Access to Public Records under New Hampshire's RSA 91-A

August 22, 2014

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A Word of Caution

No two cases are exactly alike. This material is designed to provide individuals with a broad understanding of the law pertaining to public records and the Right-to-Know law. These materials are written for educational purposes. They are not a substitute for case-specific legal advice and this material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

I. Overview

This material is designed to provide the reader with a working knowledge of the law regarding access to public records. The goal of this material is to leave the professional better equipped to make prudent judgments regarding access to public records, whether in the context of a municipal organization or on behalf of individuals seeking access to public records.

This State has a clear public policy on the public's right of access. This policy has been deemed so vital to the State that it has been incorporated within the New Hampshire Constitution. Part I, Article 8 states:

> All power residing originally in, and being derived from the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

NH Const. Part I, Art. 8. New Hampshire is one of only a handful of States with a constitutional provision that explicitly protects the public's right of access to governmental proceedings and documents. State v. DeCato, 156 N.H. 570 2007 (internal quotations and citation omitted).

This broad statement of public policy is further defined in NH RSA 91-A:1:

> Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and record of all public bodies, and their accountability to the people.

II. What is a Governmental Record?

A. Public Body or Agency.

The statute also defines the terms "public agency" and "public body."

A public agency is "any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, charter school, or other political subdivision." RSA 91-A:1-a, V.

The term "public body" is defined as "any of the following:

(a) The general court including executive sessions of committees; and including any advisory committee established by the general court.

(b) The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.

(c) Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.

(d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, charter school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.

(e) Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to *section 501(c)(3) of the Internal Revenue Code*.

RSA 91-A:1-a, VI.

The New Hampshire Supreme Court has recognized that "some entities are not easily characterized as solely private or entirely public." Union Leader Corp. v. NH Housing Finance Auth., 142 NH 540, 547 (1997). Not all organizations that work for or with the government are subject to the Right-to-Know Law. Bradbury v. Shaw, 116 NH 388, 389 (1976). However, an entity that has a distinct legal existence separate from the State and that functions independently of the State may nevertheless be subject to the Right-to-Know Law depending upon its structure and function. Professional Firefighters of New Hampshire v. Local Gov't Center, Inc., 159 NH 699, 705 (2010). The Court examines the structure and function of an entity to assess the entity's relationship with the government, and determine whether that entity is conducting the public's business. Id.

B. Records

The Right-to-Know Law defines the term "governmental record" as:

> 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. Without limiting the foregoing, the term 'governmental records' includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."

RSA 91-A:1-a, III.

The word "information" is defined as: "knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form." RSA 91-A:1-a, IV.

Absent the existence of an exemption or a valid vote to seal, one can assume that essentially all municipal records[1] are subject to classification as accessible public records. The following records will constitute "governmental records" in accord with RSA 91-A:1-a, III:

- Minutes of meetings, RSA 91-A:2(II). Minimally sufficient meeting minutes include the following:
    - The names of the members of the public body;
    - The names of all persons appearing before the public body;
    - A brief description of the subject matter discussed; and,
    - A brief description of all final decisions

[1] The term "municipal records" has been defined as "all municipal records, reports, minutes, tax records, ledgers, journals, checks, bills, receipts, warrants, payrolls, deeds and any other written or computerized material that may be designated by the [municipal records] board." See NH RSA 33-A:1(IV).

Contrary to myth, most public minutes are not required to be stenographic records. A board that insists on verbatim transcripts can become bogged down in "minute approval sessions" where members quibble over nuances such as whether or not the clerk accurately caught their "grave concerns" as opposed to their "concerns" about a particular decision.

Practice Pointer: NH RSA 91-A:2 (II) is of little comfort in the context of an adjudicative decision. When the matter involves a decision after a hearing by the board, it is important that the minutes not simply meet the minimally sufficient standard under RSA 91-A:2, II. The minutes must include the reasons supporting the board's decision. Absent such, the board may have to scramble to supplement the record or even worse, be subject to a remand for purposes of clarifying the record.

- Minutes of nonpublic sessions: Minutes of non-public sessions should be kept and shall be publicly disclosed within 72 hours of the meeting, "unless, by recorded vote of 2/3 of the members present, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the body or agency itself, or render the proposed action ineffective, or pertain to terrorism [as further defined by the statute]." RSA 91-A:3(III).

  Minutes of non-public sessions should contain, at a minimum, the information required by RSA 91-A:2(II).

  Practice Pointer: There must be a recorded vote in public session to seal the minutes of a non-public session. Absent an affirmative motion to seal the minutes, you may assume that minutes of a non-public session are public records. The purpose of the motion to seal is to create a record that the board has indeed determined that divulgence of the information "likely would affect adversely the reputation of any person other than a member of the body or agency itself or render the proposed action ineffective."

  If during non-public session the parties discuss more than one topic, care should be given to insure

that only those portions are sealed which indeed meet the standard of NH RSA 91-A:3(III). Municipalities that follow the practice of going into non-public session to address only a single topic create a greater number of non-public sessions, but simplify the task of subsequently reviewing minutes to determine whether or not they should be unsealed.

