



**RIGHT TO KNOW LAW-  
GOVERNMENTAL MEETINGS & RECORDS  
HYBRID WORKSHOP**

Stephen C. Buckley, Legal Services Counsel  
Jonathan Cowal, Municipal Services Counsel

**April 19, 2023**

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# Today's Presenters



*Stephen Buckley*  
*Legal Services Counsel*



*Jonathan Cowal*  
*Municipal Services Counsel*

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## How Do I Ask a Question?

The screenshot shows a Zoom Q&A chat window with the following content:

Q&A	
<b>You asked:</b>	
What happens when I raise my hand?	18:03
<b>Molly Parker answered:</b>	
I can take you off of mute.	18:04
Please input your question	
<input type="checkbox"/> Send Anonymously	<input type="button" value="Send"/>

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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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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

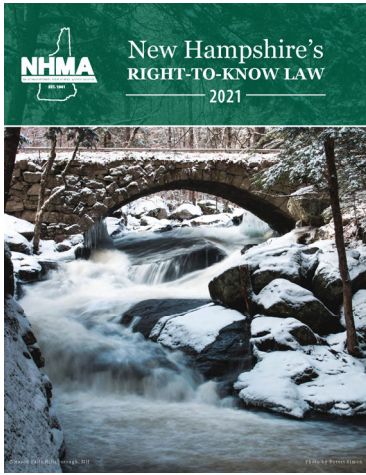
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**NHMA's Publication:**  
*New Hampshire's Right-to-Know Law*

- ▶ Glossary
- ▶ Remote Participation Checklist
- ▶ Nonpublic Session Checklist
- ▶ Law Enforcement Guidance
- ▶ Complete copy 91-A & 33-A
- ▶ Table of Cases
- ▶ Table of Statutes
- ▶ February 2023 Supplement provided



The cover of the publication features the NHMA logo at the top left and right. The title 'New Hampshire's RIGHT-TO-KNOW LAW' is centered in white text on a dark green background, with '2021' below it. The main image is a photograph of a stone arch bridge over a river with snow on the banks and rocks.

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## Agenda

- ▶ Governmental Meetings - **Steve**
- ▶ Nonpublic sessions - **Steve**
- ▶ Governmental Record - **Jonathan**
- ▶ Retention of Records, Remedies - **Jonathan**

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The background image shows a town meeting or public hearing in progress. Several people are seated at a long table in the foreground, facing a stage where a speaker is standing. An American flag is visible on the stage.


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## Governmental Meetings & The Right-to-Know Law

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## Overview of How RTK Governs Meetings Content

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

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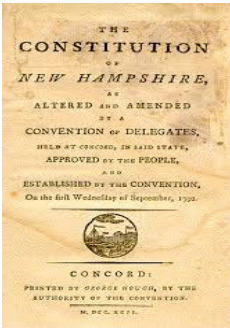
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## The Right-to-Know Law RSA Chapter 91-A



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

-  Quorum
-  Public body
-  Convenes so that they can communicate contemporaneously
-  To discuss or act upon a something over which the public body has supervision, control, jurisdiction, or advisory power

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## “Quorum”


-  Majority of membership
-  Can't define as more than majority to circumvent law
-  Another statute may apply


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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, advisory committee thereto
- New Case: But a committee of city employees providing advice to planning board applicants is not a public body. *Martin v. Rochester*

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## When Public Meetings - Purpose of Public Meetings

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

- In-person
- Email?
- Phone?

