



NEW HAMPSHIRE'S RIGHT TO KNOW LAW

RSA CHAPTER 91-A

April 2015

I. PURPOSE

Part I, Article 8 of the N.H. Constitution says:

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 time accountable to them. 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.

Section 1 of RSA Chapter 91-A reflects this purpose when it states:

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.

CONSEQUENCES OF VIOLATING THE LAW

The superior court has the authority to invalidate action taken in a meeting held in violation of the Right to Know law. Also, if a citizen files a lawsuit to enforce the Right to Know law, the municipality or the local official may be liable for damages, attorney fees, and costs.

If an official or employee violates RSA Chapter 91-A in bad faith, the court is *required* to impose a civil penalty of between \$250 and \$2,000. The person may also be required to reimburse the public body or public agency for the attorneys' fees and costs.

In addition, it is a misdemeanor for a person to knowingly destroy information to prevent its disclosure after a request has been made under the Right to Know law.

II. PUBLIC MEETINGS

General Rule: A meeting of a public body must have proper notice and be open to the public.

WHAT IS A MEETING?

It is the convening of a quorum of a public body, “whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate contemporaneously,” for the purpose of discussing or acting upon any public business. RSA 91A:2, I. This includes work sessions!

What is a *quorum*? A majority of any board or committee constitutes a quorum, unless an applicable law or rule states otherwise. RSA 21:15.

In the rare case that the rules of the body define a quorum as more than a majority (for example, if a municipal charter defines a quorum of the town council as two-thirds of the members), then a meeting occurs when a majority is convened, even if that majority is less than a quorum. This was added in recognition of the fact that even if a simple majority does not constitute a quorum for the purpose of conducting business, that majority will be able to control any decisions when a quorum is actually convened.

What is *not* a meeting? The law makes it clear that certain gatherings and communications are *not* meetings subject to the Right to Know law (see RSA 91-A:2, I). They include:

- Strategy or negotiations relating to collective bargaining
- Consultation with legal counsel
- Legislative party caucuses
- Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a public meeting (but other provisions of the law may apply—for example, the documents may be subject to disclosure)

It is important to distinguish between non-meetings (which do not exist for purposes of the Right to Know Law) and nonpublic sessions, which are meetings governed by the Right to Know Law.

WHAT IS A PUBLIC BODY?

All “public bodies” are required to have open meetings under the law. Public bodies include all municipal legislative and governing bodies and any “board, commission, committee, agency, or authority” of any municipality. Expressly included are all subcommittees, subordinate bodies, or advisory committees of such bodies. RSA 91-A:1-a, VI. Thus, *any subcommittee of a municipal body is a public body and must comply in all respects with the Right to Know Law.*

On the other hand, staff meetings, department meetings, and meetings among individual officials who are not an official board, committee, commission, etc., are not a meeting. For example, if the road agent, a planning board member and a selectman discuss something, it is not a “meeting” because that group of people has no authority to make any official decision on any

matter. Similarly, if the library employees or the police department have a staff meeting, that is not a “meeting” because those groups of employees are not an official public body.

WHAT NOTICE IS REQUIRED?

All meetings must have at least 24-hour notice (not counting Sundays and holidays) prior to the meeting. Notice must be either published in a newspaper or posted in two public places. RSA 91-A:2, II. Local ordinances can be more strict about notice. If so, they must be complied with. If the municipality or the public body has an Internet website, it may (but is not required to) use the website as one of the two public places for posting notice.

This 24-hour notice is only a minimum under the Right-to-Know Law. Other statutes can require more notice.

Emergencies. If a public body has an urgent need for a meeting, leaving no time to give proper notice, the 24-hour requirement is waived, but the nature of the emergency must be stated in the minutes of the meeting. Notice must still be posted as soon as practicable, and any other means that are reasonably available must be employed to inform the public about the meeting. RSA 91-A:2, II.