- "All notes, materials, tapes or other sources used for compiling the minutes of meetings," unless their disclosure is explicitly prohibited by statute or falls within the exemptions of NH RSA 91-A:5. NH RSA 91-A:4(II).

- "Records of any payments made to an employee of any public body or agency . . . or to the employee's agent or designee upon . . . [that employee's] resignation, discharge, or retirement . . . paid in addition to regular salary and accrued vacation, sick, or other leave. . ." NH RSA 91-A:4(I-a).

- Agreements to settle lawsuits filed or threatened, or other claim against a governmental unit, entered into by any political subdivision or its insurer, must be kept on file at the Municipal Clerk's office and made available for public inspection for at least 10 years from the settlement date. NH RSA 91-A:4, VI.

- Municipal trust funds: Trustees are required to keep records of all trusts in a record book that is available for inspection by all persons in their town. RSA 31:34.

In addition, court decisions have deemed the following "public records":

- Court case records, unless the party seeking non-disclosure of the records demonstrates that there is some overriding consideration or special circumstance that has "a sufficiently compelling interest" as to outweigh the public's right of access to those records. See Douglas v. Douglas, 146 NH 205 (2001).

- Draft documents of any public records that are circulated to the board. See Goode v. New Hampshire Office of the Legislative Budget Assistant, 145 NH 451 (2000) (draft audit reports are public record).

- Commercial or financial information, the disclosure of which will not constitute an invasion of privacy. See Union Leader Corporation v. New Hampshire Housing Finance Authority, 142 NH 540 (1997) (market analysis of potential condominium sales, financial documents, (balance sheets and income statements of interveners and corporations), commercially generated credit reports, a letter of credit, a construction finance activity sheet and financial projections pertaining to a condominium development, and market and price information deemed public records).

- Agency budget requests and income estimates: if the benefits of disclosure outweigh those of non-disclosure. Chambers v. Gregg, 135 NH 478 (1992).

- Names and addresses of substitute teachers employed during a strike. Timberlane Regional Education Association v. Crompton, 114 N.H. 315 (1974).

- Salaries and contracts of school teachers. Mans v. Lebanon School Board, 112 N.H. 160 (1972).

- Tax card information. Menge v. City of Manchester, 113 NH 533 (1973).

- Law enforcement investigative records, if not exempt from disclosure under the Murray test. See Murray v. NH Div. of State Police, 154 NH 579 (2006). 38 Endicott St. North, LLC v. State, 163 NH 656, 661 (2012). See Discussion at Section C (4), below.

- Invoices from a municipality's outside counsel, where the invoices do not reveal "the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of the law." Hampton Police Ass'n v. Town of Hampton, 162 N.H. 7 (2011).

- Names and amount of the annual pension payments received by members of the State retirement system. Union Leader Corp. v. New Hampshire Retirement System, 162 NH 673 (2011).

III. The General Presumption Regarding Access

New Hampshire has a clear presumption favoring disclosure of public records. Thus, "[e]very citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records, . . . except as otherwise prohibited by statute or RSA 91-A:5." RSA 91-A:4(I).

It is settled law in New Hampshire that restrictions on access must be reasonable, and exemptions from disclosure will be interpreted in a restrictive fashion. See e.g., Goode v. New Hampshire Office of Legislative Budget Assistant, 145 NH 451, 767 A.2d 393 (2000).

The New Hampshire Supreme Court will "resolve questions regarding the law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." N.H. Civil Liberties Union v. City of Manchester, 149 NH 437, 439 (2003) (citations omitted). Accordingly, courts will "construe provisions favoring disclosure broadly, while construing exemptions narrowly." Id.

A person's motives for seeking disclosure are irrelevant when determining whether a public record should be disclosed. Union Leader Corp. v. City of Nashua, 141 NH 473, 476 (1996). "This is because the Right-to-Know law gives any member of the public as much right to disclosure as one with a special interest in a particular document." Id. (citation omitted). The test for the reasonableness of the request is not the motive of the requesting individual, but instead, reasonableness is measured by the statute itself.

There is no prohibition against a municipal entity inquiring as to why an individual is requesting a public record, but the citizen need not answer the inquiry and the municipality must make a decision whether or not to disclose the documents on the strength of the statute and not the strength of the citizen's response.

> *Practice Pointer: Any public official presented with a request for access to a public record must keep in mind this presumption. If you elect non-disclosure of a public record, you must ask yourself:*
>
> - *Am I unreasonably restricting access?*
> - *Does my position preserve the fundamental presumption of openness, accessibility, accountability and responsiveness?*

- *Will my response to this request further the public policy favoring "the greatest possible public access?"*

- *Does my decision not to disclose this record fit squarely within an available exemption?*

Absent your ability to answer the above questions unequivocally in the affirmative, you must bear in mind that your close call not to disclose will most likely be construed against you by the judiciary. A requesting party may also be awarded costs and/or attorney's fees in connection with seeking the Court's assistance to obtain the disclosure.

IV. The Right to Inspect and Copy

A. The Scope of the Right

Every citizen during the regular or business hours of the public entity and on the regular business premises of such entity has the right to:

- Inspect all governmental records in the possession, custody or control of the public body or agency, including minutes of meetings of the bodies or agencies; and

- To copy and make memoranda, abstracts and photographic or photostatic copies of the records or minutes to inspect.

