



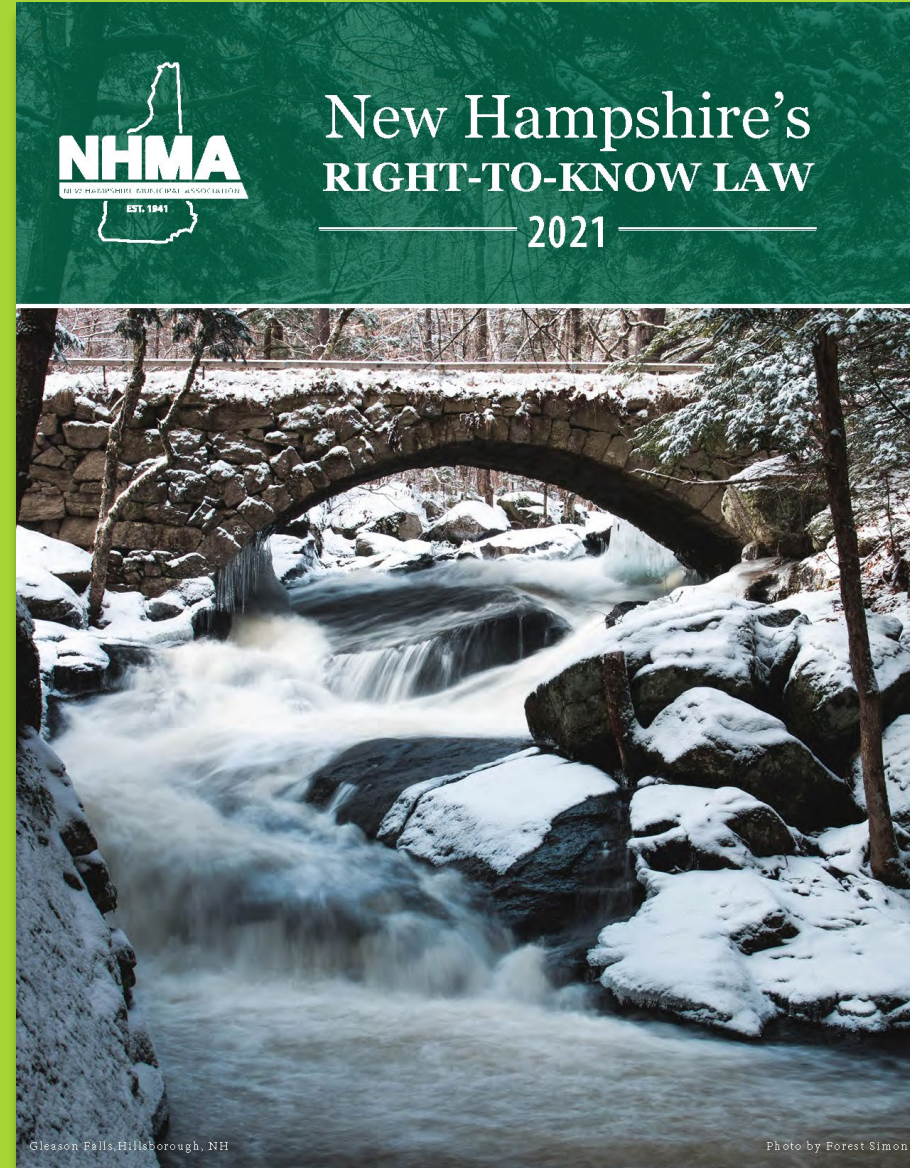
Governmental Records & The Right-to-Know Law

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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



Agenda

- Governmental Records
- Retention of Records, Remedies

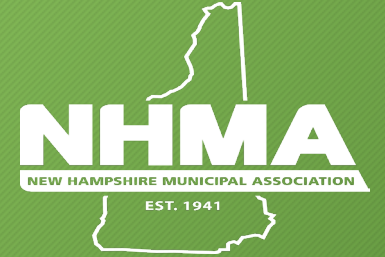


RSA 91-A:4, I: Any Citizen Can Request Records



- 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.

