

Senate Judiciary Committee

Jennifer Horgan 271-7875

SB 302-FN, establishing the personal privacy protection act.

Hearing Date: January 11, 2022

Time Opened: 1:30 p.m.

Time Closed: 2:15 p.m.

Members of the Committee Present: Senators Carson, Gannon, French, Whitley and Kahn

Members of the Committee Absent : None

Bill Analysis: This bill prohibits public agencies and public bodies from releasing any list, record, register, registry, roll, roster or other compilation of data of any kind that directly or indirectly identifies a person as a member, supporter, volunteer, or donor of any entity exempt from federal income tax under section 501(c) of the Internal Revenue Code except in specific circumstances, as well as penalties for the unlawful release of such information.

Sponsors:

Sen. Birdsell

Sen. Gannon

Sen. Daniels

Sen. Ward

Sen. French

Sen. Giuda

Rep. Lynn

Rep. DiLorenzo

Rep. McLean

Who supports the bill: Senator Birdsell; Senator Giuda; Senator Daniels; Senator French; Senator Gannon; Senator Ward; Greg Moore; Elizabeth McGuigan; Amanda Grady Sexton, NH Coalition Against Domestic and Sexual Violence; Frank Knaack, ACLU; Simon Thomson, National Federation of Independent Businesses

Who opposes the bill: Tom Donovan, NH Department of Justice; Diane Quinlan, NH Department of Justice; Kathleen Reardon, NH Center for Nonprofits

Who is neutral on the bill: Mary Ann Dempsey, NH Judicial Branch; Margaret Byrnes, NH Municipal Association; Henry Veilleux; Meg Helming

Summary of testimony presented in support:

Senator Gannon

- There will be a chilling effect on charitable giving if we do not allow people to donate anonymously.
- This bill will ensure that individual donors to non-private organizations have the right to do so anonymously.

- Donors may wish to remain anonymous due to religious beliefs, a desire to avoid unwanted solicitation, an inclination to keep the spotlight off themselves, or fear of reprisals for giving to certain groups.
- In 1956 there was a Supreme Court case regarding this. At that time in Alabama, the Attorney General wanted organizations to hand over the names of supporters to state officials for nefarious reasons. The NAACP refused to comply out of fear it would chill charitable donations and it would open their donors up to harassment. The Supreme Court unanimously decided that the constitutional rights of the donors superseded the State's interest.
- For 66 years this type of law has been tested and the Supreme Court has always ruled on the side of the donors.
- Most recently there was a case in California, Americans for Prosperity v. Bonta (2014). The Court again ruled in favor of the donors.
- Donor privacy is important, and people have a fear of the government.
- Wants to ensure NH will not find itself in the same situation as CA dealing with an expensive 7year lawsuit.
- Asks the Committee to hold the bill so an amendment can be brought forward to address concerns raised by the Charitable Trusts.
- Senator Kahn asked if there is any prohibition on private entities sharing donor information.
 - They could if they wanted to.
- Senator Kahn asked if organizations share this information with each other.
 - That is separate than the government demanding information. That is not being addressed in this bill.

Greg Moore (Americans for Prosperity Foundation/Americans for Prosperity)
(provided written testimony)

- Was not involved in the development of this legislation.
- Is concerned about these smaller organizations that do not have the resources to ensure their rights are preserved.
- The Americans for Prosperity Foundation v. Bonta case involved over 300 amicus briefs filed from across the political spectrum.
- Thinks there is importance in supporting the Americans for Prosperity Foundation v. Bonta decision with further legislation that protects donor information.
- Codifying this into statute makes it clearer to future attorney generals and state agencies that donor information is going to be protected.
- By giving a cause of action this makes it clear to any public entities how seriously the legislature takes this.
- This also starts to build a foundation around the 2018 constitutional amendment regarding the right to privacy.
- There is a not a lot of case law around that constitutional amendment, and bills like this will give statutory support for that.
- There may be a need for some amending of the bill but supports the concept.

