ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

March 20, 2015

To the People of New Hampshire:

I am proud to issue this updated Memorandum on New Hampshire's Right-to-Know law, RSA Chapter 91-A. This Memorandum describes the statute and the judicial decisions that further define and explain the peoples' right to know.

The public's right to know what its government is doing is a fundamental part of New Hampshire's democracy. New Hampshire's Constitution and the Right-to-Know law ensure that the public has reasonable access to meetings of public bodies and to governmental records. When New Hampshire's Constitution was adopted on June 2, 1784, accountability of public servants to the people was established in Part 1, article 8, which reads:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them.

In 1976, the people of New Hampshire amended Part 1, article 8 of our Constitution, reinforcing the existence of a right of access to public meetings and records, by adding the following two sentences:

> Government, therefore, should be open, accessible, accountable, and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

An integral part of the constitutional right of access to government is the protection of the freedom of speech and press guaranteed by Part 1, article 22 of the New Hampshire Constitution:

> Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

These provisions of our Constitution and RSA Chapter 91-A are intended to provide the utmost information to the people about what their government is doing, while preserving individuals' rights to privacy. The New Hampshire Supreme Court has recognized that the Right-to-Know law helps to carry out the Constitution's requirement that access to governmental proceedings and records not be unreasonably restricted.

Since the Department last issued its Memorandum, the New Hampshire Legislature has amended the Right-to-Know law in several ways. The law now allows consideration of confidential, commercial, or financial information in nonpublic session. The master jury list is now exempt from the Right-to-Know law. Officers, employees and other officials of a public body or public agency are now subject to a civil penalty of not less than $250 and not more than $2,000 if they are found to have violated the Right-to-Know law in bad faith. Such individuals may now also be required to undergo remedial training at their own expense. This Memorandum has been updated to reflect these amendments to the law and recent court decisions.

In an effort to enhance the usefulness of this Memorandum, the appendix includes sample motions for use by public bodies when the members want to go into non-public session, seal non-public minutes, or adjourn to consult with legal counsel. It also includes a sample index for use when a person has requested documents that are exempt from disclosure or contain confidential information. The index can be used to inform the requester of which documents have been withheld and the reason for their non-disclosure. For those interested in municipal government records, the statute that establishes the retention period for municipal records is provided. Finally, the appendix includes a list of statutes, rules, and court cases the designate certain information as confidential or privileged.

I strongly recommend that all public officials learn their responsibilities under the Right-to-Know law. It is important for those public officials who use e-mail or who maintain government records in electronic form to carefully study the 2008 and 2009 changes to the law relating to electronic records. This Memorandum should be kept easily accessible and be referred to when you are faced with questions on the application of the law. When you are uncertain about the application of the law to a specific circumstance, state officials should consult with my Office, county officials should consult with their County Attorney, and municipal and schools officials should consult with their legal counsel.

I am making this Memorandum widely available to the public, the press, New Hampshire's schools, and State and local officials. It will also be posted on the Department's website.

Sincerely,

Joseph A. Foster
Attorney General

#1061112

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

March 20, 2015

ATTORNEY GENERAL'S MEMORANDUM ON NEW HAMPSHIRE'S RIGHT- TO- KNOW LAW, RSA CHAPTER 91-A

TABLE OF CONTENTS

This Memorandum cites to both New Hampshire Supreme Court opinions and Superior Court orders. Unlike New Hampshire Supreme Court opinions, Superior Court orders and decisions are not binding precedent. Instead, such decisions and orders may be persuasive authority for courts when analyzing RSA 91-A issues. At the least, these cases provide guidance to state and municipal agencies, public bodies and employees.

RIGHT-TO-KNOW LAW MEMORANDUM

"Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." RSA 91-A:1.

The Supreme Court "resolve[s] questions regarding the [Right-to-Know] law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *WMUR v. N.H. Dept. of Fish and Game*, 154 N.H. 46 (2006) (*quoting Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 553 (2002)).

"The public's right of access to governmental proceedings . . . is not absolute. . . . It must yield to reasonable restrictions." *Hughes v. Speaker of the New Hampshire House of Representatives*, 152 N.H. 276, 290 (2005) (*citing Petition of Union Leader*, 147 N.H. 603, 604-05 (2002); N.H. Const. Pt. I, art. 8).

I. DEFINITIONS

The following definitions apply to the Right-to-Know law:

"Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority. RSA 91-A:1-a (I).

"Governmental proceedings" means the transaction of any functions affecting any or all citizens of the state by a public body. RSA 91-A:1-a (II).

"Governmental records" means 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. Without limiting the foregoing, the term "governmental records" 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 term "governmental records" shall also include the term "public records." RSA 91-A:1-a (III).

"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. RSA 91-A:1-a (IV).

"Public agency" means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, charter school, or other political subdivision. RSA 91-A:1-a (V). Other political subdivisions include entities like village districts and water precincts, which are public agencies under the Right-to-Know law.

"Public body" means any of the following:

(a) The general court, including executive sessions of committees, and including any advisory committee established by the general court.

(b) The executive council and the governor with the executive council, including any advisory committee established by the governor by executive order or by the executive council.

(c) Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.

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

(e) Any corporation that has as its sole member the State of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

RSA 91-A:1-a (VI).

II. BODIES AND AGENCIES SUBJECT TO THE RIGHT-TO-KNOW LAW

The Right-to-Know law establishes a person's right of access to meetings of public bodies and to the records of public bodies and public agencies. The Right-to-Know law applies to all boards, commissions, agencies, authorities, committees, subcommittees, subordinate bodies or advisory committees of all political subdivisions of the State, including, but not limited to, counties, towns, municipal corporations, village districts, school districts, school administrative units, and charter schools. RSA 91-A:l-a, VI(d); *see Selkowe v. Bean*, 109 N.H. 247 (1968) (pertaining to meetings of the Keene Municipal Finance Committee).

In determining what access is available, the initial inquiry must be whether the body or agency involved is subject to the Right-to-Know law. The Right-to-Know law applies to the following public bodies:

A. State Entities – Public Bodies

1. The New Hampshire Senate and House of Representatives, including executive sessions of committees. (*Note*: In *Hughes v. Speaker of the House*, 152 N.H. 276 (2005), the Supreme Court held that a question of whether the Legislature complied with the Right-to-Know law during the legislative process was a political question not subject to the Court's review).

2. Any advisory committee established by the General Court, the Senate or the House. RSA 91-A:l-a, VI(a).

3. The Executive Council and the Governor with the Executive Council, including any advisory committee established by the Governor by executive order[1] or by the Executive Council. RSA 91-A:l-a, VI(b).

4. The Board of Trustees of the University System of New Hampshire, including any advisory committee established by the Board of Trustees. RSA 91-A:l-a, VI(c).

5. Any board or commission of any state agency or authority, including any advisory committee established by any board or commission of any state agency or authority. RSA 91-A:l-a, VI(c).

[1] RSA 21-G:11 establishes the procedure a Commissioner should follow in establishing an advisory committee, which requires approval of the Governor and filing with the Secretary of State. Approval by the Governor, unless provided by formal executive order, would not make an advisory committee a public body under this provision. Generally, advisory committees created by public agency officials are not public bodies and are not themselves subject to the Right-to-Know law meeting requirements. However, any information an advisory committee provides to the agency will be subject to the governmental records requirements. In contrast, *see* RSA 91-A:l-a, VI(c) and 5 above, advisory committees established by a board or commission of a state agency or authority are public bodies subject to the Right-to-Know law meeting and record requirements.

6. Certain bodies corporate and politic created by statute that have a distinct legal existence and are not a department of the executive branch of state government. *E.g.*, RSA 162-A:3 (Business Finance Authority); RSA chapter 204-C (Housing Finance Authority);[2] RSA chapter 35-A (Municipal Bond Bank); and RSA chapter 12-G (Pease Development Authority). Some of the statutes creating these entities expressly state whether the Right-to–Know law applies, but others are silent on this point. Without express statutory language, applicability of the Right-to-Know law will depend on the nature and extent of the governmental functions the entity performs. *See generally Professional Firefighters of N.H. v. Healthtrust, Inc.*, 151 N.H. 501 (2004); *Northern New Hampshire Lumber Co. v. New Hampshire Water Resources Board*, 56 F. Supp. 177, 180 (D.N.H. 1944).

B. State Entities – Public Agencies

1. All State executive branch departments and agencies. RSA 91-A:6; *Lodge v. Knowlton*, 118 N.H. 574 (1978).

2. Several of the bodies corporate and politic created by statute operate through executive directors and bureaucratic structures, which for Right-to-Know law purposes should be treated as a public agency. Consider the example of the Pease Development Authority. While the Board of Directors of the Pease Development Authority is a public body, the Authority itself is a public agency. Likewise, the Division of Ports and Harbors operated by the Pease Development Authority is a public agency.

C. County And Municipal[3] Governments – Public Bodies

1. The county delegation, the county commissioners, and any committee, subcommittee, or subordinate body or any advisory committee thereto.

2. The board of selectmen, city council, school board, commissioners of a village district, the planning board, conservation commission, zoning board of adjustment, police commission, fire commission, board of fire engineers, budget committee, and any other board, commission, committee or authority including subcommittees, advisory committees, or other subordinate body.

[2] The New Hampshire Housing Finance Authority is subject to the Right-to-Know law. While the Authority is a body politic and corporate having a distinct legal existence separate from the executive branch of the State and not constituting a department of the executive branch of state government and many of its day-to-day operations function independently of the State, the Authority performs the essential government function of providing safe and affordable housing to the elderly and low income residents of the State. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540 (1997).

[3] In this Memorandum, the term "municipal" is used in its broadest sense and, except where otherwise indicated, is meant to include towns, cities, school districts, village districts, water and fire precincts, and any other unit of government established pursuant to state law.

3. Regional planning commissions, joint governing boards or commissions established through intermunicipal agreements, and other similar bodies established pursuant to statute from two or more municipalities.

D. County And Municipal Government – Public Agencies

1. The county department of corrections, office of the sheriff, county home, human services department and any other agency, authority, department, or office of the county.

2. The police, fire, highway, welfare, water, sewer, recreation, zoning enforcement, and planning departments, the office of the town clerk, tax collector, treasurer, and town/city manager of a town, city, or village district and any other agency, authority, department or office of a town, city, or village district. [4]

[4] Members of the former Right-to-Know Commission have publicly commented that the inclusion of "agency" in the definition of a municipal public body was unintended. The Right-to-Know law otherwise distinguishes a public agency from a public body. Generally, public bodies are subject to the open meeting requirements and public agencies are not. Such municipal agencies and authorities are subject to the governmental records requirements of the Right-to-Know law because they fall within the definition of a public agency. The courts have not yet had occasion to interpret whether the existing paragraph imposes public meeting requirements on a municipal agency. Applying public meeting requirements to an agency would be impractical and it is expected a court would find application of the public meeting requirement on a municipal public agency an absurd construction of the statute. Legislation introduced in 2009, House Bill 53, would have removed the words "agency" and "authority" from the definition of a municipal public body. House Bill 53 was retained in the House Judiciary Committee and vetoed after passage in the 2010 legislative session.

