

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

SUPERIOR COURT

Docket No. 217-2022-cv-01114

Union Leader Corporation

v.

New Hampshire Department of Safety

**NEW HAMPSHIRE DEPARTMENT OF SAFETY'S
MOTION TO DISMISS**

The Respondent, the New Hampshire Department of Safety (the “State”), through its counsel, the New Hampshire Department of Justice, hereby moves to dismiss Union Leader Corporation’s (the “Petitioner”) complaint for access to public records.

I. Introduction:

1. The Petitioner seeks access to “incident reports and any other public records relating to the New Hampshire State Police response at the Sununu Youth Services Center on October 7-8th, 2022.” In 2019, the Supreme Court held that investigatory records related to juveniles constitute “Court records of proceedings under [RSA chapter 169-B] and are therefore confidential under RSA 169-B:35, II. See Petition of State, 172 N.H. 493 (2019). The records subject to the Petitioner’s request clearly fall within the confidentiality provision of RSA 169-B:35, II, as interpreted by the Supreme Court, and therefore the Petitioner has no right to access those records under RSA chapter 91-A. See 91-A:4, I (providing that the public does not have a right to access records when access is

“otherwise prohibited by statute). Accordingly, the State requests that this Court dismiss the Petition in its entirety and award the State its reasonable attorney’s fees under RSA 91-A:8, II for having to defend against this frivolous Petition.

II. **Background:**

2. As alleged in the Petition and its supporting exhibits, New Hampshire State Police responded to an incident involving juveniles at the Sununu Youth Services Center on October 7-8, 2022. Petition, ¶5; Ex. 3.

3. On October 13, 2022, a reporter for the Petitioner requested access to “public records related to the state police response at the Sununu Youth Services Center on October 7-8, 2022, including any incident reports with confidential information redacted.” Petition, Ex. 1.

4. State Police denied the Petitioner’s request, explaining that such records were “law enforcement investigative records pertaining to juvenile delinquency,” which are confidential under RSA chapter 169-B and therefore not publicly available under RSA chapter 91-A. Petition, Ex. 2; see also RSA 91-A:4, I (providing a public right to inspect governmental records “except as otherwise prohibited by statute or RSA 91-A:5”).

5. In subsequent communications, Department of Safety’s Senior Staff Counsel Hilts explained in detail how the requested records are clearly confidential court records under Petition of State, 172 N.H. 493, and that if the Petitioner persisted in filing a frivolous petition for access to these records, the State would seek to recover its attorney’s fees under RSA 91-A:8, II. See Petition, Ex. 2.

III. **Standard of Review:**

6. In considering a motion to dismiss, the court must determine “whether the plaintiff’s allegations are reasonably susceptible of a construction that would permit recovery.” Konefal v. Hollis/Brookline Co-op. School Dist., 143 N.H. 256, 258 (1998) (cleaned up). In doing so, the court assumes all material facts in the plaintiff’s complaint are true “and construe[s] all reasonable inferences drawn therefrom most favorably to” the plaintiff. Karch v. BayBank FSB, 147 N.H. 525, 529 (2002) (cleaned up). “The court will not, however, assume the truth and accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law.” ERG, Inc. v. Barnes, 137 N.H. 186, 190 (1993). The question of whether a claim can be sustained is a threshold issue, which requires “the court to test the facts in the complaint against the applicable law.” Provençal v. Vermont Mut. Ins. Co., 132 N.H. 742, 745 (1990). The court does not assume the truth of statements in the plaintiff’s complaint, “which are merely conclusions of law.” Karch, 147 N.H. at 529 (quotation omitted).

IV. Motion to Dismiss

7. The Petitioner seeks access to law enforcement investigative records related to delinquent juveniles. Because such records are confidential by statute, the Petitioner does not have a right to access those records, and the Petition should be dismissed.

8. RSA 91-A:4, I, provides citizens with a right to inspect governmental records “except as otherwise prohibited by statute or RSA 91-A:5.” As relevant here, RSA 169-B:35, II provides that all “court records of proceedings” under RSA chapter 169-B “shall be withheld from public inspection.” To effect RSA chapter 169-B’s “purpose of rehabilitating delinquent minors by shielding them from the environment surrounding adult offenders and inherent in the ordinary criminal processes,” the Supreme Court liberally

construed the phrase “court records of proceedings” to include law enforcement investigatory records concerning a juvenile subject to the provisions of RSA chapter 169-B.

