over exculpatory evidence to the defendant is imputed ultimately to the prosecutor). That review does not transform the privileged nature of the information to a public document. A different interpretation would have a deterrent effect on the role of the prosecutor and the willingness of law enforcement to share personnel information. To the extent the plaintiff claims a separate privilege log/Vaughn Index was required, that document was provided to the requestor. That issue is moot. (Brief Appendix page 32).

The merits of this case have not been addressed. But in reconciling RSA 91-A, case law and RSA 105, the court must conclude that the goal of openness was not intended contravene individual privacy concerns, internal personnel practices or undermine or nullify the protections afforded under the exceptions to RSA 91-A or the special statutory protections of RSA 105:13-b.

CONCLUSION

The Superior Court order of dismissal must be affirmed. The Plaintiff has no legal standing to bring the claim. The Plaintiff, herself, never directly requested inspection of government records, nor was she ever identified as a citizen upon whose behalf a request was made. The Plaintiff was not directly aggrieved and she has no standing to pursue a claim. The Plaintiff failed to file a pleading to substitute a party or to cure any defect, despite both

knowledge that the remedy existed and that an opportunity to invoke that remedy was available within 30 days of the Superior Court order.

RULE 16 (3) (h) ORAL ARGUMENT

Oral Argument is requested.


RULE 16 (3) (i) COMPLIANCE

I hereby certify that the appealed decision is in writing and is appended to this brief.

Dated: December 20, 2017

Respectfully Submitted,
Hillsborough County

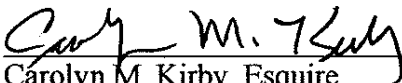
By its legal counsel,



Carolyn M. Kirby, Esquire
329 Mast Road
Goffstown, NH 03045
(603) 627-5628
ckirby@hcnh.org
Bar #7907

RULE 16 (10) CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing was mailed, postage prepaid to Tony Soltani, Esquire, counsel for the Plaintiff on this 20nd day of December 2017.



Carolyn M. Kirby, Esquire

APPENDIX TABLE OF CONTENTS

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**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF FINAL DECISION

FILE COPY

Case Name: **Lisa Censabella v Hillsborough County Attorney Dennis Hogan**
Case Number: **226-2017-CV-00135**

Enclosed please find a copy of the court's order of June 23, 2017 relative to:

ORDER (ON MO DISMISS)

Unless a post-disposition motion or appeal is submitted, final judgment shall be entered 31 days from the date of this notice of decision. After the order becomes final and judgment entered, a Certificate of Judgment, Writ of Execution, or certified copy of the Final Order may be obtained upon request.

June 26, 2017

Marshall A. Buttrick
Clerk of Court

(564)

C: Tony F. Soltani, ESQ; Carolyn Marie Kirby, ESQ

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

226-2017-CV-00135

LISA CENSABELLA

v.

HILLSBOROUGH COUNTY ATTORNEY
DENNIS HOGAN

ORDER

The plaintiff, Lisa Censabella, has filed a petition against the defendant, Dennis Hogan, in his capacity as the Hillsborough County Attorney, seeking relief pursuant to RSA 91-A, New Hampshire's Right to Know law. The defendant moves to dismiss, asserting that the plaintiff is not an aggrieved party, and, therefore, has no standing to maintain this action.

The Court held a hearing on this matter on April 14, 2017, at which both parties were represented by counsel. The parties have since filed supplemental memoranda. After considering the pleadings, the arguments, and the applicable law, the defendant's motion to dismiss is granted.