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

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

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## What is Not a “Meeting”? (i.e. “Non-meeting”)



Social or other encounter, no decisions



Collective bargaining



Consultation with legal counsel



Circulation of draft documents






*Different than nonpublic session!*

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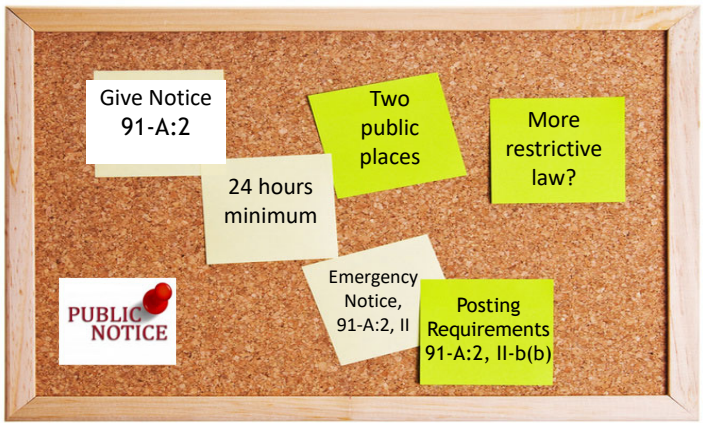
## What are the Requirements of a Public Meeting?

-  Public notice
-  Open to the public
-  Meeting minutes

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## “Posting Requirements”



- Give Notice 91-A:2
- 24 hours minimum
- Two public places
- More restrictive law?
- Emergency Notice, 91-A:2, II
- Posting Requirements 91-A:2, II-b(b)

**PUBLIC NOTICE**

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## Switching Back to In-Person Meetings

- ▶ Emergency Order #12, allowed virtual meetings during the State of Emergency
- ▶ Since State of Emergency expired on June 11, 2021, boards can still have partially remote meetings
  - ▶ There must be a physical location for the public to attend, and, in most cases,
  - ▶ A quorum of the board must be present at that location.
- ▶ Nothing prohibits boards from continuing to offer electronic access (telephonic, Zoom, etc.) to the public.

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## Option 1: Remote Board Member Participation - RSA 91-A:2, III(a)



- ▶ Public body *may* allow
- ▶ Personal attendance “not practical” (in minutes)
- ▶ Quorum *present at physical location*
- ▶ All board members can hear and be heard
- ▶ Identify board members in remote location
- ▶ All votes by roll call



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## Option 2: “Emergency” RSA 91-A:2, III(b)



- ▶ Chair must declare that “emergency” exists sufficient to satisfy requirements of RSA 91-A:2, III.
- ▶ Still requires physical location.
- ▶ However, a quorum of the board need not be present at the physical location.
- ▶ Everyone can hear and be heard
- ▶ Identify persons in remote location
- ▶ All votes by roll call

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## What is an “Emergency? & Notice Requirements

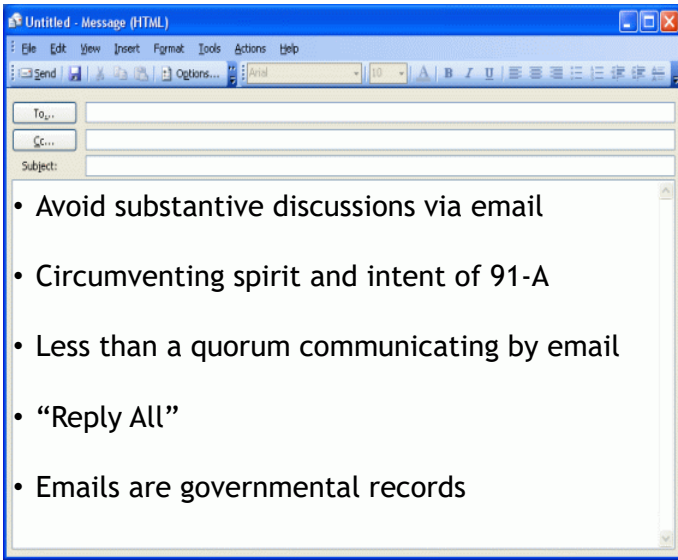
- ▶ “Emergency”: a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body.
- ▶ That presiding officer shall post a notice of the time and place of such meeting as soon as practicable.
- ▶ Further, the presiding officer shall employ whatever further means are reasonably available to inform the public that a meeting is to be held.
- ▶ “Emergency” meetings do not require 24-hour notice posted in 2 public places but should provide as much notice as practical.



