



# WORKSHOP

## 2022 Local Officials Workshop

Presented by:

- ▶ Stephen Buckley, Legal Services Counsel
- ▶ Jonathan Cowal, Municipal Services Counsel

May 17, 2022

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## Today's Presenters



**Stephen Buckley**  
*Legal Services Counsel*



**Jonathan Cowal**  
*Municipal Services Counsel*



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# NHMA's Legal Advisory Service

Open 8:30 a.m. - 4:30 p.m.

- Email: [legalinquiries@nhmunicipal.org](mailto:legalinquiries@nhmunicipal.org)
- Phone: 603-224-7447

Provide general legal advice

- Not comprehensive legal review of documents,
- Not drafting individualized ordinances or charters,
- Not reviewing specific applications before local boards,
- Not settle intra-municipal disputes.

Goal: Response w/in 48 hours.

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# Today's Agenda

9:00 am	Welcome - Margaret Byrnes, Executive Director
9:05 am	Program Overview - Steve Buckley
9:10 am	HealthTrust - David Salois
9:20 am	Review of electronic <i>Knowing the Territory</i> - Steve Buckley
9:25 am	Governance & Select Board Authority - Steve Buckley
10:30 am	Break
10:40 am	Governmental Records, Retention of Records, Remedies under the Right-to-Know Law - Jonathan Cowal
11:45 am	Lunch
12:15 pm	ARPA - Katherine Heck
12:45 pm	Legislative Update - Natch Greyes
1:00 pm	Budgeting Essentials - Steve Buckley
1:45 pm	Conflicts of Interest - Jonathan Cowal
2:45 pm	Break
2:55 pm	Right-to-Know Law: Meetings/Nonpublic Sessions - Steve Buckley
3:30 pm	Effective Meetings - Steve Buckley
4:15 pm	Final Questions - Upcoming Workshop Information
4:30 pm	Finish

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# How Do I Ask a Question?



To ask a question:

1. Type your question into the Q&A box. Click Send.  
 Note: Check **Send Anonymously** if you do not want your name attached to your question in the Q&A.
2. If the host replies via the Q&A, you will see a reply in the Q&A window.

Q&A

<b>You asked:</b> What happens when I raise my hand?	18:03
Molly Parker answered: I can take you off of mute.	18:04

Please input your question

Send Anonymously

The chat function for this workshop has been disabled.

In order to ask a question of our host or a panelist, please refer to graphic.

Once your question has been answered, it will then appear under the *Answered* tab.

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## Why HealthTrust?

- Quality, cost-effective, comprehensive benefit plans
- Innovative programs
- Enrollee Services Center
- Slice of Life – Wellness Program
- HealthTrust 360 – Health Management
- Secure Enrollee Portal - [www.healthtrustnh.org](http://www.healthtrustnh.org)
- Transition Care & Survivor Care
- Vision and Hearing Discount Programs





53,270

TOTAL MEDICAL COVERED LIVES



25,983

TOTAL MEDICAL ENROLLEES

As of January 1, 2022









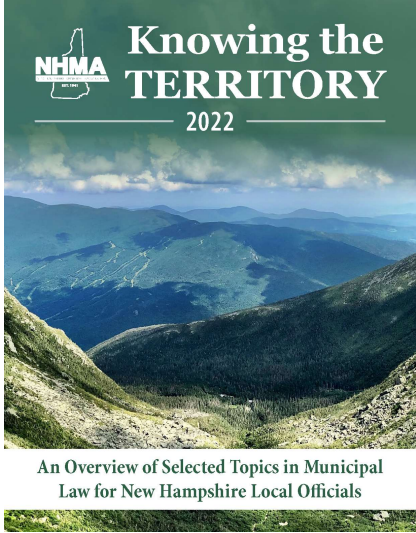






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Knowing the Territory - *Electronic*




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EST. 1941

**Knowing the  
TERRITORY**  
2022

An Overview of Selected Topics in Municipal  
Law for New Hampshire Local Officials

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**NHMA**  
NEW HAMPSHIRE MUNICIPAL ASSOCIATION  
EST. 1941

**Governance & Select  
Board Authority**

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## Types of Governmental Entities



Cities - 13, Operate via a Charter

Towns - 221, Traditional, SB2 or Charter

Village Districts - 105, special purposes

School Districts

Counties

Intergovernmental Agreements - RSA 53-A

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## Authority of Towns & Cities

- ✓ No Home Rule: The Legislature grants the power act in particular fields of law, and silence in the law does not imply authority.
- ✓ Statutory Law: Revised Statutes Annotated published by Thomson Reuters, available online:  
<http://www.gencourt.state.nh.us/rsa/html/indexes/default.html>
- ✓ Administrative Rules:  
<http://www.gencourt.state.nh.us/rules/>
- ✓ NH Supreme Court Orders & Decisions:  
<https://www.courts.nh.gov/our-courts/supreme-court/orders-and-opinions>
- ✓ Preemption: Article VI of the U.S. Constitution = Supreme Law of the Land. State statute can occupy a field of law with the intent to supersede local regulation.

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## Separation of Powers

“Governing body” means the select board or town/city council, or board of aldermen; manage prudential affairs - RSA 21:48

“Town” or “legislative body” means the town meeting, town/city council, or aldermen - RSA 21:47

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## Town Meeting is Legislative Body

### ▶ Traditional:

1. Ballot vote: Vote by ballot to elect officers and zoning ordinance (official ballot)
2. Business session; discuss and amend warrant articles and vote on whether to adopt the articles

### ▶ SB2:

1. Divides town meeting into two parts
2. First session - (“Deliberative Session”), for debate and amendments of article language
3. Second session - “Official Ballot Voting Day” voting on all warrant articles and elections
4. If operating budget rejected by voters, SB 2 towns have default budget option

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## Town Meeting Authority








- ▶ Elects town officials
- ▶ Adopts ordinances & budget
- ▶ Petitioned warrant articles

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## Checklist for Adopting Ordinances

-  Authority - Derived from statute, explicit or inherent
-  Preemption? - Does ordinance conflict with Federal or State Statute?
-  Who votes/adopts? - Is ordinance one the meeting can adopt or is the ordinance enactment delegated to another board or body?
-  Procedure - Does the ordinance require notice or hearings before the meeting?
-  Enforcement - Pattern of non-enforcement may = policy of non-enforcement

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**Select Board is Governing Body**

- Select Board must act as a Board
- May have a 5 - member Board

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## Select Board Essential Authority

Executive, managerial, administrative body	Calls annual meeting and posts warrant, RSA Chapter 39	Manages prudential affairs, RSA 41:8
Has financial responsibilities/duties <ul style="list-style-type: none"> <li>• Presents budget</li> <li>• Expenditures, RSA 41:9</li> <li>• Financial duties, RSA 41:9</li> </ul>	Manages public property, RSA 41:11-a/41:14-a	Regulates town highways, RSA 41:11
Manages employment		