9. Here, the Petitioner seeks law enforcement investigative records regarding New Hampshire State Police responding to an incident at the Sununu Youth Services Center involving juveniles. Because these records that constitute “court records of proceedings” under RSA chapter 169-B, as that the Supreme Court interpreted that phrase, they are confidential under RSA 169-B:35, II, and RSA 91-A:4 does not provide the Petitioner with a right to access such records. Accordingly, the State requests that this Court dismiss the Petition in its entirety.

A. Legislative scheme regarding confidentiality of juvenile delinquency records:

10. RSA chapter 169-B governs “delinquent children,” including those placed at the Sununu Youth Development Center. See RSA 169-B:1; RSA 169-B:2, IV (defining “delinquent”). As relevant here, RSA 169-B:35 provides that “Court records of proceedings under this chapter ... shall be kept in books and files separate from all other court records” and “shall be withheld from public inspection,” unless certain narrow exemptions to confidentiality are present.¹

11. Although RSA chapter 169-B does not expressly define the phrase “court records of proceedings under this chapter,” the Supreme Court recently interpreted the phrase in Petition of State, 172 N.H. 493 (2019). In that case, the Attorney General’s Office

¹ None of these exemptions are present here. See RSA 169-B:35, II (allowing access to such records for officers of the institution where the minor is committed, juvenile probation and parole officers, parents, guardians, and custodians of the minor, the minor’s attorney, the relevant county, and others entrusted with the corrective treatment of the minor); RSA 169-B:35, III (allowing police officers and prosecutors involved in the investigation and prosecution of criminal acts to access police records concerning juvenile delinquency); RSA 169-B:36, II (authorizing the court clerk to disclose limited information following an adjudicatory hearing in which the juvenile was found to have committed a violent crime).

specifically sought court authorization to disclose the “details of its investigation” into “an incident involving several minors,” its conclusions of fact and law, the nature of a local police department’s delinquency charges, and the disposition in the delinquency matter. Petition of State, 172 N.H. at 494. However, the Supreme Court ruled that the Attorney General’s Office could not disclose such investigatory records because they were confidential under RSA chapter 169-B. Id. at 500.

12. In reaching its decision, the Supreme Court emphasized the Legislature’s stated public policies and purposes in RSA chapter 169-B. The legislature “recogniz[ed] the inherent differences between children and adults” and “provided for special treatment of juveniles under the juvenile justice statute.” Id. at 496 (quotation omitted). Thus, the legislative purpose of juvenile laws is “not penal, but protective” and “[i]t is not that the child shall be punished for breach of a law or regulation, but that he shall have a better chance to become a worth citizen.” Id. at 496-97 (quotation omitted). To that end, RSA 169-B “shall be liberally interpreted, construed and administered to effectuate” the legislature’s stated purposes and policies, including “encourage[ing] the wholesome moral, mental, emotional, and physical development of each minor coming within the provisions of the chapter, by providing the protection, care, treatment, counselling, supervision, and rehabilitative resources which such minor needs.” RSA 169-B:1; see Petition of State, 172 N.H. at 496.

13. With these public purposes and policies in mind, the Supreme Court ruled that “the legislature intended that investigative records compiled by the [Attorney General’s Office] concerning a juvenile subject to the provisions of RSA chapter 169-B be

confidential.” Petition of State, 172 N.H. at 499.² If this were not the case, releasing investigatory records, which include much of the same information from actual court records that the Legislature intended to be confidential, would defeat the purposes of the confidentiality provisions in RSA chapter 169-B. See id (noting that investigative records related to juveniles are relevant to, could become part of, and would include the same facts that form the basis of subsequent court proceedings involving juveniles).

B. The records Union Leader seeks are confidential under RSA chapter 169-B and therefore exempt from disclosure under RSA chapter 91-A:

14. RSA 169-B:35, II provides that “[c]ourt records of proceedings” under RSA chapter 169-B “shall be withheld from public inspection.” (Emphasis added.) Here, the Petitioner seeks “incident reports and any other public records” relating to an incident involving juveniles at a delinquent juvenile detention facility that necessitated a response from New Hampshire State Police. Such records are clearly confidential “court records of proceedings” under RSA 169-B:35, II as the Supreme Court has broadly construed that phrase.

