

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

SUPREME COURT DOCKET NO. 2017-0429

JANUARY SESSION

2018 TERM

LISA CENSABELLA
V.
HILLSBOROUGH COUNTY ATTORNEY DENNIS HOGAN

NH Supreme Court
DROP BOX

JAN 17 2018

Date 1/16 Time 11:50

RULE 7 MANDATORY APPEAL OF ORDER OF THE SUPERIOR COURT
HILLSBOROUGH COUNTY SOUTH

**REPLY MEMORANDUM OF LAW IN SUPPORT OF THE
PLAINTIFF/APPELLANT
LISA CENSABELLA**

By: Tony F. Soltani
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Oral Argument Requested
To be done by Tony F. Soltani

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STATUTES

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

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

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.

RSA 91-A:8 91-A:8 Remedies. –

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

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

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

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

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

91-A:9 Destruction of Certain Information Prohibited. – A person is guilty of a

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

STATEMENT OF THE CASE

On December 28, 2015 Attorney Soltani, as the attorney for Lisa Censabella requested RSA 91-A information from Attorney Hogan regarding the McSweeney matter, without disclosing who he was representing. See Appendix at pp. 3, 30, 56. Attorney Hogan did not respond to the request until January 8, 2016, a violation of RSA:91-A:4 (which requires an answer to the request within five business days) and withheld information concerning the criminal investigation. See Appendix at pp, 3, 30, 58. Attorney Soltani repeated his requests numerous times from that date through November 21, 2016. See Appendix at pp, 3-5, 30-39, 56-111. On November 29, 2016, Attorney Hogan released partial information relative to the criminal investigation of Officer McSweeney. See Appendix at pp. 5, 39, 112.

A Petition for Statutory Relief and Permanent Injunction Pursuant to RSA 91-A was filed with the court on March 28, 2017. See Appendix at p. 9-10. Defendants filed a Motion to Dismiss on April 12, 2017 claiming that there was no request made in Lisa Censabella's name or on her behalf and that she was never identified directly and therefore could not have suffered any harm. See Appendix at p. 24-26. A hearing was held on April 14, 2017 See Transcript. Plaintiff's filed an Objection to the Motion to Dismiss on May 1, 2017 and addressed all the issues raised at the hearing, including a further explanation of the exhibits brought to court. See Appendix at p. 29-128. The Notice of Decision granting the Motion to Dismiss was ordered on June 26, 2017 and this appeal followed. See Appendix at pp. 134-143. In his brief, the Respondent argues:

- I- Lisa Censabella was not an aggrieved party and hence has no standing
- II- Lisa Censabella has waived the opportunity to substitute party proper
- III- This appeal is limited to issues of standing

While the arguments are properly framed, their analysis is improper, making a logical leap, assuming facts not evidence, and arguing precisely what the title of the argument claims should not be argued.

SUMMARY OF THE ARGUMENT

The Respondent's argument, while creative, will inevitably and irreparably nullify at least two core values of the New Hampshire Right to Know Law. First, the ability of all persons to be treated equally while making a lawful request, equal treatment by responsive agencies, and the ability to use an intermediary. These propositions find no support in New Hampshire law.

It is uncontested that Lisa Censabella by all accounts and undeniably did make a repeated request through an agent who also happens to be her attorney. The Respondent argues that this is not enough and that the request must identify the client. The Respondent never sought the name of the client, but after repeated intentional failures and denials, and after the filing of the action he now decries that the client must be identified. This position would also nullify the century old New Hampshire tradition that government must not be an obstacle to a citizen. Instead it must assist and inform the people in pursuing their legal rights. Neither she, nor her agent/ attorney were provided with a form requiring the identity of the client, nor would such a mandate be proper under New Hampshire law.