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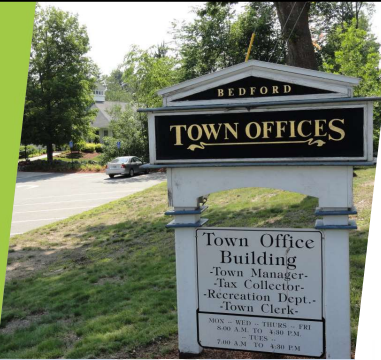


# Select Board & Elections




- ▶ Members of the Select Board are Election Officers. RSA 652:14.
- ▶ NH Constitution requires the attendance of the entire select board during voting and vote tabulation at a State General Election. As for town and school district elections, the presence of the entire select board is not mandated, but it is recommended.
- ▶ The Select Board shall provide for a suitable place in which to hold state and town elections and shall see that the same is “warmed, lighted, and furnished with proper supplies and conveniences.” RSA 658:9
- ▶ Along with the clerk and the moderator, the Select Board constitute the Board of Recount. RSA 669:32.

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BEDFORD  
**TOWN OFFICES**  
 Town Office Building  
 -Town Manager-  
 -Tax Collector-  
 -Recreation Dept.-  
 -Town Clerk-  
 MON. - WED. - THURS. - FRI.  
 8:00 A.M. TO 4:00 P.M.  
 SAT. - SUN. - HOLIDAYS  
 7:00 A.M. TO 4:00 P.M.



HENNIKER TOWN HALL

NHMA  
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 EST. 1941

## Town Administrator

v.

## Town Manager

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## Supervisory Authority Over Certain Key Officials



- **Road Agent - RSA 231:65**  
The selectmen may supervise the methods and manner of performance of such agents.
- **Appointed Police Chief - RSA 105:2-a**  
Direct and control all employees in their normal course of duty and shall be responsible for the efficient and economical use of all department equipment.
- **Appointed Fire Chief - RSA 154:5**  
Direct and control all employees in their normal course of duty and shall be responsible for the efficient and economical use of all department equipment

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## Select Board Relationship with Other Elected Officials, Generally



- ▶ No Interference
- ▶ Cooperation
- ▶ Statutory Term and Duties

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2022 Local Officials Workshop



**HealthTrust**

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**Governmental  
Records & The  
Right-to-Know Law**

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## RSA 91-A:4, I: Any Citizen Can Request Records

- ▶ No definition of “citizen” in statute or relevant case-law, but, presumably, at least a New Hampshire citizen.
- ▶ Best practice is anyone who shows up should be assumed to qualify as a “citizen” for the purposes of requesting records.
- ▶ This can make online requests tricky.



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## What They're Requesting Must Be “Reasonably Described”

- ▶ Municipal employees must know what they are looking for in the voluminous materials kept by the municipality.
- ▶ Municipal employees do have an obligation to clarify with the citizen what the citizen is requesting. *Salcetti v. City of Keene*, No. 2019-0217 (June 3, 2020) (speaking in *dicta* about a “spirit of collaboration”).
- ▶ This may require a clarifying phone call.



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## Search for Records Must Be Reasonable

- ▶ Whatever record is requested must also be met with a reasonably calculated search by the municipality to uncover the record. *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746 (2011).
- ▶ The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents.
- ▶ This can have major implications in electronic records searches.



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## Three Key Steps

STEP 1: Is it a  
*Governmental Record?*


STEP 2: Is the record  
exempt from disclosure?

STEP 3: Make available  
non-exempt records.



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## Is it a Governmental Record? RSA 91-A:1-a

- 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


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## “Public Body”

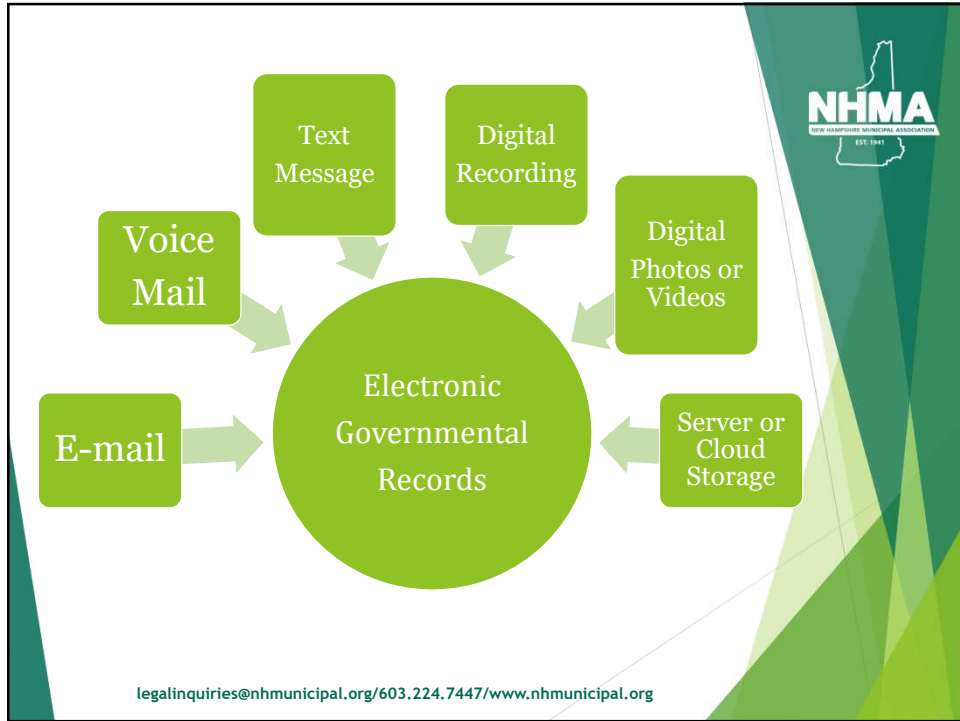
RSA 91-A:1-a, VI:



- Any legislative body, governing body, board, commission, committee of any county, town, municipal corporation, school district, SAU or other political subdivision
- Any committee, subcommittee, advisory committee thereto
- New Case: But a committee of city employees providing advice to planning board applicants is not a public body. *Martin v. Rochester*

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## Mandated Access to Certain Records



Employee separation payments if in addition to regular salary, or accrued vacation or sick time - 91-A:4, I-a



Meeting minute raw materials available after completion of public meeting - 91-A:4, II



All lawsuit settlements on file with town clerk and available for public inspection for 10 years - 91-A:4, VI

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## Exemptions to Disclosure of Governmental Records



### General Standards Governing Exemptions - RSA 91-A:5




- ▶ RSA 91-A:5 provides a list of records categorically exempt from disclosure; master jury list or teacher certification records.
- ▶ Some statutory exemptions require detailed analysis, such as records whose disclosure would constitute invasion of privacy.
- ▶ The Right-to-Know Law's purpose is to provide the utmost information to the public about what its government is up to. If disclosing the information does not serve this purpose, disclosure may not be required.
- ▶ 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 avoid nondisclosure.

