

# 2024 Local Officials Workshop

Presented by:

- ▶ Stephen Buckley, Legal Services Counsel
- ▶ Jonathan Cowal, Municipal Services Counsel

May 7, 2024



# NHMA Bill Tracker: FastDemocracy

The New Hampshire Municipal Association (NHMA) represents the interests of cities and towns before the New Hampshire General Court (House and Senate) and various state agencies based on its member-adopted [principles and policies](#). The New Hampshire legislative session happens each year between the months of January and June. Each legislative cycle, NHMA tracks state actions that could significantly affect New Hampshire's 234 municipalities.

In addition to the weekly Legislative Bulletin, NHMA provides members access to FastDemocracy, an online bill tracking platform, for efficient, real-time updates to legislative activity of interest to members. Members do not need to create a FastDemocracy account to access this information, but they are able to create an account if they wish.

Click on the subgroups below to see information on bills from either the previous, or current legislative cycle within each category, and view the NHMA's stance on the measures. Subscribe to the bill list(s) to receive daily or weekly email updates, including new bill actions and upcoming hearings.

- ALL BILLS
- ECONOMIC DEVELOPMENT
- EDUCATION FUNDING
- ELECTIONS
- ENERGY AND ENVIRONMENT
- INFORMATION TECHNOLOGY
- LABOR
- LAND USE
- LOCAL AUTHORITY
- PROPERTY TAX
- RETIREMENT
- RIGHT-TO-KNOW
- STATE AID
- SUBSTANCE USE
- TRANSPORTATION

FAST DEMOCRACY:  
REVISIONS THIS SUMMER



# Fast Democracy Bill Table Reorganization

ALL BILLS

NHMA SUPPORTS

NHMA OPPOSES

Bills by Topic:

MUNICIPAL MANAGERS, ADMINISTRATORS, SELECT BOARDS AND COUNCILS

PLANNING / ZONING / LAND USE

RIGHT-TO-KNOW

STATE AID

MUNICIPAL BUDGET

PROPERTY TAX

RETIREMENT

EDUCATION FUNDING

TAX COLLECTORS

TRUSTEE OF THE TRUST FUND

HUMAN RESOURCE PROFESSIONALS / LABOR LAW

INFORMATION TECHNOLOGY

LIBRARIES

LOCAL WELFARE ADMINISTRATION

MODERATORS AND OTHER ELECTION OFFICIALS

CONSERVATION COMMISSION

ENERGY

PUBLIC HEALTH

PUBLIC SAFETY

PUBLIC WORKS

FINANCE - ALL BILLS

SOLID WASTE

TOWN AND CITY CLERKS



# Check Out Our Bill Tables

Get e-mail updates

Subscribe to this bill list

## Property Tax



1-33 of 33

NH 2024 HB 202

Title: relative to property tax abatements.

Support

Janigian Piemonte

The bill establishes a method to equalize market value for purposes of calculating property tax abatements.

Applicable NHMA Policy: NHMA supports legislation that allows municipalities to manage property tax levies in a manner that stabilizes tax rates and ensur

NHMA's Position: Support.

Tracking

NH 2024 HB 433

Title: providing that property tax exemptions granted prior to a home sale shall not be applied to the new homeowner.

Post Harvey-Bolia Bill Boyd

Tracking

NH 2024 HB 456

Title: relative to collecting road tolls on the output of separately metered electric vehicle chargers.

# And Subscribe for Weekly or Daily Updates!

Get e-mail updates

Subscribe to this bill list

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Do you want to get daily or weekly updates this bill list:

Assessors

Do you want to subscribe to the New Hampshire Association of Assessing Officials' bill list, so you don't miss any major developments or upcoming hearings

Name


Email address

Confirm your email address

How often do you want to receive E-Mail updates on the newest bill actions and upcoming hearings? Note: of course you'll only receive an email if there are updates. You can unsubscribe with one click.

Daily  Weekly

Subscribe



NHMA  
Advocacy

NH 2023 LSR 20...  
relative to the operation...  
Laurel Stavis  
Track Bill

NH 2023 LSR 20...  
relative to the transfer...  
Joshua Adjutant  
Track Bill

NH 2023 LSR 20...  
enabling municipalities...  
Ellen Read  
Track Bill

NH 2023 LSR 2023-0081

# *NHMA has a new member portal!*

We need you to log-in, create your password, and look around your member profile  
**IMPORTANT:** You will need this member log-in to get member pricing for NHMA events.



New Hampshire Municipal Association

A screenshot of a web login page. At the top, it says "Login". Below that are two input fields: "Username" with the text "jpellowe" and a red eye icon to toggle visibility; and "Password" with a red eye icon. Below the password field is a checkbox labeled "Remember My Login". A blue "Login" button is positioned below the checkbox. At the bottom of the form, there is a link that says "Forgot your password?".

Take Advantage of Your Member Benefits

## **3 EASY STEPS TO LOGIN**

**STEP 1.** Go to: <https://nhmunicipal.weblinkconnect.com/portal>.

**STEP 2:** Click “forgot password” if you’ve never logged in before.

**STEP 3:** One of two things will occur:

You will receive an email to set your password if you are already in our system. Please follow the instructions in the email. Check your spam folder!

OR you will receive the error message “A user with that email was not found” if you are not in our system. In this case, email us at [info@nhmunicipal.org](mailto:info@nhmunicipal.org).

# Today's Presenters

*Stephen Buckley*

*Legal Services Counsel*



*Jonathan Cowal*

*Municipal Services Counsel*



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# NHMA's Legal Advisory Service

Open 8:30 a.m. – 4:30 p.m.

- Email: [legalinquiries@nhmunicipal.org](mailto: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.

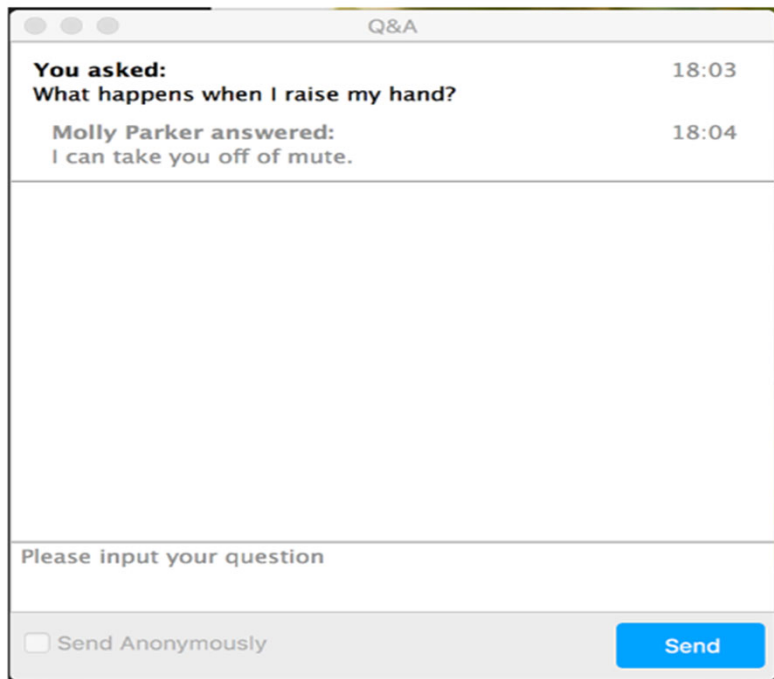
Goal: Response w/in 48 hours.



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# How Do I Ask a Question?



The screenshot shows a Zoom Q&A window with the following content:

Question	Time
<b>You asked:</b> What happens when I raise my hand?	18:03
<b>Molly Parker answered:</b> I can take you off of mute.	18:04

Below the table is a text input field with the placeholder text "Please input your question". At the bottom left, there is a checkbox labeled "Send Anonymously". At the bottom right, there is a blue "Send" button.

The chat function for this workshop has been disabled.

In order to ask a question of please use the Q&A function in Zoom.

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



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# GET TO KNOW HEALTHTRUST!

## Who is HealthTrust?

A nonprofit, public risk pool dedicated to serving our Members – New Hampshire's schools, towns, cities, counties and other public entities.

- *Exceptional service with a personal touch*
- *More than 70,000 NH public sector workers and their family members choose HealthTrust for their coverage*

## Our Board of Directors Represents You



**DANIEL ROSSNER**  
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SAJ #88 - Plymouth Schools



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Town Administrator,  
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**RUSSELL DEAN**  
Town Manager,  
Town of Exeter



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Social Studies Teacher,  
Winnacunnet High School



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# WHY HEALTHTRUST!

