

RIGHT TO KNOW LAW- GOVERNMENTAL MEETINGS & RECORDS

Presented to:
Town of Exeter

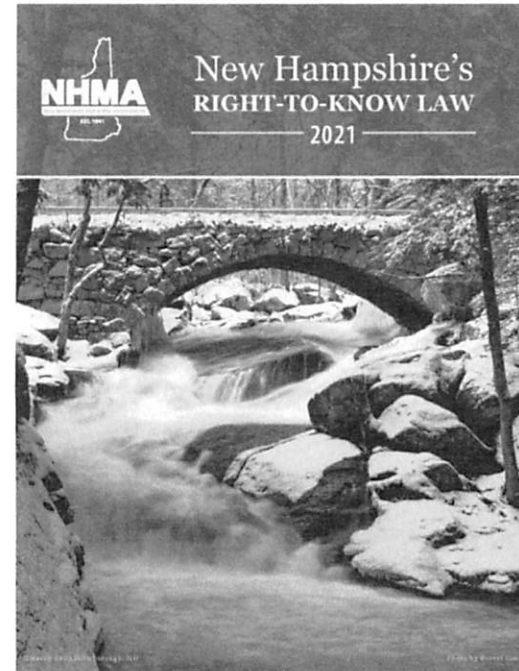
Stephen C. Buckley, Legal Services Counsel

October 18, 2023



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



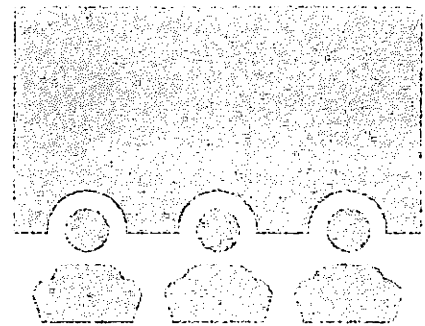
Agenda

- Governmental Meetings
- Nonpublic sessions
- Governmental Records
- Remedies



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Governmental Meetings & The Right-to-Know Law



Overview of How RTK Governs Meetings Content

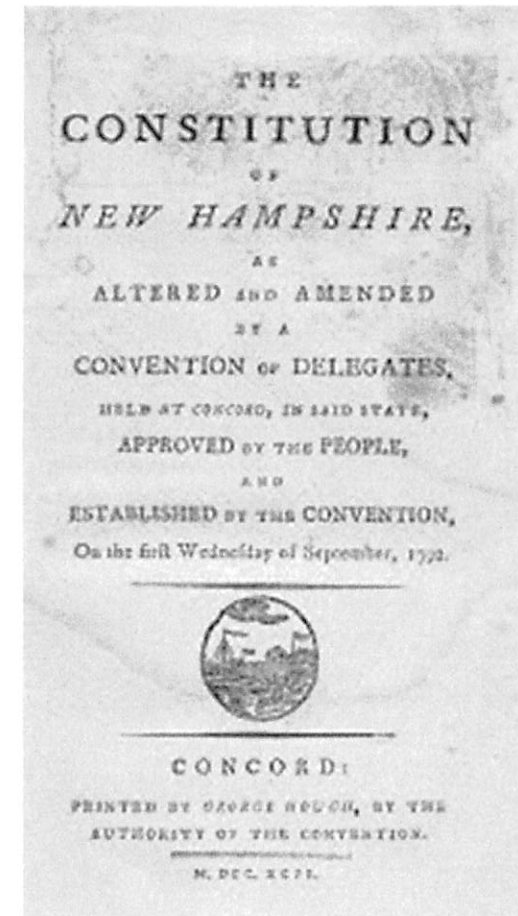
- I. What is a “meeting”?
- II. What is not a meeting, i.e., a “nonmeeting”?
- III. What are the requirements for holding a proper “meeting”?
- IV. How to hold meetings virtually.

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.