- Senator Kahn asked if Mr. Moore recognizes the point made by the Division relative to the need for directors' information.
 - As a member of boards understands that that is part of the deal. Does not think board members need to be shielded from public disclosure. The focus here should be on the donors. Would caution against the size of the exemption to ensure it is narrowly tailored.

Elizabeth McGuigan (Philanthropy Roundtable)

- Thinks this bill will help to strengthen the vitality and breadth of civil society in NH.
- Would be open to working on a narrow amendment to address the concerns of the Division.
- Shares the goal of ensuring regulatory oversight is maintained to ensure the public's trust.
- Throughout US history the norm has been to allow people to choose for themselves whether to be public or private in their charitable giving, and only in very narrow circumstances may that be set aside.
- With the rise of cancel culture, the choice to remain anonymous in charitable giving is crucial.
- Donors may be concerned that giving to causes that are controversial now or may become controversial in the future may trigger retaliation.
- Anonymous giving has important religious, cultural, and moral roots.
- A NH business anonymously matched donations up to \$100,000 to the NH Food Bank.
- In 2017 the NH Food Bank received an anonymous \$1million donation.
- In 2019, New England College was a recipient of a \$5million anonymous donation.
- The bill does allow for the continued regulation of campaign finance, political contributions, and lobbying donations, and they would remain transparent under this bill.
- Without this measure, nonprofits would be at the risk of forced disclosure of information, resulting in many who prefer to remain out of the public eye choosing not to give in the state.
- The issue of public disclosure vs disclosure solely to a government body did come up in the Americans for Prosperity Foundation v. Bonta case. It was brought up by the defendants and the Supreme Court found that it was an insufficient claim and that it would still have a chilling effect on charitable giving and freedom of association.

Summary of testimony presented in opposition:

Tom Donovan and Diane Quinlan (Division of Charitable Trusts-Department of Justice) (provided written testimony)

- The responsibility of the Division is to exercise the Attorney General's common law and statutory oversight responsibilities over the 11,000 charitable organization in the state.
- Thinks this bill is a reaction to the Americans for Prosperity Foundation v. Bonta decision.
- That involved a California requirement that large donor information be provided routinely to the Charities Bureau in CA.
- This is sometimes referred to as schedule B information and it is already provided to the IRS confidentially.
- NH has never asked for donor information as part of annual reporting.
- Concerned that this bill will prohibit the Charitable Trusts Unit from obtaining the names of members, volunteers, and donors without first filing a lawsuit.
- This would be very expensive for the charity and the board members, particularly when such expense can be avoided.
- Most members of boards of directors of charitable organizations are volunteers.
- Believes it is in the public's interest that the charities disclose the names of the directors to the Division and that they include that as part of their registration process.
- Need this information because the Division often contacts members of boards of directors directly rather than through the executive director
- Sometimes those call discuss matters involving the executive director.
- In some instances, the Division discovers that members of the boards are not actually board members when talking to them.
- State law requires charitable nonprofits corporations have at least five members of the board be unrelated by the blood or marriage. The Division can often determine that just by looking at the information they provide. If they have not met the requirements, the Division often contacts them to let them know how they can come into compliance.
- The Division also needs to know the names to determine if a conflict of interest exists for directors.
- It is in the public's interest for the public to know who the governing board members are.
- Does not think it is appropriate to disclose the private information of these individuals.
- The Secretary of State's Office also collects the names of board members for charitable nonprofit corporations every five years, and it is then published on the website.
- The Division rarely requests member or donor information.
- Healthcare organization often have sole corporate members who have reserved powers and a role in healthcare transactions, so it is important for the Division to understand who those members are.
- There are occasions where donor information is helpful, such as when the Division discovers that a charity has been set up to support a for-profit for one the directors. Donor information was in helpful in determining whether the donations were funneled through.