*Our focus is YOU!*

- Quality, cost-effective, comprehensive benefit plans
- Innovative programs
- Enrollee Services Center
- Slice of Life
- HealthTrust 360
- Secure Enrollee Portal - [www.healthtrustnh.org](http://www.healthtrustnh.org)
- Transition Care & Survivor Care
- Vision and Hearing Discount Programs

## Anthem Blue Cross and Blue Shield

- Extensive Provider Network
- [LiveHealth Online](#), AWARE Recovery Care, Lark

## CVS Caremark

- Nationwide Network of Retail Pharmacies
- Maintenance Choice (Mail Service or CVS Pharmacy)

## Northeast Delta Dental

- Extensive Provider Network

## National Insurance Services (NIS)

- Life and Long-Term Disability



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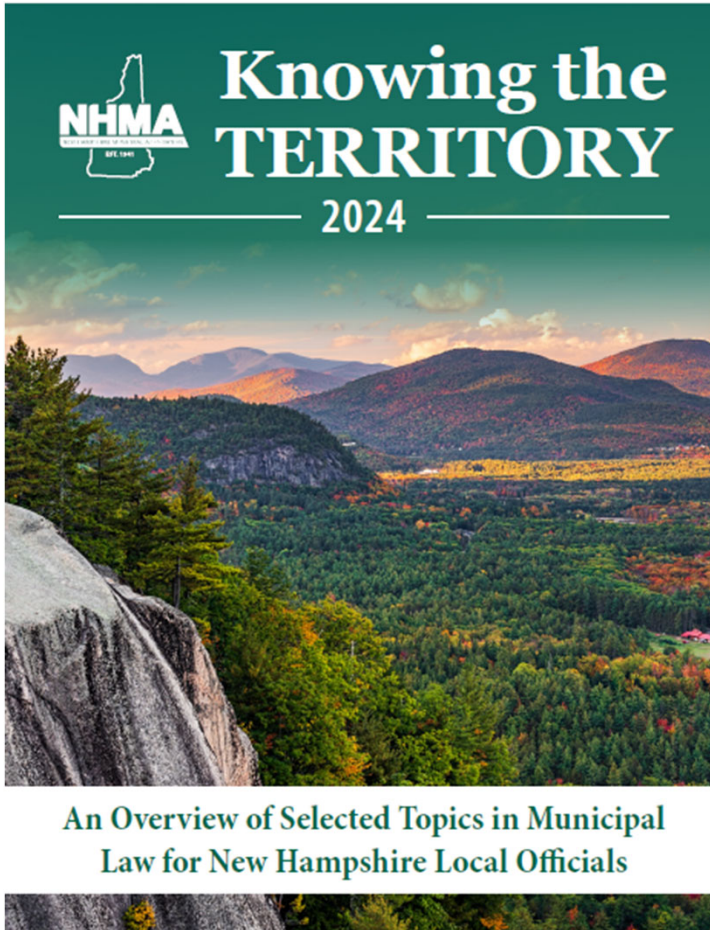


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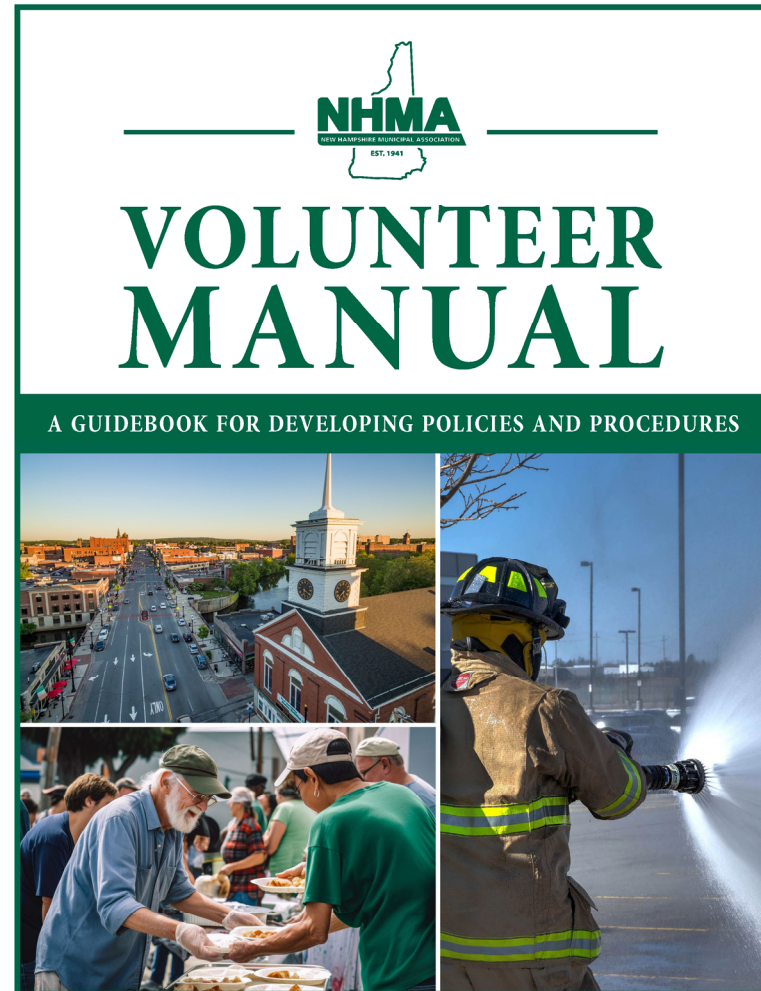
# *Knowing the Territory – Electronic*

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# Volunteer Manual – New Resource

- Frequently asked questions for new volunteers
- Volunteer Application Form
- Volunteer Position Descriptions Containing:
  - ✓ Duties of Position
  - ✓ Responsibilities
  - ✓ Appointing Authority
  - ✓ Term of Office
  - ✓ Time Commitment
  - ✓ Qualifications
  - ✓ Support provided



# Governance & Select Board Authority



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# Types of Governmental Entities

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Cities - 13, Operate via a Charter

---

Towns – 221, Traditional, SB2 or Charter

---

Village Districts – 98, special purposes

---

School Districts

---

Counties

---

Intergovernmental Agreements – RSA 53-A



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# Authority of Towns & Cities

- ✓ **No Home Rule:** The Legislature grants the power act in particular fields of law, and silence in the law does not imply authority.
- ✓ **Statutory Law:** Revised Statutes Annotated published by Thomson Reuters, available online: <http://www.gencourt.state.nh.us/rsa/html/indexes/default.html>
- ✓ **Administrative Rules:** <http://www.gencourt.state.nh.us/rules/>
- ✓ **NH Supreme Court Orders & Decisions:** <https://www.courts.nh.gov/our-courts/supreme-court/orders-and-opinions>
- ✓ **Preemption:** Article VI of the U.S. Constitution = Supreme Law of the Land. State statute can occupy a field of law with the intent to supersede local regulation.



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# Separation of Powers

“Governing body” means the select board or town/city council, or board of aldermen; manage prudential affairs  
– RSA 21:48

“Town” or “legislative body” means the town meeting, town/city council, or aldermen  
– RSA 21:47



# Select Board – General Principles



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## Select Board as Governing Body

- 3 members by default may have 5 members if approved by town meeting
- The words "selectwoman," "selectperson," and "select board" may be used interchangeably with "selectman" in all instances, where appropriate. RSA 21:28
- Select board does not have alternates, *except* pro tem may be appointed by the absent board member to perform election duties. RSA 658:21-a
- A select board only takes official actions as a select board through a majority of the members



# Actions by Select Board at Public Meetings

All actions taken by the select board must be voted on by a majority of the board at a public meeting that complies with the Right to Know Law, RSA chapter 91-A, ***PROVIDED, HOWEVER:***

- Under RSA 41:29 the select board can approve a manifest for payment of town expenses noncontemporaneously (no need for a public meeting with quorum of the select board).
- Acting as the assessing officials the select board may sign a notice of intent to cut under RSA 79:10 outside a public meeting. When a notice is to be signed by the assessing officials outside a public meeting, public notice shall be posted by the municipality at least 24 hours, excluding Sundays and holidays, before it is signed. The notice shall be posted in the 2 places where the municipality regularly posts notices of its governing body meetings.



