A Guide to Open Government
Supplement September 2020

2017 Statutory Changes

The New Hampshire legislature made two changes to the Right-to-Know Law in 2017, both taking effect on January 1, 2018.

Posting Notices and Minutes on Website. Chapter 234 of the 2017 Laws (HB 170) amended RSA 91-A:2 to require that if a public body maintains an internet website, it must either post its meeting notices on the website "in a consistent and reasonably accessible location," or post and maintain a notice on the website stating where meeting notices are posted. Further, it must either post its approved minutes on the website in a consistent and reasonably accessible location, or post and maintain a notice on the website stating where minutes may be reviewed and copies requested.

Recording Objection to Discussion by Public Body. Chapter 165 of the 2017 Laws (HB 460) added a new paragraph II-a to RSA 91-A:2, stating that if a member of a public body believes that any discussion in a meeting of the body violates the Right-to-Know Law, the member may object to the discussion; if the discussion continues, the objecting member may request that his or her objection be recorded in the minutes and may then continue to participate without being subject to penalties under the Right-to-Know Law. The public body must record the member's objection in the meeting minutes.

2018 Statutory Changes

The New Hampshire legislature made two changes to the law in 2018, both taking effect January 1, 2019.

Content of Meeting Minutes. An amendment to RSA 91-A:2, II (HB 1347) will require that minutes of public meetings include the names of the public body members who made or seconded each motion considered at a public meeting.

Court Procedures Governing Right-to-Know Complaints. An amendment to RSA 91-A:7 (HB 252) provides that all documents filed with the court as part of a Right-to-Know petition shall be considered as evidence by the court, subject to any objections by either party. All such documents must be provided to the opposing party prior to a hearing on the merits.

2019 Statutory Changes

Continuing in the tradition of making two changes to the Right-to-Know Law each year, the New Hampshire legislature adopted two changes in 2019.

IT Security Information Exempt from Disclosure. As of August 4, 2019, RSA 91-A:5 has a new provision (paragraph XI) which provides that records pertaining 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. This is a very limited exemption. Although not explained in statute, NHMA understands this exception to apply to the security protocols and measures installed on municipally owned systems in an attempt to limit the hackability of those systems.

Written Statement for Delay Longer than 5 Days Required. As of January 1, 2020, an amendment to RSA 91-A:4, IV (HB 396) requires municipalities to:

- Provide a written statement of time necessary to determine whether a request will be granted or denied if the records are not produced within 5 days; AND
- Provide a reason for the delay.

The requirement that municipalities provide a reason for the delay is new. The legislature did not articulate what reasons it expects municipalities to furnish, but it is reasonable to think that the reasons should be tied to statutory language. NHMA suggests that municipalities confine themselves to one (or more) of the following reasons:

- Municipality needs time to determine whether or not the requested record exists;
- Municipalities needs time to determine whether the requested record is disclosable; and/or
- If the record is disclosable, the municipality needs time to determine how much time it will take to make the requested records ready for review or copying.

Case Law

No requirement to send records by e-mail. As noted in the handbook at page 46, the New Hampshire Supreme Court ruled in *Green v. SAU #55*, 168 N.H, 796 (2016), that if a person requests access in electronic format to a record that is maintained electronically, the public body must provide the record electronically unless there is a valid reason not to do so. In a follow-up case, *Taylor v. SAU #55*, No. 218-2016-CV-00800 (Rockingham Co. Super. Oct. 24, 2016), the plaintiff claimed that the Green decision required the SAU to send him copies of school board minutes by e-mail upon request. The SAU's policy stated that it would only produce electronic records on a thumb drive, either provided by the requester or supplied by the SAU at a cost of $7.49. As noted on page 46, the superior court ruled that the SAU was not required to send the minutes by e-mail.

In *Taylor v. SAU #55*, 170 N.H. 322 (2017), decided in September 2017, the New Hampshire Supreme Court affirmed the superior court's decision, holding that although the SAU was required to provide the records in electronic form, the Green decision did not require it to provide them in a specific electronic form, so long as the manner of providing the records did not "limit the recipient's ability to review or search the requested documents." The court also observed that nothing in the law requires a public entity to deliver records, by e-mail or otherwise, to any location other than its regular place of business. RSA 91-A:4, I requires only that records be made available "during the regular business hours" and "on the regular business premises" of the public body or agency. Therefore, requiring the plaintiff to come to the SAU's office to obtain the records on a thumb drive was consistent with the law.

Page 11, Section I, insert the following new paragraph at the end of *A (2) Public Body*:

Where, however, a committee of public officials only provides advice to planning board applicants, and not to the planning board, that committee is not an advisory committee subject to the Right-to-Know Law. In *Paul Martin v. City of Rochester,* 173 N.H. ___, 2020 N.H. Lexis 109 (decided June 9, 2020) the NH Supreme Court narrowly interpreted the definition of "advisory committee" in RSA 91-A:1-a, ruling that the City of Rochester's Technical Review Group (TRG) was not a public body subject to the public meeting rules of the Right-to-Know Law. The Rochester City Manager appointed city employees to the TRG to provide advice to planning board applicants on their proposed projects. Each member of the TRG would suggest changes in accordance with city regulations, laws, and policies. After the TRG meeting the city planner prepared a summary of the comments made by each TRG member that was provided to the applicant, placed in the planning board file, and made available for public inspection. The plaintiff

sought access to the TRG meetings claiming they were held in violation of RSA 91-A because members of the public were not permitted to attend. The Supreme Court concluded that because the TRG's primary purpose was to provide advice to planning board applicants, not to the planning board, it was not an advisory committee as defined in RSA 91-A:1-a, I.

