THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0052

B&C Management dba Fireside Inn

v.

State of New Hampshire
Division of Emergency Services

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By its Attorneys,

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(Fifteen-minute oral argument)

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ISSUE PRESENTED

Did the trial court err by denying B&C Management dba Fireside Inn's amended petition for the release of a 911 audio recording?

STATEMENT OF FACTS AND CASE

At the hearing on the merits in this matter, the State did not contest the underlying facts. T[1] 7-8, 29. On June 16, 2019, Sherry and Charles Lawrence were hotel guests at B&C Management/dba Fireside Inn (hereinafter referred to as "Fireside Inn"), located in Nashua, New Hampshire. PA 3-4; T 3, 7-8. Mrs. Lawrence tripped and fell in the threshold of her hotel room at Fireside Inn. PA 4; T 7-8.

After Mrs. Lawrence fell, her husband called the front desk of Fireside Inn to request assistance. PA 4; T 7-8. The front desk staff called 911 to request an ambulance. PA 4; T 7-8, 29. The State of New Hampshire, Department of Safety, Division of Emergency Services ("the State") manages the call center created under RSA 106-H and serves as the statewide answering point for all 911 calls. RSA 106-H:1. In this case, the 911 operator asked to speak with Mr. Lawrence, who explained the details of the accident to the operator and indicated that Mrs. Lawrence had tripped over her foot. PA 4; T 7-8, 29. A hotel employee was present for the conversation. PA 4; T 7-8, 29.

Mr. and Mrs. Lawrence subsequently retained counsel and claimed that a frayed rug at the doorway threshold of Fireside Inn caused the fall. PA 4; T 7-8, 29. They have yet to file a lawsuit against Fireside Inn.

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[1] Citations to the record are as follows:
"PB__" refers to the plaintiff's brief and page number;
"PA __" refers to the plaintiff's appendix and page number;
"PD__" refers to the documents appended to the plaintiff's brief and page number;
"DA__" refers to the documents appended to this brief and page number;
"T__" refers to the transcript of the hearing on the merits held on November 22, 2019 and page number.

Fireside Inn filed a petition in equity requesting pre-suit discovery of the 911 audio recording pursuant to RSA 498:1. PA 8. Contemporaneously, Fireside Inn filed a Right-to-Know request pursuant to RSA chapter 91-A for the same record. After the State denied its request, Fireside Inn amended its Petition on October 16, 2019 to include a claim pursuant to RSA 91-A:7. PA 3-7. The State moved to dismiss, arguing that 911 audio recordings are exempt from disclosure under RSA 91-A and RSA 106-H:14 and that pre-suit discovery was not appropriate. PA 8-21. Fireside Inn filed an objection to the motion to dismiss and the State filed a reply. PA 22-23, 24-47, 48-51.

On November 22, 2019, the trial court held a hearing on the merits. On December 30, 2019, the trial court (*McNamara*, J.) issued its order denying Fireside Inn's amended petition, ruling that 911 recordings are exempt from RSA chapter 91-A disclosure and Fireside Inn is not entitled to equitable relief under RSA 498:1. PB 32-37.

SUMMARY OF THE ARGUMENT

The Superior Court correctly found that 911 audio recordings are statutorily and categorically excluded from disclosure pursuant to RSA chapter 91-A, the Right-to-Know Law, and RSA 106-H:14.

In addition, the Superior Court correctly ruled that the extraordinary equitable remedy of pre-suit discovery is not proper in this instance as a matter of statutory construction and because Fireside Inn has adequate alternative remedies at law; namely, it may pursue methods of discovery if, and when, Fireside Inn is named as a defendant in a lawsuit.

STANDARD OF REVIEW

This case requires the statutory interpretation of the Right-to-Know Law, RSA chapter 91-A, in conjunction with RSA chapter 106-H. The appellate court reviews the trial court's statutory interpretation and its application of law to undisputed facts *de novo*. *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95, 103 (2016). The appellate court reviews the trial court's equitable decision for production of discovery under unsustainable exercise of discretion. *Gutbier v. Hannaford Bros. Co.*, 150 N.H. 540, 541-42 (2004).

