

2022 Webinar Series

THE RIGHT-TO-KNOW LAW AND PUBLIC RECORDS



Stephen C. Buckley, Legal Services Counsel
Jonathan Cowal, Municipal Services Counsel

September 28, 2022



Today's Presenters



Stephen Buckley
Legal Services Counsel



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

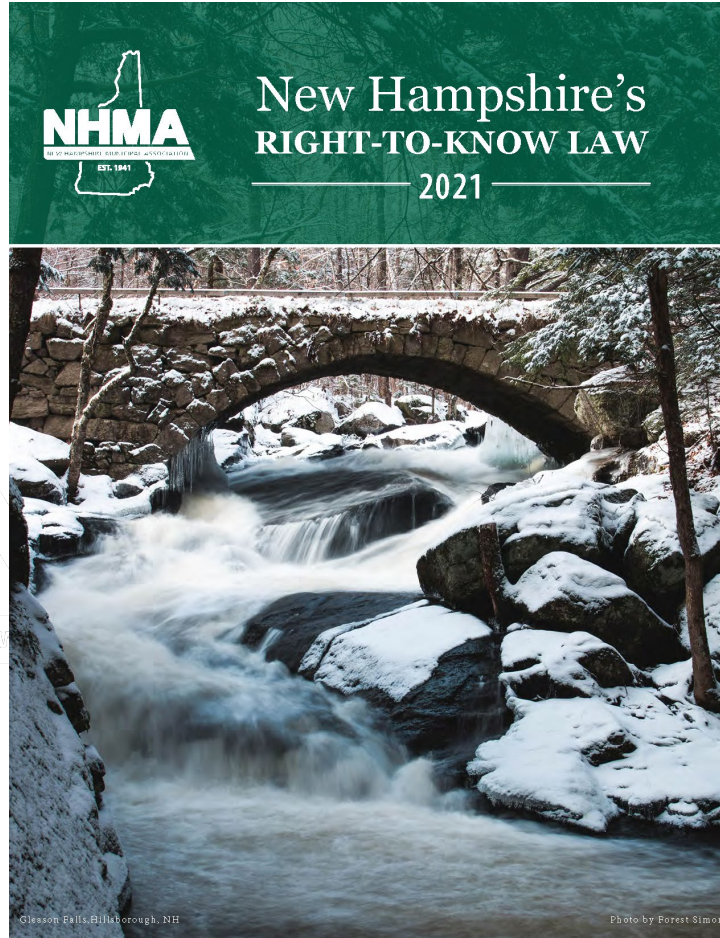
Provide general legal advice

- 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

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



How Do I Ask a Question?

A screenshot of a Zoom Q&A chat window. The window title is "Q&A". It shows a question from "You" at 18:03: "What happens when I raise my hand?". Below it is an answer from "Molly Parker" at 18:04: "I can take you off of mute.". At the bottom, there is a text input field with the placeholder "Please input your question", a checkbox for "Send Anonymously", and a blue "Send" button.

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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Governmental Records & The Right-to-Know Law

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.

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.

