No. 2020-0216

State of New Hampshire
Supreme Court

TEJASINHA SIVALINGAM,
Plaintiff – Appellant / Cross-Appellee
v.
FRANCES NEWTON AND LEIGH SHARPS,
Defendants – Appellees / Cross-Appellants
and
Town of Ashland, Board of Selectmen,
Defendant – Cross-Appellant

On Appeal from the Grafton County Superior Court
Civil Action No. 215-2018-CV-00396

REPLY AND RESPONSE BRIEF OF APPELLANT/CROSS-APPELLEE, TEJASINHA SIVALINGAM

Stephen T. Martin, Esq. (on the Brief and presenting oral argument)
The Law Offices of Martin & Hipple, PLLC
22 Bridge Street; Suite 3
Concord, NH 03301
603-856-0202 (Ext. 1)
NH Bar#: 19567

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REPLY TO THE SELECTWOMEN'S RESPONSE TO TEJASINHA'S APPEAL[1]

I. THE SELECTWOMEN HAVE CONSISTENTLY TREATED THE NON-PUBLIC SESSION AS IF THE ENTIRE SESSION WAS SEALED, NOT MERELY THE MINUTES[2], AND THE PROPER INTERPRETATION IS THAT THE SESSION ITSELF WAS SEALED.

This Court should not interpret a statute in a manner that will frustrate its purpose. *See Appeal of Town of Lincoln*, 172 N.H. 244, 251 (2019) (internal citations omitted) (explaining that simply assuming that whatever furthers the primary objective of the statute must be the law, frustrates, rather than effectuates, the legislative intent). Though RSA 91-A is generally interpreted in favor of openness, RSA 91-A:3, II (c) and RSA 91-A:3, III depart from that general policy to ensure an individual's reputation will not be harmed when discussed by a public body. Furthermore, this Court presumes that the legislature does not waste words, and that every word should be given effect. *State v. Jennings*, 159 N.H. 1, 8 (2009) (citing *State v. Yates*, 152 N.H. 245, 256 (2005)).

The BOS entered non-public session to discuss matters about Tejasinha, which if discussed in public, could harm his reputation. Appx. Vol. I at 220-221, ¶32, d-g, 307-360, and 232-233. Following that

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[1] The Point-Headings in this Reply are numbered separately from the Brief Responsive to the Cross-Appeal and Interlocutory Appeal.

[2] *See* Selectwomen's Br. at 19 (distinguishing between the minutes versus the session being sealed).

discussion, the BOS determined that the discussion it had, would in fact, harm his reputation, because it unanimously and without qualification, voted to seal. *Id.* at 233. The minutes are only a snapshot of the overall discussion. *See generally Id*. at 232-233. Thus, simply sealing the minutes seals only what little information is in the minutes.

At the end of RSA 91-A:3, III, the legislature used the word "information," when requiring an opinion that the circumstances no longer justify the seal, instead of using the word "minutes." Had the legislature intended to limit the "information" to the minutes, then it could have written the statute to read, "in the event of such circumstances, *the minutes* may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply." Thus, the non-public session itself was sealed, not simply the minutes.

That reading makes sense in light of RSA 91-A:3, II (c). If only the minutes were sealed, then, whatever is not contained in the minutes could be divulged publicly, despite the conclusion that the discussion would adversely affect the individual's reputation. That would defeat the purpose of entering non-public session pursuant to RSA 91-A:3, II (c), and it would frustrate the purpose of sealing the minutes – to maintain protection for the individual's reputation.

Instead, it appears the legislature is saying that because the information discussed in non-public session is sensitive, not only should such information not be disclosed, but to the extent the minutes reflect what was discussed, those too should not be disclosed.

Furthermore, until now, the Selectwomen have consistently interpreted the seal the same as Tejasinha, if not more broadly.[3] First, during depositions, and *after* the BOS had voted to unseal the minutes, the Selectwomen still took the position that information not in the minutes was sealed. *See generally* Appx. Vol. III at 22. Therefore, they insisted on the deposition transcripts being sealed.[4] *Id*.

Second, the Selectwomen expressed via their affidavits that the comments made during the non-public session were sensitive. Appx. Vol. I at 173, ¶6 and 176-177, ¶5. However, the Selectwomen testify and argue that, the information in the minutes is all that was divulged, and they did not divulge any other sensitive information. *Id.* If, however, that sensitive information was not in the non-public minutes, yet the Selectwomen believed they had a duty to not divulge the sensitive information, then the Selectwomen's position is that *all* the information in the non-public session was sealed, not merely the minutes.[5]

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[3] Judicial estoppel should preclude them from taking a contrary position now. *See Alward v. Johnson*, 171 N.H. 574, 584 (2018) (setting out the elements of judicial estoppel).

[4] The Superior Court unsealed the transcripts after Tejasinha filed a Motion to Unseal, which the Selectwomen did not oppose. Appx. Vol. III at 22.

[5] The Selectwomen also appear to suggest that their divulgence and the BOS' failure to record the opinion are excused because Tejasinha and the public discovered the information via the June 4 public minutes.

Indeed, even if the seal was limited to just the minutes, then that begs the question of what exactly was sealed, or what was the purpose of the seal? All of the information divulged in the June 4 and June 18, 2018 public sessions is the same information that was contained in the sealed non-public minutes as well as additional information that was discussed in the June 4 non-public session – information that the Selectwomen say a majority agreed should be disclosed. *Compare* Tejasinha's Br. at 23, n.13 *with* Appx. Vol. I at 232-233. Thus, it simply does not make sense that only the minutes were sealed because there would be no need to seal the minutes if the BOS intended to immediately disclose the information anyway.[6]

In such a case, the public body could simply put as little information in the minutes as possible, then disclose other sensitive information at will, such as is the case here. That would frustrate the purpose of *both* RSA 91-A:3, II (c) to protect a person's reputation and RSA 42:1-a, II (a) to keep such information confidential.

Thus, because the Selectwomen consistently took the position that the non-public session itself was sealed, not merely the minutes, and because interpreting it in that manner furthers RSA 91-A:3, II (c),

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Selectwomen's Br. at 19. However, that is exactly the problem: That information should *not* have been in the public minutes because that information was sealed.

[6] Furthermore, as discussed in his Opening Brief, insufficient time transpired for the circumstances to have changed to merit any agreement to unseal. Tejasinha's Opening Br. at 39.

91-A:3, III, and RSA 42:1-a, II (a)'s goals, this Court should conclude that the BOS sealed the entire session and all information discussed therein.

For the reasons stated in his Opening Brief, there was no agreement to divulge the sealed information. Therefore, this Court should REVERSE the Superior Court's Order and REMAND.

II. TEJASINHA'S AFFIDAVIT IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT IS SUFFICIENT TO CREATE A GENUINE ISSUE OF MATERIAL FACT AND DOES NOT CONSTITUTE SPECULATION.

A party opposing summary judgment need only file an affidavit that, "shows reasonable and specific grounds for believing that evidence disputing the moving party's affidavits can be produced at trial." *Omiya v. Castor*, 130 N.H. 234, 237 (1987). The, "'object of summary judgment is to separate what is formal or pretended in denial or averment from which is genuine and substantial so that only the latter may subject a suitor to the burden of a trial.'" *Id.* (quoting *Nashua Trust Co. v. Sardonis*, 101 N.H. 166, 168-169 (1957)). However, summary judgment was not intended to be used to, "cut off deserving litigants from their day in court." *Roberts v. General Motors Corp.*, 138 N.H. 532, 535 (1994) (citing *Coburn v. First Equity Associates*, 116 N.H. 522, 524 (1976)).

The facts relative to what happened in the non-public session are not known to anyone other than those who were in the room. *See generally* Appx. Vol. I at 232-233 (noting those present). Notably, the affidavits the Selectwomen submitted are essentially copies of each

other. *See generally Id.* at 172-185. Two members did not submit affidavits.[7] The affidavits reflect a procedure that the BOS has *never* used previously. *Compare Id.* at 173, ¶7 *with* 214-217, ¶¶3-15. Tejasinha's assertions in his affidavit are supported by his own personal knowledge about the BOS' course of conduct in similar cases. *See generally Id.* at 214-222.

If courts cannot accept personal knowledge of a long-standing course of conduct as evidence of a genuine issue of fact to contradict an assertion that *one* time a different procedure was used, it sets bad precedent. In such cases, it leaves a plaintiff who was not present in a non-public session unable to contradict the defendant's self-serving assertion of what happened. In the end, the defendant simply needs to sign a self-serving affidavit to prevail, regardless of overwhelming evidence illustrating that the alleged procedure used is a substantial departure from normal procedure.

Regardless, following the June 4 meeting, the Town Administrator, who was also present in the non-public session, provided information to Tejasinha directly contradicting the Selectwomen's claim that there was an agreement. *See e.g.* Appx. Vol. I at 215, ¶7 and 227-228. He confirmed that if there was an agreement to disclose, it would have been noted in the minutes – exactly what the

[7] As noted in Tejasinha's Opening Brief, the Selectwomen attempted to Supplement the record with an Affidavit from Selectman Barney well after they filed their Motion for Summary Judgment. The Superior Court never granted the request to supplement. Tejasinha's Br. at 45-46 and n.15.

BOS has done time and time again whenever disclosing information discussed in a non-public session. *Id.* The Town Administrator confirmed this after the BOS amended the June 4 public minutes to reflect that the minutes were sealed without qualification. *Id.* at 220, ¶¶29-30 and 235-243.

Notably, the affidavits the Selectwomen submitted, including the Town Administrator's, contradicts the Town Administrator's prior statements. Appx. Vol. I at 215, ¶7 and 227-228. Furthermore, their story developed *nine* months after the June 4 meeting, and only *after* they were sued. *See generally Id.* at 15-27, 28-40, and 104-111. Simply put, Tejasinha is entitled to put the contrary evidence before the trier of fact who can weigh evidence and credibility, and then resolve the competing facts.

Therefore, because Tejasinha's affidavit meets the requirements for opposing affidavits, in that it raises a genuine question about whether the BOS actually agreed to divulge information, this Court should REVERSE the Superior Court's Order on Summary Judgment.

