

WORKSHOP

**RIGHT TO KNOW LAW-
GOVERNMENTAL RECORDS
VIRTUAL WORKSHOP**

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October 6, 2020

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Today's Presenters



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Today's Presentation

Is it a governmental record?

Basic availability and access requirements

Exemptions to disclosure

Electronic records

The basics of records production

Record Retention

Remedies for violations

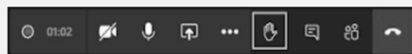
Wrap-up: Main Takeaways

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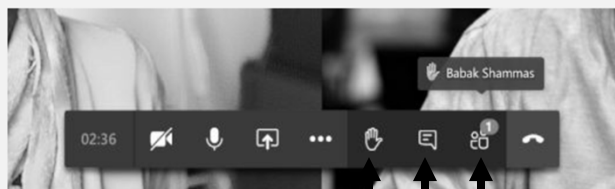
Raise your hand in a Teams meeting

During a meeting, you can raise a virtual hand to let people know you want to contribute without interrupting the conversation.

Just select Raise your hand  in the meeting controls.






Everyone in the meeting will see that you've got your hand up.




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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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“Information”

- ▶ knowledge,
- ▶ opinions,
- ▶ facts, or
- ▶ data of any kind

▶ in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.

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Public Body

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.

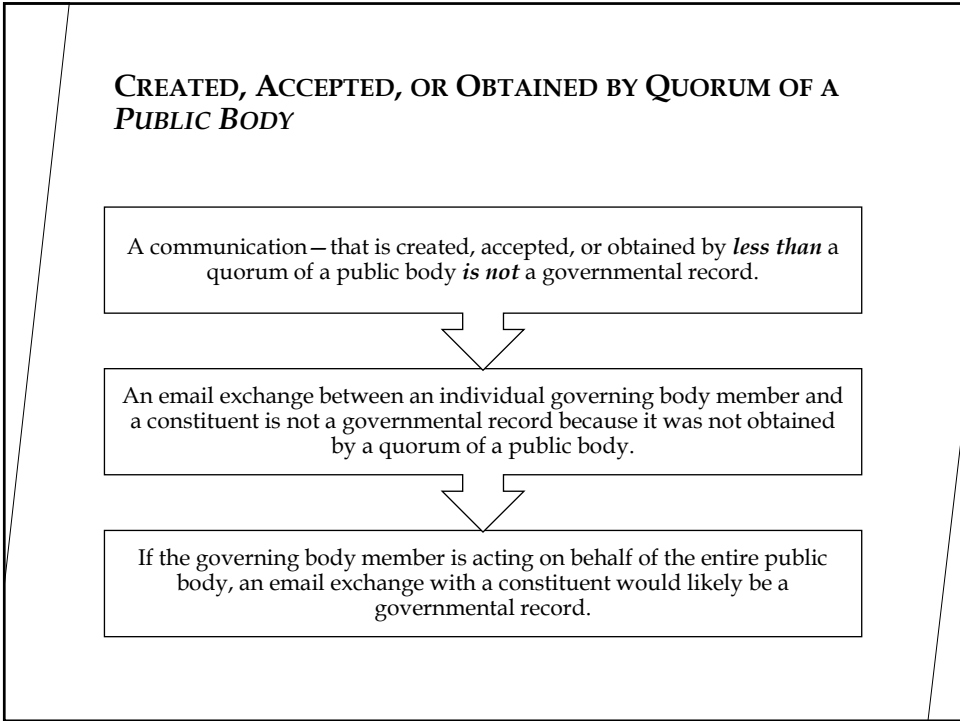
Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.

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New Case – What is not a Public Body?

- ▶ Where a committee of public officials only provides advice to planning board applicants, and not to the planning board, that committee is not an advisory committee subject to the Right-to-Know Law. *Paul Martin v. City of Rochester*
- ▶ City of Rochester's Technical Review Group (TRG) was not a public body subject to the public meeting rules of the Right-to-Know Law.
- ▶ Because the TRG's primary purpose was to provide advice to planning board applicants, not to the planning board, it was not an advisory committee as defined in RSA 91-A:1-a, I.

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Public Agency


- ▶ A “public agency” is any agency, authority, department, or office of the town, school district, or village district. RSA 91-A:1-a, V.

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ACCESS TO GOVERNMENTAL RECORDS



An individual's motives in seeking disclosure of public records are irrelevant to the question of access under the Right-to-Know Law.



The provisions of RSA Chapter 91-A are construed in a manner favoring disclosure and interpreting the exemptions to disclosure restrictively.