See NH RSA 91-A:4(I).

After the completion of a meeting of the public body, every citizen during the regular business hours of the public entity and on the regular business premises of the entity has the right to:

- Inspect all notes, materials, tapes or other sources used for compiling the minutes of such meetings; and

- To copy and make memoranda, abstracts and photographic or photostatic copies, except as otherwise prohibited by statute or by RSA 91-A:5.

See RSA 91-A:4(II).

However, there is no obligation for a municipality to keep these materials after final minutes have been approved by a board.

Practice Pointer: Clerks and Secretaries are well-advised to identify all minutes as "unapproved" until they are presented for approval to the Board at its next meeting.

Governmental records created or maintained in electronic form shall remain accessible for the same retention or archival periods as their paper counterparts. Methods that may be used to accomplish this requirement include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats. RSA 91-A:4, III-a.

A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. A record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible 'deleted items' folder or similar location on a computer shall not constitute deletion of the record. RSA 91-A:4, III-b.

B. Copying Costs

NH RSA 91-A:4(IV) provides that if a computer, photocopying machine "or other device" is used by the entity to copy the public record or document requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the body or agency. 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."

Practice Pointer: Recent litigation in the Superior Courts has dealt with the question of what constitutes a reasonable copying charge. Towns have successfully defended up to $1.00 per page, however, this is likely the outer limit of a reasonable fee.

In the case of Sourgadakis v. Town of Littleton, 215-2011-CV-00321 (Grafton Sup. Court, November 4, 2011), the court addressed the question of whether a party submitting a Right-to-Know request could be required to bear the burden of paying for the cost of producing information from a computer. In that case, the Petitioner had submitted a Right-to-Know request and a motion to search for and produce additional records, requesting that the Town of Littleton be required to search 22 previously unsearched computers of the Town's police department, but further seeking to limit the cost of producing those records to photocopying costs.

The court ruled that by adding the word "computer," to the statutory paragraph regarding costs, the Legislature intended to clarify how the Right-to-Know law applies to electronic documents. Thus, the cost associated with searching the 22 computer hard drives was part of "the actual cost of providing the copy" within the meaning of RSA 91-A:4 (IV). As a result, the Town was permitted to charge "the actual cost of searching the 22 computer hard drives in question for any such records that the plaintiff's Right-to-Know request may cover."

C. Format of Records

The Courts have generally held that municipalities are not required to produce records electronically or in a particular requested format, as RSA 91-A:4 only requires production of the records for inspection and/or copying. If the government maintains the records in an electronic format, however, they may be produced in that format. See RSA 91-A:4, IV-V; Nolen v. City of Keene, Cheshire Cty. Sup. Ct. (09-E-0152) (Arnold, J., November 23, 2009) (citing Gallagher v. Town of Windham, 121 NH 156 (1981); Nolen v. City of Manchester, Hillsborough Cty. Sup. Ct., Northern District, (216-2012-CV-00682) (Garfunkel, J., October 19, 2012) (citing Hawkins v. NH Dept. of Health and Human Services, 147 NH 376 (2001) (agency not required to compile data in format requested by party seeking data).

V. Categories of Accessible Documents

A. When Does a Record Exist?

Public bodies are not required to compile data into a record in response to a Right-to-Know request. See Hawkins v. New Hampshire Dept. of Health and Human Services, 147 N.H. 376 (2001). If there is no record, there is nothing to disclose. This is why the increased prevalence of electronic mail and the Right-to-Know Law leads to concerns of having to disclose more than one intended. Informal oral discussions cannot be disclosed pursuant to a right to know request because there is no record of the informal oral discussions. Likewise, scribbles on a piece of paper that is then thrown out cannot be disclosed because the record no longer exists. Nevertheless, the informal e-mail discussion that does not fit under a statutory exemption must be disclosed under New Hampshire's Right-to-Know Law.[2]

If electronic material is deleted from a computer after being requested, the municipality will be sanctioned by the Court for violating the Right to Know Law.

[2] Note that many informal e-mail discussions may fall under the "uncirculated draft" exemption in NH RSA 91-A:5(IX), or some other exemption.

Knight v. SAU#16, Rockingham Superior Court, Docket # 00-E-307, (January 3, 2001) (sanctioning a school district for destroying from their backups of the history of web sites visited after an individual filed suit seeking disclosure of those records); see also RSA 91-A:1-a, III ("governmental records" include documents in "electronic" form).

E-mail messages are "electronic form" governmental records under RSA 91-A:4. In Miller v. Fremont School Board, Rockingham Superior Court, Docket # 03-E-152 (May 16, 2003), the Court held that e-mails between a quorum of the board were public records, regardless of whether an actual decision was made and regardless of whether they constitute a meeting under RSA 91-A:2.

B. The Duty to Make Records Available

A municipality has the duty to make public records available along the following terms:

- Minutes of public proceedings shall be recorded and open to public inspection not more than 5 business days after the public meeting. RSA 91-A:2(II).

- Minutes and decisions reached in non-public session shall be publicly disclosed within 72 hours of the meeting unless sealed by determination of the public body. RSA 91-A:3(III).

- Records of any payment made to an employee of a public body or agency or to the employee's agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. NH RSA 91-A:4(I-a).