OPEN TO THE PUBLIC

Anyone (not just local residents) must be permitted to attend any public meeting. They may take notes, tape record, take photos and videotape. However, “open to the public” does not mean that the Right to Know Law grants anyone the right to *speak* at the meeting. RSA Chapter 91-A only assures a right to attend, not a right to participate.

Clearly, public participation must be allowed at meetings which are public hearings. Note that there may be plenty of other reasons to allow public input at specifically designated portions of a meeting. For example, the constitutional due process right to be heard on regulations that may affect citizens’ property rights — or even the political wisdom of being sure that voters’ concerns are heard and addressed — is a strong reason to allow a “public comment” period.

MINUTES OF PUBLIC MEETINGS

Minutes must be kept of all public meetings, and must be available to the public upon request within five business days after the close of the meeting. Minimum content of meeting minutes includes: (1) names of members present; (2) other people participating (it is not necessary to list everyone present, however); (3) a brief summary of subject matter discussed; and (4) any final decisions reached or action taken.

NONPUBLIC SESSIONS: EXCEPTIONS TO THE PUBLIC MEETING REQUIREMENT

Nonpublic sessions are meetings (or portions of meetings) that the public does *not* have the right to attend. Nonpublic sessions are allowed only for the reasons specified in RSA 91-A:3, II. A public body cannot meet in nonpublic session simply for the purpose of deliberation. All deliberations must be done in a public session unless one of the reasons for nonpublic sessions applies.

REASONS FOR NONPUBLIC SESSIONS

Apart from certain matters pertaining only to specific state or county bodies, a public body may hold a nonpublic session and may receive evidence and information, deliberate and decide in private only on 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 the employee, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted. RSA 91-A:3, II(a). *Notice that this section does not create a right to a meeting for an employee.* The right to a meeting must arise from some other source, such as a collective bargaining agreement, a personnel policy, or a state statute.
2. The hiring of a public employee. RSA 91-A:3, II(b).
3. Matters that, if discussed in public, would adversely affect the reputation of someone *other than a member of the public body*. However, if that person requests it, the meeting must be public. RSA 91-A:3, II(c). Such matters include any application for assistance or tax abatement, or waiver of fees or fines based on poverty or inability to pay.
4. Consideration of the acquisition, sale, or lease of real or personal property, where public discussion would benefit a party whose interests are adverse to the general public. RSA 91-A:3, II(d).
5. Consideration of lawsuits threatened in writing or filed against the body or one of its members. RSA 91-A:3, II(e).
6. Consideration of matters relating to the preparation for and the carrying out of emergency functions intended to thwart terrorism. RSA 91-A:3, II(i).

HOW TO ENTER NONPUBLIC SESSION

1. The body must first meet in a properly noticed public meeting.
2. A motion to go into a nonpublic session must be made and seconded, stating which specific reason listed in RSA 91-A:3, II is relied upon.
3. A roll call vote must be taken, and requires the affirmative vote of the majority of members present. Only the matters specified in the motion can be discussed in the nonpublic session.

MINUTES OF NONPUBLIC SESSIONS

Minutes must be kept of the proceedings and actions of nonpublic sessions. *These minutes must be released to the public within 72 hours* (less than half the time frame for regular meetings), unless two-thirds of the members present, in a recorded vote, decide to seal the minutes because release of the minutes would adversely affect someone's reputation (other than a board member),

or public release of the minutes public would render the action just taken ineffective (*e.g.*, the property offer example given above), or the information pertains to terrorism.

REMOTE PARTICIPATION IN A PUBLIC MEETING

A public body *may*, but is *not required* to, allow one or more members to participate in a meeting by telephone or other electronic communication—but only if the member’s attendance is “not reasonably practical.” *See* RSA 91-A:2, III. The reason that in-person attendance is not reasonably practical must be stated in the minutes of the meeting.

Except in an emergency, at least a quorum of the public body must be physically present at the location of the meeting. An “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.” The determination that an emergency exists is to be made by the chairman or presiding officer, and the facts upon which that determination is based must be included in the minutes.