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Availability of Governmental Records

- ▶ Governmental records must be available during the regular business hours of the public body or agency.
- ▶ "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." RSA 91-A:4, III
- ▶ RSA 41:58 - Public records must be stored at office of the political subdivision.
- ▶ RSA 41:61 - Public records may not be loaned or removed except when discharging public duties.

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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

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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.

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New Decision: Union Leader v. Salem

- The exemption from disclosure under RSA 91-A:5, IV for “internal personnel practices” 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.
- 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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New Decision: Seacoast Newspaper v. Portsmouth

- Records that document disciplinary matters involving a municipal employee that are made part of the employee’s personnel file may be exempt from disclosure if that disclosure would invade a protected privacy interest of the employee and that disclosure does not inform the public about the conduct and activities of their government.
- However, if the disciplinary record would not invade a protected privacy interest of the employee, or, where the public interest in the disciplinary record outweighs the privacy interest of the employee, then the record must be disclosed.
- NH Department of Labor, NH Admin Rule Lab 802.08, states that “Personnel File” is defined as personnel records created and maintained by an employer and pertaining to an employee including and not limited to disciplinary documentation, it would be the better practice to keep and maintain all records concerning performance evaluations and disciplinary documents in an employee’s personnel file.

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Confidential, Commercial or Financial Information: RSA 91- A:5, IV

- ▶ 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.

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IT Security

- ▶ As of Aug. 4, RSA 91-A:5 is 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.

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| | | |
|--|---------|---|
| <p>Invasion of Privacy</p> <p>RSA 91-A:5, IV</p> | 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. |

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| | |
|----------------------------------|---|
| <p>Drafts & Notes</p> | <p>Preliminary Drafts - RSA 91-A:5, IX -</p> <ul style="list-style-type: none"> • "[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." |
| | <p>Personal Notes - RSA 91-A:5, VIII -</p> <ul style="list-style-type: none"> • "Any notes or other materials made for personal use that do not have an official purpose are exempt from disclosure." |

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OTHER EXEMPTIONS TO DISCLOSURE

- ▶ Governmental records are subject to disclosure “except as otherwise prohibited by statute or RSA 91-A:5.”
- ▶ RSA 91-A:4, I
- ▶ Other Statutes

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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

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What is a Law Enforcement Agency?

Was the record gathered for law enforcement purposes?

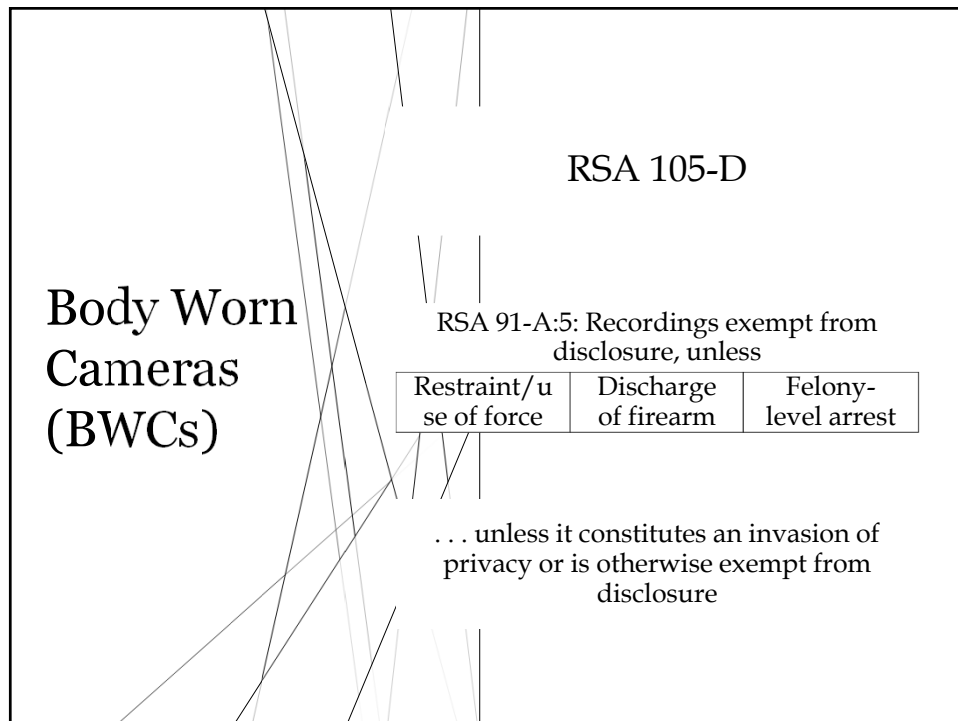
This exemption not just for apply to agencies that are officially designated as law enforcement agencies.