Is it a Governmental Record? RSA 91-A:1-a

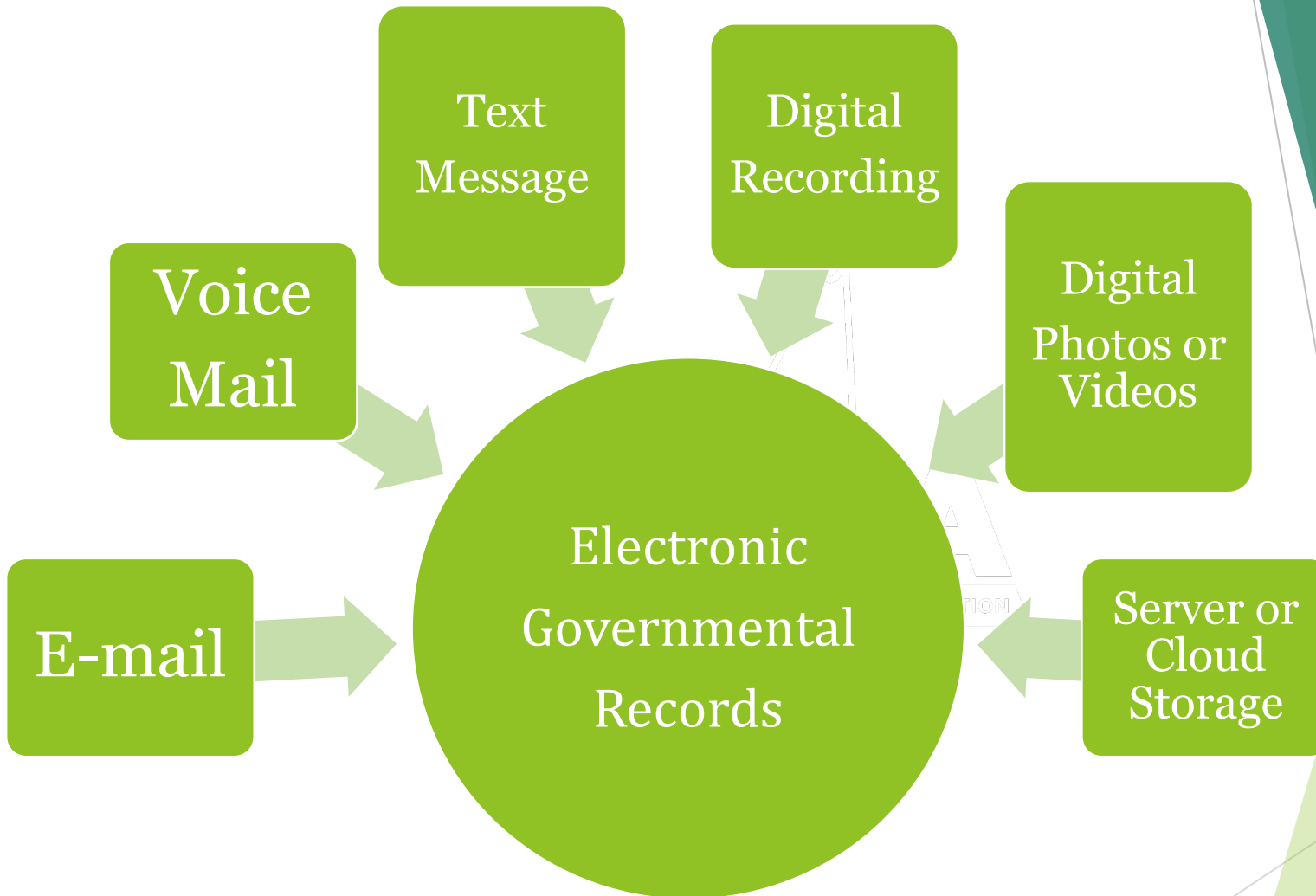
Any information

- 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



Is the Record Exempt from Disclosure?



Mandated Access to Certain Records



Employee separation payments if in addition to regular salary, or accrued vacation or sick time - 91-A:4, I-a



Meeting minute raw materials available after completion of public meeting - 91-A:4, II



All lawsuit settlements on file with town clerk and available for public inspection for 10 years - 91-A:4, VI

Exemptions to Disclosure of Governmental Records



General Standards Governing Exemptions - RSA 91-A:5



- ▶ RSA 91-A:5 provides a list of records categorically exempt from disclosure; master jury list or teacher certification records.
- ▶ Some statutory exemptions require detailed analysis, such as records whose disclosure would constitute invasion of privacy.
- ▶ The Right-to-Know Law's purpose is to provide the utmost information to the public about what its government is up to. If disclosing the information does not serve this purpose, disclosure may not be required.
- ▶ When a public body or agency seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to avoid nondisclosure.

RSA 91-A:5, IV: Most Common Exemption



Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. 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.

“Internal Personnel Practices”

RSA 91-A:5, IV



- ▶ Applies to governmental records that pertain to rules and practices dealing with employee relations or human resources, including hiring and firing, personnel rules, discipline, compensation and benefits.
- ▶ Recent Reinterpretation of Law by N.H. Supreme Court
- ▶ Formerly: “Internal Personnel Practices” was a fairly broad category separate and apart from any privacy balancing test.
 - ▶ Includes: Evaluation sheets for potential employees and answers; investigation reports of investigators hired by employers to investigate employees.
- ▶ Now: “Internal Personnel Practices” is another privacy balancing test.

Union Leader v. Salem Describes Privacy Balancing Test



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.*

Wide Reaching Implications?

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.

“Confidential, Commercial or Financial Information”



- ▶ This determination must be made objectively and should not be based on the subjective expectations of the party generating it.
- ▶ The emphasis placed on the potential harm that will result from disclosure, rather than simply promises of confidentiality, or whether the information has customarily been regarded as confidential.

“Other Files Whose Disclosure Would be an Invasion of Privacy”



Private	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.
Public	Assess the public’s interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
Balance	Balance the public’s interest in disclosure against the government’s interest in nondisclosure and the individual’s privacy interest in nondisclosure.

Drafts & Notes

Preliminary Drafts - RSA 91-A:5, IX -

- “[N]ot in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body” are exempt.

