A GUIDE TO OPEN GOVERNMENT

New Hampshire's Right-to-Know Law

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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 RSA Chapter 91-A. 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, 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).

"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 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
- 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:

(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.

"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 nonpublic session, should not be made available to the public because at least one of the following applies:

1) Divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or

2) Divulgence would render the proposed action ineffective, or

3) 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? A majority of any board or committee constitutes a quorum, unless an applicable statute states otherwise. RSA 21:15. 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, which requires the concurring vote of three members of a Zoning Board of Adjustment (ZBA) to decide in favor of the applicant). 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 city charter defines a quorum of the city 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 purposes of circumventing the public meeting requirements. For example, although a board of five could define "quorum" as four members for the 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 also 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 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.

- **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. 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. However, 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 or agency. 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 email. 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 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 vote.
- 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

Email & Electronic Communications Outside a 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 or simultaneous access to those communications. Furthermore, RSA 91-A:2-a says "[u] nless 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.

This doesn't mean that email is prohibited among a quorum of a public body, but caution must be taken. Remember that the Right-to-Know Law says a meeting is occurring only when a quorum of a public body communicates contemporaneously on matters over which the public body has authority, jurisdiction, advisory power, etc. So, although it is true that a meeting is not technically occurring when one planning board member sends a communication regarding his opinions on a pending application to the other members of the planning board, such an email invites trouble. If and when another planning board member hits "Reply All" and responds to that email, a discussion has begun, resulting in an illegal meeting communication outside a meeting. Therefore, emails of this nature should be avoided.

In fact, one superior judge has ruled 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." *Town of Sandwich v. Porter*, No. 212-2014-CV-180 (Carroll County Superior Court, August 14, 2015) (emphasis added).

Although the New Hampshire Municipal Association does not agree that the one-way communication constitutes a meeting—or that the mere *ability* to communicate contemporaneously constitutes a meeting—no public body member should ever send an email to the other members 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).

Ultimately, one board member should never send an email to his other board members on a topic that should be discussed in a public meeting or proper nonpublic session. Instead, email communication should be saved for administrative or non-substantive purposes. The most obvious example is the select board chair emailing the packet for the upcoming meeting to her 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 in your municipality, 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 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 though an email communication may not constitute an illegal meeting, remember that it is a still a governmental record. 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. That is a separate issue, and it is discussed in Chapter Three on Governmental Records.

- ❖ To summarize, here are some basic tips on using electronic communications:
- ✓ Never use email to express ideas, concerns, opinions, etc. on issues or 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 proper "non-meeting," as discussed later in this chapter.

2. ***Communications that Circumvent the "Spirit and Purpose" of the Law***

Not only are email communications outside a meeting potentially illegal, such conduct may 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 email communications among a quorum of the public body, but could also take the form of several separate oral communications among less than a quorum of the board, which, in the aggregate, are among a quorum. For example, on a board of five, if the chair contacted each of her other board members by phone, one at a time, to ask their opinions on a matter before the board, each phone call between the two board members would constitute 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 communications and violated RSA 91-A:2-a.

3. ***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 public 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 rule of thumb here is to 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.

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." Even if the gathering was not held for the purpose of discussing official matters, general conversation may 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" is misleading because it *might* suggest that public bodies can talk, outside of a public meeting, as long as no decisions are made. That is not the case. The purpose to this non-meeting exemption is to allow members of a public body to be in the same place at the same time—such as enjoying your community's Old Home Day—without that presence turning into a meeting, as long as no official matters are discussed.

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 and actively discussing and giving legal advice to the public body. This provision 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 meet in 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.

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 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 B.2, above.

In addition, select board members may also sign manifests noncontemporaneously 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.

See Appendix C: Is it a Meeting? Flow Chart

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 a meeting of a public body will be occurring, there are three basic things that must happen:

1. Notice must be given to the public prior to the meeting;
2. The meeting must be open to the public; and
3. 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 public 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
- 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

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 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. 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's 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 two statutory exceptions for land use

boards: 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. 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 of these requirements are found in RSA 91-A:2, II. This portion of RSA 91-A does not override other statutory or local notice requirements.

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 public body participating in the joint meeting 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. Attorney General's Opinion 93-01. 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 various 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 local residents, may attend any public meeting. So, 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, tape 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, or to even 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 III.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. In fact, 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 that specific individuals have 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, most public 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 from speaking 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 up 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 words and 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
- Signing in to indicate an intent to speak during public comment
- Requiring the speaker to identify him or herself 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 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 to even 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. *Thomas v. Tel. 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 the 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 of these reasons, no public body should ever have or enforce a rule that prohibits "defamatory" speech, "offensive" speech, or the like. Therefore, ultimately, comments complimentary and critical must be allowed. As the Supreme Court of the United States has put it: "As a general matter, we have indicated in public debate, our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing 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, mocking them and stating, "Why don't you arrest me?" The chair finally instructed Leach to arrest Baer. These facts demonstrated to Leach that Baer was disrupting 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 meetings. For the detailed requirements for minutes of nonpublic sessions, see Chapter Two.

1. *Contents of Minutes*

The Right-to-Know Law doesn't 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; and (4) any final decisions reached or action taken. RSA 91-A:2, II.

Sometimes there's a fifth requirement: Some provisions of RSA Chapter 91-A require a vote to be by roll call, while others required 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 vote. 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:

1. Any vote taken when a member (or in an emergency, perhaps more than one member) is participating electronically/remotely, RSA 91-A:2, III.

2. 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:

1. Any vote taken while in nonpublic session, RSA 91-A:3, III.

2. 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. Although a public body certainly may record meetings, the recording of a meeting cannot be a substitute for written minutes.

b. What does "available" mean?

"Available" does not mean that public bodies must post their minutes anywhere, such as on the public body's website. It means only that the minutes must be "open to public inspection." However, many public bodies do post their minutes, and this is a good practice.

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 at least until the written record (i.e., the written minutes) are 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.

This means, 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:

1. Make changes in red pen or some other discernable color on the original draft minutes, so that it's clear what has been changed.

2. 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.

3. 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 D: 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.

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.

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.

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 func-

tions, 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.

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.

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."

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.

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. 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 member should raise an objection and explain why the discussion is improper. If a copy of RSA 91-A:3 (or this book) is available, that can be used to point out the violation. Ideally, the members will reach an agreement about whether the discussion is or is not legal.

If the member continues to believe the discussion is illegal, but the other members insist on proceeding in nonpublic session, it is appropriate for the objecting member to ask that his objection be noted in the minutes, then leave the session and wait for the body to return to public session. This will not be popular with the other members, but it should insulate the member from personal liability for the violation--and it should send a message that the objecting member takes the law seriously and expects the others to do the same.

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 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." 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.

It is probably better to vote simply to seal the minutes, without spec-

ifying 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 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

The law does not impose any obligation on a public body to review

and unseal old minutes. It merely states that the minutes "may be withheld until, in the opinion of a majority of members, the circumstances [justifying their sealing] no longer apply."

Legally, the status of sealed minutes does not become an issue until someone asks to inspect them. If no one has requested a given set of minutes, arguably it does not matter how long they remain "sealed," because they are not actually being "withheld."

However, it is a good practice for a public body to review its sealed minutes regularly—probably at least once a year—to determine whether the circumstances that justified withholding them still apply. If the person whose reputation might be adversely affected has died, or if the information has become a matter of public knowledge and is no longer confidential, or if the lawsuit has been concluded, then the body should vote to make the minutes available. Again, this requires a majority vote of the board.

In the meantime, if someone makes a request to inspect sealed minutes, the response should not be an automatic "No." Unless they are very recent minutes and it is clear that the circumstances have not changed, the board should review the minutes to decide whether the circumstances that justified withholding them in the first place still apply.

For more information, See Appendix E: Non-public Sessions Minutes Checklist

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—written, aural, visual, electronic—it must be in some **physical form** to be a governmental record. For example, a paper document, a computer file, a tape recording, a CD or DVD, and a videocassette could all be governmental records because they exist in a physical form. On the other hand, information that a public official or employee knows is not a governmental record unless it also exists somewhere in a physical form.

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 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. 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 with a statement of the time necessary to determine whether the request will be granted or denied. *Brent v. Paquette*, 132 N.H. 415 (1989) (the maximum time anyone can be required to wait is five business days). As the New Hampshire Supreme Court observed in *Brent:*

> 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 pre-arranged 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.

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).

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)

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. Complete deletion requires that the "deleted items" folder be emptied.

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, 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. However, if additional payments are made beyond these payments, such as a settlement payment of a potential employment discrimination complaint, those additional payments would have to be disclosed under this paragraph. In short, mandated payments due an employee are not disclosed. Payments made above and beyond mandated payments must be disclosed.

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. The New Hampshire Municipal Association 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, RSA 91-A:5, I-a, and teacher certification records maintained by the Department of Education, RSA 91-A:5, V. On the other hand, some statutory exemptions require detailed analysis, such as personnel records whose disclosure would constitute invasion of privacy. *Reid v. New Hampshire Attorney General,* 169 N.H. ___, 2016 WL 7436653, at *9 (2016).

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 "record pertaining to internal personnel practices" are exempt from disclosure. Prior to 2016, the New Hampshire Supreme Court had applied this exemption to disciplinary, employment-related investigations of employees and public officials only. *See Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006) (report regarding internal investigation of water precinct employee was exempt from disclosure)*; Union Leader Corp. v. Fenniman,* 136 N.H. 624 (1993) (documents compiled during internal investigation of police officer were exempt from disclosure).

However, in 2016, the New Hampshire Supreme Court explained that information is exempt as "internal personnel practices" if it is both "internal" and "personnel." *Reid v. New Hampshire Attorney General,* 152 A.3d 860 (2016). "Internal" means that the information fits within the limits of an employment relationship; in other words, the investigation must be conducted by, or on behalf of, the employer of the investigation's target. The term "personnel" includes "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 869 (internal citations omitted).

Based on these definitions, the Court in *Reid* held that the Attorney General's investigation into alleged misconduct of a county attorney was not an "internal personnel practice" because it was not conducted by, or on behalf of, the county attorney's employer.

Then, in 2017, applying the *Reid* decision, the Court held that scoring sheets used to assess candidates for the Dover School Superintendent position were exempt from disclosure. *Clay v. City of Dover,* 169 N.H. ___, 2017 WL 730434 (decided February 24, 2017). The scoring sheets were "personnel" because they involved hiring— a personnel and human resources function. The scoring sheets were also "internal" because they were filled out by members of the superintendent search committee, on behalf of the school board, which is the entity that employs the superintendent.

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, IV. This section of the Right-to-Know Law "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 explained further that individuals have an "interest in retaining the 'practical obscurity' of private information that may be publicly available, but difficult to obtain," referring 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 limit-

ing 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 candidates' 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:

> any 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.

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 re-

cords 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 (see section D.2 of this chapter).

The New Hampshire Supreme Court 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 more on law enforcement records, see Appendix G.

J. Written Legal Advice

Written legal advice provided by the attorney representing or advising a public body is exempt from disclosure under the Right-to-Know Law. *Society for the Protection of N.H. Forests v. Water Supply and Pollution Control Commission,* 115 N.H. 192 (1975). And although attorney billing statements are public records, this protection protects information contained in a billing statement that reveals the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law. *Hampton Police Ass'n, Inc. v. Town of Hampton*, 162 N.H. 7, 16 (2011). This information should be redacted from the billing statement prior to disclosure.

K. 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).

L. 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.

M. 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. Include with this manual in Appendix ___ is a compilation of many statutory exemptions, compiled by the New Hampshire Attorney General's Office, and found in Appendix F of the New Hamp-

shire Attorney General's Memorandum on the Right-to-Know Law. 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.

