New Hampshire's Right-to-Know Law
Supplement February 2023

2022 Statutory Changes

The New Hampshire legislature made one change to the Right-to-Know Law in 2022 affecting local government taking effect on July 1, 2022.

Right-to-Know Ombudsman Created. **2022 NH Laws chapter 250 (HB 481)** creates the office of the Right-to-Know Ombudsman and modifies the Right-to-Know Law to allow a complaint to be filed with the ombudsman rather than superior court. The position of the Right-to-Know Ombudsman sunsets on July 1, 2025, unless reenacted. **Statutes amended: RSA 91-A:7; 91-A:7-a; 91-A:7-b; 91-A:7-c; 91-A:7-d; 91-A:8. E.D. July 1, 2022.**

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Case Law

ACLU v. City of Concord, **174 N.H. 653 (2021):** The City of Concord adopted a budget that contained a police department line item for "Covert Communications Equipment." Both the ACLU and the Concord Monitor submitted Right-to-Know Law requests seeking any information describing the equipment, and all contract agreements between the City and the vendor. The City responded by providing a redacted version of a License and Service agreement. Those redactions included the name of the vendor, the type of information gathered by the vendor and how the vendor uses the information. The City asserted that the redactions were necessary because the agreement contained confidential information about surveillance technology that was an exempt law enforcement record. Both the ACLU and the Concord Monitor sued under the Right-to-Know law to gain access to the redacted information. The trial court ruled that the redacted information was exempt from disclosure under FOIA standard (A) interfere with enforcement proceedings, (E) disclosure of law enforcement techniques and procedures and (F) could reasonably be expected to endanger the life or physical safety of any individual. The Supreme Court ruled that in cases involving the *Murray v. NH Div. State Police*, 154 N.H. 579 (2006) exemptions for law enforcement records, a trial court may exercise its discretion to hold an *ex parte in camera* hearing — but only after it has required the government to make as complete and detailed a public disclosure justifying exemption as possible, and determined that the disclosure nonetheless fails to provide a sufficient basis for it to make a decision. Importantly, the Court also ruled that when judging whether disclosure of a law enforcement record would result in circumvention of the law under Exemption E the government must only establish that disclosure might create a risk of circumvention of the law.

B&C Management v. NH Division of Emergency Services, **175 N.H. 20 (2022):** After a guest at hotel facility was injured the owner of the facility requested a copy of the 911 call made at the time of the fall. The Division of Emergency Services denied this request. The NH Supreme Court ruled that when the legislature addressed the information and records that should not be considered "public records" for the purposes of the Right-to-Know Law, if it had intended to exempt only "automatic number and location identification," it could have said so. It did not do so. Instead, the legislature provided that any information or records compiled under "this chapter," that is, under the chapter governing the enhanced 911 system, shall not be considered a public record for the purposes of the Right-to-Know Law. RSA 106-H:12, I; :14.

Provenza v. Town of Canaan, **175 N.H. 121 (2022):** Officer Provenza was involved in an arrest where the defendant later filed a complaint alleging excessive force. The Town of Canaan hired an independent

investigative firm to investigate the encounter and determine if any misconduct occurred. A local newspaper filed a Right-to-Know request seeking disclosure of the report. The Town denied the request, citing the "internal personnel practices" exemption set forth in RSA 91-A:5, IV. The Superior Court ruled that the report was subject to disclosure under the Right-to-Know law under *Union Leader v. Town of Salem* and *Seacoast Newspapers v. City of Portsmouth*. The court applied the privacy interest v. public interest balancing test to the report and concluded that there was a compelling enough public interest to warrant disclosure. On appeal Provenza argued that under RSA 105:13-b there is an exception to the Right-to-Know Law that should apply to the investigative report. The NH Supreme Court ruled that by its express terms, RSA 105:13-b pertains only to information maintained in a police officer's personnel file. The Court reasoned that had the legislature intended this exception to apply more broadly to "personnel information" they would have said so. There was nothing in the record to suggest that the report was contained in or is part of Provenza's personnel file. Therefore, because the case lacked evidence that the report was physically in a "personnel file" the Court declined to address this issue any further. Instead, the Court focused its analysis on Provenza's assertion that release of the report violated his privacy interests under RSA 91-A:5, IV. The Court found that Provenza's privacy interest was minimal as the report did not reveal intimate details of his personal life, but rather provided information relating to his conduct as a government employee while performing his official duties and interacting with members of the public. Additionally, there was a compelling public interest in knowing how the department investigated claims of misconduct against the officer. Under the previously established balancing test, the report was subject to disclosure under RSA 91-A.

***Colquhoun v. City of Nashua,* 2022 N.H. Lexis 128 (October 26, 2022):** The City of Nashua denied a Right-to-Know Law records request filed by Colquhoun for all email communications between two City employees during a specific two-month period. Subsequently, Colquhoun filed an action in Superior Court asking for the records and requesting attorney's fees. At issue was whether the request "reasonably described" the desired records. Ultimately, the City provided several hundred emails between the two City employees during the specified time period, and the trial court denied the award of attorney's fees to Colquhoun. Colquhoun appealed the denial of the award of attorney's fees. Under RSA 91-A:8, I attorneys fees cannot be awarded unless the court finds the public body or person knew or should have known the conduct violated RSA 91-A. In analyzing the question of whether the City knew or should have known that its conduct violated the statute, the Court determined that, due to the fact that the City provided some responsive records after suit was filed, and in light of Court's prior ruling in *ATV Watch v. N.H. Dep't of Trans.* requiring a public body to make a "reasonable search" for records, the City knew or should have known that its conduct violated the statute when it did not provide any records. The Court also stated that a reasonably described request would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.

