THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0052

B&C Management

v.

State of New Hampshire Division of Emergency Services

Appeal Pursuant to Rule 7 from Final Order
of the Merrimack County Superior Court

BRIEF OF PLAINTIFF B&C MANAGEMENT

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Oral Argument: Heather S. Ward, Esq.

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Statutes

> Jurisdiction. – The superior court shall have the powers of a court of equity in the following cases: charitable uses; trusts other than those trusts described in RSA 564-A:1, over which the probate court has exclusive jurisdiction as provided in RSA 547:3, I(c) and (d); fraud, accident and mistake; the affairs of partners, joint tenants or owners and tenants in common; the redemption and foreclosure of mortgages; contribution; waste and nuisance; the specific performance of contracts; discovery; cases in which there is not a plain, adequate and complete remedy at law; and in all other cases cognizable in a court of equity, except that the court of probate shall have exclusive jurisdiction over equitable matters arising under its subject matter jurisdiction authority in RSA 547, RSA 547-C and RSA 552:7.

Constitutional Provisions

> [Art.] 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. The public also has a right to an orderly,

lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding.

June 2, 1784

Amended 1976 by providing right of access to governmental proceedings and records.

Amended 2018 by providing that taxpayers have standing to bring actions against the government

Regulations

(a) Pursuant to RSA 106-H:14 information and records compiled by the commission or the bureau shall not be public records for the purpose of applying the provisions of RSA 91-A except to the extent that:

(1) They are limited to statistical information;

(2) They are information or records relating to a call made by dialing 911 and made available only to the person making the call; or

(3) They are made by a law enforcement agency for investigative purposes.

(b) When such information is not published in directories or listed in directory assistance offices, the following information shall be held confidential and disclosed only on a call by call basis for the purpose of delivering enhanced 911 services:

(1) Street addresses and telephone numbers provided by members of the public pursuant to Saf-C 7005.02(a); and

(2) The following information in the database:

a. Correlations between street addresses and telephone numbers; and

b. Correlations between telephone numbers and the individuals liable for payment of the accounts associated with such numbers.

(c) The bureau shall maintain in secure storage records containing the information described in (b). Recordings shall be retained for 6 months.

(d) The bureau shall dispose of such records by shredding or in another manner which maintains the security of the information they contain.

(e) The bureau shall release such records when required to do so by an order of a court which:

(1) Has jurisdiction to issue the order; and

(2) In the order identifies with particularity the party permitted to obtain the records and the records to be released.

(f) A law enforcement agency making a request for information or records compiled under RSA 106-H, shall submit the request in writing on stationery bearing the letterhead of the law enforcement agency and signed by an official authorized to make the request. The letter shall set forth the facts or circumstances indicating that the information or records sought is for official investigative purposes only.

Source. #9091, eff 2-21-08 (See Revision Note at Chapter Heading for Saf-C 7000); ss by #11128, eff 6-29-16

QUESTION PRESENTED

1. Whether the trial court erred in denying B&C Management's amended petition for the release of a 911 audio recording.

Issue preserved by Amended Petition (App.[1] 3-7); Order (dated 12/30/19) (Pl.'s Br.[2] 32-37).

[1] App. = Appendix

[2] Pl.'s Br. = Plaintiff's Brief refencing the Addendum to the Brief

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal from the December 30, 2019 decision of the Merrimack County Superior Court (McNamara, J.) denying the Plaintiff's Right-to-Know request for records of a 911 audio recording. The pertinent facts and procedural history of the case are set forth below.

On June 16, 2019, Sherry and Charles Lawrence were hotel guests at B&C Management, dba Fireside Inn located in Nashua, New Hampshire. App. 3-4; T.[3] 7-8. Mrs. Lawrence alleges that she tripped and fell in the threshold of her hotel room at the Fireside Inn. App. 4; T. 7-8.

Immediately after Mrs. Lawrence's alleged fall, Mr. Lawrence called the front desk of the Fireside Inn requesting assistance. App. 4; T. 7-8. The front desk staff placed a 911 call to request an ambulance. App. 4; T. 7-8, 29. The 911 emergency service is managed by the State of New Hampshire, Department of Safety, Division of Emergency Services ("the State"). App. 3, 54. 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 his foot. App. 4; T. 7-8, 29. A Fireside Inn employee was present for the conversation. App. 4; T. 7-8, 29.

Sherry and Charles Lawrence subsequently retained counsel and claimed that the fall was caused by a frayed rug at the doorway threshold of the Fireside Inn. App. 4; T. 7-8, 29. They have not yet filed a lawsuit against B&C Management.

On October 3, 2019, B&C Management, through counsel, submitted a formal Right-to Know request under RSA chapter 91-A for the 911 recording from June 16, 2019. App. 52-53. On October 4, 2019, the State denied the request, citing RSA 106-H:12, RSA 106-H:14, and RSA 106-H:16, II, and claiming that the records are confidential and exempt from

[3] T. = Transcript

disclosure under RSA chapter 91-A. App. 54. The State further asserted that the 911 records are exempt from disclosure under RSA 91-A:5, IV's invasion of privacy provisions. App. 54.

