



VIRTUAL

WORKSHOP



The Right-to-Know Law Virtual Workshop for Law Enforcement

October 19, 2023

Steven Buckley, Legal Services Counsel
Jonathan Cowal, Municipal Services Counsel

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Today's Presenters



Stephen Buckley
Legal Services Counsel



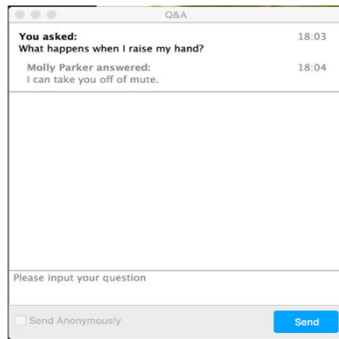
Jonathan Cowal
Municipal Services Counsel

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How Do I Ask a Question?



The chat function for this workshop has been disabled.

In order to ask a question of our host or a panelists, open the Q&A function found in the Zoom toolbar. Type you questions in the Q&A and they will be answered in the order they are received.

Once your question has been answered, it will then appear under the *Answered* tab.

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Open 8:30 a.m. – 4:30 p.m.

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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

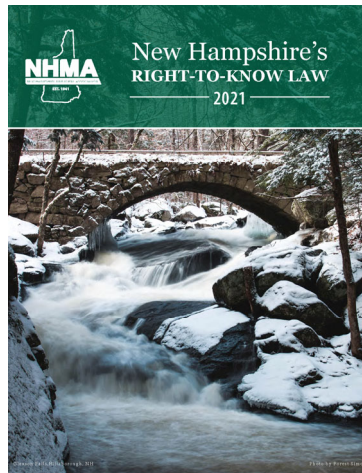
Goal: Response w/in 48 hours

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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
- ▶ February 2023 Supplement provided



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Agenda

- ▶ Record Requests and Exemptions- **Steve**
- ▶ Record Production and Remedies - **Jonathan**
- ▶ Hypotheticals and Questions

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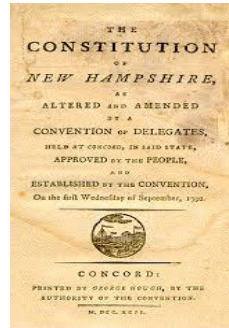
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The Right-to-Know Law RSA Chapter 91-A

PART I, ARTICLE 8 OF THE NH
Constitution: Government ...
should be open,

SECTION 1 OF RSA 91-A:

The purpose of this chapter is to ensure both the greatest possible public access to the **actions**, **discussions** and **records** of all public bodies, and their accountability to the people.



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

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



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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.

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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.

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Duty to search for records: 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, nonconclusory, 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.

ATV Watch v. NH Dept. of Transportation, 161 N.H. 746 (2011)

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Three Key Steps

STEP 1: Is it a
Governmental Record?

STEP 2: Is the record
exempt from disclosure?

STEP 3: Make available
non-exempt records.



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Is it a Governmental Record?

RSA 91-A:1-a

Any information

- created
- accepted, or
- obtained

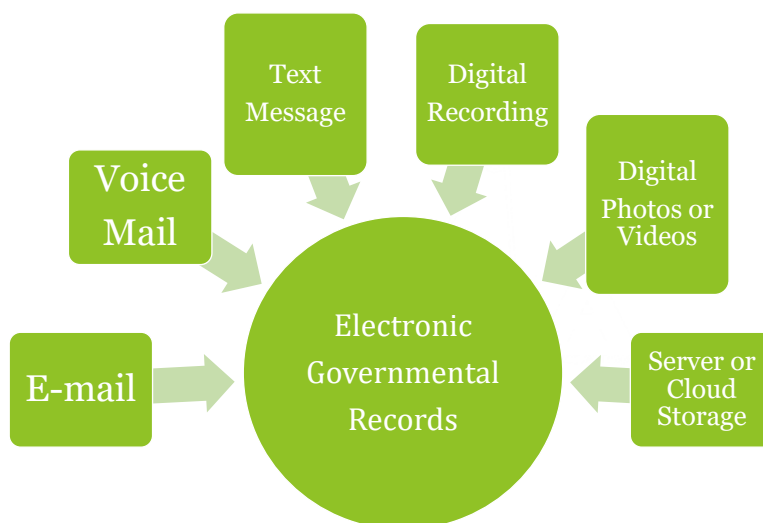
By, or on behalf of,

- any public body, or a quorum or majority thereof or
- any public agency

in furtherance of its official function

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Is the Record Exempt from Disclosure?