- "Reasonably described" records requested should be promptly disclosed when such records are immediately available for release. NH RSA 91-A:4(IV).

- Within 5 business days of the request for a public record that is unavailable for immediate inspection, the entity shall:

    - Make the record available;

    - Deny the request in writing, with reasons for the denial; or

- Furnish the citizen with written acknowledgement of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. NH RSA 91-A:4(IV).

Practice pointer: If the request is granted but additional time is needed for production, the municipality should state the date upon which production will be made. An open-ended request for "more time" leads to frustration by the requesting party and is more likely to result in a request for judicial intervention.

- If a request is denied on the basis that the records sought are exempt from disclosure, the requested records must be preserved for 90 days, or so long as any lawsuit over the non-disclosure remains pending. RSA 91-A:9.

Public entities that maintain records in a computer storage system may, in lieu of providing the original documents, provide a printout of any record reasonably described and which the entity has the capacity to produce in a manner that does not reveal confidential information. RSA 91-A:4(V).

In ATV Watch v. New Hampshire Department of Transportation, 161 NH 746 (2011), the court addressed the question of the adequacy of a public body's or agency's search and response to a Right-to-Know request. The court cited the Federal Freedom of Information Act ("FOIA") standard noting that "the adequacy of an agency's search for documents. . .is judged by a standard of reasonableness. The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents." Id. At 753, (*citing* Church of Scientology International v. United States Department of Justice, 30 F.3d 224, 230 (1st Cir. 1994) (quotations and citations omitted)).

The court also observed that:

> "The search need not be exhaustive. Rather, the agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents. This burden can be met by producing affidavits that are relatively detailed, non-conclusory and submitted in good faith. Once the agency meets its burden to show that its search was reasonable, the burden shifts to the requester to rebut the agency's evidence, by showing that the search was not reasonable or was not conducted in good faith.

Id. At 753, (*citing* Lee v. United States Attorney for Southern District of Florida, 289 Fed. Appx. 377, 380 (11th Cir. 2008) (quotations, citations and ellipses omitted)).

C. Remedies

A citizen who is denied access to a public meeting or public records after reasonably requesting access is afforded a number of remedies under RSA 91-A:8. Traditionally, these remedies have been accessed through a petition filed with the Superior Court. The remedies are as follows:

- The court may order access to a public proceeding or a public record;

- The court may find that the lawsuit was necessary in order to make the information available, or a proceeding open to the public, and award the petitioners reasonable attorney's fees and costs upon a finding that the body, agency or person "knew or should have known" that the conduct engaged in was a violation of the Right-to-Know law. However, fees shall not be awarded if the parties, by agreement, have provided that fees shall not be paid. See ATV Watch, 161 NH at 764-765.

Failure to comply with the statutory time periods for responding to a Right-to-Know request may result in an award of attorney's fees and/or costs against the public body or agency. ATV Watch, 155 N.H. 434 (2007) (holding that the department violated the Right-to-Know law by delaying disclosure of requested documents and remanding "for the trial court to determine whether ATV's lawsuit was necessary to make the category-one documents available," and whether the agency "violated the Right-to-Know Law by its nondisclosure of category-two documents and, if so, whether the lawsuit was necessary to secure their disclosure, which would entitled ATV to an award of costs").[3]

- If the court finds that an officer, employee or other official of a public body has acted in bad faith in refusing to allow access to a public proceeding or a public record, the court may award

[3] The trial court found that the department had not provided the documents within the statutorily proscribed time-frame, but held that the "delay was due to 'an oversight,' and thus, 'although DRED may have technically violated the statute, the violation did not prejudice the petitioner.'" ATV, 155 N.H. 434. The New Hampshire Supreme Court reversed this decision, holding that "[t]he plain language of the [Right-to-Know Law] does not allow for consideration of the factors applied by the trial court, such as 'reasonable speed,' 'oversight,' 'fault,' 'harm,' or 'prejudice.'" Id.

such fees personally against such officer, employee or other official;

- The court may invalidate the action of the public body taken at a meeting which violated the right-to-know law "if the circumstances justify such invalidation;" and

- In addition to any other relief awarded, the court may issue an order to enjoin future violations of the Right-to-Know law.

In WMUR Channel Nine v. N.H. Dep't of Fish & Game, 154 N.H. 46, 51 (2006), the New Hampshire Supreme Court affirmed a denial of attorney's fees because, "based upon the state of the case law," it could not conclude that the hearing officer should have known not to balance the applicant's due process rights against WMUR's right to videotape the hearing. The court noted that it has "never decided whether or not there is a constitutionally protected property interest in a hunting license," but has held that the "privilege of holding a driver's license is a legally protected interest requiring due process prior to suspension."

There is a criminal penalty for knowingly destroying any information with the purpose to prevent such information from being inspected or disclosed in response to a request under the Right-to-Know law. Any person who does such is guilty of a misdemeanor under RSA 91-A:9. This however, may not be the scope of an individual's criminal exposure. For example, an individual can be guilty of several other crimes if they knowingly destroy information to frustrate an ongoing federal or state investigation.

