# Understanding New Hampshire's Right-to-Know Law

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***Wadleigh, Starr & Peters, P.L.L.C.***
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## A Word of Caution

No two cases are exactly alike. This material is designed to provide elected officials, administrators, and managers with a broad understanding of the law pertaining to the Right-to-Know law. 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.

## Table of Contents

## ACCESS TO PUBLIC MEETINGS AND RECORDS UNDER NH RSA 91-A

### I. Overview

The purpose of this material is to provide educators and School Board Members with a working knowledge of New Hampshire's Right-to-Know Law [NH RSA 91-A]. The goal of this material is to leave the attendee better equipped to make prudent decisions regarding public access to meetings and records in a manner which fulfills the intent and objectives of the law. 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.

### II. Public Policy and the Right-to-Know Law

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.

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.

NH RSA 91-A:1.

Thus, "every 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 in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5." RSA 91-A:4(I).

There is a strong presumption favoring openness in public meetings and access to public records. A presumption simply means that any public body

which advocates for a closed meeting, or to withhold records, will carry the burden of demonstrating that the reason for closing the meeting to, or withholding the records from, the public is sufficient to overcome the presumption of openness in public business.

> *Practice Pointer: When you are caught up in the thicket of details pertaining to a request for public access, whether as to a meeting or to public records, it is vital that you step back and consider the underlying public policy considerations. Ask yourself the following questions: 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"? If you elect non-disclosure of a record, you must ask yourself: Does my decision not to disclose this record fit squarely within an available exemption? Absent your ability to answer 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.*

## III. Defining Governmental Records

RSA 91-A:1-a defines "governmental records" 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,[1] 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 terms "public agency" and "public body" are also defined within RSA 91-A. 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, chartered public school, or other political subdivision." RSA 91-A:1-a, V. A "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

[1] "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.

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, chartered public school,** or other political subdivision, **or any committee, subcommittee, or subordinate body thereof, or advisory committee[2] 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 (emphasis added).

Therefore, any board or commission of any state agency or authority has the capacity to create public records. Similarly, any board, commission, 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 has the capacity to generate a public record.

We also know from the case of Bradbury v. Shaw, 116 NH 388 (1976) that while not all entities that work for or with the government are subject to the Right-to-Know Law, entities which perform governmental functions are more likely than not subject to the Right-to-Know Law. For example, industrial commissions, advisory committees and the like have the capacity to create public records.

Certain proceedings before some committees and boards are, however, statutorily exempt from the provisions of the Right-to-Know law. See e.g. RSA 363:17-c (The Public Utilities Commission's "deliberative processes in adjudicatory proceedings held pursuant to RSA 541-A and investigations held under Title 33 shall be privileged and exempt from the public meeting, notice, and disclosure provisions of RSA 91-A. Decisions and orders in adjudicatory proceedings and investigations shall be publicly available but only after they have been announced at a public meeting or hearing of the commission or reduced to writing, signed by a majority of the commission and served upon the parties. Discussions and actions by the commission concerning procedural, administrative, legal, and internal matters shall be exempt from the meeting and notice provisions of RSA 91-A:2").

It is clear from NH RSA 91-A:4 that the term "governmental records" is broader than the minutes of meetings of the bodies or agencies. Absent the existence of an exemption or a valid vote to seal, one can assume that

[2] An "advisory committee" is "any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority." RSA 91-A:1-a, I.

essentially all municipal records[3] are subject to classification as accessible public records. This includes any records created or maintained by an agency, such as a school district or SAU, in furtherance of an agency's function. However, we can glean from the provisions of NH RSA 91-A certain records which are unequivocally defined as "governmental records." They are as follows:

- Minutes of meetings. NH RSA 91-A:4, I.

- Minutes of nonpublic sessions, unless the minutes have been the subject of a proper motion to seal.[4] RSA 91-A:4, I and RSA 91-A:3, III.

- "Records of any payment made to an employee of any public body or agency listed in RSA 91-A:1-a, VI(a)-(d), 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. . . . All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3." RSA 91-A:4, I-a.