ARGUMENT

I. 911 AUDIO RECORDINGS ARE NOT PUBLIC RECORDS UNDER THE RIGHT-TO-KNOW LAW.

A. 911 audio records are statutorily exempt from RSA 91-A.

The Right-to-Know Law provides that "[e]very citizen … has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies…except as otherwise prohibited by statute or RSA 91-A:5." RSA 91-A:4, I (emphasis added). The records sought in this matter are recordings of phone calls related to the June 16, 2019 incident which were compiled under the Enhanced 911 system established by RSA chapter 106-H.

The relevant statutory exemption states:

> Any information or records compiled under this chapter shall not be considered a public record for the purposes of RSA 91-A regardless of the use of such information under paragraph I or II. Notwithstanding any provision of law to the contrary, the bureau shall only make information or records compiled under this chapter available as follows:
>
> I. On a case-by-case basis to a law enforcement agency that requires the information or records for investigative purposes; and
>
> II. To the department of environmental services solely for the purpose of estimating the location of wells subject to RSA 482-B[.]

RSA 106-H:14 (emphasis added). Since Fireside Inn does not fall into either category of the exceptions listed above, the sole question is whether the 911 audio recordings are "information or records compiled under this

Chapter [RSA 106-H].” Audio recordings are clearly records that were created by and compiled in the course of implementing RSA chapter 106-H, and, as a result, are exempt from disclosure pursuant to RSA 91-A.

“Every telephone utility …. shall make available the universal emergency telephone number 911 for use by the public in seeking assistance from fire, police, and other related safety agencies through a single public safety answering point.” RSA 106-H:8, I (emphasis added). “Each telephone service provider shall assure that all requests for police, fire, medical, or other emergency services received by the provider or the provider's operator services shall be transferred to the public safety answering point.” *Id*. (emphasis added). It is apparent that anyone dialing 911 by telephone is making “a request for police, fire, medical or other emergency services” which is then “transferred” to the “public safety answering point.”

A “public safety answering point” means “a facility with enhanced 911 capability, operated on a 24-hour basis, assigned the responsibility of receiving 911 calls and transferring or relaying emergency 911 calls to other public safety agencies or private safety agencies.” RSA 106-H:2, XII (emphasis added). The Division of Emergency Services is responsible for operating the public safety answering point under the Enhanced 911 system. *See* RSA 106-H:6, I (The Director shall appoint personnel “as may be necessary to perform the duties assigned by the Division.”); RSA 106-H:6, III (The Director shall “do such things as may be necessary and incidental to the administration of the division's authority pursuant to this chapter, with the approval of the commissioner.”). As part of its operations, the Division records 911 calls and provides that “[e]nhanced 911 recordings

shall be retained for 6 months." DA 32 (*N.H. Admin R.* Saf-C 7006.04 (g) (eff. Aug. 25, 2020)[2]; *see also N.H. Admin R*. Saf-C 7006.04 (c) (2019) ("[r]ecordings shall be retained for 6 months.")

"'Governmental records' means any information created, accepted, or obtained by…any public agency in furtherance of its official function." RSA 91-A:1-a, III. "The term 'governmental records' shall also include the term 'public records.'" *Id*. Pursuant to RSA 106-H:8 and in furtherance of its official function to provide a single public safety answering point for individuals requesting emergency services, the State both "accept[s]" and "obtain[s]" "information" from each 911 caller while on a recorded line. It is hard to imagine a more core record for RSA 106-H purposes than the recordings of the calls that come into the public safety answering point, itself established by RSA 106-H. The audio recording itself constitutes a "record" of such "information." *See* Black's Law Dictionary (8th. Ed., 2004), p. 1301 (A record is "information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form.")

In sum, the 911 recordings contain information and are created by the State in the course of the operation of the enhanced 911 system established by RSA chapter 106-H, and are therefore compiled pursuant to that chapter, and for no other reason. It follows that such records and information are expressly made exempt from the Right to Know Law pursuant to RSA 106-H:14.

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[2] The current rule is attached hereto in the Defendant's Addendum.

