



THE RIGHT-TO-KNOW LAW HYBRID WORKSHOP FOR LAW ENFORCEMENT

FEBRUARY 22, 2025

Stephen Buckley, Legal Services Counsel

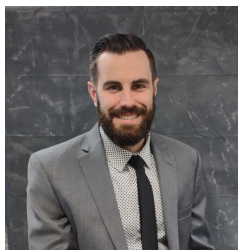
Jonathan Cowal, Municipal Services Counsel

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Today's Presenters



Stephen Buckley
Legal Services Counsel

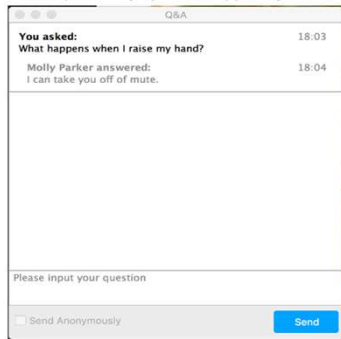


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Municipal Services Counsel

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How Do I Ask a Question?



The screenshot shows a Zoom Q&A window. At the top, it says "Q&A". Below that, it shows a question: "You asked: What happens when I raise my hand?" with a timestamp of 18:03. Below the question, it shows an answer: "Molly Parker answered: I can take you off of mute." with a timestamp of 18:04. At the bottom, there is a text input field labeled "Please input your question" and a "Send" button. There is also a checkbox labeled "Send Anonymously".

The chat function for this workshop has been disabled.

In order to ask a question of our host or a panelists, open the Q&A function found in the Zoom toolbar. Type you questions in the Q&A and they will be answered in the order they are received.

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

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NHMA's Legal Advisory Services

Open 8:30 a.m. – 4:30 p.m.

- Email: 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

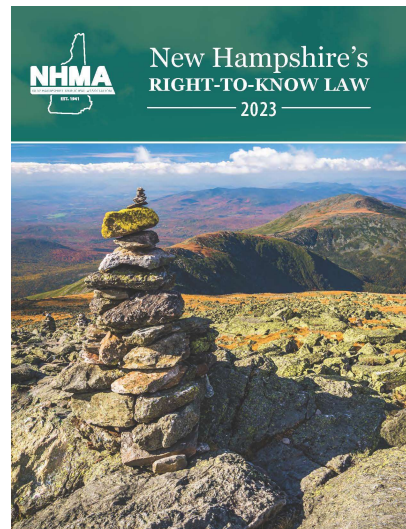
Goal: Response w/in 48 hours

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NHMA's Publication:
New Hampshire's Right-to-Know Law

- ▶ Glossary
- ▶ Remote Participation Checklist
- ▶ Nonpublic Session Checklist
- ▶ Law Enforcement Guidance
- ▶ Complete copy 91-A & 33-A
- ▶ Table of Cases
- ▶ Table of Statutes
- ▶ February 2024 Supplement provided



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Agenda

- Record Requests and Exemptions
- Record Production and Remedies
- Hypotheticals and Questions



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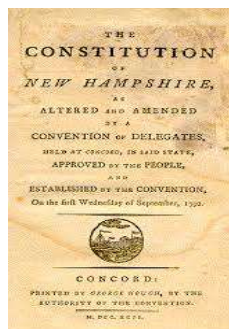
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The Right-to-Know Law RSA Chapter 91-A

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.



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RSA 91-A:4, I: The Most Important Sentence

- 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.

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Why is this important?

- Some proposed changes to RSA 91-A:4 that narrowly failed this year:
 - Remove the term citizen and replace with the term “person”
 - Include a provision that municipalities with the ability to respond electronically (all of them?) are required to do so when asked without requiring in person appointment
- Consider the consequences

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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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In Re City of Rochester

- Case decided by RTK Ombudsman
- Attempted to challenge the term “citizen”
- The petitioner was a citizen of Maine, but was a member of the media and working for a New Hampshire media company
- Ombudsman found in favor of petitioner
- Acknowledged that his decision doesn’t create binding precedent
- Consistent with NHMA guidance that if someone is willing to come in person, you should provide access to records

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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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Colquhoun v. Nashua

- The city denied a request for emails on the basis that the request was overly broad and not reasonably described
- However, the request specified specific employees and a specific date range
- Furthermore, after the lawsuit was filed, the City ended up producing records
- Make sure to show good faith effort if you are going to totally or partially deny a request on these grounds

