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The Right to Know Law Public Meetings and Governmental Records

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How Do I Ask a Question?

The chat function has been disabled for this workshop.

To ask a question, please use the Q&A in Zoom. Presenters will be monitoring it!

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

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AGENDA

Public Meetings
Nonpublic Sessions
Managing Public Comment
Minutes
Governmental Records
Record Retention
Violations/Remedies

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Introductory Thoughts

- NH courts resolve questions about RSA 91-A “with a view to providing the utmost information” to satisfy the Constitutional purpose of the law.
- This means two things:
 - Courts construe provisions requiring disclosure broadly
 - They construe all exemptions narrowly
- The burden will always be on you to prove why it wasn’t a meeting, why nonpublic session was proper, why the record is exempt from disclosure – not the other way around.

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RSA 91-A is the Floor

- If the charter or rules of procedure of any public body require broader public access to official meetings or records than the law requires, then those stricter provisions will control. RSA 91-A:2, II.
- Many other statutes require more notice or extra procedures that go beyond RSA 91-A.
- Always follow whichever provision requires the most.

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PUBLIC MEETINGS



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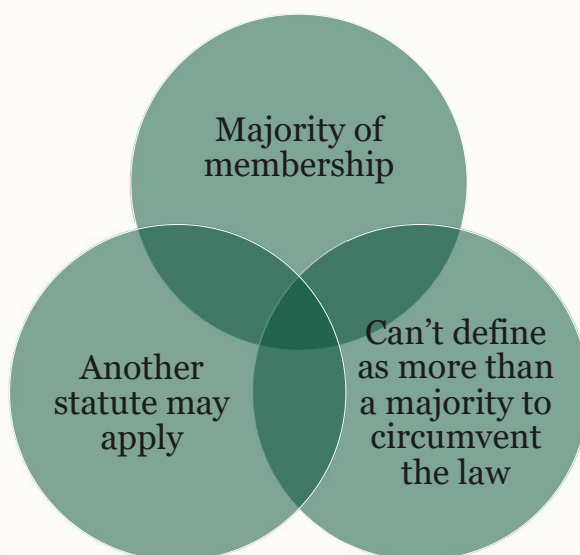


What is a Public Meeting? RSA 91-A:2

- Quorum
- Public body
- Convene so they can communicate contemporaneously
- Discuss or act upon something over which the public body has jurisdiction, control, or advisory power

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Quorum



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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, or advisory committee thereto
- However, a group of employees meeting with applicants, which makes no decisions or recommendations as a group, is not a public body.
Martin v. City of Rochester, 172 N.H. 378 (2020).

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Convening/Communicating

- When is it a meeting?
 - A quorum convenes such that all participating members can communicate with each other contemporaneously
 - In person? Zoom? Phone? Email?
 - To discuss or act upon matters over which that public body has supervision, control, jurisdiction, or advisory power
 - Any “business” the body deals with – construe this broadly.

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Communication Outside Meetings

RSA 91-A:2-a Communications Outside Meetings –

- I. Unless exempted from the definition of “meeting” under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III.
- II. **Communications outside a meeting, including but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.**

Even when fewer than a quorum are present, AVOID THIS.

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Electronic Communications Complying with RSA 91-A

- ✓ Use an administrative person to send an email (hub and spoke)
- ✓ Put recipients' email addresses in BCC line
- ✓ Never, ever, "reply all"
- ✓ Do not send email to a quorum of a public body. Could be a violation if a recipient member replies to all, creates improper electronic conversation.
- ✓ Distinguish between "distribution" and "exchange"
- ✓ Use official municipal email addresses
- ✓ Leave discussion and deliberation of official matters for a properly-held public meeting, nonpublic session, or non-meeting

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What Is Not a "Meeting"?

Social or other
encounter, no
decisions

Collective
bargaining

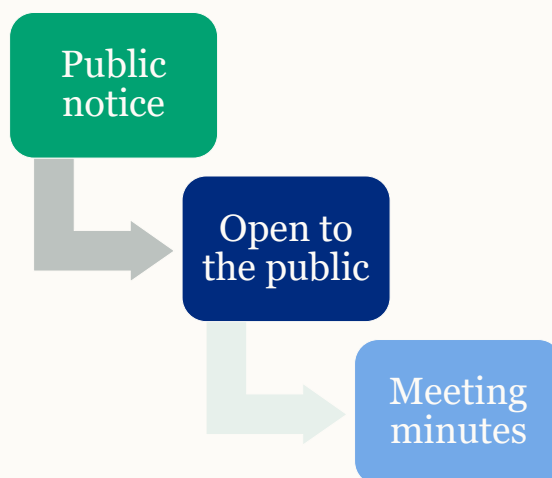
Consultation with
legal counsel

Circulation of draft
documents to
finalize a decision
already made in a
meeting

*This is **not** the same thing as a nonpublic session!*

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Public Meeting Requirements



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Public Notice: RSA 91-A:2, II

- At least 24 hours' notice
- Posted in least two public places, one of which can be the website
- You can always do more!
- Does another statute/rule require longer notice, publication, personal notice to anyone? Follow whatever requires the most notice.