Fireside Inn's entire argument hinges on a myopic interpretation of a single definition, and ignores all of the above functions established by RSA chapter 106-H. It argues that the definition of "Enhanced 911 system" should control, because the title of the chapter is "Enhanced 911 System," and then focuses on the definition of Enhanced 911 System to the exclusion of other statutory definitions and provisions. This is unpersuasive since the very definition of that term includes the statutorily defined term "public safety answering point." *See* RSA 106-H:2, VII (defining "Enhanced 911 system" as a "system consisting of selective routing with the capability of automatic number and location identification at a public safety answering point, which enables users of the public telecommunications system to request emergency services by dialing the digits 911.") (emphasis added). It is readily apparent that without the language in RSA chapter 106-H establishing a public safety answering point, there could be no 911 call and therefore no audio recording. There is absolutely no other statute that would authorize the State to operate a public safety answering point for a 911 service without RSA chapter 106-H. For that reason, Fireside Inn cannot plausibly focus this Court on one definition in the statute to dramatically – and improperly – limit the scope of records nondisclosure.

By its own terms, the statute does not only exempt the record from public disclosure, but also any "information" that is contained in the record. *See* RSA 106-H:14 ("Any information or records compiled under this chapter…") (emphasis added). As a result, the information contained in the content of the recording is also exempt from public disclosure.

Moreover, Fireside Inn's argument that RSA 106-H:14 only protects location information is unpersuasive. Location identification data is a

specifically defined term in chapter 106-H, and is expressly made confidential under RSA 106-H:12 and RSA 106-H:17. RSA 106-H:12, I (defining "automatic location identification" as "the system capability to identify automatically the geographical location of the telephone being used by the caller and to provide a display of that location at the public safety answering point.") By contrast, the terms "information and records" in RSA 106-H:14 reflect a legislative intent for a significantly broader scope than the provisions which apply solely to location information. Statutory provisions are not to be interpreted in a way that would render other provisions of the act superfluous or unnecessary. *See Ratzlaf v. United States*, 114 S. Ct. 655, 659 (1994). Adopting Fireside Inn's interpretation would run afoul of this well-established principle of statutory construction, in that if RSA 106-H:14 only applied to the location data of a 911 call, this would necessarily render 106-H:12, which solely applies to "automatic number identification and automatic location identification information" superfluous.

B. The State's interest against disclosure outweighs the needs of the public under RSA 91-A and the needs of Fireside Inn in this matter.

In its brief, Fireside Inn references Part I, Article 8 of the New Hampshire Constitution in support of its argument that the public has a right to 911 recordings. PB 13. However, Fireside Inn did not raise this constitutional argument at the hearing below. In its complaint, Fireside Inn only raised two claims, one under RSA 91-A and another under RSA 498:1. PA 3-6. By failing to raise this argument at the lower court, Fireside Inn has

waived the constitutional argument on appeal. *See State v. Dodds*, 159 N.H. 239, 243-44, 982 A.2d 377 (2009) (holding that arguments are deemed waived if not raised below).

In any event, the audio recordings at issue are clearly statutorily and categorically exempt from RSA 91-A pursuant to RSA 106-H:14. This conclusion should end the Right-to-Know analysis without the need to conduct any balancing test because there is a statutory prohibition on disclosure. See RSA 91-A:4, I (the public has the right to "inspect all governmental records…except as otherwise prohibited by statute or RSA 91-A:5.") (emphasis added). Nevertheless, if the Court construes 911 recordings to be public records, RSA 91-A:5, IV exempts such records from disclosure as an unwarranted invasion of privacy. Applicability of this exception depends upon a three-step analysis to determine whether the record is public. *N.H. Right to Life v. Dir., New Hampshire Charitable Trusts Unit*, 169 N.H. 95, 110 (2016). First, the Court must "evaluate whether there is a privacy interest that would be invaded by the disclosure." *Id*. Next, the Court considers the "public's interest in the disclosure…[and whether] the requested information should inform the public about the conduct and activities of their government." *Id*. at 111. "Finally, [the Court] balances the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Id*.

With respect to the first element of the balancing test, 911 recordings are replete with privacy interests. The recordings contain protected health information about individuals, the identities of individuals who are reporting on crimes who may be subject to harm or retaliation (*see, e.g., Id*. at 118-19), as well as private identity, contact, and address information

(*see, e.g., Lamy v. New Hampshire Pub. Utilities Comm'n*, 152 N.H. 106, 110 (2005)). Further, RSA106-H:16 creates an expectation that a person's communications with 911 during a time of need will remain private.

