ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

1 GRANITE PLACE SOUTH
CONCORD, NEW HAMPSHIRE 03301

JOHN M. FORMELLA
ATTORNEY GENERAL

JAMES T. BOFFETTI
DEPUTY ATTORNEY GENERAL

March 14, 2024

To the People of New Hampshire:

It is my pleasure to issue the following memorandum examining and analyzing New Hampshire's Right-to-Know law. I sincerely hope it will assist citizens and governmental entities alike in understanding their respective rights and obligations under RSA chapter 91-A.

This memorandum reflects a significant update to the last edition, taking into account twenty-seven statutory amendments and over fifteen new court decisions. Of note, the memorandum contains a reorganized meetings section that includes a substantial discussion on remote participation. The memorandum also contains significant updates to the governmental records section, with a revised analysis on privacy and the disclosure of law enforcement records. Finally, the updated memorandum includes a discussion of the State's new Office of the Right-to-Know Ombudsman.

The philosophy underlying this memorandum is simple: the people of the State of New Hampshire have the right to know what their government is doing. This right is enshrined in Part I, Article 8 of the New Hampshire Constitution. As our General Court has succinctly put it: "Openness in the conduct of public business is essential to a democratic society." RSA 91-A:1.

However, identifying the rights preserved in RSA chapter 91-A is far simpler than animating them. Things inevitably become complex when the rubber meets the road. "The public's right of access to governmental proceedings . . . is not absolute." *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 290 (2005) (*citing Petition of Union Leader*, 147 N.H. 603, 604-05 (2002)). It must yield to reasonable restrictions which protect important competing interests like individual privacy and law enforcement safety. Citizens can use this memorandum to learn about these restrictions and to better understand how they may exercise their rights.

As with citizens, public officials should use this memorandum to understand what restrictions they may, and what restrictions they may not, place on citizen access to records and meetings. It is my belief that this memorandum can serve both as a learning tool and as a reference manual. Public officials should do all they can to learn about their responsibilities under the Right-to-Know law so as to conduct their business openly and in accordance with the law.

This memorandum is not a substitute for legal research and advice. There will inevitably be situations in which a public official remains uncertain about the appropriate way to proceed even after reading the relevant sections of this memorandum. In those situations, public officials should consult their lawyer: State officials should consult with my Office, county officials should consult with their County Attorney, and municipal and school officials should consult with their municipality or district's legal counsel. An official's legal counsel will be able to provide situation-specific analysis and advice to supplement the information in this memorandum.

Finally, I would be remiss if I did not take this opportunity to thank the many committed public servants that put countless hours of work into fulfilling document requests, managing public meetings, and facilitating the public's right to know. It is because of their hard work that New Hampshire carries out its public business openly. I remain committed to our Constitution's mandate that the government be "open, accessible, accountable, and responsive." As a result, I proudly announce the publication of this 2024 edition of the Attorney General's Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A.

Sincerely,

John M. Formella
Attorney General

#4423530

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

1 GRANITE PLACE SOUTH
CONCORD, NEW HAMPSHIRE 03301

JOHN M. FORMELLA
ATTORNEY GENERAL

JAMES T. BOFFETTI
DEPUTY ATTORNEY GENERAL

March 14, 2024

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

TABLE OF CONTENTS

I. INTRODUCTION

The New Hampshire Constitution provides: "[T]he public's right of access to governmental proceedings and records shall not be unreasonably restricted." N.H. Const. Pt. I, art. 8. This general proposition is given life in New Hampshire's open government law. Referred to as the "Right-to-Know" law, it appears in Chapter 91-A of the New Hampshire Code. The philosophy underlying these statutory provisions is simple: "Openness in the conduct of public business is essential to a democratic society." RSA 91-A:1.

Consistent with this underlying philosophy, RSA chapter 91-A is designed "to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people." *Id.* The New Hampshire Supreme Court has made clear that it will "resolve questions regarding the Right-to-Know law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective." *CaremarkPCS Health LLC., v. N.H. Dep't of Admin. Servs.,* 167 N.H. 583, 587 (2015) (quotation omitted).

That said, "[t]he public's right of access to governmental proceedings . . . is not absolute." *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 290 (2005) (*citing Petition of Union Leader*, 147 N.H. 603, 604-05 (2002)). As contemplated by the New Hampshire Constitution, the public's right of access "must yield to reasonable restrictions." *Id.* (citing N.H. Const. Pt. I, art. 8). This Memorandum will explore the bounds of these restrictions.

As you read this Memorandum, there are a few things which you should bear in mind:

- RSA chapter 91-A applies to two types of entities: public bodies and public agencies. It provides the public the right to attend meetings and access records of public bodies. However, it only allows for the access of records with relation to public agencies. As such, it is important within this Memorandum to clearly differentiate between public bodies and public agencies. This Memorandum will use the term "public entity" when referring to both groups together.

- The term "municipal" is used within this Memorandum in its broadest sense and, except where otherwise indicated, is meant to include towns, cities, school districts, village districts, water and fire precincts, and any other unit of government established under state law.

- The New Hampshire Supreme Court is the ultimate decision-maker regarding interpretations of the Right-to-Know law. The Court has interpreted the law with a view toward providing the utmost information in order to effectuate the statutory and constitutional objectives of facilitating access to public documents. Thus, while the statute does not provide for unrestricted access to governmental records, provisions favoring disclosure are broadly construed and exemptions are interpreted restrictively. *Union Leader Corp. v. N.H. Hous. Fin. Auth*., 142 N.H. 540, 546 (1997). However, the cases also require that the records sought shed light on what the government is "up to," not simply be in government hands. *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit,* 169 N.H. 95, 111 (2016).

- This Memorandum cites to both New Hampshire Supreme Court opinions and Superior Court orders. Unlike New Hampshire Supreme Court opinions, Superior Court orders and decisions are not binding precedent. Instead, such decisions and orders may be persuasive authority for courts when analyzing RSA 91-A issues. At the least, these cases provide guidance to public agencies, public bodies, and employees.

Finally, all readers should bear in mind that the legal landscape surrounding RSA 91-A is constantly changing and evolving. This Memorandum is intended to provide guideposts for citizens to understand their rights and for public officials to understand their responsibilities under the Right-to-Know law. It is not a substitute for legal research or for consultation with one's legal counsel.

II. DEFINITIONS

The following definitions apply to the Right-to-Know law:

"Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority. RSA 91-A:1-a, I.

"Governmental proceedings" means the transaction of any functions affecting any or all citizens of the state by a public body. RSA 91-A:1-a, II.

"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" also includes the term "public records." RSA 91-A:1-a, III.

"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. RSA 91-A:1-a, IV.

"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. RSA 91-A:1-a, V.

"Public body" means any of the following:

- The general court, including executive sessions of committees and advisory committees established by the general court.
- The executive council and the governor with the executive council, including advisory committees established by the governor by executive order or by the executive council.
- Any board or commission of any state agency or authority, including the board of trustees of the University System of New Hampshire and any committee, advisory or otherwise, established by such entities.
- Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.
- Any corporation that has as its sole member the State of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax-exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

RSA 91-A:1-a, VI(a)-(e).

III. BODIES AND AGENCIES SUBJECT TO THE RIGHT-TO-KNOW LAW

The Right-to-Know law's application is broad and covers all public agencies and public bodies as defined in RSA 91-A:1-a. This includes all boards, commissions, agencies, 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 chartered public schools. RSA 91-A:l-a; *see, e.g., Selkowe v. Bean*, 109 N.H. 247 (1968) (applying the Right-to-Know law to meetings of the financial committee of the Keene city council).

However, the Right-to-Know law does not apply equally to all entities. For example, public bodies must comply with open meetings rules and governmental records rules while public agencies need only comply with governmental records rules. As such, when applying the Right-to-Know law, the first question to ask is whether the entity involved is a public entity at all and, if so, whether it is a public body or public agency.

A. Public Bodies – State Government

Public bodies include:

1. The New Hampshire Senate and House of Representatives (the "general court"), including executive sessions of committees. *See* RSA 91-A:1-a, VI(a).

    a) Advisory committees established by the House or Senate are also public bodies. *Id.*

    b) While the general court is a public body, it is not treated exactly the same as other public bodies. Specifically, in *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 278 (2005), the Supreme Court held that the question of whether the Legislature complied with the Right-to-Know law during the legislative process was a "nonjusticiable political question" not subject to the Court's review. This was in contrast to the question of whether the Legislature complied with Part I, Article 8 of the N.H. Constitution, which the Court ruled was reviewable.

2. "The executive council and the governor with the executive council." RSA 91-A:l-a, VI(b).

    a) This includes "any advisory committee established by the governor by executive order or by the executive council." *Id.*

    b) This will not generally include advisory committees created by commissioners of state agencies even when done with the approval of the Governor. Commissioners should follow the procedure in RSA 21-G:11 to establish an advisory committee. This procedure requires approval of the Governor and filing with the Secretary of State. The approval by the

Governor, unless provided by formal executive order, does not make an advisory committee a public body. *See* RSA 91-A:l-a, VI(b).

3. The Board of Trustees of the University System of New Hampshire, including any advisory committee established by the Board of Trustees. RSA 91-A:l-a, VI(c).

4. Any board or commission of any state agency or authority. RSA 91-A:l-a, VI(c).

a) This includes any advisory committee established by any board or commission of any state agency or authority. *Id.*

b) However, it will not include advisory committees created by an agency's commissioner pursuant to RSA 21-G:11, as discussed above.

5. Certain bodies corporate and politic created by statute that have a distinct legal existence and are not a department of the executive branch of State government. RSA 91-A:l-a, VI(e).

a) Examples include Business Finance Authority (RSA 162-A:3), Housing Finance Authority (RSA chapter 204-C)[1], Municipal Bond Bank (RSA chapter 35-A), and Pease Development Authority (RSA chapter 12-G).

b) Some statutes creating these entities expressly state whether the Right-to-Know law applies, but others are silent on this point. Without express statutory language, the applicability of the Right-to-Know law will depend on the nature and extent of the governmental functions the entity performs. *See generally Prof'l Firefighters of N.H. v. Healthtrust, Inc*., 151 N.H. 501 (2004); *N. N.H. Lumber Co. v. N.H. Water Res.Bd.,* 56 F. Supp. 177, 180 (D.N.H. 1944).

B. Public Bodies – County and Municipal Government

Public bodies also include:

1. The county delegation, the county commissioners, and any committee, subcommittee, or subordinate body or any advisory committee thereto. RSA 91-A:l-a, VI(d).

[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 executive branch of the State and not constituting a department of the executive branch of state government and many of its day-to-day operations function 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 our State." *Union Leader Corp., v. N.H. Hous. Fin. Auth*., 142 N.H. 540 (1997).

2. The board of selectmen, city council, school board, commissioners of a village district, the planning board, conservation commission, zoning board of adjustment, police commission, fire commission, board of fire engineers, budget committee, and any other board, commission, committee or authority including subcommittees, advisory committees, or other subordinate body. RSA 91-A:l-a, VI(d).

3. Regional planning commissions, joint governing boards or commissions established through intermunicipal agreements, and other similar bodies established pursuant to statute from two or more municipalities. RSA 91-A:l-a, VI(e).

4. Important Note: RSA 91-A:1-a, VI(d) includes in the definition of public bodies "any legislative body, governing body, board, commission, committee, agency, or authority of any county, town," etc. Municipal agencies are clearly public agencies under RSA 91-A:1-a, V. However, it is unclear if an "agency" of a town, city, or village district would be a public body in addition to a public agency. This question has not been definitively answered by our Supreme Court.

C. Public Agencies

1. A public agency is "any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, charter school, or other political subdivision." RSA 91-A:1-a, V.

2. State-Level Public Agencies:

a) All State executive branch departments and agencies are public agencies. RSA 91-A:1-a,V; *Lodge v. Knowlton*, 118 N.H. 574, 575 (1978).

b) Several of the bodies corporate and politic created by statute and operating through executive directors and bureaucratic structures should be treated as public agencies.

3. County and Municipal–Level Public Agencies:

a) The county department of corrections, office of the sheriff, county home, human services department, and any other agency, authority, department, or office of the county are public agencies.

b) The police, fire, highway, welfare, water, sewer, recreation, zoning enforcement, and planning departments, the office of the town clerk, tax collector, treasurer, and town/city manager of a town, city, or village district and any other agency, authority, department or office of a town, city, or village district are public agencies.

D. Notes Regarding Advisory Committees

1. What is an advisory committee?

RSA 91-A:1-a, I defines advisory committee as:

> Any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

The New Hampshire Supreme Court further clarified the application of this definition in *Martin v. City of Rochester*, 173 N.H. 378, 383 (2020), writing:

> Pursuant to the statute's plain meaning, the phrase "primary purpose" limits which committees, councils, commissions, or other like bodies are advisory committees under the statute. The legislature has accomplished this limitation with the use of the phrase "so as to," which qualifies the verb "consider" that precedes it. Thus, a body's consideration of issues designated by the appointing authority in and of itself is not determinative of whether the body is an advisory committee. Rather, it is the purpose of the body's consideration that is the deciding factor—i.e., whether the body's primary purpose is to consider issues "designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation."

RSA 91-A:1-a, I (emphasis added).

2. Is an advisory committee a public body?

a) As noted above, advisory committees or subcommittees created by public bodies are also public bodies and are subject to the Right-to-Know law's meeting and governmental record requirements.

b) And any advisory committee to a legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or other subordinate body is also a public body. RSA 91-A:l-a, VI(d).

c) In contrast, advisory committees created by commissioners of state agencies in accordance with RSA 21-G:11 are not public bodies. As such, they are not subject to the Right-to-Know law meeting requirements.

d) However, these commissioner-created advisory committees may remain subject to the Right-to-Know law's record requirements if they remain part of the agency and, at a minimum, any records the advisory committee provides to the agency are subject to governmental record requests.

IV. ENTITIES NOT SUBJECT TO THE RIGHT-TO-KNOW LAW

A. The Governor's Office

1. The Right-to-Know law does not apply to the Governor's Office. *See*, *e.g.*, *Spencer v. Governor*, No. 217-2020-CV-00252, 2020 WL 11567064 (N.H. Super. Ct. Oct. 14, 2020). Though the New Hampshire Supreme Court affirmed this holding, it was evenly divided, and its order lacks any precedential weight. *See Spencer v. Governor*, No. 2020-0521, 2023 WL 2326686 (N.H. Mar. 1, 2023).

2. The Governor's Office is subject to a constitutional requirement of openness under Part I, article 8 of the New Hampshire Constitution that is similar, but not identical, to the Right-to-Know law.

B. The Judicial Branch

1. The Right-to-Know law does not apply to the Judicial Branch, including court proceedings and court records. *See Addison v. State,* No. 217-2018-CV-0029 (N.H. Super. Ct. Aug. 16, 2018).

2. As with the Governor's Office, access to the Judicial Branch is governed by Part I, article 8 of the New Hampshire Constitution. The New Hampshire Supreme Court has specifically recognized that the New Hampshire Constitution creates a right of public access to court records. *In re State (Bowman Search Warrants)*, 146 N.H. 621 (2001). But this right is not absolute. It can be overcome when there is a sufficiently compelling interest supporting non-disclosure.

3. The New Hampshire Supreme Court has also determined that Part I, article 8 is not read "so broadly as to mandate public access to all records related to any superior court activity, including its nonadjudicatory activities." *In Re Union Leader Corp.*, 147 N.H. 603, 605 (2002). Access to court records is limited to "things which are filed in court in connection with a pending case." *Thomson v. Cash*, 117 N.H. 653, 654 (1977). Such access does not include "records of meetings of superior court judges concerning internal management and operation of the court that do not directly relate or pertain to court proceedings or the superior court's adjudicatory functions." *Union Leader Corp.*, 147 N.H. at 605.

4. The court system has established its own procedures for providing public access to its records and proceedings. *See Associated Press v. State*, 153 N.H. 120 (2005); *see also In Re Keene Sentinel*, 136 N.H. 121 (1992). The Judicial Branch also makes publicly available its Guidelines for Public Access to Court Records at https://www.courts.state.nh.us/rules/misc/misc-8.htm.

C. Charitable Non-Profit Organizations

1. The Right-to-Know law does not apply to most charitable non-profit organizations. However, charitable trusts, as defined in RSA 7:21, II(a), including charitable organizations as defined in RSA 7:21 II(b), are required to file certain information with the Charitable Trusts Unit of the New Hampshire Department of Justice. These filings are subject to the Right-to-Know law and to RSA 91-C:1.

2. Please note that charitable non-profit corporations that have a government entity as their sole member or non-profit corporations that are composed of units of government and carry out the work of government with public funds are subject to the Right-to-Know law. RSA 91-A:1-a, VI(e); *see also Prof'l Firefighters of N.H. v. HealthTrust, Inc.*, 151 N.H. 501, 504-05 (2004) (analyzing whether HealthTrust, Inc. was composed of political subdivisions, whether it was governed by public officials and employees, whether it performed an "essential government function," whether it operated for the sole benefit of its constituent government entities, and whether it managed money collected from governmental entities and concluding that HealthTrust was subject to the Right-to-Know law).

V. MEETINGS

Public bodies subject to the Right-to-Know law are required to follow certain procedures with respect to the notice and conduct of meetings. RSA 91-A:2; RSA 91-A:3. In most cases, meeting provisions under the Right-to-Know law do not apply to public agencies. Although the meeting provisions do not apply to most of the work an agency does, there may be occasions when an agency is required by statute, rule, ordinance, or charter provision to hold a hearing, which may be subject to public notice and meeting requirements. Public agencies should consult their legal counsel if there are questions regarding the extent to which the meetings provisions of the Right-to-Know law apply.

A. What Constitutes a Meeting of a Public Body?

1. A public body holds a meeting when a quorum or a simple majority of members, whichever is less,[2] communicates contemporaneously for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power. RSA 91-A:2; *see also Herron v. Northwood*, 111 N.H. 324, 326-27 (1971) (town budget committee's function of preparing and submitting a budget is subject to the Right-to-Know law and meetings must be held in a manner open to the public).

2. Generally, attendance by a quorum or majority of a public body at a meeting being held by a different public body to discuss or act upon a matter within the first body's jurisdiction should be treated as a meeting for Right-to-Know law purposes by both public bodies. Both bodies should provide notice of the meeting and both bodies should keep minutes, which may be the same document, separately adopted as minutes by both.[3]

3. E-mail use should be carefully limited to avoid a violation of the Right-to-Know law. A lawful meeting cannot be conducted via e-mail. *See* RSA 91-A:2, III(c) and RSA 91-A:2, IV(c).

---

[2] The number of members to make a quorum of a specific public body is sometimes defined in statute. When undefined, a quorum is a majority of the membership of the public body. *See* RSA 21:15. If a statute defines the quorum of a public body as less than a majority, the gathering of a quorum requires compliance with the meeting requirements of the Right-to-Know law. Even if a quorum is defined in statute as more than a majority of the members of the public body, the convening of simple majority requires compliance with the public meeting requirements of the Right-to-Know law. For public bodies that have a statutorily defined quorum as more than a majority of members, it is therefore possible to have a meeting that must comply with the requirement of RSA 91-A because a simple majority has gathered despite the body lacking quorum to conduct business.

[3] For example, the attendance 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, minutes, and compliance with the other meeting requirements of the Right-to-Know law. N.H. Att'y Gen. Op. No 89-33, 1990 WL 596819 (Jan. 3, 1993).

a) Communication among members of a public body that does not involve matters over which the body has supervision, control, jurisdiction, or advisory power does not technically constitute a meeting under the Right-to-Know law. As such, e-mail communication for clerical or non-substantive matters may be permissible. Even if limited to clerical and non-substantive matters, e-mail communication concerning government business is a governmental record and potentially subject to disclosure. See Section VI, B of this Memorandum for discussion on disclosing governmental records.

b) Generally speaking, e-mail communications between members of a public body concerning matters over which the public body has supervision, control, jurisdiction, or advisory power runs counter to the spirit and purpose of the Right-to-Know law. An e-mail sent to a quorum or majority of a public body by a member discussing, proposing action on, or announcing how one will vote on a matter within the jurisdiction of the body is improper.

c) Sequential e-mail communications among members of a public body cannot be used to circumvent the requirement that business of the body must be conducted in a meeting.

4. Unless exempted from the definition of "meeting" under RSA 91-A:2, I or by another statute[4], public bodies must deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held in compliance with the Right-to-Know law. RSA 91-A:2-a, I.

B. What Does Not Constitute a Meeting of a Public Body?

1. Chance or social encounters, neither planned nor intended for the purpose of discussing matters relating to official business, and at which no deliberations are conducted or decisions made, are specifically exempt from the definition of a meeting. RSA 91-A:2, I. Therefore, the Right-to-Know law does not apply to isolated conversations among both less than a quorum and a simple majority of members outside of meetings, unless the conversations were planned or intended for the purpose of discussing or acting on matters related to official business. *Webster v. Town of Candia*, 146 N.H. 430, 444 (2001). Such conversations may not be used to circumvent the spirit of the Right-to-Know law. If substantive communication occurs outside of a meeting on a regular basis, a court may determine the members held improper meetings or inappropriately circumvented the Right-to-Know law. RSA 91-A:2-a, II.

2. Strategy sessions or negotiations with respect to collective bargaining are not meetings. RSA 91-A:2, I(a). *See Appeal of Town of Exeter*, 126 N.H. 685, 687

[4] *See, e.g.,* RSA 363:17-c (making the deliberations of the Public Utilities Commission exempt from the meeting and notice provisions of the Right-to-Know law).

(1985) (collective bargaining); *Talbot v. Concord Union Sch. Dist.,* 114 N.H. 532, 535-36 (1974) (negotiations between school board and union committee not subject to the Right-to-Know statute although approved agreements are subject to the statute).

3. A caucus of officials elected on a partisan basis at a state or municipal general election is not a meeting. RSA 91-A2, I(c).

4. The circulation of draft documents that formalize decisions previously made in a meeting is not a meeting. RSA 91-A2, I(d).