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Public Notice: RSA 91-A:2, II

- Website: either post notice in a “consistent and reasonably accessible location,” or maintain a notice stating where notices are posted
 - RSA 91-A:2, II-b(b)
- Emergency notice: immediate undelayed action is imperative, as determined by the chair. Provide as much notice as possible, use whatever further means reasonably available, explain the emergency in the minutes.

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Remote Attendance

- There must be a physical location for the meeting and it must be stated in the notice.
- Except in an emergency, quorum of members must be physically present.
- Boards can **choose** to offer electronic access to the public, either with or without participation.
 - Establish rules for this and apply them evenly.

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Remote Member Attendance

Board *may* allow it

- Personal attendance “not practical” (note the reason in the minutes)
- Quorum present at physical location
- All members can hear and be heard
- Identify board members in remote location
- All votes by roll call vote

RSA 91-A:2, III(a)



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Remote Attendance – Emergency, RSA 91-A:2, III(b)

- Chair declares “emergency” exists – immediate action imperative, physical presence of quorum not reasonably practical, explain in minutes.
- Still requires physical location, but quorum need not be present.
- Everyone on both sides can hear and be heard.
- Identify all members in remote locations.
- All votes by roll call.

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“Open to the Public” 91-A:2, II

- “All meetings...shall be open to the public.”
- Each part of a meeting that is required to be open to the public shall be audible or otherwise discernable to the public at the meeting location as described in the notice.
- Public has the right to record, video, etc.
- No secret ballot voting.
- The right to ATTEND ≠ the right to SPEAK

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Practice Question #1

Is it a “meeting”? Quorum of members of Heritage Commission go on a walk-through of a Town building to view progress on restoration work that is being done. No votes will be taken.

Answer: It depends why the members are there.

- Merely curious about progress and have no role in the restoration project? Not a meeting.
- Commission provides oversight or has official input into the project? It is a meeting.
- Ask: is it within that body’s “supervision, control, jurisdiction, advisory power?”

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Practice Question #2

If a decision needs to be made between select board meetings, can town administrator email the members to see whether they agree?

- Does it make a difference if the TA calls or emails each one separately and none of them are communicating directly with each other?
- What about signing the manifest for payroll and invoices so checks can be issued? RSA 41:29, I(a).
- What about signing Intent to Cut form? RSA 79:10, I(b)

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NONPUBLIC SESSIONS



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RSA 91-A:3 – Some Thoughts

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 Is Nonpublic Session Permitted?

- Matters involving a specific employee*
- Hiring an employee
- Matters affecting someone's reputation*
- Buying/selling real or personal property
- Discussing pending/threatened lawsuits
- Emergency preparation
- Discussing legal advice
- Discussing whether to unseal minutes
- RSA 91-A:3, II – see for complete list

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RSA 91-A:3, II(a),(b) - Employee

- Dismissal, promotion, compensation, discipline, or investigation of charges concerning employee
- Must concern a specific municipal employee, not a grouping of employees or department
- Does not apply to elected or appointed officials
- IF the employee has the right to a public meeting and asks for the meeting to be held in public, board must comply. NOT VICE-VERSA – no right to a nonpublic session.
 - The right to a public meeting comes from employment contract, CBA, statute, personnel policy

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RSA 91-A:3, II(c) - Reputation

- Matters which, if discussed in public, would likely affect adversely the reputation of any person other than a member of the board itself
 - Harm to reputation must be severe, not trivial
 - Person who might suffer reputational harm can request an open meeting and board must comply
 - This includes any application for assistance (welfare), or tax abatement or waiver of a fee, fine, etc. if based on inability to pay or poverty of the applicant
 - Notice of nonpublic session based on reputational harm need not be provided to the person whose reputation is at stake. *Sivalingam v. Newton*, 174 N.H. 489 (2021)

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Entering Nonpublic Session

RSA 91-A:3, I

Motion to enter nonpublic session made and seconded

Motion must state on its face specific reason for the nonpublic session (refer to the statute)

Vote must be by roll call and recorded in the public minutes

Simple majority vote is sufficient

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Conducting Nonpublic Session

- Discussion must be confined to the reasons given in the motion for the nonpublic session
- Board may take votes in nonpublic session
- A member may object to perceived violations regarding nonpublic session – note objection in minutes. If board continues, member may participate without being subject to any penalties that may apply. RSA 91-A:2, II-a
- Must return to public session again before the whole meeting is adjourned

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Other Considerations

Include nonpublic session on agenda?

Timing – beginning or end of meeting?