III. ENTITIES NOT SUBJECT TO THE RIGHT-TO-KNOW LAW

The Right-to-Know law does not apply to the Courts or the judicial branch of government. The Courts are subject to a constitutional requirement of openness that is similar to, but not identical to the Right-to-Know law. Court rules and Supreme Court decisions define the public's constitutional right of access to most court hearings and to certain information held by the courts. *See* section VII, (Court Records), in this Memorandum.

The Right-to-Know law does not apply to most charitable non-profit corporations. However, most charitable organizations are required to file certain information with the State. These filings are public and can be accessed through the Charitable Trusts Unit of the Attorney General's Office. http://doj.nh.gov/charitable/index.html

Charitable non-profit corporations that have a government entity as their sole member or non-profit corporations that are composed of units of government and carry out the work of government with public funds are subject to the Right-to-Know law. RSA 91-A:1-a, VI (e); *see also Professional Firefighters of N.H. v. Healthtrust, Inc.*, 151 N.H. 501, 505 (2004) (Court, in determining that the Healthtrust was subject to the Right-to-Know law, considered whether the entity was a public instrumentality, whether it used public funding, whether it performed public and essential governmental functions, enjoyed the tax-exempt status of a public entity or solely benefited governmental entities).

IV. MEETINGS

Public bodies subject to the Right-to-Know law are required to follow certain procedures with respect to the notice and conduct of meetings. RSA 91-A:2; RSA 91-A:3. In most cases, meeting provisions under the Right-to-Know law do not apply to public agencies. Although the meeting provisions do not apply to most of the work an agency does, there may be occasions when an agency is required by statute, rule, ordinance or charter provision to hold a hearing, which may be subject to public notice and meeting requirements.

A. What Constitutes a Meeting of a Public Body?

1. A public body holds a meeting when:

   a. A quorum of the membership of the public body[5] is convened in person so that all members may communicate contemporaneously; and

   b. The purpose of convening a quorum or a majority of the membership is to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power. RSA 91-A:2; s*ee also Herron v. Northwood*, 111 N.H. 324, 326-27 (1971) (town budget committee's function of preparing and submitting a budget is subject to the Right-to-Know law and meetings must be held in a manner open to the public).

      The attendance by a quorum of a municipal board of selectmen or planning board at public informational meetings of the Department of Transportation for the purpose of advising the Department concerning a highway project can constitute a "meeting" under RSA 91-A:2, I, requiring appropriate notice. Attorney General's Opinion 93-01. Generally, attendance by a quorum of a public body at a meeting being held by a different public body to discuss or act upon a matter within the first body's jurisdiction should be treated as a meeting for Right-to-Know law purposes by both public bodies. Both bodies should provide notice of the meeting and both bodies should keep minutes, which may be the same document, separately adopted as minutes by both.

2. When members of a public body constituting a quorum find themselves together either coincidently or when gathering for a purpose other than discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power, communications between the members shall not be used to circumvent the spirit and purpose of the Right-to-Know law. RSA 91-A:2-a, II. The convening of a quorum of a public body that does not have a purpose to discuss or act on business, could easily constitute a meeting.

[5] In the absence of specific language to the contrary, a quorum is defined as a majority of the membership of the public body. *See* RSA 21:15. Some statutes specifically define a quorum, in which case the specific statutory quorum requirement will control.

Therefore, it is very important to limit any conversation or other communication about the business of the public body. It is explicitly improper to deliberate or act on any business of the public body. RSA 91-A:2-a, II.

3. E-mail use should be carefully limited to avoid an inadvertent meeting, albeit one where there is a failure to have a physical quorum at a noticed meeting place. Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote on a matter within the jurisdiction of the body would constitute an improper meeting. Sequential e-mail communications among members of a public body similarly should not be used to circumvent the public meeting requirement. For example, e-mail among a quorum of members of a public body in a manner that does not constitute contemporaneous discussion or deliberation and does not involve matters over which the body has supervision, control, jurisdiction, or advisory power does not technically constitute a meeting under the Right-to-Know law. E-mail discussions of a quorum concerning matters over which the public body has supervision, control, jurisdiction, or advisory power would run counter to its spirit and purpose.

4. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, or by another statute, 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-a, I. *See e.g.*, RSA 363:17-c (making Public Utility Commission deliberations exempt from the Right-to-Know law).

B. Not a Meeting

1. Chance or social meetings, neither planned nor intended for the purpose of discussing matters relating to official business, and at which no deliberations are conducted and no decisions are made, are specifically exempt from the open meeting requirement. The Right-to-Know law does not apply to isolated conversations among less than a quorum of individual members outside of public meetings, unless the conversations were planned or intended for the purpose of discussing matters relating to official business and the public entity made decisions during the isolated conversation. *Webster v. Town of Candia*, 146 N.H. 430 (2001). Such meetings may not be used to circumvent the spirit of the Right-to-Know law. Therefore, if official deliberations occur or if decisions are made at such gatherings or if the gatherings occur on a regular basis, a court may determine that they constitute improper ''meetings'' under the Right-to-Know law. RSA 91-A:2, I(a).

2. Strategy or negotiations with respect to collective bargaining, a caucus of officeholders elected on a partisan basis at a state or municipal general election, and consultation with legal counsel are not meetings. RSA 91-A:2, I(b-d). These statutory exclusions are reinforced by the holdings of *Appeal of Town of Exeter*,

126 N.H. 685 (1985) (collective bargaining), *Society for Protection of New Hampshire Forests v. WSPCC*, 115 N.H. 192 (1975) (consultation with legal counsel) and *Talbot v. Concord Union School Dist.*, 114 N.H. 532, 535-36 (1974) (negotiations between school board and union committee not subject to public Right-to-Know statute although approved agreements are subject to the statute).

3. Consultation with legal counsel is neither a "meeting" under RSA chapter 91-A, nor does it fall within the "non-public" meeting provisions.[6] If a public body is meeting in public session and wants to consult with legal counsel, it should vote on the record to adjourn the meeting. *See* Appendix B for a model motion to adjourn for the purpose of consulting with legal counsel. Please note, however, if members of the public are not present during an open, public meeting, the public body does not need to move into non-meeting with counsel to preserve the privilege. *See Prof. Fire Fighters of N.H. v. N.H. Local Gov't Ctr.*, 163 N.H. 613, 615 (2012) (holding meeting minutes containing attorney-client privileged communication may be redacted as "[t]he fact that the meeting occurs in a public place does not destroy the privilege, if no one hears the conversation."). If the public body intends to reconvene the public meeting, it should vote to temporarily adjourn the meeting for the purpose of consulting with legal counsel, giving notice to those present that the meeting will be reconvening. Everyone except the members of the public body should be excluded from the room when any consultation with legal counsel occurs. Minutes are not required or appropriate for consultation with legal counsel. Consultation with legal counsel should be limited to discussion of legal issues. Deliberation about the matter on which advice is sought may not occur during consultation with legal counsel. The public body must reconvene and, unless a statutory exemption allowing deliberation in non-public session exists, conduct deliberation in public session.

   To constitute consultation with counsel, there must be a contemporaneous exchange of words and ideas between the public body and its attorney (e.g., physically present, telephonically, video-conference, etc.). A public body may not (a) move into non-meeting merely to discuss the contents of legal documents or advice previously provided by counsel or (b) close a meeting whenever its discussion turns to advice received from its attorney. *Ettinger v. Town of Madison Planning Bd.*, 162 N.H. 785, 789–92 (2011). However, discussion of legal advice in public session may constitute an inadvertent waiver of the attorney-client privilege if members of the public are present during the discussion. Public bodies are encouraged to consult with legal counsel prior to making a decision regarding waiver of the privilege.

[6] Note however that RSA 91-A:3,II(e) allows consideration or negotiation of pending claims or litigation in certain circumstances.

C. Notice – RSA 91-A:2[7]

When a public body intends to convene a meeting, notice must be given as follows:

1. Regular Notice

a. Either of the two following forms of notice is proper under the Right-to-Know law:

(1) Notice of the time and place of any meeting (including non-public sessions) shall be posted in two appropriate places 24 hours prior to the meeting, excluding Sundays and legal holidays. RSA 91-A:2, Notices should be posted where people are likely to see them, such as on the public body's website[8], the location where the checklist or town warrant is posted, the agency's office lobby or front door, and the State House or Town Hall bulletin board; or

(2) Notice of the time and place of the meeting shall be printed in a newspaper of general circulation in the city or town at least 24 hours prior to the meeting, excluding Sundays and legal holidays.

b. If the body decides to go into non-public session during an open meeting, the notice for the open meeting will suffice. If both public and non-public sessions are planned in advance, the notice should so state.

c. The Right-to-Know law explicitly requires that a notice of the meeting of a public body include the time and place of the meeting. While not required under the Right-to-Know law, it is generally appropriate that the notice include or be accompanied with a brief list of the planned agenda items and a general notice that other matters within the public body's jurisdiction may be considered. Other law may impose requirements that notices of certain hearings and meetings where particular actions may be taken include specific additional information. Members of a public body should maintain familiarity with these additional notice requirements and consult with legal counsel as to the proper form of a meeting notice when uncertainty exists.

d. Individual notice may not be necessary where particular individuals are affected so long as notice is proper as described above. *See Brown v. Bedford School Bd.*, 122 N.H. 627, 631 (1982) (under the Right-to-Know law probationary teachers not entitled to individual notice of public meeting at which teachers' terminations were on the agenda where public notice was otherwise proper).

[7] Effective December 1, 2012, the General Court repealed RSA 91-A:2-b "Meetings of the Economic Strategic Commission to Study the Relationship Between New Hampshire Businesses and State Government by Open Blogging Permit."

[8] Note that only one of the two required postings can be on the internet.

e. Additional notice may not be necessary for continuation of public meetings. *See Town of Nottingham v. Harvey*, 120 N.H. 889, 894–95 (1980) (recess of a public zoning meeting until a later date without notice of the second date did not violate Right-to-Know law). When practical, posting notice of meetings that are to be reconvened supports the spirit and objectives of the Right-to-Know law.

2. Emergency Meeting Notice Procedure

a. This method of notice may be utilized if the chairperson or presiding officer of the public body decides that an emergency exists and that immediate action is imperative. RSA 91-A:2, II. *See* Section D, 3 below.

b. Notice shall be made by whatever means are available to inform the public about the meeting. RSA 91-A:2, II. For example, notice may be given over the radio, the body may post notice, and/or may notify by telephone people known to be interested in the subject matter of the meeting. The nature of the emergency will dictate the type of notice which can be given. In any event, a diligent effort must be made to provide some sort of notice and those efforts should be documented.

c. In the event an emergency meeting is required in an adjudicative proceeding (*see* RSA 541-A:I, I), notice must be provided to all parties unless the body possesses authority to issue an *ex parte*[9] order in the case at hand.

d. The minutes of the meeting must clearly spell out the need for the emergency meeting. RSA 91-A:2, II.

3. Notice of Legislative Meetings

Notice of legislative committee meetings shall be made in accordance with the Rules of the House of Representatives and the Rules of the Senate, as appropriate. *See Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 278 (2005) (issue of whether Speaker of the House violated Right-to-Know law by excluding a Representative from meetings of conferees was a nonjusticiable (not appropriate or proper for judicial consideration or resolution) political question); *see also Baines v. NH Senate President*, 152 N.H. 124, 130 (2005) (authority to adopt procedural rules for passing legislation is demonstrably committed to the legislative branch by Part II, articles 22 and 37 of the New Hampshire Constitution).