5. A public body's consultation with legal counsel is not a meeting. RSA 91-A:2, I(b); *Soc'y for Prot. of N.H. Forests v. Water Supply and Pollution Control Comm'n*, 115 N.H. 192, 194 (1975).

a) If a public body is meeting in public session and wants to consult with legal counsel, it should either recess or adjourn the meeting. If the public body intends to reconvene after consultation, it should recess the meeting for the purpose of consulting with legal counsel, giving notice to the public that the meeting will reconvene. Please see Appendix A of this Memorandum for additional guidance.

b) If members of the public are not present during a meeting and a public body consults its legal counsel, a failure to recess or adjourn does not destroy the attorney-client privilege. *See Prof'l Firefighters of N.H. v. N.H. Local Gov't Ctr.,* 163 N.H. 613, 615 (2012) (holding meeting minutes containing attorney-client privileged communication may be redacted as "[t]he fact that the meeting occurs in a public place does not destroy the privilege, if no one hears the conversation.").

c) Everyone except the members of the public body and their staff should be excluded from the room when consultation with legal counsel occurs. Because consultation with counsel occurs outside the definition of a meeting, minutes are not required nor appropriate during the period the public body is consulting with its counsel.

d) Consultation with counsel requires the ability to have a contemporaneous exchange of words and ideas between the public body and its attorney (e.g., physically present, telephonically, video-conference, etc.). *Ettinger v. Town of Madison Planning Bd*., 162 N.H. 785, 789 (2011). If a public body wishes to discuss legal advice previously provided and counsel is not present, the body may enter nonpublic session during a meeting. RSA 91-A:3, II(*l*). Please note: discussion of legal advice in public session may constitute a waiver of the attorney-client privilege if members of the public are present during the discussion. Public bodies are

encouraged to consult with legal counsel on how to handle legal advice and waiver of the attorney-client privilege.

e) Consultation with legal counsel should be limited to discussion of legal issues. Deliberation by members of the public body about the matter on which advice is sought may not occur during consultation with legal counsel. Once members of the public body wish to deliberate or act upon the matter, the public body must convene a meeting and, unless a statutory exemption allows deliberation in nonpublic session, remain in public session to deliberate.

C. Notice of Meetings[5]

When a public body intends to convene a meeting, advance notice must be given to the public.

1. Notice of In-Person Meetings

a) Two forms of notice are proper under the Right-to-Know law:

(1) Notice of the time and place of any meeting (including nonpublic sessions) posted in two appropriate places at least 24 hours prior to the meeting, excluding Sundays and legal holidays. RSA 91-A:2, II. Notices should be posted where people are likely to see them, such as on the public body's website,[6] the location where the checklist or town warrant is posted, the agency's office lobby or front door, or a Town Hall bulletin board;

or

(2) Notice of the time and place of the meeting printed in a newspaper of general circulation in the city or town at least 24 hours prior to the meeting, excluding Sundays and legal holidays. RSA 91-A:2, II.

[5] Administrative rulemaking proceedings are beyond the scope of this memo, but certain rulemaking hearings may also qualify as meetings and require notice compliant with both the Right-to-Know law and the State's Administrative Procedures Act, RSA chapter 541-A. Public bodies conducting rulemaking that have questions about meeting and notice requirements should consult with counsel.

[6] If a public body has a website, the public body must either post meeting notices on that website in a consistent and reasonably accessible location, such as the homepage, or post a notice on its website stating where the public body's meeting notices are publicly posted. RSA 91-A:2, II-b(b). Note that posting meeting notices on the public body's website does not relieve the body from the requirement to post two notices. A second notice must also be posted.

b) Contents of the notice:

(1) The notice must state the time and place of the meeting. RSA 91-A:2, II.

(2) The notice must provide awareness of the public session and any planned nonpublic sessions. *Id*. If the public body decides properly, but unexpectedly, to go into nonpublic session during a properly noticed public session of a meeting, the notice for the meeting is sufficient.

(3) While not required under the Right-to-Know law, it is generally appropriate that the notice include a brief agenda and a general notice that other matters within the public body's jurisdiction may be considered.

(4) Other laws or procedures specific to a public body may impose additional notice requirements for meetings. Members of a public body should maintain familiarity with these additional requirements and consult with legal counsel as to the proper form of a meeting notice when uncertainty exists.

c) Individual notice may not be necessary even where a particular individual's rights are affected so long as notice is proper as described above. *See Brown v. Bedford Sch. Bd*., 122 N.H. 627, 631 (1982) (under the Right-to-Know law, probationary teachers were not entitled to individual notice of public meeting at which the teachers' terminations were on the agenda and public notice was otherwise proper); *Sivalingam v. Newton*, 174 N.H. 489, 502 (2021) (the Right-to-Know law does not require public bodies to provide specific notice to an individual of intent to enter nonpublic sessions to discuss matters that may adversely affect the individual's reputation).

d) Provided the initial meeting notice is proper, posting of additional notice is unnecessary if the same meeting is continued to another day. *See Town of Nottingham v. Harvey*, 120 N.H. 889, 894-95 (1980) (reconvening a public zoning meeting on a later date without posting notice of the second date did not violate Right-to-Know law). However, best practice is to post notice of meetings that are to be reconvened whenever possible to support the spirit and objectives of the Right-to-Know law.

2. Notice of Remote Meetings Held by State Boards[7]

[7] As used in this memo, a "remote meeting" is a meeting held by a State board, committee, council, advisory committee, or like body of State government ("State board") as defined in RSA 91-A:2, IV and conducted in accordance with the requirements of RSA 91-A:2, IV.

a) A State board holding a remote meeting as described below in Section V, D must comply with the same meeting notice requirements described above in Section V, C, 1.

b) Members of the public must be allowed to participate in remotely held meetings as the rules and procedures of the State board allow. RSA 91-A:2, IV (b). Accordingly, notice of a remote meeting must include or be accompanied by the necessary information to allow the public to access the meeting remotely. It is best practice for the State board to provide a mechanism for the public to alert the board during the meeting if there are problems with remote access.

3. Notice of Emergency Meetings

a) Emergency notice may be used only if the chair or presiding officer of the public body determines an emergency exists because immediate action is imperative. RSA 91-A:2, II; III(b); IV(d).

b) As soon as possible after it is determined an emergency meeting will be held, notice of the time and place of the emergency meeting must be posted. RSA 91-A:2, II. The law requires employing whatever additional means are available to inform the public about the meeting. RSA 91-A:2, II. For example, notice may be given over the radio, by e-mail, via social media, or by telephone to people known to be interested in the subject matter of the meeting. The nature of the emergency will dictate the type of notice that can be given. In any event, notice must be posted, and a diligent effort made to reasonably inform the public that an emergency meeting is to be held. Such efforts should be documented.

4. Notice of Legislative Meetings

a) Notice of legislative committee meetings must be made in accordance with the Rules of the House of Representatives and the Rules of the Senate, as appropriate. RSA 91-A:2, II.

5. Notice when Broader Access Required

a) A municipal charter, ordinance, rule, or guideline adopted by a public body may require broader public access to meetings than what the Right-to-Know law requires. If adopted, the requirements for greater access control. RSA 91-A:2.

b) As a result, a public body must always tailor its notice to ensure compliance regarding public access to its meetings. The Right-to-Know law only establishes minimum requirements; public bodies must comply

with additional requirements as applicable. Members of a public body should consult with legal counsel as to the proper form of a meeting notice when uncertainty exists.

6. Effect of Failure to Observe Notice Requirements

a) Failure to give proper public notice subjects the public body and its members to possible judicial sanctions including civil penalties, declaring the meeting and any actions taken invalid, enjoining the public body's actions or practices, and assessing legal costs and fees. RSA 91-A:7 & RSA 91-A:8; *See also* Section VII, B (Forms of Relief).

D. Meeting Procedures

The basic rule is that meetings of public bodies subject to the Right-to-Know law occur at a physical location where the members gather to deliberate or act on matters over which the public body has supervision, control, jurisdiction, or advisory power. A public body acts through voting on motions properly made and seconded by members of the body during a meeting.

Meetings are open to the public unless the body is authorized, after beginning the meeting in public, to enter a nonpublic session. Any person may attend a meeting, but the public's right to attend a meeting does not convey a right to speak. Other laws may require that the public be afforded some opportunity to be heard at public hearings or certain other meetings of public bodies. Many public bodies voluntarily establish appropriate regulated public comment periods at some meetings; however, this is not required by the Right-to-Know law.

1. Physical Location

a) All meetings of a public body under the Right-to-Know law must have a physical location.

b) No meeting may be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern the meeting discussion contemporaneously at the physical meeting location specified in the meeting notice. RSA 91-A:2, III(c); IV(c).

c) The physical meeting space of a public body should be accessible to persons with disabilities and large enough to accommodate any reasonably anticipated public attendance. If necessary, the body should make provisions for amplifying the discussions between members and parties presenting to the public body. Public bodies should consult with legal counsel to ensure the body is prepared to meet the requirements of

the Americans with Disabilities Act should any person require accommodation.

d) If unanticipated public attendance results in members of the public being effectively denied the opportunity to attend the meeting, it may be necessary to reconvene the meeting in a more suitable space. For example, if a crowd in excess of the fire code limit for the meeting room shows up and individuals wishing to attend are limited to hallways or other rooms where they can neither hear nor see the meeting, the right of public access is in question. If practical, move the meeting to a sufficiently large nearby space. Ensure those arriving at the location shown on the meeting notice are informed of the new meeting location. If moving is impractical, consult with legal counsel before proceeding with a meeting where members of the public are being denied the opportunity to attend due to space limitations.

2. Member Attendance

a) Unless not reasonably practicable, members of all public bodies must attend meetings in person. All public bodies may, but are not required to, allow members to attend meetings remotely when physical attendance is not reasonably practicable. RSA 91-A:2, III.

b) For the purposes of this memorandum, meetings can be divided into two categories based on member attendance: in-person meetings and remote meetings.

(1) In-Person Meetings of Any Public Body

(a) For an in-person meeting, there must be at least a quorum of the public body physically present at the location specified in the meeting notice. RSA 91-A:2, III(b).

(b) If permitted by the public body and physical attendance is not reasonably practicable, a member of the public body may participate in an in-person meeting remotely. RSA 91-A:2, III(a). But any member participating remotely does not count toward the required quorum of members that must be physically present at the meeting location. A member allowed to participate remotely is considered present for voting purposes. Whenever a member participates remotely, all votes must be done by roll call vote.

(c) Each member participating remotely, whether by phone or otherwise, must be able to simultaneously hear and speak to the other members of the public body during the meeting. The member participating remotely must also be audible or otherwise discernible to the public in attendance at the meeting's location. RSA 91-A:2, III(c). One practical solution for remote participation in an in-person meeting is participation by telephone, provided there is a speakerphone used in the meeting room that can be heard by the other members of the public body and by the public. Remote web-based conference applications are also acceptable solutions, but are not required, for meetings conducted in accordance with RSA 91-A:2, III(c). Except for remote State board meetings RSA 91-A:2, IV (discussed below), there is no requirement in the law to be *seen* during the meeting, only to be *heard*.

(d) Every member participating remotely must identify all other persons present at the member's location. RSA 91-A:2, III(c)

(2) Remote Meetings of State Boards

(a) A "remote meeting" is a meeting held by a State board and conducted in accordance with the requirements of RSA 91-A:2, IV.

(b) "State boards" are defined as the boards, committees, councils, advisory committees, and like bodies of State government whose composition may be drawn from individuals who reside throughout the State. RSA 91-A:2, IV. Only State boards may hold remote meetings under RSA 91-A:2, IV. Other public bodies, such as local boards, may permit remote participation in meetings with a quorum of the public body physically present at the meeting location as outlined in the preceding section.

(c) A State board electing to hold a remote meeting under RSA 91-A:2, IV may allow up to two-thirds of its total membership to be remote. However, at least one-third of the members of the State board must still be physically present at the location specified in the meeting notice. RSA 91-A:2, IV(b).

(d) A member of the State board may only participate remotely in a remote meeting if the board authorizes

remote participation because physical attendance is not reasonably practicable. RSA 91-A:2, IV(a). Each member authorized to participate remotely counts toward the State board's quorum for the purpose of convening a meeting. RSA 91-A:2, IV(b. Each member authorized to participate remotely is also deemed present for the purposes of voting. *Id*. In any meeting where a member participates remotely, all votes must be by roll call. *Id*.

(e) The vote to authorize remote participation is an official action that must occur in a meeting and be recorded in the meeting minutes. *See* Section V, E on Minutes, below. Therefore, as a practical matter, a State board's initial vote to authorize remote participation must occur in a meeting that has a quorum physically present.[8]

(f) It is recommended that State boards consider standing authorizations for remote participation. Such an authorization would allow members to participate remotely based on specific reasons the board deems sufficient to meet the standard that physical attendance at the meeting site is not reasonably practicable. For example, a State board may wish to vote that childcare obligations, excessive travel, or driving in hazardous weather conditions are sufficient reasons to allow a member to participate remotely. If a State board votes to approve a standing authorization, the board may also vote to revoke, renew, or modify the authorization. *See* RSA 91-A:2, IV(a).

(g) If a standing authorization is approved, subsequent meetings of the State board may occur with less than a physical quorum as permitted by law. A member authorized to participate remotely may do so without another authorizing vote and until the authorization is amended, revoked, or expires. *See* RSA 91-A:2, IV(a).

(h) Inevitably a situation will arise that is not covered by a standing authorization. In such a circumstance, if there is a lawful quorum of members authorized to participate in the meeting – which could be comprised of physically present members and members participating remotely under a standing authorization – the State board may properly convene a remote meeting and also vote to

[8] If a State board has less than a physical quorum at its meeting location and has not yet authorized any member to participate remotely, it lacks a lawful quorum to convene a meeting and conduct official business, including the votes to authorize remote participation.

authorize a member or members to participate remotely for a new reason.

(i) Each member participating remotely must be able *to see* and hear, and *be seen* and heard by, all other members of the State board and members of the public at the meeting location. RSA 91-A:2, IV (b) (emphasis added). As a result, remote participation in a remote meeting of a State board will require participation through some form of video-conference platform or similar technology that allows remote members to be seen and heard at the physical meeting location.

(j) Every member participating remotely must identify all other persons present at the member's location. RSA 91-A:2, IV(b). And, regardless of when authorization to participate remotely is granted, the minutes of each meeting must state the authorized reason one or more board members participated remotely. RSA 91-A:2, IV(a).

(k) Please note remote meetings are not synonymous with emergency meetings. In an emergency, as discussed further in Section V, D below, all members of the State board may participate remotely without prior authorization based solely on the determination of the chair or presiding officer that immediate action is imperative and physical presence of members is not reasonably practicable within the period of time requiring action. RSA 91-A:2, IV(d).

3. Voting

a) Except as described below, the Right-to-Know law does not mandate the procedure a public body must use to vote.[9] Specific requirements may be imposed by other laws or adopted by the public body. Public bodies are encouraged to consult with legal counsel regarding questions of parliamentary procedure.

b) No vote in a meeting may be taken by secret ballot except for town meetings and elections; school district meetings and school district elections; or village district meetings and elections. RSA 91-A:2, II.

c) In any meeting where a member of the public body participates remotely, all votes taken during the meeting must be by roll call. RSA 91-A:2, III(e); IV(b). In order to comply with the roll call requirement, the

[9] The Right-to-Know law does not require public bodies adopt Robert's Rules of Order or another parliamentary system to govern a public body's meetings or its voting procedures.

minutes should explicitly identify how each member voted on each motion, including any abstentions. Compliance with the roll call requirement should be documented in the meeting minutes.

d) All votes on motions to enter nonpublic sessions must occur during a public session of a meeting. The vote to enter nonpublic session must also be conducted by roll call, regardless of whether all members of the public body are in-person. RSA 91-A:3, I(b).

e) The Right-to-Know law requires the minutes of nonpublic sessions reflect all actions in a manner that the vote of each member is clear and recorded. *See* RSA 91-A:3, III. This may be accomplished through using roll call votes. But roll call votes in nonpublic session are not required (unless a member is participating remotely), provided the minutes of the nonpublic session are clear how each member voted. For example: "Motion passes unanimously" or "Motion passes, 3-2, with Ms. Smith and Mr. Jones voting against" allow a reader of the minutes to determine how each member of the body voted (as long as the minutes properly list the members present).

f) Minutes of a nonpublic session are subject to disclosure within 72 hours of the meeting unless two thirds of the public body votes in public session to withhold the minutes. The Right-to-Know law requires this vote to be a "recorded vote." RSA 91-A:3, III. As discussed above, this may be accomplished through using a roll call vote. But such a process is not required, provided the minutes are clear how each member voted. *See id*.; *see also* Section V, E below.

4. Public Sessions & Public Participation

a) The default is that meetings of public bodies subject to the Right-to-Know law are open to the public. RSA 91-A2. All meetings must begin in public session and may only move into a nonpublic session after an authorizing vote is conducted in public session. *See* RSA 91-A:2 and Section V, E below.

b) Any person may attend the public session of a meeting. If a State board holds a remote meeting under RSA 91-A:2, IV as described above, the public must be allowed to access the meeting remotely as well. It is best practice to provide a mechanism for the public to alert the State board if, during the public portion of a remote meeting, there are problems with remote access. State boards should consult with legal counsel before proceeding with a remote meeting where members of the public cannot attend remotely due to a technology failure.

c) The public's right under the Right-to-Know law to attend the public portion of a meeting does not convey a right to speak. Other laws, however, may require that the public be afforded some opportunity to speak at public hearings or certain meetings.

d) Many public bodies voluntarily establish appropriately regulated public comment periods at some meetings, even though this is not required by the Right-to-Know law. Public bodies should consult with counsel regarding the establishment and regulation of public comment periods, including handling disruptive conduct and potential time, place, and manner restrictions.

e) If a State board holds a remote meeting as described in Section V, D above and offers a public comment period, the public must be allowed to participate remotely in the same manner as members of the public who attend in-person.

f) Any person attending a meeting must be permitted to use recording devices including, but not limited to, tape recorders, cameras, and videotape equipment.[10] RSA 91-A:2, II; *See WMUR v. N.H. Dep't of Fish and Game,* 154 N.H. 46 (2006) *as modified on denial of reconsideration* (Sept. 20, 2006) (prohibiting television cameras at a hearing on issuance of a hunting and fishing license because the presence of cameras would impair the applicant's ability to present his case violated the Right-to-Know law where the applicant had not established that he had a due process right to a hearing without cameras present).[11]

g) Public bodies whose public meetings are regularly recorded by members of the public should establish uniform procedures that allow for a reasonable opportunity to record while not interfering with or disrupting the conduct of the meeting.

5. Nonpublic Sessions[12]

a) A public body may exclude the public from a meeting only if the body votes, by roll call vote, to move into a nonpublic session. The motion must state the statutory basis for the nonpublic session and be approved by a majority of the members at the meeting. *See* Appendix A.

[10] A public session of a meeting is a public forum, so there is no reasonable expectation that oral communication will not be recorded. As a result, recording a public session is not a violation of New Hampshire's wiretap statute for recording without permission or notice to those who are being recorded. *See* RSA 570-A:1, II.

[11] The Court did not reach the question of whether the right to due process, if it had been established by the person seeking a license, would outweigh the right to use television cameras at a public hearing contained in RSA 91-A:2, II. Television cameras should generally be allowed at public meetings and hearings.

[12] Nonpublic sessions were previously referred to as executive sessions. The term "executive session" has been replaced throughout RSA chapter 91-A with the term "nonpublic session."

b) The vote to go into nonpublic session must be taken during a public session of the meeting and recorded in the minutes that will be available to the public. *See* RSA 91-A:3, I. As a result, no meeting under the Right-to-Know law can ever be entirely nonpublic. At the minimum, a public body must first properly convene a meeting open to the public and then vote, in public, on a motion to enter a nonpublic session.

c) Unless a specific statute authorizes a body to deliberate in nonpublic session on a particular question, public bodies must deliberate in public. RSA 91-A:2-a; RSA 91-A:3, I(a).

d) The Right-to-Know law authorizes a nonpublic session during a meeting to discuss or act upon 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 them. RSA 91-A:3, II(a).

(a) This exception does not apply if the employee affected (1) has a right to a meeting under a statute, rule, or other applicable law; and (2) requests the meeting be conducted in public session. RSA 91-A:3, II(a).

(b) Any public employee with a right under another law to a hearing or meeting may be entitled to personal notice of that meeting according to the law or contract that grants the right. When a right to a hearing and notice exists, that right typically attaches when the public body is considering imposing discipline or discharging the employee. The right generally does not apply to nonpublic sessions held to discuss the initial receipt of a complaint or held to decide whether to refer the complaint for investigation by an appropriate authority.

(c) If the body plans to hold a "hearing" on the discipline, compensation, or promotion of a particular public employee, the notice of the meeting and notice sent to the parties should state that the meeting will be nonpublic, unless the public employee has a right to have a public meeting and requests the meeting be public.

(d) Public bodies that are hiring authorities with disciplinary and discharge authority that also provide open public comment periods at meetings should consult with legal counsel and establish a procedure to follow when a

member of the public makes a complaint about a specific employee.

(2) The hiring of any person as a public employee. RSA 91-A:3, II(b). Please note: the Supreme Court has held this provision does not apply to an appointment of a public official. *Lambert v. Belknap Cnty. Convention,* 157 N.H. 375, 379-80 (2008). But the Court did not address whether other provisions of RSA 91-A:3, II could apply when a public body considers an appointment. *Id*. at 381. Accordingly, if a public body considering an appointment desires to enter nonpublic session another provision may provide appropriate authorization to do so, such as RSA 91-A:3, II(c), discussed below.

(3) Matters that, if discussed in public, are likely to adversely affect the reputation of any person, other than a member of the public body, unless such person requests an open meeting.[13] RSA 91-A:3, II(c).

(a) Although nonpublic session is inappropriate if the individual whose reputation is at issue requests the discussion occur in public, a public body is not required to provide specific notice to an individual of its intent to enter nonpublic session to discuss that individual. *Sivalingam v. Newtown*, 174 N.H. 489, 501-503 (2021).

(b) The New Hampshire Supreme Court affirmed a Superior Court holding that public bodies must engage in some form of threshold inquiry to determine whether a matter to be discussed is likely to adversely affect the reputation of an individual. *Clay v. Newmarket Sch. Dist.*, No. 2019-0718, 2020 WL 6441334, at *8-10 (N.H. Oct. 1, 2020).[14] According to the Superior Court, the threshold inquiry can "and probably should occur entirely within a particular [public body] member's own mind." *Id*. at *8.