Attendance by non-members

Only board members have a right to attend nonpublic session. Board may **allow** anyone to attend. However, best to exclude anyone whose presence is not essential. May want to excuse all non-board members, have a member take minutes.

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MANAGING PUBLIC COMMENT & MEETING BEST PRACTICES



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Meeting v. Hearing



Meeting

- To conduct the board's business
- RSA 91-A applies
- Open to public
- No right to speak



Hearing

- To hear public or certain people on an issue
- Occurs within a public meeting
- RSA 91-A "plus"
- Some right to speak

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Who Can Speak?

- Public Meeting: no one other than board members has the right to speak, unless the board gives them that right.
 - RSA 91-A:2 only grants the right to attend and record.
 - Remember – the purpose of a public meeting is for the board to conduct its business, which may or may not include hearing from the public. It does not have to!
- Public Hearing: who can speak depends on the hearing.
 - Check the statute that applies
 - In most cases, it will be the "public" generally

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Managing Comments at Meetings

- Establish written rules as a board (boards may differ).
- Explain the rules clearly at every meeting in which comment will be permitted. *Repeat as necessary.* Have written copies.
- Apply the rules evenly to everyone and consistently at each meeting (every time).
- You can change your rules if they don't work.
- Try to allow it at consistent times in your agenda rather than moving it all around.

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1st Amendment Issues

- Once you allow public comment, you have triggered 1st Amendment rights to free speech
- What does this mean?
 - You MAY impose “reasonable time, place and manner” restrictions on public comment
 - You MAY NOT put any restrictions on the content of that speech, other than to limit the topic(s) (but carefully....)

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What Restrictions Are Allowed?

- Specific topics (the proposal to replace stop sign with traffic light; anything on the agenda; anything within the jurisdiction of this board).
 - This creates a “limited public forum” for speech
- Time limits per person (3-5 minutes is common and generally upheld)
- Using signup sheet or lining up at microphone
- Everyone speaks once before anyone goes again

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What Is Not Acceptable?

- “Only positive comments”
- “No comments about employees”
- No swearing or obscenity (although you can prohibit specific threats of harm and speech likely to incite violence or injury)
- Prohibiting a particular person or group from speaking (discrimination)
- Prohibiting the display of a message (shirt with slogan, banner held up in the back, etc.)

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Can Anyone Speak?

- Public meeting is open to the “public” which includes everyone.
- Avoid limiting public comment to “residents only” or “taxpayers only.” It invites lawsuits without really helping you.
- Don’t require speakers to provide their name or address, although you may ask (and they may refuse).
- Board members simply listen and give comments the weight the members believe they are due.
 - Non-resident comments **may** carry less weight

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Maintaining Control

- If comments are limited to a particular topic and speaker goes off-topic, chair reminds them (gently but firmly) of the limitation.
- Encourage people to submit comments in writing (note that the board will read them all).
- Board members should simply listen. There is no obligation to engage in discussion or answer questions!
- Remain calm. Take a deep breath. Practice your “neutral face” in the mirror.

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Maintaining Control

- If a speaker is breaking the rules, chair should remind them of the rule and allow them to try again.
- Provide 2-3 chances.
- Take a 5-10 minute recess from the meeting to let everyone calm down. You can do this at ANY TIME.
- Board can vote to adjourn the meeting or continue it to another time, date place.
- In extreme cases, someone who is preventing the business of the meeting from continuing may be removed by law enforcement. Use this sparingly!
 - *State v. Dominic*, 117 N.H. 573 (1977).

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Rules of Procedure

- Land Use Boards – must have them, RSA 676:1.
- Other boards – don't have to, but should.
- Adopted by a board vote at a regular public meeting.
- Follow your own rules. Include a provision that says the board can vote to waive the rules in appropriate situations, but don't use it unless you need to.
- If the rules don't work for you, change them!
- If they are too complicated, simplify them!
- Avoid *Robert's Rules of Order*. Please.

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Rules of Procedure

Regular meeting day, time & location

Annual election of officers

Authority of chair

Participation of alternates (for boards that have them)

Quorum & voting

Agendas for meetings

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Rules of Procedure

Order of business at meetings

Meeting procedure & decorum expectations

Public comment

Procedures for public hearings

Acknowledgement of RSA 91-A

Committees/Liaisons/Appointments

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Agendas

- No legal requirement to have an agenda, to post it, or to follow it (but be careful with that part)
 - Requirements are about posting meeting *notices*
- Establish in your rules of procedure how the agenda is created (Who does it? Who calls meetings? Who can add to it? How do they do it?)
- There is no general public right to demand to be on the agenda
- Are there availability constraints that dictate the order of things on the agenda?