4. Broader Access

[9] An order issued on behalf of one party without hearing from other parties.

A municipal charter, ordinance, or rule or guideline adopted by a public body may require broader public access to meetings than what the Right-to-Know law requires. If such charter provisions, guidelines, or rules of order have been adopted and they are more broad (strict), their provisions shall take precedence over the provisions of the Right-to-Know law. RSA 91-A:2. The Right-to-Know law establishes minimum requirements; public bodies must comply with more stringent requirements established by other law.

5. Effect of Failure to Observe Notice Requirements

Failure to give proper public notice subjects the public body to possible judicial sanctions, including an order declaring the meeting invalid, an order enjoining the public body's actions or practices, and/or an order assessing legal costs and fees. RSA 91-A:7 and 8; *see also* Section V (Remedies) of this Memorandum.

D. Meeting Procedures

Meetings of public bodies subject to the Right-to-Know law are open to the public unless the body is authorized to hold a non-public session. RSA 91-A:2. Any person may attend an open meeting. The public's right to attend a meeting established by the Right-to-Know law does not convey a right to speak or participate. Other laws may require that the public be afforded some opportunity to speak at public hearings or certain other meetings of public bodies. Many public bodies voluntarily establish appropriate regulated public comment periods at some meetings; however, this is not required by the Right-to-Know law.

1. Member Participation and Attendance at Meetings

a. Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice. RSA 91-A:2, III(b).

b. A member of the public body may participate in a meeting other than by attending in person at the location of the meeting only when attending in person is not reasonably practical. RSA 91-A:3(a). The reason for participation from some place other than the location of the meeting shall be stated in the minutes of the meeting. RSA 91-A:2, III(a).

c. Each member participating remotely, whether by phone, electronically, or otherwise, must be able to simultaneously hear each other member and speak to each other member during the meeting. The member participating remotely must also be audible or otherwise discernible to the public in attendance at the meeting's location. RSA 91-A:2, III(c). One practical solution is participating by telephone, provided there is a speaker phone used in the meeting room that can be heard by the public.

d. Any member participating remotely must identify all other persons present at the place from which the member is participating. RSA 91-A:2, III(c).

e. A member participating in a meeting remotely is deemed to be present at the meeting for purposes of voting.

f. All votes taken during a meeting in which any member participates remotely shall be by roll call vote. RSA 91-A:2, III(e). The Right-to-Know law does not explicitly require that every roll call vote be recorded member by member in the minutes. However, compliance with the roll call requirement should be documented.

2. Basic Meeting Requirements

a. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern the meeting discussion contemporaneously at the meeting location specified in the meeting notice. RSA 91-A:2, III(c).

b. RSA 91-A:2, III(c) explicitly requires that when a member is participating remotely each part of a meeting required to be open to the public shall be as audible or otherwise discernible to the public as it would be if all members were participating in person.

Generally, a public body should plan to hold meetings in a space that is accessible to persons with disabilities and that will accommodate any reasonably anticipated public attendance. If necessary, the body should make provisions for amplifying the discussions between members and parties presenting to the public body. While outside the scope of this Memorandum, public bodies should consult with legal counsel to ensure the body is prepared to meet the requirements of the Americans with Disabilities Act should any person require accommodation.

If extraordinary unanticipated public attendance results in some members of the public being effectively denied the opportunity to attend the public meeting, it may be necessary to reconvene the meeting in a more suitable space. For example, if a crowd in excess of the fire code limit for the meeting room shows up and others wishing to attend are limited to hallways or other rooms where they can neither hear nor see, the right of public access is put in question. If practical, move the meeting to a sufficiently large nearby space. Ensure those arriving at the location shown on the meeting notice are informed of the new meeting location. If moving is impractical, consult with legal counsel before proceeding with a meeting where members of the public are present who are being denied the opportunity to attend due to space limitations.

c. Any person shall be permitted to use recording devices including, but not limited to, tape recorders, cameras, and videotape equipment at public meetings. RSA 91-A:2, II; s*ee WMUR v. N.H. Dept. of Fish and Game*, 154 N.H. 46 (2006) (prohibiting television cameras at a hearing on issuance of a hunting and fishing license because the presence of cameras would impair the applicant's ability to present his case violated the Right-to-Know law where the applicant had not established that he had a due process right to a hearing without cameras present).[10] It is recommended that public bodies whose public meetings are regularly recorded by members of the public establish uniform procedures that allow for a reasonable opportunity to record while not interfering with or disrupting the conduct of the meeting.

d. No vote in a public meeting may be taken by secret ballot except for:

(1) Town meetings and elections;
(2) School district meetings and school district elections; or
(3) Village district meetings and elections.

e. Meeting minutes must be kept and must include:

(1) The names of the members present;
(2) The names of persons appearing before the body;
(3) A brief description of each subject discussed; and
(4) A description of all final decisions made, including all decisions to meet in non-public session. "Final decisions" include actions on all motions made, even if the motion fails. A clear description of the motion, the person making the motion, and the person seconding the motion should also be included.

f. Minutes are not required to include stenographic or verbatim transcripts. *DiPietro v. City of Nashua*, 109 N.H. 174 (1968). However, there may be other statutes which require a verbatim record for certain types of public proceedings. *E.g.*, adjudicative hearings conducted under RSA 541-A:31, VII.

g. Minutes are a permanent part of the body's records and must be written and open to public inspection not more than five business days after the meeting.[11] RSA 91-A:2, II. There are no exceptions to this requirement for

[10] The Court did not reach the question of whether the right to due process, if it had been established by the person seeking a license, would outweigh the right to use television cameras at a public hearing. Television cameras should generally be allowed at public meetings and hearings.

[11] RSA 641:7 reflects the importance of keeping minutes which accurately record the proceedings before the public body. This statute imposes a misdemeanor penalty upon persons who "tamper with public records or information." A person is guilty of this crime if he or she:

the minutes of open meetings. Draft minutes can be used to satisfy this requirement, until the final minutes are completed and accepted, but they must be clearly marked "Draft."

h. Each public body should adopt a uniform character for its minutes and decide, outside the context of any controversial issue, how detailed its minutes will be. Many public bodies choose to keep minutes that go beyond the requirements of the Right-to-Know law and include a summary of discussion or comments on most agenda items. While this practice is generally appropriate, the additional information voluntarily included in minutes is subject to the same disclosure requirements as the information required by the Right-to-Know law. *Orford Teachers Ass'n v. Watson*, 121 N.H. 118, 121 (1981) (Court rejected the contention that "public records" are only those records required to be kept by law) (citing *Menge v. Manchester*, 113 N.H. 533, 536-37 (1973)).

3. Emergency Meetings

a. "Emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. RSA 91-A:2, II.

b. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body. The facts upon which that determination is based shall be included in the minutes of the meeting. RSA 91-A:2, III(b).

c. In an emergency there still must be a location specified in the notice which is available for public attendance. Therefore, as a practical matter, most emergency meetings will involve at least one member present at the public location. Other members may attend electronically, provided the requirements described herein are met.

4. Characteristics of Non-Public Sessions[12]

a. A body may exclude the public from a meeting only if the body votes, by roll call vote, to adopt a motion for a non-public session. The motion should state the statutory basis for the non-public session and must be approved by the

---

I. Knowingly makes a false entry in or false alteration of anything belonging to, received, or kept by the government for information or record, or required by law to be kept for information of the government; or

II. Presents or uses anything knowing it to be false, and with a purpose that it be taken as a genuine part of information or records referred to in paragraph I; or

III. Purposely and unlawfully destroys, conceals, removes or otherwise impairs the verity or availability of any such thing. RSA 641:7.

[12] Chapter 217, Laws of 1991, deleted the term "executive session" throughout RSA chapter 91-A and replaced it with the term "non-public session."

majority of the members present. The vote to go into non-public session is taken at the public meeting and recorded in the minutes of the public meeting that will be available to the public. The minutes should explicitly identify each voting member and how he or she voted on the motion to enter non-public session.

The allowable grounds for holding a non-public session are limited to the consideration of the following matters:

(1) The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him, unless the employee affected (1) has a right to a meeting pursuant to statute, rule or applicable law; and (2) requests an open meeting in which case the request shall be granted. RSA 91-A:3, II(a).

Note: The "right to a meeting" provision was added by Laws of 1992, Chapter 34:1, and effectively replaces the holding in *Johnson v. Nash*, 135 N.H. 534 (1992). Any person with a right under some other law to a public hearing or meeting would be entitled to personal notice of that meeting according to the law or contract that grants the right. Where a right to a public hearing and notice exists, generally that right attaches when the public body is considering imposing discipline or discharging the employee. It would generally not apply to non-public sessions held to discuss a complaint when initially received or to decide whether to direct that a complaint be investigated by the appropriate authority.

Public bodies that are hiring authorities with disciplinary and discharge authority that also provide open public comment periods at meetings should consult with legal counsel and establish a procedure to follow when a member of the public makes a complaint about a specific employee.

Nonetheless, if the body plans to hold a non-public "hearing" on the discipline, compensation or promotion of a particular employee, it should state this intention in the notice sent to the parties, and if a right to have that meeting held in public is granted by some legal authority (law, ordinance, contract), include in the notice a statement of the employee's right to an open meeting.

(2) The hiring of any person as a public employee. RSA 91-A:3, II(b). Note: Filling a vacancy of an elected or appointed public office is an "appointment" and is not the "hiring" of a public employee. Interviews and deliberation on filling a vacancy in an elected office therefore must occur in public session. *Lambert v. Belknap County Convention*, 157 N.H. 375 (2007).

(3) Matters which, if discussed in public, likely would adversely affect the reputation of any person, other than a member of the body or agency itself, unless such person requests an open meeting.[13] This exception shall extend 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. RSA 91-A:3, II(c).

(4) Consideration of the acquisition, sale or lease of real or personal property which, if discussed in public, likely would benefit a party or parties whose interests are adverse to those of the general community. RSA 91-A:3, II(d).

(5) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the body or agency or any subdivision thereof, or against any member thereof because of his or her membership in such body or agency, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any body, board or agency for the purposes of this subparagraph. RSA 91-A:3, II(e). However, note that RSA 91-A:3, II(c) makes a non-public session proper if the tax abatement is sought based on inability to pay or poverty.

(6) Consideration of applications by the Adult Parole Board under RSA chapter 651-A. RSA 91-A:3, II(f).

(7) Consideration of security-related issues bearing on the immediate safety of personnel or inmates at the county correctional facilities by facility superintendents or their

[13] In *Appeal of Plantier*, 126 N.H. 500 (1985), the New Hampshire Supreme Court ruled that the New Hampshire Board of Registration in Medicine could not rely on this section to hold a closed disciplinary hearing to protect the reputation of a complaining witness where another more specific statute entitled the physician complained against to an open hearing if he requested one.

designees. RSA 91-A:3, II(g). A county correctional superintendent acting in his or her executive capacity is not a public body subject to the public meeting requirements of the Right-to-Know law. This provision applies to meetings of the superintendent with the County Commissioners or any other public body for the purposes stated.

