

**NHMA**  
NEW HAMPSHIRE MUNICIPAL ASSOCIATION  
EST. 1941

NEW HAMPSHIRE MUNICIPAL ASSOCIATION



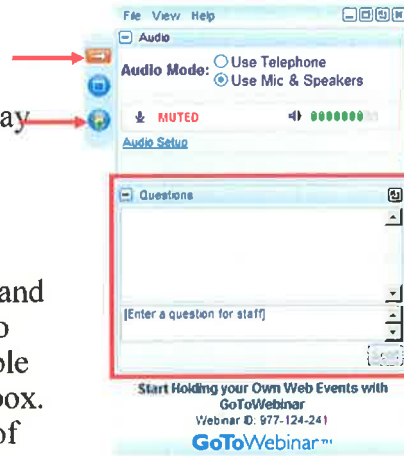
Presented by  
Stephen Buckley, Esq.  
and  
Margaret Byrnes, Esq.,  
*Legal Services Attorneys*

## How to Participate Today

- Open and close your Panel
- Submit text questions
- Couple of hypotheticals today



- New Feature – Upper left hand corner is a Comment icon to view presenter notes. Double click to expand presenters box. In upper right hand corner of presenter notes, click to close.



## Governmental Records

To disclose or not to disclose...  
That is the question.



Let's answer it.





Only governmental records can be subject to disclosure under the Right to Know law ("RTK"), so start by determining whether the record is a governmental record.

Under **91-A:1-a**, a *governmental record* is:


1. Any information
  - a. created
  - b. accepted, or
  - c. obtained
2. By, or on behalf of,
  - a. any public body, or a quorum or majority thereof or
  - b. any public agency
3. in furtherance of its official function

It includes any written communication or other information, 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 information must be a record; it must exist in some ascertainable form.

The term "governmental records" includes the term "public records."

What's a **public agency**? 91-A:1-a, V



What's a **public body**? 91-A:1-a, VI

Public Agency: “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.” → *Example: Town Clerk’s Office*

Public Body:

- 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 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 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.

→ *Examples: Select Board, Town Meeting*

## Is it a governmental record when it's...



- Received by town clerk?  
– *Yes.*
- Received by the select board chair?  
– *No.*
- Received by board quorum?  
– *Yes.*

“In furtherance of official function”?



6

But remember, it's only a governmental record in the first place if it is “in furtherance of the official function” of the public agency or public body. So, if the planning board chair receives an e-card on his birthday and emails it to his other board members, it's not a governmental record!



Once you have determined the record in question qualifies as a governmental record, don't stop there. You must still determine whether there are any exemptions that apply. If an exemption applies, the record must not be disclosed.

Exemptions are found in 91-A:5, other statutes, and case law.

Let's start with 91-A:5, which includes 10 exemptions:

I. Records of grand and petit juries.

I-a. The master jury list as defined in RSA 500-A:1, IV.

II. Records of parole and pardon boards.

III. Personal school records of pupils.

IV. 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.

V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.


VI. Records pertaining to matters relating to the preparation for and the carrying out of all 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.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

VIII. 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.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

Most of the questions we get come from IV, VIII, and IX.



IV, 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**

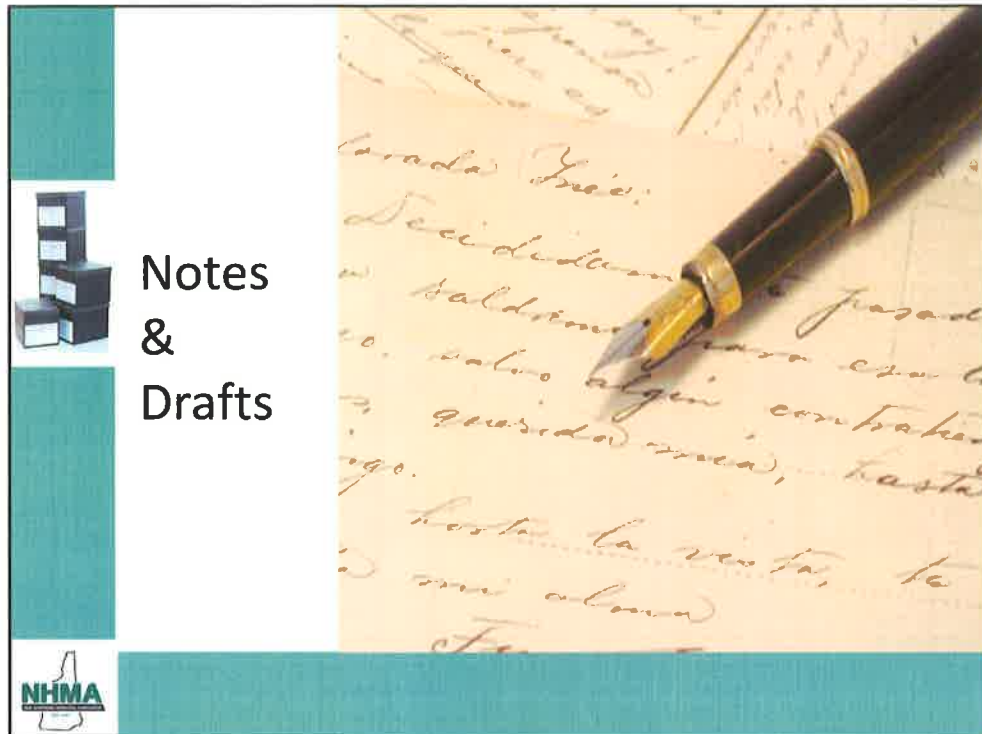
**Privacy Exemption: Use Balancing Test**