(c) It is a best practice for a public body to not establish categories of subjects or matters that will always be discussed and acted upon in nonpublic session based on this exception. Rather, for every motion to enter nonpublic

[13] 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 licensee to an open hearing if requested.

[14] Please note, however, that this order lacks precedential value. *See* Sup. Ct. R. 20(2). The Court authorized the publication of this order for informational purposes only.

session under this exception, each member should consider whether the expected discussion or action is likely to adversely affect the reputation of an individual other than a member of the public body.

(d) This exception includes any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant. RSA 91-A:3, II(c).

(4) Consideration of the acquisition, sale or lease of real or personal property that, if discussed in public, likely would benefit a party or parties whose interests are adverse to those of the general community.[15] RSA 91-A:3, II(d).

(5) Consideration or negotiation of pending claims or litigation that have been threatened in writing or filed against the public body or any subdivision thereof, or against any member thereof because of their membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. RSA 91-A:3, II(e).

(a) Any application filed for tax abatement with any public entity may not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph. *Id*. But RSA 91-A:3, II(c) makes a nonpublic session proper if the tax abatement is sought based on inability to pay or poverty.

(6) 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. RSA 91-A:3, II(g).

(a) Note that a county correctional superintendent acting in their executive capacity is not a public body subject to the public meeting requirements of the Right-to-Know law. This provision applies to meetings of the superintendent with the County Commissioners or any other public body for the purposes stated.

[15] Regardless of whether a public body votes to seal nonpublic session minutes related to discussions held in nonpublic session under this exception, the Right-to-Know law requires nonpublic session minutes made under this exception be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction. RSA 91-A:3, III.

(7) Consideration of applications by the Business Finance Authority under RSA 162-A:7-10 and RSA 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. RSA 91-A:3, II(h).

(8) Consideration of matters relating to the preparation for and carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials for the purpose of thwarting a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. RSA 91-A:3, II(i).

(9) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding in accordance with RSA 541 or RSA 541-A. RSA 91-A:3, II(j).

(10) Consideration by a school board of entering into a student or pupil tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations. RSA 91-A:3, II(k).

> (a) It is important to note that although a school board is authorized to consider a student or pupil tuition contract in nonpublic session, the law requires that contract negotiated by a school board be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session. Additionally, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, must also be made public. Approval of a contract by a school district may occur only at a meeting open to the public at which, or after which, the public has an opportunity to participate. RSA 91-A:3, II(k).

(11) Consideration of legal advice previously provided by legal counsel, either in writing or orally, to one or more members of the public body, when legal counsel is not present. RSA 91-A:3, II(l). If the public body has the ability to have a contemporaneous exchange of words and ideas with its attorney, the body may

consider exiting the meeting to have a non-meeting session. See Section V, B above.

(12) Consideration of whether to disclose minutes of a nonpublic session due to a change in circumstances under RSA 91-A:3, III. RSA 91-A:3, II(m). But any vote on whether to disclose minutes must take place in public session. *Id*.

e) A public body is limited to discussing, in nonpublic session, the specific matters set out in the motion to enter nonpublic session (which must be made during a meeting's public session). RSA 91-A:3, I(c). A public body may take final action in a nonpublic session on matters that are properly considered in nonpublic sessions unless required by law to act in public. *See id*.; *see also*, RSA 91-A:3, II(k); (m).

f) Any motion to go into nonpublic session must include a specific reference to an appropriate section in RSA 91-A:3, II. If the body is relying on other law, a reference to that law should be included in the motion and minutes. *See*, *e.g.*, RSA 21-G:31, V.

6. Emergency Meetings

a) In an emergency, there is no requirement that any member of the public body be physically present at the location specified in the meeting notice. RSA 91-A:2, III(b); VI(d).

b) "Emergency" means that immediate action is imperative and the physical presence of sufficient members is not reasonably practical within the period of time requiring action. RSA 91-A:2, III(b); IV(d). Inability to obtain enough members of the public body to be physically present at a scheduled meeting will not, by itself, constitute adequate grounds for an emergency.

c) The determination that an emergency exists must be made by the chair or presiding officer of the public body. The facts upon which that determination is based must be included in the minutes of the meeting. RSA 91-A:2, III(b); IV(d).

d) In an emergency, a meeting notice must still be issued and there must be a physical location of the meeting available for public attendance. Therefore, as a practical matter, most emergency meetings will involve at least one member of the public body, or a support staffer, present at the meeting's physical location. Members of the public body may attend remotely, provided the other applicable requirements of the Right-to-Know law are met. *See* RSA 91-A:2, III(b); IV(d).

E. Meeting Minutes:

1. For All Meetings:

a) Minutes must be kept and 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; and

(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 member making the motion, and the member seconding the motion must also be included.

(5) An objection made by a member of the public body to a discussion in public or nonpublic session as violating the Right-to-Know law must be recorded in the minutes if requested by the objecting member. RSA 91-A:2, II-a. If the objection is to a discussion in nonpublic session, the objection must be recorded in the public minutes, but the notation is limited to the member's name, a statement that he or she objected to the discussion in nonpublic session, and a reference to the provision of RSA 91-A:3, II, that was the basis for the discussion. *Id*.

b) If any member of the public body attends remotely, the following must also be recorded in the minutes:

(1) The name of each member of the public body participating remotely and the reason physical attendance by that member is not reasonably practicable. RSA 91-A:2, III(a); IV(a).

(2) The roll call vote for all votes taken during the meeting. RSA 91-A:2, III(e); IV(b).

c) Minutes are not required to be or include stenographic or verbatim transcripts. *DiPietro v. City of Nashua*, 109 N.H. 174, 176 (1968). However, there may be other statutes that require a verbatim record for certain types of proceedings. *See*, *e.g.*, RSA 541-A:31, VII (adjudicative proceedings).

d) The Right-to-Know law guarantees the right to inspect and copy all notes, materials, tapes, or other sources used for compiling the minutes of

a public body's meetings, unless otherwise prohibited by RSA 91-A:5 or other statute. RSA 91-A:4, I.

e) Minutes are a permanent part of the body's records and must be written and open to public inspection not more than five business days after the meeting.[16] RSA 91-A:2, II. There are no exceptions to this requirement for written minutes of the public session of meetings. Even if a public body recorded the meeting and the recording could be made available, the recording does not satisfy the requirement for minutes. Written draft minutes, however, can be used to satisfy this requirement, until the final minutes are completed and accepted. Draft minutes should be clearly marked "Draft."

f) If a public body has an internet website, the body must post either (1) its approved minutes in a consistent and reasonably accessible location on its website or (2) a notice on the website stating where the minutes may be reviewed and how copies can be requested. RSA 91-A:2, II-b(a).

g) Each public body should adopt a uniform character for its minutes and decide, outside the context of any controversial issue, how detailed its minutes will be. Many public bodies choose to keep minutes that go beyond the requirements of the Right-to-Know law and include a summary of discussion or comments on most agenda items. While this practice is permissible, the additional information voluntarily included in minutes is subject to the same disclosure requirements as the information required by the Right-to-Know law. *Orford Teachers Ass'n v. Watson,* 121 N.H. 118, 121 (1981) (court rejected the contention that "public records" are only those records required to be kept by law) (*citing Menge v. City of Manchester*, 113 N.H. 533, 536-37 (1973).

2. For Meetings with Nonpublic Sessions

a) Public minutes:

(1) The motion to enter nonpublic session, the statutory basis for entering nonpublic session, the member making the motion, the

[16] RSA 641:7 reflects the importance of keeping minutes that 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 anything 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 anything 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. RSA 641:7.

member seconding the motion, and the roll call vote to adopt the motion must all be recorded in the public minutes of the meeting.

(2) Minutes of nonpublic sessions are subject to disclosure within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present and taken in public session, the public body adopts a motion to withhold the nonpublic session minutes. Please note, the 72-hour timeline is unaffected by holidays or calculating business days.[17]

(a) The decision to withhold nonpublic session minutes must be based on one of three reasons:

(i) Public release of the minutes would likely adversely affect the reputation of a person other than a member of the public body;

(ii) Public release of the minutes would render the proposed action ineffective; or

(iii) The minutes pertain to terrorism, specifically, to matters relating to the carrying out emergency functions or the training to carry out such functions.

b) Nonpublic session minutes:

(1) Minutes of nonpublic sessions are required and must meet the same minimum standards as those taken in public session. RSA 91-A:2, II.

(2) Minutes for nonpublic sessions must also record all final actions taken during the nonpublic session in a manner that the vote of each member is recorded and can be ascertained. RSA 91-A:3, III. This may be accomplished through using roll call votes but is not required, provided the minutes are clear how each member voted. For example: "Motion passes unanimously" or "Motion passes, 3-2, with Ms. Smith and Mr. Jones voting against" allow a reader of the minutes to determine how each member of the body voted (as long as the minutes properly list the members present).

[17] For nonpublic session meeting minutes not withheld, the minutes must be available within 72 hours. RSA 91-A:3, III. As a result, unless there is a proper 2/3 vote to withhold from disclosure, nonpublic session meeting minutes must be available faster than the public session minutes of the same meeting.

c) List of nonpublic sessions and review of nonpublic session minutes:

(1) As of January 1, 2022, all public bodies subject to the Right-to-Know law must maintain a list of all nonpublic sessions where the public body determined that the minutes or decisions were not subject to full public disclosure. RSA 91-A:3, III.

(2) This list must identify the public body, the date and time of the nonpublic session, the specific exemption relied upon to enter nonpublic session, the date of the decision to withhold the minutes from public disclosure, and the date of a subsequent decision to make the minutes available for public disclosure, if any. *Id*.

(3) A public body may adopt procedures to review nonpublic minutes and to determine by majority vote whether the circumstances that justified withholding the nonpublic minutes still apply. RSA 91-A:3, IV(a). If the public body determines that the circumstances no longer apply, the minutes must be made publicly available. *Id*. If a public body does not adopt such a procedure, it must review and determine by majority vote whether the circumstances that justified withholding still apply. RSA 91-A:3, IV(b). This review must occur at least every 10 years. *Id*.

(4) Nonpublic minutes that were kept from the public prior to October 3, 2023 and not reviewed by October 3, 2033 will become subject to public disclosure without any further action. RSA 91-A:3, IV(b).

3. For Emergency Meetings

a) Minutes for emergency meetings are required and must meet the same minimum standards discussed above.

b) In addition, for all emergency meetings, the minutes must clearly spell out the need for the emergency meeting and the facts relied upon by the presiding officer or chair to make an emergency determination. RSA 91-A:2, II; III(b); IV(d).

c) If any member of the public body attends an emergency meeting remotely, the requirements for minutes when there is remote participation, Section V, E above, must also be met.

VI. GOVERNMENTAL RECORDS

During the regular or business hours of all public entities, the public has a right to inspect and copy all non-exempt governmental records in the possession, custody, or control of the entity. RSA 91-A:4, I. Public entities must maintain their public governmental records in a way that makes them available to the public. *Hawkins v. N.H. Dep't of Health and Hum. Servs.*, 147 N.H. 376, 379 (2001).

A. What is a Governmental Record?

1. "'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.

2. "'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." RSA 91-A:1-a, IV.

3. The term "public record" refers to specific files, documents, or data in an agency's files, and not to information that might be gathered or compiled from numerous sources. *Brent v. Paquette*, 132 N.H. 415, 426 (1989). Public entities are not required to create records or compile data in response to a Right-to-Know request. *Id.*

4. Governmental records are limited to information that is created, accepted, or obtained by a public entity "*in furtherance of its official function*." In determining whether a particular record constitutes a governmental record, a determination should be made as to the capacity and authority under which the individual or agency is acting in creating or receiving the document. For instance, spam or junk e-mail received and incidental personal messages sent or received via electronic communication are unlikely to be deemed governmental records as they are not created or received in furtherance of an official function. However, if e-mails are analyzed for evidence of abuse of the governmental e-mail system, for example, they likely would then be considered a governmental record.

B. Required Disclosure Examples

1. Individual salaries and employment contracts of local school teachers. *Mans v. Lebanon Sch. Bd.*, 112 N.H. 160, 164 (1972).

2. Names and addresses of substitute teachers hired during a strike. *Timberlane Reg'l Educ. Assn. v. Crompton*, 114 N.H. 315, 316 (1974).

3. Certain law enforcement investigative records. *Lodge v. Knowlton*, 118 N.H. 574 (1978) and *Murray v. N.H. Div. State Police*, 154 N.H. 579, 582 (2006). *See* Section V. J, below, for a discussion of law enforcement records.

4. A computerized tape of field record cards concerning property tax information. *Menge v. City of Manchester*, 113 N.H. 533, 537-38 (1973).

5. State entity budget requests and income estimates submitted pursuant to RSA 9:4 and 9:5 to the Commissioner of Administrative Services. *Chambers v. Gregg,* 135 N.H. 478, 479 (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 entity listed in RSA 91-A:1-a, VI(a)-(d), or to an employee's agent or designee, upon the employee's resignation, discharge, or retirement. RSA 91-A:4, I-a; *Union Leader Corp. v. N.H. Ret. Sys.*, 162 N.H. 673, 684-85 (2011).

C. Electronic Records

1. Electronic records are defined in RSA 5:29, VI as "information that is created or retained in a digital format."

2. Electronic Governmental Records may include, but are not limited to:

a) Documents stored in a computer or any other storage medium such as CD, DVD, the cloud, or thumb drive;
b) E-mail;
c) Voicemail;
d) Instant or chat messages;
e) Text messages; and
f) Electronic photos or video recordings (digital).

3. The Right-to-Know law states that in lieu of producing original records, a public entity may copy the requested records to electronic media using standard or common file formats provided that such copying does not provide access to work papers, personnel data, and other confidential information. RSA 91-A:4, V. It also makes clear that if copying to electronic media is not reasonably practicable, or if the requestor requests a different method, the public entity may provide physical copies or may use any other means reasonably calculated to comply with the request. *Id.*

4. The New Hampshire Supreme Court has ruled that when a requestor seeks records in electronic format, the records are available in such a format, and there is no valid reason not to provide copies in that format, the public entity is required to produce the records via electronic media. *Green v. SAU #55*, 168 N.H. 796, 801–02 (2016). The Court subsequently specified that a public entity is not required to utilize the specific type of electronic media desired by the requestor so long as the entity's choice of media does not diminish the ease of use of the electronic files. *Taylor v. SAU #55*, 170 N.H. 322 (2017) (requestor asked for documents to be emailed, but the Court ruled that the SAU appropriately offered to provide documents on a thumb drive made available for pickup at the SAU office).

5. Additionally, the public entity may charge the requestor for the actual cost of electronic media used to respond to the request. RSA 91-A:4, IV(d).

6. Governmental records that are provided electronically may contain metadata that could be accessible to the requesting party. Metadata is data imbedded in electronic documents and can include information such as your organization and/or computer name, comments, template information, hidden text or cells, the name of the network server or hard disk where the document is saved, and the names of previous document authors.

a) RSA 91-A:5, XI does exempt from disclosure "records pertaining to information technology systems, including cybersecurity plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed."

b) However, with regard to metadata more generally, New Hampshire courts have not ruled on whether such information is subject to disclosure under the Right-to-Know law. Questions about metadata should be reviewed with legal counsel.

7. In order to be prepared to appropriately respond to a request for electronic records, public entities should review the following with legal counsel: their computer, e-mail, instant message, phone and other communication system use; the sections of their employee handbooks covering e-mail, instant message and chat functions, phone and web usage, including but not limited to social media usage; and record retention policies and practices.

D. Maintaining Governmental Records

1. RSA 91-A:4, III requires that "each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place." If the public entity does not have a regular office

or place of business, its governmental records must be kept in an office of the political subdivision in which the body is located or, in the case of a State entity, in an office designated by the Secretary of State. RSA 91-A:4, III.

2. Historically, in many small towns and village districts, the district clerk, tax collector, or treasurer would keep governmental records in his or her home. This is not permissible under the Right-to-Know Law unless the official maintains a "regular office or place of business" at that residence.

3. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. RSA 91-A:4, III-a. If there is no retention period for the paper counterpart, the electronic record does not need to be kept beyond its useful life. However, governmental records in electronic form kept and maintained beyond the applicable retention or archival period must remain accessible and available in accordance with RSA 91-A:4, III.

4. There is no duty to keep a particular record in both paper and electronic form. RSA 91-A:4, III-a specifically permits maintaining governmental records by "copying to microfilm or paper or to durable electronic media using standard or common file formats."

5. State agencies and public bodies must maintain records for four years, unless otherwise provided by law or agreement between the state entity and the Department of State, Division of Archives and Records Management. *See* RSA 5:38; 5:40. State and municipal entities should contact the State Archivist for the schedules applicable to their individual agencies or entities.

6. Deletion of an Electronic Record

a) If an electronic record would fulfill a pending Right-to-Know request, it may not be destroyed, even if exempt from disclosure. RSA 91-A:9.

b) A record in electronic form is considered deleted only if it is no longer readily accessible to the public entity itself. RSA 91-A:4, III-b.

c) The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer does not constitute deletion of the record. RSA 91-A:4, III-b.

d) Backup files: The New Hampshire Supreme Court ruled in *Ortolano v. City of Nashua* that deleted emails which existed solely on backup tapes were "readily accessible" and thus had not been "initially and legally deleted" under RSA 91-A:4, III-b. *Ortolano v. City of Nashua*, No 2022-0237, 2023 WL 9751180 (N.H. Aug 18, 2023). In that case, the

Court determined that the specific backup tapes in question were not used solely to ensure continued functioning in the event of a catastrophic emergency; instead they were easily and regularly accessed, including for the purpose of responding to at least one Right-to-Know request. Entities should consult with legal counsel regarding the need to restore files from backup media.

e) Restoring from backup might also be legally necessary if an electronic record was not retained as required by law, that is, if it was illegally deleted. The expense of restoring records from backups is another reason why public entities should review their electronic record retention and purging policies and practices.

E. Settlements of Lawsuits

1. The Right-to-Know law specifically requires municipalities to keep every agreement to settle a lawsuit, threatened lawsuit, or other claim against a public entity, or its members entered into by any political subdivision or its insurer, on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years. RSA 91-A:4, VI.

2. For all legal settlements made by a "governmental unit", state law requires the complete terms of the settlement and the decree of the court judgment be available as a governmental record under the Right-to-Know law. *See* RSA 507:17. A "governmental unit" includes the state and any political subdivision within the state including any county, city, town, precinct, school district, chartered public school, school administrative unit, or departments or agencies thereof. *Id*.

F. Exemptions from Disclosure

1. RSA 91-A:5 contains exemptions from disclosure. The Right-to-Know law does not provide for unfettered access to governmental records, but the court broadly construes provisions in favor of disclosure and interprets the exemptions restrictively. There are also exemptions contained in other statutes outside of RSA chapter 91-A.

2. Under RSA 91-A:5, the following government records are exempt from disclosure:

a) Records of grand and petit juries. RSA 91-A:5, I.

b) The master jury list as defined in RSA 500-A:1, IV. RSA 91-A:5, I-a

c) Records of parole and pardon boards. RSA 91-A:5, II.

d) Personal school records of pupils. RSA 91-A:5, III; *Brent v. Paquette,* 132 N.H. 415 (1989); *see also* 20 U.S.C. §1232(F), et seq. (known as the Buckley Amendment or the Family Educational Rights and Privacy Act ("FERPA); *but see* 20 U.S.C. 1092(f), et seq. (known as the Clery Act, requiring postsecondary educational institutions to disclose campus security policy and crime statistics).

e) Records pertaining to internal personnel practices. RSA 91-A:5, IV.

(1) In 2020, the New Hampshire Supreme Court overruled the previous per se exemption for internal personal practices records and held that the exemption only applied to internal rules and practices governing an agency's operations and employee relations, not to information concerning the performance of a particular employee. The Court held that the balancing test used for other categories of records in RSA 91-A:5, IV should also be used to determine whether internal personnel records should be released. Determining whether the exemption for records relating to internal personnel practices applies requires analyzing both whether records relate to such practices and whether their disclosure would constitute an invasion of privacy. *See Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020). *See also, Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020) (internal personnel practices are an agency's rules and practices dealing with employee relations or human resources including personnel's use of parking facilities, regulation of lunch hours, statements of policy as to sick leave and the like. (citing *Milner v. Dep't of Navy*, 562 U.S. 562, 570 (2011)).

(2) In deciding whether disclosure of records would constitute an "invasion of privacy" under RSA 91-A:5, IV a court will determine (1) whether there is, objectively, a privacy interest that would be invaded by the disclosure; (2) the public interest in the disclosure, that is whether disclosing the information will in fact inform the public about the conduct and activities of the government; and, (3) the balance of the public's interest in disclosure against the interest of the government and the privacy interest of the individual in nondisclosure. *Lambert v. Belknap Cnty. Convention*, 157 N.H. 375, 382-383 (2008).

f) Confidential, commercial, or financial information. RSA 91-A:5, IV.

(1) Confidential Information.

(a) The public entity must have a basis for invoking this exemption and may not simply mark or consider a record "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. *See Prof'l Firefighters of N.H. v. Local Gov't Ctr.,* 159 N.H. 699, 709 (2010) (while employees of a public entity may not have expected their salary information to be made public, that does not make the information confidential under the Right-to-Know law).

(b) To show that 'work papers' are confidential, the party resisting disclosure must prove that disclosure is likely: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of a person from whom the information was obtained. *Goode v. N.H. Legislative Budget Assistant*, 148 N.H. 551, 554 (2002) (citing *Union Leader Corp. v. N.H. Hous. Fin. Auth.*, 142 N.H. 540, 554 (1997)).

