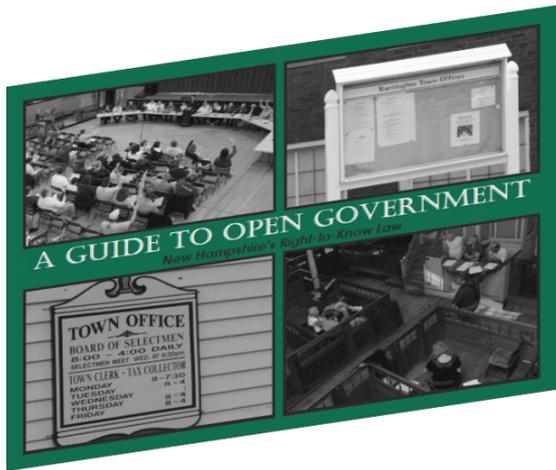


2020 Webinar Series



Right-to-Know Law: Governmental Meetings & Governmental Records

Stephen C. Buckley, Legal Services Counsel
Natch Greyes, Municipal Services Counsel

July 15, 2020

legalinquiries@nhmunicipal.org / 603.224.7447 / www.nhmunicipal.org

Our Presenters



Stephen Buckley
Legal Services Counsel



Natch Greyes
Municipal Services Counsel



Agenda



12:00 pm – 1:00 pm

Governmental Meetings & the Right-to-Know Law

Nonpublic Sessions



1:00 pm – 2:00 pm

Governmental Records & The Right-to-Know Law

Record Retention – Remedies



Governmental Meetings & The Right-to-Know Law



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COVID-19 Effects on Gov't



- ▶ Governor declared State of Emergency on March 13, 2020.
 - ▶ States of Emergency last 21 days, unless renewed. Renewal is also for 21 days. Governor has indicated that he intends on continuing to renew the State of Emergency into, at least, the fall.
- ▶ Previously, limitation on the schedule gathering sizes.
 - ▶ Emergency Order #52 terminated the limitation. Now, gatherings of any size permitted, but...
- ▶ CDC & Department of Health & Human Services (DHHS) guidance still encourages “social distancing.”
 - ▶ “[r]emaining out of crowded public places where close contact with others may occur, such as shopping centers, movie theaters, stadiums, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible.”
- ▶ CDC & DHHS also recommending that those 60 years or older stay home and avoid exposure to public locations as much as possible.

Remote Services

- ▶ **Remote Meetings**
 - ▶ Allowed Under Emergency Order #12.
 - ▶ Allowed “for the duration of the State of Emergency.”
- ▶ **Remote Access**
 - ▶ No prohibition on boards adopting rules of procedure which allow for continued remote access or participation in meetings past the end of the State of Emergency.
 - ▶ May see an increase in interest if utilize provisions of Emergency Order #56 allowing governing body to reduce appropriations.
- ▶ **Remote Payments**
 - ▶ GOFERR funds may be used for the fee on credit card transactions.
 - ▶ May see an increase if utilize provisions of Emergency Order #56 allowing payment plans for property taxes.



COVID-19 Effects Cont.

- ▶ Events rapidly unfolding on an international, national, and state scale.
- ▶ We anticipate that there may be future Executive Orders which will impact the functioning of municipal government.
- ▶ NHMA providing updates at:
<https://www.nhmunicipal.org/covid-19-resources>
- ▶ Check the State of NH Emergency Order Page:
<https://www.governor.nh.gov/news-and-media/emergency-orders-2020>