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Voluminous Requests

- **Paragraph (e)** allows a public body or agency to suggest to the requestor a reasonable modification of the scope of the request, if doing so would enable the body or agency to produce records sought more efficiently and affordably. The legislative intent and plain language of this paragraph was aimed at capturing the *dicta* about cooperation between requestors and the government in *Salcetti v. City of Keene*, No. 2019-0217
- **HB 1002** retains the existing ability of the government to charge requestors the actual cost of providing a copy, while now *also* providing for a local option to charge requestors a fee in certain circumstances where the municipality is being asked to produce hundreds of pages of electronic records whether or not paper copies are being produced. This fee – the “reasonable per electronic communication charge” – may not exceed \$1.00 per communication and may be charged whether the records are delivered in hard copy or electronically. However, no charge may be incurred for the first 250 electronic communications. Additionally, certain requestors are exempt from being charged.
- Pay attention to what you are retaining for records!!!

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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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Duty to search for records: The agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents. This burden can be met by producing affidavits that are relatively detailed, nonconclusory, and submitted in good faith. Once the agency meets its burden to show that its search was reasonable, the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith.

***ATV Watch v. NH Dept. of Transportation*, 161 N.H. 746 (2011)**

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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

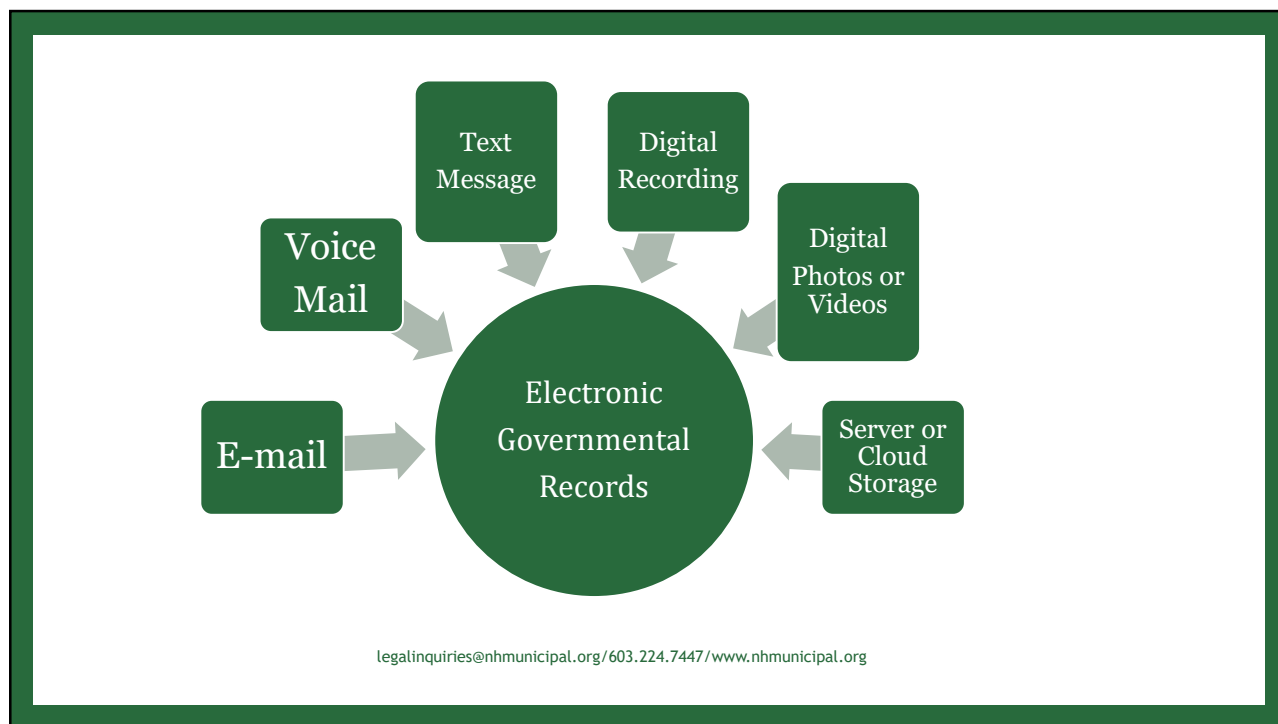
By, or on behalf of,

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

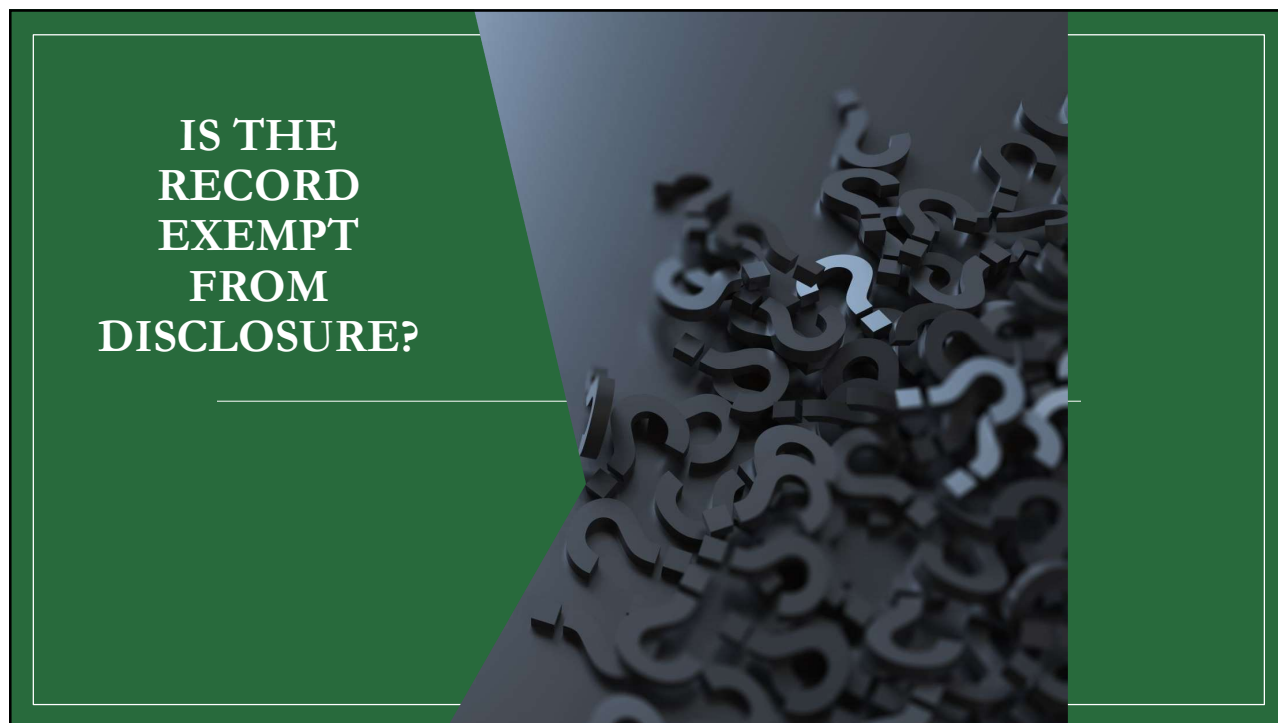
in furtherance of its official function

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Exemptions to Disclosure

- ▶ **RSA 91-A:5** provides a list of records exemptions:
 - ▶ Some are categorical exemptions, such as the master jury list or teacher certification records.
