



### Support of HB307, As Amended By the Senate Judiciary Committee

We submit this statement on behalf of the following organizations and individuals in support of HB307, as amended by the Senate Judiciary Committee on December 12, 2023: (i) 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; (ii) the New England First Amendment Coalition, which defends, promotes, and expands public access to government and the work it does; (iii) former New Hampshire Supreme Court Justice Chuck Douglas of *The Bow Times*; (iv) the New Hampshire Press Association, and (v) the press outlets *New Hampshire Bulletin*, *Union Leader Corporation*, and the *Boston Globe*.

HB307 would significantly improve government transparency by, in the form of mandatory fee shifting, creating incentives for government actors to be more transparent in response to requests made by the public under the Right-to-Know Law. This bill addresses the question of—if a request for public records was meritorious as found by a court—who should bear the burden of the expense of that litigation. The two choices are either the requestor or the public body. Currently under the law, the requester bears the expense of that successful litigation in most cases unless it can be shown, under a high standard, that the public body “knew or should have known that the conduct engaged in was in violation of this chapter.” This bill corrects the error of the current system by ensuring that the public body, not the requester, bears that expense. After all, a court decision requiring public disclosure benefits the entire public, not just the requesting party. Given this public benefit secured by the requester, the requester should not be punished by having to be made to pay the costs of this successful litigation.

This bill was unanimously approved by the House Judiciary Committee (20 to 0), and the House approved it by voice vote. The Senate Judiciary Committee amended HB307 on December 12, 2023, in ways that do not alter the scope of, or intent behind, this important legislation, and recommended its passage on the consent calendar by a vote of 5 to 0. We respectfully urge the full Senate to approve HB307, as amended by the Senate Judiciary Committee.

#### **I. Mandatory Fee Shifting in HB307 is Necessary to Ensure that Government Bodies Interpret the Right-to-Know Law Consistent with its Presumption in Favor of Disclosure.**

Mandatory fee shifting — which allows requesters who prevail in public records lawsuits to recover attorneys’ fees and costs — is critical to ensuring that the public’s right of access to government records is properly enforced.

Currently, the standard in New Hampshire to have a government body pay the requester’s attorneys’ fees when the body violates the Right-to-Know Law is a high one, where the successful requester must show that the agency “knew or should have known that the conduct engaged in was in violation of this chapter.” As a result of this high standard, in a majority of cases, a government actor that violates the Right-to-Know Law is *not* required to pay the requester’s attorneys’ fees despite the requester having successfully won in court.

Mandatory fee-shifting is important because, when a requester successfully goes to court, the requester has brought a lawsuit that confers a societal good, not just a personal benefit. And, without mandatory fee shifting, a member of the public is left to weigh the relative value of the requested records against the cost of litigation. The result of this calculus is that many successful lawsuits to remedy a government’s violation may not be brought and, as a result, the public loses out on important information. Moreover, with mandatory fee shifting, a government entity is more likely to apply the Right-to-Know Law with a presumption in favor of transparency and err on the side of disclosure, as required by the Law.<sup>1</sup>

<sup>1</sup> Courts resolve questions under the Right-to-Know Law “with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents.” *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe “provisions favoring disclosure



Without some mechanism mandating the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be unfeasible for many people. Indeed, in states that do not have similar fee-shifting provisions in their public records laws, the financial risk of litigation is often a deterrent to requesters.<sup>2</sup> And agencies in states with mandatory fee-shifting provisions tend to demonstrate better compliance with public records laws. As one study has found, “[f]indings indicate that states with higher public records request compliance ... include mandatory attorney fee-shifting provisions in their state laws.”<sup>3</sup>

In short, attorney fee-shifting is integral to the enforcement of the Right-to-Know Law where this Law relies on private enforcement. Without certainty that those fees will be recovered in successful actions, the press, advocacy groups, and the public will be disincentivized from pursuing public records that have been wrongfully withheld. A system of private enforcement is meaningless without a penalty for a violation. Attorneys’ fees are a deterrent against non-compliance. Where a system of private enforcement exists, attorney fee-shifting must be a fundamental pillar of upholding the law to (i) ensure that government bodies comply with the Law and (ii) ensure that private litigants need not be required to bring costly lawsuits.