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## “Electronic Communications”




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

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## Meetings “Open to the Public”





- ▶ “All meetings . . . shall be open to the public.” RSA 91-A:2, II.
- ▶ “Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting.”
- ▶ Public has right to record, etc.
- ▶ No secret ballot voting.
- ▶ Public Comment?

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## Public Comment

- No right to speak in meeting, unless you say public can speak (remember hearings are different)
- Establish & explain rules, apply consistently
- First Amendment: Many restrictions are not acceptable!
- Maintain control & order
  - Removal?

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## Public Comment: Some Observations





- ▶ The public body should have rules governing public comment before it occurs. Explain the rules clearly to everyone at every meeting. Repeat as necessary.
- ▶ When you allow public comment the First Amendment applies - only “time, place and manner” restrictions -no content restriction
- ▶ You can limit time for comments, require speaking in order of sign-up.
- ▶ You cannot require only positive comments, or prohibit comments about municipal employees
- ▶ A person who is not complying with the public comment rules, and after reminders by the chair, may in extreme cases be removed from the meeting by law enforcement (*State v. Dominic*, 117 N.H. 573 (1977)).

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## Public Meeting Minutes RSA 91-A:2

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

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## Nonpublic Sessions RSA 91-A:3

It's a nonpublic session, not a nonpublic meeting

A nonpublic session is different from a "non-meeting"


Nonpublic session is the exception, not the rule

Nonpublic sessions are permitted, not required

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## When May a Public Body Enter Nonpublic Session?\* RSA 91-A:3, II






- Public employee (specific employee)
- Hiring
- Reputation
- Real or personal property
- Lawsuits
- Emergency preparation
- Discuss legal advice
- Discuss student tuition contract

\*Most common, but not complete list

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## How Does a Public Body Enter Nonpublic Session? RSA 91-A:3, I

-  Motion to enter nonpublic session must be made and seconded.
-  Motion must state on its face the specific exemption relied upon.
-  Vote must be by roll call; simple majority is sufficient. RSA 91-A:3, I(b).

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## Minutes of Nonpublic Sessions



Minutes must be kept—same as for public session.



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

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## Conducting the Nonpublic Session

May make decisions in nonpublic session

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

Returning to public session

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## Other Considerations

- Include nonpublic session on posted agenda.
- Timing—beginning or end of meeting?
- Attendance by non-members
  - Legally, there is no limit on who may be permitted to attend a nonpublic session. However, it is best to exclude anyone whose presence is not essential. This may mean excusing the administrator and/or the recording secretary and instead having one of the board members take minutes. Whether to do this is a judgment call to be made by the board.

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## Disclose or Seal?

Minutes must be publicly disclosed within 72 hours unless board determines, by 2/3 vote taken in public session, that:

- Disclosure would have adverse effect on reputation;
- Disclosure would “render the proposed action ineffective”; or
- Discussion in nonpublic session pertained to terrorism.

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## New Law: HB 108 - Maintain List of Nonpublic meeting minutes



- Effective January 1, 2022 (assuming bill is signed by Governor)
- List of sealed nonpublic meeting minutes must:
  - Identify the public body
  - State the date & time of the nonpublic session
  - State the exemption for the nonpublic session
  - State the date of the decision to seal the minutes
  - State the date of any subsequent decision to unseal minutes
- Minutes sealed under RSA 91-A:3, II (d) (sale or acquisition of real or personal property) “shall be made available to the public 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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**TAKE A 10-MINUTE BREAK**




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## Governmental Records & The Right-to-Know Law

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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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## 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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## 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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## 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