 - ▶ Some require detailed analysis, such as “personnel records whose disclosure would constitute invasion of privacy.”
- ▶ **Other statutes and case law** also contain exemptions.
- ▶ The Right-to-Know Law’s purpose is to provide the utmost information to the public about what its government is up to.
- ▶ When a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden.

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

- Recent Reinterpretation of Law by N.H. Supreme Court
- Formerly: “Internal Personnel Practices” was a broad category separate and apart from any privacy balancing test
- Now, Internal Personnel Practices is no longer a categorical exemption and is likely going to be subject to the same privacy vs. public balancing test as established in a series of recent cases

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Seacoast Online v. Portsmouth

- Superior Court decision that denied public access to an arbitration ruling concerning the dismissal of a Portsmouth police office.
- The NH Supreme Court overruled its decision in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) to the extent that decision too broadly interpreted the “internal personnel practices” exemption under RSA 91-A:5, IV.
- Henceforth, the “internal personnel practices” exemption only applies to records pertaining to the internal rules and practices governing an agency’s operations and employee relations, and not information concerning the performance of a particular employee.
- The internal personnel practices exemption in RSA 91-A:5, IV only applies to matters that are inherently minor or trivial, such as rules regarding the use of parking facilities or the regulation of lunch hours

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Union Leader v. Salem

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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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 citing the "internal personnel practices" exemption.
- Superior Court concluded that the report was subject to disclosure under RSA 91-A. This decision was appealed to the Supreme Court.
- First, the Court looked to RSA 105:13-b which creates an exception for information in a police officer's personnel file. The Court ruled that the report was not physically in his file and therefore this did not apply.
- Next, the Court affirmed that there is no categoric exemption for police internal investigative files and they are subject to balancing test.