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Deviating from the Agenda

- Public hearing: if agenda includes one, try to stick to the advertised start time (and NEVER start earlier)
- Otherwise, no legal requirement to follow the agenda as written or posted (if you posted it).
 - You may skip things, take them out of order, and add new items (unless public or specific notice was required for that new item)
 - However – be careful playing games with the agenda. Have a good reason and explain why you're doing it.

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Preparation

- Circulate materials well in advance of meetings.
- Make being prepared part of your board culture.
- Encourage members to think about comments and questions before the meeting
 - Okay to send question/comments to staff but NOT to other board members (one-way communication)
 - Okay to send draft minutes or other documents to members before the meeting, but ALL discussion of it must wait until the meeting
 - Beware the inadvertent meeting!

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Conducting the Meeting

- Be on time and start on time.
- Set clear ground rules.
- Stay on topic.
- Things do not need to be “read into the record” (correspondence, public comment in written form)
 - Chair can state correspondence was received, summarize important points if appropriate, and ask to have it attached to minutes.
- Have a different member run meetings now and then with the chair there to assist!

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Discussions and Voting

- When there is a motion, confine the discussion to the specific motion on the table. One motion at a time.
- Follow RSA 91-A and record who made and seconded each motion and what the vote was.
- Be sure the minute-taker has the wording of motions.
- A tie vote means no action was taken. The motion on the table failed and the board should try again. It doesn't mean the opposite of the motion passed.

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Respect and Decorum

- Board conduct is even more important than handling the public. Courts expect you to be reasonable even when no one else is.
- Assume you are being recorded at all times. No one has a reasonable expectation of privacy in a public meeting.
- Imagine the meeting from the observer's point of view. What do you see?
- Don't get defensive. Different points of view are part of the process.
- "I don't know but I'll find out" is a perfectly acceptable answer to a question when you don't know.

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Respect and Decorum

- Treat one another courteously, even those you don't like.
- Listen to what everyone is saying.
- Don't interrupt or talk over each other (it looks terrible, makes everyone loud for no reason, and makes taking minutes very difficult).
- Avoid side conversations, don't pass notes, and NEVER conduct a conversation via text or email with board members during a meeting.
- If you must use your phone, have a good reason.

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MINUTES



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Minimum Required Contents

- Names of members present
- People appearing before the board
- Start and end times of the meeting
- Brief description of subject matter discussed
- Record of decisions made
- Names of members who made and seconded each motion
- Name of person who prepared minutes

RSA 91-A:2

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Handling Minutes

- Made available upon request within 5 business days after the meeting (M-F, not holidays)
- No obligation to “post” minutes
- Website: either (a) maintain notice stating where minutes may be reviewed or (b) post approved minutes in consistent and reasonably accessible location, RSA 91-A:2-b(a)
- Recordings are not a substitute for written minutes (and are public so long as they exist)

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Minutes of Nonpublic Session

- Minutes must be kept of all nonpublic sessions and require all the same information required for public minutes, plus:
 - Must record all actions in such a manner that the vote of each member is recorded
 - Any vote to seal minutes must be recorded in the minutes of the public session
 - Available upon request within 72 hours

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Disclose or Seal?

- Nonpublic minutes are *public* unless board determines, by 2/3 vote taken in public session, that disclosure of minutes would:
 - Have adverse effect on reputation of person other than board member
 - “Render the proposed action ineffective”
 - Reveal information related to terrorism

RSA 91-A:3, III

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List of Sealed Minutes

List of sealed nonpublic meeting minutes must:

- Identify public body
- State date & time of nonpublic session
- State statutory reason for nonpublic session
- State date of decision to seal minutes
- Include date of any subsequent decision to unseal the minutes

Minutes sealed under RSA 91-A:3, II(d) (buy/sell real or personal property) must be unsealed “as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.”

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Review of Sealed Minutes

- Sealed minutes will become unsealed automatically 10 years after the last time the board reviewed them and decided to keep them sealed. RSA 91-A:3, IV.
- All sealed minutes from before October 3, 2023 must be reviewed within 10 years from that date or they will become public.
- This will occur regardless of any harm that might result from the release of those minutes.
- Boards should have a systematic review process for all nonpublic sealed minutes – should they stay sealed?
- Keep record of your review as part of the required list.

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Practice Question #3

The select board had a nonpublic session during its last meeting to discuss an issue involving a citizen, who was not present in the nonpublic session. The select board voted to seal the minutes of the nonpublic session. *Can the citizen obtain a copy of those minutes?*

- Would it make a difference if the citizen had been present at the nonpublic session?
- What if the board had been discussing an employee?

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Practice Question #4

Members of a board have begun requesting extensive revisions to meeting minutes, not because the minutes inaccurately reflect what was said at the meeting, but to clarify what they meant to say. *Is this appropriate?*

- Common sense dictates that minutes should be an accurate record of what actually happened, rather than what the members wish had happened.
- Member who wants to elaborate or explain what they meant can do so in the minutes of the next meeting.

