



Right-to Know Law Update: Statutes & Cases 2021 - 2022

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Jonathan Cowal, NHMA Municipal Services Counsel

Today's Presenters



Stephen Buckley
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Municipal Services Counsel



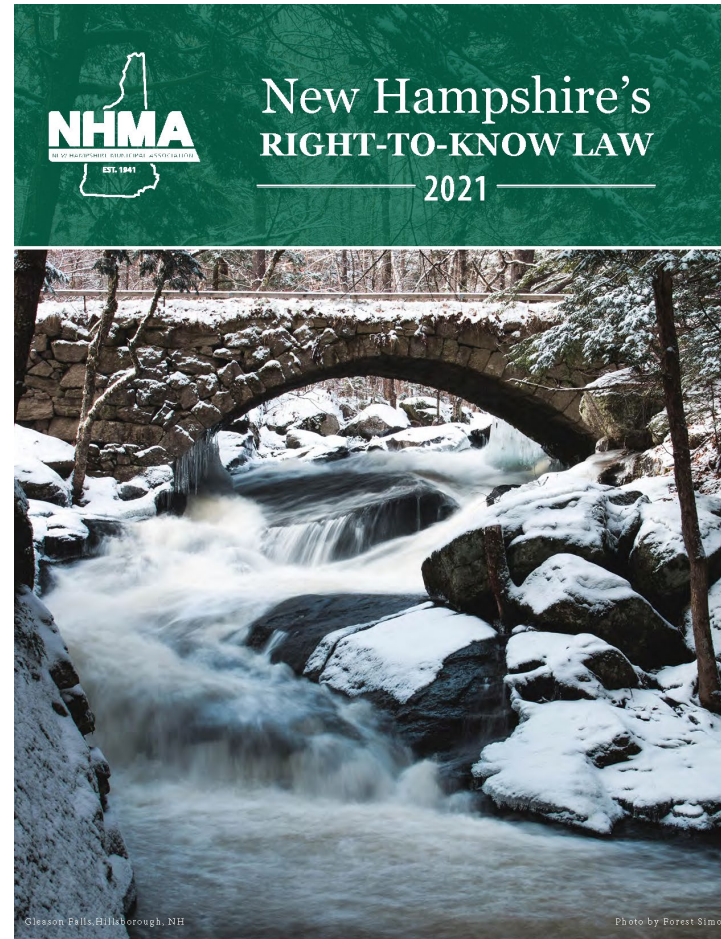
Agenda

Statutory Changes to 91-A - 2021
to 2022

91-A Court Cases from 2021 to
2022

NHMA's Publication: *New Hampshire's Right-to-Know Law*

- ▶ Glossary
- ▶ Remote Participation Checklist
- ▶ Nonpublic Session Checklist
- ▶ Law Enforcement Guidance
- ▶ Complete copy 91-A & 33-A
- ▶ Table of Cases
- ▶ Table of Statutes



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Session Q&A Chat Community

Today 2:46 PM

Ashley, Methot

The chat function is used to say hello to fellow attendees, it is also where you can post any questions you have for technical support. Example you need help with your audio, etc.

0 Likes

If Not Exempt, Disclose

- ▶ Right to inspect, copy, and make notes of records
- ▶ → Electronic Records, RSA 91-A:4, V
- ▶ Records should be available on regular business premises during regular business hours
- ▶ Record must be reasonably described
- ▶ There is no obligation to compile, cross reference or assemble records
- ▶ Motive is irrelevant

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Show Agenda

Right to Know Law Virtual Workshop for Law Enforcement

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Session Q&A

Chat

Community

Questions Filter by Sort by




0 Votes

10/19/2020, 2:48 PM • Ashley Methot

The Session Q&A is where you ask/post any questions for the speaker(s), or any questions relating to the presentation. This is NOT the place for any technical support questions.