For more information regarding statutory exemptions, see Append G: Attorney General's Memorandum dated March 20, 2015 – Appendix F – New Hampshire Statutes, Court Decisions, and Court Rules Making Information Confidential or Non-public.

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 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.

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. 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. 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 with a statement of the time reasonably necessary to determine whether the request will be granted or denied." *ATV Watch v. New Hampshire Dept. of Resources and Economic Development (DRED)*, 155 N.H. 434, 440 – 41 (2007). 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 by acknowledging the request and stating when the body or agency will be able to respond. Be sure to follow up within the time period stated.

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 *Green v. School Administrative Unit #55*, 168 N.H. 796 (2016). In *Green* the Court determined that, when requested to do so, a public body is required to provide electronic records in electronic format in response to a Right-to-Know Law request if it is reasonably practical to do so. In a follow-up to the *Green* case, the Rockingham County Superior Court recently ruled that electronic records are not required to be emailed where the SAU had adopted a policy of only producing electronic records by copying those records onto a USB ("thumb drive"). The policy required individuals to come to the SAU administrative office and either obtain the USB—at a cost of $7.49—from SAU 55, or bring their own USB—sealed in its original packaging—for acquiring the electronic records. *Taylor v. School Administrative Unit #55*, No. 218-2016-CV-00800 (Rockingham County Superior Court October 24, 2016).

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."

It is unclear whether the "actual cost" of copying may include an amount for staff time needed to make the copies, as well as the actual mechanical costs of copying. The New Hampshire Supreme Court has not yet addressed this issue. While the Merrimack and Grafton Superior Courts have issued opinions regarding this issue, neither led to a Supreme Court decision. The better practice at this point is not to charge for staff time until there is further guidance from the legislature or courts.

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. One court found that a charge of $0.50/page was reasonable for copies. *Kelley v. Hooksett Assessing Office*, No. 11-CV-566 (Merrimack County Superior Court December 12, 2011). However, this opinion is not binding on New Hampshire courts, so caution is advised.

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 less a Right-to-Know Law question than it is a Municipal Records Disposition Act question. RSA Chapter 33-A 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, however, 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 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 H: 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.

Electronic records of a category defined in RSA 5:29, VI and designated on the disposition schedule under RSA 33-A:3-a to be retained for more than 10 years must be transferred to paper or microfilm, or stored in portable document format/archival (PDF/A) on a medium from which they are readily retrievable. Electronic records designated on the disposition schedule to be retained for less than 10 years may be retained solely electronically if so approved by the municipal records committee.

Applying these requirements to some of the examples listed above, annual reports and minutes of boards and committees would have to be maintained on paper and/or in portable document format/archival (PDF/A) because they are required under RSA 33-A:3-a to be retained permanently (that is, more than 10 years). On the other hand, since abatements have a retention period of fewer than 10 years, the responsible official could choose to maintain them solely in electronic form, but only if so approved by the municipality's records committee.

See Insert: Government Records Poster

Chapter Four: Remedies for Violations of the Right-to-Know Law

I. How is the Right-to-Know Law Enforced?

There is no state agency with the power to enforce violations of the Right-to-Know Law. All alleged violations of the law must be adjudicated in a court. Under RSA 91-A:7, any person "aggrieved by a violation of this chapter 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 judge may order notice by any reasonable means, and that the judge has the "authority to issue an order ex parte when he or she shall reasonably deem such an order necessary to insure compliance" with the Right-to-Know Law.

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 of 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 should not have known, that excluding video cameras from a hunting license hearing violated 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 an annual 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 an incredibly 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 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

Section 91-A:1

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. 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.

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.

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.

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 Meetings of the Economic Strategic Commission to Study the Relationship Between New Hampshire Businesses and State Government by Open Blogging Permitted. – [Repealed 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) Consideration of applications by the adult parole board under RSA 651-A.

(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 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.

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.

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.

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 min-

utes 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. 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. If a public body or agency is unable to make a governmental record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. 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 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.

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.

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.

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.

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. – 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 or any justice thereof. Thereupon the clerk of court or any justice shall order service by copy of the petition on the person or persons charged. When any justice shall find that time probably is of the essence, he or she may order notice by any reasonable means, and he or she shall have authority to issue an order ex parte when he or she shall reasonably deem such an order necessary to insure compliance with the provisions of this chapter.

Source. 1967, 251:1. 1977, 540:5. 2008, 303:5, eff. July 1, 2008.

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: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.

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 participating electronically

____ The board members physically present can hear the board member participating electronically

____ The board member participating electronically can hear everyone at the physical meeting place

____ The board member participating electronically identifies anyone present with the board member at the remote location

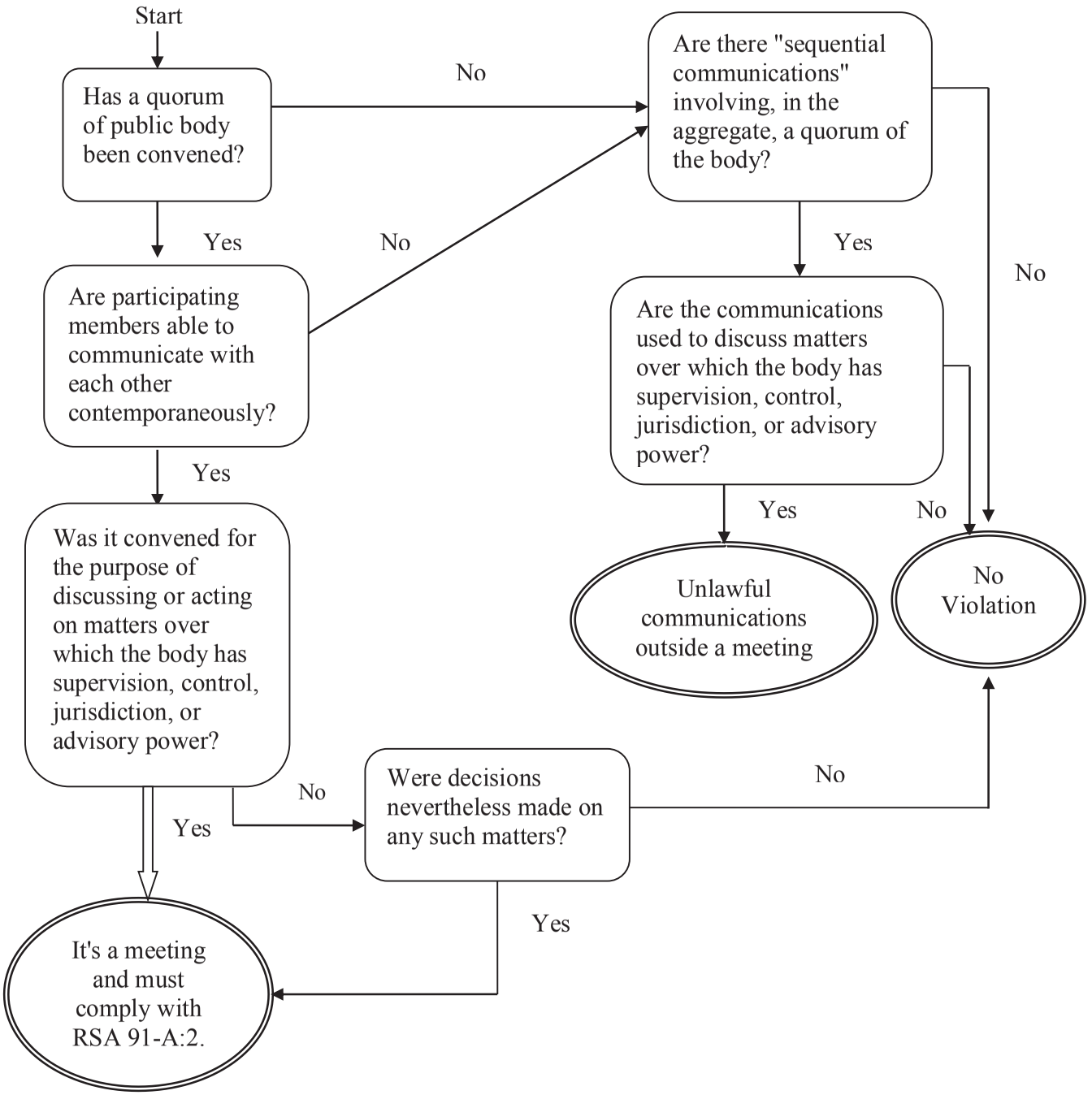
____ Any votes taken are done by roll call

____ 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.

Is It a Meeting?

Use this flow chart to determine whether communications among members of a public body constitute a meeting subject to the Right to Know Law, or, if they do not constitute a meeting, whether they are unlawful communications outside a meeting.



APPENDIX C

APPENDIX D

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 always 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 be reduced to a paper format and may not be kept solely as electronic records. RSA 33-A:5-a. Thus, a permanent paper 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 its next meeting, the minutes of that next meeting should refer to the old minutes and detail 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

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

immediately posts the document on its internet website, or distributes it to members of other local boards for informational purposes. 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. This seems to be an excellent way to serve all interests, in that it preserves the draft document as originally created and made available to the public, allows the board to review the record and make any needed changes, and allows the users of the documents to see the text as originally prepared, the changes that were made, and the reasons why the changes were made.

F. We have also heard that some clerks will destroy draft minutes and only keep the "perfect" record that reflects the amendments made. We do not endorse this method because there is a large risk that a member of the public, the board, or another board will be misled by using the earlier document, and then later be unable to determine when, how, or why the changes were made. This could be very important in a planning board or zoning board of adjustment case that is litigated when the "certified record" is prepared for filing with the court.

APPENDIX E

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 against this board or any subdivision thereof, 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.*

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 proceedings in nonpublic sessions shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. 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, it is determined that divulgence of the information likely would affect adversely the reputation of any person* ***other than a member of this board****, or render the proposed action of the board ineffective, or pertain to terrorism. 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.*

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

____ 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)

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.

These minutes recorded by: _____

APPENDIX F

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.

- 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.

- In pretrial situations, consult with prosecutor.
- Examples of information that may affect right to a fair trial:
    - 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: 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 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.

Was the person given a promise of confidentiality? Even if there was no express promise, was it implied?

5. Investigative techniques and procedures.

- Investigation and prosecution procedures, guidelines, techniques.
- Would release of the information make it easier for people to avoid the law?
- Does not include things that are already well known to the public.

6. Endangering life or physical safety of any individual.

Question is whether disclosure "could reasonably be expected to endanger the life or physical safety of any individual."

C. Disclosure of specific records.

Using the FOIA test, the following records usually would be subject to disclosure:

- Routine dispatch logs
- Arrest records[1]
- Most closed investigation files (except internal investigations)
- Administrative files
- Minutes

NOTE: Even if a record is subject to disclosure, some parts of it may constitute an invasion of privacy and should be redacted before disclosure—*e.g.,* medical and health information, domestic information, welfare information.

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 (169-B:34, III).

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.

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1 Under RSA 594:14-a, "Arrest records are 'governmental records' as defined in RSA 91-A and subject to disclosure in accordance with that chapter, with the exception noted in RSA 106-B:14 [state police records]." Of course, disclosure "in accordance with [RSA 91-A]" necessarily incorporates the FOIA test for exemption from disclosure.