The Respondent invites this court to essentially amend New Hampshire law importing most troublesome and disastrous requirements with no legal authority and no legislative support. Secret rules, never written, and never disclosed cannot, and should not create a last-minute bar to assertion of a citizen's constitutional or legal rights and remedies. Otherwise the very core of RSA 91-A would be frustrated. The respondent's objective is merely to delay and escape the

consequences of his misconduct. His attempts are in vain, since the petitioner has standing, and is entitled to all remedies including attorney's fees and costs.

ARGUMENT

I- STANDARD OF REVIEW

The Respondent correctly points to the standard of review as enunciated by this court:

" Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the petitioners' pleadings are sufficient to state a basis upon which relief may be granted." *Avery v. N.H. Dep't of Educ.*, 162 N.H. 604, 606, 34 A.3d 712 (2011). " To make this determination, the court would normally accept all facts pled by the petitioners as true, construing them most favorably to the petitioners." *Id.* " When the motion to dismiss does not challenge the sufficiency of the petitioners' legal claim but, instead, raises certain defenses, the trial court must look beyond the petitioners' unsubstantiated allegations and determine, based on the facts, whether the petitioners have sufficiently demonstrated their right to claim relief." *Id.* (quotation and brackets omitted). " A jurisdictional challenge based upon lack of standing is such a defense." *Id.* at 607. " Since the relevant facts are not in dispute, we review the trial court's determination on standing de novo." *Id.* *K.L.N. Constr. Co. v. Town of Pelham*, 107 A.3d 658, 167 N.H. 180, (N.H. 2014)

However, the *Avery* case's elaboration on the issue is instructive:

" Generally, in ruling upon a motion to dismiss, the trial court is required to determine whether the allegations contained in the petitioners' pleadings are sufficient to state a basis upon which relief may be granted." *Avery v. N.H. Dep't of Educ.*, 162 N.H. 604, 606, 34 A.3d 712 (2011). " To make this determination, the court would normally accept all facts pled by the petitioners as true, construing them most favorably to the petitioners." *Id.* " When the motion to dismiss does not challenge the sufficiency of the petitioners' legal claim but, instead, raises certain defenses, **the trial court must look beyond the petitioners' unsubstantiated allegations and determine, based on the facts, whether the petitioners have sufficiently demonstrated their right to claim relief.**" *Id.* (quotation and brackets omitted). " A jurisdictional challenge based upon lack of standing is such a defense." *Id.* at 607. " Since the relevant facts are not in dispute, we review the trial court's determination on standing de novo."

K.L.N. Constr. Co. v. Town of Pelham, 107 A.3d 658, 167 N.H. 180, (N.H. 2014); *emphasis supplied*.

Both cases involved taxpayer actions against municipalities. They both involved whether the individual taxpayer had suffered any grievance which was unique, and not common to all taxpayers. The court focused on determining facts beyond unsubstantiated, or generalized facts, in determining underlying facts, in support of those allegations. This was necessary for the court to engage in statutory analysis on the issue of jurisdiction.

Here specific, substantiated, and direct facts indicate that the requests made by me were on behalf of Lisa Censabella, my client. See App. Pg. 2-3, Para. 4, 5, 14, 16. In the hearing, I informed the court that I did not identify Lisa as the requestor, and I was never asked to identify my client. I made it clear that I never disclose the identity of the client, because the law does not prohibit any citizen from making a request through an agent, without disclosing the agency. That is why New Hampshire has designed the law the way it has so people would be treated equally. Tr. PP. 9-12. "The legislature was very specific about that. They don't want everybody to know who is getting what in these small towns." Tr. P. 12. This is a point of pride and a testament to New Hampshire while the FOIA has consistently failed to correct misuse by government agencies, much to the dismay of federal courts. "when documents are within FOIA's disclosure, citizens should not be required to explain why they seek the information. The Supreme Court, in determining whether FOIA requestor should be treated differently if the requestor is a news agency, similarly resolved that a requestor's identity has no bearing on the merits of his or her FOIA request" *Protecting Freedom of Information Act, 21-SPG Kan. J. L & Pub. Pol'y. 221; Citing National Archives & Administration V. Favish, 541 US 157, 172 (2004); U.S. Dep't. of Justice v. Reporters Comm. For Freedom of the Press, 489 US 749, 771 (1989)*, Internal citations and quotations omitted.