**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

“Quorum”

Majority of membership

Can't define as more than majority to circumvent law

Another statute may apply

Meetings Among Public Body Members Outside of Public Meetings

Meetings of public body members that are less than a quorum to discuss public business should not be undertaken - all public business should only be discussed at properly convened public meetings

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

“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*



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

**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!

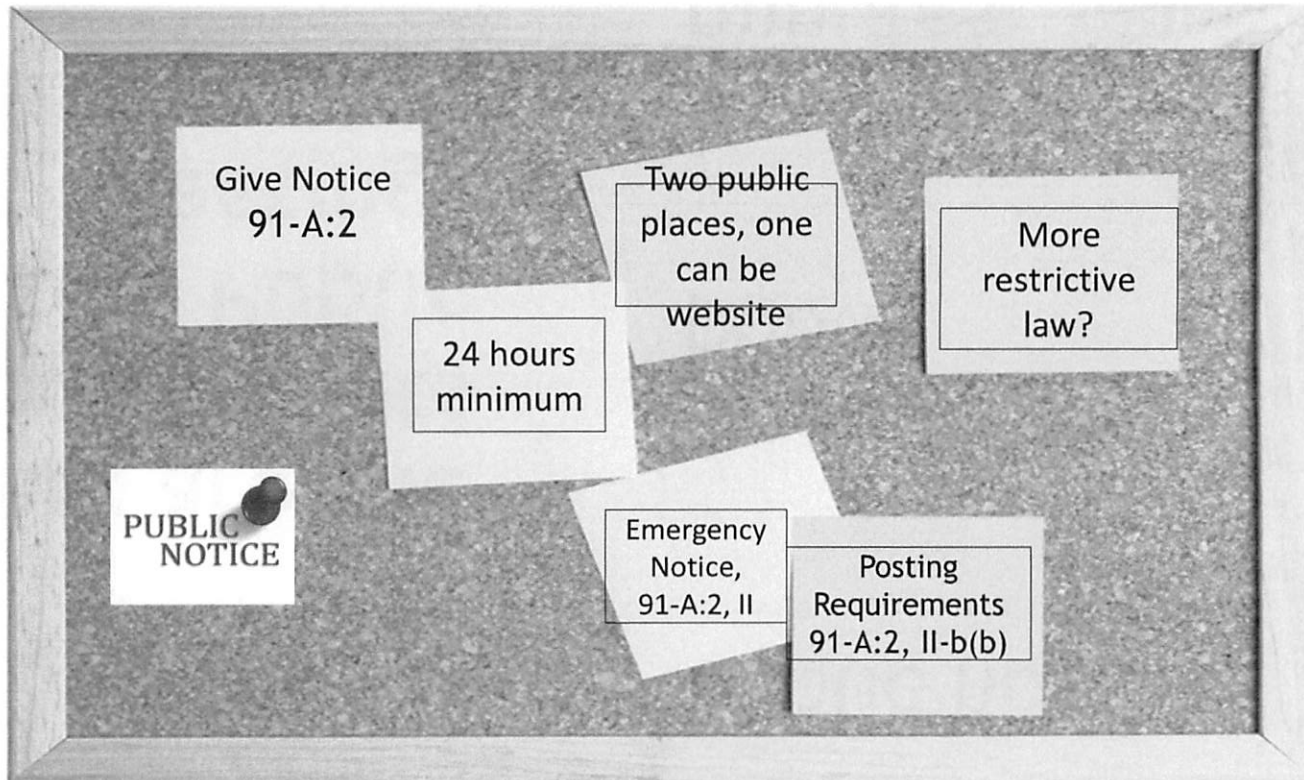
What are the Requirements of a Public Meeting?

Public notice

Open to the public

Meeting minutes

“Posting Requirements”