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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.



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“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

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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

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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.

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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 categorical exemption for police internal investigative files and they are subject to balancing test.



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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

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Privacy Balancing Test



- First, 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.
- *Keep in mind that this balancing test should be done in conjunction with the FOIA exemption factors.

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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

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NH ADOPTS FEDERAL STANDARD FOR DISCLOSURE OF LAW ENFORCEMENT RECORDS - LODGE V. KNOWLTON 118 N.H. 574 (1978)



- ▶ Freedom of Information Act (FOIA) used to govern disclosure of police investigatory files. Now it operates along with RSA 91-A
- ▶ First, the agency seeking to avoid disclosure must establish that the requested materials were “compiled for law enforcement purposes.
- ▶ Second, if the entity meets this threshold requirement, it must then show that releasing the material would have one of the six enumerated adverse consequences.

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What is a Law Enforcement Agency?



Was the record gathered for law enforcement purposes?

This exemption not just for agencies that are officially designated as law enforcement agencies

Applies to all records compiled by any type of agency for law enforcement purposes, including in civil and criminal matters

What are the authorized activities of the agency involved?

A mixed-function agency encompassing both administrative and law enforcement duties can satisfy the threshold requirement by showing that the pertinent records were compiled pursuant to the agency's law enforcement functions

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Montenegro v. City of Dover 162 N.H. 641 (2011)

Thus, to withhold materials under the modified test adopted in *Murray*, an agency need not establish that the materials are investigatory, but need only establish that the records at issue were compiled for law enforcement purposes, and that the material satisfies the requirements of one of the subparts of the test.

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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

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Factor A: Reasonably Expected to Interfere with Law Enforcement Proceedings



Two step analysis:

- (1) Whether a law enforcement proceeding is **pending** or **prospective**, and
 - (2) Whether release of information about it could **reasonably** be expected to cause some articulable harm.
- Pending Investigations: Exempt
 - Dormant/Prospective: Exempt, as long as prospective investigation is “concrete”

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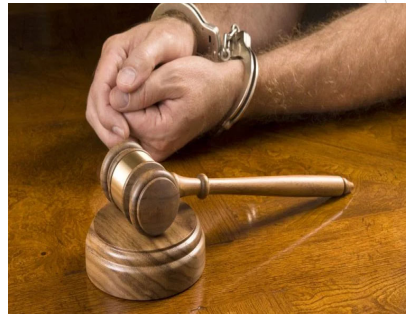
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Factor B: Deprive a Person of Right to Fair Trial or Impartial Adjudication



Two-part test:

- (1) That a trial or adjudication is pending or truly imminent; and
- (2) That it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings



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What Types of Information Might Cause Prejudice?

- ▶ Statements about the guilt or innocence of a defendant
- ▶ The character or reputation of a suspect
- ▶ Examinations or tests which the defendant may have taken or have refused to take
- ▶ Gratuitous references to a defendant; for example, a reference to the defendant as "a dope peddler"
- ▶ The existence of a confession, admission or statement by an accused person, or the absence of such
- ▶ The possibility of a plea of guilty to the offense charged or a lesser offense;
- ▶ The identity, credibility or testimony of prospective witnesses;
- ▶ Any information of a purely speculative nature; and
- ▶ Any opinion as to the merits of the case or the evidence in the case.

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- ▶ Information that would lead to embarrassment, harassment, disgrace, loss of employment or friends .
- ▶ Guards the privacy interests of a broad range of individuals, including government agents, personnel, confidential sources, and investigatory targets.
- ▶ Protects a broad notion of personal privacy, including an individual's interest in avoiding disclosure of personal matters.
- ▶ Notion of privacy encompasses the individual's control of information concerning his or her person, and when, how, and to what extent information about them is communicated to others.