APPENDIX G

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
6:10-a Checks to be Void under Title I, The State and Its Government	The state treasurer is authorized and directed to cancel of record, and refuse to honor, all state checks, except those drawn on special funds created under RSA 282-A, which have not been presented for payment within one year from the date of issue. The records of all checks outstanding, as maintained by the state treasurer during the period prior to cancellations, shall be exempt from the provisions of RSA 91-A.		State checks
7:41 Findings and Purpose.	Address confidentiality Program for Victims of Domestic Violence, Stalking, or Sexual Assault		
7:47 Disclosure of Records Prohibited; Exceptions.	The attorney general shall not make any records in a program participant's file available for inspection or copying, other than the address designated by the attorney general, except under the following circumstances: I. If requested by a law enforcement agency, to the law enforcement agency; II. If directed by a court order, to a person identified in the order; III. If certification has been cancelled; or IV. To verify the participation of a specific program participant, in which case the attorney general may only confirm participation in the program.		Inspection
9:4 - Requests for Appropriations and Statement of Objectives and 9:5-Estimates of Income	Under Statute Annotations: State agency budget requests and income estimates are subject to public scrutiny on October 1, the statutory deadline for their submission to the commissioner of administrative services, unless they are exempt from the provisions of the Right-to-Know law. To determine whether state agency budget requests and income estimates are exempt from the Right-to-Know law as confidential, the benefits of disclosure to the public must be weighed against the benefits of nondisclosure to the government.	Chambers v. Gregg, 135 N.H. 478 (1992)	Budget; income estimates
RSA 14:31-a - Audit	II. The detailed reports of every audit conducted pursuant to this section	Goode v. LBA,	LBA, Legislative

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
work papers and notes.	shall become a public record upon approval by the fiscal committee. Audit work papers and notes are not public records. However, those materials necessary to support the compilations in the final audit report may be made available by majority vote of the fiscal committee after a public hearing showing proper cause. For the purposes of this section, work papers shall include, but are not limited to, all preliminary drafts and notes used in preparing the audit report.	148 N.H. 551, (2002)	Audit, Work Papers, notes
RSA 21-G:31	Executive Branch Ethics Committee Complaints, until closed or hearing is held.		
21-M:8-c Victim of Alleged Sexual Offense.	The bill for the medical examination of a sexual assault victim shall not be sent or given to the victim or the family of the victim. The privacy of the victim shall be maintained to the extent possible during third party billings. Billing forms shall be subject to the same principles of confidentiality applicable to any other medical record under RSA 151:13. Where such forms are released for statistical or accounting services, all personal identifying information shall be deleted from the forms prior to release.		Sexual assault, medical examination
21-M:8-k Rights of Crime Victims.	(m) The right of confidentiality of the victim's address, place of employment, and other personal information.		Confidential
21-M:9 Consumer Protection and Antitrust Bureau.	III. The bureau may disclose to the public the number and type of complaints or inquiries filed by consumers against a particular person, as defined by RSA 358-A:1, I; provided, however, that no such disclosure shall abridge the confidentiality of consumer complaints or inquiries.		Consumer complaint, confidentiality
21-I:43 II (r)	II. The director of personnel shall adopt rules, pursuant to RSA 541-A, which shall apply to employees in the classified service of the state, relative to… (r) Availability of division records for public inspection, including identification of those records or portions of records for which exemption under RSA 91-A:5 is claimed.		

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
21-I:52-a - Employee Assistance Program; Confidential Communications.	The confidential relations and confidential communications between an employee of the state of New Hampshire and a representative or representatives of an employee assistance program shall be placed on the same basis as those provided by law between attorney and client. Except as otherwise provided by law, no representative of an employee assistance program shall be required to disclose either the nature of the program's relationship with the state employee or any privileged and confidential communications, either oral or written, made between the state employee and the representative or representatives of the program in the context of that relationship.		Employee assistance program
21-M:16, IV Incapacitated Adult Fatality Review Committee Established.	Records of the committee, including testimony by persons participating in or appearing before the committee and deliberations by committee members relating to the review of any death, shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or administrative proceeding.	*Capitol One Auto Fin., Inc. v.* *Clougherty*, Merrimack Co., No. 2010-CV-708 (May 31, 2012) (*McNamara*, J.)	Records, confidential, privilege,
21-J:14, I Confidentiality of Department Records for the Department of Revenue	Notwithstanding any other provision of law, and except as otherwise provided in this chapter, the records and files of the department are confidential and privileged. Neither the department, nor any employee of the department, nor any other person charged with the custody of such records or files, nor any vendor or any of its employees to whom such information becomes available in the performance of any contractual services for the department shall disclose any information obtained from the department's records, files, or returns or from any examination, investigation or hearing, nor may any such employee or person be required to produce any such information for the inspection of any person or for use in any action or		Department of Revenue

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
	proceeding except as hereinafter provided.		
72:34,II Investigation of Application and Decision by Town Officials.	II. For those exemptions having income or asset limitations, the assessing officials may request true copies of any documents as needed to verify eligibility. Unless otherwise provided for by law, all documents submitted with an application or as requested, as provided for in paragraphs I and II, and any copies shall be considered confidential, handled so as to protect the privacy of the individual, and not used for any purpose other than the specific statutory purposes for which the information was originally obtained. All documents and copies of such documents submitted by the applicant shall be returned to the applicant after a decision is made on the application.		Confidential
76:16,III (h) By Selectmen or Assessors	Municipalities shall treat the social security or federal tax identification information as confidential and exempt from a public information request under RSA 91-A		Abatement
77-B:26 Commuter's Income Tax - Confidentiality of Department of Revenue Administration Records.	Notwithstanding any other provision of law and except as hereinafter provided, the records and files of the department of revenue administration respecting the administration of this chapter are confidential and privileged		Confidential, privilege, Deptartment of Revenue
82-A:16-a Confidentiality of Records -from 82-A Communications Services Tax	Information disclosed shall not be further disclosed to persons other than officers or employees of the bureau of emergency communications, division of emergency services, communications, and management, of the department of safety.		Confidential

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
84-A:10 & 84-C:10 Confidentiality of Records under Title V: Taxation *****	Notwithstanding the provisions of RSA 21-J:14, the commissioner shall not be prohibited from providing tax information to the commissioner of health and human services with respect to the tax imposed by this chapter, provided that the commissioner of health and human services and his agents and employees shall be subject to the provisions of RSA 21-J:14 with respect to any tax information provided by the commissioner.		
91-A:5,I Grand and Petit Jury Records		*State v. Purrington*, 122 N.H. 458 (1982)	
91-A:5,II Parole and Pardon Board Records			
91-A:3 ,III Sealed Minutes	Sealed if there is a recorded vote of 2/3 members present at non-public meeting to seal the minutes.		
91-A:5, III Personal School Records of Pupils			
91-A:5, IV	Records pertaining to test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations		
91-A:5, IV Records pertaining to confidential, commercial, or financial information			
91-A:5, IV Records pertaining to	"A report generated in the course of an investigation of alleged employee misconduct is a record pertaining to "internal personal practices" and thus is	*Hounsell v. North Conway Water*	Internal personal practices

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
personnel, medical, welfare, library user, videotape sale or rental and other files whose disclosure would constitute invasion of privacy.	exempt from disclosure."	*Precinct*, 154 N.H. 1, 4 (2006)	
91-A:5, V Teacher Certification Records	Teacher certification records, both hard copies and computer files, in the department of education, provided that the department shall make available teacher certification status information.		
91-A:5, VI	Records pertaining to matters related to the preparation for and carrying out emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thrawt a deliberate act that is intended to result in widespread of severe damage to property or widespread injury or loss of life		
91-A:5, VII	Unique pupil identification information collected in accordance with RSA 193-E:5		
91-A:5, IX	Preliminary drafts, notes and memoranda, as well as other documents "not in their final form and not disclosed, circulated, or available to a quorum or a majority" of the public.	*ATV Watch v.* *N.H. Dep't of Trans.*, 161 N.H. 746 (2011)	
98-E:3 Confidential Records under Title VI. Public Officers	Nothing in this chapter shall suspend or affect any law relating to confidential and privileged records or communications. For the purposes of this chapter, confidential records and communications shall include		Communication, Records, Confidential,

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and Employees	communication or records relating to investigations for law enforcement purposes and collective bargaining proceedings.		
105:13-b, II Confidentiality of Personnel Files under Title VII. Sheriffs, Constables, and Police Officers	No personnel file on a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case	*State v. Puzzanghera*, 140 N.H. 105 (1995); *State v. Gaffney*, 147 N.H. 550 (2002); *In re State (Theodosopolous)*, 153 N.H. 318 (2006).	Personnel Files, Confidential
106-B:14 The State Police under Title VII. Sheriffs, Constables, and Police Officers	With the approval of the commissioner of safety, the director shall adopt rules under RSA 541-A as may be necessary to secure records and other information relative to persons who have been convicted of a felony, misdemeanor or violation within the state, or who are known to be habitual criminals, or who have been placed under arrest in criminal proceedings. The term "violation"; as used in this section shall apply only to violations committed under title LXII. Notwithstanding RSA 91-A, such records and information, including but not limited to dissemination logs, shall not be open to the inspection of any person except those who may be authorized to inspect the same by the director, as follows:		
106-F:6 Application for License; Confidential under Title VII. Sheriffs, Constables, and Police Officers	All information provided by an applicant for a license under this chapter, other than the application date and the business address of the applicant, shall be kept confidential, unless such information is requested by a law enforcement agent engaged in the performance of his authorized duties		License, confidential

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106-H:12 Confidentiality – Enhanced 911 systems	Automatic number identification and automatic location identification information consisting of the address and telephone numbers of telephone subscribers whose listings are not published in directories or listed in directory assistance offices is confidential		Emergency, Confidential
106-K:6 Confidentiality – Enhanced 911 systems	All data stored in J-One shall be confidential and shall be exempt from disclosure under RSA 91-A; provided, however, that nothing in this chapter shall affect the continued application of RSA 91-A to such information, to the extent that it is collected and maintained separately by a member agency		Emergency, Confidential
126-J:4 Technical Assistance under Title X Public Health	The department of health and human services, department of education, and the insurance department shall provide to the council available data, consistent with confidentiality requirements, relevant to the needs of this population.		Department of Health and Human Services; Data, Confidential
126:24-d Disclosure of Information From Vital Records.	All protected health information possessed by the department shall be considered confidential, except that the commissioner shall be authorized to provide vital record information to institutions and individuals both within and outside of the department who demonstrate a need for such information for the purpose of conducting health-related research.		Research, Health, Confidential
126-A:4,III, IV – b – Dept. of Health and Human Services	(III)The records of the ombudsman's office shall be confidential and shall not be disclosed without the consent of the client or employee on whose behalf the complaint is made, except as may be necessary to assist the service provider or the employee's supervisor to resolve the complaint, or as required by law. (IV-b) Records of the department's quality assurance program including records of interviews, internal reviews or investigations, reports, statements, minutes, and other documentation except for individual client medical records, shall be confidential and privileged and shall be protected from direct or indirect discovery, subpoena, or admission into evidence in any		Confidential, privilege, complaint

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	judicial or administrative proceeding, except as provided in subparagraphs IV (c) and (d).		
126-H:8 Healthy Kids Corporation - Confidentiality	Notwithstanding any provision of law to the contrary, the corporation shall have access to the medical records of a child upon receipt of permission from a parent or guardian of the child. Such medical records may be maintained by state and local agencies. Any confidential information obtained by the corporation pursuant to this section shall remain confidential and shall not be subject to RSA 91-A.		Medical Records, Confidential
135-C:19-a,II and IIINH Mental Health Services System - Disclosure of Certain Information	Information disclosed pursuant to this paragraph shall remain confidential and shall not be subject to discovery, subpoena, or admission into evidence in any judicial or administrative proceeding. Any person who willfully re- discloses confidential information provided to a committee designated by the governor to review child fatalities shall be guilty of a violation.		Confidential, Mental Health, Records
135-C:63-a, II NH Mental Health Services System Proceedings of Quality Assurance Program; Confidentiality.	Records of a community mental health program's quality assurance program, including those of its functional components and committees as defined by the organization's quality assurance plans, organized to evaluate matters relating to the care and treatment of patients and to improve the quality of care provided and testimony by members on the board of directors of the community mental health program, medical and clinical staff, employees, or other committee attendees relating to activities of the quality assurance program shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or administrative proceeding.		Records, Mental Health
135-C:66 Access of Records under Title X: Public Health	Notwithstanding any other provisions of law, records regarding children placed at Philbrook center pursuant to RSA 169-B, 169-C, or 169-D shall be exchanged between employees of the department to facilitate coordinated care for those children and their families. The confidentiality of such		Philbrook; Records, Confidential