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GOVERNMENTAL RECORDS



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What is a Governmental Record?

- Any information created, accepted or obtained
- By, or on behalf of,
 - Any public body, or a quorum/majority thereof
 - Any public agency
- In furtherance of its official function

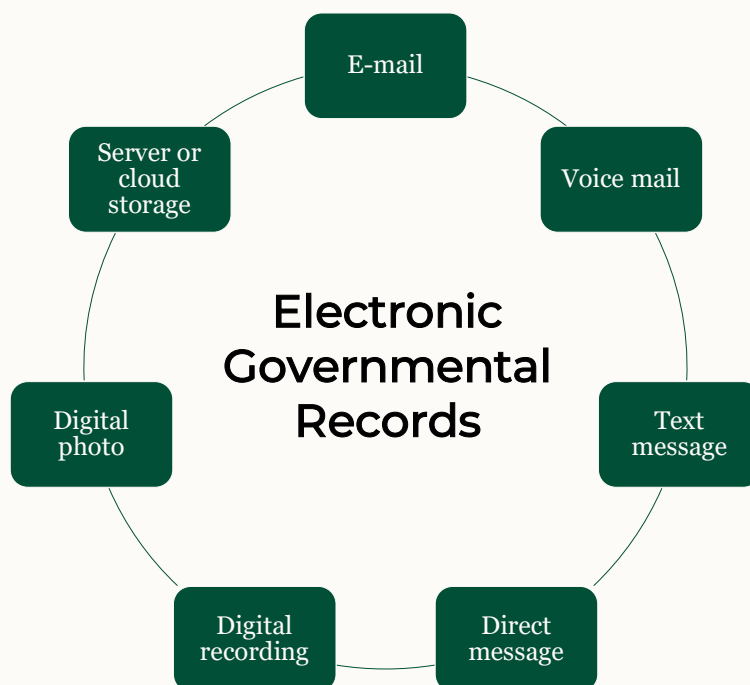
RSA 91-A:1-a

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Records, not Just Information

- Includes any written communication or other information
- Whether in paper, electronic, or other physical form (audio, video, computer file, photo, document....)
- Does not include information that hasn't been fixed in some physical, electronic, or other form

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Created, Accepted or Obtained by a Public Body

- Communication becomes a governmental record if it is “received by a quorum or majority of a public body in furtherance of its official function.”
- If created, accepted or obtained by fewer than a quorum, then it isn’t yet a governmental record (unless it falls under another category)
- Email exchange between one select board member and a constituent? Not a governmental record because not obtained by a quorum of select board members

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“Public Agency”

- Any agency, authority, department, or office of any town or city. RSA 91-A:1-a, V.
- May include, but isn’t limited to, the town administrator or town manager’s office, police department, land use administrator, planning department, tax collector, town clerk, treasurer, public works.

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“In Furtherance of Official Function”

- Personal correspondence is not in furtherance of the board or agency’s official function, and thus not a governmental record. Falls outside of RSA 91-A.
- Example: superior court ruled that advertisements and “junk mail” email messages were not in furtherance of the agency’s official function and were thus not governmental records. Agency was not required to produce them. *Brandano v. Superintendent, SAU #16*, 2023 N.H. Lexis 190.

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Practice Question #5

Administrative Assistant puts together a packet of material for the Select Board’s meetings, and emails it out to the members three days before each meeting. *When does this material become a governmental record subject to disclosure upon request?*

- When it is emailed to the members
- When the Select Board meeting begins
- When the Select Board meeting ends

Does it make a difference whether the email goes to all members at once or is sent separately to each one?

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Practice Question #6

Our planning board secretary records the meetings on her personal cell phone and uses that recording to create the minutes. Sometimes it is audio only, sometimes she records video as well. *If a Right to Know request is made for the recording, do we have to provide them or are they the personal property of the secretary?*

- Created, accepted or obtained “by or on behalf of” a public body, RSA 91-A:1-a, III.
- RSA 91-A:4, II – citizens may access “all notes, materials, tapes, or other sources used for compiling the minutes...”
- Very likely yes, it is a governmental record *while it exists*.

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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 non-exempt records available.

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Is the Record Exempt from Disclosure?



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Mandated Access

- Employee separation payments if in addition to regular salary, or accrued vacation or sick time – RSA 91-A:4, I-a
- Meeting minute raw materials available after completion of public meeting – RSA 91-A:4, II
- All lawsuit settlements on file with clerk and available for public inspection for 10 years – RSA 91-A:4, VI

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Exemptions to Disclosure

- RSA 91-A:4, I: Governmental records must be made available “except as otherwise prohibited by statute or RSA 91-A:5.”
- RSA 91-A:5 provides a list of records which are exempt from disclosure.
 - Some are categorically exempt
 - Others require detailed analysis (RSA 91-A:5, IV)
- Purpose of RSA 91-A is to provide the utmost information about what the government is up to. If disclosing the information would not do this, disclosure may not be required.
- When a public body or agency seeks to avoid disclosure under this law, they bear a heavy burden.

