AN OVERVIEW OF RSA 91-A
THE "RIGHT TO KNOW" LAW

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NOTE: The following summary is prepared for the purposes of the N.H. Tax Collector's Ass'n. Certification Program. More detailed discussion can be found in Vol. 13 N.H. Practice Series (Loughlin) 4th Ed., Chapter 18.

1) New Hampshire's version of a "right-to-know" law was enacted in 1967. Laws of 1967, Ch. 251. Because of a series of amendments since its enactment, one must be careful in relying on rulings in early cases, since amendments have often been targeted at overturning prior rulings. For example, in 1590 Broadcasting Corp. vs. PUC, 113 N.H. 258 (1973) the N.H. Supreme Court ruled the statute did not require PUC to allow audio taping. The law was subsequently amended to permit recording of proceedings. See, Laws of 1975, Chapter 183. Likewise, in 1992 the Court ruled that the then-existing language of RSA 91-A:3 prohibited a Board of Selectmen from going into executive session to discuss discipline of an employee, if the employee had not been notified in advance. Johnson vs. Nash, 135 N.H. 534 (1992). The Legislature responded with a clarifying amendment which limited the scope of this ruling. See, Laws

of 1992, Chapter 34. In 2003, the author obtained a Superior Court ruling that allowed Right to Know law access to ballots cast in an election. See, Hartung vs. Town of Hampstead, Rockingham County Superior Court (2003). The Legislature subsequently made cast ballots exempt from RSA 91-A review, (See, Laws of 2003 Chapter 289:60; RSA 659:95(II)), an exemption ultimately upheld in 2016. See, Sumner vs. N.H. Secretary of State, 168 N.H. 667 (2016). Since this outline was last revised in 2016 nearly a dozen Legislative Amendments have been made.

2) Today, the "right-to-know" is not only a statutory right but a constitutional right. Under a 1976 Amendment to the State Constitution, "the public's right of access to governmental proceedings and recordings shall not be unreasonably restricted". N.H. Const., Pt. 1, Art. 8. See, Petition of Keene Sentinel, 136 N.H. 121, 126 (1992): New Hampshire Civil Liberties Union vs. City of Manchester, 149 N.H. 437 (2003).

3) The Legislature has taken the unusual step of providing a preamble section to this law, setting forth its purpose:

> 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:I.

4) Likewise, the New Hampshire Courts have given broad interpretation to this Chapter:

> Enacted in 1967, the Right to Know Law RSA Chapter 91-A (Supp. 1973), was intended to increase public access to governmental proceedings in

order to augment popular control of government and to encourage agency responsibility. Since its enactment, this Court has broadly construed the statute's provisions in order to further these objectives. Society for Protection of New Hampshire Forests vs. Water Supply and Pollution Control Commission, 115 N.H. 192, 194 (1975).

Or, as stated in more modern vernacular:

"Our ultimate goal in construing the Right-to-Know Law is to further the statutory and constitutional objectives of increasing public access to all public documents and governmental proceedings and to provide the utmost information to the public about what its government is up to." Grafton County Attorney's Office vs. Canner, 169 N.H. 319, 322 (2016). See also, CaremarkPCS Health, LLC vs NH Dept of Administrative Services, 167 N.H. 583 (2015)(purpose of law is to ensure greatest public access to the actions, discussions and records of all public bodies and their accountability to the people).

The Supreme Court has reaffirmed its usual rule in statutory interpretation that the ultimate interpretation of the law is up to the Court. 38 Endicott Street North, LLC vs. State Fire Marshall, 163 NH 652 (2012); Lamy vs. NH Public Utilities Comm, 152 N.H. 106 (2005). To implement the purposes of the law, the Court construes provisions favoring disclosure broadly, while construing exemptions narrowly. Lambert vs. Belknap County Convention, 157 N.H. 375 (2008); Murray vs. N.H. Division of State Police, 154 N.H. 579 (2008). In addition, the Court also looks to decisions on similar laws made in other jurisdictions, especially for guidance in reaching decisions on the

various balancing tests that must be made. 38 Endicott Street North, supra; Union Leader Corp. vs. N.H. Housing Finance Agency, 142 N.H. 540 (1997).

