

**Statement of Richard C. Gagliuso on Senate Bill 39  
On Behalf of the New Hampshire Press Association and  
the New England First Amendment Coalition**

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By way of a brief introduction, I am an attorney in private practice in Manchester with the law firm of Bernstein, Shur, Sawyer & Nelson. I have represented newspapers and other members of the media in New Hampshire since the 1980s, in countless matters involving access to public records and proceedings, among other legal issues. I am currently a member of the board of the New Hampshire Press Association and the board of the New England First Amendment Coalition, and my comments today are made on behalf of both organizations.

I had the privilege of representing Seacoast Newspapers, Inc. in a case decided by the New Hampshire Supreme Court last May. In that case, as well as a companion case decided the same day, the Court corrected a line of prior decisions interpreting RSA 91-A, the Right-to-Know Law, which had stood for almost thirty years for the proposition that the personnel records of public employees were categorically exempt from disclosure. As a result of that longstanding misinterpretation of the Right-to-Know Law, the people of New Hampshire had been deprived of access to virtually all information concerning the performance of public employees, including law enforcement officers.

Senate Bill 39 appears to be an attempt to reverse the recent decisions of the Supreme Court by effectively reinstating the environment of secrecy that prevailed prior to that decision, but only as applied to police officers. Not only were these cases correctly decided, but they reaffirmed the public policy in favor of open government enshrined in the Right-to-Know Law since its enactment in the 1960s.

I want to offer just a few observations for your consideration. First, do not let anyone tell you that the Supreme Court made a mistake last May. In revisiting its prior decisions, the Court examined the legislative history of the statutory exemptions in question and it looked to the way the federal courts had consistently interpreted virtually identical exemptions in the federal Freedom of Information Act. The Court further acknowledged that its prior decisions represented a departure from the guideposts it had consistently followed in interpreting the Right-to-Know Law. Ultimately, the Court was so convinced of its prior error that it took the brave and extraordinary step of reversing a line of cases that had stood for years as the law of this state. In so doing, the Court adhered to the balancing test it had articulated and applied for many years in the context of other exemptions.

The issue before you today in the form of Senate Bill 39 is not whether *Seacoast Newspapers* was correctly decided. The issue presented by Senate Bill 39 is whether the Right-to-Know Law, construed now as it was intended to be interpreted and applied at the time of its passage, still strikes the right balance between the public's interest in knowing what its government is up to and the sometimes competing privacy interests of our citizens.

The Right-to-Know Law still represents sound public policy. With respect to access to certain categories of public records like public employee personnel, investigatory and disciplinary records, the law wisely avoids making a categorical declaration in favor of a case-by-case balancing approach, which permits public bodies and the courts to assess each request for access on its particular facts, taking into account the competing interests at stake. Senate Bill 39 would forego this careful, case-by-case analysis in favor of a broad, all-encompassing rule that exalts secrecy over transparency. That was not good public policy back in the 1960s and it still is not good public policy.

And by the way, we need to abandon the notion that public employees have a privacy interest in the way they do their jobs. As many courts around the country have ruled, those taking public employment do not relinquish their privacy interests in purely personal information, but they have no legitimate interest in keeping private information about their job performance. Please bear in mind that the Right-to-Know Law currently provides for the protection of private information pertaining to public employees. Information like personal health and financial information is adequately protected from public disclosure by the law in its current form.

Please consider the wisdom of shielding an employer from reliable information about how well its employees are performing. In the private sector, the notion that an employer should not have access to such information would be viewed as nonsensical. After all, it is the employer's right and responsibility to evaluate the job performance of an employee to determine whether the employee should be praised or promoted, disciplined or dismissed. Yet, Senate Bill 39 invites the General Court to shield the public, which ultimately employs all state and municipal employees, from the very information needed to fulfill the responsibilities of an employer. How are the citizens of this state to obtain the information they need to assess the performance of those to whom they entrust great responsibility and who are compensated out of public revenues? How are we to fulfill our role as supervisors of those we employ to conduct our business for us if we cannot know who is performing well for us and who is falling short of expectations?

I encourage you to ask yourselves also why police officers should be singled out for special treatment while the performance of other public employees remains open to some degree of public oversight. There is an argument to be made that law enforcement officers, by virtue of the unique authority delegated to them, should be subject to a greater degree of scrutiny than other public employees. Certainly, there is no reason to carve out an exception for them to a rule that appropriately balances competing interests in the disclosure of personnel, investigatory and disciplinary records of public employees.

I understand why some law enforcement officers may wish to return to the days when their conduct, good or bad, was a matter between them and their immediate superiors. But the Right-to-Know Law was never intended to cast a shroud over their conduct, and the law as it existed previously was never sound policy. Most people who serve in law enforcement are deserving of our gratitude and praise, and their good work should be an open book for all to see. For those few whose conduct does not measure up, their conduct too should be open to scrutiny.

I grew up in Concord and have lived in New Hampshire almost my entire life. I was proud of my role in the *Seacoast Newspapers* case because I felt that I had contributed to a restoration of the law that was intended to shed light on governmental activity. I urge you to recognize the salutary effect of that decision and leave the Right-to-Know Law alone in this instance.