ELECTRONIC COMMUNICATIONS AND RIGHT TO KNOW

Prepared for N.H. Tax Collector's Association
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By: Bernard H. Campbell, Esq.
Legal Counsel, NHTCA
Beaumont & Campbell Prof. Ass'n.
1 Stiles Road – Suite 107
Salem, New Hampshire 03079
Tel: 603-898-2635
Email: BCampbell@beaumontandcampbell.com

I. BACKGROUND

The State's "Right-to-Know" law, RSA 91-A is fifty (50) years old in 2017, having first been enacted in 1967. When it was first enacted, there were no "electronic communications" as we know them today. Over time, the law has been amended to address such things as "remote participation" by one or more members of a public body. See, RSA 91-A:2 (III). It has also been amended to address the proliferation of electronic communications and exactly how electronic communications "fit" within the State's Right-to-Know laws.

The current preamble to RSA 91-A was written in 1977. It specifies that:

> *"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 has consistently held that its interpretation of the law is to foster the goal of providing the utmost information in order to effectuate the statutory and

constitutional objectives of facilitating access to all public documents. See, ATV Watch vs. N.H. Dept. of Resources and Economic Development, 155 N.H. 434 (2007).

For a complete overview of the operation of RSA 91-A, including its provisions for both "meetings" and "records", Collectors are encouraged to attend the Certification program were the author presents a half-day program on RSA 91-A.

II. ELECTRONIC COMMUNICATIONS

In 2008, the Legislature substantially re-wrote RSA 91-A:1-a including new broad definitions of both "Governmental Records" and "Information". Reference to "Electronic" communications was included into a definition of governmental records:

> *"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"."*

Note that this covers both records of a "body" (e.g. Selectmen, City Council, School Board) as well as records of the "agency" itself (Town, City, School District). The "information created, accepted or obtained" also incorporates the concept of electronic records:

"IV. "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."

It is therefore clear that the "electronic information" which is "created" or "obtained" (i.e. received) by the public agency qualifies as a record under the Right to Know law.

The one "caveat" in these definitions is the phrase "in furtherance of its official function". RSA 91-A:1-a (III). This would appear to exclude purely "personal" messages that might be received (e.g. "Happy Birthday Tax Collector", or "Can you bring home some milk on your way home?" – Query – Should these messages be sent/received on municipal e-mail accounts?). Just as there is an exception in the definition of "meetings" to exclude gatherings which are the result of "chance, social or other encounters not convened for the purpose of conducting business (e.g. the Town officials' softball game) (See, RSA 91-A:2 (I)), certain messages can fall outside of Right-to-Know. However, any activity related to the function of one's office, or affecting the citizens is, by definition, a "governmental proceeding". RSA 91-A:1-a (II).

III. ACCESS TO AND RETENTION OF ELECTRONIC RECORDS

If one assumes that "electronic messages" are essentially the equivalent of any other paper records, then, the regular rules governing such records apply. This means that every "citizen" [NOTE: This creates its own ambiguities as to whether or not requests are limited to New Hampshire residents.] has a right to inspect all governmental records, and to copy such record unless they are exempt from disclosure under RSA 91-A:5. RSA 91-A:4 (I). The exemptions under RSA 91-A:5 include several

categories of specific sensitive information, along with a broader general exemption under RSA 91-A:5 (IV):

> *"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 public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected."*

When determining whether a record is exempt from disclosure under this exemption, the Court engages in an analysis which weighs the "need to know" versus the "need to keep confidential", always putting a priority on "need to know".

The legislature has specified that electronic records must be kept and maintained in the same fashion as their paper counterparts:

> *"III-a. 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. Methods that may be used to keep and maintain government records in electronic form*

may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.

RSA 91-A:4 (III-a)

The important thing to note here is that one must look at the statutory retention periods in RSA 33-A to determine how long documents must be maintained. If there is no specific retention period for (say) letters requesting tax statements or memo's advising you of when budget hearings are held, then the e-mail versions of such documents may be deleted at any time. In fact, it is probably advisable practice to delete such messages on a regular basis, since, as it is noted, they remain accessible as long as they exist even if they could have been deleted/moved at an earlier date.