Background

The Court draws the following facts from the record. The plaintiff's attorney, Tony Soltani, Esq., had contacted the Hillsborough County Attorney's Office ("HCAO") numerous times seeking the production of certain documents pursuant to RSA 91-A. The Court summarizes some of the parties' communications as follows:

1. On December 28, 2015, Attorney Soltani sent a letter to the defendant seeking production of "any and all information, documents, memoranda, reports, and other material in whatever form kept and by whatever name called regarding Kimberley McSweeney" The subject line in the letter is "Re: Right to Know Request- Kimberley McSweeney." This letter did not mention the plaintiff's name or that Attorney Soltani was seeking the information on behalf of a client.
2. On January 8, 2016, the defendant responded to Attorney Soltani's letter. He provided a record of Ms. McSweeney from his "file management systems." He also noted that "You have not identified yourself or your office as representing Kimberly McSweeney. Therefore any personnel information we have is not available to you."
3. On January 26, 2016, Attorney Soltani wrote a letter to the defendant, which stated in part: "I am in receipt of your response dated January 8, 2016 regarding my Right to Know Request." (Emphasis added.) Attorney Soltani also indicated that he did not represent Ms. McSweeney. Again, however, he did not mention that he was seeking the documents on behalf of the plaintiff or any other client.
4. On March 2, 2016, Attorney Soltani wrote four letters to the defendant requesting information regarding Weare, New Hampshire police officers. All of the letters stated "This request is being made under the New Hampshire Right to Know Law (RSA 91-A)." On March 7, 2016, Attorney Soltani wrote a similar letter requesting information regarding State Representative Neal Kurk. These letters did not mention the plaintiff's name nor did they indicate that Attorney Soltani sought the information on behalf of a client.

5. On April 8, 2016, Attorney Soltani responded to the defendant's "response dated March 31, 2016 regarding my Right to Know Request of Kimberly McSweeney." In that letter, Attorney Soltani indicated that he was trying to narrow his request to "mitigate the ... expenditure on my client's behalf for material that we may not need." The letter, however, does not mention the client's name.
6. On July 22, 2016, Attorney Soltani wrote a letter to the defendant. Attorney Soltani noted that his law firm, the MuniLaw Group, "initially filed a right to know request ... relative to Sergeant Kimberly McSweeney." The letter does not indicate that Attorney Soltani was seeking the information on behalf of a client.
7. In another follow-up letter dated September 29, 2016, Attorney Soltani indicated that "This Office has been retained to represent former Chief John Velleca." There is no mention of any other clients. At the very end of this letter, it states: "Cc: Client(s)."
8. On November 21, 2016, Attorney Soltani wrote to the defendant in regards to "my Right to Know Requests involving Kimberly McSweeney." (Emphasis added.) In the letter, Attorney Soltani indicated that he was still unsatisfied with the defendant's responses and threatened litigation. There was no mention of the plaintiff's name. At the very end of this letter, it states: "Cc: Client(s)."
9. On November 29, 2016, the defendant wrote to Attorney Soltani. The defendant enclosed "six sheets of paper containing the information you requested in your November 21, 2016 letter." The defendant indicated that "[t]wo portions of the information required redaction."

(Pl.'s Ex. 1; Def.'s Ex. A.)

Unsatisfied with the information received, the plaintiff filed this petition on March 30, 2017. She alleges that she "is a citizen and resident of the State of New Hampshire who has been aggrieved by violations of RSA 91-A occurring between December 28, 2015 through November 29, 2016, by the Defendant Hillsborough County Attorney Dennis Hogan, which violations have not been remedied" (Pet. ¶ 6.)

The defendant now moves to dismiss. He asserts that the plaintiff "is not identified directly or indirectly in any of the requests cited in the petition nor do any documents reflect that requests were proffered on her behalf." (Def.'s Mot. Dismiss ¶ 4.) As such, the defendant maintains that the plaintiff lacks standing under RSA 91-A to bring this petition.

Standard of Review

"Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the [plaintiff's] pleadings are sufficient to state a basis upon which relief may be granted." K.L.N. Constr. Co. v. Town of Pelham, 167 N.H. 180, 183 (2014) (citation omitted). "To make this determination, the [C]ourt would normally accept all facts pled by the [plaintiff] as true, construing them most favorably to the [plaintiff]." Id. (citation omitted). "When the motion to dismiss does not challenge the sufficiency of the [plaintiff's] legal claim but, instead, raises certain defenses, the trial court must look beyond the [plaintiff's] unsubstantiated allegations and determine, based on the facts, whether the [plaintiff] ha[s] sufficiently demonstrated [her] right to claim relief." Id. (citation omitted). "A jurisdictional challenge based upon lack of standing is such a defense." Id. (citation omitted).