5) Most analysis breaks down RSA 91-A into two (2) objectives: (1) making "meetings" or "governmental proceedings" (RSA 91-A:I-a (II)) open to public scrutiny; and (2) making "records" of public bodies or agencies available to public inspection. In 2008 the Legislature passed a comprehensive set of amendments to RSA 91-A. See, Chapter 303 Laws of 2008. One of the actions was to amend the Chapter heading for RSA 91-A to "Access to Governmental Records and Meetings" (it was formerly "Public Records and Meetings").

6) The 2008 Amendment to RSA 91-A created several new definitions which define the scope of the law:

- A "public agency" includes any agency, authority, department or office of any political entity. RSA 91-A:1-a (V).
- A "public body" incorporates several different entities including the General Court, Governor and Council; any board or commission of a state agency, and any "legislative body, governing body, board, commission, committee, agency or authority of a county, town, municipal corporation, school district, School Administrative Unit, Chartered Public School, or other political subdivision (e.g., village districts)." See, RSA 91-A:1-a (VI) (d). Any wholly owned corporate subsidiaries of a political subdivision are also covered.
- "Advisory Committees" are defined (RSA 91-A:1-a (I)) and are also covered by the statute.

In addition to specific agencies of government, the statute has been construed to

cover "quasi" state entities, such as the independent New Hampshire Housing Finance Agency. See, Union Leader Corp. vs. N.H. Housing Finance Agency, 142 N.H. 540 (1997). In 2004 the Supreme Court held that HealthTrust, Inc., the quasi-public entity established under RSA 5-B:5(I) was subject to RSA 91-A. In so finding, the Court noted that:

- HealthTrust was an organization made up of governmental entities.
- Governed by Public officials and employees
- Providing benefits to public employees
- Performing an essential governmental function of providing insurance and risk management to political subdivisions.

Professional Firefighters of NH vs HealthTrust, 151 N.H.501 (2004).

In 2010 the Supreme Court issued a second ruling in the dispute between the Professional Firefighters and the Local Government Center (LGC). The Supreme Court held that LGC's other affiliated entities are also subject to the Right-To-Know law. See, Professional Firefighters of New Hampshire vs. Local Government Center, Inc., 159 N.H. 699 (2010). In so ruling, the Court reviewed earlier cases where it had held "entities" subject to the Right-To-Know law, including Bradbury vs. Shaw, 116 N.H. 388 (1976) where an industrial advisory committee formed by the mayor was found to be subject to the law due to the committee's involvement in governmental programs and decisions. Bradbury, supra at 390. The Court put great weight on the makeup of the governing board (all local government officials), which serves all the affiliated LGC entities. While acknowledging that not all entities related to governmental entities fall within the statute, the Court held that the "structure and function" of the LGC affiliates

was such that they are "conducting the public's business" and therefore are subject to the statute.

7) "Meetings" which are subject to the procedural requirements of the law are defined broadly to include any gathering of a quorum of members, to discuss matters within its realm of supervision, control, jurisdiction or advisory power. RSA 91-A:2 (I). There are exceptions for chance meetings and social gatherings not convened for the purpose of acting upon business, provided no such business is conducted. Also falling into the category of "non-meeting" are labor negotiation meetings, consultation with counsel, political caucus meetings and the act of circulating draft documents intended to formalize decisions previously made (i.e. a draft Notice of Decision), although such items may be public documents subject to access. RSA 91-A:2(I) (a,b,c,d). The importance of these exceptions is that these "gatherings" (for example, with counsel) do not require advance postings, or minutes, and may be closed to the public. Note that the exception for "consultation with counsel" requires legal counsel to be present (or at least on the phone). Ettinger vs. Town of Madison Planning Board, 162 N.H. 785 (2011). A subsequent law change allows a Board to go into "non-public session" (discussed below) if it wishes to discuss written legal advice.