Each part of the meeting must be audible “or otherwise discernable” to the public at the physical location of the meeting. All members of the public body must be able to hear and speak to each other simultaneously during the meeting, and must be audible or otherwise discernable to the public in attendance. **No meeting may be conducted by electronic mail** or “any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.”

All votes taken during such a meeting must be by roll call vote.

COMMUNICATIONS OUTSIDE A MEETING

RSA 91-A:2-a, limits the use of communications outside a public meeting. The bottom line is that discussion and action on official matters should occur only in a properly held meeting.

1. *No deliberations outside a public meeting.* Public bodies may deliberate on matters of official business “only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III”—*i.e.*, only in properly noticed public meetings. This does not mean that any mention of a matter of official business outside a public meeting is illegal; however, it is illegal for the body to *deliberate* on such a matter outside a meeting—*i.e.*, to discuss the matter with a view toward making a decision. *This includes discussions by e-mail!*

Note: There is an exception for those events that are exempted from the definition of a “meeting.” These include (among others) consultations with legal counsel and strategy or negotiation sessions with respect to collective bargaining.

2. *No circumvention of spirit or purpose of the law.* Communications outside a meeting, “including, but not limited to, sequential communications among members of a public body,” shall not be used “to circumvent the spirit and purpose of this chapter.” This is intended primarily to prevent public bodies from skirting the “meeting” definition by deliberating or deciding matters via a series of communications, none of which alone involves a quorum of the public body, but which in the aggregate include a quorum.

III. GOVERNMENTAL RECORDS

WHAT IS A GOVERNMENTAL RECORD?

The law defines a “governmental record” as

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.”

See RSA 91-A:1-a, III. The word “information,” in turn, is defined as “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.” *See* RSA 91-A:1-a, IV.

There are several important points here:

1. *Information in physical form.* “Information” may be “written, aural, visual, [or] electronic,” but in any case must be in some *physical form*. This part of the Right to Know Law affects not *knowledge*, but *records*.
2. *Created, accepted, or obtained by a public body.* Information (such as a written communication) will constitute a governmental record when it is “created, accepted, or obtained by, or on behalf of, any public body, *or a quorum or majority thereof*, . . . in furtherance of its official function.”
3. *Created, accepted, or obtained by a public agency.* Information constitutes a governmental record if it is “created, accepted, or obtained by, or on behalf of, . . . any public agency in furtherance of its official function.” A public agency includes any agency, authority, department or office of a municipality. *See* RSA 91-A:1-a, V.
4. “In furtherance of its official function.” A governmental record is one created, accepted, or obtained by a public body or a public agency *in furtherance of its official function*. Personal correspondence, for example, is not subject to disclosure.

PUBLIC DISCLOSURE REQUIREMENT

RSA 91-A:4 governs the public disclosure and inspection of governmental records. The statute requires the following:

1. Records must be available for inspection and copying during the regular business hours of the public body or agency – unless a record is temporarily unavailable because it’s actually being used. RSA 91-A:4, IV says that when a public body or agency is not able

to make a record available for immediate inspection, it must do so within 5 business days, or deny the request with written reasons, or acknowledge the request with a statement of the time necessary to determine whether the request will be granted or denied.

2. Any citizen may make notes, tapes, photos, or photocopies of a governmental record. However, government officials should not hand over the records for copying (see RSA 41:61, which prohibits the person with custody of the records from loaning them out).

The governmental agency or official is permitted by RSA 91-A:4, IV to make copies and charge the person requesting them the “actual cost” of copying. This does not appear to authorize charging for the cost of labor to retrieve and copy the records, although that question has not been definitively addressed by the New Hampshire Supreme Court.