Analysis

It is black letter law that "[f]or a court to hear a party's complaint, the party must have standing to assert the claim." GE v. Comm'r, N.H. Dep't of Revenue

Admin., 154 N.H. 457, 461 (2006) (quotation omitted); see also State ex rel. Thomson v. State Bd. of Parole, 115 N.H. 414, 419 (1975) (noting that the purpose of the law of standing is to protect against improper plaintiffs). "In evaluating whether a party has standing to sue, [the Court] focus[es] on whether the party suffered a legal injury against which the law was designed to protect." Birch Broad., Inc. v. Capitol Broad. Corp., Inc., 161 N.H. 192, 199 (2010) (quotation omitted). Because the defendant's standing argument is statutorily based, the Court is required to interpret RSA 91-A.¹

"The ordinary rules of statutory construction apply to [the Court's] review of the Right-to-Know Law." N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit, 169 N.H. 95, 102–03 (2016) (quotation omitted). "When examining the language of a statute, [the Court] ascribe[s] the plain and ordinary meaning to the words used." Id. at 103 (quotation omitted). The Court gleans "legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. (quotation omitted). The Court "also interpret[s] a statute in the context of the overall statutory scheme and not in isolation." Id. (quotation omitted). The Court may also "look to the decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information

¹ There is also a constitutional dimension to the standing inquiry. See Duncan v. State, 166 N.H. 630, 642 (2014) (noting that "[a]lthough the standing requirements under Article III of the Federal Constitution are not binding upon state courts, and although the State Constitution does not contain a provision similar to Article III, as a practical matter, Part II, Article 74 imposes standing requirements that are similar to those imposed by Article III of the Federal Constitution") (internal citations omitted).

Act (FOIA)." Id. (quotation omitted). "Such similar laws, because they are in *pari materia*, are interpretatively helpful" Id.

RSA 91-A:4 provides, in relevant part:

Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release. If a public body or agency is unable to make a governmental record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied.

RSA 91-A:4, IV. In the event the public body or the agency fails to comply with the "request," "[a]ny person aggrieved by a violation of this chapter may petition the superior court for injunctive relief." RSA 91-A:7.

The issue in this case is whether the plaintiff is a "person aggrieved" and therefore entitled to maintain this action. The term "person aggrieved" is not defined in RSA 91-A. The New Hampshire Supreme Court, however, has held that the "plain and ordinary meaning of the term 'aggrieved'" is one "having a grievance; specifically suffering from an infringement or denial of legal rights." In re Williams, 159 N.H. 318, 324 (2009) (quotation and brackets omitted). Thus, it follows that an "aggrieved party" in the context of RSA 91-A is one who has had his or her right of inspection and/or access to public records denied by a public body. See also McDonnell v. United States, 4 F.3d 1227, 1237 (3d Cir. 1993) (legislative history of FOIA indicated "Congress's intent to identify the person

making the request with the person aggrieved when a request is denied"); Osterman v. U.S. Army Corps of Eng'rs, No. CV13-1787-BJR, 2014 U.S. Dist. LEXIS 154058, at *4 (W.D. Wash. Oct. 30, 2014) ("In the context of FOIA, standing is conferred on an individual whose FOIA request has been denied in whole or part.").

Here, it appears undisputed that the plaintiff herself never requested any of the documents she seeks in her petition, and, therefore, never had her right of access denied by the defendant. While her attorney could have requested the documents on her behalf, the plaintiff's name does not appear in *any* of Attorney Soltani's letters to the defendant. See Brown v. EPA, 384 F. Supp. 2d 271, 276-77 (D.D.C. 2005) (holding that plaintiff had standing to challenge denial of attorney's FOIA request that was expressly made on plaintiff's behalf). In one of his letters, Attorney Soltani had written that he represented a party, but it was a different party—a Chief John Velleca. Attorney Soltani also routinely wrote in the first person in many of his letters. See Three Forks Ranch Corp. v. Bureau of Land Mgmt., Little Snake Field Office, 358 F.Supp.2d 1, 3 (D.D.C. 2005) (dismissing FOIA action where attorney "wrote in the first-person and did not specifically state that he was making the request 'on behalf of Three Forks Ranch" because "an attorney must adequately identify that he is making the FOIA request for his client in order for the client to have standing to pursue a FOIA action").