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	information shall be maintained according to applicable law.		
135- E:3,VIInvoluntary Civil Commitment of Sexually Violent Predators - Notice to County Attorney or Attorney General; Multidisciplinary Teams Established.	VI. Records, reports, and proceedings of the multidisciplinary team shall be confidential and shall be exempt from the provisions of RSA 91-A, except as provided in RSA 135-E:15		Records, Reports
135-E:15, I Involuntary Civil Commitment of Sexually Violent Predators - Release of Records.	In order to protect the public, relevant information and records that are otherwise confidential or privileged shall be released to the agency with jurisdiction, to a multidisciplinary team, or to the county attorney or attorney general for the purpose of meeting the notice requirements of this chapter and determining whether a person is or continues to be a sexually violent predator. A person, agency, or entity receiving information under this section which is confidential shall maintain the confidentiality of that information. Such information does not lose its confidential status due to its release under this section.		Sexually Violent, Confidential
137-J:9 Confidentiality and Access to Protected Health Information.	I. Health care providers, residential care providers, and persons acting for such providers or under their control, shall be authorized to; (a) Communicate to an agent any medical information about the principal, if the principal lacks the capacity to make health care decisions, necessary for the purpose of assisting the agent in making health care decisions on the principal's behalf. (b) Provide copies of the principal's advance directives as necessary to		Health Care

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	facilitate treatment of the principal. II. Subject to any limitations set forth in the advance directive by the principal, an agent whose authority is in effect shall be authorized, for the purpose of making health care decisions, to: (a) Request, review, and receive any information, oral or written, regarding the principal's physical or mental health, including, but not limited to, medical and hospital records. (b) Execute any releases or other documents which may be required in order to obtain such medical information. (c) Consent to the disclosure of such medical information.		
137-K:7 Brain and Spinal Cord Injuries - Disclosure; Confidentiality.	A report provided to the brain and spinal cord injury registry disclosing the identity of an individual, who was reported as having a brain and spinal cord injury, shall only be released to persons demonstrating a need which is essential to health-related research, except that the release shall be conditioned upon the individual granting authority to release the information and personal identities remaining confidential.		Health, research, confidential
141-B:9 Chronic Disease Prevention, Assessment and Control - Disclosure; Confidentiality.	A report provided to the cancer registry disclosing the identity of an individual, who was reported as having a cancer, shall only be released to persons demonstrating a need which is essential to health-related research, except that the release shall be conditioned upon the personal identities remaining confidential.		Report, Health, Research, Confidential
146-C:5, IV Records Required; Inspections under Title X Public Health	Information obtained by the department under this chapter which, in the judgment of the federal Environmental Protection Agency or the department, constitutes a trade secret shall not be disclosed to the public without notice to the owner of the trade secret and an opportunity for hearing. The		Trade, Confidential

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	department may provide information relating to trade secrets to the Environmental Protection Agency, provided that the Environmental Protection Agency guarantees the same degree of confidentiality as does the department.		
141-C:10, I Communicable Diseases - Disclosure; Confidentiality.	Any release of information under this section without the informed, written consent of the individual shall be conditioned upon the protected health information remaining confidential.		Health, Confidential
141-F:8, I, II Human Immunodeficiency Virus Education, Prevention, and Control - Confidentiality; Release of Information.	All records and any other information pertaining to a person's testing for the human immunodeficiency virus shall be maintained by the department, health care provider, health or social service agency, organization, business, school, or any other entity, public or private, as confidential and protected from inadvertent or unwarranted intrusion. Such information obtained by subpoena or any other method of discovery shall not be released or made public outside of the proceedings.		Confidential, Health, HIV
147-C:4 Duties of the Committee under Title X: Public Health	The committee shall: (b) Have access to all information given to and comments made to the department, except that information relative to a facility application obtained by the department which, in the judgment of the federal Environmental Protection Agency or the department, constitutes a trade secret shall not be disclosed to the committee without notice to the owner of the trade secret and an opportunity for hearing. The department may provide information relating to trade secrets to the Environmental Protection Agency, provided that the Environmental Protection Agency guarantees the same degree of confidentiality		Trade secret, confidential

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	provided by the department. A "trade secret" means any confidential formula, pattern, device or compilation of information which is used in the employer's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is known to the employer and those employees to whom it is necessary to confide it;		
151:2-d Criminal Record Check Required under Title: XI Hospitals and Sanitaria	III. (a) Upon receipt of a notarized criminal conviction record release authorization form from a home health care provider, the division of state police shall conduct a criminal conviction record check pursuant to RSA 106- B:14 and provide the results to the home health care provider. The home health care provider shall maintain the confidentiality of all criminal conviction records received pursuant to this section.		Criminal conviction record
151:5-c Proceedings of Residential Care Facility Quality Assurance Program; confidentiality under Title XI: Hospitals and Sanitaria	III. Records of a quality assurance program in a licensed residential care facility, including those of its functional components and committees as defined by the facility's quality assurance plans, organized to evaluate matters relating to the care and treatment of residents and to improve the quality of care provided, and testimony by owners or members, or both, on the board of directors of the residential care facility, medical and clinical staff, employees, or the committee attendees relating to activities of the quality assurance program, shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or administrative proceeding. However, information, documents, or records otherwise available from original sources shall not be construed as immune from discovery or use in any such civil or administrative action merely because they were presented to a quality assurance program, and any person who supplies information		Records, Treatment

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	or testifies as part of a quality assurance program, or who is a member of a quality assurance program committee, shall not be prevented from testifying as to matters within his or her knowledge, but such witness shall not be asked about his or her testimony before such program, or opinions formed by him or her, as a result of committee participation. Further, a program's records shall be discoverable in either of the following cases: (a) A judicial or administrative proceeding brought by a licensed residential care facility, its quality assurance program, or owners and/or board of directors, to revoke or restrict the license or certification of a staff member; or (b) (b) A proceeding alleging repetitive malicious action or personal injury brought against a staff member.		
151-D:2 Proceedings of Quality Assurance Program; confidentiality under Title XI: Hospitals and Sanitaria	I. Records of an ambulatory care clinic's quality assurance program, including those of its functional components and committees as defined by the organization's quality assurance plans, organized to evaluate matters relating to the care and treatment of patients and to improve the quality of care provided, and testimony by members on the board of directors of the ambulatory care clinic, medical and clinical staff, employees, or other committee attendees relating to activities of the quality assurance program shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or administrative proceeding. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil or administrative action merely because they were presented to a quality assurance program, and any		Records, Treatment, Confidential

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	person who supplies information or testifies as part of a quality assurance program, or who is a member of a quality assurance program committee, may not be prevented from testifying as to matters within his or her knowledge, but such witness may not be asked about his or her testimony before such program, or opinions formed by him or her, as a result of committee participation. Further, a program's records shall be discoverable in either of the following cases: (a) A judicial or administrative proceeding brought by an ambulatory care clinic, its quality assurance program, or its board of directors, to revoke or restrict the license, certification, or privileges of a physician or staff member; or (b) A proceeding alleging repetitive malicious action and personal injury brought against a physician or staff member.		
151-G:5 Confidentiality under Title XI: Hospitals and Sanitaria	All information of any type submitted to or collected by the commission, including, but not limited to, written, oral, and electronic information; records and proceedings of the commission, including, but not limited to, oral testimony and discussions, notes, minutes, summaries, analyses, and reports; and information disseminated by the commission or its members to acute care hospitals and ambulatory surgical centers, shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial, administrative, or other type of proceeding. The provision of information to the commission and the dissemination of information by the commission shall not be deemed to void, waive, or impair in any manner the confidentiality protection of this section or which the information may have under any other law or regulation.		Confidential, privilege, records

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151-G:6 Administration under Title XI: Hospitals and Sanitaria	The activities of the Foundation for Healthy Communities and its employees or agents shall be subject to the same confidentiality provisions as those that apply to the commission.		Confidential
155:74 Complaints; Investigations; Confidentiality	II. The name of any person registering a complaint regarding noncompliance shall not be divulged by the department of health and human services in any correspondence or meetings, nor shall it be made available over the telephone, unless specific written approval has been given to do so by the complainant. All complaints, except names, shall be a public record for purposes of RSA 91-A. The name of any complainant who requests anonymity, however, shall not be revealed under RSA 91-A.		Complaints, noncompliance, confidential
159:6-a confidentiality of Licenses.	Notwithstanding the provisions of RSA 91-A:4 or any other provision of law to the contrary, all papers and records, including applications, pertaining to the issuance of licenses pursuant to RSA 159:6 and all licenses issued pursuant to said section are subject to inspection only by law enforcement officials of the state or any political subdivision thereof or of the federal government while in the performance of official duties or upon written consent, for good cause shown, of the superior court in the county where said license was issued.		Licenses, records
159-D:2 Confidentiality	I. If the department of safety conducts criminal background checks under RSA 159-D:1, any records containing information pertaining to a potential buyer or transferee who is not found to be prohibited from receipt or transfer of a firearm by reason of state or federal law, which are created by the department of safety to conduct the criminal background check, shall be confidential and may not be disclosed by the department or any officers or employees to any person or to another agency. The department shall destroy any such records after it communicates the corresponding approval number		Criminal background checks, confidential, records

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	to the licensee and, in any event, such records shall be destroyed within one day after the day of the receipt of the licensee's request.		
161-C:3-a Confidentiality of Records and Information; Information From Financial Institutions under Title XII Public Safety and Welfare	The records and information made available to the client or the client's authorized representative shall not include information provided to the department that is prohibited from release by federal law, state statute, state case law, or by contract or agreement between the department and another entity if such contract or agreement prohibits release of such information.		Confidential
161-F:14 Access to Facilities, Residents, and Records under Title XII Public Safety and Welfare	The representative of the office shall maintain the confidentiality of all books, files, medical records, or other records inspected under the provisions of this paragraph except as they may pertain to the resolution of the ongoing investigation.		Records, confidentiality
161-F:57 Access to Files; Confidentiality	The files maintained by the department which relate to investigations of alleged instances of abuse, neglect, or exploitation shall be disclosed only with the written consent of the victim, or his guardian or attorney, or if such disclosure is required by court or administrative order.		Abuse; neglect
161-I:6-a Criminal Record Check Required	III. (a) Upon receipt of a notarized criminal conviction record release authorization form from an other qualified agency, the division of state police shall conduct a criminal conviction record check pursuant to RSA 106-B:14 and provide the results to the other qualified agency. The other		Record, criminal, confidential