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# Town Meeting Elections



# The Town Meeting

Elects town officials

Approves all appropriations

Votes to adopt Most Ordinances & Bylaws – RSA 31:39

Citizen authority to propose warrant articles

Citizens can petition for special town meeting

Must approve sale or purchase of town real property unless RSA 41:14-a has been adopted



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# Forms of Town Meeting

## **Traditional:**

1. Ballot vote: Vote by official ballot to elect officers, adopt or amend zoning ordinance, or other matters allowed/required to appear on official ballot.
2. Business session; discuss and amend warrant articles and vote on whether to adopt the articles

## **SB2:**

1. Divides town meeting into two parts
2. First session – “Deliberative Session” for debate and amendments of article language
3. Second session – “Official Ballot Voting Day” voting on all warrant articles and elections
4. If operating budget rejected by voters, SB 2 towns have default budget option





## Select Board: Town Meeting & Warrant Articles

- Select Board sets date of business meeting or deliberative session and calls special town meeting
- Petitioned warrant articles signed by 25 voters shall be placed on the warrant with only minor textural modifications that cannot change the intended effect of the article
- All **other** separate warrant articles for any purpose, including appropriations, only get placed on the warrant by the select board
- Petitioned articles have no special status and may be amended by the business meeting or deliberative session
- Order of Warrant – Mainly decided by Select Board:
  - ✓ Election of Officers, Zoning Amendments, other Official Ballot questions –
  - ✓ Article to approve bond greater than \$100,000
  - ✓ Operating Budget
  - ✓ Collective Bargaining Agreements



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# Content of Warrant Articles

- The Municipal Tax Rate Setting Portal (MTRSP) will populate your draft warrant with DRA recommended warrant article language
- Handout – DRA Suggested Warrant Articles.
- What about illegal warrant articles? A warrant article proposes to accomplish a rule or regulation not within authority of the meeting?:
  - ✓ If adopted the article may only be advisory
  - ✓ Provide guidance on legality of article at the deliberative or business meeting



# Select Board & Elections

- Members of the Select Board are Election Officers. RSA 652:14.
- NH Constitution requires the attendance of the entire select board during voting and vote tabulation at a State General Election. As for town and school district elections, the presence of the entire select board is not mandated, but it is recommended.
- The Select Board shall provide for a suitable place in which to hold state and town elections and shall see that the same is “warmed, lighted, and furnished with proper supplies and conveniences.” RSA 658:9
- Along with the clerk and the moderator, the Select Board constitute the Board of Recount. RSA 669:32.



# NHMA Important Date Calendars

- [2023 Important Dates General Calendar](#)
- [2024 Important Dates General Calendar](#)
- [2024 Important Dates - SB2 March Town Meeting](#)
- [2024 Important Dates - SB2 April Town Meeting](#)
- [2024 Important Dates - SB2 May Town Meeting](#)
- [2024 Important Dates - Traditional March Town Meeting](#)
- [2024 Important Dates - Traditional May Town Meeting](#)

The screenshot shows a web interface for the 'Important Dates Calendar'. At the top right, it says 'Hello Stephen Buckley Log out'. Below the navigation bar, there is a breadcrumb trail: 'Home > Resources & Publications > Important Dates Calendar >'. The main heading is 'Important Dates Calendar'. There is a dropdown menu set to 'General Calendar'. To the right of the dropdown are two buttons: 'DOWNLOAD ICAL CALENDAR' and 'SUBSCRIBE TO ICAL CALENDAR'. Below the dropdown is a 'Choose Calendar' button. There are two view options: 'Month View' (selected) and 'List View'. The calendar for 'March 2024' is displayed with navigation arrows for 'PREV' and 'NEXT'. The calendar grid shows the following dates: Sun 25, Mon 26, Tue 27, Wed 28, Thu 29, Fri 1 (Property tax abatement), and Sat 2.



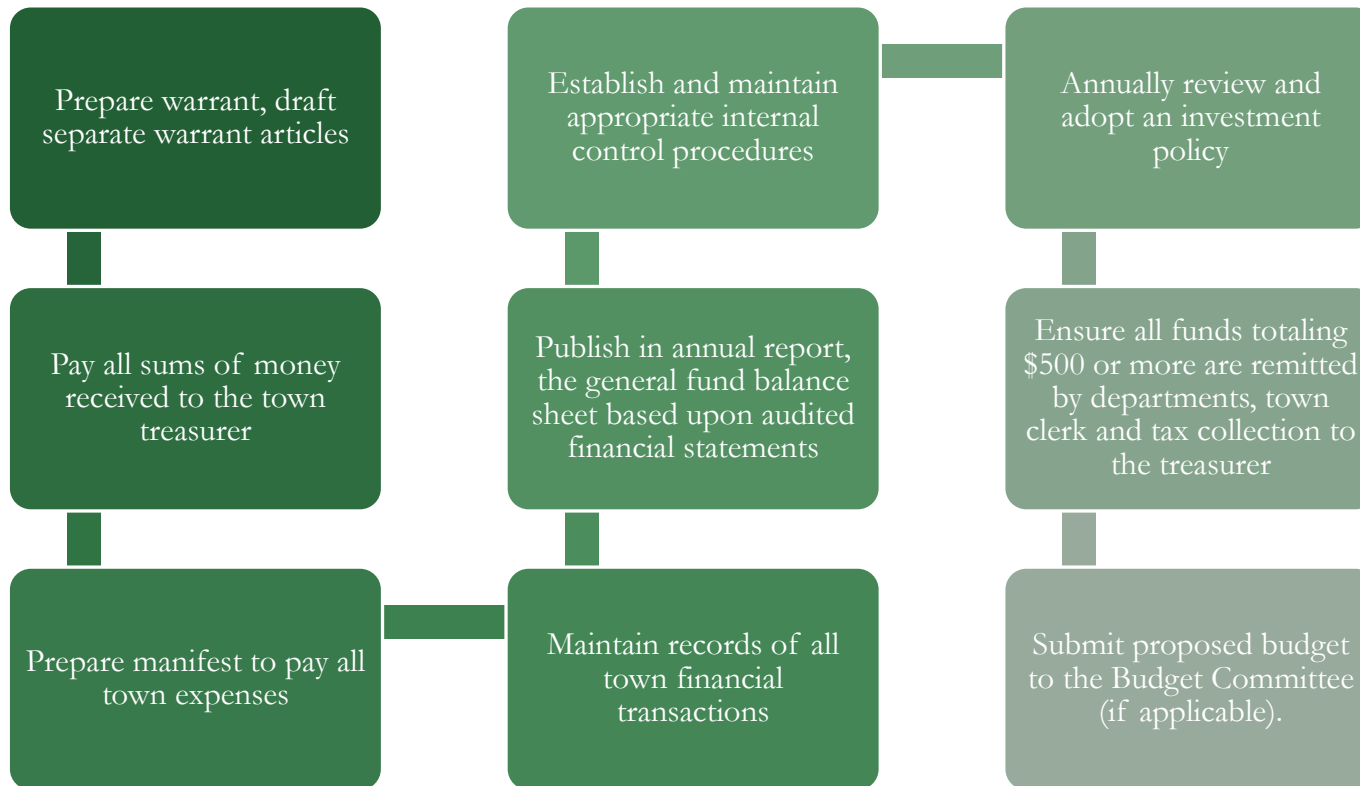
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# Budgeting & Spending Issues



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# Select Board & Budgeting



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# Bond Issues & Borrowing

**Debt Limit** –the total amount of debt that may be outstanding at any one time.

This limit is calculated as a percentage of the total market value (equalized assessed value) of all taxable property in town.

- 3 % for cities,
- 3 % for towns,
- 1 % for village districts

The total debt limit for any municipality that contains an overlapping political subdivision (such as a school district and town that cover the same geographic area) can be limited to 9.75 percent. RSA 33:4-a and 33:4-b.

Tax anticipation notes do not count as part of the municipality's total debt limit.



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# Acceptance of Gifts

- Under RSA 31:19, II the select board can be authorized by town meeting to accept gifts, legacies and devises.
  - ✓ A gift is synonymous with a donation.
  - ✓ A legacy is a donation receive from an estate.
  - ✓ A devise is the donation of real property from an estate.
  - ✓ Acceptance would take at a public meeting of the select board through a motion to accept the gift for the purposes expressed by the donor.
  - ✓ The donated sum would be deposited into a restricted account held in the custody of the Trustees of Trust Funds accompanied by instructions from the select board dictating for what purposes the donated sum may be spent.



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## Select Board's Other Essential - Executive, Managerial, & Administrative Duties

- Manages prudential affairs, RSA 41:8
- Regulates town highways, RSA 41:11
- Manages public property, RSA 41:11-a/41:14-a
- Makes most appointments to town boards & committees and fills vacancies
- Manage Municipal Communications: Website & Social Media



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# Key Prudential Affairs

- Select Board manages the town's legal affairs, hires town counsel, etc.
- Approves tax warrant and grants or denies abatements and exemptions (unless municipality has a board of assessors)
- Manages employment; adopts or amends personnel policies, hiring, discipline and firing.
- Makes most appointments to town boards & committees and fills vacancies



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# Manage Municipal Highways

- Select Board regulates the use of all town highways in the same manner as city councils under RSA 47:17 and adopts bylaws and ordinances to:
  - ✓ Regulate the use of highways (street opening permits, placement of signs, installation of railings)
  - ✓ Regulate traffic control devices (traffic lights, stop signs, etc., subject to latest edition of the Manual on Uniform Traffic Control Devices)
  - ✓ Regulate parking (control the parking, standing and stopping of automobiles)
  - ✓ Approve OHRV use on town roads – RSA 215-A:6, IX



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# Manage Municipal Property

- Select Board manages all real property owned by the town unless delegated to other public officers under RSA 31:112 (town forest) RSA 35-B (recreation commission) RSA 36-A:4 (conservation commission) and RSA 202-A:6 (library):
  - ✓ Includes the power to rent or lease town property during periods not needed for public use, provided, however, that any rental or lease agreement for a period of more than one year shall not be valid unless ratified by vote of the town.
  - ✓ Town Meeting can vote to permit select board to rent or lease for up to 5 years.