CONCLUSION

For the reasons stated in this Reply and in Tejasinha's Opening Brief, this Court should REVERSE the Superior Court's Order on Summary Judgment, and REMAND for further proceedings.

RESPONSE TO CROSS-APPEAL AND INTERLOCUTORY APPEAL

ISSUES PRESENTED[8]

Cross-Appeal

Motion for Attorneys' Fees and Costs

I. Did the Superior Court err in soundly exercising its discretion in denying the Selectwomen's[9] request for attorneys' fees when it found no evidence that Tejasinha acted in bad faith?

II. Did the Superior Court err in soundly exercising its discretion in denying the Selectwomen's request for attorneys' fees when it found this case distinguishable from other cases applying the substantial benefit theory and declining to expand that exception?

Motion for Judgment on the Pleadings

III. Did the Superior Court err in denying the Motion for Judgment on the Pleadings, where Tejasinha sufficiently pleaded that the information the Selectwomen divulged would adversely affect his reputation?

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[8] Tejasinha has restated the Issues Presented for the Cross-Appeal for simplicity and conformity to the issues confronting the Superior Court. He has restated the Issue Presented for the Interlocutory Appeal to reflect the issue initially presented to this Court, but specific to the facts of this case. *See* Interlocutory Appeal Statement at 3.

[9] The term "Selectwomen" as used throughout this Brief refers to the two Selectwomen Defendants, Newton and Sharps.

Interlocutory Appeal

Motion to Dismiss

IV. Does RSA 91-A:3, II(c) require that the BOS have provided some type of prior notice that it intended to discuss Tejasinha in non-public session?

STATEMENT OF THE CASE

Cross-Appeal

On February 15, 2019, the Selectwomen filed a Motion for Judgment on the Pleadings. Appx. Vol. I at 28. They argued that Tejasinha's reputation was not harmed as a matter of law, because the information the Selectwomen divulged could not adversely affect his reputation as meant by RSA 42:1-a, II (a). *Id.* They argued that "adversely affect" should be interpreted to require defamation-level reputational harm. *See generally Id.* The Selectwomen requested that the Court award them their attorneys' fees and costs, though they offered no argument to support that request. *See generally Id.*

In his February 26, 2019 Objection, Tejasinha explained that the BOS had entered non-public session pursuant to RSA 91-A:3, II (c) because the information it anticipated discussing was likely to affect adversely, his reputation. Appx. Vol. I at 66-67. In fact, the information discussed and later divulged, did adversely affect his reputation. *Id.* at 67-71. He argued that the normal rules of statutory construction require a plain reading of adversely affect, and that any other reading would render RSA 91-A:3, III meaningless and eliminate RSA 42:1-a's remedy. *Id.* Similarly, RSA 91-A:3, III would offer little in the way of protection for reputational harm if the legislature required *actual* harm to invoke RSA 42:1-a, II (a)'s remedy. *Id.* Thus, reading a higher-standard and proof of actual reputational harm into RSA 42:1-a would be inappropriate. *Id.*

Tejasinha responded to the request for attorneys' fees and costs arguing that the Superior Court should deny it because he did not bring the case in bad faith, vexatiously, or wantonly. Appx. Vol. I at 72. He also argued that the Selectwomen failed to develop an argument supporting their request for attorneys' fees, thereby waiving their request. *Id.*

In their March 13, 2019 Reply, the Selectwomen contended, for the first time, that RSA 42:1-a, II (a)'s phrase "would adversely affect," emphasis on "would," requires a finding that the legislature intended that the divulgence actually harmed the person's reputation. *Compare* Appx. Vol. I at 28-40 and 104-107. The Selectwomen concluded that RSA 91-A's policy towards transparency requires that result. *Id.* The Selectwomen then reiterated their argument that the Superior Court should apply a "defamatory meaning" to the phrase "adverse affect" on reputation. *Id.* at 107-108.

Finally, for the first time, the Selectwomen attempted an argument regarding their request for attorneys' fees and costs. Appx. Vol. I at 110-111. They contended that Tejasinha's claim is frivolous and brought in bad faith. *Id.* They further argued that his claims are not supported by any material facts or law. *Id.* Finally, they argued that Tejasinha improperly brought the claim against the Selectwomen, because, the Selectwomen argued, he should have brought it against the entire BOS. *Id*.

On March 20, 2019, Tejasinha submitted a Surreply.[10] Appx. Vol. I at 115. He noted that if the Superior Court adopted the Selectwomen's position, it would be a departure from the ordinary rules governing statutory interpretation. *Id.* at 116-117. Doing so, would be to inappropriately consider RSA 42:1-a in isolation. *Id.* He argued that because the public entity bears a heavy burden to avoid disclosure, RSA 91-A:3, III's phrase, "likely would" preceding "affect adversely" should be read as requiring a higher probability/presumption that the sealed information would negatively impact a person's reputation for a non-public session to be sealed. *Id.* He noted that here, the BOS unanimously determined as much. *Id.*

Finally, Tejasinha argued that the Superior Court should reject the Selectwomen's request for attorneys' fees and costs, because they waived the request by not developing their argument in their opening memorandum. Appx. Vol. I at 119-120.

On October 21, 2019, the Superior Court denied the Motion for Judgment on the Pleadings. Selectwomen's Ad. at 41.

On December 13, 2019, the Selectwomen filed a Motion for Attorneys' Fees and Expenses. Appx. Vol. II at 70. They argued that Tejasinha brought Count II in bad faith, and they also argued, for the first time, that the Superior Court should apply the substantial benefit

[10] Tejasinha filed a Motion for Leave to file his Surreply contemporaneously with the Surreply, to which the Selectwomen objected. Appx. Vol. I at 127.

exception. *Compare* Appx. Vol. I at 39, n.9 and n.10 and at 135 with Appx. Vol. II at 75-76.

On December 20, 2019, Tejasinha responded. Appx. Vol. II at 105. He first argued that the Superior Court should deny the Motion because it is the third request that had failed twice previously. *Id.* at 110-112. Second, he argued that he did not act in bad faith, and that his claim is supported by both the law and the facts. *Id.* at 112-116. He also argued that because the Selectwomen are public officials, and he is a private citizen, not a public official, the substantial benefit exception does not apply to this case. *Id.* at 117-118. Furthermore, because the Selectwomen relied upon public funds, not private funds, for their defense, the substantial benefit exception does not apply.[11] *Id.*

In their December 30, 2019 Reply, the Selectwomen responded to Tejasinha's timeliness argument, claiming that their motion was timely, yet avoiding the fact that they requested fees twice previously to no avail. Appx. Vol. II at 133-144. They also reiterated the arguments made in their opening Motion. *See generally Id.* at 133-138.

On January 10, 2020, the Superior Court denied the Motion for Attorneys' Fees and Expenses, "without prejudice pending resolution of the case on appeal." Selectwomen's Ad. at 48. On January 21, 2020, the Selectwomen filed a Motion to Reconsider, requesting that the Superior

[11] Tejasinha also requested fees due to the Selectwomen's bad faith litigation conduct. Appx. Vol. II at 118-119. The Selectwomen objected. *Id.* 139-140. However, that issue is not a subject of this appeal. *See generally* Notice of Appeal and Notice of Cross-Appeal.

Court issue a written order granting or denying the Motion so that issue could be addressed in this appeal. Appx. Vol. II at 173-175.

On March 9, 2020, the Superior Court granted the Motion for Reconsideration to explain its decision denying the attorneys' fees motion. Selectwomen's Ad. at 56. The Superior Court held that Tejasinha did not act in bad faith in bringing the claim, and that the substantial benefit exception does not apply. *Id.* at 57. First, the Superior Court reminded the Selectwomen that it denied the Motion for Judgment on the Pleadings, indicating that there were sufficient grounds to bring the Complaint. *Id.* Furthermore, it explained that Tejasinha prosecuted his case vigorously, which it expected him to do. *Id.* Finally, the Superior Court reasoned that the substantial benefit theory has never been applied with respect to analogous facts as those here, and therefore, it did not extend it to this case. *Id.*

This appeal followed. *See* Notice of Cross-Appeal.

Interlocutory Appeal

On March 18, 2019, the Town filed a Motion to Dismiss Count I, alleging failure to state a claim for relief. Appx. Vol. III at 33. The Town argued that it was not obligated to provide advance personal notice to Tejasinha prior to conducting a non-public session to discuss him, because the statute does not require such notice. *Id.* at 35-38.

In his March 25, 2019 Objection, Tejasinha argued that *Johnson v. Nash*, 135 N.H. 534 (1992), interpreting the former RSA 91-A:3, II (a) requires that RSA 91-A:3, II (c) be interpreted the same. Appx. Vol. III at 43-46. Indeed, the intended effect of subsection (c) could not be

realized where the public body fails to provide notice of the anticipated non-public session. *Id.* Tejasinha further argued that interpreting the statute in such manner furthers the legislative objective of openness. *Id.* at 46-47.

In the Town's April 1, 2019 Reply, it suggested that because Tejasinha is not a public employee, he is not entitled to a hearing, and therefore, not entitled to notice of a non-public session about him. Appx. Vol. III at 54-60. The Town further relied upon an opinion issued by the New Hampshire Attorney General's office in supporting its argument. *Id.*

In his April 4, 2019 Surreply[12], Tejasinha directed the Superior Court to the actual issue: Tejasinha's unqualified right to request an open meeting, and his inability to do so without prior notice of the BOS' intent to hold a non-public session about him. Appx. Vol. III at 69-71. Tejasinha distinguished the cases the Town cited and reminded the Superior Court that he received no notice that the BOS intended to discuss him in non-public session. *Id.* Finally, Tejasinha explained that the Attorney General's opinion applies only to subsection (a), not (c). *Id.*

On May 24, 2019, the Superior Court agreed with Tejasinha's analysis and denied the Motion to Dismiss. Town's Appx. at 6.

[12] Tejasinha filed a Motion for Leave to File Surreply, to which the Town objected. Appx. Vol. III at 66 and 73.

On December 10, 2020, the Town filed a Motion for Interlocutory Appeal, which the Superior Court granted, and this Court accepted. *See generally* Notice of Interlocutory Appeal.