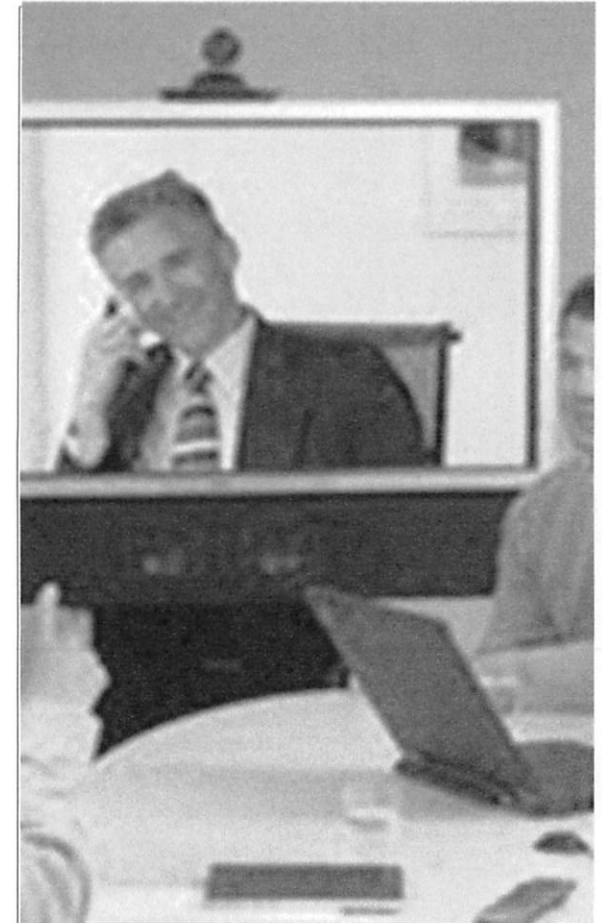
Switching Back to In-Person Meetings

- 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



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



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

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.

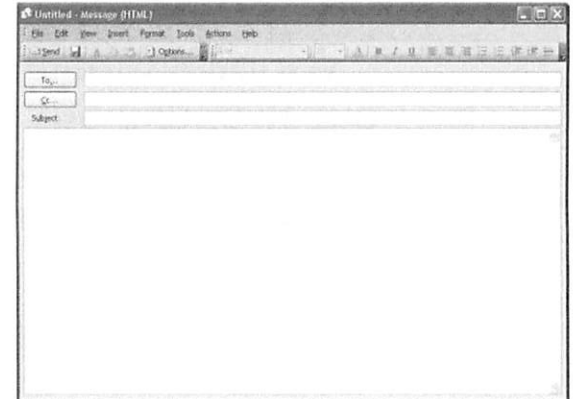
Further, the presiding officer shall employ whatever further means are reasonably available to inform the public that a meeting is to be held.

That presiding officer shall post a notice of the time and place of such meeting as soon as practicable.

“Emergency” meetings do not require 24-hour notice posted in 2 public places but should provide as much notice as practical.

“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



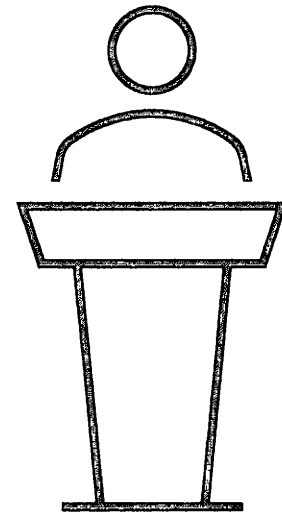


Meetings “Open to the Public”

- ▶ “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?

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?



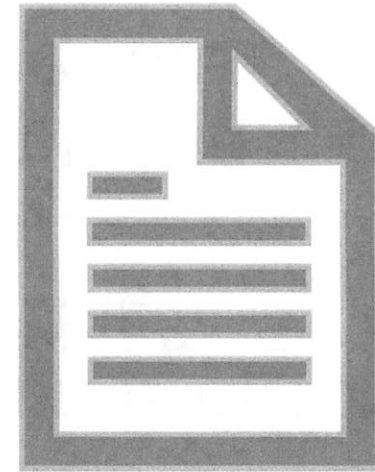
Public Comment: Some Observations

- 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))

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.



