



WORKSHOP



The Right-to-Know Law for Law Enforcement Thursday, November 17, 2022

Jonathan Cowal, Municipal Services
Counsel

NHMA's Legal Advisory Services



Open 8:30 a.m. – 4:30 p.m.

- Email: legalinquiries@nhmunicipal.org
- Phone: 603-224-7447

Provide general legal advice

- Not comprehensive legal review of documents
- Not drafting individualized ordinances or charters
- Not reviewing specific applications before local boards
- Not settle intra-municipal disputes

Goal: Response w/in 48 hours

RSA 91-A:4, I: Any Citizen Can Request Records



- ▶ No definition of “citizen” in statute or relevant case-law, but, presumably, at least a New Hampshire citizen.
- ▶ Best practice is anyone who shows up should be assumed to qualify as a “citizen” for the purposes of requesting records.
- ▶ This can make online requests tricky.

What They're Requesting Must Be "Reasonably Described"

- ▶ Municipal employees must know what they are looking for in the voluminous materials kept by the municipality.
- ▶ Municipal employees do have an obligation to clarify with the citizen what the citizen is requesting. *Salcetti v. City of Keene*, No. 2019-0217 (June 3, 2020) (speaking in *dicta* about a "spirit of collaboration").
- ▶ This may require a clarifying phone call.

Search for Records Must Be Reasonable



- ▶ Whatever record is requested must also be met with a reasonably calculated search by the municipality to uncover the record. *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746 (2011).
- ▶ The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents.
- ▶ This can have major implications in electronic records searches.

“Something” w/in 5 Days

As of Jan. 1, 2020, municipalities must:

- Provide a written statement of time necessary to determine whether request granted or denied; AND
- *Provide a reason for the delay!*
- Amendment to RSA 91-A:4, IV – HB 396 – 2019 NH Laws Chapter 107

NHMA Suggestion for Reason for Delay –

- Need time to determine whether or not record exists;
- Need time to determine whether it is disclosable;
- If disclosable, need time to determine how much time it will take to make the requested records ready for review or copying

- ▶ Records must be provided *only* when they are immediately available for release.
- ▶ RTK *does not* give citizens the right to review records in any quantity and wherever kept immediately upon demand.
- ▶ Requiring appointment to review records permitted

Brent v. Paquette, 132 N.H. 415
(1989)

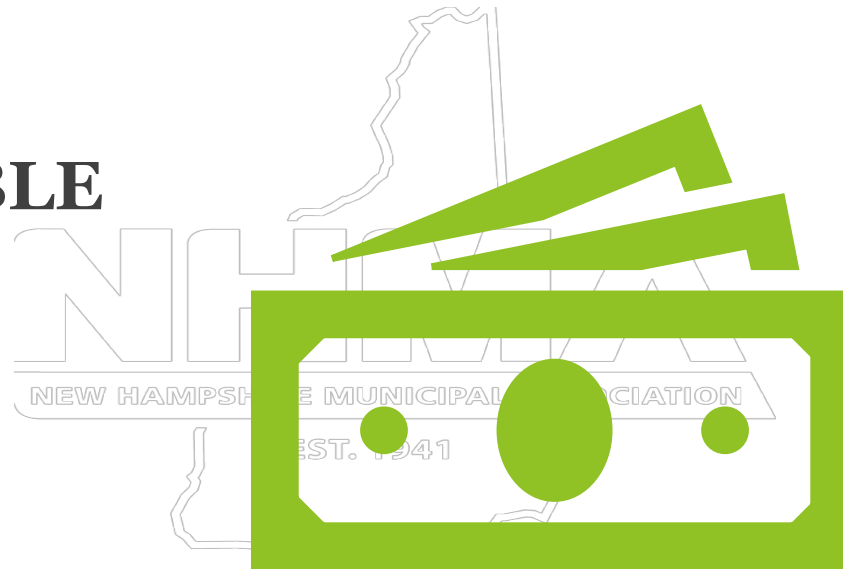
- ▶ RTK does not require document compilation.
- ▶ To “compile” is “to collect and assemble (written material or items from various sources) into a document or volume or a series of documents or volumes.
- ▶ The ruling in *Brent v. Paquette* shields agencies from having to create a new document in response to a RTK request, it does not shelter them from having to assemble existing documents in their original form.

*New Hampshire Civil Liberties Union v.
City of Manchester*, 149 N.H. 437 (2003)

No flat fees!



- ▶ **ONLY**
REASONABLE
FEES ARE
ALLOWED!