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.

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.

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.

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

Any information

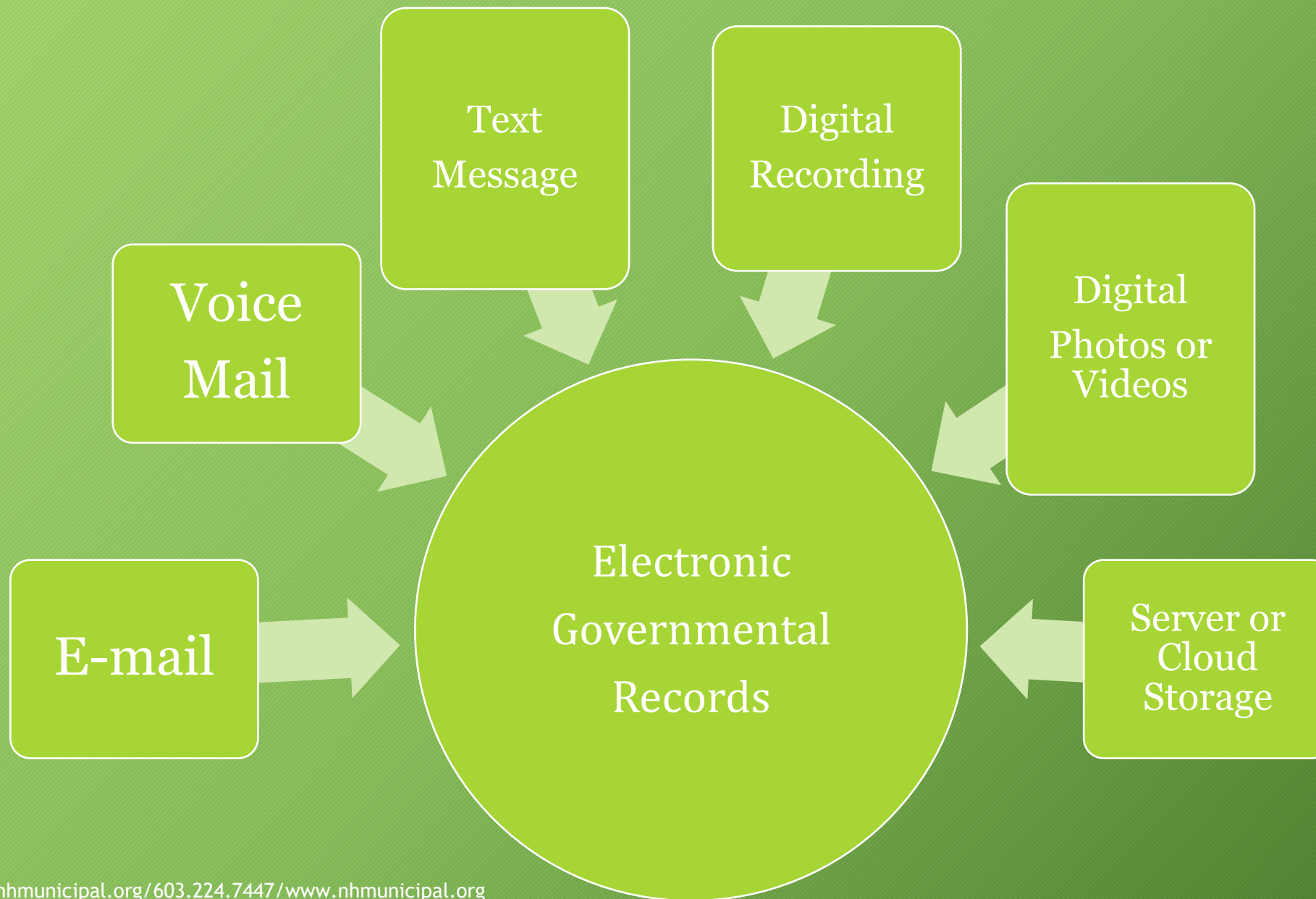
- created
- accepted, or
- obtained



By, or on behalf of,

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

in furtherance of its
official function



Is the Record Exempt from Disclosure?