As to the second prong of the analysis, "[d]isclosure of the requested information should inform the public about the conduct and activities of their government." *N.H. Right to Life*, 169 N.H. at 111. Fireside Inn is not requesting, for instance, a series of 911 recordings in order to, for instance, determine the duration of response times in different geographic areas under the enhanced 911 system. Such a request may possibly inform the public about governmental activities. However, the disclosure of a single record does not tell the public what the State "is up to," rather this is a specific request about a specific individual. *See Lamy*, 152 N.H. at 111 ("The purpose of the law is to provide the utmost information to the public about what its government is up to.") "If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." *Id*. This request is a targeted request expressly for a private party to obtain a record for use against another private party in civil litigation. Therefore, the public's interest in this record is negligible.

Assuring privacy best serves the public interest that underlies the creation and maintenance of the 911 system at all. Without anonymity, citizens will be far less likely to participate in the 911 system. Concerns about publicity or being pulled into legal proceedings would chill potential reporters in a public realm from serving the larger public interests of public safety and emergency response by making potential reporters hesitant to call 911.

Further, the State's interests in not disclosing 911 recordings outweigh the need for their public disclosure under RSA 91-A and disclosure to a civil litigant under RSA 498:1. A New Jersey Court has already ruled on the innate privacy of 911 calls. In *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, a newspaper sought disclosure of a 911 tape and transcript relating to a double murder. *Asbury Park Press v. Ocean Cty. Prosecutor's Office*, 374 N.J. Super. 312, 314 (2004). The state in this matter argued that release of the tape would unduly invade the caller's privacy interests. *Id.* at 315. In declining to release the tapes, the court held that the 911 tape did not contribute to the purpose of the Right-to-Know law or provide "even a scintilla of insight into the functioning of government." *Id.* at 330. Rather, the records reflect only what a caller said in a moment of vulnerability. Whether a topic as graphic and sensitive as a murder or a more mundane report of an erratic, potentially intoxicated driver, these general principles equally apply. Victims or injured parties have a reasonable expectation of privacy when they call 911, which is merely an event personal to the caller – it tells you nothing about what government "is up to." To be sure, if a person knew that they would become a witness to a civil matter by making a request for emergency services, it may have a chilling effect on an individual's choice to report an incident.

Just as the request for disclosure in *Asbury Park Press* only benefitted the party requesting disclosure and not the public, so it is the case that only Fireside Inn would benefit from receiving the 911 recording, with the public receiving not even a scintilla of benefit. Finally, it does not matter here that the requestor had an employee participate in the call since

under the Right-to-Know Law, the Supreme Court has long held that a "plaintiff's motives for seeking disclosure are irrelevant." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996). "This is because the Right-to-Know Law gives any member of the public as much right to disclosure as one with a special interest in a particular document." *Id*. The key concept is that if a governmental record is public for one person, then it is public for all people.

II. FIRESIDE INN IS NOT ENTITLED TO PRE-SUIT DISCOVERY UNDER RSA 498:1 AS A MATTER OF STATUTORY CONSTRUCTION AND BECAUSE IT HAS ALTERNATIVE MEANS TO PURSUE ACCESS TO THE RECORD.

Since the 911 records are expressly exempt from RSA 91-A pursuant to RSA 106-H:14, the only remaining claim that Fireside Inn advances is that it is entitled to them under RSA 498:1. "The superior court shall have the powers of a court of equity in the following cases… discovery; cases in which there is not a plain, adequate and complete remedy at law." RSA 498:1.

"It is well established that when the statute's language is plain, the sole function of the courts… is to enforce it according to its terms." *In re England*, 375 F.3d 1169, 1177 (D.C. Cir. 2004); *see Brown v. Brown*, 133 N.H. 442, 445 (1990) ("[C]ourts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include."). And, it is well-established that legislatively enacted statutes can limit a Court's equitable jurisdiction. *Porter v. Warner Holding Co*., 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.") Here, the statute in question plainly, clearly, and unambiguously states that "[n]otwithstanding any provision of law to the contrary, the bureau shall only make information or records compiled under this chapter available" to law enforcement officers or to the Department of Environmental Services. RSA 106-H:14, I & II (emphasis added). This mandate provides no exception for requests pursuant to RSA 498:1 and works to limit the

Court's equitable jurisdiction to compel any such records. The petitioner cannot use a general, equity statute to make public what a very specific statute carefully and unambiguously makes confidential.