# Vacancies & Appointments

- Generally, a vacancy occurs in public office when the elected or appointed official resigns, ceases to have domicile in town (where required) or dies. RSA 652:12
- Because there is no clear law on how an official submits their resignation and when it is effective, the select board should have a written policy, that all resignations shall be in writing and shall become effective when delivered to the board.
- In most instances the select board makes all appointments and fill vacancies.
- When filling a vacancy in an elected position, the person appointed in most instances serves until the next town meeting where a person is elected to serve the unexpired term or is elected to a new term as the case may be. RSA 669:61.
- A person appointed or elected does not assume their office until they are “qualified,” and that requires to office holder to take the oath of office as required by RSA chapter 42.



# Select Board Manages Government Communication

- Under the Government Speech Doctrine, municipalities can control the content of information provided on municipal websites and social media accounts, this authority is exercised by the select board
- Municipalities can adopt policies that controls the content of signs and flags that are displayed at government venues
- It is recommended municipalities adopt written policy stating the government venue is not intended to serve as a forum of free expression by the public, rather any sign, flag or information displayed is an expression of the sentiments of local government.
- To avoid liability for deleting or blocking social media posts a public official should clearly label a personal social media account as only expressing personal views that do not represent the views of the government employer. *Lindke v. Freed*, 2024 U.S. LEXIS 1214



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# Checklist for Adopting Ordinances



**Authority – Derived from statute, explicit or inherent**



**Preemption? – Does ordinance conflict with Federal or State Statute?**



**Who votes/adopts? – Is ordinance one the meeting can adopt or is the ordinance enactment delegated to another board or body?**



**Procedure – Does the ordinance require notice or hearings before the meeting?**



**Enforcement – Pattern of non-enforcement may = policy of non-enforcement**

# Select Board Supervisory Authority Over Certain Key Officials

## ➤ Road Agent – RSA 231:65

The selectmen may supervise the methods and manner of performance of such agents.

## ➤ Appointed Police Chief – RSA 105:2-a

Direct and control all employees in their normal course of duty and shall be responsible for the efficient and economical use of all department equipment.

## ➤ Appointed Fire Chief – RSA 154:5

Direct and control all employees in their normal course of duty and shall be responsible for the efficient and economical use of all department equipment

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## Select Board Relationship with Other Elected Officials, Generally



- ▶ No Interference
- ▶ Cooperation
- ▶ Statutory Term and Duties



## Town Administrator:

- ✓ Not defined in statute
- ✓ Employee Appointed by Select Board
- ✓ Duties defined by written contract, job description or personnel manual

## Town Manager – RSA chapter 37:

- ✓ Duties defined by statute
- ✓ Must be adopted by town meeting
- ✓ Administrative/supervisory head of all departments
- ✓ Responsible to the governing body, serves at their pleasure or as set forth in written contract



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## 2024 Local Officials Workshop



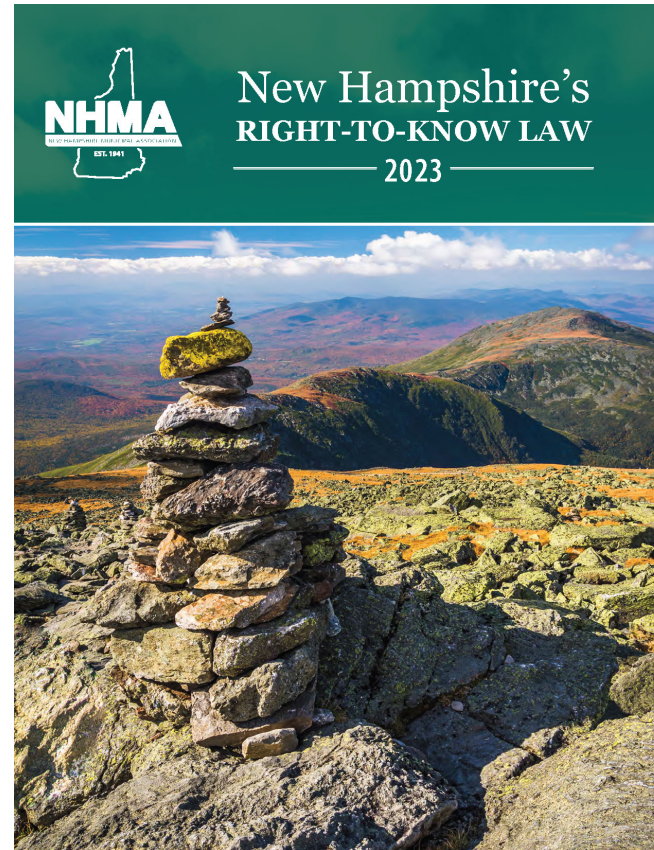
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# NHMA's Publication: *New Hampshire's Right-to-Know Law*

- Glossary
- Remote Participation Checklist
- Nonpublic Session Checklist
- Law Enforcement Guidance
- Complete copy 91-A & 33-A
- Table of Cases
- Table of Statutes



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# Overview of How RTK Governs Meetings Content

- I. What is a “meeting”?
- II. What is not a meeting, i.e., a “nonmeeting”?
- III. What are the requirements for holding a proper “meeting”?
- IV. How to hold meetings virtually.



# What is a Public Meeting? RSA 91-A:2



Quorum



Public body



Convenes so that they can communicate contemporaneously



To discuss or act upon a something over which the public body has supervision, control, jurisdiction, or advisory power

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# Quorum



Majority of  
membership



Can't define as more  
than majority to  
circumvent law



Another statute may  
apply

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# Public Body

## RSA 91-A:1-a, VI:

- Any legislative body, governing body, board, commission, committee of any county, town, municipal corporation, school district, SAU or other political subdivision
- Any committee, subcommittee, advisory committee thereto
- New Case: But a committee of city employees providing advice to planning board applicants is not a public body *Martin v. Rochester*





# When Public Meetings – Purpose of Public Meetings



Convenes such that all participating members are able to communicate with each other contemporaneously

In-person  
Email?  
Phone?



To discuss or act upon matters which the Public Body has Supervision, Control, Jurisdiction, or Advisory Power

Any “business” the body deals with  
Construe broadly

# Meetings Among Public Body Members Outside of Public Meetings

Meetings of public body members that are less than a quorum to discuss public business should not be undertaken – all public business should only be discussed at properly convened public meetings

91-A:2-a Communications Outside Meetings. –

I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III

II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1



# What is Not a “Meeting”? (i.e., “Non-meeting”)



Social or other encounter, no decisions



Collective bargaining



Consultation with legal counsel



Circulation of draft documents



*Different than nonpublic session!*

# What are the Requirements of a Public Meeting?



Public notice



Open to the public



Meeting minutes

# Posting Requirements



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# Switching Back to In-Person Meetings

- Emergency Order #12, allowed virtual meetings during the State of Emergency
- Since State of Emergency expired on June 11, 2021, boards can still have partially remote meetings
  - There must be a physical location for the public to attend, and, in most cases,
  - A quorum of the board must be present at that location.
- Nothing prohibits boards from continuing to offer electronic access (telephonic, Zoom, etc.) to the public.



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## Option 1: Remote Board Member Participation RSA 91-A:2, III(a)



- Public body *may* allow
- Personal attendance “not practical” (in minutes)
- Quorum *present at physical location*
- All board members can hear and be heard
- Identify board members in remote location
- All votes by roll call

## Option 2: “Emergency” RSA 91-A:2, III(b)

- Chair must declare that “emergency” exists sufficient to satisfy requirements of RSA 91-A:2, III.
- Still requires physical location.
- However, a quorum of the board need not be present at the physical location.
- Everyone can hear and be heard.
- Identify persons in remote location.
- All votes by roll call.

**HELP**  
**EMERGENCY**



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# Tips for Electronic Communications that Comply with 91-A

- ✓ Use an administrative person to send an email.
- ✓ Put the recipients' email addresses in the BCC line of the email to prevent the possibility of "Reply All."
- ✓ Sending an email to a quorum of a public body could be deemed a violation of RSA 91-A where a recipient public body member could hit reply all and create an improper electronic conversation
- ✓ Use official city/town email addresses.
- ✓ Leave discussion and deliberation of official matters for a public meeting, a properly-held nonpublic session, or proper "non-meeting."



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# Meetings “Open to the Public”

- “All meetings . . . shall be open to the public.” RSA 91-A:2, II.
- “Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting.”
- Public has right to record, etc.
- No secret ballot voting.
- Public Comment?