Mandated Access to Certain Records



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

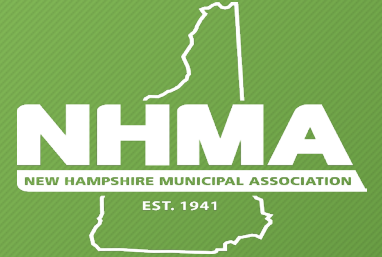


Meeting minute raw materials available after completion of public meeting - 91-A:4, II



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

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



Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

Union Leader v. Salem Describes Privacy Balancing Test



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

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

“Other Files Whose Disclosure Would be an Invasion of Privacy”



Private	Evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.
Public	Assess the public’s interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
Balance	Balance the public’s interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure.

Drafts & Notes

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

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

Personal Notes - RSA 91- A:5, VIII -

- “Any notes or other materials made for personal use that do not have an official purpose are exempt from disclosure” are exempt.

IT Security



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

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

Attempt to limit hackability of municipal systems.

Attorney-Information

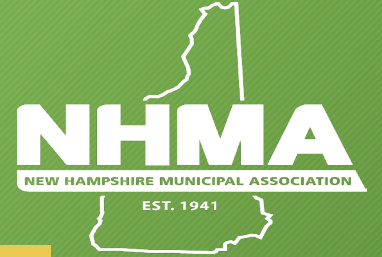


- As of July 30, 2021, RSA 91-A:5 was amended by adding new paragraph XII in response to a N.H. Supreme Court decision subjecting attorney-client privileged communications and attorney work product to the privacy balancing test.
- Blanket exception for: “Records protected under the attorney-client privilege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



Make Non-Exempt Records Available

Basics of Record Production



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



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



Requiring appointment to review records is permitted.



RTK does not require document “compilation.”

No Flat Fees!



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

How Much Time To Produce Records?

We have 5 days...



...right?

“Something” w/in 5 Days

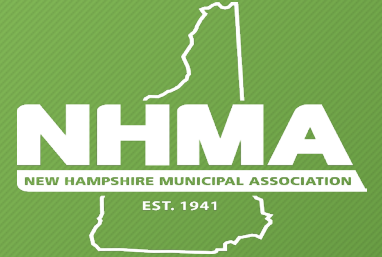


- As of Jan. 1, 2020, municipalities must:
 - Provide a written statement of time necessary to determine whether request granted or denied; AND
 - *Provide a reason for the delay!*
 - Amendment to RSA 91-A:4, IV - HB 396 - 2019 NH Laws Chapter 107
- NHMA Suggestion for Reason for Delay -
 - Need time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

Retention & Remedies



Records Retention



RSA 33-A:3-a contains 156 categories of records to be retained.

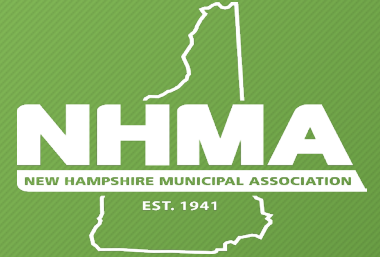


Records retained for the prescribed period.



Once the retention period has expired records may be discarded, but if still available must be produced.

Common Inquiry - Duty to Retain Correspondence:



XXV. Correspondence by and to municipality-administrative records: minimum of one year. *Example - Public Works Director sends proposed budget to Town Manager for next fiscal year via email.*

XXVI. Correspondence by and to municipality-policy and program records: follow retention requirement for the record to which it refers. *Example - Town Administrator sends email inquiry to Welfare Administrator about pending expenditure for a particular welfare recipient - RSA 41:46 duty to keep welfare records and CL Welfare department vouchers must be retained 4 years.*

XXVII. Correspondence by and to municipality-transitory: retain as needed for reference. *Example - Town Administrator sends email to employees reminding everyone about all staff meeting*

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.