Factor C: Could Reasonably Be Expected to Constitute an Unwarranted Invasion of Privacy

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- ▶ Mentioning persons not targets of investigations
- ▶ Identities of federal, state, and local law enforcement personnel
- ▶ Identities of both clerical personnel and investigators
- ▶ Names of witnesses and their home and business addresses
- ▶ Trial testimony does not eliminate Exemption 7(C) protection
- ▶ Individuals identified as potential witnesses
- ▶ Passage of time will not ordinarily diminish the privacy protection. The passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge, but has faded from memory

Generally Exempt Under Factor C to Protect Privacy

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Examples of Information that May Implicate a Privacy Interest

- ▶ Legitimacy of children
- ▶ Sexual orientation
- ▶ Medical or mental health conditions
- ▶ Welfare recipient
- ▶ Consumption of alcohol or a controlled substance
- ▶ Domestic disturbances and disputes
- ▶ Names of witnesses who cooperated by providing information to authorities and the information provided by them
- ▶ Names of subjects of investigation
- ▶ Names of children
- ▶ Marital status
- ▶ Dates of birth
- ▶ Financial information
- ▶ Employment information, and
- ▶ The existence of a criminal investigation that does not result in charges against a specific individual

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EXEMPTION 7 (D) RECORDS WHICH COULD REASONABLY BE EXPECTED TO DISCLOSE THE IDENTITY OF A CONFIDENTIAL SOURCE

Exemption 7(D) is comprised of two distinct clauses:

- ▶ 1st clause protects identity of confidential sources
- ▶ 2nd clause protects all information obtained from the source

- ▶ Was the source given express promise of confidentiality?

OR

- ▶ Can an assurance of confidentiality be inferred from the circumstances surrounding receipt of the information?

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WHAT CONFIDENTIAL INFORMANT INFORMATION IS PROTECTED?



- Once a source has been deemed confidential, the identity of the source, and in certain circumstances, all of the information obtained by the source would be exempt from disclosure
- The exemption safeguards not only such obviously identifying information as an informant's name and address, but also all information that would "tend to reveal" the source's identity

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EXAMPLES OF PROTECTED SOURCES

- ▶ crime victims
- ▶ citizens providing unsolicited allegations of misconduct
- ▶ citizens responding to inquiries from law enforcement agencies
- ▶ private employees responding to OSHA investigators
- ▶ employees providing information about their employers and co-workers
- ▶ prisoners
- ▶ mental healthcare facilities
- ▶ medical personnel
- ▶ commercial or financial institutions and their employees

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EXEMPTION 7(E) - DISCLOSURE WOULD REVEAL TECHNIQUES AND PROCEDURES FOR LAW ENFORCEMENT, OR, WOULD DISCLOSE GUIDELINES FOR LAW ENFORCEMENT INVESTIGATIONS OR PROSECUTIONS IF SUCH DISCLOSURE COULD REASONABLY BE EXPECTED TO RISK CIRCUMVENTION OF THE LAW.



- Probably provides "categorical" protection for law enforcement techniques and procedures. . . . FOIA sets a "relatively low bar" for withholding under this exemption
- Courts have uniformly required that the technique or procedure must not be well known to the public
- "guidelines" = means by which agencies allocate resources for law enforcement investigations (whether to investigate)
- "techniques and procedures" = the means by which agencies conduct investigations (how to investigate)

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Exemption 7(E) Encompasses Withholding Wide Range of Techniques and Procedures, Including:



- Immigration enforcement techniques
- Information about databases used for law enforcement purposes
- Surveillance tactics and methods
- Portions of a law enforcement agency's investigations and operations manual
- Funds expended in furtherance of an investigation
- Law enforcement codes, and techniques used to uncover tax fraud
- Techniques and procedures pertaining to the forensic analysis of firearms and computers
- Details of the status of investigatory efforts
- Search and arrest warrant execution techniques
- Suspect threat detection techniques
- Law enforcement checkpoints

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EXEMPTION 7(F) REASONABLY BE EXPECTED TO ENDANGER THE LIFE OR PHYSICAL SAFETY OF ANY INDIVIDUAL