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## RSA 91-A:5, IV: Most Common Exemption




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.

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## “Internal Personnel Practices” RSA 91-A:5, IV



- ▶ Applies to governmental records that pertain to rules and practices dealing with employee relations or human resources, including hiring and firing, personnel rules, discipline, compensation and benefits.
- ▶ Recent Reinterpretation of Law by N.H. Supreme Court
- ▶ Formerly: “Internal Personnel Practices” was a fairly broad category separate and apart from any privacy balancing test.
  - ▶ Includes: Evaluation sheets for potential employees and answers; investigation reports of investigators hired by employers to investigate employees.
- ▶ Now: “Internal Personnel Practices” is another privacy balancing test.

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## Union Leader v. Salem Describes Privacy Balancing Test

If governmental records are properly classified as “internal personnel practices” then whether such records are subject to disclosure depends on evaluating whether that disclosure would constitute an invasion of privacy.

- ▶ *First, evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.*
- ▶ *Second, assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.*
- ▶ *Finally, balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.*

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## Wide Reaching Implications? *Provenza v. Canaan*


- ▶ Provenza sought to prevent the public disclosure of an internal investigative report that had exonerated him from a claim of excessive force arising out of a traffic stop.
- ▶ **Superior Court concluded that:**
  - ▶ Information concerning purely private details someone who works for the government is very different from details concerning the individual's conduct as a government employee.
  - ▶ Compelling public interest supporting release of the internal investigation
    - ▶ Are citizen complaints about police officer conduct taken seriously?
    - ▶ Was the internal investigation process fair the Provenza?
    - ▶ Transparency over police conduct investigations helps ensure public confidence in local police departments

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## “Confidential, Commercial or Financial Information”




- ▶ This determination must be made objectively and should not be based on the subjective expectations of the party generating it.
- ▶ The emphasis 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.

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## “Other Files Whose Disclosure would be an Invasion of Privacy”



<b>Private</b>	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.
<b>Public</b>	Assess the public’s interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
<b>Balance</b>	Balance the public’s interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure.

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## Drafts & Notes

**Preliminary Drafts - RSA 91-A:5, IX -**


- “[N]ot in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.”

**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.”




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## Law Enforcement Records? *Use FOIA*


- ▶ Factor A: Interfere with law enforcement proceedings
- ▶ Factor B: Interfere with fair trial
- ▶ Factor C: Invasion of privacy
- ▶ Factor D: Confidential sources
- ▶ Factor E: Disclosing investigative techniques and procedures
- ▶ Factor F: Endangering life or safety



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## Body Worn Cameras (BWCs)



RSA 105-D

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RSA 91-A:5: Recordings exempt from disclosure, unless

Restraint/use of force	Discharge of firearm	Felony-level arrest
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↓

... unless it constitutes an invasion of privacy or is otherwise exempt from disclosure

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## IT Security



As of Aug. 4, 2020, RSA 91-A:5 was amended by adding a new paragraph XI, providing that records pertain to information technology systems are exempt from disclosure under the Right-to-Know Law if release of those records would disclose security details that would aid an attempted security breach or circumvention of law.

↓

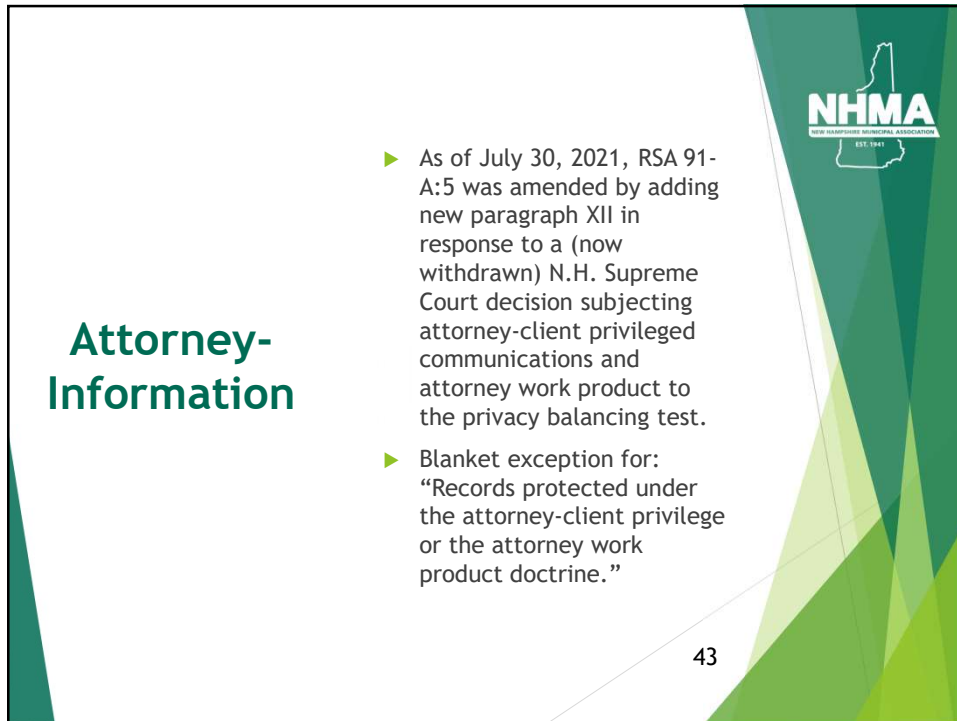
Very limited exemption. Applies, essentially, to the security protocols and measures installed on municipally owned systems.

↓

Attempt to limit hackability of municipal systems.

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## Attorney-Information

- ▶ As of July 30, 2021, RSA 91-A:5 was amended by adding new paragraph XII in response to a (now withdrawn) N.H. Supreme Court decision subjecting attorney-client privileged communications and attorney work product to the privacy balancing test.
- ▶ Blanket exception for: “Records protected under the attorney-client privilege or the attorney work product doctrine.”

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## Make Non-Exempt Records Available

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## Basics of Record Production



Records must be provided immediately *only* when they are immediately available for release.



RTK *does not* give citizens the right to review records in any quantity and wherever kept immediately upon demand.



Requiring appointment to review records is permitted.



RTK does not require document "compilation."

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## Before Providing Records: Redact Exempt Information



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# No Flat Fees!





- ▶ **ONLY Reasonable fees are allowed!**
- ▶ RSA 91-A:4, IV
- ▶ FIFTY CENTS PER PAGE FOR FIRST 10 PAGES, AND THEN TEN CENTS PER PAGE DEEMED REASONABLE.  
*MARTIN V. ROCHESTER,*  
173 NH 378 (2020)

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## A Note About Fees & Electronic Records...