Indeed, every federal court interpreting FOIA has held that a previously undisclosed client does not have standing to bring an action under these

circumstances. Mahtesian v. U.S. OPM, 388 F. Supp. 2d 1047, 1048 (N.D. Cal. 2005) (noting that under FOIA, "every court that has considered the issue has held that" there is no standing).² Because the New Hampshire Supreme Court has repeatedly found federal courts' interpretation of FOIA to be instructive in construing RSA 91-A,³ the Court finds these cases to be persuasive.

Conclusion

The following orders are entered by the Court:

1. The Court concludes that the plaintiff is not a "person aggrieved" under RSA 91-A:7, and, therefore, does not have standing to proceed with this action.

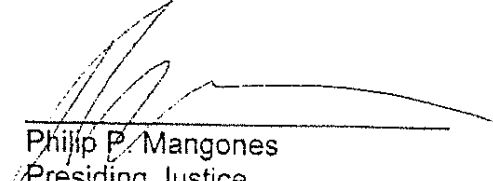
² See, e.g., Wetzel v. U.S. Dep't. of Veterans Affairs, 949 F. Supp. 2d 198, 202 (D.D.C. 2013) (stating that "courts routinely dismiss FOIA cases for lack of standing by a plaintiff where plaintiff's counsel submitted a request without including plaintiff's name or clearly indicating that the request was being filed on the plaintiff's behalf"); Wingate v. U.S. Dep't of Homeland Sec., No. 8:11-cv-223-T-33AEP, 2012 U.S. Dist. LEXIS 75270, at *2 (M.D. Fla. May 31, 2012) (plaintiffs had no standing when FOIA requests were made by attorney without naming plaintiffs as requesting parties); Fieger v. Fed. Election Comm'n, 690 F. Supp. 2d 644, 649 (E.D. Mich. 2010) ("There must be an identity between the requesting person and the party bringing the lawsuit."); Haskell Co. v. U.S. DOJ, No. 05-1110(RMC), 2006 U.S. Dist. LEXIS 12992, at *2 (D.D.C. Mar. 13, 2006) (dismissing case for lack of standing because FOIA request was "submitted solely by" plaintiff's attorney and plaintiff was "not the real party in interest"); Brown, 384 F.Supp.2d at 276 (D.D.C. 2005) (noting that "several courts have dismissed FOIA claims for lack of standing where plaintiff's counsel submitted a request for documents to an agency without including the plaintiff's name on the request or stating that the request was being filed on behalf of the plaintiff"); see also Craig A. Rolfe P.L.L.C v. Lake Templene Improvement Bd., No. 327513, 2015 WL 9487695, at *3 (Mich. Ct. App. Dec. 29, 2015) (client could not maintain Michigan FOIA action where the "facts show that [the attorney] sent FOIA requests in his own name on September 18, 2014 and that these FOIA requests included absolutely no mention of [the client] or the fact that [the attorney] had been retained by [the client]"); Macris v. Guam Mem'l Hosp. Auth., No. CV0117-07, 2008 WL 1749476, at *6 (Guam Apr. 11, 2008) ("Under the Sunshine Act, the agent must identify the principal in making the information request, for the principal to have standing to institute proceedings pursuant to section 10111(b).").

³ See Reid v. N.H. Att'y Gen., 169 N.H. 509, 522 (2016) (looking to United States Supreme Court's interpretation of term in FOIA); 38 Endicott St. N., LLC v. State Fire Marshal, 163 N.H. 656, 667 (2012) (looking to federal circuit court's interpretation of FOIA); ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 753 (2011) (looking to federal's courts interpretation of FOIA regarding reasonableness of search efforts by agency); Lodge v. Knowlton, 118 N.H. 574 (1978) (adopting six-prong test under FOIA for evaluating requests for access to police investigative files).