Overview of How RTK Governs Meetings Content



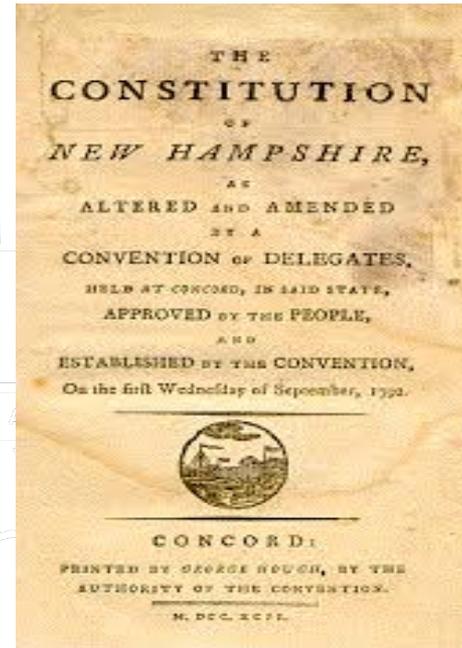
- I. What is a “meeting”?
- II. What is not a meeting, i.e., a “nonmeeting”?
- III. What are the requirements for holding a proper “meeting”?
- IV. How to hold meetings virtually.

The Right-to-Know Law RSA Chapter 91-A

PART I, ARTICLE 8 OF THE NH
Constitution: Government ...
should be open,

SECTION 1 OF RSA 91-A:

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.



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

“Quorum”



Majority of
membership



Can't define as more
than majority to
circumvent law



Another statute may
apply

“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

Meetings In Ordinary Circumstances

Convenes such that all participating members are able to communicate with each other contemporaneously

- In-person
- Email?
- Phone?

To discuss or act upon matters which the Public Body has Supervision, Control, Jurisdiction, or Advisory Power

- Any “business” the body deals with
- Construe broadly

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!

What are the requirements of a public meeting?



