

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

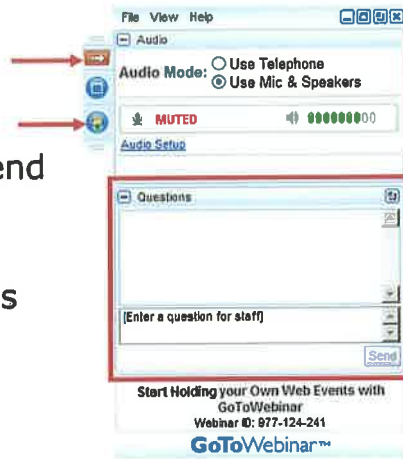


**Right to Know
or
Right to Privacy?**

**Presented by
Matthew Serge, Drummond Woodsum
Margaret Byrnes, NHMA Staff Attorney**

How to Participate Today

- Open and close your Panel
- Submit text questions
- Q&A addressed at the end of today's session
- Couple of quiz questions today




ATTORNEY GENERAL'S MEMORANDUM ON NEW HAMPSHIRE'S RIGHT-TO-KNOW LAW



<http://doj.nh.gov/civil/documents/right-to-know.pdf>






91-A:1-a, III

A "governmental record" is 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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 4

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

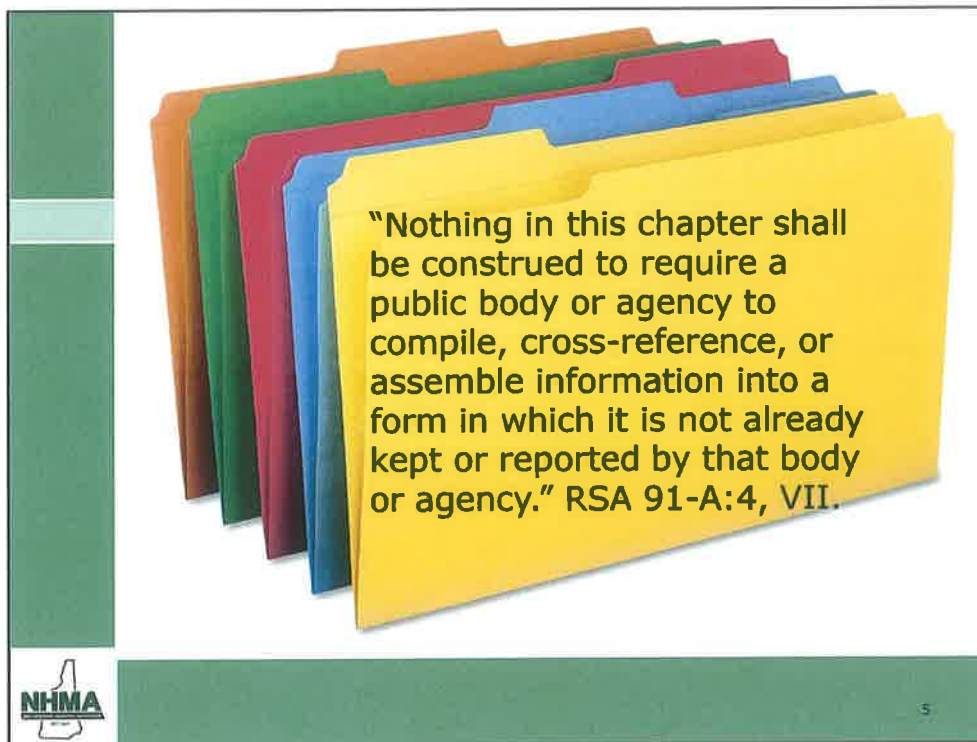
It includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of

the body.

The information must be a record; it must exist in some ascertainable form.

→ 91-A:1-a, IV. "Information" means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.)