2. To the extent that plaintiff seeks to go forward with this action, plaintiff shall have thirty (30) days from the date of the Clerk of Court's notification of this order in which to file a motion seeking to correct the issue of standing. If defendant objects to the motion, defendant shall have the customary ten (10) days in which to file an objection.
3. Absent a successful correction of the issue of standing, as determined by the Court, defendant's motion to dismiss shall be granted.

SO ORDERED.

6-23-17
Date


Philip P. Mangones
Presiding Justice

Hillsborough County Attorney
State of New Hampshire

300 Chestnut Street, Manchester, New Hampshire 03102
Telephone 603-827-5605
Fax 603-827-5627

DENNIS C. HOGAN
COUNTY ATTORNEY



KENT E. SMITH
FIRST ASSISTANTS

MERRILL BEAUCHAMP
DIRECTOR, VICTIM/WITNESS PROGRAM

January 8, 2016

Tony F. Soltani, Esq.
The Munilaw Group
P. O. Box 300
Epsom, NH 03234

Re: Right to Know Request-Kimberley McSweeney

Dear Attorney Soltani:

Your letter of December 28, 2015 requested records regarding Kimberly McSweeney. I have enclosed the record of her in the file management systems which shows she is on the witness list for eight files. It is a matter of interpretations whether each file "regards" McSweeney. For purposes of this response my interpretation is that the files do not regard McSweeney. If you disagree you can request additional records. Being more specific about what you want from those files, can prevent you paying for information in which you have no interest.

You have not identified yourself or your office as representing Kimberly McSweeney. Therefore, any personnel information we have is not available to you.

Sincerely,

A handwritten signature in cursive script that reads "D. Hogan".

Dennis C. Hogan

General Person Lookup System (DAGPLS)

Query Adult Juvenile Investigation VAW Civil Social

Name: MCSWEENEY, KIM

Report

DA Log #	Role	Charge Code	Date Off	Dept	Incident Rept #	Date Rcv'd

Case

County #	Role	LP	CC/PC	VWA	RSA	Note	Case #	Charge Docket #
15-1448	Witness	AAO						
13-0643	Witness	LAD		MOB				
12-1925	Witness	LR						
12-1923	Witness	BJH						
12-1514	Witness	MGV						
12-1253	Witness	AAC						
12-1253	Witness	LAD				ANNULLED		
12-0833	Witness	BJH						

Witness Case

The County of Hillsborough
New Hampshire

329 Mast Road
Goffstown, NH 03045
Tel: 627-5628
Fax: 628-6370

Carolyn M. Kirby, Esq.
Legal Counsel



July 19, 2017

Anthony Soltani, Esquire
MuniLaw Group
Ronald Reagan Plaza
PO Box 457
Epsom, NH 03234

Re: Right to Know Request Kimberly Mc Sweeney

Dear Attorney Soltani:

Enclosed please find copies of materials responsive to your request for information relative to former Weare Police Department employee Kimberly McSweeney. A total of 98 pages have been identified that are hopefully responsive to your request. As you may recall, both County Attorney Hogan and I have attempted to more clearly refine and/or delineate exactly what information you are seeking. Please note that some of the documents were previously provided to you in an effort to address your requests as outlined in the Censabella v. Hogan petition (NH Superior Court Docket Number 226-2017-CV-135). County Attorney Hogan has since undertaken a further search and identified documents related to Evidence Audits that either referenced or directly identified Ms. McSweeney, so those are included from page 62 forward as they may potentially be responsive. I also enclose a Privilege Log/Vaughn Index that identifies precise pages with documents redacted or withheld. Most specific among those pages is an internal investigation by the Weare Police Department identified as withheld. As I understand it, that investigation is a personnel matter exempt under the law.-

I hope this information is helpful to you and responsive to your request. If you have any questions or wish to further discuss this matter, please feel free to contact me.

Very truly yours,

Carolyn M. Kirby

Encl.
cc: Dennis Hogan, Esquire w/ Encl.