- "[A]ll notes, materials, tapes or other sources used for compiling the minutes of . . . meetings," unless their disclosure is explicitly

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[3] 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 RSA 33-A:1(IV).

[4] Minutes of meetings in nonpublic session must "publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency 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. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply. For all meetings held in nonpublic session, where the minutes or decisions were determined to not be subject to full public disclosure, a list of such minutes or decisions shall be kept and this list shall be made available as soon as practicable for public disclosure. This list shall identify the public body and include the date and time of the meeting in nonpublic session, the specific exemption under paragraph II on its face which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the minutes or decisions from public disclosure, and the date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure. Minutes related to a discussion held in nonpublic session under subparagraph II(d) 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." RSA 91-A:3, III.

prohibited by statute or falls within the exemptions of NH RSA 91-A:5. RSA 91-A:4, II.

- Court case records, unless the party seeking non-disclosure of 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 record that are circulated to the board. See Goode v. New Hampshire Office of the Legislative Budget Assistant, 145 NH 451 (2000).

- 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. See Chambers v. Gregg, 135 NH 478 (1992).

- The names and addresses of substitute teachers employed during a strike. See Mans v. Lebanon School Board, 112 N.H. 160 (1972).

- The salaries and contracts of school teachers. See Timberlane Regional Education Association v. Crompton, 114 N.H. 315 (1974).

The statute also makes it clear that nothing in RSA 91-A "shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency." RSA 91-A:4, VII; see also Hampton Police Ass'n, Inc. v. Town of Hampton, 162 N.H. 7, 13 (2011); Brent v. Paquette, 132 N.H. 415, 426 (1989).

*Practice Pointer: A simple working definition of a public record is any governmental record which has not been exempted from disclosure.*

## A. Exempt Records

Lest there be any doubt, New Hampshire has a clear presumption favoring disclosure of public records. 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 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.

Certain records are, however, 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 these exemptions are narrowly construed and that a court will, whenever reasonably possible, favor disclosure. Exempt records include, but are not limited to, the following:

- Grand and Petit Jury Records and the master jury list. RSA 91-A:5, I, I-a;
- Parole and Pardon Board Records. RSA 91-A:5, II;
- Sealed Minutes. RSA 91-A:3, III;
- Personal School Records of Pupils, including the name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the assessment under RSA 193-C:6. RSA 91-A:5, III;
- Records pertaining to test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations. RSA 91-A:5, IV;
- Records pertaining to confidential, commercial, or financial information. RSA 91-A:5, IV;
- Records pertaining to internal personnel practices. RSA 91-A:5, IV. See also Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325 (2020); Union Leader Corp. v. Salem, 173 N.H. 345 (2020);

- Records pertaining to personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. 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.

  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);

  The New Hampshire Supreme Court has consistently held that “[o]fficial 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.” See e.g. 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.

  A similar public interest balancing test applies to records that may be subject to the “confidential, commercial, or financial information” and “internal personnel practices” exemptions. This balancing test requires the public body or

agency to balance the consequences of disclosure with the public's interest in disclosure. See Union Leader Corp. v. Town of Salem, 173 N.H. 345 (2020).

- Teacher certification records. 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. RSA 91-A:5, VI.

- Unique pupil identification information collected in accordance with RSA 193-E:5. 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. RSA 91-A:5, VIII;

- Preliminary drafts, notes and memoranda, as well as other documents "not in their final form and not disclosed, circulated, or available to a quorum or a majority" of the public body. RSA 91-A:V, IX.

- Records pertaining to information technology systems, including cyber security plans, vulnerability testing and assessment materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed. RSA 91-A:5, XI;

- Records protected under attorney-client privilege or the attorney work product doctrine. RSA 91-A:5, XII;

- Records exempt from public inspection under RSA 282-A:117-123. RSA 91-A:6.

*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.*

*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.*

There are a number of other statutes that render certain records confidential, including, but not limited to:

- Juvenile case and court records in delinquency proceedings. RSA 169-B:35-36. 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; RSA 170-G:8-a.

- Case and court records in juvenile proceedings involving children in need of services. RSA 169-D:25.

