NHMA
NEW HAMPSHIRE MUNICIPAL ASSOCIATION
EST. 1941

New Hampshire's RIGHT-TO-KNOW LAW

2023

TABLE OF CONTENTS

INTRODUCTION 6

RIGHT-TO-KNOW LAW GLOSSARY OF FREQUENTLY USED TERMS 7

CHAPTER ONE: PUBLIC MEETINGS 9

"Meeting" 9

Quorum of a Public Body 9

Quorum 9

Public Body 10

Convenes and Communicates Contemporaneously 11

Remote Participation in a Public Meeting 12

Electronic Communications May Violate Public Meeting Requirements 12

Communications that Circumvent the "Spirit and Purpose" of the Law 14

A Site Visit Is a Meeting 14

To Discuss or Act Upon Matter(s) Over Which the Public Body has Supervision, Control, Jurisdiction, or Advisory Power 15

Exceptions to the "Meeting" Definition (The So-Called "Non-Meeting") 15

Chance social or other encounters 16

Strategy or negotiations relating to collective bargaining 16

Consultation with legal counsel 16

A caucus of members of a public body of the same political party 16

Circulation of draft documents 16

The Requirements for Holding a Proper Meeting 17

Notice to the Public 17

The Basic Requirements 17

Cancelling a Meeting 18

"Continuing" a Meeting 18

Exception to Strict Notice Requirement: An Emergency 18

Notice of Joint Meetings 18

Open to the Public 19

Who are "the public" 19

What does "open" mean? 19

Public Comment and the First Amendment 19

Voting 22

Minutes of Public Meetings 23

Contents of Minutes 23

Public Availability of Minutes 23

CHAPTER TWO: NONPUBLIC SESSIONS 25

Basic Principles 25

It's a Nonpublic Session, Not a Nonpublic Meeting 25

A Nonpublic Session is Different from a "Non-Meeting" 25

Nonpublic Session is the Exception, Not the Rule 25
Nonpublic Sessions are Permitted, Not Required 26
Objection by public body member to nonpublic discussion 26
Permitted Purposes 26
Public Employee Dismissal, Promotion, etc. 27
Hiring 27
Reputation 27
Property Transactions 27
Pending or Threatened Litigation 27
Adult Parole Board 28
Security at Correctional Facilities 28
Applications to Business Finance Authority 28
Emergency Functions Related to Terrorism 28
Confidential Information in Adjudicative Proceedings 28
Student Tuition Contracts 28
Consideration of Legal Advice 29
Consideration of disclosing minutes of a nonpublic session 29
Procedural Requirements 29
Entering Nonpublic Session 29
Conduct of Nonpublic Session; Minutes 29
Exiting Nonpublic Session; Availability of Minutes 30
Practical Considerations 30
Placement on the Agenda 31
Timing 31
Attendance by Non-Members 31
Recording During Nonpublic Session 31
Making Decisions in Nonpublic Session 31
Dealing with Nonpublic Session Violations 32
Returning to Public Session 32
Minutes 32
Content of the Minutes 32
To Seal or Not to Seal? 33
How Long to Seal? 33
Review and Approval of Sealed Minutes 34
Delayed Vote to Seal 34
Review by New Board Members? Former Board Members? 34
Review and Unsealing of Old Minutes 35
List of sealed minutes 35
CHAPTER THREE: GOVERNMENTAL RECORDS 37
What Is a Governmental Record? 37
The Basic Definition of a Governmental Record - RSA 91-A:5 37
Information Must be in Physical Form - RSA 91-A:1-a, IV 37
Created, Accepted, or Obtained by a Public Body 37
Created, Accepted, or Obtained by a Public Agency 38
In Furtherance of Its Official Function 38

Access to Governmental Records 38
The Law Favors Disclosure 38
Availability 38
Storing Public Records 39
Electronic Governmental Records 39
Deletion of Electronic Governmental Records 40
Mandated Access to Certain Records 40
Exemptions to Disclosure of Governmental Records 41
General Standards Governing Exemptions - RSA 91-A:5 41
Internal Personnel Practices - RSA 91-A:5, IV 42
Confidential, Commercial or Financial Information - RSA 91-A:5, IV 42
Invasion of Privacy - RSA 91-A:5, IV 43
Personnel Files 44
Preliminary Drafts - RSA 91-A:5, IX 45
Personal Notes - RSA 91-A:5, VIII 45
Law Enforcement Body Camera Recordings - RSA 91-A:5, X 45
Law Enforcement Records 45
Information Technology Systems 46
Attorney-Client and Attorney Work Product Documents 46
Documents Received During a Nonpublic Session 47
Records of Certain Emergency Functions 47
Other Statutory Exemptions 47
Responding to Governmental Records Request 47
Who May Request Governmental Records? 48
The Record Must Be Reasonably Described 48
Search for Records 49
Produce Records If Immediately Available 49
"On the Business Premises" 49
No Obligation to Compile, Cross Reference or Assemble 50
Appointment to Review Records 50
Redact Confidential Information 50
Producing Electronic Governmental Records 50
When Denying Access 51
Charging for Copies of Governmental Records 51
Retention of Governmental Records 51
The Records Retention Statute, RSA chapter 33-A 51
Municipal Records Committee 52
Retention Periods 52
Format of Document Retention 52
CHAPTER FOUR: REMEDIES FOR VIOLATIONS OF THE RIGHT-TO-KNOW LAW ..54
How is the Right-to-Know Law Enforced? 54
Office of the RTKO 54
Enforcement Through Superior Court 54
What Are the Remedies and Penalties? 55
Appendices 57
A. Chapter 91-A: Access to Government Records and Meetings 57
B. Remote Participation Checklist 71

C. Draft Meeting Minutes - Practical Considerations 72
D. Nonpublic Sessions Minutes Checklist 74
E. Disclosure of Law Enforcement Records Under the Right-to-Know Law 77
F. Chapter 33-A: Disposition of Municipal Records 80
G. Sealed Nonpublic Meeting Minutes Review Procedure 90
Table of Cases 92
Table of Statutes, Regulations and Constitutions 95

No part of this publication may be reproduced, distributed, or transmitted in any form or by any means, including but not limited to photocopying, recording, posting on a website, or other electronic or mechanical methods, without prior written permission of the New Hampshire Municipal Association, except in the case of quotations that cite the publication as the source or other non-commercial uses permitted by law.

INTRODUCTION TO NEW HAMPSHIRE'S RIGHT-TO-KNOW LAW

All states, as well as the federal government, have laws like New Hampshire's Right-to-Know Law, which require government operations to be generally open and accessible to the people.

Part I, Article 8 of the New Hampshire Constitution reads:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

When RSA chapter 91-A, the Right-to-Know Law, was enacted, Section 1 was written to reflect that purpose:

> Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

Section 1 requires openness and access to "actions, discussions, and records" of the government. Therefore, to understand the Right-to-Know Law, it's best to think of it as having two major components: public meetings and governmental records.

However, the Right-to-Know Law is just the floor; in other words, it sets forth the bare minimum requirements that all public bodies and agencies must comply with. Public bodies and agencies may enact their own local rules that provide more access and openness than is required by the Right-to-Know Law. RSA 91-A:2, II says:

> If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter.

Accordingly, in addition to using this book to ensure compliance with the Right-to-Know Law, you must be aware of any local rules of procedure that require you to do more than what the statutes require. If your municipality has these more restrictive rules, you must follow them. Failure to do so will constitute a Right-to-Know Law violation.

There is no question that there are costs—time, effort, money—associated with compliance. The New Hampshire legislature has decided that the benefits of open government outweigh any inconveniences posed by the Right-to-Know Law, so compliance should be considered part of the cost of governmental operations. A court will always construe the Right-to-Know Law broadly and in favor of the public's right to access. The assumption is that the public is entitled to access, and so it will always be the government's burden to prove that the public should be denied access in certain circumstances.

See Appendix A, RSA chapter 91-A: Access to Government Records and Meetings

RIGHT-TO-KNOW LAW GLOSSARY OF FREQUENTLY USED TERMS

"Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

"Governmental proceedings" means the transaction of any functions affecting any or all citizens of the state by a public body.

"Governmental records" means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" also includes the term "public records," as defined in RSA 91-A:10, relative to the release of personal information for research purposes. That very limited aspect the Right-to-Know Law is not covered in this book.

"Information" means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.

"Meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters.

"Minutes" are a written summary of a meeting. Minutes are required for all meetings, including both public meetings and nonpublic sessions. Minutes must include, at a minimum, the names of the public body members present, the names of persons appearing before the public body, and a brief description of the subject matter discussed and final decisions (if any), and state the name of the members who made and seconded each motion.

"Nonpublic session" is part of a "meeting" that can be done without the public present. A nonpublic session can be held only for particular purposes, and only if certain procedural requirements are met, as described in RSA 91-A:3. Unlike a "non-meeting," a nonpublic session is still part of a meeting; it's just that public bodies are allowed to conduct that part of the meeting without the public present.

"Non-meeting" is not an official term used in RSA chapter 91-A, but it is a term used to describe situations that are specifically not considered meetings, even though they would otherwise fit the definition of "meeting," above. They are as follows:

- A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters if no decisions are made regarding such matters;
- Strategy or negotiations with respect to collective bargaining;
- Consultation with legal counsel;

- A caucus consisting of elected members of a public body of the same political partywho were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or
- Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting. However, other provisions of RSA chapter 91-A (such as those regarding governmental records) still apply to such documents or related communications.

"Public agency" means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.

"Public body" means any of the following:

- The general court including executive sessions of committees; and including any advisory committee established by the general court.
- The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.
- Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.
- Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corpo ration, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.
- Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

"Recorded vote" is a vote that allows the public to ascertain how each public body member voted. A recorded vote may be accomplished by conducting a roll call vote (see next entry), but roll call is not necessarily required, as long as it's clear how each member voted. (Examples: "Motion passes, 4-1, with Mr. Buckley voting in the negative" or "Motion passes unanimously.")

"Roll call vote" is a vote that states, in the public body's minutes, how each individual board member voted. (Example: Byrnes: Yes; Buckley: Yes; Johnston: No.)

"Sealed Minutes" is not an official term in RSA chapter 91-A. However, the term is used to describe minutes of nonpublic sessions that the board has determined, by a 2/3 vote of members present during public session, should not be made available to the public because at least one of the following applies:

- Divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or
- Divulgence would render the proposed action ineffective, or
- The discussions in the nonpublic session pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

CHAPTER ONE: PUBLIC MEETINGS

This chapter discusses public meetings. For nonpublic sessions, refer to Chapter Two.

General Rule of Public Meetings: A meeting of a public body must have proper notice and be open to the public, and the public body must create minutes.

To understand this rule, and its nuances and exceptions, we must start with the definition of "meeting."

I. "MEETING"

A meeting is defined as "the convening of a quorum of the membership of a public body, … or the majority of the members of such public body if the rules of that body define 'quorum' as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously,… for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power.…" **RSA 91-A:2, I.**

Therefore, for a "meeting" to occur, the following must be true:

A. A quorum of a public body
B. Convenes so that they can communicate contemporaneously (in-person, telephone, electronic communication, etc.)
C. To discuss or act upon something over which the public body has supervision, control, jurisdiction, or advisory power.

Let's look at each part separately.

A. Quorum of a Public Body

1. Quorum

What is a quorum? It is the number of members who must be present to take action. "In the absence of a statutory directive to the contrary, a majority ordinarily constitutes a 'quorum' which can take effective action." ***First Fed. Savings & Loan Ass'n v. State Board of Trust Co. Incorporation*, 109 N.H. 467, 469 (1969)**. When a quorum is present, a majority vote of those present is all that is needed to take action—again, unless there is a statute to the contrary (for example, **RSA 674:33, III**, which requires the concurring vote of three members of a zoning board of adjustment to take any action).

In the rare case that the rules of the body define a quorum as something more than a majority of the members (for example, if a town charter defines a quorum of the town council as two-thirds of the members), the presence of a simple majority will still constitute a "meeting" under the Right-to-Know Law. In other words, a public body can't define "quorum" as more than a majority for the purpose of circumventing the public meeting requirements. For example, although a board of five could define "quorum" as four members for purposes of voting/acting, three members of that board would still constitute a quorum under the Right-to-Know Law.

2. Public Body

"Public body" is defined in **RSA 91-A:1-a, VI**. That paragraph has five subparagraphs, with subparagraph (d) being the most important part of the definition for municipalities, school districts, and the like:

a. The general court including executive sessions of committees; and including any advisory committee established by the general court.

b. The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.

c. Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.

d. Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.

e. Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax-exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

Let's look at subparagraph (d) more closely:

- The **legislative body** is a public body. This means that when the annual town, village district, or school district meeting is going on, a meeting of a public body is occurring. However, those legislative bodies do not have a "quorum." It is simply the conducting of the town meeting that constitutes a meeting of a public body.
- A **governing body**—e.g., select board, town council, city council, library trustees, school board—is a public body.
- Other **boards, commissions,** and **committees** in your municipality are public bodies: planning board, conservation commission, trustees of the trust fund, capital improvements committee, just for a few examples.
- **Any committee, subcommittee, subordinate body, or advisory committee *of or to* a public body or agency is a public body as well.** Sometimes this is misunderstood, and it's extremely important. When a public body creates an advisory committee, it's a public body. When a public body creates a subcommittee of itself, it's a public body. Therefore, if the seven-person planning board creates a three-member subcommittee to draft a proposed ordinance, the three-person subcommittee is a public body of its own. It must do all the things a public body must do, including giving notice of meetings and taking minutes, which will be described later in this chapter.

Furthermore, if a public body or agency creates a committee, that committee is a public body as well. So said the New Hampshire Supreme Court, when it ruled that an "Industrial Advisory Committee" created by a mayor constituted a public body, even though that public body was not created by ordinance or statute, because "the committee's involvement in governmental programs and decisions brought it within the scope of the right-to-know law." ***Bradbury v. Shaw*, 116 N.H. 388, 390 (1976)**. Therefore, the focus is on whether the body is engaged in governmental operations; if it is, it should be considered a public body. Err on the side of openness; you can be assured a court will.

On the other hand, a committee of public officials that provides advice only to planning board applicants, and not to the planning board, is not an advisory committee subject to the Right-to-Know Law. In ***Martin v. City of Rochester*, 173 N.H. 378 (2020)**, the New Hampshire Supreme Court interpreted narrowly the definition of "advisory committee" in **RSA 91-A:1-a**, ruling that the city's technical review group (TRG) was not a public body subject to the public meeting rules of the Right-to-Know Law. The city manager appointed city employees to the TRG to provide advice to planning board applicants on their proposed projects. Each member of the TRG would suggest changes in accordance with city regulations, laws, and policies. After the TRG meeting the city planner prepared a summary of the comments that was provided to the applicant, placed in the planning board file, and made available for public inspection. The plaintiff sought access to the TRG meetings. The supreme court concluded that because the TRG's primary purpose was to provide advice to planning board applicants, not to the planning board, it was not an advisory committee as defined in **RSA 91-A:1-a, I**, and its meetings were not required to be open to the public.

- Note: "Public body" also curiously includes "agency" in its definition. There is agreement—including from the New Hampshire Attorney General's office—that this was erroneously included in the definition. A "public agency," which is defined as "any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision," is not understood to be a public body. A public agency could be an agency of one, such as the town clerk or town administrator, or the mayor of a city. An agency might also be made up of a department head and a few employees. Therefore, the definition of a public body has, thus far, not been interpreted to include "public agency," which is separately defined in **RSA 91-A:1-a**. It may just be that "agency" was included to reinforce that any board, commission, committee, etc. acting on behalf of town business is included in the definition of "public body."

As you can see, virtually all groups that perform any governmental function in a governmental entity (town, school district, village district, etc.) are considered public bodies, like the Industrial Advisory Committee in the Bradbury case above. Other civically engaged groups in town that have no official governmental status would not constitute public bodies under the Right-to-Know Law. For example, a "Friends of the Library" committee, formed on its own as an independent nonprofit organization, is not a public body. However, if the library trustees created such a committee, it would be a public body subject to the Right-to-Know Law.

B. Convenes and Communicates Contemporaneously

The most obvious manner in which a public body "convenes and communicates contemporaneously" is a quorum of the board sitting together, in person, and having a discussion. But contemporaneous communications can occur through other media and in other settings, such as by telephone or video conference. They key is whether a quorum of the board is having contemporaneous communications—regardless of the forum.

This section addresses important issues related to communications through electronic means.

1. Remote Participation in a Public Meeting

It is possible for a board member to participate in a public meeting, even if he or she cannot be physically present. The Right-to-Know Law authorizes a public body—but does not require it—to allow one or more members to participate in a meeting by telephone or other communication, but only if the very specific rules in **RSA 91-A:2, III**, are scrupulously followed:

- The member's in-person attendance must be "not reasonably practical."
- The reason in-person attendance is not reasonably practical must be stated in the minutes of the

meeting. Although the law does not indicate what situations would qualify, some obvious examples include physical incapacity and out-of-state travel.

- Except in an emergency, at least a quorum of the public body must be physically present at the location of the meeting. An "emergency" means that "immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action." The determination that an emergency exists is to be made by the chairman or presiding officer, and the facts upon which that determination is based must be included in the minutes.
- All votes taken during such a meeting must be by roll call.
- Each part of a meeting that is required to be open to the public must be audible "or otherwise discernable" to the public at the physical location of the meeting. All members of the public body, including any participating from a remote location, must be able to hear and speak to each other simultaneously during the meeting, and must be audible or otherwise discernable to the public in attendance.
- Any member participating remotely must identify anyone present at the remote location.

See Appendix B: Remote Participation Checklist

2. Electronic Communications May Violate Public Meeting Requirements

(a) Illegal Meeting.

Even though electronic participation in a meeting is permitted, it must be done in accordance with **RSA 91-A:2, III**. Remember that one of the most important requirements of that statute is that members of the public and members of the public body who are physically present at the meeting must be able to contemporaneously hear the board member who is participating electronically, and vice versa. When members of a public body are emailing each other, it is impossible for the public to have contemporaneous access to those communications. To emphasize this point, paragraph III(c) states, "No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice."

If members constituting a quorum of a public body have a contemporaneous discussion by telephone or video conference of matters within their jurisdiction, and they have not posted notice and allowed public access, they are conducting an illegal meeting, in violation of **RSA 91-A:2**.

(b) Illegal Communication Outside a Meeting.

Because the statute defines "meeting" as the convening of a quorum "such that all participating members are able to communicate with each other *contemporaneously*," one might wonder whether the public meeting requirements can be avoided through the use of non-contemporaneous communications. For example, an email discussion that takes place over several days does not involve "communicating contemporaneously," and therefore is not within the definition of a meeting. Can such a discussion occur in private?

The answer is an emphatic no. **RSA 91-A:2-a** says, "Unless exempted from the definition of 'meeting' under **RSA 91-A:2, I**, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of **RSA 91-A:2, II or III**." Therefore, a substantive discussion of matters within a public body's supervision,

control, jurisdiction, or advisory power can never take place by email or other private communication, whether "contemporaneous" or otherwise. Whether one thinks of this as an illegal *meeting* or as an illegal communication *outside* a meeting is largely a matter of semantics; what matters is that it's illegal.

This doesn't mean that all email among a quorum of a public body is prohibited, but caution must be exercised. If one planning board member sends a communication to the other board members with his opinions on a pending application, this is not (yet) a technical violation of the law—but it is inviting trouble. A quorum has not been "convened" for "contemporaneous" discussion of matters within the board's jurisdiction, so there is no "meeting"; and there is no violation of the requirement that the board "deliberate" on matters within its jurisdiction only in properly held meetings, because there has been no deliberation—just an opinion sent by one member of the board. However, if another planning board member hits "Reply All" and responds to that email, a deliberation among a quorum of the board has begun, resulting in an illegal communication outside a meeting. Therefore, emails of this nature should be avoided.

In fact, one superior judge has ruled (incorrectly, in our view) that even a one-way communication from one board member to his other board members does constitute a meeting, even though no "discussion" among the board members had taken place. The judge decided that the potential for an email discussion to arise out of that original email was enough to create an "illegal meeting": "The key to the contemporaneous communication is the *ability* to communicate contemporaneously—as opposed to whether the contemporaneous communication actually occurred." ***Porter v. Town of Sandwich*, No. 212-2014-CV-180 (Carroll County Superior Court, August 14, 2015)** (emphasis added).

Although the New Hampshire Municipal Association does not agree that a one-way communication constitutes a meeting—or that the mere *ability* to communicate contemporaneously constitutes a meeting—public body members should avoid sending email or other communications to each other discussing any substantive topic that the board acts upon, conducts business upon, or is involved with in any way (*i.e.*, "official matters" of the public body). Instead, email and other communications outside of meetings should be saved for administrative or non-substantive purposes. A common example of a permitted communication is the select board chair emailing the packet for the upcoming meeting to the other select board members. The public body can take even further precautions by having an administrative person send the email, if such a person is available, and/or putting the email addresses for the other board members in the "BCC" line rather than the "To" line of the email. Using the BCC line prevents a board member from being able to click "Reply All" and respond easily to all members of the board. Instead, a response email, even if "Reply All" were used, would reply only to the sender of the original email.

Even when an email communication among a quorum of a public body does not constitute an illegal communication, remember that it is a still a governmental record that must be disclosed to a citizen upon request. Further, depending on the content of the email, just like any other record, it may be subject to a particular retention period under the Municipal Records Retention Statute, **RSA chapter 33-A**. Disclosure and retention requirements are separate issues, and they are discussed in Chapter Three on Governmental Records.

❖ To summarize, here are some basic tips on using electronic communications:

✓ Never use email or other communication outside a meeting to express ideas, concerns, opinions, etc. on matters related to the business and duties of your public body.

✓ Use an administrative person (i.e., someone who is not a member of the public body) to send an email to members of a public body, if you have that option.

✓ Put the recipients' email addresses in the BCC line of the email to prevent the possibility of "Reply All" and a discussion ensuing among a quorum of the public body.

✓ Always use official email addresses issued by the municipality, school district, or other governmental entity for communicating town business, because such communications constitute governmental records that will be subject to disclosure, as discussed in Chapter Three.

✓ Leave discussion and deliberation of official matters for a public meeting, a properly held nonpublic session, or a proper "non-meeting," as discussed later in this chapter.

3. Communications that Circumvent the "Spirit and Purpose" of the Law

Not only are email and other communications outside a meeting potentially illegal, but such conduct may also signal to the public that the body is trying to circumvent the open meeting requirement.

In fact, circumventing the spirt and purpose of the Right- to-Know Law is a violation of the law in and of itself. **RSA 91-A:2-a, II** says that "[c]ommunications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter." Such circumvention may come in the form of communications among a quorum of the public body but could also take the form of several separate communications among less than a quorum of the board which, in the aggregate, are among a quorum.

For example, on a board of five, a conversation between two members—whether in person, by telephone, or by email or other electronic communication—does not, by itself, violate the law. There is no convening of a quorum, and there is no deliberation by "the public body"—only by two members of the body. However, if one of those members then communicates with a third member about the same subject, there is a potential violation of the law, because a quorum has now engaged in a discussion outside a public meeting.

Similarly, if the chair of the board contacts each of the other board members, one at a time, to ask their opinions on a matter before the board, each discussion between the two board members would involve less than a quorum. However, in the aggregate, a quorum of the board has communicated, sequentially, on a matter within its jurisdiction. Therefore, the board has engaged in illegal communication and violated **RSA 91-A:2-a**.

4. A Site Visit Is a Meeting

A site visit or site walk most often occurs when a land use board, usually a planning board, goes to the physical site where a new land use project is being proposed. Although a site visit is most common for land use boards, it could also occur when, for example, a select board goes to view a property it has taken by tax deed or a school board goes to view the progress on a new auditorium being built.

If a quorum of the public body is attending the site visit to view and consider a property/location, it is a meeting. Although this gathering occurs outside of the normal meeting space, it is still a meeting of the board if a quorum is present. This is so because the site walk is the "convening of a quorum of the membership of a public body. . . for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power." **RSA 91-A:2, I**. The body should treat site walks like any other public meeting and give appropriate written notice, take proper minutes, and allow unfettered public attendance. If land use board members opt to visit the property individually on their own time, there is no Right-to-Know Law issue, as long as a quorum of members is not present on the site at one time.

Two notes about site visits, particularly for land use boards. First, a land use board has the right to enter property for purposes of gathering information. The board has a right to obtain all the information it needs to make an intelligent and informed decision on the application. If it has decided in good faith that a site walk is necessary, the applicant's refusal to allow access to the site ought to be a sufficient basis for denying the application, because that applicant has refused to provide access to information necessary to make a decision. It is no different from refusing to provide, say, soil information or a traffic impact study.

Further, planning boards have statutory protection in **RSA 674:1, IV**, which states that "[t]he planning board, and its members, officers, and employees, in the performance of their official functions may, by ordinance, be authorized to enter upon any land and make such examinations and surveys as are reasonably necessary and maintain necessary monuments and marks and, in the event consent for such entry is denied or not reasonably obtainable, to obtain an administrative inspection warrant under **RSA 595-B**." Note, however, that this authority is created only "by ordinance," so if the town has not enacted such an ordinance, it is of no use. Further, it applies only to planning boards, not other land use boards. In the absence of that tool, the board should be justified in relying on the rationale stated above—it cannot make an informed decision without visiting the site.