- ▶ 91-A:4, IV: . . . . 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.
- ▶ Green v. SAU #55: Electronic Records Produced Electronically.
- ▶ Taylor v. SAU #55: School Administrative Unit's policy requiring use of a thumb drive to produce electronic records was valid under The Right-to-Know Law.

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# How Much Time To Produce Records?

We have 5 days...



...right?

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## “Something” w/in 5 Days

- ▶ As of Jan. 1, 2020, municipalities must:
  - ▶ Provide a written statement of time necessary to determine whether request granted or denied; AND
  - ▶ *Provide a reason for the delay!*
  - ▶ Amendment to RSA 91-A:4, IV - HB 396 - 2019 NH Laws Chapter 107
- ▶ NHMA Suggestion for Reason for Delay -
  - ▶ Need time to determine whether or not record exists;
  - ▶ Need time to determine whether it is disclosable;
  - ▶ If disclosable, need time to determine how much time it will take to make the requested records ready for review or copying.

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## Records Retention



-  RSA 33-A:3-a contains 156 categories of records to be retained.
-  Records retained for the prescribed period.
-  Once the retention period has expired records may be discarded, but if still available must be produced.

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## Archive Paper Records in PDF/A?

*Any* municipal records in paper form listed in RSA 33-A:3-a may be transferred to electronic form (PDF/A Format ONLY), and the original paper records may be disposed of as the municipality chooses.


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## 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.

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## How are Violations of RSA Chapter 91-A Enforced?




-  No enforcement agency (currently)
-  “Aggrieved person”
-  Lawsuit
-  RSA 91-A:7, :8

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## Remedies for Violations



- ▶ Attorney’s fees and/or costs to petitioner
- ▶ Invalidation of an action
- ▶ Civil penalty against an individual officer, employee, or other official for bad faith violations
- ▶ Injunction
- ▶ Remedial training
- ▶ Knowing destruction: misdemeanor
- ▶ 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

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# Main Takeaways



Every citizen can request records. \*

The record request must be “reasonably described.” RSA 91-A:4, IV.

Any search for records must be reasonably calculated to uncover relevant documents.

There is no obligation to compile, cross reference or assemble records.

Requiring a citizen make an appointment to review records is permitted.

When denying access provide written reasons.

Redact exempt information

Reasonable fees allowed

Is it really deleted? RSA 91-A:4, III-b

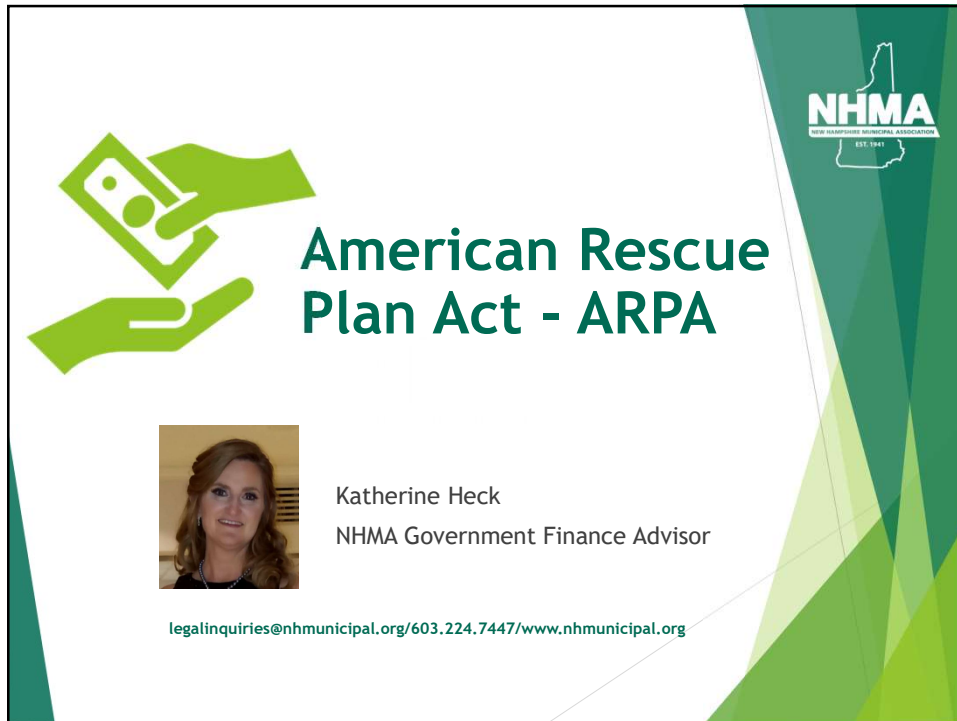
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# 2022 Local Officials Workshop





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**American Rescue Plan Act - ARPA**





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NHMA Government Finance Advisor

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**Presentation Goals**


-  Introduction
-  NH ARPA Allocations
-  Timeline
-  Eligible Uses
-  Update: Treasury's Final Rule
-  Compliance Standards



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# TREASURY'S GUIDING PRINCIPLES




- Accountable
- Transparent
- User friendly reporting
- Focused on Recovery

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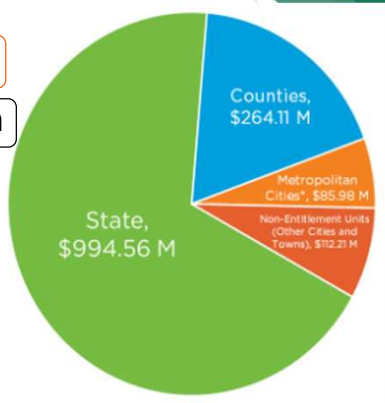
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# NH ARPA ALLOCATIONS



**Allocations**

- State: \$ 994.56 Million
- Counties: \$ 264.11 Million
- Metro Cities: \$ 85.98 Million
- Towns (NEU): \$ 112.21 Million