STATEMENT OF FACTS

Background Applicable to Both Appeals

Tejasinha is a former Ashland Selectman. Appx. Vol. I at 214, ¶2. He resigned on January 7, 2018. *Id*. On May 12, 2018, Tejasinha submitted a Citizen Inquiry to the BOS. *Id.* at 8, ¶29. In it, he requested a public censure of, and a public apology from, the Selectwomen. *Id*. During the May 21, 2018 BOS meeting, the Selectwomen publicly recused themselves from considering Tejasinha's May 12 Citizen Inquiry, which resulted in the BOS lacking a quorum to act. *Id*. at 8, ¶30. Despite recusing herself, and despite the BOS lacking a quorum at that point to take any action, Sharps publicly expressed that Tejasinha would not receive an apology. *Id*. at 9, ¶31.

On June 4, 2018, without prior notice, the BOS unanimously voted to enter non-public session pursuant to RSA 91-A:3, II (c). Appx. Vol. I at 9, ¶32, and at 22, ¶32. It did so, "out of an abundance of caution" because the matters it intended to discuss, "would likely affect adversely," Tejasinha's reputation. *Id.* at 21-22, ¶32, RSA 91-A:3, II (c). In non-public session, the BOS discussed Tejasinha and his May 12, 2018 Citizen Inquiry. *Id.* at 9, ¶32-33, *see also Id.* at 21-22, ¶32. Tejasinha's Citizen Inquiry was the only Citizen Inquiry discussed. *Id.* It was, "used as an example of how citizen inquiries were being used by the townspeople." *Id.* at 21-22, ¶32.

Cross-Appeal

Motion for Judgment on the Pleadings

The BOS unanimously voted to seal the June 4, 2018 non-public session. Appx. Vol. I at 10, ¶36, 75 and 82:16. In the immediately following public session, either Newton or Sharps or both, instructed, asked, or otherwise caused the Town Administrator to disclose what the BOS discussed, and Newton divulged the decisions reached. *Id.* at 10, ¶36.

The Town Administrator identified only Tejasinha. Appx. Vol. I at 60-61.[13] The Town Administrator publicly stated that Tejasinha's Citizen Inquiry had been sent to the Town's attorney who had written an opinion specifically about it. *Id*. at 61. Newton then divulged the conclusion that the BOS would no longer address criticisms of the BOS in public. *See Id*. This exact information was discussed during the non-public session, which was sealed. *Id*. at 74-75.

The BOS did not vote to unseal any portion of the minutes or other information discussed during the non-public session before the Town Administrator divulged the information and Newton divulged the BOS' decision. *See* Appx. Vol. I at 10, ¶36 (explaining that the purpose of sealing the minutes evaporated), *see also Id*. at 74-77 and 82-85 (devoid of any indication that the BOS voted to unseal any portion of the non-public minutes pertaining to Tejasinha) and *cf. Id*. at

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[13] The video can be seen here: <https://youtu.be/lsq-Z3rB1oo>, and the relevant portion runs from approximately 50:25 to 53:55. *See also* Appx. Vol. I at 61, n.4.

84:5-9 (announcing for the first time that the BOS voted to unseal the June 4 non-public session minutes entirely) and *Id*. at 82:16 (noting that the minutes were sealed as of the beginning of the public session on June 4).

The information the Town Administrator divulged, and the decision Newton divulged, were directly related to the Citizen Inquiry that Tejasinha submitted on May 12 asking for a public censure and apology of and from Newton and Sharps. Appx. Vol. I at 10, ¶36. The June 4 BOS public meeting minutes also identified Tejasinha. *Id*. at 84:41-46 – 85:1-3.

The June 4 non-public meeting minutes characterize Tejasinha's Citizen Inquiry as a "personal attack" and links his Citizen Inquiry to the characterization of the form being misused and abused and otherwise not used as intended. Appx. Vol. I at 232-233 and 176, ¶3.

On June 18, Sharps sought BOS consensus to eliminate the Citizen Inquiry form. Appx. Vol. I at 60, n.3[14]. Notably, she alleged that the Citizen Inquiry form had been abused. *See Id*. at 61, n.4. This follows the June 4 non-public session in which Tejasinha's May 12 Citizen Inquiry was discussed in the context of Citizen Inquiry forms being misused. *See Id*. at 33. Thus, the BOS' decision to no longer offer

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[14] The video can be seen here: <https://www.youtube.com/watch?v=vMrEyzdYTX0&feature=youtu.be&list=PLbPTWBdOlg4AMYauSq5-wBKhJqla6hTvQ>, and the relevant portion begins at approximately 37:30. *See also* Appx. Vol. I at 100 (the public meeting minutes).

the Citizen Inquiry form was also linked to Tejasinha.

After Tejasinha found out about the decisions made during the June 4 non-public session, he submitted Right to Know Requests to, at least in part, uncover facts related to the June 4 non-public session and the other events occurring between May 21 and June 18, 2018. Appx. Vol. I at 10, ¶38, *see also Id*. at 90-99. On June 18, after eliminating the Citizen Inquiry form, the BOS recommended that the public use RSA 91-A instead of the Citizen Inquiry form. *Id*. at 357-360 and 160-163.

In the July 16 and August 6, 2018 BOS public meeting minutes, Tejasinha was again identified in connection with Right to Know Requests he submitted. Appx. Vol. I at 53:9-14, 86:43-46 – 87:1-3, and 89:18-20. He was publicly accused of costing the Town substantial amounts of money. *Id*. at 11, ¶39. Sharps publicly raised the issue of Tejasinha's RSA 91-A requests, implying that Tejasinha was further harming the Town. *Id*. at 62, n.9[15].

As with nearly all public BOS meetings, the May 21, June 4, and June 18 BOS public sessions were broadcast on television. Appx. Vol. I at 7-8, ¶24, 61, n.4, and 60, n.3. Thus, the public was aware of Tejasinha's Citizen Inquiry, the contents therein, the information divulged during the June 4 and June 18 public sessions, and the negative insinuations about him. *Id*.

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[15] The video can be seen here: <https://youtu.be/pSvdZTv3Dcc?t=210>, and the relevant portion is from approximately 3:35-6:30. Appx. Vol. I at 62, n.9.

On June 7, 2018, the *Record Enterprise* reported on the public statements made during the June 4 public session that immediately followed the non-public session. Appx. Vol. I at 328-330. The article referred to Tejasinha by name. *Id*. Because Newton and the Town Administrator mischaracterized his Citizen Inquiry during the public session, the article misstated it as a "demand." *Id*. It also connected the June 4 and June 18 meetings and the divulgence in each meeting, tying the June 18 divulgence to the June 4 non-public session. *Id.* However, on its face, Tejasinha's Citizen Inquiry was simply a request to redress concerns he had with the public officials named therein. *Id*. at 315. Just as the public statements tied him to the BOS' non-public discussion and decisions, the article named only Tejasinha, which connected him to the BOS' decisions to not consider criticisms of the BOS in public. *Id*.

Immediately after the Selectwomen divulged the information on June 4 and June 18, Tejasinha's relationships with his friends and colleagues fell apart. Appx. Vol. I at 11, ¶40, and 218, ¶17. For example, on June 3, 2018, Tejasinha had formed a campaign committee for State Representative. The Committee was comprised of Sandra Coleman, Sherrie Downing, and Jeanette Stewart. *Id.* at 218, ¶¶17 and 18. However, following the June 4 and June 18 disclosures, Ms. Downing and Ms. Stewart began distancing themselves from him. *Id.* Ms. Downing asked to be removed from Tejasinha's campaign committee, and Ms. Stewart stopped talking to Tejasinha. *Id*.

Facts Relevant to Attorneys' Fees Motion

Following the June 4, 2018 BOS meeting, prior to filing suit, Tejasinha submitted a Right-to-Know request to the Town. Appx. Vol. I at 215-216, ¶7. He wanted to determine, among other things, whether there was an agreement to make an announcement following the June 4, 2018 non-public session. *Id.* The Town Administrator responded that any announcement would be reflected in the minutes, thereby confirming that no such agreement was reached. *Id*., *see also Id*. at 228. Neither the June 4 public minutes nor the non-public minutes reflect an agreement to make an announcement following the non-public session. Appx. Vol. I at 220, ¶¶29-30, 232-233, and 235-243. Furthermore, the only relevant amendment to the June 4 public minutes was to note that the BOS sealed the non-public minutes. *Id.* at 220, ¶¶29-30 and 235-243.

However, Tejasinha did not simply rely upon the Town Administrator. In fact, he submitted additional, thoroughly drafted, Right-to-Know requests, requesting specific information from the Town regarding the divulgence. *See generally* Appx. Vol. I at 214-221.

On August 6, 2018, the non-public meeting minutes were unsealed after the Town's counsel represented to Tejasinha that he was the only individual discussed during that June 4, 2018 non-public session. *See* Appx. Vol. I at 220, ¶32a and 298-315. Indeed, the June 4 non-public minutes only mention Tejasinha's name, and they contain the same information that the Selectwomen disclosed. *Id*. at 232-233.

Historically, Newton has instructed the Town Administrator to perform various actions. *See* Appx. Vol. I at ¶37. Newton, as Chairwoman had control over the conduct of BOS meetings. *See Id*. at ¶20 (as an example). Additionally, Sharps has served as a Selectwoman for "many years." *Id*. at 32.

Tejasinha described, in detail, numerous occasions during which the Selectwomen worked in concert to mistreat him. *See e.g.* Appx. Vol. I at 5-7, ¶¶16, 17, 19, 21, and 22. In the video of the June 4 public session Newton appears to be nodding in a reassuring manner towards the Town Administrator as he is reading, and Sharps appears to subtly shake her head as the Town Administrator reads Tejasinha's request for an apology, which would be consistent with her earlier comment about not apologizing. *See* link at n.13 at approximately 52:28. After the Town Administrator read the legal opinion in response to Tejasinha's Citizen Inquiry, Newton stated her hope that that discussion puts an end to the issues raised in Tejasinha's Citizen Inquiry. Appx. Vol. I at 35. In the moments leading to discussion about Tejasinha's Citizen Inquiry and the matters discussed during the non-public session, Sharps made a mocking remark saying, "let's not slight somebody else," followed by smiles and glances exchanged between Sharps and the Town Administrator, as if a mutual understanding was held between them. *See* link at n.13 at approximately 51:25.