Second, the applicant cannot ban the public from the site walk. The applicant needs to understand that a site walk attended by a quorum or more of the land use board is a public meeting under RSA chapter 91-A and, as such, has to be done in public. Because the board does not have a right to exclude the public, it cannot participate in a site walk where the applicant will not permit public access. It is the better practice, therefore, to have the applicant provide a written consent to enter and inspect form as part of the application process that also extends permission to enter the subject property by members of the public.

C. To Discuss or Act Upon Matter(s) Over which the Public Body has Supervision, Control, Jurisdiction, or Advisory Power

A meeting occurs when a quorum of a public body is discussing matters related to what it does, whether it has direct supervision, control, or jurisdiction over those matters, or whether it simply has advisory power. Furthermore, even if the public body makes no decision during its discussions, a meeting is still occurring—the law explicitly says to "discuss or act upon." And it is important to realize that whether the public body calls the meeting a "meeting," a "work session," or some other term, it is still a "meeting" for purposes of **RSA 91-A** if it meets the definition of meeting and, therefore, must comply with all requirements for meetings.

II. EXCEPTIONS TO THE "MEETING" DEFINITION (THE SO-CALLED "NON-MEETING")

There are several exceptions to the definition of "meeting" described above. The law makes it clear that certain gatherings of public officials are not meetings, even though they would otherwise fit the definition. These types of gatherings are specifically exempt from the requirements of the Right-to-Know Law. They

are often referred to as "non-meetings." Make sure you do not confuse them with nonpublic sessions, which are meetings subject to the Right-to-Know Law, and which are discussed in detail in Chapter 2.

The non-meetings are listed in **RSA 91-A:2, I**:

1. **Chance, social or other encounters** "not convened for the purpose of discussing or acting upon" matters over which the public body has supervision, control, jurisdiction or advisory power, "if no decisions are made regarding such matters." This "exception" is really just a redundancy in the statute, because the definition of "meeting" is premised on the convening of a quorum "for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power." If the gathering was not convened for that purpose, and if no decisions are made regarding such matters, it is by definition not a meeting.

Even if the gathering was not held for the purpose of discussing official matters, general conversation could drift into the area of official business. This should be scrupulously avoided, and if it begins, should stop immediately. Keep in mind, too, that the provision "if no decisions are made" can be misleading, because it might suggest that public bodies can discuss matters within their jurisdiction outside of a public meeting, as long as no decisions are made. That is not the case. While it still may not be a "meeting," such a discussion would constitute "deliberation" outside a meeting, which is prohibited. (See Section I B.2.(b) above.) The purpose of this non-meeting exemption is to allow a quorum of a public body to be in the same place at the same time—such as the town's Old Home Day or other social event, or a chance encounter on the street—without that presence turning into a meeting, as long as no official matters are discussed.

Of course, any gathering of less than a quorum does not constitute a "meeting" in any event, regardless of what is discussed. But a series of gatherings of less than a quorum creates the same potential for a violation as the "sequential communications" discussed in Section I.B.3, above.

2. **Strategy or negotiations relating to collective bargaining**. This includes discussions within the public body itself ("strategy"), as well as discussions with the other side ("negotiations").

3. **Consultation with legal counsel**. This provision applies only when the attorney is present (either in person or by telephone or other electronic means) and actively discussing and giving legal advice to the public body. It does not apply to a discussion about legal advice previously received that the public body wishes to discuss, such as a legal memorandum or email written by the attorney. To hold a non-meeting on this basis, at the very least, the body must have the ability to have a contemporaneous exchange of words and ideas with the attorney (for instance, when the attorney is present or is on the telephone with the public body). ***Ettinger v. Madison Planning Board*, 162 N.H. 785 (2011)**. This "non-meeting" is entirely separate from **RSA 91-A:3, II(l)**, which allows a public body to enter nonpublic session for "[c]onsideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present." For more information on that, refer to Chapter 2 on nonpublic sessions.

4. **A caucus of members of a public body of the same political party** who were elected on a partisan basis by a municipality that has adopted a partisan ballot system. (At the time of this publication, there are no such municipalities in New Hampshire.)

5. **Circulation of draft documents** which, when finalized, are intended only to formalize decisions previously made in a meeting. Be careful! This non-meeting exemption is narrow. What this means is that a board member can circulate a draft document to the other board members (e.g., by email), and that circulation will not constitute a meeting. Here's an example: The select board discusses the contents of a letter. The select board decides that the chair will draft the letter after the meeting. The chair drafts the letter and then sends the draft to the other board members. That act of circulating the letter, which

memorializes what the board already talked about during a proper public meeting, is not a meeting. There has been no violation of the public meeting requirement if that is all the board members are doing. However, if the board members begin an email discussion about possible edits to the letter or other things to add to the letter, they are no longer protected by the "draft documents" non-meeting exception. For more information on email communications as a meeting, see section I.B.2, above.

In addition, select board members may sign manifests non-contemporaneously outside of a noticed public meeting. **RSA 41:29, I(a)**. In a way, this is like another "non-meeting" not listed in **RSA 91-A:2, I**.

III. THE REQUIREMENTS FOR HOLDING A PROPER MEETING

Now that we understand what is a "meeting" and what is not, we can dissect the second part of that general rule we started with:

> A meeting of a public body must have proper notice and be open to the public, and the public body must create minutes.

Therefore, once you have determined that a meeting of a public body will be occurring, there are three basic things that must happen:

- Notice must be given to the public prior to the meeting;
- The meeting must be open to the public; and
- The public body must create minutes.

All of these requirements are described in **RSA 91-A:2**.

A. Notice to the Public

1. The Basic Requirements

The Right-to-Know Law requires a minimum of 24 hours' notice to the public prior to a meeting. The notice must:

- Be given at least 24 hours in advance, not including Sundays or holidays;
- Include the time and place of the meeting; and
- Be published in a newspaper or posted in two "prominent" public places in the municipality, one of which *may* be the public body's official website.

The public body is not *required* to post meeting notices on its internet website. However, if it has a website—and almost all municipalities do—the public body must either (a) post meeting notices on the website "in a consistent and reasonably accessible location" or (b) post and maintain a notice on the website stating where meeting notices are posted. **RSA 91-A:2, II-b(b)**.

If an individual public body has its own page on the municipality's website, its meeting notices may be posted on that page. Alternatively, the municipality's home page may have links to meeting notices for all public bodies or a notice stating where the meeting notices are posted. If the municipality chooses to post meeting notices for some but not all public bodies, the website must indicate where the other meeting notices are posted.

This 24 hours' notice is only a minimum under the Right-to-Know Law. A public body may establish a procedural rule requiring more notice. See **RSA 91-A:2, II**. In addition, other statutes also may require

more notice, particularly when a hearing is required. For example, planning board hearings require 10 days' notice under **RSA 676:4, I(d)**; ZBA hearings require five days' notice under **RSA 676:7**; select board's hearings on highway petitions require 14 days' notice under **RSA 43:2** and **RSA 43:3**; and budget hearings require 7 days' notice under **RSA 32:5**. Whichever law, ordinance, or rule requires the most notice is the one the public body must follow.

Note also that the only required contents of the notice under **RSA 91-A** are the time and place of the meeting (and, logically, of course, the public body that is holding the meeting). The law does not require the purpose of the meeting or a meeting agenda to be included in the notice (unless, again, another statute requires that information). However, many public bodies do include such information, which certainly can benefit the public. And, if your own local rules of procedure require you to post an agenda, then you must (remember local rules giving more access take precedence, **RSA 91-A:2, II**).

Finally, even if the public body's only discussion will be done in nonpublic session, public notice is still required, because every nonpublic session must begin in a public meeting. See Chapter Two.

2. Cancelling a Meeting

There is nothing in the law regarding cancelling a meeting. Of course, if a public meeting has been noticed and the public body subsequently has decided to cancel it, giving some level of notice is highly encouraged. This should include putting a sign on the door of the place where the meeting would have taken place and putting a notice on the website, if one exists, or some other visible public place. If the body wants to reschedule that meeting, new notice of the new meeting time and place must be provided.

3. "Continuing" a Meeting

Public meetings also generally cannot be "continued." In other words, a public body can't announce at the end of a public meeting that the meeting will be continued to another date and time, thus avoiding the need to post notice of the new meeting. A new meeting requires new notice. There are three statutory exceptions for land use boards and the governing body or budget commitee: both a planning board (RSA 676:4, I(d)(1)) and a zoning board of adjustment (RSA 676:7, V) may announce a continuance of a hearing to a specified time and place without the need to post new notice as can the budget committee or governing body when holding a budget hearing (RSA 32:5, I). In the absence of an explicit statutory provision that allows for announcing the continuance of a meeting or hearing, new notice must always be posted.

4. Exception to Strict Notice Requirements: An Emergency

There is one important exception to the general notice requirement. If there is an emergency, defined as a "situation where immediate and undelayed action is deemed to be imperative by the chairman or presiding officer of the public body," a meeting may be held with less than 24 hours' notice. The chair or presiding officer is required to post a notice of the time and place of the meeting as soon as practicable, and "shall employ whatever further means are reasonably available to inform the public that a meeting is to be held." The nature of the emergency must be stated clearly in the minutes of the meeting (and minutes are, of course, required). All these requirements are found in **RSA 91-A:2, II**.

5. Notice of Joint Meetings

A joint meeting occurs when two or more public bodies meet together. Even though only one actual meeting will occur, for the purposes of the Right-to-Know Law, each public body involved in the joint meeting is holding its own meeting. For that reason, each body must post its own notice.

A joint meeting can also occur when one public body is attending the meeting of another public body. For example, if a quorum of the library trustees come to a meeting with the budget committee to discuss the proposed library budget, that meeting should really be noticed both by the budget committee as

a budget committee meeting, and by the library trustees as a library trustee meeting. As stated in the New Hampshire Attorney General's Memorandum on the Right-to-Know Law:

> The attendance by a quorum of a municipal board of selectmen or planning board at public informational meetings of the Department of Transportation for the purpose of advising the Department concerning a highway project can constitute a "meeting" under **RSA 91-A:2, I**, requiring appropriate notice.

Generally, attendance by a quorum of a public body at a meeting being held by a different public body to discuss or act upon a matter within the first body's jurisdiction should be treated as a meeting for Right-to-Know Law purposes by both public bodies. Both bodies should provide notice of the meeting and both bodies should keep minutes, which may be the same document, separately adopted as minutes by both.

Joint meetings or hearings between more than one land use board are governed by **RSA 676:2**. Such meetings often occur when a planning board and a zoning board of adjustment hold a joint meeting to discuss a project that will require approvals from both boards. Read that statute carefully: one of the requirements is that the respective boards have rules governing joint meetings and hearings.

B. Open to the Public

1. Who are "the public"?

Anyone, not just the municipality's residents, may attend any public meeting. A public body cannot limit the audience to residents of the town or school district, or citizens of New Hampshire. All members of the public are welcome.

2. What does "open" mean?

All people in attendance have the right to take notes, record, take photos, and videotape the meeting. **RSA 91-A:2, II**; see also ***WMUR Channel Nine v. N.H. Dep't of Fish and Game*, 154 N.H. 46 (2006)**. Members of the public do not need permission from the public body to engage in recording, and do not even need to inform anyone at the meeting that they are recording. A public meeting is a public place where people do not have a reasonable expectation of privacy, so there is no violation of New Hampshire's wiretap statute for recording without permission or notice to those who are being recorded. *See* **RSA 570-A:1, II** (definition of "oral communication") and **RSA 570-A:2**. In addition, individuals can do whatever they want with their recording. A public body cannot, for example, prohibit someone from posting the video recording on YouTube.

The "open" requirement also means that members of the public must have contemporaneous access to the meeting. This goes back to section I.B., above, regarding the requirements for electronic participation of members of a public body, and the prohibition on using electronic communications to circumvent the law.

"Open to the public" does not include the right to speak. The Right-to-Know Law does not give the public the right to speak—just the right of access, as described above. However, boards often do afford the public the right to speak, which is addressed below.

3. Public Comment and the First Amendment

As stated above, the Right-to-Know Law does not give the public the right to speak at a public meeting. Of course, when a statute requires a public body to hold a public hearing—such as a budget hearing—the public must be given the opportunity to speak and weigh in because that's the purpose of a public hearing. Other statutes also provide certain individuals a right to speak at a public hearing, such as a hearing on an application for a variance where the applicant, abutters, or other parties whose rights are being determined have the right to participate. But if the public body is holding a regular business meeting, **RSA chapter 91-A**

simply does not require public bodies to allow public comment. That being said, many public bodies, including most local governing bodies, provide a public comment portion of their meeting, usually before or after the body's business is conducted (or at both times). When doing so, the public body must comply with the First Amendment.

(a) Public Comment as a Public Forum

When a public body does allow for public comment, it creates a type of "public forum." There are different types of public forums. In a traditional public forum— one that has been historically open for the purposes of First Amendment expression and conduct—the government cannot engage in content-based or viewpoint-based discrimination. In a traditional public forum, the government therefore cannot allow or disallow an individual to speak based on the topic of the speech (content) or the stance a person has on the topic he or she is speaking about (viewpoint). On the other hand, a "limited public forum" is created when the government intentionally opens a space for public discourse, but only for a limited purpose. In such a forum, the government can generally restrict the topics of discussion (content) to those consistent with the purpose of the limited forum but can never restrict speech based on the viewpoint of the speaker. These protections apply both to words and to expressive conduct.

Many courts have determined that public comment portions of public meetings are limited public forums, *see, e.g.,* ***Norse v. City of Santa Cruz*****, 629 F.3d 966 (9th Cir. 2010);** ***Reza v. Pearce*****, 806 F.3d 497 (9th Cir. 2015)**, while others have held that public comment is a traditional public forum, *see, e.g.,* ***Mesa v. White*****, 197 F.3d 1041 (10th Cir. 1999)**.

(b) Rules of Public Forums

Given the complexity of First Amendment jurisprudence, and the consequences that ensue when the government violates free speech protections, public bodies should regulate the conduct of public comment only through reasonable time, place, and manner restrictions. The key is to have rules of procedure that balance the First Amendment rights of the speakers with the decorum and efficiency of the meeting. These rules must target the so-called "time, place, and manner" of the speech because they apply to everyone, regardless of the content or viewpoint of the individual's speech. The most common and effective of these restrictions is a time limit for each speaker—e.g., two minutes per person. Essentially, regardless of what the person is saying, each speaker gets his or her two minutes in front of the public body. Other neutral rules could include:

- Public comment will take place after the business portion of the meeting is completed.
- One person speaks at a time (no interrupting).
- No one speaks until recognized by the chair.
- Speakers must sign in to indicate an intent to speak during public comment.
- Speakers must identify themselves when beginning to speak.
- Public comment is a time for members of the public to speak; it is not a "question and answer session" with the public body.

Note: It is also important to distinguish between a public comment session and the business portion of the meeting. Public comment is the time for members of the public to speak and to be heard by the public body. But no one has a right to be placed on the agenda, i.e., to speak during the business portion of the meeting. The setting of the agenda is within the purview of the public body.

Another rule of some public comment sessions is to restrict the topics of the public's speech to matters pertaining to the agenda of the particular public meeting. Such a rule would actually be content based

because it would allow speakers to speak only on certain topics. Despite that, at least one federal court has determined that an "agenda-only items" rule is a valid time, place, and manner restriction, stating: "A council can regulate not only the time, place, and manner of speech in a limited public forum, but also the content of speech—as long as content-based regulations are viewpoint neutral and enforced that way." ***Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010)**.

While such a rule may be valid, other factors must be considered. First, the public body should have a written rule of procedure to this effect so that the public is on notice. Second, an agenda should actually be posted with notice of the public meeting so that the public is on notice, prior to the meeting, of the topics that will be discussed. Third, it is probably wise to provide a "safety valve," giving an individual the ability to request permission to speak on a topic not on the agenda. Finally, this rule may prove difficult in enforcement. A public body should consider carefully whether it wants to take this route, or whether time limits on speech (and other content-neutral rules) may be sufficient to balance the relative interests of both the public body and the public.

Some rules of public comment are entirely inadvisable. For example, public bodies often think it makes sense to have a rule that prohibits "defamatory speech." But these bans run a serious risk of creating viewpoint discrimination, which is never permitted, because they prohibit someone from speaking critically, but allow someone else to speak favorably, on the same issue. For example, if a public body had a rule that prohibited defamatory speech, the body might decide to prohibit someone from accusing the select board of lying but allow someone else to praise the select board for all its hard work. This is viewpoint discrimination.

In addition, whether something is defamatory is a complicated legal question, and not simply a matter of determining whether speech is hurtful or insulting to someone. Defamation is a civil claim—a basis for one person to sue another. Therefore, the remedy for defamation is an action in a court for damages. Furthermore, an insulting comment alone is not enough even to prove a claim of defamation; defamation requires the public pronouncement of a statement of fact, not a statement of opinion—and most of the less-than-flattering statements made during public comment will be statements of opinion. *See* ***Thomas v. Telegraph Publ'g Co.*, 155 N.H. 314 (2007)**. Because the public body is not a judge or jury adjudicating a claim of defamation, it cannot deem comments defamatory and prohibit them without running a serious risk of violating the First Amendment. And, in fact, any rule that gives governmental officials the unchecked authority to use their own discretion to decide what content of speech is appropriate is very likely to violate the First Amendment.

Similarly dangerous rules are those that would prohibit "offensive speech" or "fighting words." These types of speech are, again, not simply what governmental officials deem to be offensive or violence-inciting, but are legal concepts, extensively developed through First Amendment jurisprudence. In fact, many words and actions that a good segment of the public would agree are offensive are protected by the First Amendment.

For all the above reasons, no public body should ever have or enforce a rule that prohibits "defamatory" speech, "offensive" speech, or the like. Ultimately, comments both complimentary and critical must be allowed. As the Supreme Court of the United States has put it: "As a general matter, we have indicated that in public debate, our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." ***Boos v. Barry*, 485 U.S. 213, 322 (1988)**.

(c) Disruptive Conduct

Despite the protections of the First Amendment, nobody has a right to disrupt a meeting or to speak without being invited. But the disruption must focus on the conduct of the individual that causes real disorder in the meeting, and not on the critical or unpleasant content of the individual's speech. The New Hampshire Supreme Court has said that the chair of a public body is in control of who speaks and when, and that an individual can be lawfully removed from a public meeting without violating First Amendment

protections if the individual's conduct "prevent[s] the [public body] from continuing their meeting" and impacts "the rights of others to speak in an orderly manner." ***State v. Dominic*, 117 N.H. 573 (1977)**.

In *Dominic*, the disruptive individual who was removed was actually one of the members of the select board, but this same principle would apply to a member of the public disrupting the meeting in a severe manner, perhaps by repeatedly trying to speak outside of the public comment session, by interrupting others during public comment, or by refusing to yield the floor once his or her designated time for speaking during public comment has ended. Such conduct may rise to the level of disorderly conduct, a criminal offense, which occurs when a person "purposely causes a breach of the peace, public inconvenience, annoyance or alarm, or recklessly creates a risk thereof, by . . . disrupting any lawful assembly or meeting of persons without lawful authority." **RSA 644:2, III(c)**.

However, having someone removed from a public meeting should be a last resort, only after all other methods of trying to control the situation have been pursued.

In a 2015 case, the U.S. District Court in New Hampshire determined that a school board chair had lawfully ordered a member of the public removed from a meeting for being disruptive. ***Baer v. Leach*, 2014 D.N.H. 214 (November 24, 2015)**. Baer was arrested for his conduct, but the charges against him were ultimately dropped. Baer then sued the arresting officer, alleging that his constitutional rights had been violated through his removal from the public meeting. The court determined that Leach, the arresting officer, was immune from liability because he had sufficient reason to believe that his arrest was lawful based on the circumstances.

Specifically, Leach had observed Baer disregarding the rules governing the public meeting— namely, that public comment was not a "Question and Answer" session and subsequently by interrupting after his allotted time had ended. Furthermore, when the board chair tried to regain order multiple times to allow others to speak, Baer continued to interrupt the meeting. Although the judge did say that there is no "magic number" of warnings necessary before someone can be removed from a meeting, these facts are instructive and show that multiple attempts to resolve the situation should be made before removal is even considered.

Although the ultimate issue in this case was whether the police officer was immune from liability for making the arrest of disorderly conduct—and the Court determined that he was—the underlying analysis regarding the conduct that led to the arrest is helpful to a public body in determining whether removal from a public meeting is appropriate.

Contrast that to the case of ***Clay v. Town of Alton*, No. 15-CV-279 (D.N.H. 2016)**. The select board allowed five minutes per speaker during public comment. Clay took his turn at the microphone and began criticizing the select board for a variety of alleged misdeeds. One of the board members asked him to refrain from his insulting and defamatory remarks, and then a motion was made and approved to discontinue the public comment session. Ultimately, Clay was arrested for disorderly conduct before he ever reached his five minutes. The criminal charges were dismissed. The judge determined that the arrest was unlawful: Clay had not been engaged in disruptive conduct and had not been violating the rules of the board. In addition, the ban on critical or insulting comments about the select board members was viewpoint discrimination. As a result, a civil rights action, which was ultimately settled, was filed against the town by the New Hampshire Civil Liberties Union.

4. Voting

Except for annual town, school district, or village district meetings (see **RSA 40:4-a**), no vote in a public meeting may be taken by secret ballot. **RSA 91-A:2, II**. The public has the right to know how each member of a public body votes on an issue before it in order to hold that member accountable for his or her actions. Voting by secret ballot would frustrate the public's right to this information.

***Lambert v. Belknap County Convention*, 157 N.H. 375 (2008)**. In addition, some votes must be by "roll call," while others must be "recorded" in the minutes. Refer to section C.1. below for more details.

C. Minutes of Public Meetings

This section discusses the requirements for minutes of primarily public sessions. For the detailed requirements for minutes of nonpublic sessions, see Chapter Two.

1. Contents of Minutes

The Right-to-Know Law does not require a public body to create a transcript of its meetings. Instead, the law says the following minimum contents are required: (1) names of members present; (2) other people participating (although it is not necessary to list everyone present); (3) a brief summary of subject matter discussed; (4) any final decisions reached or action taken; and (5) the names of the members who made or seconded each motion. **RSA 91-A:2, II**.

Sometimes there's a sixth requirement: Some provisions of **RSA chapter 91-A** require a vote to be by roll call, while others require a recorded vote. The essence of both is that the public must be able to ascertain the manner in which each public body member voted. However, when the statute requires a roll call vote, the minutes must actually state each member's name, and the manner in which the member voted. Take a look at these examples:

- Roll Call Vote Example

  "Byrnes: yes; Buckley: yes; Johnston: no. Motion Passes."

- Recorded Vote Examples

  "Motion passes 2-1, with Johnston voting in the negative."
  And for a unanimous vote: "Motion passes unanimously."

A roll call vote or recorded vote is required only when the statute says it is required. Otherwise, a public body is not required to do either, unless the public body has its own local rule that requires such practice.

Under **RSA chapter 91-A**, a public body must take a vote by roll call under the following circumstances:

- Any vote taken when a member (or in an emergency, perhaps more than one member) is participating electronically/remotely, **RSA 91-A:2, III**.
- Vote to go into nonpublic session, **RSA 91-A:3, I(b)**.

On the other hand, the statute requires a recorded vote under the following circumstances:

- Any vote taken while in nonpublic session, **RSA 91-A:3, III**.
- Vote to "seal" nonpublic session minutes, **RSA 91-A:3, III**.

2. Public Availability of Minutes

(a) When must minutes be available?

Minutes of all public meetings must be kept and must be available to the public upon request not more than five business days after the public meeting. A business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays. **RSA 91-A:2, II**. Although a public body certainly may record meetings, the recording of a meeting cannot be a substitute for written minutes.

Although there is no requirement to post minutes, the statute does require that if a public body has an internet website, it must either (i) post its *approved* minutes (see paragraph (c) below) "in a consistent

and reasonably accessible location on the website" or (ii) post and maintain on the website a notice stating where the minutes may be reviewed and copies requested. **RSA 91-A:2, II-b(a)**.

As mentioned earlier with respect to meeting notices, almost every municipality now has a website, so either the minutes themselves or the notice of where minutes may be reviewed must be posted on the website. If an individual public body has its own page on the municipality's website, the minutes or notice may be posted on that page. Alternatively, the municipality's home page can have links to minutes of all public bodies or a notice stating that minutes of all public bodies may be obtained at the town hall (or wherever). If the municipality chooses to post minutes of some but not all public bodies, the website must indicate where minutes of the bodies that do not post their minutes may be found.

(c) What must be available? Draft minutes v. "approved minutes"

There is no legal requirement for the public body to "accept" or "approve" the minutes. Of course, all public bodies should review and approve minutes as a best practice, but it is not required.