(c) Except when the result is plainly established by the Right-to-Know law itself, courts analyzing whether a "confidential" government record should be disclosed will apply a test that balances the benefits of public disclosure against the benefits of non-disclosure when construing the scope of RSA 91-A:4 and RSA 91-A:5. A similar balancing test may also apply when analyzing confidentiality under other laws.[18]

(d) Whether information is 'confidential' for purposes of RSA 91-A:5, IV is determined objectively and turns upon the potential harm that will result from disclosure of the information after weighing the benefits of disclosing the information against the benefits of nondisclosure. Relevant

[18] *See In Re State*, 172 N.H. 493 (2019) (finding that investigative records compiled by the Office of the Attorney General relating to an incident involving juveniles were subject to the confidentiality provisions contained in statute that governed access to proceedings and records involving delinquent juveniles, despite argument that the public had a right to an accounting of the basic facts for the Office's conclusions in a matter involving important social justice issues and the public's skepticism of government's willingness and ability to deal competently with those issues; the legislature had determined that confidentiality in juvenile proceedings and records prevailed over the right of public access to such information).

factors in assessing confidentiality of information include whether disclosing information is likely to impair the government's ability to obtain necessary information in the future and whether disclosure is likely to cause substantial harm to the person from whom the information was obtained. *Union Leader Corp. v. N.H. Hous. Fin. Auth*., 142 N.H. 540, 555 (1997).

(2) Commercial Information.

(a) The government will often come into possession of information belonging to a commercial entity which believes the information should be treated as confidential and exempt from disclosure under the Right-to-Know law. During the contracting process, it is helpful when the contracting document cites the legal authority for the information being confidential or otherwise nonpublic.

(b) It is appropriate for the government to promise in contract documents only to give notice to the commercial entity and to afford it a set period of time to seek a court order prohibiting disclosure in the event a Right-to-Know request is received that would require the government to disclose the commercial information.

g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examinations for employment, or academic examinations. RSA 91-A:5, IV.

h) Personnel, medical, welfare, library user, videotape sale or rental and other files whose disclosure would constitute an invasion of privacy. RSA 91-A:5, IV.

(1) In *Provenza v. Town of Canaan*, an independent report commissioned by a town to analyze a motor vehicle stop was determined not to be exempt from disclosure under RSA 91-A:5, IV as a personnel record. The police officer's privacy interest was not high because the report did not reveal intimate details of his life, but only information relating to his conduct as a government employee while performing his official duties and interacting with a member of the public. *Provenza v. Town of Canaan*, 175 N.H. 121, 129-131 (2022).[19]

[19] The Court also held that the report was not exempt from disclosure under RSA 105:13-b, which pertained only to information maintained within a police officer's personnel file. The Court also concluded that the report was also not exempt under RSA 516:36, which was limited to questions of admissibility in civil litigation. *Provenza*, 175 N.H. at 128-30.

(2) The New Hampshire Supreme Court has found that the "Exculpatory Evidence Schedule" (EES), a list of police officers who had engaged in misconduct reflecting negatively on their credibility or trustworthiness was not exempt from disclosure under the Right-to-Know law based on RSA 105:13-b, because – by its express terms – the statute pertained only to information maintained in a police officer's personnel file. Therefore, the EES, which was not kept in any individual officer's file, was not exempt under RSA 91-A:5, IV as an "internal personnel practice." *N.H. Ctr. for Pub. Interest Journalism v. N.H. DOJ*, 173 N.H. 648, 659 (2020).

(3) Recently, the New Hampshire Supreme Court found that RSA 105:13-b does not categorically prohibit disclosure of police personnel file records under RSA 91-A:4, I. Courts should instead employ the privacy balancing test under RSA 91-A:5, IV to determine whether police personnel file records should be disclosed. *ACLU of N.H. v. N.H. Div. of State Police*, No. 2022-0321, 2023 WL 8245120 at *3 (N.H. Nov. 29, 2023).

(4) It was proper for the government to deny disclosure of the names and addresses of residential customers of a utility company based on invasion of customers' privacy. *Lamy v. N.H. Pub. Util. Comm'n*, 152 N.H. 106, 113 (2005) (holding the names and addresses of a utility's residential customers were private and disclosure would not inform the public about the conduct of the State's Public Utilities Commission).

(5) Similarly, the Supreme Court has upheld redacting identities whose release may have an attenuated connection to governmental operations because a significant privacy interest in nondisclosure supported redaction under the invasion of privacy exemption in the Right-to-Know law. *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit,* 169 N.H. 95, 117-20 (2016 (finding names of Planned Parenthood of Northern New England employees on the organization's license renewal application were properly withheld as their privacy interest in nondisclosure outweighed a negligible and speculative interest in assessing the New Hampshire Board of Pharmacy's performance of its official licensing function).

(6) Individual citizens have a privacy interest in keeping secret the fact that they were subjects of a law enforcement investigation. In certain circumstances, even confirming that such records exist, but withholding them under the privacy exemption, could constitute an invasion of privacy. Depending on the relevant facts

of the underlying investigation, when a privacy interest outweighs the public's interest in disclosure, the public entity may respond that it can neither confirm nor deny the existence of such records. *Welford v. N.H. Div. of State Police*, No. 217-2016-cv-282 (N.H. Super. Ct. Sept. 22, 2016). *See also, Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 477 (1996) (quoting *Stern v. F.B.I.*, 237 U.S. App. D.C. 302, 737 F.2d 84, 91-92 (D.C. Cir. 1984) ("Individuals have a strong interest in not being associated unwarrantedly with alleged criminal activity.").[20]

i) Teacher certification records, held by the Department of Education. But the Department must make teacher certification status available. RSA 91-A:5, V.

j) 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. RSA 91-A:5, VI. Such records may be marked "limited purpose release" and disclosed solely to local or state safety officials and not further disseminated by the recipient to the public. RSA 91-A:5-a.

k) Certain information regarding the State's procurement and contracting process.

(1) "In order to protect the integrity of the bidding process, notwithstanding RSA 91-A:4, no information shall be available to the public . . . concerning specific responses to requests for bids (RFBs), requests for proposals (RFPs), requests for applications (RFAs), or similar requests for submission for the purpose of procuring goods or services or awarding contracts from the time the request is made public until the closing date for responses." RSA 21-G:37.[21] On and after the closing date for responses, certain information must be posted. RSA 21-G:37, II. Only after the contract is finally approved will all documents concerning an RFP process be subject to RSA 91-A disclosure. RSA 21-G:37, III. Further, RSA 9-F:1, II(d) requires that State contracts entered into

[20] *But see Grafton Cnty. Attorney's Off. v. Canner*, 169 N.H. 319, 328 (2016) (records maintained by arresting and prosecuting agencies pertaining to an annulled arrest and the related prosecution do not fall under the exemption in RSA 91-A:4, I, for records that are "otherwise prohibited by statute" from public inspection). Note that in *Canner* the court explicitly did not decide whether these records might be exempt due to the privacy interest.

[21] S*ee also Irwin Marine. v. Blizzard, Inc*., 126 N.H. 271 (1985) (government contracting process must be fair; any procedure that places a bidder at a disadvantage violates the public interest and weakens public confidence in government).

as a result of requests for proposals ("RFP") be posted online. It is advisable to include language in the RFP informing potential vendors that any resulting contract will be posted online.

(2) RSA 9-F:1 does not require posting of information exempt from public disclosure under RSA chapter 91-A or other law. For example, contracts may contain confidential, commercial, or financial information exempt from disclosure under RSA 91-A:5, IV. [22] Therefore, pursuant to the requirements of RSA 9-F:1 and RSA 91-A:5, state entities are responsible for ensuring that information exempt under RSA 91-A, and other laws, is redacted prior to the proposed contract being posted online or otherwise disclosed to the public.

(3) Finally, information related to cancelled bids cannot be released for two years after the bid is cancelled or until a similar contract subsequently awarded, whichever occurs earlier. RSA 21-G:37, VI(b).

l) Unique pupil identification information collected in accordance with RSA 193-E:5. RSA 91-A:5, VII.

m) 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. RSA 91-A:5, VIII.

(1) The term "official purpose" is narrower than "bearing on the agency's business" and handwritten personal notes on margins and sticky-notes are exempt from disclosure. *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746, 761 (2011).

n) 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. RSA 91-A:5, IX.

(1) The "preliminary draft" exemption was designed to protect pre-decisional, deliberative communications that are part of an agency's decision-making process. *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746, 758 (2011).

[22] *See also*, *CaremarkPCS Health, LLC., v. N.H. Dep't of Admin. Servs.*, 167 N.H. 583, 590 (2015) (holding that disclosure of trade secrets is prohibited under New Hampshire's Uniform Trade Secrets Act and, as such, trade secrets are exempt from disclosure under RSA 91-A:4, I as records whose disclosure is "otherwise prohibited by statute").

o) Video and audio recordings made by a law enforcement officer using a body-worn camera ("BWC") pursuant to RSA 105-D. RSA 91-A:5, X.

(1) However, RSA 91-A:5, X allows for the release of certain BWC recordings in limited scenarios. The following BWC recordings are subject to release to the public:

i) restraint or use of force by an officer;
ii) the discharge of a firearm; and
iii) an encounter resulting in a felony arrest.

RSA 91-A:5, X(a)-(c).

(2) All of the permitted disclosures in (1) above are subject to an analysis for an invasion of privacy, as each category "shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure." *Id.*

(3) By way of example, an officer's discharge of his firearm would be subject to disclosure under RSA 91-A:5, X(b). However, the footage following the discharge, potentially depicting the suffering or death of the individual shot, would not likely be subject to disclosure, as it would constitute an invasion of privacy. RSA 91-A:5, IV; *See Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 170-71 (2004) (holding that FOIA recognizes a surviving family members' right to privacy in regard to family death-scene images, requiring a balance of the family's privacy interest against public interest prior to disclosure). Further, under FOIA analysis, "where there is a privacy interest protected by [the law enforcement exemption for unwarranted invasion of privacy] and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requestor must establish more than a bare suspicion in order to obtain disclosure. Rather, the requestor must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id*. at 174.

p) Records pertaining to information technology systems, including cyber security plans, vulnerability and assessment materials, detailed network diagrams, or other materials, the public release of which could aid an attempted security breach or circumvention of law as to the items assessed. RSA 91-A:5, XI.

q) Records protected under the attorney-client privilege or the attorney work product doctrine. RSA 91-A:5, XII.

r) Records of the youth development center claims-administration and the YDC settlement fund pursuant to RSA 21-M:11-a, with the exemption of settlement agreements, which are subject to RSA 91-A:4, IV, and after a claim has been finally resolved, such other records the release of which would constitute a violation of other provisions of law or an unwarranted invasion of a claimant's privacy. RSA 91-A:5, XIII.

3. Invasion of Privacy

a) The balancing test articulated in (b) below should be applied in all cases after determining that a record fits into one of the exemptions listed in RSA 91-A:5, IV. "Invasion of privacy" should not be so broadly construed as to defeat the purpose of the Right-to-Know law. *Mans v. Lebanon Sch. Bd.*, 112 N.H. 160, 162 (1972).

b) A three-step analysis should be used to evaluate whether disclosure of governmental records constitutes an invasion of privacy:

(1) Is there a privacy interest at stake that would be invaded by the disclosure?

(2) Would disclosure inform the public about the conduct and activities of its government?

(3) Is the public interest in disclosure greater than the government's interest in non-disclosure and the individual's privacy interest in non-disclosure.

See N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit, 169 N.H. 95, 110-111 (2016); *Lambert v. Belknap Cnty. Convention*, 157 N.H. 375, 382–83 (2008); *Lamy v. N.H. Pub. Util. Comm'n*, 152 N.H. 106, 109 (2005); *N.H. Civ. Liberties Union v. City of Manchester*, 149 N.H. 437, 440 (2003); *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996).

c) In 2018, a state constitutional amendment regarding personal privacy was ratified and became effective. Part 1, Art. 2-b of the New Hampshire Constitution now provides, "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." There have been no Supreme Court cases yet providing insight into what impact this constitutional provision may have on the privacy analysis for purposes of the Right-to-Know law.

d) The motives of a particular 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. *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996). There is a presumption in

favor of disclosure and when no privacy interest is involved, disclosure is mandated. However, the general 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. In explaining the balancing of a requesting party's interest with the interest in privacy, the Court stated:

> If the general public has a legitimate, albeit abstract, interest in the requested information such that disclosure is warranted, disclosure must be made despite the fact that the party actually requesting and receiving the information may use it for less-than-lofty purposes.
>
> Conversely, if disclosure of the requested information does not serve the purpose of informing the citizenry about the activities of their government, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.

Union Leader Corp., 141 N.H. at 476–77 (quoting *Halloran v. Veterans Admin.,* 874 F.2d 315, 323 (5th Cir.1989)). When there is a question regarding whether the release of records may cause an invasion of privacy, an *ex parte* in-camera review of the records by a court may be appropriate. *Union Leader Corp.,* 141 N.H. at 478.

e) Disclosure of information about private citizens in government files that reveals nothing about a government conduct is not within the purpose of the Right-to-Know law. *Lamy v. N.H. Pub. Util. Comm'n*, 152 N.H. 106 (2005) (the names and addresses of a utility's residential customers were private and disclosure would not inform the public about the conduct of the Public Utilities Commission, however, the utility's business customers did not have a privacy interest and their names and addresses were required to be disclosed under the Right-to-Know law); *Prof'l Firefighters of N.H. v. Local Gov't Ctr., Inc.,* 159 N.H. 699, 709-10 (2010) (employees' names and salary information provides insight into the operations of the entity and must be disclosed); *see also U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press,* 489 U.S. 749, 773 (1989).

f) Analysis of what information should be redacted from a governmental record before disclosure should include consideration of the risk of identity theft. There is no requirement that individuals seeking records pursuant to the Right-to-Know law identify themselves. Once information or records have been disclosed, there is no legal bar to them

being published on the Internet. This type of publicly available information has been recognized as a source of identity theft.[23]

G. Statutory Exemption from Disclosure

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

2. Many public entities are subject to federal and state statutes prohibiting disclosure of certain types of information. Although not listed as exemptions in RSA 91-A:5, laws making records exempt from disclosure are explicitly recognized as grounds for withholding records. RSA 91-A:4, I. Examples of state statutes making information exempt from disclosure under the Right-to-Know law include, but are not limited to:

a) Information from Vital Records. RSA 5-C:9.

b) Tax records. RSA 21-J:14.

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

(1) Enhanced 911 system records including the information provided by the caller in addition to automatic number and location information produced by the system are exempt from disclosure under RSA 91-A. *B&C Mgmt. v. N.H. Div. of Emergency Servs.*, 175 N.H. 20 (2022).

d) Certain motor vehicle records. RSA 260:14, II(a). *See DeVere v. Attorney Gen.*, 146 N.H. 762 (2001).

e) Department of Labor proceedings and records regarding workers' compensation claims under RSA 281-A. RSA 281-A:21-b.

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

3. To determine whether records are exempt from disclosure, all applicable federal and state statutes must be analyzed. Governmental records that are exempted or made privileged by statute are appropriately treated as exempt from disclosure under the Right-to-Know law.

[23] Kurt M. Saunders & Bruce Zucker, Counteracting Identity Fraud in the Information Age: The Identity Theft and Assumption Deterrence Act, 8 CORNELL J.L. & PUB. POL'Y 661 (1999) (This journal article is cited as an example of redaction for the purposes of preventing identity theft with a meta-analysis of the then existing academic literature and evidence from the experience of law enforcement.)

H. Other Exceptions to Disclosure

1. Court rules, court orders, or common law that make information exempt from public disclosure are also appropriately cited as a basis for withholding under the Right-to-Know law.

2. The minutes and decisions of meetings in nonpublic session are exempt from disclosure if 2/3 of the members present determine that divulgence of the records meet the exemptions under the statute. *See* RSA 91-A:3, III; IV.

3. The Right-to-Know law does not require the probing of the mental processes of governmental decision-makers. *See Merriam v. Town of Salem*, 112 N.H. 267, 268 (1972). In other words, the Right-to-Know law does not give the public the right to force a government decision-maker to explain, beyond what has already been disclosed in a governmental record, why he or she made a particular decision. *See also Chambers v. Gregg*, 135 N.H. 478, 481 (1992).[24]

4. Real estate appraisal reports compiled by the Department of Transportation are exempt from disclosure. *Perras v. Clements*, 127 N.H. 603 (1986).

5. Quality assurance records maintained by ambulatory care clinics are exempt from disclosure. *Disabilities Rights Ctr., Inc. v. Comm'r, N.H. Dep't of Corr.*, 143 N.H. 674, 679 (1999).

I. Limited Purpose Disclosures

1. Records from nonpublic sessions under RSA 91-A:3, II(i) (emergency functions) or records 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 should be marked "limited purpose release" and not disclosed by the recipient to the public. RSA 91-A:5-a.

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

[24] While not clearly established, at least one court has distinguished between a "deliberative process privilege" and the "executive privilege." *N.H. Republican State Comm. v Hassan,* No. 2016-CV-612, 2017 (N.H. Super. Ct. Jan. 17, 2017) (stating, with respect to a claim of executive privilege, the proper standard must be whether or not requiring disclosure will impair a governor's ability to carry out the functions of his or her office effectively); *In Re S.N.H. Med. Ctr.*, 164 N.H. 319, 328 (2012) (discussing the overlap in powers between the legislative branch and judicial branch to promulgate rules of evidence). While "[t]he phrase 'executive privilege' has not been used with precision or uniformity by courts," *see Killington, Ltd. v. Lash*, 153 Vt. 628, 632 n.3 (1990), the Court believes that since the privilege is based upon separation of powers, under New Hampshire constitutional law a functional analysis is appropriate to determine whether or not a court can pierce the executive privilege possessed by a governor. The scope of the privilege depends upon the needs of the executive.

J. Law Enforcement Records or Information

1. General Overview:

a) Relevant portions of FOIA, 5 U.S.C. §552(b)(7), have been adopted as the standard for the disclosure or non-disclosure of law enforcement records. *Lodge v. Knowlton,* 118 N.H. 574, 576–77 (1978); *Murray v. N.H. Div. State Police*, 154 N.H. 579, 582 (2006); *38 Endicott St. N., LLC v. State Fire Marshal*, 163 N.H. 656, 660 (2012).

b) The records must meet a two-prong test in order to be exempt from disclosure. First, the entity seeking to avoid disclosure must establish that the records[25] were compiled for law enforcement purposes.[26] Second, if the records requested were compiled for law enforcement purposes, they may be withheld if the entity can prove that disclosure would:

(1) Interfere with enforcement proceedings;

(2) Deprive a person of a right to a fair trial or an impartial adjudication;

(3) Constitute an unwarranted invasion of privacy. The statutory exemption for invasion of privacy will be strictly construed. *Mans v. Lebanon Sch. Bd.*, 112 N.H. 160 (1972).

(4) Reveal the identity of a confidential source or, in the case of a record compiled by a law enforcement authority in the course of a criminal investigation or by any entity conducting a lawful national security investigation, confidential information furnished only by a confidential source;

(5) Reveal investigative techniques and procedures; or

(6) Endanger the life or physical safety of any person.

[25] The New Hampshire Supreme Court has explicitly held that this exemption extends beyond "investigatory" documents to records "compiled for law enforcement purposes." *Montenegro v. City of Dover*, 162 N.H. 641, 646 (2011).

[26] "The exemption does not apply exclusively to law enforcement officers or agencies, but rather applies to all records and information compiled, by any type of agency, for law enforcement purposes." *38 Endicott St. N., LLC*, 163 N.H. at 661–62 (finding Fire Marshal's Office is not primarily a law enforcement agency but instead, a "mixed-function agency"). "When the agency claiming the exemption constitutes a 'mixed-function agency,' it may meet its burden [to demonstrate the records were compiled for law enforcement purposes] by showing that the pertinent records were compiled pursuant to the agency's law enforcement functions, as opposed to administrative functions." *Id*. at 665. The New Hampshire Supreme Court has yet to adopt a test to determine when records are compiled for law enforcement purposes for agencies whose primary function is law enforcement. *Id*.

See Murray, 154 N.H. at 582. The above test has been termed the *Murray* exemption by the New Hampshire Supreme Court. *38 Endicott St. N., LLC v. State Fire Marshal*, 163 N.H. at 661. Each of the *Murray* factors are discussed in greater detail below.

c) The burden of proof is on the public entity to show that the record is exempt. *Id*. It is not the responsibility of the person requesting the record to show that no exemption applies.[27]

2. Guidance In Producing Law Enforcement Records

a) The *Murray* Factors: Requests for the production of law enforcement investigative records should be considered in light of all the relevant facts and circumstances. There is no bright-line test to apply in every instance to determine which documents may be withheld and which must be disclosed. However, the following factors should be considered when making such a determination:

(1) Interference with Law Enforcement Proceedings

(a) Documents compiled for law enforcement purposes are exempt from production if such production would reasonably be expected to interfere with law enforcement proceedings.

(b) The proceedings must either be pending or "reasonably anticipated." *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 583 (2006). The Court construes this to include unresolved crimes where some regular effort continues to be expended to solve it. *Id.* at 583.

(c) The *Murray* exemption "does not require that the agency explain when, where, or by whom charges might arise. It does not even require that the agency establish that law enforcement proceedings are a certainty. It merely requires the agency to demonstrate that law enforcement proceedings are 'reasonably anticipated.'" *38 Endicott St. N., LLC*, 163 N.H. at 666. However, the entity, at the least, must "fairly describe the content of the material withheld and adequately [state the] grounds for nondisclosure, and [explain why] those grounds are reasonable and consistent with the applicable law." *Id.* at 667 (*citing Barney v. I.R.S.*, 618 F.2d 1268, 1274 (8th Cir. 1980) (quotation omitted)).[28]

[27] If none of the *Murray* exemptions apply to a particular record, a statutory exemption may still apply.
[28] The *38 Endicott St. N., LLC* Court further found where an agency has "sustained its burden of proof by affidavit or testimony" demonstrating likely interference, through "generic determinations" for each category

(d) The Supreme Court has provided examples of categories of information that, if released, could interfere with law enforcement investigations if proceedings are pending or reasonably anticipated, such as, "details regarding initial allegations giving rise to th[e] investigation; interviews with witnesses and subjects; investigative reports furnished to the prosecuting attorneys; contacts with prosecutive attorneys regarding allegations, subsequent progress of investigations, and prosecutive opinions." *Murray*, 154 N.H. at 584 (*quoting Curran v. U.S. Dep't of Justice*, 813 F.2d 473, 474 (1st Cir. 1987)).

(i) This exemption would not justify 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.