- Originally only protected law enforcement personnel but was later amended and now protects the safety of any individual.
- Exemption 7(F) can protect the names and identifying information of:
 - non-law enforcement federal employees
 - local law enforcement personnel
 - other third persons in connection with law enforcement matters such as:
 - ✓ names of and identifying information about inmates
 - ✓ private security contractor companies
 - ✓ identities of medical personnel who prepared requester's mental health records would endanger their safety
 - ✓ identifying information about individuals who provided information about alleged criminal activities

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TAKE A 10-MINUTE BREAK



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PRODUCTION OF RECORDS AND REMEDIES

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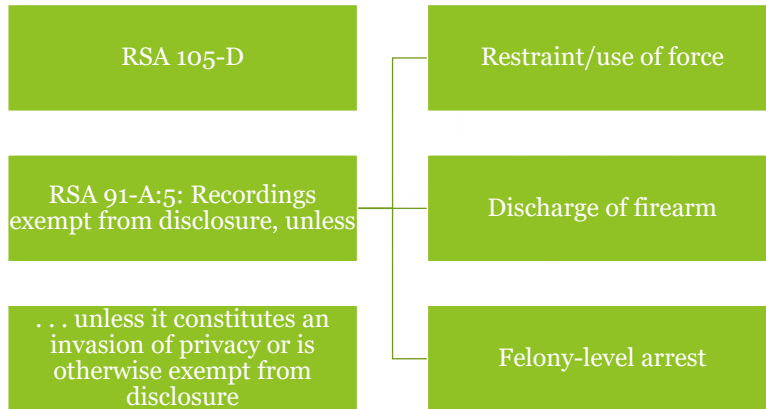
- Could it be concluded that public disclosure of Use of Force protocols, or standard operating procedures, would reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behavior in an effort to avoid detection?
- 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

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Body Worn Cameras (BWCs)



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Body Worn Cameras: Record Retention

General rule:

- Permanently destroy/overwrite 30 – 180 days after recording

Exceptions:

- Keep minimum 3 years
 - Deadly force
 - Discharge of firearm
 - Death or serious bodily injury
 - Encounter resulting in complaint
 - Evidence
- Keep for as long as legally required
 - Pending case, court order
 - Retain as training tool

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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

The form includes sections for:

- DRIVER INFORMATION (Name, Address, License No., etc.)
- VEHICLE INFORMATION (Year, Make, Model, Color, etc.)
- ACCIDENT INFORMATION (Date, Time, Location, etc.)
- DESCRIPTION OF ACCIDENT (Narrative of what happened)
- DIAGRAM (A hand-drawn sketch of the accident scene with labels like 'Sim 448', 'Stop Sign', and 'Lk 23') and a 'DESCRIBE WHAT HAPPENED' section with handwritten notes.
- VIOLATIONS CONTRIBUTING TO ACCIDENT (List of traffic laws broken)
- INVESTIGATOR INFORMATION (Name, Title, Signature, Date)
- REPORTING OFFICER INFORMATION (Name, Title, Signature, Date)

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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



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Arrest and Prosecution Records after Annulment

- ▶ Records maintained by arresting and prosecuting entities documenting conduct underlying an annulled conviction are not categorically exempt from disclosure under RSA 91-A:4, I, which exempts records otherwise prohibited by statute for public inspection. *Grafton County Attorney's Office v. Canner*, 169 N.H. 319, 328 (2016)
- ▶ Note that *Canner* did not address the issue of whether such records may be exempt under another provision of RSA 91-A, such as the work product or privacy exemption of A:5, IV
- ▶ The Court did say that an annulment does not “turn the public event of a criminal conviction into a private, secret, or secluded fact” and the public “has a substantial interest in understanding how investigations and alleged crimes are conducted, and how prosecutors exercise their discretion when deciding whether to prosecute, reach a plea agreement, or try cases”

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Rights of Crime Victims

RSA 21-M:8-k, II

To the extent that they can be reasonably guaranteed by the courts and by law enforcement and correctional authorities, and are not inconsistent with the constitutional or statutory rights of the accused, crime victims are entitled to the following rights

...

(m) The right of confidentiality of the victim's address, place of employment, and other personal information



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Domestic Violence Victims Addresses

RSA 7:41



Allows victims of domestic violence to designate a substitute mailing address with the AG's office



Substitute mailing address is kept confidential



Must apply to program with AG's office

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Confidentiality of Education Records

RSA 193-D:7



Safe School Zone Statute



Law enforcement and school can exchange only particular information



“Reasonably relates to delinquency or criminal conduct”
– Theft, Destruction, or Violence

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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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We have 5 days...