In fact, the only statute that refers to the approval of minutes is **RSA 33-A:3-a, LXXX**, in the records retention statute, which requires tape recordings of meetings to be kept (if such recordings are made) at least until the written record (*i.e.*, the written minutes) is approved at a meeting. As soon as the minutes are approved, the statute allows the public body to either reuse or dispose of the tape.

The five-day requirement means that, at the very least, a public body must have compiled its draft (*i.e.*, "unapproved") minutes by the fifth business day after the meeting. Those minutes, although not yet reviewed and approved by the body, must be made available to anyone who requests to see or copy them. It does not matter that they have not yet been approved—they are still the minutes, and they cannot be withheld. (Unless, of course, they are nonpublic session minutes that have been sealed, which is discussed in Chapter Two.)

Public bodies have different practices for handling the draft v. approved minutes issue. One option is to mark minutes that have not yet been approved as "Draft" or something similar, so that anyone who obtains a copy of minutes prior to approval understands the minutes may change. If, when the public body subsequently goes to approve minutes, changes need to be made to the draft version, there are several options:

- Make changes in red pen or some other discernable color on the original draft minutes, so that it's clear what has been changed.
- Create a new set of minutes evidencing any changes. If you take this route, the New Hampshire Municipal Association strongly advises that you retain both the original draft minutes and the final approved minutes. Although no statute explicitly requires this, the records retention statute, **RSA 33-A:3-a, LXXXI, LXXXII**, and **LXXXIII** state the minutes of boards and committees, town meeting and town council, and the select board must be kept "permanently," and does not distinguish between draft and approved minutes.
- Memorialize changes to draft minutes in the minutes of the next meeting, so that there is always just one set of minutes for each meeting. If you take this route, it would be wise to put a notation at the end of all minutes that changes or amendments to the minutes of that meeting will be in the minutes of the next meeting.

For more information, See Appendix C: Draft Meeting Minutes – Practical Considerations and Insert: Public Meeting Poster.

CHAPTER TWO: NONPUBLIC SESSIONS

This chapter covers nonpublic sessions. For public meetings, please refer to Chapter One.

I. BASIC PRINCIPLES

A. It's a nonpublic session, not a nonpublic meeting

The first thing that needs to be understood about a nonpublic session is that it is just that: a "session." There is no such thing as a "nonpublic meeting," because every "meeting" must, under **RSA 91-A:2, II**, be open to the public. A nonpublic *session* is a portion of a public meeting from which the public may be excluded. A nonpublic session may be held only during the course of a meeting that has been the subject of proper notice and that is open to the public. Once the public *meeting* has been convened, the body may enter nonpublic *session* for a proper purpose and by following the proper procedures, discussed in the following pages.

B. A nonpublic session is different from a "non-meeting"

A nonpublic session also must be distinguished from certain events that are *not meetings*. The most common examples of these, discussed in Chapter One, section II, are consultations with legal counsel and strategy or negotiating sessions with respect to collective bargaining. Those events are specifically exempted from the definition of a "meeting," and the Right-to-Know Law therefore does not apply to them at all. Thus, as explained in Chapter One, these "non-meetings" may be held without any notice, without allowing public access, and without keeping any minutes. As far as the Right-to-Know Law is concerned, they simply do not exist.

In contrast to "non-meetings," nonpublic sessions are subject to very strict rules. It is essential that public bodies understand these rules so they do not inadvertently enter a nonpublic session for an improper purpose, or use improper procedures to enter or conduct a nonpublic session. An error, even one made in good faith, can result in legal action that could invalidate the actions taken and lead to other unfortunate consequences, such as liability for attorney fees and costs.

C. Nonpublic session is the exception, not the rule

Most public bodies will only occasionally have a legitimate reason to meet in nonpublic session, and some never will. For example, unless a planning board or zoning board of adjustment is involved in personnel matters dealing with a public employee, such as hiring or firing a planning director, its only likely reason to hold a nonpublic session would be to discuss pending or threatened litigation or to discuss legal advice. A conservation commission, which is less likely to be involved in litigation, will probably have occasion to use nonpublic session only when it is considering the purchase or sale of real estate. Of course, governing bodies, which deal more regularly with public employee matters as well as litigation and real estate transactions, are more likely to need nonpublic sessions.

A public body should never enter nonpublic session just because its members are uncomfortable holding a discussion in public. The need to discuss uncomfortable topics in public is an unfortunate reality of holding public office. If the item for discussion is not within one of the allowed reasons for nonpublic session under the Right-to-Know Law, it must be discussed in public.

D. Nonpublic sessions are permitted, not required

It is also important to understand that a public body is never *required* to enter nonpublic session. The statute contains a list of purposes for which a nonpublic session is permitted, not required. If a public body wants to discuss pending litigation, for example, in public, it is free to do so, although it may not be a good idea.

E. Objection by public body member to nonpublic discussion

The Right-to-Know Law was amended in 2017 to afford protection from statutory penalties to a public body member who objects to a discussion in nonpublic session the member believes would violate the law. This could occur if the discussion strays from the permitted nonpublic topic that was the foundation for the motion to retire to the nonpublic session, or if the member believes the nonpublic session itself is illegal. If, after the member states his or her objection, the public body continues the discussion despite the objection, the member can request that the objection be recorded in the minutes. The member then may continue to participate in the discussion without being subject to possible fines and other penalties that could be imposed under **RSA 91-A:8, IV or V**. The substance of the objection must be recorded in both the public and the nonpublic minutes; the notation in the public minutes must include the member's name, a statement that he or she objected to the discussion in nonpublic session, and a reference to the provision of **RSA 91-A:3, II**, that was the basis for the discussion.

II. PERMITTED PURPOSES

It cannot be stressed enough that a public body may use a nonpublic session only for very limited purposes, all of which are listed in **RSA 91-A:3, II**. If none of these purposes applies, the discussion may not be held in nonpublic session. The permitted purposes are:

A. Public employee dismissal, promotion, etc.

Nonpublic session is proper to discuss or act upon "[t]he dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted." **RSA 91-A:3, II(a)**.

Notice that the statute does not create a right to a meeting for an employee. The language "unless the affected employee has a right to a meeting" indicates that such a right would have to arise from some other source. This would most likely be a collective bargaining agreement, a personnel policy, or a state statute. In the absence of such a right, the public body may enter nonpublic session under this provision without precondition. However, it is always a good idea for the public body to consult with its legal counsel before using this procedure, both for Right-to-Know reasons and for employment law reasons.

> *Note:* The law was different before 1992. Until then, the "unless" clause in 91-A:3, II(a) merely stated, "unless the employee affected requests an open meeting." In ***Johnson v. Nash*, 135 N.H. 534 (1992)**, the New Hampshire Supreme Court ruled that this language would be meaningless if the employee was not given notice that the action was being considered. Thus, a public body could not consider dismissing an employee in nonpublic session unless it first notified the employee and gave him or her an opportunity to request an open meeting. In other words, the statute before 1992 *did* create a right to an open meeting.
>
> That year, the legislature amended the statute to read as it does now. With the revision, nonpublic session is permitted unless the employee has a right to a meeting that arises from another source, so *Johnson v. Nash* is no longer applicable. Of course, if the employee does have a right to a meeting, the public body must give the employee notice and an opportunity to exercise that right. And even if the employee does not have that right, there could be reasons to give the employee an opportunity for a meeting, either in public or in private.

B. Hiring

Nonpublic session may be used for "[t]he hiring of a public employee." **RSA 91-A:3, II(b)**. Note that this is strictly limited to the hiring of an employee. It does not include appointments to a non-employee position, such as a planning board member or budget committee member.

It also does not include appointment of someone to fill a vacancy in a full-time elected position. In ***Lambert v. Belknap County Convention*, 157 N.H. 375 (2008)**, the Supreme Court ruled that the county convention had acted illegally when it used a nonpublic session to discuss candidates for a vacancy in the county sheriff position and subsequently voted on the two finalists by secret ballot. Similarly, if there is a vacancy in the position of town clerk or an elected police chief, that is not something that could be discussed in nonpublic session.

C. Reputation

Nonpublic session is proper for "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting." RSA 91-A:3, II(c). This includes any application for assistance or tax abatement, or waiver of fees or fines based on poverty or inability to pay.

This exception should be used only when absolutely necessary—it should not be used as a pretext just to discuss someone whom a member of the public body dislikes. Further, applying the rationale of *Johnson v. Nash,* discussed above, the clause "unless such person requests an open meeting" suggests that the person must be notified and given an opportunity to request an open meeting, although the Supreme Court has not had occasion to rule on this issue. In a Supreme Court decision , *Tejasinha Sivalingam v. Frances Newton, &a*, 174 N.H. 489 (2021) the Court ruled that the statutory language does not require that a public body provide notice of its intent to enter nonpublic session to discuss matters which may adversely affect a specific person's reputation in order to afford the individual an opportunity to request an open meeting.

D. Property transactions

The statute allows a nonpublic session for "[c]onsideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community." **RSA 91-A:3, II(d)**. This allows the public body to discuss, for example, how much it is willing to pay for an item of property, or how much it is willing to accept for the purchase of property it is planning to sell, without tipping its hand to a potential seller or buyer.

It does *not* allow the public body to negotiate in private with a potential buyer or seller. Unfortunately, it also does not allow the public body to discuss other contract matters not involving the acquisition, sale, or lease of real or personal property.

Effective January 1, 2022, if minutes related to a nonpublic session held under **RSA 91-A:3, II(d)** are sealed (see section V.B), they must be made available to the public ("unsealed") as soon as possible after the transaction has closed or the public body has decided not to proceed with the transaction.

E. Pending or threatened litigation

Nonpublic session may be used for "[c]onsideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled." **RSA 91-A:3, II(e)**. An application for a tax abatement does not constitute threatened or filed litigation. (But an abatement application may be discussed in nonpublic session under paragraph II(c) if the request is based on poverty or inability to pay. See paragraph II.C. (Reputation) above.) Note that the public body's legal counsel does not need to be present for this

provision to apply--but the discussion does need to be about active litigation or a claim that has been threatened *in writing*.

F. Adult parole board

The adult parole board may consider applications under **RSA 651-A** in nonpublic session. **RSA 91-A:3, II(f)**.

G. Security at correctional facilities

Nonpublic session is allowed for consideration of "security-related issues bearing on the immediate safety of security personnel or inmates at the county or state correctional facilities by county correctional superintendents or the commissioner of the department of corrections, or their designees." **RSA 91-A:3, II(g)**.

H. Applications to business finance authority

The statute allows a nonpublic session for "consideration of applications by the business finance authority under **RSA 162-A:7-10 and 162-A:13**, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application." **RSA 91-A:3, II(h)**.

I. Emergency functions related to terrorism

A public body may use nonpublic session to consider "matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life." **RSA 91-A:3, II(i)**.

Note that this applies only to functions designed to thwart *deliberate* acts that are intended to result in widespread injury, death, or property damage–*i.e.*, terrorist acts. Other emergency management matters (flood, storm, health emergency) are not covered under this subparagraph and are not a proper subject for a nonpublic session.

J. Confidential information in adjudicative proceedings

Nonpublic session is allowed for "consideration of confidential, commercial, or financial information that is exempt from public disclosure under **RSA 91-A:5, IV** in an adjudicative proceeding pursuant to **RSA 541 or RSA 541-A**." Note that this applies only to adjudicative proceedings under the statutes indicated. **RSA 91-A:3, II(j)**.

K. Student tuition contracts

A school board may use nonpublic session to consider entering into a student tuition contract authorized by **RSA 194** or **RSA 195-A** if a public discussion would likely benefit a party or parties (such as the other school district) whose interests are adverse to those of the general public or of the school district. A meeting between the school boards, or committees thereof, involved in negotiating the contract may also be conducted in nonpublic session. **RSA 91-A:3, II(k)**.

However, a contract negotiated by a school board must be made public prior to its consideration for approval by a school district. Minutes of any meetings held in nonpublic session to discuss the contract, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, also must be made public. Approval of a contract by a school district may occur "only at a meeting open to the public at which, or after which, the public has had an opportunity to participate."

L. Consideration of legal advice

A public body may use nonpublic session to consider legal advice provided by its legal counsel, either orally or in writing, to one or more members of the public body, even if the attorney is not present. **RSA 91-A:3, II(l)**. Again, if legal counsel is present, the session is not considered a "meeting" at all, see **RSA 91-A:2, I(b)**, and the requirements of the Right-to-Know Law do not apply.

M. Consideration of disclosing minutes of a nonpublic session

Effective January 1, 2022, a public body may enter nonpublic session to consider whether to disclose minutes of a nonpublic session due to a change in circumstances contemplated under **RSA 91-A:3, III**. As discussed in section V.B below, the following circumstances allow sealing the minutes in the first place: (1) divulgence would adversely affect the reputation of any person other than a member of the public body, (2) divulgence would render the proposed action taken in nonpublic session ineffective, or (3) divulgence would disclose information pertaining to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life, including training to carry out such functions. If it is felt that these circumstances have changed and withholding the minutes is no longer justified, the body may enter nonpublic session to discuss whether to disclose the minutes. **However, any *vote* on whether to disclose previously sealed nonpublic minutes shall take place in public session.**

That's all! A public body may not enter nonpublic session for any purpose other than those listed above. Nor may it enter nonpublic session for one of these purposes and then digress to a discussion of something different. Once it has covered the purpose for which it properly entered nonpublic session, it must return to public session (or adjourn, if it has finished its business).

III. PROCEDURAL REQUIREMENTS

In addition to limiting the subjects that may be discussed in nonpublic session, the statute contains very strict procedural requirements for nonpublic sessions. If these are not followed carefully, any action taken in a nonpublic session may be invalidated, and the public body could be subjected to injunctive relief and civil penalties.

A. Entering nonpublic session

The requirements for entering nonpublic session are set out in **RSA 91-A:3, I**, and are very clear:

A public body may enter nonpublic session only "pursuant to a motion properly made and seconded."

The motion must state on its face the specific exemption in **RSA 91-A:3, II**, that is relied upon as the purpose for the nonpublic session, and all discussions held and decisions made during the session must be confined to the matters set out in the motion.

The vote on the motion must be by roll call. A simple majority is all that is required.

B. Conduct of nonpublic session; minutes

Other than identifying the matters that may be discussed in nonpublic session, the law says very little about the conduct of the session. It does require that minutes be kept, which must contain the same kind of information that is required for public sessions: the names of members present, the names of persons appearing before the public body, and a brief description of the subject matter discussed and final decisions. See **RSA 91-A:2, II, 91-A:3, III**.

The minutes also must "record all actions in such a manner that the vote of each member is ascertained and recorded." **RSA 91-A:3, III**. This is because, with the public excluded from the meeting, there is no other way for the public to know how individual members have voted. This requirement may be satisfied by recording a roll call on each vote, although that is not necessary. If a vote is unanimous, it is sufficient to record that fact, since the minutes will already have indicated which members were present. For a non-unanimous vote, the minutes could say, for example, that the vote was 4–1, with Ms. Reid voting in the negative. If the minutes have properly listed the members present, anyone reading them should be able to identify the four members who voted in the affirmative.

The Right-to-Know Law was amended in 2017 to afford protection from statutory penalties to a public body member who objects to a discussion in nonpublic session the member believes would violate the law. This could occur if the discussion in nonpublic strays from the permitted nonpublic topic that was the foundation for the motion to retire to the nonpublic session, or if the member believes the nonpublic session itself is illegal. If, after the member states his or her objection, the public body continues the discussion despite the objection, the member can request that his or her objection be recorded in the minutes. The member then may continue to participate in the discussion without being subject to possible fines and other penalties that could be imposed under **RSA 91-A:8, IV or V**. The substance of the objection must be recorded in both the public and the nonpublic minutes; the notation in the public minutes must include the member's name, a statement that he or she objected to the discussion in nonpublic session, and reference to the provision of **RSA 91-A:3, II**, that was the basis for the discussion.

C. Exiting nonpublic session; availability of minutes

There are no specific requirements for exiting nonpublic session, as there are for entering. The law does require, however, that the minutes be "publicly disclosed" within 72 hours after the session, unless the board determines that:

- Disclosure would likely have an adverse effect on the reputation of a person other than a member of the public body;
- Disclosure would "render the proposed action ineffective"; or
- The discussion in nonpublic session pertained to terrorism. (Terrorism is defined as "matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.)

A determination that one of the above circumstances applies must be made by a two-thirds vote of the members present, and that vote must be taken after the body returns to public session.

A decision not to disclose the minutes is typically referred to as "sealing" the minutes, although the statute does not use that term anywhere. If the public body does vote to seal the minutes, the minutes may be withheld "until, in the opinion of a majority of members, the aforesaid circumstances no longer apply." A discussion to unseal nonpublic meeting minutes will be a permitted reason to enter nonpublic session under **RSA 91-A:3, II(m)** effective January 1, 2022. However, any vote on whether to disclose minutes must take place in public session.

IV. PRACTICAL CONSIDERATIONS

Although the statute is quite clear on a number of points, some things are less clear or are simply misunderstood. Here are some practical suggestions and clarifications.

A. Placement on the agenda

There is no requirement that a nonpublic session be listed on the agenda for a public body's meeting. If it is known that a nonpublic session is going to be necessary, then it may be useful to list it, but given that an agenda is not even required for most public bodies, there certainly is no requirement that the agenda include reference to a planned nonpublic session. Further, sometimes the need for a nonpublic session is not apparent until a meeting is under way, so it would be impossible to mention it in the agenda. Nevertheless, it is prudent to have the following entry on all public body meeting notices and agendas: *"The (insert name of public body) may enter nonpublic session for a permitted discussion as provided in* ***RSA 91-A:3, II.***"

B. Timing

There are no rules or limitations about when during a meeting a nonpublic session may take place, except that it must begin with a motion made during public session—so a nonpublic session may not be held before the public meeting is convened.

All things being equal, it generally makes sense to hold a nonpublic session at the end of the meeting, so members of the public do not have to wait for a continuation of the public session. However, conditions may weigh in favor of holding it at the beginning of the meeting—for example, to accommodate the schedule of a non-board member who needs to be present, or because a decision made in nonpublic session may affect other actions during the meeting, or because the matter is particularly important and needs to be addressed while board members are at their sharpest.

C. Attendance by non-members

Legally, there is no limit on who may be permitted to attend a nonpublic session. The law merely states that the session may be closed to the public. There may be reasons to have people other than board members present—e.g., the town or county administrator or school superintendent, the recording secretary, a department head with knowledge of the issue being discussed, or a professional advisor to the board.

However, for obvious reasons of confidentiality, there should be as few non-board members as possible. At least for city and town boards, board members are required by law (**RSA 42:1-a**) or charter to maintain the confidentiality of matters discussed in nonpublic session if the minutes are sealed or if the information is otherwise confidential. Disclosure of such information constitutes a violation of their oath of office, for which they are subject to removal. But employees and others who are not municipal "officers" are not subject to the same statutory requirement and penalty, so they may have less of an incentive to maintain confidentiality. An employee's disclosure of confidential information may well be cause for dismissal, but the public body has little control over persons who are neither employees nor members of the body.

In short, it is best to exclude anyone whose presence is not essential. This may mean excusing the administrator and/or the recording secretary and instead having one of the board members take minutes. Whether to do this is a judgment call to be made by the board.

D. Recording during nonpublic session

As discussed in Chapter One, section III.B.2, the public has a right to record all public meetings under **RSA 91-A:2, II**. However, the public's right of access is explicitly made "subject to **RSA 91-A:3**" (the nonpublic session section), and nothing in that section provides a right to record during a nonpublic session. Therefore, the body conducting the nonpublic session can prohibit the use of recording devices.

E. Making decisions in nonpublic session

Public body members frequently ask whether it is legal to make decisions in nonpublic session, or whether

they must return to public session to take action. It is clear that decisions may be made in nonpublic session. **RSA 91-A:3** specifically refers in several places to "actions" taken or "decisions" made during nonpublic sessions.

Of course, any decision made presumably will become public eventually, but there are a number of reasons that it may not be appropriate to make a decision in public—for example, a decision to terminate an employee, or to make an offer to settle litigation. Whether to take a vote in nonpublic session or wait and take it in public is a question for the discretion of the public body. If there is a reason to keep the decision confidential for some period, it will be necessary to take the vote before leaving nonpublic session.

F. Dealing with nonpublic session violations

What should a public body member do if he or she believes the body has entered nonpublic session illegally or, having entered legally, is engaging in an improper discussion? For example, a board of selectmen properly enters nonpublic session to discuss the hiring of an employee, but after finishing that discussion, begins a discussion about filling a vacancy on the board. The Right-to-Know Law was amended in 2017 to afford protection from statutory penalties to a public body member who objects to a discussion in nonpublic session the member believes would violate the law. If, after the member states his or her objection, the public body continues the discussion despite the objection, the member can request that the objection be recorded in the minutes. The member then may continue to participate in the discussion without being subject to possible fines and other penalties that could be imposed under **RSA 91-A:8, IV or V**. The substance of the objection must be recorded in both the public and the nonpublic minutes; the notation in the public minutes must include the member's name, a statement that he or she objected to the discussion in nonpublic session, and a reference to the provision of **RSA 91-A:3, II**, that was the basis for the discussion.

G. Returning to public session

As stated above, there are no specific requirements for returning to public session. In theory, the body could just say, "We're back in public session," and invite the public back into the room (if anyone is still there). However, for the sake of clarity, it is best to have a formal vote to return to public session.

In fact, there is no legal requirement to return to public session at all, so if there is nothing remaining to be done in public (such as voting to seal the minutes), the body in theory could simply end the meeting at the end of the nonpublic session. Again, however, for the sake of clarity, it is better to return to public session, deliberately discuss whether the minutes of the just completed nonpublic session should be sealed, and then adjourn.

V. MINUTES

The keeping of minutes and deciding whether and how to seal them are among the thorniest problems involved in nonpublic sessions.

A. Content of the minutes

In many cases, the issues around the sealing of minutes can be avoided by keeping very simple minutes that do not contain confidential information. If there is nothing confidential or inflammatory in the minutes, then there probably is no reason to seal them, and a problem is avoided.

The law requires only that the minutes include the names of members present, names of persons appearing before the public body, and "a brief description of the subject matter discussed and final decisions." In addition, nonpublic session minutes must record actions taken in such a manner that the vote of each member is ascertained and recorded. **RSA 91-A:3, III**. Thus, depending on the circumstances, it might be perfectly

legitimate for the minutes to simply list the people present and then state:

> "The board heard a complaint about a town employee. The town administrator was asked to obtain further information and report to the board."
>
> OR
>
> "The board received an update on the litigation involving John Doe. No decisions were made."

In the first case, there probably is no need to include any more information about the complaint. In the second case, no purpose would be served by describing all of the questions that were asked or the strategic discussions about the litigation.

Of course, more detailed minutes will be necessary in some circumstances--most notably, if there is a need to have a record because of a potential for litigation--and there may be occasions when inclusion of confidential discussions is unavoidable; but the public body should think about this and have a discussion about how much detail should be included *before* leaving nonpublic session.

For the sake of convenience, the nonpublic session minutes should be a separate document from the public session minutes. This is not required by law, but it will be necessary as a practical matter if the nonpublic minutes are going to be sealed. The public session minutes should state that the board entered nonpublic session at a specific time (and include the motion, the basis for the motion, and the roll call vote on the motion), and then indicate that the board returned to public session at a specific time.

B. To seal or not to seal?

As stated earlier, the Right-to-Know Law makes no reference to "sealing the minutes." What it says is that nonpublic minutes must be made available to the public unless the board determines that certain circumstances apply. If the board makes that determination, the minutes "may be withheld until, in the opinion of a majority of the board, the aforesaid circumstances no longer apply."

Thus, a vote to "seal the minutes" is merely a vote that the minutes will not be made available upon request until the board decides otherwise. The minutes are not physically sealed (although perhaps they could be). However, "sealing the minutes" is a useful shorthand way of referring to this action, as long as it is understood what is actually being done.

Remember that the only permissible reasons for sealing the minutes are:

- Disclosure would adversely affect the reputation of a person other than a member of the board;
- Disclosure would render the proposed action ineffective; or
- The discussion in the minutes pertains to terrorism.

If none of these conditions exist, the minutes may not be sealed. There is no need to vote *not* to seal the minutes; in the absence of a vote, the minutes are automatically not sealed, and must be available to the public within 72 hours (not the five business days allowed for minutes of public sessions).

Remember also that the motion to seal the minutes must specifically cite one of the reasons noted above, and requires the affirmative vote of two-thirds of those present. Do not confuse this with the motion to enter nonpublic session, which must be by roll call but requires only a simple majority.

C. How long to seal?

There is no requirement that the public body vote to seal the minutes for a particular period; and in fact, it probably should not do so.

Again, the law says the minutes may be withheld from the public "until, in the opinion of a majority of members, the aforesaid circumstances no longer apply." A vote by the public body to seal the minutes for a specific period (or forever) is not conclusive, because the body may decide later that the circumstances justifying confidentiality no longer exist, and the minutes should be made public. It may make sense for the public body to set a date after which the minutes *must* be made public, but this would not prevent the board (or a future board) from releasing them at an earlier date. However, effective January 1, 2022, minutes of a nonpublic session under **RSA 91-A:3, II(d)** (acquisition or sale of real or personal property) must be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.