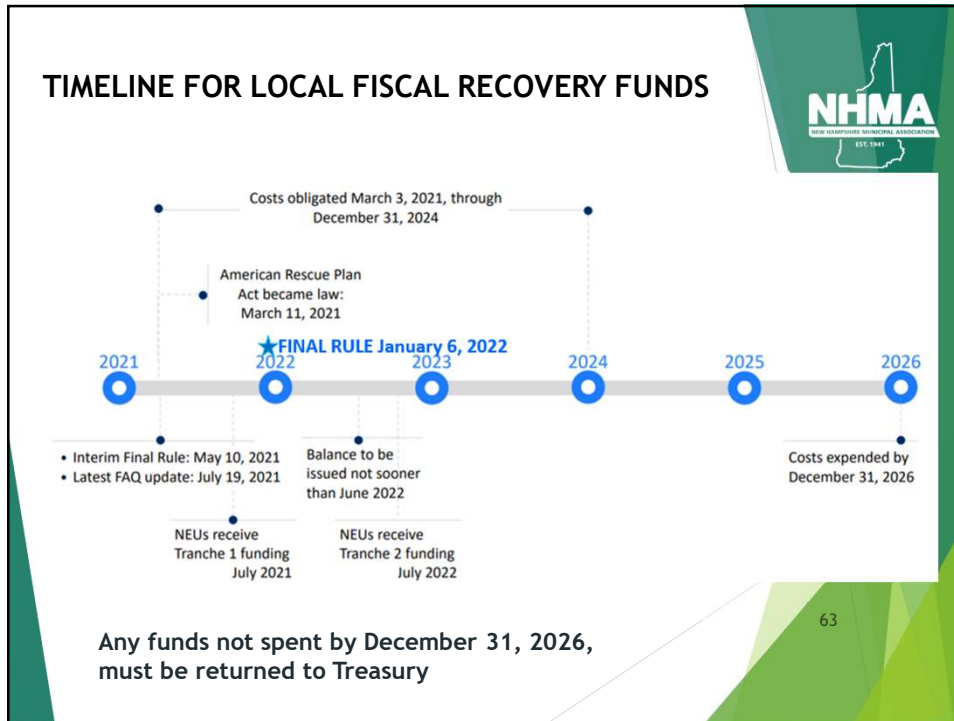


“Metropolitan Cities” in New Hampshire include Dover, Manchester, Nashua, Portsmouth, and Rochester.

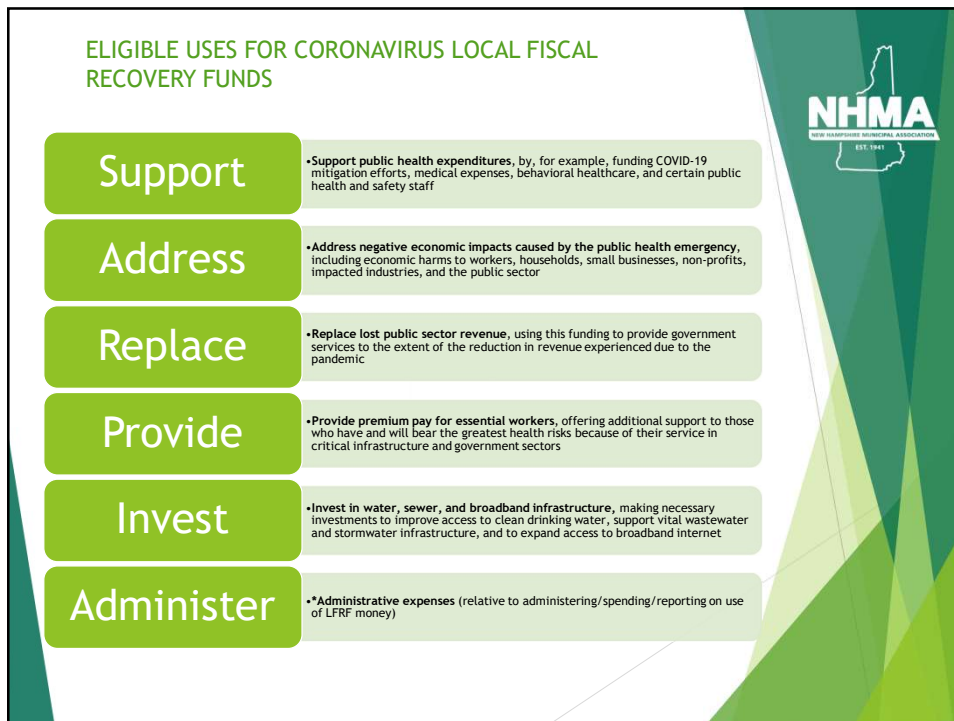
Chart: New Hampshire Fiscal Policy Institute

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# Treasury's Final Rule




## Key Changes

- 
**Replacing Lost Public Sector Revenue**
  - Standard Allowance of \$10 million
- 
**Public Health and Economic Impacts**
  - Capital Expenditures
  - Impacted and those Disproportionately effected
- 
**Water, Sewer, & Broadband Infrastructure**
- 
**Premium Pay**

**\*Final Rule Effective Date – April 1, 2022**

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# Lost Revenue




- Revenue Loss provision provides broad flexibility.
  - Simplified reporting requirements
  - Choose either the standard \$10 million allowance or the regular formula
- Focus on the long-term value of investments and stability.
- One-time infusion of resources for one-time non-reoccurring expenditures.
- Cities and Towns can spend revenue loss funding on any traditional government service.

Government services can include, but are not limited to, maintenance or pay-go funded building of infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; school or educational services; construction of schools and hospitals; and the provision of police, fire, and other public safety services.

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# Final Rule: Prohibited Expenditures





**Restrictions on Use**

- No Payments to Elected Officials/Volunteers under Premium Pay
- No deposits into pension funds
- No debt service
- No replenishing financial reserves/capital reserves
- No satisfaction of settlements and judgments
- SLFRF funds may not be used for a project that conflicts with or contravenes the purpose of the American Rescue Plan Act statute


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# 4 Key Principles for Effective Compliance





1. Recipients/sub-recipients are responsible for ensuring funds used properly & no fraud, waste or abuse of the intended purposes



2. Funding is intended to swiftly/effectively meet urgent needs.  
*But* has to be balanced with maintaining robust documentation & compliance program

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## Key Principles for Effective Compliance- Continued



3. Projects should advance shared interests & promote equitable delivery of government benefits & opportunities to underserved communities, on advancing racial equity & support for underserved communities through federal funding.



4. Transparency & public accountability of funds expended = program integrity & trust in government.

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## Terms and Conditions



### Parts 1D and 1E: Uniform Administrative Requirements and Award Terms and Conditions

SLFRF recipients must follow the Uniform Administrative Requirement, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Part 200) and the Terms and Conditions of the SLFRF assistance.