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.



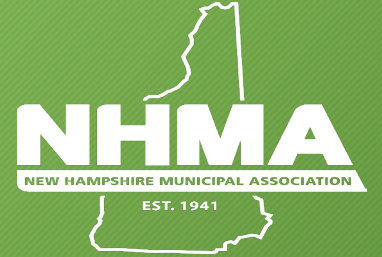
A record can be “legally deleted” if it is not subject to a retention period, or if the required retention period for that record has expired.

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.

How are Violations of RSA Chapter 91-A Enforced?



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



“Aggrieved person”

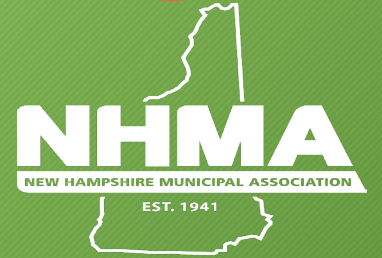


Lawsuit or by complaint to Ombudsman



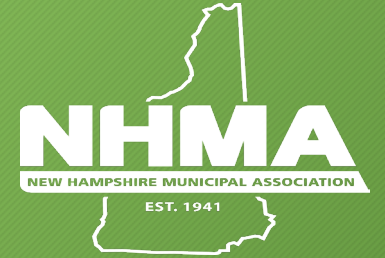
RSA 91-A:7, :7-a, :7-b, :7-c,:8

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

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

Upcoming Webinars



Overview of the Surety Bonding Process in New Hampshire Webinar

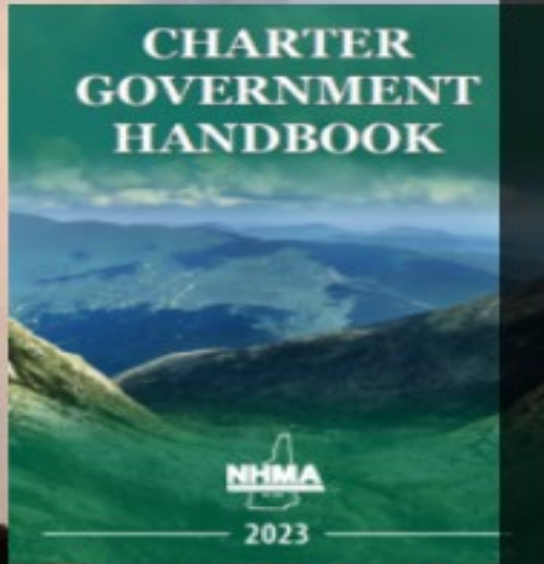
12:00 noon - 1:00 pm, Wednesday, August 30, 2023. Join NHMA's Natch Greyes and Rochester's Director of Planning and Development Shanna Saunders as they review the requirements and limits on the security needed for construction projects under subdivision regulations.

REGISTRATION OPEN!

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Upcoming Webinars



RESCHEDULED TO SEPTEMBER 7: Charter Government in New Hampshire Webinar

Rescheduled to 12:00 noon - 1:30 pm, Thursday, September 7, 2023. Presentation by NHMA attorneys will provide city and town council members, and alderpersons, a thorough introduction to the governance of municipalities with municipal charters.

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Upcoming Workshops



Registration Now Open for Budget & Finance Workshops!

9:00 am - 4:45 pm, Tuesday, September 12 (Derryfield Country Club, Manchester) and **Tuesday, September 19** (Littleton Opera House). Cost is \$90 in-person and \$70 virtual. **A must for local officials involved in the budget process.**

Registration Open!