Initially, B&C Management filed a Petition in equity requesting the 911 audio recording. App. 8. After denial of the Right-to-Know request, on October 16, 2019, B&C Management filed an Amended Petition requesting the 911 recording from June 16, 2019 pursuant to RSA chapter 91-A. App. 3-7. B&C Management retained its argument that if the 911 recording is not subject to disclosure pursuant to RSA chapter 91-A, the 911 recording should be produced under the trial court's discretionary power to afford equitable relief. Id. The State filed a motion to dismiss, App. 8-21, arguing that 911 audio recordings are categorically excluded from disclosure pursuant to RSA chapter 91-A pursuant to RSA 106-H:14. B&C Management filed an objection to the motion to dismiss and the State filed a reply. App. 22-23, 24-47, 48-51.

On November 22, 2019, the trial court held a hearing on the merits. At the hearing on the merits, the State did not contest the facts. T. 7-8, 29. B&C Management submitted into evidence its request pursuant to RSA chapter 91-A and the State's denial. App. 52-53, 54. On December 30, 2019, the trial court (McNamara, J.) issued its order denying B&C Management's Amended Petition, ruling that 911 recordings are exempt from RSA chapter 91-A disclosure and B&C Management is not entitled to equitable relief under RSA 498:1. Pl.'s Br. 32-37.

This appeal followed.

SUMMARY OF THE ARGUMENT

The Superior Court erred when it found that 911 audio recordings are statutorily excluded from disclosure pursuant to RSA chapter 91-A, the Right-to-Know Law, and RSA 106-H:14. Based upon a reading of the entire statute, RSA chapter 106-H, RSA 106-H:14 does not apply to 911 audio recordings. RSA 106-H:14 limits disclosure *only* of the fixed-point location data, such as telephone numbers and addresses, compiled under the Enhanced 911 System.

The Superior Court erred when it failed to do a fact-specific inquiry consistent with this Court's precedent of this requested 911 audio recording based upon the three-step analysis pursuant to RSA 91-A:5, IV and instead found that 911 audio recordings are categorically excluded from disclosure.

The Superior Court erred by not ordering production of the recording in equity regardless of B&C Management's standing as a defendant, as B&C Management has no other remedy at law.

ARGUMENT

I. 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. This Court reviews the lower 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 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).

II. UNDER THE NEW HAMPSHIRE RIGHT-TO-KNOW LAW, RSA CHAPTER 91-A, THE PUBLIC IS ENTITLED TO 911 RECORDINGS.

A. A presumption exists that public records should be disclosed and the State bears a heavy burden to show nondisclosure.

There are two aspects of a 911 recording: (1) the information provided within the call by the caller; and (2) the information obtained by the 911 call system to pinpoint the location of that individual by telephone number or address. The first is a public record subject to disclosure under RSA chapter 91-A. The latter is prohibited from disclosure pursuant to RSA chapter 106-H.

The State of New Hampshire Division of Emergency Services is the government agency responsible for retaining the 911 audio recordings. App. 54. B&C Management requested from the State the record of the 911 audio recording from June 16, 2019. App. 52-53. The State denied the request, stating that 911 recordings are categorically excluded pursuant to statute, see RSA chapter 106-H, and if not excluded by statute,

categorically excluded by an exception to the Right-to-Know Law. App. 54. The lower court erred when it found that the State had met its "heavy burden," see Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006), not to produce this public record because these recordings are categorically excluded from production as "often contain[ing] sensitive, protected, confidential information to which the public cannot claim a right." Pl.'s Br. 32 at fn. 1.

Part I, Article 8 of the New Hampshire Constitution provides: "the public's right of access to governmental proceedings and records shall not be unreasonably restricted." This constitutional requirement of public access and government transparency is governed by RSA chapter 91-A, the Right-to-Know Law. See Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. ___, ___ at 19 (decided May 29, 2020) ("Together with Part I, Article 8 of our Constitution, the Right-to-Know Law is the crown jewel of government transparency in New Hampshire."). As stated in the Preamble to the Right-to-Know Law: "Openness in the conduct of public business is essential to a democratic society. The purpose of [chapter 91-A] 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.

RSA 91-A:4, I, 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*." (Emphasis added). In order to advance the purpose of the Right-to-Know Law, these exceptions are construed narrowly. Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475 (1996). The lower court found that the 911 audio recording was exempt from disclosure under RSA 91-A:4, I, based upon a statutory prohibition at RSA 106-H:14 and under an exception pursuant to RSA 91-A:5. This ruling was inconsistent

with the purposes of the Right-to-Know Law. RSA chapter 91-A is interpreted broadly to allow observation of government functions. Id. Such government functions include emergency personnel response to 911 calls.

B. RSA chapter 106-H does not apply to 911 audio recordings and disclosure of these recordings is not prohibited by statute.

The interpretation of RSA chapter 106-H requires the same ordinary rules of statutory construction as RSA chapter 91-A. CaremarkPCS Health v. N.H. Dep't of Admin. Servs., 167 N.H. 583, 587 (2015). The statute must be "considered as a whole." See id. (discussing statutory construction in application of RSA chapter 91-A). In reading the statute as a whole, the Court "ascribe[s] the plain and ordinary meaning of the words used" and "interpret[s] 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. Importantly, the statute is interpreted "in the context of the overall statutory scheme and not in isolation." Id.