It is better to vote simply to seal the minutes, without specifying a period. If and when there is a request for the minutes, the public body can revisit the question of whether they should continue to be withheld. That question can also be considered as part of the public body's periodic review of its sealed minutes, as recommended below.

D. Review and approval of sealed minutes

The matter of sealed minutes is complicated by the fact that the vote to seal them generally takes place before they even exist. The next step, of course, is for the person responsible for the minutes to prepare a draft and keep them in a secure location.

Next, they need to be circulated to the board members for review. The board should review and, if necessary, revise them at the next meeting (not by e-mail discussion between meetings!). Because this will be the board's first look at the minutes, it will also provide another opportunity to decide whether they really need to be sealed. The board might decide to delete unnecessary confidential material so that the minutes may be made public.

After the board reviews the minutes and makes any necessary revisions, the board members' drafts should be collected and destroyed.

E. Delayed vote to seal

The law requires that nonpublic minutes be "publicly disclosed within 72 hours" unless the board votes to withhold them. It says nothing about when the board needs to vote to seal them (except that the vote must take place in public session). Although the better practice is to take that vote immediately upon emerging from the nonpublic session, the board certainly can vote anytime within 72 hours to seal the minutes if they have not already been disclosed.

Whether the minutes may be sealed after 72 hours if they have not yet been provided to anyone is less certain. It is unclear what "publicly disclosed" means, but presumably it is the same as the general requirement that all minutes be "open to public inspection." If the minutes have been available upon request, but no one has actually requested them, and if they have not been posted in a public place (which is not required), perhaps they can still be sealed even after 72 hours. But this is an unresolved question, and the board should consult with its legal counsel before taking such an action.

F. Review by new board members? Former board members?

A new person has been elected to the board, and wants to review all of the board's sealed minutes. Or a former board member wants to review the sealed minutes from when he or she was a member. Should this be permitted?

There is no clear law on this, but they are the board's minutes. So long as they remain sealed, it seems fairly clear that they are subject to review only by the board as it is currently constituted. A new board member has the same rights as other current board members, but if one or more board members want to review

the minutes, it is a better practice to make the minutes available to the entire board at a meeting and then return them to their secure location. Alternatively, the board may vote to authorize individual members to review the minutes.

Because they are the board's minutes, it follows that a former board member has no right to see minutes that remain sealed. It does not matter that he or she was on the board at the time of the nonpublic session; a former member is just that—a former member—and has no more right than any other member of the general public.

G. Review and unsealing of old minutes

Effective October 3, 2023, RSA 91-A:3 has been amended adding paragraph IV requiring public bodies to review previously withheld nonpublic meeting minutes at least every 10 years to determine if they should continue to be withheld. This amendment adds statutory language that tells public bodies to either develop their own process to review minutes or to follow a statutorily created process.

In developing their own process, public bodies have wide discretion in deciding how to structure their review of sealed minutes. Some may choose to assign one board member the task of reviewing the minutes and making a recommendation, others may choose a subcommittee, still others may choose to review all sealed minutes as a whole committee. Similarly, boards may choose to review all sealed minutes or only some each year. Thus, a board may stagger the review process so that it does not interfere with other board business.

In the absence of adopting its own process, a public body must follow the statutorily created process. That statutory process requires a review of sealed minutes "no more than 10 years from the last time the public body voted to prevent the minutes from being subject to public disclosure." The statutory process also includes a 10-year review period. In other words, if your board has minutes that were sealed more than 10 years ago and your board hasn't reviewed them since, you have 10 years after the law goes into effect to review those minutes and decide whether to keep them sealed or not. ***The amendment provides that meeting minutes that were kept from the public prior to October 3, 2023 that are not reviewed by the public body or agency within 10 years of October 3, 2023 "shall be subject to public disclosure without further action of the public body."***

While, in most cases, there is no penalty for disclosure of information that could be withheld from public disclosure, there are a handful of circumstances where disclosure is not in the best interests of anyone. Private information, such as social security numbers, statutorily protected information, such as whether someone is receiving municipal welfare, and information that, if disclosed, could result in harm to persons or property, such as information about access points to public water systems, ought to continue to be carefully protected from disclosure. The best way to do that is to ensure that future boards do not rush through a review process to protect that type of information from becoming public. Instead, starting now can ensure that the citizens of the state of New Hampshire can "know what the government is up to" while also ensuring that information that was rightfully protected from public disclosure and ought to continue to be protected from public disclosure remains protected.

H. List of sealed minutes

Effective January 1, 2022, **RSA 91-A:3, III**, requires every public body to create and maintain a list of all minutes that have been "determined not to be subject to full public disclosure"—i.e., a list of all of the public body's sealed minutes. This list must include the following information for each set of sealed minutes:

- Name of the public body.
- Date and time of the nonpublic session.

- Specific exemption in **RSA 91-A:3, II**, that was relied upon as the foundation for the nonpublic session.
- Date of the decision to withhold the minutes from public disclosure (*i.e.*, to "seal" the minutes).
- Date of any subsequent decision to make the minutes available to the public ("unseal" the minutes).

Public bodies are not required to go back and compile a list of all of their pre-2022 sealed minutes; the law is prospective only. Beginning in 2022, each public body must keep this list for any new nonpublic session minutes that are sealed.

For more information, See Appendix D: Nonpublic Session Minutes Checklist.

For more information, See Appendix G: Sealed Nonpublic Meeting Minutes Review Procedure.

CHAPTER THREE: GOVERNMENTAL RECORDS

This chapter discusses governmental records. For public meetings, see Chapter One, and for nonpublic sessions, see Chapter Two.

I. WHAT IS A GOVERNMENTAL RECORD?

A. The Basic Definition of a Governmental Record – RSA 91-A:5

A "governmental record" is defined in **RSA 91-A:1-a, III** as "any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term 'governmental records' includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term 'governmental records' shall also include the term 'public records.'"

B. Information Must be in Physical Form – RSA 91-A:1-a, IV

As described above, a governmental record is "information." Under the Right-to-Know Law, "information" is defined as "knowledge, opinions, facts, or data of any kind and *in whatever physical form* kept or maintained, including, but not limited to, written, aural, visual, electronic or other physical form." **RSA 91-A:1-a, IV**.

So, while information may exist in many different forms, it must be in some **physical form** to qualify as a governmental record. For example, a paper document, a computer file, or a tape recording would all be governmental records because they exist in a physical form. In contrast, information that a public official or employee knows – but has not written down – is not a governmental record because it does not exist in physical form. Therefore, someone may request a paper document, a computer file, or a tape recording, but cannot request information only contained in an official's head.

C. Created, Accepted, or Obtained by a Public Body

Information (such as a written communication) will constitute a governmental record when it is "created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, … in furtherance of its official function." More specifically, email and other written communications constitute governmental records if they are "received by a quorum or majority of a public body in furtherance of its official function." Thus, a communication—electronic or otherwise—that is created, accepted, or obtained by less than a quorum of a public body is not a governmental record and is not subject to disclosure.

An email exchange between an individual governing body member and a constituent on an issue of local interest is not a governmental record because it was not obtained by a quorum of a public body. However, once that email is shared with a quorum of the public body, it becomes a governmental record. In addition, if the governing body member is acting on behalf of the entire public body, an email exchange with a constituent would likely be a governmental record. *See Op. AG.* **No. 11-01 (June 29, 2011)** (With certain exceptions, many emails sent or received by legislators do not constitute governmental records as that term is used in **RSA 91-A**, as they are not created, accepted, or obtained by or on behalf of the General

Court; and in addition, even emails that constitute governmental records may be protected from disclosure under the Speech and Debate Clause of the New Hampshire Constitution).

D. Created, Accepted, or Obtained by a Public Agency

A "public agency" is "any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision." **RSA 91-A:1-a, V**. Information constitutes a governmental record if it is "created, accepted, or obtained by, or on behalf of, … any public agency in furtherance of its official function." **RSA 91-A:1-a, III**. Examples may include (but not be limited to) the town administrator or manager's office, the police department, the land use administrator, a planning department, tax collector, treasurer, or town clerk.

E. In Furtherance of Its Official Function

A governmental record is one created, accepted or obtained by a public body or a public agency in furtherance of its official function. Personal correspondence, for example, is not in furtherance of the public body's or public agency's official function and, therefore, is not subject to disclosure.

II. ACCESS TO GOVERNMENTAL RECORDS

A. The Law Favors Disclosure

Although the Right-to-Know Law does not provide for unrestricted access to public records, courts resolve questions regarding the Right-to-Know Law with a view to providing the utmost information. The provisions of **RSA chapter 91-A** are construed in a manner favoring disclosure and interpreting the exemptions to disclosure restrictively. ***CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Services*, 167 N.H. 583 (2015)**. An individual's motives in seeking disclosure of public records are irrelevant to the question of access under the Right-to-Know Law; information that is subject to disclosure under the Right-to-Know Law belongs to citizens to do with as they choose. ***Lambert v. Belknap County Convention* 157 N.H. 375 (2008)**.

B. Availability

Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or **RSA 91-A:5. RSA 91-A:4, I**.

Although governmental records should be available during the regular business hours of the public body or agency, a record may be temporarily unavailable because it is being used by public officials. ***Gallagher v. Windham,* 121 N.H. 156 (1981)**. The New Hampshire Supreme Court has held that when the office receiving the request for a record is busy, officials may ask the citizen to make an appointment to review the records. As the New Hampshire Supreme Court observed in ***Brent v. Paquette,* 132 N.H. 415 (1989)**:

> The plaintiff alleges that requiring an appointment is an unnecessary and onerous burden to citizens, and contrary to the purpose of the Right-to-Know Law. We hold, however, that under the facts of this case, requiring citizens to arrange a mutually convenient time to examine public records perpetuates the underlying purpose of the statute. In those cases in which it is necessary, calling ahead to arrange a time to review particular documents assures citizens that they will be able to examine the records soon after they arrive at the office, and that they will not be told either to wait an indeterminate amount of time for someone to help them, or to come back later when

the office is not so busy. Likewise, our public offices will be able to function more smoothly and efficiently if the keepers of the records can plan their days around prearranged appointments, and not be forced to interrupt their work whenever a citizen "drops by" to inspect a public record. For these reasons, we affirm the trial court's ruling that a government official does not necessarily violate **RSA chapter 91–A (Supp.1988)** whenever he or she requests a citizen to make an appointment before reviewing a public record.

RSA 91-A:4, IV requires that when a public body or agency is not able to make a governmental record available for immediate inspection, it must do so within five business days, or deny the request with written reasons, or acknowledge the request by providing a written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay. The requirement that municipalities provide a reason for the delay was added to the statute beginning January 1, 2020. Although the legislature did not articulate what reason(s) it expects municipalities to provide, it is reasonable to think that the reason(s) should be tied to statutory language. NHMA recommends that municipalities confine themselves to one (or more) of the following reasons:

- Municipality needs time to determine whether or not the requested record exists;
- Municipality needs time to determine whether the requested record is disclosable; and/or
- If the record is disclosable, the municipality needs time to determine how much time it will take to make the requested records ready for review or copying.

C. Storing Public Records

RSA 91-A:4, III mandates that "each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place." Even if there is no office for a public body or agency, its governmental records must be kept in an office of the political subdivision where the public body or agency is located. **RSA 41:58** also requires the deposit of public records with the town clerk when not needed by public officers for the discharge of official duties. Likewise, **RSA 41:61** prohibits the loaning or removal of public records from where they are kept except when necessary for discharge of public duties.

In harmony with these statutes, the New Hampshire Supreme Court found that the temporary removal of building plans from town hall did not result in the denial of access to a public record. The Court ruled that it was reasonable for the chairman of the planning board to remove the building plans to prepare for a planning board meeting. Therefore, the legitimate use of a public record by a public official which resulted in a limited period of their unavailability did not constitute a denial of access to public records. ***Gallagher v. Town of Windham,* 121 N.H. 156, 159 (1981)**. Presumably, however, the rule in *Gallagher* would not hold in the case where governmental records are inaccessible because they are either not stored at the offices of the political subdivision or removed from them for an extended period of time.

Electronic governmental records should be stored in an accessible location, under the control of the public body or agency, such as a server, digital storage device, or cloud-based storage system. That electronic storage system ought to be readily accessible for retrieval of electronic documents requested by the public.

D. Electronic Governmental Records

Under the definition of "governmental records" found in **RSA 91-A:1-a**, information created, accepted or obtained by a public body or agency in electronic form is also a governmental record. As described on pages 22 – 23 of the ***Memorandum on New Hampshire's Right-to-Know Law,* (March 20, 2015)** authored by the New Hampshire Attorney General, electronic governmental records may include, but are not limited to:

a. Documents stored in a computer or any other storage medium such as CD, DVD, the cloud, or thumb drive;

b. E-mail;

c. Voice mail;

d. PDF documents;

e. Instant messages;

f. Text messages; and

g. Electronic photos (digital).

It is important to note that the Attorney General's list is not exhaustive. Any "information" captured in "physical form" would qualify as a "governmental record" if it was something related to the business of government.

E. Deletion of Electronic Governmental Records

A governmental record in electronic form is no longer required to be disclosed once it has been "initially and legally deleted." RSA 91-A:4, III-b. A record can be "legally deleted" if it is not subject to a retention period, or if the required retention period for that record has expired, under the Disposition of Municipal Records Statute, RSA chapter 33-A. For such electronic records that are no longer required to be retained by a public body or agency, a record in electronic form will be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer does not constitute deletion of the record because it can still be accessed by the municipality.

This concept is especially important to understand when dealing with things like cloud storage and backup tapes. If your municipality engages in the practice of backing up computer systems or email servers that contain electronic documents, those documents may not be deemed to have been initially and legally deleted if they are still accessible on those backup devices. In the case of *Ortolano v. City of Nashua*, the City received a records request for certain emails that had been deleted from the City's email server and backup drive. However, after informing the Plaintiff that the records no longer existed, it was discovered that the City had backup tapes of their computer system that had backed up the email server during the time that the records in question still existed. A technician for the City testified during trial that it would have only taken a few hours to restore those backup tapes to a searchable format, and the records in question could have been recovered. *Ortolano v. City of Nashua, 2023 N.H. LEXIS 149.*

The Court ruled against the City and found that Nashua violated the Right-to-Know law by not engaging in a reasonable search of those backup tapes and producing the relevant records contained therein. This is why it can be very important, when deleting electronic records, to make sure that they have been eliminated from all of the different locations where they may have been copied or backed up.

F. Mandated Access to Certain Records

1. *Employee Separation Payment*

RSA 91-A:4, I-a imposes a very specific duty to disclose and make available for public inspection any payment made to a public employee that is ***in addition*** to regular salary and accrued vacation, sick, or other leave payments made in the normal course. Ordinarily when a public employee separates from employment, he or she is paid accrued salary and other forms of compensation, such as accrued sick

and vacation pay. Those types of payments made in the ordinary course are not subject to disclosure. If additional payments are made beyond these payments, however, those additional payments would have to be disclosed. A good example of a type of payment disclosed under this paragraph might be a settlement payment related to an employment discrimination complaint.

2. *Raw Materials Used to Compile Minutes*

Raw materials (audio tapes, video tapes, rough notes, etc.) used to compile the official minutes are governmental records. As provided in **RSA 91-A:4, II**, after the completion of a meeting of a public body every citizen, during the regular or business hours of the public body, and on the regular business premises of such public body, has the right to inspect all notes, materials, tapes, or other sources used for compiling the minutes of the meeting, and to make memoranda or abstracts or to copy such notes, materials, tapes, or sources inspected, except as otherwise prohibited by statute or **RSA 91-A:5**.

These raw materials may be destroyed after the official minutes are prepared, but they remain governmental records until destroyed. NHMA recommends that municipalities adopt (and then follow) a formal policy stating how long notes or original tapes are kept after the minutes are prepared and who is responsible for discarding them.

3. *Agreements to Settle Legal Claims*

As provided in **RSA 91-A:4, VI**, every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, must be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.

III. EXEMPTIONS TO DISCLOSURE OF GOVERNMENTAL RECORDS

A. General Standards Governing Exemptions – RSA 91-A:5

RSA 91-A:5 contains a list of record categories that are exempt from disclosure. In some instances, these exemptions are categorical since the plain language of the exemption is sufficient, without further analysis, to allow the responding public body or agency to determine whether a governmental record is exempt from disclosure. Examples of categorical exemptions are the master jury list defined in **RSA 500-A:1, IV,** and teacher certification records maintained by the Department of Education, **RSA 91-A:5, V**.

Many of the items on the list, however, require a detailed analysis, typically involving a balancing test where the public interest in disclosure is weighed against the private interest in nondisclosure.

Regardless of whether an exemption is categorical or requires detailed analysis, the legitimacy of the public's interest in disclosure is tied to the Right-to-Know Law's purpose, which is "to provide the utmost information to the public about what its government is up to." ***Lamy v. N.H. Pub. Utilities Comm'n*, 152 N.H. 106, 111 (2005)**. As a result, "[i]f disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released." Id. Regardless, "an individual's motives in seeking disclosure are irrelevant to the question of access." ***Lambert v. Belknap County Convention*, 157 N.H. 375, 383 (2008)**.

In all circumstances, when a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure. ***Union Leader Corp. v. City of Nashua*, 141 N.H. 473 476 (1996)**.

B. Internal Personnel Practices – RSA 91-A:5, IV

Under **RSA 91-A:5, IV** "records pertaining to internal personnel practices" are exempt from disclosure. The NH Supreme Court overruled its decision in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) that "internal personnel practices" are categorically exempt from disclosure under RSA 91-A:5, IV. The Court will now require that the disclosure of internal personnel practices will be subject to a balancing test to determine whether such materials are exempt governmental records. *Union Leader Corp v. Town of Salem*, 173 N.H. 345(2020).

The Supreme Court concluded that the *Fenniman* per se rule is inconsistent with the historical and current interpretation of the RSA 91-A:5, IV for "confidential, commercial, or financial information." Consequently, the Court overruled *Fenniman* to the extent that it adopted a per se rule of exemption for records relating to "internal personnel practices." As stated by the Court in the companion case *Seacoast Newspapers v. Portsmouth*, 173 N.H. 325, 337 (2020), the "internal personnel practices" exemption applies narrowly to records relating to the internal rules and practices governing an agency's operations and employee relations. In the future, the balancing test used for other categories of records listed in RSA 91-A:5, IV shall apply to records relating to "internal personnel practices." Determining whether the exemption for records relating to "internal personnel practices" applies will require analyzing both whether the records relate to such practices as redefined in the *Seacoast Newspapers* decision, and whether their disclosure would constitute an invasion of privacy.

The court's decisions from the *Union Leader* and *Seacoast Newspaper* cases were put to the test a few years later in the case of *Provenza v. Town of Canaan, 175 N.H. 121 (2022).* In this case, a Right-to-Know request was made for an investigative report into an allegation of misconduct against Officer Provenza. The lower court applied the public vs. private balancing test established in the *Union Leader* and *Seacoast Newspaper* cases and found that there was a compelling public interest which warranted disclosure of the report. Officer Provenza appealed and argued that release of the report violated his privacy interests under RSA 91-A:5, IV. The New Hampshire Supreme Court found that Officer Provenza's privacy interest was minimal as the report did not reveal intimate details of his life, but rather information relating to his conduct as a government employee while performing his official duties and interaction with members of the public. Additionally, there was a compelling public interest in knowing how the department investigated claims of misconduct against an officer. The decision of the lower court was upheld that under the previously established balancing test, the report was subject to disclosure under RSA 91-A.

In a decision from 2016, the Court explained that for information to be an "internal personnel practices" it must be both "internal" and "personnel." *Reid v. New Hampshire Attorney General*, 169 N.H. 509 (2016). "Internal" means that the information fits within the limits of an employment relationship. The term "personnel" refers to "the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives" as well as "the conditions of employment . . . such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id*. at 523 (internal citations omitted).

C. Confidential, Commercial or Financial Information – RSA 91-A:5, IV

Under **RSA 91-A:5, IV**, confidential, commercial, or financial information is exempt from disclosure. The terms "commercial" or "financial," as used in this exemption, encompass information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition. In determining whether information is confidential, "the emphasis should be placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential." ***Goode v. New Hampshire Office of Legislative Budget Assistant*, 148 N.H. 551, 554-55 (2002)** (internal citations omitted). This determination must be made objectively and should not be based on the subjective expectations of the party generating it.

***Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 553 (1997)**. In *Union Leader Corp.*, the Court held that the following documents were *not* exempt from disclosure: market analysis of potential condominium sales; balance sheets and income statements of real estate developers; commercially-generated credit reports of real estate developers; a letter of credit issued by a real estate developer; construction finance activity sheet; rent and credit income information; and a development agreement and construction loan agreement between a real estate developer, the New Hampshire Housing Finance Authority, and private lenders.

D. Invasion of Privacy – RSA 91-A:5, IV

The Right-to-Know Law specifically exempts from disclosure "files whose disclosure would constitute invasion of privacy." **RSA 91-A:5**. This provision "means that financial information and personnel files and other information necessary to an individual's privacy need not be disclosed." ***Mans v. Lebanon School Board*, 112 N.H. 160, 162 (1972)**. In ***Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005)**, the New Hampshire Supreme Court set forth a three-part test for determining whether a privacy interest exempts information from disclosure:

1. Evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.

2. Assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.

3. Balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.

Using this test, the Court in *Lamy* declared that the names and home addresses of utility customers in a report filed with the New Hampshire Public Utilities Commission had little if any public interest value because the information was deemed a derivative use of information that did not directly provide insights into the operation of the government.

a. The Right to "Practical Obscurity"

The New Hampshire Supreme Court has also said that the right to privacy includes an individual's right to "practical obscurity." In ***N.H. Right to Life v. Director, Charitable Trust*, 169 N.H. 95 (2016)**, Right-to-Know Law requests were made by New Hampshire Right to Life addressed to several state agencies to produce various records related to Planned Parenthood of Northern New England (PPNNE) and its New Hampshire clinics. Some of the information collected was video surveillance that captured the images of passersby not related to PPNNE business, and vehicles entering, exiting, or parked in the lot or the adjacent lot to the building occupied by PPNNE, including the license plates on those vehicles.

Drawing on *Lamy*, the Court said that individuals generally have "a large measure of control over the disclosure of their own identifies and whereabouts." The Court further explained that individuals have an "interest in retaining the 'practical obscurity' of private information that may be publicly available, but difficult to obtain." In this explanation, the Court referred to a U.S. Supreme Court case that found federal employees have an interest in their home addresses even though the information may be publicly available through other sources, such as telephone directories. Furthermore, the Court said the fact that these individuals and license plates were publicly displayed when being recorded did not mean they had no privacy interest in their whereabouts because "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information."

b. Election documents

Documents related to an individual's candidacy for an elected office are public. In the case of ***Lambert v. Belknap County Convention* 157 N.H. 375 (2008)**, the New Hampshire Supreme Court said that disclosure of candidates' applications for office of county sheriff, letters of recommendation, and score sheets would not constitute an invasion of privacy and must be disclosed. The candidates were voluntarily seeking to fill an elected public office and thus had a diminished privacy expectation in personal information relevant to that office. Disclosure of the documents would inform the public about its government's activities, and the public's interest in disclosure was paramount and outweighed the candidate's and county's interests in nondisclosure.

The Court has not considered whether disclosure of employment applications for an appointed position—as opposed to elected— would constitute an invasion of privacy. This would seem to involve a different analysis, because those seeking an appointed office ordinarily do not have to file a public declaration of candidacy.

E. Personnel Files

Personnel files maintained by a public body or public agency are not *per se* exempt from disclosure under **RSA 91-A:5, IV**. Rather, to determine whether information is exempt as a "personnel file," a two-part analysis is required: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy under the three-part privacy test, as described above.

At N.H. Admin Code Lab 802.08, the New Hampshire Department of Labor defines "personnel file" as:

> [A]ny personnel records created and maintained by an employer and pertaining to an employee including and not limited to employment applications, internal evaluations, disciplinary documentation, payroll records, injury reports and performance assessments, whether maintained in one or more locations, unless such records are exempt from disclosure under RSA 275:56, III or are otherwise privileged or confidential by law. The term does not include recommendations, peer evaluations, or notes not generated or created by the employer.

a. Public Employee Salaries

Specific names and salary information of public employees are public, and disclosure does not constitute an invasion of privacy. *See* ***Mans v. Lebanon School Board* 112 N.H. 160 (1972)** (teachers' salaries are not exempt from inspection and disclosure). In ***Professional Firefighters of New Hampshire v. Local Government Center, Inc.,* 159 N.H. 699 (2010)**, the New Hampshire Supreme Court also determined that risk management pool employees had no greater privacy interest than traditional public employees, and disclosure was essential to knowing how the risk pool was spending taxpayer money.

b. Disciplinary Records

The N.H. Supreme Court ruled in ***Seacoast Newspapers v. Portsmouth*, 173 N.H. 325 (2020)** that records documenting the history or performance of a particular employee fall within the exemption for personnel files. Because records pertaining to an employee's work performance or discipline are typically maintained in a personnel file, the disclosure of such records would be governed by the clause in **RSA 91-A:5, IV**, "personnel . . . files whose disclosure would constitute invasion of privacy." In assessing whether such information must be disclosed, it is necessary to determine: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy. If a disciplinary or performance record is part of the employee's personnel file, then whether the disclosure would constitute an invasion of privacy would be based upon the well-established three-step analysis:

- First, evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.
- Second, assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
- Finally, balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. ***Reid v. N.H. Attorney General*, 169 N.H. 509, 528-29 (2016)**.