- Lamy v. N.H. Public Utilities Commission, 152 N.H. 106 (2005) involved a demand for the names and addresses of an electric utility’s customers that were on file with the PUC. The Court ruled that the privacy interests of residential customers outweighed the public interest. Importantly, in that case, the Court found that the only way home addresses could tell the public anything about what the government is doing was for the person to use them to contact the residents. That use, “derivative use,” was found not to be strong enough to overcome the residents’ privacy interest in their addresses.

**Confidential Exemption:** Place emphasis on the potential harm that will result from nondisclosure or whether the information has customarily been regarded as confidential. Union Leader Corp. v. New Hampshire Hous. Fin. Auth., 142 N.H. 540 (1997).

- Confidential records include records protected under attorney-client privilege, even if the document is circulated to a quorum of the board. Privilege can be lost if information in record is disclosed to parties not privy to the attorney-client relationship.
  - Privilege will be lost if a quorum of body/agency discusses the record (and such discussion would constitute a meeting).
    - ❖ This does not apply if a quorum convenes to talk *with counsel present*.
- Personnel records are exempt from disclosure only if they are related to internal personnel discipline or akin to such matters as hiring and firing, work rules, and discipline. Montenegro v. City of Dover, 162 N.H. 641 (2011).





#### Notes & Drafts Exemptions (VIII and IX)

VIII. 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.

- “Notes” are any documents not having an official purposes, even if the notes are circulated to a quorum of the body/agency.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

- “Preliminary drafts” are documents that are “pre-decisional, deliberative communications.”

ATV Watch v. N.H. Dep’t of Transp., 161 N.H. 746 (2011)

## Exemptions from case law and other statutes



- Exemptions in other statutes
- Case law establishes and interprets exemptions
- FOIA “Murray Test”



Scattered throughout the RSAs are other provisions that involve the disclosure/non-disclosure of governmental records not directly addressed in 91-A.

- *Example:* RSA 466:1-d Lists of Licensed Dog Owners
- *Example:* RSA 282-A (Unemployment Compensation) includes certain exemptions


Case law can establish exemptions and interpret what particular exemptions mean (like Lamy).

Police records are not addressed in 91-A:5. NH follows the 6-prong test established under FOIA (Freedom of Information Act) for all records compiled for law enforcement purposes:


1. Could reasonably be expected to interfere with enforcement proceedings,
2. Would deprive a person of a right to a fair trial or an impartial adjudication,
3. Could reasonably be expected to constitute an unwarranted invasion of personal privacy,
4. Could reasonably be expected to disclose the identity of a confidential source, including a state, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or of information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
5. Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
6. Could reasonably be expected to endanger the life or physical safety of any individual.

\*If the record meets any one of these 6, it is exempt from disclosure. See Murray v. State Police, 154 N.H. 579 (2006); Montenegro v. Dover, 162 N.H. 641 (2011).