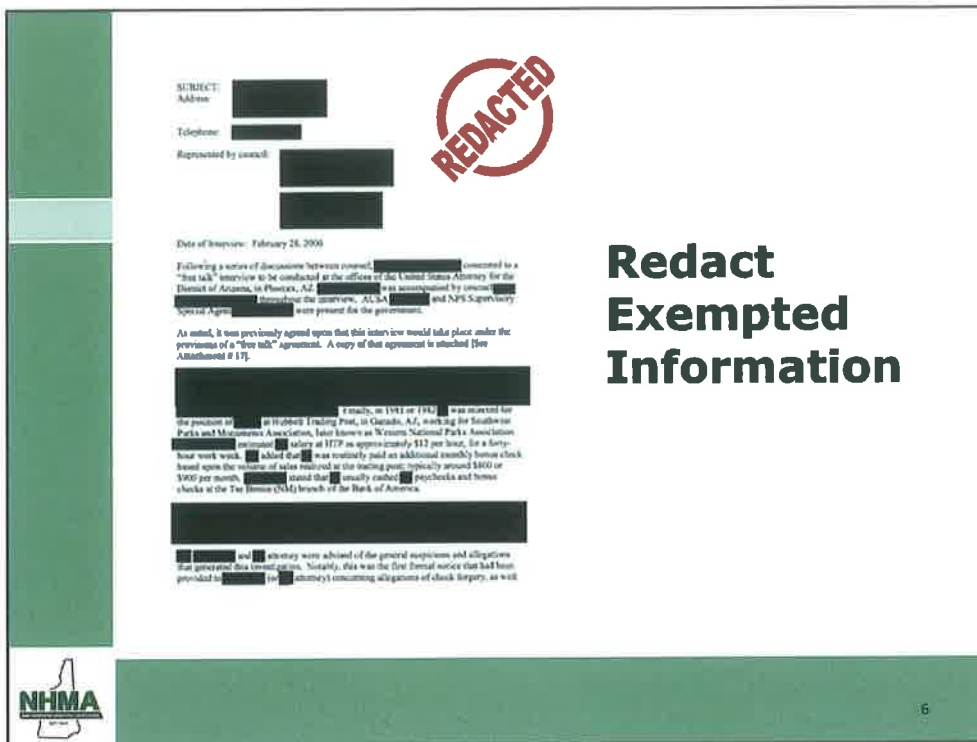
The term "governmental records" includes the term "public records."



The Right-to-Know Law doesn't require you to create a record that does not already exist.

Brent v. Paquette, 132 N.H. 415, 426(1989): Public officials are not required to retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist. In *Brent*, the information requested was contained on registration cards, but there was actually no list. The city did not have an obligation to create such a list.

The Right-to-Know law does not give the public the right to force a government decision-maker to explain, beyond what has already been disclosed in a public document, why he or she made a particular decision.

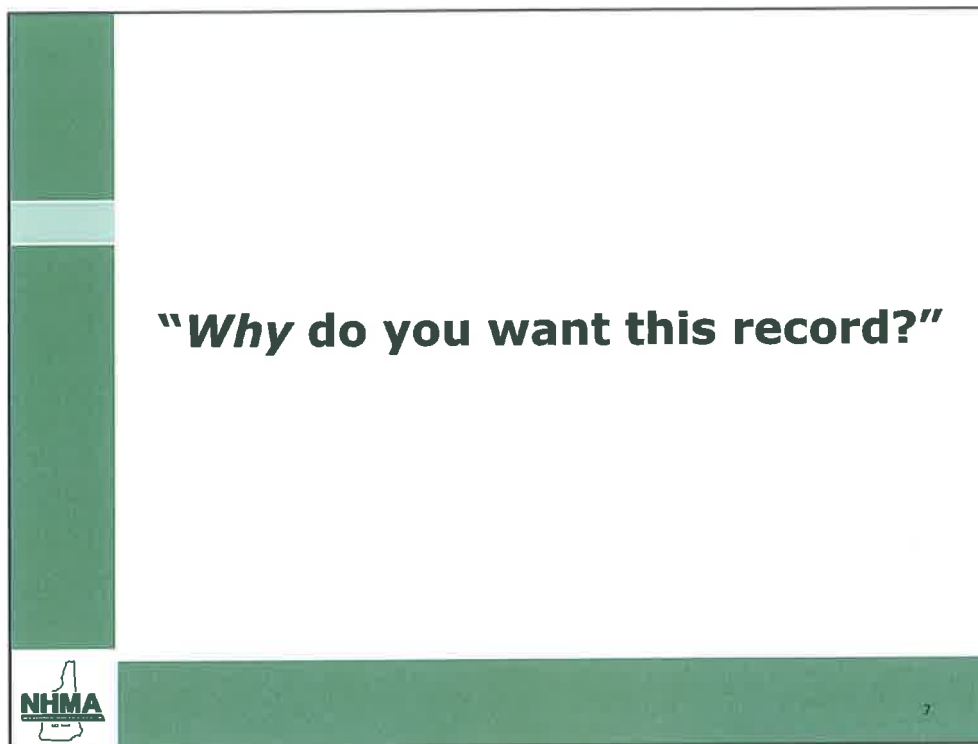


Even though the record itself may need to be disclosed, the record may contain information that is exempted from disclosure. If it does contain such information, redact that information before you disclose the document. Do not withhold entire record just because it contains information that should not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

See Hampton Police Ass'n, Inc. v. Town of Hampton, 162 N.H. 7 (2011), which addressed the disclosure of attorney's invoices and references redaction of legitimately confidential information.