The Selectwomen were the *only* selectpersons that discussed the information publicly – Newton on June 4 and June 18, and Sharps on June 18. *See generally* Appx. Vol. I at 28, 55, 129, and 186 (all of which

address *only* the Selectwomen disclosing, or causing to be disclosed, the non-public information). Newton even conceded that she likely directed the Town Administrator to discuss the information. Appx. Vol. II at 124.

Despite the numerous RSA 91-A requests, Citizen Inquiries, and discussions with the Town Administrator and the Town's Attorney, the Town did not *once* say or provide anything that would support the Selectwomen's claim that the BOS authorized the disclosure of the information prior to the minutes being unsealed on August 6, 2018. *See generally* Appx. Vol. I at 214-222, 298-315, and 317-326. Notably, *after* the information was divulged, the Town Administrator stated that the BOS needed to vote to approve the release of the redacted attorney opinion email. *Id*. at 317-326.

In their Answer to the Complaint, the Selectwomen did *not* mention *any* agreement to release information discussed during the June 4, 2018 non-public session prior to August 6. *See generally* Appx. Vol. I at 15-27. It was not until they filed their Motion for Summary Judgment, nine months after the June 4 meeting, purportedly supported by nearly identical affidavits, that they indicated there was some, unrecorded agreement reached by something other than a vote to release the information. *See generally Id*. at 129-149.

The conclusions drawn from Tejasinha's preliminary research – that the Selectwomen did *not* have authority to divulge the information because there was no evidence of an agreement – suggested that they violated their oaths of office as contemplated by RSA 42:1-a. *See* Appx.

Vol. I at 219, ¶24. Furthermore, in addition to the information he had at the time, as outlined in his Complaint, and as he noted in his own affidavit, the Selectwomen's prior and continued mistreatment of him, led him to reasonably conclude that they divulged the information as further mistreatment. *See generally Id*. at 3-14; *see also Id*. at 219, ¶25. His further prosecution of the case even after the Selectwomen moved for summary judgment, is the result of his good faith belief that there is a genuine issue of material fact regarding whether there was an agreement to divulge. *See generally* Tejasinha's Opening Br.

The Selectwomen filed their two dispositive motions, almost back-to back, one on February 15, 2019, and the other on March 26. Appx. Vol. I at 28 and 129. Tejasinha was forced to respond to *both*, and he was forced to respond to the Motion for Judgment on the Pleadings twice, because it was incorporated into the Motion for Summary Judgment. *Id*. at 139.

The Selectwomen objected to his motions for leave to allow Surreply that Tejasinha filed, despite raising new issues in their Replies requiring surreplies. Appx. Vol. I at 127 and Appx. Vol. II at 21.

Tejasinha attempted to keep this case on a short track to bring resolution to both counts quickly. The Selectwomen *chose* to waive ADR, which could have brought a resolution to the matter sooner. Appx. Vol. III at 8.[16] Originally, the trial date was set for July 26, 2019.

[16] This is a clearer copy of "Exhibit 2" from Plaintiff's Objection to the Selectwomen's Motion for Attorneys' Fees, which is also at Appx. Vol. II at 126-131.

Id. at 4. However, the Selectwomen's two dispositive motions, for which they requested oral argument, continued trial to January 2020. *Id.* at 13.

The depositions Tejasinha took were necessary to prove the claims in his Complaint. *See e.g.* Appx. Vol. III at 18, ¶12. However, despite commencing a line of questions directly relevant to the case, Sharps refused to answer. *Id*. at 16-17, ¶7. Thus, he was forced to file a Motion to Compel. *Id.* at 15. However, he withdrew that Motion after the Selectwomen indicated they would comply at a rescheduled deposition. *Id.* at 20.

Although Tejasinha took depositions, he would have taken them even without Count II as they were necessary for Count I. Appx. Vol. II at 110 and Appx. Vol. III at 17, ¶8. Though the depositions revealed information useful to the prosecution of Count II, he did not supplement the record because the transcripts were not available until after the dispositive motions were filed, and Tejasinha did not want to delay the proceedings. Appx. Vol. II at 110. He would expect to use the testimony at trial. *Id.*

Additionally, the Selectwomen demanded that certain portions of depositions be sealed, despite there being no basis for sealing, which resulted in Tejasinha having to file a Motion to Unseal. Appx. Vol. III at 22. The Superior Court unsealed those depositions. *Id.*

When Tejasinha filed his Complaint, the Selectwomen were still serving. Appx. Vol. I at 172, ¶1 and 176, ¶1. The Town paid the

Selectwomen's attorneys' fees; they did not expend their own personal funds. *See generally* Appx. Vol. II at 70-77.

Interlocutory Appeal

The BOS did not provide any prior notice that it intended to enter non-public session to discuss Tejasinha, which the Town concedes. Appx. Vol. I at 9-10, ¶¶34-35 and ¶43 (explaining that the BOS did not provide *any* notice) and at 22, ¶¶34-35 and ¶43 (admitting that the BOS provided *no* notice to Tejasinha). Tejasinha only learned, after the meeting, that the BOS entered non-public session to discuss him. *Id*. Because the BOS did not provide prior notice, Tejasinha was not given the opportunity to request that the BOS hold an open meeting. *Id*.

STANDARD OF REVIEW

Motion to Dismiss and Motion for Judgment on the Pleadings

This Court treats motions for judgment on the pleadings the same as motions to dismiss. *Jenks v. Menard*, 145 N.H. 236, 239 (2000). In reviewing such motions, this Court must "assume the truth of the facts alleged [in the complaint] and construe all reasonable inferences in the light most favorable to [the plaintiff]." *LaChance v. United States Smokeless Tobacco Co.*, 156 N.H. 88, 93 (2007) (citing *Paul v. Sherburne*, 153 N.H. 747, 749 (2006)). If this Court finds that the complaint, "on its face … asserts a cause of action," then it must affirm the trial court's decision denying a motion for judgment on the pleadings and/or to dismiss. *See Tessier v. Rockefeller*, 162 N.H. 324, 329-330 (2011) (citing *Williams v. O'Brien*, 140 N.H. 595, 597 (1995)).

Where this Court must interpret a statute as part of its review, it reviews the trial court's interpretation *de novo*. *In re Cierra*, 161 N.H. 185, 188 (2010).

Motion for Attorneys' Fees and Expenses

This Court reviews the denial of a motion for attorney's fees using the unsustainable exercise of discretion standard. *Jackson v. Morse*, 152 N.H. 48, 54-55 (2005) (citing *Town of Littleton v. Taylor*, 138 N.H. 419, 424 (1994)). Therefore, this Court gives deference to the trial court's decision. *Id*. "'To be reversible on appeal, the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party.'" *In the Matter of Martel & Martel*, 157 N.H. 53, 63 (2008) (quoting *Arcidi v.*

Town of Rye, 150 N.H. 694, 704 (2004)). So long as there is "some support in the record," for the trial court's decision, this Court will affirm. *Id*.

Even where the trial court declines to expand a judicially-created exception to the American Rule, the abuse of discretion standard still applies. *See Harkeem v. Adams*, 117 N.H. 687, 690 (1977) (citing both *Lavoie v. Bourque*, 103 N.H. 372, 375 (1961), and *Concord Nat'l Bank v. Haverhill*, 101 N.H. 416, 419 (1958) as having expanded exceptions to the American Rule)). Indeed, an award of attorney's fees is a form of equitable relief. *See Harkeem*, 117 N.H. at 688. Such relief is subject to the sound discretion of the trial court. *See Clapp v. Goffstown Sch. Dist.*, 159 N.H. 206, 209-210 (2009) (explaining that the standard of review for an award of damages under the trial court's equitable jurisdiction is an abuse of discretion standard).

SUMMARY OF THE ARGUMENT

Cross Appeal

This Court has not previously interpreted RSA 42:1-a, II (a), and the legislature chose not to define the words "affect" and "adversely." This Court should not depart from ordinary statutory construction by assigning a definition other than the plain and ordinary meaning absent legislative direction to the contrary. Furthermore, this Court can use RSA 91-A:3, II (c) and RSA 91-A:3, III as guides to interpreting the same words in RSA 42:1-a, II (a). Normal rules of statutory construction mandate that this Court interpret RSA 42:1-a, II (a) in accordance with the overall statutory scheme, which does not support reading defamation-level reputational harm into the statute.

The Superior Court properly exercised its discretion denying the Selectwomen's request for attorneys' fees. First, the record is devoid of evidence of bad faith. Second, the substantial benefit exception has not been applied in a situation where a public official uses public funds to defend against a statutory check on her power. Because the American Rule is meant to encourage, rather than discourage lawsuits, this Court should decline to extend it to this case.

Thus, this Court should AFFIRM the Superior Court's denial of the Motion for Judgment on the Pleadings and AFFIRM its Order denying the Motion for Attorneys' Fees.

Interlocutory Appeal

The Superior Court correctly denied the Town's Motion to Dismiss, because Tejasinha could not invoke his right to an open

meeting without prior notice of its intent to discuss him in the non-public session. Because the right to an open meeting is not contingent upon some separate, independent right, Tejasinha was entitled to prior notice. The legislature reinforced this concept when amending RSA 91-A:3, II (a) to require an independent right to a meeting, but declining to amend RSA 91-A:3, II (c) similarly. Indeed, such inaction reflects the legislative decision to continue to keep personnel matters confidential, but to ensure that government remains open and accountable in non-personnel matters.

Therefore, this Court should AFFIRM the Superior Court's Order.

ARGUMENT RESPONSIVE TO CROSS-APPEAL

Statute at Issue

The Selectwomen only address the last element of RSA 42:1-a, II (a), that divulging sealed information would adversely affect a person's reputation. *See generally* Selectwomen's Br. Therefore, that is the only element Tejasinha addresses.