We have



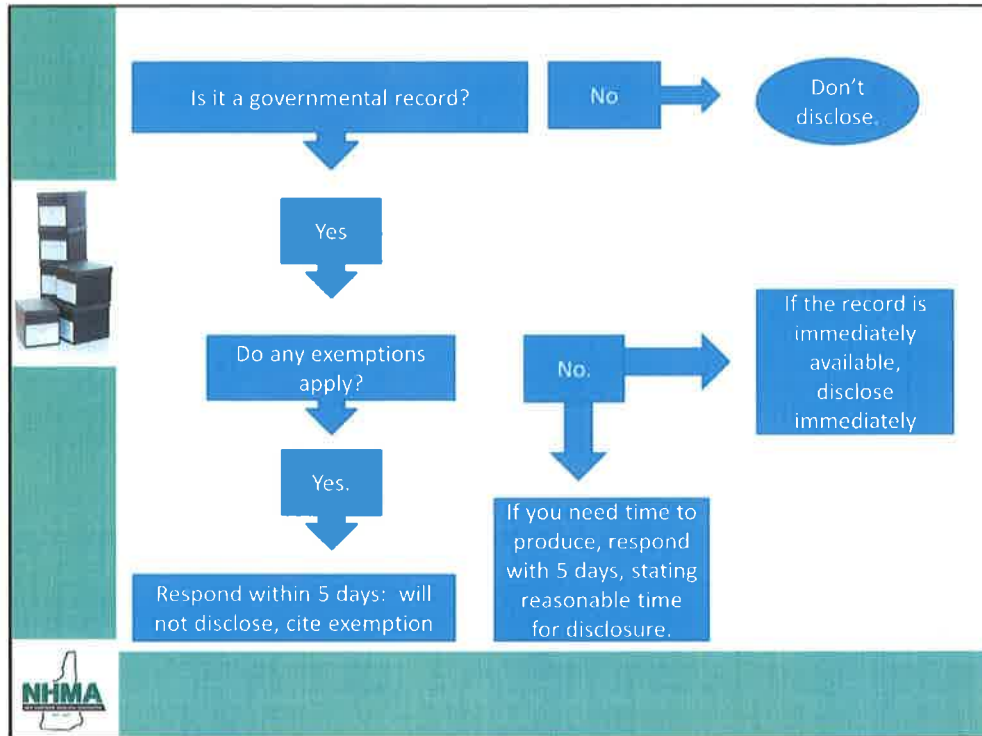
...right?



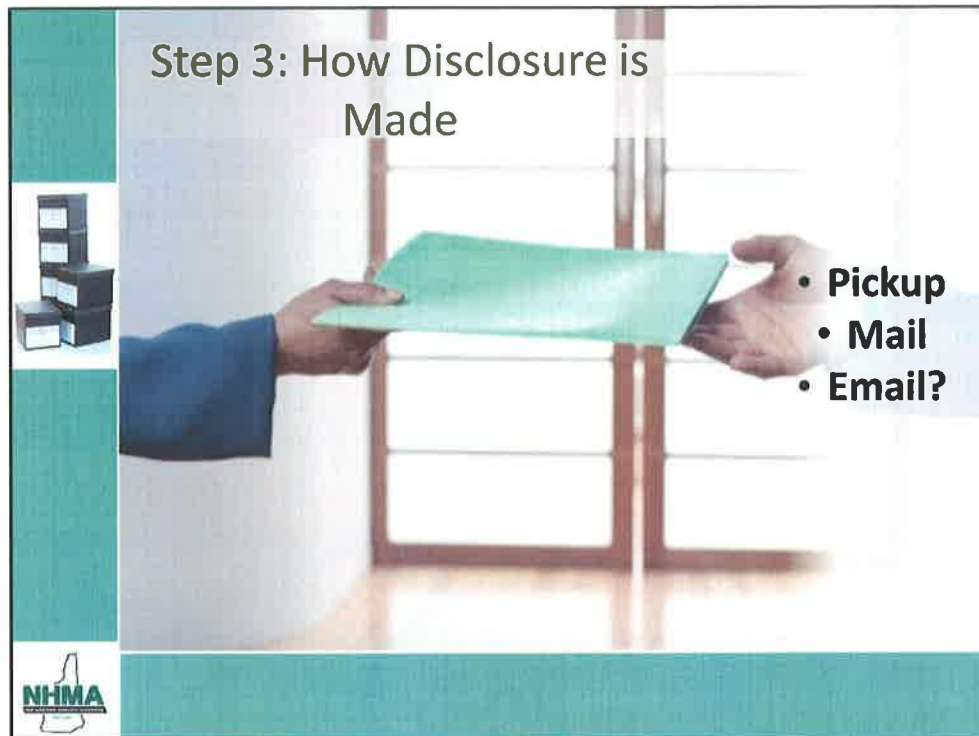
So, you get the RTK request. We have heard the question—“We have 5 days to disclose, right?”—many times. Is it true?

Sort of. Records that are immediately available must be disclosed immediately. If records are not immediately available, you have up to five business days to:

1. make those records available;
2. provide written acknowledgement of request and estimation of time it will take to respond; or
3. provide written acknowledgement and explanation of why request is being denied, citing the exemption that applies.



Use this chart to help you determine what to do after you receive an RTK request.

