March, 2003

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

It is with great pleasure that I issue this edition of the Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A. The purpose of this memorandum is to provide a reference guide to the statute and to judicial decisions which have affected the Right-to-Know Law. This edition includes general principles concerning the law, recent statutory changes, and up-to-date judicial interpretations of the statute. I urge all public officials to refer to this guide when faced with questions on the application of the law. I am, accordingly, making this Memorandum widely available to state and local officials, the public, and the press and posting it on my Department's website, at www.state.nh.us/oag/front.html.

As always, this Office stands ready to provide guidance in complying with RSA 91-A to state and local officials, the public and the media, and to promote the principles of openness and access to state and local government which underlie our Right-to-Know Law.

Yours truly,

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RIGHT-TO-KNOW LAW MEMORANDUM

I. WHICH GOVERNMENTAL BODIES ARE SUBJECT TO THE RIGHT-TO-KNOW LAW?

The Right-to-Know Law establishes certain procedures to be followed by governmental bodies and certain rights of access by members of the general public to the meetings and records of those bodies. In determining the applicable rights and procedures, the initial inquiry must be whether the governmental body involved is subject to the Right-to-Know Law.

A. IF THE GOVERNMENTAL BODY FALLS WITHIN ONE OF THE DESCRIPTIVE CATEGORIES SET FORTH BELOW, THE RIGHT-TO-KNOW LAW APPLIES:

1. STATE ENTITIES

a. The General Court including executive sessions of committees. RSA 91-A:l-a, I(a).

b. The Governor's Council and the Governor with the Governor's Council. RSA 91-A:l-a, I(b).

c. The Board of Trustees of the University System of New Hampshire. RSA 91-A:l-a, I(c).

d. All State executive branch agencies and departments, Lodge v. Knowlton, 118 N.H. 574 (1978), including boards and commissions associated with such agencies and departments. RSA 91-A:l-a, I(c).

e. Any advisory committee established by any of the above entities. RSA 91-A:1-a, I.

f. Although the Right-to-Know Law does not specifically include committees of State boards, commissions, councils, and the General Court, Bradbury v. Shaw, 116 N.H. 388 (1976), holds that a board or committee need not be formally established by statute or ordinance to fall within the provisions of the Right-to-Know Law.

g. Several state statutes create bodies corporate and politic. E.g., RSA 162-A:3 (Business Finance Authority); RSA 204-C (Housing Finance

Authority)[1]; RSA 35-A (Municipal Bond Bank); and RSA 12-G (Pease Development Authority). Some of these statutes specify whether the entity is or is not subject to the Right-to-Know Law, but others are silent on this point. Absent express statutory language, applicability of the Right-to-Know Law will depend on the nature and extent of the governmental functions they perform. See generally Northern New Hampshire Lumber Co. v. New Hampshire Water Resources Board, 56 F.Supp. 177, 180 (D.N.H. 1944).

2. COUNTY AND MUNICIPAL ENTITIES

Boards, commissions, agencies, or 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, I(d); See Selkowe v. Bean, 109 N.H. 247 (1968)(pertaining to meetings of the Keene Municipal Finance Committee).

B. THE RIGHT-TO-KNOW LAW DOES NOT APPLY TO THE JUDICIAL BRANCH OF GOVERNMENT

The court system has established procedures of its own for providing public access to its records and proceedings. See Petition of Keene Sentinel, 136 N.H. 121 (1992).

II. MEETINGS

If the governmental body is one of those included above, the Right-to-Know Law imposes certain procedural requirements with respect to its meeting.

A. WHEN DOES A PUBLIC BODY HOLD A MEETING?

1. A public body holds a meeting under the Right-to-Know Law when two criteria are met:

a. A quorum of the membership of the public body is convened; and

[1] 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 State and not constituting a department of state government, and while in many of its day-to-day operations the Authority functions 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).

b. The purpose of the meeting 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.

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.

A majority of agency members constitutes a quorum absent some other controlling statute. See RSA 21:15 (authorizing a majority of agency members to take agency action).

2. When less than a quorum convenes, there is no meeting within the meaning of the Right-to-Know Law unless the group is a committee of the larger body. In that case, the Right-to-Know Law applies if a quorum of the subcommittee has convened. If members of the public body constituting less than a quorum are joined by an additional member, thereby creating a quorum, the Right-to-Know Law and its notice and procedural requirements apply.