(8) Consideration of applications by the Business Finance Authority under RSA 162-A:7-10 and RSA 162-A:13, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application. RSA 91-A:3, II(h).

(9) Consideration of matters relating to the preparation for and carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials for the purpose of thwarting a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. RSA 91-A:3, II(i).

(10) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A.

b. Unless a specific statute authorizes a body to deliberate in non-public session on a particular question, public bodies must deliberate in public. RSA 91-A:3, I(a).

c. Any motion to go into non-public session must include a specific reference to an appropriate section in RSA 91-A:3, II, as listed above. If the body is relying on other law, a reference to that law should be included in the motion and minutes. *See, e.g.*, RSA 21-G:31, V.

d. A public body may take final action in a non-public session on matters which may properly be considered in non-public sessions.

e. Minutes of non-public sessions:

(1) The roll call vote to adopt a motion to go into non-public session, and the statutory basis for doing so, must be recorded in the minutes of the public meeting.

(2) Minutes of non-public sessions are required. These minutes (including any decisions reached by the body) must be disclosed within 72 hours unless two-thirds of the members present determine that divulgence of the information would:

(i) Likely adversely affect the reputation of any person other than a member of the body or agency itself;

(ii) Render the proposed action ineffective; or

(iii) Pertain to terrorism.

(3) A vote by two-thirds of the members present not to divulge the information is a "decision" that must be recorded in the minutes, together with the reasons for non-disclosure. Any decision on the matter under consideration must be recorded in the minutes, although it need not be disclosed until a majority of the members determine that the circumstances set forth in (i), (ii), or (iii) above no longer apply.

See Appendix B, Model Nonpublic Session Procedures/Motions.

V. GOVERNMENTAL RECORDS

During the regular or business hours of all public bodies and public agencies, the public has a right to inspect and copy all non-exempt governmental records in the possession, custody, or control of the body or agency. RSA 91-A:4, I. Public bodies and public agencies must maintain their public records in a way that makes them available to the public. *NHCLU v. City of Manchester*, 149 N.H. 437 (2003).

A. What is a Governmental Record?

"Governmental records" means 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. Without limiting the foregoing, the term "governmental records" 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 term "governmental records" also shall include the term "public records." RSA 91-A:1-a, III.

"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. RSA 91-A:1-a, IV.

The term "public record" refers to specific pre-existing files, documents or data in an agency's files, and not to information which might be gathered or compiled from numerous sources. *Brent v. Paquette*, 132 N.H. 415, 426 (1989). Documents or data which are covered by statutory or common-law privileges or exclusions are excluded from the definition of "public records." *See* RSA 91-A:4, I (referring to statutory exclusions). Some, but not all, of these privileged and excluded records are included among the exemptions specified in RSA 91-A:5, *e.g.*, medical treatment records. If you question whether a document is a public record, you should consult your legal counsel.[14]

The NH Supreme Court has not had occasion to address the requirement that to be a governmental record, information must be created, accepted or obtained by a public body or public agency "*in furtherance of its official function.*" However, both the Superior Court and an Attorney General's Opinion have addressed the issue of when an individual member of a public body is acting on behalf of that body in furtherance of its official function. *See KingCast.net et al. v. Martha Mcleod et al.*, Grafton County Superior Ct., No. 08-E-192 (Dec. 23, 2008) (Order, Vaughan, J.) (finding under the circumstances of this case individual legislators' emails were not "'governmental records' because they

[14] The New Hampshire Supreme Court is the ultimate decision maker regarding interpretations of the Right-to-Know Law. The Court has interpreted he law with a view toward providing the utmost information, in order to effectuate the statutory and constitutional objectives of facilitating access to all public documents. Thus, while the statute does not provide for unrestricted access to public records, provisions favoring disclosure are broadly construed and exemptions are interpreted restrictively. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth*., 142 N.H. 540 (1997).

were not '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.'"); *see also Joseph Kelly Levasseur v. City of Manchester, et al.*, Hillsborough County Superior Ct. Northern District, No. 216-2014-CV-0125 (Mar. 31, 2014) (Order, Nicolosi, J.) (finding individual Alderman's email "does not, on its own, constitute a record created, accepted or obtained by, or on behalf, of a public body."); *see also* Attorney General's Opinion 11-01 ("[I]n determining whether a particular email constitutes a governmental record, a determination should be made as to the capacity and authority under which the individual legislator is acting in creating or receiving the email" because "if an individual member is imbued with authority to act on behalf of a public body,… the individual member could presumably create or obtain governmental records.").

Spam or junk e-mail received and incidental personal messages sent or received via e-mail, such as chat, instant messages or other forms of electronic communication, are unlikely to be deemed governmental records, as they are not received in furtherance of an official function. However, if the e-mails are analyzed for evidence of abuse of the governmental e-mail system, particularly if they end up being used as evidence in a personnel action, they likely would then be considered a governmental record.

Governmental records that are provided electronically may contain metadata that could be accessible to the requesting party. Metadata is data imbedded in electronic documents and can include information such as your organization and/or computer name, comments, template information, hidden text or cells, the name of the network server or hard disk where the document is saved, and the names of previous document authors. New Hampshire Courts have not ruled on whether such information is subject to disclosure under RSA 91-A. At least one Federal District Court has determined that, with respect to the Freedom of Information Act, certain metadata is an intrinsic part of an electronic record and that "metadata *maintained* by the agency *as part of an electronic record* is *presumptively* producible under FOIA, unless the agency demonstrates that such metadata is not 'readily producible.'" *National Day Laborer Organizing Network, et al., Plaintiffs, v. United States Immigration and Customs Enforcement Agency, et al., Defendants*, No. 10 Civ. 3488 (SAS). Questions about metadata should be reviewed with legal counsel.

Given the proliferation of electronic records, public bodies and public agencies should review the following with legal counsel: their computer, e-mail, instant message, phone and other system use; the sections of their employee handbooks covering e-mail, instant message, phone and web usage, including but not limited to social media usage such as Twitter, YouTube, Facebook; and record retention policies and practices.

B. Examples of Governmental Records Required to be Disclosed

1. Individual salaries and employment contracts of local school teachers. *Mans v. Lebanon School Board*, 112 N.H. 160 (1972).

2. Names and addresses of substitute teachers hired during a strike. *Timberlane Regional Education Assn. v. Crompton*, 114 N.H. 315 (1974).

3. Certain law enforcement investigative records. *Lodge v. Knowlton*, 118 N.H. 574 (1978). (Discussed in more detail below).

4. A computerized tape of field record cards concerning property tax information. *Menge v. City of Manchester*, 113 N.H. 533 (1973).

5. State agency budget requests and income estimates submitted pursuant to RSA 9:4 and 5 to the Commissioner of Administrative Services. *Chambers v. Gregg*, 135 N.H. 478 (1992).

6. Records of any payment in addition to regular salary and accrued vacation, sick, and other leave, made to an employee of any public agency or body listed in RSA 91-A:1-a, I-IV, or to an employee's agent or designee, upon the employee's resignation, discharge, or retirement. RSA 91-A:4, I-a.[15] *See Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673 (2010) (requiring disclosure of names of retired public employees who received payments from public employee retirement plan and amounts of those payments).

C. Examples of Electronic Governmental Records Required to be Disclosed

1. Electronic records are defined in RSA 5:29, VI as "information that is created or retained in a digital format. Electronic governmental records shall be available in the same manner as records stored in public files if access to such records would not reveal work papers,[16] personnel data or other confidential information. RSA 91-A:4, V. The New Hampshire Supreme Court has held that a record does not lose its status as public because it is stored in a computer system. *Hawkins v. N.H. DHHS*, 147 N.H. 376 (2001).

2. Electronic Government Records may include, but are not limited to:

   a. Documents stored in a computer or any other storage medium such as CD, DVD, the cloud, or thumb drive;
   b. E-mail;
   c. Voice mail;
   d. PDF documents;
   e. Instant messages;
   f. Text messages; and

[15] Public bodies or public agencies should be careful not to make public any health information protected under HIPAA or other health information privacy laws.

[16] While courts have not yet addressed the issue, it is our view that the RSA 91-A:4 exemption, while referencing only public bodies, is properly applied to the governmental records of a public agency because the Court has found it is merely an emphasis on the exemption in RSA 91-A:5, which applies to government records held by a public agency.

g. Electronic photos (digital).

D. A Public Body's Duty to Maintain Electronic Records

1. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. RSA 91-A:4, III-a. You do not need to keep a particular record in both paper and electronic form.

2. Retention schedules for public bodies are set forth within the following statutes:

   a. Counties, cities and towns, RSA 33-A:3-a;
   b. School Districts and School Boards; RSA 189:29-a; RSA 189:27-a, b;
   c. State Entities, RSA 5:40 (The Director of the Division of Archives, under the supervision of the Secretary of State, shall establish a manual of uniform procedures necessary and proper to effectuate the purpose of this subdivision. A link to the Archives Procedure Manual, which sets forth the retention schedules for state government records, can be found at http://sos.nh.gov/Arch_Rec_Mgmt.aspx.)

3. There is no requirement to keep or maintain electronic records which have no paper counterpart. RSA 91-A:4, III-a. If an electronic record would fulfill a pending Right-to-Know request it may not be destroyed, even if exempt from disclosure. *See* RSA 91-A:9, addressed further below.

4. Methods that may be used to keep electronic records accessible include, but are not limited to:

   a. Copying to microfilm or paper. RSA 91-A:4, III-a.
   b. Transferring to durable electronic media using standard or common file formats. RSA 91-A:4, III-a.

5. Deletion of an electronic record.

   a. A record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. RSA 91-A:4, III-a.
   b. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record. RSA 91-A:4, III-a.

   While the New Hampshire Supreme Court has not yet addressed the issue, it is our view that electronic records that have been legally deleted and are available only on system back-up storage media are properly treated as no longer subject to disclosure

under RSA 91-A:4 III-b. To access a record that exists only on back-up media typically requires either replicating the system hardware or taking the system in use off-line to restore the backup. RSA 91-A:4, III-a has the effect of making restoration from back-up unnecessary in the ordinary course of responding to Right-to-Know requests.[17]

Restoring from backup, however, might be legally necessary if an electronic record was not retained as required by law, that is, if it was illegally deleted. The expense of restoring records from backups is another reason why public bodies and public agencies should review their electronic record retention and purging policies and practices.

E. Settlements of Lawsuits by Municipalities

Every agreement to settle a lawsuit, threatened lawsuit, or other claim against a public body, public agency, or its members entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years. RSA 91-A:4, VI.

F. Exemptions From Disclosure

Statutory Exemptions - RSA 91-A:5. The following government records are exempt from disclosure. *Also see* Appendix F, a listing of most statutes that exempt specific government records from disclosure.

1. Records of grand and petit juries.[18]

2. Records of parole and pardon boards.

3. Personal school records of pupils. *Brent v. Paquette*, 132 N.H. 415 (1989); *see also* 20 U.S.C. §1232(F), *et seq.*, known as the Buckley Amendment or the Family Educational Rights and Privacy Act ("FERPA") and 20 U.S.C. 1092(f), *et seq.*, known as the Clery Act, requiring postsecondary educational institutions to disclose campus security policy and crime statistics.