F. Preliminary Drafts – RSA 91-A:5, IX

The "preliminary draft" exemption was designed to protect pre-decisional, deliberative communications that are part of an agency's decision-making process. ***ATV Watch v. New Hampshire Dept. of Transp.* 161 N.H. 746 (2011)**. In that case, the Court determined that this exemption extended to drafts of letters from the New Hampshire Department of Transportation (DOT) to the Federal Highway Administration and other entities outside DOT concerning a request for records relating to use of all-terrain vehicles on former railroad corridors converted to rail trails.

G. Personal Notes – RSA 91-A:5, VIII

Any notes or other materials made for personal use that do not have an official purpose are exempt from disclosure. This includes notes and materials made prior to, during, or after a governmental proceeding, such as notes taken by a member of a public body during a meeting. However, if these notes are later used for an official purpose—such as compiling the minutes of a meeting—they are no longer "personal" because they have been used for an "official" purpose. Under those circumstances, the notes would be subject to disclosure as materials as "raw materials" used to compile the minutes under **RSA 91-A:4, II**.

The New Hampshire Supreme Court has said that handwritten, personal notes in the margin of a letter from the New Hampshire Department of Resources and Economic Development to employee of the Department of Transportation (DOT), together with handwritten personal notes in margins, and a "sticky note" on a letter from the Federal Highway Administration to Commissioner were "personal notes" not subject to disclosure. ***ATV Watch v. New Hampshire Dept. of Transp.* 161 N.H. 746 (2011)**.

H. Law Enforcement Body Camera Recordings – RSA 91-A:5, X

Video and audio recordings made by a law enforcement officer using a body-worn camera pursuant to **RSA chapter 105-D** are exempt from disclosure ***except*** where the recordings depict any of the following:

a. Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

b. The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

c. An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure.

I. Law Enforcement Records

Starting with ***Lodge v. Knowlton*, 118 N.H. 574 (1978)** the New Hampshire Supreme Court imported standards from the federal Freedom of Information Act, 5 U.S.C §552(b)(7), to determine whether law

enforcement investigation files are subject to disclosure. First, the entity seeking to avoid disclosure must establish that the requested materials were compiled for law enforcement purposes. Second, if the entity meets this threshold requirement, it must then show that releasing the material would have one of the following enumerated adverse consequences:

a. Interfere with enforcement proceedings,

b. Deprive a person of a right to a fair trial or an impartial adjudication,

c. Constitute an unwarranted invasion of privacy,

d. Disclose the identity of a confidential source, and in the case of a record compiled by a law enforcement authority in the course of a criminal investigation, or by any agency conducting a lawful national security intelligence investigation, confidential information furnished only by a confidential source,

e. Disclose investigative techniques and procedures, or

f. Endanger the life or physical safety of law enforcement personnel.

This law enforcement purposes exception does not apply exclusively to law enforcement officers or agencies, but rather applies to all records and information compiled, by any type of agency, for law enforcement purposes. ***38 Endicott Street North, LLC v. State Fire Marshal, New Hampshire Div. of Fire Safety*, 163 N.H. 656 (2012)**.

For example, in the case of ***Montenegro v. City of Dover,* 162 N.H. 641 (2011),** the court upheld the denial of a Right-to-Know request seeking information about certain surveillance equipment and procedures. The requesting party sought the precise locations of the city's surveillance equipment, the recording capabilities, specific time periods each piece of equipment was expected to be operated, and the retention time for recordings. The court ruled that this information could reasonably be expected to risk circumvention of the law and was exempt. Similarly, in the case of ***ACLU v. City of Concord,* 174 N.H. 653 (2021),** the court denied a Right-to-Know request for details involving the city's contract for the purchase of "covert communications equipment" for the police on the grounds that disclosure could reasonably be expected to risk circumvention of the law. These are both examples of how the exemptions mentioned in FOIA can have an impact on requests made under RSA 91-A.

For more on law enforcement records, see Appendix E.

J. Information Technology Systems

Paragraph XI provides that records pertaining to information technology systems are exempt from disclosure under the Right-to-Know Law if release of those records would disclose information that would aid an attempted security breach or circumvention of law. Although not explained in statute, this limited exception was designed to prevent hackers from gaining information that would enable them to better circumvent security protocols on municipal systems. At the time of passage, numerous well-publicized ransomware attacks had occurred throughout the country and, presumably, limiting disclosure of certain IT information would assist municipalities in safeguarding their records against these types of attacks.

K. Attorney-Client and Attorney Work Product Documents

Effective September 28, 2021, the list of records exempt from disclosure under **RSA 91-A** was amended to include records protected under the attorney-client privilege or the attorney work product doctrine. **RSA 91-A:5, XII**. The classic articulation of the attorney-client privilege provides that where legal

advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives. ***Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273 (1966)**.

The work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which she can analyze and prepare her client's case. The courts have defined work product as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation. For the work product doctrine to apply, the lawyer's work must have formed an essential step in the procurement of the information which is sought, and she must have performed duties normally attended to by attorneys. ***Balzotti Glob. Grp., LLC v. Shepherds Hill Proponents, LLC,* 173 N.H. 314, 324 (2020)**.

L. Documents Received During a Non-Public Session

Although not yet addressed by the New Hampshire Supreme Court, both the New Hampshire Attorney General and the Maine Supreme Court agree that documents or information a public body or agency properly receives during a non-public session are exempt if disclosure would frustrate the purpose of the non-public session. ***Memorandum on New Hampshire's Right-to-Know Law,* (2015)**, page 20; ***Blethen Maine Newspapers, Inc. v. Portland School Committee*, 947 A.2d 479 (Me. 2008)**.

M. Records of Certain Emergency Functions

RSA 91-A:5, VI exempts records pertaining to matters related to the preparation for and the carrying out of all emergency functions that are developed by local or state safety officials and are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life, including training to carry out such functions. Note that this applies only to emergency functions intended to "thwart a *deliberate* act"—in other words, an act of terrorism. It does not apply to records related to natural disaster emergency planning.

N. Other Statutory Exemptions

RSA 91-A:4, I states that governmental records are subject to inspection and copying "except as otherwise prohibited by statute." Numerous statutes, and some court rules, prohibit the disclosure of certain governmental records. Included in Appendix F of the New Hampshire Attorney General's ***Memorandum on New Hampshire's Right-to-Know Law*** is a compilation of these other statutory Right-to-Know Law exemptions. The following is a brief list of such other statutory exemptions of note for municipal officials:

a. Income and asset information gathered during an investigation of a real estate tax exemption, credit or deferral that relies upon personal financial information of the taxpayer, such as income tax returns. **RSA 72:34, II**.

b. Local aid to assisted persons records. **RSA 165:2-c**.

c. Library user records. **RSA 201-D:11**.

d. Motor vehicle records. **RSA 260:14**.

e. List of licensed dog owners. **RSA 466:1-d**.

IV. RESPONDING TO GOVERNMENTAL RECORDS REQUEST

A. Who May Request Governmental Records?

Every citizen during the regular business hours of all public bodies and public agencies, on the regular business premises of such agencies and bodies, has the right to inspect all governmental records and to make copies, except as prohibited by statute or **RSA 91-A:5. RSA 91-A:4, I**.

One lingering question is "who is a citizen" with the right to access governmental records? The statute refers to "citizens" but does not define this term. The United States Supreme Court issued an opinion in April 2013 addressing this question under a similar statute in Virginia. ***McBurney v. Young*, 133 S. Ct. 1709 (2013)**. Two separate cases involved record requests from people who were not Virginia citizens. Both requests were denied under the Virginia Freedom of Information Act, although the information was available through other channels. Of particular interest, the Court noted that New Hampshire is one of the eight states whose public records statutes guarantee access only to citizens of that particular state.

This opinion includes several important points. The U.S. Constitution does not grant any citizen the right to access governmental records. Rather, that right is a relatively recent addition to federal law, based in the federal Freedom of Information Act first enacted by Congress in 1966. Individual state freedom of information acts (known by various names) are intended to provide citizens of that state access to information about what their own state and local governments are doing. State freedom of information acts do not violate the U.S. Constitution by regulating how access to public documents may be obtained by non-citizens of a state, so long as there exists some means by which access may be obtained.

In New Hampshire, we do not yet have a ruling from our Supreme Court as to the meaning of the word "citizen" in **RSA chapter 91-A**. Thus, we cannot say with certainty how our courts or legislature will define or construe the meaning of that term. For now, the focus when responding to requests for governmental records should remain on the obligation to meet the purpose and intent of the law. The purpose is "to ensure the greatest possible access to governmental records." **RSA 91-A:1**. If requests are received from outside New Hampshire, it seems that a refusal to provide those records electronically will not violate a federal law. Furthermore, it appears that, under **RSA 91-A**, a request by an out-of-state person could be denied. However, a request made in person should probably be honored, regardless of the citizenship of the person making the request, even though the public body or agency is likely not technically required to do so.

B. The Record Must Be Reasonably Described

The Right-to-Know Law requires public bodies and agencies to make available records that are "reasonably described." **RSA 91-A:4, IV**. Thus, the person seeking access to the governmental record must provide a sufficient description to permit the public body or agency to determine whether the record exists, and to provide access or a copy (assuming the record is not exempt from disclosure). If the request is so vague that it is uncertain what the requester is seeking, the public body or agency should request clarification, or deny the request, and ask for a better description of the information sought.

In a recent Superior Court decision, ***Laura Colquhoun v. Nashua*, Hillsborough Superior Court – Southern District, Docket No. 2021-CV-00163, (decided May 12, 2021)** the presiding justice turned to FOIA case law to determine if a governmental records request was reasonably described:

> Under FOIA, a reasonably described request "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." . . . Indeed, "FOIA does not authorize (a governmental body] to deny a FOIA email request categorically, simply and solely because the request does not reference the sender, recipient, subject, and time frame. " . . . However, the determination of whether a request is reasonably described "is highly context-specific.". . . "While the linchpin inquiry is whether the agency is able to determine precisely what records are being requested, an agency need not honor a request that requires an unreasonably burdensome search or would require the

> agency to locate, review, redact, and arrange for inspection vast quantities of material." . . . "This is so because FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.". . . "Thus agencies . . . often engage in cooperative discussion tonarrow and focus requests for the benefit of both the agency and the requester."

Colquhoun v. City of Nashua, 2021 N.H. Super. LEXIS 7, *4-5. (May 12, 2021).

The trial court in *Colquhoun* ruled that the plaintiff was not entitled to an award of attorneys fees under RSA 91-A:8 because it could not find the City knew or should have known that its conduct violated the Right-to-Know Law. The NH Supreme Court reversed that decision finding that "the City should have known, in light of our decision in *ATV Watch*, that it was required to undertake a reasonable search. Thus, by denying the plaintiff's request in its entirety as unduly burdensome, the City should have known that it was asserting that any search would be unreasonable because any search would be unduly burdensome. The facts of this case and our earlier cases demonstrate that the City should have known that such an assertion was not justified." The Court remanded the matter for an award of reasonable attorneys fees to Colquhoun. *Colquhoun v. City of Nashua*, 175 N.H. 474 (2022).

C. Search for Records

The scope of the search for records by an agency or public body must be reasonably calculated to uncover all relevant documents. *ATV Watch v. NH Dept. of Transportation,* 161 N.H. 746 (2011). Where records are sought from multiple municipal departments, boards and commissions, it may be necessary to document in writing the municipal officials who were consulted, the physical and electronic files examined, and the scope of the examination for subject matter and period of time the search entailed. It is important to keep in mind that governmental records, especially electronic records may exist in multiple different places. Just because they no longer exist in one location doesn't mean that they haven't been backed up or uploaded to a different location. When engaging in a search for records, municipalities must be sure to search all locations where those records are likely to be kept. Once the public body or agency has demonstrated through affidavits or offers of proof that the document search was reasonable, the burden shifts to the requester to show that the search was not reasonable or was not conducted in good faith. *Id.* at 753.

D. Produce Records If Immediately Available

The time period for responding to a Right-to-Know request is absolute." ***ATV Watch v. New Hampshire Dept. of Resources and Economic Development (DRED)*, 155 N.H. 434, 440 – 41 (2007)**. The statute mandates that an agency [or public body] make public records available when they are immediately available for release, or otherwise, it must within five business days of the Right-to-Know request: (1) make the records available; (2) deny the request in writing with reasons; or (3) acknowledge receipt of the request in writing and provide a written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay.

In *ATV Watch*, the trial court found it was a *per se* violation of the Right-to-Know Law when DRED did not respond within five business days. Thus, when in doubt about whether the records sought exist, or are reasonably described, or are exempt from disclosure, a public body or agency must respond in five business days.

E. "On the Business Premises"

The law gives citizens the right to inspect and copy records "during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies." **RSA 91-A:4, I**. Note that it does not impose any requirement that a public body or agency deliver records, whether by mail, e-mail, or otherwise. Of course, a public body or agency may choose to comply with a request by mailing or e-mailing the requested records, and sometimes it may be more efficient to do so; but the law does not require this.

F. No Obligation to Compile, Cross Reference or Assemble

Under **RSA 91-A:4, VII**, public bodies and agencies have no duty to "compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency." For example, a town was not required to have outside counsel prepare revised legal bills listing the general subject matter and approximating how many entries were devoted to the subject matter at issue, because that required the creation of an entirely new document that did not already exist. ***Hampton Police Association v. Town of Hampton*, 162 N.H. 7 (2011)**.

G. Appointment to Review Records

Requiring a citizen make an appointment to review records probably does not violate the law, although such a requirement should be reasonable under the circumstances. In ***Brent v. Paquette*, 132 N.H. 415, 422-24 (1989)**, the school superintendent required a citizen to make an appointment as a precondition to reviewing public records in the superintendent's possession. The Court said this conduct did not violate the Right-to-Know Law, absent any evidence that the citizen attempted to make an appointment and was refused, or that school superintendent was "unavailable" to meet with citizen; requiring citizen to arrange mutually convenient time to examine records further the underlying purposes of **RSA chapter 91-A**.

H. Redact Confidential Information

If only part of a governmental record is subject to an exemption, the part that is not protected should be released. The confidential portion should be "redacted" (i.e., blacked out, erased, or otherwise removed). If a partial document release goes to court, the burden of proof will be on the town or city to prove that the related material is subject to an exemption.

I. Producing Electronic Governmental Records

Governmental records maintained in electronic form may be disclosed by copying them to an electronic medium; however, if that is not reasonably practical, or if the person making the request asks for the records in a different format, the public body or agency may provide a printout of the records "or may use any other means reasonably calculated to comply with the request." **RSA 91-A:4, V**. Municipalities should protect the integrity of their computers and networks by refusing to allow people to insert media such as USB flash drives into the public computers. This is a significant risk to security of public records and a possible avenue for introduction of software that could harm the system or corrupt the data. Even if the citizen appears to have no intent to cause the harm, most individuals are not capable of truly assuring that their media is free of malicious software.

The obligation to provide electronic records in an electronic form was addressed by the New Hampshire Supreme Court in two cases: ***Green v. School Administrative Unit #55*, 168 N.H. 796 (2016)** and ***Taylor v. SAU #55*, 170 N.H. 322 (2017)**. In *Green* the Court determined that if a person requests access in electronic format to a record that is maintained electronically, the public body must provide the record electronically unless there is a valid reason not to do so. In the follow-up case, *Taylor*, the plaintiff claimed that the *Green* decision required the SAU to send him copies of school board minutes by e-mail upon request. The SAU's policy stated that it would only produce electronic records on a thumb drive, either provided by the requester or supplied by the SAU at a cost of $7.49.

The Court in *Taylor* decided that, although the SAU was required to provide the records in electronic form, *Green* did not require it to provide them via a specific method so long as the manner of providing the records did not "limit the recipient's ability to review or search the requested documents." The court also observed that nothing in the law requires a public entity to deliver records, by e-mail or otherwise, to any location other than its regular place of business. **RSA 91-A:4, I** requires only that records be made available "during the regular business hours" and "on the regular business premises" of the public body or

agency. Therefore, requiring the plaintiff to come to the SAU's office to obtain the records on a thumb drive was consistent with the law.

J. When Denying Access

When denying a request for records, the municipality must provide the reason(s) for denial in writing. **RSA 91-A:4, IV**. However, it is not necessary to produce a detailed list such as a "Vaughn index" (an index with a general description of each document withheld and the reason for its nondisclosure). ***Certain experienced "requesters" are in the habit of demanding a Vaughn index. That demand may be safely disregarded.***

K. Charging for copies of governmental records

Any citizen may make notes, tapes, photos, or photocopies of a governmental record, but government officials should not hand over the records for copying. See **RSA 41:61**, which prohibits the person with custody of the records from loaning them out, and **RSA 91-A:4**, III, which requires that records be kept at the public entity's regular place of business. The governmental agency or official is permitted by **RSA 91-A:4, IV** to make copies and charge the person requesting them the "actual cost of providing the copy." A municipality may not charge for staff time as part of its calculation of the "actual cost" of copying.

Establishing a per copy cost that is not out of line with the prevailing rates charged by other governmental agencies will likely help to avoid complaints that the rates exceed the "actual cost" or are so high as to frustrate the intent of the law. In ***Paul Martin v. City of Rochester*, 173 N.H. 378 (2020)** the N.H. Supreme Court ruled that the city's public records copying fee of fifty cents per page for the first ten pages and then ten cents per page did reflect the "actual cost." The plaintiff challenged the city's copying fee schedule arguing that only a rate of four cents per copy would comply with **RSA 91-A:4, IV**. The Supreme Court agreed with the trial court that the testimony of the city manager was adequate evidence that the city's fee schedule was commensurate with the actual cost of providing the copy. The Court noted that the legislature did not mandate the use of a formulaic method for determining the actual cost for copying. Thus, the testimony provided by the city manager that the city based its copying fee on the cost of leasing copy machines, maintenance, capital costs of the machines, and the cost of paper was sufficient.

No fee may be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Thus, when an electronic record is provided without copying to a separate medium (for example, by e-mail), no fee can be charged for the delivery of that record. However, if the electronic record is copied to a USB flash drive, the public entity may charge for the cost of the flash drive. Similarly, if the electronic record must be redacted and a paper copy of the redacted version of the record is provided, a fee can be charged for the paper copy, but not for the cost of the redaction process. On the other hand, if an electronic record is redacted without copying and the person requesting access only requests the ability to inspect the redacted version, no fee can be charged.

V. RETENTION OF GOVERNMENTAL RECORDS

A. The Records Retention Statute, RSA chapter 33-A

The question of how long to retain governmental records is controlled by the Municipal Records Disposition Act, **RSA chapter 33-A**. That statutory chapter governs the length of time and the manner in which certain municipal records must be retained and also includes a detailed retention schedule.

B. Municipal Records Committee

Every municipality must have a municipal records committee. **RSA 33-A:3**. This committee includes the "municipal officers" (select board member; town manager, in towns with the council-manager plan under **RSA chapter 49-A**; the mayor, in cities; a county commissioner in counties; or a precinct commissioner in a precinct; or their designee), the clerk, the treasurer, an assessor, and the tax collector. *See* **RSA 33-A:1, III**. It is the duty of the committee to designate which municipal officer will be responsible for the retention of each type of municipal record. Alternatively, the municipality may pass an ordinance to make this designation. In any case, the statute requires that the committee exist.

C. Retention Periods

RSA 33-A:3-a sets forth the length of time that 156 different categories of municipal records must be retained. The following are a few examples:

- Abatements – five years
- Annual audit reports – ten years
- Annual reports and town warrants – permanently
- Bank deposit slips and statements – six years
- Correspondence by and to municipality administrative records – minimum of one year
- Correspondence by and to municipality – transitory retain as needed for reference
- Minutes of board and committees – permanently
- Job applications – successful retirement or termination plus 50 years
- Job applications – unsuccessful current year plus three years
- Vehicle maintenance records – life of vehicle plus two years

Each municipal official and body should review the retention schedule in **RSA 33-A:3-a** to ensure that records are being retained for as long as the law requires and to ensure that there is an appropriate policy in place governing the time and manner of record disposal. Once the retention period has expired, records may be destroyed or discarded; however, so long as they still exist, they remain governmental records subject to the disclosure requirements of the Right-to-Know Law.

Municipalities should develop a policy regarding retention and disposal of records. The policy should include the statutorily required retention periods; a set time after the end of the retention period when records will be disposed of; which official, body, or employee will review the records, decide what may be disposed of, and actually dispose of it (these tasks might be assigned to different officials, boards or employees as time permits); and the method of disposal.

For more information regarding disposition of municipal records, see Appendix F: Chapter 33-A – Disposition of Municipal Records.

D. Format of Document Retention

The government must maintain governmental records "in a manner that makes them available to the public." ***Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001)**. The Court in Hawkins said that information stored as data in a computer system was a public (now governmental) record under the Right-to-Know Law. In response to the *Hawkins* decision, legislation enacted in 2008 and amended in 2009 states that records maintained in electronic form must remain accessible and available as long as they exist and must be kept and maintained for the same minimum retention or archival periods as their paper counterparts. **RSA 91-A:4, III-a**.

Paper municipal records listed in **RSA 33-A:3-a** may be transferred to electronic records, as defined in **RSA 5:29, VI**, and the original paper records may be disposed of as the municipality chooses, subject to the requirements of other state or federal laws. Such records shall be stored in portable document format/archival (PDF/A) or another file format approved by the secretary of state and the municipal records board. **RSA 33-A:5-a**. However, original town meeting and city council records shall be permanently preserved. **RSA 33-A:6**.

CHAPTER FOUR: REMEDIES FOR VIOLATIONS OF THE RIGHT-TO-KNOW LAW

I. HOW IS THE RIGHT-TO-KNOW LAW ENFORCED?

A. Office of the Right-to-Know Law Ombudsman

Through HB 481, effective July 1, 2022, the Office of the Right-to-Know Law Ombudsman has been created to provide an alternative administrative process to resolve complaints under the Right-to-Know Law. In lieu of filling suit in the Superior Court, a complaint can be filed with the newly created Ombudsman. RSA 91-A:7, II. The aggrieved party must make an election to either file the complaint with the Superior Court or the Ombudsman - filing with one forecloses filing with the other. RSA 91-A:7, III, IV. The Ombudsman is administratively attached to the NH Department of State and is nominated and confirmed by the Governor and Executive Council. RSA 91-A:7-a.

The appointed Ombudsman shall be an attorney with minimum 5 years' experience and be knowledgeable about the provisions of 91-A and other laws pertaining to 91-A. RSA 91-A:7-a. The Ombudsman must adopt rules governing streamlining the complaint process and hearing procedures. RSA 91-A:7-d. The Ombudsman's office is currently in the process of drafting rules, however the office is still operating based on procedures outlined in Jus 800. It is expected that official rules will be adopted within the next few months.

The procedures before the Ombudsman will follow a simplified complaint process. After the complaint is received, the public body is given notice and required to respond with an answer to within 20 days. The Ombudsman is empowered to: (1) Compel timely delivery of public records; (2) conduct in-camera review of records; (3) compel interviews with the parties; (3) order attendance at hearings; (4) order access to public records or access to meetings; (5) and make any finding or order as permitted by the Superior Court under RSA 91-A:8. The Ombudsman may draw negative inferences from a party's failure to participate and comply with orders during the review process. The Ombudsman shall issue a ruling within 30 calendar days following the deadline for receipt of the parties' submissions. The Ombudsman may also expedite resolution of the complaint upon a showing of good cause and rule within 10 business days, or sooner where necessary. RSA 91-A:7-b.

Decisions by the Ombudsman may be appealed to Superior Court within 30 days with all factual findings by the Ombudsman deemed lawful and reasonable. Decisions not appealed may be registered in Superior Court and be enforceable through contempt proceedings. RSA 91-A:7-c.

B. Enforcement Through the Superior Court:

In the alternative, any person aggrieved by a violation of the Right-to-Know law may petition the superior court for injunctive relief. All the "aggrieved person" must do is file a petition that "states facts constituting a violation" of the law. The statute also provides that if it appears from the petition that "time probably is of the essence," the any justice of the Superior Court may order notice by any reasonable means and issue an order *ex parte* when he or she shall reasonably deem such an order necessary to ensure compliance with the Right-to-Know Law.