Meetings subject to the law are subject to procedural requirements as to notice of the meeting, specifying notices be posted in two (2) public places (one (1) of which can be the public body internet site if one exists) or published twenty-four (24) hours in advance (except in statutorily defined emergencies). RSA 91-A:2(II). Notice for legislative committee hearings shall be that set forth in the rules of the body. Id. The public has a right to "attend" and may use "recording devices". Id. The right to attend

may even require the board or committee to move to larger quarters if they are reasonably available. Dunn vs. Town of Windham, Rockingham County Superior Court (1983).

The 2008 amendment to the statute established a framework for participation by members in a meeting via telephone or electronic communication when their personal attendance is "not reasonably practical". RSA 91-A:2 (III) (a). The body in question is entitled to decide if electronic participation shall be permitted. If it does, there are rules governing such participation, including (i) that a quorum of members must be physically present at the meeting site, (ii) the participating member must be heard by all, and must be able to hear others participating, (iii) all votes must be by roll call, and (iv) the person must identify the persons present with him/her in the remote location. RSA 91-A:2 (III).

8) The law governs the form of voting which may occur at meetings. In order to assure "open" government, no secret ballot votes may be taken except for Town and School District Meetings and elections. RSA 91-A:2(II). See, Lambert vs. Belknap County Convention, 157 N.H. 375 (2008) (election of sheriff by County Convention by secret ballot voided; replacing elected official not considered as "hiring" an employee).

9) Besides the exceptions to the definition of "Meetings", there is a narrow class of meetings which can be conducted as Non-Public (executive) Sessions. These are governed under RSA 91-A: 3 (II). Most of the exceptions deal with employment matters such as hiring, promotion or discipline of employees. See, RSA 91-A:3 (II) (a, b). Under former language of this section, meetings could be non-public unless the employee affected requested an open meeting. RSA 91-A:3(II)(a) (1987). In 1992, the Supreme Court ruled that this language could only make sense if the employee knew in

advance that the issue would come up. Johnson vs. Nash, 135 N.H. 534 (1992). The law was subsequently amended to give the employee the option to request an open meeting, only when the employee has the right to such a meeting. See, RSA 91-A:3(II)(a) (eff. 1992). E.g., police officer removal procedures under RSA 41:48 (hearing required).

Also permitted as possible non-public sessions are meetings which discuss pending or threatened claims, or litigation (including litigation brought by the body or agency) provided any such claims have been threatened in writing. Consideration of advice given by counsel either in writing or orally, may be the basis for a non-public session. RSA 91-A:3(II)(l).

Other permitted subjects of a non-public session include acquisition of property, and discussions of items which could affect the reputation of a person other than a member of the body itself. RSA 91-A:3(II)(c). In 2002, the Legislature added (Chapter 222, Laws of 2002) several additional exceptions for meetings concerning emergency preparedness and responding to terrorist threats. E.g., RSA 91-A:3 (II) (i). It is beyond the scope of this outline to explore each of these exceptions in detail.

10) There are specific procedures that must be followed to enter a non-public session:

- The Motion to go into a non-public session must specify the statutory reason;
- The vote to go into non-public session must be by roll call;
- The discussions must be confined to the topic stated in the Motion.

RSA 91-A:3(I).

11) A major impetus of the 2008 amendments was to deal with electronic communication. The addition of RSA 91-A:2-a added language which affirms that all "deliberations" of public bodies must be at meetings which comply with the statutory requirements, and that "sequential communications" among members (i.e., instant messaging, Facebook sharing, etc.) shall not be used to circumvent the spirit and purpose of the chapter. RSA 91-A:1-2-a (II). The Legislature did make clear that the circulation of a draft document among members to formalize a decision is not a meeting (RSA 91-A:2 (I) (d)), but it may be a public document subject to disclosure unless it otherwise qualifies as a privileged item.