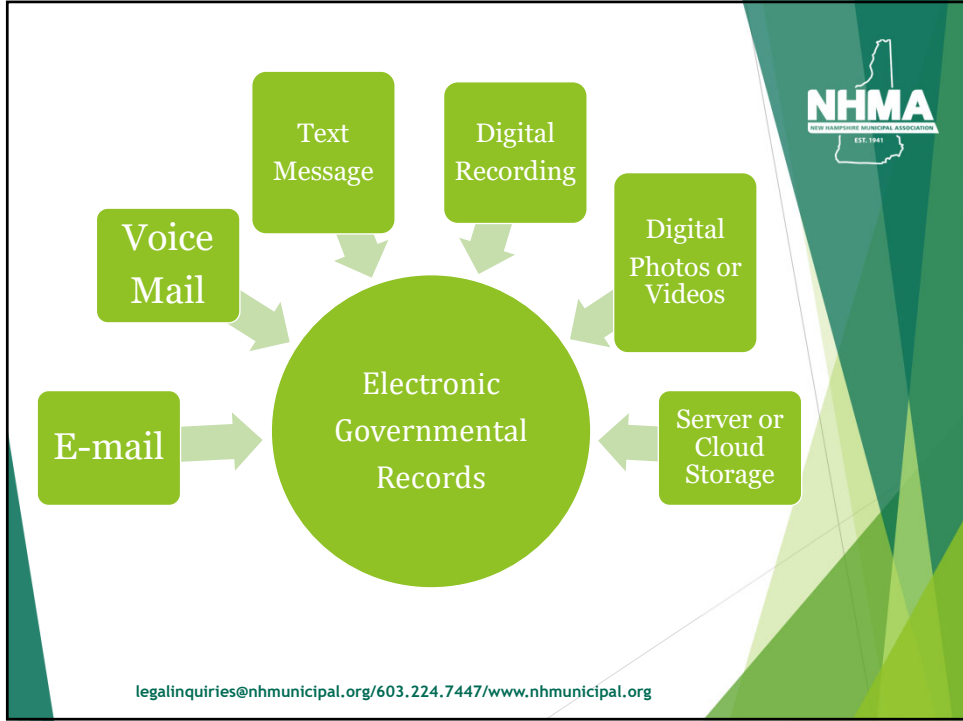
By, or on behalf of,

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

in furtherance of its official function

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## 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

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## Exemptions to Disclosure of Governmental Records



### General Standards Governing Exemptions - RSA 91-A:5



- ▶ RSA 91-A:5 provides a list of records categorically exempt from disclosure; master jury list or teacher certification records.
- ▶ Some statutory exemptions require detailed analysis, such as records whose disclosure would constitute invasion of privacy.
- ▶ The Right-to-Know Law's purpose is to provide the utmost information to the public about what its government is up to. If disclosing the information does not serve this purpose, disclosure may not be required.
- ▶ When a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to avoid nondisclosure.

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## 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.

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

- ▶ Applies to governmental records that pertain to rules and practices dealing with employee relations or human resources, including hiring and firing, personnel rules, discipline, compensation and benefits.
- ▶ Recent Reinterpretation of Law by N.H. Supreme Court
- ▶ Formerly: “Internal Personnel Practices” was a fairly broad category separate and apart from any privacy balancing test.
  - ▶ Includes: Evaluation sheets for potential employees and answers; investigation reports of investigators hired by employers to investigate employees.
- ▶ Now: “Internal Personnel Practices” is another privacy balancing test.

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## 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.*

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## Wide Reaching Implications? *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 categorical exemption for police internal investigative files and they are subject to balancing test.

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## “Confidential, Commercial or Financial Information”



- ▶ This determination must be made objectively and should not be based on the subjective expectations of the party generating it.
- ▶ The emphasis placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential.

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## “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.

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## 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.

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## Law Enforcement Records? *Use FOIA*






- ▶ Factor A: Interfere with law enforcement proceedings
- ▶ Factor B: Interfere with fair trial
- ▶ Factor C: Invasion of privacy
- ▶ Factor D: Confidential sources
- ▶ Factor E: Disclosing investigative techniques and procedures
- ▶ Factor F: Endangering life or safety

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# 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.

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# Attorney- Information



- ▶ As of July 30, 2021, RSA 91-A:5 was amended by adding new paragraph XII in response to a (now withdrawn) 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.”