Looking at the language of the statute and reading the statute as a whole, RSA chapter 106-H does not apply to 911 audio recordings and instead is limited to the pinpoint location data of the 911 caller. RSA 106-H:14, states, in pertinent part: "Any information or records compiled under this chapter shall not be considered a public record for the purposes of RSA 91-A. . ." (Emphasis added). The issue becomes the meaning of "this chapter" as it qualifies the records that are referenced. "This chapter" is defined as Chapter 106-H, Enhanced 911 System. RSA 106-H:2, VII further defines "Enhanced 911 system" and "enhanced 911 services" 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). Thus, "records compiled under this chapter," see RSA 106-H:14, means the

"automatic number and location identification," see RSA 106-H:2, VII. By definition, it does not include the content of a 911 recording. The 911 audio recording is not "information or records" complied under RSA chapter 106-H and instead the information and records compiled "under this chapter," see RSA 106-H:14, are the caller's fixed-location data.

This interpretation is consistent with the other provisions of the chapter when reading the statute as a whole. RSA 106-H:1 provides the purpose of this chapter is to create a "coordinated statewide enhanced 911 system, utilizing 911 as the primary emergency telephone number . . . with the objective of reducing the response time to emergency calls . . ." See e.g. RSA 106-H:10 (Municipalities provide street address guide and the bureau shall provide local telephone service providers this list); RSA 106-H:16 (Emergency Notification System uses the fixed-location data in the bureau's telephone database and location information databases); RSA 106-H:17 (Disclosure of Caller Location in Emergency Situations). RSA 106-H:12, I, specifically addresses the confidentiality of the information obtained under the Enhanced 911 System and references the information obtained by this system: "Automatic number identification and automatic location identification information consisting of the address and telephone numbers of telephone subscribers whose listings are not published in directories or listed in directory assistance offices is confidential."

Neither RSA 106-H:12, nor any other provision within this chapter, references 911 audio recordings. In interpreting this statute, the Court cannot add language that is not there. Based upon the plain reading of the statute as a whole there is no statutory privilege that applies to 911 audio recordings. Furthermore, looking at the statute as a whole in the context of the other provisions of the statute, the legislature intended this statute to reference the data collected as part of the 911 system that allows locating specific addresses and telephone numbers.

This interpretation is consistent with the language of the exceptions noted for disclosure. RSA 106-H:14 provides for two specific exceptions for when the data compiled "under this chapter" may be disclosed. "[T]he 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 purposes of estimating the location of wells subject to RSA 482-B. Information shared with the department of environmental services under this provision shall be limited to geographic information systems data that will aid in locating such wells. The department of environmental services shall not release such shared data under RSA 91-A.

RSA 106-H:14.

The strong language of RSA 106-H:14: "shall only make available" indicates that this data must not be disclosed if it does not fall within one of these two very narrow exceptions. See e.g. Appeal of Rowan, 142 N.H. 67, 71 (1997) (defining the statutory language "shall" which indicates that the provision is mandatory and not discretionary). For the language of these exceptions to have meaning, the disclosure in these two exceptions must include all disclosure and not just pursuant to RSA chapter 91-A, as neither law enforcement nor the department of environmental service would be requesting this information pursuant to a Right-to-Know request as they are both government agencies. Therefore, RSA 106-H:14 must be read to only allow disclosure of the information compiled under this chapter in these two very specific circumstances.

The two exceptions include (1) law enforcement in limited circumstances, i.e., "a case-by-case basis,"; and (2) the department of

environmental services to locate wells. Under these exceptions, the limiting language would not have meaning if this chapter applied to 911 audio recordings as law enforcement is always privy to the content of the 911 recording at the time of the call for purposes of emergency response. There would be no need for the limitation of a "case-by-case basis" for purposes of "investigation." For this limitation to have meaning in the context of the statute, the interpretation must be that the disclosure to law enforcement on a case-by-case basis is the disclosure of the telephone or address pinpoint location of a caller. Such information may be necessary in the course of law enforcement investigation. Similarly, the second exception as to the department of environmental services regarding the location of the wells clearly applies to data location and not the 911 audio recording as such information would not be available through a 911 recording. Therefore, reading RSA 106-H:14 as a whole, the legislature intended to only allow the information obtained through the Enhanced 911 System to be made available to law enforcement and the department of environmental services under these two specific scenarios. These exceptions would be consistent with the interpretation that the information RSA 106-H:14 is referencing is the fix-location data collection of the 911 system and not the 911 audio recording.

Historically, 911 audio recordings are not just produced under the limited exceptions of RSA 106-H:14. The general production of this information is part of the administration of justice. See e.g. State v. Pepin, 156 N.H. 269 (2007) (prosecutor permitted to play 911 of victim at trial); State v. Jordan, 148 N.H. 115 (2002) (911 audio played at trial). These audio recordings are regularly produced as part of trial for evidentiary reasons and are not obtained on "a case-by-case basis . . . for investigative purposes," see RSA 106-H:14, I. A reading of RSA 106-H:14 to include not just the fixed location data but expand the reading to include the audio

record would be inconsistent with the historical use of 911 calls. Based upon the limited exception of law enforcement use on a case-by-case basis, 911 audio would not be generally used in the administration of justice because it would not be obtained in every case. Instead, it would only be obtained as needed as part of a specific investigation. This evidence, however, is regularly produced as part of litigation because RSA 106-H:14 does not limit the disclosure of the audio of 911 calls but instead the fixed-location data of the caller.

