A Guide to Open Government
August 2019 Supplement

2017 Statutory Changes

The New Hampshire legislature made two changes to the Right-to-Know Law in 2017, both taking effect on January 1, 2018.

Posting Notices and Minutes on Website. Chapter 234 of the 2017 Laws (HB 170) amended RSA 91-A:2 to require that if a public body maintains an internet website, it must either post its meeting notices on the website "in a consistent and reasonably accessible location," or post and maintain a notice on the website stating where meeting notices are posted. Further, it must either post its approved minutes on the website in a consistent and reasonably accessible location, or post and maintain a notice on the website stating where minutes may be reviewed and copies requested.

Recording Objection to Discussion by Public Body. Chapter 165 of the 2017 Laws (HB 460) added a new paragraph II-a to RSA 91-A:2, stating that if a member of a public body believes that any discussion in a meeting of the body violates the Right-to-Know Law, the member may object to the discussion; if the discussion continues, the objecting member may request that his or her objection be recorded in the minutes and may then continue to participate without being subject to penalties under the Right-to-Know Law. The public body must record the member's objection in the meeting minutes.

2018 Statutory Changes

The New Hampshire legislature made two changes to the law in 2018, both taking effect January 1, 2019.

Content of Meeting Minutes. An amendment to RSA 91-A:2, II (HB 1347) will require that minutes of public meetings include the names of the public body members who made or seconded each motion considered at a public meeting.

Court Procedures Governing Right-to-Know Complaints. An amendment to RSA 91-A:7 (HB 252) provides that all documents filed with the court as part of a Right-to-Know petition shall be considered as evidence by the court, subject to any objections by either party. All such documents must be provided to the opposing party prior to a hearing on the merits.

2019 Statutory Changes

Continuing in the tradition of making two changes to the Right-to-Know Law each year, the New Hampshire legislature adopted two changes in 2019.

IT Security Information Exempt from Disclosure. As of August 4, 2019, RSA 91-A:5 has a new provision (paragraph XI) which provides that records pertain to information technology systems are exempt from disclosure under the Right-to-Know Law if release of those records

would disclose security details that would aid an attempted security breach or circumvention of law. This is a very limited exemption. Although not explained in statute, NHMA understands this exception to apply to the security protocols and measures installed on municipally owned systems in an attempt to limit the hackability of those systems.

Written Statement for Delay Longer than 5 Days Required. As of January 1, 2020, an amendment to RSA 91-A:4, IV (HB 396) requires municipalities to:

- Provide a written statement of time necessary to determine whether request granted or denied if records not produced within 5 days; AND
- Provide a reason for the delay.

The requirement that municipalities provide a reason for the delay is new. The legislature did not articulate what reasons it expects municipalities to furnish, but it is reasonable to think that the reasons should be tied to statutory language. NHMA suggests that municipalities confine themselves to one (or more) of the following reasons:

- Municipality needs time to determine whether or not requested record exists;
- Municipalities needs time to determine whether 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.

Case Law

No requirement to send records by e-mail. As noted in the handbook at page 46, the New Hampshire Supreme Court ruled in *Green v. SAU #55,* 168 N.H, 796 (2016), 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 a follow-up case, *Taylor v. SAU #55,* No. 218-2016-CV-00800 (Rockingham Co. Super. Oct. 24, 2016), 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. As noted on page 46, the superior court ruled that the SAU was not required to send the minutes by e-mail.

In *Taylor v. SAU #55,* 170 N.H. 322 (2017), decided in September 2017, the New Hampshire Supreme Court affirmed the superior court's decision, holding that although the SAU was required to provide the records in electronic form, the *Green* decision did not require it to provide them in a *specific* electronic form, 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.