4. 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, examinations for employment or academic examinations; and personnel, medical, welfare, library user, videotape

[17] *See Paul Twomey v. N.H. Department of Justice*, Docket No. 10-CV-503 (2010) (finding that where the purpose of back-up tapes is to restore agency services and not to maintain governmental records, and where the back-up tapes only contain a snapshot of what is on a computer at a particular time, "the back-up tapes themselves cannot be considered governmental records within the meaning of RSA 91-A:1-a because they do not contain 'information'.").

[18] This extends to stenographic notes and transcripts of grand jury proceedings. *State v. Purrington*, 122 N.H. 458 (1982).

sale or rental and other files whose disclosure would constitute an invasion of privacy.[19] *See Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006) (investigative report prepared for the Water Precinct concerning claimed employee misconduct that could have lead to disciplinary action was a record pertaining to internal personnel practices and thus exempt from disclosure); *Lamy v. NH Public Utilities Commission*, 152 N.H. 106 (2005) (upholding non-disclosure of names and addresses of residential customers of utility company); *Montenegro v. City of Dover*, 162 N.H. 641 (2011) (job titles of any persons who had monitored city's law enforcement surveillance equipment were not internal personnel practice).

5. Teacher certification records, held by the Department of Education. However, the Department shall make teacher certification status available. RSA 91-A:5, V.

6. 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.

7. Certain information regarding the State's procurement and contracting process. Notwithstanding RSA 91-A:4, no information shall be available to the public concerning bids or proposals, from the time the invitation is made public until the contract is actually awarded in order to protect the integrity of the public bidding process. RSA 21-I:13-a, II; *see also Irwin Marine Inc. v. Blizzard Inc*., 127 N.H. 271 (1985) (government contracting process must be fair; any procedure that places a bidder at a disadvantage violates the public interest and weakens public confidence in government).

---

[19] A municipal officer may be dismissed from office for breaching the confidentiality provided by RSA 91-A:3 or :5. RSA 42:1-a, II provides:

> Without limiting other causes for such a dismissal, it shall be considered a violation of a town officer's oath for the officer to divulge to the public any information which that officer learned by virtue of his official position, or in the course of his official duties, if:
>
> (a) A public body properly voted to withhold that information from the public by a vote of 2/3, as required by RSA 91-A:3, III, and if divulgence of such information would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective; or
>
> (b) The officer knew or reasonably should have known that the information was exempt from disclosure pursuant to RSA 91-A:5, and that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective.

When a proposed contract is submitted to the Governor and Council (G&C) for approval, only the contract and its exhibits and attachments are placed on the public agenda. Other documents related to a contract, such as bids or proposals, internal emails, memoranda, notes, should not be submitted and are not subject to disclosure at that point. RSA 21–I:13-a, II. Once the contract is "actually awarded" by G&C, all relevant documents, including the internal emails, memoranda, notes and the like will be subject to RSA 91-A disclosure.[20] If the G&C do not actually award the contract or the contract is withdrawn from consideration, the provisions of RSA 21-I:13, II would continue to apply until either a new invitation to bid or RFP is issued, in which case the RSA 21–I:13-a, II provision would again apply, or the original public offering is abandoned by the agency.

Further, RSA 9-F:1 requires that State contracts entered into as a result of requests for proposals ("RFP") be posted online. It is advisable to include language in the RFP informing potential vendors that any resulting contract will be posted online(*see* sample RFP public disclosure language in Appendix E).

RSA 9-F:1 does not require posting of information exempt from public disclosure under RSA 91-A or other law. For example, contracts may contain confidential, commercial, or financial information exempt from disclosure under RSA 91-A:5, IV.[21] Therefore, pursuant to the requirements of RSA 9-F:1 and RSA 91-A:5, state agencies are responsible for ensuring that information exempt under RSA 91-A, and other laws, is redacted prior to the proposed contract being posted online.

8. 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

[20] To the extent that a contract is not subject to approval by the G&C, the contract is "actually awarded" following DOJ approval for form, substance and execution.

[21] The New Hampshire Supreme Court has not had occasion to rule on how trade secrets are addressed under RSA 91-A. The Merrimack Superior Court in *Caremark PCS Health, LLC v. NH Department of Administrative Services*, 217-2011-CV-00475 (2014), held that disclosure of trade secrets is prohibited under New Hampshire's Uniform Trade Secrets Act and, as such, trade secrets are exempt from disclosure under RSA 91-A:4, I as records "otherwise prohibited by statute." This decision is on appeal.

[22] In business dealings where a unit of government will come into possession of information belonging to the contracting party and that party believes it should be treated as confidential and exempt from the disclosure under the Right-to-Know law, it is appropriate for government to promise in contract documents only to give notice to the other party and to afford that party a set period of time in which to seek a court order prohibiting disclosure in the event a Right-to-Know request is received, which the public body or public agency believes requires disclosure of the information. It is helpful when the contracting document cites the legal authority for the information being confidential or otherwise non-public.

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.

9. "Invasion of privacy" will not be so broadly construed as to defeat the purpose of the Right-to-Know law. *Mans v. Lebanon School Board*, 112 N.H. 160 (1972). In *Brent v. Paquette*, 132 N.H. 415 (1989), the Court balanced the competing interests of society against those of school children and their parents and determined that disclosure of the names and addresses would be an invasion of privacy.

   A three-step analysis should be used to evaluate whether disclosure of governmental records constitutes an invasion of privacy:

   i. Is there a privacy interest at stake that would be invaded by the disclosure?
   ii. Would disclosure inform the public about the conduct and activities of its government?
   iii. Balance the public interest in disclosure against the government's interest in non-disclosure and the individual's privacy interest in non-disclosure.

   Lambert v. Belknap County Convention, 157 N.H. 375, 382-3 (2008); *Lamy v. New Hampshire PUC*, 152 N.H. 106, 109 (2005); *NHCLU v. Manchester*, 149 N.H. 437, 440 (2003); *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996).

10. Many State agencies are subject to federal and state statutes and regulations establishing the confidentiality of certain types of information. Examples of state statutes include, but are not limited to:

    (a) Certain records of the Department of Employment Security. RSA 282-A:118.

    (b) Public assistance records. RSA 167:30.

    (c) Physician/patient communications. RSA 329:26.

    (d) Certain records of the Insurance Department. RSA 400-A:25.

    (e) Certain consumer protection and antitrust records of the Office of Attorney General. RSA 356:10, V and RSA 358-A:8, VI.

    (f) Enhanced 911 System records. RSA 106-H:14.

    (g) Motor vehicle records. RSA 260:14, II(a); s*ee DeVere v. Attorney General*, 146 N.H. 762 (2001).

11. To determine which records of an agency or body are confidential, all applicable federal and state statutes and regulations must be analyzed. Governmental records which are made privileged by statute, court rule, or common law, are appropriately treated as exempt from disclosure under the Right-to-Know law *See* Addendum E for a list of most state statutes and court rules that make specific information confidential or exempt from disclosure under the Right-to-Know law.

12. Records from non-public sessions under RSA 91-A:3, II(i) (emergency functions) or records that are exempt under RSA 91-A:5,VI (emergency functions) may be released to local or state safety officials. Records released under this section shall be marked "limited purpose release" and shall not be disclosed by the recipient to the public. RSA 91-A:5(a).

13. If disclosure of a record is prohibited by statute, the Right-to-Know law does not compel disclosure. RSA 91-A:4, I.

G. Other Exceptions to Disclosure

1. Written legal advice from the agency or body's counsel. *Society for the Protection of N.H. Forests v. Water Supply and Pollution Control Commission*, 115 N.H. 192 (1975). *See Hampton Police Ass'n Inc. v. Town of* Hampton, 162 N.H. 7 (2011) ("attorney-client privilege may apply to information in a billing record that reveals the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law"); *Professional Fire Fighters of New Hampshire v. New Hampshire Local Government Center*, 163 N.H. 613 (2012) (Communications protected under the attorney-client privilege fall within the exemption in the Right-to-Know law for confidential information).

2. Documents or information which an agency properly receives in non-public session if disclosure of such records would frustrate the purpose for the non-public session.[23]

3. The Right-to-Know law does not require the probing of the mental processes of governmental decision-makers. *See Merriam v. Salem*, 112 N.H. 267, 268 (1972). In other words, 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.

4. While advisory documents may be public records, the Right-to-Know law does not require disclosure that would effectively prohibit the frank, open, and honest

[23] If an agency can exclude the public from certain meetings and receive information in such a closed session or receive legal advice in a non-meeting, the forced public disclosure of those government records would nullify the effect of holding a non-public session or non-meeting to consult with legal counsel.

discussion that is so necessary to reasoned decision-making. *See Chambers v. Gregg*, 135 N.H. 478, 481 (1992) ("[I]t is arguable that the interaction between the Governor and department heads ... constitutes a deliberative process.").

5. Any notes or other materials made for personal use that do not have an official purpose, including notes and materials made prior to, during, or after a public proceeding. RSA 91-A:5, VII. *See ATV Watch v. N.H. Dept. of Transportation*, 161 N.H. 746, 761 (2011) (rejecting argument that all notes and materials that bear on an agency's business must be disclosed; "official purpose" is narrower than "bearing on the agency's business").

6. 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 those entities defined in RSA 91-A:1-a. *See ATV Watch v. N.H. Dept. of Transportation*, 161 N.H. 746, 758 (2011) (exemption meant to protect "pre-decisional, deliberative communications that are part of an agency's decision-making process [and] the distinction between preliminary and final documents does not consist of the extent to which the person or persons from whom they originate expect to alter them."; also rejecting argument that disclosure to another agency invalidates the exemption).

7. Bank examiners' reports. *Appeal of Portsmouth Trust Co*., 120 N.H. 753 (1980).

8. Real estate appraisal reports compiled by the Department of Transportation. *Perras v. Clements*, 127 N.H. 603 (1986).

9. Quality assurance records maintained by ambulatory care clinics. *Disabilities Rights Center, Inc. v. Comm'r, N.H. Dept. of Corrections*, 146 N.H. 430 (1999).

10. A public body may release information concerning health or safety to people whose health or safety might be affected without compromising the confidentiality of the files. RSA 91-A:5, IV.

H. Law Enforcement Records or Information[24]

1. Relevant portions of the Federal Freedom of Information Act, 5 U.S.C. §552(b)(7), have been adopted as the standard for the disclosure or non-disclosure of law enforcement records. *Lodge v. Knowlton*, 118 N.H. 574 (1978); *Murray v. State Police*, 154 N.H. 579, 582 (2006); *38 Endicott St. N., LLC v. State Fire Marshal*, 163 N.H. 656 (2012).

2. If the records requested are compiled for law enforcement purposes, they may be withheld if the agency[25] can prove that disclosure would either:

[24] The New Hampshire Supreme Court has explicitly held that the exemption extends beyond "investigatory" documents to records "compiled for law enforcement purposes." *Montenegro v. City of Dover*, 162 N.H. 641, 646 (2011).

a. Interfere with enforcement proceedings;

b. Deprive a person of a right to a fair trial or an impartial adjudication;

c. Constitute an unwarranted invasion of privacy.[26] (The statutory exemption for invasion of privacy will be strictly construed. *Mans v. Lebanon School Board*, 112 N.H. 160 (1972));

d. Reveal the identity of a confidential source, and in the case of a record compiled by a law enforcement authority in the course of a criminal investigation or by any agency conducting a lawful national security investigation, confidential information furnished only by a confidential source;

e. Reveal investigative techniques and procedures; or

f. Endanger the life or physical safety of any person.