- Donors could be victims of deceptive acts, so it is helpful to get donor information to provide restitution.
- Charities can overinflate gifts in kind on public reports to make it look more favorable, and donor information allows the Division to check those donations against the donors' 990s.
- Sometimes donations are made to get a more significant economic transactions, such as when a real estate developer donates to charity in exchange favorable treatment with respect to a real estate transaction.
- This bill does allow for the Division to obtain this information with a lawsuit when certain conditions are met, but it would be expensive for charities to go through that.
- Currently, the Division can obtain this information when it needs it.
- Often after getting this information the Division is able to resolve the matter either through a settlement or an assurance of discontinuance; sometimes it is as simple as letting a charity know what they need to do in order to be in compliance.
- The role of the Division is to regulate the charities but also to educate them.
- Senator Gannon asked why the Division isn't following the precedence set by the Supreme Court cases.
 - Director Donovan answered that in both of those cases they were looking for wholesale lists of donors. The Division does not look for that, as it is inappropriate. When the Division looks for donors, it is because of there is a specific issue and it is not in most cases all donors but just the donors impacted by a series of transactions.
- Senator Gannon asked how often this occurs.
 - Director Donovan answered that it happens a few times a year. Asst Director Quinlan just won a case involving a sham breast cancer charity and in that case part of the remedy was restitution for the donors. The Division needed donor information to be able to contact them.
- Senator Kahn asked if the Division is suggesting an amendment or just opposition to the bill.
 - Director Donovan answered that he does not think the bill is needed, but they are always willing to talk. Thinks protecting director addresses and telephone numbers is appropriate, but believes that is already an exemption to 91-A. Would be willing to work on something that would allow the Division receive information but not disclose private information.
- Senator Carson asked how this currently works with 91-A.
 - Director Donovan thinks 91-A already covers it. If the Division collects donor information that is protected from disclosure. That may be able to be strengthened further.
- Senator Carson asked how nonprofits hired by state agencies would be affected by this.
 - Director Donovan responded that he thinks it would impacted. Does not see a need for DHHS to see a donor list when hiring a mental health

center. Believes that DHHS may require the names of the directors like the Division.

- Senator Kahn asked if donor names are ever disclosed in audit statements
 - Asst. Director Quinlan responded that she does not recall seeing them on the audit reports.

Kathleen Reardon (NH Center for Nonprofits) (provided written testimony)

- It is essential to preserve the public's trust in NH nonprofits.
- NH relies extensively on the nonprofit sector to provide essential services while trusting them to effectively manage finances, remain politically nonpartisan, avoiding self-dealing, etc.
- This layer of secrecy of public agencies regarding any kinds of records could erode the public's trust in nonprofits.
- Recognizes a reasonable amount of regulation and transparency is in the best interest of the sector.
- Nonprofits are nonpartisan and bring people together regardless of partisan lines.
- Concerned that this bill might be a tipping point that might lead to the politicization of 501(c)(3) organizations.
- The Division does not require submission of schedule B information, that donor privacy has already been settled in case law, making this legislation unnecessary and potentially harmful to the nonprofit sector.

Neutral Information Presented:

Mary Ann Dempsey (NH Judicial Branch) (provided written testimony)

- III (e) deals with how information is handled in a court case; it provides the court cannot release information absent a specific finding of good cause.
- Proposed some language to make clear how confidential information would be provided to the court.
- It is the party that is submitting the information that files it under a motion to seal and advises the court there is confidential information.
- There can also be a hearing where confidential information would be discussed, and the party would let the court know and the court would take appropriate steps to hear the testimony in a confidential manner.
- Suggesting language to make it clear that if a party is going to be providing this information to the court it be done under a motion to seal or other proper measures.

Margret Burns (NH Municipal Association)

- Not opposing the bill but is concerned about some of the language.
- The bill seems to deal with an issue at the state level, but it would also apply to municipalities.
- Not sure if municipalities have this kind of information, but assuming that they do, even an inadvertent disclosure would lead to a claim and potential liability for municipalities.
- Also concerned that this is a prohibition on the release of certain information, and the language would be inserted into 91-A.

- RSA91-A deals with public information and information that is exempt from disclosure.
- RSA91-A does not deal with bans or prohibitions.
- Should language like this go into law, it may be more appropriate to place it in a different section of law or in a new section.
- Would oppose the creation of new liability, civil action, and cause of action against municipalities.

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Date Hearing Report completed: January 13, 2022