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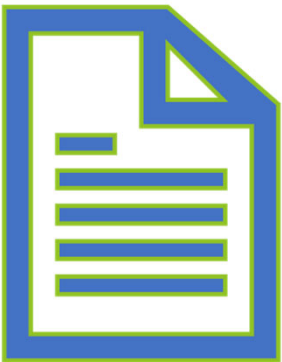
# Public Comment: Some Observations

- The public body should have rules governing public comment before it occurs. Explain the rules clearly to everyone at every meeting. Repeat as necessary.
- When you allow public comment the First Amendment applies – only “time, place and manner” restrictions -no content restriction
- You can limit time for comments, require speaking in order of sign-up.
- You cannot require only positive comments, or prohibit comments about municipal employees
- A person who is not complying with the public comment rules, and after reminders by the chair, may in extreme cases be removed from the meeting by law enforcement (*State v. Dominic*, 117 N.H. 573 (1977)).



# Public Meeting Minutes

## RSA 91-A:2



- Minimum required contents:
  - (1) the names of members, (2) persons appearing before the public bodies, (3) a brief description of the subject matter discussed, (4) state final decisions made, and, (5) state the names of the members who made or seconded each motion shall be recorded in the minutes.
- Made available within 5 business days.
- Posting requirements–
  - RSA 91-A:2, II-b(a)
- If the software used to conduct a remote meeting allows for recording, use it to aid the minute taker, but remember that recordings are not a substitute for written minutes.

# Nonpublic Sessions

## RSA 91-A:3

It's a nonpublic session, not a nonpublic meeting

A nonpublic session is different from a “non-meeting”

Nonpublic session is the exception, not the rule

Nonpublic sessions are permitted, not required

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# When May a Public Body Enter Nonpublic Session?\*

## RSA 91-A:3, II

- Public employee (specific employee)
- Hiring
- Reputation
- Real or personal property
- Lawsuits
- Emergency preparation
- Discuss legal advice
- Discuss student tuition contract

\*Most common, but not complete list

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# How Does a Public Body Enter Nonpublic Session? RSA 91-A:3, I



Motion to enter nonpublic session must be made and seconded.



Motion must state on its face the specific exemption relied upon.



Vote must be by roll call; simple majority is sufficient. RSA 91-A:3, I(b).

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## **RSA 91-A:3, II (a) Dismissal, Promotion, Compensation, Discipline, Investigation of Charges Concerning a Public Employee**

- Must concern a particular municipal employee – not a grouping of employees or a department
- This provision states that the meeting must be held in public if the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
  - Thus, the “right to a meeting” refers to some written rule entitling the employee to a public airing of the matter under investigation.
  - By way of example, under RSA 41:48, an appointed police officer cannot be removed from office unless she is provided notice and a public hearing before the governing body.
  - Similarly, under RSA 202-A:17, no public employee of a public library can be removed from employment unless they are provided written notice and a public hearing on their removal if requested.



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## **RSA 91-A:3, II (c) Matters Which, if Discussed in Public, Would Likely Affect Adversely the Reputation of Any Person, Other than a Member of the Public Body Itself**

- The harm to reputation must be severe and not trivial
- The claim of reputational harm cannot be asserted by a member of the public body that is convening the nonpublic session
- Person who might suffer the reputational harm can nevertheless request an open meeting
- This exemption extends to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant
- Notice of a nonpublic session based on harm to reputation need not be provided to the person whose reputation could be adversely affected. *Sivalingam v. Newton*, 174 N.H. 489 (2021)



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# Minutes of Nonpublic Sessions



Minutes must be kept—  
same as for public session.



Must “record all actions in  
such a manner that the  
vote of each member is  
ascertained and recorded.”

# Conducting the Nonpublic Session

May make decisions in nonpublic session

Member objecting to violations—note objection. If board persists, objecting member may continue to participate without being subject to penalties

RSA 91-A:2, II-a

Returning to public session



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# Other Considerations

Include nonpublic session on posted agenda

Timing—beginning or end of meeting?

Attendance by non-members

- Legally, there is no limit on who may be permitted to attend a nonpublic session. However, it is best to exclude anyone whose presence is not essential. This may mean excusing the administrator and/or the recording secretary and instead having one of the board members take minutes. Whether to do this is a judgment call to be made by the board.



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## Disclose or Seal?

Minutes must be publicly disclosed within 72 hours unless board determines, by 2/3 vote taken in public session, that:

- Disclosure would have adverse effect on reputation;
- Disclosure would “render the proposed action ineffective”; or
- Discussion in nonpublic session pertained to terrorism.



# New Law: HB 108

## Maintain List of Nonpublic Meeting Minutes

Effective January 1, 2022

List of sealed nonpublic meeting minutes must:

- Identify the public body
  - State the date & time of the nonpublic session
  - State the exemption for the nonpublic session
  - State the date of the decision to seal the minutes
  - State the date of any subsequent decision to unseal minutes
- Minutes sealed under RSA 91-A:3, II (d) (sale or acquisition of real or personal property) “shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.”



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# New Law: HB 321

## Sealed Nonpublic Meeting Minutes Review Procedure

Effective October 3, 2023

- HB 321 imposes a statutory obligation to review all previously sealed nonpublic meeting minutes and complete that review process within 10 years of October 3, 2023.
- This new law does not require the release of sealed nonpublic meeting minutes if divulgence would still cause harm to reputation, or render the proposed action discussed ineffective, or pertain to thwarting a terrorist attack.
- However, failure to review previously sealed minutes during the review period will automatically result in the public release of those minutes, regardless of the potential harm resulting from that release.



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# **EFFECTIVE MEETINGS, FREEDOM OF SPEECH & CIVILITY**

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# Tips for Effective Meetings



- Preparation = more effective meetings
- Do you have rules of procedure?
- Agenda
- Circulate materials in advance
- Read packet, think about comments and questions in advance
- No discussions prior to/outside meeting!

# Rules of Procedure: Basic Content

Regular Meeting Day, Time & Location

Annual Election of Officers

Authority of Presiding Officer/Chair

Duties & Privileges of Board Members

Quorum & Voting

Agenda for Board Meetings

## Rules of Procedure: Basic Content (cont.)

Order of Business at Board Meetings

Meeting Procedure and Decorum

Procedures for Public Hearing, Public Comment

Right-to-Know Law

Committees/Liaisons/Appointments

Enactment of Ordinances, Resolutions & Motions

# Setting the Agenda

- Not mandatory, but effective tool for organization and keeping things on track
- Not required to be posted with notice
- Have procedures in place to allow for all members to have a say in agenda setting
- You are not strictly bound to the agenda, but it can be helpful in controlling what the public is allowed to bring up at the meeting
- The agenda is not to be used to silence certain topics or opinions!

# Conducting the Meeting

## Timing

- Be and start on time

## Chair

- Chair's responsibilities

## Rules

- Set ground rules

## Focus

- Stay on topic

## Be mindful

- Don't forget the minute-taker

# Meeting Decorum



ALL EYES ARE ON YOU



PAY ATTENTION!



ELECTRONIC MEDIA  
USE DURING MEETINGS

# Riggins'

## “Don’t’s”



**Don’t mingle with friends, acquaintances, unknown applicants or objectors** in the audience before the meeting & during a recess period.



**Don’t indicate by word or action how you intend to vote** during the portion of the hearing devoted to presentations.



**Don’t interrupt a presentation** until the question period, except for very short and *necessary* clarifying remarks or queries.



**Don’t use first names** in addressing *anyone at all* during the course of the hearing.



**Don’t try to make the applicant or any other person appearing before you look like a fool** by the nature of your questions or remarks.



# Riggins' "Do's"



**Do rotate the seating** in some regular manner each successive meeting to prevent a "strong" member from gradually dominating a "weak" member.



**Do sit down and have a long soul-searching session with yourself** if you find you are consistently "out in left field," that no one seems inclined to second your profound motions, and that you are quite often a minority of one.

# Dealing with (Sometimes Difficult) People



Listen actively



Stay calm



What you say & *how* you say it



Apply rules of  
decorum/procedure evenly

## Public Comment

- No right to speak in meeting, unless you give it to them (remember hearings are different)
- Establish & explain rules, apply consistently
- First Amendment: Many restrictions are not acceptable!
- Maintain control & order
  - Removal?



# Speech & Other “Expressive” Conduct

- ▶ Right-to-Know Law applies to all public meetings, including town meeting
- ▶ Who has the right to speak?
- ▶ Reasonable restrictions



# 1<sup>st</sup> Amendment Cases

- *Dayton v. Estari (Ohio)*- Regulation of “expressive conduct” not permissible unless it is accompanied by other impermissible conduct.
- *Norse v. City of Santa Cruz*- Government officials in America must occasionally tolerate offensive and irritating speech.
- *Cohen v. California*- Citizens have the right to express their opinions and criticisms, even if the speech is foolish and without moderation.

