



New England  
First Amendment Coalition

**Statement by Gilles Bissonnette, Legal Director of the ACLU-NH  
Senate Judiciary Committee  
Senate Bill 342  
January 25, 2022**

I am the Legal Director of the American Civil Liberties Union of New Hampshire (ACLU-NH)—a non-profit organization working to protect civil liberties throughout New Hampshire for over fifty years. I appreciate the opportunity to testify today in opposition to SB342, which could be construed to expand the circumstances under which governing bodies can prevent disclosure of meeting minutes of nonpublic sessions—including with respect to “personnel discipline and investigations.”

I am also testifying on behalf of the New England First Amendment Coalition and the *Bow Times*, whose editor is Attorney and former New Hampshire Supreme Court Justice Chuck Douglas. The New England First Amendment Coalition defends, promotes, and expands public access to government and the work it does. The Coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, librarians, and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment.

We believe that this Committee should deem this bill *inexpedient to legislate* for two reasons.

*First*, this area of law concerning how public “personnel discipline and investigation” information should be handled is currently in flux. There are two pending cases potentially implicating the interpretation of RSA 91-A:3. For example, the Merrimack Superior Court held on June 10, 2021 that RSA 91-A:3, II’s closed meeting provisions—which are analogous to the provisions of RSA 91-A:3, III at issue here concerning the secrecy of nonpublic meeting minutes—should be construed to make Police Standards and Training de-certification hearings presumptively public. There, the Court held that, in deciding when an official’s reputational interest warrants closure of a public meeting, this statute should be construed to require a balancing of the public interest against the harm to reputations which would likely result from permitting transparency. The Court explained that “[w]ithout such a balancing test, any information that might mar a person’s reputation would suffice to close a hearing from public view. This would be the case regardless of the weight of the public interest and regardless of whether the likely harm to reputation would be defamatory or deserved.” This case is still pending, and this decision is attached.

The second case is *Provenza v. Town of Canaan* where the New Hampshire Supreme Court is considering in the public records context how the privacy interests of a police officer should be balanced against the public interest in disclosure in the context of a police investigatory report. *See Provenza v. Town of Canaan*, No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that an internal investigation report concerning an allegation that an officer engaged in excessive force and that found the misconduct unsustainable is a public document, in part, because “the public has a significant interest in knowing how the police investigate such complaints”; currently on appeal to N.H. Supreme Court at No. 2020-0563 and argued on Oct. 20, 2021). This case too may shed light on how these interests should and will be balanced in the context of public meeting transparency under RSA 91-A:3. In short, as the courts are still considering how to balance these competing interests in the Chapter 91-A context, we feel that this Committee should await these decisions before taking final action.

Second, though this may not be the intent, we are concerned that this bill would weaken the law—and the recent *Union Leader Corp. v. N.H. Police Standards and Training Council* decision—in making information concerning “personnel discipline and investigations” less public, particularly insofar as this bill could be construed to eliminate *Union Leader Corp.*’s public interest balancing test in construing RSA 91-A:3’s transparency provisions, thereby mandating secrecy of this information in meeting minutes without examining the public’s interest. In the public records context, this information is not categorically secret. Rather, as the New Hampshire Supreme Court held in two decisions issued in May 2020, the disclosure of this personnel/disciplinary information is determined by a public interest balancing test. *See Union Leader Corp. v. Salem*, 173 N.H. 345 (2020); *Seacoast Newspapers, Inc. v. Portsmouth*, 173 N.H. 325 (2020). This test balances the public interest in disclosure against any privacy or governmental interests in nondisclosure. In other words, the public interest must be considered, and this test explicitly evaluates whether an employee has a legitimate privacy interest at stake.

Though it may not be the intent, this bill, however, seems to suggest in the context of non-public session minutes under RSA 91-A:3, III that such information should never be public and that there is never a public interest in disclosing this information. This is inconsistent with Chapter 91-A, which presumes transparency. Public officials, after all, work for us and are paid by taxpayer dollars. If they have engaged in misconduct that relates to their official duties and this is presented to and discussed by a public body, we believe that information should generally be made public. However, this bill potentially would ignore this public interest and presume that such information is categorically secret. Moreover, transparency in how public bodies adjudicate investigatory and personnel discipline is vital. As the New Hampshire Supreme Court has explained, “[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate.” *See Reid v. N.H. Att’y Gen.*, 169 N.H. 509, 532 (2016).

For these reasons, we respectfully urge members of this Committee to vote *inexpedient to legislate* on this bill.