(2) Accused's Right to a Fair Trial

(a) This exemption could apply to some extent in all pretrial situations. Right-to-Know requests received during the pendency of a criminal prosecution should be reviewed with the case prosecutor before a substantive response is made.

(b) This exemption has not created much case law in the State of New Hampshire. Under FOIA case law, the standard is: "(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 101-02 (D.C. Cir. 1988).

(c) Information that might prejudice an accused's right to a fair trial includes, but is not limited to, records relating to the following:

(i) The guilt or innocence of a defendant;

(ii) The character or reputation of a suspect;

---

of documents, the "trial court need not undertake an *in camera* inspection or order a *Vaughn* index." 163 N.H. at 668.

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

(iv) Gratuitous references to a defendant, for example, a reference to the defendant as "a dope peddler";

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

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

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

(viii) Any information of a purely speculative nature; and

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

(3) Unwarranted Invasion of Privacy

(a) In determining whether disclosure of documents will constitute an unwarranted invasion of privacy, the court will balance the public and/or private interest in the information sought against the severity of the invasion of privacy similar to the exemption found in RSA 91-A:5, IV for records "whose disclosure would constitute invasion of privacy."[29] *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 475 (1996).

(b) When determining whether a privacy interest is implicated, the court should consider whether the disclosure would subject an individual to "embarrassment, harassment, disgrace, loss of employment or friends." *Reid v. N.H. Attorney Gen.*, 169 N.H. 509, 530 (2016) (quotations and citations omitted). Individuals maintain a "strong privacy interest in their identities," including where public release of the identity would subject an individual to reputational or emotional harm in either their official duties

[29] *See* Section VI, F above.

or private lives. *N.H. Right to Life v. Dir.*, *N.H. Charitable Trusts Unit*, 169 N.H. 95, 117 (2016).[30]

(c) However, the New Hampshire Supreme Court has noted that a governmental employee does not maintain a "weighty" privacy interest in information "relating to [their] conduct as a government employee while performing [their] official duties and interacting with a member of the public." *Provenza v. Town of Canaan*, 175 N.H. 121, 130 (2022).

(d) Examples of information that may implicate a privacy interest:

(i) Legitimacy of children;
(ii) Sexual orientation;
(iii) Medical or mental health conditions;
(iv) Status as a recipient of welfare funds;
(v) Consumption of alcohol or a controlled substance;
(vi) Domestic disturbances and disputes;
(vii) Names of witnesses who cooperated by providing information to authorities and the information provided by them; [31]
(viii) Names of subjects of investigation;
(ix) Names of children;

[30] If, objectively, information is expected to be subject to public exposure at some point, the privacy interest is diminished. *Reid*, 169 N.H. at 530-31.

[31] The NH Supreme Court recognized in *Reid v. N.H. Attorney General*, 169 N.H. 509, 531 (2016) that federal case law states that "[a] clear privacy interest exists with respect to such information as names, addresses, and other identifying information even where such information is already publicly available, and that a witness does not waive his or her interest in personal privacy [even] by testifying at a public trial." *Id*. (internal citations and quotations omitted). 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. Dep't 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). However, the N.H. Supreme Court has noted that "the privacy interest in a witness's or investigation interviewee's name and identifying information will likely differ from the privacy interest in the substantive information the witness or interviewee imparts." *Reid*, 169 N.H. at 531. Further, "even information imbued with a legitimate privacy interest is subject to disclosure if, on balance, that interest is outweighed by the public's cognizable interest in disclosure" and each case warrants a fact-specific inquiry. *Id*.

(x) Marital status;[32]
(xi) Dates of birth;
(xii) Financial information;
(xiii) Employment information; and
(xiv) The existence of a criminal investigation that does not result in charges against a specific individual. [33]

(4) Confidential Source

(a) Information may be withheld if disclosure "could reasonably be expected to disclose the identity of a confidential source, . . . [or] in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by any agency conducting a lawful national security intelligence investigation, confidential information furnished by a confidential source ." *Murray v. N.H. Div. of State Police,* 154 N.H. 579, 582 (2006) (*quoting* 5 U.S.C. § 552(b)(7) as adopted by *Lodge v. Knowlton*, 118 N.H. 574 (1978)).

(5) Investigative Techniques and Procedures

(a) Information may be withheld if disclosure "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." *Murray v. N.H. Div. of State Police,* 154 N.H. 579, 582 (2006) (*quoting* 5 U.S.C. § 552(b)(7) as adopted by *Lodge v. Knowlton*, 118 N.H. 574 (1978)).

(b) One area that the Court exempted from disclosure was "detailed law enforcement surveillance procedures," such as locations of surveillance equipment, recording capabilities for each piece of equipment, the specific time

[32] However, in *In Re Keene Sentinel*, 136 N.H. 121, 128 (1992), the Supreme Court held that divorce records that 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. *See Associated Press v. State*, 153 N.H. 120 (2005) (affirming that burden of justifying non-disclosure lies with the party seeking to prevent disclosure).

[33] *Welford v. N.H. Div. of State Police*, 217-2016-cv-282 (N.H. Super. Ct. Sept. 22, 2016) (Persons have a privacy interest in keeping secret the fact that they were subjects of a law enforcement investigation. Even confirming such records exist, but withholding them under the privacy exemption, constitutes an invasion of privacy. When a privacy interest outweighs the public's interest in disclosure, a public entity should respond that it can neither confirm nor deny the existence of such records.).

periods each piece of equipment is expected to be operational, and the retention time for any recordings. *Montenegro v. City of Dover*, 162 N.H. 641, 647-48 (2012). "This information is of such substantive detail that it could reasonably be expected to risk circumvention of the law by providing those who wish to engage in criminal activity with the ability to adjust their behaviors in an effort to avoid detection." *Id.* at 648. Further, if released, the information "could lead to decreased effectiveness in future investigations by allowing potential subjects to anticipate and identify [investigation] techniques as they are being employed." *Id*. at 647.

(c) This exemption sets a "relatively low bar" to justify withholding of information, and "requires only that the agency demonstrate logically how the release of the requested information *might* create a risk of circumvention of the law." *ACLU of N.H. v. City of Concord*, 174 N.H. 653, 667 (2021).

(d) This exemption should not be interpreted to include routine techniques and procedures already well known to the public.

(6) Endangering Life or Physical Safety of Any Person

(a) Information may be withheld if disclosure "could reasonably be expected to endanger the life or physical safety of any individual." *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 582 (2006) (quoting 5 U.S.C. § 552(b)(7) as adopted by *Lodge v. Knowlton*, 118 N.H. 574 (1978)). The federal courts have held that "[d]isclosure need not definitely endanger life or physical safety; a reasonable expectation of endangerment suffices." *Pub. Emps. For Env't Resp. v. U.S. Section Int'l Boundary & Water Comm'n*, 740 F.3d 195, 206 (D.C. Cir. 2014).

(b) This can include increasing risk to law enforcement personnel.[34]

[34] *See*, *e.g.*, *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1198 (10th Cir. 2011) (affirming lower court decision that prison staff roster was properly withheld because release could "expos[e] [staff] to threats, manipulation, and harm"); *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001) (protecting information about DEA agents).

3. Effect of Annulment

a) Records maintained by arresting and prosecuting entities documenting conduct underlying an annulled conviction are not categorically exempt from disclosure under RSA 91-A:4, I, which exempts records from public inspection if otherwise prohibited by statute. *Grafton Cnty. Attorney's Off. v. Canner*, 169 N.H. 319, 328 (2016) (holding records of annulled arrest not categorically exempt under annulment statute).

In *Canner*, the Court observed that the public "has a substantial interest in understanding how investigations and alleged crimes are conducted, and how prosecutors exercise their discretion when deciding whether to prosecute, reach a plea agreement, or try cases." *Id.* The Court recognized that a prosecutor "must be publicly accountable for his or her decisions," and "the public should have access to information that will enable it to assess how prosecutors exercise the tremendous power and discretion with which they are entrusted." *Id*. (citations omitted).

However, the Court did not decide whether the law enforcement and prosecution records would be exempt under another provision of RSA chapter 91-A, such as the attorney work product exemption under RSA 91-A:5, XII or privacy exemption under RSA 91-A:5, IV. *Id*. at 329. As such, this memo cannot specifically advise whether the records should be disclosed under the Right-to-Know law. Nevertheless, the Court, when discussing the implications of an annulled arrest or conviction, stated that annulments do not "turn the public event of a criminal conviction into a private, secret, or secluded fact," and the annulment statute provides protections for a person whose record is annulled, but not for the underlying investigative files. *Id.* (*citing Lovejoy v. Linehan,* 161 N.H. 483, 486-87 (2011)). Given the holding in *Lovejoy* as relied upon by *Canner*, combined with the Court's declination to extend RSA 91-A:4, I to categorically exempt annulled records from public disclosure, the disclosing entity must analyze whether a strong privacy interest exists that would categorically exempt the underlying records from public disclosure based on an individual's privacy concerns. A factor in this analysis should be the extent to which the investigative material was used during a public trial. Simply having a conviction annulled does not constitute a basis for declining to provide the records to the public. *See Canner*, 169 N.H. at 328.

b) The arresting and prosecuting entities disclosing governmental records related to records documenting conduct underlying an annulled conviction should consider informing the requestor of the fact of the annulment. *See Hynes v. N.H. Democratic Party*, 175 N.H. 781 (2023).

4. Exculpatory Evidence Schedule

a) The Exculpatory Evidence Schedule ("EES") is maintained by the New Hampshire Department of Justice and constitutes a public document. RSA 105:13-d, I; *see also N.H. Ctr. For Pub. Int. Journalism v. N.H. DOJ*, 173 N.H. 648 (2020).

b) There is a nonpublic portion of the EES that includes officers added to the EES after the enactment of the statute and pending final exhaustion of any grievance process (RSA 105:13-d, III(b)) and those officers added to the EES prior to the enactment of the statute with a pending legal action regarding the officer's placement on the EES (RSA 105:13-d, II(d)).

5. General Observations

a) Many of the exemptions for law enforcement records or information have received limited interpretation by New Hampshire courts. The above guidance is based, in part, on federal case law, which the New Hampshire Supreme Court has cited favorably. 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, however, 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 an entity's denial of a request for law enforcement information under the Right-to-Know law.

b) Any law enforcement record, whether open, closed, active or inactive, may fall within one or more of these exemptions. For instance, the disclosure of an open or active file could interfere with enforcement proceedings in many ways such as creating a flight risk of a suspect, tainting witness memories, or disclosing trial strategy. 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.

c) If only a portion of the record is exempt, the remaining portion must be disclosed if it can be reasonably segregated from the non-exempt portions.

6. Procedures for Withholding Law Enforcement Records

a) If an entity denies a request for law enforcement records, it should "provide a written statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld." RSA 91-A:4, IV(c).

b) To justify the withholding of records, an entity should provide the court a categorization of the records, with each category defined precisely. *Murray v. N.H. Div. of State Police*, 154 N.H. at 583. The description should not reveal the contents of withheld records but should provide enough information to allow a court to determine if the records must be disclosed. *Id.* "[T]he government's justification for exemption need not be so specific as to reveal the withheld information, and the requesting party is not entitled to learn all of the information that forms the basis for the withholding." *ACLU of N.H. v. City of Concord*, 174 N.H. at 661-62. The court may, but is not required to, hold *in camera* proceedings prior to reaching a decision regarding disclosure. *Id*. at 662.

c) The Court, in *Murray*, offered examples of the types of categories that might satisfy the categorization requirement:

(1) Details regarding initial allegations giving rise to the investigation;
(2) Interviews with witnesses and subjects;
(3) Investigative reports furnished to prosecutors;
(4) Communications with prosecutors;
(5) Investigation progress reports; and
(6) Prosecutor's opinions – Prosecution Memoranda.

Murray v. N.H. Div. of State Police, 154 N.H. at 584. The Court noted that, in limited circumstances where the naming of a category would in itself release information that would interfere with an investigation, a "miscellaneous" category may be justifiable. *Id.* Broad terms for categories such as photographs, correspondence, or maps and diagrams are insufficient. *Id.*

Affidavits, testimony, or other evidence that explains how the disclosure of the information within the categories could interfere with any investigation or enforcement may be required by the court in order to justify exemption, especially if the reasons for non-disclosure are vague. *Id*. The law enforcement entity may also be required to explain why there is no portion of the withheld materials that can be reasonably segregated within a particular category that is suitable for release. *See id.*

K. Responding to Requests for Governmental Records

1. General Overview

a) Public entities may receive requests to inspect governmental records or for copies. Each entity should develop an internal process to ensure requests are handled timely and in accordance with legal requirements. This section will address the general legal requirements for

responses. However, providing advice on an appropriate internal process for a particular entity is beyond the scope of this memorandum. State entities should consult the Department of Justice when developing an internal process. Municipal or county government entities should consult their respective legal counsel.

b) The Right-to-Know law does not require the requesting parties to identify themselves and imposes no restrictions on the use of information once it is disclosed. *Associated Press v. State,* 153 N.H. 120 (2005).

c) It is permissible to ask the person making a Right-to-Know request to put the request in writing. But if the person declines, the individual receiving the request should create a written record for the public entity's files. The written record should include the date of the request and a description of the specific governmental records being requested.

d) Governmental records that are immediately available must be provided for inspection. When this occurs, the public entity should document what governmental records were provided for inspection or copying.

2. Burden of Proof for Not Disclosing a Governmental Record

a) The public entity or party seeking to prevent release bears the burden of proving that a record is not subject to public release. *CaremarkPCS Health LLC. v. N.H. Dep't of Admin. Servs.,* 167 N.H. 583, 586 (2015) (analyzing injunction action seeking to prevent agency's disclosure of its trade secrets and propriety of disclosure under Right-to-Know law). A public entity must meet a minimum threshold to justify non-disclosure. A public entity "is not required, however, to justify its refusal on a document-by-document basis." *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 583 (2006). "When generic determinations are used, the withholding should be justified category-of-document by category-of-document not file-by-file." *Id.*

b) The legislature has clarified this requirement in RSA 91-A:4, IV (effective January 1, 2020).[35]

(1) If records are requested and not made available within 5 business days, entities must provide a written statement of the time reasonably necessary to determine whether the request will be granted or denied and the reason for the delay.

[35] Given this statutory change, decisions finding that vague government responses did not violate the Right-to-Know law should not be relied upon. *See Granite Green Inv. Partners, LLC. v. Nashua*, No. 2019-0004, 2019 WL 6048950 (N.H. Oct. 28, 2019) and *Conkey v. Town of Dorchester,* No. 2014-0343, 2015 WL 11077804 (N.H. March 16, 2015).

(2) If any part of a request is denied or redacted, the entity must provide a written response identifying the specific exemption or reason for the denial and a brief explanation. This is not a page-by-page "Vaughn" [36] index but does require that a specific exemption in RSA chapter 91-A, other statute, or case law be cited, along with a brief explanation for the category of documents withheld or redacted.

(a) Example: If a record contains both public information and confidential medical information that has been redacted, the person requesting the record should be informed that the record has been redacted to prevent disclosure of confidential medical information. The appropriate statutory provisions must be cited. The person seeking the governmental record can then easily independently assess the appropriateness of the redaction.

(b) Example: If letters from the Department of Justice to the Department of Health and Human Services are exempt from disclosure based on attorney-client privilege, that rationale for nondisclosure must be provided to the requestor. The agency does not need to prepare a "Vaughn" index, which requires identifying each specific page not disclosed along with the specific rational for nondisclosure. The basis for nondisclosure can be done categorically.

(3) Should a court find that disputed records cannot be reviewed effectively, such as in a case involving a large number of documents, the court may order that the party resisting disclosure prepare a detailed document index, like the index required by *Vaughn*, to assist the court in determining whether the documents in question are exempt from the Right-to-Know law. *Union Leader Corp. v. N.H. House Fin. Auth.*, 142 N.H. 540, 548–51 (1997). Such an index will include a general description of each individual document withheld and the justification for its nondisclosure. *See* Appendix D, for a sample of a Vaughn index.

3. Redaction vs. Denial

a) An entity cannot withhold an entire file or document if only portions are covered by an exemption. *Murray v. New Hampshire Div. of State Police,* 154 N.H. 579, 584 (2006) (*quoting Curran*, 813 F.2d at 476)

[36] *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) (remanding with order for agency responding to a FOIA request produce an index of documents with corresponding justifications for each withholding).

(stating that an entity must explain why "there was no reasonably segregable portion of any of the withheld material suitable for release" when that was a claimed basis for withholding requested documents).

b) Although redaction of nonpublic information is not specifically addressed in the Right-to-Know law, it is not uncommon for a governmental record to contain some information that must be disclosed and some information that is exempt from disclosure. Under these circumstances, the governmental entity has an obligation to produce the non-exempt portion of the requested record if the exempt portion can reasonably be redacted or separated from the requested record.

c) What information should be redacted?

(1) *See* Section VI, F above regarding information exempt from public disclosure. If no exemption applies, a governmental record is subject to public inspection.

(2) Redaction must be based on an analysis of the specific governmental record. Statutes, court rules, and case law make some types of information exempt from disclosure. And information exempt from disclosure should always be redacted.

(3) Statutes, court rules, and case law also make some types of information subject to a privacy balancing test. For such information, a record may only be withheld if the privacy interest outweighs the public's interest in disclosure. *See* Section VI, F above.

(4) Always redact the following private or privileged information from governmental records subject to disclosure (this is not an exhaustive list):

(a) Date of birth (generally acceptable to list age)
(b) Place of birth (town/city/state)
(c) Social Security number
(d) Driver's license/driver ID number
(e) Grand Jury records
(f) Juvenile records
(g) Attorney work product and attorney-client information (prosecution memoranda, memoranda of law not filed with a court, communications to or from attorney seeking or providing legal advice)
(h) Medical records/information on medical condition
(i) Psychiatric and drug treatment records/information
(j) Educational records

(k) Names of juvenile witness/suspect named in a crime investigation report
(l) Criminal records obtained from the Central Repository
(m) E-911 Records

(5) Generally, redact or analyze the privacy interests for the following data (this is not an exhaustive list):

(a) Home address
(b) Home telephone number
(c) Personal cell phone number
(d) Other unlisted telephone numbers
(e) Personal email address
(f) Work email address, if not a State employee
(g) Any other information that may be considered personal identifying information under RSA 638:25
(h) Details about individuals personal affairs unrelated to showing government activity
(i) Financial records
(j) Personnel Records

d) The public entity should retain a copy of both the redacted and unredacted record.

e) Redaction must effectively block out the exempt portion of the record so that it is unreadable:

(1) Redaction may be accomplished manually by copying the document and then covering the sections to be redacted on the copy with ink, for example using a black marker. Alternatively, a piece of white redaction tape can be used to cover the sections of the copy to be redacted. The redacted copy is then copied, with the person making the request receiving that second-generation copy. If ink is used, it is important to check the second-generation copy to ensure the redaction effectively blocks the nonpublic information. The quality of some copiers makes it necessary to use very heavy application of ink, redaction tape, or to make a third-generation copy.

(2) Software programs, such as various versions of Adobe Acrobat, provide an electronic redaction capability. The manufacturer claims that once the electronic redaction is applied, it is not possible to electronically recreate the information that has been redacted. If using Adobe, ensure the version used has this capability. It is best practice to retain a version that has been

"marked" for redaction, as well as the fully redacted version. When applying redactions, the option for removing hidden information should always be used as it may be possible to "see behind" the redaction if this is not done.

f) When a public entity is preparing a copy of documents for disclosure, it is good practice to Bates Stamp or page number all of the documents disclosed. This creates a record of how many pages were disclosed. This is particularly helpful when the disclosure involves many different original documents that were previously numbered or records from different sources. The Bates Stamped number or page numbering should be done on a corner of the document in a manner that does not cover or alter the other information on the document. Software programs, such as most full versions of Adobe Acrobat, can electronically Bates Stamp each page of a document. Documents and records from various paper sources can be scanned and combined with electronic documents to create a single electronic document for Bates Stamping, redaction, and then electronic disclosure. If the person making the request prefers, the final product can also be printed and provided on paper.

4. General Consideration for Responses
(Appendix C has a sample template for Right-to-Know response letters.)

The following generally apply when responding to requests for governmental records:

a) The public's right to inspect governmental records, including meeting minutes, specifically includes a right to inspect and copy all notes, materials, tapes, or other sources used by an entity to compile the minutes of a meeting, after the completion of a meeting and during the entity's regular business hours. RSA 91-A:4, II.

b) A public body is not obligated to 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). If drafts, notes, and memoranda and other documents not in their final form are disclosed, circulated, or made available to a quorum or a majority of the members of a public body and retained after the public entity has approved final minutes, they will be subject to inspection. *See Orford Teachers Ass'n v. Watson,* 121 N.H. 118 (1981); RSA 91-A:5, IX. Drafts, notes, memoranda, and other documents not in their final form that are not disclosed, circulated, or made available to a quorum or a majority of the members of a public body are exempt from disclosure. RSA 91-A:5, IX. The courts have not yet addressed whether audio or video recordings made by the individual responsible for drafting minutes solely as an aid to creation of the minutes constitute governmental records that must be

retained as long as its paper counterpart. Public bodies using tape or video recordings solely to aid in the creation of minutes should consult with legal counsel regarding whether the recordings can properly be destroyed. Generally, minutes of meetings must be preserved permanently. RSA 91-A:2, II.

c) 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). When resolving conflict between a request to immediately access governmental records and disruption of the public entity's business or legal obligations to fulfill other duties, the only guide is reasonableness.

d) 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, 159-60 (1981).

e) Although all governmental records must be available for inspection and copying, the public entity is not mandated to provide copies at its own expense. *Gallagher v. Town of Windham*, 121 N.H. 156 (1981). 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, 99 (1980). There can be no charge for records that are maintained in electronic format that are provided electronically without copying. RSA 91-A:4, IV(d). But an entity may charge for the actual cost of providing a copy, including the cost of the electronic media – such as a thumb drive or CD – used to provide a copy. RSA 91-A:4, IV(d). An entity may specify the manner in which records will be provided electronically. *Taylor v. SAU #55*, 170 N.H. 322 (2017) (upholding requirement that requestor provide an original packaging thumb drive and declining to provide records by e-mail).

f) The Right-to-Know law does not require an entity to compile data in the format requested by a member of the public or to create a new document. RSA 91-A:4, VII. However, the New Hampshire Supreme Court has suggested that the Right-to-Know law does require that public records be maintained in a manner that makes them available to the public. *Hawkins v. Dep't of Health and Hum. Servs.*, 147 N.H. 376, 379 (2001).

g) If the public entity uses a photocopy machine or other device to make copies of records for the requestor, and the device is maintained by the entity, the entity may charge the actual cost of providing a copy or the fee established by law. RSA 91-A:4, IV.

h) When providing statistical tables and limited data sets for research, the requestor can be required to pay fees established by law for obtaining copies of limited data sets or statistical tables. Such fees must be based on the cost of providing the copy in the format requested. The entity head must provide the requestor with a written description of the basis for the fee. RSA 91-A:10, VI.

i) Any public entity that maintains governmental records in electronic format may, in lieu of providing original records, copy the requested records to electronic media using standard or common file formats in a manner that does not reveal information that is not subject to disclosure. RSA 91-A:4, V.

j) If copying to electronic media is not reasonably practicable, or if requestor asks for the records in a different format, the public entity may provide a printout of the requested records, or may use any other means reasonably calculated to comply with the request in light of the purpose of the Right-to-Know law as expressed in RSA 91-A:1.

k) The cost of converting a record into a format that can be made available to the public is not a factor in determining whether the information is subject to disclosure. *Hawkins,* at 376.

l) A citizen does not have to offer a reason or demonstrate a need to inspect a governmental record. 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. It is not whether the particular requestor should have the information. *Mans v. Lebanon Sch. Bd.*, 112 N.H. 160 (1972).