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Welford v. State Police

- While the previous cases involved privacy issues involving internal police practices, Welford addresses privacy issues involving private citizens
- Persons have an obvious privacy interest in keeping secret the fact that they were subjects of a law enforcement investigation
- The relevant public interest is not to find out what the individual himself was 'up to' but rather how the government carried out its statutory duties to investigate and prosecute criminal conduct
- Where there is a privacy interest at stake, the requester must produce evidence that would warrant a belief by a reasonable person that alleged Government impropriety might have occurred. Or, at the very least, the requestor must articulate why the requested information serves a public purpose greater than simply exposing the police involvement of another individual

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Privacy Balancing Test

- First, 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.
- Keep in mind that this balancing test should be done in conjunction with the FOIA exemption factors.

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Health and Safety Exemption

- 91-A:5 states: “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”
- Therefore, even if there is a legitimate privacy interest at stake, and there isn't a compelling enough public interest to warrant disclosure, the records may still be disclosed if they are necessary to protect someone's health and safety, subject to the necessary redactions
- Care should be given to redact all identifying information about individuals with a privacy interest whose health or safety is not at issue

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Practice Example 1

Q. A citizen makes RKT request for all building permit applications filed with the town in the last month. He wants name, address, and project information.

A. The person's name and address is subject to a privacy exemption. What public purpose is there in releasing this information? Redact the name and address and provide the rest of the application.

***Why is this important?** In this example it turned out that the citizen owned a lumber yard wanted to use the permit applications to direct advertise to these people so they would buy lumber from him. **NOT THE PURPOSE OF 91-A!**



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Practice Example 1 (cont.)

Q. A citizen makes RKT request for all building permit applications filed with the town in the last month. He wants name, address, and project information.

A. Same as before, you redact the contact information as "private". Upon providing the redacted records, the person is dissatisfied with the redaction, says that they need name and address because they believe the town is discriminating against certain households in town by denying their building permit requests for certain projects while granting permits for other households for the exact same project. Now, there may be a compelling public purpose warranting disclosure of address!

***Notice that the town never questioned motive or requestor**



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Practice Example 2

Q. The town publishes their assessing records on their website for anyone to look at. Local police officer in town wants his name taken off the website for safety purposes.

A. The officer has a legitimate privacy interest in this information being made so publicly available. The town is going above and beyond public record requirements by posting this information online. They should consider taking his information down.



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Practice Example 2 (cont.)

Q. The officer wants his name and address removed from the official assessing card kept at the town hall.

A. Assessing records serve a public purpose. The town must keep record of who owns property to properly assess taxes. The public has an interest in knowing that the town is fairly assessing property. This info is also available elsewhere, like the registry of deeds. The town has already accommodated the privacy interest by taking the records off the website. Now, public interest may outweigh this privacy interest.



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ACLU v. N.H. Div. of State Police

- A State Trooper was put on the EES (Lori List) as a result of conduct while on official duty.
- ACLU filed a RSA 91-A RTK request for information related to his placement on the EES contained in his personnel file
- State denied the request stating that the records were exempt under RSA 105:13
- Court ruled that this statute is distinct from 91-A and is not to be used as an exemption.
- Information is subject to the standard private v. public balancing test. Officers have limited privacy for official acts

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Jonathan Stone v. City of Claremont

- Plaintiff was a former Claremont police officer
- Newspaper sought records under 91-A related to his dismissal
- As part of a settlement agreement related to his dismissal, officer negotiated that his personnel file would be “purged” of reference to his suspension and termination and no information would be disclosed to the media
- Court ruled that you can’t change the requirements of RSA 91-A via private agreements. If the records exist they are subject to public disclosure
- Do not destroy public records as part of a separate agreement unless they are subject to deletion under RSA 33-A:3-a

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What if “private” information is disclosed?