The lower court's ruling that the 911 audio recording is excluded from disclosure pursuant to statute required the court to invalidate an administrative rule. Pl.'s Br. 35. The administrative rule, N.H. Admin. R. Saf-C 7006.04, however, is consistent with the interpretation that RSA 106-H applies to the fixed-location data system of the Enhanced 911 System and not the 911 audio recording. The administrative rule, Confidentiality of Information and Records, reads, in pertinent part: "The bureau shall release such records when required to do so by an order of a court which: (1) Has jurisdiction to issue the order; and (2) In the order identifies with particularity the party permitted to obtain the records and the records to be released." N.H. Admin. R. Saf-C 7006.04(e). The lower court agreed with the State that "Saf-C 7006.04 is invalid where it affords discretion the legislature did not see fit to grant." Pl.'s Br. 35. This administrative rule, however, is consistent with RSA 106-H:4 and the very limited circumstances under which an exception applies for release of the location data points obtained by the Enhanced 911 System – provided a law enforcement agency or the department of environmental services believes a request falls within the limited exceptions, it must obtain a court order to receive the data compiled under RSA chapter 106-H. RSA chapter 106-H does not apply to the 911audio recordings and therefore law enforcement is

not required to obtain a court order for purposes of receiving the recordings as part of the administration of justice, i.e. trial.

Reading RSA chapter 106-H as a whole indicates that this statute does not apply to 911 audio recordings. The legislature defined what is compiled pursuant to this chapter and did not include reference to "911 audio recordings." The legislature chose limiting language and this Court should not add language the legislature did not see fit to include. There is no statutory privilege that precludes disclosure of 911 audio recordings pursuant to RSA chapter 91-A.

C. A fact-specific inquiry of this 911 audio recording does not preclude disclosure under RSA 91-A:5, IV.

The Right-to-Know Law provides for a limited list of exemptions from disclosure of public documents. RSA 91-A:5. The State, here, denied access to the 911 audio recording based upon RSA 91-A:5, IV, "other files whose disclosure would constitute invasion of privacy," asserting that even if the statutory privilege of RSA 106-H:14 does not apply, 911 audio recordings are exempt pursuant to RSA 91-A:5, IV. App. 54. In a footnote, the lower court found that the State met its burden to show the calls are not public because "these calls often contain sensitive, protected, confidential information to which the public cannot claim a right." Pl.'s Br. 35 at fn. 1. Essentially, the lower court held that 911 audio recordings are *per se* excluded under RSA 91-A:5, IV without undertaking a fact-specific inquiry as to this specific 911 audio recording. Such *per se* categorical exclusion is inconsistent with this Court's precedent and RSA chapter 91-A. See Union Leader Corp. v. Town of Salem, 173 N.H. ____, ___ (2020) (overruled Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) for applying a *per se* rule of exemption for the requested materials relating to "internal personnel practices" and not applying a balancing test).

The State bears a "heavy burden" to prove nondisclosure of these public documents pursuant to RSA 91-A:5. Murray, 154 N.H. at 581. In determining if the State has met this heavy burden as to the exemption pursuant to invasion of privacy, the Court applies the three-step balancing test to determine if the privacy interest outweighs the strong public interest in disclosure. N.H. Right to Life, 169 N.H. at 111. "[The Court's] review focuses upon whether the State 'has shown that the records sought will not inform the public' about the State's activities, 'or that a valid privacy interest, on balance, outweighs the public interest in disclosure.'" Id. (*quoting* N.H. Civ. Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003)).

"Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party's subjective expectations." Union Leader Corp. v. N.H. Retirement Sys., 162 N.H. 673, 679 (2011). "[I]nformation that, under an objective standard, would be expected to become public in due course, should not give rise to the same privacy interest as information for which public exposure would, objectively, never be anticipated." Reid v. N.H. AG, 169 N.H. 509, 530 (2016). "[E]ven information imbued with a legitimate privacy interest is subject to disclosure if, on balance, that interest is outweighed by the public's cognizable interest in disclosure." Id. at 531. Therefore, "a fact-specific inquire is required in each case." Id. "The legitimacy of the public's interest in disclosure . . . is tied to the Right-to-Know Law's purpose, which is to provide the utmost information to the public about what its government is up to." Id. at 532 (quotations and citations omitted).

Furthermore, "the plaintiff's motives for seeking disclosure are irrelevant." Union Leader Corp., 141 N.H. at 476. "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, and

accordingly the motivations of any member of the public are irrelevant to the question of access." Id. (quotations, citations and ellipses omitted).

The lower court did not engage in a fact-specific inquiry, as required by this Court's precedent, prior to finding that the State met its heavy burden. Instead, it concluded that 911 audio recordings *often* contain sensitive information and therefore all such calls are categorically excluded from disclosure. Pl.'s Br. 35 at fn. 1. In failing to complete a fact-specific inquiry as to this specific 911 call, the lower court did not analyze whether or not this 911 recording had any privacy interest at issue and if so whether the privacy interest could be minimized by preventing disclosure of only privileged information and not the entire recording.