Public notice

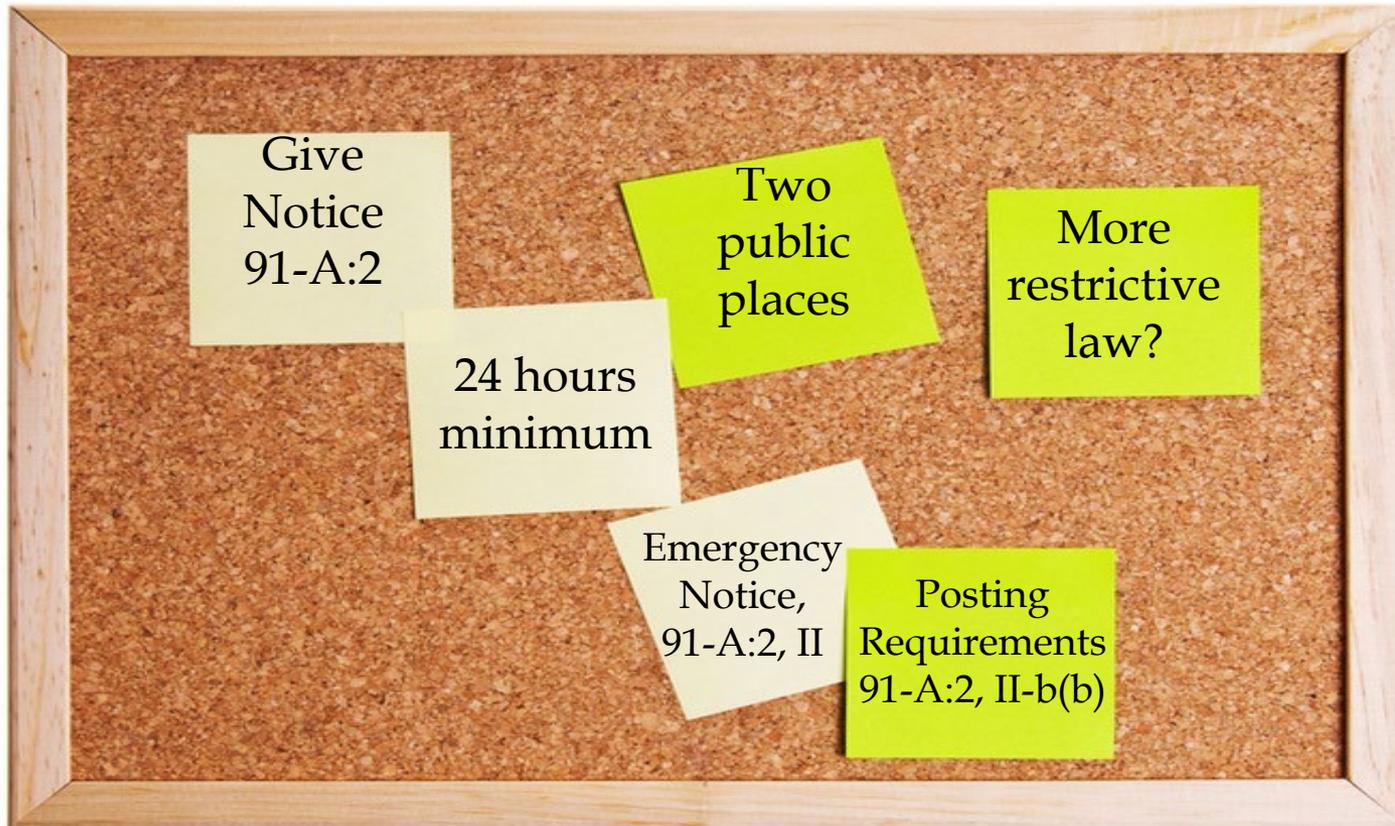


Open to the public



Meeting minutes

“Posting Requirements”



“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.

Ordinary Procedures: Meetings “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’s has right to record, etc.
- ▶ No secret ballot voting.
- ▶ Public Comment?



Emergency Orders and Municipal Operations: What is in Effect Now?

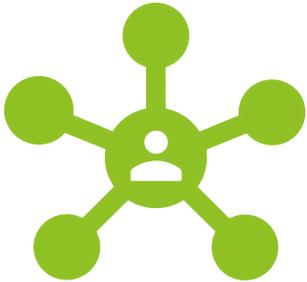


- ▶ No changes have been made to the Emergency Order #12, allowing municipalities to hold remote meetings, or Emergency Order #23, relaxing statutory deadlines.
- ▶ These Orders are slated to remain in effect for the duration of the State of Emergency, and we do not anticipate any future Orders changing their duration.
- ▶ Boards may still meet remotely, and we encourage even those which choose to meet in-person to continue to provide remote access options to the public and abide by social distancing guidelines.

Procedures During the Pandemic, Part I



- ▶ Emergency Order #12 waived the provision of RSA 91-A, III(b) requiring that a quorum of a public body be physically present unless immediate action is imperative.
 - ▶ In other words, meetings can be conducted entirely remotely now.
- ▶ Emergency Order #12 does require that any remote meeting have a telephonic connection for the public.
 - ▶ Other technological options are encouraged:
 - ▶ Conference call lines
 - ▶ Streaming services
 - ▶ Etc.
- ▶ Promote available technological options as well as access information in all notices of meeting.
- ▶ Chair should clearly and succinctly explain process at beginning of meeting -
 - ▶ E.g. Public comment period and how that will work.



Procedures During the Pandemic, Part II

- ▶ Boards participating remotely must still:
 - ▶ identify the reason why the in-person attendance of any remote board members is not reasonably practicable in the minutes of the meeting;
 - ▶ identify any persons present in the location where the board member is calling from; and
 - ▶ take all votes by roll call.
- ▶ In addition, there must be a mechanism for the public to alert the public body during the meeting if there are problems with access.
 - ▶ Intended to allow the body to know whether there is an issue with the conference call overall, not an issue with the public just hearing a particular speaker.
- ▶ The meeting must be adjourned if it is determined that the public is unable to access the meeting, e.g. the conference call software stops functioning.

**Ordinary
Procedures:
Remote
(Electronic)
Meeting
Participation
RSA 91-A:2,
III**



Public body *may* allow



Personal attendance “not practical”
(in minutes)



Quorum *present*



Everyone can hear and be heard



Identify persons present in remote
location



All votes by roll call

“Electronic Communications”

A screenshot of an email client window titled "Untitled - Message (HTML)". The window has a blue title bar and a menu bar with options: File, Edit, View, Insert, Format, Tools, Actions, and Help. Below the menu bar is a toolbar with icons for Send, Undo, Redo, and Options, along with a font dropdown set to "Arial" and a size dropdown set to "10". The main area of the window contains a "To:" field, a "Cc:" field, and a "Subject:" field, all of which are empty. Below these fields is a large text area containing a list of five bullet points.