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

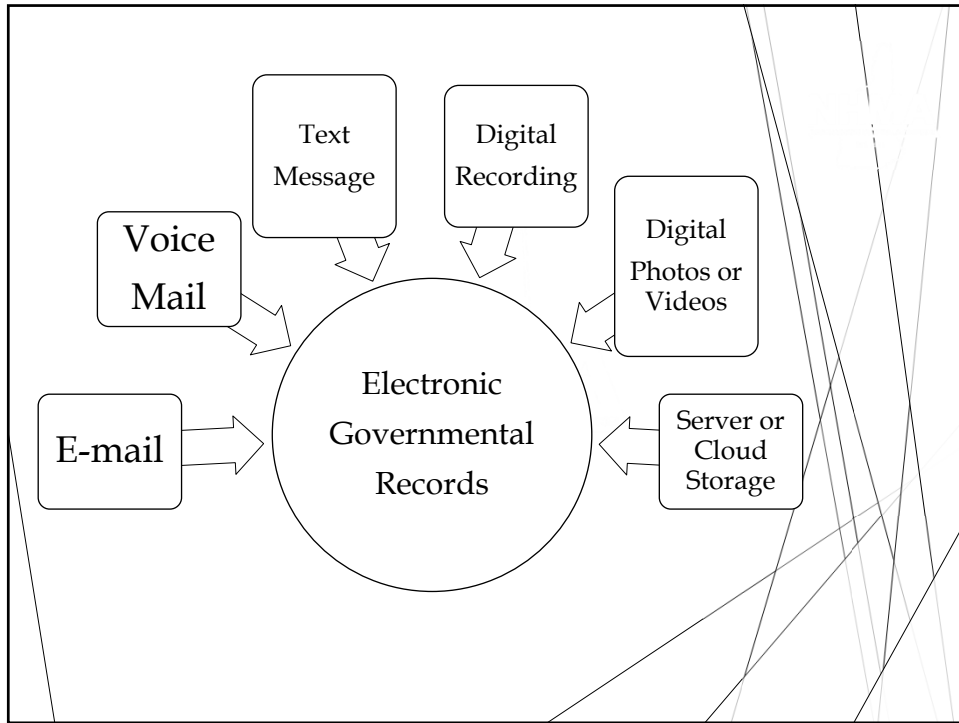
What are the authorized activities of the agency involved?

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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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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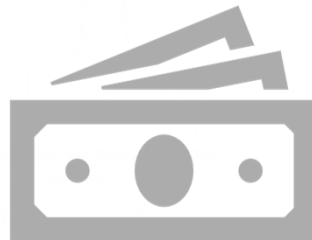
Basics of Record Production

- ▶ Records must be provided immediately *only* when they are immediately available for release. (But not under E.O. #23!)
- ▶ RTK *does not* give citizens the right to review records in any quantity and wherever kept immediately upon demand.
- ▶ Requiring appointment to review records is permitted.
- ▶ RTK does not require document “compilation.”

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No flat fees!

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



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New Case

Paul Martin v. Rochester

- ▶ N.H. Supreme Court rules that the city's public records copying fee of fifty cents per page for the first ten pages and then ten cents per page did reflect the "actual cost."
- ▶ The plaintiff argue that only a rate of four cents per copy would comply with RSA 91-A:4, IV.
- ▶ The testimony by the city manager that that the city based its copying fee on the cost of leasing copy machines, maintenance, capital costs of the machines, and the cost of paper was adequately demonstrated the fee charged was the "actual cost."
- ▶ The legislature did not mandate the use of a formulaic method for determining the actual cost for copying.

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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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Production of Electronic Records

- ▶ Green v. SAU #55
- ▶ 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.
- ▶ 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.

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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.