Redaction may be accomplished manually by copying the document and then covering the sections to be redacted on the copy with ink, for example using a black marker. Alternatively, a piece of white redaction tape can be used to cover the sections of the copy to be redacted. The redacted copy is then copied, with the person making the request receiving that second generation copy. If ink is used, it is

important to check the second generation copy to ensure the redaction effectively blocks the non-public information. The quality of some copiers makes it necessary to use very heavy application of ink, redaction tape, or to make a third generation copy.



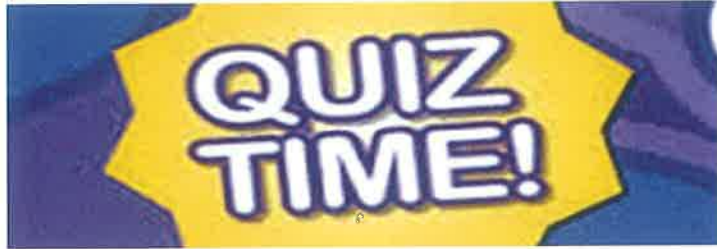
. . . Is a question you can never ask!

Mans v. Lebanon School Board, 122 N.H. 160 (1972):
A citizen does not have to offer a reason or demonstrate a need to inspect a governmental record. If a record is public, it must be disclosed regardless of the motive for the request. The issue is always whether "the public should have the information," not whether the particular requesting party should have the information.



In all cases, the public body bears the burden of proving that a record is not subject to public release. An agency must meet a minimum threshold to justify non-disclosure. It "is not required, however, to justify its refusal on a document-by-document basis. When generic determinations are used, the withholding should be justified category of document by category-of-document not file-by-file." *Murray v. State Police*, 154 N.H. 579, 583 (2006).

When you produce a document that is partially redacted, explain (at least generally) why the information is redacted (i.e., exempted from disclosure).



**In what year did New Hampshire's
Right-to-Know law become effective?**

- 1. 1975**
- 2. 1967**
- 3. 1962**
- 4. 1972**
- 5. 1970**




Exemptions we're going to talk about today:

1. Confidential Information
2. Private Information
3. Personnel Records
4. Internal Personnel Records
5. Law Enforcement Records



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.**



12

RSA 91-A:5 lists out the type of information that is exempted under the Right-to-Know Law.

91-A:5 Exemptions. – The following governmental records are exempted from the provisions of this chapter:

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.

The exemptions for internal personnel practices, confidential information, personnel information, and private information all come from **RSA 91-A:5, IV (on slide)**.

Keep in mind that there are other statutes—outside RSA Chapter 91-A—that exempt certain information from disclosure (e.g., RSA 159:6-a, documents related to licenses to carry exempt)

What is *confidential* information?

What is the **potential harm** that will result from disclosure?



CONFIDENTIAL



13

Goode v. New Hampshire Office of Legislative Budget Assistant, 148 N.H. 551, 554-55 (2002):

To show that information is sufficiently confidential to justify nondisclosure, the party resisting disclosure must prove that disclosure is likely:

- (1) to impair the State's ability to obtain necessary information in the future; or
 - (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.
- ❖ As this test illustrates, "the emphasis should be 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." The burden of proving whether

information is confidential rests with the party seeking non-disclosure.

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

Attorney-client privilege: 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 or if the body/agency discusses the record, unless counsel is present.

From the attorney general's memo, on confidential records:
Confidential Information. The public body must have a basis for invoking the exemption and may not simply mark a document "confidential" in an attempt to circumvent disclosure. In determining whether a governmental record must be disclosed, "the emphasis should be 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." *Goode v. LBA*, 148 N.H. 551, 554-55 (2002).²² To best effectuate the purposes of the Right-to-Know law, whether information is "confidential" must be determined objectively, and not based on the subjective expectations of the party generating it. See *Professional Firefighters of N.H. v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 709 (2010) (while employees of public body may not have expected their salary information to be made public, that does not make the information confidential under the Right-to-Know law).. Except when the result is plainly established by the Right-to-Know law itself, courts analyzing whether a "confidential"

government record should be disclosed will apply a test which balances the benefits of public disclosure against the benefits of non-disclosure in construing the scope of RSA 91-A:4 and RSA 91- A:5.