- Avoid substantive discussions via email
- Circumventing spirit and intent of 91-A
- Less than a quorum communicating by email
- “Reply All”
- Emails are governmental records

Avoid Temptation to Use Inaccessible Technological Options During Pandemic



Remember that fundamental principal of RSA 91-A is to allow the public access.



Text messages, emails, and other electronic means of communication which excludes the public should not take the place of publicly accessible meetings.



As much as possible, government should try to maintain normalcy during this abnormal time.

Public Meeting Minutes

RSA 91-A:2



- ▶ Minimum required contents:
 - ▶ (1) the names of members, (2) persons appearing before the public bodies, (3) a brief description of the subject matter discussed , (4) state final decisions made, and, (5) state the names of the members who made or seconded each motion shall be recorded in the minutes.
- ▶ Made available within 5 business days
- ▶ Posting requirements-
 - ▶ RSA 91-A:2, II-b(a)
- ▶ If the software used to conduct a remote meeting allows for recording, use it to aid the minute taker, but remember that recordings are not a substitute for written minutes.

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

Boards meeting remotely
should consider
technological options for
holding nonpublic
sessions: e.g. starting a
separate call

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

*Most common, but not complete list

Entering Nonpublic Session for COVID-19



- ▶ 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.
 - ▶ Conversation must focus on *deliberate act* that is being thwarted.
 - ▶ Basic conversation about COVID-19 does not qualify – Virus will not change its spread based on knowing what the government is planning.
 - ▶ However, news reports have indicated that known infected have purposefully evaded quarantine. Planning for that may qualify.

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).

Minutes of Nonpublic Sessions



Minutes must be kept —
same as for public session.



Must “record all actions in
such a manner that the
vote of each member is
ascertained and recorded.”

Conducting the Nonpublic Session

May make decisions in nonpublic session.

Member objecting to violations – note objection. If board persists, objecting member may continue to participate without being subject to penalties.
RSA 91-A:2, II-a .

Returning to public session.

Disclose or Seal



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.

Other Considerations

Include nonpublic session on posted agenda.

Timing – beginning or end of meeting?

Attendance by non-members

- If meetings are being conducted with remote participation of board members and public, must plan how to conduct non-public sessions in a manner that preserves their secrecy.



Governmental Records & The Right-to-Know Law

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

EST. 1941

nhmainfo@nhmunicipal.org / 800.852.3358 / www.nhmunicipal.org

GOVERNMENTAL RECORDS

STEP 1: Is it a
Governmental Record?

STEP 2: Is the record
exempt from disclosure?

STEP 3: Make available
non-exempt records.

Is it a Governmental Record?