Page 39, Section III, strike out the existing content for *B. Internal Personnel Practices – RSA 91-A:5, IV* and replace with the following:

B. Internal Personnel Practices – RSA 91-A:5, IV

Under RSA 91-A:5, IV "records pertaining to internal personnel practices" are exempt from disclosure. The NH Supreme Court overruled its decision in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) that "internal personnel practices" are categorically exempt from disclosure under RSA 91-A:5, IV. The Court will now require that the disclosure of internal personnel practices will be subject to a balancing test to determine whether such materials are exempt governmental records. *Union Leader Corp v. Town of Salem*, 173 N.H. ___, 2020 N.H. Lexis 102 (decided May 29, 2020)

The Supreme Court concluded that the *Fenniman* per se rule is inconsistent with the historical and current interpretation of the RSA 91-A:5, IV for "confidential, commercial, or financial information." Consequently, the Court overruled *Fenniman* to the extent that it adopted a per se rule of exemption for records relating to "internal personnel practices." As stated by the Court in the companion case *Seacoast Newspapers v. Portsmouth*, 173 N.H. ___, ___, 2020 N.H. Lexis 103 (decided May 29, 2020) (slip op. at 11), the "internal personnel practices" exemption applies narrowly to records relating to the internal rules and practices governing an agency's operations and employee relations. In the future, the balancing test used for other categories of records listed in RSA 91-A:5, IV shall apply to records relating to "internal personnel practices." Determining whether the exemption for records relating to "internal personnel practices" applies will require analyzing both whether the records relate to such practices as redefined in the *Seacoast Newspapers* decision, and whether their disclosure would constitute an invasion of privacy.

In a decision from 2016, the Court explained that for information to be an "internal personnel practices" it must be both "internal" and "personnel." *Reid v. New Hampshire Attorney General*, 169 N.H. 509 (2016). "Internal" means that the information fits within the limits of an employment relationship. The term "personnel" refers to "the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with [or involving] employees or their representatives" as well as "the conditions of employment . . . such matters as hiring and firing, work rules and discipline, compensation and benefits." *Id*. at 523 (internal citations omitted).

Page 41, Section III, strike out the existing content for *E. Personnel Files* and replace with the following:

E. Personnel Files

Personnel files maintained by a public body or public agency are not *per se* exempt from disclosure under RSA 91-A:5, IV. Rather, to determine whether information is exempt as a "personnel file," a two-part analysis is required: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy under the three-part privacy test, as described above.

At N.H. Admin Code Lab 802.08, the New Hampshire Department of Labor defines "personnel file" as:

> [A]ny personnel records created and maintained by an employer and pertaining to an employee including and not limited to employment applications, internal evaluations, disciplinary documentation, payroll records, injury reports and performance assessments, whether maintained in one or more locations, unless such records are exempt from disclosure under RSA 275:56, III or are otherwise privileged or confidential by law. The term does not include recommendations, peer evaluations, or notes not generated or created by the employer.

a. Public Employee Salaries

Specific names and salary information of public employees are public, and disclosure does not constitute an invasion of privacy. *See Mans v. Lebanon School Board* 112 N.H. 160 (1972) (teachers' salaries are not exempt from inspection and disclosure). In *Professional Firefighters of New Hampshire v. Local Government Center, Inc.,* 159 N.H. 699 (2010), the New Hampshire Supreme Court also determined that risk management pool employees had no greater privacy interest than traditional public employees, and disclosure was essential to knowing how the risk pool was spending taxpayer money.

b. Disciplinary Records

The N.H. Supreme Court ruled in *Seacoast Newspapers v. Portsmouth*, 173 N.H. ___, 2020 N.H. Lexis 103 (decided May 29, 2020) that records documenting the history or performance of a particular employee fall within the exemption for personnel files. Because records pertaining to an employee's work performance or discipline are typically maintained in a personnel file, the disclosure of such records would be governed by the clause in RSA 91-A:5, IV, "personnel . . . files whose disclosure would constitute invasion of privacy." In assessing whether such information must be disclosed, it is necessary to determine: (1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy. If a disciplinary or performance record is part of the employee's personnel file, then whether the disclosure would constitute an invasion of privacy would be based upon the well-established three-step analysis:

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. *Reid v. N.H. Attorney General*, 169 N.H. 509, 528-29 (2016).

Page 47, Section IV, revise the third paragraph of *K. Charging for copies of governmental records* as follows:

Establishing a per copy cost that is not out of line with the prevailing rates charged by other governmental agencies will likely help to avoid complaints that the rates exceed the "actual cost" or are so high as to frustrate the intent of the law. ~~One court found that a charge of $0.50/page was reasonable for copies. Kelley v. Hooksett Assessing Office, No. 11-CV-566 (Merrimack County Superior Court December 12, 2011). However, this opinion is not binding on New Hampshire courts, so caution is advised.~~ In *Paul*

Martin v. City of Rochester, 173 N.H. ___, 2020 N.H. Lexis 109 (decided June 9, 2020) the N.H. Supreme Court ruled that the city's public records copying fee of fifty cents per page for the first ten pages and then ten cents per page did reflect the "actual cost." The plaintiff challenged the city's copying fee schedule arguing that only a rate of four cents per copy would comply with RSA 91-A:4, IV. The Supreme Court agreed with the trial court that the testimony of the city manager was adequate evidence that the city's fee schedule was commensurate with the actual cost of providing the copy. The Court noted that the legislature did not mandate the use of a formulaic method for determining the actual cost for copying. Thus, the testimony provided by the city manager that that the city based its copying fee on the cost of leasing copy machines, maintenance, capital costs of the machines, and the cost of paper was sufficient.