L. Public Inspection of Governmental Records

1. The public has the right to inspect all non-exempt governmental records, including meeting minutes, during the regular or business hours of a public entity, at the regular business premises of that entity. The public may make memoranda, abstracts, and photographic or photostatic copies of the records or minutes, except as otherwise prohibited by statute or RSA 91-A:5. RSA 91-A:4, I.

2. If records are immediately physically available, the public entity should:

a) Ask the person requesting access to wait while the records are made available.

b) If public disclosure is appropriate, make the records available for inspection or copying. If disclosure is not appropriate, provide a written explanation of the denial. RSA 91-A:4, IV.

c) If providing records, provide only a copy for inspection or closely monitor the person's handling of the original records.

d) If, during inspection, records are copied or reproduced using the public entity's equipment, the public entity may charge for the copying or reproduction costs. RSA 91-A:4, IV(d).

3. Timing is important!

a) If the records are not immediately available, the entity has at most five business days to provide an initial response to the request. Often records will not be available immediately because:

(1) The documents are in use;
(2) They must be reviewed or redacted;
(3) They are archived in another location;
(4) They are not readily identifiable;
(5) A search for the documents must be conducted; or
(6) Legal advice must be obtained.

b) Within five business days, the public entity must either deny the request in writing, with reasons, or notify the requestor, in writing, if or when the records will be available. If the public official is not sure whether or what responsive documents exist, then the requestor must be told when the search, retrieval, and review process is expected to be completed. RSA 91-A:4, IV. The requestor must also be told the reason for the delay. RSA 91-A:4, IV. *See* Appendix C for a sample template for 5-day letters.

c) In *ATV Watch v. N.H. Dep't of Res. and Econ. Dev.,* 155 N.H. 434 (2007), the N.H. Supreme Court made clear that it is essential that:

(1) If government records are immediately available, disclosure must be immediate;

(2) If government records can be produced within five days, they must be produced within five days; and

(3) Otherwise, it is critical that the requesting party be provided with a written response explaining when the determination will be made as to what, if anything, will be disclosed.

ATV Watch did not address how much time can be taken to produce a response. The statute refers to the "time reasonably necessary to determine

whether the request shall be granted or denied." However, the Supreme Court has upheld a requirement that an appointment be made to view records. *Brent v. Paquette*, 132 N.H. 415,424 (1989). In *Paquette*, the Court also provided some guidance that available resources and other business obligation can be a legitimate factor in determination of a "reasonable" time. *Id.* at 425.

M. Other Considerations in Responding to Requests for Governmental Records

1. The purpose of the Right-to-Know law is to provide the public with access to existing records. It does not require a public entity to create governmental records to answer a question. Nor does the Right-to-Know law prevent a public entity from answering the public's questions in written form. Whether or not a public entity should answer a question—or whether the entity should create a new governmental record in response—is a policy choice for the public entity. The Right-to-Know law does not provide guidance on how to determine when creating an answer is consistent with or supports the purpose or mission of the entity. However, once created, the written answer becomes a governmental record, itself likely subject to disclosure. To the extent that a new document is created to provide an answer to a question posed, it is helpful to inform the party making the request that the Right-to-Know law does not create a right to have all questions answered, and that the document is being provided as a public service.

2. Public entities are created to serve the public. While specific statutory duties to inform the public vary, most public entities are generally expected to keep the public informed regarding how the entity's duties are being carried out. At the same time, most are expected to use the public's resources efficiently to carry out the public entity's duties and not to divert unreasonable quantities of public resources to satisfy the interests of a single person that are not common to others served by the entity. The functions of an entity cannot cease to address each and every Right-to-Know request. Rather, an entity must balance responding to Right-to-Know requests with all its other existing duties and responsibilities.

3. The Right-to-Know law should not be used as a discovery tool in ongoing litigation. *Renegotiation Bd. v. Bannercraft Clothing Co*., 415 U.S. 1, (1974). To the extent that a requestor makes a Right-to-Know request to circumvent discovery, "the test for disclosure . . . is whether the documents would be routinely or normally disclosed upon a showing a relevance." *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95, 106 (2016).

4. Right-to-Know requests and response letters themselves are governmental records subject to the Right-to-Know law. While it will be appropriate to redact the same information that would be redacted from any other governmental record, the public's Right-to-Know extends to the requests its government is responding to. To the extent that a public entity creates records summarizing the cost of

responding to a Right-to-Know request, that document also is subject to disclosure.

N. FOIA – The Federal Freedom of Information Act

1. The federal Freedom of Information Act ("FOIA"), is similar to, but not identical to, New Hampshire's Right-to-Know law. FOIA applies to the federal government. FOIA does not apply to the State of New Hampshire or its political subdivisions. The Right-to-Know law does not apply to the federal government.

2. State and municipal officials are encouraged to treat a request for governmental records citing only "Open Government," "FOIA," or the "sunshine" law as a Right-to-Know request. "FOIA" and "sunshine law" are terms from federal law and the laws of other states that are considered generic terms for the Right-to-Know law in New Hampshire. "Open Government" is also a generic term commonly understood to refer laws granting access to government meetings and records. The Right-to-Know response should inform the requesting party that the response is made under New Hampshire's Right-to-Know law because FOIA does not apply to the state, county, or municipal public entity.

VII. REMEDIES

Various remedies are available to people who are aggrieved by a public entity's noncompliance with the Right-to-Know law.

A. Forums for Seeking Relief

A person who believes they have been aggrieved by a public entity's noncompliance with the Right-to-Know law may proceed down one of two paths in seeking relief. They may petition the Superior Court or they may file a complaint with the Office of the Right-to-Know Ombudsman ("Ombudsman's Office"). RSA 91-A:7.

Individuals may not proceed in both the Superior Court and the Ombudsman's Office simultaneously. Filing a petition with the Superior Court forecloses the filing of a complaint with the Ombudsman's Office. Filing of a complaint with the Ombudsman's Office forecloses the filing of a petition with Superior Court until the Ombudsman issues a final ruling or the deadline for issuing that ruling has passed. RSA 91-A:7.

1. Superior Court

a) A petition requesting an injunction against a public entity may be filed with the Superior Court. Proceedings seeking an injunction are to be given high priority on the court calendar.

b) 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.

c) A petitioner may appear with or without legal counsel.

d) *Ex Parte*[37] Relief:

(1) Prior versions of RSA 91-A:7 authorized granting *ex parte* relief when time is "probably of the essence" and the proceeding is "necessary to ensure compliance."

(2) But the current version of RSA 91-A:7 makes no reference to *ex parte* relief.

2. Ombudsman's Office[38]

[37] An *ex parte* decision is one made by a court after hearing only from the petitioner.

[38] The statutory provisions creating the Ombudsman's Office and providing for these proceedings have a sunset clause which will expire on July 1, 2025, unless further action is taken by the General Court.

a) Proceedings before the Ombudsman are initiated by filing a written, signed complaint. RSA 91-A:7-b, I.

(1) The complaint must have attached to it the request served on the public entity and the written response of the public entity. RSA 91-A:7-b, I(a).

(2) The complaint is deemed sufficient if it states facts constituting a violation of RSA chapter 91-A. *Id.*

(3) There is a $25 fee to file a complaint. *Id*. But this fee may be waived by the Ombudsman based on a finding of an inability to pay. *Id.*

b) Once the Ombudsman receives a complaint, it is provided to the public entity, who has 20 calendar days to submit an answer. RSA 91-A:7-b, II. This deadline may be extended for good cause. *Id.*

c) The Ombudsman then proceeds to review and consider the issues raised in the complaint and answer. In doing so, the Ombudsman may:

(1) Compel production of the records in question in order to conduct an in-camera review. RSA 91-A:7-b, III(a).

(a) Records produced to the Ombudsman for an in-camera review are to be returned to the public entity following the review and are not subject to independent disclosure under RSA 91-A due to their possession by the Ombudsman's Office. RSA 91-A:7-b, VI.

(2) Compel interviews with the parties. RSA 91-A:7-b, III(b).

(3) Hold a hearing at which the parties are compelled to appear. (This hearing is an open meeting and itself subject to RSA chapter 91-A). RSA 91-A:7-b, III(c).

d) Following the review process, the Ombudsman must issue a written ruling determining whether there has been a violation of the Right-to-Know law. RSA 91-A:7-b, V.

(1) This decision must be issued within 30 calendar days following receipt of the parties' submissions. However, this deadline may be extended to a reasonable time for good cause. *Id.*

(2) The Ombudsman may also expedite resolution of the case for good cause. Expedited rulings must be issued within ten business days. *Id.*

(3) When issuing its written decision, the Ombudsman's Office may order remedies to the same extent as those that may be ordered by the Superior Court. RSA 91-A:7-b, III(f).

(4) If the Ombudsman's decision is not appealed, the Ombudsman must follow up with all parties to verify compliance with the Ombudsman's rulings.

(5) If not appealed, the party seeking enforcement may also register the Ombudsman's decision as a judgment in the Superior Court. The Ombudsman's rulings are then enforceable through contempt of court proceedings. RSA 91-A:7-c, IV. If this is necessary, reasonable attorney fees must be paid by the noncompliant public entity. *Id.*

e) Any party may appeal a decision of the Ombudsman's Office within 30 days of the decision. RSA 91-A:7-c, I.

(1) For citizen-initiated appeals, there is no filing fee or surcharge. *Id*.

(2) Upon the filing of an appeal, the Superior Court may issue an order staying the Ombudsman's decision. *Id.*

(3) In the appeal, the Superior Court "shall treat all factual findings of the ombudsman as prima facie lawful and reasonable, and shall not set them aside, absent errors of law, unless it is persuaded by a balance of probabilities on the evidence before it that the ombudsman's decision is unreasonable." RSA 91-A:7-c, II.

B. Forms of Relief

In addition to ordering disclosure of the specific documents that are the subject of the litigation, the Superior Court or the Ombudsman may issue other forms of relief.

1. Injunctive Relief – A court or the Ombudsman may issue an injunction ordering the public entity not to violate the Right-to-Know law in the future. RSA 91-A:7-b, III(f); RSA 91-A:8, V.

2. Training – A court or the Ombudsman may also require any officer, employee, or other official of a public entity in violation of RSA chapter 91-A to

undergo appropriate remedial training at such person's expense. RSA 91-A:7-b, III(f); RSA 91-A:8, V.

3. Invalidation of Action in an Improper Meeting – A court or the Ombudsman may invalidate an action taken at a meeting held in violation of the Right-to-Know law if "the circumstances justify such invalidation." RSA 91-A:8, III.

a) In *Stoneman v. Tamworth School District*, 114 N.H. 371, 376 (1974), the Supreme Court imposed this remedy after the school board failed to provide proper notice or hold an open meeting. It is noteworthy that this decision was issued prior to RSA 91-A:8's express inclusion of invalidation of action as an available remedy.

b) In *Hull v. Grafton County*, 160 N.H. 818, 823 (2010), the Supreme Court discussed how the statutory language, which authorizes invalidation if the circumstances justify, leaves it within the discretion of the court to determine if invalidation is necessary. It is incorrect to assume that actions must be invalidated simply because open meetings rules were violated.

4. Summary Disclosure and Sanctions – A court or the Ombudsman may order summary disclosure when a public entity has improperly refused to disclose its records. *Union Leader Corp. v. New Hampshire Hous. Fin. Auth*., 142 N.H. 540, 551 (1997). Summary disclosure may also be appropriate when an entity refuses to provide a Vaughn index when ordered by the court to determine whether documents are exempt from the Right-to-Know law. *Id.*

a) The Right-to-Know law authorizes imposing a civil penalty of not less than $250 and not more than $2,000 against an officer, employee, or other official if there is a finding that the individual has violated any provision of the Right-to-Know law in bad faith. RSA 91-A:8, IV.

b) If there is a finding of bad faith, the officer, employee, or other official may also be required to reimburse the public entity for attorney's fees or costs paid as a result of defending a Right-to-Know lawsuit.

C. Attorney's Fees and Costs

If a public entity, or officer, employee or other official thereof violates the Right-to-Know law, such public entity or official may be required to pay for reasonable attorney's fees and costs incurred in a lawsuit under RSA chapter 91-A.

1. Costs of Litigation:

a) The test for costs is if the court finds that the lawsuit was necessary in order to make the information available or to make the proceeding open

to the public; or the lawsuit was necessary to address a purposeful violation of this chapter. RSA 91-A:8, I; *N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit*, 169 N.H. 95, 110 (2016).

2. Attorney's Fees:

a) Under RSA 91-A:8, I attorney's fees shall be awarded if "the trial court finds that the lawsuit was necessary to make the requested information available and that the" public entity "knew or should have known that its conduct violated the statute." *Colquhoun v. City of Nashua*, 175 N.H. 474, 478-79 (2022). *See also, N.H. Challenge Inc. v. Comm'r, N.H. Dep't of Educ.*, 142 N.H. 246 (1997) (holding that attorney's fees are mandated if necessary findings are made).

b) Note that this is a different standard than that used for costs. "Establishing that the agency 'knew or should have known' that its refusal constituted a Right-to-Know violation is required for an award of legal fees, but not for costs." *ATV Watch v. N.H. Dep't of Resources and Economic Dev.,* 155 N.H. 434, 442 (2007).

c) The Supreme Court has considered on a number of occasions what facts are sufficient to establish that the public entity knew or should have known they were in violation of the Right-to-Know law:

(1) *Colquhoun v. City of Nashua*, 175 N.H. 474, 478-79 (2022) (awarding attorney's fees when public entity should have known that the plaintiff's request for documents was not overbroad).

(2) *WMUR v. N.H. Dep't of Fish & Game,* 154 N.H. 46 (2006) (refusing to award attorneys' fees after concluding that the public agency did not know its conduct was a violation of 91-A given the state of the case law).

(3) *Goode v. N.H. Legislative Budget Assistant*, 145 N.H. 451 (2000) (finding request for attorney's fees were 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).

(4) *Voelbel v. Town of Bridgewate*r, 140 N.H. 446 (1995) (holding award of attorney's fees was inappropriate because second factor was not present and discussing amendment of the statute to add this factor).

(5) *Chambers v. Gregg*, 135 N.H. 478 (1992) (declining to award fees where the second factor was not present).

3. Bad Faith:

a) If an officer, employee, or other official has acted in bad faith, both attorney's fees and costs may be awarded personally against him or her. RSA 91-A:8, IV.

b) The court or ombudsman may award attorney's fees to a public entity or other defendant in a Right-to-Know action if the court finds that the lawsuit was in bad faith, frivolous, unjust, vexatious, wanton, or oppressive. RSA 91-A:8, II.

4. No fees may be awarded by the court if the parties have agreed that fees shall not be paid. RSA 91-A:8, I.

D. A Note Regarding the Destruction of Records

1. A person is guilty of a misdemeanor if he or she knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under the Right-to-Know law. RSA 91-A:9.[39]

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

3. The general statute of limitations for a misdemeanor is one year. RSA 625:8, I(c). However, the statute of limitations for any offense based upon misconduct in office by a public servant extends to any time when the defendant is in public office or within two years thereafter. RSA 625:8, III(b).

[39] In a 2001 Rockingham County case (*Knight v. SAU #16*, No. 217-2000-E-307 (N.H. Super. Ct., Jan 3, 2001)(Abramson, J.)), the Court found that respondents intentionally deleted the requested files and misled the Court into believing that the files still existed at the time of trial. The Court made a judicial finding that information in the deleted files was "unfavorable and embarrassing" to the respondents and found them in contempt of Court. Respondents were required to pay petitioner's costs and attorney's fees and to bear the costs of production of the remaining records. In 2002, RSA 91-A was amended to include subsection 9, making it a misdemeanor to knowingly destroy records that are responsive to a Right-to-Know request.

INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

Appendix A: Model Nonpublic Session & Legal Consultation Motions

Nonpublic Sessions

A public body is always required to provide notice of the time and location of its meetings. All meetings of a public body must begin in public session. The default rule is that the entirety of a meeting will remain open to the public. But under one or more of the circumstances listed in RSA 91-A:3 or as authorized by another statutory provision, the members of a public body may vote to move into a nonpublic session. A vote to enter nonpublic session must be done by roll call.

The public is properly excluded from a nonpublic session.

Minutes of nonpublic sessions are required and must meet the same minimum standards as those taken in public session. Minutes for nonpublic sessions must also record all final actions taken during the nonpublic session in a manner that the vote of each member is recorded and can be ascertained. This may be accomplished through using roll call votes but is not required, provided the minutes are clear how each member voted. For example: "Motion passes unanimously" or "Motion passes, 3-2, with Ms. Smith and Mr. Jones voting against" allow a reader of the minutes to determine how each member of the body voted (as long as the minutes properly list the members present).

The minutes of nonpublic sessions are public documents unless the public body determines by a recorded vote of the body that the minutes are properly kept from the public, often called "sealed." A public body should carefully consider the detail of its minutes. The need to seal minutes may be prevented by keeping simple minutes that do not contain unnecessary information but still meet the requirements of the Right-to-Know law. Each public body should decide, outside the context of any controversial issue, how detailed its minutes will be.

As of January 1, 2022, all public bodies subject to the Right-to-Know law must maintain a list of all nonpublic sessions where the public body determined that the minutes or decisions were sealed. As a general rule, public bodies should adopt a procedure to review and unseal nonpublic minutes as soon as the circumstances justifying sealing no longer apply.

The following model motions are offered as examples of motions that comply with the Right-to-Know law. This list is not exhaustive. Alternative wording for motions may also satisfy the law. Public bodies with concerns regarding their nonpublic meeting procedures should consult with their legal counsel.

To Enter Nonpublic Session:

During the public session of a properly noticed meeting a member of a public body seeking to have the body enter a nonpublic session should make a motion, such as the following:

> **Example (three-member public body)**:
>
> Member 1: "I move to enter into nonpublic session for the purposes of discussing a personnel matter as authorized by RSA 91-A:3, II (a)."

Chair: “Is there a second?”

Member 2: “I second the motion.”

Chair: “This requires a roll call vote. I will call the roll.”

The chair should then state each present member’s name out loud. The member should then state his or her vote out loud. Alternatively, each member can state his or her vote out loud, typically going in order around the table. For a roll call vote, the minutes should explicitly identify how each member voted on each motion, including any abstentions.

Chair: “Member 1”

Member 1: “Yes”

Chair: “Member 2”

Member 2: “Yes.”

Chair: “The Chair votes yes.”

Chair: “A majority of the board members present having voted yes we will now go into nonpublic session.”

The chair or presiding officer of the public body should announce to the public that the meeting is now moving into nonpublic session and advise if or when the meeting will return to public session.

> “Everyone present from the public is required to leave the room. Those interested in attending the public session following this nonpublic session should wait in the hallway, we will open the door when we come out of nonpublic session. We expect to resume public session in thirty minutes.”

Necessary support staff to the public body and other necessary parties to the matter to be discussed may participate in the nonpublic session.

If a recording is made of the meeting by the public body, either as a permanent record of the meeting or as an aid to creation of the minutes, a good practice is to use a different recording for each nonpublic session. If any member of the public was or may have been recording the public session, be sure that recording device is removed from room during the nonpublic session.

The body then conducts its nonpublic session.

To Exit Nonpublic Session:

There is no specific requirement for how to return to public session. But, for the sake of clarity, many public bodies return to public session through a motion and formal vote. This vote does not need to be conducted by roll call unless there are members of the body participating remotely.

Member 1: "I move to return to public session."

Member 2: "I second the motion."

Chair: "All those in favor say "yes."

Member 1, Member 2, Chair: "Yes."

Chair: "It is a vote in favor; we will now return to public session."

If a tape recording is being made, the nonpublic session tape should be removed and replaced with the public session tape. If, after a vote in public session, the nonpublic minutes were sealed, the tape should be marked accordingly.

The Chair should then arrange for the hallway door to be opened and the members of the public waiting to be invited to return to the room.

Chair: "We are now back in public session."

To Seal the Minutes of the Nonpublic Session:

If the public body wishes the minutes of the nonpublic session to remain nonpublic, there must be a motion to seal the nonpublic session minutes. The Right-to-Know law specifies a motion and vote to seal the minutes must occur in the public session. The Right-to-Know law does not require that motion explicitly state the basis in law for sealing the minutes, however, doing so will create a record should the decision later be challenged.

Member 1: "I move to seal the minutes because divulgence of the information in the minutes would likely adversely affect the reputation of the employee [or citizen] discussed."

Member 2: "I second the motion."

Chair: "A motion has been made and seconded to seal the minutes, all in favor say 'yes.'"