In N.H. Right to Life, this Court addressed RSA 91-A:5, IV "invasion of privacy" exemption. The Court noted that the purpose of the Right-to-Know Law is to inform the public as to what the government is doing, specifically an agency's performance of its duties. N.H. Right to Life, 169 N.H. at 111. This Court addressed multiple claims of non-disclosure under chapter 91-A. Id. The plaintiff was an organization opposed to government support by taxpayer subsidies of medical clinics that provide abortion services. Id. at 100. The plaintiff made Right-to-Know requests to the State for documents related to Planned Parenthood and/or its New Hampshire clinics. Id. Most relevant to the issue currently before this Court was the Court's holding as to the production of video surveillance at Planned Parenthood. The lower court held that production of the video surveillance of individuals at Planned Parenthood would result in an invasion of privacy and was therefore exempt. Id. at 112. The lower court concluded "the DVDs should be protected from disclosure based on concerns for the personal privacy of individuals depicted in the videos" and that the State articulated "a valid privacy interest at stake – the identity of [Planned Parenthood] patients and clients." Id. at 112. The lower court

further found that there was no specific public interest in the disclosure of the footage as the trial court could not "discern how the contents of the DVDs would shed light on the activities and conduct" of the State. Id. (brackets omitted).

This Court in N.H. Right to Life vacated the lower court's ruling and found that the fact that the video showed individuals near Planned Parenthood, without any additional facts, was not sufficient to meet the State's heavy burden that the video should not be disclosed pursuant to RSA chapter 91-A. Id. at 113. The Court cited to Lamy v. N.H. Public Utils. Comm'n, 152 N.H. 106, 110 (2005) to analyze that often people have a privacy interest in their names and home addresses. N.H. Right to Life, 169 N.H. at 113. The Court remanded for additional proceedings where "the parties may address whether the trial court should require the redaction of the DVD footage so as to allow its disclosure without compromising the privacy interests of the … individuals." Id. at 115.

In N.H. Right to Life, this Court further discussed when identifying information should be redacted. Id. at 117-18. The plaintiff had requested certain license renewal applications of Planned Parenthood. Id. at 115. The lower court found that the State met its burden to produce these applications, but redact them of any identifying employee information. Id. at 117. The Court did not hold that identifying information is always exempt from 91-A disclosure. In fact, the Court has held the contrary. See Professional Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 702 (2010) (disclosure of names and salaries does not constitute invasion of privacy). "Under some circumstances, individuals retain a strong privacy interest in their identities, and information identifying individuals may be withheld to protect that privacy interest." N.H. Right to Life, 169 N.H. at 117 (*quoting* Sensor Systems Support, Inc. v. FAA, 851 F. Supp. 2d 321 333 (D.N.H. 2012)). "One such circumstance is when public identification

'could conceivably subject' those identified to 'harassment and annoyance in the conduct of their official duties and in their private lifes.'" Id. (*quoting* Sensor Systems Support, Inc., 851 F. Supp. 2d at 333). In N.H. Right to Life, the Court found disclosure of the names of Planned Parenthood employees was not required under the Right-to-Know Law due to the cognizable privacy interests of the employees where there is a known history of violence against such individuals. Id. at 121.

Here, the lower court categorically excluded all 911 audio recordings as an invasion of privacy. There is no support in the record to meet the State's heavy burden that this specific 911 audio recording created a cognizable privacy interest or that the privacy interest could not be protected through redaction while still addressing the strong public interest to know the emergency personnel response to 911 calls. See N.H. Civ. Liberties Union, 149 N.H. at 438 (consensual photographs of people taken by the Manchester Police Department of individuals stopped by officers but not arrested not subject to exclusion as unwarranted invasion of privacy). The public's strong interest in the content of 911 audio recordings is similar to its interest in law enforcement investigatory files, see Murray, 154 N.H. at 585, as both show that the government is responding to emergencies and investigating pursuant to its governmental functions. Without public access to 911 recordings, the public will not be able to know how the government responds to specific calls. Any concern regarding the specific content of a 911 call regarding privacy must be addressed in a case-by-case basis. When the State has met its heavy burden to show that such identifying information creates a privacy interest that weighs in favor of redaction, such as the safety issue of disclosing Planned Parenthood employees, the remedy is not categorically excluding disclosure of all 911 audio recordings. The State has provided no evidence regarding this specific 911 call to support an exception to RSA 91-A.

Disclosure of the 911 audio recordings is consistent with other jurisdictions' interpretation of their Right-to-Know Laws, as well as the federal Freedom of Information Act (FOIA). In interpreting the Right-to-Know Law, this Court "look[s] to the decisions of other jurisdictions, since other similar acts, because they are *in pari materia*, are interpretatively helpful, especially in understanding the necessary accommodation of the competing interests involved." Murray, 154 N.H. at 581 (quotations and citations omitted). This Court also looks to the federal FOIA interpretation. Seacoast Newspapers, Inc., 173 N.H. at ___, at 7.