Speaking of "deleted", there are specific rules which detail when an electronic record is, in fact, "deleted":

"III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, 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. 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-b)

IV. ISSUES WITH PRODUCTION OF ELECTRONIC RECORDS

In the last year, two (2) cases involving the Timberlane School District have outlined issues related to electronic records.

In Green vs. School Administrative Unit #55, (168 N.H. 796 (2016)), the State Supreme Court held that a Right-to-Know request for "electronic records" must be honored where the agency in question has the records available in that form. The Plaintiff requested electronic copies of certain budget documents from the School District which existed in electronic form (spreadsheets or PDF). The School District responded by offering to print-out and provide paper copies of the record, and to charge a cost-per-page for copies. The Trial Court originally held that the District had complied with the language of RSA 91-A, but the Supreme Court reversed. Citing the purpose of RSA 91-A, the Court held that there was no evidence that it was not practical to provide the documents in electronic media using standard file formats. Id at 801. The Court also referenced the fact that producing the records, which were already in electronic form, in an electronic format was more efficient and less costly. Id at 802.

This Supreme Court decision was followed by a Superior Court decision in Rockingham County Superior Court in October 2016. See, Taylor vs. SAU #55, Rockingham County Superior Court No. 218-2016-CV-0900 (10/24/16). The School District, in response to the Supreme Court Opinion noted above, adopted a policy of providing electronic records via a USB (thumb drive) which the requester could bring in (unopened package) or purchase from the District. The Plaintiff wanted the documents e-mailed, which the District refused to do. The Plaintiff again claimed a violation of RSA 91-A:4. The Superior Court, citing issues of cyber security, agreed that the policy was not in violation of RSA 91-A:4.

The issue of e-mail, both sent and received, can pose particular questions for Tax Collectors. It is fairly clear that e-mail received by employees of the "agency"

(municipality) or generated that are "in furtherance of its official function", would be records of the "agency" itself. Such may not be the case with "elected officials" who are not employees. In an article written for the New Hampshire Bar Journal in the fall of 2007, Cordell Johnston, Legislative Affairs Counsel for NHMA, noted that e-mail between a "Member of the Public Body" of an agency and a member of the public, would not be public document of the "agency" itself. See, 48 N.H.B.J. 38 (No. 3 Autumn 2007), at pg. 41.

This reasoning appears to call into question whether the Tax Collector is an "agency" of the municipality, or an "employee" of the municipality. The definition of public agency includes the following:

> *"V. "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."*

If the "Tax Collector" is an "authority" or "department" of the municipality, then e-mail related to public business would likely be a "governmental record" available for access and reproduction. This puts even greater emphasis on issues related to retention and deletion of records not otherwise required by law to be maintained.

On the other hand, if the Tax Collector is an "independent elected official", then e-mail generated and sent to a member of the public, or even to individual members of the Board of the municipality, would likely not be considered "Governmental Records" subject to disclosure under Right-to-know law.

There is no clear answer to this question because there are no Court cases reported by our State Supreme Court on this exact subject. It has been suggested that e-mail created and sent by a Town Administrator is, in fact, a governmental record, because the Town Administrator is an "authority" of the Town. See, 13 N.H. Practice (Loughlin) 3rd Ed. § 661.

Although not impacting Tax Collectors, you should be aware that there have been cases (widely debated) which have involved e-mail by and among members of a board or committee. Such messages are clearly "records" if they are communicated to a quorum of the Board. See, RSA 91-A:1-a (III). The question litigated is whether or not such communications become "meetings" which would be illegal without advance notice and "opportunity" for the public to "observe". There are recommended steps to avoid this outcome. The author, a member of a School Board, inserts the following (or similar) "Disclaimer" in messages sent to the Board:

"This message is intended strictly for distribution. No contemporaneous response is solicited or expected. The sender is not awaiting any replies."