RSA 91-A:4, IV Paragraph (f) provides a public body or agency immunity from penalties in a civil action due to an inadvertent disclosure of information that would have been exempt from disclosure. This immunity only applies when the public body or agency has acted in “good faith,” and will not apply if it is shown the public body or agency has acted in a wanton or reckless manner. The provision also identifies that use of an automated software to produce redactions more quickly, along with “spot checks,” will automatically qualify as “good faith.” This provision is designed to encourage the government’s use of such automated software but must be done with appropriate spot checks.

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NH ADOPTS FEDERAL STANDARD FOR DISCLOSURE OF LAW ENFORCEMENT RECORDS - *LODGE V. KNOWLTON* 118 N.H. 574 (1978)



- ▶ Freedom of Information Act (FOIA) used to govern disclosure of police investigatory files. Now it operates along with RSA 91-A
- ▶ First, the agency 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 six enumerated adverse consequences.

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What is a Law Enforcement Agency?

Was the record gathered for law enforcement purposes?

This exemption not just for agencies that are officially designated as law enforcement agencies

Applies to all records compiled by any type of agency for law enforcement purposes, including in civil and criminal matters

What are the authorized activities of the agency involved?

A mixed-function agency encompassing both administrative and law enforcement duties can satisfy the threshold requirement by showing that the pertinent records were compiled pursuant to the agency's law enforcement functions

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Montenegro v. City of Dover 162 N.H. 641 (2011)

Thus, to withhold materials under the modified test adopted in *Murray*, an agency need not establish that the materials are investigatory, but need only establish that the records at issue were compiled for law enforcement purposes, and that the material satisfies the requirements of one of the subparts of the test.

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Law Enforcement Records FOIA Exemption Factors



- ▶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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Factor A: Reasonably Expected to Interfere with Law Enforcement Proceedings



Two step analysis:

- (1) Whether a law enforcement proceeding is **pending** or **prospective**, and
- (2) Whether release of information about it could **reasonably** be expected to cause some articulable harm.

➤Pending Investigations: Exempt

➤Dormant/Prospective: Exempt, as long as prospective investigation is “concrete”

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Factor B: Deprive a Person of Right to Fair Trial or Impartial Adjudication

Two-part test:

- (1) That a trial or adjudication is pending or truly imminent; and
- (2) That it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings



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Factor C: Could Reasonably Be Expected to Constitute an Unwarranted Invasion of Privacy

- Information that would lead to embarrassment, harassment, disgrace, loss of employment or friends .
- Guards the privacy interests of a broad range of individuals, including government agents, personnel, confidential sources, and investigatory targets.
- Protects a broad notion of personal privacy, including an individual's interest in avoiding disclosure of personal matters.
- Notion of privacy encompasses the individual's control of information concerning his or her person, and when, how, and to what extent information about them is communicated to others.



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EXEMPTION 7 (D) RECORDS WHICH COULD REASONABLY BE EXPECTED TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL SOURCE

Exemption 7(D) is comprised of two distinct clauses:

- ▶ 1st clause protects identity of confidential sources
 - ▶ 2nd clause protects all information obtained from the source

 - ▶ Was the source given express promise of confidentiality?
- OR***
- ▶ Can an assurance of confidentiality be inferred from the circumstances surrounding receipt of the information?

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EXEMPTION 7(E) - DISCLOSURE WOULD REVEAL TECHNIQUES AND PROCEDURES FOR LAW ENFORCEMENT, *OR*, WOULD DISCLOSE GUIDELINES FOR LAW ENFORCEMENT INVESTIGATIONS OR PROSECUTIONS *IF SUCH DISCLOSURE COULD REASONABLY BE EXPECTED TO RISK CIRCUMVENTION OF THE LAW.*

- Probably provides "categorical" protection for law enforcement techniques and procedures. . . . FOIA sets a "relatively low bar" for withholding under this exemption
- Courts have uniformly required that the technique or procedure must not be well known to the public
- "guidelines" = means by which agencies allocate resources for law enforcement investigations (whether to investigate)
- "techniques and procedures" = the means by which agencies conduct investigations (how to investigate)

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**EXEMPTION 7(F) REASONABLY BE EXPECTED TO
ENDANGER THE LIFE OR PHYSICAL SAFETY OF
ANY INDIVIDUAL**