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RSA 91-A:5 - Exemptions

- **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, including but not limited to notes and materials made prior to, during, or after a governmental proceeding.”

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RSA 91-A:5 - Exemptions

- **IT Security – RSA 91-A:5, XI**
 - “...pertaining to IT systems, including cyber security plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials” if release would release security details that would aid an attempted security breach or circumvention of law
 - Very limited exemption, this applies, essentially, to security protocols and measures installed on municipally-owned systems
 - To limit hackability of municipal systems

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RSA 91-A:5 - Exemptions

- **Attorney-Client Protected Info – RSA 91-A:5, XII**
 - “Records protected under the attorney-client privilege or the attorney work product doctrine.”
 - This includes correspondence with attorney for the purpose of obtaining legal advice, records created for the purpose of litigation, etc.
 - HOWEVER – only for so long as they are not shared with anyone “outside of the privilege”
 - Once the privilege is gone, so is the exemption

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RSA 91-A:5 - Exemptions

- **Terrorism – RSA 91-A:5, VI**
 - Records related to emergency preparation and functions pertaining to terrorism are exempt
- **Body-cam recordings – RSA 91-A:5, X**
 - Law enforcement body-cam recordings under RSA 105-D are exempt from disclosure, with exceptions (those depicting restraint/use of force, discharge of firearm, felony-level arrest)

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RSA 91-A:5 - Exemptions

- **Law Enforcement Records Generally**
 - NH courts use the 6-factor federal FOIA test – records are exempt if disclosure would result in any of these
 - A – Interfere with law enforcement proceedings
 - B – Interfere with fair trial
 - C – Result in an invasion of privacy
 - D – Reveal confidential sources
 - E – Reveal investigative techniques and procedures
 - F – Endanger the life or safety of any person

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Exemptions – RSA 91-A:5, IV

- This is the most common exemption
- Beware – it is not as straightforward as it appears
- “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....”

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Invasion of Privacy: 3-Part Test

Privacy Interest

- Is there a privacy interest at stake that would be invaded by the disclosure?
- If no, the Right to Know Law mandates disclosure.

Public Interest

- What is the public's interest in disclosure?
- Would this information tell the public anything about what the government is up to?

Balance

- Balance the public's interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest.

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Practice Question #7a

A citizen files a request for all building permit applications filed with the town in the last month, including name, address, and project information. Is any of this information exempt?

- Name and address of the person who applied?
- Address of the property where the project would be?
- Project information?

Ask – is there a privacy interest in any of this information? If so, what would this information tell the public about what the government is doing?

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Practice Question #7b

Because the applicant has a privacy interest in their name and address, and because that information tells the public nothing about what the government is up to, Town ultimately redacts that information and releases the rest of the applications.

The requestor is dissatisfied with this and then explains they are believe permits submitted by members of a certain racial or ethnic group are being denied while others are being granted.

Ask – given this new information, is it possible that the name/address information of the applicants *would* tell the public something about what the government is doing?

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Practice Question #8

- The town receives a RTK request for a list of all the house holds in town receiving the veterans tax exemption. Perhaps they even indicate that the reason for the request is that they want to send thank you cards to everyone in town who served on veterans' day.
 - What information is subject to a privacy interest?
 - What information provides information about the government?
- Consider the same request for households receiving the elderly or disabled tax exemption. How could release of that information be problematic?

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Confidential, Commercial, or Financial Information

- RSA 91-A:5, IV – as used here, encompasses information such as business sales statistics, research data, technical designs, overhead and operating costs, and information on financial condition.
- To show that information is sufficiently “confidential” to justify nondisclosure, must show that disclosure is likely:
 - To impair the government’s ability to obtain necessary information in the future; or
 - To cause substantial harm to the competitive position to the person from whom the information is obtained, to be determined objectively rather than the subjective expectation of the party generating the information.

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Personnel Information

- Personnel files are not *per se* exempt from disclosure under RSA 91-A:IV. Use a two-stage analysis:
 - Is this information considered a “personnel file” or part of a “personnel file” (does not have to be in the actual labeled personnel file to count); and
 - Whether disclosure of the material would constitute an invasion of privacy under the 3-part privacy test.
- Names and salary information of public employees are public. *Mans v. Lebanon School Board*, 112 N.H. 160 (1972)
- Records regarding public employee’s work performance or discipline – use the 3-part privacy test

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Exemptions in Other Statutes