In *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), the Court held that a balancing test would be inappropriate where the legislative history was clear that internal police investigatory files were "records pertaining to internal personnel practices, which are categorically exempt from disclosure." In *Goode v. LBA*, 148 N.H. 551 (2002), the Court held that "while . . . 'work papers' is a category of confidential information under RSA 91-A:5, IV, there must be a balancing test applied to determine whether they are sufficiently confidential to justify non-disclosure." In *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996), the Court held that the motives of a particular party seeking disclosure are irrelevant when conducting the balancing test between the public's interest in disclosure and a private citizen's interests in privacy. There is a presumption in favor of disclosure and when no privacy interest is involved, disclosure is mandated. However, the general public must have a legitimate interest in the information and disclosure must serve the purpose of informing the public about the activities of the government. The New Hampshire Supreme Court adopted the United States Supreme Court's view that disclosure of information about private citizens in government files that reveals nothing about an agency's conduct is not within the purpose of the Right-to-Know law. *Lamy v. NH Public Utilities Commission*, 152 N.H. 106 (2005) (the names and addresses of PSNH's residential customers are private and disclosure does not inform the public about the conduct of the PUC. However, PSNH's business customers do not have a privacy interest and their names and addresses must be disclosed under the Right-to-Know law.); *Professional Firefighters of N.H. v. Local Gov't Ctr., Inc.*, 159 N.H. 699, 709–10 (2010) (employers' names

and salary information provides insight into the operations of the entity and must be disclosed); see also U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989). When release of records may cause an invasion of privacy, an ex parte in-camera review of the records by a court is appropriate. Union Leader Corp., 141 N.H. at 478.



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.

1. Private Interest: Determine whether there is actually a privacy interest at stake. The privacy interest must be judged using an objective standard—that is, it does not matter what this particular person's subjective beliefs about the privacy of the information are. If there's no privacy interest, stop here because the exemption cannot apply.

2. Public Interest: Assess the public's interest in the requested information. Disclosure of the information should inform the public about the conduct or activities of its government.

3. Balancing Test: Compare the weight of the private interest and the government's interest in nondisclosure against the weight of the public interest in disclosure. The more compelling interest dictates your response to the request.

" . . . [W]eigh the public's interest in disclosure against the government's interest in non-disclosure to determine whether the documents should be disclosed." *Goode v. New Hampshire Office of Legislative Budget Assistant*, 148 N.H. 551, 552 (2002).

Always redact the following private information from governmental records (this is not an exhaustive list):*

- Date of birth (generally acceptable to list age)
- Place of birth (town/city/state)
- Social Security number
- NH driver's license/driver ID number
- Grand Jury records
- Juvenile records
- Attorney work product (prosecution memoranda, memoranda of law not filed with a court)
- Medical records/information on medical condition
- Psychiatric records/information
- Educational records
- Names of juvenile witness/suspect named in a crime investigation report
- Criminal records obtained from the Central Repository
- Personnel records