However lofty the notion of equal treatment might be it is unattainable and not presently in practice as reported by the same journal. This core deficiency need not be imported into New Hampshire law, where there is no support for such proposition.

The respondent's conclusion and trial courts, require a leap of logic. The court, invited by the respondent found, not that I had made the requests on Lisa's behalf, but only that I did not identify my client, without even being asked. See Order, Pg. 7. These are two mutually exclusive matters, with no connection and without undermining the undeniable truth that I was acting on behalf of Lisa Censabella. In its decision, the court relied on, my writing style, I have identified a client in another unrelated request, and that Lisa "[N]ever herself requested" the documents Order Pg. 7. I will address them in turn:

A- MY WRITING STYLE

I generally write in the first person singular. The Royal, or editorial "we" makes me, as an ordinary man, uncomfortable. Except of course when I write for a group, such as a committee or deliberative report. It is also simpler to make requests or demands or prayers by using singular first person. This court can take judicial notice that many if not most lawyers ask opposing counsel or even the court what they want, or desire, in discovery, trial management, plea bargaining, and most of what we write and say. This habit violates no rule, and is hardly an offense for which Lisa should be deprived of her day in court. It stretches the bounds of logic to assume when a lawyer speaks or writes in the first person using firm letterhead, he or she is asking for what he or she wants, and not what her client wants.

B- NAMING A CLIENT

Next the respondent points to my letter of 9-27-2016 as having identified a client. App. 178. The letter should be viewed in context and in its entirety. The disclosure appears in the third paragraph, it does not identify that particular client as the requestor, and it is merely there to assuage any concern which the respondent might have had regarding disclosing personal information relating to that specific client. The letter also discusses various attempts at stonewalling and semantical gymnastics by the respondent in relation to another pending request. Yet the court completely dismissed the substantial and important reasons for which I protected my client's identity, in addition to the legal reality that I am not required to identify my client. She is a former police officer and a whistleblower, who has been subjected to mistreatment in Hillsborough County. See TR. P 21 Ln.20 through P 23 Ln.20.

C- The court observed that Lisa never directly or personally asked for any record, which is entirely correct; but immaterial. There is no such legal requirement in New Hampshire and there is no rationale to impose such a requirement. The respondent argues that there are 300 million people in the United States. A responding agency would not know who would be asking for the documents. That is precisely what makes the New Hampshire uniquely superior and more effective than FOIA. The agency should not know if the request is from a news organization, a legislative or executive oversight committee gauging their adherence to the law, or a simple ordinary citizen. This obtains the end for which the United States Supreme Court desired in the Reporter's Commission case, *supra*. This is an advantage, a great and insightful safety mechanism which the respondent urges this court to utterly gut and destroy. They also confuse the carefully chosen term "citizen". This court has

acknowledged that New Hampshire has specifically defined “resident” and “domiciliary”.

“The legislature has defined “residence” differently from “domicile.” “Residence” is “a person’s place of abode or domicile,” and the phrase “place of abode or domicile” is defined as “that [place] designated by a person as his principal place of physical [117 A.3d 736] presence for the indefinite future to the exclusion of all others.” RSA 21:6-a. Pursuant to RSA 21:6, a “resident” is “a person who is domiciled or has a place of abode or both in this state ... and who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others.” Our motor vehicle laws use this definition of “resident.” See RSA 259:88 (2014). Upon becoming a “resident” of New Hampshire, one has 60 days in which to register one’s vehicle here and to obtain a New Hampshire driver’s license. See RSA 261:45 (2014); RSA 263:35 (2014). These requirements do not apply to citizens who are not “residents” of New Hampshire although they have their “domicile” here. The basic difference between a “resident” and a person who merely has a New Hampshire “domicile,” is that a “resident” has manifested an intent to remain in New Hampshire for the indefinite future, while a person who merely has a New Hampshire “domicile” has not manifested that same intent. *Guare v. State*, 167 N.H. 658, 117 A.3d 731, (2015)