Member 1, Member 2, and Chair: "Yes."

Chair: "All three members of the board having voted yes, the motion caries by more than 2/3rds of the members present and the minutes of the nonpublic session are sealed.[40]"

[40] RSA 91-A:3, III provides in pertinent part "Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session," the body votes to seal the minutes. The law does not require a "recorded roll call vote." Therefore, while a

Alternative Process – Nonpublic Session Minutes Not Sealed.

RSA 91-A:3, III, requires that "Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting . . ." This neither requires nor prohibits immediate disclosure of the decisions made.

> Chair: "We are now back in public session. The minutes of the nonpublic session, which document the actions we took, will be available within 72 hours. You may pick them up here at this office any time after 3 p.m. on Wednesday." (*Assumes 3 p.m. on Wednesday is within 72 hours of the announcement*).

Alternative:

> Chair: "We are now back in public session. We voted to accept a negotiated settlement of the lawsuit by the Smiths about the property line between their property and the transfer station. We will pay them $10,000 to settle this matter. The agreement allows us to keep the recycling shed where it is currently situated."

Additional Grounds for a Motion to Enter Nonpublic Session:

The following are example motions for entering nonpublic session based on the reasons listed in RSA 91-A:3, II:

> Member 1: "I move to enter into nonpublic session for the purposes of discussing the hiring of a public employee as authorized by RSA 91-A:3, II(b)."

> Member 1: "I move to enter into nonpublic session for the purposes of discussing a matter which, if discussed in public, would likely affect adversely the reputation of a person who is not a member of this body as authorized by RSA 91-A:3, II(c)."

> Member 1: "I move to enter into nonpublic session for the purposes of discussing a request for assistance based on poverty as authorized by RSA 91-A:3, II(c)."

> Member 1: "I move to enter into nonpublic session for the purposes of discussing a tax abatement which is sought on the grounds of inability to pay as authorized by RSA 91-A:3, II(c)."

> Member 1: "I move to enter into nonpublic session for the purposes of discussing a request for a waiver of a beach permit fee based on the poverty of the applicant as authorized by RSA 91-A:3, II(c)."

---

role call vote satisfies the law, it is sufficient if the public minutes reflect the count of members voting for and against or a statement by the chair that the vote to seal was carried by a vote of 2/3rds or more of the members present. In determining supermajority votes while the general rule is that only "yes" and "no" votes are counted, this statutory provision requires a vote "of the members present," therefore the 2/3rds majority requirement is satisfied only if 2/3 of the members present, including those abstaining, vote in favor of sealing the minutes.

Member 1: "I move to enter into nonpublic session for the purposes of discussing the acquisition, sale, or lease of land as authorized by RSA 91-A:3, II(d)."

Member 1: "I move to enter into nonpublic session for the purposes of discussing a lawsuit against the town as authorized by RSA 91-A:3, II(e)."

Member 1: "I move to enter into nonpublic session for the purposes of discussing security at the county department of corrections as authorized by RSA 91-A:3, II(g)."

Member 1: "I move to enter into nonpublic session for the purposes of considering applications by the business finance authority under RSA 162-A:7-10 and 162-A:13, because consideration of these applications in public session would cause harm to the applicant or would inhibit full discussion of the application. Entering nonpublic session is authorized by RSA 91-A:3, II(h)."

Member 1: "I move to enter into nonpublic session for the purposes of discussing plans for emergency responses to an incident at the high school when there is a threat of widespread injury or loss of life as authorized by RSA 91-A:3, II(i)."

Member 1: "I move that this adjudicative proceeding enter a nonpublic session for the purposes of discussing confidential, commercial or financial information that is exempt from public disclosure under RSA 91-A:5, IV as authorized by RSA 91-A:3, II(j).

Member 1: "I move to enter into nonpublic session for the purposes of discussing legal advice from board counsel as authorized by RSA 91-A:3, II(l).

Member 1: "I move to enter into nonpublic session for the purposes of considering whether to disclose minutes of a nonpublic session due to a change in circumstances as authorized by RSA 91-A:3, II(m).

Consultation with Legal Counsel

Consultation with legal counsel is exempted by the Right-to-Know law from the definition of a meeting. Therefore, a public body gathering to consult with its legal counsel is, in the eyes of the Right-to-Know law, not a meeting. Often public bodies will consult with legal counsel at the same time and place they hold their meetings. It is also common during a meeting for the public body to need to consult with its legal counsel.

Consulting with legal counsel before a meeting is called to order or after it has been adjourned requires no special action. Preserving the attorney client privilege – the right to keep everything discussed with legal counsel non-public – requires limiting who is present during the consultation. It may be helpful to inform the public at the meeting of the consultation, to establish that no improper meeting or nonpublic session occurred. This can be done by announcing at the start or end of a meeting that the body gathered to consult with its counsel.

Consulting with legal counsel during a meeting is best accomplished by recessing the meeting. This gives proper notice to anyone attending the meeting that they are not entitled to be present during the consultation. It also makes clear in the minutes that activity occurred that is properly not included in the minutes.

Although the Right-to-Know law does not mandate a process for taking a recess, many public bodies do so through a formal vote. Accordingly, to recess a properly noticed and convened meeting for the purpose of consulting with legal counsel, a member of the body should make a motion, such as follows:

Example (three member public body):

> Member 1: "I move that we recess this meeting for the purpose of consulting with legal counsel."
>
> Chair: Is there a second?
>
> Member 2: "I second the motion."
>
> Chair: "All in favor say: 'Aye.'"
>
> Members: All vote "Aye."
>
> Chair: "The motion passes. We will now adjourn this public meeting for the purpose of consulting with legal counsel. The public must leave the meeting room and the door will be closed. We expect this to take about 15 minutes and we plan to reconvene the meeting as soon as we are done consulting with our attorney.

The public body then clears the room to consult with its counsel.

Appendix B: Template 5-Day Letter

RTK 5 DAY Letter Template

[*Date*]

[*Requestor's address*]
[*xxxxxx@gmail.com*]

Re: Right-to-Know request regarding [ ]

Dear [ ]:

We are in receipt of your request dated [*date of request*] for documents under New Hampshire RSA chapter 91-A. We received your request on [*date request received*] for the following:

1. [*describe what is requested*]

2. [*describe what is requested*]

3. [*describe what is requested*]

[***Select most applicable response below – may be combination depending on the status of the requested records and the method of delivery***]

Please be advised that we have determined that this department does not have any records that are responsive to your request.

Please be advised that the records that you seek in request(s) # [*specify all that apply*] above are [***choose one***: attached as electronic records; available and will be copied at the cost of [ ] cents per page for paper copies and/or [ ] for the cost of thumb drive/cd/dvd [if provided by agency].]

Please be advised that due to [*list reason for delay such as the volume and type of documents requested, number of other pending requests, etc*.] we estimate that it will take us until [*specific date*] to locate and review the records that you requested to determine if they can be produced.

Sincerely,

Appendix C: Template Response Letter

RTK Response template

[today's date]

Requestor's address
xxxxxx@gmail.com

Re: Right-to-Know Request Dated [ ]

Dear [ ]:

We have completed our search for and review of records with regard to your request under New Hampshire RSA chapter 91-A for the following:

[Describe what is requested]

Response: [Select all that are applicable – may be combination of more than one]

Please be advised that we have determined that this department does not have any records that are responsive to your request.

Please be advised that the records are [choose one] attached as electronic records/available or will be copied at the cost of __ cents per page for paper copies or __ cents per page for copies that must be scanned.

We have withheld or redacted records based on [list all exemptions that apply specifying the section of RSA 91-A, statute or case law that makes them confidential – most common are personnel records, medical, education or otherwise confidential records (cite statute if have one). See RSA 91-A:5 for exemptions.

[If more than one category requested] provide the description of what was requested, then provide the appropriate response above that applies to each category].

Sincerely,

Appendix D: Right-to-Know Request Index of Fully Redacted Pages

Right-to-Know Request Index of Fully Redacted Pages

Bate Stamp Page Number(s)	Category of document / Reason Fully Redacted	Statute/Case Law/Administrative Rule/Court Order *

* Legal authority establishing the documents cited are nonpublic/not properly disclosed in response to a Right-to-Know request. The State reserves the right to assert additional legal authority for withholding this information should non-disclosure be challenged.

SAMPLE
Right-to-Know Request
Index of Fully Redacted Pages -

Bate Stamp Page Number(s)	Category of document / Reason Fully Redacted	Statute/Case Law/Administrative Rule/Court Order *
RTK 000120	Juvenile Matter Record	RSA 169-B:35-38; RSA 91-A:5, IV
RTK 000473 to 000476	E-911 Records	106-H:14
RTK000511 to 000521	Juvenile Matter Record (Sealed by Court)	RSA 169-B:35-38; RSA 91-A:5, IV
RTK000713 to 000716	Medical Record	RSA 91-A:5, IV
RTK000806 to 000807	Juvenile Petitions	RSA 169-B:35-38; RSA 91-A:5, IV
RTK000808 to 000809	Petition for Certification	RSA 169-B:35-38; RSA 91-A:5, IV
RTK000822 to 000826	Motion to Preserve Evidence – Juvenile Matter	RSA 169-B:35-38; RSA 91-A:5, IV
RTK001037 (partial)	Reference to sealed information	Court Order sealing personnel information
RTK001050 to 001059	Motion for Discovery	Sealed by Court Order
RTK001118 (partial)	Notes	RSA 91-A:5, VIII
RTK001161 to 001172	Medical Record – John Doe	RSA 91-A:5, IV
RTK001347 to 001350	Notes – Confidential Attorney Work Product	RSA 91-A:5, VIII and IV
RTK001444 to 001446	Drafts of communications between counsel, notes, confidential attorney work product	RSA 91-A:5, IV and VIII, and IX.
RTK001560 to 001561	Department of Safety Personnel Memo, supervisor to subordinate, and subordinate to supervisor response	RSA 91-A:5, IV; Administrative Rules Chapter Per 1500 Personnel Records.
RTK001584	Letter from AG to defense counsel disclosing personnel file information regarding state witness.	RSA 91-A:5, IV and Court Order dated 2/17/97 see RTK001528; Administrative Rules Chapter Per 1500 Personnel Records
RTK002221 to 002222	Disciplinary Complaint, Personnel file	RSA 91-A:5, IV, *Housell v. North Conway Water Precinct*, 154 N.H. 1 (2006); *Provenza v. Town of Canaan*, 175 N.H. 121 (2022)
RTK002259 to 002279	Internal Memorandum between subject employee and	RSA 91-A:5, IV, *Housell v. North Conway Water Precinct*, 154 N.H. 1

	supervisors and between supervisors and leadership re disciplinary complaints, including copies of related investigation reports. Internal investigation/ personnel file documents.	(2006); *Union Leader Corp. v. Town of Salem,* 173 N.H. 345 (2020); Administrative Rules Chapter Per 1500 Personnel Records.
RTK002679	State employee inked fingerprint card, personnel file	RSA 91-A:5, IV, VIII, and IX; Administrative Rules Chapter Per 1500 Personnel Records
RTK002680	State employee birth certificate, personnel file	RSA 91-A:5, IV, VIII, and IX; Administrative Rules Chapter Per 1500 Personnel Records
RTK002681 to 002703	State employee employment background investigation report, personnel file	RSA 91-A:5, IV, VIII, and IX; Administrative Rules Chapter Per 1500 Personnel Records
RTK004559 to 004570	Internal personnel practice, Rules and regulations, technical training and firearms tactics – disclosure would increase criminal's ability to circumvent law enforcement	RSA 91-A:5, IV; *Lodge v. Knowlton*, 118 N.H. 544 (1978); FOIA and FOIA caselaw
RTK005526	Handwritten notes for personal use, attorney work product privileged, confidential	RSA 91-A:5, IV, VIII, IX
RTK005579 to 005588	Internal personnel practice, Rules and regulations, technical training and firearms tactics – disclosure would increase criminal's ability to circumvent law enforcement	RSA 91-A:5, IV; *Lodge v. Knowlton*, 118 N.H. 544 (1978); FOIA and FOIA caselaw
RTK005897 to 005898	Juvenile Record/Educational Record	RSA 169-B:35-38; RSA 91-A:5, IV, RSA 91-A:5, III

Legal authority establishing the documents cited are non-public/not properly disclosed in response to a Right-to-Know request. The State reserves the right to assert additional legal authority for withholding this information should non-disclosure be challenged.

Appendix E: Important Superior Court Cases

130

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

James M. Knight

v.

School Administrative Unit #16, et al.

Docket No. 00-E-307

ORDER ON MOTION FOR SANCTIONS AND
MOTION FOR RECONSIDERATION OF ATTORNEY'S FEES

The petitioner brought a Petition for Injunctive Relief and Request for Attorney's Fees pursuant to RSA 91-A. On Nov. 2, 2000, the Court ordered the respondents to provide the petitioner with access to the respondents' Internet History Log Files ("IHLFs") dating from January 1, 1998. The Court also ordered the respondents to pay the petitioner's costs and attorney's fees. In a Motion to Reconsider attorney's fees, the respondents notified the Court that they could not comply with the Court's order because most of the IHLFs had been deleted. The petitioner now objects and moves for sanctions. The Court held a hearing on December 13, 2000; and for the reasons set forth below, the Court **DENIES** the respondents' Motion to Reconsider attorney's fees and **GRANTS** the petitioner's Motion for Sanctions.

FINDINGS:

The Court finds the following:

I. After the petitioner filed his Petition for Injunctive Relief on June 15, 2000, but before the trial on the merits on September

19, 2000, the respondents intentionally, and not by a routine matter, deleted the IHLFs.

II. Without revealing the destruction of public records to the Court, the respondents intentionally misled the Court into believing that the IHLFs still existed at the time of September trial.

SANCTIONS:

A. The Court makes a judicial finding that information in the deleted IHLFs was unfavorable and embarrassing to the respondents.

B. The Court finds the respondents to be in contempt of Court.

C. The respondents must pay the petitioner his costs and attorney's fees incurred both in the underlying litigation and in litigating this motion for sanctions.

D. The respondents must bear the costs and produce the remaining records currently in their possession which were the subject of the petitioner's request.

BRIEF BACKGROUND:

Between May and August 1999, the petitioner, James Knight, made three written and several oral requests to the respondent School Administrative Unit #16's Superintendent, respondent Dr. Arthur Hanson ("Hanson"), citing RSA 91-A, the Right-to-Know Law. The petitioner specifically asked to see the respondent's, Exeter Region Cooperative School District ("ERCSD"), and the respondent's, Exeter School District ("ESD"), IHLFs dating **from January 1, 1998,** to the present. Hanson personally responded to each request but through stalling tactics neither granted nor denied the

petitioner's request until September. In a letter dated September 2, 1999, repeating the petitioner's request to access the IHLFs **from January 1, 1998,** Hanson finally denied the request, forcing the petitioner to pursue costly litigation.

On June 15, 2000, the petitioner petitioned this Court for injunctive relief and requested attorney's fees pursuant to RSA 91-A. In his request for relief, the petitioner specifically asked this Court: "B. Order the Defendants to provide the plaintiff with access to the Exeter Regional Cooperative School District's and the Exeter School District's Internet History Log Files in electronic or disk form **from January 1, 1998, to the present**". (Petr.'s Ver. Pet. (emphasis added.)) The respondents, although they knew or should have known that the IHLFs were public records pursuant to RSA 91-A, continued to deny the petitioner access and filed an Answer which referenced the above correspondence. At no time prior to the September 19, 2000, trial, nor at any point during trial, did the respondents notify the Court, or the petitioner, that the IHLFs that the petitioner were requesting did not exist.

On November 2, 2000, the Court issued its order granting the petitioner's request to view the IHLFs from January 1, 1998 to the present and for attorney's fees. On November 13, 2000, the respondents moved for reconsideration of attorney's fees. In this motion, the respondents notified the Court, and the petitioner, **for the first time**, that "the requests currently stored in ERCSD's and ESD's computers no longer date back to 1998." In their November 22, 2000, Memorandum, the respondents first notified the Court that

ERCSD's IHLF dates back only to August 27, 2000 and ESD's IHLF dates back only to January 28, 2000.

The petitioner now moves for "Sanctions Based on the Defendant's Destruction of Public Records and Other Misleading Conduct." The respondents deny that they misled the Court. The Court held a hearing on December 13, 2000. This order is consistent with the rulings made at the December hearing.

FINDINGS:

I. The Respondents Destroyed Public Records

Throughout litigation, the respondents failed to notify the Court that the files the petitioner was requesting did not exist. Only after the Court ordered the respondents to disclose the IHLFs to the public, the respondent first gave notice to the Court that most of the IHLFs had been deleted.

The respondents claim that they have not "deleted or purged any outgoing URL requests because of plaintiff's right to know requests or this case." (Def. Memo. Mot. to. Recons., 11/22/00.) The respondents argue that before the petitioner filed this action, they did not have a duty to retain any part of the IHLFs. The respondents continue and claim that "because of this case, ERCSD and ESD have saved data which would otherwise have been deleted..." (Id.). The Court finds this statement to be contradictory and unsupported by the record.

First, the respondents informed the Court that the IHLFs "no longer date[s] back to 1998." (Mot. to Recons. 11/13/00.) Then, the respondents claimed that ESD and ERCSD maintained a backlog of 30

days, but also asserted that ERCSD's IHLF dates back to August 27, 2000 and ESD's IHLF dates back to January 28, 2000. (Mem. in Supp. of Mot. to Recons. 11/22/00.) Hanson reiterated this information in a sworn affidavit. (Affidavit of Arthur L. Hanson, 11/22/00.)

Notwithstanding these claims, in a later sworn affidavit, Hanson informed the Court that ERCSD was on a 5-week rotational period and that its IHLF dated back to August 27, 2000. (Affidavit of Arthur L. Hanson, 12/05/00.) He also stated that ESD's IHLF dated back to January 28 or 29, 2000, excluding a period from August 5, 2000, to September 18, 2000. (Id.)

Joseph Faletra, the only technical staff employee, who testified at the September trial **and** at the December hearing, was not hired until July 2000, after this action had commenced and after the files were allegedly deleted. After the December hearing, the Court reviewed the tapes of the September trial. At the September trial, the petitioner's attorney specifically asked Faletra whether he agreed with the statement that "[t]he main Squid Proxy Server log file that dates back to November 1998, is currently over 470MB in size." (quoted from the 6/14/99 response.) Faletra stammered briefly before he replied that he "couldn't say" but never mentioned that the files had been deleted.

Suddenly, at the December hearing, Faletra testified that ERCSD maintained a 5-week rotational period and, after he learned of the lawsuit, he independently decided to begin saving the IHLF on separate disks from August. Faletra also testified that ESD

maintained a 90-day cycle which was changed in favor of saving data because of the pending trial.

It is clear to the Court that Faletra withheld significant information from the Court and the petitioner when he testified in September as he knew, at that time, that the files at issue had already been deleted.

The Court finds the respondents' claims to be untenable and replete with contradictions. None of the respondents' explanations add up mathematically:

ERCSD: If ERCSD was on a 5-week rotational period, and if the IHLF was maintained from the action's institution, the IHLF would date back to early May. If, as Faletra testified, he began saving the IHLF in August, it would date back to June or July. However, the respondents claim that ERCSD's IHLF dates back only to August, 27, 2000.

ESD: If ESD was on a 90-day rotational period, in mid-June or August it would date back only to mid-March or May, respectively. However, the respondents claim that ESD's IHLF dates back to January 29, 2000.

At the September trial, Hanson testified that the only people who have had access to the proxy servers were the System Administrator and three people whom the System Administrator designates ("technical staff"). Hanson testified that the IHLFs became too large to store in the proxy servers and so the technical staff made a decision on its own, without consulting him, to delete large portions of the IHLFs. Hanson claimed that he was unaware

when the technical staff had made this decision and when they began deleting the IHLFs. Hanson testified that at some time prior to the September trial, he learned that the technical staff had been deleting the IHLFs on a rotational basis, but Hanson mysteriously failed to so notify the petitioner.[1] The respondents never informed the Court of this rotational deletion and never mentioned in any of their briefs, nor indicated at the September trial, that such a practice was occurring. The respondents did not produce, either at the September trial or at the December hearing, any of the four members of the technical staff who could support this testimony. Based on the selectively uninformed and unhelpful substance of Hanson's testimony, as well as his evasive and tentative demeanor while testifying, the Court finds his testimony to be incredible and self-serving.

After the Court ordered the respondents to produce the public records, and the motion for sanctions was filed, the burden shifted to the respondents to show cause why they could not comply with the Court's ruling, especially when the respondents never informed the Court that these public records had been destroyed. The respondents failed to meet this burden. The only witnesses produced at the

---

[1] At trial, Hanson testified that his reference to the date of November 1998 and not January 1998 in his 6/14/99 and 8/12/99 responses should have, at the time he received them, caused the petitioner to question the lack of files from January 1998 to November 1998.

Three points are worthy of mention here. First, as the petitioner testified, this is a new technology and he believed the proxy servers might not have been in place or have been recording prior to November 1998. Second, the rotational deletion had not yet started either by November 1998, June 1999, or August 1999. Third, Hanson himself did not question the lack of these files.

December hearing were unfamiliar with all the facts and dates pertaining to the IHLFs' destruction. The respondents produced Hanson and Faletra, neither of whom had any knowledge as to when the respondents began deleting the IHLFs. Based on the pleadings, the direct and circumstantial evidence at the September trial and at the December hearing, and all the logical inferences that can be drawn therefrom, the Court finds that the IHLFs were deleted after June 15, 2000, the date the petitioner filed suit, but before September 19, 2000, the date of the trial. The Court further finds that this deletion was intentional and not a matter of routine.

II. The Respondents Intentionally Misled the Court

The respondents intentionally misled the Court by allowing the Court and the petitioner to believe that the IHLFs still existed at the September trial.