**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

Most Commonly Use Reasons for Nonpublic Sessions*

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

*But not complete list

RSA 91-A:3, II (a) dismissal, promotion, compensation, discipline, investigation of charges concerning a public employee

- Must concern a particular municipal employee - not a grouping of employees or a department
- This provision states that the meeting must be held in public if the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted
 - Thus, the “right to a meeting” refers to some written rule entitling the employee to a public airing of the matter under investigation.
 - By way of example, under RSA 41:48, an appointed police officer cannot be removed from office unless she is provided notice and a public hearing before the governing body
 - Similarly, under RSA 202-A:17, no public employee of a public library can be removed from employment unless they are provided written notice and a public hearing on their removal if requested

RSA 91-A:3, II (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself

- The harm to reputation must be severe and not trivial
- The claim of reputational harm cannot be asserted by a member of the public body that is convening the nonpublic session
- Person who might suffer the reputational harm can nevertheless request an open meeting
- This exemption extends to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant
- Notice of a nonpublic session based on harm to reputation need not be provided to the person whose reputation could be adversely affected. *Sivalingam v. Newton*, 174 N.H. 489 (2021)

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

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

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”**

Conducting the Nonpublic Session

May make decisions in nonpublic session

Member objecting session 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

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

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.

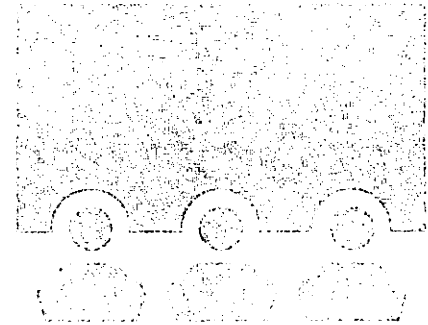
New Law: HB 108 - Maintain List of Nonpublic Meeting Minutes

- 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.”

HB 321 and Review of Sealed Minutes

- In the past, practice was to review sealed minutes only when a record request was made.
- New law requires municipalities to create their own specific process or follow a statutorily created one.
- Statute requires at a minimum, review of sealed minutes “no more than 10 years from the last time the public body voted to prevent the minutes from being subject to public disclosure.”
- 10-year grace period for minutes sealed more than 10 years ago. You have until 2033 to review all sealed minutes or they become public.

Governmental Records & Remedies under 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