- Originally only protected law enforcement personnel but was later amended and now protects the safety of any individual.
- Exemption 7(F) can protect the names and identifying information of:
 - non-law enforcement federal employees
 - local law enforcement personnel
 - other third persons in connection with law enforcement matters such as:
 - ✓ names of and identifying information about inmates
 - ✓ private security contractor companies
 - ✓ identities of medical personnel who prepared requester's mental health records would endanger their safety
 - ✓ identifying information about individuals who provided information about alleged criminal activities

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PRODUCTION OF RECORDS AND REMEDIES

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Records available through other means

- Just because a record can be obtained through some other manner than a Right-to-Know request does not mean a municipality can ignore RSA 91-A requirements
- Make sure you show you engaged in a Right-to-Know analysis before denying
- Citizens can be referred to online databases of information

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Kenneth T. Michaud v. Town of Campton Police Department

- Plaintiff filed a RTK request for records related to himself and his address
- Due to similarity between this RTK request and a discovery motion filed between same plaintiff and PD in litigation the PD denied the request citing FOIA and availability of records through other means
- Remember, RSA 91-A are public records. There may be information available to the public within other protected records
- You still must go through a standard 91-A analysis when you receive a RTK request

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Union Leader v. NH Dept. of Safety

- Union Leader filed RTK request for records related to emergency responses to Sununu Center. Specified that redactions to protect privacy were anticipated
- NHDES cited RSA 169-B:35 as exemption from public record
- Again, court ruled that this does not exempt information from RSA 91-A
- You still must perform a RTK analysis
- General standard is privacy v. public test, understanding that juveniles will have heightened privacy

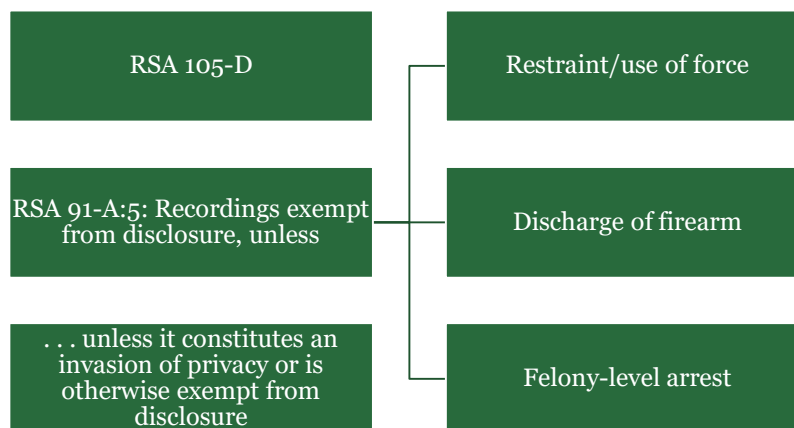
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Requests for Use of Force Policy

- Could it be concluded that public disclosure of Use of Force protocols, or standard operating procedures, would reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behavior in an effort to avoid detection?
- Using the information in a Use of Force Policy, would those engaging in criminal acts be able to adjust their behavior by disguising their movements and then strike out violently before the officer can appropriately respond?

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Body Worn Cameras (BWCs)



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Body Worn Cameras: Record Retention

General rule:

- Permanently destroy/overwrite 30 – 180 days after recording

Exceptions:

- Keep minimum 3 years
 - Deadly force
 - Discharge of firearm
 - Death or serious bodily injury
 - Encounter resulting in complaint
 - Evidence
- Keep for as long as legally required
 - Pending case, court order
 - Retain as training tool

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Motor Vehicle Records

- RSA 260:14, VII, VII-a: Can release accident reports to certain persons:
 - Owner/Operator
 - Passenger
 - Pedestrian Injured
 - Owner Property Damaged
 - Insurance Companies
 - Lawyers

➤ Can charge reasonable fee

- RSA 260:14, XI-a: Liability protection for improper release

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Police Reports

- Police reports have a privacy interest associated with them and should not be released to anyone who comes asking
- A defendant is entitled to a copy of their police report through the discovery process. They are not always given a fully unredacted version! Don't get caught in a situation where the PD is providing a defendant with the information they need to track down a protected witness, spouse, girlfriend, etc
- If you are being asked to disclose a police report, apply the same balancing test and make redactions as necessary

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Arrest and Prosecution Records after Annulment