# Artus v. Town of Atkinson

- To state a viable claim of First Amendment retaliation, a plaintiff must show that the defendant intended to “chill his expression”.
- The defendant’s actions must be such that it would curb the expression of a “reasonably hardy individual”.
- Moderators are protected by “Legislative Immunity” when they are enforcing rules to keep the proceedings in order.
  - No person shall speak in any meeting without leave of the moderator
  - All persons shall be silent at the desire of the moderator
  - If any person persists in disorderly behavior after a warning from the moderator, the moderator may command that person to be removed.

# Electioneering At Polling Places – RSA 659:43

- Electioneering shall be prohibited within the polling place building.
- Establish one or more no-electioneering corridors, no less than 10 feet wide, that extend from all entrances of the polling place
- Voter must be allowed to enter polling place building without interference from individuals outside the corridor.
- Moderator shall designate a preferred area for electioneering
- The distribution or posting of electioneering communications, including but not limited to posters, cards, handbills, placards, pictures, pins, stickers, circulars, or articles of clothing, is prohibited within any no-electioneering corridor established outside the polling place by the moderator.

# Civility v. Protected v. Disruptive

- **Civility:** *formal politeness and courtesy in behavior or speech.*
- **Civil discourse:** *“the free and respectful exchange of different ideas. It entails questioning and disputing, but doing so in a way that respects and affirms all persons, even while critiquing their arguments.”*
- **Incivility not to be confused with Unprotected Speech or Disruptive Speech**
- Protected speech can be disruptive, uncivil speech can be protected, civil speech can be disruptive
- *Barron v. Kolenda*, 491 Mass. 408 (2023)
  - “Although civility can and should be encouraged in political discourse, it cannot be required.”
  - Held unconstitutional Southborough, Mass select board meeting rules that:
    - required speakers to “act in a professional and courteous manner”
    - required “[a]ll remarks and dialogue ... be respectful and courteous, free of rude, personal or slanderous remarks”
    - declared that “[i]nappropriate language and/or shouting will not be tolerated”



## Civil v. Uncivil

CIVIL	UNCIVIL
Treating opponents with the respect with which you wish yourself <b>(or your mother)</b> to be treated	Insulting, berating or otherwise being disrespectful to those who don't hold your position
Assuming that - and treating - a person holding an position different than yours as simply having different opinions as to the best course of action	Treating a person with a different opinion than yours as having improper motives
Addressing and challenging the opposing argument	Attacking the person making the opposing argument
Providing valid counterarguments and supporting your own with reason and objectively true information	Dismissing opposing viewpoints out of hand, spreading disinformation or merely trolling (provocative comments to incite emotional fracas rather than discussion of ideas)
Adhering to the meeting rules	Disrupting the meeting by interrupting, disrupting or otherwise ignoring the meeting rules

# Out of Order Speakers & Disruptive Attendees

➤ **40:7 Debate.** – No person shall speak in any meeting

- without leave of the moderator,
- nor when any person speaking is in order;
- and all persons shall be silent at the desire of the moderator,
- on pain of forfeiting \$1 for each offense, for the use of the town.

➤ **40:8 Disorder.** – If any person shall behave in a disorderly manner, and,

- after notice from the moderator, persist in such behavior, or
- shall in any way disturb the meeting, or
- willfully **violate any rule** of proceeding,

the moderator may command any constable or police officer, or any legal voter of the town, to remove such disorderly person from the meeting and detain such person until the business is finished.

# Out of Order Speakers & Disruptive Attendees

- **40:9 Duty of Police.** – Every constable or police officer
  - shall obey the orders and commands of the moderator for the preservation of order,
  - and may command such assistance as is necessary;
  - and if any constable or police officer neglects to perform any of the duties imposed by this or RSA 39 such constable or police officer shall forfeit \$40 for the use of the town.
  
- **RSA 644:2** (NH Criminal Code) a person is guilty of disorderly conduct if:
  - III. He purposefully causes a breach of the peace, *public inconvenience, annoyance* or alarm, or recklessly creates a risk thereof, by:
    - (b) Disrupting *any lawful assembly or meeting* of persons without lawful authority.
  
  - VI. *Disorderly conduct is a misdemeanor if the offense continues after a request by any person to desist*, otherwise, it is a violation.

## Out of Order Speakers & Disruptive Attendees

- State v. Dominic, 117 N.H. 573 (1977). Selectboard member can be criminally prosecuted for disorderly conduct after ignoring chair's rulings and continually interrupting meeting.
- In State v. Comely, 130 N.H. 688 (1988), upheld disorderly conduct conviction of protester who caused 90 second delay of opening of NH gubernatorial inauguration.
- State v. Jeffrey Clay, Case No. 2018-0184 (2019, N.H. S.Ct., unpublished order), affirmed convictions for disorderly conduct and resisting detention after repeated refusal to comply with select board's public comment rules.
- Baer v. Leach, (2015, U.S. Dist. Ct., Dist. N.H.). Police officer did not violate rights of individual arrested and charged with disorderly conduct after being warned three times to cease interrupting meeting. (Note the state court had dismissed the disorderly conduct charge.)

# Out of Order Speakers & Disruptive Attendees

## PROCEED CAREFULLY

- Removal is on the surface antithetical to right of free speech, and the attend open meetings,
- Decision to remove a person from a meeting should be taken and carried out with due care.
- Disruptions must be actual, not constructive, technical or anticipatory (i.e., a perception comments could cause a disruption after the fact).
- Meet with officer or Chief before the meeting;
  - Discuss meeting rules;
  - Discuss cues and steps before invoking removal power.

<https://www.youtube.com/watch?v=FbwH2IL3M0k&list=WL&index=1&t=4s>

# Conflicts of Interest



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# It All Begins with “Ethics”

“Ethics” are hard to pin down and mean different things to different people, but generally:

- Avoiding conflicts of interest
- Disclosing financial interests
- Avoiding criminal behavior, following state & local law
- Respecting confidentiality
- Not abusing authority
- Treating people fairly and equally
- Honesty, integrity, and trustworthiness
- Avoiding the appearance of impropriety



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# Few Statutory Rules

- Incompatibility statutes contain clear rules, but they're **not** the *only* ethical rules.
- Case law does provide a number of examples not contained in statute, but even that isn't complete.
- Ethical Golden Rule:
  - If you were to read about the same scenario occurring somewhere else in a newspaper, would you feel good about everyone who participated?
    - If the answer is “no,” then take steps to correct the problem.



# Incompatibility

Whether the person can hold a particular office in the first place:

- 669:7 (general)
- 673:7 (land use boards)
- 32:15 (budget committee members)
- Other statutes
- Local ordinances (which we will talk more about later)
- Common law: positions may be incompatible even if not stated in a statute—whenever two positions bear a special relationship to each other, one being subordinate to and interfering with the other, with inconsistent loyalties or responsibilities, then one person cannot legally hold both positions. *Cotton v. Phillips*, 56 N.H. 220 (1875).



# When Do Conflicts of Interest Arise?

- A **conflict** of interest exists if “**an official has a direct interest in the outcome of a proceeding, or any “conne[ct]ion with the parties in interest, as would be likely, improperly, to influence [his or her] judgment”**”
- The direct interest is:
  - personal or financial.
  - immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative.
- The idea is that one person cannot serve two masters at the same time.
- RSA 95:1- Public Officials Barred From Certain Private Dealings



# Areas That Tend to Present Conflicts

- Prejudgment. An abutter to land that is the subject of an application before a land use board.
- Employment relationship, which is connected to the financial interest in the outcome. Just like the financial interest, the employment relationship must create an immediate/definite conflict. The mere existence of the employment relationship is not going to be sufficient.
- Family relationships: Not necessarily a conflict. *Webster v. Candia*, 146 N.H. 430 (2001).



# What if the Official Participates Anyway?

Whether an official is disqualified, and what the consequences of a disqualified member's participation are depends on whether the decision was legislative or quasi-judicial.

## "Legislative" decisions

- Court will only invalidate the action if the person with the conflict cast the deciding vote.

## "Quasi-Judicial" decisions

- Court will automatically invalidate the decision and remand the decision to the board with instructions to begin again, without the disqualified person.



Courts resolve "conflict of interest" disputes by examining the type of action taken + the facts.

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# Difference Between Legislative vs. Quasi-Judicial

## Legislative

- ▶ Widely felt
- ▶ Policy decisions
- ▶ Must act in public's interest, but don't need to be "indifferent"

## Quasi-Judicial

- ▶ Affect rights of specific petitioner
- ▶ Notify & hear parties
- ▶ Weigh evidence
- ▶ Must be indifferent



# Juror Disqualification Standard

## RSA 500-A:12

A juror is disqualified if the juror is “not indifferent” because he or she:

- ▶ Expects to gain or lose upon the disposition of the case;
- ▶ Is related to either party;
- ▶ Has advised or assisted either party;
- ▶ Has directly or indirectly given his opinion or has formed an opinion;
- ▶ Is employed by or employs any party in the case;
- ▶ Is prejudiced to any degree regarding the case; or
- ▶ Employs any of the counsel appearing in the case in any action then pending in the court.