Subject to objection by either party, all documents filed with the petition and with any response to the petition shall be considered as evidence by the court. All documents submitted must be provided to the opposing party prior to a hearing on the merits. RSA 91-A:7.

II. WHAT ARE THE REMEDIES AND PENALTIES?

Under RSA 91-A:8, a successful Right-to-Know Law lawsuit can result in one or more of the following:

1. Award of attorney's fees to the petitioner
2. Award of costs to the petitioner
3. Invalidation of an action taken at a meeting that was not in compliance with 91-A
4. Civil penalty against an individual officer, employee, or other official of a public body or public agency of no less than $250 and no more than $2,000 for bad faith violations
5. Reimbursement by the individual officer, employee, or other official to the public body or agency for bad faith violations
6. Injunction against future violations of 91-A
7. Remedial training

In addition, under RSA 91-A:9, a person is guilty of a misdemeanor if he or she knowingly destroys information with the purpose of preventing the information from being inspected or disclosed in response to a request for information. If disclosure of the requested information has been denied as exempt, the public body or agency also has an obligation to preserve that information for at least 90 days or, if there is a pending lawsuit regarding the requested information, to preserve the information for the pendency of the lawsuit.

The New Hampshire Supreme Court has said that the provision for attorney's fees and costs ensures that an individual's ability to finance litigation does not stand in the way of enforcement of the law. *Bradbury v. Shaw,* 166 N.H. 388 (1976). However, attorney's fees and costs are not automatically awarded under all circumstances. RSA 91-A:8, I requires the payment of attorney's fees when both of the following are true: (1) the court finds that such *lawsuit was necessary in order to enforce compliance* with the provisions of the Right-to-Know Law or to address a purposeful violation of the Right-to-Know Law and (2) the public body, public agency, or person *knew or should have known* that the conduct engaged in was in violation of the Right-to-Know Law. Costs, alone, are awarded when the first part of the test is established: the lawsuit was necessary to enforce compliance.

For example, the New Hampshire Supreme Court said that it was proper for a superior court judge not to award attorney's fees and costs where the judge determined the lawsuit was not necessary to enforce compliance: the State had sufficiently justified its reasoning for withholding certain documents, and, although some of the withheld information should have been disclosed, the judge determined that the decision to withhold was not so unreasonable that the State knew or should have known disclosure was required. *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95 (2016). Where the governmental entity successfully defends the withholding of information under an exemption, attorney's fees and costs are also not appropriate. *See 38 Endicott St. N., LLC v. State Fire Marshal,* 163 N.H. 656 (2012). Furthermore, where a decision to withhold information or deny access is based on a matter of first impression to a court, attorney's fees generally also will not be awarded because the public body or agency could not have "known" a violation was occurring. *See, e.g., Ettinger v. Town of Madison Planning Board*, 162 N.H. 785 (2011) (at the time, matter of first impression whether public bodies could discuss legal advice in private session); *WMUR Channel Nine v. N.H. Dep't of Fish & Game*, 154 N.H. 46 (2006) (given the state of the law at the time, department director did not know, and did not have reason to know, that excluding video cameras from a hunting license hearing violated RSA 91-A).

Other penalties for a violating the law, as stated above, are invalidation of a decision, injunction, or remedial training. For example, the New Hampshire Supreme Court held that a county convention's selection of a sheriff must be invalidated where the decision was made by secret ballot during a public meeting. *Lambert v. Belknap Cty. Convention,* 157 N.H. 375 (2008). As stated in Chapter Two, no vote in a public meeting, other than a town or school district meeting, may be taken by secret ballot. Therefore, in *Lambert*, the county convention was required to make the appointment of sheriff all over again, as if it never occurred in the first place.

An injunction is ordered to enjoin (stop) future violations of the Right-to-Know Law by the public body, agency, or individual. Remedial training on the Right-to-Know Law, paid for by the entity or individual that has violated the law, can also be ordered.

Finally, civil penalties can be awarded:

> If the court finds that an officer, employee, or other official of a public body or public agency has violated any provision of this chapter in bad faith, the court shall impose against such person a civil penalty of not less than $250 and not more than $2,000. Upon such finding, such person or persons may also be required to reimburse the public body or public agency for any attorney's fees or costs it paid pursuant to paragraph I. If the person is an officer, employee, or official of the state or of an agency or body of the state, the penalty shall be deposited in the general fund. If the person is an officer, employee, or official of a political subdivision of the state or of an agency or body of a political subdivision of the state, the penalty shall be payable to the political subdivision.

RSA 91-A:8, IV.

As you can see, these civil penalties—ranging from $250 to $2,000—can be assessed against an individual official, officer, or employee, as well as a public body or agency. The statute also allows a judge to order the individual who acted in bad faith to reimburse the public agency or public body for attorney's fees and costs, if such an award to the petitioner was made, which may be a very substantial amount of money.

There is one final consequence of violating the law that is not stated in RSA Chapter 91-A: the public's loss of confidence in government. The public has a right of access, with exceptions, to the conduct of its government. Depriving them of this access not only violates that right, but it also causes the public to become skeptical and feel disenfranchised, which negatively impacts government at all levels.

Some mistakes cannot be avoided. But because one official's or employee's violation of the law can lead to serious consequences for the public body or public agency—and potentially civil penalties and other substantial costs for the individual—regular training for all officials and employees of your town, village district, school district, or other governmental entity is crucial.

Attorney's fees and costs may also be awarded to a public body, agency, employee, or official when the lawsuit was brought in bad faith, or was frivolous, unjust, vexatious, wanton, or oppressive.

APPENDIX A

CHAPTER 91-A
ACCESS TO GOVERNMENTAL RECORDS AND MEETINGS

91-A:1 Preamble. – Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

Source. 1967, 251:1. 1971, 327:1. 1977, 540:1, eff. Sept. 13, 1977.

Section 91-A:1-a

91-A:1-a Definitions. –
In this chapter:
I. "Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.
II. "Governmental proceedings" means the transaction of any functions affecting any or all citizens of the state by a public body.
III. "Governmental records" means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."
IV. "Information" means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.
V. "Public agency" means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.
VI. "Public body" means any of the following:
(a) The general court including executive sessions of committees; and including any advisory committee established by the general court.
(b) The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.
(c) Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.
(d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.
(e) Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

Source. 1977, 540:2. 1986, 83:2. 1989, 274:1. 1995, 260:4. 2001, 223:1. 2008, 278:3, eff. July 1, 2008 at 12:01 a.m.; 303:3, eff. July 1, 2008; 303:8, eff. Sept. 5, 2008 at 12:01 a.m.; 354:1, eff. Sept. 5, 2008.

Section 91-A:2

91-A:2 Meetings Open to Public. –

I. For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include:

(a) Strategy or negotiations with respect to collective bargaining;

(b) Consultation with legal counsel;

(c) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

II. Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings. Minutes of all such meetings, including nonpublic sessions, shall include the names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions. The names of the members who made or seconded each motion shall be recorded in the minutes. Subject to the provisions of RSA 91-A:3, minutes shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. For the purposes of this paragraph, a business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays.

II-a. If a member of the public body believes that any discussion in a meeting of the body, including in a nonpublic session, violates this chapter, the member may object to the discussion. If the public body continues the discussion despite the objection, the objecting member may request that his or her objection

be recorded in the minutes and may then continue to participate in the discussion without being subject to the penalties of RSA 91-A:8, IV or V. Upon such a request, the public body shall record the member's objection in its minutes of the meeting. If the objection is to a discussion in nonpublic session, the objection shall also be recorded in the public minutes, but the notation in the public minutes shall include only the member's name, a statement that he or she objected to the discussion in nonpublic session, and a reference to the provision of RSA 91-A:3, II, that was the basis for the discussion.

II-b. (a) If a public body maintains an Internet website or contracts with a third party to maintain an Internet website on its behalf, it shall either post its approved minutes in a consistent and reasonably accessible location on the website or post and maintain a notice on the website stating where the minutes may be reviewed and copies requested.

(b) If a public body chooses to post meeting notices on the body's Internet website, it shall do so in a consistent and reasonably accessible location on the website. If it does not post notices on the website, it shall post and maintain a notice on the website stating where meeting notices are posted.

III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.

(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.

(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.

(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.

IV. The provisions of this paragraph allowing for less than a quorum to be physically present for meetings shall apply only to boards, committees, councils, advisory committees and like bodies of state government, not including the general court or either house thereof or any committee of either house, nor the governor and council, the composition of which is permitted by law or regulation to be drawn from individuals who may reside throughout the state of New Hampshire. This paragraph does not apply to boards, committees, councils, advisory committees, or any other components or instrumentalities of county or municipal government. For purposes of this paragraph only the boards, committees, councils, and like bodies to which this paragraph is applicable shall be referred to as "state boards."

(a) A state board covered by this paragraph may vote to allow one or more members to participate in a meeting remotely only when physical attendance at the meeting site is not reasonably practicable. Any reason that such attendance is not reasonably practicable shall be stated in the minutes of the meeting.

The authority granted under this paragraph may be revoked, renewed, or modified in the same manner as it is approved.

(b) At least one-third of the total membership of the state board shall be present at the physical location of the meeting. Each member participating electronically or otherwise shall be able to contemporaneously and throughout the meeting see and hear, and be seen and heard by, the other members of the public body attending the meeting and members of the public in attendance at the meeting site. A member participating in a meeting remotely as described in this paragraph is deemed to be present for all purposes, including for determination of a quorum and voting. Each member participating remotely shall identify the persons present in the location from which the member is participating. All votes taken during such a meeting shall be by roll call vote. Members of the public shall be permitted to participate remotely in remotely held state board meetings, including testifying or asking questions as the rules and procedures of the board allow.

(c) No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

(d) In an emergency, when immediate action is imperative and the physical presence requirement is not reasonably practicable within the period of time requiring action, the minimum physical presence required under subparagraph (b) shall not apply. The determination that an emergency exists shall be made by the chair or presiding officer of the state board, and the facts upon which that determination is based shall be included in the minutes of the meeting.

(e) Any meeting held pursuant to the terms of this paragraph shall comply with all other requirements of this chapter relating to public meetings not inconsistent with this paragraph, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

Source. 1967, 251:1. 1969, 482:1. 1971, 327:2. 1975, 383:1. 1977, 540:3. 1983, 279:1. 1986, 83:3. 1991, 217:2. 2003, 287:7. 2007, 59:2. 2008, 278:2, eff. July 1, 2008 at 12:01 a.m.; 303:4, eff. July 1, 2008. 2016, 29:1, eff. Jan. 1, 2017. 2017, 165:1, eff. Jan. 1, 2018; 234:1, eff. Jan. 1, 2018. 2018, 244:1, eff. Jan. 1, 2019.

Section 91-A:2-a

91-A:2-a Communications Outside Meetings. –

I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III.

II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

Source. 2008, 303:4, eff. July 1, 2008.

Section 91-A:2-b

91-A:2-b Repealed by 2012, 232:14, eff. Dec. 1, 2012. –

Section 91-A:3

91-A:3 Nonpublic Sessions. –

I.(a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.

(b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.

(c) All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion.

II. Only the following matters shall be considered or acted upon in nonpublic session:

(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.

(d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph.

(f) [Repealed.]

(g) Consideration of security-related issues bearing on the immediate safety of security personnel or inmates at the county or state correctional facilities by county correctional superintendents or the commissioner of the department of corrections, or their designees.

(h) Consideration of applications by the business finance authority under RSA 162-A:7-10 and RSA 162-A:13, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application.

(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

(j) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A.

(k) Consideration by a school board of entering into a student or pupil tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations. A contract negotiated by a school board shall be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the

contract, shall be made public. Approval of a contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate.

(l) Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.

(m) Consideration of whether to disclose minutes of a nonpublic session due to a change in circumstances under paragraph III. However, any vote on whether to disclose minutes shall take place in public session.

III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. For all meetings held in nonpublic session, where the minutes or decisions were determined to not be subject to full public disclosure, a list of such minutes or decisions shall be kept and this list shall be made available as soon as practicable for public disclosure. This list shall identify the public body and include the date and time of the meeting in nonpublic session, the specific exemption under paragraph II on its face which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the minutes or decisions from public disclosure, and the date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure. Minutes related to a discussion held in nonpublic session under subparagraph II(d) shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.

IV. (a) A public body or agency may adopt procedures to review minutes of meetings held in nonpublic session and to determine by majority vote whether the circumstances that justified keeping meeting minutes from the public under RSA 91-A:3, III no longer apply. If the public body determines that those circumstances no longer apply, the minutes shall be available for release to the public pursuant to this chapter.

(b) In the absence of an adopted procedure to review and determine whether the circumstances no longer apply for meeting minutes kept from the public, the public body or agency shall review and determine by majority vote whether the circumstances that justified keeping meeting minutes from the public under RSA 91-A:3, III no longer apply. This review shall occur no more than 10 years from the last time the public body voted to prevent the minutes from being subject to public disclosure. Meeting minutes that were kept from the public prior to the effective date of this paragraph that are not reviewed by the public body or agency within 10 years of the effective date of this paragraph shall be subject to public disclosure without further action of the public body.

Source. 1967, 251:1. 1969, 482:2. 1971, 327:3. 1977, 540:4. 1983, 184:1. 1986, 83:4. 1991, 217:3. 1992, 34:1, 2. 1993, 46:1; 335:16. 2002, 222:2, 3. 2004, 42:1. 2008, 303:4. 2010, 206:1, eff. June 22, 2010. 2015, 19:1; 49:1; 105:1, eff. Jan. 1, 2016; 270:2, eff. Sept. 1, 2015. 2016, 30:1, eff. Jan. 1, 2017; 280:1, eff. June 21, 2016; 2023, 189:1, effective October 3, 2023.

Section 91-A:4.

91-A:4 Minutes and Records Available for Public Inspection. –

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

I-a. Records of any payment made to an employee of any public body or agency listed in RSA 91-A:1-a, VI(a)-(d), or to the employee's agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3.

II. After the completion of a meeting of a public body, every citizen, during the regular or business hours of such public body, and on the regular business premises of such public body, has the right to inspect all notes, materials, tapes, or other sources used for compiling the minutes of such meetings, and to make memoranda or abstracts or to copy such notes,
materials, tapes, or sources inspected, except as otherwise prohibited by statute or RSA 91-A:5.

III. Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.

III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

IV. (a) Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release.

(b) If a public body or agency is unable to make a governmental record available for immediate inspection and copying the public body or agency shall, within 5 business days of a request:

(1) Make such record available;

(2) Deny the request; or

(3) Provide a written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay.

(c) A public body or agency denying, in whole or part, inspection or copying of any record shall provide a written statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

(d) If a computer, photocopying machine, or other device maintained for use by a public body or agency is

used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. No cost or fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.

VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.

VII. Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

Source. 1967, 251:1. 1983, 279:2. 1986, 83:5. 1997, 90:2. 2001, 223:2. 2004, 246:2. 2008, 303:4. 2009, 299:1, eff. Sept. 29, 2009. 2016, 283:1, eff. June 21, 2016. 2019, 107:1, eff. Jan. 1, 2020; 163:2, eff. Jan. 1, 2020 at 12:01 a.m.

Section 91-A:5

91-A:5 Exemptions. –

The following governmental records are exempted from the provisions of this chapter:

I. Records of grand and petit juries.

I-a. The master jury list as defined in RSA 500-A:1, IV.

II. Records of parole and pardon boards.

III. Personal school records of pupils, including the name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the assessment under RSA 193-C:6.

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.

VI. Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.
X. Video and audio recordings made by a law enforcement officer using a body-worn camera pursuant to RSA 105-D except where such recordings depict any of the following:
(a) Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.
(b) The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.
(c) An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure.
XI. Records pertaining to information technology systems, including cyber security plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed.
XII. Records protected under the attorney-client privilege or the attorney work product doctrine.
XIII. Records of the youth development center claims administration and the YDC settlement fund pursuant to RSA 21-M:11-a, with the exception of settlement agreements, which shall remain subject to RSA 91-A:4, VI, and, after a claim has been finally resolved, such other records the release of which would not constitute a violation of other provisions of law or an unwarranted invasion of a claimant's privacy.

Source. 1967, 251:1. 1986, 83:6. 1989, 184:2. 1990, 134:1. 1993, 79:1. 2002, 222:4. 2004, 147:5; 246:3, 4. 2008, 303:4, eff. July 1, 2008. 2013, 261:9, eff. July 1, 2013. 2016, 322:3, eff. Jan. 1, 2017. 2018, 91:2, eff. July 24, 2018. 2019, 54:1, eff. Aug. 4, 2019; 2021, 163:2, effective July 30, 2021; 2022, 122:3, effective May 27, 2022.

Section 91-A:5-a

91-A:5-a Limited Purpose Release. – Records from non-public sessions under RSA 91-A:3, II(i) or that are exempt under RSA 91-A:5, VI may be released to local or state safety officials. Records released under this section shall be marked "limited purpose release" and shall not be redisclosed by the recipient.

Source. 2002, 222:5, eff. Jan. 1, 2003.

Section 91-A:6

91-A:6 Employment Security. – This chapter shall apply to RSA 282-A, relative to employment security; however, in addition to the exemptions under RSA 91-A:5, the provisions of RSA 282-A:117-123 shall also apply; this provision shall be administered and construed in the spirit of that section, and the exemptions from the provisions of this chapter shall include anything exempt from public inspection under RSA 282-A:117-123 together with all records and data developed from RSA 282-A:117-123.

Source. 1967, 251:1. 1981, 576:5, eff. July 1, 1981.

Section 91-A:7

91-A:7 Violation. [Effective until July 1, 2025]
I. Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief. In order to satisfy the purposes of this chapter, the courts shall give proceedings under this chapter high priority on the court calendar. Such a petitioner may appear with or without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter, and may be filed by the petitioner or his or her counsel with the clerk of court.

II. In lieu of the procedure under paragraph I, an aggrieved person may file a complaint with the ombudsman under RSA 91-A:7-a and in accordance with RSA 91-A:7-b.
III. A person's decision to petition the superior court forecloses the ability to file a complaint with the ombudsman pursuant to RSA 91-A:7-b.
IV. A person's decision to file a complaint with the ombudsman forecloses the ability to petition the superior court until the ombudsman issues a final ruling or the deadline for such a ruling has passed.

Source. 1967, 251:1. 1977, 540:5. 2008, 303:5, eff. July 1, 2008. 2018, 289:1, eff. Jan. 1, 2019; 2022, 250:2, effective July 1, 2022.

Section 91-A:7-a

91-A:7-a. Office Established. [Repealed effective July 1, 2025]
There is hereby established the office of the right-to-know ombudsman to be administratively attached to the department of state under RSA 21-G:10. The ombudsman shall be appointed by the governor and council and shall have the following minimum qualifications:
I. Be a member of the New Hampshire bar.
II. Have a minimum of 5 years full-time practice of law in any jurisdiction.
III. Be experienced with and knowledgeable of the provisions of this chapter and all New Hampshire laws regarding right-to-know.
IV. Annually, complete a minimum of 3 hours of continuing legal education courses or other training relevant to the provisions of this chapter.

Source: 2022, 250:3, effective July 1, 2022; repealed by 2022, 250:6, effective July 1, 2025.

Section 91-A:7-b

91-A:7-b. Complaint Process. [Repealed effective July 1, 2025]
I. Any party aggrieved by a violation of this chapter shall have the option to either petition the superior court or file a signed, written complaint, along with a $25 fee, with the office of the ombudsman, established under RSA 91-A:7-a. The ombudsman shall have the discretion to waive the $25 fee upon a finding of inability to pay. Any signed, written complaint filed with the ombudsman shall attach, if applicable, the request served on the public agency or official and the written response of the public agency or official. The complaint shall be deemed sufficient if it states facts constituting a violation of this chapter.
II. Once a complaint has been filed and provided by the ombudsman to the public body or public agency, the public body or public agency shall have 20 calendar days to submit an acknowledgment of the complaint and an answer to the complaint, which shall include applicable law and, if applicable, a justification for any refusal to or delay in producing the requested governmental records, access to meetings open to the public, or otherwise comply with the provisions of this chapter. This 20-day deadline may be reasonably extended by the ombudsman for good cause.
III. In reviewing complaints, the ombudsman shall be authorized to:
(a) Compel timely delivery of governmental records within a period not less than 14 days or more than 30 days unless an expedited hearing is warranted, regardless of medium and format, and conduct a confidential in-camera review of records where the ombudsman concludes that it is necessary and appropriate under the law.
(b) Compel interviews with the parties.
(c) Order attendance at hearings within a reasonable time if the ombudsman determines that a hearing is necessary. Such hearings shall be open subject to the provisions of RSA 91-A.
(d) Issue findings in writing to all parties.
(e) Order a public body or public agency to disclose requested governmental records within a reasonable time, provide access to meetings open to the public, or otherwise comply with the provisions of this chapter, subject to appeal.

(f) Make any finding and order any other remedy to the same extent as provided by the court under RSA 91-A:8.
IV. The ombudsman may draw negative inferences from a party's failure to participate and comply with orders during the review process.
V. The ombudsman shall determine whether there have been any violations of this chapter and issue a ruling within 30 calendar days following the deadline for receipt of the parties' submissions. This 30-day deadline may be extended to a reasonable time frame by the ombudsman for good cause. The ombudsman may also expedite resolution of the complaint upon a showing of good cause. Rulings on expedited complaints shall be issued within 10 business days, or sooner where necessary.
VI. The ombudsman shall, where necessary and appropriate under the law, access governmental records in camera that a public body or public agency believes are exempt in order to make a ruling concerning whether the public body or public agency shall release the records or portions thereof to the public. The ombudsman shall maintain the confidentiality of records provided to the ombudsman by a public body or public agency under this section and shall return the records to the public body or public agency when the ombudsman's review is complete. All records submitted to the ombudsman for review shall be exempt from the public disclosure provisions of RSA 91-A during such review.
VII. Nothing in this section shall affect the ability of a person to seek relief in superior court under RSA 91-A:7, I in lieu of this process.

Source: 2022, 250:3, effective July 1, 2022; repealed by 2022, 250:6, effective July 1, 2025.

Section 91-A:7-c

91-A:7-c. Appeal and Enforcement. [Repealed effective July 1, 2025]
I. Any party may appeal the ombudsman's final ruling to the superior court by filing a notice of appeal in superior court no more than 30 calendar days after the ombudsman's ruling is issued. The ombudsman's ruling shall be attached to the document initiating the appeal, admitted as a full exhibit by the superior court, considered by the judge during deliberations, and specifically addressed in the court's written order. Citizen-initiated appeals shall have no filing fee or surcharge. The public body or public agency shall pay the sheriff's service costs if the public body or public agency, or its attorney, declines to accept service. Nothing in this section shall prevent a superior court from staying an ombudsman's decision pending appeal to the superior court.
II. On appeal, the superior court shall treat all factual findings of the ombudsman as prima facie lawful and reasonable, and shall not set them aside, absent errors of law, unless it is persuaded by a balance of probabilities on the evidence before it that the ombudsman's decision is unreasonable.
III. If the ombudsman's final ruling is not appealed, the ombudsman shall, after the deadline has passed, follow up with all parties, as required, to verify compliance with rulings issued.
IV. The ombudsman's final rulings which are not appealed may be registered in the superior court as judgments and enforceable through contempt of court. If such action is necessary to enforce compliance, all costs and fees, including reasonable attorney fees, shall be paid by the noncompliant public body or public agency.

Source: 2022, 250:3, effective July 1, 2022; repealed by 2022, 250:6, effective July 1, 2025.

Section 91-A:7-d

91-A:7-d. Rulemaking. [Repealed effective July 1, 2025]
The ombudsman shall adopt rules pursuant to RSA 541-A relative to:
I. Establishing procedures to streamline the process of resolving complaints under this chapter.
II. Hearing procedures.
III. Other matters necessary to the proper administration of RSA 91-A:7-a through RSA 91-A:7-c.

Section 91-A:8

91-A:8 Remedies. –

I. If any public body or public agency or officer, employee, or other official thereof, violates any provisions of this chapter, such public body or public agency shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter. Fees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter or if the parties, by agreement, provide that no such fees shall be paid.

II. The court may award attorney's fees to a public body or public agency or employee or member thereof, for having to defend against a lawsuit under the provisions of this chapter, when the court finds that the lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive.

III. The court may invalidate an action of a public body or public agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation.

IV. If the court finds that an officer, employee, or other official of a public body or public agency has violated any provision of this chapter in bad faith, the court shall impose against such person a civil penalty of not less than $250 and not more than $2,000. Upon such finding, such person or persons may also be required to reimburse the public body or public agency for any attorney's fees or costs it paid pursuant to paragraph I. If the person is an officer, employee, or official of the state or of an agency or body of the state, the penalty shall be deposited in the general fund. If the person is an officer, employee, or official of a political subdivision of the state or of an agency or body of a political subdivision of the state, the penalty shall be payable to the political subdivision.

V. The court may also enjoin future violations of this chapter, and may require any officer, employee, or other official of a public body or public agency found to have violated the provisions of this chapter to undergo appropriate remedial training, at such person or person's expense.