- Records maintained by arresting and prosecuting entities documenting conduct underlying an annulled conviction are not categorically exempt from disclosure under RSA 91-A:4, I, which exempts records otherwise prohibited by statute for public inspection. *Grafton County Attorney's Office v. Canner*, 169 N.H. 319, 328 (2016)
- Note that *Canner* did not address the issue of whether such records may be exempt under another provision of RSA 91-A, such as the work product or privacy exemption of A:5, IV
- The Court did say that an annulment does not “turn the public event of a criminal conviction into a private, secret, or secluded fact” and the public “has a substantial interest in understanding how investigations and alleged crimes are conducted, and how prosecutors exercise their discretion when deciding whether to prosecute, reach a plea agreement, or try cases”

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Rights of Crime Victims

RSA 21-M:8-k, II

To the extent that they can be reasonably guaranteed by the courts and by law enforcement and correctional authorities, and are not inconsistent with the constitutional or statutory rights of the accused, crime victims are entitled to the following rights

...

(m) The right of confidentiality of the victim's address, place of employment, and other personal information

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Domestic Violence Victims Addresses

RSA 7:41



Allows victims of domestic violence to designate a substitute mailing address with the AG's office



Substitute mailing address is kept confidential



Must apply to program with AG's office

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Confidentiality of Education Records

RSA 193-D:7



Safe School Zone Statute



Law enforcement and school can exchange only particular information



“Reasonably relates to delinquency or criminal conduct”
– Theft, Destruction, or Violence

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If Not Exempt, Disclose

- ▶ Right to inspect, copy, and make notes of records
- ▶ →Electronic Records, RSA 91-A:4, V
- ▶ Records should be available on regular business premises during regular business hours
- ▶ Record must be reasonably described
- ▶ There is no obligation to compile, cross reference or assemble records
- ▶ Motive is irrelevant*

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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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Albert S. Brandano v. Superintendent of the NH S.A.U. 16

- A large RTK records request was made to the superintendent of S.A.U.
- Many records were available online, some records were with the S.A.U., others were with individual schools
- Superintendent responded asking for 45 days to respond
- After 45 days passed, S.A.U. failed to respond
- Petitioner filed suit, S.A.U. argued that they were the improper party to request records from and several were available online
- Court agreed that individual schools are separate entities under 91-A and it is appropriate to refer someone to online records, however if you are going to ask for time to respond, you need to stick to your own timelines!

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- ▶ Records must be provided *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 permitted

***Brent v. Paquette*, 132 N.H. 415 (1989)**

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- ▶ RTK does not require document compilation
- ▶ To “compile” is “to collect and assemble (written material or items from various sources) into a document or volume or a series of documents or volumes
- ▶ The ruling in *Brent v. Paquette* shields agencies from having to create a new document in response to a RTK request, it does not shelter them from having to assemble existing documents in their original form

***New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003)**

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No Flat Fees!

- **ONLY REASONABLE FEES ARE ALLOWED!**
- RSA 91-A:4, IV
- REMEMBER NEW PROVISION FOR LARGE ELECTRONIC REQUESTS.



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Retention of Police Records, RSA 33-A:3-a

- 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.

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Retention of Correspondence RSA 33-A:3-a

- 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

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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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ELECTRONIC RECORDS ARE ONLY TRULY DELETED WHEN NO LONGER READILY ACCESSIBLE – *Ortolano v. Nashua, August 18, 2023*

- City of Nashua practice to have emails automatically deleted after 120 days and were only retained on personal U-drives. Emails not retained on personal U-drives were deemed deleted
- However, the City had backup tapes from which deleted emails could be extracted
- The City argued that the emails were “initially and legally deleted,” and the extraction from backup tape process should deem those emails as no longer readily accessible
- The NH Supreme Court disagreed since the City’s IT employee testified the emails could be made available with a couple of hours work

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How are Violations of RSA Chapter 91-A Enforced?