3. The burden of proof is on the agency to show that the record is exempt.[27] It is not the responsibility of the person requesting the record to show that no exemption applies.[28] If an agency denies a request for law enforcement records, it should include in its response to the requester an explanation of the basis for non-disclosure. In *Hopwood v. Pickett*, 145 N.H. 207 (2000), the Court held that the probate court erred in relying on the *Lodge* factors to deny a litigant's request to have an law enforcement record introduced into evidence as a sealed exhibit, where the investigating agency did not object. [29]

I. Guidance In Producing Law Enforcement Records

---

[25] "The exemption does not apply exclusively to law enforcement officers or agencies, but rather applies to all records and information compiled, by any type of agency, for law enforcement purposes." *38 Endicott St. N., LLC*, 163 N.H. at 661–62 (finding Fire Marshal's Office is not primarily a law enforcement agency but instead, a "mixed-function agency"). "When the agency claiming the exemption constitutes a 'mixed-function agency,' it may meet its burden by showing that the pertinent records were compiled pursuant to the agency's law enforcement functions, as opposed to administrative functions." *Id*. at 665.

[26] In *Union Leader Corp. v. City of Nashua*, No. 95-E-023 (1997), the Hillsborough County Superior Court held that police reports and a videotape of a defendant arrested for drunk driving but not prosecuted for that offense were not exempt from the Right-to-Know law. The Court reasoned that the information would shed light on the police department's activities and that the defendant's privacy interest was "weak" due to the fact that his arrest was widely reported in the press.

[27] The standard for determining whether the agency met its burden depends on whether the agency is primarily a law enforcement agency, a mixed-function agency, or something else. *See 38 Endicott St. N. LLC v. State Fire Marshal*, 163 N.H. 656, 662–63 (2012).

[28] If none of the *Lodge* exemptions apply to a particular record, one of the statutory exemptions described in Section III, E of this Memorandum may still apply.

[29] The burden is on the State agency to object to a request to introduce investigatory records; otherwise, the court may not rely on *Lodge* in refusing to admit them.

Requests for the production of investigative records should be considered in light of all the relevant facts and circumstances. There is no bright-line test to apply in every instance to determine which documents may be withheld and which must be disclosed. However, the following should be considered:

1. Interference with Law Enforcement Proceedings

   Documents compiled for law enforcement purposes are exempt from production if such production would reasonably be expected to interfere with law enforcement proceedings.

   The proceedings must either be pending or "reasonably anticipated." *Murray v. State Police*, 154 N.H. 579, 582 (2006). The Court construes this to include unresolved crimes where some regular effort continues to be expended to solve it. *Id.* at 583. The exemption for interference with enforcement proceedings "requires proof of only 'a reasonable chance that an enforcement proceeding will occur.'" *Murray v. State Police*, (*Murray II*), No. 2007-0459, at 1 (Supreme Court Order, April 16, 2008) (rejecting claim that proof of 'a high likelihood that an individual would be prosecuted' was required).

   This exemption would not justify, for instance, withholding investigative records concerning an unquestioned suicide, although other exceptions might apply. For example, the report may include facts whose disclosure would constitute an invasion of privacy.

   This exemption "does not require that the agency explain when, where, or by whom charges might arise." *38 Endicott St. N., LLC*, 163 N.H. at 666. Instead, the agency, at the least, must "fairly describe the content of the material withheld and adequately [state the] grounds for nondisclosure, and [explain why] those grounds are reasonable and consistent with the applicable law." *Id. at 667* (*citing Barney v. I.R.S.*, 618 F.2d 1268, 1274 (8th Cir. 1980) (quotation omitted)).[30]

2. Accused's Right to a Fair Trial

   This exemption will apply to some extent in all pretrial situations. Right-to-Know requests received during the pendency of a criminal prosecution should be reviewed with the case prosecutor before a substantive response is made. Information which might prejudice an accused's right to a fair trial includes, but is not limited to, records relating to the following:

   a. The guilt or innocence of a defendant;

[30] The *38 Endicott St. N., LLC* Court further found where an agency has "sustained its burden of proof by affidavit or testimony" demonstrating likely interference, through "generic determinations" for each category of documents, the "trial court need not undertake an *in camera* inspection or order a *Vaughn* index." 163 N.H. 656, 668 (2012).

b. The character or reputation of a suspect;

c. Examinations or tests which the defendant may have taken or have refused to take;

d. Gratuitous references to a defendant; for example, a reference to the defendant as "a dope peddler;"

e. The existence of a confession, admission or statement by an accused person, or the absence of such;

f. The possibility of a plea of guilty to the offense charged or a lesser offense;

g. The identity, credibility or testimony of prospective witnesses;

h. Any information of a purely speculative nature; and

i. Any opinion as to the merits of the case or the evidence in the case.

3. Unwarranted Invasion of Privacy

In determining whether disclosure of documents will constitute an unwarranted invasion of privacy, the court will balance the public and/or private interest in the information sought against the severity of the invasion of privacy.

A three-step analysis should be undertaken when considering whether disclosure of public records constitutes an invasion of privacy under RSA 91-A:5, IV. First, evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations. 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. If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.

Finally, balance the public interest in disclosure against the government's interest in non-disclosure and the individual's privacy interest in non-disclosure. The motives of the person making the request are irrelevant to this analysis. "Information that is subject to disclosure under the Right-to-Know law belongs to citizens to do with as they choose. As a general rule, if the information is subject to disclosure, it belongs to

all." *Lambert v. Belknap County Convention*, 157 N.H. 375, 382–83 (2008) (*citing and quoting Lamy*, 152 N.H. at 109.)

Examples of information that may implicate a privacy interest:

a. Marital status;[31]

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; and

j. Names of children.

4. Confidential Source

Information may be withheld if disclosure "could reasonably be expected to disclose the identity of a confidential source, . . .in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by any agency conducting a lawful national security

[31] In *Petition of Keene Sentinel*, 136 N.H. 121, 128 (1992), the Supreme Court held that divorce records which were sealed in Superior Court could not remain sealed merely by asserting a general privacy interest. Right of access to these records must be weighed and balanced against privacy interests that are articulated with specificity. *See Associated Press v. State*, 153 N.H. 120 (2005) (affirming that burden of justifying non-disclosure lies with the party seeking to prevent disclosure).

[32] The reasoning behind this exclusion has been explained as follows:

> Public policy requires that individuals may furnish investigative information to the government with complete candor and without the understandable tendency to hedge or withhold information out of fear that their names and the information they provide will later be open to the public. *Forrester v. U.S. Dept. of Labor*, 433 F. Supp. 987 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 1330 (2d Cir. 1978).

Such disclosure might have a "chilling effect on sources." *Id.; see also Tarnopol v. FBI*, 442 F. Supp. 5 (D.D.C. 1977); *Ferguson v. Kelly*, 448 F. Supp. 919 (N.D. Ill., 1977), *reconsideration granted* 455 F. Supp. 324 (N.D. Ill. 1978).

intelligence investigation, confidential information furnished by a confidential source; or . . ." *Murray v. State Police*, 154 N.H. 579, 582 (2006).

5. Investigative Techniques and Procedures

   Information may be withheld if disclosure "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." *Murray v. State Police*, 154 N.H. 579, 582 (2006). This exclusion should not be interpreted to include routine techniques and procedures already well known to the public. It does, however, protect from disclosure "detailed law enforcement surveillance procedures," such as locations of surveillance equipment, recording capabilities for each piece of equipment, the specific time periods each piece of equipment is expected to be operational, and the retention time for any recordings. *Montenegro v. City of Dover*, 162 N.H. 641, 649 (2012). "This information is of such substantive detail that it could reasonably be expected to risk circumvention of 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." *Id*.

6. Endangering Life or Physical Safety of Any Person

   Information may be withheld if disclosure "could reasonably be expected to endanger the life or physical safety of any individual." *Murray v. State Police*, 154 N.H. 579, 582 (2006).

Any law enforcement record, whether open, closed, active or inactive, may fall within one or more of these exemptions. For instance, the disclosure of an open or active file could interfere with enforcement proceedings in many ways such as apprehending a suspect, disclosing trial strategy, etc. Disclosure of a closed file would not be likely to interfere with enforcement proceedings but might constitute an unwarranted invasion of privacy or make public the name of a confidential informant. If only a portion of the record is exempt, the remaining portion must be disclosed if it can be reasonably segregated from the non-exempt portions.

Many of the exemptions for law enforcement records or information have received limited interpretation by the New Hampshire courts. The above guidance is based, in part,on federal case law, which the New Hampshire Supreme Court has cited to favorably. The needs, demands, and results of good law enforcement are complex and long lasting, and the federal case law will not be lightly disregarded. It is important, however, that these exemptions be applied thoughtfully and carefully. The mere assertion of an exclusion without adequate reason or justification will not be sufficient to sustain an agency's denial of a request for law enforcement information under the Right-to-Know law.

In a 2006 decision, the Supreme Court clarified the process for asserting the law enforcement records exception for interference with law enforcement proceedings. *Murray v. New Hampshire Division of State Police,* 154 N.H. 579 (2006). To justify the withholding of records, an agency should provide the court a categorization of the records, with each category defined precisely. The description should not reveal the contents of withheld documents, but should provide enough information to allow a court to determine if the documents must be disclosed. The Court, in *Murray,* offered examples of the types of categories that might satisfy that reguirement:

1. Details regarding initial allegations giving rise to the investigation;
2. Interviews with witnesses and subjects;
3. Investigative reports furnished to prosecutors;
4. Communications with prosecutors;
5. Investigation progress reports;
6. Prosecutor's opinions – Prosecution Memoranda.

Murray, 154 N.H. at 584. The Court noted that, in limited circumstances where the naming of a category would in itself release information that would interfere with an investigation, a "miscellaneous" category may be justifiable. Broad terms for categories such as photographs, correspondence, or maps and diagrams are insufficient. *Id.*.

Affidavits, testimony, or other evidence that explains how the disclosure of the information within the categories could interfere with any investigation or enforcement should be provided to the court. The law enforcement agency may also be required to explain why there is no portion of the withheld materials that can be reasonably segregated within a particular category that is suitable for release. *Murray v. New Hampshire Division of State Police,* 154 N.H. 579 (2006).

J. Burden of Proof for Not Disclosing a Governmental Record

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).

However, in cases where disputed records cannot be reviewed effectively, such as in case involving a large number of documents, a court may order that the party resisting disclosure prepare a detailed document index pursuant to *Vaughn v. Rosen*, 157 U.S. App. D.C. 340, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), to assist the court in determining whether the documents in question are exempt from the Right-to-Know law. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth*., 142 N.H. 540 (1997). Such an index will include a general description of each document withheld and the justification for its nondisclosure. *See* Appendix C, for a sample of a *Vaughn* Index

K. Public Inspection of Governmental Records – RSA 91-A:4, IV

Every citizen during has the right to inspect all non-exempt governmental records, including meeting minutes , during the regular or business hours of a public body or public agency, at the regular business premises of that body or agency. Citizens have the right to make memoranda, abstracts, and photographic or photostatic copies of the records or minutes, except as otherwise prohibited by statute or RSA 91-A:5. RSA 91-A:4, I.