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Upcoming Webinars



Municipal Immunities: What They Are, How They Work, and Why They Are Important Webinar

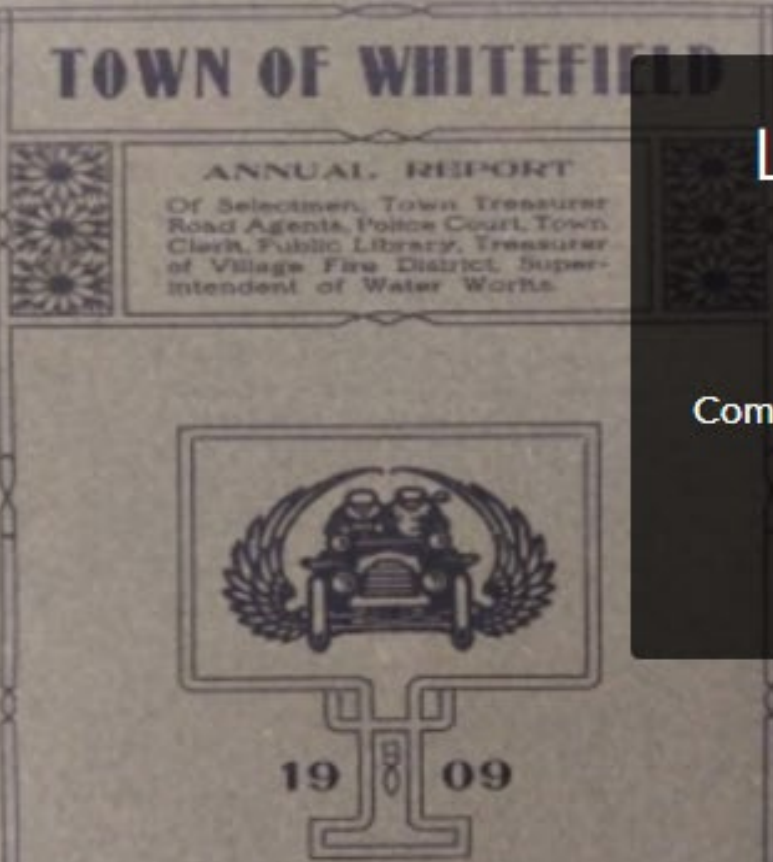
12:00 noon - 1:00 pm, Thursday, September 21, 2023. Join Primex General Counsel Mike Ricker and NHMA's Natch Greyes as they discuss legislative- and judicially-recognized protections for municipal officials including police, fire, and EMTs.

[REGISTER NOW!](#)

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Upcoming Webinars



Learn About UNH's Digitized City and Town Annual Reports Collection Webinar

12:00 noon - 1:00 pm, Tuesday, September 26, 2023. Join Eleta Exline, UNH Scholarly Communication Librarian and Sarah Stinson, UNH Digital Collections Coordinator, who will review the project's history and show us how to best access these vital resources.

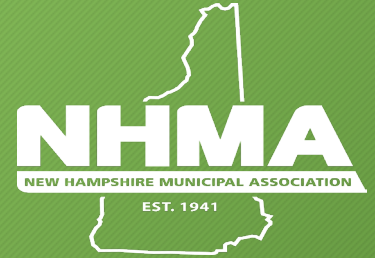
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UNH Library Digitizes Town Reports for

NHMA's 82nd Annual Conference & Exhibition



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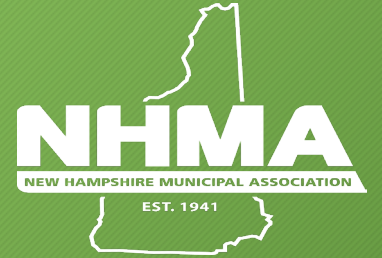
SAVE THE DATES: Zap the Gap: How to Make Peace & Work Effectively in a Multigenerational World

Join us for NHMA's 82nd Annual Conference and Exhibition on Wednesday, November 15 and Thursday, November 16 at the DoubleTree by Hilton Manchester Downtown Hotel.

REGISTRATION TO OPEN SOON!

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*For attending
our Webinar!*



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