VI. The Related Duty to Keep and Maintain Public Records

All public bodies and agencies are required to keep and maintain all public records in their custody at their regular offices or places of business in an accessible place. If there is no such office or place of business, the public records pertaining to the body or agency shall be kept in an office of the political subdivision in which such body or agency is located or, in the case of a state agency, in an office designated by the Secretary of State. See NH RSA 91-A:4(III).

The governmental body must be mindful of its duty to preserve records in an accessible manner. In the case of New Hampshire Civil Liberties Union v. City of Manchester, 149 NH 437 (2003), the Court affirmed an order from the Superior Court giving the New Hampshire Civil Liberties Union access to consensual photographs of people taken over a five year period by the Manchester Police Department. The Court observed that "the Right-to-Know Law requires governmental agencies to maintain public records in a manner that

makes them available to the public." The City argued producing the photographs would require it to have it compile the records into a new format contrary to the principles set forth in Brent v. Paquette, 132 NH 415 (1989), which held that the Right-to-Know Law "does not require public officials to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist."

In New Hampshire Civil Liberties Union, the Court limited the Brent exception noting that "while the Brent rule shields agencies from having to create a new document in response to a Right-to-Know request, it does not shelter them from having to assemble existing documents in their original form." 149 NH 437. The court went on to state, "[u]nlike the plaintiff in Brent, the plaintiff here is not requesting a new document that does not already exist." Id. at 439-440. The implication of this decision is that public officials should be mindful when they organize and maintain their records they have a duty to maintain records in a manner that will make them accessible to the public requests.

Minutes of public proceedings are considered permanent records of any body or agency or any subordinate body thereof, without exception. Therefore, a public entity has a duty to permanently preserve the records of its body or meetings. See NH RSA 91-A:2.

Agreements to settle lawsuits against governmental units, threatened lawsuits, or other claims entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement. RSA 91-A:4(VI).

The preservation of municipal records is governed by RSA 33-A, which creates a municipal records board. The municipal records board advises the secretary of state on standards and procedures for the effective and efficient management of municipal records; those standards and procedures govern the retention, preservation and disposition of municipal records. RSA 33-A:4-b. RSA 33-A:3-a sets forth the minimum time period for the retention of 155 categories of documents, including voter registration, subdivision applications, police files, and personnel files. Electronic records that are to be retained for more than 10 years "shall be transferred to paper, microfilm, or both." RSA 33-A:5-a. Electronic records designated to be retained for less than 10 years may be retained in their electronic form, "if so approved by the record committee of the municipality responsible for the records." Id. Regional town meeting and city council records shall not be disposed of, and must be permanently preserved. RSA 33-A:6.

Town officers, committees, and boards must deposit "books, records, papers, vouchers, and documents" that are "not needed elsewhere by them in the discharge of official duty," with the town clerk. RSA 41:58. Selectman have a duty to care and preserve for the public records of the town in accord with RSA 41:59. Town officers are prohibited from loaning public records or permitting "them to be taken from the place where they are usually kept except when necessary for the discharge of official duty or upon the summons of a court of competent authority." RSA 41:61.

The clerk in each town and city is required to forward to the state library two copies, and to the library of the University of New Hampshire one copy, of the city or town report for the previous fiscal year. RSA 201-A:18.

> *Practice Pointer: In small towns, zoning boards and the like often lack dedicated office space and frequently do not have regular business hours. Under such circumstances, the town should make arrangements for the records to be kept with the town clerk and should post a notice as to where the records of the pertinent agency can be obtained. It is technically improper for a planning board secretary or zoning board secretary to retain the official records of the municipality's agency at his or her home.*

State records are governed by the "Records, Management and Archives Act." RSA 5:38 provides that

> Unless otherwise provided by law with respect to particular departments or particular records, records not having a permanent or historical value may be destroyed at the end of 4 years from their making, provided that the rules of the director, as adopted under RSA 5:40, may provide that designated records may be destroyed at an earlier period or require their retention for a longer period.

VII. Exempt Records

Certain records are exempt from public access. Exemptions arise from the express language of NH RSA 91-A, other statutory provisions, or as a result of case law. Officials should remember that all of these exemptions are narrowly construed and that a court will, whenever reasonably possible, favor disclosure.

A. Records Exempt Under RSA 91-A:5

The Right-to-Know law outlines certain records that, as a matter of law, are exempt:

- Grand and Petit Jury Records. NH RSA 91-A:5(I);

- Parole and Pardon Board Records. NH RSA 91-A:5(II);

- Sealed Minutes. NH RSA 91-A:3(III);

- Personal School Records of Pupils. NH RSA 91-A:5(III);

- Records pertaining to internal personnel practices. NH RSA 91-A:5(IV). Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4 (2006) (report generated in the course of an investigation of alleged employee misconduct is a record pertaining to "internal personnel practices" and thus is exempt from disclosure).

- Records pertaining to test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations. NH RSA 91-A:5(IV);

- Records pertaining to confidential, commercial, or financial information. NH RSA 91-A:5(IV);

- Records pertaining to personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. NH RSA 91-A:5(IV).

The New Hampshire Supreme Court uses a three-step approach when determining whether disclosure of a record would constitute an invasion of privacy:

1. Evaluate whether there is a privacy interest at stake that would be invaded by disclosure. If there is not, the record must be disclosed.