...right?

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“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

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- ▶ 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)

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- ▶ 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)*

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No Flat Fees!

- ▶ ONLY
REASONABLE
FEES ARE
ALLOWED!
- ▶ RSA 91-A:4, IV



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Retention of Police Records, RSA 33-A:3-a

- XCVII. Police, accident files-fatalities: 10 years.
- XCVIII. Police, accident files-hit and run: statute of limitations plus 5 years.
- XCIX. Police, accident files-injury: 6 years.
- C. Police, accident files-involving arrests: 6 years.
- CI. Police, accident files-involving municipality: 6 years.
- CII. Police, accident files-property damage: 6 years.
- CIII. Police, arrest reports: permanently.
- CIV. Police, calls for service/general service reports: 5 years.
- CV. Police, criminal-closed cases: statute of limitations plus 5 years.
- CVI. Police, criminal-open cases: statute of limitations plus 5 years.
- CVII. Police, motor vehicle violation paperwork: 3 years.
- CVIII. Police, non-criminal-internal affairs investigations: as required by attorney general and union contract and town personnel rules.
- CIX. Police, non-criminal-all other files: closure plus 3 years.
- CX. Police, pistol permit applications: expiration of permit plus one year.

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Retention of Correspondence RSA 33-A:3-a

- XXV. Correspondence by and to municipality-administrative records: minimum of one year
- XXVI. Correspondence by and to municipality-policy and program records: follow retention requirement for the record to which it refers
- XXVII. Correspondence by and to municipality-transitory: retain as needed for reference



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Archive Paper Records in PDF/A?

Any municipal records in paper form listed in RSA 33-A:3-a may be transferred to electronic form (PDF/A Format ONLY), and the original paper records may be disposed of as the municipality chooses

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Deletion of Electronic Governmental Records



A governmental record in electronic form is no longer required to be disclosed once it has been “initially and legally deleted.” RSA 91-A:4, III-b



A record can be “legally deleted” if it is not subject to a retention period, or if the required retention period for that record has expired

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ELECTRONIC RECORDS ARE ONLY TRULY DELETED WHEN NO LONGER READILY ACCESSIBLE – *Ortolano v. Nashua*, August 18, 2023



- ▶ City of Nashua practice to have emails automatically deleted after 120 days and were only retained on personal U-drives. Emails not retained on personal U-drives were deemed deleted
- ▶ However, the City had backup tapes from which deleted emails could be extracted
- ▶ The City argued that the emails were “initially and legally deleted,” and the extraction from backup tape process should deem those emails as no longer readily accessible
- ▶ The NH Supreme Court disagreed since the City’s IT employee testified the emails could be made available with a couple of hours work

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How are Violations of RSA Chapter 91-A Enforced?



Office of Right-to Know Ombudsman
established effective 7/1/22



“Aggrieved person”



Lawsuit or by complaint to Ombudsman



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

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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

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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

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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

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Remedies for Violations



- ▶ Attorney's fees and/or costs to petitioner
- ▶ Invalidation of an action
- ▶ Civil penalty against an individual officer, employee, or other official for bad faith violations
- ▶ Injunction
- ▶ Remedial training
- ▶ Knowing destruction: misdemeanor
- ▶ Attorney's fees and costs may also be awarded to a public body, agency, employee, or official when the lawsuit was brought in bad faith, or was frivolous, unjust, vexatious, wanton, or oppressive

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Useful Practices

- ▶ Five “types” of requests:
 - ▶ 1. Individual citizens
 - ▶ 2. Attorney’s
 - ▶ 3. Educational institutions or researchers
 - ▶ 4. 1st Amendment auditors
 - ▶ 5. Predatory Requests
- ▶ Create a spreadsheet to keep track of requests
- ▶ All emails are responded to with an in-person appointment requirement
- ▶ Use of a sanitized laptop for viewing electronic records
- ▶ PD provides USB or DVD for a fee, or citizen bring unopened media of their choice

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OTHER INFORMATION SOURCES

NH Attorney General’s Right to Know Memorandum:
<https://www.doj.nh.gov/civil/documents/right-to-know.pdf>

U.S. Department of Justice Guide to the Freedom of Information Act:
<https://www.justice.gov/oip/doj-guide-freedom-information-act-0>

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Recent Questions & Answers



Question: The guardian of a child is seeking “evidence supporting negligence, endangerment, abuse neglect or harm to said child from 2005 to the present.” The PD has a few dispatch logs and a report from when the child was in his dad’s custody. Should this information be disclosed?