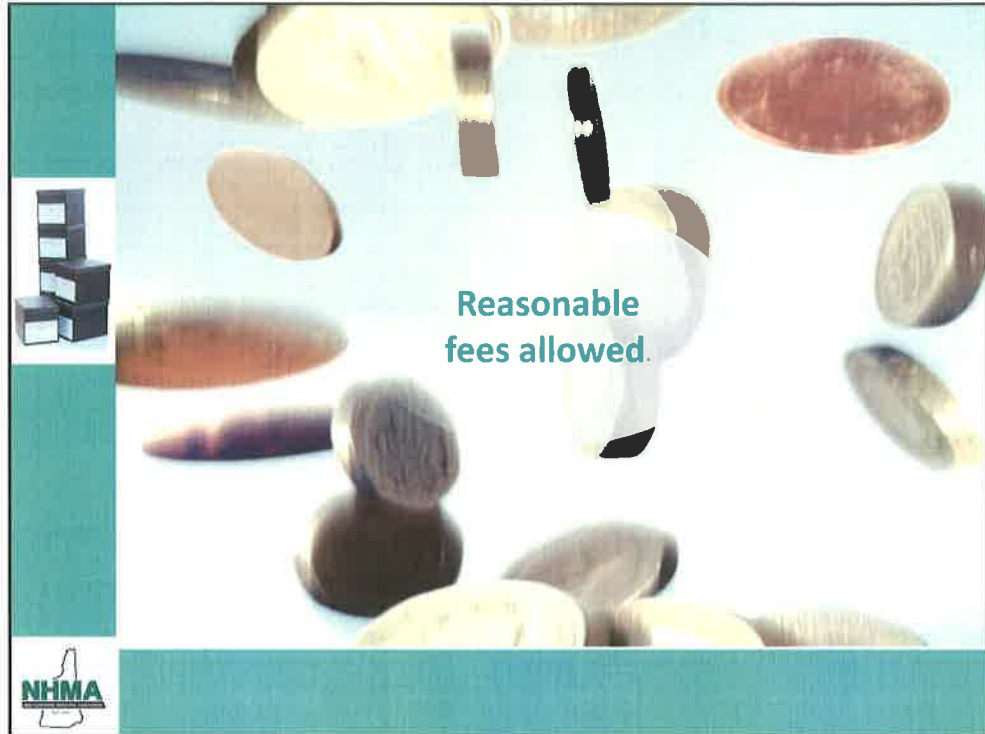


In what form/manner must you disclose the records?

- You can make records available at the town hall for pickup; they do not need to be sent by mail or by email (but they can be).
- Citizens have the right to inspect records in the custody of public agencies or bodies (during normal business hours). 91-A:4, I.
- After a meeting is complete, citizens have the right to inspect/copy notes, materials, tapes, etc. used for compiling minutes of the meeting, see 91-A:4, II, except for those notes, materials, tapes, etc. that are exempt by 91-A:5, VII and IX.

Under 91-A:4, VII, you do not need to create/compile records you don't have: "Nothing in this chapter 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."

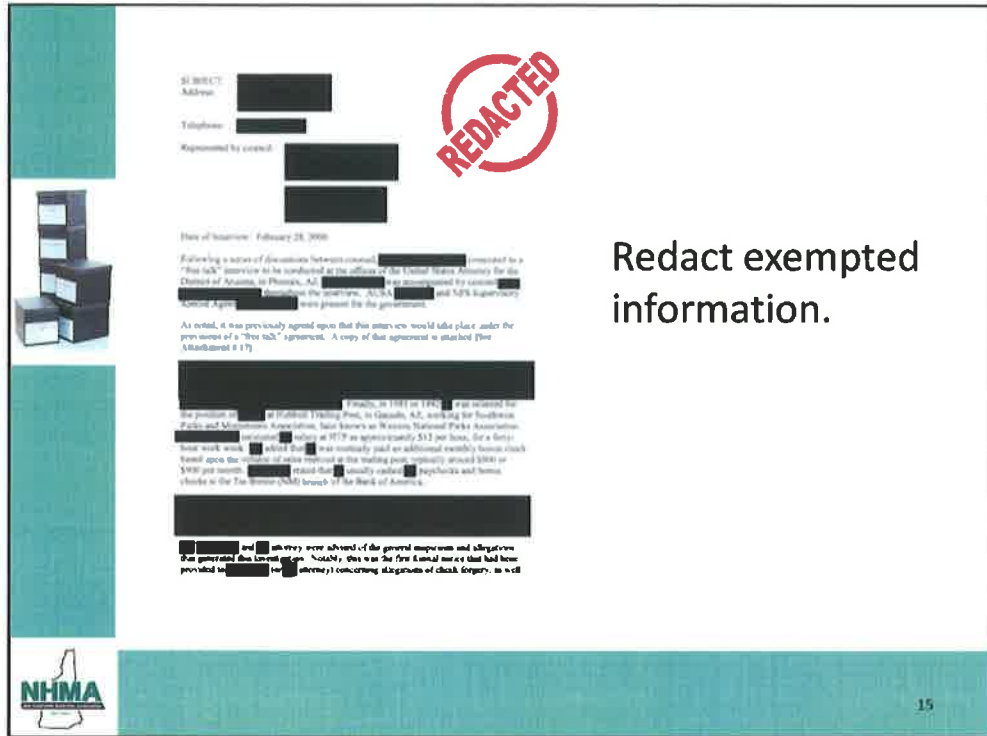
So, if you get a request like, "Tell me everything that the town knows about \_\_\_\_\_," you are NOT required to put together a document to respond, such as a report. If there are governmental records, not subject to an exemption, that provide information responsive to the request, then you disclose those.