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**Archive
Paper
Records
in
PDF/A?**

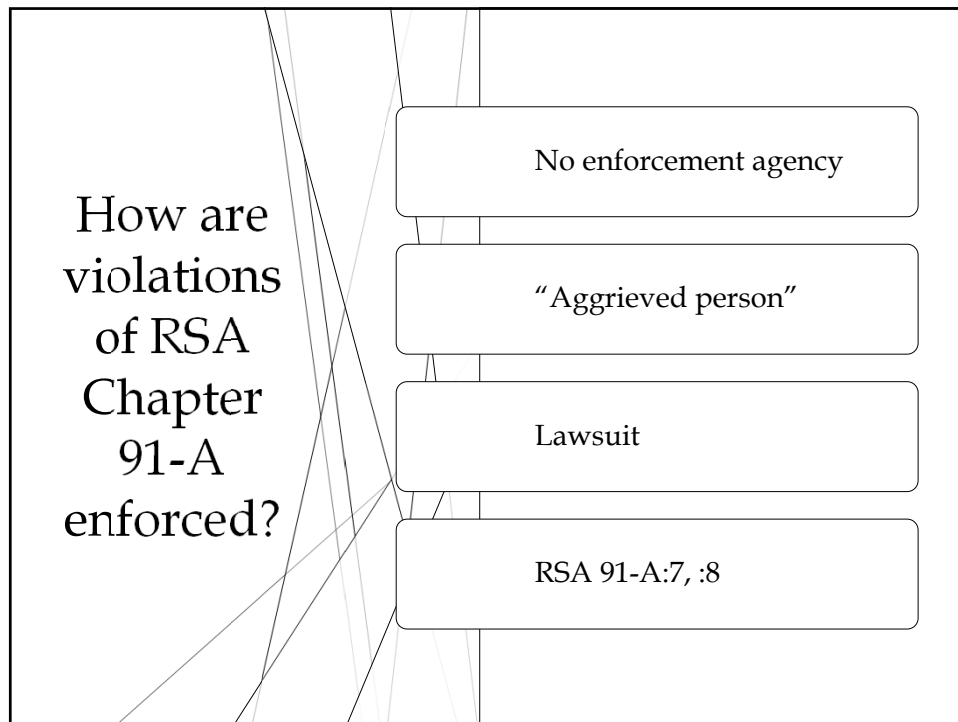
Any municipal records in paper form listed in RSA 33-A:3-a may be transferred to electronic form (PDF/A Format ONLY), and the original paper records may be disposed of as the municipality chooses.

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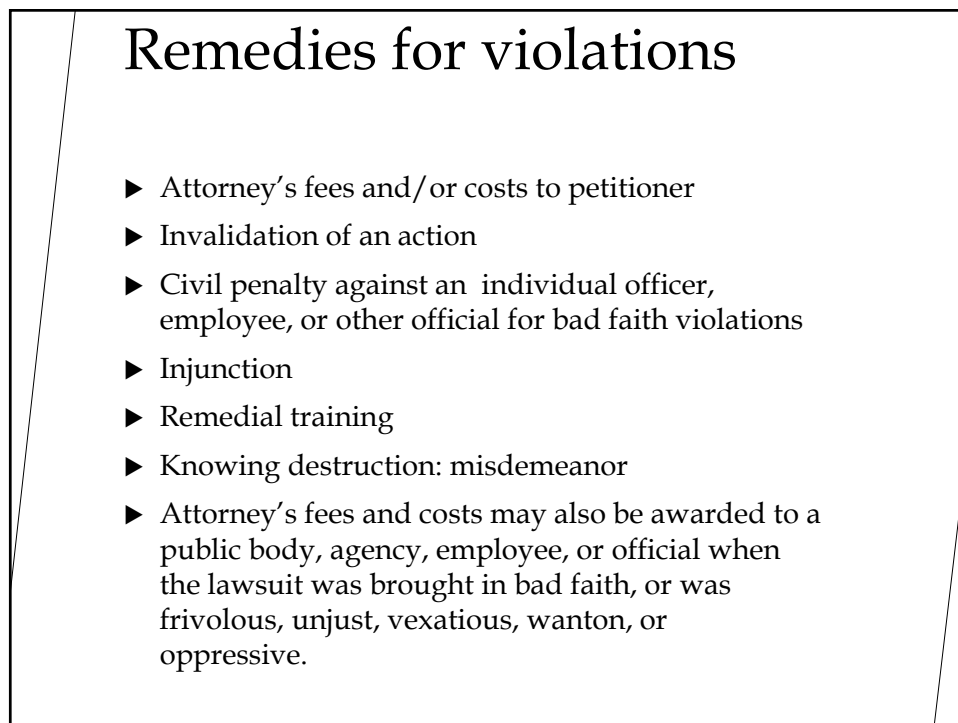
**RECORDINGS
OF MEETINGS**

- Not required
- Use and discard
- Disclose if they exist

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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

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for joining us for this workshop today!

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