Not only is disclosure limited to two, specific circumstances, even those circumstances are carefully circumscribed. Law enforcement officers may only receive the recordings on a "case by case basis" and the Department of Environmental Services may receive them "solely" for determining well locations. RSA 106-H:14, I & II. This unambiguous restriction in the use of recorded 911 calls establishes a clear legislative intent that 911 audio recordings are not public records subject to disclosure under either RSA 91-A or RSA 498:1.

Moreover, the ability to bring an action under the court's general equity powers is limited. *See Gutbier v. Hannaford Brothers Co*., 150 N.H. 540, 545 (2004) (holding that an injured party was barred from pre-suit discovery under RSA 498:1 where a negligence action could have been pursued). To be sure, the Court has recognized the right of a pre-suit discovery action against an entity in order to determine the identity of potential parties who may be at fault. *See, e.g.*, *Robbins v. Kalwall Corp*., 120 N.H. 451, 452 (1980). Such actions are permitted only in narrow and special circumstances, none of which apply to Fireside Inn in this matter. Fireside Inn is not seeking records to uncover information related to potential claims that it may pursue and the State is not a private third-party entity. In fact, Fireside Inn allegedly knows what the plaintiff said on the 911 call because its employee was present. PA 4. As provided below, these key distinctions preclude this action under RSA 498:1.

Civil discovery petitions brought within the narrow parameters established in *Gutbier* and *Robbins* contemplate that a plaintiff is entitled to engage in pre-suit discovery in order to uncover the identity of potential defendants or claims that he or she could not discover otherwise. In *Robbins*, the Court permitted a plaintiff to pursue a pre-suit discovery action against her employer after she suffered a workplace injury related to an oven. *Robbins*, 120 N.H. at 452. As explained more thoroughly in *Gutbier*, the *Robbins* plaintiff was barred from pursuing an action directly against her employer under the workers' compensation statute, and she did not know the identity of the manufacturer of the oven. *Gutbier*, 150 N.H. at 544 (*citing Robbins*, 451 N.H. at 452). She sought this information from her employer to potentially pursue a potential products liability claim against the manufacturer. *Id*. Because there were no available means for the plaintiff to obtain this information from a private nonparty entity, the Court permitted the pre-suit discovery. *Id*.

This Honorable Court reasoned that equitable discovery petitions brought against a private nonparty "apply with equal force and some greater reason" because the "nonparty often has no interest in participating in the plaintiff's suit against another litigant, and, absent equitable discovery, a plaintiff may have had no means at law to obtain necessary information." *Gutbier*, 150 N.H. at 544. This same policy is not served by Fireside Inn's request for records from the State. First, Fireside Inn is not in search of facts or parties to bring a potential claim or cross-claim. The complaint does not allege that the records sought will disclose the identity of unknown additional parties who might be at fault or reveal claims that Fireside Inn may be able to pursue. Rather, the parties and claims to this matter all

appear to be known to Fireside Inn. And, according to the complaint, Fireside Inn already has admissible facts sufficient to establish the alleged content of the phone call being sought, *i.e.* that the injured guest's husband said his wife tripped over his foot "in the presence of the inn manager." PA 3, ¶ 8; s*ee N.H. R. Ev*. 801 (d)(2) & 803 (1)-(4).

Where the claims and parties are all known, *Gutbier* stands for the proposition that there is a "plain, adequate and complete remedy at law" and relief under RSA 498:1 is not appropriate. *Gutbier*, 150 N.H. at 545. This Court explained:

> The plaintiff knows the form that the action should take, i.e., an action in negligence, and knows the identity of the defendant. Even if, as plaintiff contends, it would be "cheaper, faster and easier" to file a petition in equity for discovery than to file a lawsuit and seek "normal" discovery, she has a plain, adequate and complete remedy at law. Thus, no sufficient reason exists for invoking equity jurisdiction.