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

- Educational records. 20 USC 1232g.

- 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. RSA 186:11, IX-c.

All exemptions are narrowly construed and a court will, whenever reasonably possible, favor disclosure. Therefore, any record that does not fall within a statutory exemption must be disclosed to the public. When in doubt, exemptions should be interpreted in the most restrictive fashion and the record disclosed.

### 1. 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:

"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.

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.

*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, and such records are exempt under RSA 91-A:5.*

### B. Access to Public Records[5]

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 such entity, including minutes of meetings of the bodies or agencies; and

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

RSA 91-A:4, I.

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

In addition, after the completion of a meeting of the municipal entity, every citizen during the regular business hours of the public entity and on the regular business premises of the entity has the right to:

[5] Discharging the access duties under the Right-to-Know Law differs from the access requirements of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

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

- To make memoranda, abstracts and photographic or photostatic copies; or

- Tape record such notes, materials, tapes or sources, except as otherwise prohibited by statute or NH RSA 91-A:5.

RSA 91-A:4, II.

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, and are permanent records of the public body or agency.

- 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.

- 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.

- "Reasonably described" records requested should be promptly disclosed when such records are immediately available for release.

- 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 the reasons for the denial (including the specific exemption and an explanation of how the exemption applies to the record that was withheld); 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 and the reason for the delay. Additionally, pursuant to a recent amendment to the law, this response option must also include an "estimate of the cost of making the record available" if doing so will require 10 hours or more of the public body's or agency's time.[6]

RSA 91-A:4. 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. See e.g. ATV Watch v. N.H. Dep't of Resources and Economic Development, 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")[7]; see also RSA 91-A:8.

A person's motives for seeking disclosure are irrelevant. 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). NH RSA 91-A:8 provides a remedy to any person who is denied their reasonable request for a public record. 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.

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[6] As noted in Section III(E)(1), a public body or agency may charge up to $25 per hour for the time necessary to make the records available if that time will exceed 10 hours. RSA 91-A:4, VIII.

[7] 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 NH 434. The 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.

### C. 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 RSA 91-A:4, VII; see also 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. Informal e-mail discussions that do not fit under a statutory exemption must be disclosed under New Hampshire's Right-to-Know Law.[8] Even if the user thinks he deleted the message, a municipality or school district with its own server is likely keeping backup records of messages long after they have been deleted by the user. And, 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. See e.g. 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:9.

Broad requests for e-mail communications—of individual Board members, District personnel, etc.—requires a somewhat nuanced analysis. Some requests may ask for teacher e-mails, staff e-mails, or e-mails to or from an individual Board member but not circulated to a quorum of the Board. For such requests, the focus as to whether a particular e-mail must be disclosed under RSA 91-A is whether the email was "created, accepted, or obtained by, **or on behalf of**" the Board (public body) or District (public agency), **and in furtherance of its function**. RSA 91-A:1-a, III. Depending on the circumstances, this could draw non-personal e-mails involving the Superintendent, individual Board members, and others, **if** the e-mails were created or obtained on behalf of the Board or District (by way of delegation), and in furtherance of its official function.

### D. The 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. NH RSA 91-A:4, III; see also RSA 33-A, municipal records.

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 Supreme Court affirmed an order from the Superior Court giving the New Hampshire Civil Liberties Union access to consensual photographs of people taken over the past five years by the Manchester Police Department. In affirming that order, the Court observed that

[8] 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.

"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 compile the records into a new format contrary to the principles set forth in Brent v. Paquette, 132 NH 415 (1989) (this case stands for the proposition 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 that, when they organize and maintain their records, they have a duty to maintain records in a manner that will make them accessible in response to 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. RSA 91-A:2.

Public entities that maintain records "in electronic format, may in lieu of providing the original documents, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, mor may use any other means reasonably calculated to comply with the request in light of the purpose of [RSA 91-A] as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided." RSA 91-A:4, V.

Governmental records maintained in electronic format must be kept and maintained for the same retention periods as a paper record. Records kept in electronic format are not subject to disclosure after they have "been initially and legally deleted," which means that "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.