**II. This Change Reinstates the 1973 Amendments to the Right-to-Know Law that Were in Place Until 1977.**

It is important to note that this bill codifies the way the New Hampshire Right-to-Know Law was written from 1973 to 1977.<sup>4</sup> In the Law’s 1973 amendment, RSA 91-A:8 stated the following:

Any body or agency which, in violation of the provisions of this chapter, refuses to provide a public document or refuses access to a public proceeding, to a person who reasonably requests the same, shall be liable for reasonable attorney’s fees and costs incurred in making the information available or the proceeding open to the public provided the court renders final judgment in favor of such request.

In a 1975 article in the *New Hampshire Bar Journal*, then New Hampshire Supreme Court Justice Chuck Douglas (who has also co-authored this statement) explained the history of this 1973 amendment, noting the opinion of a government lawyer who had recently lost a case under RSA ch. 91-A where information was ordered to be disclosed. As Justice Douglas highlighted, the

---

broadly, while construing exemptions narrowly.” *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 554 (2002). (citation omitted). “[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.” *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581 (2006) (emphasis added).

<sup>2</sup> See Hooper & Davis, *A Tiger with No Teeth: The Case for Fee Shifting in State Public Records Law*, 79 Mo. L. Rev. 949, 967-68 (2014) (“Thus, there is a curious disincentive at work in states where catalyst theory is not recognized. Other than the threat of a lawsuit, public employees have little to lose when they withhold documents.”; “Faced with increasing demands for their time, reporters often have little time to pursue denied open records requests, regardless of how egregious the denial or how flimsy the excuse for non-compliance. Likewise, public officials, receiving little training and mixed messages about government open records policy, have little incentive to comply with open records requests.”).

<sup>3</sup> See David Cuillier, *Bigger Stick, Better Compliance? Testing Strength of Public Records Statutes on Agency Transparency in the United States* (2019) 6th Global Conference on Transparency Research, available at <https://eventos.fgv.br/en/6deg-global-conference-transparenciaresearch/executive-and-advisory-committee>

<sup>4</sup> RSA 91-A:8 (Supp. 1975) provides: “Any body or agency which, in violation of the provisions of this chapter, refuses to provide a public document or refuses access to a public proceeding, to a person who reasonably requests the same, shall be liable for reasonable attorney’s fees and costs incurred in making the information available or the proceeding open to the public provided the court renders final judgment in favor of such request.” *Bradbury v. Shaw*, 116 N.H. 388, 390 (1976).



The Boston Globe

government lawyer “saw the inequity of the plaintiff prevailing—vindicating his right—and then having to write a large check to his lawyer.” The lawyer explained: “The citizen ended up having to pay his own legal fee to get something the court eventually told him he was entitled to in the first place, and this bill seeks to remedy that injustice.”<sup>5</sup>

As the New Hampshire Supreme Court explained three years later in 1976 in interpreting this 1973 mandatory fee-shifting statute:

The provision for the award of attorney’s fees is critical to securing the rights guaranteed by the statute. Without this provision, the statute would often be a dead letter, for the cost of enforcing compliance would generally exceed the value of the benefit gained. In some cases, the plaintiff may gain a financial benefit by the invalidation of government action taken in violation of the statute. But it will frequently be impossible to place a monetary value on the interests protected by the right-to-know law. The attorney fee provision was enacted so that the public’s right to know would not depend upon the ability of individuals to finance litigation. The legislative history indicates that the purpose of the attorney’s fees provision is not to punish the defendant but to promote the statutory objective. In some cases, citizens might be deterred from seeking vindication of public rights if good faith secrecy were a defense to the award of attorney’s fees ....