The Maine Supreme Court, analyzing its Freedom of Information Act, which is in line with its federal counterpart, found that the information in a 911 call is subject to public disclosure. Mainetoday Media, Inc. v. State, 82 A.3d 104 (Me. 2013). The Maine Freedom of Information Act requires generally: "Except as otherwise provided by statute, a person has the right to inspect and copy any public record in accordance with this section within a reasonable time of making the request to inspect or copy the public record." ME. REV. STAT. TIT. 1, §408-A. Similar to New Hampshire, this Right-to-Know statute is to be "liberally construed and applied." ME. REV. STAT. TIT. 1, §401. In Mainetoday Media, Inc., the Maine Court found that the audio recordings of 911 calls "are subject to disclosure as public records unless they fall within one of the exceptions." Mainetoday Media, Inc., 82 A.3d at 109. The Court stated that the only exception was "[r]ecords that have been designated confidential by statute." ME. REV. STAT. TIT. 1, §402(3)(A). Similar to New Hampshire, Me. Rev. Stat. Ann. tit. 25, § 2929 addresses the confidentiality of emergency services communication. Unlike RSA chapter 106-H, Me. Rev. Stat. Ann. tit. 25, § 2929 specifically references "audio recordings of 9-1-1" and allows production of the "information contained in the audio recordings," excluding personally identifying information, such as names, addresses and

telephone numbers, as well as medical information. ME. REV. STAT. TIT. 25, §2929(1)&(4).

Other jurisdictions have reached this same conclusion that 911 audio recordings are subject to public disclosure. See e.g. State v. Cain, 613 A.2d 804, 809 (Conn. 1992) (discussing the history of the 911 emergency call system and stating that "tape recordings of 911 calls are public records"); State v. Gray, 741 S.W.2d 35, 38 (Mo. App. 1987) (911 audio recordings are a public record); State ex rel. Cincinnati Enquirer v. Hamilton County, 662 N.E.2d 334, 336 (Ohio 1996) (finding "911 tapes in general, as well as the particular 911 tapes requested in these cases, are public records which are not exempt from disclosure); see also Posr v. Ueberacher, 2012 U.S. Dist. LEXIS 433, 2012 WL 13932 (S.D.N.Y. 2012) (granting FOIA request by plaintiff: "Plaintiff is entitled to the audio recording of his 911 call").

The lower court, here, was correct in finding that 911 audio recordings may contain sensitive information; however, the fact that the recordings have sensitive information is not sufficient to categorically withhold these government records from the public. For example, the Superior Court of Connecticut allowed the public release of the 911 audio recordings from the Sandy Hook Elementary School shooting. Sedensky v. Freedom of Info. Comm'n, 2013 Conn. Super. LEXIS 2716, 2013 WL 6698055 (decided Nov. 26, 2013) (911 audio recordings from the tragic shooting of twenty elementary children and six teachers). Considering the nature of these 911 audio recordings, it is presumed that a 911 audio recording involving the shooting of elementary children is a horrific record; however, such sensitive nature does not preclude the public from having access.

Furthermore, to the extent that the State argues that this information is sensitive and confidential, that is a fact-specific inquiry that must be made on a case-by-case basis. For example, in Payne v. Grand Rapids

Police Chief, 443 N.W.2d 481 (Mich. App. 1989), the Michigan Court analyzed the Freedom of Information Act regarding the request for 911 audio recordings. The Michigan Appeals Court found that the lower court's statement that the revelation of the names "might have a chilling effect" is "entirely conclusory, and therefore improper…" Id. at 484. The lower court here made the same conclusory and improper statement when it held the State met its burden because "these calls often contain sensitive, protected, confidential information to which the public cannot claim a right." Pl.'s Br. 35 at fn.1.

The public has a strong interest in the disclosure of the content of this information as it indicates its government's response to emergencies. The public has a right to know whether the emergency personnel are responding and/or not responding to certain categories of crimes, certain locations of calls, and/or if a certain race or gender of individual is involved. Any privacy interest in the identifying information of the caller is minor and is substantially outweighed by the public's interest in government transparency. Although there may be instances where a legitimate privacy interest is at stake, such interest can be addressed by redacting information on a case-by-case basis.

III. B&C MANAGEMENT IS PREJUDICED BY THE LOWER COURT'S DECISION NOT TO PRODUCE THE 911 AUDIO RECORDING IN EQUITY.

B&C Management is in a defensive position without any remedy. Sherry and Charles Lawrence ("the plaintiffs") have made a claim asserting injury for a defective rug at the Fireside Inn. B&C Management asserts that the 911 audio recording shows the contrary. A 911 audio recording is a unique piece of evidence in that it is a contemporaneous statement of an individual asserting facts in that moment. See State v. Ainsworth, 151 N.H. 691, 696 (2005) ("The 9-1-1 tape is as contemporaneous as possible

an account of the events as they occurred."). B&C Management asserts that this recording is a public document that must be produced pursuant to RSA chapter 91-A. The State and the lower court's interpretation under RSA chapter 91-A and RSA chapter 106-H that 911 audio recordings are categorically excluded from disclosure leaves B&C Management no other remedy at law to obtain this information. Without production of this recording, B&C Management is prejudiced in any negotiating position with the plaintiffs.