RSA 91-A:1-a

Any information

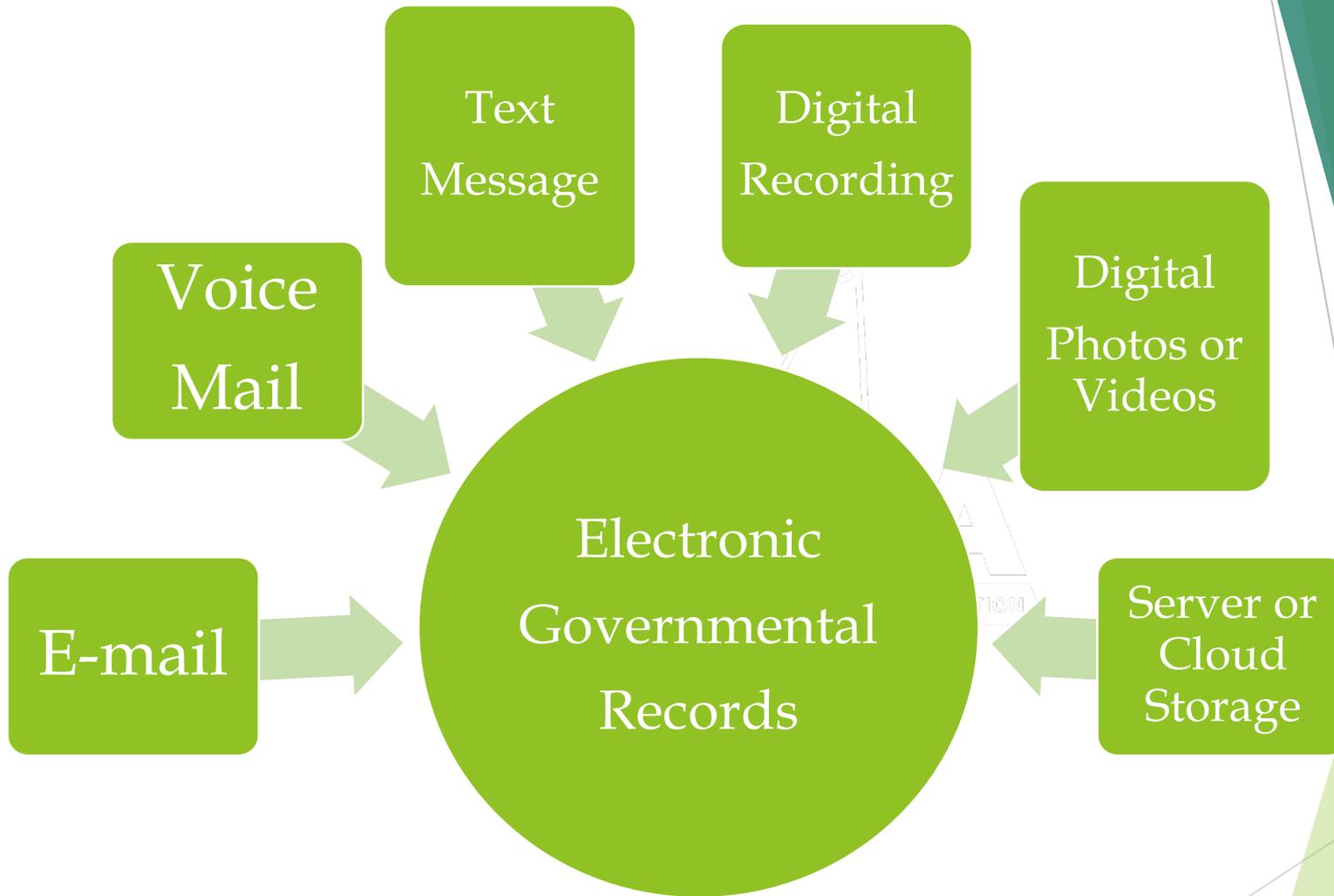
- created
- accepted, or
- obtained

By, or on behalf of,

- any public body, or a quorum or majority thereof, or
- any public agency

in furtherance of its
official function





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.

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

New Decision:

Seacoast Newspaper v. Portsmouth



- Records that document disciplinary matters involving a municipal employee that are made part of the employee's personnel file may be exempt from disclosure if that disclosure would invade a protected privacy interest of the employee and that disclosure does not inform the public about the conduct and activities of their government.
- However, if the disciplinary record would not invade a protected privacy interest of the employee, or, where the public interest in the disciplinary record outweighs the privacy interest of the employee, then the record must be disclosed.
- NH Department of Labor, NH Admin Rule Lab 802.08, states that "Personnel File" is defined as personnel records created and maintained by an employer and pertaining to an employee including and not limited to disciplinary documentation, it would be the better practice to keep and maintain all records concerning performance evaluations and disciplinary documents in an employee's personnel file.

New Decision: Union Leader v. Salem



- The exemption from disclosure under RSA 91-A:5, IV for “internal personnel practices” 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.
- 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.

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



- ▶ 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.

Invasion of Privacy

RSA 91-A:5, IV

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

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.”