0 replies

0 Likes



Statutory Changes
to 91-A:
2021 to 2022

2021- Chapter 118 – SB 84 – Village Districts Subject to RSA 91-A (eff. 9/7/21)

- Amended RSA chapter 52, the Village District chapter, by adding a new statute, RSA 52:11-b
- Amends the village district statute to state that any “legislative body, governing body, board, commission, or committee” of a village district is a “public body” for purposes of the Right-to-Know Law. This is just a more specific statement of the law under RSA 91-A:1-a, VI(d), which states that any such body of a “political subdivision”—which includes a village district—is a public body.

2021 – Chapter 163 – HB 108 – Attorney Client Communications

- Amended RSA 91-A:5, Exemptions, by adding a new paragraph XI, exempting from disclosure public records protected under the attorney-client privilege or the attorney work product privilege. (eff. 9/28/21)
- Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives.
- The work product privilege, is to afford protection from discovery the work product of a lawyer produced as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation.

2021 – Chapter 163 – HB 108 - Maintain List of Nonpublic Session Minutes (eff. 1 / 1 / 22)

- Requires a public body to create and maintain a list of nonpublic session minutes that have been determined not to be subject to full public disclosure.
- The list must include the date and time of the nonpublic session, the specific exemption under RSA 91-A:3, II, relied upon for the nonpublic session, the date of the decision to withhold the minutes from public disclosure, and the date of any subsequent decision to make the minutes available.
- This requirement only applies to nonpublic meeting minutes and sessions held on or after 1/1/22

2021 – Chapter
163 – HB 108 –
Release nonpublic
minutes related to
acquisition/sale
of property (eff.
1/1/22)

- Minutes related to a discussion held in nonpublic session under subparagraph 91-A:3, II(d) (acquisition, sale or lease of real or personal property) shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.

2022 – Chapter 250 – HB 481 – Right-to-Know Ombudsman (eff. 7/1/22)

- Alternative process to resolve complaints under RSA 91-A
- In lieu of filing suit in the Superior Court, complaint may be filed with the Ombudsman
- Aggrieved party must make an election to either file complaint with the Court or the Ombudsman - filing with one forecloses filing with the other
- Ombudsman is administratively attached to the NH Dept. Of State
- Ombudsman nominated and confirmed by the Governor and Executive Council

2022 – Chapter 250 – HB 481 – Right-to-Know Ombudsman (eff. 7/1/22)

Appointed Ombudsman shall be an attorney with minimum 5 years experience and be knowledgeable of the provisions of 91-A and other laws pertaining to 91-A.

Ombudsman must adopt rules to governing streamlining complaint process, hearing procedures

2022 – Chapter 250 – HB 481 – Right-to-Know Ombudsman (eff. 7/1/22)

- Simplified complaint process -after complaint received, public body is given notice and required to respond with an answer to within 20 days
- Ombudsman is empowered to: (1) Compel timely delivery of public records; (2) conduct in-camera review of records; (3) compel interviews with the parties; (3) order attendance at hearings; (4) order access to public records or access to meetings; (5) make any finding or order as permitted by the Superior Court under RSA 91-A:8

2022 –
Chapter 250
– HB 481 –
Right-to-
Know
Ombudsman
(eff.
7/1/22)

The Ombudsman may draw negative inferences from a party's failure to participate and comply with orders during the review process

The Ombudsman shall issue a ruling within 30 calendar days following the deadline for receipt of the parties' submissions

The Ombudsman may also expedite resolution of the complaint upon a showing of good cause and rule within 10 business days, or sooner where necessary

2022 – Chapter 250 – HB 481 – Right-to-Know Ombudsman (eff. 7/1/22)

- Decisions by the Ombudsman may be appealed to Superior Court within 30 days
- All factual findings by Ombudsman deemed lawful and reasonable
- Decisions not appealed may be registered in Superior Court and be enforceable through contempt proceedings



Court Updates to
91-A:
2021 to 2022

2021 – *New Hampshire Center for Public Interest Journalism v. NH Dept. of Justice*