12) Where a board fails to properly notify the public as to a meeting, or illegally meets in a closed session, such action can result in the meeting being declared illegal and the action reversed by the Courts. RSA 91-A:8(II); Carter vs. Nashua, 113 N.H. 407 (1973); Johnson vs. Nash, et al, 135 N.H. 534 (1992); Lambert vs. Belknap County Convention, supra. (Selection of sheriff by non-permitted secret ballot voided). There is also possible liability for attorney's fees. See, Paragraph #22, below.

Effective January 1, 2013, individuals (officers, employees, board members) who are found to have violated RSA 91-A "in bad faith" may be assessed a civil penalty and be required to reimburse the municipality its attorney's fee it paid to a claimant. The Court may also order "appropriate remedial training" at the violator's expense. RSA 91-A:8 (IV and V).

13) Finally, there are stringent "Minutes" requirements for all meetings. These specify what must be contained (generally who was present and what was decided) and

when they must be available for inspection (generally within five (5) business days). RSA 91-A:2(II). Minutes of both public and non-public meetings must include similar content including the names of persons who made or seconded by Motions. As of July 1, 2018, a municipality with an Internet Website must either (i) post minutes on the website in a consistent fashion, or (ii) indicate on the website where the minutes may be viewed and requested. In non-public minutes, the votes of each member must be recorded on any Motions. RSA 91-A:3(III). In the case of non-public sessions, minutes must be available within 72 hours of the meeting, however, the Board may vote (by 2/3rds) to "seal" the minutes (such vote taking place in public session) if their release would negate the purposes for which the Board entered the non-public session. RSA 91-A:3(III). The sealed minutes can be released once a majority determines the reason for the sealing no longer exists.

14) Effective January 1, 2018, the statute now includes provisions which allow a member to "object" if they believe the Board is meeting in violation of the statute. RSA 91-A:2(II-a). This includes objection to consideration of matters in a non-public session. The minutes must note the objection, and if the objection is during a non-public session, the objection must be noted in the public minutes as well. Id.

15) Of more interest to tax collectors (perhaps) are the provisions dealing with access to records. The current definition of "governmental records" is as follows:

> *"III. "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).

Before 2008, the term was "public records", a term not statutorily defined (See, Brent vs. Paquette, 132 N.H. 415 (1989)), but developed through case law.

16) One starts with the presumption that every citizen has the right to examine all governmental records. RSA 91-A:4(I). A person does not have to have a "need to know" (See, DiPietro vs. City of Nashua, 109 N.H. 174 (1968)), nor is their purpose for requesting the record relevant. Mans vs. Lebanon School Board, 112 N.H. 160 (1972); Union Leader Corp. vs. City of Nashua, 141 N.H. 473 (1996); Lambert vs. Belknap County Convention, supra.

The Supreme Court has stated:

"The motivations... are irrelevant to the question of access. We cannot dictate what should or should not interest the public. Were the Court to do so, we would overstep our judicial authority by substituting our preferences for those of the individual. Accessibility of information assumes and encourages a community of people free to think as it chooses and act according to its collective will."

Petition of Keene Sentinel, 136 N.H. 121, 128 (1992).

Although at some stage the governmental body may be able to charge certain fees for copies, the cost involved in producing information is not a factor in determining whether a given item is a public record. Hawkins vs. New Hampshire Department of Health & Human Services, 147 N.H. 376 (2001).

17) The statute makes clear the governmental agency's obligation to provide access to records at a designated place (RSA 91-A:4(III)) during regular hours. RSA 91-A:4(I). Copies must be provided upon reasonable request and fees may be charged.