Applicable Rules

Where a public body seals information pursuant to RSA 91-A, III because such information, "likely would affect adversely" the reputation of a person, such information necessarily, "would adversely affect" a person's reputation as those words are used in RSA 42:1-a, II (a). *See Censabella v. Hillsborough County Atty.*, 171 N.H. 424, 426 (2018) (explaining that this Court adopts the plain and ordinary meaning of the words used in a statute consistent with the overall statutory scheme).

Where there is overwhelming record-evidence that a litigant engaged in thorough research prior to, and during, his lawsuit, made sound legal argument supported by the facts and law, and did nothing more than fail to prevail in the trial court, the trial court cannot be said to have unsustainably exercised its discretion in declining to find bad faith. *Cf. Harkeem v. Adams*, 117 N.H. at 690-691 (explaining that the "bad faith" exception to the American Rule applies where a litigant acted in such a manner where it should have been unnecessary for the successful party to litigate the action).

The substantial benefit exception applies only as to public officials against other public officials, or by a private litigant against a public official or public entity. *See generally e.g. Bedard v. Town of Alexandria*, 159 N.H. 740 (2010). Where no, "overriding considerations of justice" compels an award of fees, this Court should not extend an exception to the American Rule. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

With the above rules in mind, this Court should AFFIRM the Superior Court's Order on the Motion for Judgment on the Pleadings and the Motion for Attorneys' Fees and Expenses.

I. NORMAL RULES OF STATUTORY CONSTRUCTION DO NOT SUPPORT THE SELECTWOMEN'S PROPOSED HIGHER STANDARD AND NARROWER DEFINITION OF, "ADVERSELY AFFECTED."

This Court must apply the plain and ordinary meaning to the words contained in RSA 42:1-a, II (a), and it must interpret the statute in the context of the overall statutory scheme. *See Mortgage Specialists, Inc. v. Davey*, 153 N.H. 764, 774 (2006) (internal citation omitted), *see also Appeal of HCA Parkland Med. Ctr.*, 143 N.H. 92, 94 (1998) (internal citations omitted) (explaining that undefined words in a statute are given their plain and ordinary meanings considering the context in which they are used and the overall statutory scheme).

RSA 42:1-a, II (a) refers to information sealed pursuant to RSA 91-A:3, III. Relevant to this case, RSA 91-A:3, III allows the public body to seal information that, "likely would affect adversely, the reputation of any person" other than a member of the public body. RSA 91-A:3,

III's language is similar to RSA 91-A:3, II (c) allowing a public body to enter non-public session to address matters which if done in public, "would likely affect adversely, the reputation of any person" other than a member of the public body.

Thus, applying the normal rules of statutory construction, this Court must consider the meaning of the terms "affect" and "adversely" in the context of all three statutes together.

A. RSA 42:1-a, II (a)'s Relationship to RSA 91-A:3, II (c) and RSA 91-A:3, III, Requires an Interpretation That Will Not Frustrate the Statutes' Purpose.

If the legislature enacts a statute, this Court "assumes" "it has in mind, previously enacted statutes relating to the same subject matter." *Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012) (citing *State Employees Assoc. of N.H. v. N.H. Div. of Personnel*, 158 N.H. 338, 345 (2009)). In such cases, this Court interprets related statutes in such a manner that they, "do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." *Id*. (citing *Grand China v. United Nat'l Ins. Co.*, 156 N.H. 429, 431 (2007)).

Among the type of information that RSA 91-A:3, II (c) considers harmful to reputation is information pertaining to inability to pay or poverty of an applicant for tax abatement. The public body could then seal information pertaining to such non-public sessions if it determines that the information discussed about poverty or tax abatement was likely to adversely affect that person's reputation. RSA 91-A:3, III.

First, such information is not false information, which is required for defamation. *See Boyle v. Dwyer*, 172 N.H. 548, 554 (2019). Second, it is not the type of information that would subject the individual to, "contempt, hatred, scorn, ridicule," or that which would "tend to impair the individual's standing in the community." *Id*. It is not the type of information that would lower the individual, "'in the esteem of any substantial and respectable group.'" *Id.* (quoting *Sanguedolce v. Wolfe*, 164 N.H. 644, 646 (2013)). Thus, the legislature could not have intended that "defamation" be the standard for "affect" and "adversely" as used in RSA 91-A:3, II (c).

Similarly, RSA 91-A:3, III does not expand or limit RSA 91-A:3, II (c)'s use of the same words. Instead, RSA 91-A:3, III considers whether, after holding the non-public session, there were, in fact, discussions meeting RSA 91-A:3, II (c)'s criteria. If so, then the BOS may seal the session. In turn, RSA 42:1-a, II (a) ensures adherence to those prior determinations. In other words, if a public body decides that information should be sealed because the information likely would adversely affect an individual's reputation, then RSA 42:1-a, II (a) requires the public officials to keep it confidential or be subject to dismissal.

Here, the BOS previously unanimously confirmed, that after entering non-public session suspecting it would discuss information adverse to Tejasinha's reputation, that, it in fact, did discuss information which would adversely affect Tejasinha's reputation by unanimously sealing the non-public session. Appx. Vol. I at 9, ¶32, 10,

¶36, 75, and 82:16. As of that moment, RSA 42:1-a, II (a) compelled the public officials to hold that information in confidence.

RSA 91-A:3, II (c), 91-A:3, III, and RSA 42:1-a, II (a)'s purpose appears to be to protect individual damage to reputation generally, and ascribing defamation's higher standard to them is facially at odds with the statutes. Thus, reading RSA 42:1-a, II (a) in the context of RSA 91-A:3, II (c) and III requires no higher showing than the plain and ordinary meanings of the words used therein.

B. Even if RSA 42:1-a, II (a) is Interpreted in Isolation, the Plain and Ordinary Meanings of "Affect" and "Adversely" Do Not Support Defamation-Level Harm.

If the legislature intended to define, "affect adversely the reputation of any person" as "defamation," it would have said so. *See Petition of Carrier*, 165 N.H. 719, 721 (2013) (internal citations omitted). The legislature did not say so, therefore, this Court must apply the ordinary meanings to the words.

"Adverse" is defined as "acting against or in a contrary direction," or "opposed to one's interests," or "causing harm" or "*harmful*." MERRIAM-WEBSTER'S DELUXE DICTIONARY 27 (10th Collegiate ed. 1998) (emphasis added). The plain and ordinary meaning of "affect" is "to produce an effect upon." *Id*. at 30. Finally, the plain and ordinary meaning of "reputation" is, "overall quality or character as seen or judged by people in general." *Id*. at 1561.

This Court has previously interpreted exemptions which have a reputational harm component similarly. *See Reid v. N.H. A.G.*, 169 N.H. 509, 530 (2016). In *Reid*, this Court found that reputational harm

included embarrassment, loss of friendships, loss of relationships, and other similar harm. *Id*.

The Selectwomen cite *In re Diana P.*, 120 N.H. 791 (1980) and *Appeal of Geekie*, 157 N.H. 195 (2008), suggesting that this Court should apply the common law definition of "defamatory meaning." Selectwomen's Br. at 25. That analysis is unhelpful, however, because the appropriate analysis would be to apply the common law definition of "adverse" and "affect." *See Id*. Despite significant research, there appears to be no common law definition of "adverse" and "affect" as those terms are used in the statutes here. Instead, the Selectwomen presume, without supporting, that the legislature intended a defamatory meaning, and then improperly suggest using the common law definition thereof.

Instead, applying the plain and ordinary meaning of, "adversely affecting the reputation" of a person, translates to, causing harm to a person's character as seen or judged by people generally. In short, the statement need not be false, and the damage to reputation need not be greater than that ordinarily defined.

Tejasinha alleged in his Complaint that his reputation was harmed. Appx. Vol. I at 11, ¶40. He specifically cited the breakdown of personal relationships directly resulting from the Selectwomen divulging the information. *Id.*

Thus, based upon the plain and ordinary meaning of "adverse" and "affect," Tejasinha has stated a viable claim for relief, and this Court should AFFIRM.

C. By Entering Non-Public Session and Sealing it, the BOS Determined That the Information Would, In Fact, Adversely Affect Tejasinha's Reputation. Thus, as a Matter of Law, the Information is the Type RSA 42:1-a, II (a) Prohibits From Disclosure.

A public entity bears a "heavy burden" to avoid disclosure. *Taylor v. SAU 55*, 170 N.H. 322, 326 (2017) (internal citation omitted). Thus, that is how the words in the applicable statutes should be interpreted.

The word "would" is used to express a possibility, probability, or presumption. MERRIAM-WEBSTER'S DELUXE DICTIONARY, 2134 (10th Coll. Ed. 1998). Thus, the term "likely would" preceding "affect adversely" in RSA 91-A:3, III should be read as requiring a higher probability/presumption that the information to be sealed would negatively impact someone's reputation. Therefore, to justify sealing the minutes, the BOS unanimously determined that there was a high probability/presumption that the sealed information would adversely affect Tejasinha's reputation.

RSA 42:1-a, II (a) requires only that it was probable or that there was a mere presumption, that the disclosure affect someone's reputation. In other words, it does not require that the person's reputation *was* adversely affected (more than RSA 91-A:3, III requires for minutes to be sealed), or that it was *likely* to be adversely affected, only that it was probable.

To conclude that RSA 42:1-a, II (a) requires that the information *actually have* caused damage to reputation would render RSA 91-A:3,

III meaningless as the official would avoid penalty for disclosing information that RSA 91-A:3, III meant to keep confidential.

Furthermore, the statutory scheme illustrates that the legislature intended to limit the grounds for dismissal. Indeed, RSA 42:1-a, II (a) does not allow removal for information divulged that was previously sealed under *any* provision of RSA 91-A:3, III. Instead, the legislature chose to specify which specific grounds under RSA 91-A:3, III would be a basis for removal if divulged. For example, RSA 91-A:3, III allows a public body to seal minutes if a non-public session pertains to terrorism or emergency functions. A public official cannot be dismissed for divulging such information. *See generally* RSA 42:1-a, II (a). Thus, when RSA 42:1-a, II (a) is read in conjunction with RSA 91-A:3, III, it appears that the legislature intended to limit the rationale under RSA 91-A:3, III, which if disclosed would constitute an oath violation. It does not appear to have intended that RSA 42:1-a, II (a) have its own, separate, higher standard to be analyzed either independently of, or in addition to, RSA 91-A:3, III.