- Several newspapers filed suit seeking access to the Exculpatory Evidence Schedule a/k/a The Laurie List which is a list of officers who have acted in a way which reflects negatively on their credibility as a witness.
- Historically, this list was kept private and only known to law enforcement and prosecutors. Disclosure of the names and offenses only occurred during the context of a criminal case.
- The court ruled that the list was not exempt from disclosure as a police personnel file under RSA 105:13-b, nor is it an exempt internal personnel practice.
- However, the actual information about the offense that led the officer to be placed on the list is still subject to the privacy/public balancing test.

2021 – *ACLU v. City of Concord*

- The City of Concord released a budget with a line item for “Covert Communications Equipment”. When asked for more information via a Right-to-Know request, the police department released only a select few heavily redacted pieces of information, citing in large part FOIA Exemption E which allows withholding information that could lead to a circumvention of the law.
- The court ruled that when judging whether disclosure of a law enforcement record would result in circumvention of the law under Exemption E, the government must only establish that disclosure might create a risk of circumvention.
- The agency did need to provide an adequate level of detail so the court could justify the exemption, however in certain circumstances these details can be reviewed *ex parte in camera*.

2021 – *Tejasinha Sivalingam v. Frances Newton*

- A former select board member sued a sitting select board member claiming his reputation was injured through an improper disclosure of confidential information from a nonpublic session. Plaintiff sued for removal under RSA 42:1-a.
- To support a claim for removal, it is necessary to demonstrate that 1. The information divulged was learned through virtue of an official position or in the course of official duties, 2. The information was properly sealed, 3. Divulgence would adversely affect the reputation of the person using the defamation standard.
- In this case, the information did not meet the necessary standard. In addition, the plaintiff was not entitled to notice that information potentially affecting their reputation was going to be discussed in a nonpublic session.

2022 – *Provenza v. Town of Canaan*

- Officer Provenza sought to keep an internal investigation report regarding an allegation of excessive force against him private from a right-to-know request.
- He claimed that: this report was protected by his privacy interest and there was not a compelling enough public interest to warrant disclosure. He also argued it was exempt under RSA 105:13-b.
- The court declined to engage in the 105:13-b analysis but instead ruled that this document was subject to the standard privacy/public balancing test.
- Here, there is a compelling public interest in knowing that the police department investigated this complaint appropriately and the document should be released.

2022 – *Colquhoun v. City of Nashua*

- Nashua denied a RTK records request for all email communications between two city employees over a 2 month period. The City argued that the request was not reasonably described. Ultimately, the City did provide the records, but the plaintiff sought attorney's fees for a knowing violation of the statute.
- First, the court looked to whether the City knew or should have known that they were violating the statute. Because the City chose to provide records after suit was filed, this was a good indicator that the City knew their initial denial was in violation of the reasonable search standard.
- A reasonably described request would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area to locate the records with a reasonable amount of effort.
- Here, the time frame and scope of the request established a clearly delineated group of documents and the City knew or should have known that it had an obligation to conduct a reasonable search.

PENDING – *Ortolano v. City of Nashua*

- Nashua received a RTK request for emails between city employees. At first, the City denied the request stating that the emails were automatically deleted from Outlook. After performing a further search, the City provided some emails.
- Eventually, it came to light that the City possessed backup tapes of their computer system that contained additional emails. These tapes were not searched to fulfill the request.
- Plaintiff argued that the City should have searched their backup tapes for records relevant to their request and failure to do so was a knowing violation of the statute. A Superior Court found in favor of the plaintiff. This decision was appealed to the NH Supreme Court and is currently pending.
- Important issues involved in this case: 1. Whether or not backup tapes, and the information contained within, are expected to be searched pursuant to a 91-A request, 2. Whether failure to thoroughly search backup tapes is a knowing violation of RSA 91-A.

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



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

Mission Statement

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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