The New Hampshire Constitution, adopted prior to the ratification of the United

States Constitution, uses the terms “subject”, “person”, “man”, “individual”,

“people”, “public” and “citizen” interchangeably. See Pt. First, Art. 1, 2, 3, 5, 6, 7,

8, 12,13,14,15,16,17,18,19,28, among others. Yet The respondent urges this court to

revise its traditional interpretation of the term “Citizen”. The respondent appears to

argue that the right of access to public records is reserved to residents of

Hillsborough County, or at most to legal citizens of the United States. This argument

fails both in legal, and factual terms. It also would devastate the core values of

Article 8, and RSA 91-A. This would eviscerate the right of any corporate or legal

entity, chartered in this state or any other state, as well as residents of foreign states,

and nations. In the respondent’s vision, Permanent resident aliens earning their way

to citizenship, The New York Times, The Concord Monitor, The Canadian

Broadcasting Corporation would be foreclosed from availing themselves to rights conferred under RSA 91-A. This claim also undermines the respondent's own conduct. I am a resident of Merrimack County and he never asked to see proof of my citizenship. Yet he now claims that I was the requestor. The extension of this rationale would also have absurd jurisprudential consequences. Suddenly and overnight, many rights enshrined in the New Hampshire Bill of Rights would either disappear or would vastly limited to only real persons (perhaps only men) who are citizens of the united states. This court has repeatedly established that no law will be so interpreted as to produce an absurd result. " However; we will not interpret statutory language in a literal manner when such a reading would lead to an absurd result." *State v. Brest*, 167 N.H. 210, 108 A.3d 623, (2014).

Finally, the court also inquired as to any specific authority allowing me to make a request without disclosing my client. This rationale is the inverse of American Jurisprudence. The burden is on the respondent to demonstrate that I must disclose my client, without ever so much as asking for her name.

II- LISA CENSABELLA HAS STANDING

There appears to be little dispute between the parties regarding the governing law. However, the application of the law to this fact established Lisa to be an aggrieved party. The respondent argues that this court should amend state law to require one of the worst features of FOIA without any legal support. They argue that because Lisa was not identified, apart from the fact that she had good and substantial reason not to be identified, and even though the respondent never asked for the identity of the requestor, she is not aggrieved. I simply ask this court to apply its traditional rules of statutory construction. Lisa was in fact the requestor, but chose not to disclose her identity. She used an attorney.

A function of our profession is to protect our clients, hold public officials or anyone violating the law accountable. Sometimes, this duty, if permitted by law requires us to be a firewall between our clients, and any potential harm which may come to them. "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. We should not be playing "Gotcha" with the public's right to access. Public officials should most willingly help, assist, guide and cooperate persons, citizens, residents, women, legal entities, or taxpayers, however they choose to label them. Without the service of an intermediary, the identity of requestors, will be public and subject to dissemination. As multiple studies have found, this leads to disparate treatment, political vengeance, and abuse and scorn. See Protecting Freedom of Information Act. *Supra*. This defects of FOIA has been alleged to lead to "witch hunts", "fishing expeditions", "an easy way to target people who [a public official] might think are up to no good", and "used to track who the biggest gadfly is". David Jackson, Republican Plans Investigation of 'corrupt' Obama Administration, USA Today, Jan. 3, 2011, at <http://usatoday.com/communittees/theoval/post/2011/01/republican-plans-investigation-of-corrupt-obama-investigation/1>; Eric Lipton, Republican Congressman Proposes Tracking Freedom of Information Act Requests, N.Y. Times, Jan. 29, 2011, at A14.