Source. 1973, 113:1. 1977, 540:6. 1986, 83:7. 2001, 289:3. 2008, 303:6. 2012, 206:1, eff. Jan. 1, 2013.

Section 91-A:8-a

91-A:8-a Repealed by 2017, 126:2, eff. November 1, 2017. –

Section 91-A:9

91-A:9 Destruction of Certain Information Prohibited. – A person is guilty of a misdemeanor who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter. If a request for inspection is denied on the grounds that the information is exempt under this chapter, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending.

Source. 2002, 175:1, eff. Jan. 1, 2003.

Procedure for Release of Personal Information for Research Purposes

Section 91-A:10

91-A:10 Release of Statistical Tables and Limited Data Sets for Research. –

I. In this subdivision:

(a) "Agency" means each state board, commission, department, institution, officer or other state official or group.

(b) "Agency head" means the head of any governmental agency which is responsible for the collection and use of any data on persons or summary data.

(c) “Cell size” means the count of individuals that share a set of characteristics contained in a statistical table.
(d) “Data set” means a collection of personal information on one or more individuals, whether in electronic or manual files.
(e) “Direct identifiers” means:
(1) Names.
(2) Postal address information other than town or city, state, and zip code.
(3) Telephone and fax numbers.
(4) Electronic mail addresses.
(5) Social security numbers.
(6) Certificate and license numbers.
(7) Vehicle identifiers and serial numbers, including license plate numbers.
(8) Personal Internet IP addresses and URLs.
(9) Biometric identifiers, including finger and voice prints.
(10) Personal photographic images.
(f) “Individual” means a human being, alive or dead, who is the subject of personal information and includes the individual’s legal or other authorized representative.
(g) “Limited data set” means a data set from which all direct identifiers have been removed or blanked.
(h) “Personal information” means information relating to an individual that is reported to the state or is derived from any interaction between the state and an individual and which:
(1) Contains direct identifiers.
(2) Is under the control of the state.
(i) “Provided by law” means use and disclosure as permitted or required by New Hampshire state law governing programs or activities undertaken by the state or its agencies, or required by federal law.
(j) “Public record” means records available to any person without restriction.
(k) “State” means the state of New Hampshire, its agencies or instrumentalities.
(*l*) “Statistical table” means single or multi-variate counts based on the personal information contained in a data set and which does not include any direct identifiers.
II. Except as otherwise provided by law, upon request an agency shall release limited data sets and statistical tables with any cell size more than 0 and less than 5 contained in agency files to requestors for the purposes of research under the following conditions:
(a) The requestor submits a written application that contains:
(1) The following information about the principal investigator in charge of the research:
(A) name, address, and phone number;
(B) organizational affiliation;
(C) professional qualification; and
(D) name and phone number of principal investigator’s contact person, if any.
(2) The names and qualifications of additional research staff, if any, who will have access to the data.
(3) A research protocol which shall contain:
(A) a summary of background, purposes, and origin of the research;
(B) a statement of the general problem or issue to be addressed by the research;
(C) the research design and methodology including either the topics of exploratory research or the specific research hypotheses to be tested;
(D) the procedures that will be followed to maintain the confidentiality of any data or copies of records provided to the investigator; and
(E) the intended research completion date.
(4) The following information about the data or statistical tables being requested:
(A) general types of information;
(B) time period of the data or statistical tables;
(C) specific data items or fields of information required, if applicable;

(D) medium in which the data or statistical tables are to be supplied; and
(E) any special format or layout of data requested by the principal investigator.
(b) The requestor signs a "Data Use Agreement" signed by the principal investigator that contains the following:
(1) Agreement not to use or further disclose the information to any person or organization other than as described in the application and as permitted by the Data Use Agreement without the written consent of the agency.
(2) Agreement not to use or further disclose the information as otherwise required by law.
(3) Agreement not to seek to ascertain the identity of individuals revealed in the limited data set and/or statistical tables.
(4) Agreement not to publish or make public the content of cells in statistical tables in which the cell size is more than 0 and less than 5 unless:
(A) otherwise provided by law; or
(B) the information is a public record.
(5) Agreement to report to the agency any use or disclosure of the information contrary to the agreement of which the principal investigator becomes aware.
(6) A date on which the data set and/or statistical tables will be returned to the agency and/or all copies in the possession of the requestor will be destroyed.
III. The agency head shall release limited data sets and statistical tables and sign the Data Use Agreement on behalf of the state when:
(a) The application submitted is complete.
(b) Adequate measures to ensure the confidentiality of any person are documented.
(c) The investigator and research staff are qualified as indicated by:
(1) Documentation of training and previous research, including prior publications; and
(2) Affiliation with a university, private research organization, medical center, state agency, or other institution which will provide sufficient research resources.
(d) There is no other state law, federal law, or federal regulation prohibiting release of the requested information.
IV. Within 10 days of a receipt of written application, the agency head, or designee, shall respond to the request. Whenever the agency head denies release of requested information, the agency head shall send the requestor a letter identifying the specific criteria which are the basis of the denial. Should release be denied due to other law, the letter shall identify the
specific state law, federal law, or federal regulation prohibiting the release. Otherwise the agency head shall provide the requested data or set a date on which the data shall be provided.
V. Any person violating any provision of a signed Data Use Agreement shall be guilty of a violation.
VI. Nothing in this section shall exempt any requestor from paying fees otherwise established by law for obtaining copies of limited data sets or statistical tables. Such fees shall be based on the cost of providing the copy in the format requested. The agency head shall provide the requestor with a written description of the basis for the fee.

Source. 2003, 292:2, eff. July 18, 2003.

Right-to-Know Oversight Commission

Section 91-A:11 to 91-A:15

91-A:11 to 91-A:15 Repealed by 2005, 3:2, eff. Nov. 1, 2010. –

APPENDIX B

Remote Participation Checklist

(RSA 91-A:2, III)

Date: _____

____ Attendance in person is not "reasonably practical" (*e.g.*, out of state).

Board members present constitute

____ A quorum ***OR***

____ Less than a quorum because the chair has determined this is an **emergency**: immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action.

____ The public can hear the member(s) participating electronically.

____ The board members physically present can hear the board member(s) participating electronically.

____ The board member(s) participating electronically can hear everyone at the physical meeting place.

____ The board member(s) participating electronically identifies anyone present with the board member at the remote location.

____ Any votes taken are done by roll call.

____ When minutes are created, state why in-person attendance was not "reasonably practical."

____ If less than a quorum was present, state in the minutes the facts upon which the determination of "emergency" was based.

APPENDIX C

Draft Meeting Minutes – Practical Considerations

A. A meeting is held, and the Right to Know Law (RSA 91-A) requires "minutes" to be prepared and be made available to the public upon request within 5 business days[1] after the meeting. RSA 91-A:2, II. The board which met probably does not meet again to approve the minutes within this time frame, so the minutes will probably be the output of the single staff person or board member tasked to create the document. This version, whether approved or not, becomes a "governmental record" under RSA 91-A:1-a, III, and must be made available upon request. Minutes must be retained as a governmental record forever under RSA chapter 33-A, so they must either be kept on paper (or microfilm) or stored in portable document format/archival (PDF/A) or another approved file format on a medium from which they are readily retrievable. RSA 33-A:5-a [2]. Thus, a permanent record will come into existence within 5 business days of the meeting and is subject to disclosure under the Right to Know Law, even if the board regards it as a draft document.

B. There is no requirement in the Right to Know Law that any board act to "approve" its draft minutes. However, it is a near universal practice for all boards to review the minutes that were created within the 5-day time frame. During this review, members often suggest additions, deletions, and corrections. If a board wishes to amend the minutes, it may do so, but the discussion and vote must take place at a duly noticed public meeting of a quorum of the board. Therefore, the actual discussion to amend and approve the minutes must be documented in the minutes of that subsequent meeting as an item of business the board considered.

C. Given the system set up by the law, we suggest that whenever minutes are created, they are marked as "not yet reviewed" or "draft." This will warn anyone who reads them that the board, as of the date the minutes were created, has not approved them. If the board does amend them at a subsequent meeting, the minutes of that subsequent meeting should refer to the old minutes and describe the changes made. The board may also wish to produce a new document of the amended minutes labeled "as amended and approved by board" or something of that nature.

D. However, we do not recommend that "draft" minutes be destroyed or altered when they are stored. If these so-called draft documents are destroyed, there is a risk that some member of the public or a different town official actually received the draft and has already used it. Between the time when the draft was created and the time it was amended and approved by the board, the draft *was* the minutes and thus exists as a governmental record. The possibility of reliance on a preliminary document is greatly increased if the board immediately posts the document on its internet website,

[1] These considerations apply to nonpublic session minutes that are not sealed, except that those minutes must be available within 72 hours.

[2] Notwithstanding, under RSA 33-A:6 original town meeting and city council records shall not be disposed of but shall be permanently preserved.

or distributes it to members of other local boards for informational purposes. Since under RSA 91-A:2, II-b(a) a public body that posts its minutes on a municipal website is only required to post approved minutes, posting draft minutes is both unnecessary and unwise. Also, if the draft document is altered to reflect changes made in a subsequent meeting, any discussion and debate about why the change was made could be lost forever if no document preserving the original text is allowed to survive.

E. Some clerks have adopted the following practice. The draft minutes document is created as noted above. If changes are made at a subsequent meeting, the changes are detailed in the minutes of that second meeting. As the minutes are being prepared for permanent storage in paper format, the clerk will add a notation to the permanent record of the first meeting that corrections were made and give an exact reference to the page where the changes appear in the minutes of the subsequent meeting.

F. We have also heard that some clerks will destroy draft minutes and only keep the "perfect" record that reflects the amendments made. If you take this route, we recommend that you retain both the original draft minutes and the final approved minutes. Although no statute explicitly requires this, the records retention statute, RSA 33-A:3-a, LXXXI, LXXXII, and LXXXIII state the minutes of boards and committees, town meeting and town council, and the select board must be kept "permanently," and does not distinguish between draft and approved minutes.

APPENDIX D

Nonpublic Session Minutes Checklist

[INSERT NAME OF TOWN AND BOARD]

Date: _____

Members Present: [board member name] ___

[board member name] ___

[board member name] ___

[board member name] ___

[board member name] ___

Motion to enter Nonpublic Session made by _____ seconded by _____

Specific Statutory Reason cited as foundation for the nonpublic session:

_____ RSA 91-A:3, II(a) *The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, **unless** the employee affected (1) has a right to a public meeting, and (2) requests that the meeting be open, in which case the request shall be granted.*

_____ RSA 91-A:3, II(b) *The hiring of any person as a public employee.*

_____ RSA 91-A:3, II(c) *Matters which, if discussed in public, would likely affect adversely the reputation of any person, **other than a member of this board**, unless such person requests an open meeting. This exemption shall extend to include any application for assistance or tax abatement or waiver of a fee, fine or other levy, if based on inability to pay or poverty of the applicant.*

_____ RSA 91-A:3, II(d) *Consideration of the acquisition, sale or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.*

_____ RSA 91-A:3, II(e)
*Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed **by or against** this board or any subdivision thereof, or by or against any member thereof because of his or her membership therein, until the claim or litigation has been fully adjudicated or otherwise settled.*

_____ RSA 91-A:3, II(i) *Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.*

_____ RSA 91-A:3, II(l) *Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.*

_____ RSA 91-A:3, II(m) (Effective 1/1/2022) *Consideration of whether to disclose minutes of a nonpublic session due to a change in circumstances under paragraph III. (However, any vote on whether to disclose minutes must take place in public session.)*

Roll Call vote to enter nonpublic session:	[name]	Y	N
	[name]	Y	N
	[name]	Y	N
	[name]	Y	N
	[name]	Y	N

Remove public meeting tape (if applicable).

Entered nonpublic session at _____a.m./p.m.

Other persons present during nonpublic session:_____

_____

Description of matters discussed and final decisions made: _____

_____

_____

_____

Note: RSA 91-A:3, III. *Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the*

opinion of a majority of members, the aforesaid circumstances no longer apply. For all meetings held in nonpublic session, where the minutes or decisions were determined to not be subject to full public disclosure, a list of such minutes or decisions shall be kept and this list shall be made available as soon as practicable for public disclosure. This list shall identify the public body and include the date and time of the meeting in nonpublic session, the specific exemption under paragraph II on its face which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the minutes or decisions from public disclosure, and the date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure. Minutes related to a discussion held in nonpublic session under subparagraph II(d) shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.

Motion to leave nonpublic session and return to public session by _____, seconded by _____.

Motion: PASSED / DID NOT PASS (circle one)

Nonpublic meeting tape removed, public meeting tape replaced (if applicable).

Public session reconvened at _____ a.m./p.m.

Motion made to seal these minutes? If so, motion made by _____, seconded by _____, because it is determined that divulgence of this information likely would…

____ Affect adversely the reputation of any person other than a member of this board;

____ Render a proposed action ineffective; or

____ Pertains to preparation or carrying out of actions regarding terrorism.

Roll Call Vote to seal minutes:	[name]	Y	N
	[name]	Y	N
	[name]	Y	N
	[name]	Y	N
	[name]	Y	N

Motion: PASSED / DID NOT PASS (circle one)

NOTE: If the minutes are going to be sealed, they must be added to the public body's list of sealed minutes as required by RSA 91-A:3, III.

These minutes recorded by: _____

APPENDIX E

Disclosure of Law Enforcement Records Under the Right-to-Know Law (RSA 91-A)

A. Background/FOIA test

RSA 91-A does not specifically exempt law enforcement records from disclosure—or, in fact, mention such records at all. However, the New Hampshire Supreme Court has adopted the test under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. §552(b)(7), as the standard for disclosing law enforcement records. *See Murray v. State Police,* 154 N.H 579, 582 (2006); *Lodge v. Knowlton,* 118 N.H. 574, 576-77 (1978).

Under the FOIA test, law enforcement records may be withheld if disclosure would:

1. Interfere with enforcement proceedings;
2. Deprive a person of a right to a fair trial;
3. Constitute an unwarranted invasion of privacy;
4. Disclose the identity of a confidential source, or confidential information furnished only by a confidential source;
5. Disclose investigative techniques and procedures; or
6. Endanger the life or physical safety of any individual.

B. Applying the FOIA factors

1. Interference with enforcement proceedings

May include:

- Pending/open investigations or enforcement actions
- Unresolved cases if the department reasonably anticipates that there will be future proceedings.

2. Right to a fair trial

Generally, this will apply where a trial is prospective or in progress. In pretrial situations, consult with prosecutor. Examples of information that may affect right to a fair trial include, but are not limited to:

- Tests taken or refused by defendant

- Existence or absence of a confession
- Anything regarding prospective witnesses

3. Unwarranted invasion of privacy

Use the standard "invasion of privacy" test under 91-A under this section. That test asks: Does public's interest in disclosure outweigh government's interest in non-disclosure and individual's interest in privacy?

Examples of information that could constitute unwarranted invasion of privacy include, but are not limited to:

- marital status
- health information
- sexual orientation
- financial information
- information about children

4. Confidential sources

Information that could identify, or lead to identification of, a confidential source. The key question is typically: Was the person given a promise of confidentiality? Even if there was no express promise, was it implied?

5. Investigative techniques and procedures

Ask: Would release of the information make it easier for people to avoid the law? These items may include investigation and prosecution procedures, guidelines, or techniques, but does not include things that are already well known to the public.

6. Endangering life or physical safety of any individual

Ask whether disclosure "could reasonably be expected to endanger the life or physical safety of any individual?" If the answer is yes, then the disclosure can be prevented.

C. Disclosure of specific records

The following usually would not be subject to disclosure:

- Open investigative files
- Records that may be used at trial
- Closed investigation files if disclosure would invade privacy, disclose confidential sources, or threaten someone's safety

Some other records that are protected from disclosure by state statute:

- Motor vehicle records (RSA 260:14, II(a))

- Enhanced 911 system records (RSA 106-H:14)
- Annulled arrest and conviction records (RSA 651:5, XI)
- Juvenile records (RSA 169-B:35)—but name, age, address, and other information may be disclosed to victim of crime committed by juvenile (RSA 169-B:34, III).

Please note that this is not an exhaustive list! If you have questions about disclosure of specific records, talk to your municipality's legal counsel or NHMA. Unlike most other governmental records, with law enforcement records it is better to err on the side of non-disclosure when there is any doubt.

APPENDIX F

CHAPTER 33-A
DISPOSITION OF MUNICIPAL RECORDS

33-A:1 Definition of Terms. –
In this chapter:
I. "Board" means the municipal records board.
II. "Municipal" refers to a city or town, county or precinct.
III. "Municipal officers" means:
(a) In the case of a town, the board of selectmen.
(b) In the case of a city which has adopted the council manager plan under RSA 49-A, the city manager.
(c) In the case of any other city, the mayor.
(d) In the case of a county, the county commissioners.
(e) In the case of a precinct, the precinct commissioners.
IV. "Municipal records" means all municipal records, reports, minutes, tax records, ledgers, journals, checks, bills, receipts, warrants, payrolls, deeds and any other written or computerized material that may be designated by the board.
V. "Active" means until termination or expiration of obligations or services, cessation of need for further attention, and completion or release of any pending legal processes.

Source. 1967, 105:1. 1977, 358:1, eff. July 1, 1977. 2005, 187:1, eff. Aug. 29, 2005.

Section 33-A:2

33-A:2 Repealed by 1957, 95:2, eff. Jan. 1, 1958. –

Section 33-A:3

33-A:3 Municipal Committees. – The municipal officers or their designee together with the clerk, treasurer, an assessor, and tax collector of each city or town shall constitute a committee to govern the disposition of municipal records pursuant to this chapter. Unless otherwise provided by a municipal ordinance, the committee shall designate the office responsible for the retention of each type of record created for the municipality.

Source. 1967, 105:1. 1977, 358:2, eff. July 1, 1977. 2005, 187:2, eff. Aug. 29, 2005. 2006, 119:1, eff. May 12, 2006.

Section 33-A:3-a

33-A:3-a Disposition and Retention Schedule. –
The municipal records identified below shall be retained, at a minimum, as follows:

I. Abatements: 5 years.

II. Accounts receivable: until audited plus one year.

III. Aerial photographs: permanently.

IV. Airport inspections-annual: 3 years.

V. Airport inspections-daily, including fuel storage and vehicles: 6 months.

VI. Annual audit report: 10 years.

VII. Annual reports, town warrants, meeting and deliberative session minutes in towns that have adopted official ballot voting: permanently.

VIII. Archives: permanently.

IX. Articles of agreement or incorporation: permanently.

X. Bank deposit slips and statements: 6 years.

XI. Blueprints-architectural: life of building.

XII. Bonds and continuation certificates: expiration of bond plus 2 years.

XIII. Budget committee-drafts: until superseded.

XIV. Budgets: permanently.

XV. Building permits-applications and approvals: permanently.

XVI. Building permits-lapsed: permanently.

XVII. Building permits-withdrawn, or denied: one year.

XVIII. Capital projects and fixed assets that require accountability after completion: life of project or purchase.

XIX. Cash receipt and disbursement book: 6 years after last entry, or until audited.

XX. Checks: 6 years.

XXI. Code enforcement specifications: permanently.

XXII. Complaint log: expiration of appeal period.

XXIII. Contracts-completed awards, including request for purchase, bids, and awards: life of project or purchase.

XXIV. Contracts-unsuccessful bids: completion of project plus one year.

XXV. Correspondence by and to municipality-administrative records: minimum of one year.

XXVI. Correspondence by and to municipality-policy and program records: follow retention requirement for the record to which it refers.

XXVII. Correspondence by and to municipality-transitory: retain as needed for reference.

XXVII. Current use applications and maps: until removed from current use plus 3 years.

XXIX. Current use release: permanently.

XXX. Deed grantee/grantor listing from registry, or copies of deeds: discard after being updated and replaced with a new document.

XXXI. Deferred compensation plans: 7 years.

XXXII. Underground facility damage prevention forms: 4 years.

XXXIII. Dredge and fill permits: 4 years.

XXXIV. Driveway permits and plans: permanently.

XXXV. Easements awarded to municipality: permanently.

XXXVI. Elections-federal elections: ballots and absentee ballot applications, affidavit envelopes, and lists: by the town clerk until the contest is settled and all appeals have expired or at least 22 months after the election, whichever is longer.

XXXVII. Elections-not federal: ballots and absentee ballot applications, affidavit envelopes, and lists: by the town clerk until the contest is settled and all appeals have expired or at least 60 days after the election, whichever is longer.

XXXVIII. Elections-challenge affidavits by the town clerk: until the contest is settled and all appeals have expired or 22 months after the election, whichever is longer.

XXXIX. Elections-ward maps: until revised plus 1 year.

XL. Emergency medical services run reports: 10 years.

XLI. Equipment maintenance: life of equipment.

XLII. Excavation tax warrant and book or list: permanently.

XLIII. Federal form 1099s and W-2s: 7 years.

XLIV. Federal form 941: 7 years.

XLV. Federal form W-1: 4 years.

XLVI. Fire calls/incident reports: 10 years.

XLVII. Grants, supporting documentation: follow grantor's requirements.

XLVIII. Grievances: expiration of appeal period.

XLIX. Health-complaints: expiration of appeal period.

L. Health-inspections: 3 years.

LI. Health-service agreements with state agencies: term plus 7 years.

LII. Health and human services case records including welfare applications: active plus 7 years.

LIII. Inspections-bridges and dams: permanently.

LIV. Insurance policies: permanently.

LV. Intent to cut trees or bushes: 3 years.

LVI. Intergovernmental agreements: end of agreement plus 3 years.

LVII. Investigations-fire: permanently.

LVIII. Invoice, assessors: permanently.

LIX. Invoices and bills: until audited plus one year.

LX. Job applications-successful: retirement or termination plus 20 years.

LXI. Job applications-unsuccessful: current year plus 3 years.

LXII. Labor-public employees labor relations board actions and decisions: permanently.

LXIII. Labor union negotiations: permanently or until contract is replaced with a new contract.

LXIV. Ledger and journal entry records: until audited plus one year.

LXV. Legal actions against the municipality: permanently.

LXVI. Library:

(a) Registration cards: current year plus one year.

(b) User records: not retained; confidential pursuant to RSA 201-D:11.

LXVII. Licenses-all other except dog, marriage, health, and vital records: duration plus 1 year.

LXVIII. Licenses-dog: current year plus one year.

LXIX. Licenses-dog, rabies certificates: disposal once recorded.

LXX. Licenses-health: current year plus 6 years.

LXXI. Liens-federal liens upon personal property, other than IRS liens: permanently.

LXXII. Liens-hospital liens: 6 years.

LXXIII. Liens-IRS liens: one year after discharge.

LXXIV. Liens-tax liens, state liens for support of children: until court order is lifted plus one year.

LXXV. Liens-tax liens, state meals and rooms tax: until release plus one year.

LXXVI. Liens-tax sale and record of lien: permanently.

LXXVII. Liens-tax sales/liens redeemed report: permanently.

LXXVIII. Liens-Uniform Commercial Code leases: lease term plus 4 years; purge all July 1, 2007.

LXXIX. Liens-Uniform Commercial Code security agreements: 6 years; purge all July 1, 2007.

LXXX. Meeting minutes, tape recordings: keep until written record is approved at meeting. As soon as minutes are approved, either reuse the tape or dispose of the tape.

LXXXI. Minutes of boards and committees: permanently.

LXXXII. Minutes of town meeting/council: permanently.

LXXXIII. Minutes, selectmen's: permanently.

LXXXIV. Motor vehicle-application for title: until audited plus one year.

LXXXV. Motor vehicle-titles and voided titles: sent to state division of motor vehicles.

LXXXVI. Motor vehicle permits-void and unused: until audited plus one year.

LXXXVII. Motor vehicle permits and registrations-used: current year plus 3 years.

LXXXVIII. Municipal agent daily log: until audited plus one year.

LXXXIX. Notes, bonds, and municipal bond coupons-cancelled: until paid and audited plus one year.

XC. Notes, bonds, and municipal bond coupon register: permanently.

XCI. Oaths of office: term of office plus 3 years.

XCII. Ordinances: permanently.

XCIII. Payrolls: until audited plus one year.

XCIV. Perambulations of town lines-copy kept by town and copy sent to secretary of state: permanently.

XCV. Permits or licenses, pole: permanently.

XCVI. Personnel files: retirement or termination plus 20 years.

XCVII. Police, accident files-fatalities: 10 years.

XCVIII. Police, accident files-hit and run: statute of limitations plus 5 years.

XCIX. Police, accident files-injury: 6 years.

C. Police, accident files-involving arrests: 6 years.

CI. Police, accident files-involving municipality: 6 years.

CII. Police, accident files-property damage: 6 years.

CIII. Police, arrest reports: permanently.

CIV. Police, calls for service/general service reports: 5 years.

CV. Police, criminal-closed cases: statute of limitations plus 5 years.

CVI. Police, criminal-open cases: statute of limitations plus 5 years.

CVII. Police, motor vehicle violation paperwork: 3 years.

CVIII. Police, non-criminal-internal affairs investigations: upon the retirement or termination of the subject officer plus 20 years, except that the municipality shall follow the retention period for non-criminal internal affairs investigations as set forth in any applicable union or collective bargaining agreement in effect as of July 1, 2021 until such agreement expires, at which time the 20-year retention period in this paragraph shall apply.

