Senate Judiciary Committee

Matthew Schelzi 271-3266

HB 307-FN, relative to attorney's fees in actions under the right to know law.

Hearing Date: March 28, 2023

Time Opened: 1:45 p.m. **Time Closed**: 2:58 p.m.

Members of the Committee Present: Senators Carson, Whitley and Chandley

Members of the Committee Absent : Senators Gannon and Abbas

Bill Analysis: This bill requires the court to issue a final judgment in favor of the requester before attorney's fees are awarded under the right to know law.

Sponsors:
Rep. D. McGuire Rep. M. Smith

Who supports the bill: Katherine Kokko, Rep. Marjorie Smith (Straf. 10), Chris Maidment (AFP-NH), Gilles Bissonnette (ACLU), Laurie Ortolano, Curtis Howland, Laura Colquhoun, Deborah Sumner, and David Saad.

Who opposes the bill: Tom Mullins (City of Keene), Jim Kennedy (City of Concord), Jennifer Perez (City of Dover), and Natch Greyes (NHMA).

Who is neutral on the bill: Jessica King (NH Dept. of Justice)

Summary of testimony presented in support:

Representative Marjorie Smith introduced HB 307-FN on behalf of the prime sponsor, Representative Dan McGuire. HB 307-FN passed the House Judiciary Committee 20-0 and passed on the House Floor on the Consent Calendar. HB 307-FN restores the attorney's fees language of RSA 91-A, the Right to Know law, as it was originally enacted. Rep. Smith said the language allows for the awarding of attorney's fees to a party that goes to court over the withholding of governmental records and succeeds. She said the law was changed in the 1980s to say that even if a citizen prevails in court they may not receive attorney's fees unless the court finds that the governmental entity knew or should have known that withholding those records violated the statute. She said the House Judiciary Committee hoped that passing HB 307-FN would promote the practice that disclosure, rather than nondisclosure, should be the norm. HB 307-FN also allows the awarding of attorney's fees for the public body if the court finds the lawsuit was in bad faith, frivolous, or oppressive and finds in their favor. Rep. Smith said HB 307-FN is about fairness and equity for both sides of

Right to Know disputes. She said there is frequently an unwillingness of public bodies to act as thoroughly as they are required under RSA 91-A.

Senator Carson asked about the Right to Know Ombudsman and why it was not referenced in HB 307-FN, given that the intention of creating the Ombudsman was to reduce the need to go to court over RSA 91-A disputes. She said she would have expected some type of suggestion that people try to mediate their disputes through the Ombudsman rather than going to court.

Rep. Smith said the reality is that the Ombudsman's Office is very new. She said the General Court and the Governor made clear that using the Ombudsman's Office makes a lot of sense in terms of speed and cost. She said not every case is going to go to the Ombudsman. She said the concern with HB 307-FN is the cases where people do go to court and the case is decided in their favor. Rep. Smith said that happens rarely. She said HB 307-FN is not an attempt to tell people that they should go to court.

Sen. Carson said it was interesting that Section 2 of HB 307-FN allows a municipality to sue an individual for a frivolous lawsuit over a Right to Know question. She asked if this addressed the issue of individuals who file repeated Right to Know requests, costing municipalities thousands of dollars.

Rep. Smith said she did not recall conversations in the House Judiciary Committee about that section of the bill. She said the Committee was well aware that there are frivolous Right to Know cases and there is abuse of the system and people should be held accountable for their actions.

Representative Dan McGuire, said it seems right that someone who goes through all the steps, asks for information, gets denied, appeals the decision, goes to court, and wins their case should get their attorney's fees paid. He said it serves a public purpose to get Right to Know decisions out in the open. He said they want communities to give out public information freely and when people win in court they should not be out of pocket at the end of the day.

Chris Maidment, Americans for Prosperity New Hampshire, said he supports HB 307-FN. He said passing the bill would send a clear message that the General Court supports government transparency and accountability. He said there should be some penalty when a government agency denies a disclosure that is appropriately owed to the taxpayers or requester. He said that by following the disclosure standard it would alleviate many of the fears raised around hypothetical lawsuits. Referencing a 2015 study by the Center for Public Integrity, he said New Hampshire received an "F" for public access to information. He said there have been several RSA 91-A requests that have been denied or delayed in response in an inappropriate way.