Office of Right-to Know Ombudsman
established effective 7/1/22



“Aggrieved person”



Lawsuit or by complaint to Ombudsman



RSA 91-A:7, :7-a, :7-b, :7-c, :8

righttoknow@cityofnashua.org / (603) 224-7447 / www.cityofnashua.org

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2022 – Chapter 250 – HB 481 – Right-to-Know Ombudsman (eff. 7/1/22)

- Alternative process to resolve complaints under RSA 91-A
- In lieu of filing suit in the Superior Court, complaint may be filed with the Ombudsman
- Aggrieved party must make an election to either file complaint with the Court or the Ombudsman - filing with one forecloses filing with the other
- Ombudsman is administratively attached to the NH Dept. Of State
- Ombudsman nominated and confirmed by the Governor and Executive Council

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2022 – Chapter 250 – HB 481 – Right-to-Know Ombudsman (eff. 7/1/22)

- Simplified complaint process -after complaint received, public body is given notice and required to respond with an answer to within 20 days
- Ombudsman is empowered to: (1) Compel timely delivery of public records; (2) conduct in-camera review of records; (3) compel interviews with the parties; (3) order attendance at hearings; (4) order access to public records or access to meetings; (5) make any finding or order as permitted by the Superior Court under RSA 91-A:8

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2022 – Chapter 250 – HB 481 – Right-to-Know Ombudsman (eff. 7/1/22)

- Decisions by the Ombudsman may be appealed to Superior Court within 30 days
- All factual findings by Ombudsman deemed lawful and reasonable
- Decisions not appealed may be registered in Superior Court and be enforceable through contempt proceedings

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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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Useful Practices

- Five “types” of requests:
 - 1. Individual citizens
 - 2. Attorney’s
 - 3. Educational institutions or researchers
 - 4. 1st Amendment auditors
 - 5. Predatory Requests
- Create a spreadsheet to keep track of requests
- All emails are responded to with an in-person appointment requirement
- Use of a sanitized laptop for viewing electronic records
- PD provides USB or DVD for a fee, or citizen bring unopened media of their choice

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OTHER INFORMATION SOURCES

NH Attorney General’s Right to Know Memorandum:

<https://www.doj.nh.gov/news-and-media/memorandum-new-hampshires-right-know-law>

U.S. Department of Justice Guide to the Freedom of Information Act:

<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

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Recent Questions & Answers

Question: I have a right-to-know request from a private investigative agency for all documents relating to a fatal car accident that happened in 2019. The crash in question was a single vehicle car accident with 1 person in the vehicle, who died. I am unclear what I can release based on the Motor Vehicle Records Privacy Act, RSA 260:14.

Answer: Under RSA 260:14, VII-a, a police department would be permitted to release copies of reports of motor vehicle accidents prepared by the department that were filed with the division of motor vehicles pursuant to RSA 264:25 and RSA 264:26. However, such reports may only be released by your department to an “owner, operator, or passenger of a vehicle involved in said accident, pedestrian hit by a vehicle in said accident, owner of property damaged in said accident, the insurance company of any of the foregoing parties, or the authorized legal representative of any of the aforementioned.” An authorized legal representative would include a person's conservator, executor, administrator, or next of kin as defined in RSA 259:66-a. If the private investigative agency is an authorized legal representative as described in the statute then the complete, unredacted fatal car accident report could be released to the private investigators.

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Recent Questions & Answers

Question: Someone made a request for any police reports associated with certain local officials. There is no reference to a specific incident and it seems like they are just fishing to see if these people have ever had any police involvement.

Answer: This sounds very much like the Welford v. State Police case. While this case is only a superior court decision, it is still a compelling authority for similar cases. In this case, someone filed a right to know request of the state police seeking any reports or investigative files on a certain individual who happened to be a member of a local school board. The state police responded by saying that they would neither confirm nor deny the existence of any such records, because admitting that any such records existed in and of itself could be a violation of this person's privacy.

If you have someone fishing for any police involvement with another private citizen, and they are unable to even indicate a specific instance or occurrence they are aware of, the proper response under this Welford decision may simply be to neither confirm nor deny the existence of any such records.

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Recent Questions & Answers

Question: If the code enforcement officer has a complaint form that he requires that anyone with a complaint needs to fill out and give their name can their name be kept confidential or can it be given out if a right-to-know request was submitted?

Answer: Consistent with *38 Endicott Street LLC v. State Fire Marshal*, 163 N.H. 656 (2012), the code enforcement office of the town could qualify as a law enforcement agency, and, if the complaints that are received by the town are for code enforcement purposes, this would permit the town to use the decision of the NH Supreme Court in *Lodge v. Knowlton*, 118 N.H. 574 (1978) to claim the records are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. §552 (b)(7). Under FOIA exemption (7) (D) it would be permissible to redact the name and other identifying information provided by a complaining party who would be deemed a confidential source, or, under (7) (C) where the disclosure of the information about the complaining party would constitute an unwarranted invasion of privacy.

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*for joining us for
today's workshop!*

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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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