- ▶ RSA 91-A:4, IV

Exemptions to Disclosure

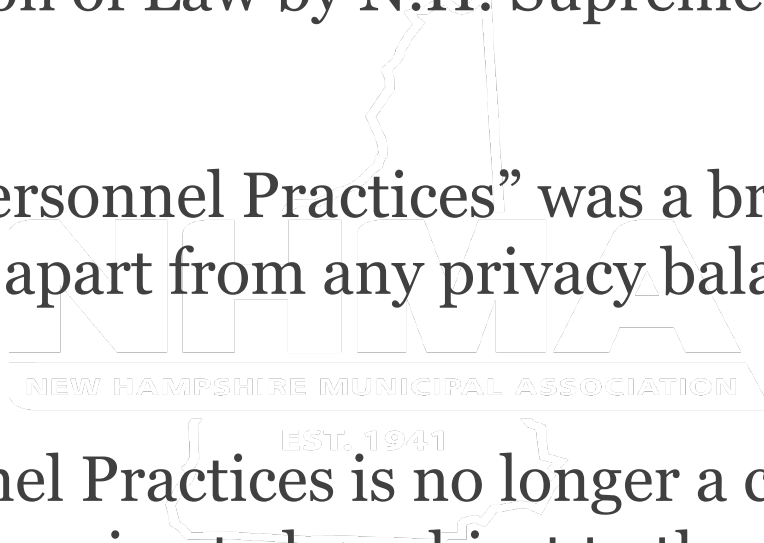
- ▶ **RSA 91-A:5** provides a list of records exemptions:
 - ▶ Some are categorical exemptions, such as the master jury list or teacher certification records.
 - ▶ Some require detailed analysis, such as “personnel records whose disclosure would constitute invasion of privacy.”
- ▶ **Other statutes and case law** also contain exemptions.
- ▶ The Right-to-Know Law’s purpose is to provide the utmost information to the public about what its government is up to.
- ▶ When a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden.

“Internal Personnel Practices”

RSA 91-A:5, IV



- ▶ Recent Reinterpretation of Law by N.H. Supreme Court
- ▶ Formerly: “Internal Personnel Practices” was a broad category separate and apart from any privacy balancing test.
- ▶
- ▶ Now, Internal Personnel Practices is no longer a categorical exemption and is likely going to be subject to the same privacy vs. public balancing test as established in a series of recent cases



Seacoast Online v. Portsmouth



- ▶ Superior Court decision that denied public access to an arbitration ruling concerning the dismissal of a Portsmouth police officer
- ▶ The NH Supreme Court overruled its decision in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) to the extent that decision too broadly interpreted the “internal personnel practices” exemption under RSA 91-A:5, IV.
- ▶ Henceforth, the “internal personnel practices” exemption only applies to records pertaining to the internal rules and practices governing an agency’s operations and employee relations, and not information concerning the performance of a particular employee.
- ▶ The internal personnel practices exemption in RSA 91-A:5, IV only applies to matters that are inherently minor or trivial, such as rules regarding the use of parking facilities or the regulation of lunch hours.

Union Leader v. Salem

If governmental records are properly classified as “internal personnel practices” then whether such records are subject to disclosure depends on evaluating whether that disclosure would constitute an invasion of privacy.

- *First, evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure.*
- *Second, assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.*
- *Finally, balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.*

Provenza v. Canaan



- ▶ Provenza sought to prevent the public disclosure of an internal investigative report that had exonerated him from a claim of excessive force arising out of a traffic stop citing the "internal personnel practices" exemption.
- ▶ Superior Court concluded that the report was subject to disclosure under RSA 91-A. This decision was appealed to the Supreme Court.
- ▶ First, the Court looked to RSA 105:13-b which creates an exception for information in a police officer's personnel file. The Court ruled that the report was not physically in his file and therefore this did not apply.
- ▶ Next, the Court affirmed that there is no categoric exemption for police internal investigative files and they are subject to balancing test.

Welford v. State Police



- ▶ While the previous cases involved privacy issues involving internal police practices, Welford addresses privacy issues involving private citizens.
- ▶ Persons have an obvious privacy interest in keeping secret the fact that they were subjects of a law enforcement investigation.
- ▶ The relevant public interest is not to find out what the individual himself was 'up to' but rather how the government carried out its statutory duties to investigate and prosecute criminal conduct.
- ▶ Where there is a privacy interest at stake, the requester must produce evidence that would warrant a belief by a reasonable person that alleged Government impropriety might have occurred. Or, at the very least, the requestor must articulate why the requested information serves a public purpose greater than simply exposing the police involvement of another individual.