Towns may charge reasonable fees for photocopying records in response to RTK requests:

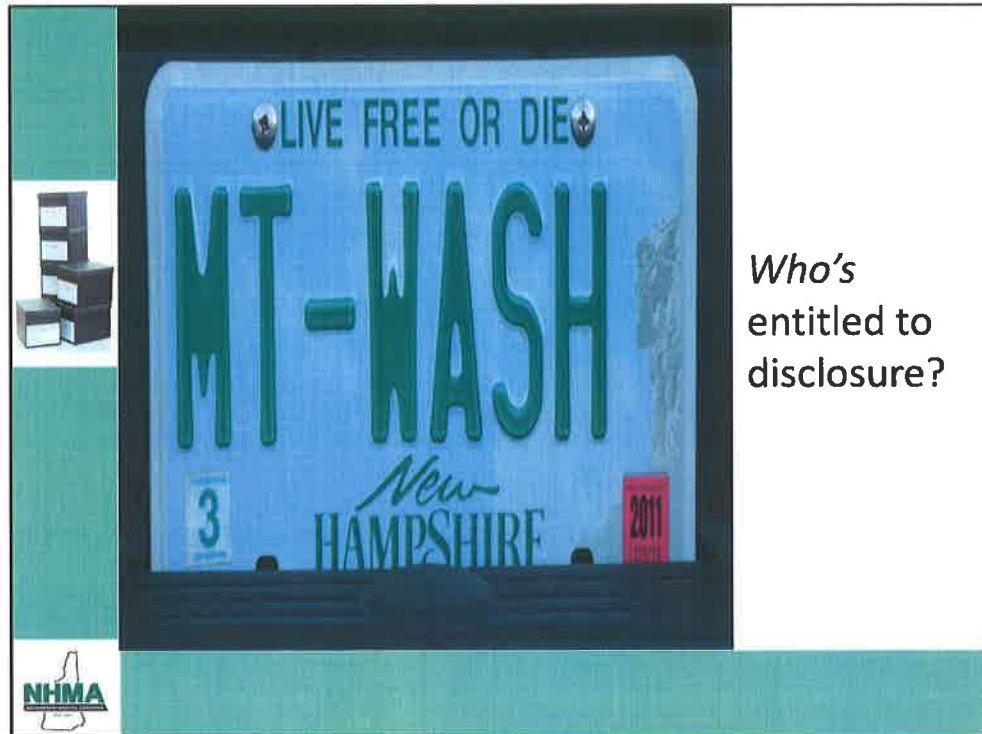
*91-A:4, IV: Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.*

Fees must be *reasonable*. There is no New Hampshire Supreme Court case on point, but there was a superior court case, in which the judge decided that a \$.50 fee was permissible because it was premised upon a reasonable calculation of the costs associated with creating the copies.



Even though the record itself may need to be disclosed, the record may contain information that is exempted from disclosure. If it does contain such information, redact that information before you disclose the document. Do not withhold entire record just because it contains information that should not be disclosed.

→ *Example:* Employee time sheet or pay stub: redact SSN, home address (any information that constitutes an invasion or privacy, or falls into any other exemption, if applicable)



Who's entitled to disclosure?

RSA 91-A:4 requires towns and cities to provide access to governmental records upon reasonable request.


However, in 2013, the U.S. Supreme Court released an opinion that a state with an open records law that provides access to "citizens" does not have an obligation to *send* records to someone out of state. McBurney v. Young, U.S. Supreme Court, No. 12-17, 4/29/13. **Interestingly, the Court cited New Hampshire as one of seven states whose Right to Know Law specifically limits obligations to its state's citizens.**

Therefore, it appears that New Hampshire municipalities do not have to provide copies to out-of-state requestors. It would be sufficient to cite RSA 91-A:4, IV, saying that the records are available at a particular office during regular business hours (wherever and whatever those hours are) and that they are free to come in and inspect and obtain copies of them.