Gilles Bissonnette, Legal Director for the ACLU-NH, said the ACLU strongly supports HB 307-FN. He said there is a broad coalition of supporters for the bill, including the ACLU, AFP, media outlets, and various attorneys. He said HB 307-FN is required to ensure the interpretation of RSA 91-A on the presumption of transparency. He said awarding attorney's fees is critical to ensuring the public's right to access is preserved. He said the "knew or should have known" standard is very high and attorney's fees are infrequently awarded. He said HB 307-FN acknowledges that the

requester has brought forward a lawsuit that is a societal good in ensuring the public's access to the public's records. He said that many people will not go to court over RSA 91-A issues because there is not mandatory fee shifting. He said that this, inversely, also lowers the stakes for government actors in deciding not to provide public records. If there is a risk of having to pay attorney's fees, the public body is more likely to produce the documents upfront.

Mr. Bissonnette said HB 307-FN reinstates the law as it existed for beginning in 1973. He said the Supreme Court at the time discussed the importance of fee shifting. The law was changed in 1986. Over the last 30 years, he said, government entities have acted with the notion that the law presumes secrecy. He said there are so many legal opinions around RSA 91-A because government entities deny Right to Know requests. He said HB 307-FN will prevent litigation because it will make it more likely for government entities to produce information. He said HB 307-FN is the single most impactful change that could be made to RSA 91-A in the name of transparency.

Senator Whitley asked if it is common for other states to have associated attorney's fees in their transparency statutes.

Mr. Bissonnette said that although the language does change depending on the state, it is common. He referenced his written testimony for specific examples, including California, New Jersey, and North Carolina. He said there is also fee shifting in the federal Freedom of Information Act, although it uses "may" rather than "shall". He said there are provisions in the Freedom of Information Act where attorney's fees can be awarded even in the absence of a final judgment when it can be proven that the request caused a change in the agency's action.

Katherine Kokko, President of Right to Know NH, said she supports HB 307-FN because it sets a more reasonable standard when Right to Know cases are won by the requester. She said awarding attorney's fees is incredibly rare; she said there is limited ability to review court records to present data on how rare. She said agencies and municipalities out-lawyer and out-spend the average citizen making a records request, which forces out citizens who must make a choice about pursuing an enforcement action that may result in a financial loss even if they win. She said the public good rarely outweighs the personal pocketbook. Ms. Kokko referenced previous testimony on the Center for Public Integrity report from 2015. She said the creation of the Right to Know Ombudsman was a tacit acknowledgement that the financial burden of bringing a Right to Know case disincentivizes the public. She said investigations still need to be instigated by private action. She said gray areas work to the advantage of the public body in withholding information and the only way to bring clarity to those areas is to bring a challenge.

Ms. Kokko said that HB 307-FN reinstates previous language. She said that the majority of Right to Know cases are not intensely complicated. She said most cases are straightforward requests for documents. She said the cases that make it to the Supreme Court are the situations that require clarification but are not the majority of cases. She said it is the default position of most municipalities to look at a Right to Know request and try to find an exemption.

Laurie Ortolano of Nashua said Sen. Carson raised a good point about the Right to Know Ombudsman not being referenced in HB 307-FN but said there are cases that involve issues litigants would like to bring before a judge. She said there are individuals who believe their municipality would not accept the ruling of the Ombudsman. She said she believed the City of Nashua would not accept a ruling from the Ombudsman and she would have to go to court anyway. She said simple cases like not being able to access meeting minutes are perfectly fine to go before the Right to Know Ombudsman.

Ms. Ortolano said the City of Nashua may consider her to be burdensome with her Right to Know requests but the information she is seeking is not available online and, further, believes that asking any question is a Right to Know request, being docketed and sent with a formal letter from a Right to Know administrator.