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.

### E. 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)).

### 1. Copying Costs

RSA 91-A:4, IV provides that if a 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. In addition, the ability to charge the actual cost providing a copy does not exempt a person from paying fees otherwise established by law for obtaining copies of public records or documents,

but if a fee is established for the copy, no additional costs or fees shall be charged.

However, no costs or fees shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form, unless the time needed to make the records available meets the requirements of recently adopted RSA 91-A:4, VIII. This new amendment to the law allows public bodies and agencies to charge a "reasonable" amount, not to exceed $25 per hour, for "employee time to make the record available to the requestor, including time to search, retrieve, duplicate, redact, and otherwise make the record available for the requestor." However, "no costs shall be charged for requests under 10 hours." In other words, if it takes a public body or agency 10 hours or more to search for, redact, compile, and make available records responsive to a request, the public body or agency may charge the requester up to $25 per hour. Any request that requires less than 10 hours to respond to cannot result in a charge to the requester, except for actual copying costs under RSA 91-A:4, IV.

### F. The Duty to Preserve Confidentiality

RSA 42:1-a imposes a clear duty upon a town officer to preserve the confidentiality of certain information. 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 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 RSA 91-A:5 and that its divulgence would constitute an invasion of privacy or would adversely effect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective.

RSA 42:1-a, II.

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 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.*

## IV. Defining Public Meetings

A public meeting occurs when:

1. A quorum of the membership of the public body is convened, whether in person, by means of telephone or electronic communication (as described below), or in any other manner such that all participating members are able to communicate with each other contemporaneously; and

2. The purpose of the meeting is to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power.

RSA 91-A:2, I.

Public bodies may, but are not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the following requirements:

- A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.

- Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. An emergency exists when "immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public

body, and the facts upon which that determination is based shall be included in the minutes of the meeting."

- 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. Each member participating in the meeting must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating remotely must identify the persons present in the location from which the member is participating. Meetings shall not be conducted by electronic mail or other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

    - The COVID-19 pandemic saw the widespread use of remote meetings, pursuant to the Governor's former Emergency Order #12 permitting such meetings. Although fully remote meetings are no longer permitted (a quorum of the public body must be physically present), some Boards continue to use remote meeting platforms as a means to allow members of the public to attend and/or participate in public meetings. Care should be taken to ensure that the remote meeting platform and technological infrastructure are sufficient to avoid any interruptions or disruptions to the public's ability to discern each part of the meeting. Further, a Board should establish protocols sufficient to allow members of the public attending the meeting remotely to participate in the meeting to the same extent as those physically present. While the Legislature has considered addressing remote meetings in the context of RSA 91-A,[9] it has not yet passed such an amendment.

- The meeting must comply with all of the requirements of RSA 91-A pertaining to public meetings, "and shall not circumvent the spirit and purpose of [RSA 91-A] as expressed in RSA 91-A:1."

- All votes taken during such a meeting shall be by roll call vote.

RSA 91-A:2, III.

[9] See https://www.gencourt.state.nh.us/bill_status/legacy/bs2016/billText.aspx?sy=2022&id=1147&txtFormat=pdf&v=current.

*Practice Pointer: If a subcommittee of the public body meets, there is a public meeting if there is a quorum of the subcommittee.*

A public meeting does not include:

- A chance meeting or social meeting neither planned nor intended for the purpose of discussing matters related to official business, and at which no decisions are made;
- Consultation with legal counsel;
- Strategy or negotiations with regard to collective bargaining; or
- A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2.
- Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; however, the balance of RSA 91-A applies to such documents and/or related communications.

*Practice Pointer: None of these "nonmeetings" will be construed as such if they are used to circumvent the spirit of the Right-to-Know Law.*

When a meeting has been deemed public, citizens have a right to:

- Attend all public sessions;
- Observe all votes (no secret balloting); and
- Use recording devices, including, but not limited to tape recorders, video recorders, cameras, and the like.

RSA 91-A:2, II.