2. Assess the public's interest in disclosure. If disclosure of the information would serve the purpose of informing the public about the conduct and activities of their government, then the public has a high interest in disclosure.

3. Balance the public interest in disclosure against the government interest in

nondisclosure and the individual's privacy interest in nondisclosure.

Professional Firefighters of N.H. v. Local Gov't Center, Inc., 159 NH 699 (2010); Lamy v. N.H. Public Utilities Comm'n, 152 NH 106 (2005) (citations omitted).

The party asserting the privacy exception bears a heavy burden to shift the balance toward nondisclosure. N.H. Civil Liberties Union v. City of Manchester, 149 NH 437, 440 (2003) (citations omitted). "Official information that sheds light on an agency's performance of its statutory duties falls squarely within the statutory purpose of the Right-to-Know law." N.H. Civil Liberties Union v. City of Manchester, 149 NH 437, 441 (2003) (citations omitted). In most cases, when the requested information has pertained to governmental activities, courts have held that any privacy interest in the requested information was not outweighed by the public's interest in disclosure.

- Teacher certification records. NH RSA 91-A:5(V). The Department of Education is required to release information pertaining to a teacher's certification status.

- Records pertaining to matters related to the preparation for and carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. NH RSA 91-A:5(VI).

- Unique pupil identification information collected in accordance with RSA 193-E:5. NH RSA 91-A:5(VII).

- Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding. NH RSA 91-A:5(VIII).

Practice Pointer: Caution – Although Board Members' personal notes are not public documents when the Board Member retains them for his or her use, once disclosed to the Board they become part of the Board's files and thus are subject to disclosure as a governmental record.

- Preliminary drafts, notes and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body. NH RSA 91-A:5(IX). This exemption is intended to protect pre-decisional, deliberative communications that are part of any agency's decision-making process, and that have not been provided to a quorum or majority of the public body. ATV Watch v. N.H. Dep't of Transportation, 161 N.H. 746 (2011).

- Records exempt from public inspection under RSA 282-A:117-123 (employment security). NH RSA 91-A:6.

B. Records Exempt by Other State or Federal Statutes

There are other state statutes that provide for the confidentiality of certain records, and certain proceedings before some committees and boards are statutorily exempt from the provisions of the Right-to-Know law. In such cases, the Right-to-Know law does not compel disclosure. RSA 91-A:4(I).

> *Practice Pointer: Before concluding that a record should be disclosed, the decision-maker should consider whether there are other statutory exemptions that may require non-disclosure.*

These statutes include, but are not limited to:

- Library records containing the names or other personal identifying information regarding the users of public or other than public libraries, "may be disclosed to the extent necessary for the proper operation of such libraries and shall be disclosed upon request by or consent of the user or pursuant to subpoena, court order, or where otherwise required by statute." RSA 201-D:11(I)-(II).

- Papers and records pertaining to a petition for pre-authorization of a surrogacy arrangement. RSA 168-B:24(II).

- Juvenile case and court records in delinquency proceedings. RSA 169-B:35; RSA 169-B:36. RSA 170-G:8-a governs the disclosure of case records, and preserves the confidentiality of case records by limiting access to necessary parties.

- Court records and case records pertaining to juvenile child abuse and neglect hearings. RSA 169-C:25. All case records

relative to abuse and neglect are deemed confidential and access is limited under RSA 170-G:8-a. The New Hampshire Supreme Court has held that the entire investigatory file of the Division for Children, Youth, and Families in a juvenile matter is confidential. State v. Gagne, 136 NH 101 (1992).

- Case and court records in juvenile proceedings involving children in need of services. RSA 169-D:25. Once a child in need of services reaches 18 years of age, court and police records must be destroyed. In contrast, juvenile delinquency records are sealed.

- Adoption records. Hearings in Adoptive proceedings are held in closed court. The papers and records pertaining to an adoption proceeding are "subject to inspection only upon written consent of the court for good cause shown." RSA 170-B:23-24 preserves the confidentiality of these records and sets forth a process whereby the adoptee may obtain background information. There are substantial penalties for violating this statutory section. RSA 170-B:24(IV).

- Records pertaining to termination of parental rights. RSA 170-C:14 declares the confidentiality of "all papers and records including birth certificates pertaining to the termination of parental rights" and allows for inspection "only upon written consent of the court for good cause shown." RSA 170-C:14(II). There are substantial penalties for violating this provision. RSA 170-C:14(III).

- Daycare investigations. The Department of Health and Human Services must observe the confidentiality requirements of any agency from which it receives information in the context of a child daycare and child placing agency investigation or licensure. RSA 170-E:23; see also RSA 170-E:49 (requiring that the department "shall strictly observe the confidentiality requirements of the agency from which it receives information").

- Records of the division for children in need of services. RSA 170-G:8-a, provides that the case records of the Division for Children, Youth, and Families in connection with a juvenile proceeding, are deemed confidential. RSA 170-G:8-a(II). Access to the records is essentially limited to the essential parties in a proceeding as well as service providers.