III- LISA CENSABELLA HAS NOT WAIVED ANYTHING

This case was brought by Lisa Censabella for violation of RSA 91-A. In a motion to dismiss generally this court allows a leave to amend the pleading. *ERG, Inc. v. Barnes*, 137 N.H. 186, 624 A.2d 555, (1993)

In this case the court did grant a leave to amend. However, after deliberation and research, it was obvious, that neither I nor Attorney James Carney had made the requests as individuals, but acted as agents for Lisa Censabella. To substitute either of us as the party plaintiff would be distasteful at least, and less than truthful at most. There is nothing wrong with asking a court for a potential remedy to further research and explore the possibilities. There is nothing wrong with not amending a complaint to state facts with which I do not completely agree, nor find completely honorable.

I am unsure what the respondent seeks by raising this argument. But, it has no impact on this appeal. Nothing preserved and argued below has been waived.

IV- THE APPEAL IS LIMITED TO THE ISSUE OF STANDING

I completely agree with the learned opposing counsel. The issues of adequacy, timeliness, good faith, and other ancillary issues are not before the court. The case was dismissed on a motion to dismiss and the record is limited to that which was presented below. It is only on remand that Lisa Censabella and the respondent can argue whether his responses were proper, timely and made in good faith. It is similarly not ripe to argue whether the respondent's assertion of certain exceptions or exemptions to the repeated requests were appropriate and recognized by New Hampshire law. This is more significant for acts or actions taken after the initiation of the suit and the order on dismissal.

No briefing, nor arguments are properly before this court except those involving the issues pertaining to Lisa Censabella's standing to petition to redress. Equally important is that no documents or exhibits should be considered by this court other than those which comprise the record below, and matters subject to judicial notice or law.

There are many issues yet to be litigated on remand, which include the propriety of assertion of various exemptions and exceptions to RSA 91-A. Those issues require far greater legal briefing and factual evidence which could not possibly have been generated in the present posture of this case.

V- ERRORS AND CORRECTIONS TO THE RECORD

I have the highest respect for my learned opposing counsel. Nothing here should in any way be construed as remotely an attack on her professionalism, character, honesty, and legal prowess. I do apologize to the court and my opposing counsel for accidentally omitting pages 30, and 31 of what has been appended to her brief. The failure to include those two pages was an error on my part. They are indeed a part of the record below, and should have been included in my appendix. Conversely pages 32 through 34 of the opposing brief are not a part of the record below and were generated after the motion to dismiss was granted, rendering the case ripe for appeal. My opposing counsel's motives were entirely pure in that she was attempting to be complete while being entirely candid with this court. However, these documents, not a part of the record, cannot be appended to any briefing nor are permitted under Supreme Court Rule 13(1). As such those documents should be stricken from the record as well as, any part of the brief relying on information contained in those documents.

VI- CONCLUSION

The petitioner respectfully prays that this court:

- 1- Strike from the record, pages 32 through 34 of the respondent's brief.

- 2- Strike from the record the last sentence of the second paragraph of page 15, the last two sentences of the first paragraph of page 16 of the respondent's brief.
- 3- Reverse the trial court in-so-far as the court held she had no standing.
- 4- Remand the case to the trial court with instruction for further proceedings.
- 5- Award the petitioner attorney's fees and costs incident to the prosecution and appeal of this case, under RSA 91-A:8, the redemption of a public right and, the Harkeem doctrine.


SUPREME COURT RULE 16(10) COMPLIANCE

The undersigned hereby certifies that he has sent by first class mail two copies of this brief to Attorney Carolyn M. Kirby on this 16th day of January 2018.

REQUEST FOR ORAL ARGUMENT

Plaintiffs wish to be heard orally. Their argument will be presented by Tony F. Soltani and will take no more than 15 minutes as permitted by Supreme Court Rule 18(3).

Respectfully submitted,
Lisa Censabella
By and through her attorneys,
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