- Identity of local welfare clients – RSA 165:2-c
- Records related to the Enhanced 911 System – RSA 106-H:14
- Motor vehicle records (with exceptions) - RSA 260:14
- Names of people receiving elderly tax exemption under RSA 72:39-b – see RSA 72:40-b
- Documents supporting application for tax exemption that includes an income or asset limitation – RSA 72:34, II
- Dog registration records, information and lists – RSA 466:1-d
- Ballots (including cast, cancelled, and uncast ballots, and successfully challenged absentee ballots still in envelopes – RSA 669:33, II

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Practice Question #9

- Town Fire Station has a video camera which records not only the driveway area at the Fire Station but also part of the Town's public road next to it. Video is automatically deleted after 30 days unless needed for something. Someone asks for a copy of the recording that might show an auto accident.
 - Is it a governmental record?
 - Does any exemption apply?
- What about a similar video camera in the Town Hall Lobby? Someone asks for a copy of the video from a particular day.
- What about a similar camera in the Police Station Lobby?

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Make Non-Exempt Records Available



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Record Requests

91-A:4 Minutes and Records Available for Public Inspection.

I. Every citizen during the regular or business hours of all public bodies or agencies, and **on the regular business premises of such public bodies or agencies**, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5.

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Record Requests

- Any “citizen” can request to view or obtain copies of records. RSA 91-A:4, I
- No definition of “citizen” in statute or relevant case law (although there are often bills in the Legislature).
- Best practice: anyone who shows up in your office should be assumed to qualify as a “citizen” for the purpose of requesting records.
- This can make online requests tricky.

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Records You Have

- Public body/agency shall make governmental records within its files available for inspection and copying “upon request for any governmental record reasonably described.” RSA 91-A:4, IV(a).
- The obligation is to provide records you actually have
- RSA 91-A:4, VII – nothing in the law requires the government to compile, cross-reference, or assemble information in a form in which it is not already kept or maintained
- However, if you have info in a more convenient form, or your software offers reports that can be obtained easily, that generally has to be provided. See *Menge v. Manchester*, 113 N.H. 513 (1973).

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Records Reasonably Described

- Public body/agency shall make governmental records within its files available for inspection and copying “upon request for any governmental record reasonably described.” RSA 91-A:4, IV(a).
- Request has to be clear enough to allow municipal employees to know what they are looking for in the voluminous materials kept by each municipality.
- Government employees have an obligation to clarify with the citizen what they are requesting, ask clarifying questions if needed. See *Salcetti v. City of Keene*, No. 2019-0217 (6/3/2020) (speaking in dicta about “spirit of collaboration”).

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Search for Records

- Requests must be met with a search reasonably calculated by the municipality to uncover the record. *ATV Watch v. NH DOT*, 161 N.H. 746 (2011).
- Critical issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to find the requested records.
- Voluminous request can't be denied outright because it would require a lot of effort. Work with the requestor, show a good-faith effort – it may simply take more time. *Colquhoun v. Nashua*, 175 N.H. 474 (2022)
- RSA 91-A:4, IV(e): you may suggest reasonable modification to scope of request to enable production more efficiently and affordably.

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Basics of Record Production

- Records only have to be made available immediately upon request if they are **actually** immediately available.
 - RSA 91-A:4, IV(a)
- RTK does not give citizens the right to review records in any quantity and wherever kept, immediately upon demand.
- People can be asked to make an appointment to review records.
- *Brent v. Paquette*, 132 N.H. 415 (1989).

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“Something” Within 5 Days

- If a record is not immediately available, you must do some combination of the following within 5 business days (Mon – Fri, not including state/federal holidays):
 - Make the record available;
 - Deny the request and provide a written statement of the specific exemption applies and brief explanation of how the exempt applies to the record withheld;
 - Provide a written statement of the time reasonably necessary to fulfill the request and reason for the delay RSA 91-A:4, IV(b) and (c)

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“Something” Within 5 Days

- Why might you need more than 5 days to produce records?
 - Need time to determine whether the record exists, conduct a reasonable search
 - Need time to determine whether the record is disclosable (which might include having legal counsel review it), and to determine if redactions are needed and to make them
 - Need to determine how many records there are, how much time it will take to make them ready for review or to make copies

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Stay in Touch

- When the response is "we will need ___ days/weeks to provide a response because....", you must follow up.
- If you get toward the original deadline and are not finished, (1) provide what you've got so far if you can, and (2) provide an updated estimate with an explanation.
- Do not stop communicating, do not avoid them.
- *Brandano v. Superintendent, SAU #15*, superior court was not amused. Don't put yourself in the same position.

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Records Available Elsewhere

- Just because a record, or the information in it, can be obtained through some manner other than a 91-A request does not mean a municipality can ignore 91-A requirements.
- Make sure you have engaged in a Right to Know analysis (governmental record that we have? Exempt?) before denying the request.
- However – people can be referred to online municipal databases of information, if done in a reasonable way.