RSA 498:1 provides, in pertinent part: "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; and in all other cases cognizable in a court of equity…" The lower court's decision not to exercise its equity powers to produce the 911 audio recording is prejudicial to B&C Management. "Equitable discovery arose in response to the common law maxim that one is not bound to arm one's adversary against oneself." Gutbier v. Hannaford Bros. Co., 150 N.H. 540, 543 (2004). "This principle generally allowed parties to conceal from each other, up to the time of trial, the evidence upon which they intended to rely, and would not compel either of them to supply the other with any evidence to assist that party in the conduct of its cause." Id. "Under this maxim, many claims existed for which there could be no redress, simply because the plaintiff's evidence was, in whole or in part, in the defendant's possession." Id. This injustice led to the development of the equitable remedy at issue here. Id.

The lower court erred when it held that for the court to compel the discovery on behalf of a potential defendant would twist the purpose of the court's equitable powers. Pl.'s Br. 36. The State argued that because B&C Management was not a plaintiff seeking information for a potential claim, it

was precluded from obtaining information under RSA 498:1. App. 15-17. The lower court's equitable powers cannot be limited to potential plaintiffs.

In Gutbier, this Court, in affirming the lower court's denial of equitable relief, noted that the plaintiff was seeking discovery "from a known potential adversary to determine if litigation, that the plaintiff concedes could otherwise have been brought, is justifiable." Id. at 544. This Court held that where the plaintiff "knows the form the action should take" and "knows the identity of the defendant," the plaintiff can file a lawsuit and therefore has "a plain, adequate and complete remedy at law." Id. at 545.

B&C Management does not have a remedy at law to obtain the 911 audio recordings. It cannot file suit as the potential defendant. Instead, it is in the position to incur attorney's fees to participate in discovery and potential negotiations pre-suit without the ability to obtain the necessary evidence to evaluate the strength of the potential plaintiff's case. Although this Court's precedent addresses potential plaintiffs, see Gutbier, 150 N.H. at 543; Robbins v. Kalwall Corp., 120 N.H. 451 (1980), equity relief cannot be limited to plaintiffs and the precedent does not limit the language to potential plaintiffs. Instead, the question is whether there is an adequate remedy at law. Here, where there is no adequate remedy at law, the B&C Management is entitled to equitable relief even as a potential defendant.

If potential defendants are not permitted to obtain discovery through equitable relief, incorrectly named potential defendants will be put in the position of continuing to incur pre-suit costs without any remedy at law. The ability of defendants to request in equity evidence that would indicate that the potential plaintiff has targeted the wrong entity is consistent with the court's equitable powers and the history of RSA 498:1.

CONCLUSION

Wherefore, B&C Management respectfully requests that this Court vacate and remand for further proceedings consistent with the Court's decision.

This brief complies with the word limit and includes 7,532 words.

REQUEST FOR ORAL ARGUMENT

B&C Management requests oral argument. Oral argument will be presented by Heather S. Ward.

RULE 16(3)(i) CERTIFICATION

I certify that the appealed decision, consisting of the Order dated December 30, 2019, is in writing and appended to this brief.

Respectfully submitted,
B&C MANAGEMENT

By Its Attorneys,

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Dated: October 26, 2020

CERTIFICATE OF SERVICE

I, Heather S. Ward, hereby certify that a copy of B&C Management's Brief has this date been provided to the Office of the Attorney General's Office via the efiling system.

Dated: October 26, 2020

/s/ *Heather S. Ward*
Heather S. Ward

ADDENDUM – TABLE OF CONTENTS

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

B & C Management d/b/a Fireside Inn

v.

State of New Hampshire Division of Emergency Services

No. 217-2019-CV-00595

ORDER

The Plaintiff, B&C Management d/b/a Fireside Inn ("Fireside"), seeks to compel the Defendant, the State of New Hampshire, to release certain records of a 911 call made from its premises. The call involved an injury incurred by a former client, Mrs. Lawrence, while on Fireside's property. Mrs. Lawrence has indicated that she may bring a negligence action against Fireside for personal injury damages resulting from the incident. The State has persuasively argued that such records are not subject to RSA 91-A, and Fireside has failed to show reasons why the Court should use its equitable powers to compel such disclosure. Therefore, Fireside's motion is DENIED.

I

On June 16, 2019, Sherry Lawrence was injured in a fall at the Fireside Inn in Nashua, New Hampshire. At the time of the injury, her husband, Charles Lawrence, placed a call for aid via 911 to New Hampshire Emergency Services. The Lawrences have contacted Fireside, through an attorney, to assert a personal injury claim. The letter details their attorney's plan to investigate the fall. The letter does not demand a sum for settlement of any potential lawsuit. No suit has been filed in any court.

Fireside submitted an RSA 91-A request to the State of New Hampshire Division of Emergency Services (the Defendant) to obtain an audio recording of the subject 911 telephone call. The State denied this request. Fireside now moves for this Court to compel the State to comply with the request. Fireside claims that the 911 call should be released under two theories. First, Fireside claims that the call should be released under 91-A as a governmental record. Second, Fireside argues that the Court should grant relief under its equitable powers pursuant to RSA 498:1. The State objects. The Court will address each argument in turn.

II

Fireside first argues that it is prima facie entitled to the 911 audio recording under RSA 91-A. RSA 91-A creates a mechanism for the public to request governmental records. The public policy behind 91-A is to keep the government accountable through transparency, as explained in the 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."