3. Chance or social meetings neither planned nor intended for the purpose of discussing matters relating to official business, and at which no decisions are made, are specifically exempt from the open meeting requirement. The Right-To-Know Law does not apply to isolated conversations among 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 them." Webster v. Town of Candia, 146 N.H. 430 (2001)(Motion to Reconsider granted in part and denied in part at 2001 N.H. Lexis 154). Such meetings may not be used to circumvent the spirit of the Right-to-Know Law, therefore, if official deliberations occur or if a decision is made at such gatherings or if the gatherings occur on a regular basis, a court may determine that they constitute ''meetings'' under the Right-to-Know Law. RSA 91-A:2, I(a).

4. The definition of ''meeting'' covered by RSA 91-A excludes strategy or negotiations with respect to collective bargaining and consultation with legal counsel. RSA 91-A:2, I(b-c). These statutory exclusions are consistent with the holdings of Appeal of Town of Exeter, 126 N.H. 685 (1985) (collective bargaining) and Society for Protection of New Hampshire Forests v. WSPCC, 115 N.H. 192 (1975) (consultation with legal counsel).

B. NOTICE - RSA 91-A:2

Assuming the governmental body is subject to the Right-to-Know Law and intends to convene a meeting within the meaning of the Right-to-Know Law, notice must be given as follows:

1. REGULAR NOTICE

   a. Notice of the time and place of any meeting (including nonpublic sessions) must be posted in two appropriate places 24 hours (excluding Sundays and legal holidays) in advance of the meeting. These should be places where people are likely to see them, such as the location where the checklists or town warrants are posted, or the agency's office lobby or front door and the State House or Town Hall bulletin board; or

   b. Notice of the time and place of the meeting may be printed in a newspaper of general circulation in the city or town at least 24 hours before the meeting, excluding Sundays and holidays.

   c. If the body decides to go into nonpublic session during an open meeting, the notice for the open meeting will suffice, but if both public and nonpublic sessions are planned in advance, the notice should so state and generally identify the topics to be addressed in each session, including a brief outline of the agenda for each session is recommended.

2. EMERGENCY NOTICE PROCEDURE

   a. This method of notice may be utilized if the chairman or presiding officer of the public body decides that immediate undelayed action is imperative;

   b. Notice shall be made by whatever means are available to inform the public about the meeting. For example, notice may be given over the radio, the body may post notice, and/or may notify by telephone persons 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.

   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 order in the case at hand.

d. The minutes of the meeting must clearly spell out the need for the emergency meeting.

3. NOTICE OF LEGISLATIVE MEETINGS

Notice of committee meetings shall be made in accordance with the Rules of the House of Representatives and the Rules of the Senate, as appropriate.

4. BROADER ACCESS

Any public body acting by its charter or by rules or guidelines may provide broader public access to meetings or records than the law requires. If such charter provisions, guidelines, or rules of order have been adopted, their provisions shall take precedence over the provisions of the Right-to-Know Law. RSA 91-A:2.

5. EFFECT OF FAILURE TO OBSERVE NOTICE REQUIREMENTS

Failure to notify the public properly subjects the agency to possible judicial sanctions, including an order declaring the meeting invalid, an order enjoining agency actions or practices, and an order assessing legal costs and fees. RSA 91-A:7 and 8. See also Section IV of this memorandum.

C. PROCEDURES AT MEETINGS

Meetings of bodies subject to the Right-to-Know Law are open to the public unless the body is authorized to hold a nonpublic session. RSA 91-A:2.

1. CHARACTERISTICS OF OPEN MEETINGS

a. Any person may attend an open meeting;

b. No vote in an open meeting may be taken by secret ballot except for:

(1) town meetings and elections

(2) school district meetings and school district elections.

c. Any person may record, film, or videotape an open meeting, subject to reasonable restrictions necessary to accommodate the interests of the public and the purposes of the meeting;

d. Minutes must be recorded 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

(4) a description of all final decisions made, including all decisions to meet in nonpublic 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.

e. Minutes are not required to include stenographic or verbatim transcripts. DiPietro v. City of Nashua, 109 N.H. 174 (1968). There may, however, 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.

f. Minutes are a permanent part of the body's records and must be recorded and open to public inspection within 144 hours of the meeting.[2] RSA 91-A:2, II. THERE ARE NO EXCEPTIONS TO THE MINUTE REQUIREMENTS FOR OPEN MEETINGS.

g. The right of the public to inspect public records including minutes of meetings specifically includes inspection and copying, after the completion of a meeting and during regular business hours, of all notes, materials, tapes or other sources used by an agency to compile the minutes of the meeting. RSA 91-A:4, II. An agency is not obligated to

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[2] 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:

I. knowingly makes a false entry in or false alteration of any thing 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 any thing 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.

