



NEW HAMPSHIRE MUNICIPAL ASSOCIATION



Exemptions from Disclosure Under the Right-to-Know Law

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This webinar addresses exemptions from the disclosure requirements for “governmental records” under the Right-to-Know Law.

- RSA 91-A:5 lists categories of records that are exempt from disclosure.
- Other statutes and case law create additional exemptions.

Difference between exemption for records and non-public session

- This discussion is about records that are exempt from disclosure. Whether a meeting be held in non-public session is an entirely different subject.
- Public body cannot necessarily meet in non-public session just because it's dealing with records that are exempt from disclosure.

RSA 91-A:5, I-III — first four exemptions

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- I. Records of grand and petit juries.
 - I-a. The master jury list.
 - II. Records of parole and pardon boards.
 - III. Personal school records of pupils.

These are of little interest to cities and towns (except for school records, in cities that have a dependent school district).

The big one—91-A:5, 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.

“Records pertaining to internal personnel practices”

- Does not exempt all personnel records!
- Clearly exempt: Internal investigation records. *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006); *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993).
- Probably exempt: “Rules and practices dealing with employee relations or human resources . . . such matters as hiring and firing, work rules, and discipline.” *Montenegro v. Dover*, 162 N.H. 641 (2011) (*dictum*, citing federal cases under FOIA).
- Clearly not exempt: Public employee salaries, *Mans v. Lebanon School Board*, 112 N.H. 160 (1972), and retirement benefits, *Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673 (2011).

“Confidential, commercial, or financial information”

Balancing test: Does the public’s interest in disclosure outweigh the privacy interest at stake and the government’s interest in non-disclosure?

“Confidential, commercial, or financial information”

- Example—names and addresses:

Individual requested information about PSNH customers from state Public Utilities Commission. *Held*: Business customers had no privacy interest that prevented disclosure of their names and addresses, but residential customers had an interest in “not being disturbed at home,” and public interest in disclosure of residents’ names and addresses was minimal. *Lamy v. New Hampshire Public Utilities Comm’n*, 152 N.H. 106 (2005).

- Example—property information:

Appraisal cards showing detailed information about land and buildings, including topography, improvements, type of occupancy, construction, computations of value, and sketch of the property, are subject to disclosure. “Nothing in the information would qualify as an invasion of privacy.” *Menge v. City of Manchester*, 113 N.H. 533 (1973).

- Example—property information:

Plaintiff whose property was taken by eminent domain requested state’s appraisal reports with respect to his property and others. *Held*: Other property owners’ privacy interests, as well as state’s interest in its bargaining position, outweighed the interest in disclosure. Appraisal reports may include information about income-producing property, security systems, or trade practices. *Perras v. Clements*, 127 N.H. 603 (1986).

“Test questions, scoring keys, and other examination data”

Self-explanatory. Not likely to be an issue for municipalities, except those that use an examination as part of the hiring process for some positions.

“Personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy”

Personnel—again, not all personnel records are exempt. Only if disclosure would constitute an invasion of privacy.

Compensation information is not exempt; health insurance information presumably is.

“Personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy”

- Medical information—obviously exempt.
- Welfare information—obviously exempt.
See also RSA 165:2-c.
- Library user, videotape sale or rental—may be disclosed under some circumstances.
See RSA 201-D:11, 351-A:1.



TAKE A



POLL!

Quiz Question

- What former federal judge can we thank for the library user and movie rental exemptions?
 - a) David Souter
 - b) William Rehnquist
 - c) Thurgood Marshall
 - d) Robert Bork

“Other files whose disclosure would constitute invasion of privacy”

Again, balance privacy interest against the public’s interest in disclosure.

Confidentiality/invasion of privacy is one of the few areas under RTK Law in which it is better to err on the side of *non*-disclosure.

Other exemptions under 91-A:5

V. Teacher certification records—not relevant.

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.

This is a very narrow exemption—don't abuse it!



Other exemptions under 91-A:5

VII. Unique pupil identification information collected in accordance with RSA 193-E:5—not relevant.

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.

Example—selectman’s personal notes made during a meeting.

Other exemptions under 91-A:5

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.

Example—Planning administrator, or one member of planning board, drafts zoning amendment for board's consideration. Amendment is exempt from disclosure until it is made available to a quorum of the board.

TAKE A



POLL!



Quiz Question

A new member of the Board of Selectmen walks into the office of the Welfare Administrator and demands that she be provided all files of persons who have received local assistance during the past year for her review. Assume the other members of the Board of Selectmen had not approved this inquiry, and are unaware the individual Selectman was going to make the request. Should the Welfare Administrator provide the requested files?

- a) Yes
- b) No

Other statutory exemptions

Many other state and federal statutes either exempt records from disclosure under 91-A or state that records shall not be disclosed.

For list of state statutes, see Appendix E to Attorney General's Right-to-Know Law Memorandum, available at <http://www.doj.nh.gov/civil/documents/right-to-know.pdf>.

Most are not relevant to municipalities.

Other relevant state statutes

RSA 106-H:14 – records related to enhanced 911 system.

RSA 159:6-a – records related to pistol licenses.

RSA 165:2-c – identifying information about local welfare recipients.

Judicially created exemptions

Attorney-client communications

Written communications that are subject to attorney-client privilege are exempt from disclosure. *ATV Watch v. Dep't of Transp.*, 161 N.H. 746 (2011).

But public body may not enter non-public session to discuss such communications unless attorney is present. *Ettinger v. Madison Planning Board*, 162 N.H. 785 (2011).

Judicially created exemptions

Law enforcement files

Not all records are exempt. New Hampshire follows federal court decisions under the federal Freedom of Information Act (FOIA).

91- A, the Federal Freedom of Information Act (FOIA) and Police Investigations

- Disclosure of police investigations judged by FOIA found at 5 USC §552(b)(7), as per NH Supreme Ct. in *Lodge v. Knowlton*, 118 N.H. 574 (1978)

Would the disclosure:

- 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?

FOIA and duty to search for records

- The adequacy of an agency's search for documents judged by whether the agency's search was reasonably calculated to discover the requested documents. *ATV Watch v. Dep't of Transp.*, 161 N.H. 746 (2011)

91-A and Derivative Disclosures

- The asserted public interest in disclosing the names and addresses of utility customers stems not from the disclosure of the information itself, but rather from the hope that the information will enable obtaining additional information about the operation of a public agency. Lamy v. PUC, 152 NH 106 (2005).
- The central purpose of the Right-to-Know Law is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.

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