*Bradbury v. Shaw*, 116 N.H. 388, 390 (1976) (emphasis added) (internal citations omitted).<sup>6</sup> The current New Hampshire Supreme Court has also noted the importance of these principles:

Although subsequent to our decision in *Bradbury*, the legislature revisited the fee provision and made clear that an award can only be ordered when a public body “knew or should have known” that its conduct “was in violation of this chapter,” the principles underlying the availability of the award have not changed. To place a monetary value on the interests protected by the law will frequently be impossible. *Id.* “Without this provision, the statute would often be a dead letter, for the cost of enforcing compliance would generally exceed the value of the benefit gained.” *Id.*; see also Heath Hooper & Charles N. David, *A Tiger With No Teeth: The Case For Fee Shifting in State Public Records Law*, 79 Mo. L. Rev. 949 (2014).

*Colquhoun v. City of Nashua*, 175 N.H. 474, 484 (2022).

This bill restores these vital principles that existed in the 1973 amendment and that are necessary to make sure that our Right-to-Know Law is meaningful.

<sup>5</sup> Charles G. Douglas II., *New Hampshire Right to Know Law - A Analysis*, The, 16 N.H. B.J. 227, 244-45 (1975).

<sup>6</sup> This 1973 language was changed in 1977 HB 845, where RSA 91-A:8 was amended as follows to state that the payment of fees “may” be required,” as opposed to “shall” be required:

If any body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a public document or refuses access to a public proceeding to a person who reasonably requests the same, such body, agency or person may be liable for reasonable attorney’s fees and costs incurred in making the information available or the proceeding open to the public, at the discretion of the court. In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter. (Emphasis added).

The bill records at the State Archives are unclear as to what motivated this 1977 amendment. This section was later amended in 1986 HB 123, which inserted the “knew or should have known that the conduct engaged in was in violation of this chapter” language for attorneys’ fees in RSA 91-A:8 that exists in current law.



### III. Recent Examples Demonstrate the Need for This Bill

The recent *Colquhoun* case granting attorneys’ fees is the exception, not the rule, and the position of the City of Nashua in that case only demonstrates the need for this type of legislation to deter similar obstructive municipal conduct.

Indeed, what we have generally seen is that New Hampshire’s departure from the 1973 amendment—and, instead, its adoption of the 1986 fees language that still exists in current law—has often hampered the public right’s right of access and enabled government bodies to take a “default” position of secrecy that is inconsistent with the Law’s presumption of transparency. This “default” position of government bodies then requires plaintiffs, if they have resources, to engage in costly litigation. We have seen multiple examples of this “default” position of secrecy:

- The State Police’s effort to keep secret the police misconduct records of former state trooper Haden Wilber. Former state trooper Wilber was discharged from the New Hampshire State Police in August 2021. He had been placed on the Exculpatory Evidence Schedule (also known as the “Laurie List”) due to credibility issues, and his alleged conduct in this February 2017 stop led to \$212,500 of taxpayer funds being used to settle a 2019 federal lawsuit alleging that the trooper fabricated evidence. The Superior Court ordered this information released, but the state police appealed the case anyway. The New Hampshire Supreme Court rejected this effort of secrecy. *See 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).<sup>7</sup>
- The Salem police department’s refusal to produce complete, unredacted copies of: (i) the 120-page audit report of the Salem Police Department dated October 12, 2018, focusing on internal affairs complaint investigations; (ii) the 15-page addendum focusing on the Department’s culture; (iii) the 42-page audit report of the Department dated September 19, 2018, focusing on time and attendance practices; (iv) the 14-page response dated November 9, 2018, to these three audit reports by Salem Police Department Chief Paul Donovan; and (v) the two-page memorandum from Salem Town Manager Christopher Dillon to Chief Donovan dated October 29, 2018, discussing these audit reports. These records depict a department that, at the time, was dysfunctional and poorly serving the taxpayers it was tasked with protecting. The audit reports go so far as to state: “We see a system designed to intimidate members of the public and make them fearful of the consequence of filing a complaint about concerning police conduct.” A more complete report was released after successful litigation.<sup>8</sup>
- The Concord School District’s initial decision to withhold an over 100-page report that details its response to complaints of inappropriate behavior by a former teacher. This was eventually released after litigation.<sup>9</sup>