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	qualified agency shall maintain the confidentiality of all criminal conviction records received pursuant to this section.		
167:30 Confidential Character of Public Assistance Record under Title XII: Public Safety and Welfare	Whenever under provisions of law names and addresses of recipients of assistance or child welfare services under this chapter or RSA 161 are furnished to or held by any other agency or department of government, such agency or department of government shall be required to adopt regulations necessary to prevent the publication of lists thereof or their use for purposes not directly connected with the administration of this chapter or RSA 161		Confidential, child welfare
169-B:19 Dispositional Hearing under Title XII Public Safety and Welfare	III-c. (e) The provisions of RSA 169-B:34 through 169-B:38, relating to confidentiality of proceedings and records, shall apply to all de novo trials conducted pursuant to this section.		Confidential, records, de novo trials
169-C:25 Confidentiality under Title XII: Public Safety and Welfare	I. (a) The court records of proceedings under this chapter shall be kept in books and files separate from all other court records. Such records shall be withheld from public inspection but shall be open to inspection by the parties, child, parent, grandparent pursuant to subparagraph (b), guardian, custodian, attorney or other authorized representative of the child.		Records, inspection
169-C:34-a Multidisciplinary Child Protection Teams and Title XII: Public Safety and Welfare	III. The department may share information from its case records to the extent permitted by law with members of a multidisciplinary child protection team in order to assist the team with its investigation and evaluation of a report of abuse or neglect. Multidisciplinary child protection team members shall be required to execute a confidentiality agreement and shall be bound by the confidentiality provisions of RSA 169-C:25 and RSA 170-G:8-a.		Multidisciplinary, investigation,
170-B:23 Confidentiality of Records under Title XII: Public Safety and	Notwithstanding any other law concerning public hearings and records: II. All papers and records, including birth certificates, pertaining to the adoption, whether part of the permanent record of the court or of a file in the division, in an agency or office of the town clerk or the bureau of vital		Records, inspection

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Welfare	records and health statistics are subject to inspection only upon written order of the court for good cause shown, except as otherwise provided in RSA 170-B:24. III. Nothing contained in this section or RSA 170-B:24 shall prevent the department or the licensed child-placing agency from sharing with the adoptive parents all information it has available about the minor child being placed for adoption. The department or the licensed child-placing agency shall delete any information, which would tend to identify a birth parent.		
170-C:14 Confidentiality of Records under Title XII: Public Safety and Welfare	Any other law concerning public hearings and records notwithstanding: I. All hearings held in termination proceedings shall be in closed court without admittance of any person other than essential officers of the court, the parties, their witnesses, counsel, and representatives of the agencies present to perform their official duties. II. All papers and records, including birth certificates, pertaining to the termination, whether part of the permanent record of the court or of a file in the department, in an agency or office of the town clerk or the division of vital records administration are subject to inspection only upon written consent of the court for good cause shown.		Records, children, termination
170-E:7 State Registry and Criminal Records Check; Revocation of Registration and Withholding of State Funds under Title XII: Public Safety and Welfare ****	(b) The department shall submit the criminal history records release form to the New Hampshire division of state police, which shall conduct a criminal history records check through its records and through the Federal Bureau of Investigation. Upon completion of the background investigation, the division of state police shall release copies of the criminal conviction records to the department. The department shall maintain the confidentiality of all criminal history records information received pursuant to this paragraph.		Records, criminal history,

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170-E:23 Confidentiality and Investigations under Title XII: Public Safety and Welfare	State registry files and all other related confidential information kept by any state agency may be used by the department for the purpose of investigation and licensure. The department shall strictly observe the confidentiality requirements of the agency from which it receives information.		Confidential, investigations
170-E:29 State Registry and Criminal Records Check.	V. The commissioner shall adopt rules, pursuant to RSA 541-A, relative to the confidentiality of information collected under this section and to the release, if any, of such information.		
170-E:49 Confidentiality and Investigations under Title XII: Public Safety and Welfare	The department may request and shall receive cooperation from other state agencies in connection with investigations and licensure. Because certain information kept by other state agencies and requested by the department may be confidential, the department shall strictly observe the confidentiality requirements of the agency from which it receives information.		Confidential, investigations
170-G:8-a Record Content; Confidentiality; Rulemaking under Title XII: Public Safety and Welfare	II. The case records of the department shall be confidential. (a) The department shall provide access to the case records to the following persons unless the commissioner or designee determines that the harm to the child named in the case record resulting from the disclosure outweighs the need for the disclosure presented by the person requesting access:		Child, disclosure, confidential
172:8-a Confidentiality of Client Records under Title XII: Public Safety and Welfare	No reports or records or the information contained therein on any client of the program or a certified alcohol or drug abuse treatment facility or any client referred by the commissioner shall be discoverable by the state in any criminal prosecution. No such reports or records shall be used for other than rehabilitation, research, statistical or medical purpose, except upon the written consent of the person examined or treated. Confidentiality shall not		Records, reports

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	be construed in such manner as to prevent recommendation by the commissioner to a referring court, nor shall it deny release of information through court order pursuant to appropriate federal regulations.		
173-B:22 Confidentiality under Title XII Public Safety and Welfare	All persons who are employed, appointed, or who volunteer under this chapter shall maintain confidentiality with regard to persons served by the coordinator and grantees and files kept by the coordinator and grantees, except for reasons of safety for other shelter residents or staff.		Confidentiality
173-C:2 Privilege under Title XII: Public Safety and Welfare	I. A victim has the privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by the victim to a sexual assault counselor or a domestic violence counselor, including any record made in the course of support, counseling, or assistance of the victim. Any confidential communication or record may be disclosed only with the prior written consent of the victim. This privilege terminates upon the death of the victim		Communication, counseling, confidential
189:13-a School Employee and Volunteer Background Investigations under Title XV: Education	The school administrative unit, school district, or charter school shall maintain the confidentiality of all criminal history records information received pursuant to this paragraph. If the criminal history records information indicates no criminal record, the school administrative unit, school district, or charter school shall destroy the information received immediately following its review of the information.		Education, confidential, criminal record
193-D:7 Confidentiality under Title XV: Education	Notwithstanding any other provision of law, it shall be permissible for any law enforcement officer and any school administrator to exchange information relating only to acts of theft, destruction, or violence in a safe school zone regarding the identity of any juvenile, police records relating to a juvenile, or other relevant information when such information reasonably relates to delinquency or criminal conduct, suspected delinquency or suspected criminal conduct, or any conduct which would classify a pupil as		Safe School zone, records, delinquency

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	a child in need of services under RSA 169-D or a child in need of protection under RSA 169- C		
201-D:11 Library User Records; Confidentiality under Title XVI: Libraries	Library records which contain the names or other personal identifying information regarding the users of public or other than public libraries shall be confidential and shall not be disclosed except as provided in paragraph II. Such records include, but are not limited to, library, information system, and archival records related to the circulation and use of library materials or services.		Library, records, Confidential
227-C:11 Confidentiality of Archeological Site Location Information under Title XIX: Public Recreation	Information which may identify the location of any archeological site on state land, or under state waters, shall be treated with confidentiality so as to protect the resource from unauthorized field investigations and vandalism. Toward this end, state agencies, departments, commissions, institutions and political subdivisions, permittees and private landowners with preservation and conservation agreements shall consult with the commissioner before any disclosure of information to insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk. Such information is exempt from all laws providing rights to public access. Disclosure for the public record for tax assessment, transfer, sale or other consideration of the property shall receive careful consideration to minimize the risk to the resource.		Archeological, exempt
236:31 Evasion of Tolls and Charges under Title XX: Transportation	VI. (a) The department, and any designee of the department, shall maintain the confidentiality of all information acquired in connection with the administration and enforcement of toll evasion, including but not limited to credit and account data, photographs or other images, and all personally identifying information obtained relative to owners of vehicles. Such information shall not be a public record subject to disclosure under RSA 91- A and shall be used solely for enforcement of this section.		Toll, data,

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237:16-e Confidentiality of Records under Title XX: Transportation	Notwithstanding RSA 91-A or any other provision of law, all information received by the department that could serve to identify vehicles, vehicle owners, vehicle occupants, or account holders in any electronic toll collection system in use in this state shall be for the exclusive use of the department for the sole purpose of administering the electronic toll collection system, and shall not be open to any other organization or person, nor be used in any court in any action or proceeding, unless the action or proceeding relates to the imposition of or indemnification for liability pursuant to this subdivision. The department may make such information available to another organization or person in the course of its administrative duties, only on the condition that the organization or person receiving such information is subject to the limitations set forth in this section. For the purposes of this section, administration or administrative duties shall not include marketing, soliciting existing account holders to participate in additional services, taking polls, or engaging in other similar activities for any purpose.		Vehicle, confidential, electronic toll
260:14 – Motor Vehicles under Chapter XXI: Motor Vehicles	II. (a) Proper motor vehicle records shall be kept by the department at its office. Notwithstanding RSA 91-A or any other provision of law to the contrary, except as otherwise provided in this section, such records shall not be public records or open to the inspection of any person.		Motor Vehicle records
263:56-b Revocation or Denial for Drugs or Alcohol Involvement under Title XXI: Motor Vehicles	Notwithstanding RSA 169-B:35 or any other law regarding confidentiality any court which convicts or makes a finding that an offense described in this section has occurred involving a person who meets the age limits specified in this section shall forward a notice of such conviction or finding to the director. The director shall maintain the confidentiality of notices received.		Confidential, convicts
275:51, III-a Enforcement under	III-a. Records compiled pursuant to employee interviews under paragraphs II and III are not subject to disclosure by the department. The commissioner		Labor, employee interviews

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Title XXIII: Labor	may release such information to public officials when such information is necessary to perform their duties. If the commissioner determines that a person or employer has violated any provision of this subdivision or any rule adopted under this subdivision, that person or employer shall be provided with a report specifying the statute and rules that have been violated and a summary of supporting evidence.		
275:62 Right to Leave Work under Title XXIII: Labor	An employer shall maintain the confidentiality of any written documents or records submitted by an employee relative to the employee's request to leave work under this subdivision.		Employee records, Confidential
277-B:15-a Client List; Confidentiality under Title XXIII: Labor	Client lists shall remain confidential except that the commissioner may share such information with other appropriate state agencies.		Client lists
281-A:21-b Confidentiality of Workers' Compensation Claims under Title XXIII: Labor	Proceedings and all records of the department of labor with respect to workers' compensation claims, not only to DOL injury reports containing personal employee information, under RSA 281-A shall be exempt from RSA 91-A. Nothing in this section shall prohibit the department of labor from releasing information on a person's claim or claims to the person, the person's legal representative, attorney, health care providers, employer, the employer's workers' compensation insurer, the attorneys for the employer or employer's insurer, or state and federal agencies with relevant jurisdiction. Notwithstanding the provisions of this section, information relating to a person's claim or claims may be released to other parties only with the prior written permission of the claimant.	*Premium Research Servs.* *V. N.H. Dep't of Labor*, 162 N.H. 741 (2011).	Workers' compensation, confidential
282-A:117-123 and 91-A:6 Records exempt from	Each employing unit shall keep true and accurate work records for such periods of time and containing such information as the commissioner may by rules prescribe. Such records shall be open to inspection and subject to be		Confidential; employment

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inspection	copied or reproduced by the commissioner, or his authorized representatives in this state at any reasonable time and as often as may be necessary at a place selected by the commissioner. The commissioner may, at his discretion, notify any employer of the prospective benefit rights of any individual in his employ. The commissioner may upon petition for cause authorize such records as he requires be maintained to be physically located in a state other than New Hampshire; however, when such petition is allowed, such records may, in the sole judgment of the commissioner, be examined at the department administrative office in this state or at their location outside this state. Where examination occurs outside this state, a penalty equal to all costs attendant thereupon, solely as computed by the commissioner, shall be paid by the employer to the department.		
282-A:118 Reports or Statement; Confidentiality under Chapter XXIII: Labor	The commissioner or his authorized representatives and the chairman of any appeal tribunal may require from any employing unit any sworn or unsworn reports or statements, with respect to persons employed by it, which either deems necessary for the effective administration of this chapter. Information thus obtained or obtained from any individual, claimant or employing unit pursuant to the administration of this chapter shall be held confidential and shall not be published or open to public inspection in any manner revealing the individual's or employing unit's identity except: -Refer to law for exceptions including information shared with the United States Census Bureau related to the employment dynamics program.		Labor; employment
282-A:119 Summary, Duplication, etc.; Admissibility under Chapter XXIII: Labor	The commissioner may cause to be made such summaries, compilations, photographs, duplications, or reproductions of any records, reports, or transcripts thereof, as he may deem advisable for the effective and economical preservation of the information contained therein. Such summaries, compilations, photographs, duplications or reproductions, duly		Labor; employment