*AG's Memo

15

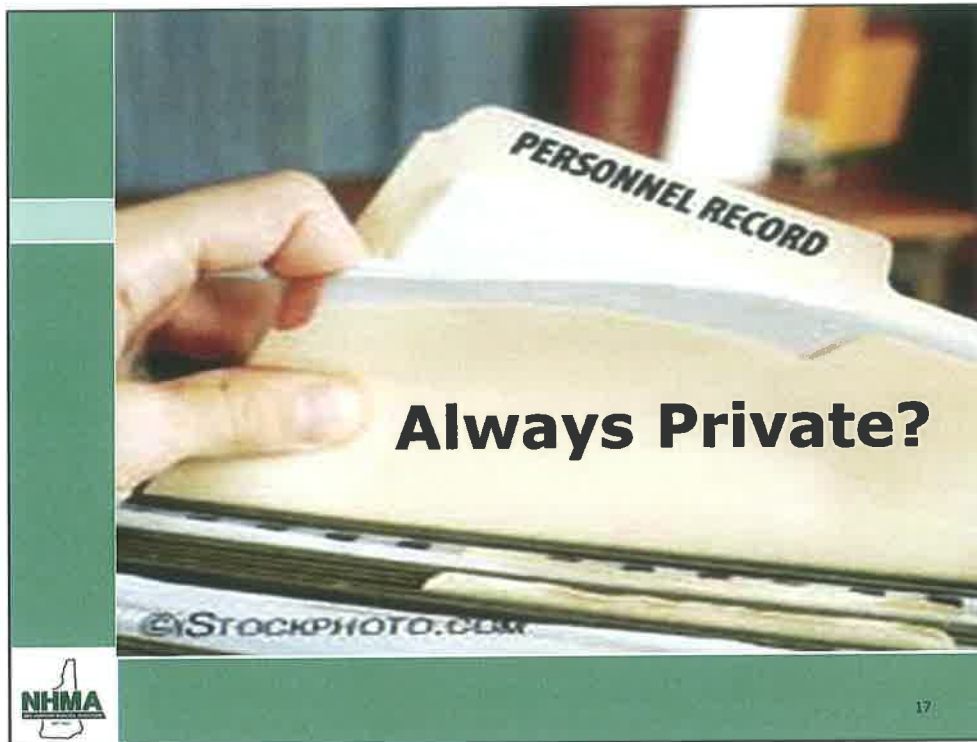
This list comes from the AG's Memo.

Welfare information also cannot be disclosed per RSA 165:2-c.

Generally redact or analyze the privacy interests of the following data (this is not an exhaustive list):*

- Home address
- Home telephone number
- Personal cell phone number
- Other unlisted telephone numbers
- E-911 Records





There has been a lot of debate on what personnel records are exempt. Many personnel records will be exempt under the privacy test. However, not all personnel-related information is exempt, as described below.

Mans v. Lebanon School Bd., 112 N.H. 160, 162 (1972):

- We know that not all information related to an individual's employment is per se exempt from disclosure. In *Mans*, the Court held that salary information of public school teachers, contained in the employment contracts, must be disclosed to the public.
- The Court said: "In the employment realm, the New Hampshire Supreme Court has interpreted this exemption to mean that 'financial information and personnel files and other information necessary to an individual's privacy need not be disclosed.' "
- Although the employment contract was a record contained within the teachers' personnel files, the Court declined to read the exemption broadly, construing it narrowly and in

favor of disclosure, concluding that “disclosure of salaries of schoolteachers is not a disclosure of those intimate details which ‘would constitute invasion of privacy.’ ” It found that the legislature intended “a full disclosure of the mode and manner of public expenditures for school purposes.”

- *Professional Firefighters v. LGC*, 159 N.H. 699 (2010): names and salaries of risk pool employees not exempt (information was essential to knowing how public money is being spent).

Union Leader Corp. v. New Hampshire Ret. Sys., 162 N.H. 673 (2011): Similarly, in 2011, the Court said that records of payments to retired public employees were also not exempt from disclosure under RSA 91-A:5, IV.

Clay v. Dover (Strafford Cty. Superior Court., No. 219-2014-CV-124, May 29, 2015): Superior Court case where judge determined that documents related to the hiring process of a new superintendent were not exempt from disclosure. This case is going on appeal. **Stay tuned.**

What’s the definition of a “personnel record”? The law doesn’t give us one, but the NH DOL regulations provide a definition of “personnel file”:

Lab 802.09 "Personnel file" as used in RSA 275:56 means any personnel records created and maintained by an employer and pertaining to an employee including and not limited to employment applications, internal evaluations, disciplinary documentation, payroll records, injury reports and performance assessments, whether maintained in one or more locations, unless such records are exempt from disclosure under RSA 275:56, III or are otherwise privileged or confidential by law. The term does not include recommendations, peer

evaluations or notes not generated or created by the employer.

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.