Ms. Ortolano said she has a current case against the City of Nashua where she was awarded attorney's fees by a lower court that is being appealed to the Supreme Court. She said there are many citizens who are not putting in records requests or not fighting Right to Know cases because of the costs and the fact that few lawyers want to take on Right to Know cases. She said the City of Nashua has appealed all of her Right to Know victories to the Supreme Court and an attorney to represent her would cost at least $200,000. She said she believed the City would behave differently if they knew they would be assessed attorney's fees more often.

Summary of testimony presented in opposition:

Tom Mullins, City Attorney for the City of Keene, said he was testifying as both the City Attorney and as a private citizen. He said he opposes HB 307-FN because it imposes strict liability on municipalities when they are trying to act reasonably. He said there is an unfortunate belief that municipalities do not take Right to Know requests seriously but that is not the case. He said RSA 91-A is a difficult statute to interpret and implement and is not the same statute that existed in the 1970s or 1980s. He said he regularly needs to review the statute, Attorney General's memos, and judicial opinions on the statute in order to advise the City on appropriate responses to Right to Know requests. He said that the Supreme Court has been very active in interpreting the statute without the General Court's involvement. Under HB 307-FN, he said, if the municipality makes a good faith mistake they would have to pay attorney's fees, imposing additional burdens and costs on taxpayers. Mr. Mullins said they do not only receive Right to Know requests from individuals seeking transparency but also from people and corporations who are datamining, using taxpayer funds to provide governmental records to people and corporations who then use that information for a profit. RSA 91-A does not consider that circumstance at all.

Mr. Mullins spoke about a lawsuit the City was involved in a few years ago. He said the Superior Court essentially agreed with the City's position regarding the numerous Right to Know requests they received. It was appealed to the Supreme Court, which

essentially reversed many of the Superior Court's findings and remanded the case back to the Superior Court.

Mr. Mullins said the Superior Court worked with the requestors and the City to resolve the dispute in that case. He said under HB 307-FN, the City would have had to have paid attorney's fees and costs in that case. He said it is not fair to look at municipalities and assume they are not doing the right thing.

Jim Kennedy, City Attorney for the City of Concord, said the City of Concord opposes HB 307-FN for the same reasons raised by Mr. Mullins and Ms. King. He said there has been more litigation under the Right to Know law than any other section of statute. He said that removing the "knew or should have known" standard puts municipalities at grave risk of disclosing confidential information. There are 225 or so municipalities in New Hampshire and Mr. Kennedy said not every municipality has a municipal attorney that is as experienced as Mr. Mullins or the Attorney General in answering the complex questions around Right to Know requests. He said the Supreme Court's privacy test is not easy and sometimes involves guessing in good faith.

Mr. Kennedy said the City of Concord rarely gets sued under the Right to Know law; in his 15 years as the City Attorney he recalled having one Right to Know law case. He said the city goes beyond what RSA 91-A requires.

Mr. Kennedy spoke about the *Laura Colquhoun v. City of Nashua* decision, where Ms. Colquhoun requested documents from the City and was denied. The Superior Court in that case denied a request for attorney's fees because it did not meet the "knew or should have known" standard. On appeal, the Supreme Court found that the City should have known and that attorney's fees were appropriate. He said that case was decided in a 3-2 decision, where two Supreme Court justices and one Superior Court judge said attorney's fees should not have been awarded. He said this exemplifies the complexities of the Right to Know law.

Jennifer Perez, Deputy City Attorney for the City of Dover, said she opposes HB 307-FN. She said the Right to Know law is ambiguous and has changed dramatically since 2020. She said the City of Dover processes many Right to Know requests, some of which contain thousands of pages of materials. She said the City strives to find the right answer but, due to the complexities of the Right to Know law, the right answer for the City may not always be the "most right" answer in the opinion of a court. She said HB 307-FN would require the City to achieve perfection and exactly understand the statute in the same way a judge would understand the statute in that specific case.