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), but if such draft materials are retained after the agency has approved final minutes they will be subject to inspection. See Orford Teachers Association v. Watson, 121 N.H. 118 (1981).

h. The public body should state during the public meeting what action it is taking when signing a check. The court may see the check signing process as a "*de facto* secret ballot" if the public is denied access to information about the checks being signed. See, generally, Cioffi v. Sanbornton, No. 2001-E-022, Belknap County Superior Court (2001).

2. CHARACTERISTICS OF NONPUBLIC SESSIONS[3]

a. A body or agency may exclude the public only if a recorded roll call vote is taken on a motion to go into nonpublic session which states the statutory basis for the nonpublic session.

The allowable grounds for holding a nonpublic 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 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 supplants the holding in Johnson v. Nash, 135 N.H. 534 (1992), because any person with a right to a meeting would be entitled to personal notice of that meeting. Nonetheless, if the body plans to hold a nonpublic ''hearing'' on the discipline, compensation or promotion of a particular employee, it should probably state this intention in the notice sent to the parties and remind them of their right to request an open meeting.

[3] Chapter 217, Laws of 1991, deleted the term ''executive session'' throughout RSA Ch. 91-A and replaced it with the term ''nonpublic session.''

(2) The hiring of any person as a public employee.

(3) Matters which, if discussed in public, likely would affect adversely the reputation of any person, other than a member of the body or agency itself, unless such person requests an open meeting.[4]

(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.

(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 membership in such body or agency, until the claim or litigation has been fully adjudicated or otherwise settled.

(6) Consideration of applications by the Adult Parole Board under RSA 651-A.

(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 designees.

(8) Consideration of applications by the business finance authority under RSA 162-A:7-10 and 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.

(9) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions,

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[4] 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.

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.

b. The former law permitting nonpublic sessions for public bodies to deliberate for any purpose was repealed effective January 1, 1992. Public bodies may now meet in nonpublic session only for one of the specific purposes listed in RSA 91-A:3, II.

c. The reason for going into nonpublic sessions should be articulated with a specific reference to an appropriate section in RSA 91-A:3, II. See, generally, Cioffi v. Sanbornton, No. 2001-E-022, Belknap County Superior Court (2001).

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

e. Minutes of nonpublic sessions:

(1) The decision to hold a nonpublic session must be included in the minutes of the open meeting.

(2) Minutes of nonpublic 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:

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

(b) Render the proposed action ineffective; or

(c) Pertain to terrorism.

(3) The determination by two-thirds of the members present not to divulge the information is a ‘‘decision’’ which must be recorded together with the reasons for nondisclosure. The 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 (a), (b), or (c) above no longer apply.

III. RECORDS

A. WHAT IS A PUBLIC RECORD?

Every citizen during the regular or business hours of all such bodies or agencies, and on the regular business premises of such bodies or agencies, has the right to inspect all public records, including minutes of meetings of the bodies or agencies, and to make memoranda, abstracts, and photographic or photostatic copies of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. RSA 91-A:4, I.

Case law indicates that the term 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 also 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.[5]

B. 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) (This is 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).

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[5] The interpretation of the Right-to-Know Law is decided ultimately by the New Hampshire Supreme Court, which resolves questions regarding the law with a view to providing the utmost information, in order to best 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).

5. State agency budget requests and income estimates submitted pursuant to RSA 9:4, 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:1a, I-IV, or to an employee's agent or designee, upon the employee's resignation, discharge, or retirement. RSA 91-A:4, I-a.

C. ACCESS TO INFORMATION STORED IN COMPUTERS

Public documents stored in computers shall be available in the same manner as records stored in public files if access to such records would not reveal work papers, personnel data or other confidential information. RSA 91-A:4, V. The N.H. 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). While the Right-To-Know Law does not require an agency to compile data in the format requested by a member of the public, it does require that public records be maintained in a manner that make them available to the public. Id. at 258 (rejecting the argument that information stored in a computer does not constitute a public record because unlinked electronic information is not part of an existing document as required by the statute.)