**\*Remember that a public body/agency taking official action and requesting a record is different than one member of that public body/agency requesting a record. Bodies and agencies take official action through a quorum of its membership. One member of a board requesting a record is *not* the official action of that board. Instead, that one board member would be making the request in his/her individual capacity, and it would be treated just like any other RTK request.**



## Minutes



- 91-A:2, II
- Required information?
- Draft v. “Approved”
- Available, not (necessarily) “published”
  - 5 days



### What information must be in your minutes?

- Minutes must include names of board members present, brief description of subject matter discussed, and record of actions taken/votes made.
- Could you require more? Yes.
  - ❖ However, if your board has a policy that requires that your minutes include more information than is required by 91-A:2, II, watch out for this sentence in the same section of the statute: *If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter.*
- If you call an emergency meeting (i.e., requisite notice cannot be given), minutes must also include the reason for the emergency.

\*Every public body or agency must keep minutes of their meetings. Recall that this includes subcommittees and advisory committees!

### Draft v. Approved

- First, remember that there is no requirement in the law that a body/agency “approves” or “finalizes” their minutes; however, most do.
- Second, beware of a quorum of the board’s members communicating suggested edits to the draft minutes outside of a properly noticed meeting. Such communications, whether by email, in-person, or otherwise, constitute an illegal meeting!
- The better practice is to discuss edits to minutes at the next meeting. However, the board members can communicate edits directly to a staff person (such as the board’s secretary) before the next meeting. Email just the staff person, and avoid the “reply all” button. However, the *discussion* of the proposed changes must occur at the next meeting; then the body can vote to finalize/approve.
- Remember that whatever minutes are compiled by the 5-day deadline are the minutes that must be available if a citizen makes a request. So, even if they have not been “finalized,” those minutes must be available. You can still revise and finalize them thereafter.
- Mark them as “draft” minutes.
- Finalized minutes should refer to draft minutes.
- Keep draft minutes intact.


Availability

- Minutes must be made available within 5 days of the meeting.
- There is no requirement that minutes be published (i.e., posted on the town website). They just have to be available at the appropriate town office so that citizens may inspect, copy, etc.



Suggested best practice: Create draft minutes, marked as such. If changes are made at a subsequent public meeting, the changes are detailed in the minutes of the subsequent meeting. As the minutes are being prepared for permanent storage in a paper format, the clerk will add a notation to the permanent record of the first meeting that corrections were made, and give an exact reference to the page where the changes appear in the minutes of the subsequent meeting. This seems to be an excellent way to serve all interests, in that it preserves the draft document as originally created and made available to the public, allows the board involved to review the record and make any needed changes, and allows all users of the documents to see the exact text as originally prepared, the changes that were made, and the reasons why the changes were made.

\*\*You can record meetings to assist in compiling minutes. We'll talk in a moment about how long to keep them.

## Nonpublic session minutes



- Create minutes
- Public unless sealed

Here is what you need to know about minutes in nonpublic sessions (see 91-A:3, III):

1. You must take minutes.
2. The minutes must state the reason for going into nonpublic session. (Reasons for nonpublic sessions in 91-A:3, II)
3. The minutes must be made publicly available within 72 hours (NOT 5 days!) unless they are sealed, which requires:
  - a. 2/3 vote of members present that
  - b. divulgence of the information likely would
    - i. affect adversely the reputation of any person other than a member of the public body itself;
    - ii. render the proposed action ineffective;
    - iii. 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)

\*Minutes are kept sealed until “in the opinion of a majority of members, the aforesaid circumstances no longer apply.”

\*We suggest coming out of nonpublic session and then moving to seal the minutes.