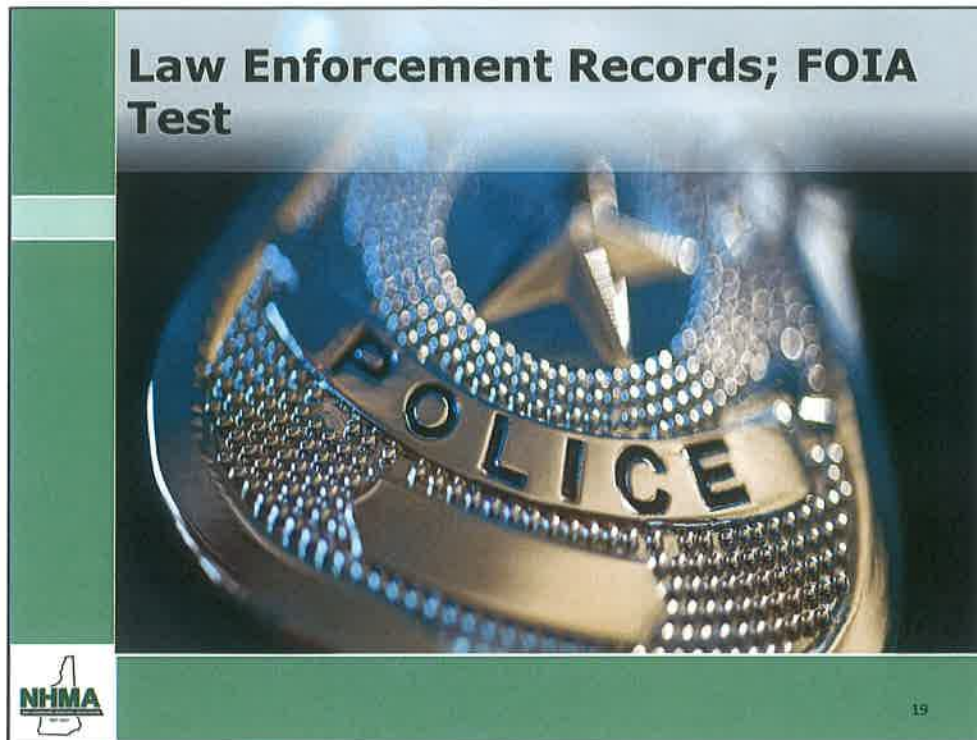
18

What are “internal personnel practices”?

- *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993): Documents compiled during an internal investigation of a police lieutenant were exempt from disclosure as an internal personnel practice. The Court determined that records that documented an investigation leading up to potential discipline—as these were—fell within the plain meaning of “internal personnel practices.”
- *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006): In a subsequent case, the Court similarly held that a report generated by a water district about alleged misconduct of its employee was also an exempt internal personnel practice.
- *Montenegro v. City of Dover*, 162 N.H. 641 (2011): The petitioners had requested the job titles of Dover employees who monitored surveillance equipment, and

the city had denied that request on the grounds that this information constituted internal personnel practices. The Court decided that these employee names were not internal personnel practices. In reaching this decision, the Court looked to *Fenniman* and *Hounsell*, as well as the federal courts' interpretation of a FOIA exemption (5 U.S.C. § 552(b)(2) (2006), also referred to as "Exemption 2"), "which shields from compelled disclosure documents related solely to the internal personnel rules and practices of an agency." *Milner v. Department of Navy*, 131 S. Ct. 1259, 1262 (2011). The *Milner* Court had reasoned that "[a]n agency's 'personnel rules and practices' are its rules and practices dealing with employee relations or human resources. . . . They concern the conditions of employment in federal agencies—such matters as hiring and firing, work rules and discipline, compensation and benefits." *Montenegro*, 162 N.H. at 650 (internal citations omitted). In light of *Milner*, *Fenniman*, and *Hounsell*, the New Hampshire Supreme Court in *Montenegro* held that the requested job titles were not records related to internal personnel practices because they were not "related to internal personnel discipline, . . . a quintessential example of an internal personnel practice," and were also not "akin to such matters as hiring and firing, work rules and discipline." *Montenegro*, 162 N.H. at 650 (internal citations omitted).

- Based on this line of cases, records and other information compiled or created as part of an investigation into misconduct of a public employee is exempt from disclosure as "internal personnel practices."



RSA Chapter 91-A does not address law enforcement records.

NH courts use federal FOIA test. 5 U.S.C. Section 552(b)(7), adopted in *Lodge v. Knowlton*, 118 N.H. 574 (1978)

To be exempt:

1. Record must be investigatory and compiled for law enforcement purposes
2. Record must meet at least one of the 6 elements in the FOIA test

| | |
|--|---|
| | <p><u>FOIA Test for Law Enforcement Records:</u></p> <p>Factor A: Interfere with law enforcement proceedings</p> <p>Factor B: Interfere with fair trial</p> <p>Factor C: Invasion of privacy</p> <p>Factor D: Confidential sources</p> <p>Factor E: Disclosing investigative techniques and procedures</p> <p>Factor F: Endangering life or safety</p> |
| | 20 |