D. EXEMPTIONS FROM DISCLOSURE

1. STATUTORY EXEMPTIONS - RSA 91-A:5

a. Records of grand and petit juries.[6]

b. Records of parole and pardon boards.

c. 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.

d. 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

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

personnel, medical, welfare, library user, videotape sale or rental and other files whose disclosure would constitute an invasion of privacy.[7]

e. Teacher certification records, both hard copies and computer files, in the department of education, however, the department shall make teacher certification status available. RSA 91-A:5, V.

f. 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.

g. 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. To best effectuate the purposes of the Right-to-Know Law, whether information is "confidential" must be determined objectively, and not based on the subjective expectations of the party generating it. The following standard test, while not being exclusive, is instructive. To show that information is sufficiently "confidential" to justify non-disclosure, the party resisting disclosure must prove that disclosure is likely to: (1) impair the State's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. Union Leader v. New Hampshire Hous. Fin. Auth., 142 N.H. 540 (1997).

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[7] A town officer may be dismissed from office if the confidentiality provided by RSA 91-A:3 or :5 is breached. RSA 41:1-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:
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> (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
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> (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.

h. "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 names and addresses would be an invasion of privacy.

Except when the result is plainly established by the Right-to-Know Law itself, courts will apply a test which balances the benefits of public disclosure against the benefits of nondisclosure 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.'' In Goode v. Buckley, ___ N.H. ___ (decided November 25, 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 nondisclosure."

In Union Leader Corp. v. City of Nashua, 141 N.H. 473 (1996), the court held that the motives of a 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 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 U.S. Supreme Court's view that 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. U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749, 773 (1989). An ex parte in camera review of records whose release may cause of invasion of privacy is appropriate. Union Leader Corp., 141 N.H. at 478.

i. Many 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:

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

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

(3) Physician-patient communications. RSA 329:26.

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

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

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

(7) Motor vehicle records. RSA 260:14, II(a). See DeVere v. Attorney General, 146 N.H. 762 (2001).

Reference should be made to all federal and state statutes and regulations applicable to an agency or body for purposes of determining which records may be deemed confidential.

j. Records from nonpublic sessions under RSA 91-A:3, II(i)(emergency functions) or 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. RSA 91-A:5(a).

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

2. OTHER EXCEPTIONS TO DISCLOSURE

a. Written legal advice from the agency's or body's counsel. Society for the Protection of N.H. Forests v. Water Supply and Pollution Control Commission, 115 N.H. 192 (1975).

b. Documents or material which an agency would be permitted to receive in nonpublic session to the extent disclosure of such records would frustrate the purpose for the nonpublic session.[8]

[8] The reasons behind both (a) and (b) are fairly obvious. If an agency can exclude the public from certain meetings and receive legal advice or information in such a closed session, the forced public disclosure of those documents would nullify the effect of holding a nonpublic session.

c. 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). While many draft or advisory documents may be public records, the Right-to-Know Law does not require disclosure which would effectively prohibit the frank, open, and honest discussion which 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.") However, RSA 91-A, IV should not be construed to exempt records simply because they are not in final form. Goode v. N.H. Office of the Legislative Budget Assistant, 145 N.H. 451 (2000). If a record is requested and is not available for immediate release the agency must make it available within five days or provide some other written response. Id. at 453-4. In Goode, the court specifically noted that unlike the federal Freedom of Information Act, the N.H. Right-To-Know Law does not exempt disclosure of inter-agency or intra-agency memorandums or letters, preliminary drafts, and notes. Id. at 454.

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

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

f. 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).

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

3. LAW ENFORCEMENT INVESTIGATIVE FILES

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 nondisclosure of law enforcement investigative records. Lodge v. Knowlton, 118 N.H. 574 (1978).

If the records requested are (1) investigative records and (2) compiled for law enforcement purposes, they may be withheld if the law enforcement agency can prove that disclosure would either:

a. Interfere with enforcement proceedings; or

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

c. Constitute an unwarranted invasion of privacy [9] (NOTE: The statutory exemption for invasion of privacy will be strictly construed. Mans v. Lebanon School Board, 112 N.H. 160 (1972)); or

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; or

e. Reveal investigative techniques and procedures; or

f. Endanger the life or physical safety of law enforcement personnel.