Id. Likewise, here it is unambiguous as to who the potential parties are or what the potential claims or defenses could be brought against or asserted by Fireside Inn. RSA 498:1 does not permit this action to proceed because Fireside Inn is not without a remedy at law. Once the injured guest and her husband file a lawsuit against Fireside Inn, it may seek to obtain the record through the "normal" civil discovery tools, just as was required by the plaintiff in *Gutbier v. Hannaford Brothers Co*., 150 N.H. 540, 545 (2004). In that scenario, a trial court has before it specific facts and arguments, in the context of a civil complaint, against which to judge whether discovery is appropriate. It does not apply to the circumstances here, where a party simply prefers to have access to certain records before a lawsuit is filed.

Fireside Inn has made no such allegation in its complaint that would trigger this Court's equity jurisdiction in this regard.

"The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute." *Weare Land Use Ass'n v. Town of Weare*, 153 N.H. 510, 511-12 (2006). When construing two different statutes, the Courts "construe them so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." *Wolfgram v. New Hampshire Dep't of Safety*, 169 N.H. 32, 37 (2016). "Where reasonably possible, statutes should be construed so that they … do not contradict each other." *State v. Patterson*, 145 N.H. 462, 465 (2000). Sustaining a cause of action under RSA 498:1 solely in instances where records are otherwise designated non-public would circumvent RSA 91-A. The legislature's purpose in RSA 106-H:14, is to protect certain sensitive information from public disclosure. If this Court were to adopt Fireside Inn's argument, RSA 498:1 would provide parties an easy pathway to end-run the specific, express and unambiguous limitations in RSA 91-A:4 and RSA 106-H:14, whenever there is a mere potential for litigation, however thin or robust; and, would frustrate the legislature's purpose in those statutes. Such speculative statements cannot serve as a basis for ignoring the intent of the General Court and rendering statutory language a nullity.

Finally, this Court has made clear that records may be statutorily privileged and exempt from civil discovery if there is "a clear legislative mandate that prohibits such disclosure." *Marceau v. Orange Realty, Inc*., 97 N.H. 497, 500 (1952); *see Petition of New Hampshire Sec'y of State*, 171 N.H. 728, 734 (2019) (discussing without deciding, the trial court's

application of *Marceau*). Here, RSA 106-H:14 provides, in plain language, that "[n]otwithstanding any provision of law to the contrary, the bureau shall only make information or records… available [to law enforcement and to the department of Environmental services]"). RSA 106-H:14. At the outset, such records are therefore exempt from the court's subpoena power established by RSA 516:1, *et seq*.; *but see State v. Merski*, 121 N.H. 901, 911 (1981) (discussed below). Moreover, the statute's command that 911 records may "only" be disclosed in two circumstances expresses the legislature's desire to shield such records from civil litigants – or disclosure in any other circumstances. In this context, the term "only" means "as a single fact or instance and nothing more or different." *See "*Only." *Merriam-Webster*, (2020). The Court should not give this term any less effect than what the term 'only' means. S*ee also Brown v. Brown*, 133 N.H. 442, 445 (1990) (holding that the word 'all' …cannot be read out of the statute or interpreted to encompass any less than the word 'all' requires.")

However, "(e)ven a statutory privilege is not fixed and unbending and must yield to countervailing considerations." *State v. Merski*, 121 N.H. 901, 911 (1981). Rather, statutory privileges "are not absolute and must yield when disclosure of the information concerned is considered essential." *Id*. It is dubious that Fireside Inn may meet this heavy burden in the context of any future litigation, given that its own employee allegedly overheard what was said during the 911 call. PA 4. Nevertheless, whether or not Fireside Inn ultimately meets its burden is not presently before this Court. Whether or not a statutory privilege must yield in the context of civil litigation must be determined on a case-by-case basis and decided by the

trial judge if, and when, a civil action is initiated. Whether a statutory privilege exists should not be decided pre-suit on the mere basis that someone has threatened litigation. Instead, such discovery disputes that involve confidential records should be decided only with an adequate factual record, providing the prospective plaintiff and other parties with notice and an opportunity to be heard on the issue. The ultimate decision on the matter, like all discovery disputes, should be made by the trial judge that is assigned to hear the matter.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument. Matthew T. Broadhead will present the oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

December 10, 2020

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CERTIFICATE OF COMPLIANCE

I, Matthew T. Broadhead, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,832 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

December 10, 2020 *<u>/s/ Matthew T. Broadhead</u>*
Matthew T. Broadhead

CERTIFICATE OF SERVICE

I, Matthew T. Broadhead, hereby certify that a copy of the State's brief shall be served on Heather S. Ward, Esquire, and Naomi L. Getman, counsel for B &C Management, through the New Hampshire Supreme Court's electronic filing system.