3. If the information requested exists in a more convenient form, then that must also be made available. For example, in *Menge v. City of Manchester*, 113 N.H. 533 (1973), the Court said the city had to make its computerized tax records available. Offering Menge only photocopies of the paper assessment cards did not satisfy the Right to Know law.
4. Governmental records maintained in electronic form may be disclosed by copying them to an electronic medium; however, if that is not reasonably practical, or if the person making the request asks for the records in a different format, the public body or agency may provide a printout of the records “or may use any other means reasonably calculated to comply with the request.” RSA 91-A:4, V.
5. The motives of the person requesting the information are not relevant, and should not even be asked about.
6. Materials (tapes, notes, etc.) used to compile official meeting minutes are governmental records, too. These materials may be destroyed after the official minutes are prepared, but they are subject to disclosure until destroyed.
7. Records maintained in electronic form must remain accessible for the same periods as their paper counterparts. RSA 91-A:4, III-a. Retention periods for a variety of municipal records are prescribed in a separate statute, RSA chapter 33-A.

A record in electronic form is no longer subject to disclosure once it has been “initially and legally deleted.” RSA 91-A:4, III-b. A record cannot be “legally” deleted until the expiration of any statutory retention periods. An electronic record is deemed to have been “deleted” only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a “deleted items” folder or similar location on a computer does not constitute deletion.

EXEMPTIONS TO PUBLIC DISCLOSURE

RSA 91-A:5 exempts certain records from public disclosure. Among them are the records of grand and petit juries, parole and pardon boards, personal school records of students, and teacher certification records, and the following types of records that are particularly relevant to town and city governments:

1. Records pertaining to internal personnel files or practices, including police and other internal investigation documents relating to public employees. This exemption has been applied to records related to such matters as hiring and firing, work rules, and discipline. Salaries and lists of employees, however, are not exempt from disclosure.
2. Medical or welfare information, library user and videotape sale or rental records. *See* RSA 91-A:5, IV.
3. Confidential, commercial or financial information and other records whose disclosure would be an invasion of privacy. *See* RSA 91-A:5, IV. Whether a record qualifies for this exemption requires balancing the public's interest in disclosure against the government's interest in non-disclosure and the individual privacy interest that could be invaded. Any decisions about releasing information that might be subject to this exemption should be made in consultation with legal counsel.
4. Records pertaining to anti-terrorism measures. RSA 91-A:5, VI.
5. Notes or other materials made for personal use that do not have an official purpose. RSA 91-A:5, VIII.
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 a public body. RSA 91-A:5, IX.

OTHER EXEMPTIONS

Other records that are exempt from public disclosure, as determined by case law, include written legal advice, so long as it remains subject to the attorney-client privilege, and some, but not all, law enforcement files. There also are other privacy statutes that make certain information confidential and exempt from disclosure.

Appendix – Basic Definitions and Rules

“Governmental record” means (91-A:1-a):

any **information** → **“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.

created, accepted,
or obtained by, or
on behalf of,

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

or

any **public agency** → **“Public agency”** means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.

**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.

Right to inspect and copy governmental records (91-A:4):

Every citizen

during the **regular or business hours** of all public bodies or agencies,

and **on the regular business premises** of such public bodies or agencies,

has the **right to inspect all governmental records** in the possession, custody, or control of such public bodies or agencies,

and **to copy and make memoranda or abstracts** of the records or minutes so inspected,

except as otherwise prohibited by statute or RSA 91-A:5.

“Meeting” means (91-A:2, I):

the **convening** of a **quorum** of the membership of a **public body**,

or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members,

whether **in person**, by means of **telephone** or **electronic communication**, or **in any other manner** such that all participating members are able to communicate with each other contemporaneously,

for the purpose of discussing or acting upon a matter or **matters over which the public body has supervision, control, jurisdiction, or advisory power.**



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

Meetings open to the public (91-A:2, II)

All meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, **shall be open to the public.**

Except in an emergency . . . , a **notice of the time and place** of each such meeting, including a nonpublic session, shall be **posted in 2 appropriate places** one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town **at least 24 hours**, excluding Sundays and legal holidays, **prior to such meetings.**

Minutes of all such meetings, including **names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions**, shall be promptly recorded and **open to public inspection not more than 5 business days after the meeting.**

Communications outside a meeting (91-A:2-a)

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

Communications outside a meeting, including, but not limited to, **sequential communications** among members of a public body, **shall not be used to circumvent the spirit and purpose of this chapter.**