



# Right to Know Law

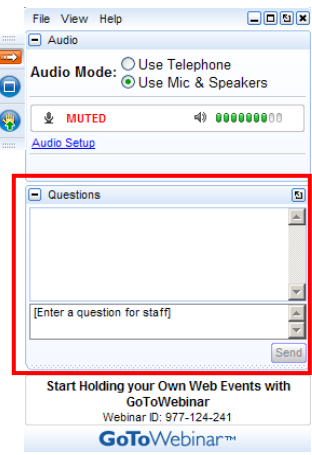
Drafts, Notes, and Revisions  
Creating, Retaining and Disclosing a NH Municipality's  
Unfinished Business

Presenter: Paul Sanderson, Staff Attorney  
Moderator: Tim Parsons, MPH



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Meetings, Records, and Remedies

◦ **GENERAL PRINCIPLES**



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## The Right to Know Law

- Part I, Article 8 of the NH Constitution:
  - Government ... should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.
- Section 1 of RSA 91-A:
  - Openness in the conduct of public business is essential in 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.

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## Right to Know Law

- Two major requirements:
  - Meetings conducted in public
    - Exceptions in narrowly limited circumstances
  - Open access to governmental records
    - Exceptions: protect personal privacy, security, and commercial and financial interests
- Assure the public right to observe and inspect how government works

## Public Meetings

- Convening of a quorum or majority of the membership of a public body,
- To discuss or act upon matters within its supervision, control, jurisdiction, or advisory power
  - All members and the public must be able to hear, read or discern discussion
  - E-mail does not qualify: RSA 91-A:2, III(c)

## Governmental Records

- RSA 91-A:1-a, III definition:
  - ANY information
  - Created, accepted or obtained
  - By or on behalf of a quorum or majority of a public **body** or a public **agency**
  - In any format, received in or out of a meeting
  - In furtherance of board/agency's official function

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## Examples of Records

- Notes to create minutes
- Draft minutes
- Working drafts provided to members
- Electronic documents/files
- Audio-video recordings
- Drafts of document used to implement a prior decision
- Photographs, if distributed

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## Requests-Have a Process

- A subpoena or court order is not a 91-A request, seek assistance of counsel
- Make a record “available” for inspection within five business days
  - May be immediate, if practical
  - May deny the request with reasons
  - May acknowledge the request with a statement of the time necessary to determine whether the request will be granted or denied.

## Process, cont.

- Who receives requests, makes decisions?
- “Available” means in the format in which it is kept and used
  - Should comply if practical
  - May be difficult to “redact” an electronic record without specific software
  - Must not use a format designed to make it difficult/expensive to use the record
- A record may be copied at the citizen’s expense, at “actual cost”.


## Remedies for Violations


- No agency charged with enforcement, or to assist with compliance.
- Remedies available in Superior Court.
  - Invalidate action taken at illegal meeting.
  - Injunctive relief to prevent a violation.
  - Municipality pays attorney's fees and costs where suit needed to obtain information; and the public body knew or should have known that it was violating law.

## Remedies, cont.

- Personal liability possible if an official is knowingly violating law.
- Official may be removed from office for disclosure of confidential/exempt information. RSA 42:1-a
- Knowingly destroying information to prevent disclosure after a request has been made is a misdemeanor (crime), RSA 91-A:9.

Unfinished business

 **DRAFTS, NOTES,  
REVISIONS**




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**What do you think?**

It sure was a long night at the planning board, 5 hours of testimony! The next day, a reporter asked for a copy of the audiotape, and the secretary's personal notes taken during the meeting.

*Must the secretary provide copies of her handwritten notes to the reporter?*



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## Statute

- 91-A:4 Minutes and Records Available for Public Inspection.
  - II. **After the completion of a meeting** of a public body, every citizen, during the regular or business hours of such public body, and on the regular business premises of such public body, has the right to inspect **all notes, materials, tapes, or other sources used for compiling the minutes** of such meetings, and to make memoranda or abstracts or to copy such notes, materials, tapes, or sources inspected, except as otherwise prohibited by statute or RSA 91-A:5.

## Special Case of Minutes

- Must be available to the public within 5 business days of the meeting
- Board probably will not meet again during that time
  - Version created becomes “the minutes” for RTK purposes, even if called a “draft”.
  - No need for a board to approve before they must be disclosed (or ever).
- Do not invite deliberation of the draft via e-mail; changes may be considered at the next public meeting!



## Statute

- **91-A:5 Exemptions.** – The following governmental records are exempted from the provisions of this chapter:
  - **VIII. Any notes or other materials made for personal use** that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.
  - **IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.**

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## The Leading Case/Answers

- **ATV Watch v. NH DOTransportation**
  - **161 NH 746 (2011), April 26, 2011**
- **What is the scope of a search for records?**
  - A search “reasonably calculated to uncover all relevant documents”.
- **What if a record is immediately available?**
  - Even if immediately available, may use the statutory time frame of 5 business days.
- **Is a “Vaughn” index required when multiple records are either withheld or redacted?**
  - No written index required at the time of disclosure, may need later in court.

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## The Leading Case/Answers

- What is a “draft” record, and when must it be disclosed?
  - Draft work is exempt until distributed to a majority/quorum of the public body, or agency.
- Must communication between departments be disclosed?
  - Communication between departments is exempt until provided to the public body.
- Can notes to attorneys be redacted as privileged communications?
  - Notes to attorneys may be redacted if made to facilitate the provision of legal services by attorney.

## Lessons Learned

- Have a document retention policy and follow it, in order to keep the scope of what records exist manageable.
- If there is any doubt about whether a record is exempt from disclosure, or needs to be redacted, take the allotted time to obtain advice or assistance.
- Avoid making marginal handwritten notes on original documents/records that may need to be disclosed at some time in the future.

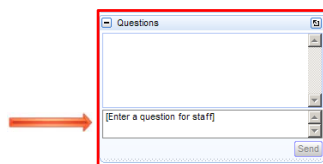
## Lessons Learned

- Those who take notes used in creation of the minutes should keep them factual and free of personal editorial comment.
- Every document/record/email that goes to a majority of a board is subject to disclosure, regardless of how “final” or “preliminary” the contents.
- If the work product stays with staff, it may be exempt from RTK disclosure, unless that person is also the “public agency”.
- Any record might be disclosed by court order during the discovery process in a litigated matter.

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## Questions?



Legal inquiries from NHMA member municipalities may be directed to:

- Phone: 800.852.3358, ext. 384
- Email: [legalinquiries@nhlgc.org](mailto:legalinquiries@nhlgc.org)
- Web: [www.nhlgc.org/services/legalinquiries.asp](http://www.nhlgc.org/services/legalinquiries.asp)

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