Privacy Balancing Test



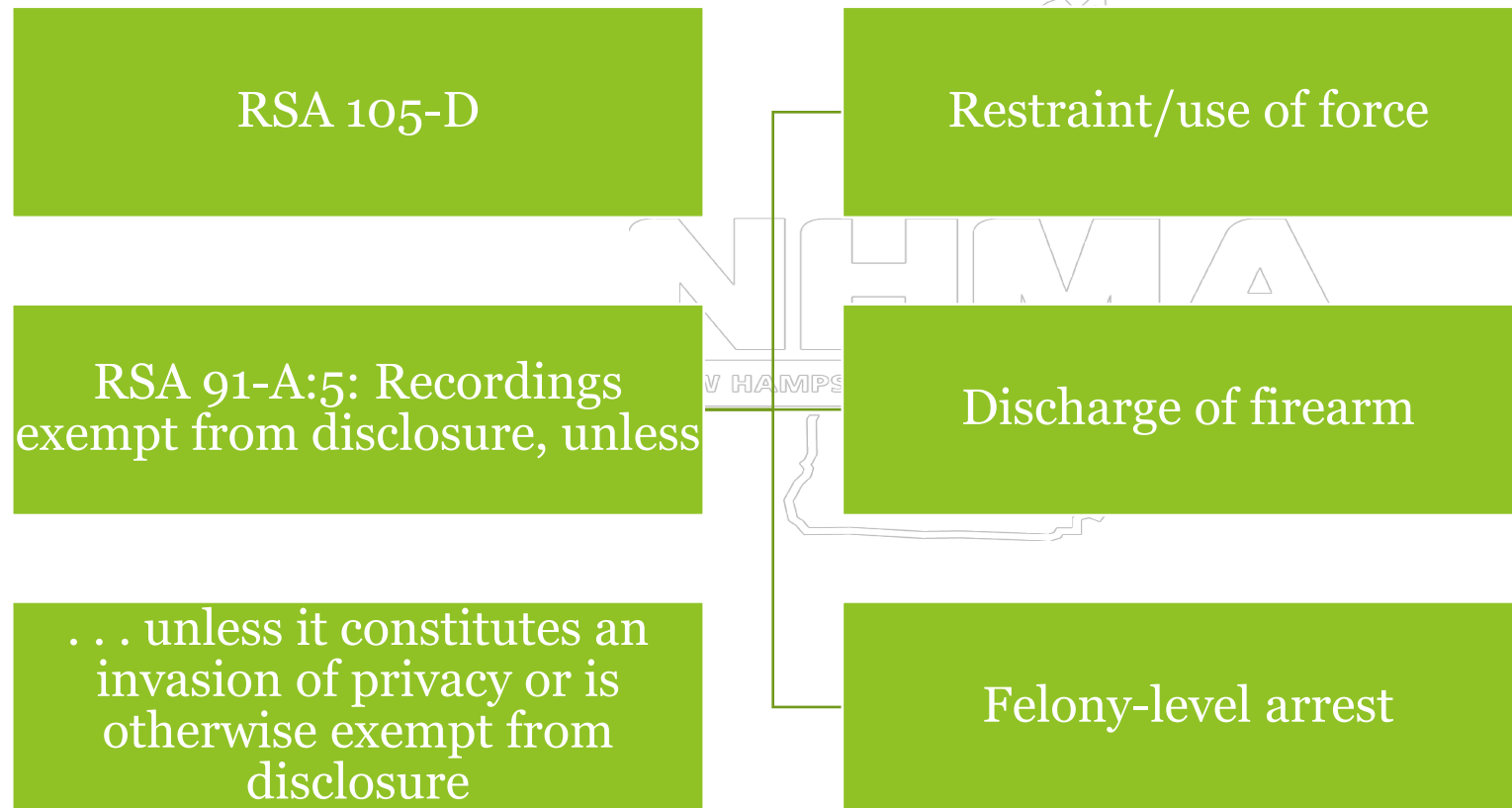
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- Second, assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
- Finally, balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.
- *Keep in mind that this balancing test should be done in conjunction with the FOIA exemption factors.

Health and Safety Exemption



- ▶ 91-A:5 states: “Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.”
- ▶ Therefore, even if there is a legitimate privacy interest at stake, and there isn't a compelling enough public interest to warrant disclosure, the records may still be disclosed if they are necessary to protect someone's health and safety, subject to the necessary redactions.
- ▶ Care should be given to redact all identifying information about individuals with a privacy interest whose health or safety is not at issue.