The "governmental records" for which RSA 91-A compels release are defined within the statute as follows:

> [A]ny information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."

RSA 91-A:1-a, III.

Under the statute, a citizen who wishes to inspect any such "governmental records" must make a request to the agency holding the records. RSA 91-A:4. The burden falls upon the agency to either make the records available or to deny the request in writing with its reasoning. Id.

In this case, Fireside requested that New Hampshire Emergency Services disclose the 911 audio recording. New Hampshire Emergency Services responded with a denial of the request, stating that such calls are exempt from RSA 91-A pursuant to RSA 106-H:14, which states in pertinent part:

> 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 [of emergency communications] 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).

At the hearing on this matter, the State referenced an administrative rule promulgated by the Commissioner of the Department of Safety, Saf-C 7006.04, related to RSA 106-H:14, which seemingly broadens the allowed disclosure to include disclosure to 911 callers and others by court order. The administrative rule, entitled Confidentiality of Information and Records, reads in relevant part:

> (a) Pursuant to RSA 106-H:14[,] information and records compiled by the commission or the bureau [of emergency communications] shall not be public records for the purposes of applying the provision of RSA 91-A except to the extent that:

(1) They are limited to statistical information;

(2) They are information or records relating to a call made by dialing 911 and made available only to the person making the call; or

(3) They are made by a law enforcement agency for investigative purposes.

. . . .

(e) The bureau shall release such records when required to do so by an order of a court which:

(1) Has jurisdiction to issue the order; and

(2) In the order identifies with particularity the party permitted to obtain the records and the records to be released.

Saf-C 7006.04.

The Court agrees with the State that Saf-C 7006.04 is invalid where it affords discretion the legislature did not see fit to grant. See Formula Development Corp. v. Town of Chester, 156 N.H. 177, 182 (2007) ("Administrative officials do not possess the power to contravene a statute[] [and] . . . administrative rules may not add to, detract from, or modify the statute which they are intended to implement." (quoting Appeal of Anderson, 147 N.H. 181, 183 (2001)). Further, the rule lacks any standard for the exercise of such judicial discretion. The State has met its burden to show the calls are not public as a matter of law. [1]

III

Fireside next argues that it needs the 911 call to prepare for a potential civil case and asks the Court to exercise its equitable powers to compel the State to release the 911

[1] The statutory analysis controls the Court's decision. But even if the Court were to consider the competing policies, Plaintiff's argument would not be persuasive. It is true that public policy supports government transparency and accountability. But release of this recording would not further this public policy concern. Rather, the State has effectively argued that these calls often contain sensitive, protected, confidential information to which the public cannot claim a right.

records. RSA 498:1 grants the Court equity powers in "cases in which there is not a plain, adequate and complete remedy at law" in order to maintain fairness. Fireside claims that without access to the audio recording, it "has no means at law to obtain the information needed to assess the claims being asserted against it," yet it fails to articulate how granting this relief would promote equality between the parties. (Pl's Mot. ¶ 24.) To compel this request on behalf of a potential defendant for a postulated lawsuit would twist the purpose of the Court's equitable powers:

> Equitable discovery arose in response to the common law maxim that one is not bound to arm one's adversary against oneself. This principle generally allowed parties to conceal from each other, up to the time of trial, the evidence upon which they intended to rely, and would not compel either of them to supply the other with any evidence to assist that party in the conduct of its cause. Under this maxim, many claims existed for which there could be no redress, simply because the plaintiff's evidence was, in whole or in part, in the defendant's possession. This perceived injustice at common law led to the development of the equitable remedy of bills for discovery.

Gutbier v. Hannaford Bros. Co., 150 N.H. 540, 543 (2004) (citations omitted).

Fireside asserts that the Court has the power to compel discovery even though no suit is pending. See Robbins v. Kalwall Corp., 120 N.H. 451 (1980). Although it may be true that the Court holds this power, Fireside has failed to show good reason why the Court should exercise it. As it stands, Fireside has suffered no injury. Further, if the Court does not compel this discovery, Fireside's position will not change. It is the responsibility of the Court to cautiously exercise its powers of equity in those very limited circumstances where not to do so would create an intolerable imbalance of power, not to aid parties during informal disputes and negotiations.

The Court's equitable powers exist to prevent miscarriages of justice where injured parties are blocked from bringing claims of negligence by parties who

exclusively hold evidence of their own wrongdoing. See Gutbier, 150 N.H. at 543. Without this power, the injured party would be left with a financial burden and no means of relief. Id. For example in Robbins, the injured party had no way to discover the name of a potential defendant. Therefore, she had no way to seek a remedy for her injuries without the Court using its equitable powers to compel disclosure from her former employer. Id. In contrast, Fireside has suffered no financial burden and seeks no relief. It may be that the Lawrences never file suit against Fireside. But, if they do, then the sitting court would presumably revisit this discovery request under a different standard than that applied here today.

The State has met its burden to show why the requested record is not subject to an RSA 91-A request. Fireside has failed to show that it has no other remedy available at law to compel the Court to use its powers of equity. Therefore, Fireside's motion is DENIED.

SO ORDERED.

12/30/19
DATE

Richard B. McNamara,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 01/02/2020