Ms. Perez spoke about *Laura Colquhoun v. City of Nashua* and said that the entire issue before the Court was about attorney's fees. She said that as written the statute lays out situations where attorney's fees shall be awarded if the public body knew or should have known. She said the City's argument in the case was around reasonableness. The case was not a unanimous decision, she said, proving how complex and challenging the Right to Know law is. She said reasonableness is highly specific to the context. Ms. Perez read from the dissent in *Laura Colquhoun v. City of*

Nashua: "Hindsight is not the proper perspective to employ when determining whether the City is liable for attorney's fees." She said the majority opinion agreed that certain terms were not defined in the law. She said this case shows that the default position for municipalities is to disclose, rather than nondisclosed. She said the *Colquhoun v. City of Nashua* case shows that the system works as it currently exists, as municipalities that don't apply the Right to Know law in good faith will have attorney's fees awarded against them.

Ms. Perez said that HB 307-FN punishes public bodies that operate in good faith with respect to the Right to Know law. She said New Hampshire looks to the Freedom of Information Act when interpreting RSA 91-A. She said HB 307-FN is not consistent with that. She urged the Committee to maintain consistency.

Natch Greyes, New Hampshire Municipal Association, said it appeared some speakers had forgotten the changes made to RSA 91-A in 1977. He said HB 307-FN addresses what happens when the policy from the General Court is unclear. He said the issue evolves when a governmental entity makes a reasoned judgement about what it should do based on the language of the policy and the judicial system determines that that reasoned judgement was wrong. He said that it is not his intention to say that when the government does something bad it should not be charged for paying for that, as it is clearly explained in the current statute if there is a willful violation of the policy. He said they do not agree with punishing the government when the government is doing its best to comply with the policy set by the General Court. He said it is more reasonable to have the courts flag the gray area to the General Court and ask for clarification.

Neutral Information Presented:

Jessica King, Senior Assistant Attorney General, appeared on behalf of Attorney General John Formella to present concerns of the Department of Justice. She said the bill presents significant impairment to the State's and municipalities' abilities to discharge their obligations under the Right to Know law. The general rule in litigation is that each party pays its own attorney's fees. She said the current statute allows for the assessing of attorney's fees against the public body if the body knew or should have known that they were violating the Right to Know law. RSA 91-A:8 penalizes public officials if they act in bad faith and allows a court to enjoin future violations and order the public body to undergo training. She said the law as it stands is appropriate because it penalizes the public body when it knows or should have known it was violating the law. She said HB 307-FN would assess fees against the public body in the event it simply loses a Right to Know lawsuit. She said it was simple in the abstract but in reality the Right to Know law is not black and white.

Ms. King said there are multiple examples that highlight how the Right to Know law is a complex, evolving area of law. The Supreme Court has ruled towards a balancing test, meaning that the State has to make a judgement call in weighing the privacy interests against the public interest. She said that the State could withhold

information in good faith only to learn later on that the privacy interest was not significant. She said the privacy interest does not apply just to personnel records but could also include trade secrets.

Ms. King said she believed the Office of the Right to Know Ombudsman alleviates many of the concerns HB 307-FN seeks to address. The Ombudsman can waive the filling fee, public bodies are required to respond to requests from the Ombudsman, the Ombudsman can compel production of documents, and the Ombudsman can issue findings. She said the potential liability for attorney's fees could discourage the State from enforcing certain viable exceptions to the Right to Know law. Attorneys are expensive and HB 307-FN could subject the State to hefty fees for making a judgement call.

Sen. Whitley asked if the evolving judicial position on the Right to Know law was evidence of a need for legislative intervention to clarify the intention of the law.

Ms. King said that if the General Court wanted to step in to clarify the law, that may be a way to help the courts with the evolution of understanding the law. She said HB 307-FN would not clarify the Right to Know law, as it is a mechanism to enforce attorney's fees.

Sen. Whitley said that was not her question. She said sometimes it is the General Court's job to give clarity but often it is to set policy. She said she saw HB307-FN as the General Court taking a clear policy position separate from the inner workings of the Supreme Court.

Ms. King said she agreed it was the General Court's position to set policy and said that was why the Department was not taking a firm position on supporting or opposing HB 307-FN. She said the Department was informing the Committee of potential risks and complications that they see with the policy in HB 307-FN.

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Date Hearing Report completed: April 3, 2023