

January 25, 2021

Chairwoman Sharon Carson
Senate Judiciary Committee
The New Hampshire State Senate
107 North Main Street
Concord, NH 03301

Re: Our Opposition to Attorney Mark Broth's Proposed Amendment

Dear Chairwoman Carson and the members of the Senate Judiciary Committee:

We are a coalition of individuals and organizations opposing SB39, which was heard on January 19, 2021 before this Committee. We write to respectfully oppose the amendment that was proposed to the Committee on January 21 by Attorney Mark T. Broth. Like SB39, Attorney Broth's amendment, if enacted, would be harmful to government accountability, as well as undermine our Right-to-Know Law's presumption in favor of transparency. All public employees work for us, not themselves. In this historic moment of discussion on government and police transparency, we should be making government records more available, not less. Rather than consider this problematic amendment—which was not subjected to a public hearing—we believe that SB39 should be voted *inexpedient to legislate* by the Senate.

Attorney Broth's amendment is problematic for several reasons. *First*, the proposed amendment's exemption for "employee personnel records as defined in RSA 275:56" (excluding records pertaining to "a final determination of proven employee misconduct") is overbroad, is unnecessary, and, in our view, violates Part I, Article 8 of the New Hampshire Constitution which dictates that "the public's right of access to ... records shall not be unreasonably restricted." Under the current balancing test, sensitive information that has no nexus to an official's public duties—like private citizen names, medical information, home addresses—are already routinely redacted and withheld because the public interest is minimal. However, this amendment categorically excludes "personnel records" more broadly and, in so doing, captures information that is not personal or sensitive in nature and, instead, does have a nexus to the performance of a government official's duties. Indeed, the current balancing test has applied to other public records for nearly 50 years and is well established. New Hampshire courts have already applied this test in other contexts, and many other states have a similar balancing test for personnel information. All of these decisions provide guidance to municipalities and government agencies as to how to employ the current balancing test.

Second, this amendment purports to exempt from disclosure internal investigations that are not part of a "final determination of proven misconduct." However, there is a compelling public interest in disclosing internal employee investigations regardless of the outcome so the public can vet and evaluate the integrity of the investigation. After all, it is the public that is paying for these investigations. The proposed amendment does not recognize this public interest and operates on the assumption that all government investigations are comprehensive and accurate without any need to provide the public a window into this process.

For example, the exemption in the proposed amendment would essentially overturn the recent Superior Court decision in *Provenza*, which ruled that an internal investigation of a police officer's alleged excessive force should be public, even if the report concluded that the allegation was unsustainable, because it allows the public to evaluate the integrity of the investigation. As the *Provenza* Court noted, "the public has a significant interest in knowing how the police investigate such complaints."¹ The New Hampshire Supreme Court has already concluded that the "public has a significant interest in knowing that a government investigation is

¹ See *Provenza v. Town of Canaan*, No. 215-2020-cv-00155, at *17-18 (Grafton Cty. Super. Ct. Dec. 2, 2020) (currently on appeal), https://www.aclu-nh.org/sites/default/files/field_documents/public_order_on_merits.pdf.

comprehensive and accurate.” See *Reid. v. N.H. Att’y Gen.*, 169 N.H. 509, 532 (2016). However, under the proposed amendment, the public would not obtain access to many investigatory reports that would help the public learn about whether such investigations are “comprehensive and accurate.”

As yet another example, if a police department habitually sweeps misconduct under the rug by not disciplining officers or engaging in meaningful internal investigations, this amendment would give the public no insight into that flawed investigatory process. What is the end result of this lack of transparency if this amendment is adopted? Police departments with poor internal disciplinary practices will never be held accountable because the public will never know that their practices are faulty. Indeed, under this amendment, portions of an audit report criticizing the Salem Police Department’s internal affairs investigation that the public ultimately did get access to could be deemed exempt from disclosure, as many portions do not implicate a “final determination of proven misconduct.” This highlights the overbreadth of the amendment. Just recently—on January 21, 2021—the Superior Court concluded that portions of this Salem audit report should be released because “the public has a strong interest in understanding how workplace misconduct is handled by the police department.”² The Court added: “The public interest is at its zenith, and ... officers’ privacy concerns are at their nadir, with respect to accusations of misconduct towards members of the public under color of law.”³ This decision further confirms that the current balancing test works and that there is no need for further legislation.