- Allowable Activities
- Allowable Costs/Cost Principles (such as administrative costs and salaries and expenses)
- Cash Management
- Eligibility
- Subrecipient Monitoring
- SAM.gov Requirements
- Recordkeeping Requirements
- Single Audit Requirements
- Civil Rights Compliance

U.S. DEPARTMENT OF THE TREASURY  
The Office of Recovery Programs

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## U.S. Treasury Resources

► U.S. Department of Treasury Compliance and Reporting Landing Page: SFRF Project and Expenditures Report User Guide (January 24, 2022)

► <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds/recipient-compliance-and-reporting-responsibilities>

► U.S. Department of Treasury Landing page for NEU's:

► <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-fund/non-entitlement-units>

► Introductory overview of SFRF Compliance and Reporting Guidance for NEU's- [presentation](#) and recorded [webinar](#)

► For NEU grant managers: Step-by-step guidance on account creation, roles, and agreements/supporting docs submission for NEU: [NEU Intro to Reporting](#)

► NEU and Non-UGLG Agreements and Supporting Documents User Guide (December 14, 2021)

► Compliance and Reporting Guidance (November 15, 2021)

► NHMA

<https://www.nhmunicipal.org/american-rescue-plan-act-2021-information-page>

► NLC's COVID-19 Hub

<https://www.nlc.org/covid-19-pandemic-response>



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## Legislative Update



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# Budgeting Essentials

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## The Budget Process: Key Players

- ▶ Legislative Body
- ▶ Governing Body
- ▶ Budget Committee: Advisory v. Official



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## The Legislative Body

- ▶ Approves all appropriations
- ▶ Votes to create and fund common municipal funds
- ▶ Citizen authority to propose appropriations by petition
- ▶ May amend separate articles to reduce or zero out appropriations
- ▶ May amend budget to reduce (or increase) total bottom line appropriation
- ▶ Can zero out line item appropriations in DRA budget form

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## Governing Body

- ▶ Prepares warrant, drafts separate warrant articles
- ▶ Pay all sums of money received to the town treasurer
- ▶ Prepare manifest to pay all town expenses
- ▶ Maintain records of all town financial transactions
- ▶ Publish in annual report, the general fund balance sheet based upon audited financial statements
- ▶ Establish and maintain appropriate internal control procedures
- ▶ Annually review and adopt an investment policy
- ▶ Ensure all funds totaling \$500 or more are remitted by departments, town clerk and tax collection to the treasurer
- ▶ Submit proposed budget to the Budget Committee or Town Meeting.

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## Budget Committee


- ▶ Review current year's expenditures
- ▶ Review proposals, request information
- ▶ Prepare budget
- ▶ Schedule and hold budget hearings
- ▶ Forward final proposed budget to governing body
- ▶ **Does not control spending**
- ▶ 10% Rule in towns with official budget committee

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## Procedural Requirements for Valid Appropriations (Budget Creation)

- ✓ Public budget hearing
- ✓ Disclosure of purpose and amounts at hearing
- ✓ Disclosure of default budget at first budget hearing
- ✓ Budgeting on gross basis
- ✓ Recommendations
- ✓ Warrant Notice
- ✓ Listing of all appropriations and separate warrant articles on posted budget

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## Other forms of Spending

- ▶ Transfers, RSA 32:10
- ▶ Legal judgments, RSA 32:9
- ▶ DRA permission, RSA 32:11
- ▶ Spending prior to town meeting, RSA 32:13
- ▶ Unanticipated revenue, RSA 31:95-b
- ▶ Capital reserve/trust funds
- ▶ Other statutory funds
- ▶ Certain multi-year appropriations

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## Lapse of Appropriations RSA 32:7

- ▶ All appropriations lapse at the end of the fiscal year and any unexpended portion thereof shall not be expended without further appropriation, **UNLESS**:
  - Encumbered by legally-enforceable obligation;
  - Placed in nonlapsing fund: e.g., conservation fund;
  - Appropriated to a capital reserve fund;
  - Amount is raised through bonds or notes (then lapses upon completion of purpose);
  - Money received from state, federal, or private grant (then nonlapsing for as long as program rules)
  - Special warrant article:
    - Governing body can vote to encumber for one year; OR
    - Article was labeled as nonlapsing by meeting (specifies lapse, up to 5 years).

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## Common Municipal Funds

- ▶ Reserve Funds
- ▶ Special Revenue Funds
- ▶ Revolving Funds
- ▶ (Private) Trust Funds

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## SB 2 & The Default Budget: RSA 40:13

- Governing body calculates, unless delegated to budget committee
- As long as statutory formula is used, default budget may be higher or lower than last year's budget\*
- Default budget is amount of the same appropriations as contained in the operating budget authorized for the previous year . . .
  - reduced and increased, as the case may be, by debt service, contracts, and other obligations previously incurred or mandated by law, and
  - reduced by one-time expenditures contained in the operating budget and by *salaries and benefits of positions that have been eliminated in the proposed budget*. RSA 40:13, IX(b).

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## Conflicts of Interest

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## It All Begins with “Ethics”

“Ethics” are hard to pin down and mean different things to different people, but generally:

- Avoiding conflicts of interest
- Disclosing financial interests
- Avoiding criminal behavior, following state & local law
- Respecting confidentiality
- Not abusing authority
- Treating people fairly and equally
- Honesty, integrity, and trustworthiness
- Avoiding the appearance of impropriety

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## Few Statutory Rules

- ▶ Incompatibility statutes contain clear rules, but they're not the *only* ethical rules.
- ▶ Case law does provide a number of examples not contained in statute, but even that isn't complete.
- ▶ Ethical Golden Rule:
  - ▶ If you were to read about the same scenario occurring somewhere else in a newspaper, would you feel good about everyone who participated?
    - ▶ If the answer is "no," then take steps to correct the problem.

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## Incompatibility

Whether the person can hold a particular office in the first place:

- ▶ 669:7 (general)
- ▶ 673:7 (land use boards)
- ▶ 32:15 (budget committee members)
- ▶ Other statutes
- ▶ Local ordinances (which we will talk more about later)
- ▶ Common law: positions may be incompatible even if not stated in a statute—whenever two positions bear a special relationship to each other, one being subordinate to and interfering with the other, with inconsistent loyalties or responsibilities, then one person cannot legally hold both positions. *Cotton v. Phillips*, 56 N.H. 220 (1875).



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## When Do Conflicts of Interest Arise?

- ▶ A conflict of interest exists if “an official has a direct interest in the outcome of a proceeding, *see State ex rel. Thomson v. State Bd. of Parole*, 115 N.H. 414, 422, 342 A.2d 634, 639 (1975), or any “conne[ct]ion with the parties in interest, as would be likely, improperly, to influence [his or her] judgment,” *New Hampshire Milk Dealers’ Ass’n v. Milk Control Board*, 107 N.H. 335, 338, 222 A.2d 194, 198 (1966) (quotation omitted). *Appeal of City of Keene*, 141 N.H. 797, 801, 693 A.2d 412, 415 (1997).
- ▶ The direct interest is:
  - personal or financial.
  - immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative.
- ▶ The idea is that one person cannot serve two masters at the same time.
- ▶ RSA 95:1- Public Officials Barred From Certain Private Dealings  
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## Areas That Tend to Present Conflicts:

- ▶ Prejudgment. An abutter to land that is the subject of an application before a land use board.
- ▶ Employment relationship, which is connected to the financial interest in the outcome. Just like the financial interest, the employment relationship must create an immediate/definite conflict. The mere existence of the employment relationship is not going to be sufficient.
- ▶ Family relationships: Not necessarily a conflict. *Webster v. Candia*, 146 N.H. 430 (2001).