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	authenticated, shall be admissible in any proceeding under this chapter if the original record or records would have been admissible therein.		
282-A:120 Destruction of Records under Chapter XXIII: Labor	The commissioner may by rules order the destruction, after reasonable periods, of any and all records, reports, transcripts or reproductions thereof, or other papers kept pursuant to the administration of the unemployment compensation law, which are not considered by him as necessary to the administration of this chapter.		Labor; employment
282-A:121 Penalty under Chapter XXIII Labor	Any employee of the department of employment security, member of an appeal tribunal, or any individual, corporation, association, partnership or other type of organization, who lawfully obtains or sees records, reports or information obtained in the administration of this chapter who violates any provision of this subdivision shall be guilty of a misdemeanor.		Employment security;
282-A:123 Records Unavailable for Legal Process under Chapter XXIII: Labor	No records of any type in any form whether copies, compilations or reproductions pertaining to any individual or employing unit obtained in the course of or growing out of the administration of this chapter, or oral testimony relative thereto, as to either a specific person or in general shall be available for use in any proceeding, administrative or judicial; except that a necessary party to a proceeding directly and primarily concerned with workmen's compensation or an employer-employee relationship may by the use of valid judicial process obtain such records as directly relate to the necessary parties to the proceeding, and otherwise as is provided by this chapter. In matters unrelated to those enumerated previously, such records and oral testimony shall be available for use in any proceeding, administrative or judicial, where the state is a necessary party. No oral or written policy statements, opinions, advice, instructions or information of the department as to a specific person or in general shall be available for use in any proceeding, administrative or judicial through any means, and any		Reproductions; employment;

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	process which attempts to obtain such shall be null and void.		
282-A:118 Reports or Statement; Confidentiality under Title XXIII: Labor	Information thus obtained or obtained from any individual, claimant or employing unit pursuant to the administration of this chapter shall be held confidential and shall not be published or open to public inspection in any manner revealing the individual's or employing unit's identity except: Look up exceptions		Inspections, confidential
311 Unauthorized practice of law – investigations confidential	311:7-b Investigation by Attorney General. – I. The attorney general may investigate any complaint of unauthorized practice of the law V. Investigations under this section shall be confidential. Any person participating in the investigation who, except as required in the discharge of the person's official duties, discloses to any person, other than to a person under investigation, the name of any person under investigation or any witness examined, or any other information obtained in the investigation is guilty of a misdemeanor.		
318:5-a Rulemaking Authority under Title XXX: Occupations and Professions	The board shall adopt rules, pursuant to RSA 541-A, relative to XVIII. Disclosure and confidentiality relative to the New Hampshire Rx advantage program, pursuant to RSA 161-L:3		Confidential
326-B:15 Criminal History Record Checks under Title	The board shall maintain the confidentiality of all criminal history records information received pursuant to this section.		Criminal history records

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XXX Occupations and Professions			
326-E:5 Duties and Powers of the Board under Title XXX: Occupations and Professions	II. In addition, the board shall: (e) Keep information confidential in accordance with the confidentiality requirements of RSA 328-F.		
326-E:7 Rights of Consumers under Title XXX: Occupations and Professions	III. Any person may submit a complaint in writing to the board regarding any licensee, entity, or other person potentially in violation of this chapter or of RSA 328-F. Confidentiality shall be maintained subject to state and federal law.		Licensee
328-A:15 Rights of Consumers; Confidentiality under Title XXX: Occupations and Professions	II. The home address and telephone numbers of physical therapists and physical therapist assistants shall not be public record and shall be kept confidential by the board unless they are the only addresses and telephone numbers of record.		Telephone numbers, records, confidential
328-C:5-a Confidentiality of Information under Title XXX: Occupations and Professions	I. Unless waived by the person to whom the information pertains, the following information relative to certified marital mediators, applicants for certification, and formerly certified marital mediators which may be in the possession of the board shall be confidential and shall not be subject to disclosure, except as provided in paragraph II, absent an order of the court: (f) Any information deemed confidential under RSA 91-A or other applicable law.		Certified marital mediators, confidential
328-D:3-a Criminal History Record	IV. The board shall review the criminal record information prior to making a licensing decision and shall maintain the confidentiality of all criminal		Criminal record, licensing,

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Checks under Title XXX: Occupations and Professions	history records received pursuant to this section.		confidential
328-F:24 Investigations and Disciplinary Proceedings under Title XXX: Occupations and Professions	II. Unless used in disciplinary proceedings or required to be disclosed by an order of a court, the following information obtained during investigations shall be held confidential and shall be exempt from the disclosure requirements of RSA 91-A: (a) Complaints received by the board. (b) Information and records acquired by the board during its investigation. (c) Reports and records made by the board as a result of its investigation. (d) Patient or client records, including clinical records, files, oral and written reports relating to diagnostic findings or treatment of licensees' patients or clients and oral and written information from which the identity of licensees' patients or clients or their families can be derived.		Investigations, Complaints, records, reports
329:13-b Physician Effectiveness Program under Title XXX: Occupations and Professions	III. Notwithstanding the provisions of RSA 91-A, the records and proceedings of the board, compiled in conjunction with a physician effectiveness peer review committee, shall be confidential and are not to be considered open records unless the affected physician so requests; provided, however, the board may disclose this confidential information only: (a) In a disciplinary hearing before the board or in a subsequent trial or appeal of a board action or order; (b) To the physician licensing or disciplinary authorities of other jurisdictions; or (c) Pursuant to an order of a court of competent jurisdiction.		Records, physician
329:20-a Report to	All licensed physicians practicing ophthalmology in this state shall report,		Physicians, report,

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Blind Services Program, Bureau of Vocational Rehabilitation under Title XXX: Occupations and Professions	with the permission of the patient, all cases of vision examination results of 20/200 or less, in the better eye, after correction, to the blind services program, bureau of vocational rehabilitation, department of education. Such report shall contain the name and address of the examined individual, date of birth, the amount of vision in both eyes, and the cause of visual impairment. The information contained in said report shall be treated as confidential by the bureau.		
329:26 Confidential Communications under Title XXX: Occupations and Professions	Confidential relations and communications between a patient and any person working under the supervision of a physician or surgeon that are customary and necessary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising physician or surgeon.		Physician, privileged
329:29 Proceedings of Medical Review Committee under Title XXX: Occupations and Professions	All proceedings, records, findings and deliberations of medical review committees of a duly established county or state medical society or of any such committees of the board of medicine are confidential and privileged and shall not be used or available for use or subject to process in any other proceeding. The manner in which a medical review committee and each member thereof deliberates, decides or votes on any matter submitted to it is likewise confidential and privileged and shall not be the subject of inquiry in any other proceeding.		Medical review committee, privileged, confidential
329:29-a Proceedings of Physician Practice Quality Assurance Program; Confidentiality under Title XXX: Occupations and	II. Records of a quality assurance program, including those of its functional components and committees, as defined by the physician practice's quality assurance plans, and testimony by persons participating in or appearing before the quality assurance program or its functional components or committees, relating to the activities of the quality assurance program shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena, or admission into evidence in any judicial or		Physician , assurance program,

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Professions	administrative proceeding.		
330-A:28 Investigations and Complaints under Title XXX: Occupations and Professions	I. The board shall investigate possible misconduct by licensees and other matters within the scope of this chapter. Investigations may be conducted formally, after issuance of a board order setting forth the general scope of the investigation, or informally, after a board vote to seek additional information, without such an order. In either case, information gathered subsequent to the initiation of and during such investigations shall be exempt from the public disclosure provisions of RSA 91-A, except to the extent such information may later become the subject of a public disciplinary hearing. The existence of a complaint and status of the investigation, without disclosing the identity of those involved, shall be subjec t to the disclosure provisions of RSA 91-A. The board may disclose information acquired in an investigation to law enforcement only if it involves suspected criminal activity, to health licensing agencies in this state or any other jurisdiction if the licensee has or is seeking additional licenses, or as required by specific statutory requirements or court orders. A licensee under this chapter shall be promptly informed of the nature and scope of any pending investigation.		Investigations
330-A:32 Privileged Communications under Title XXX: Occupations and Professions	The confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order.		License,
332-B:14 Disciplinary	All such investigations and preliminary hearings shall be confidential and		Investigations,

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Action; Civil Penalty under Title XXX: Occupations and Professions	exempt from the provisions of RSA 91-A, provided that the board shall make public any action taken under RSA 332-B:14, III resulting from a preliminary hearing or investigation.		hearings,
332-I:2 Patient Information under Title XXX: Occupations and Professions	(e) The health care provider shall not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest		Confidential communications
339-D:3 Inventory Reporting under Title XXXI: Trade and Commerce	II. All reports filed pursuant to this section shall be an exempt record and confidential pursuant to RSA 91-A:5, IV, and shall be maintained for the sole and confidential use of the director of the governor's council on energy, except that the reports may be disclosed to the appropriate energy agency or department of another state with substantially similar confidentiality statutes or regulations with respect to such reports.		Energy, reports,
351-A:1 Videotape Rental or Sales Records; Confidentiality under Title XXXI: Trade and Commerce	I. Videotape rental or sales records which contain the names or other personal identifying information regarding the renters or purchasers of videotapes shall be confidential and shall not be disclosed by any person or other entity renting or selling such videotapes except as provided in paragraph II.		Sales records, confidential
354-B:2 Civil Action by Attorney General under Title XXXI: Trade and Commerce	II. The civil action brought by the attorney general shall be filed in the superior court or, in the case of a child under the age of 17, either in superior court or the district court in the county or judicial district where the alleged violator resides or where the alleged conduct occurred. In the case of a child under the age of 17, all such proceedings shall be confidential.		Civil action, minor
356:10 - Official	Any procedure, testimony taken or document or object produced under this		Investigation

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Investigation under Chapter XXXI: Trade and Commerce	chapter shall be kept confidential by the attorney general before the institution against the person of an action brought under this chapter for the violation under investigation unless confidentiality is waived by the person or disclosure is authorized by the superior court.		
358-A:8- Subpoena; Production of Books, Examination of Persons, etc. under Chapter XXXI: Trade and Commerce	VI. USE OF INFORMATION. Any information, testimony, or documentary material obtained under the authority of this section shall be used only for one or more of the following purposes: (a) In connection with investigations instituted under this chapter or for the prosecution of legal proceedings instituted under this chapter or other provisions of the RSA; and (b) In connection with any formal or informal program of or request for information exchange between the department of justice and any other local, state or federal law enforcement agency. However, no information or material obtained or used pursuant to the authority of this section shall be released publicly by any governmental agency except in connection with the prosecution of legal proceedings instituted under this chapter or other provisions of the RSA. In addition, any information, testimony or documentary material obtained or used pursuant to a protective order shall not be exchanged or released, as provided herein, publicly except in compliance with such protective order.		
361-A:6-a Examinations under Title XXXIII-A: Retail Installment Sales	(c) All reports pursuant to this section shall be privileged and although filed in the department as provided in subparagraph (b) shall not be for public inspection. The comments and recommendations of the examiner shall also be confidential information and shall not be available for public inspection.		Sales
365:8 Rulemaking Authority under Title	The commission shall adopt rules, pursuant to RSA 541-A, relative to: IV. Standards and procedures for the handling of confidential information, in		