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

Body Worn Cameras (BWCs)

RSA 105-D

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

Restraint/use of force

Discharge of firearm

Felony-level arrest

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

IT Security



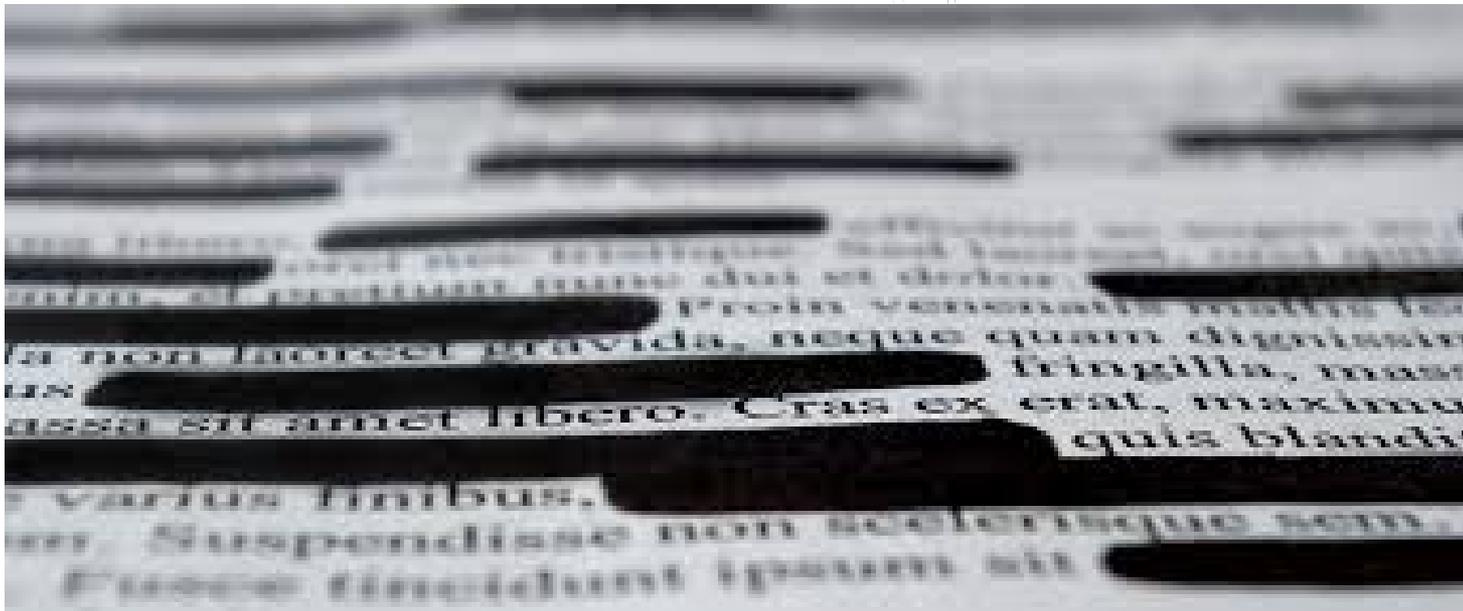
- ▶ As of Aug. 4, RSA 91-A:5 is amended by adding a new paragraph XI, providing that records pertain to information technology systems are exempt from disclosure under the Right-to-Know Law if release of those records would disclose security details that would aid an attempted security breach or circumvention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

Basics of Record Production

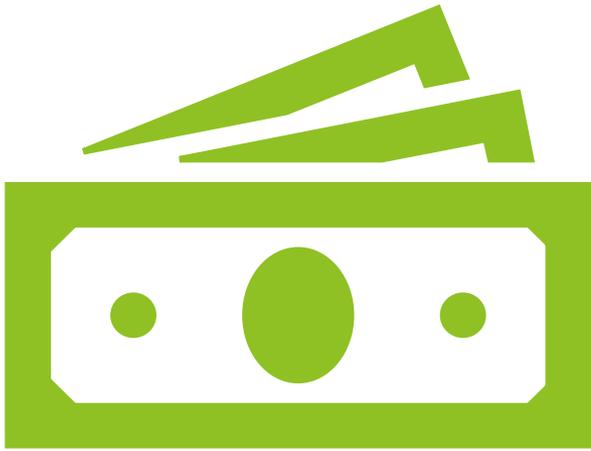


- ▶ Records must be provided immediately *only* when they are immediately available for release. (But not under E.O. #23!)
- ▶ RTK *does not* give citizens the right to review records in any quantity and wherever kept immediately upon demand.
- ▶ Requiring appointment to review records is permitted.
- ▶ RTK does not require document “compilation.”