## Records Retention

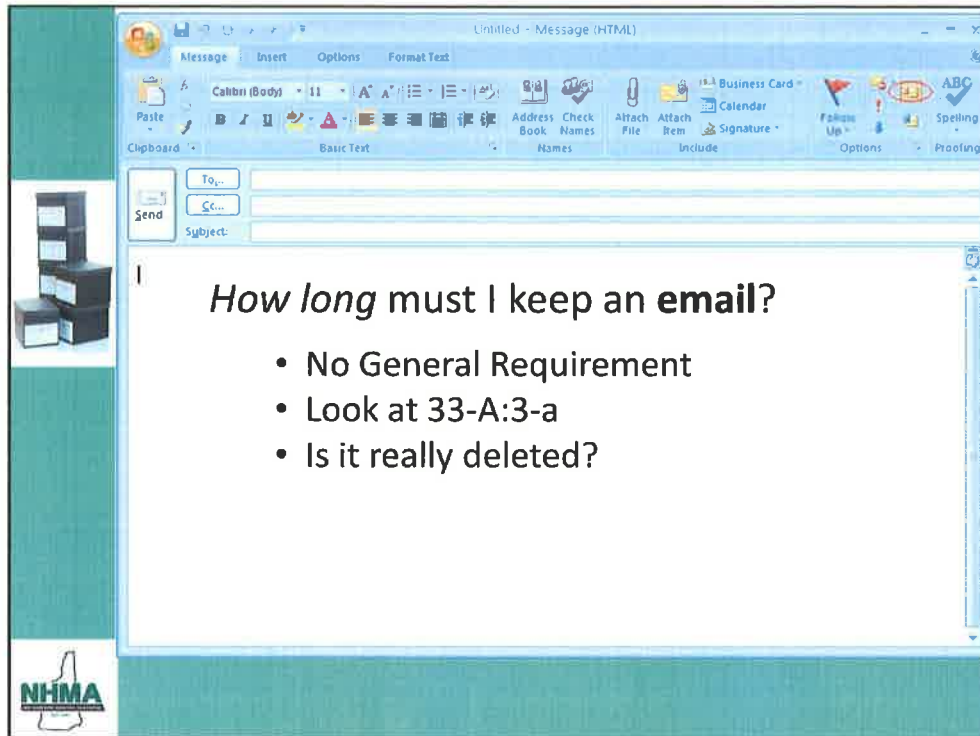


*“How long do I have to keep records?”*

*Follow RSA 33-A:3-a*



- RSA 33-A is the Disposition of Municipal Records statute.
- 33-A:3-a is a (very long) list documents and the time period for which each of those documents must be kept. (FYI: The state Municipal Records Board and associated rules no longer exist—just look to the statute.)
- Some records must be kept permanently (e.g., minutes, budget, annual reports).
- Records that must be maintained for more than 10 years **must be transferred to paper or microfilm, or both**. Therefore, an electronic copy only is **not** sufficient. See 33-A:5-a.
- 91-A: 4: Governmental records created/maintained in electronic form must be kept for the same time period as their paper counterparts.



There's no general requirement to keep all emails for a certain period of time. Instead, you must discern the subject matter of the email and whether, due to its subject matter, it must be kept.

There are three categories of correspondence in 33-A:3-a that are helpful to know:

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

Most correspondence falls into the third category and needs to be retained only for as long as it has some purpose or use. If it is no longer needed, it may be deleted.

\*Be aware that deleted must mean "permanently deleted." If you delete it and it goes into your "deleted items" or "trash" box, it still exists and would be subject to disclosure:

A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if 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.  
91-A:4, III-b

\*\*91-A:4, III-b, therefore, applies to all electronic records. Watch out!

## Records Retention



*“Where can I keep records?”*

- RSA 91-A:
- RSA 41:58
- RSA 41:61




**91-A:4, III:** Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.


**41:58:** All books, records, papers, vouchers, and documents which shall be in the possession of any officer, committee, or board of officers of the town, and which are not needed elsewhere by them in the discharge of official duty, shall be deposited in the office of the town clerk, and shall be there kept and preserved by him as public records of the town. Provided that, if the office of the clerk is not equipped for the safe keeping of the said public records, the clerk may, with the approval of the selectmen, deposit such records in some other safe and suitable place.

**41:61:** No town officer having the custody of its public records or documents shall loan the same or permit them to be taken from the place where they are usually kept except when necessary for the discharge of official duty or upon the summons of a court of competent authority; and they shall be open at all proper times for public inspection and examination.

## Recordings of Meetings



- Not required
- Use and discard
- Disclose 'em if you got 'em



You may, but are not required to, record meetings.

33-A:3-a, LXXX says that as soon as minutes are approved, either reuse the tape or dispose of the tape.

That same section also says that draft minutes can be disposed of once the final minutes are approved.

For as long as you keep the recordings, they are governmental records that must be disclosed upon request, whether it's before or after the minutes are approved. "Disclose 'em if got 'em" applies to all non-exempt governmental records. Refer to 91-A:4, II.

Remember, though, if the agency/body has a rule that requires the recording and/or retention of those recordings, that rule must be complied with under RTK. Clear policies on how long recordings will be kept (and strict compliance with those policies) are a good idea.



Let's assume the following:

On March 5, 2015, Orson, select board chair, receives an email full of angry rantings about the budget from Citizen Kane. The chair deletes it. Subsequently, the town receives a 91-A request for all correspondence between citizens and any select board members from January 1, 2015 to the present. What to do?

- It probably wasn't a governmental record anyway because it was sent only to one select board member. RSA 91-A:1-a, III.
- No reason it couldn't have been deleted even if it had been a governmental record because it is probably "transitory correspondence." Remember the disposition schedule under 33-A:3-a.