The burden of proof is on the law enforcement agency to show that the record is exempt. It is not the responsibility of the person requesting the record to show that no exemption applies.[10] In Hopwood v. Pickett, 145 N.H. 207 (2000), the court held that investigatory records may only be withheld if the State objects to their release. 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.

4. GUIDANCE IN PRODUCING LAW ENFORCEMENT INVESTIGATIVE RECORDS

Requests for the production of investigative records should be considered in light of all the relevant facts and circumstances. There is no test to apply in every instance to determine which documents may be withheld and which must be disclosed. However, in order to provide law enforcement with some assistance in resolving such requests, additional guidance follows:

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[9] 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.

[10] If none of the Lodge exemptions applies to a particular record, one of the statutory exemptions described in Section III D of this memorandum may still apply.

a. Reference should be made to the State Security and Privacy Plan for guidance concerning the disclosure of criminal history record information (CHRI).

b. Interference With Law Enforcement Proceedings

The proceedings do not have to be pending, but there should be a reasonable likelihood of adjudicatory proceedings at some point in the future. We construe this to include unresolved crimes where some regular effort continues to be expended to solve it.

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.

c. Accused's Right To Fair Trial

This exemption probably would apply in all pretrial situations. Information which might prejudice an accused's right to a fair trial includes records relating to the following:

(1) The guilt or innocence of a defendant;

(2) The character or reputation of a suspect;

(3) Examinations or tests which the defendant may have taken or have refused to take;

(4) Gratuitous references to a defendant; for example, reference to the defendant as “a dope peddler;”

(5) The existence of a confession, admission or statement by an accused person, or the absence of such;

(6) The possibility of a plea of guilty to the offense charged or a lesser offense;

(7) The identity, credibility or testimony of prospective witnesses;

(8) Any information of a purely speculative nature;

(9) Any opinion as to the merits of the case or the evidence in the case.

d. Unwarranted Invasion of Privacy

In determining whether disclosure of documents will constitute an unwarranted invasion of privacy, we expect the court will balance the public and/or private interest in the information sought against the severity of the invasion of privacy. If the public body asserts this exemption in good faith, the individual requesting the information will have to provide a reason or need for the information, contrary to most Right-to-Know Law situations. Although the federal courts are in some disagreement, there is substantial authority to support the nondisclosure of the types of information listed below on the grounds that their disclosure constitutes an unwarranted invasion of privacy, which is another way of saying an invasion of privacy without justification or adequate reason. Remember that these are not blanket exceptions. The facts and circumstances of each situation must be carefully examined to determine whether the privacy exception will apply. Information regarding the following matters may be exempt under this section:

1. Marital status[11]

2. Legitimacy of children

3. Medical conditions

4. Welfare payments

5. Alcohol consumption

6. Family fights

[11] 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.

7. Names of witnesses who cooperated by providing information to authorities and the information provided by them[12]

8. Names of subjects of investigation.

e. Confidential Source

This relates to the informant situation and will probably cover express or implied assurances of confidentiality.

f. Investigative Techniques And Procedures

This exclusion should not be interpreted to include routine techniques and procedures already well known to the public, but should cover techniques and procedures not commonly known.[13]

g. Endangering Life Or Physical Safety Of Law Enforcement Personnel

This exclusion has not been widely construed, but appears to be fairly straightforward.

Any investigative record, whether open, closed, active, or inactive may fall within the exemptions. For instance, the disclosure of an open or active file could interfere with enforcement proceedings in many ways: 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 is reasonably segregable from the non-exempt portions.

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[12] 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).

[13] See Ferguson v. Kelly, 448 F. Supp. 919, 922 (N.D. Ill., 1977), reconsideration granted, 455 F.Supp. 324 (N.D. Ill. 1978).

Many of the exemptions for law enforcement investigative records have yet to be interpreted by the New Hampshire courts. The above guidance is based on federal case law, which a New Hampshire court may reject. Nevertheless, 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, therefore, 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 a law enforcement agency's denial of a request for information under the Right-to-Know Law.

E. BURDEN OF PROOF

In all cases, the public body bears the burden of proving that a record is not subject to public release.

In large document cases where disputed evidence cannot be reviewed effectively, 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), in order to determine 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). In cases of this type, the best practice is to prepare a document index such as described in Vaughn.