Thus, because the BOS properly entered non-public session, because it properly sealed the session by finding that the information had a high probability of adversely affecting Tejasinha's reputation, it must be presumed that it met its heavy burden of excluding the public. As such, RSA 42:1-a, II (a) compels that the information have been kept confidential. Therefore, this Court should AFFIRM.

D. The Divulged Information is Facially Adverse to Tejasinha's Reputation, but the Context Cannot be Ignored.

This Court does not read statutes in a manner, and presumes that the legislature did not intend an interpretation, that would lead to an absurd or illogical result. *STIHL, Inc. v. State of N.H.*, 168 N.H. 332, 334-335 (2015). Furthermore, when applying facts to a statute, this Court does not review the facts in a vacuum. *See e.g. Roy v. Hampton*, 108 N.H. 51, 52-53 (1967). Instead, the facts must be reviewed, "in the light of all the circumstances of the case." *Id*.

The statements themselves are facially harmful to Tejasinha's reputation because they refer to him and connect him with adverse actions relative to the ability for individuals to speak before, and submit Citizen Inquiries to, the BOS. Appx. Vol. I at 10-11, ¶¶36. However, the statements are also harmful to his reputation when considered in the larger context in which they were spoken. *Id.* at ¶¶36-39.

On May 21, 2018, the BOS brought its business to a complete standstill in reaction to Tejasinha's May 12 Citizen Inquiry and only his inquiry. Appx. Vol. I at 8-9, ¶¶30-31 and 58-59. Only Tejasinha was specifically discussed during the June 4 non-public session. *Id.* at 9-10 ¶¶32-33, and 21-22, ¶32. The information Newton caused the Town Administrator to divulge specifically identified Tejasinha. *Id.* at 10, ¶36. The decision Newton divulged related specifically to Tejasinha's, and only Tejasinha's, May 12 Citizen Inquiry. *Id.* Tejasinha's name, and only Tejasinha's name, was referenced immediately prior to Newton

publicly divulging the decision to no longer address criticisms of the BOS in public. *Id.* Only Tejasinha's name, was entered into the BOS meeting minutes (both public and non-public) and connected to the decision to no longer allow Citizen Inquiry forms because they were being used for "personal attacks." *Id.* at 84:41-46 – 85:1-3. On June 18, the Selectwomen discussed the Citizen Inquiry form, calling for a consensus for its elimination and noting that it had been "abused." *Id.* at 61, n.4. That is the same information discussed during the June 4 non-public session and still under seal. *Id.* at 192. Later, the BOS identified Tejasinha, and only Tejasinha, when discussing the expenses related to his RSA 91-A requests, which he submitted to learn more about the June 4 and later June 18 BOS meetings and decisions. *Id.* at 86:43-46 – 87:1-3, and 89:18-20. The same information was publicly reported in the newspaper and broadcast via video. *Id.* at 7-8, ¶24, 61, n.4, and 60, n.3.

In short, Tejasinha was the only person publicly connected to the negative comments about, and ultimate elimination of, the Citizen Inquiry form and the BOS' decision to not consider criticisms of BOS in public. While that is enough to establish that Tejasinha's reputation would be adversely affected, he lost two professional relationships and friendships as a direct result of Selectwomen divulging the information. Appx. Vol. I at 11, ¶40 and 218, ¶17. Thus, Tejasinha's reputation was, in fact, harmed.

Therefore, Tejasinha has sufficiently pleaded adverse affect to his reputation, and this Court should AFFIRM.

II. THE SUPERIOR COURT SUSTAINABLY EXERCISED ITS DISCRETION IN DENYING THE SELECTWOMEN'S MOTION FOR ATTORNEYS' FEES.

New Hampshire follows the American Rule, requiring each party to bear his/her own fees and costs. *Bedard v. Town of Alexandria*, 159 N.H. at 744. That rule is premised upon the concept that litigants should not be penalized simply for prosecuting a lawsuit. *Harkeem v. Adams*, 117 N.H. at 690.

Here, there are no overriding considerations of justice compelling an attorney fee award based upon either, (a) the bad faith exception, or (b) the substantial benefit exception. *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. at 718.

A. Tejasinha Vigorously and Carefully Prosecuted Count II, Which is Not Evidence of Bad Faith.

One of the important underlying reasons for New Hampshire's rule that each party bear his/her own attorney's fees and costs is to avoid deterring individuals of limited resources from prosecuting lawsuits. *Harkeem v. Adams*, 117 N.H. at 690. Thus, only where a party acts, "'in bad faith, vexatiously, wantonly, or for oppressive reasons,'" should the court deviate from the general rule and enter an award of attorney's fees for the prevailing party. *Id*. at 690-91 (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, n.4 (1968)).

1. As a Case of First Impression, Tejasinha Brought His Claim in Good Faith Based Upon His Pre-Suit Investigation, and RSA 42:1-a, II (a)'s Plain Language.

This is not a case where the Selectwomen were, "forced to seek judicial assistance to secure a clearly defined and established right." *Cf. Harkeem v. Adams*, 117 N.H. at 691. This is a situation in which the evidence confronting Tejasinha evidenced a violation of RSA 42:1-a, II (a), as the specific issue had not been addressed by *any* court previously. *Cf. Id*. at 691-692 (admonishing the defendant for subjecting the plaintiff to new arguments, while acting contrary to established case law and statutory mandates). Indeed, it is not bad faith for a plaintiff to bring and prosecute a claim that had never been raised in the past. *See Id*. at 692; *see also Bedard v. Town of Alexandria*, 159 N.H. at 744 (affirming the trial court's finding of no evidence of bad faith where the action was "based upon a reasonable misunderstanding of the applicable statute").

Before filing suit, Tejasinha conducted a thorough investigation about the events that led to the divulgence of the information discussed during the June 4, 2018 non-public session. Appx. Vol. I at 214-222, 298-315, and 317-326. Tejasinha had a right to rely upon the information the Town provided him, including that which was provided in response to his RSA 91-A requests. Appx. Vol. II at 116.

Based upon his pre-suit investigation, Tejasinha submitted developed, logical, and sound legal argument as to why the BOS could not have opined or reached an agreement to divulge, as a matter of law,

given RSA 91-A:3, III's recording requirements. *See generally* Appx. Vol. I at 58-73, 115-121, 188-211, and Vol. II at 18-20. Though the Superior Court held that the divulgence was not unlawful, it nevertheless admonished the BOS to record such decisions to divulge in the future. Selectwomen's Ad. at 45, n.4. Thus, it validated Tejasinha's concerns.

Therefore, there is no evidence that Tejasinha initiated the suit in bad faith, and this Court should AFFIRM.

2. Tejasinha Carefully Litigated His Case, While Continuing to Move the Case Forward On its Short Track.

This is not the type of case where the plaintiff engaged in bad faith conduct at all, but certainly none that, "persisted throughout the entire litigation," or which amounted to conduct that delayed or obstructed the litigation. *Cf. LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 260 (2006). Indeed, there is significant information missing from the Selectwomen's arguments about Tejasinha's litigation conduct.

First, the Selectwomen spent *three* days deposing Tejasinha. Appx. Vol. II at 137. However, he was deposed for *both* Counts. *Id.* at 110. To ensure that he answered questions truthfully and as completely as possible, he sought clarity of some questions. *See e.g. Id.* at 143-156. Finally, Tejasinha's deposition did not occur until well after the Selectwomen filed their dispositive motions, and they did not use any portion thereof to supplement their motions. Thus, the

deposition's length had no impact on the dispositive motions or the case generally.

Second, the Selectwomen filed substantial pleadings to which Tejasinha had to respond – one of which they filed *twice*. Appx. Vol. I at 28 and 129 and 137. The two dispositive motions, which they filed almost back-to-back, required responsive pleading to both, yet they could have consolidated them into one pleading. *See Id.* It is not reasonable to believe that the Superior Court would have had sufficient time to rule on the Motion for Judgment on the Pleadings prior to the deadline for filing Motions for Summary Judgment. Appx. Vol. III at 3-4 (noting the preference for 60 days to rule on pr-trial motions and setting the dispositive motion deadline).

Furthermore, despite not developing arguments and/or raising arguments for the first time in their Replies, the Selectwomen refused to assent to Tejasinha submitting surreplies. Appx. Vol. I at 127 and Vol. II at 21. Had they assented, they would not have had to file additional pleadings objecting.

Third, Tejasinha did not prolong the litigation. For example, in preparing the original CSO, he attempted to keep the matter on a short track, with a full day trial initially scheduled for July 2019. Appx. Vol. III at 4. However, the Selectwomen's two dispositive Motions, caused trial to be continued from July 26, 2019 to January 2020. Appx. Vol. III at 13.

Earlier in the litigation, the Selectwomen opted not to agree to a form of ADR, stating through counsel, that "mediation is NOT

appropriate in this case based upon the claims that have been made." Appx. Vol. II at 127 and Appx. Vol. III at 8. Through counsel, Tejasinha underscored the benefits of ADR, stating, "I am ok with waiving [the ADR requirement], but I always think it could be helpful regardless of the claims alleged." *Id*. The Selectwomen persisted with opting out. *Id.*

Later, neither the Motion for Judgment on the Pleadings, the Motion for Summary Judgment, nor discovery yielded any reason to cease pursuing Count II. In fact, through discovery, Tejasinha confirmed his prior suspicions that Newton instructed the Town Administrator to release some of the information. Appx. Vol. II at 124.

Furthermore, he submitted video evidence showing that Sharps discussed the sealed information on June 18. Appx. Vol. II at 67. There is no evidence of any other BOS member discussing the same information, or evidence that the other BOS members are culpable for divulging the sealed information. *Id.* Furthermore, the Superior Court also treated the June 18 disclosure arising from the June 4 non-public session. Selectwomen's Br. at Ad. 44.

Additionally, the "sensitive discussion" was about information pertaining to Tejasinha, and the divulged information was about him. Appx. Vol. I at 173, ¶6, 191 and 201-202.

