

Senate Judiciary Committee

Jennifer Horgan 271-7875

HB 1073, modifying attorney exemptions under RSA 91-A.

Hearing Date: April 14, 2022

Time Opened: 1:19 p.m.

Time Closed: 1:43 p.m.

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

Members of the Committee Absent : None

Bill Analysis: This bill narrows the scope of attorney-related records exempt from the right to know law.

Sponsors:

Rep. Wuelper

Rep. Potucek

Rep. Stapleton

Who supports the bill: Representative Wuelper; Julie Smith; David Saad, Right To Know NH; Tracy Walbridge; Deborah Sumner; Walter Kirsch; Alvin See

Who opposes the bill: Chris Boldt; Kathy Fox, NH Bar Association; Margaret Byrnes, NHMA; Kate Horgan, NHAC; Josh Wyatt, City of Dover; Jennifer Perez, City of Dover; Christina Wilson, NHDOJ; Matt Broadhead, NHDOJ; Kathleen Mulcahey-Hampson, NHDOT

Summary of testimony presented in support:

Representative Wuelper

- This bill deals with a change to the attorney client privilege exemption that was enacted last year.
- The point is to clarify the law that the exemption is not a per se exemption but is subject to the balance against the public's right to know.
- The best example of this need is the Supreme Court case last spring with the Hampstead SAU which asked for an investigation of itself.
- The results of that investigation should have been made public, but the SAU said it was not because it was attorney-client work product.
- The whole point of that report was to find out what was going on at the SAU and the public had a right to know the result.
- The Supreme Court issued a ruling that said it had to be balanced against the public's right to know.
- At the time, the attorney-client privilege exemption wasn't even in the law.

- The current attorney-client privilege is not qualified and therefore is concerned the Court will read that as a blanket exemption.
- Does not think a lot of those interactions should be removed from the public sphere, it should be balanced against the public's right to know.

Summary of testimony presented in opposition:

Senior Assistant Attorney General Matthew Broadhead and Assistant Attorney General Christina Wilson (NH Department of Justice)

- The exemption at issue touches on two concepts in the legal system.
- One the attorney-client privilege, which states when a person seeks legal advice from a lawyer those communications are confidential.
- This protection provides a safe environment for people to obtain legal advice; without it, clients may be less likely to come forward to seek advice, ask questions, and be honest with their attorneys.
- This is considered one of the more sacrosanct and closely guarded privileges in the US legal system, and it is deeply rooted in common law, and it is reflected in court rules, rules of evidence, and rules governing professional conduct of lawyers.
- The second concept is the attorney work product doctrine, which is directed at the material created in anticipation of litigation.
- This allows attorneys to thoroughly prepare for litigation without concern that others will obtain access to that work through discovery.
- These two protections apply in both the civil and criminal context.
- The NHDOJ represents over 100 state agencies, licensing boards and commissions, and under RSA 99-D it represents state employees, officers, trustees, and officials including members of General Court if they are sued for acts committed in the scope of their duties.
- The DOJ further enforces criminal laws and prosecutes criminal cases throughout the State.
- In performing these services and providing counsel the DOJ's communication with their clients are no different in nature than an attorney would have with a client in the private sector.
- Many of the entities the DOJ represents come to them on a nearly a day-to-day basis seeking advice and counsel.
- These privileges in law encourages clients to come forward with ideas and be fully open with the DOJ.
- This protection allows the DOJ and its clients to better serve the State.
- Just like in the private sector, government agencies need to be able to strategize and prepare their cases; their impressions, discussions, and legal strategies are entitled to the same protections as those enacted in the private sector.
- This would place the State at an extreme disadvantage and hinder the ability of the DOJ to litigate criminal and civil cases.
- This bill would apply to all public bodies within the State seeking legal counsel.
- The existing exemption reflects what has been well established in common law.
- The existing exemption in RSA 91-A simply codifies what has been recognized for decades.