*Practice Pointer: A public meeting is still a meeting of the Board. There is no general statutory right to interact with the Board, to disrupt the meeting, to speak to the Board, or to otherwise interfere with the business of the Board.*

Public bodies cannot utilize their administrative rules to avoid the requirements of the Right-to-Know law. WMUR Channel Nine v. N.H. Dep't of Fish & Game, 154 N.H. 46 (2006). In that case, the Department of Fish and

Game agreed to close a hearing to cameras and audio recording devices because the hearing officer concluded that the commotion caused by the cameras and lights would deprive an individual of his opportunity to be heard on his hunting license reinstatement claim. Id. at 47. WMUR appeared at the hearing with a television camera; the cameras were barred, but a WMUR employee was allowed to attend the hearing and take notes. Id. WMUR filed a petition for an injunction to permit them to use their cameras, but the court was not able to act on the motion before the hearing concluded.

WMUR and the Department of Fish and Game filed motions for summary judgment. WMUR asserted that the department's refusal to allow WMUR to videotape the hearing violated the Right-to-Know law; the department argued that the hearing officer's decision was reasonable and did not violate RSA 91-A. The trial court granted WMUR's motion, but ruled that WMUR was not entitled to attorney's fees because the hearing officer did not know, nor should have known, that his conduct violated RSA 91-A. Id.

The New Hampshire Supreme Court rejected the department's argument that the hearing officer "correctly balanced WMUR's right to videotape the hearing against [the applicant's] constitutional due process right to have a fair hearing and an opportunity to be heard," finding that "the department has failed to demonstrate that [the applicant] had a due process right in the hearing. Id. at 48-49.

The Court also rejected the department's argument that its administrative rules gave the hearing officer the authority to override the Right-to-Know law, reaffirming that regulations that "contradict the terms of a governing statute exceed the agency's authority." Id. at 49.

> *Practice Pointer:* *If a Charter, Guidelines, or Rules of Order of the public agency or body require broader public access to official meetings and records than the Right-to-Know Law, then those provisions will govern access to public meetings and records. Accordingly, it is important that the body or agency be familiar with any rules or provisions pertaining to public access, as well as with the provisions of the Right-to-Know Law.*

### A. The Notice Requirement

Notice to the public is a precondition to almost any public meeting. A statutorily sufficient notice contains the following components:

- The time of the meeting;
- The place of the meeting; and

- Per advice of the Attorney General, a brief outline of the agenda for both the public session and the statutory basis for any anticipated nonpublic session.

A statutorily sufficient notice to the public must be posted in two appropriate public locations, one of which may be the public body or agency's website, or in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to the meeting.

In the event of a genuine emergency, there is a statutory provision for emergency notice to the public. An emergency is "a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the body or agency."

In an emergency situation, the public should be noticed by:

- Whatever means are available to best inform the public of the meeting (radio, television, internet, telephone, posting); and

- "Diligent efforts," in keeping with the nature of the emergency.

The minutes of the emergency meeting must spell out the need for the emergency meeting. See RSA 91-A:2, II.

### B. Meetings Minutes

#### 1. The Minimum Requirements

The Right-to-Know Law also protects the public by requiring that the Board maintain statutorily sufficient minutes of its public meetings. NH RSA 91-A:2, II clearly defines minutes of all public proceedings as a public record. Minimally sufficient minutes of meetings include the following:

- The names of the members of the public body or agency;

- Names of all persons appearing before the public body or agency;

- A brief description of the subject matter discussed;

- A brief description of all final decisions; and

- The names of the members of the public body or agency or made or seconded each motion.

RSA 91-A:2, II.

Contrary to myth, most public minutes are not required to be stenographic records. Nevertheless, many boards insist on verbatim transcripts and 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.

The right to access minutes also includes the right (during regular business hours) to inspect and copy the supporting materials used to compile the minutes.