### IV. New Hampshire’s Current Fee-Shifting Provision is Even More Restrictive Than the Federal FOIA.

New Hampshire’s “knew or should have known that the conduct engaged in was in violation of this chapter” standard for attorneys’ fees is also more restrictive than the fee-shifting provisions in the federal Freedom of Information Act, which uses the term “may” and does not use New Hampshire’s heightened standard. The FOIA was amended in the “Openness Promotes

<sup>7</sup> See also <https://www.concordmonitor.com/Personnel-records-of-fired-Trooper-Haden-Wilber-to-be-made-public-46328248>.

<sup>8</sup> [https://www.unionleader.com/news/safety/updated-salem-police-audit-report-released/article\\_adc8964a-a636-5937-b401-b0d487356051.html](https://www.unionleader.com/news/safety/updated-salem-police-audit-report-released/article_adc8964a-a636-5937-b401-b0d487356051.html).

<sup>9</sup> <https://patch.com/new-hampshire/concord-nh/concord-school-district-releases-leung-sexual-misconduct-report>.



Effectiveness in our National Government Act of 2007” to provide for greater access to attorneys’ fees when the federal government violates the principles of transparency. The relevant amendment, 5 U.S.C. § 552(a)(4)(E)(i), states as follows:

- (E) (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
- (ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—
  - (I) a judicial order, or an enforceable written agreement or consent decree; or
  - (II) a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.

Current New Hampshire law under RSA 91-A:8 is far more restrictive than these FOIA provisions.

**V. Several Other States Have Similar Mandatory Fee-Shifting Provisions in Their Public Records Laws.**

As noted above, several states have similar mandatory fee-shifting provisions. For example, California law states that “[t]he court shall award court costs and reasonable attorney’s fees to the requester should the requester prevail in litigation filed pursuant to this section. The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official . . . .”<sup>10</sup> New Jersey and North Carolina also allow a requester to receive attorneys’ fees where the requester substantially prevails in the lawsuit.<sup>11</sup>

For these reasons, the organizations and individuals listed below support HB307, as amended by the Senate Judiciary Committee.

- Gilles Bissonnette, Esq., Legal Director, ACLU of New Hampshire
- Justin Silverman, Esq., Executive Director, New England First Amendment Coalition
- Gregory V. Sullivan, Esq., President, New England First Amendment Coalition
- Annmarie Timmins, Senior Reporter, The New Hampshire Bulletin
- Chuck Douglas, Esq., The Bow Times, LLC
- Brendan J. McQuaid, President and Publisher of Union Leader Corporation, and President of the New Hampshire Press Association
- Nancy Barnes, Editor, The Boston Globe

<sup>10</sup> Section 6259(d) of the California Public Records Act (“CPRA”) provides that the court “shall award costs and reasonable attorney fees” to the plaintiff should the plaintiff prevail in proceedings to compel disclosure of public records pursuant to CPRA. Cal. Gov’t Code § 6259(d). The award of costs and fees is mandatory. *Bernardi v. County of Monterey*, 167 Cal. App. 4th 1379, 1393, 84 Cal. Rptr. 3d 754 (2008). “The costs and fees shall be paid by the public agency of which the public official is a member employee and shall not become a personal liability of the public official.” *Id.*; cf. *Pacific Merchant Shipping Assoc. v. Board of Pilots Comm.*, 242 Cal. App. 4th 1043, 1061, 195 Cal. Rptr. 3d 358 (2015) (upholding fee award against port agent and holding that state officers acting in official capacity can be liable for fees under the CPRA).

<sup>11</sup> See <https://www.rcfp.org/open-government-sections/a-attorney-fees/>; see also [https://www.nfoic.org/wp-content/uploads/2020-02/Blueprint%20to%20Transparency\\_%20Enforcing%20Open%20Records%20Laws-4.pdf](https://www.nfoic.org/wp-content/uploads/2020-02/Blueprint%20to%20Transparency_%20Enforcing%20Open%20Records%20Laws-4.pdf)