CIX. Police, non-criminal-all other files: closure plus 3 years.

CX. Police, pistol permit applications: expiration of permit plus one year.

CXI. Property inventory: 5 years.

CXII. Property record card: current and last prior reassessing cycle.

CXIII. Property record map, assessors: until superceded.

CXIV. Property tax exemption applications: transfer of property plus one year.

CXV. Records management forms for transfer of records to storage: permanently.

CXVI. Road and bridge construction and reconstruction, including highway complaint slips: 6 years.

CXVII. Road layouts and discontinuances: permanently.

CXVIII. Scenic roads: permanently.

CXIX. School records: retained as provided under RSA 189:29-a.

CXX. Septic plan approvals and plans: until replaced or removed.

CXXI. Sewer system filtration study: permanently.

CXXII. Sign inventory: 7 years.

CXXIII. Site plan review: life of improvement plus 3 years.

CXXIV. Site plan review-lapsed: until notified that planning board action and appeal time has expired plus one year.

CXXV. Site plan review-withdrawn or not approved: appeal period plus one year.

CXXVI. Special assessment (betterment of property): 20 years.

CXXVII. Street acceptances: permanently.

CXXVIII. Street signs, street lights and traffic lights-maintenance records: 10 years.

CXXIX. Subdivision applications-lapsed: until notified that planning board action and appeal period has expired plus one year.

CXXX. Subdivision applications-successful and final plan: permanently.

CXXXI. Subdivision applications-withdrawn, or not approved: expiration of appeal period plus one year.

CXXXII. Subdivision applications-working drafts prior to approval: expiration of appeal period.

CXXXIII. Summary inventory of valuation of property: one year.

CXXXIV. Tax maps: permanently.

CXXXV. Tax receipts paid, including taxes on land use change, property, resident, sewer, special assessment, and yield tax on timber: 6 years.

CXXXVI. Tax-deeded property file (including registered or certified receipts for notifying owners and mortgagees of intent to deed property): permanently.

CXXXVII. Time cards: 4 years.

CXXXVIII. Trust fund:

(a) Minutes and quarterly reports, in paper or electronic format: permanently.

(b) Bank statements, in paper or electronic format: 6 years after audit.

CXXXIX. Vehicle maintenance records: life of vehicle plus 2 years.

CXL. Voter checklist-marked copy kept by town pursuant to RSA 659:102:7 years.

CXLI. Voter registration:

(a) Forms, including absentee voter registration forms: until voter is removed from checklist plus 7 years.

(b) Same day, returned to undeclared status, form and report from statewide centralized voter registration database: 7 years.

(c)

(1) Party change form: until voter is removed from checklist plus 7 years.

(2) List of undeclared voters from the statewide centralized voter registration database: 7 years.

(d) Forms, rejected, including absentee voter registration forms, and denial notifications: 7 years.

(e) Qualified voter affidavit: until voter is removed from checklist plus 7 years.

(f) Verifiable action of domicile document: until voter is removed from checklist plus 7 years.

(g) Overseas absentee registration affidavit: until voter is removed from checklist plus 7 years.

(h) Absentee ballot voter application form in the federal post card application format, for voters not previously on the checklist: until voter is removed from checklist plus 7 years.

(i) Absentee ballot affidavit envelope for federal post card applicants not previously on the checklist: until voter is removed from checklist plus 7 years.

(j) Notice of removal, 30-day notice: until voter is removed from checklist plus 7 years.

(k) Report of death: until voter is removed from checklist plus 7 years.

(l) Report of transfer: until voter is removed from checklist plus 7 years.

(m) Undeliverable mail or change of address notice from the United States Postal Service: until voter is removed from checklist plus 7 years.

CXLII. Vouchers and treasurers receipts: until audited plus one year.

CXLIII. Warrants-land use change, and book or list: permanently.

CXLIV. Warrants-property tax, and lists: permanently.

CXLV. Warrants-resident tax, and book or list: permanently.

CXLVI. Warrants-town meeting: permanently.

CXLVII. Warrants-treasurer: until audited plus one year.

CXLVIII. Warrants-utility and betterment tax: permanently.

CXLIX. Warrants-yield tax, and book or list: permanently.

CL. Welfare department vouchers: 4 years.

CLI. Work program files: current year plus 6 years.

CLII. Writs: expiration of appeal period plus one year.

CLIII. Zoning board of adjustment applications, decisions, and permits-unsuccessful: expiration of appeal period.

CLIV. Intent to excavate: completion of reclamation plus 3 years.

CLV. Election return forms, all elections: permanently.

CLVI. Affidavits of religious exemption: until voter is removed from checklist plus 7 years.

Source: 2005, 187:3, eff. August 29, 2005; 2006, 119:2–5, eff. May 12, 2006; 2010, 172:1–3, eff. August 16, 2010; 191:1, eff. August 20, 2010; 2012, 113:1, eff. May 31, 2012; 284:13, eff. September 1, 2015; 2014, 319:1, effective September 30, 2014; 2015, 4:1, effective July 4, 2015; 2017, 205:15, effective September 8, 2017; 2018, 247:1, 2, effective August 11, 2018; 2021, 227:2, effective July 1, 2021.

Section 33-A:4

33-A:4 Repealed by 1977, 358:7, II, eff. July 1, 1977. –

Section 33-A:4-a

33-A:4-a Municipal Records Board. –

I. There is hereby established a municipal records board consisting of the following persons or their designees:

(a) The director of the division of archives and records management.

(b) The director of the New Hampshire Historical Society.

(c) The state librarian.

(d) The presidents of the New Hampshire Tax Collectors' Association, the New Hampshire City and Town Clerks' Association and the Association of New Hampshire Assessors.

(e) The registrar of vital records.

(f) The secretary of state.

(g) A municipal treasurer or finance director appointed by the president of the New Hampshire Municipal Association for a 3-year term.
(h) A professional historian appointed by the governor and council for a 3-year term.
(i) A representative of the Association of New Hampshire Historical Societies appointed by its president for a 3-year term.
(j) A representative of the department of revenue administration.
(k) The state records manager.
II. The board shall elect its own chairman and vice-chairman. The board shall meet at the call of the chairman, but not less than once every 2 calendar years. Five members of the board shall constitute a quorum for all purposes. Board members shall serve without compensation. Administrative services for the board shall be provided by the director of the division of archives and records management who shall serve as secretary of the board.

Source. 1977, 358:3. 1985, 102:1. 1991, 197:1, eff. July 27, 1991. 2003, 97:4, eff. Aug. 5, 2003; 319:56, eff. July 1, 2003.

Section 33-A:4-b

33-A:4-b Powers and Duties of Board. – The board shall advise the secretary of state on standards and procedures for the effective and efficient management of municipal records. Such standards and procedures shall govern the retention, preservation and disposition of municipal records. The board shall oversee the local government records management improvement program as provided in RSA 5:47-5:51.

Source. 1977, 358:3, eff. July 1, 1977. 2002, 145:3, eff. July 12, 2002. 2005, 187:4, eff. Aug. 29, 2005.

Section 33-A:5

33-A:5 Microfilming. – If municipal records are disposed of by microfilming, 2 films shall be produced. One film shall be retained by the municipality in a fireproof container and properly labeled. One shall be transferred to a suitable location for permanent storage.

Source. 1967, 105:1. 1977, 358:4, eff. July 1, 1977.

Section 33-A:5-a

33-A:5-a Electronic Records. –
I. Paper municipal records listed in the disposition and retention schedule of RSA 33-A:3-a may be transferred to electronic records, as defined in RSA 5:29, VI, and the original paper records may be disposed of as the municipality chooses, subject to the requirements of other state or federal laws. Such records shall be stored in portable document format/archival (PDF/A) or another file format approved by the secretary of state and the municipal records board.
II. Electronic municipal records listed on the disposition and retention schedule of RSA 33-A:3-a that are to be retained for 10 years or less may be retained solely electronically in their original format if so approved by the municipal committee responsible for the records. The municipality is responsible for assuring the accessibility of the records for the retention period. If the records retention period exceeds 10 years or the municipal committee does not approve retention of the record solely electronically in an approved format, the records shall be transferred to paper, microfilmed, or stored in portable document format/archival (PDF/A) or another approved file format on a medium from which it is readily retrievable. At least once every 5 years from date of creation, the municipal committee shall review documents and procedures for compliance with

guidelines issued by the secretary of state and the municipal records board.

Source. 2005, 187:5, eff. Aug. 29, 2005. 2006, 275:6, eff. June 15, 2006. 2016, 226:1, eff. Aug. 8, 2016. 2017, 96:1, eff. Aug. 7, 2017.

Section 33-A:6

33-A:6 Exception. – Notwithstanding any other provision hereof, original town meeting and city council records shall not be disposed of but shall be permanently preserved. Such records prior to 1900 need not be microfilmed unless legible.

Source. 1967, 105:1, eff. July 10, 1967.

APPENDIX G

Sealed Nonpublic Meeting Minutes Review Procedure

Under RSA 91-A:3, III, minutes of non-public sessions "may be withheld" (commonly called "sealed") "until, in the opinion of a majority of members, the [reason for withholding the minutes] no longer apply." This provision raises the question: what is the obligation of a public body to evaluate whether the reason for withholding the minutes continues to exist?

Until recently, the practical reality was that sealed minutes would either be reevaluated upon the receipt of a records request from someone or sealed for a certain amount of time (subject, presumably, to a reevaluation upon the time coming to a close). Instead, NHMA has long recommended that public bodies take proactive steps to ensure that minutes are withheld for only as long as the circumstances leading to their withholding still apply.

Recently adopted HB 321 addresses this question. It adds new paragraph IV to RSA 91-A:3, III, requiring public bodies to either develop their own process to review minutes or to follow a statutorily created process. Either way, public bodies are required to review all nonpublic minutes that were previously sealed and determine whether the circumstances that justified keeping meeting minutes from the public under RSA 91-A:3, III no longer apply. That review process must take place within 10 years of the effective date of HB 321, October 3, 2023. ***Meeting minutes that were kept from the public that are not reviewed by the public body or agency on or before October 3, 2033 shall be subject to public disclosure without further action of the public body.***

In developing their own process, public bodies have wide discretion in deciding how to structure their review of sealed minutes. Some may choose to assign one board member the task of reviewing the minutes and making a recommendation, others may designate a subcommittee, still others may choose to review all sealed minutes as a whole committee. Similarly, boards may choose to review all sealed minutes or only some each year. Thus, a board may stagger the review process so that it does not interfere with other board business.

In the absence of adopting its own process, a public body must follow the statutorily created process. That statutory process requires a review of sealed minutes "no more than 10 years from the last time the public body voted to prevent the minutes from being subject to public disclosure." The statutory process also includes a 10-year review period. In other words, if your board has minutes that were sealed more than 10 years ago and your board hasn't reviewed them since, you have 10 years after the law goes into effect to review those minutes and decide whether to keep them sealed or not.

Public bodies ought to take advantage of the 10-year review period and start evaluating what, if any, review process they would like to develop. Once that determination has been made, it is important for boards to follow those processes and teach new board members about the legal requirement to review sealed minutes and the locally adopted process designed to comply with that requirement.

While, in most cases, there is no penalty for disclosure of information that could be withheld from public disclosure as our law begins by assuming that any information held by the government is subject to disclosure, there are a handful of circumstances where disclosure is not in the best interests of anyone. Private information, such as social security numbers, statutorily protected information, such as whether someone is receiving municipal welfare, and information that, if disclosed, could result in harm to persons or property, such as information about access points to public water systems, ought to continue to be carefully protected from disclosure. The best way to do that is to ensure that future boards need not rush through a review process to protect that type of information from becoming public. Instead, starting now can ensure that the citizens of the state of New Hampshire can "know what the government is up to" while

also ensuring that information that was rightfully protected from public disclosure and ought to continue to be protected from public disclosure remains protected.

Bottom Line: HB 321 imposes a statutory obligation to review all previously sealed nonpublic meeting minutes and complete that review process within 10 years of October 3, 2023. This new law does not require the release of sealed nonpublic meeting minutes if divulgence would still cause harm to reputation, or render the proposed action discussed ineffective, or pertain to thwarting a terrorist attack. However, failure to review previously sealed minutes during the review period will automatically result in the public release of those minutes, regardless of the potential harm resulting from that release.

TABLE OF CASES

Numbers

38 Endicott St. N., LLC v. State Fire Marshal, 163 N.H. 656 (2012) 55
38 Endicott Street North, LLC v. State Fire Marshal, New Hampshire Div. of Fire Safety, 163 N.H. 656 (2012) 46

A

AG. No. 11-01 (June 29, 2011) 37
ATV Watch v. New Hampshire Dept. of Resources and Economic Development (DRED), 155 N.H. 434, 440 – 41 (2007) 49
ATV Watch v. New Hampshire Dept. of Transp. 161 N.H. 746 (2011) 45

B

Baer v. Leach, 2014 D.N.H. 214 (November 24, 2015) 22
Balzotti Glob. Grp., LLC v. Shepherds Hill Proponents, LLC, 173 N.H. 314, 324 (2020) 47
Blethen Maine Newspapers, Inc. v. Portland School Committee, 947 A.2d 479 (Me. 2008) 47
Boos v. Barry, 485 U.S. 213, 322 (1988) 21
Bradbury v. Shaw, 116 N.H. 388, 390 (1976) 10
Bradbury v. Shaw, 166 N.H. 388 (1976) 55
Brent v. Paquette, 132 N.H. 415, 422-24 (1989) 50
Brent v. Paquette, 132 N.H. 415 (1989) 38

C

CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Services, 167 N.H. 583 (2015) 38
Clay v. Town of Alton, No. 15-CV-279 (D.N.H. 2016) 22
Colquhoun v. City of Nashua, 175 N.H. 474 (2022) 49
Colquhoun v. City of Nashua, 2021 N.H. Super. LEXIS 7, *4-5. (May 12, 2021) 49

E

Ettinger v. Madison Planning Board, 162 N.H. 785 (2011) 16
Ettinger v. Town of Madison Planning Board, 162 N.H. 785 (2011) 55

F

First Fed. Savings & Loan Ass'n v. State Board of Trust Co. Incorporation, 109 N.H. 467, 469 (1969) 9

G

Gallagher v. Town of Windham, 121 N.H. 156, 159 (1981) 39
Gallagher v. Windham, 121 N.H. 156 (1981) 38
Goode v. New Hampshire Office of Legislative Budget Assistant, 148 N.H. 551, 554-55 (2002) 42
Green v. School Administrative Unit #55, 168 N.H. 796 (2016) 50

H

Hampton Police Association v. Town of Hampton, 162 N.H. 7 (2011) 50
Hawkins v. N.H. Dep't of Health and Human Services, 147 N.H. 376 (2001) 52

J

Johnson v. Nash, 135 N.H. 534 (1992) 26

L

Lambert v. Belknap County Convention, 157 N.H. 375, 383 (2008) 41
Lambert v. Belknap County Convention 157 N.H. 375 (2008) 38
Lambert v. Belknap County Convention 157 N.H. 375 (2008) 44
Lambert v. Belknap County Convention, 157 N.H. 375 (2008) 23, 27
Lambert v. Belknap Cty. Convention, 157 N.H. 375 (2008) 56
Lamy v. N.H. Public Utilities Commission, 152 N.H. 106 (2005) 43
Lamy v. N.H. Pub. Utilities Comm'n, 152 N.H. 106, 111 (2005) 41
Laura Colquhoun v. Nashua, Hillsborough Superior Court –
Southern District, Docket No. 2021-CV-00163, (decided May 12, 2021) 48
Lodge v. Knowlton, 118 N.H. 574 (1978) 45

M

Mans v. Lebanon School Board, 112 N.H. 160, 162 (1972) 43
Mans v. Lebanon School Board 112 N.H. 160 (1972) 44
Martin v. City of Rochester, 173 N.H. 378 (2020) 11
McBurney v. Young, 133 S. Ct. 1709 (2013) 48
Memorandum on New Hampshire's Right-to-Know Law 47
Memorandum on New Hampshire's Right-to-Know Law, (2015) 47
Memorandum on New Hampshire's Right-to-Know Law, (March 20, 2015) 39
Mesa v. White, 197 F.3d 1041 (10th Cir. 1999) 20
Montenegro v. City of Dover, 162 N.H. 641 (2011) 46

N

N.H. Right to Life v. Director, Charitable Trust, 169 N.H. 95 (2016) 43
N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95 (2016) 55
Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2010) 21
Norse v, City of Santa Cruz, 629 F.3d 966 (9th Cir. 2010); Reza v. Pearce,
806 F.3d 497 (9th Cir. 2015) 20

O

Ortolano v. City of Nashua 40
Ortolano v. City of Nashua, 2023 N.H. LEXIS 149 40

P

Paul Martin v. City of Rochester, 173 N.H. 378 (2020) 51
Porter v. Town of Sandwich, No. 212-2014-CV-180 (Carroll County Superior Court, August 14, 2015) 13
Professional Firefighters of New Hampshire v. Local Government Center, Inc., 159 N.H. 699 (2010) 44
Provenza v. Town of Canaan, 175 N.H. 121 (2022) 42

R

Reid v. New Hampshire Attorney General, 169 N.H. 509 (2016) 42
Reid v. N.H. Attorney General, 169 N.H. 509, 528-29 (2016) 45
Riddle Spring Realty Co. v. State, 107 N.H. 271, 273 (1966) 47

S

Seacoast Newspapers v. Portsmouth, 173 N.H. 325, 337 (2020) 42
Seacoast Newspapers v. Portsmouth, 173 N.H. 325 (2020) 44
State v. Dominic, 117 N.H. 573 (1977) 22

T

Taylor v. SAU #55, 170 N.H. 322 (2017) 50
Tejasinha Sivalingam v. Frances Newton, &a, 174 N.H. 489 (2021) 27
Thomas v. Telegraph Publ'g Co., 155 N.H. 314 (2007) 21

U

Union Leader Corp. v. City of Nashua, 141 N.H. 473 476 (1996) 41
Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) 42
Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 N.H. 540, 553 (1997) 43
Union Leader Corp v. Town of Salem, 173 N.H. 345(2020) 42

W

WMUR Channel Nine v. N.H. Dep't of Fish and Game, 154 N.H. 46 (2006) 19
WMUR Channel Nine v. N.H. Dep't of Fish & Game, 154 N.H. 46 (2006) 55

TABLE OF STATUTES

RSA 5:29, VI 53, 88
RSA 5:47-5:51 88
RSA 21-G:10 66
RSA 21-M:11-a 65
RSA 32:5 18
RSA 32:5, I 18
RSA 33A:1, III 52
RSA 33-A:3-a 52, 53, 73, 88
RSA 33-A:3-a, LXXX 24
RSA 33-A:3-a, LXXXI, LXXXII, and LXXXIII ... 24
RSA 33-A:5-a 53, 72
RSA 33-A:6 53
RSA 40:4-a 22
RSA 41:29, I(a) 17
RSA 41:58 39
RSA 41:61 ..... 39, 51
RSA 42:1-a 31
RSA 43:2 18
RSA 43:3 18
RSA 44:2 58
RSA 49-A 80
RSA 72:34, II 47
RSA 91-A 15, 18, 37, 42, 46, 48, 55, 58, 66, 67, 72, 77
RSA 91-A:1 ..... 48, 59, 60, 64
RSA 91-A:1-a 11, 39
RSA 91-A:1-a, I 11
RSA 91-A:1-a, III 37, 38, 72
RSA 91-A:1-a, IV 37
RSA 91-A:1-a, V 10, 38
RSA 91-A:1-a, VI 58
RSA 91-A:1-a, VI(a)-(d) 63
RSA 91-A:2 ..... 12, 17
RSA 91-A:2-a 12, 14
RSA 91-A:2-a, I 14
RSA 91-A:2, I 9, 12, 15, 16, 17, 19, 60
RSA 91-A:2, I(b) 29
RSA 91-A:2, II 17, 18, 19, 22, 23, 25, 31, 60, 72
RSA 91-A:2, II, 91-A:3, III 29
RSA 91-A:2, II-b(a) 24, 73
RSA 91-A:2, II-b(b) 17
RSA 91-A:2, III 11, 12, 23, 58
RSA 91-A:2, II or III 12
RSA 91-A:3 ..... 31, 32, 58, 63
RSA 91-A:3, I 29
RSA 91-A:3, I(b) 23
RSA 91-A:3, II 26, 29, 30, 32, 36, 59
RSA 91-A:3, II. 31
RSA 91-A:3, II(a) 26, 74
RSA 91-A:3, II(b) 27, 74
RSA 91-A:3, II(c) 27, 74
RSA 91-A:3, II(d) 27, 34, 74
RSA 91-A:3, II(e) 27, 74
RSA 91-A:3, II(f) 28
RSA 91-A:3, II(g) 28
RSA 91-A:3, II(h) 28
RSA 91-A:3, II(i) 28, 65, 75
RSA 91-A:3, III 23, 29, 30, 32, 35, 62, 75, 76
RSA 91-A:3, II(j) 28
RSA 91-A:3, II(k) 28
RSA 91-A:3, II(l) 16, 29, 75
RSA 91-A:3, II(m) 30, 75
RSA 91-A:4, I 38, 47, 48, 49, 50
RSA 91-A:4, I-a 40
RSA 91-A:4, II 41, 45
RSA 91-A:4, III 39, 51, 63
RSA 91-A:4, III-a 53
RSA 91-A:4, III-b 40
RSA 91-A:4, IV 39, 48, 51, 64
RSA 91-A:4, V 50
RSA 91-A:4, VI 41, 65
RSA 91-A:4, VII 50
RSA 91-A:5 ..... 38, 41, 43, 48, 63, 65
RSA 91-A:5, IV 28, 42, 44, 61, 64
RSA 91-A:5, V 41
RSA 91-A:5, VI 47, 65
RSA 91-A:5, XII 46
RSA 91-A:6, ... 58
RSA 91-A:7 ..... 54, 67
RSA 91-A:7-8 68
RSA 91-A:7-a 54, 66, 67
RSA 91-A:7-b 54, 66
RSA 91-A:7-c 54, 67
RSA 91-A:7-d 54
RSA 91-A:7, II 54
RSA 91-A:7, III, IV 54
RSA 91-A:8 ..... 49, 54, 55, 67
RSA 91-A:8, IV 56, 59
RSA 91-A:8, IV or V 26, 30, 32
RSA 91-A:9 55
RSA 105-D 65
RSA 106-H:14 79
RSA 162-A:7-10 61
RSA 162-A:7-10 and 162-A:13 28

RSA 162-A:13 61
RSA 165:2-c 47
RSA 169-B:34, III 79
RSA 169-B:35 79
RSA 189:29-a 85
RSA 193-C:6 64
RSA 193-E:5 64
RSA 194 ..... 28, 61
RSA 195-A 28, 61
RSA 201-D:11 ..... 47, 83
RSA 260:14 47
RSA 260:14, II(a) 78
RSA 275:56, III 44
RSA 282-A 65
RSA 282-A:117-123 65
RSA 466:1-d 47
RSA 500-A:1, IV 64
RSA 500A:1, IV, RSA 91-A:5, I-a 41
RSA 541 ..... 28, 61
RSA 541-A 28, 61, 67
RSA 570-A:1, II 19
RSA 570-A:2 19
RSA 595-B 15
RSA 644:2, III(c) 22
RSA 651:5, XI 79
RSA 651-A 28
RSA 659:102 86
RSA 669:12 58
RSA 674:1, IV 15
RSA 674:33, III 9
RSA 676:2 19
RSA 676:4, I(d) 18
RSA 676:4, I(d)(1) 18
RSA 676:7 18
RSA 676:7, V 18
RSA chapter 33-A 13, 40, 51, 72
RSA chapter 49-A 52
RSA chapter 91-A 15, 19, 23, 38, 48, 50
RSA chapter 91–A (Supp.1988) 39
RSA chapter 105-D 45

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

The New Hampshire Municipal Association (NHMA) provides legislative advocacy, a legal advice hotline, and training programs for member municipalities. Originally formed by local officials in 1941 to represent municipal policy concerns before the state legislature, NHMA has more than 75 years of continuous service to the state's municipalities. As the service and action arm of local governments throughout New Hampshire, NHMA staff respond to thousands of legal inquires from members every year, and track hundreds of bills every legislative session, actively working to advance member-adopted policies.

NHMA also provides significant training and educational opportunities for local officials and employees from member municipalities. We know local government! Learn more at ***www.nhmunicipal.org***.

OUR MISSION

Through the collective power of cities and towns, NHMA promotes effective municipal government by providing education, training, advocacy and legal services.

NHMA
NEW HAMPSHIRE MUNICIPAL ASSOCIATION
EST. 1941

25 Triangle Park Drive, Concord, NH 03301 • Phone: 603.224.7447

www.nhmunicipal.org