What if, after receiving it, Orson sent it to his other board members? His other board members also deleted it after reading it.

→ Now it's a governmental record, but that still doesn't mean it needs to be kept unless the retention schedule says so.

What if, after reading it, all the board members deleted it, but Orson forgot to clear it out of his "Deleted Items" box?

→ It exists! Disclose.



**Remedies for violations**

- 91-A:7
- 91-A:8

**NHMA**

91-A:7 gives any person “aggrieved by a violation” of 91-A:7 the ability to petition the superior court for injunctive relief.

91-A:8 describes the consequences of violations. The court can

- Order the municipality to pay for the aggrieved party’s attorney’s fees and costs
- Invalidate the body/agency action
- Impose fines up to \$2,000
- Enjoin future violations
- Order remedial training

# HYPOTHETICAL



## HYPOTHETICAL #1



Your town decides it wants to start charging for copies made in response to RTK requests. It is considering the following options. Which one is the *best* option?

- A. Every response will require a \$15.00 fee.
- B. After assessing the cost for paper, ink, and time (based on an average wage of administrative personnel in your town), the cost will be \$.20 per page for each request.
- C. Each department/board will have the authority to set its own fee.
- D. Same as B, except that you tack on an additional \$.30 to compensate the town for that fact that the individual gathering the requested documents will have to take time away from his/her primary job duties, for a total fee of \$.50 per page.



HYPOTHETICAL #1



**B = Most Reasonable**



Even though a fee of \$.50 per page was found reasonable by a superior court, use the fee that is based on the most reasonable calculation.

## HYPOTHETICAL



## HYPOTHETICAL #2



A citizen writes a letter to the select board chair after the budget hearing, arguing that the budget committee chair has a conflict of interest because his wife is also a member of the school board. In the letter, he asks that his name be kept anonymous. The chair sends a copy of the letter to the other board members.

Two days later, a citizen requests the letter. The board should:

- A. Refuse to produce the letter.
- B. Produce the letter, with the citizen's name redacted.
- C. Produce the letter in its complete form.



HYPOTHETICAL #3



# C: No Exemption



The citizen's request to be kept anonymous does not bring the letter within the "invasion of privacy" exemption in 91-A:5.

### HYPOTHETICAL #3



The town administrator receives an email from a reporter with the Washington Post requesting copies of records under the Right to Know law that describe what incentives or other advantages were awarded to Walmart when it built a new distribution center in town. When the Walmart project was approved by the planning board, a number of agreements were made as part of the site plan approval that changed the amount of off-site improvements that had to be built by Walmart, but the content of those agreements are scattered throughout a foot stack of planning board records. How should the town administrator respond to this inquiry?





HYPOTHETICAL #3



Reporter can come to town hall.



The Town is required to provide public records to citizens of the State of New Hampshire only. See, McBurney v. Young, 133 S.Ct. 1709 (2013). Furthermore, under RSA 91-A:4 (VII), the Town is not required to scour the Planning Board's file and assemble the requested information.

→ *Suggestion:* Tell the reporter she can come to town hall and look at the records herself.

#### **HYPOTHETICAL #4**



The Town of River City operates a sewer plant that has a number of industrial users. Each of those industrial users must provide detailed industrial pre-treatment permit submittals that describe in great detail the chemical composition of all effluent. The sewer department receives a Right to Know law request from Screen It Now, Inc., seeking a copy of the sewer permit for Digital Screen Technologies, a computer screen manufacturer located in Town. The permit issued to Digital Screen Technologies contains a description of the chemical compound that comprises the trade secret screen formula. How should the sewer department respond to this request?





The sewer department should deny (respond within 5 days!) the request because the information sought is confidential, commercial information. See RSA 91-A:5 (IV).

## HYPOTHETICAL #5



At a public meeting of the Town of Maple Select Board, one member of the board receives a text message from a citizen complaining about poor snow plowing of her street.

1. Is that message immediately subject to disclosure?
2. What if the message is sent to all of the members of the select board?



HYPOTHETICAL #5



1. No quorum, no public record
2. Quorum = disclose



If the message is received by only one member of the select board and is not shared with the remainder of the board, it is not a public record because it has not been created or obtained by a quorum of the select board. However, once the text message has been shared or distributed to the whole select board, it would become a public record subject to disclosure. See, RSA 91-A:1-a (III) definition of "Governmental Records."

**PROD.**

**COMING ATTRACTIONS**

**April 8**

**A Mid-Session  
Legislative Update**

**VENUE**  
[www.nhmunicipal.org](http://www.nhmunicipal.org)





*for attending  
our webinar  
presentation  
today!*

## Mission Statement

The New Hampshire Municipal Association is a non-profit, 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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