- Records of the Youth Services Center. RSA 621-A:7 provides that records pertaining to children "shall not be open to the inspection of any persons not on the staff of the director [of the Youth Services Center] except that such records shall be available, by court order, to any court having competent jurisdiction of the child in any matter pending in the state or to such person or persons as may be authorized by the court." See NH RSA 621-A:7(I).

- Reports or records pertaining to the client of a State operated alcohol and drug abuse program. RSA 172:8-a.

- Records pertaining to victims of domestic violence. Employees and appointees participating under a state funded domestic violence program are required to maintain confidentiality with regard to persons served. The statewide organization or agency appointed to coordinate domestic violence programs is performing a quasi-public function, however their files are confidential. RSA 173-B:22.

- Communications and records made between the victim of sexual assault or domestic violence and their counselor. RSA 173-C:2. This privilege may be waived by the victim in whole or in part. RSA 173-C:3; RSA 173-C:4.

- State educational testing data**.** The state is authorized to delete individual pupil names or codes contained in statewide assessment results. RSA 193-C:11.

- Videotape rental records. RSA 351-A:1(I) provides that these records shall be confidential. From a practical perspective, it is unclear why they would be subject to the Right-to-Know law since the Right-to-Know law applies to public bodies.

- Consumer protection investigations. RSA 358-A:8 provides that no information or material obtained or used under NH RSA 358-A:8 "shall be released publicly by any governmental agency except in connection with the prosecution of legal proceedings" instituted under the consumer protection statute. The same provision goes on to state that "any information, testimony or documentary material obtained or used pursuant to a protective order, shall not be exchanged or released, as provided herein, publicly, except in compliance with such protective order." RSA

358-A:8(VI).

- Certain records of the Department of Employment Security. RSA 282-A:117 - 282-A:123. In particular, RSA 282-A:118 preserves the confidentiality of information obtained by the Commissioner of the Department of Employment Security from "any individual, claimant or employee employing unit" limiting access to the employing unit and the claimant. RSA 282-A:123 limits the use of records in collateral proceedings.

- 911 System Records. RSA 106-H:14.

- Certain proceedings before the Public Utilities Commission. RSA 363:17-c.

- Information pertaining to the location of archeological sites. RSA 227-C:11 explicitly exempts information pertaining to archeological sites on state lands or state waters "from all laws providing rights to public access."

- Personnel files of a police officer. RSA 105:13-b provides particular protection to the personnel file of a police officer who is serving as a witness or prosecutor in a criminal case. The file may only be accessed if the judge rules that there is probable cause that the file contains evidence relevant to the criminal case and upon examination of the filing camera makes a determination that it indeed contains evidence relevant to the case. Only those portions of the file which the judge determines to be relevant are to be released. The balance of the file is treated as confidential and returned to the police department.

- Records of the Insurance Department. All records and documents of the insurance department are subject to public inspection pursuant to the Right-to-Know law, RSA 91-A. However, the commissioner may determine by order that it is in the public interest to make public additional records and documents or to hold certain records and documents confidential within the insurance department. RSA 400-A:25(I).

- Insurance Department Records regarding Managed Care. Information reported to the commissioner of insurance in the context of regulating managed care is deemed confidential and "shall not be made public by the commissioner or any other

person, except to insurance departments of other states, unless the commissioner after consultation with the affected parties, determines that the interest of policyholders, shareholders or the public will be served by the publication thereof in which event the commissioner may disclose all or any part thereof in such a manner as the commissioner may deem appropriate." RSA 420-J:11.

- Investigations of the State of New Hampshire Insurance Fraud Unit, including papers, documents, reports or evidence relative to the subject of the investigation, are confidential and "shall not be subject to public inspection or disclosure." NH RSA 417:29.

- Public Assistance Records. NH RSA 167:30.

- Educational records. 20 USC 1232g.

- Proceedings and records of the Department of Labor regarding workers' compensation claims. NH RSA 281-A:21-b.

- The name of a student and his/her parent/guardian and any specific reasons disclosed to school officials about the objection to specific course materials. NH RSA 186:11, IX-c.

See also New Hampshire Attorney General's Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A at Appendix E, available at: http://doj.nh.gov/civil/documents/right-to-know.pdf (accessed June 12, 2014).

C. Judicial Exceptions to Disclosure.

The judiciary has also acknowledged certain exemptions from public access under the Right-to-Know law. They are as follows:

1. Written Legal Advice from the Public Agency or Body's Legal Counsel.

NH RSA 91-A:2(I)(b) indicates that consultation with legal counsel does not fit within the definition of a "meeting." Common sense dictates that if the public could access written legal advice from an agency's or body's legal counsel, the attorney/client privilege would be circumvented. The New Hampshire Supreme Court has upheld the protection of written legal advice in society for the protection of New Hampshire Forest v. Water Supply and Pollution Control Commission, 115 NH 192 (1975).

The New Hampshire Supreme Court held that NH RSA 91-A:2(I)(b) did not permit a public body to read a letter from counsel and discuss its contents in a private session without an attorney at the meeting. Ettinger v. Town of Madison Planning Board (2011). The court noted that for NH RSA 91-A:2(I)(b) to apply, an attorney needed to be physically present or present telephonically, so that the attorney was able to participate in the public body's discussion. Legislative attempts to overrule this decision by statute have been unsuccessful.