Answer: First, we apply the privacy vs. public interest balancing test to these documents. Presumably, there are at least two people with a privacy interest; the child and his dad. Since the person requesting the documents is the legal guardian of the child, that privacy interest may be satisfied, however the dad likely still has a strong privacy interest in not having these records made public, especially if no charges came about as a result of his interactions with police

Next, we ask what the public interest in disclosing these documents would be. Finding out whether or not this guy is a responsible dad doesn’t qualify as a public interest under RTK standards. There could be a slight public interest in evaluating whether or not the PD is properly handling calls for service when a child is involved, but the requesting party has not articulated that as a concern. Therefore, there does not seem to be a compelling public interest in disclosing these documents

However, the requesting party expressly stated that their concern is for the health and safety of the child. They are seeking any records which would show that the child’s health and safety was at risk. Therefore, under RSA 91-A:5,IV these records could be released with proper redactions

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Recent Questions & Answers



Question: A private investigator representing someone in a probate matter submitted a request for all documents related to interactions an individual had with a particular PD. The PD had arrested this person on criminal charges in the past and had some other calls for service at their address

Answer: Under the balancing test, this is a clear example of a situation where the person’s privacy interest outweighs any public interest, as there appears to be almost no public interest. The requesting party has not articulated any reason why they want these records other than to dig up dirt on this particular person, presumably to gain an advantage in some Probate matter. Records related to any criminal charges against the person may have already become public record and are available for inspection and copying at the clerk’s office in the court where the case was handled. These records, including the Gerstein affidavit, would be available and would already be redacted when they were filed by the County Attorney’s Office

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Recent Questions & Answers



Question: Inquiry received from MuckRock seeking records sufficient to show funding for municipal law enforcement officers and activities for the years 2000 through 2020. Requestor asks that the records be send electronically or be uploaded to a dedicated website

Answer: The town is never required to “send” records in response to a Right-to-Know request under RSA chapter 91-A. Thus, the town is never required to send records by email, upload records or documents to a website, or even mail records via the US Postal Service to a requesting party. RSA 91-A:4, IV. The town is only required to make records available for inspection and copying. The proper response to this request, and any similar request, is that the town will make the records available for inspection and possible copying by MuckRock (at the expense of MuckRock) at the town hall

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Upcoming Workshops and Webinars



Roadmap to Decarbonization Vendor Webinar

12:00 pm - 1:00 pm, Tuesday, October 17, 2023. Join representatives from USOURCE, a Nextera Energy Company, who will discuss how your municipality can create an individualized sustainability plan with the help of renewable energy experts.

REGISTRATION OPEN!

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Upcoming Workshops and Webinars



Informational Webinar on Inflation Reduction Act's Clean Energy Tax Credits for Tax-exempt and Governmental Entities

12:00 noon - 1:00 pm, Monday, October 23, 2023. Join us for this informational webinar to learn how government entities can receive direct payments for certain clean energy tax credits that were expanded in the Inflation Reduction Act.

JEANNE SHAHEEN
U.S. SENATOR for NEW HAMPSHIRE

REGISTRATION NOW OPEN!

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Upcoming Workshops and Webinars



Registration Now Open for NHMA's 82nd Annual Conference and Exhibition

Please join us on Wednesday, November 15 and Thursday, November 16 at the DoubleTree by Hilton Manchester Downtown Hotel. Our theme is "*Zap the Gap: How to Make Peace & Work Effectively in a Multigenerational World.*"

REGISTRATION OPEN!



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for joining us for today's workshop!



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Through the collective power of cities and towns, NHMA promotes effective municipal government by providing education, training, advocacy and legal services.



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