> *Practice Pointer: Passing muster with a minimally sufficient minute for purposes of 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 include the reasons for the board's decision. Absent such, the board may have to scramble to supplement the record or even worse, may be subject to a remand for purposes of clarifying the record.*

### 2. Accessibility

Minutes are to be preserved in perpetuity. They shall be made available to the public for inspection and copying not more than 5 business days after the public meeting. RSA 91-A:2, II. Unless they are sealed by vote of 2/3rds of the members present, the board is required to make minutes of its nonpublic sessions available within 72 hours of the meeting. Any vote to seal the records of a nonpublic session should be taken immediately after the nonpublic session and should be recorded as a matter of public record. RSA 91-A:3, III.

Any public body that maintains a website or contracts with a company to maintain a website on its behalf must either post its approved minutes “in a consistent and reasonably accessible location on the website or post and maintain a notice on the website stating where the minutes may be reviewed and copies requested.” RSA 91-A:2, II-b(a).

> *Practice Pointer: Absent an affirmative motion to seal the minutes, you may assume that minutes of non-public sessions 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, or pertain . . . to matters relating to the preparation for and the carrying out of all emergency 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.”*

### 3. Opportunity to Object

If a member of the public body believes that a discussion during a meeting, including a nonpublic session, of the public body violates RSA 91-A, that member may object to the discussion. If the discussion continues, over the member's objection, then the objecting member may request that the objection be recorded in the minutes, and may then participate in the discussion without being subject to the penalties in RSA 91-A:8, IV or V. Upon request, the public body must record the objection in the meeting minutes. If the objection is to a discussion in nonpublic session, then the objection shall also be recorded in the public minutes. However, the public minutes shall only include the member's name, a statement that he/she objected to the discussion in nonpublic session and a reference to the provision of RSA 91-A:3, II that was the basis for the discussion. RSA 91-A:2, II-a.

## C. The Nonpublic Session

The nonpublic portion of a meeting is known as a "nonpublic session," and must be preceded by a recorded, roll call vote on a motion, properly made and seconded, to go into nonpublic session. The motion must state a legitimate statutory basis for the nonpublic session. Under no circumstances may the board move beyond the scope of the stated reason for the nonpublic session. RSA 91-A:3, I.

The statute prohibits public bodies from meeting in nonpublic session, except for one of the reasons stated in RSA 91-A:3, II. These reasons include, but are not limited to:

1. The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him, unless the employee affected:

    a. has a right to a meeting and
    b. requests that the meeting be open, in which case the request shall be granted.[10]

2. The hiring of any person as a public employee.

3. Matters which, if discussed in public, would likely affect adversely the reputation of any person, ***other than a member of the body*** or agency itself, unless such person requests an open meeting. This exemption shall extend to

[10] This opportunity to elect an open meeting implies that the employee will have to be given notice of the meeting and the opportunity to request that it occur in public session.

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.

4. Consideration of the acquisition, sale or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

5. Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the body or agency or any subdivision thereof, or against any member thereof because of his or her membership in such body or agency, until the claim or litigation has been fully adjudicated or otherwise settled. Applications for tax abatement do not constitute threatened or filed litigation.

6. Consideration of matters relating to the preparation for and the 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.

7. Consideration by a school board of entering into a student or pupil tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations. A contract negotiated by a school board shall be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, shall be made public. Approval of a contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate.

8. Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.

9. Effective January 1, 2022: Consideration of whether to disclose minutes of a nonpublic session due to a change in circumstances under RSA 91-A:3, III; any vote on whether to disclose minutes shall take place in public session.

RSA 91-A:3, II.

### 1. Documenting and Periodic Review of Sealed Minutes

As of January 1, 2022, certain specified data relating to all minutes of non-public sessions that are sealed by a public body must appear on a "list" that is to be made publicly available "as soon as is practicable." RSA 91-A:3, III. The data that is to be publicly available in relation to sealed minutes includes: (1) the identity of the public body; (2) the date and time of the subject non-public session; (3) the specific ground(s) for entering into non-public session; (4) the date of the decision to seal the minutes; and (5) the date of the decision, if any, to unseal the minutes.