Page 41, Section III, B, insert the following new paragraph after the last two sentences of the previous paragraph at the top of the page:

The court's decisions from the ***Union Leader*** and ***Seacoast Newspaper*** cases were put to the test a few years later in the case of ***Provenza v. Town of Canaan, 175 N.H. 121 (2022).*** In this case, a Right-to-Know request was made for an investigative report into an allegation of misconduct against Officer Provenza. The lower court applied the public vs. private balancing test established in the ***Union Leader*** and ***Seacoast Newspaper*** cases and found that there was a compelling public interest which warranted disclosure of the report. Officer Provenza appealed and argued that release of the report violated his privacy interests under RSA 91-A:5, IV. The New Hampshire Supreme Court found that Officer Provenza's privacy interest was minimal as the report did not reveal intimate details of his life, but rather information relating to his conduct as a government employee while performing his official duties and

interaction with members of the public. Additionally, there was a compelling public interest in knowing how the department investigated claims of misconduct against an officer. The decision of the lower court was upheld that under the previously established balancing test, the report was subject to disclosure under RSA 91-A.

Page 44, Section I, insert the following after the last sentence of the final paragraph in this section:

For example, in the case of ***Montenegro v. City of Dover, 162 N.H. 641 (2011),*** the court upheld the denial of a Right-to-Know request seeking information about certain surveillance equipment and procedures. The requesting party sought the precise locations of the city's surveillance equipment, the recording capabilities, specific time periods each piece of equipment was expected to be operated, and the retention time for recordings. The court ruled that this information could reasonably be expected to risk circumvention of the law and was exempt. Similarly, in the case of ***ACLU v. City of Concord, 174 N.H. 653 (2021),*** the court denied a Right-to-Know request for details involving the city's contract for the purchase of "covert communications equipment" for the police on the grounds that disclosure could reasonably be expected to risk circumvention of the law. These are both examples of how the exemptions mentioned in FOIA can have an impact on requests made under RSA 91-A.

Page 47, Section B, insert the following after (Case citations omitted):

The trial court in *Colquhoun* ruled that the plaintiff was not entitled to an award of attorneys fees under RSA 91-A:8 because it could not find the City knew or should have known that its conduct violated the Right-to-Know Law. The NH Supreme Court reversed that decision finding that "the City should have known, in light of our decision in *ATV Watch*, that it was required to undertake a reasonable search. Thus, by denying the plaintiff's request in its entirety as unduly burdensome, the City should have known that it was asserting that any search would be unreasonable because any search would be unduly burdensome. The facts of this case and our earlier cases demonstrate that the City should have known that such an assertion was not justified." The Court remanded the matter for an award of reasonable attorneys fees to Colquhoun. *Colquhoun v. City of Nashua*, 2022 N.H. LEXIS 128, at *18 (Oct. 26, 2022).

Page 52, Chapter Four, strike existing Section I, and insert the following revised Section I, How is the Right-to-Know Law Enforced?

I. How is the Right-to-Know Law Enforced?

A. Office of the Right-to-Know Law Ombudsman

Through HB 481, effective July 1, 2022, the Office of the Right-to-Know Law Ombudsman has been created to provide an alternative administrative process to resolve complaints under the Right-to-Know Law. In lieu of filling suit in the Superior Court, a complaint can be filed with the newly created Ombudsman. RSA 91-A:7, II. The aggrieved party must make an election to either file the complaint with the Superior Court or the Ombudsman - filing with one forecloses filing with the other. RSA 91-A:7, III, IV. The Ombudsman is administratively attached to the NH Department of State and is nominated and confirmed by the Governor and Executive Council. RSA 91-A:7-a.

The appointed Ombudsman shall be an attorney with minimum 5 years' experience and be knowledgeable about the provisions of 91-A and other laws pertaining to 91-A. RSA 91-A:7-a. The Ombudsman must adopt rules governing streamlining the complaint process and hearing procedures. RSA 91-A:7-d.

The procedures before the Ombudsman will follow a simplified complaint process. After the complaint is received, the public body is given notice and required to respond with an answer to within 20 days. The

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) and make any finding or order as permitted by the Superior Court under RSA 91-A:8. The Ombudsman may draw negative inferences from a party's failure to participate and comply with orders during the review process The Ombudsman shall issue a ruling within 30 calendar days following the deadline for receipt of the parties' submissions The Ombudsman may also expedite resolution of the complaint upon a showing of good cause and rule within 10 business days, or sooner where necessary. RSA 91-A:7-b.

Decisions by the Ombudsman may be appealed to Superior Court within 30 days with all factual findings by the Ombudsman deemed lawful and reasonable. Decisions not appealed may be registered in Superior Court and be enforceable through contempt proceedings. RSA 91-A:7-c.

B. Enforcement Through the Superior Court:

In the alternative, any person aggrieved by a violation of the Right-to-Know law may petition the superior court for injunctive relief. All the "aggrieved person" must do is file a petition that "states facts constituting a violation" of the law. The statute also provides that if it appears from the petition that "time probably is of the essence," the any justice of the Superior Court may order notice by any reasonable means and issue an order *ex parte* when he or she shall reasonably deem such an order necessary to ensure compliance with the Right-to-Know Law.

Subject to objection by either party, all documents filed with the petition and with any response to the petition shall be considered as evidence by the court. All documents submitted must be provided to the opposing party prior to a hearing on the merits. RSA 91-A:7.