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XXXIV. Public Utilities	accordance with RSA 91-A.		
378:43 Information Not Subject to Right-to-Know Law under Title XXXIV. Public Utilities	I. (a) Any information or records that a telephone utility provides to the public utilities commission or its staff as part or in support of a filing with the commission or in response to a request that the information or records be provided to the commission or its staff shall be maintained confidentially and shall not be considered public records for purposes of RSA 91-A, if the information or records satisfy the requirements of paragraph II.		Telephone utility,
383:7 Compensation; Assistants under Title XXXV. Banks and Banking; Loan Associations; Credit Unions	IV. The banking department shall submit the criminal history records release form to the New Hampshire division of state police, which shall conduct a criminal history records check through its records and through the Federal Bureau of Investigation. Upon completion of the background investigation, the division of state police shall release copies of the criminal conviction records to the department. The department shall maintain the confidentiality of all criminal history records information received pursuant to this paragraph.		Criminal history records
383:10-b Confidential Information under Title XXXV. Banks and Banking; Loan Associations; Credit Unions	All records of investigations and reports of examinations by the banking department, including any duly authenticated copy or copies thereof in the possession of any institution under the supervision of the bank commissioner, shall be confidential communications, shall not be subject to subpoena and shall not be made public unless, in the judgment of the commissioner, the ends of justice and the public advantage will be sub served by the publication thereof. The commissioner may furnish to the federal supervisory authorities and to independent insuring funds which he deems qualified such information and reports relating to the institutions under his supervision as he deems best. On motion for discovery filed in any court of competent jurisdiction, in aid of any pending action, the court, after		Investigations,

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	hearing the parties, may order the production of such records, investigations and reports for use in such action whenever it is found that justice so requires, subject to such reasonable safeguards imposed by the court as may be necessary to prevent use by unauthorized persons or publicity of irrelevant portions thereof.		
383:10-e Confidential of Consumer Complaints under Title XXXV. Banks and Banking; Loan Associations; Credit Unions	The commissioner may disclose to the public the number and type of complaints or inquiries filed by consumers against a particular person or entity; provided, however, that no such disclosure shall abridge the confidential of consumer complaints or inquiries.		Consumer complaints
384:60-a Examination of Out-of-State Banks and Bank Holding Companies under Title XXXV. Banks and Banking; Loan Associations; Credit Unions	The commissioner is further authorized to enter into agreements with out-of- state and federal bank regulatory agencies for purposes of sharing and protecting the confidentiality of any New Hampshire banking department examination report, work papers or other examination information and the examination report, work papers or other examination information of the out-of-state state or federal bank regulatory agency.		Examination report,
384-F:33 Confidentiality of Examination Reports under Title XXXV. Banks and Banking; Loan Associations; Credit Unions	The confidentiality provisions of RSA 383:10-b shall apply to reports of examinations under this chapter.		Banks; reports; examinations

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392:9-a Confidentiality under Title XXXV. Banks and Banking; Loan Associations; Credit Unions	The commissioner may, at his or her discretion on request or otherwise, determine that confidential information received in connection with any petition or application of or concerning a public trust company should not be publicly available, in which case such information shall be confidential communications, shall not be subject to subpoena, and shall not be disclosed unless, in the judgment of the commissioner, the ends of justice and the public advantage will be served by the disclosure of the information.		Confidential communications, fiduciary
397-A:5 License Application; Requirements; Investigation under Title XXXV. Banks and Banking; Loan Associations; Credit Unions	(c) The department shall submit the criminal history records release form to the New Hampshire division of state police which shall conduct a criminal history records check through its records and through the Federal Bureau of Investigation. Upon completion of the background investigation, the division of state police shall release copies of the criminal conviction records to the department. The department shall maintain the confidentiality of all criminal history records information received pursuant to this paragraph.		Criminal history records,
397-A:20 Administration by Commissioner; Rulemaking under Title XXXV. Banks and Banking; Loan Associations; Credit Unions	VII. In adopting rules, preparing forms, setting standards, and in performing examinations, investigations, and other regulatory functions authorized by the provisions of this chapter, the commissioner may cooperate, and share information pursuant to confidentiality agreements, with regulators in this state and with regulators in other states and with federal regulators in order to implement the policy of this chapter in an efficient and effective manner and to achieve maximum uniformity in the form and content of applications, reports, and requirements for mortgage bankers and brokers, where practicable.		Banks
399-A:3 Application and Fees under Title XXXVI. Pawnbrokers	(d) The department shall submit the criminal history records release form to the New Hampshire division of state police, which shall conduct a criminal history records check through its records and through the Federal Bureau of		Criminal history records

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and Moneylenders	Investigation. Upon completion of the background investigation, the division of state police shall release copies of the criminal conviction records to the department. The department shall maintain the confidentiality of all criminal history records information received pursuant to this paragraph.		
399-D:5 License Application; Requirements; Investigation under Title XXXVI. Pawnbrokers and Moneylenders	(h) The department shall submit the criminal history records release form to the New Hampshire division of state police, which shall conduct a criminal history records check through its records and through the Federal Bureau of Investigation. Upon completion of the background investigation, the division of state police shall release copies of the criminal conviction records to the department. The department shall maintain the confidentiality of all criminal history records information received pursuant to this paragraph.		Criminal history records
400-A:15-b Confidentiality of Provider's Personal Information under Title XXXVII. Insurance	I. Health insurers and other third party payers shall not display a medical provider's home address, date of birth, or social security number on documents provided to subscribers for the purpose of claim payment unless the provider has provided that information for the purposes of claim payment. II. The provisions of this section shall apply to group hospital and medical expense policies subject to RSA 415, group health service plan contracts issued pursuant to RSA 420-A, and to health maintenance organization policies and plans issued pursuant to RSA 420-B.		Health insurers
400-A:25 – Certain Records of the Insurance Dept. under Chapter XXXVII: Insurance	I. Unless otherwise provided by law, all records and documents of the insurance department are subject to public inspection pursuant to the rightto- know law, RSA 91-A. Notwithstanding the provisions of RSA 91-A, the commissioner may determine by order that it is in the public interest to make public additional records and documents or to hold certain records and documents confidential within the insurance department		insurance
400-A:36-c	All financial analysis ratios and examination synopses concerning insurance		Financial analysis

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Confidentiality under Title XXXVII. Insurance	companies that are submitted to the department by the National Association of Insurance Commissioners' Insurance Regulatory Information System are confidential and shall not be disclosed by the department. Nothing contained in this title shall prevent or be construed as prohibiting the commissioner from disclosing any other material or information obtained by the commissioner in line with the duties of the commissioner's office so long as the governmental or regulatory agency or office receiving the information agrees in writing to keep it confidential and in a manner consistent with this title.		ratios; examination synopses
400-A:37 Examinations under Title XXXVII. Insurance	(a) Except as provided in subparagraph IV(c)(2) and in this subparagraph, documents, materials, or other information, including, but not limited to, all working papers, and copies thereof created, produced or obtained by or disclosed to the commissioner or any other person in the course of an examination made under this title, or in the course of analysis by the commissioner of the financial condition or market conduct of a company shall be confidential by law and privileged, shall not be subject to RSA 91- A, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. The commissioner is authorized to use the documents, materials, or other information in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties		Insurance
401-B:8 Confidential Treatment under Title XXXVII. Insurance	I. Documents, materials, or other information in the possession or control of the insurance department that are obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to RSA 401-B:6 and all information reported pursuant to RSA 401-B:3, II(l) and (m), RSA 401-B:4, and RSA 401-B:5, shall be confidential by law and privileged shall not be subject to RSA 91-A,		Insurance

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	shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. However, the commissioner is authorized to use the documents, materials, or other information in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties. The commissioner shall not otherwise make the documents, materials or other information public without the prior written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby notice and opportunity to be heard, determines that the interests of policyholders, shareholders, or the public will be served by the publication thereof, in which event the commissioner may make public all or any part in such manner as may be deemed appropriate. II. Neither the commissioner nor any other person shall be permitted or required to testify at any private civil action concerning any confidential documents, materials, or information subject to RSA 401-B:8, I. III. The commissioner may share documents, materials, or other information, including the confidential and privileged documents, materials, or information subject to paragraph I, with other state, federal and international regulatory agencies, with the NAIC and its affiliates and subsidiaries, and with state, federal, and international law enforcement authorities, including members of any supervisory college described in RSA 401-B:7 [NOTE – see conditions set forth in subsections (a)-(d)]. IV-V. The sharing of information by the commissioner shall not constitute a delegation of regulatory authority or rulemaking and no waiver of any applicable privilege or claim of confidentiality shall occur as a result of disclosure or sharing.		
402-C:14 Conduct of	I. CONFIDENTIALITY OF COMMISSIONER'S HEARINGS. The		Hearings

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Hearings in Summary Proceedings under Title XXXVII. Insurance	commissioner shall hold all hearings in summary proceedings privately unless the insurer requests a public hearing, in which case the hearing shall be public. II. CONFIDENTIALITY OF COURT HEARINGS. The court may hold all hearings in summary proceedings and judicial reviews thereof privately in chambers, and shall do so on request of the insurer proceeded against.		
402-D:16 Record Retention under Title XXXVII. Insurance	III. Records submitted to the commissioner in accordance with this section that contain personal identifying information, shall be treated as confidential by the commissioner and shall not be subject to RSA 91-A. However, in order to assist in the performance of the commissioner's duties, the commissioner may share documents, materials, or other information, including the confidential documents, materials, or other information with other state, federal and international regulatory agencies, with the National Association of Insurance Commissioners (NAIC) and its affiliates and subsidiaries, and with state, federal and international law enforcement authorities; provided, that the recipient agrees to maintain the confidentiality of the information provided.		National Association of Insurance Commissioners; insurance commissioner
404-F:8 Confidentiality; Prohibition on Announcements; Prohibition on Use in Ratemaking under Title XXXVII. Insurance	All RBC reports, to the extent the information therein is not required to be set forth in a publicly available annual statement schedule, and RBC plans, including the results or report of any examination or analysis of an insurer performed pursuant hereto and any corrective order issued by the commissioner pursuant to examination or analysis, with respect to any domestic insurer or foreign insurer which are filed with the commissioner constitute information that might be damaging to the insurer if made available to its competitors, and therefore shall be kept confidential by the commissioner. This information shall not be made public or be subject to subpoena, other than by the commissioner and then only for the purpose of		Insurance, examination

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	enforcement actions taken by the commissioner pursuant to this chapter or any other provision of the insurance laws of this state.		
408-C:8 Commission Records and Enforcement under Title XXXVII. Insurance	I. The commission shall promulgate rules establishing conditions and procedures for public inspection and copying of its information and official records, except such information and records involving the privacy of individuals and insurers' trade secrets. The commission may promulgate additional rules under which it may make available to federal and state agencies, including law enforcement agencies, records and information otherwise exempt from disclosure, and may enter into agreements with such agencies to receive or exchange information or records subject to nondisclosure and confidentiality provisions. II. Except as to privileged records, data and information, the laws of any compacting state pertaining to confidentiality or nondisclosure shall not relieve any compacting state commissioner of the duty to disclose any relevant records, data or information to the commission; provided, that disclosure to the commission shall not be deemed to waive or otherwise affect any confidentiality requirement; and further provided, that, except as otherwise expressly provided in this chapter, the commission shall not be subject to the compacting state's laws pertaining to confidentiality and nondisclosure with respect to records, data and information in its possession. Confidential information of the commission shall remain confidential after such information is provided to any commissioner.		Official records, trade secrets.
420-J:5-e General Provisions Regarding External Review under Title XXXVII. Insurance	III. An independent review organization shall maintain all standards of confidentiality. The records and internal materials prepared for specific reviews by an independent review organization under this section shall be exempt from public disclosure under RSA 91-A.		Insurance,