2. Bank Examiner's Reports.

See Appeal of Portsmouth Trust Company, 120 NH 753 (1980).

3. Real Estate Appraisal Reports.

Reports compiled by the Department of Transportation for purposes of condemnation/eminent domain are confidential. See Perras v. Clements 127 NH 603 (1986).

4. Police Investigative Files.

The New Hampshire Supreme Court has adopted a six-prong test to evaluate requests for access to police investigative files. 38 Endicott Street, LLC v. State Fire Marshall, 163 NH 656 (2012); Murray v. N.H. Division of State Police, 154 N.H. 579, 582 (2006) (citation omitted). Under that test, agencies may exempt from disclosure:

> Records or information complied for law enforcement purposes, but only to the extent that the production of such law enforcement records or information--
>
> (A) could reasonably be excepted to interfere with law enforcement proceedings,
> (B) would deprive a person of a right to a fair trial or an impartial adjudication,
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national

security intelligence investigation, information furnished by a confidential source,

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual

These exclusions will be construed narrowly. However, the agency is only required to "establish that the records at issue were compiled for law enforcement purposes, and that the material satisfies the requirements of one of the subparts of the test." See 38 Endicott Street, LLC, 163 NH at 661 (upholding Superior Court decision exempting documents related to fire investigation); Montenegro v. City of Dover, 162 NH 641(2011) (holding that "the precise locations of the City's surveillance equipment, the recording capabilities for each piece of equipment, the specific time periods each piece of equipment is expected to be operational, and the retention time for any recordings are exempt from disclosure").

Practice Pointer: The practitioner should remember that all exemptions are narrowly construed and that a court will, whenever reasonably possible, favor disclosure. Therefore, any record that does not fall within an exemption must be disclosed to the public regardless of whether it is a hard copy or in electronic format. When in doubt, exemptions must be interpreted in the most restrictive fashion and the record disclosed.

VIII. Confidential Records and Other Statutory Protections

NH RSA 42:1-a imposes a clear duty upon a town officer to preserve the confidentiality of certain information. NH RSA 42:1-a(II) states that:

> [w]ithout limiting other causes for such a dismissal, it shall be considered a violation of a town officer's oath for the officer to divulge to the public any information which that officer learned by virtue of his official position, or in the course of his official duties, if:
>
> (a) a public body properly voted to withhold that information from the public by a vote of two thirds (2/3) as required by NH RSA 91-A:3(III), and if divulgence of such information would constitute an

invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective; or,

(b) the officer knew or reasonably should have known that the information was exempt from disclosure pursuant to NH RSA 91-A:5 and that its divulgence would constitute an invasion of privacy or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective.

NH RSA 42:1-a(III) provides "no town officer who is required by an order of a court to divulge information outlined in Paragraph 2 in a legal proceeding under oath shall be guilty of a violation under this section."

Practice Pointer: A town officer may only be dismissed by petition to the Superior Court in accord with NH RSA 42:1-a. However, the statutory law clearly imposes a duty on a town officer to preserve confidential information. Therefore, town officers must exercise care in making disclosure decisions.

IX. Federal Privacy Rights Under the Family Educational Rights and Privacy Act ("FERPA")

Under FERPA, parents have statutory rights to inspect and review their child's educational records. As a general rule, school districts are prohibited from disclosing educational records to third parties without prior parental consent. See 20 USC 1232g. Educational records are defined as:

The statute defines educational records as: "those records, files, documents, and other materials which:

i. Contain information directly related to a student; and

ii. Are maintained by an educational agency or institution or by a person acting for such agency or institution."

20 U.S.C. 1232g(a)(4)(A); 34 C.F.R. 99.3.

The term "record" means "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. 99.3.

However, educational records do not include:

1. Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker and which are not accessible or revealed to any other person except a substitute;

2. Records maintained by a law enforcement unit of the school district that were created by that law enforcement unit for the purpose of law enforcement;

3. In the case of persons who are employed by a school district but who are not attending a school district, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose;

4. Records on a student who is 18 years of age or older, or is attending a college or other postsecondary institution, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice;

5. Records created or received by a school district after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student; or,

6. Grades on peer-graded papers before they are collected and recorded by a teacher.

20 U.S.C. 1232g(a)(4)(B) (emphasis added); 34 CFR 99.3.

The term “disclosure” is defined as: “[t]o permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record.” 34 C.F.R. 99.3.

The Family Policy Compliance Office (“FPCO”) investigates complaints regarding FERPA violations. FERPA does not create a private right of action, and 42 U.S.C. ' 1983 may not be used to enforce the provisions of FERPA. Gonzaga Univ. v. League, 536 U.S. 273, 276, 287-88 (2002).

> *Practice Pointer: Those individuals who work for school districts should exercise care when presented with a request by a third party for student records. The general rule of thumb should be that student records will not be released without parental consent or consent of an adult student.*

X. Conclusion

The Right-to-Know law exists in order to shine light on the process of government. Municipal entities and elected officials should construe the exceptions to the Right-to-Know law narrowly and should place a premium on the benefit to public disclosure. You can avoid creating exposure by understanding and properly interpreting the narrow exceptions under which a board may go into a nonpublic session or withhold disclosure of documents.

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