Statement by Gilles Bissonnette, ACLU-NH Legal Director
House Judiciary Committee
ACLU-NH Opposition to HB1002
Hearing: January 17, 2024

I submit this testimony on behalf of the American Civil Liberties Union of New Hampshire ("ACLU-NH"), a non-partisan, non-profit organization working to protect civil liberties for over 50 years. HB1002 would allow government entities to charge requesters "for the employee time to make [a] record available to the requestor, including time to search, retrieve, duplicate, redact, and otherwise make the record available for the requestor." The bill also notes that "hourly costs shall not exceed $25 per hour and no costs shall be charged for requests under 10 hours." We—as part of a broad coalition that includes Americans for Prosperity and the New England First Amendment Coalition—ask that this Committee deem this bill *inexpedient to legislate*, as this bill would make New Hampshire a less transparent state. By way of background, a similar labor costs bill (HB1611) was rejected by the House Judiciary Committee 16-1.[1]

HB1002 Will Deter Vitally Important Public Records Requests: The Right-to-Know law is an incredibly useful tool in identifying systemic government abuse. It has exposed police misconduct, how various agencies regulate schools, how our laws are enforced, and how we are taxed. But this bill will deter even modest requests, not just ones that proponents of this bill deem "excessive." Indeed, under this bill, it will be inevitable for government actors, even for modest requests, to, as a default under this bill, estimate that the collection could exceed ten (10) hours, thereby deterring the requester from moving forward. And these collection estimates can be through no fault of the requester—they could include manually retrieving documents because the government entity has a poor document retention system or needless and excessive redactions. As a result, even modest requests would be impacted here.

This new regime would also be ripe for abuse by government agencies, and we already know that even under existing law government agencies (i) do not always produce the records that they should, and instead force requesters to go to court, (ii) sometimes needlessly fight their constituents every step of the way, and (iii) treat RSA ch. 91-A as a secrecy statute, not a disclosure statute.[2] This would make the situation worse by giving government agencies another tool for obstruction. This is because there is nothing in the bill that would meaningfully prevent a government agency from overestimating the time that will be required to collect, review, and redact documents, and therefore providing requesters with excessive estimates that deter them from moving forward. We already know that many government agencies overestimate the time necessary to respond to simple requests for discrete and readily-identifiable documents. For example, under this bill, even for a basic request, a government agency would now essentially be permitted to "estimate" that document retrieval and redactions would take 40 hours, even where the redactions are excessive and unnecessary, and even where the documents should *not* take this long to collect. The requester has little

[1] https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/bill_docket.aspx?lsr=2496&sy=2016&sortoption=billnumber&txtsessionyear=2016&txtbillnumber=HB1611

[2] *See Ortolano v. City of Nashua*, No. 2022-0237, 2023 N.H. LEXIS 149, at *1 (N.H. Sup. Ct. Aug. 18, 2023) (ordering disclosure of emails on backup tapes); *ACLU-NH v. N.H. Div. of State Police*, No. 2022-0321, 2023 N.H. LEXIS 219 (N.H. Sup. Ct Nov. 29, 2023) (holding that, in response to a Right-to-Know request, police misconduct personnel files cannot be categorically withheld from the public under a different and separate criminal discovery statute -- RSA 105:13-b); *Colquhoun v. City of Nashua*, 175 N.H. 474, 484 (2022) (Plaintiff was entitled to attorney's fees from a city under RSA 91-A:8, I, of the Right-to-Know Law, as the city should have known that plaintiff's request reasonably described the records sought in that plaintiff's description was sufficient to permit the city to quickly find 547 responsive documents in readily available files once plaintiff filed suit).

or no ability to challenge this "estimate," and the likely result is that the requester will turn away and not pursue the request.

HB1002 Allows Government Actors to Add Needless Costs to the Point Where Collection Becomes Cost Prohibitive: HB1002 also allows government agencies to add needless costs that will ultimately be billed to the requester. For example, it is not uncommon for government agencies to not have the best record-keeping practices. Thus, when a request is received, such a government agency will effectively be able to make the requester pay for the agency's poor record keeping practices.

Moreover, under HB1002, a government actor may charge for "redacting" documents, which is especially problematic if the agency is overaggressive in engaging such redactions—a practice which is not uncommon. In such a situation, the requester may be obligated to pay for the agency's time to review and redact such documents even though the agency's concern is not justified and the redacted information is not exempt.

HB1002 Will Hurt Government Accountability, and Does Not Provide a Fee Waiver for Indigent Requesters: In deterring the collection of documents under this law, HB1002 will deter government misconduct from being uncovered, especially where misconduct can be buried in scores of documents. This bill will cause government abuses and civil rights violations to go unexposed. Instead of weakening our public records laws, the State should be attempting to strengthen it.

Moreover, many states—like Arizona[3], California[4], and Louisiana[5] which charge copy costs—do *not* charge for staff time, presumably because of the negative impact that such charges would have on requests. Labor costs are similarly not charged under the federal Freedom of Information Act. While many states do charge labor costs, we should not copy bad policies from other, less transparent states.

For these reasons, the ACLU-NH opposes HB1002.

[3] https://www.azleg.gov/ars/39/00121-01.htm.
[4] https://law.justia.com/codes/california/2019/code-gov/title-1/division-7/chapter-3-5/article-1/section-6253/.
[5] https://www.legis.la.gov/Legis/Law.aspx?d=99691.