Id. See also, Gallagher vs. Town of Windham, 121 N.H. 156 (1981) (Right-to-know law not violated if record is absent for day on official business; law does not impose absolute duty to make copies if Town does not have required equipment). If a record cannot be made available immediately, a municipality must (i) make such record available within five (5) business days; (ii) send a written denial of the request, spelling out why the record cannot/will not be produced (including reference to the applicable exemption from disclosure) or (iii) acknowledge the request, indicating it will take more than five (5) day to make the record available, and why it will take more than five (5) days to respond. RSA 91-A:4(IV). The Supreme Court has indicated that an agency need not "drop everything" to satisfy a request but may require a citizen to make an appointment to review records. Brent vs. Paquette, 132 N.H. 415 (1989).

18) In 2016 the Supreme Court ruled that if an governmental agency maintains a record in electronic form, then that agency must provide the record in electronic form if requested (i.e. it may not insist on proving it in "paper" form). Green vs School Administrative Unit #55, 168 N.H. 796 (2016). Also in 2016 the legislature specifically provided that no fees can be charged for "inspection" of records, whether in paper or electronic, and no fee can be charged to produce electronic records if they do not need to be provided on a separate storage medium. RSA 91-A:4(IV). However a policy which requires a requestor to provide an "unopened" media storage device (e.g. a thumb drive) or to purchase one from the governmental entity is allowable as a method to prevent damage to the public records. Taylor vs. School Administrative Unit #55, 170 N.H. 322 (2017).

19) There exist several specific rules governing the production, copying and

retention of records "used for compiling" the minutes of a given meeting. See, RSA 91-A:4(II). These "source materials" such as notes, materials, tapes, videotapes, etc. must be made available (Id.) , but there is no statutory mandate to preserve them. Once minutes are prepared, the source materials need not be retained. Brent, supra. The source material likewise does not include privately made recordings even if done by the public official charged with preparing the minutes.

20) It should be kept in mind that the law provides access to "records" which exist. It does not impose a burden on an agency to "retrieve and compile into a list random information gathered from numerous documents, if a list of this information does not already exist". Brent, supra at 426. See also, RSA 91-A:4 (VIII) (Public body or agency not required to compile, cross-reference or assemble information into a form not already kept). In the 2011 decision of Hampton Police Association vs. Town of Hampton, 163 N.H. 7 (2011), the Supreme Court reversed a lower Court ruling which had ordered the Town's attorney to create a revised legal invoice to incorporate specific items that could be disclosed to the Plaintiff police union. On the other hand, an agency can be required to make available documents in a form that allows them to be made available to the public, even if they are currently in a form that the general public cannot use. Hawkins, supra.

21) In response to changing technologies, the Legislature has mandated that records which are created and stored in electronic form must remain accessible for the same retention period as a paper counterpart. RSA 91-A:4 (III-a). In some cases, this may require that the electronic record be printed to paper in the event that technology changes.

22) Like meetings, there are also certain exemptions from disclosure of types of records kept by a public body or agency. These exceptions are in RSA 91-A:5. In addition to records of Juries, Parole Boards, school children records, teacher certification materials, records related to emergency response plans for terrorist attacks, and police body camera videos (with certain exceptions to the exception), the statute provides the following general exemption:

> IV. Records pertaining to internal personnel practices; confidential, commercial or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

RSA 91-A:5(IV).

The scope of this exemption has been the subject of numerous Court decisions, the results of which are not particularly helpful in staking the limits of the exemptions. In Union Leader Corp. vs. Fenniman (136 N.H. 624 (1993)), the Supreme Court held that records from a police department internal affairs investigation were records relating to "internal personnel practices" and therefore exempt from disclosure. This more protective view is in contrast to two (2) cases construing the scope of the "confidential, commercial or financial transaction" exemption. In Chambers vs. Gregg (135 N.H.