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

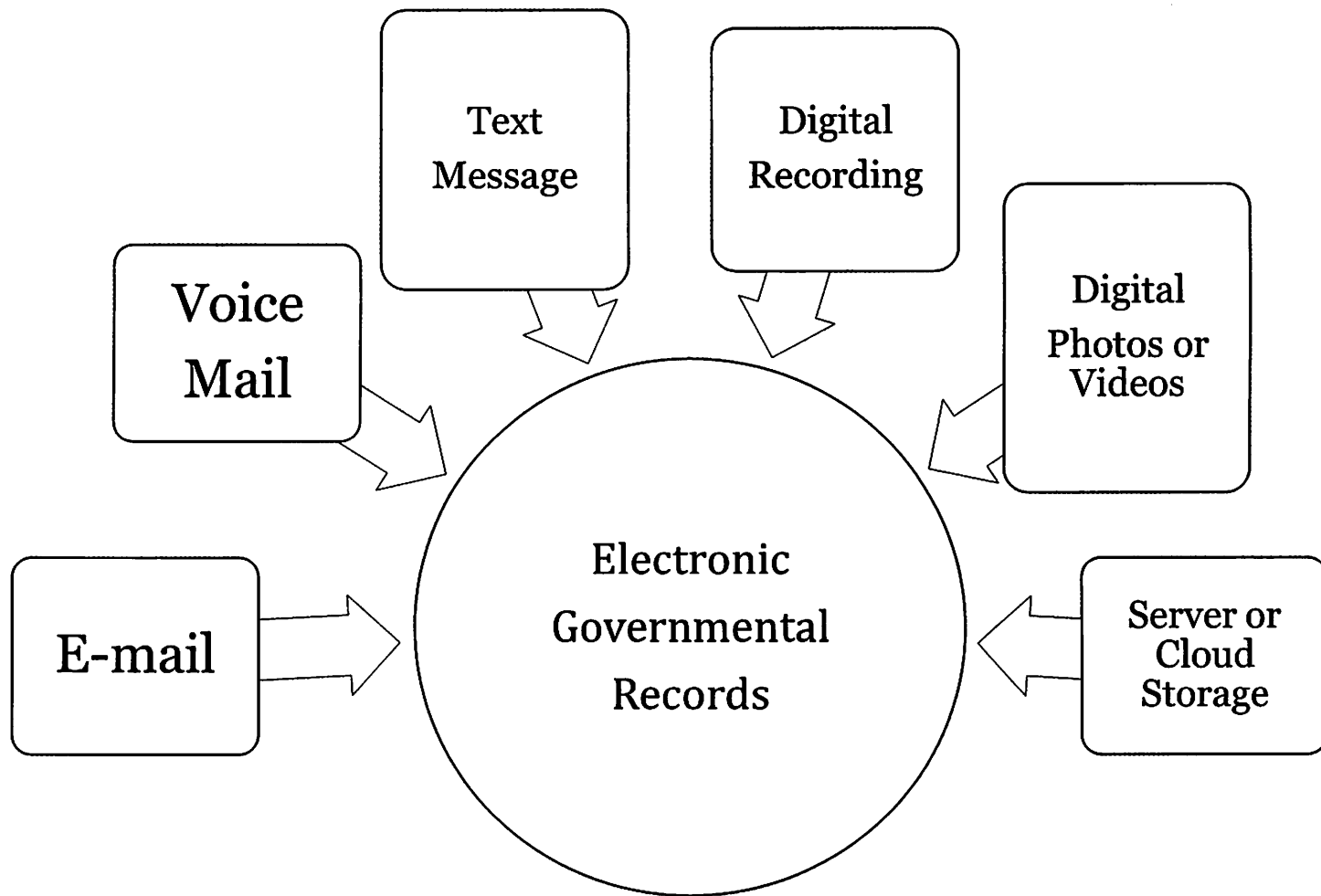
Any information

- created
- accepted, or
- obtained

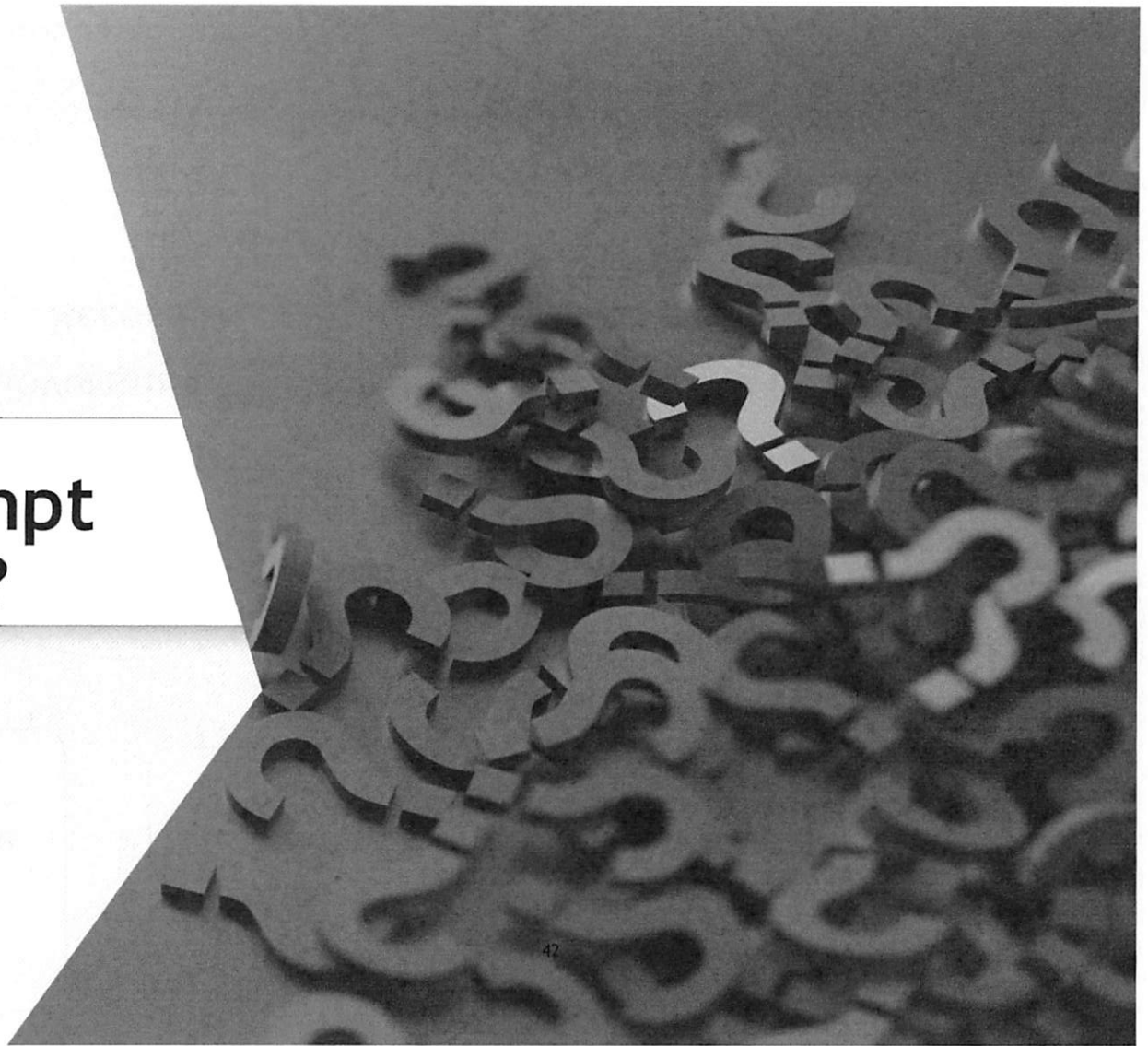
By, or on behalf of,

- 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

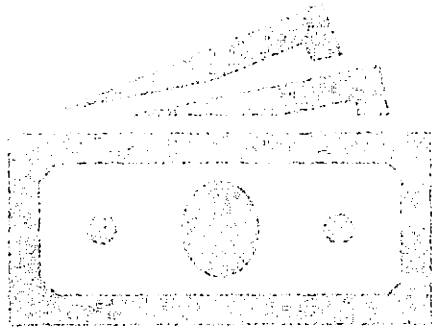


Requiring appointment to review records is permitted



RTK does not require document “compilation”

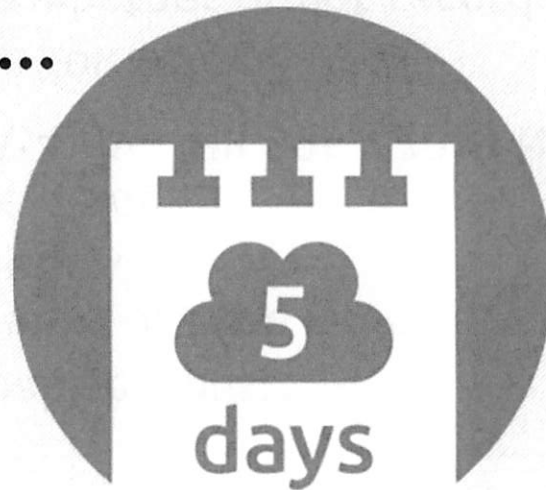
No Flat Fees!



- **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*

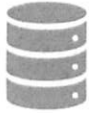
XXVII. Correspondence by and to municipality-transitory: retain as needed for reference. *Example - Town Administrator sends email to employees reminding everyone about all staff meeting*

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



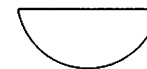
“Aggrieved person”



Lawsuit or by complaint to Ombudsman

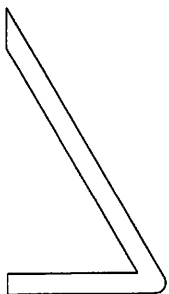


RSA 91-A:7, :7-a, :7-b, :7-c,:8



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

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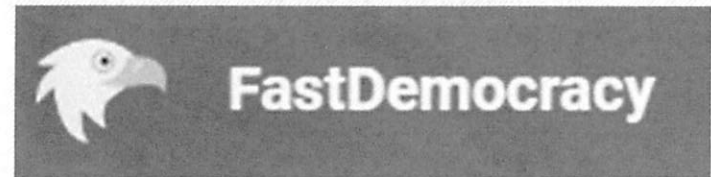
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