Body Worn Cameras (BWCs)



Motor Vehicle Records

- ▶ RSA 260:14, VII, VII-a: Can release accident reports to certain persons:
 - ▶ Owner/Operator
 - ▶ Passenger
 - ▶ Pedestrian Injured
 - ▶ Owner Property Damaged
 - ▶ Insurance Companies
 - ▶ Lawyers
- ▶ Can charge reasonable fee
- ▶ RSA 260:14, XI-a: Liability protection for improper release.

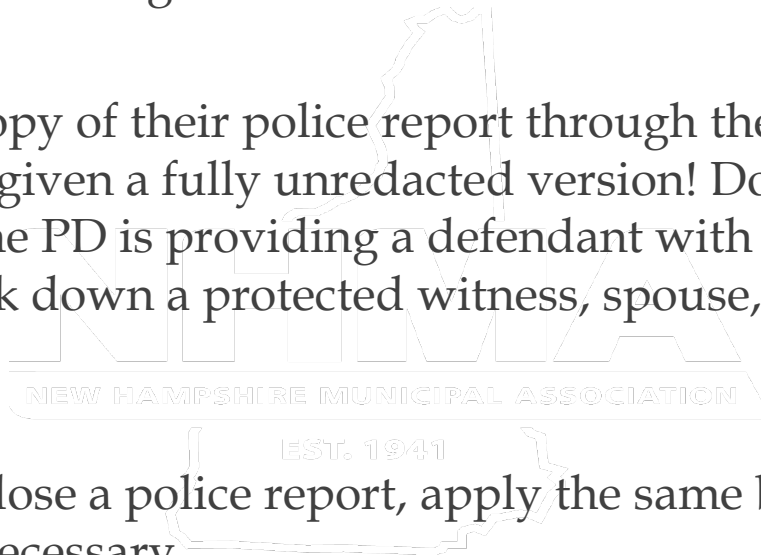
KIND OF LOCALITY (Check one) 1 <input type="checkbox"/> Apartments, Stores, Factories, Schools 2 <input type="checkbox"/> One family houses 3 <input type="checkbox"/> Farms, Fields 4 <input checked="" type="checkbox"/> No original development	ROAD LANES (TOTAL) (Check one) 1 <input type="checkbox"/> 1 lane 2 <input type="checkbox"/> 2 lanes 3 <input type="checkbox"/> 3 lanes 4 <input type="checkbox"/> 4 or more lanes	WHAT DRIVERS WERE GOING TO DO BEFORE ACCIDENT (Check one for each driver) Driver 1 1 <input checked="" type="checkbox"/> Go straight ahead 2 <input type="checkbox"/> Overtake and pass 3 <input type="checkbox"/> Make right turn 4 <input type="checkbox"/> Make left turn 5 <input type="checkbox"/> Make U turn 6 <input type="checkbox"/> Slow or stop Driver 2 7 <input type="checkbox"/> Start in traffic lane 8 <input type="checkbox"/> Start from parked position 9 <input type="checkbox"/> Back Driver 3 10 <input type="checkbox"/> Remain stopped in traffic lane 11 <input type="checkbox"/> Remain parked
TRAFFIC CONTROL (Check one) 1 <input checked="" type="checkbox"/> Stop sign 2 <input type="checkbox"/> Stop and go signal 3 <input type="checkbox"/> Officer or watchman 4 <input type="checkbox"/> R. R. gates or signals 5 <input type="checkbox"/> Stoplight 6 <input type="checkbox"/> No traffic control	ROAD SURFACE (Check one) 1 <input checked="" type="checkbox"/> Dry 2 <input type="checkbox"/> Wet 3 <input type="checkbox"/> Slippy or icy 4 <input type="checkbox"/> Other (specify)	WHAT PEDESTRIAN WAS DOING (Check one) 1 <input type="checkbox"/> Crossing or entering at intersection 2 <input type="checkbox"/> Crossing or entering not at intersection 3 <input type="checkbox"/> Getting on or off vehicle 4 <input type="checkbox"/> Crossing or entering at intersection 5 <input type="checkbox"/> Walking in roadway - against traffic 6 <input type="checkbox"/> Standing in roadway 7 <input type="checkbox"/> Crossing or entering at intersection 8 <input type="checkbox"/> Walking in roadway - against traffic 9 <input type="checkbox"/> Standing in roadway 10 <input type="checkbox"/> Other (specify)
LIGHT CONDITIONS (Check one) 1 <input type="checkbox"/> Daylight 2 <input checked="" type="checkbox"/> Darkness 3 <input type="checkbox"/> Dawn 4 <input type="checkbox"/> Dusk	ROAD CHARACTER (Check one) 1 <input type="checkbox"/> Straight road 2 <input type="checkbox"/> Curve 3 <input type="checkbox"/> Level 4 <input type="checkbox"/> On grade 5 <input type="checkbox"/> Hillcrest	VIOLATIONS CONTRIBUTING TO ACCIDENT (Check one for each driver) Driver 1 1 <input type="checkbox"/> Speeding - over limit 2 <input type="checkbox"/> Speed - under limit - unsafe 3 <input type="checkbox"/> Fail to Yield PCN to Vehicle 4 <input type="checkbox"/> Disregard Stop Sign or Light 5 <input type="checkbox"/> Disregard Stop and Go Signal 6 <input type="checkbox"/> Disregard Flashing Yellow Signal 7 <input type="checkbox"/> Improper Lane - wide right 8 <input type="checkbox"/> Improper Lane - cut corner on left 9 <input type="checkbox"/> Improper Lane - wrong lane 10 <input type="checkbox"/> Wrong side - not passing 11 <input type="checkbox"/> Wrong way - way road 12 <input type="checkbox"/> Passing too closely 13 <input type="checkbox"/> Overtake and pass - unsafe - wrong clearance 14 <input type="checkbox"/> Park in No. Parking Zone 15 <input type="checkbox"/> All other illegal parking 16 <input type="checkbox"/> No signal or wrong signal of intersection 17 <input type="checkbox"/> Improper start from parked position 18 <input type="checkbox"/> Improper turn - wrong lane 19 <input type="checkbox"/> Wrong side - not passing 20 <input type="checkbox"/> Driving under influence (alcohol or drugs) 21 <input type="checkbox"/> Driving under influence (drugs or drugs) 22 <input type="checkbox"/> Defective brakes 23 <input type="checkbox"/> Defective lights 24 <input type="checkbox"/> Other Malfunction 25 <input type="checkbox"/> Other (specify) 26 <input type="checkbox"/> No violation as accident cause
INDICATE ON THIS DIAGRAM WHAT HAPPENED INSTRUCTIONS: 1. Follow dotted lines to draw outline of roadway at place of accident. 2. Number each vehicle and show direction of travel at time of accident. 3. Use dotted line to show path before accident. 4. Show pedestrian by: 5. Show sign(s) by: 6. Show distance and direction to landmarks, identify landmarks by name or number.		
DESCRIBE WHAT HAPPENED (Refer to vehicles by numbers) Veh. #1 travelling south on Hwy 349. Veh. #2 travelling east on FM 888. Veh. #2 did not see stop sign or Veh. #1. Veh. #2 hit left front of Veh. #1. Veh. #2 did not stop at stop sign at intersection.		
POLICE ACTIVITY Name: _____ Charge: _____ Ticket No. _____ Name: _____ Charge: _____ Ticket No. _____ Time reported at scene of accident: <u>8:08 p.m.</u> Date: <u>Nov 6, 1965</u> Was investigation made at scene of accident? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Were photos taken? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Is investigation complete? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No SIGNATURES: <u>M. J. [unclear]</u> <u>[unclear]</u> <u>[unclear]</u> Date of report: <u>7 Nov 1965</u>		