December 10, 2020 *<u>/s/ Matthew T. Broadhead</u>*
Matthew T. Broadhead

ADDENDUM TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE

OFFICE OF LEGISLATIVE SERVICES

STATE HOUSE
107 NORTH MAIN STREET, ROOM 109
CONCORD, NEW HAMPSHIRE 03301-4951

August 26, 2020

Received from Commissioner, Department of Safety

the following certified rule(s) filed with the Director of Legislative Services, in accordance with RSA 541-A, the Administrative Procedures Act.

Document #	#13093
Relative to:	Saf-C 7006.04 - Emergency Communication Rules, Confidentiality of Records.
Number of Pages:	1
Adopted Date:	8-24-20
Filing Date:	8-25-20 @ 10:18 am
Effective Date:	8-25-20 @ 10:18 am
Expiration Date:	08/25/2030
Notes:	N/A

In all communications with this office concerning the above rule(s), please cite the appropriate document number, as indicated above.

David J. Alukonis, Director
Office of Legislative Services

Readopt with amendment Saf-C 7006.04, effective 6-29-16 (Document #11128), to read as follows:

Saf-C 7006.04 Confidentiality of Information and Records.

(a) Pursuant to RSA 106-H:14, 911 recordings, records, and information compiled by the commission or the bureau shall not be considered governmental records available under RSA 91-A.

(b) The bureau shall release 911 recordings, records, and information as follows:

(1) On a case by case basis, to law enforcement agencies for official investigative purposes; and

(2) The department of environmental services for the sole purpose of providing geographic information systems data to aid in locating wells subject to RSA 482-B.

(c) Law enforcement agencies requesting recordings, records, or information compiled under RSA 106-H shall submit a written request on stationery bearing the letterhead of the law enforcement agency signed by an official authorized to make the request.

(d) If there is an urgent need for any such recording, record, or information, and it is impractical for a law enforcement agency to submit a request in the manner prescribed in (b) above, a request shall be submitted telephonically to the 9-1-1 PSAP Supervisor's Desk. All requests for recordings, records, or information compiled under RSA 106-H, regardless of what form, shall set forth sufficient facts or circumstances to establish the records sought are only for official investigative purposes.

(e) Pursuant to RSA 106-H:14, II, the records released in (a)(2) above shall not be rereleased under RSA 91-A by the department of environmental services.

(f) Pursuant to RSA 106-H:12, the following information shall be held confidential and securely stored within the enhanced 911 system, and disclosed by the bureau only to facilitate the delivery of emergency services:

(1) Addresses and telephone numbers not published in directories or listed with directory assistance which are included within the enhanced 911 automatic location identifications and automatic telephone number identifications systems to enable the bureau to:

a. Correlate street addresses and geographical locations with telephone numbers; and

b. Correlate telephone numbers with telephone number account holders; and

(2) Physical impairment or special needs information provided by a telephone subscriber concerning anyone within the subscriber's household or business.

(g) Enhanced 911 recordings shall be retained for 6 months.

(h) The bureau shall destroy enhanced 911 recordings and records in a manner that safeguards the confidentiality of the information they contain.

Rule	Statute
Saf-C 7006.04	RSA 106-H:12; RSA 106-H:14

State of New Hampshire
DEPARTMENT OF SAFETY
OFFICE OF THE COMMISSIONER
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ROBERT L. QUINN
COMMISSIONER OF SAFETY

Notice 2020-61

Adoption of Saf-C 7006.04 Emergency Communication Rules, Confidentiality of Records

I, Commissioner Robert L. Quinn, hereby certify that the material attached is a true copy of Saf-C 7006.04 adopted by me on August 24, 2020.

This rule shall replace the rule of the same number and title. This rule shall become effective on the day and time of filing.

August 24, 2020

Robert L. Quinn
Commissioner
New Hampshire Department of Safety