15. Juveniles at the Sununu Youth Center are delinquents subject to the provisions of RSA chapter 169-B. Incident reports from State Police, which detail State Police’s response to incidents at the Sununu Youth Center involving juveniles, are investigatory records that are relevant to, could become part of, and would include the same facts that would form the basis of subsequent court proceedings involving juveniles. Thus, the

² Notably, RSA 169-B:35, III provides that, “notwithstanding” the confidentiality provisions of RSA 169-B:35, police officers and prosecutors in certain circumstances “shall be authorized to access “police records” concerning juvenile delinquency.” (Emphasis added.) That the legislature provided “court records of proceedings under this chapter ... shall be withheld from public inspection” but then established an exemption allowing limited access to “police records” further demonstrates that the legislature intended the phrase “court records of proceedings” to have a broad meaning inclusive of law enforcement investigatory records.

subject records constitute “court records of proceedings” under RSA chapter 169-B. Accordingly, RSA 169-B:35, II requires that these records “be withheld from public inspection.”

16. Despite the Supreme Court’s clear opinion in Petition of State, the Petitioner asserts that they nevertheless have a right to access the subject records because they are requesting access under RSA chapter 91-A rather than under RSA chapter 169-B. See Petition, ¶¶9-10. The Petitioner’s argument ignores the plain language of RSA 169-B:35, II, which provides that confidential records under the chapter “shall be withheld from public inspection,” and RSA 91-A:4, I, which provides that the public does not have a right to access governmental records where disclosure is “otherwise prohibited by statute.” Because RSA 169-B:35, II prohibits disclosure of the requested records, the Petitioner does not have a right to access those records through RSA chapter 91-A:4, I. Put differently, RSA 91-A:4, I, recognizes the confidentiality provisions of other statutes and prohibits the public from using RSA chapter 91-A to evade those confidentiality provisions. See also Petition of State, 172 N.H. at 499 (“The legislature has ... determined that confidentiality to juvenile proceedings prevails over the right of public access to such information.”).

17. Furthermore, the Petitioner’s suggestion that the public can somehow access records that are statutorily confidential under RSA 169:35, II simply by filing a right-to-know request is plainly wrong. If that were the case, public access to such records through RSA chapter 91-A would eviscerate the confidentiality provisions of RSA chapter 169, which the Supreme Court reasoned were important and necessary to effect the legislature’s stated public purposes and policies for RSA chapter 169.

18. Lastly, the Petitioner appears to suggest that redacting identifying information of specific juveniles from the requested records is sufficient to overcome the confidentiality requirement mandated by RSA 169-B:35, II. See Petition, ¶9. To the contrary, RSA 169-B:35, II provides a categorical bar to disclosure, and redacting some information from otherwise exempt records will not overcome RSA 169:35, II. Notably, in Petition of State, the Attorney General’s Office similarly argued that, even if RSA 169-B:35, II applied to certain records, the Attorney General’s Office nevertheless should be allowed “to release redacted records” and that the confidentiality provision of RSA 169-B:35 should “be limited only to those aspects of the records that might reveal the juvenile’s identity.” Petition of State, 172 N.H. at 496 (quotation omitted). The Court rejected that argument, reasoning that the “legislature has, however, determined that confidentiality to juvenile proceedings and records prevails over the right of public access to such information.” Id. at 499. Therefore, the requested records are categorically exempt from disclosure under RSA chapter 169-B, and redacting certain information from those records will not overcome the categorical exemption.

C. State’s Request for Attorney’s Fees:

19. RSA 91-A:8, II, provides that the Court may award attorney’s fees to a public agency “for having to defend against a lawsuit under the provisions of this chapter, when the court finds that the lawsuit is ... frivolous.”

20. Here, the Petition is frivolous because it seeks access to records that are clearly confidential under RSA chapter 169-B and the Supreme Court’s 2019 opinion in Petition of State. Despite counsel for the State fully explaining to the Petitioner that they did not

have a right to access to the requested records, the Petitioner persisted in filing this frivolous lawsuit.

21. Therefore, the State requests that this Court find that the Petition is frivolous and award the State its reasonable attorney's fees.

WHEREFORE, the State, respectfully requests that this Honorable Court:

- A. Dismiss the Union Leader Corporation's petition in its entirety;
- B. Grant the State its attorney's fees under RSA 91-A:8, II; and
- C. Grant such other and further relief as justice may require.

Respectfully submitted,

NEW HAMPSHIRE DEPARTMENT OF SAFETY

By its attorney,

JOHN M. FORMELLA
ATTORNEY GENERAL

Date: January 10, 2023

By: /s/ Brendan A. O'Donnell
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic filing system to all parties of record.

Date: January 10, 2023

/s/ Brendan A. O'Donnell
Brendan A. O'Donnell.