Finally, there is absolutely no evidence in, or inferred by, the record that supports the claim that the Selectwomen and Tejasinha were political opponents, or that he brought this suit to achieve a political advantage. *See* Appx. Vol. I at 172-185.

Tejasinha brought Count II in good faith with the pre-suit information he had before him, and he continued to prosecute Count II diligently and in good faith based upon the information he continued to learn. Therefore, the Superior Court did not unsustainably exercise its discretion in declining to find bad faith. Thus, this Court should AFFIRM.

B. Applying the Substantial Benefit Exception to the Facts Here Does Not Further its Purpose of Correcting Errors and Sharing the Benefit Among a Similarly Situated Class of Beneficiaries.

The substantial benefit exception has not been applied against a private individual in favor of a governmental entity, and it should not be. *See e.g. Bedard v. Town of Alexandria*, 159 N.H. at 746.

1. The substantial benefit exception does not apply to the facts of this case.

This Court has shifted fees only where a *plaintiff* prevailed against a defendant municipality or representatives thereof conferring a benefit on those similarly situated. *See e.g. Irwin Marine, Inc. v. Blizzard, Inc.*, 126 N.H. 271 (1985) (holding that plaintiff conferred a substantial benefit for potential purchasers by successfully seeking a requirement of fairness in the Laconia's public bidding procedures); *see also e.g. Silva v. Botsch,* 121 N.H. 1041 (1981) (holding that a selectman removed by other board members using an illegal process conferred a benefit upon other public officials).

That is because, "a governmental entity's responsibilities include protection of the public interest, and therefore, the award of attorney's

fees for successfully meeting this responsibility is neither necessary nor warranted." *Bedard v. Town of Alexandria*, 159 N.H. at 746.

Furthermore, the substantial benefit exception was not intended to be a penalty. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396-397 (1970). Its purpose is to, "impose the attorney's fees upon the class that has benefited from them, and that would have had to pay them had it brought the suit." *Id*. Thus, for example, when the plaintiffs prevailed against a corporation to set aside a vote based upon a misleading proxy solicitation, the Court awarded fees to the plaintiffs because they conferred a benefit upon the other shareholders. *Id*.

Notably *Silva v. Botsch* is *not* analogous to this case as the Selectwomen suggest. 121 N.H. 1041 (1981). In *Silva*, the public official was unlawfully removed. *Id.* at 1042. The board did not utilize RSA 42:1-a or another legal mechanism to remove him. *Id.* (explaining that he was removed illegally). That official also used his own funds to prosecute his case, and he recovered his fees against other public officials, not private individuals. *Id*. at 1042-1044.

In *Foster v. Town of Hudson*, the appointed police chief was removed "without just cause" by the municipality. 122 N.H. 150, 151 (1982). After successfully prosecuting his petition, he was reinstated and awarded his fees *from the municipality*. *Id*. at 152.

The common theme is that the larger body politic engaged in an unlawful or inappropriate act which harmed its constituents, and which one (or multiple) constituents successfully prosecuted for the

benefit of all other constituents using personal funds. None of those facts exist here.

Tejasinha, an Ashland constituent, utilized the statutory check on municipal officials, RSA 42:1-a. The Selectwomen were not dismissed or forced to resign at all, never mind by an unlawful process. *See generally* Selectwomen's Ad. at 47. Furthermore, the Town paid *all* of the Selectwomen's attorneys' fees; they did not use private funds. Appx. Vol. II at 72.

Thus, the Superior Court did not unsustainably exercise its discretion in declining to apply the substantial benefit exception here.

2. Expanding the substantial benefit exception will chill litigants from using RSA 42:1-a's remedy.

The American Rule exists to avoid deterring litigants of limited resources from prosecuting lawsuits. *Harkeem v. Adams*, 117 N.H. at 690 (citing *Tau Chapter v. Durham*, 112 N.H. 233 (1974) and *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. at 718. Indeed, "every person has the right to go to court." *Tau Chapter v. Durham*, 112 N.H. at 237.

When public officials administer a town's affairs, "they are subject to the control of the court …" *Sherburne v. Portsmouth*, 72 N.H. 539, 541 (1904). Accordingly, RSA 42:1-a, requires dismissal petitions be filed in Superior Court. It exists as a statutory check on town officials and is therefore an, "integral part of our governmental system of checks and balances." *See Fischer v. Superintendent, Strafford County House of Corrections*, 163 N.H. 515, 518 (2012) (explaining that

separation of powers is integral to our system of government, and that each branch of government acts as a check on the other). The system of checks and balances prevents the, "tyranny of any one branch of the government from being supreme." *Id*.

The Selectwomen are asking this Court to transform the substantial benefit exception into a punishment. If that happens, then the public will lose its only statutory check to ensure its public officials are upholding their oaths, by deterring individuals from invoking the statutory check of dismissal. Furthermore, it may decrease the public trust of relying upon information received from a municipality and/or a municipality's attorney in response to Right-to-Know Requests. Thus, it is not appropriate to expand the substantial benefit exception to the facts here.

Therefore, the Superior Court sustainably exercised its discretion declining to apply or expand the substantial benefit exception. Thus, this Court should AFFIRM.

ARGUMENT RESPONSIVE TO INTERLOCUTORY APPEAL

Statute at Issue

A public body may enter non-public session if it intends to discuss,

> "Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting."

RSA 91-A:3, II (c).

Applicable Rule

Where, as here, the statute provides an individual who is the subject of a non-public session, the right to request an open meeting, the public body must necessarily provide prior notice that it intends to discuss him in such a session. *See Johnson v. Nash*, 135 N.H. at 537 (interpreting the former RSA 91-A:3, II (a)).

Using this rule, this Court should AFFIRM the Order denying the Motion to Dismiss.

III. REQUIRING PRIOR NOTICE GIVES EFFECT TO THE STATUTE AND ACCOMPLISHES RSA 91-A's POLICY GOAL OF ACHIEVING OPENNESS AND ACCOUNTABILITY.

This Court cannot interpret a statute in a manner that renders any part of it meaningless. *See Johnson v. Nash*, 135 N.H. at 537, *see also Strike Four, LLC v. Nissan N. Am., Inc.*, 164 N.H. 729, 746 (2013). Furthermore, this Court interprets RSA 91-A in favor of openness. *Censabella v. Hillsborough County Atty.*, 171 N.H. at 426. Interpreting RSA 91-A:3, II (c) as requiring advance notice of the public body's

intent to discuss an individual in non-public session furthers that goal and is consistent with the statutory framework.

A. Ordinary Rules of Statutory Construction Require That the Town Have Provided Prior Notice of The Non-Public Session.

Although this Court cannot add or remove words the legislature did not see fit to, it cannot interpret a statute in a manner that would lead to an absurd result. *Great Traditions Home Builders, Inc. v. O'Connor*, 157 N.H. 387, 388 (2008). This Court does not read statutory provisions in isolation, but with the overall statutory scheme in mind. *Chesley v. Harvey Indus.*, 157 N.H. 211, 213 (2008).

Generally, a public body must provide a notice of its general intent to hold a non-public session. RSA 91-A:2, II. [17] However, the statutory provisions regarding non-public sessions require some type of prior notice that it intends to discuss an individual pursuant to RSA 91-A:3, II (c). *See Moore v. Taylor*, 44 N.H. 370, 373 (1862) (explaining that a later provision of a statute considering the same subject matter

[17]Until now, the Town has never addressed whether the Town properly noticed the June 4, 2018 BOS meeting pursuant to RSA 91-A:2, II. *Compare* Appx. Vol. III at 33-39 and 54-61 *with* Town Br. at 11. The Superior Court did not address whether the June 4 meeting was properly noticed pursuant to RSA 91-A:2, II, and the Complaint does not address whether it was properly noticed pursuant to RSA 91-A:2, II. *See generally* Town Ad. at 3-6 and Appx. Vol. 1 at 3-14. The issue in this case is whether the Town provided prior notice that the BOS intended to discuss Tejasinha in non-public session pursuant to RSA 91-A:3, II (c). Thus, this Court should reject the assertion that the Parties do not dispute that the June 4 meeting was properly noticed pursuant to RSA 91-A:2, II.

qualifies the earlier provision). RSA 91-A provides specific rules for the types of meetings that may be held in non-public session and individual rights pertaining to such sessions. *See generally* RSA 91-A:3, II.

One such right is to, in certain circumstances, request an open meeting. *See e.g.* RSA 91-A:3, II (c). In fact, RSA 91-A:3, II (a) and RSA 91-A:3, II (c) are the only non-public session provisions which allow the subject of the session to request an open meeting. *See generally* RSA 91-A:3, II. RSA 91-A:3, II (a) is the only subsection that qualifies that right by requiring that the requesting party have some underlying right to a meeting. On the other hand, RSA 91-A:3, II (c) contains no such qualifier.

RSA 91-A:3, II (c) reads,

> "II. Only the following matters shall be considered or acted upon in nonpublic session:
> …
> (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, *unless such person requests an open meeting* …"

(emphasis added). The former RSA 91-A:3, II (a), which the *Johnson* Court interpreted, read in relevant part,

> "II. … A motion to go into executive session stating which exemption under this paragraph is claimed shall be made only when the body or agency is considering or acting upon the following matters:

> (a) The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him, *unless the employee affected requests an open meeting* …"

(emphasis added). The emphasized language in both is virtually identical. In *Johnson*, the Court interpreted the statement, "unless the employee affected requests an open meeting," as the employee's statutory right. *Johnson v. Nash*, 135 N.H. at 537.

The *Johnson* Court explained the importance of prior notice, noting that it is not reasonable to expect that an employee would, "attend every public meeting in which their termination could conceivably be considered." *Id*. Similarly, it cannot be expected that every member of the public attend every BOS meeting, or that he should expect he will be discussed in a non-public session pursuant to RSA 91-A:3, II (c), if the BOS did not provide *any* notice that it intended to discuss him in such a session.[18] As recently as 2017, the New Hampshire Municipal Association expressed agreement with that interpretation:

> "[RSA 91-A:3, II (c)] should be used only when absolutely necessary – it should not be used as a pretext just to discuss someone

[18] Of course, better practice would be to provide personal notice because if the point of RSA 91-A:3, II (c) is to protect reputation, then it seems absurd to publicly advertise that. Again, this appeal is not about *personal* notice, it is about not providing *any* notice at all.