Personal Notes - RSA 91-A:5, VIII -

- “Any notes or other materials made for personal use that do not have an official purpose are exempt from disclosure” are exempt.

Law Enforcement Records?

Use FOIA



- ▶ 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

Body Worn Cameras (BWCs)



RSA 105-D



RSA 91-A:5: Recordings exempt from disclosure, unless

Restraint/use of
force

Discharge of firearm

Felony-level arrest



. . . unless it constitutes an invasion of privacy or is
otherwise exempt from disclosure

IT Security



As of Aug. 4, 2020, RSA 91-A:5 was amended by adding a new paragraph XI, providing that records pertain to information technology systems are exempt from disclosure under the Right-to-Know Law if release of those records would disclose security details that would aid an attempted security breach or circumvention of law.

Very limited exemption. Applies, essentially, to the security protocols and measures installed on municipally owned systems.

Attempt to limit hackability of municipal systems.

Attorney- Information

- ▶ As of July 30, 2021, RSA 91-A:5 was amended by adding new paragraph XII in response to a (now withdrawn) N.H. Supreme Court decision subjecting attorney-client privileged communications and attorney work product to the privacy balancing test.
- ▶ Blanket exception for: “Records protected under the attorney-client privilege or the attorney work product doctrine.”

Make Non-Exempt Records Available



Basics of Record Production



Records must be provided immediately *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.

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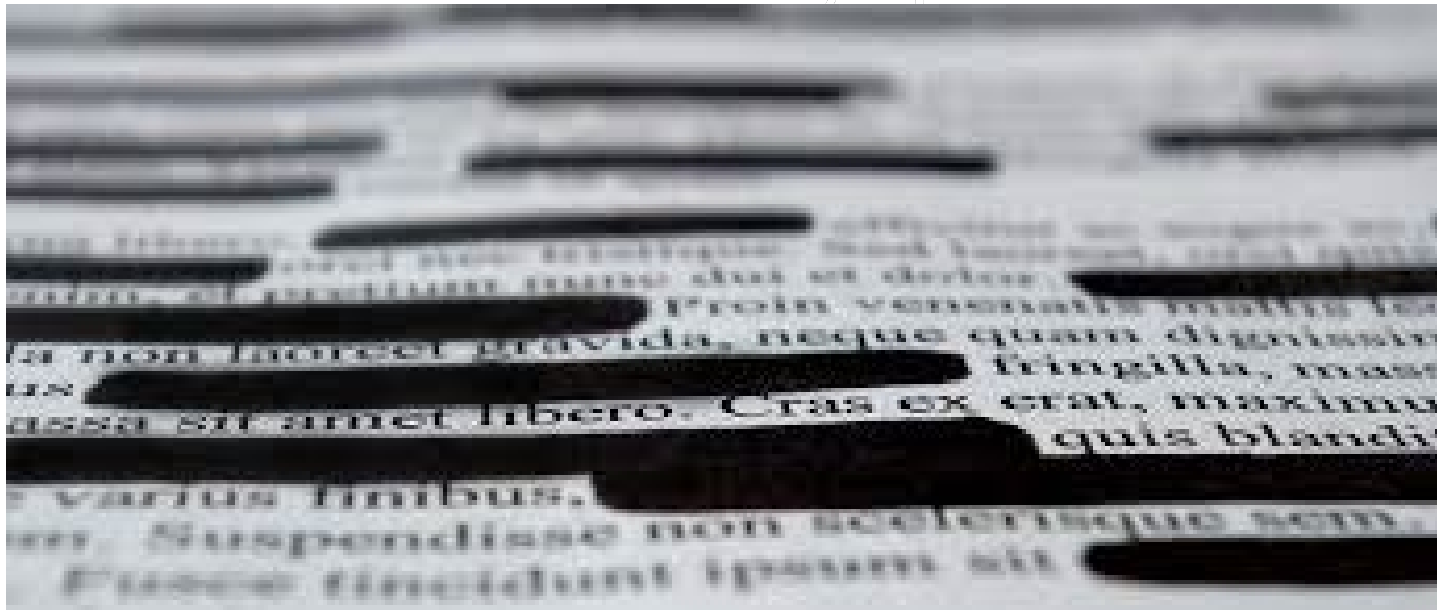


Requiring appointment to review records is permitted.

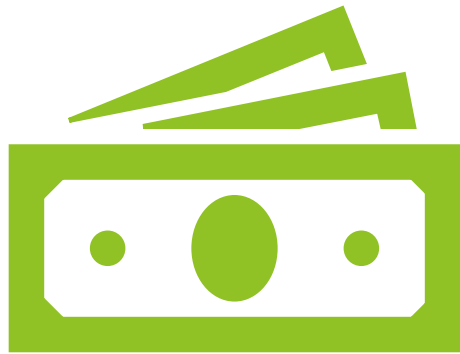


RTK does not require document “compilation.”