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## What if the Official Participates Anyway?

Whether an official is disqualified, and what the consequences of a disqualified member's participation are depends on whether the decision was legislative or quasi-judicial.

<p><b>“Legislative” decisions</b></p> <ul style="list-style-type: none"> <li>• Court will only invalidate the action if the person with the conflict cast the deciding vote.</li> </ul>	<p><b>“Quasi-Judicial” decisions</b></p> <ul style="list-style-type: none"> <li>• Court will automatically invalidate the decision and remand the decision to the board with instructions to begin again, without the disqualified person.</li> </ul>
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Courts resolve “conflict of interest” disputes by examining the type of action taken + the facts.

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## Difference Between Legislative vs. Quasi-Judicial



<p><b>Legislative</b></p> <ul style="list-style-type: none"> <li>▶ Widely felt</li> <li>▶ Policy decisions</li> <li>▶ Must act in public's interest, but don't need to be “indifferent”</li> </ul>	<p><b>Quasi-Judicial</b></p> <ul style="list-style-type: none"> <li>▶ Affect rights of specific petitioner</li> <li>▶ Notify &amp; hear parties</li> <li>▶ Weigh evidence</li> <li>▶ Must be indifferent</li> </ul>
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## Juror Disqualification Standard: RSA 500-A:12

A juror is disqualified if the juror is “not indifferent” because he or she:

- ▶ Expects to gain or lose upon the disposition of the case;
- ▶ Is related to either party;
- ▶ Has advised or assisted either party;
- ▶ Has directly or indirectly given his opinion or has formed an opinion;
- ▶ Is employed by or employs any party in the case;
- ▶ Is prejudiced to any degree regarding the case; or
- ▶ Employs any of the counsel appearing in the case in any action then pending in the court.

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## Recusal vs. Abstaining



**Recuse:** Immediately remove from discussion and voting



**Abstain:** does not vote



Recusing is the remedy for avoiding conflict, not abstaining

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## Ethical Violations and Conflicts of Interest



- ▶ Could be criminal
  - ▶ RSA 640- bribery, threatening harm to influence someone's actions
  - ▶ RSA 643- official oppression, failing to carry out a duty while purporting to be acting officially with the purpose of benefitting oneself or others. Misuse of information, insider trading.
- ▶ Could result in removal from office
  - ▶ Requires judicial intervention

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## Local Conflicts of Interest Ordinances - RSA 31:39-a



- ▶ Adopted by legislative body (town meeting/city council).
- ▶ Regulate conflicts of interest for officers (elected or appointed) & employees.
- ▶ May require financial disclosures by officers and employees.
- ▶ May enact more stringent incompatibility standards.
- ▶ May provide for conditions that warrant removal from office with the Superior Court having sole jurisdiction over the removal process.

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## Governmental Meetings & The Right-to-Know Law

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## RSA chapter 91-A is just the floor

- ▶ If the rules of procedure of any public body require a broader public access to official meetings or records then those provisions will govern.
- ▶ RSA 91-A:2, II

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## What is a Public Meeting?

### RSA 91-A:2

Quorum

Public body

Convenes so that they can communicate contemporaneously





To discuss or act upon a something over which the public body has supervision, control, jurisdiction, or advisory power

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## What is *not* a “Meeting”?

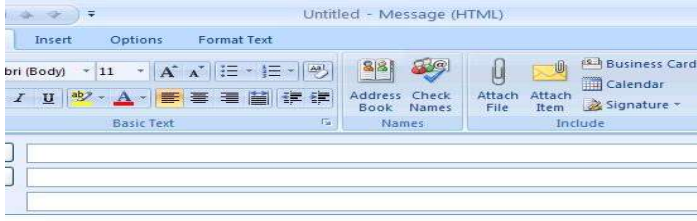
(i.e. “non-meeting”)

-  Social or other encounter, no decisions
-  Collective bargaining
-  Consultation with legal counsel
-  Circulation of draft documents
-  *Different than nonpublic session!*

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## Electronic Communication






- ▶ Avoid substantive discussions via email
- ▶ Circumventing spirit and intent of 91-A
- ▶ “Reply All”
- ▶ Administrative person/BCC line
- ▶ Emails are governmental records

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# What are the requirements of a public meeting?

-  Public notice
-  Open to the public
-  Meeting minutes

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# “Public Notice”



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## “Open to the Public”




- ▶ “All meetings . . . shall be open to the public.” RSA 91-A:2, II.
- ▶ “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.”
- ▶ Public has right to record, etc.
- ▶ No secret ballot voting
- ▶ Public Comment?

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## Switching Back to In-Person Meetings



- ▶ Since the expiration of State of Emergency, boards can still have partially remote meetings
  - ▶ There must be a physical location for the public to attend, and, in most cases,
  - ▶ A quorum of the board must be present at that location.
- ▶ Nothing prohibits boards from continuing to offer electronic access (telephonic, Zoom, etc.) to the public.

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## Option 1: Remote Board Member Participation - RSA 91-A:2, III(a)



- ▶ Public body *may* allow
- ▶ Personal attendance “not practical” (in minutes)
- ▶ Quorum *present at physical location*
- ▶ All board members can hear and be heard
- ▶ Identify board members in remote location
- ▶ All votes by roll call

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## Option 2: “Emergency” - RSA 91-A:2, III(b)



- ▶ Chair must declare that “emergency” exists sufficient to satisfy requirements of RSA 91-A:2, III.
- ▶ Still requires physical location.
- ▶ However, a quorum of the board need not be present at the physical location.
- ▶ Everyone can hear and be heard
- ▶ Identify persons in remote location
- ▶ All votes by roll call


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## What is an “Emergency?” & Notice Requirements

- ▶ “Emergency”: a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body.
- ▶ That presiding officer shall post a notice of the time and place of such meeting as soon as practicable.
- ▶ Further, the presiding officer shall employ whatever further means are reasonably available to inform the public that a meeting is to be held.
- ▶ “Emergency” meetings do not require 24-hour notice posted in 2 public places but should provide as much notice as practical.

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## Nonpublic Sessions RSA 91-A:3

It’s a nonpublic session, not a nonpublic meeting

A nonpublic session is different from a “non-meeting”

Nonpublic session is the exception, not the rule

Nonpublic sessions are permitted, not required

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## When May a Public Body Enter Nonpublic Session?\* RSA 91-A:3, II



- Public employee (specific employee)
- Hiring
- Reputation
- Real or personal property
- Lawsuits
- Emergency preparation
- Discuss legal advice
- Discuss student tuition contract

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\*Most common, but not complete list

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## How Does a Public Body Enter Nonpublic Session?

RSA 91-A:3, I



Motion to enter nonpublic session must be made and seconded.



Motion must state on its face the specific exemption relied upon.