478(1992)), the Court held that budget estimates prepared by department personnel in the early phases of preparation of the state budget were not financial records exempt from disclosure. While this is understandable in view of the nature of the materials involved, the results in Union Leader Corp. vs. N.H. Housing Finance Agency (142 N.H. 540 (1997)) are less clear. After finding that the NHHFA was a "public agency" subject to disclosure, the Court upheld the ordered release of financial records including sales projections, market analysis reports, and personal guarantees provided by a customer of NHHFA. Contrary to the opinion in Fenniman, the Court implies that even these statutory exemptions are subject to a balancing test between the privacy rights of the individual involved, and the public's interest in disclosure. Id.

In the 2016 case of Reid vs. New Hampshire Attorney General, 169 N.H. 509 (2016), the Court held that while the statute specifically exempts "internal personnel practices" (such as Evaluation Scores in the hiring practice – Clay vs. City of Dover, 169 N.H. 681 (2017)), records in a "personell file" were not categorically exempt, but instead would be subject to a "balancing test" analysis (see, below).

In Union Leader Corporation vs. City of Nashua (141 N.H. 473 (1996)), the plaintiff sought disclosure of police investigating files in a drunk driving arrest. The Trial Court had found that disclosure would result in an unwarranted invasion of privacy of the individual involved. Because the Trial Court considered the alleged reason for asking for the record, the decision was reversed. In so ruling, the Court held that that disclosure of investigating files could occur if the public interest in the disclosure outweighed the privacy interest of the individual. See also, Lodge vs. Knowlton, 118 N.H. 574 (1978). For a thorough analysis of the scope of the disclosure exemption for

law enforcement investigatory files, see 38 Endicott Street North, LLC vs. State Fire Marshall, 163 N.H. 656 (2012).

In a 2003 case, the City of Manchester resisted attempts to obtain copies of photographs made during a police department program of making consensual photographs of people who were stopped but not arrested. See, N.H. Civil Liberties Union vs. City of Manchester, 149 N.H. 437 (2003). The city argued that release would violate the privacy rights of the persons pictured. The Court rejected this argument, setting up a three (3) part test:

i) Whether there is a privacy issue at stake;

ii) The public's interest in the disclosure, and

iii) Balancing the public interest in disclosure against the government's interest in non-disclosure or the individual's privacy interest in non-disclosure.

Id at 440.

In the 2005 case of Lamy vs NH Public Utilities Comm (152 N.H. 106(2005)), the Court ordered the disclosure by the PUC of copies of filed "complaint" forms against the quality of utility services provided by PSNH which had been submitted by businesses, but required that complaints filed by individual residential customers have the name and address redacted on privacy grounds. The Court found a "discernable interest exists in the ability to retreat to the seclusion of one's own home and to avoid enforced disclosure of one's name and address." Id at 110.

In the 2010 case of Professional Firefighters of New Hampshire vs. Local Government Center, Inc., supra, the Court ordered the disclosure of salaries earned,

rejecting a claim that such salary information was "confidential", following the 1972 case of Mans vs. Lebanon School Board (112 N.H. 160 (1972)), which required disclosure of teacher salaries. In the LGC case, the Court stated:

> *"Public access to salary information gives direct insight to the public body by enabling scrutiny of the wages paid (and such scrutiny) can expose corruption, incompetence, inefficiency, prejudice and favoritism."*
>
> Id.

Disclosure of pensions paid by the New Hampshire Retirement System was ordered in 2011 in Union Leader Corp. vs. N.H. Retirement System, 162 N.H. 673 (2011). Citing the Mans case, as well as Lamy, the Court held that the public's right to know how its money was being spent outweighed the privacy interests of the individual retirees receiving a pension. The Court stated:

> *"Knowing how a public body is spending taxpayer money in conducting business is essential to the transparency of government, the very purpose underlying the Right-to-Know law."*
>
> Id. at 684.