As of October 3, 2023, public bodies must review sealed meeting minutes at least every 10 years and determine, by majority vote, whether to release the previously sealed minutes or continue to seal them for another, at most, 10 years. RSA 91-A:3, IV.[11] If the public body fails to review and vote to continue to seal the minutes, they will automatically become public after 10 years. Review and discussion as to whether the minutes should remain sealed, based on an analysis as to whether the circumstances and statutory basis for previously sealing the minutes still remains, should be in non-public session. RSA 91-A:3, II(m). However, any vote to unseal the minutes or keep them sealed must be made in public session. Id. RSA 91-A:3, IV permits public bodies and agencies to adopt procedures for this review process, which could require review within a shorter timeframe, however this is not required. If no procedures are adopted, the 10-year default rule will apply.

Finally, recent amendments to the law require the public disclosure of sealed non-public session minutes in two instances, irrespective of the review process or 10-year timeline. First, RSA 91-A:3, III requires the disclosure of sealed minutes relating to the "consideration of the acquisition, sale, or lease of real or personal property" (RSA 91-A:3, II(d)) as soon as is practicable after the transaction has closed or the public body has decided not to proceed with the transaction. Second, RSA 91-A:3, II(k) requires: "A contract negotiated by a school board shall be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session, any proposals or records related to the contract, and any proposal or records

[11] For minutes sealed prior to October 3, 2023, the statute provides a 10-year grace period. In other words, for all minutes sealed prior to that date, the public body has 10 years from October 3, 2023 to review those minutes and determine whether they should be released.

involving a school district that did not become a party to the contract, shall be made public."

## V. Remedies

### A. Traditional Superior Court Petition Process

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 for injunctive relief filed with the Superior Court. RSA 91-A:7. 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 to enforce compliance with RSA 91-A or to address a purposeful violation of RSA 91-A and award the petitioners reasonable attorneys 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.

- The court may award attorney's fees to a public body or agency for having to defend against a lawsuit under RSA 91-A, when the court finds that the lawsuit was in bad faith, frivolous, unjust, vexatious, wanton, or oppressive.

- If the court finds that an officer, employee or other official of a public body or agency has acted in bad faith, the court shall impose against such person a civil penalty of not less than $250 and not more than $2,000, payable to the political subdivision. "Upon such finding, such person or persons may also be required to reimburse the public body or public agency for any attorney's fees or costs it paid."

- 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;"

- The court may require that any officers, employees, or other officials of a public body or agency found to have violated the

Right to Know law undergo appropriate remedial training, at that person's expense; and

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

See RSA 91-A:8.

Any person who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under RSA 91-A is guilty of a misdemeanor. 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.

There is also a duty to preserve documents which have been requested and the request has been denied. The requested material "shall be preserved for ninety (90) days or while any lawsuit pursuant to RSA 91-A:7-8 is pending." RSA 91-A:9.

### B. Alternative Ombudsman Complaint Process

In 2022, the Legislature amended RSA 91-A:7 to provide a process alternative to filing a petition in Superior Court. The statute, as amended, now allows a person "aggrieved by a violation of" RSA 91-A to file a complaint with a newly established Office of the Right-to-Know Ombudsman. RSA 91-A:7, II; RSA 91-A:7-a. Instead of the filing fee associated with Superior Court complaints, the person filing a complaint with the Ombudsman need only submit a $25 fee, which can be waived. After the public body or agency responds to the complaint within 20 days, the Ombudsman may order a hearing, conduct interviews, and/or issue findings, rulings, and remedies to the same extent as provided by the court under RSA 91-A:8. A party may appeal the ruling of the Ombudsman to the Superior Court, but the court will give deference to the findings of the Ombudsman.

Filing a complaint with the Ombudsman forecloses a person's ability to file a petition in Superior Court, except to the extent of the parties' appeal rights following a decision of the Ombudsman. Likewise, filing a petition in Superior Court forecloses a person's ability to file a complaint with the Ombudsman.

This new process is viewed as somewhat experimental. The law has a sunset clause and will be automatically repealed on July 1, 2025 unless the Legislature acts to extend it.

## VI. Conclusion

The Right-to-Know law exists in order to shine light on the process of government. Administrators 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. Administrators and officials can avoid creating exposure by understanding and properly interpreting the narrow exceptions justifying a nonpublic session or withholding disclosure of documents.