Vote must be by roll call; simple majority is sufficient. RSA 91-A:3, I(b).

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## Disclose or Seal?

- ▶ Minutes must be kept,
- ▶ Minutes must allow public to ascertain who votes in what manner.
- ▶ Minutes must be publicly disclosed within 72 hours unless board determines, by 2/3 vote taken in public session, that:
  - Disclosure would have adverse effect on reputation;
  - Disclosure would “render the proposed action ineffective”; or
  - Discussion in nonpublic session pertained to terrorism.

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## New Requirements - List of Sealed Minutes - Disclosure of minutes related to sale or lease of property.

- ▶ Effective January 1, 2022
- ▶ Create and maintain a list of nonpublic session minutes that have been determined not to be subject to full public disclosure. **Prospective only.** Include date and time of the nonpublic session, the specific exemption under RSA 91-A:3, II, relied upon for the nonpublic session, the date of the decision to withhold the minutes from public disclosure, and the date of any subsequent decision to make the minutes available.
- ▶ Minutes related to a nonpublic session held under RSA 91-A:3, II(d) (consideration of acquisition, sale, or lease of property) shall be made available as soon as possible after the transaction has closed or the public body has decided not to proceed with the transaction

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## Preparation for Meeting

- ▶ Do you have rules of procedure?
- ▶ Chair's role
- ▶ Agenda
- ▶ Circulate materials in advance
- ▶ Read packet, think about comments and questions in advance
- ▶ No discussions prior to/outside meeting!



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## Rules of Procedure: Basic Content

- Regular Meeting Day, Time & Location
- Annual Election of Officers
- Authority of Presiding Officer/Chair
- Duties & Privileges of Board Members
- Quorum & Voting
- Agenda for Board Meetings

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## Rules of Procedure: Basic Content (cont.)

- Order of Business at Board Meetings
- Meeting Procedure and Decorum
- Procedures for Public Hearing, Public Comment
- Right-to-Know Law
- Committees/Liaisons/Appointments
- Enactment of Ordinances, Resolutions & Motions


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## Conducting the Meeting




BE AND START  
ON TIME




CHAIR'S  
RESPONSIBILITIES



APPLY RULES  
OF DECORUM  
EVENLY



ELECTRONIC  
MEDIA DURING  
MEETING




DON'T FORGET  
THE MINUTE-  
TAKER

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- ▶ Paraphrase what the person says.
- ▶ “What I heard you says was . . .”
- ▶ Listening actively can be hard work.



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## Effective Meeting: Respect and Decorum



- ▶ All eyes are on you
- ▶ Pay attention!
- ▶ Electronic media use during meetings



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## Riggins Rules

- ▶ Don't mingle with friends, acquaintances, unknown applicants before the meeting.
- ▶ Don't indicate how you intend to vote during hearings & presentations.
- ▶ Do rotate the seating in some regular manner to prevent a "strong" member from gradually dominating a "weak" member.
- ▶ Don't interrupt a presentation until the question period.
- ▶ Don't use first names in addressing *anyone at all* during the course of the hearing.
- ▶ Don't make anyone appearing before you look like a fool by the nature of your questions or remarks.



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## Riggins Rules (Con't)

- ▶ Do not permit people to leave the podium and approach closer to the hearing body except in unusual circumstances.
- ▶ Don't become involved in neighborhood quarrels.
- ▶ Do not take staff recommendations lightly.
- ▶ Don't try to ease your conscience and toss the applicant a bone.
- ▶ Don't show any displeasure or elation, by word or action, over the outcome of a vote.
- ▶ Do sit down and have a long soul searching session with yourself if you find you are consistently "out in left field."


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## Riggins Rules

- ▶ *Suggested Do's and Don'ts for Conduct of Public Hearings and the Department of Members of Boards, Commissions & Other Bodies.*
- ▶ Authored by Fred Riggins in 1967, former Chairman of the City of Phoenix Planning Commission.
- ▶ <https://plannersweb.com/wp-content/uploads/1994/01/513.pdf>



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## Public Comment


- No right to speak in meeting, unless you give it to them (remember hearings are different)
- Establish & explain rules, apply consistently
- First Amendment: Many restrictions are not acceptable!
- Maintain control & order
  - Removal?



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### Upcoming Workshops and Complimentary Webinars



## INVESTIGATION

### Join Us for Investigations 101 Webinar

12:00 noon - 1:00 pm., Wednesday, May 18, 2022. Join Attorney Talesha Saint-Marc from Bernstein Shur who will examine when municipalities need to conduct an investigation and how to do it.

**BERNSTEIN SHUR**


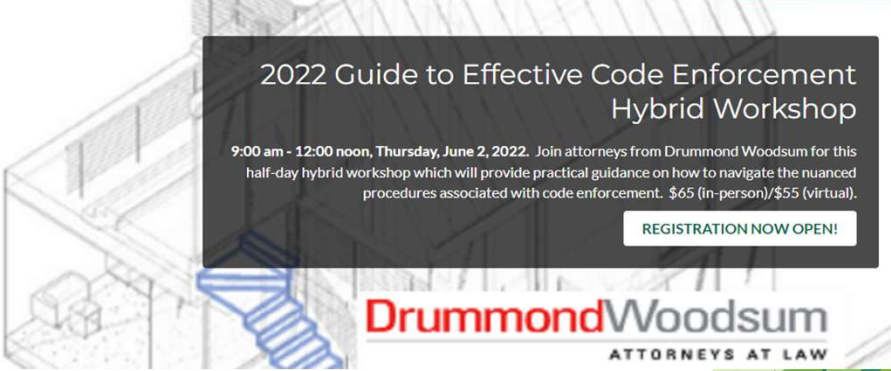
**REGISTRATION NOW OPEN!**

**REGISTER NOW**

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Upcoming Workshops and Complimentary Webinars

**2022 Guide to Effective Code Enforcement Hybrid Workshop**

9:00 am - 12:00 noon, Thursday, June 2, 2022. Join attorneys from Drummond Woodsum for this half-day hybrid workshop which will provide practical guidance on how to navigate the nuanced procedures associated with code enforcement. \$65 (in-person)/\$55 (virtual).

REGISTRATION NOW OPEN!

**DrummondWoodsum**  
ATTORNEYS AT LAW

REGISTER NOW

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Upcoming Workshops and Complimentary Webinars







**2022 Municipal Trustees Training Virtual Workshop**

9:00 am - 3:00 pm, Thursday, June 9, 2022. Costs \$70.00. Municipal trustees—cemetery trustees, library trustees, trustees of trust funds—have important and varied duties and this workshop will give you the tools to perform your duties legally and understandably.

REGISTRATION OPEN!

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Upcoming Workshops and Complimentary Webinars




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**THANK YOU** for attending our workshop **TODAY!**




The New Hampshire Municipal Association is a nonprofit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.

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