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Make Non-Exempt Records Available

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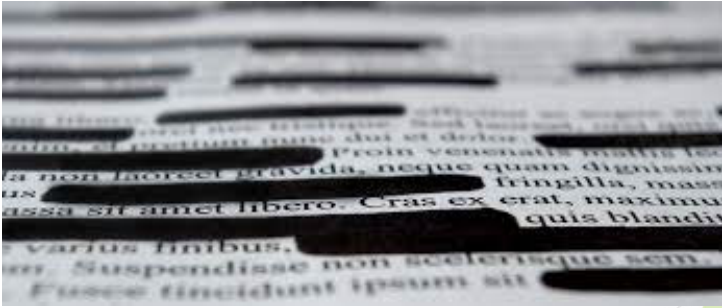
## Basics of Record Production

-  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.”

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## Before Providing Records: Redact Exempt Information



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## 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)

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## A Note About Fees & Electronic Records...

- ▶ 91-A:4, IV: . . . . No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.
- ▶ Green v. SAU #55: Electronic Records Produced Electronically.
- ▶ Taylor v. SAU #55: School Administrative Unit's policy requiring use of a thumb drive to produce electronic records was valid under The Right-to-Know Law.

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## How Much Time To Produce Records?

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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## Retention & Remedies


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## 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.

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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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## Backup Tapes/Files








- ▶ When searching for records, make sure that you are aware of all the places where deleted records may have been “backed up”.
- ▶ The use of backup tapes or other system recovery procedures, cloud storage, etc. could inadvertently create a backup copy of a governmental record that was supposed to be deleted.
- ▶ Whether or not these records are subject to disclosure will most likely depend on the amount of time and effort it will take a municipality to access them.

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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

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## Right-to-Know Ombudsman



- ▶ Aggrieved person files complaint with Ombudsman or Superior Court - filing complaint with one forecloses filing with the other.
- ▶ The Ombudsman may:
  - Compel timely delivery of governmental records
  - Compel interviews with the parties
  - Order attendance at hearings
  - Order disclosure of records and access to meetings
  - Draw negative inferences from a party’s failure to participate in process
  - Can issue any remedial orders permitted under RSA 91-A:8
- ▶ Any party may appeal the ombudsman’s final ruling to the superior court
- ▶ On appeal, the superior court shall treat all factual findings of the ombudsman as prima facie lawful and reasonable

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## Ombudsman Current Procedures



- ▶ RTK Ombudsman Thomas F. Kehr is currently taking cases.
- ▶ Currently in the rule making process under RSA 541-A.
- ▶ Operating based on procedures outlined in Jus 800.
- ▶ [rko-general-procedureal-order-1-pre-rulemaking.pdf \(nh.gov\)](#).

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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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# Main Takeaways



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Every citizen can request records. \*

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The record request must be “reasonably described.” RSA 91-A:4, IV.

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Any search for records must be reasonably calculated to uncover relevant documents.

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There is no obligation to compile, cross reference or assemble records.

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Requiring a citizen make an appointment to review records is permitted.

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When denying access provide written reasons.

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Redact exempt information

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Reasonable fees allowed

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Is it really deleted? RSA 91-A:4, III-b

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### REGISTRATION OPEN: The Value of Card Based Payments Webinar

12:00 noon - 1:00 pm, Thursday, April 20, 2023. Join Citizens Bank Card Payment Consultant, Adam Pan, in reviewing the operational efficiency of card-based payments to make your payables process a model of cost-efficiency and productivity.

REGISTRATION OPEN!



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Join Us for Municipal Treasurer Training 101 Webinar

6:00 pm - 7:30 pm, Monday, May 8, 2023. Whether elected or appointed, come learn from NHMA's Government Finance Advisor Katherine Heck about the roles and responsibilities of the municipal treasurer and the best practices associated with the position.


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Go Road-Tripping: Hard Road to Travel Hybrid Workshop

9:00 am - 12:30 pm, Wednesday, May 17, 2023. \$65 in-person & \$55 virtual. Join NHMA attorneys as they delve into the details of roads and provide insight into some of the most common road-related legal issues facing towns and cities.

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