F. PUBLIC INSPECTIONS - RSA 91-A:4, IV

1. If no exemption applies, the record is subject to public inspection. Any citizen has the right to inspect all non-exempt public records during the regular business hours on the regular business premises of the public body.[14]

2. If the public body does not have a regular office or place of business, the public records shall 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.

3. If the agency uses a photocopying machine or other device maintained for use by the agency, the agency may charge only the actual cost of providing the copy unless another exclusively applicable fee has been established by law. RSA 91-A:4, IV. If the agency maintains its records in a computer storage system, it may

[14] RSA 91-A:4, I applies only to ''citizens,'' but the Right-to-Know Law does not define the 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, but may have a basis for questioning unusual requests from obviously foreign sources.

provide a printout in lieu of the original documents, provided that the agency has the capacity to produce the information in a manner that does not reveal confidential information, and may charge a fee equal to the actual costs of preparing the printout. The cost of converting a record into a format that may be made available to the public is not a factor in determining whether the information is a public record. Hawkins, 147 N.H. 376 (2001).

4. A citizen does not have to offer a reason or demonstrate a need to inspect the documents. 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).

5. 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 which does not exist, the agency is not required to create that format. Brent v. Paquette, 132 N.H. 415 (1989).

6. If the requested records are not immediately available, the agency is required to, within five (5) business days, make the record available, deny the request in writing with reasons, or furnish a written acknowledgment of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. RSA 91-A:4, IV. 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).

7. 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 public documents must be available for inspection and copying, the public body is not absolutely mandated to provide copies at its 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).

G. SEALED COURT RECORDS

In Petition of Keene Sentinel, 136 N.H. 121 (1992), the Supreme Court set forth procedures and standards to be used when a member of the public or the media seeks access to sealed court records. It may be assumed that a trial court will use similar standards and procedures in considering whether records in possession of a public body should be disclosed. These procedures include:

1. An examination of the document in question in camera in chambers with only counsel for the parties present and on the record. However, counsel is not entitled to be present for in camera review of confidential records. See Union Leader v. City of Nashua, 141 N.H. 473, 478 (1996); State v. Pressey, 137 N.H. 402, 414 (1993).

2. The court shall determine if there is some overriding consideration or special circumstances that would justify preventing public access to the records. The court must determine that no reasonable alternative to nondisclosure exists and must use the least restrictive means necessary to effectuate the purposes sought to be achieved.

3. In the event of an appeal, no access to the documents shall be granted until the matter is finally resolved.

IV. REMEDIES

The importance of compliance with the Right-to-Know Law is demonstrated by the remedies available to persons aggrieved by a public body's noncompliance.

A. INJUNCTIVE RELIEF - RSA 91-A:7

1. A petition requesting an injunction against a public body may be filed with any clerk or justice of the superior court.

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.

3. Ex Parte relief may be granted when time is of the essence.

4. The court may even issue an order enjoining the public body from violating the Right-to-Know Law with regard to future actions subject to its provisions. RSA 91-A:8.

B. ATTORNEY'S FEES AND COSTS - RSA 91-A:8

A body, agency or person violating the Right-to-Know Law will be required to pay for attorneys' fees and costs incurred in a lawsuit under RSA 91-A if the court finds (1) that the lawsuit was necessary in order to make the information available or the proceeding open and (2) that the body, agency or person knew or should have known that the conduct engaged in was a violation. Voebel v. Town of Bridgewater, 140 N.H. 446 (1995)(award of attorney’s fees held inappropriate because second factor

was not present); Chambers v. Gregg, 135 N.H. 478 (1992)(declining to award fees where the second factor was not present); 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); and New Hampshire Challenge Inc. v. Commissioner, NH Dept. of Education, 142 N.H. 246 (1997)(holding that attorney's fees are mandated if necessary findings are made).

1. If an officer, employee or other official has acted in bad faith, the fees may be awarded personally against him.

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

C. INVALIDATION OF AGENCY ACTION

A court may invalidate an action taken at a meeting held in violation of the Right-to-Know Law. RSA 91-A:8, II. See also Stoneman v. Tamworth School District, 114 N.H. 371 (1974)(imposing such a remedy based upon an agency's failure to provide proper public notice of a meeting before invalidation was expressly included in RSA 91-A:8).

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) (See III. E., supra).

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 this chapter. If a request for inspection is denied on the grounds that the information is exempt under this chapter, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending. RSA 91-A:9.