Finally, in the 2016 case of New Hampshire Right to Life vs. Director of New Hampshire Charitable Trust Unit, 169 N.H. 95 (2016), the Plaintiffs sought the names of board members and key administrators of a reproductive health center which received State grants. The Supreme Court held that such names could be redacted due to an invasion of privacy, and the public interest in disclosure was negligible. Id.

Disclosure of "trade secrets" was the subject of the 2015 case of CaremarkPCS Helath vs NH Dept of Administrative Services, 167 N.H. 583 (2015). The Plaintiff had submitted an RFP to the state to provide pharmacy benefit management, and had designated portions of its response as a "trade secret" material. When competitors

sought to request copies of the Caremark bid, Caremark sued to prevent disclosure. The Supreme Court held that New Hampshire laws protecting "trade secrets" (RSA 350-B) was the basis to deny a request for access under the Right-to-Know law. Id.

23) Notes or materials made for personal use that do not have an official purpose are exempt from disclosure. See, Chapter 246, Laws of 2004. RSA 91-A:5(VIII). The same amendment also exempted preliminary drafts, notes and memoranda not in final form and not disclosed, circulated or available to a quorum or majority of the public body. RSA 91-A:5((IX).

24) Up until 1994, it was not clear what could be done about public officials who violated confidential matters discussed in non-public session. In that year the Legislature enacted RSA 42:1-a. Now a Town official can now face a Superior Court petition for dismissal for violating his/her oath of office by improperly divulging confidential information.

25) The statute provides that attorney's fees may be awarded to successful plaintiffs. RSA 91-A:8. Such fees require a finding that (i) the suit was necessary to obtain the record of access sought, and (ii) that the parties or agencies involved knew or should have known that the conduct was a violation of RSA 91-A. When a town acts on advice of their attorney, and that advice is reasonable, no fees will be awarded. Voelbel vs. Town of Bridgewater, 140 N.H. 446 (1995). However, Courts must investigate carefully to find out whether defendants "should have known" their conduct was in violation. New Hampshire Challenge, Inc. vs. Commissioner, Dept. of Education, 142 N.H. 246 (1997). A Court may award attorneys' fees to a Board or agency to defend a lawsuit if the Court makes an affirmative finding that the lawsuit was brought in bad

faith, was frivolous, unjust, vexatious, wanton or oppressive. RSA 91-A:8 (II). There are civil penalties that can be assessed of between $250.00 and $2,000.00 for "bad faith" violations. RSA 91-A:8 (IV). In addition, the Court can order "remedial training" at the violators expense. RSA 91-A:8 (V).

26) In response to a specific incident, the Legislature inserted a criminal penalty for the destruction of information with the purpose of preventing its disclosure under RSA 91-A. RSA 91-A:9

27) Statutes outside the right-to-know law exist which govern or restrict the handling of public records:

a) RSA 41:61 prohibits any municipal officer having custody of public records from loaning them, or permitting them to be removed, except when required to discharge official duties, or when a subpoena is issued for their delivery to court. See, Gallagher vs. Windham, 121 N.H. 156 (1981) (RSA 91-A is not violated if records or plans are unavailable due to their removal by a public official for performance of duties).

b) RSA 41:58 speaks generally about the requirement that all public documents which are in the possession of any office of the Town and which are not required elsewhere as part of the discharge of their official duties, must be deposited with the Town Clerk, who is charged to keep and protect same. RSA 91-A:4(IV) specifies that agencies which maintain separate and regular offices may keep their records there. Boards or agencies which do not have regular offices, should maintain their records with the Clerk's office.

c) The ultimate disposition (destruction) of public records is governed under the RSA 33-A the State Disposition of Municipal Records Law. Under a 2005 wholesale re-write of this law, document retention periods are now set by statute. RSA 33-A:3-a. Each municipality shall have its own "Municipal Committee" (including the Tax Collector) to implement at the local the governing laws on record retention. RSA 33-A:3.