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# Recusal vs. Abstaining



**Recuse:** Immediately remove from discussion and voting



**Abstain:** does not vote



**Recusing** is the remedy for avoiding conflict, not abstaining

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# Ethical Violations and Conflicts of Interest

- Could be criminal
  - RSA 640- bribery, threatening harm to influence someone's actions
  - RSA 643- official oppression, failing to carry out a duty while purporting to be acting officially with the purpose of benefitting oneself or others. Misuse of information, insider trading.
- Could result in removal from office
  - Requires judicial intervention



# Local Conflicts of Interest Ordinances

## RSA 31:39-a

- Adopted by legislative body (town meeting/city council).
- Regulate conflicts of interest for officers (elected or appointed) & employees.
- May require financial disclosures by officers and employees.
- May enact more stringent incompatibility standards.
- May provide for conditions that warrant removal from office with the Superior Court having sole jurisdiction over the removal process.



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# Governmental Records, Retention & Remedies Under The Right-to-Know Law



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

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



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# Sending Records Electronically

## **91-A:4 Minutes and Records Available for Public Inspection. –**

I. Every citizen during the regular or business hours of all public bodies or agencies, and **on the regular business premises of such public bodies or agencies**, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5.

## What They're Requesting Must Be “Reasonably Described”

- Municipal employees must know what they are looking for in the voluminous materials kept by the municipality.
- Municipal employees do have an obligation to clarify with the citizen what the citizen is requesting. *Salcetti v. City of Keene*, No. 2019-0217 (June 3, 2020) (speaking in *dicta* about a “spirit of collaboration”).
- This may require a clarifying phone call.



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# Search for Records Must Be Reasonable

- Whatever record is requested must also be met with a reasonably calculated search by the municipality to uncover the record. *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746 (2011).
- The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents.
- This can have major implications in electronic records searches.





# Three Key Steps

**STEP 1: Is it a *Governmental Record*?**

**STEP 2: Is the record exempt from disclosure?**

**STEP 3: Make available non-exempt records.**

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

## Any information

- created
- accepted, or
- obtained

## By, or on behalf of,

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

## in furtherance of its official function

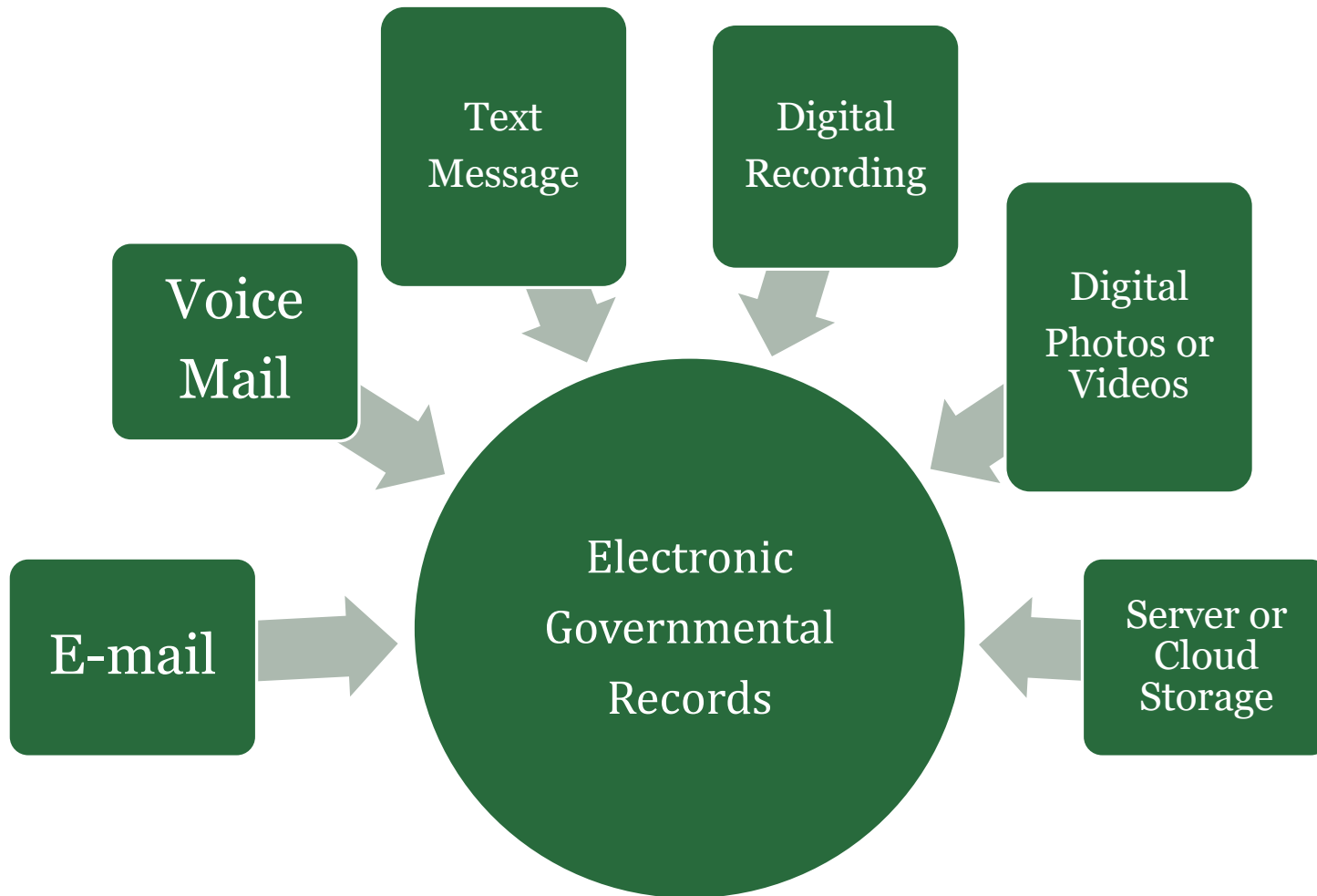


# “Public Body”

RSA 91-A:1-a, VI:



- Any legislative body, governing body, board, commission, committee of any county, town, municipal corporation, school district, SAU or other political subdivision.
- Any committee, subcommittee, advisory committee thereto.
- New Case: But a committee of city employees providing advice to planning board applicants is not a public body. *Martin v. Rochester*



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# Is the Record Exempt from Disclosure?



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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

# 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.



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## Other Files Whose Disclosure Would be an Invasion of Privacy

<b>Private</b>	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.
<b>Public</b>	Assess the public's interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.
<b>Balance</b>	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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# Practice Example 1

Q. A citizen makes RKT request for all building permit applications filed with the town in the last month. He wants name, address, and project information.

A. The person's name and address is subject to a privacy exemption. What public purpose is there in releasing this information? Redact the name and address and provide the rest of the application.

\*Why is this important? In this example it turned out that the citizen owned a lumber yard wanted to use the permit applications to direct advertise to these people so they would buy lumber from him. NOT THE PURPOSE OF 91-A!



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## Practice Example 1 (cont.)

Q. A citizen makes RKT request for all building permit applications filed with the town in the last month. He wants name, address, and project information.

A. The person's name and address is subject to a privacy exemption. What public purpose is there in releasing this information? Redact the name and address and provide the rest of the application. The person is dissatisfied with the redaction, says that they need name and address because they believe permits from multi-family households are being denied while single family houses are being granted the same permits. Now, maybe there is a more compelling public interest!



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## Practice Example 2

Q. The town publishes their assessing records on their website for anyone to look at. Local police officer in town wants his name taken off the website for safety purposes.

A. The officer has a legitimate privacy interest in this information being made so publicly available. The town is going above and beyond public record requirements by posting this information online. They should consider taking his information down.



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## Practice Example 2 (cont.)

Q. The officer wants his name and address removed from the official assessing card kept at the town hall.

A. Assessing records serve a public purpose. The town must keep record of who owns property to properly assess taxes. The public has an interest in knowing that the town is fairly assessing property. This info is also available elsewhere, like the registry of deeds. The town has already accommodated the privacy interest by taking the records off the website. Now, public interest may outweigh this privacy interest.



## 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.”

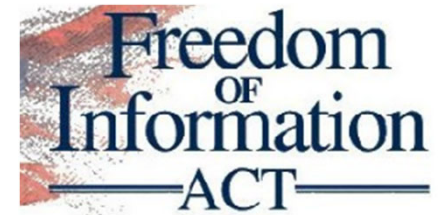
### Personal Notes – RSA 91-A:5, VIII –

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

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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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## Practice Example 3

Q. An attorney who represents someone in a divorce proceeding is seeking all records of police response or involvement at a particular address. No reason is provided for request.