Before Providing Records: Redact Exempt Information



No Flat Fees!



- ▶ ONLY Reasonable fees are allowed!
- ▶ RSA 91-A:4, IV
- ▶ FIFTY CENTS PER PAGE FOR FIRST 10 PAGES, AND THEN TEN CENTS PER PAGE DEEMED REASONABLE. *MARTIN V. ROCHESTER*, 173 NH 378 (2020)

A Note About Fees & Electronic Records...

- ▶ 91-A:4, IV: No fee shall be charged for the inspection or delivery, without copying, of governmental records, whether in paper, electronic, or other form. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.
- ▶ Green v. SAU #55: Electronic Records Produced Electronically.
- ▶ Taylor v. SAU #55: School Administrative Unit's policy requiring use of a thumb drive to produce electronic records was valid under The Right-to-Know Law.



How Much Time To Produce Records?



We have 5 days...



...right?

“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.

Retention & Remedies



Records Retention



RSA 33-A:3-a contains 156 categories of records to be retained.



Records retained for the prescribed period.



Once the retention period has expired records may be discarded, but if still available must be produced.

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.



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.

How are Violations of RSA Chapter 91-A Enforced?



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



“Aggrieved person”

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Lawsuit or by complaint to Ombudsman



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

Right-to-Know Ombudsman



- ▶ Aggrieved person files complaint with Ombudsman or Superior Court - filing complaint with one forecloses filing with the other.
- ▶ The Ombudsman may:
 - Compel timely delivery of governmental records
 - Compel interviews with the parties
 - Order attendance at hearings
 - Order disclosure of records and access to meetings
 - Draw negative inferences from a party's failure to participate in process
 - Can issue any remedial orders permitted under RSA 91-A:8
- ▶ Any party may appeal the ombudsman's final ruling to the superior court
- ▶ On appeal, the superior court shall treat all factual findings of the ombudsman as prima facie lawful and reasonable

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

Main Takeaways



Every citizen can request records. *

The record request must be “reasonably described.” RSA 91-A:4, IV.

Any search for records must be reasonably calculated to uncover relevant documents.

There is no obligation to compile, cross reference or assemble records.

Requiring a citizen make an appointment to review records is permitted.

When denying access provide written reasons.

Redact exempt information

Reasonable fees allowed

Is it really deleted? RSA 91-A:4, III-b

Principles of Employment Law Virtual Seminar

9:00 am - 4:00 pm, Tuesday, October 4, 2022. Join Drummond Woodsum's attorneys in this full day virtual seminar providing municipal officials with practical knowledge and skills to handle the unique employment challenges facing public employers. Cost: \$90.

REGISTER NOW!

DrummondWoodsum
ATTORNEYS AT LAW

[REGISTRATION NOW OPEN!](#)



2022 Hard Road to Travel Workshop

9:00 am - 12:30 pm, Thursday, October 6, 2022. Join NHMA's Stephen Buckley and Jonathan Cowal who will help local officials understand some of the more complicated areas of highway law.
\$65: In-person attendance; \$55: virtual.

REGISTRATION NOW OPEN!

**A HARD
ROAD TO
TRAVEL
Workshop**

[REGISTRATION NOW OPEN!](#)



2022 Municipal Land Use Law Virtual Conference

9:00 am - 3:00 pm, Saturday, October 15, 2022. Full day virtual event with multiple sessions on land use-related topics.

REGISTRATION OPEN!



REGISTRATION NOW OPEN!

REGISTRATION NOW OPEN!



NHMA's 81st Annual Conference and Exhibition



GETTING USED TO DIFFERENT

NHMA's 81st Annual Conference and Exhibition

November 16-17, 2022

Please save the dates of Wednesday, November 16 and Thursday, November 17 for NHMA's *81st Annual Conference and Exhibition* at the DoubleTree by Hilton Downtown Manchester. Our theme this year is "*Getting Used to Different*."

It's been nearly two years and New Hampshire municipalities are still "getting used to different" and adapting to the extraordinary events of the pandemic. Elected and appointed officials have been faced with tough challenges and opportunities to create new programs and services that best meet the changing needs of their residents.

This year's conference will be held as a live, in person event in Manchester both days with simultaneous live-streaming for virtual attendees. Please join us in November!

[LEARN MORE HERE!](#)



for joining
us today!



NHMA'S MISSION

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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