The Right-to-Know law does not require the requesting party to identify himself or herself and imposes no restrictions on the use of information once it is disclosed. *Associated Press v. N.H.*, 153 N.H. 120 (2005). It is permissible to ask the person making a Right-to-Know request to put the request in writing. However, if he or she declines, the individual receiving the request should create a written record for the public body or public agency's files. The written record should include the date of the request and a description of the specific governmental records being requested. Governmental records that are immediately available must be provided for inspection. When this occurs, the written record should also document what governmental records were provided for inspection and/or which were copied.

1. If records are immediately physically available, the public body or public agency should:

    a. Ask the person requesting access to wait while the records are made available;
    b. If production is appropriate, make the records available for inspection and/or copying;
    c. Provide only a copy for inspection or closely monitor the person's handling of the original documents;
    d. If production is not appropriate, explain why;
    e. If the documents are copied or reproduced using the public body or public agency's equipment is used, the person requesting the documents may be charged for copying or reproduction costs.

RSA 91-A:4(I), RSA 91-A:4(IV), RSA 126-A:5(X). *See ATV Watch v. N.H. Dept. of Transportation*, 161 N.H. 746, 757-758 (2011) (finding that petitioner's inadequately supported statement that documents were 'probably immediately available' was not sufficient to prove a violation of the Right-to-Know law).

2. Timing is important! If the records are not immediately available the body or agency has at most five business days to provide an initial response to the request. Often records will not be available immediately because:

    a. The documents are in use;
    b. They must be reviewed or redacted;

c. They are archived in another location;
d. They are not readily identifiable;
e. A search for the documents must be conducted; or
f. Legal advice must be obtained.

Within five business days, the public agency or body must either deny the request in writing, with reasons, or notify the requester, in writing, if or when the records, subject to RSA 91-A and other applicable statutes, will be available. If the public official is not sure whether or what responsive documents exist, then the requester must be told when the search, retrieval and review process is expected to be completed. RSA 91-A:4(IV).

The NH Supreme Court in *ATV Watch v. DRED*, 155 N.H. 434 (2007) made clear that it is essential that:

a. If government records are immediately available, disclosure must be immediate;
b. If government records can be produced within five days, they must be produced within five days; and
c. Otherwise it is critical that the requesting party be provided with a written response explaining when the determination will be made as to what, if anything, will be disclosed.

Id. at 440-41. *ATV Watch* did not address how much time can be taken to produce a response . The statute refers to the "time reasonably necessary to determine whether the request shall be granted or denied." That is the only guidance available as to how much of a public body's or agency's resources must be diverted from regular work to complete the retrieval, review, redaction process, which is necessary to determine what can be produced.

3. The following generally applies to all governmental records:

a. The public's right to inspect governmental records, including meeting minutes, specifically includes a right to inspect and copy all notes, materials, tapes or other sources used by an agency to compile the minutes of a meeting, after the completion of a meeting and during the entity's regular business hours. RSA 91-A:4, II.

b. An agency is not obligated to retain notes, tapes or other draft materials used to prepare minutes after final minutes have been approved, prepared and filed. *Brent v. Paquette*, 132 N.H. 415, 420 (1989). If drafts, notes, and memoranda and other documents not in their final form are disclosed, circulated, or made available to a quorum or a majority of the members of a public body and retained after the public body or agency has approved final minutes, they will be subject to inspection. *See Orford Teachers Association v. Watson*, 121 N.H. 118 (1981); RSA 91-A:5, IX. Drafts, notes, memoranda

and other documents not in their final form which are not disclosed, circulated, or made available to a quorum or a majority of the members of a public body are exempt from disclosure. RSA 91-A:5, IX. The courts have not yet addressed whether audio or video recordings made by the individual responsible for drafting minutes solely as an aid to creation of the minutes constitute governmental records that must be retained as long as its paper counterpart. Public bodies using tape or video recordings solely to aid in the creation of minutes should consult with legal counsel regarding when, if ever, the recordings can properly be destroyed. Generally minutes and paper verbatim transcripts used for minutes must be preserved permanently.

c. If no exemption applies, a governmental record is subject to public inspection. Any citizen has the right to inspect all non-exempt governmental records during the entity's regular business hours on the regular business premises of the public body or public agency.[33]

d. Arranging a mutually convenient time for the inspection of public documents is consistent with the purposes of the Right-to-Know law. *Brent v. Paquette*, 132 N.H. 415 (1989). Reasonableness is the only guide for resolving conflict between a request to immediately access governmental records, when doing so would significantly disrupt the public body's or agency's business or its legal obligations to fulfill other duties.

e. If a public document is unavailable for a limited time because of its removal for use by a government official in discharging his official duties, this is not a violation of the requirement that public documents be available for inspection and copying. *Gallagher v. Town of Windham*, 121 N.H. 156 (1981). The *Gallagher* case also confirmed that, although all governmental records must be available for inspection and copying, the public body is not absolutely mandated to provide copies at its own labor and expense. Public officials have been cautioned, however, to assist citizens in obtaining copies whenever it is reasonable to do so. *Carbonneau v. Town of Rye*, 120 N.H. 96 (1980).

f. Municipal records shall be retained in the manner specifically set forth in RSA 33-A:3-a. Original town meeting and city council records shall be permanently preserved. RSA 33-A:6.

g. The Right-to-Know law does not require an agency to compile data in the format requested by a member of the public or to create a new document. RSA 91-A:4, VII. The NH Supreme Court has suggested that RSA 91-A does require that public records be maintained in a manner that makes them available to the public. *Hawkins*, 147 N.H. at 379.

[33] RSA 91-A:4, I, refers to "citizens," but the Right-to-Know law does not define this term, and uses it nowhere else. Instead, the statute emphasizes accountability to "the people," accessibility to the "public," and the goals of a "democratic society." An agency should not, therefore, require persons requesting access to public documents to demonstrate that they are citizens of either New Hampshire or the United States.

h. If the public body or public agency does not have a regular office or place of business, the public records must be kept in an office of the political subdivision in which the body is located or, in the case of a state agency, in an office designated by the Secretary of State. RSA 91-A:4, III. A public agency includes any office of a county, town, municipal corporation, school district, school administrative unit, charter school, or other political subdivision. Historically, in many small towns and village districts, the district clerk, tax collector, or treasurer would keep the office records in his or her home. This is not permissible under the Right-to-Know Law unless the official maintains a "regular office or place of business" at that residence.

i. If the public body or public agency uses a photocopy machine or other device to make copies of records for the requester, and the device is maintained by the agency/body, the agency may charge the actual cost of providing a copy, unless an applicable fee has been established by law. RSA 91-A:4, IV.

j. When providing Statistical Tables and Limited Data Sets for Research, the requestor can be required to pay fees established by law for obtaining copies of limited data sets or statistical tables. Such fees shall be based on the cost of providing the copy in the format requested. The agency head shall provide the requestor with a written description of the basis for the fee. RSA 91-A:10, VI.

k. Any public body or agency that maintains governmental records in electronic format may, in lieu of providing original records, copy the requested records to electronic media using standard or common file formats, in a manner that does not reveal information which is confidential under the Right-to-Know law or any other law. RSA 91-A:4, V.

l. If copying to electronic media is not reasonably practicable, or if requester asks for the records in a different format, the public body or agency may provide a printout of the requested records, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided. RSA 91-A:4, V.

m. The cost of converting a record into a format that can be made available to the public is not a factor in determining whether the information is a public record. *Hawkins v. NH Department of Health and Human Services*, 147 N.H. 376 (2001).

n. Although redaction of non-public information is not specifically addressed in RSA chapter 91-A, it is not uncommon for a governmental record to contain some information that must be disclosed and some information that is exempt

from disclosure and which the public body or public agency has a duty not to disclose. Under these circumstances, the governmental entity may have an obligation to produce the non-exempt portion of the requested record if the exempt portion can reasonably be redacted or separated from the requested record.

o. Redaction must effectively block out the exempt portion of the record so that it is unreadable:

i. The governmental entity should retain a copy of both the redacted and un-redacted record. The governmental entity producing the record should also include an explanation of why certain information has been redacted or removed from the record. For example, if a record contains both public information and confidential medical information that has been redacted, the person requesting the record should be informed that the record has been redacted to prevent disclosure of confidential medical information. It is helpful to cite the applicable section of the Right-to-Know law or the other legal authority which exempts the information from disclosure. The person seeking the governmental record can then easily independently assess the appropriateness of the redaction. State officials should consult with the Attorney General's Office if they have questions regarding this process.

ii. 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.

iii. Software programs, such as Adobe Acrobat version 8 or higher, provide an electronic redaction capability. The manufacturer claims that once the electronic redaction is applied, it is not possible to electronically recreate the information that has been redacted.

iv. When a public body or public agency is preparing a copy of documents for disclosure, it is good practice to Bates Stamp or page number all of the documents disclosed. This creates a record

of how many pages were disclosed. This is particularly helpful when the disclosure involves many different original documents that were previously numbered or records from different sources. The Bates Stamped number or page numbering should be done on a corner of the document in a manner that does not cover or alter the information on the document. Software programs, such as Adobe Acrobat version 8 or higher, will electronically Bates Stamp each page of a document. Documents and records from various paper sources can be scanned and combined with electronic documents to create a single electronic document for Bates Stamping, redaction, and then electronic disclosure. If the person making the request prefers, the final product can also be printed and provided on paper. The "see through" problem with ink redaction does not occur with printed documents that have been electronically redacted.

v. Redaction must be based on an analysis of the specific governmental record. Statutes, court rules, and case law make some types of information non-public, privileged, or confidential. These types of information should always be redacted. People have a legally recognized, but limited, privacy interest in other information, such as home addresses. *Lamy*, 152 N.H. 106 (2005). For such information, analysis must establish that the public interest in disclosure does not outweigh the privacy interest of the individual.

vi. Analysis of what information should be redacted from a governmental record before disclosure should include consideration of the risk of identity theft. There is no requirement that a person seeking records pursuant to the Right-to-Know law identify himself or herself. Once information or records have been disclosed, there is no legal bar to them being published on the Internet. This type of publicly available information has been recognized as a source of identity theft.[34] Public bodies and public agencies should redact information which would facilitate identity theft.

vii. Always redact the following private information from governmental records subject to disclosure (this is not an exhaustive list):

- Date of birth (generally acceptable to list age)

[34] Saunders, Kurt M. and Zucker, Bruce, "Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act," Cornell Journal of Law and Public Policy, Vol. 8, p. 661, 1999. Available at SSRN: http://ssrn.com/abstract=870791, last viewed 01-18- 2009. This journal article is cited as an example of redaction for the purposes of preventing identity theft with a meta-analysis of the then existing academic literature and evidence from the experience of law enforcement.