> whom a member of the public body dislikes. Further, applying the rationale of *Johnson v. Nash* … the clause, 'unless such person requests an open meeting' suggests that the person must be notified and given an opportunity to request an open meeting …"

Appx. Vol. III at 51-52.

To find otherwise, the clause, "unless such person requests an open meeting" would be rendered meaningless if the individual has no knowledge that the public body intended to discuss him in non-public session. Thus, to give effect to that clause, the *Johnson* holding must extend to RSA 91-A:3, II (c) requiring that prior notice be given.

Considering the above, it is unsurprising that the *Brown* Court failed to find a right to *personal* notice, because it dealt with the hiring of a public employee, which does not include the right to request an open meeting. *Brown v. Bedford Sch. Bd.*, 122 N.H. 627, 629-630 (1982), *see also* RSA 91-A:3, II (b).

The Court further explained that plaintiffs were not entitled to personal notice, not because they lacked an underlying property right, but because, (a) their collective bargaining agreement did not allow for personal notice, and (b) they received advance notice through their representative. *Brown v. Bedford Sch. Bd.*, 122 N.H. at 629 and 631-632. Those circumstances do not exist here, and this case is about some type of advance notice, not personal notice.

This Court in *Stoneman* rejected the argument that the plaintiff had sufficient notice simply because the plaintiff knew action would be

taken on or prior to a certain date. *Stoneman v. Tamworth School District*, 114 N.H. 371, 375 (1974). The Court started with the presumption that the session at issue was a public, not executive (or non-public) session. *Id.* at 374. In doing so, it analyzed whether there were grounds for an executive session, *not* whether there was a property interest to allow the plaintiff to request an open meeting. *Id.* The Court held that the school board violated RSA 91-A for improperly holding an executive session without providing proper prior notice. *Id.* at 375.

The Attorney General agrees that advance notice about a non-public session is required. Town Appx. at 29. The memorandum explains that, "other law may impose requirements that notices of certain hearings and *meetings* where particular actions may be taken include specific additional information." *Id.* (emphasis added). Thus, the Attorney General's interpretation supports the conclusion that RSA 91-A:3, II (c) requires notice that the public body intends to discuss the individual in non-public session.

It is uncontested, and the Superior Court agreed, that the Town failed to provide any prior notice that it intended to discuss Tejasinha in non-public session. Appx. Vol. I at 9-10, ¶¶34-35 and ¶43 and at 22, ¶¶34-35 and ¶43, *see also* Town Ad. at 20-21. Thus, as pleaded, Tejasinha has stated a viable claim that the BOS did not properly provide prior notice of the non-public session.

Thus, this Court should AFFIRM.

B. Interpreting Subsection (c) to Require Prior Notice Furthers RSA 91-A's Purpose of Public Access and Accountability.

"The purpose of [RSA 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.'" *N.H. Right to Life v. Dir. N.H. Charitable Trusts Unit*, 169 N.H. 95, 103 (2016) (quoting RSA 91-A:1). Thus, a court interpreting RSA 91-A must, "'broadly construe provisions favoring disclosure and interpret the exemptions restrictively.'" *Id*. at 103 (quoting *CaremarkPCS Health v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 587 (2016)). Indeed, resolving questions regarding RSA 91-A are done, "'with a view to providing the *utmost information* in order to best effectuate these statutory and constitutional objectives.'" *Green v. SAU #55*, 168 N.H. 796, 799 (2016) (quoting *CaremarkPCS Health*, 167 N.H. at 587) (emphasis added). Thus, the government has a, "heavy burden" when it comes to non-disclosure. *N.H. Right to Life v. Dir. N.H. Charitable Trusts Unit*, 169 N.H. at 111.

This Court should interpret RSA 91-A:3, II (c) in a way that favors holding an open meeting to act as a, "safeguard against improper official conduct …" *See Stoneman v. Tamworth School District*, 114 N.H. at 375. Similarly, *Johnson v. Nash* was not decided based upon an underlying due process right to a hearing[19], but instead was to

[19] This Court separately considered whether the defendant's procedural due process rights were violated in connection with the

protect the employee, "'from improper official conduct by compelling the government to make public the considerations on which its actions are based.'" 135 N.H. at 537-538 (quoting *Stoneman*, 114 N.H. at 374).

This Court has previously held that in light of a plaintiff's strained relationship with the board, and because of his concern that his reputation would be "distorted," an open meeting would have been a "safeguard against improper official conduct." *Stoneman v. Tamworth School District*, 114 N.H. at 376.

Thus, *Stoneman* favors Tejasinha's argument for advance notice because he had the right to request an open meeting and allowing him to request such an open meeting would ensure that his reputation would not be "distorted." Making such a request was impossible without prior notice.

Though this Court need not look beyond the plain language of the statute because it is not ambiguous, the legislative history supports construing RSA 91-A:3, II (c) in favor of requiring prior notice. *See New Eng. Backflow, Inc. v. Gagne*, 172 N.H. 655, 661 (2019) (explaining that the Court only looks to legislative history if the statute is ambiguous). The legislature amended RSA 91-A:3, II (a) to qualify the right to request an open meeting to situations in which the employee has a right to a meeting. Because the legislature did not amend RSA 91-A:3, II (c) as it did subsection (a), this Court should not add the same

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lawsuit; it did not hold that (or even consider whether) the employee had a due process right to an open meeting. *See generally Johnson v. Nash*, 135 N.H. 534 (1992).

limitation the legislature added to subsection (a). *See Strike Four, LLC v. Nissan N. Am., Inc.*, 164 N.H. at 735 (explaining that the court should not add words the legislature did not see fit to include or remove those it did not see fit to exclude). Furthermore, the history indicates that the legislature did not want to diminish rights by amending the statute. Town Appx. at 30. Instead the purpose was to force the public body to comply with a request for an open meeting where the employee has a right to a meeting. *Id*. at 45. The legislature did not similarly amend subsection (c), suggesting that it was content that subjects discussed pursuant to subsection (c) have an unqualified right to an open meeting. *See generally* RSA 91-A:3, II (c).

Considering that the legislature categorically exempted personnel matters from disclosure, which as a result are not as narrowly interpreted as other exemptions, the amendment to subsection (a), but not (c) makes sense. *See e.g. Reid v. N.H. AG*, 169 N.H. at 519 (explaining that personnel practices exceptions are reviewed less rigorously). Employee matters are personnel matters. *Id*. at 522-523 (explaining that personnel matters necessarily include employee relations or human resources). Thus, the legislature has opined that the government has an interest in protecting its internal personnel matters from disclosure. *See* RSA 91-A:5, IV.

On the other hand, the public body does not have a similar interest in privacy when discussing a member of the public. Ensuring that the person discussed can request an open meeting guarantees governmental accountability by ensuring the public body does not

abuse or overuse subsection II (c) – it ensures that there is some person besides the governmental entity to act as a check against using subsection II (c) inappropriately. In short, requiring notice serves the purpose of allowing that person to hear, and potentially record, what the public body and its members have to say about him, and it may afford him the opportunity to be able to defend himself on record against those allegations. At the very least, it would allow him the opportunity to publicly counter the narrative thereby preserving his reputation.

Thus, interpreting RSA 91-A:3, II (c) to require prior notice is consistent with the overall statutory scheme of broad public access, and the ability to hold public officials and public bodies accountable for their actions.

This Court should AFFIRM the Superior Court's Order.

CONCLUSION

Cross-Appeal

Because Tejasinha alleged sufficient facts in his Complaint illustrating that his reputation would be and was, "adversely affected," he stated a viable claim for relief pursuant to RSA 42:1-a, II (a). Therefore, this Court should AFFIRM the Order denying the Motion for Judgment on the Pleadings.

The Superior Court did not unsustainably exercise its discretion declining to find that Tejasinha acted in bad faith prosecuting Count II given the absence of supporting evidence. Furthermore, this case is distinguishable from other substantial benefit exception cases, and the Superior Court did not unsustainably exercise its discretion in declining to expand the exception. Therefore, this Court should AFFIRM the Order denying attorneys' fees.

Interlocutory Appeal

Normal rules of statutory construction require that the Town have provided prior notice that it intended to hold a non-public session pursuant to RSA 91-A:3, II (c) about Tejasinha. This Court need not address whether *personal* notice is required, given that Tejasinha alleges, the Town concedes, and the Superior Court agreed, that the Town provided no notice at all. As such, this Court should AFFIRM the Superior Court's Order and REMAND the matter for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Tejasinha continues to believe that oral argument will be helpful to the Court for the reasons stated in his Opening Brief. Attorney Stephen T. Martin will present argument for the Appellant.

Dated: November 19, 2020

Respectfully submitted,
Tejasinha Sivalingam,
By, The Law Offices of Martin & Hipple, PLLC

/s/Stephen T. Martin

Stephen T. Martin, Esq.
22 Bridge Street; Suite 3
Concord, NH 03301
603 856 0202 (Ext. 1)
smartin@nhlegalservices.com
NH Bar#: 19567

CERTIFICATE OF COMPLIANCE

COMES NOW Attorney Stephen T. Martin, Counsel for the Appellant/Cross-Appellee, Tejasinha Sivalingam, and hereby certifies that this Brief was produced using standard sized typewriter characters or size 13 font, and that excluding the Cover Page, Table of Contents, Table of Authorities, Statutory Provisions, the Certificate of Compliance, Certificate of Service, Signature Block, and Addendum, this brief contains 13,958 words.

Dated: November 19, 2020

/s/Stephen T. Martin
Stephen T. Martin, Esq.

CERTIFICATE OF SERVICE

COMES NOW Attorney Stephen T. Martin, Counsel for the Appellant/Cross-Appellee, Tejasinha Sivalingam, and hereby certifies that I have caused a copy of the Brief, Addendum, and Appendix to be served upon Counsel for the Appellees/Cross-Appellants and Counsel for the Cross-Appellee Town using this Court's electronic filing system.

Dated: November 19, 2020

/s/Stephen T. Martin
Stephen T. Martin, Esq.