REDACT EXEMPTED INFORMATION



No Flat Fees!



▶ ONLY
REASONABLE FEES
ARE ALLOWED!

▶ RSA 91-A:4, IV

New Decision:

Paul Martin v. City of Rochester



- ▶ Plaintiff challenged city's copying fee schedule for public records.
- ▶ The city charged a fee of fifty cents per page for the first ten pages and then ten cents per page thereafter.
- ▶ Plaintiff argued that only a rate of four cents per copy would comply with RSA 91-A:4, IV.
- ▶ The Supreme Court agreed with the trial court that testimony of the city manager was adequate evidence that the city's fee schedule was commensurate with the actual cost of providing the copy.
- ▶ The Court noted that the legislature did not mandate the use of a formulaic method for determining the actual cost for copying. The testimony provided by the city manager that that the city based its copying fee on the cost of leasing copy machines, maintenance, capital costs of the machines, and the cost of paper was sufficient.

We have 5 days...



...right?

“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.

Production of Electronic Records

- ▶ Green v. SAU #55: Electronic Records Produced Electronically.
- ▶ 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.
- ▶ 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.



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.

RECORDINGS OF MEETINGS



Not required



Use and discard



Disclose if they exist

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.

RSA 33-A:5-a

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.

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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.

How are Violations of RSA Chapter 91-A Enforced?



No enforcement agency



“Aggrieved person”

NEW HAMPSHIRE MUNICIPAL ASSOCIATION



Lawsuit



RSA 91-A:7, :8

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



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



A GUIDE TO OPEN GOVERNMENT

New Hampshire's Right-to-Know Law



[Purchase at NHMA's Online Shop](#)

Complimentary Webinar



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SAVE THESE DATES

for the following *VIRTUAL*

RIGHT-TO-KNOW LAW WORKSHOPS



PUBLIC MEETINGS

6:00 pm—8:00 pm
Thursday September 10, 2020
\$40.00



GOVERNMENT RECORDS

1:30 pm - 3:30 pm
Tuesday, October 6, 2020
\$40.00



LAW ENFORCEMENT

9:00 am - 12:00 pm
Thursday, October 15, 2020
\$65.00

Ashley Methot, Events Coordinator
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Concord, NH 03301
603.230.3340

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www.nhmunicipal.org





SAVE THE DATE

THURSDAY, SEPTEMBER 24

2020 Budget & Finance Virtual Workshop

NHMA will be holding its annual Budget & Finance Workshop on Thursday, September 24th as a virtual workshop to ensure the safety of attendees as COVID-19 remains a serious public health threat.

We have restructured this annual event in order to deliver professional training and education to our members on timely and relevant financial issues.

Please visit www.nhmunicipal.org for the latest event information and registration details.



SAVE THE DATE

2020

VIRTUAL LAND USE LAW CONFERENCE

(formerly known as the Municipal Law Lecture Series)

WHEN

Tentative

October 31, 2020
9:00 am—3:00 pm

WHAT

Full day **virtual conference** for municipal land use officials including members of planning and zoning boards, planners, land use administrators, select boards, town and city councilors, building inspectors, code enforcement officers and public works personnel. Presentations will focus on the legal authority and procedures these land use boards must understand with content structured to be beneficial to both novice and experienced municipal officials.

CONTACT INFO

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**FOR ADDITIONAL
DETAILS VISIT**
www.nhmunicipal.org

**REGISTRATION
OPENS IN SEPTEMBER**



79th Annual Conference and Exhibition

NHMA is Going Virtual in 2020!



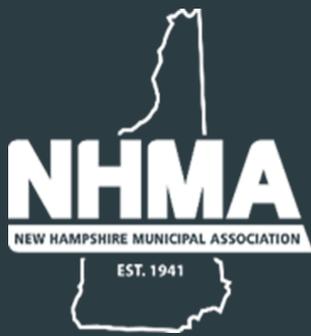
Wednesday, November 18, 2020 — Friday, November 20, 2020



Join us for 3 days of engaging interaction to help your municipality adjust to the new normal.

Registration to open soon.





*THANK YOU for
attending our
webinar TODAY!*

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

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