To suggest that the public is only entitled to documents related to “final determination[s] of proven misconduct” is also at odds with the work of the LEACT Commission, which found that reforms were needed in the area of internal investigations of police misconduct. The Commission noted: “Individual law enforcement agencies routinely conduct internal affairs investigations of the officers in their agencies. As stated above, such investigations are not regulated by a uniform policy or procedure.” To address this, the Commission recommended the creation of an independent statewide agency, with public members, to ensure the integrity and accuracy of the internal investigations.⁴

Third, and relatedly, the importance of having access to investigations regardless of outcome applies outside the context of the police. Under this amendment, it is not clear whether the public would have received access to portions of an internal investigation report that the public ultimately received concerning how the Concord School District responded to allegations that a teacher sexually abused students.⁵ This shows, yet again, that the amendment is overbroad and would deprive the public of valuable information. The disclosure of this report was critical for the public and the press to hold the Concord School District accountable.

Finally, Attorney Broth justifies the amendment by arguing that the disclosure of “unfounded” or “unsubstantiated” allegations can cause stigma to public employees and therefore should be secret.⁶ At the outset, this secrecy ignores the fact that public officials are paid by taxpayer dollars and work for us. This concern is also mitigated by the fact that the public would know that any allegation was deemed unfounded.

² See *Union Leader Corp. v. Town of Salem*, No. 218-2018-cv-01406, at *23 (Rockingham Cty. Super. Ct. Jan. 21, 2021), https://www.aclu-nh.org/sites/default/files/field_documents/final_order_1-22-2021_10.12.7_5261469_ba990cec-7536-4a32-806b-6ac36e0ea781.pdf.

³ *Id.* at *25.

⁴ The LEACT Commission’s August 31, 2020 Report and Recommendation can be found here. See <https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf>. This language and recommendation can be found at Pages 12 and 17-18.

⁵ <https://www.concordmonitor.com/Independent-report-district-administrators-Leung-investigation-Concord-NH-35198606>.

⁶ Attorney Broth’s use of the Atlanta bomber tragedy is not apt, as it was misconduct by law enforcement that led to the unfair public scrutiny. Of course, such misconduct—and investigations related to it regardless of outcome—should be public so the public can hold public officials accountable.

Attorney Broth’s argument also sets aside the reality that, in the criminal defense context, criminal defendants are routinely *publicly* charged with crimes even before they have received a hint of due process. This is because, notwithstanding any prejudice that they may confront by this public disclosure, there is value in the public learning about whether the criminal justice system is operating fairly and effectively, regardless of whether the person is later acquitted or convicted. The same is true for the discipline process of public employees. It is important that the public learn how this process works, regardless of the outcome. Indeed, since the May 2020 New Hampshire Supreme Court decisions, we have seen public examples of how such discipline processes may be flawed. Last year, for example, an arbitrator reinstated Manchester police officer Aaron Brown despite him engaging in racist speech on a Department cell phone.⁷ This disclosure has raised questions by some about the integrity of arbitration decisions that are part of the police discipline process. Without disclosure of such decisions—regardless of outcome—the public cannot fully learn about the integrity of this process.

In short, the proposed amendment, like SB39, should be rejected. We respectfully ask that the Senate vote SB39 *inexpedient to legislate*.

Thank you for your consideration.

Best,

| | | | |
|--|--|--|---|
| Julian Jefferson, Esq. Criminal Defense Member of LEACT Commission | Ronelle Tshiela Public Member and Co- Founder, Black Lives Matter Manchester, NH, LEACT Member | Joseph Lascaze Smart Justice Organizer ACLU of New Hampshire, LEACT Member | James T. McKim President of the Manchester, NH NAACP, LEACT Member |
| Richard C. Gagliuso, Esq. New Hampshire Press Association; New England First Amendment Coalition | Gregory V. Sullivan, Esq. Union Leader Corporation | Chuck Douglas, Esq. Bow Times; New Hampshire Press Association | Cynthia Mousseau New England Innocence Project |
| Gilles Bissonnette, Esq. ACLU of New Hampshire Legal Director | Katherine Cooper, Esq. New Hampshire Association of Criminal Defense Lawyers | David Saad, President, Right to Know New Hampshire | Justin Silverman New England First Amendment Coalition |
| Lawrence Vogelmann, Esq. | Tristan Husby Unitarian Universalist (UU) Action New Hampshire | The Rev. David Grishaw- Jones Pastor, Community Church of Durham, United Church of Christ | Margaret Fogarty, NH Program Director American Friends Service Committee |

⁷ https://www.unionleader.com/news/politics/local/police-chief-saddened-and-sickened-by-ruling-about-cop-texting-racist-statements/article_97dc13f4-8336-55b8-a65a-1fc37eccfa50.html.