Anthony Soltani Request
Re: Kimberley McSweeney
HILLSBOROUGH COUNTY ATTORNEY PRIVILEGE INDEX

Bate Stamp page number	Category of Document/Information Reason for Redaction	Legal Authority (Statute, Case Law, etc.)
0004-0024	Internal Investigation IA-15-019 Dated 11/24/15 withheld	<i>Non-public document (Weare Police Internal Investigation), RSA 91-A:5, IV, <u>Union Leader v. Fenniman</u>, 136 N.H. 624 (1993), RSA 105:13-b, <u>Reid v. NH Atty General</u>, (Dec. 2015-0499, December 23, 2016), <u>Hounsell v. N. Conway Water Precinct</u>, 154 N.H. 1 (2006), RSA 275:56, Lab. 802.08, March 2017 Attorney General Joseph Foster Exculpatory Evidence Protocol; February 13, 2004 Attorney General Peter Heed <u>Laurie</u> Memo, <u>State v. Laurie</u>, 139 N.H. 325 (1995), <u>Petition of State of New Hampshire</u>, 153 N.H. 318, 320 (2006) and <u>State of N.H. v. Lucius</u>, 140 N.H. 60, 63 (1995)</i>
0025-0026	12/1/15 Email from Chief Kelly to CA Hogan subject line and identifier of attachment redacted 12/1/15 Letter from Chief Kelly to CA Hogan withheld	<i>RSA 91-A:5, IV, RSA 275:56, Lab. 802.08, March 2017 Attorney General Joseph Foster Exculpatory Evidence Protocol; February 13, 2004 Attorney General Peter Heed <u>Laurie</u> Memo, <u>State v. Laurie</u>, 139 N.H. 325 (1995), <u>Petition of State of New Hampshire</u>, 153 N.H. 318, 320 (2006) and <u>State of N.H. v. Lucius</u>, 140 N.H. 60, 63 (1995)</i>
0042-0043	3/21/16 email from Chief Kelly to Dennis Hogan redacted subject and 3/21/16 emails from Chief Kelly to ACA Michael Valentine redacted 3/21/16 email from Michael Valentine to Chief Kelly redacted	<i>RSA 91-A:5, IV, <u>Union Leader v. Fenniman</u>, 136 N.H. 624 (1993), RSA 105:13-b, <u>Reid v. NH Atty General</u>, (Dec. 2015-0499, December 23, 2016), <u>Hounsell v. N. Conway Water Precinct</u>, 154 N.H. 1 (2006), RSA 275:56, Lab. 802.08, March 2017 Attorney General Joseph Foster Exculpatory Evidence Protocol; February 13, 2004 Attorney General Peter Heed <u>Laurie</u></i>

		<p>Memo, <u>State v. Laurie</u>, 139 N.H. 325 (1995), <u>Petition of State of New Hampshire</u>, 153 N.H. 318, 320 (2006) and <u>State of N.H. v. Lucius</u>, 140 N.H. 60, 63 (1995). Attorney Work Product</p>
0049-50	<p>3/28/16 email from Chief Kelly to ACA Michael Valentine subject redacted and 3/21/16 email from ACA Michael Valentine to Chief Kelly redacted</p>	<p>RSA 91-A:5, IV, <u>Union Leader v. Fenniman</u>, 136 N.H. 624 (1993), RSA 105:13-b, <u>Reid v. NH Atty General</u>, (Dec. 2015-0499, December 23, 2016), <u>Hounsell v. N. Conway Water Precinct</u>, 154 N.H. 1 (2006), RSA 275:56, Lab. 802.08, March 2017 Attorney General Joseph Foster Exculpatory Evidence Protocol; February 13, 2004 Attorney General Peter Heed <u>Laurie</u> Memo, <u>State v. Laurie</u>, 139 N.H. 325 (1995), <u>Petition of State of New Hampshire</u>, 153 N.H. 318, 320 (2006) and <u>State of N.H. v. Lucius</u>, 140 N.H. 60, 63 (1995) Attorney Work Product</p>