Kate Horgan (Association of Counties) (provided written testimony)

- Echoes the statements of the Attorney General's Office.
- The county's ability to have appropriate legal advice in a non-public session is very important.
- Often the counties are discussing personal information of their employees, and they do not think that should be released to the public.
- We should be protecting our employees' rights.
- Spoke to several county attorneys and none of them could determine what "subject to the public's right to know" from a legal standpoint means, and they said they would not know how to apply it.

Margaret Byrnes (Municipal Association)

- The NH Supreme Court issued a decision last year that ruled that confidential attorney-client communication and attorney work product were not per se subject to disclosure, but instead were subject to a balancing test under the Right-to-Know law.
- This overruled longstanding precedent and practice.
- In the wake of that decision, the Legislature passed HB108 to make clear that records protected by attorney-client privilege and attorney-client work product were per se exempt from disclosure
- That legislation was supported by the NH Attorney General, the NH Bar Association, the NH Association of Counties, municipal attorneys, municipal officials, and the NH Municipal Association.
- The bill is deeply problematic and in effect repeals the exemption currently in law.
- The terminology used does not have any legal meaning.
- There is no definition for "consistent with the public's right to know" in the law and there is no guidance for public agencies or bodies in how to implement it.
- The ambiguity in this language would certainly require litigation to interpret what the statute meant and to determine on a case-by-case basis how records should be treated under this language.
- The intent of this bill is clearly to weaken or dilute the current exemption.
- Enacting this would have a devastating effect on municipal and governmental clients and their attorneys by making them feel cautious and concerned about having frank discourse and discussions and receiving frank legal advice and guidance from their attorneys.
- This chilling effect would not be good public policy.
- In reference to the Supreme Court case from last year, in a very unusual turn of events a number of attorneys and the Attorney General requested the case be reconsidered. The Supreme Court vacated that decision, but when HB108 was passed there was no longer a need for the Court to reconsider that decision.
- This bill would put the State back in the position it was in before the Legislature acted last year.

City Attorney Josh Wyatt and Deputy City Attorney Jennifer Perez (City of Dover) (submitted written testimony)

- Needs these protections in order to be able to do their job for the City of Dover.
- Thinks this bill is the result of a misunderstanding about the law.

- It is not the case that these are entirely exempt from disclosure, but these doctrines are inherently limited.
- Attorney-client privilege has exemptions, one of them being the crime-fraud exception.
- If an attorney is assisting an individual to commit a crime that document is not privileged.
- The work product is not an absolute protection.
- If someone has sufficient need for attorney work product, they can get it if they make the required showing.
- Attorneys are ethically bound to not counsel people to commit a crime.
- Attorneys help people make their decisions, and to do that sometimes people need to tell an attorney the mistaken or misguided or bad idea they had in mind.
- Does not see an upside with this bill.
- This will likely interfere with good faith efforts to comply with the law.
- The work product doctrine is meant to create a zone of privacy to prepare for litigation. Why would we allow people to discover that?
- The confidentiality of communications is one that attorneys are bound to through their rules of ethics.
- The attorney-client privilege and the attorney work product doctrine are two distinct principles that are important for the public to ensure their representatives are getting the best possible legal counsel.

Chris Boldt (Donahue Tucker & Ciandella)

- Echoes the testimony of those in opposition.
- The Hampstead case was the epitome of bad facts making bad law.
- The trial court expressly did not reach the question of was that report work product.
- This bill only confuses the situation.
- Represents private clients, individuals, and municipal entities.
- If there was a requirement to have a balancing test for each document, the bills to the municipalities would be enormous.
- However, many member folks are asking for something, there is an equal number of folks who liked the selectman's decision.
- Senator French asked if a client wanted this information to be made public, they could release it without a problem.
 - Correct. Attorney-client privilege can be waived by the client, it cannot be waived by the attorney. Rule of Professional Conduct 1.6 puts the obligation on attorneys to protect the confidentiality. Does not have two classes of clients, the body of clients are all protected by the attorney-client privilege. When a person is going into a conference with their lawyer that is confidential.