Factor A: Interference w/law enforcement proceedings

details regarding initial allegations giving rise to investigation; interviews with witnesses and subjects; contacts and investigative reports furnished to the prosecuting attorneys; prosecutorial opinions reasonable belief that an investigation will lead to criminal charges at some point in the future *Murray v. City of Dover*, 162 N.H. 641 (2011); location, recording capabilities, run times, and retention periods for surveillance cameras exempt *Murray v. New Hampshire Div. State Police*, 154 N.H. 579 (2006)

Factor B: Interfere with fair trial

Pretrial situations, consult prosecutor
 Examples: records relating to
 Guilt or innocence of defendant
 Tests taken or refused by defendant
 Confessions (existence or absence of)
 Anything regarding prospective witnesses

Anything speculative or mentioning merits of case
Anything that would tend to prejudice potential jurors

Factor C: invasion of privacy

Attorney general advises using basically the same balancing test (Lamy) that we discussed earlier for Factor C.

Examples:

Marital status, legitimacy of children

Medical conditions, substance abuse issues

Domestic disputes

Names of witnesses and information they provided

Names of subjects of an investigation

Factor D: Confidential sources

Information that could identify or lead to identification of a confidential source

Was the person given the promise of confidentiality? If not express, was it reasonably implied?

Factor E: disclosing investigative techniques and procedures

Information could reasonably be expected make it easier to circumvent the law by providing those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection

Investigation and prosecution procedures, guidelines, techniques

Doesn't include information already well-known by the public

Factor F: Endangering life or safety

FOIA mentions law enforcement personnel

NH Supreme Court includes "any other person"

Could disclosure "reasonably be expected" to endanger someone?

Police personnel files – See RSA 105:13-b special rules





The Right-to-Know Law, RSA Chapter 91-A, never refers to "sealing minutes" or "sealed minutes."

Examples of information that may implicate a privacy interest in law enforcement records*:

- a. Marital status
- b. Legitimacy of children
- c. Sexual orientation
- d. Medical or mental health conditions
- e. Welfare recipient
- f. Consumption of alcohol or a controlled substance
- g. Domestic disturbances and disputes
- h. Names of witnesses who cooperated by providing information to authorities and the information provided by them;³²
- i. Names of subjects of investigation
- j. Names of children.



Resources available

NHMA's Publication
Knowing the Territory

NHMA's regional RTK
Workshops

Contact
NHMA!

225-7447 x 3408

or

legalinquiries@
nhmunicipal.org

AG's RTK Memo

NHMA Webinars
& On-Demands

New Hampshire Municipal Association

www.nhmunicipal.org

Thank
You!