- 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

ix. 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

p. 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. *Mans v. Lebanon School Board*, 122 N.H. 160 (1972).

q. Whenever access to public records is requested, the agency must make a diligent effort to produce the record. An agency is not required to create a record where one does not exist. If public information is requested in a format that does not exist, the agency is not required to create a document in that format. *Brent v. Paquette*, 132 N.H. 415 (1989); *Hawkins*, 147 N.H. at 379.

L. Other Considerations of Public Inspection of Governmental Records

The Right-to-Know law does not require a public body or a public agency to create governmental records to answer a question. Nor does the Right-to-Know law prevent a public body or public agency from answering the public's questions in written form. The decision whether questions posed in the context of a Right-to-Know request should be answered, when it would be necessary to create a new governmental record to do so, is a policy choice for the public body or public agency. The Right-to-Know law does not provide guidance on how to determine when creating an answer is consistent with or supports the purpose or mission of the entity. However, once created, the written answer becomes a governmental record, which typically will be subject to

disclosure. To the extent that new document is created to provide an answer to a question posed for which there were no previously existing governmental records that provided the answer, it is helpful to inform the party making the request that the Right-to-Know law does not create a right to have all questions answered, that the answer is provided as a public service. This notice should help mitigate the misperception by some that the Right-to-Know law entitles them to receive answers to any question they wish to pose to a public body, agency, or official.

Public bodies and public agencies are created to serve the public. While specific statutory duties to inform the public vary, most public entities are generally expected to keep the public informed regarding how the body or agency's duties are being carried out. At the same time, most are expected to use the public's resources efficiently to carry out the public entity's duties and not to divert unreasonable quantities of public resources to satisfy the interests of a single person that are not common to others served by the entity.

When analyzing the adequacy of a public body's or agency's search for documents conducted in response to a Right-to-Know request, the New Hampshire Supreme Court looks to the FOIA and other jurisdictions for guidance. *See ATV Watch v. N.H. Dept. of Transportation*, 161 N.H. 746, 753 (2011). The Court employs a "standard of reasonableness" in which "[t]he crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents." *Id*. (quoting *Church of Scientology Intern. v. United States Dept. of Justice*, 30 F.3d 224, 230 (1st Cir. 1994)). The Court in *ATV Watch v. N.H. Dept. of Transportation*, 161 N.H. 746 (2011), found that the Department of Transportation's search was reasonable because evidence on record indicated the search was not unreasonably limited. *Id*. At 755-56 (finding petitioners have the burden to offer "sufficient evidence to raise substantial doubt concerning the adequacy of [the agency's] search").

Right-to-Know requests and response letters themselves are governmental records subject to the Right-to-Know law. While it will be appropriate to redact the same information that would be redacted from any other governmental record, the public's Right-to-Know extends to the right to know what Right-to-Know requests its government is responding to. To the extent that a public body or public agency creates records summarizing the cost of responding to a Right-to-Know request, that document also is subject to disclosure upon request.

M. FOIA – THE FEDERAL FREEDOM OF INFORMATION ACT

The federal Freedom of Information Act ("FOIA"), is similar to, but not identical to, the Right-to-Know law. FOIA applies to federal government departments and agencies. FOIA does not apply to the State of New Hampshire or its political subdivisions. The Right-to-Know law does not apply to the federal government or its departments.

State and municipal officials are encouraged to treat a request for governmental records citing only "FOIA" or the "sunshine" law as a Right-to-Know request. While a request under FOIA does not technically trigger the obligations imposed by the Right-to-Know law, "FOIA" and "sunshine law" are terms from federal law and the laws of other states[35] which are considered generic terms for the Right-to-Know law in New Hampshire. The Right-to-Know response should

[35] *E.g.* see Florida Constitution, Article I, Section 24; Fla. Statutes 286.*011 et. seq*. and 119.01 *et. seq*.

inform the requesting party that the response is made under the Right-to-Know law because FOIA does not apply to the state, county, or municipal public body or public agency.

VI. REMEDIES

The remedies available to people aggrieved by a public body's noncompliance demonstrate the importance of compliance with the Right-to-Know law.

A. Injunctive Relief – RSA 91-A:7

1. A petition requesting an injunction against a public body may be filed with any Superior Court. Proceedings under this chapter shall be given high priority on the court calendar.

2. The petition need only state facts constituting a violation of the Right-to-Know law and need not adhere to all the formalities normally required of court pleadings. A petitioner may appear with or without legal counsel.

3. *Ex parte* relief (a decision by the court after hearing only from the petitioner) may be granted when time is "probably of the essence" and the proceeding is "necessary to ensure compliance."

4. The court may issue an injunction ordering the public body not to violate the Right-to-Know law in the future. RSA 91-A:8, III. It may also require any officer, employee, or other official of a public body or public agency in violation of RSA chapter 91-A to undergo appropriate remedial training at such person(s) expense. *Id*.

B. Attorney's Fees and Costs – RSA 91-A:8

If a public body, public agency or officer, employee or other official thereof violates the Right-to-Know law, such public body or public agency will be required to pay for attorney's fees and costs incurred in a lawsuit under RSA chapter 91-A if the court finds that:

(1) the lawsuit was necessary in order to make the information available or the proceeding open to the public; or the lawsuit was necessary to address a purposeful violation of this chapter; and
(2) the public body, public agency or person knew or should have known that the conduct engaged in was a violation.

Proof required for fees is different than the proof required for costs. "Establishing that the agency 'knew or should have known' that its refusal constituted a Right-to-Know violation is required for an award of legal fees, but not for costs." *ATV Watch v. N.H. Dept. of Resources and Economic Dev.*, 155 N.H. 434, 449 (2007) (remanding case to require court to determine lawfulness of defendant's conduct in delayed disclosure and retention of documents). The test for awarding the reasonable costs of a lawsuit is whether the lawsuit was necessary in order to make information available that is subject to disclosure under the Right-to-Know law. *Id. See also; WMUR Channel Nine v. N.H.*

Dept. of Fish & Game, 154 N.H. 46 (2006) (no attorneys' fees awarded where the public agency did not know the conduct was a violation due to state of case law); *Goode v. N.H. Office of the Legislative Budget Assistant*, 145 N.H. 451 (2000) (request for attorney's fees properly denied where the record, the trial court's findings, and the area of law revealed that the defendant neither knew nor should have known that its conduct violated the statute); *New Hampshire Challenge Inc. v. Commissioner, N.H. Dept. of Education*, 142 N.H. 246 (1997) (holding that attorney's fees are mandated if necessary findings are made); *Voelbel v. Town of Bridgewater*, 140 N.H. 446 (1995) (award of attorney's fees held inappropriate because second factor was not present); *Johnson v. Nash*, 135 N.H. 534 (1992) (award of attorneys' fees upheld where selectmen failed to provide proper notice of meeting); and *Chambers v. Gregg*, 135 N.H. 478 (1992) (declining to award fees where the second factor was not present).

If an officer, employee or other official has acted in bad faith, the fees may be awarded personally against him or her. RSA 91-A:8, I.

No fees shall be awarded by the court if the parties have agreed that fees shall not be paid.

The court may award attorney's fees to a public body or public agency or other defendant in a Right-to-Know court action if the court finds the person bringing the claim did so in bad faith, the claim was frivolous, unjust, vexatious, wanton, or oppressive.

C. Invalidation of Agency Action

A court may invalidate an action taken at a meeting held in violation of the Right-to-Know law if the circumstances justify such invalidation. RSA 91-A:8, III. *See also Stoneman v. Tamworth School District*, 114 N.H. 371 (1974) (imposing such a remedy based upon an body's failure to provide proper public notice of a meeting before invalidation was expressly included in RSA 91-A:8); *Johnson v. Nash*, 135 N.H. 534 (1992) (reinstating police officer because selectmen failed to notify officer that they would be making motion to go into non-public session for purpose of considering termination); *Hull v. Grafton County*, 160 N.H. 818,823 (2010) (noting that the superior court has discretion in whether to invalidate action of the public body under RSA 91-A:8, II).

D. Sanctions

A court may order summary disclosure when a public agency has improperly refused to disclose its records. Summary disclosure may also be appropriate when an agency refuses to provide a *Vaughn* index when ordered by the court to determine whether documents are exempt from the Right-to-Know law. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth.*, 142 N.H. 540 (1997).

The Right-to-Know law was amended, effective January 1, 2013, to include a provision authorizing a court to impose a civil penalty of not less than $250 and not more than $2,000 against an officer, employee or other official if the court finds that the individual has violated any provision of the Right-to-Know law in bad faith. Such person or persons may also be required to reimburse the public body or public agency for any attorney's fees or costs paid as a result of defending a Right-to-Know lawsuit. *See* RSA 91-A:8, IV.

E. Destruction of Records

A person is guilty of a misdemeanor who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under the Right-to-Know law.[36] If a request for inspection is denied on the grounds that the information is exempt under the Right-to-Know law, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7 and RSA 91-A:8 is pending. RSA 91-A:9.

The general statute of limitations for a misdemeanor is one year. RSA 625:8, I (c). However, the statute of limitations for any offense based upon misconduct in office by a public servant extends to any time when the defendant is in public office or within two years thereafter. RSA 625:8, III (b).

[36] In a 2001Rockingham County Superior Court case (*James M. Knight v. School Administrative Unit #16, et al.*, Docket No. 00-E-307 (2001)), the Court found that respondents intentionally deleted the requested files and misled the Court into believing that the files still existed at the time of trial. The Court made a judicial finding that information in the deleted files was "unfavorable and embarrassing" to the respondents, and found them in contempt of Court. Respondents were required to pay petitioner's costs and attorney's fees and to bear the costs of production of the remaining records. In 2002, RSA 91-A was amended to include subsection 9, making it a misdemeanor to knowingly destroy records that are responsive to a Right-to-Know request.

VII. COURT RECORDS

A. The Right-To-Know Law Does Not Apply to Court Records

Access to court records is governed by Part I, article 8 of the New Hampshire Constitution (the public's right of access to governmental proceedings and records shall not be unreasonably restricted). The New Hampshire Supreme Court has specifically recognized that the New Hampshire Constitution creates a right of public access to court records. *Petition of the State of New Hampshire (Bowman Search Warrants)*, 146 N.H. 621 (2001). That right is not absolute and can be overcome when there is a sufficiently compelling interest supporting non-disclosure. The court system has established its own procedures for providing public access to its records and proceedings. *See Associated Press v. State*, 153 N.H. 120 (2005); *see also Petition of Keene Sentinel*, 136 N.H. 121 (1992).

B. Sealed Court Records

The Supreme Court, in *Petition of Keene Sentinel*, 136 N.H. 121 (1992) and *Associated Press v. State*, 153 N.H. 120 (2005), established the standards to be applied whenever a member of the public, including the press, seeks access to sealed court documents. The standards require that:

1. A party opposing disclosure of the sealed court document must demonstrate that there is a sufficiently compelling reason that would justify preventing public access to the document;

2. The court must determine that no reasonable alternative to non-disclosure exists; and

3. The court must use the least restrictive means available to accomplish the purposes sought to be achieved.

381077.doc

ATTACHMENTS TO ATTORNEY GENERAL'S RIGHT TO KNOW MEMORANDUM NOT INCLUDED.

PLEASE SEE WWW.DOJ.NH.GOV FOR ENTIRE MEMORANDUM.