IMPORTANT! Drivers must also submit a report to DPS if there were casualties and/or total damage of \$25 or more. Drivers accident report forms are available at all state, county, and city police offices.

Police Reports



- ▶ Police reports have a privacy interest associated with them and should not be released to anyone who comes asking.
- ▶ A defendant is entitled to a copy of their police report through the discovery process. They are not always given a fully unredacted version! Don't get caught in a situation where the PD is providing a defendant with the information they need to track down a protected witness, spouse, girlfriend, etc.
- ▶ If you are being asked to disclose a police report, apply the same balancing test and make redactions as necessary.



Law enforcement records FOIA Exemption Factors



- ▶ Factor A: Interfere with law enforcement proceedings
- ▶ Factor B: Interfere with fair trial
- ▶ Factor C: Invasion of privacy
- ▶ Factor D: Confidential sources
- ▶ Factor E: Disclosing investigative techniques and procedures
- ▶ Factor F: Endangering life or safety

- Could it be concluded that public disclosure of Use of Force protocols, or standard operating procedures, would reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behavior in an effort to avoid detection?
- Using the information in a Use of Force Policy, would those engaging in criminal acts be able to adjust their behavior by disguising their movements and then strike out violently before the officer can appropriately respond?

Requests for Use of Force Policy



Mission Statement



*for attending our annual
Right-to-Law Update
workshop!*



The New Hampshire Municipal Association is a nonprofit, non-partisan association working to strengthen New Hampshire cities and towns and their ability to serve the public as a member-funded, member-governed and member-driven association since 1941. We serve as a resource for information, education and legal services. NHMA is a strong, clear voice advocating for New Hampshire municipal interests.

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