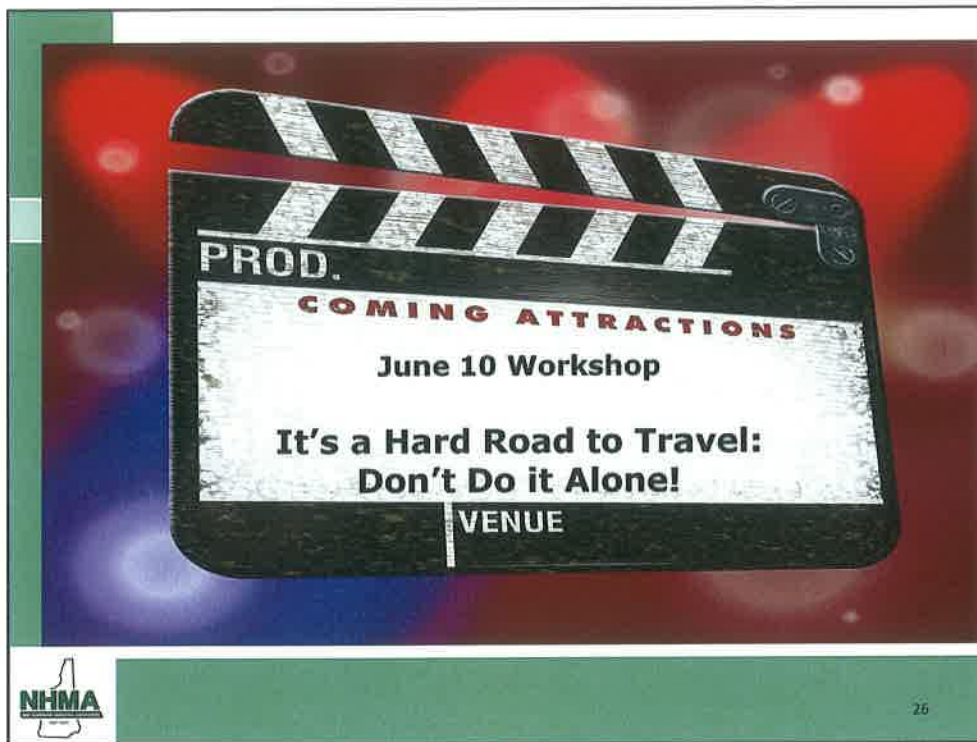




Spend an hour with Legal Services Counsel Stephen Buckley and Staff Attorney Margaret Byrnes, who will look at a variety of selected issues related to governmental records. To start, learn how to distinguish between non-public records and public records. Then, understand a municipality's actual legal obligations when responding to a records request. Next, take a closer look at three specific exemptions in RSA 91-A:5: "confidential, commercial, and financial information," "notes or materials made for personal use," and "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." Finally, this webinar will also cover some pointers regarding meeting minutes, particularly focusing on issues related to non-public session minutes. As always, bring your questions!

This webinar is open to members of the New Hampshire Municipal Association. **Registration deadline is noontime, May 10, 2016.**

[REGISTER HERE!](#)



SAVE THE DATE! COME BACK SOON FOR REGISTRATION DETAILS

With the 2015 revision of *A Hard Road to Travel* as a backdrop, this workshop will explore the law related to liability, regulation, and maintenance of municipal roads. Join NHMA Legal Services Counsel Stephen Buckley and Staff Attorney Margaret Byrnes for an in-depth review of these important areas, including updates in the law since the 2004 publication. There will be a particular focus on several areas that frequently create questions: ATVs, snowmobiles, and OHRVs; erecting gates and bars on Class VI roads; inclement weather policies; road insufficiencies; driveways and drainage; weight limits; and "No-Thru Trucking" designations. The workshop will include "real-life" scenarios for discussion and a Q&A session with the attorneys. Attendees will receive a copy of the 2015 edition of *A Hard Road To Travel*. Workshop runs from 9:00 a.m. - 12:00 p.m. Registration and continental breakfast start at 8:30 a.m.

Workshop registration, including 2015 edition of *A Hard Road to Travel*: \$90

Workshop registration only (no publication): \$45

Pre-registration is required one week prior to the workshop.

If you register and do not attend, you will be invoiced \$45 to cover the cost of meals

and materials.



2016 Local Officials Workshops

Workshops for seasoned and new municipal officials and employees of New Hampshire Municipal Association member towns.

Dates and Locations

Saturday, April 9

Jaffrey Civic Center
40 Main Street, Jaffrey

Wednesday, April 13

Grantham Town Hall
300 Route 10 South, Grantham
Sponsored by Primex

Wednesday, April 27

Hudson Community Center
12 Lions Ave., Hudson
Sponsored by Davis & Towle

Thursday, May 19

Melnyre Building, Auditorium,
16 Highland Street, Whitefield

Wednesday, May 25

Carroll County Complex,
Delegation/Commissioner Conference Rm
95 Water Village Rd., Ossipee
Sponsored by Primex

Saturday, June 4

25 Triangle Park Drive, Concord
Sponsored by Davis & Towle

Agenda

9:00 a.m.— 4:00 p.m.

Continental breakfast and lunch will be provided.
Registration and breakfast begins at 8:30 a.m.

Overview

Presented by NHMA's Legal Services attorneys, the workshops provide newly elected and appointed municipal officials with tools and information to effectively serve their communities. Topics will include the Right-to-Know Law, ethics and conflicts, town governance, public employment, liability and more. Interactive discussions will offer an opportunity to test scenarios, discuss concerns, ask questions and share ideas.

Attendees will receive a complimentary copy of NHMA's 2016 edition of publication, *Knowing the Territory*.

No Fee, On-line Registration Required!

To register online, please visit www.nhmunipal.org and click on the Calendar of Events. Space is limited!

Cancellation must be received 48 hours in advance. If cancellation is not received 48 hours in advance, NHMA will invoice you for \$20 to cover workshop costs, including meals.

Questions? Please call 800.852.3358, ext. 3350 or email NHMARegistrations@nhmunipal.org.



**Visit NHMA's Anniversary Webpage:
www.nhmunicipal.org/anniversary**





*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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