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Methods of Providing Records

- *In person in your office* – RSA 91-A:4, I.
- You may choose to mail records out by US mail or email, but you are not required to do this. Have a policy!!
- Hard copy – if you only have hard copy, you don't have to convert to electronic format
- Electronic copy – if you have something electronically and that is what the person asks for, you must do it, but only in a format in which you already have it
- If you have it in both hard copy and electronically, they can choose.

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Charging for Copies

- RSA 91-A:4, IV(d) - the "actual cost of providing the copy"
- Reasonable per-page fee for hard copies which reflects overhead (copier cost, toner, paper) but NOT staff time
 - Ex. - \$0.50/page for first 10 pages, then \$0.10/page, *Martin v. Rochester*, 173 N.H. 378 (2020)
- Electronic copies – actual cost of USB/other device that you provide (if they provide, ONLY new, in package)
- Cannot charge if you email records out or if they view electronic or paper records in your office without taking them. RSA 91-A:4, IV(d)
- See NHMA Guidance from 2024, ability to charge for voluminous electronic text/email requests

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RECORD RETENTION



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Municipal Records Act

- RSA 33-A:3-a – schedule of 156 categories of municipal records and the minimum time they must be kept
- Once the retention period is over, they may be discarded
- You **can** continue to keep records longer than that
- However, so long as they continue to exist, they are subject to record requests under RSA 91-A

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Storing Public Records

- Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place. RSA 91-A:4, III.
- RSA 41:58 requires public records to be deposited with the town clerk when not needed by public officers for the discharge of official duties (i.e., the clerk is the default when there is no other place to store it)
- RSA 41:61 prohibits loaning or removing public records from their storage place except when necessary for the discharge of public duties (i.e., records should be kept by the town or city, NOT by anyone at home)

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Retention Periods RSA 33-A:3-a

- Suggestion: READ THROUGH the whole thing to see if there is something that relates to your department or board
- Correspondence:
 - Administrative records – one year
 - Policy and program records – follow retention requirement for the record to which it refers
 - Transitory – retain as needed for reference
 - This might be just as long as it takes to read it and then dispose of it.

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Retention Periods RSA 33-A:3-a

- Recordings of meetings used to create minutes: until written minutes are approved by board
- Minutes of boards and committees: permanently
- Minutes of town meeting: permanently
- Ordinances: permanently

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Retention Periods - Other

- What if it isn't in RSA 33-A?
 - Find something analogous in RSA 33-A to use
 - Ex. – Variances and special exceptions, suggest using subdivision and site plan review retention periods
 - Consider the statute of limitations (3 years for most actions, 20 years for title to real estate)
 - What might you need it for in the future?

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What Form Is Required?

- You can always keep hard copies.
- Original town meeting records “shall not be disposed of but shall be permanently preserved.” Those prior to 1900 need not be microfilmed unless legible. RSA 33-A:6.
- Paper records may be transferred to PDF/A and the original disposed of as the municipality chooses, subject to requirements of other state or federal laws. RSA 33-A:5-a, I.

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What Form Is Required?

- Electronic records with a retention period of 10 years or less may be kept solely electronically in their original format so long as they remain accessible (subject to local committee rules).
- Electronic records with a retention period longer than 10 years must also be transferred to paper, microfilm, or PDF/A “on a medium from which it is readily retrievable.”
- RSA 33-A:5-a, II.

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Deleting Electronic Records

- Electronic records could include documents stored in computer, in the cloud, on a website, USB device, CD/DVD, email, voicemail, text, etc.
- RSA 91-A:4, III-b: An electronic record is no longer subject to disclosure once it has been “initially and legally deleted.”
 - Legally = retention period has ended
 - Initially = “no longer readily accessible” to the public body or agency itself

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Deleting Electronic Records

- What we know: transferring something to “trash” or “deleted items” is not enough; you must also empty that folder.
- What we don’t know: when must you have the IT department retrieve it for you?
- *Ortolano v. City of Nashua*, 176 N.H. 175 (2023)
 - Could be searched and retrieved from disaster-prep backup with a few hours’ IT Dept work
 - Had, in fact, been done before
- If it’s that simple, you probably have to do it.

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VIOLATIONS and REMEDIES



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How is RSA 91-A Enforced?

- “Any person aggrieved” by a violation may file either with the superior court or the RTK Ombudsman Office
- Superior court – RSA 91-A:7
 - Supposed to be given “high priority” on schedule
- Ombudsman – RSA 91-A:7-a - :7-d
 - No attorney required, somewhat faster process
 - Ombudsman can order same remedies as court
 - Rulings can be appealed to, or enforce in, superior court
 - HOWEVER – the Legislature severely reduced compensation for the position in 2025 and it has been vacant ever since

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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 (\$250-\$2,000)
- Injunction
- Remedial training
- Knowing destruction of requested record: 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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THANK YOU!



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