A. There is no public interest at play here. This is an example of an attorney for a private citizen trying to use 91-A to dig up dirt on another private citizen, most likely to gain an edge in the divorce. NOT THE PURPOSE OF 91-A. This request can be denied under 91-A privacy exemption. FYI there are other ways the attorney can get this info properly.



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## Practice Example 3 (cont.)

Q. The attorney responds to the denial of records by saying that they have reason to believe their client's child was present at the address when the police responded there. They are concerned for the safety of the child.

A. Now, this may fall into the health and safety exemption of 91-A:5, IV. Records may be released subject to redaction.



# 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.



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## 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



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# Basics of Record Production



Records must be provided immediately *only* when they are immediately available for release.



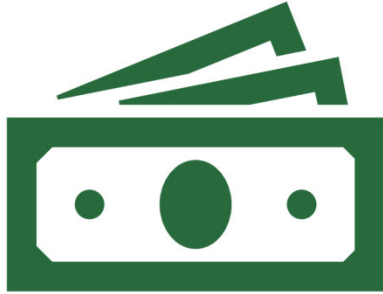
RTK *does not* give citizens the right to review records in any quantity and wherever kept immediately upon demand.



Requiring appointment to review records is permitted.



RTK does not require document “compilation.”



## *No Flat Fees!*

- *ONLY* reasonable fees are allowed!
- RSA 91-A:4, IV
- Fifty cents per page for first 10 pages, 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” within 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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# Retention & Remedies



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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.

# Deleting Electronic Records

- When deleting electronic records, make sure they are deleted from all possible storage locations.
- Records that are backed up on other places are still considered subject to disclosure if they are requested.
- Make sure you are aware of all the ways your electronic records are being duplicated before informing a requesting party that the records have been deleted.



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# Archive Paper Records in PDF/A?

PDF



Document

*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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# How are Violations of RSA Chapter 91-A Enforced?



Office of Right-to Know Ombudsman



“Aggrieved person”



Lawsuit or by complaint to Ombudsman



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

# Right-to-Know Ombudsman (eff. 7/1/22)

## **NOTICE OF RKO CASE HEARINGS**

*Schedule Issued: March 18, 2024*

*As a general matter, unless otherwise ordered, the hearings in these contested cases are open to observation by the public. This does not imply a right to participate in the hearings or offer public comment during the proceedings. Observers may not participate in hearings unless they have been called as a witness, or admitted to the case as a party, intervenor or representative in advance of the hearing. See Jus 809.01.*

*The presiding officer in these matters will be Thomas F. Kehr, Esq., NH Right to Know Ombudsman.*

*The following hearings in contested cases will be held by the Office of the Right to Know Ombudsman ("RKO") in Room 313 of the State House Annex, 25 Capital Street, Concord, NH. Dates and locations are subject to change.*

**DATE/TIME                      MATTER NAME                      RKO DOCKET NUMBER**

**March 29, 2024, 1:00 PM – second prehearing conference**

**In re: Town of Pelham Cemetery Trustees - 001**  
**RKO 2023-016**

**April 17, 2024, 1:00 PM**

**In re: Town of Nottingham -001**                      **RKO 2023-037**  
*Prehearing conference: April 3, 2024 1:00 PM*

- Simplified complaint process -after complaint received, public body is given notice and required to respond with an answer to within 20 days.
- Ombudsman is empowered to: (1) Compel timely delivery of public records; (2) conduct in-camera review of records; (3) compel interviews with the parties; (3) order attendance at hearings; (4) order access to public records or access to meetings; (5) make any finding or order as permitted by the Superior Court under RSA 91-A:8.



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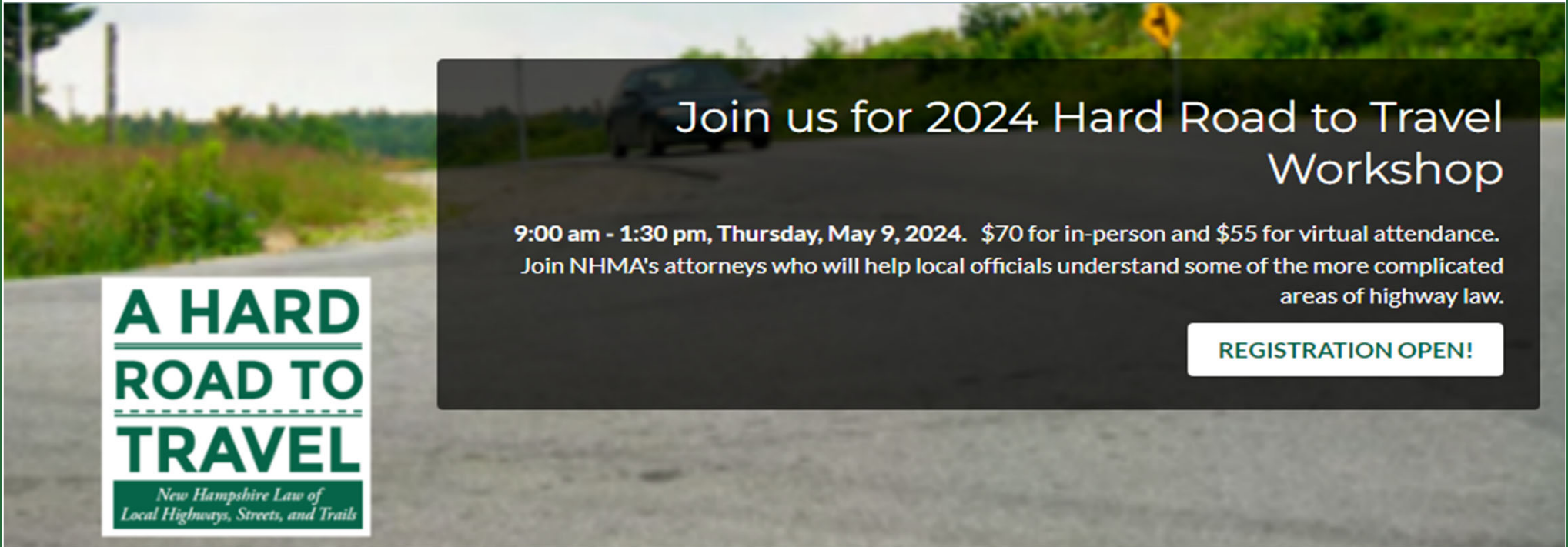
# Remedies for Violations

- 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





## Upcoming Workshops and Complimentary Webinars



**A HARD  
ROAD TO  
TRAVEL**  
*New Hampshire Law of  
Local Highways, Streets, and Trails*

Join us for 2024 Hard Road to Travel Workshop

9:00 am - 1:30 pm, Thursday, May 9, 2024. \$70 for in-person and \$55 for virtual attendance.  
Join NHMA's attorneys who will help local officials understand some of the more complicated areas of highway law.

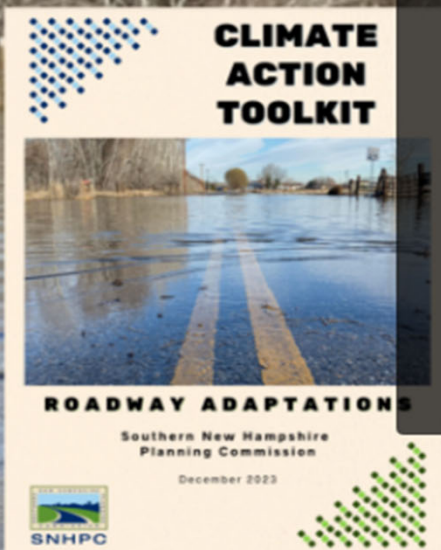
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## Upcoming Workshops and Complimentary Webinars



### Fostering Regional Resilience: SNHPC's Road Adaptation Toolkit Webinar

12:00 noon - 1:00 pm, Wednesday, May 15. Join Suzanne Nienaber, Principal Planner, and Zachary Swick, Senior GIS Analyst, with the SNHRPC, who will provide details of this toolkit for addressing pressing climate concerns.

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## Upcoming Workshops and Complimentary Webinars

### REGISTRATION OPEN: The Workings of a Planning Board Webinar

**11:30 am- 1:00 pm, Wednesday, June 5, 2024.** Join NHMA attorneys for this webinar geared for new planning board members and alternates, as well as seasoned veterans who want a refresher course on planning board basics.

**REGISTRATION OPEN!**

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## Upcoming Workshops and Complimentary Webinars

Zoning Board Meeting - 4/3/24

### REGISTRATION OPEN: ZBA Basics Webinar

11:30 am - 1:00 pm, Wednesday, June 12, 2024. Join NHMA attorneys who will provide a basic review of ZBA roles and responsibilities to make your public service more enjoyable and productive.

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