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420-J:10 Confidentiality of Insurer Records under Title XXXVII. Insurance	Data or information pertaining to the diagnosis, treatment, or health of a covered person obtained from the person or from a provider by a health carrier is confidential and shall not be disclosed to any person except to the extent that it may be necessary to carry out the purposes of this chapter and as allowed by any applicable state or federal law; or upon the express consent of the covered person; or pursuant to statute or court order for the production of evidence or the discovery thereof; or in the event of a claim or litigation between the covered person and the health carrier where the data or information is pertinent, regardless of whether the information is in the form of paper, is preserved on microfilm, or is stored in a computer retrievable form.		Diagnosis, treatment,
420-J:11 Confidentiality of Insurance Department Records under Title XXXVII. Insurance	All information, documents and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to RSA 400-A:37, and, unless otherwise provided in this chapter, all information reported and maintained pursuant to this chapter shall be given confidential treatment and shall not be made public by the commissioner or any other person, except to insurance departments of other states, unless the commissioner after consultation with the affected parties, determines that the interest of policyholders, shareholders, or the public will be served by the publication thereof, in which event the commissioner may disclose all or any part thereof in such manner as the commissioner may deem appropriate.		Insurance, policyholders
436:123 Confidentiality under Title XL. Agriculture, Horticulture and Animal Husbandry	II. With the exception of the state and federal veterinarians, acting in their official capacity, state board members and agents of the board shall not make available to any other regulatory or enforcement agency not involved in the program, or to the public, information obtained in the course of such help or inspection unless:		veterinarians

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
463:9 Confidentiality of Proceedings under Title XLIV. Guardians and Conservators	II. Records, reports, and evidence submitted to the court or recorded by the court shall be confidential insofar as they relate to the personal history or circumstances of the minor and the minor's family. For cause shown, the court may authorize disclosure under such terms and conditions as the court may deem appropriate.		
471-C:20, VII Notice and Publication of Lists of Abandoned Property, under Title XLVI	Any information or records required to be furnished to the division of abandoned property shall be confidential except as is otherwise necessary in the proper administration of this chapter. Notwithstanding any other provision of law, any identifying information set forth in any report, record, claim, or other document submitted to the treasurer pursuant to this chapter concerning unclaimed or abandoned property is a confidential record and shall be made available for public examination or copying only in the discretion of the treasurer or the treasurer's designee.		Abandoned Property
485-A:18 Investigation and Inspection; Records under Title L. Water Management and Protection	III. Any other provisions of law notwithstanding, upon a showing satisfactory to the department by any person that any record, report, or information or any particular part thereof, to which the department has access, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the department shall consider such record, report, information or particular part thereof confidential, and it shall thereafter not be disclosed to the public. All financial information shall be considered confidential for purposes of this chapter. Nothing in this section shall preclude the department from transmitting any such confidential information to any agency of the United States having jurisdiction over water pollution, provided that such agency is authorized by law to maintain the confidentiality of such information and agrees to maintain the confidentiality of any such information. In no case, however, shall effluent data, standards or limitations, names or addresses of permit applicants or		Trade secrets, environment

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
	permittees, nor permit applications or permits be considered confidential information.		
490-C:5-b Confidentiality and Disclosure of Information under Title LI. Courts	I. (a) Unless waived by the person to whom the information pertains, the following information, if any, relative to certified guardians ad litem, applicants for certification, and formerly certified guardians ad litem which may be submitted to the board on or in conjunction with application, supplemental application, application renewal, recertification, and reinstatement forms shall be confidential and exempt from the disclosure requirements of RSA 91-A, unless disclosure is required pursuant to an order of the court:		Guardian ad litem
516:36 Witnesses under Title LIII. Proceedings in Court	Written Policy Directives to Police Officers and Investigators. – I. In any civil action against any individual, agency or governmental entity, including the state of New Hampshire, arising out of the conduct of a law enforcement officer having the powers of a peace officer, standards of conduct embodied in policies, procedures, rules, regulations, codes of conduct, orders or other directives of a state, county or local law enforcement agency shall not be admissible to establish negligence when such standards of conduct are higher than the standard of care which would otherwise have been applicable in such action under state law. II. All records, reports, letters, memoranda, and other documents relating to any internal investigation into the conduct of any officer, employee, or agent of any state, county, or municipal law enforcement agency having the powers of a peace officer shall not be admissible in any civil action other than in a disciplinary action between the agency and its officers, agents, or employees. Nothing in this paragraph shall preclude the admissibility of otherwise relevant records of the law enforcement agency which relate to the incident under investigation that are not generated by or part of the internal	Until an internal investigation produces information that results in the initiation of disciplinary process, public policy requires that internal investigation files remain confidential, see RSA 516:36, II (1997); *Fenniman*, 136 N.H. at 626, 620	Internal investigation, personnel, law enforcement,

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
	investigation. For the purposes of this paragraph, "internal investigation" shall include any inquiry conducted by the chief law enforcement officer within a law enforcement agency or authorized by him.	A.2d at 1041, and separate from personnel files. See RSA 275:56; RSA 516:36, II; N.H. Admin. Rules, Lab 802.07. *Pivero v. Largy*, 143 N.H. 187, 191 (1998)	
519-B:8 Confidentiality and Admissibility under Title LIII. Proceedings in Court	I. Except as provided in this section, all proceedings before the panel, including its final determinations, shall be treated as private and confidential by the panel and the parties to the claim. (a) The findings and other writings of the panel and any evidence and statements made by a party or a party's representative during a panel hearing are not admissible in court and shall not be submitted or used for any purpose in a subsequent trial and shall not be publicly disclosed except as follows: (1) Any testimony or writings made under oath may be used in subsequent proceedings for purposes of impeachment. (2) The party who made a statement or presented evidence may agree to the submission, use, or disclosure of that statement or evidence. (b) If the panel findings as to both questions under RSA 519-B:6, I(a) and (b) are unanimous and unfavorable to the defendant, the findings are admissible in any subsequent trial of the medical injury case. (c) If the panel findings as to any question under RSA 519-B:6, I are unanimous and unfavorable to the plaintiff, the findings are admissible in	RSA 519-B:8, I(a), and III, have been held unconstitutional in the case of *In re Southern New Hampshire Medical Center* 164 N.H. 319 (2012),	proceedings

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
	any subsequent trial of the medical injury case. II. The confidentiality provisions of this section shall not apply if the findings were influenced by fraud. III. The deliberations and discussion of the panel and the testimony of any expert, whether called by a party or the panel, shall be privileged and confidential, and no such person may be asked or compelled to testify at a later court proceeding concerning the deliberations, discussions, findings, or expert testimony or opinions expressed during the panel hearing, unless by the party who called and presented the nonparty expert, except such deliberation, discussion, and testimony as may be required to prove an allegation of fraud.		
522:1 Authority for Test under Title LIII. Proceedings in Court	I. In a civil action in which paternity is a contested and relevant issue, the mother, child, and putative father shall submit to blood, tissue typing, and/or genetic marker tests which may include, but are not limited to, tests of red cell antigens, serum proteins, and deoxyribonucleic acid (DNA) analysis. The genetic samples collected shall be subject to safeguarding and confidentiality procedures and used exclusively for purposes of paternity testing. Testing shall be ordered as follows:		DNA
651-C:2 DNA Analysis Required under Title LXII. Criminal Code	IV. The division may contract with third parties for the purposes of this subdivision. Any DNA sample sent to third parties for analysis shall be coded to maintain confidentiality concerning the donor of the sample.		DNA
RULE 40. PROCEDURAL RULES OF COMMITTEE ON JUDICIAL	(a) Except as provided in this section, all proceedings before the committee, and all information, communications, materials, papers, files, and transcripts, written or oral, received or developed by the committee in the course of its work, shall be confidential. No member of the committee or its staff and no employee of the committee shall disclose such proceedings,		Judicial conduct

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
CONDUCT under Rules of the Supreme Court of the State of New Hampshire	information, communications, materials, papers, files, or transcripts, except in the course of official duty and as otherwise authorized in this section. [NOTE – see conditions set forth in subsections (b)-(j)].		
RULE 8-2. CONFIDENTIALITY OF REPORTS under New Hampshire Superior Court Administrative Rules	Each probation report shall be kept in a sealed envelope which shall be resealed after use, and shall not be examined without permission of the Court, or as required by statute		Probation
Family Division Rule 5.8 CONFIDENTIALITY under New Hampshire Circuit Court Rules	The existence of a guardianship case or the fact that a guardianship hearing is on the docket is not confidential. However, guardianship hearings shall be closed to the public, except for persons other than the parties, their counsel, witnesses and agency representatives whom the Court may, in its discretion, admit. Records, reports and evidence shall be confidential to the extent that they contain information relating to the personal history or circumstances of the minor and the minor's family. If any person other than a party wishes to review a case file, a motion must be filed and submitted to the Court for consideration		Guardian, minor, ward
PROTOCOL 5. CONFIDENTIALITY under New Hampshire Court Rules	All parties, witnesses, and others present shall be advised by the court, pursuant to RSA 169-C:25 II, that it shall be unlawful to disclose information concerning the hearing that may identify a child or parent who is involved in the hearing without the permission of the court. Any person who knowingly violates this provision shall be guilty of a misdemeanor.		Child, negligence, abuse
GUIDELINE II. RECORDS SUBJECT TO	The public right of access to specific court records must be weighed and balanced against nondisclosure interests as established by the Federal and/or New Hampshire Constitution or by statutory provision granting or requiring		Public access

APPENDIX F New Hampshire Statute, Court Decisions, and Court Rules Making Information Confidential or Non-public			
Statutory Exemptions	Key Text/Summary	Case Law	Key Terms
INSPECTION under New Hampshire Court Rules	confidentiality. Unless otherwise ordered by the court, the following categories of cases shall not be open to public inspection: juvenile cases (delinquency, CHINS, abuse/ neglect, termination of parental rights, adoption); pending or denied application for search or arrest warrants; grand jury records; applications for wire taps and orders thereon; and any other record to be kept confidential by statute, rule or order. Before a court record is ordered sealed, the court must determine if there is a reasonable alternative to sealing the record and must use the least restrictive means of accomplishing the purpose. Once a court record is sealed, it shall not be open to public inspection except by order of the court.		

APPENDIX H

CHAPTER 33-A
DISPOSITION OF MUNICIPAL RECORDS

Section 33-A:1

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 Authority Granted. – [Repealed 1977, 358:7, I, eff. July 1, 1977.]

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.
XXVIII. 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 50 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 50 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: as required by attorney general and union contract and town personnel rules.
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) Domicile affidavit: 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. Aug. 29, 2005. 2006, 119:2-5, eff. May 12, 2006. 2010, 172:1-3, eff. Aug. 16, 2010; 191:1, eff. Aug. 20, 2010. 2012, 113:1, eff. May 31, 2012; 284:13, eff. Sept. 1, 2015. 2014, 319:1, eff. Sept. 30, 2014. 2015, 4:1, eff. July 4, 2015.

Section 33-A:4

33-A:4 Disposition Schedule. – [Repealed 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. – Electronic records as defined in RSA 5:29, VI and designated on the disposition schedule under RSA 33-A:3-a to be retained for more than 10 years shall be transferred to paper or microfilm, or stored in portable document format/archival (PDF/A) on a medium from which it is readily retrievable. Electronic records designated on the disposition schedule to be retained for less than 10 years may be retained solely electronically if so approved by the record committee of the municipality responsible for the records. The municipality is responsible for assuring the accessibility of the records for the mandated period.

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

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.

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