Hanson testified at the December hearing that the reason he failed to notify the Court that the files the petitioner had requested were deleted was because he was under the impression that the petitioner only wanted files saved under the present and future rotations. Despite the petitioner's 5/24/99, 6/22/99 and 8/10/99 requests - which specifically state the January 1, 1998 date; and despite his own 6/14/99, 8/12/99 and 9/2/99 responses - which reference the requests and the latter of which also states the January 1, 1998 date; and despite the 6/15/00 Verified Petition to the Court - specifically asking the Court for access to the IHLFs from January 1, 1998, to the present; and despite the respondents' 7/17/00 Answer to the Court - referencing most of the

aforementioned documents; and despite the petitioner's 9/19/00 Request for Findings - which lists the January 1, 1998 date; Hanson unpersuasively testified that he assumed the petitioner wanted "present" IHLFs and it never occurred to him that the petitioner wanted the "past" IHLFs. Combined with Faletra's testimony, the Court lightly regards this posture.

The respondents' defense is nothing more than a specious and transparent attempt to camouflage their actions. The September trial on the merits was a lengthy evidentiary hearing and never once did the respondents share with the Court that they had already deleted the very subject matter of the litigation, something Faletra clearly and Hanson presumably knew. The Court finds that the respondents, by pretending the records still existed, deliberately deceived the Court.

SANCTIONS:

A. The Deleted IHLFs Contained Unfavorable and Embarrassing Information

At the close of the December hearing, the respondents' attorney repeatedly invited the Court to speculate as to what the respondents would have to gain by deleting the files and perpetrating a fraud on the Court. The clear answer is that the deleted information was unfavorable and embarrassing to the respondents. Accordingly, the respondents were faced with an unpleasant choice: weigh the displeasure of the Court against the outrage of the public. They made a calculated decision to delete the files in an attempt to dupe the Court rather than face the

public reaction of angry and outraged citizens when they learned what was contained in the IHLFs.

As a sanction, through reasonable inferences from the record and by way of analogy to the concept of spoliation, the Court makes a judicial finding that information in the IHLFs was unfavorable and embarrassing to the respondents. *See* Rodriguez v. Webb, 141 N.H. 177 (1996). The following discussion is not relevant under the Right-to-Know statute and was not considered in the Court's November 2, 2000 order, but is now pertinent as to why the Court believes the respondents intentionally, and not as a matter of routine, deleted the IHLFs. Id., at 180 ("Although there was no direct evidence that the defendant acted with fraudulent intent, the circumstances of the destruction alone were sufficient to permit the jury to infer that the destroyed evidence would have favored the plaintiff.")

In an Internet Statement in ESD's 'Acceptable Use Policy,' ("policy") sent to students' parents in April 1999, the respondent ESD recognized the Internet's negative effects.

> There is, unfortunately, a "dark side" to the Internet which is composed of material that is not of educational value in the context of the school setting. This information may be judged as inaccurate, abusive, profane, sexually oriented, or illegal. (Policy, p.3, Pet'r Ex. 1-1).

Despite this acknowledgement, the respondents decided that Internet "blocking" or "filtering software" was too costly and would not be installed (Policy, p.4, Pet'r Ex. 1-1), thereby leaving open the ability for students to access inappropriate websites and information. The petitioner, a parent, believed that the Internet

was being used inappropriately and voiced his concern over the lack of filtering to the respondents on numerous occasions.[2]

Finally, at the end of September 1999, ERCSD installed a computer filter monitoring system. Hanson testified at the September trial that ERCSD began requiring students and parents to sign its Internet and Electronic Mail Permission Form at the beginning of the 1999-2000 school year. (Resp. Ex. E.) ESD circulated a similar policy to parents in April 1999.

Once the petitioner instituted legal action, the respondents were faced with an unpleasant choice: grant the petitioner's request to view the IHLFs and reveal the actual use of the computers to the public or deny the petitioner's request to view the public record. The Court finds the respondents chose to sabotage the petitioner and the public by deleting the IHLFs so that when the Court ordered the respondents to produce the public records the petitioner had asked for, these could no longer be produced. At present, the IHLFs which the respondents claim that they have saved, and could produce, all conveniently date after September 1999, i.e. after the filter was in place and after the respondents' "acceptable use policies" were in effect.

---

[2] *See* ERCSD School Board Minutes, 6/8/99, Pet'r Ex. 1-5; ERCSD School Board Minutes, 6/22/99, Pet'r Ex. 1-8; ERCSD School Board Minutes, 8/10/99, Pet'r Ex. 1-12. *See also* 9/2/99 response; respondents' Memorandum, 9/19/00. Hanson testified at trial to having conversations with the petitioner about his concerns in April and May 1999.

Accordingly, the Court makes a judicial finding that information in the deleted IHLFs was unfavorable and embarrassing to the respondents.

B. The Respondents are in Contempt of Court

The Court finds that the respondents fraudulently destroyed a public record when they deleted the IHLFs. For all the reasons given in this order, the Court believes that the respondents acted in bad, if not rancid faith, and finds them in contempt of Court.

C. Costs and Attorney's Fees

This Court has equitable powers to impose sanctions.

> The inherent power to impose sanctions stems from a court's necessary power to control the proceedings before it. When overriding considerations so indicate, the award of fees lies within the power of the court, and is an appropriate tool in the court's arsenal to do justice and vindicate rights. The power of the judiciary to control its own proceedings, the conduct of the participants, the actions of the officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice. Emerson v. Town of Stratford, 139 N.H. 629, 631 (1995) (quotations, citations and brackets omitted).

This case is replete with bad faith. First, the respondents denied the petitioner his right to view the IHLFs, forcing the petitioner to pursue costly litigation. Next, the respondents destroyed these public records. Then, without revealing this destruction to the Court, or to the petitioner, the respondents continued to feign their existence during lengthy litigation. The Court finds that the respondents have wasted judicial resources, the petitioner's counsel's time, and the petitioner's time and money.

The Court is frankly astonished that the respondents have the temerity to sulk over the initial imposition of attorney's fees, in a motion to reconsider, given the foregoing circumstances.

The Court finds that the respondents have displayed a flagrant disregard for the public's right to know under RSA 91-A, have destroyed public documents in bad faith and have intentionally misled the Court. The Court rules that the respondents shall be responsible for the petitioner's costs and attorney's fees incurred both in the underlying litigation and in litigating this motion for sanctions.

D. The Remaining Records

The Court rules that the respondents must now bear the costs to produce for the petitioner the remaining records currently in their possession, consistent with the Court's November 2, 2000 Order.

So Ordered.

1/3/01
Date

Gillian L. Abramson
PRESIDING JUSTICE

The State of New Hampshire

MERRIMACK, SS. SUPERIOR COURT

NO. 217-2016-CV-282

STEVEN WELFORD

V.

STATE OF NEW HAMPSHIRE, DIVISION OF STATE POLICE

ORDER

This case is brought under the Right to Know Law and concerns a request that the New Hampshire State Police produce documents "that concern complaints or reports of suspected criminal misconduct, if any," involving a named individual. (State's Memorandum, Exhibit A). The inquiry refers specifically to a police chief's possible transfer to the State Police of a criminal matter concerning the individual.

The State Police replied that it had no documents responsive to the request, but later clarified its answer to say that it had "no documents responsive to this request that are subject to disclosure pursuant to RSA 91-A." As it explained later, the answer was meant as a refusal to either confirm or deny there were such records, because just as disclosing the reports might be an invasion of privacy, so would confirming their existence. *See* State's Memorandum, ¶ 3.

The United States Court of Appeals for the D.C. Circuit calls this answer a *Glomar* response, based on "the CIA's refusal to confirm or deny the existence of records about the *Hughes Glomar Explorer*, a ship used in a classified [CIA] project 'to raise a sunken Soviet submarine from the floor of the Pacific Ocean to recover the missiles, codes, and communications equipment onboard for analysis by United States military and intelligence experts." *People for the Ethical Treatment of Animals (PETA) v. Nat'l Inst. Health*, 745 F.3d 535, 540 (D.C. Cir. 2014) (quotation omitted). This response is justified when "merely acknowledging the existence of responsive records would itself 'cause harm cognizable under'" an exemption. *Id.* (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)) (internal quotation omitted)). Under interpretations of the federal Freedom of Information Act (FOIA) (influential in analyzing the Right to Know Law) "to the extent the circumstances justify a *Glomar* response, the agency need not conduct any search for responsive documents or perform any analysis to identify segregable portions of such documents." *Id.* Mr. Welford does not challenge the categorical nature of the agency response, but he says the documents should be disclosed because the public interest in disclosure outweighs the privacy interest of the person whose records are sought.

"The purpose of the Right–to–Know Law 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." *38 Endicott St. N. v. State Fire Marshal*, 163 N.H. 656, 660 (2012) (quotation omitted). An agency may withhold an otherwise public record, but only if disclosure is barred by statute or an exemption in RSA 91-A:5. RSA 91-A:4, I (2013). *See Prof.*

Fire Fighters of New Hampshire v. N.H. Local Government Center, 163 N.H. 613, 614 (2012). The exemptions are construed narrowly, with the burden falling on the agency to show an exemption applies. *CaremarkPCS Health, LLC v. N.H. Dept. of Admin. Servs.*, 167 N.H. 583, 587 (2015).

Law enforcement agency records may come within an exemption for "files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV (2015 supp). In *Lodge v. Knowlton*, 118 N.H. 574, 576 (1978), the State Supreme Court adopted the FOIA exemption in 5 U.S.C. § 552(b)(7) (A)-(F) for records or information compiled for law enforcement purposes, including subpart 7(C),where production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." In order to claim the exemption "an agency need not establish that the materials are investigatory, but need only establish that the records at issue were compiled for law enforcement purposes, and that the material satisfies the requirements of one of the subparts of the test." *Montenegro v. City of Dover*, 162 N.H. 641, 646 (2011) (quotation omitted). Welford does not contest that the records he seeks would have been "compiled for law enforcement purposes." The question then is whether the State Police was justified in neither confirming nor denying that it possessed responsive documents, on the basis that to answer otherwise "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *PETA*, 745 F.3d at 541. *See Murray v. N.H. Division of State Police*, 154 N.H. 579, 582 (2006).

The validity of the agency response is determined by weighing "the public interest in disclosure of the requested information against the government interest in nondisclosure, and in privacy exemption cases, the individual's privacy interest in nondisclosure." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 475 (1996).

On one side of the ledger is the individual's privacy interest. Just "the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Schrecker v. U.S. Dept. of Justice*, 349 F.3d 657, 666 (D.C. Cir. 2003) (quotation omitted). It follows that persons have an "obvious privacy interest cognizable under [exemption C] in keeping secret the fact that they were subjects of a law enforcement investigation," *Citizens for Resp. and Ethics in Washington*, 746 F.3d at 1091, and "in not being associated unwarrantedly with alleged criminal activity." *N.H. Civil Liberties Union v. City of Manchester*, 149 N.H. 437, 440–41 (2003).

Mr. Welford says the fact that the person whose records he seeks is a public official – a local school board member – reduces the privacy interest. Public officials "may have a somewhat diminished privacy interest," but they "'do not surrender all rights to personal privacy when they accept a public appointment.'" *Citizens for Resp. and Ethics in Washington*, 746 F.3d at 1092 (quotations omitted). "While an individual's official position may enter the 7(C) balance, it does not determine, of its own accord, that the privacy interest is outweighed." *Bast v. U.S. Dept. of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (citation omitted). In fact, to the extent the person is known because of the position he holds, "[t]he

degree of intrusion is . . . potentially augmented." *Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856, 865, (D.C. Cir. 1981). "The disclosure of that information would produce the unwarranted result of placing the named individual[] in the position of having to defend [the] conduct in the public forum outside of the procedural protections normally afforded the accused in criminal proceedings." *Id.* In this case, the privacy interest is not lessened by any appreciable degree simply because the inquiry is for records concerning a person on a local school board.

Weighed against the privacy interest is the public interest in disclosure that lies in "provid[ing] the utmost information to the public about what its government is up to." *Union Leader*, 141 N.H. at 476 (quotation omitted). Matters of law enforcement "are proper subjects of public concern." *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 766 n. 18 (1989). But that interest

> is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed. . . . If disclosing the information does not serve this purpose, disclosure will not be warranted even though the public may nonetheless prefer, albeit for other reasons, that the information be released.

N.H. Right to Life v. Director, N.H. Charitable Trusts Unit, 2016 WL 3086734, at *8 (N.H., June 2, 2016) (quotation omitted). So, "the relevant public interest is *not* to find out what [the individual] himself was 'up to' but rather how the [government] carried out [its] . . . statutory duties to investigate and prosecute criminal conduct." *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Justice*, 746 F.3d 1082, 1093 (D.C. Cir. 2014).

Keeping in mind that the public interest at stake is the right of citizens to find out what "the government is up to," *Union Leader*, 141 N.H. at 47, disclosing law enforcement reports on a specified individual would shed direct light on the purported activities of the person, but only provide indirect insight into how the government functions. Still, Welford argues that if reports of criminal activity exist, they would show how various governmental bodies operate – the local school district and SAU with respect to how well they screen employees and volunteers, and the state and local police in terms of how diligently and effectively they investigate crime reports.

The public interest in knowing whether the government is doing its job is a legitimate one. But it would negate the exemption if merely stating this public interest gave it greater or equal weight to the privacy interest. For that reason, the Supreme Court requires

> that, where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

National Archives and Records Admin. v. Favish, 541 U.S. 157, 173–74 (2004). *See PETA*, 745 F.3d at 543 (where "the FOIA request implicated the public interest in shedding light on agency investigatory procedures . . . we have consistently found that interest, without more,

insufficient to justify disclosure when balanced against the substantial privacy interests weighing against revealing the targets of law enforcement investigation.")

As Congress has modified the law enforcement records exemption under FOIA (5 U.S.C. § 552(b)(7)), the State Supreme Court has made corresponding changes to the exemption under state law. *See Montenegro v. City of Dover*, 162 N.H. at 646 (noting adoption of amended test in *Murray v. N.H. Division of State Police*, 154 N.H. at 582). There is good reason to believe the State Supreme Court would adopt the requirement imposed by *Favish*.

On the basis of RSA 91-A, Mr. Welford sought law enforcement records concerning reports of criminal conduct by a particular individual. If the State Police confirmed it had such information, that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The public interest at stake is to allow an understanding of agency investigatory practices, but there is no allegation that an agency performed its duties improperly. Under these circumstances, the privacy interest of the person outweighs the public interest in disclosure, so the *Glomar* response by the Division of State Police was appropriate. For the reasons given, the complaint is DISMISSED.

SO ORDERED.

DATE: SEPTEMBER 22, 2016

BRIAN T. TUCKER
PRESIDING JUSTICE

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

New Hampshire Republican State Committee

v.

Governor Maggie Hassan and the State of New Hampshire

No. 2016-CV-612

ORDER

The Plaintiff has filed a Petition pursuant to the Right to Know Law, RSA 91-A seeking that the Court order the Defendants, the Governor and various agencies of the State of New Hampshire, to produce certain documents withheld from a production made pursuant to its RSA 91-A request. The Petition asserts that, on a number of occasions, the Plaintiff has requested public documents related to a $37 million contract awarded to Dartmouth-Hitchcock Medical Center to provide psychiatric services to New Hampshire Hospital. (Pet., ¶ 6.) Plaintiff recites in the Petition that requests have been served on the Governor, the Commissioner of Health and Human Services, the Department of Resources and Economic Development, and the Department of Safety. (Pet., ¶ 12–19.) Plaintiff recites that some requested documents have been produced, but a number of documents have been withheld or redacted by the Defendants pursuant to claims of privilege.

By Order dated October 27, 2016, this Court ordered that Defendants produce a

privilege log, or so-called "Vaughn index[1]," so that the claim of privilege could be adequately determined. Defendants have filed an index and the Plaintiff has objected, alleging that the index provided is inadequate. The Court agrees. For the reasons stated in this Order, the Court orders that the Defendant shall update the index in accordance with the terms of this Order, which will allow the Court and the parties to determine whether the claims of attorney-client and/or executive privilege are well taken, whether *in camera* review must be conducted, or whether the documents must be produced. The updated index shall be filed with this Court on or before February 3, 2017. However, the Plaintiff's Objection to Defendants' withholding documents pursuant to the draft exception of RSA 91-A is OVERRULED.

I

"The purpose of [the Right to Know Law] 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; Caremark PCS Health v. N.H. Dept. of Admin. Servs., 167 N.H. 583, 587 (2015). However, the statute does not provide unrestricted access to governmental records; to effectuate important governmental policies, certain types of documents are exempted from the provisions of the statute by RSA 91-A:5. The New Hampshire Supreme Court has stated that it interprets questions regarding the Right to Know Law "with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives" of providing access to government proceedings that is not unreasonably restricted. Id. The Court has stated that it looks to the decisions of other jurisdictions interpreting similar acts, including federal

[1] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

interpretations of the federal Freedom of Information Act ("FOIA") because such laws are "interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved." Montenegro v. City of Dover, 162 N.H.641, 645 (2011).

In a case involving a voluminous production of documents, preparation of a Vaughn index, which requires the nondisclosing party to list each document withheld, with a description of the document and the basis for withholding or redaction, is particularly appropriate. Prof'l Firefighters of N.H. v. Health Trust, 151 N.H. 501, 506 (2004). As the Court noted in Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 548 (1997), "[t]he Vaughn index is a procedure developed by the federal courts to effectuate the goal of broad disclosure of public documents and assist trial courts in cases involving a large number of documents." This procedure "safeguards the adversary process in a setting where one party, the party resisting disclosure, has exclusive control of vital information" by forcing the government "to analyze carefully any material withheld" and enabling the trial court to fulfill its duty of ruling on the applicability of exceptions. Id. (citation omitted).

"The overriding aim of the Vaughn index is to maximize disclosure of public documents — a purpose consistent with the aims of the Right-to-Know Law." Union Leader Corp., 142 N.H. at 548. The burden of proving that an exception to the Right to Know Law applies rests with the party seeking to withhold the document. In re Keene Sentinel, 136 N.H. 121, 128 (1992). The New Hampshire Supreme Court has stated that:

> Requiring *in camera* inspection of all documents in a large document case would undermine this holding since it would shift the burden of proof from the party resisting disclosure to the petitioners, who with limited knowledge must argue that a document is not exempt while straining the resources of the court, which is forced to wade through potentially voluminous documents to determine whether an exemption applies.

Union Leader Corp., 142 N.H. at 549 (citations and quotation omitted).

II

The essential elements of a privilege log are described in Superior Court Rule 21(c). The Rule provides:

> (c) **Privilege Log.** When a party withholds materials or information otherwise discoverable under this rule by claiming that the same is privileged, the parties shall promptly and expressly notified the opposing party of the privilege claim and, without revealing the contents or sections of the materials or information at issue, shall describe its general character with sufficient specificity as to enable other parties to assess the applicability of the privilege claim.

This rule is virtually identical to Federal Rule of Civil Procedure 26(b)(5). The Defendants assert two different privileges; attorney-client or work product privilege and executive privilege.[2] Some of the difficulty in this case arises from the fact that the New Hampshire Supreme Court has never discussed the parameters of executive privilege and the law in other jurisdictions is not uniform. The Court addresses the adequacy of the log provided by Defendants separately with respect to each of the privileges claimed.

A

The law regarding the sufficiency of a privilege log when a claim of attorney-client or work product privilege asserted is well-settled. "The standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed." SEC v. Beacon Hill Asset Mgmt., LLC, 231 F.R.D. 134, 144 (S.D.N.Y. 2004). "The focus is on the specific descriptive portion of the log, and not on the conclusory invocations of the privilege or work-product rule, since the burden of the party

[2] Plaintiffs do not assert a claim of executive privilege may not be made in response to an RSA 91-A

withholding documents cannot be discharged by mere conclusory or ipse dixit assertions." Id. (internal quotation omitted); see also In re Copper Mkt. Antitrust Litig., 200 F.R.D. 213, 223 (S.D.N.Y. 2001). To satisfy these requirements it is often held that the log must include, at a minimum, (1) the type of document, (2) the general subject matter of the document; (3) the date of the document; (4) the author of the document; and (5) the recipient of the document. Ruran v. Beth El Temple of West Hartford Inc., 226 F.R.D. 165, 168-169 (D.Conn. 2005) (referencing local rule 37 (a)); see also Bowne v. AmBase Corp., 150 F.R.D. 465, 474 (S.D.N.Y. 1993). While a statement that a communication involves legal advice may be sufficient, depending upon the type of document involved, a document which simply reflect "communications" with counsel is insufficient, because "[a]n attorney and client can have many communications which are neither privileged nor subject to work product protection, e.g., correspondence advising of the date and time of meetings, correspondence transmitting documents, etc." SEC v. Beacon Hill Asset Mgmt., LLC, 231 F.R.D. at 145. See also E. Epstein, The Attorney-Client Privilege and The Work Product Doctrine, American Bar Association, Litigation Section (5th Ed. 2007), pp. 1188-1195. In order to provide an adequate basis for assessment of the privilege, a privilege log must fully identify the authors and recipients of the documents so as to allow the court to determine that the documents are in fact communications between the attorney and client (as required the attorney-client privilege to apply) and/or that they were prepared by or for defendants or their representatives (as required for the work product doctrine to apply). See Hill v. McHenry, 2002 U.S. Dist. LEXIS 6637, *6–8 (D. Kan. April 10, 2002).

When these standards are applied to the log produced by the Defendants, it is

---

request, but challenged the adequacy of the Defendant's response and the privilege.

apparent that the log is deficient. In particular, the Defendants' production lacks any description of the nature of the document withheld sufficient for the Court to make an intelligent determination of whether or not a privilege is available. Accordingly, Defendants shall amend their privilege log, to provide a sufficient basis for the Court to determine whether or not the claim of privilege is well taken with respect to each document.

B

The Defendants have withheld a number of documents noting nothing more in the privilege log than "executive privilege." Defendants, however, provide no explanation as to why a document they seek to withhold is privileged. The Plaintiffs argue that each claim of executive privilege requires an affidavit by the Governor explaining the basis for the claim of executive privilege, but do not address the circumstances under which a legitimate claim of privilege can be made. Both parties' arguments miss the mark.

It is generally acknowledged that some form of executive privilege is a necessary complement to the executive power. Annot., Construction and Application under State law of Doctrine of "Executive Privilege", 10 A.L.R.4th 355 (1981). The recognition is not, however, universal. Babets v. Sec. of the Executive Office of Human Services, 403 Mass. 230, 233 (1988) ("We think that the doctrine of separation of powers does not require recognition of [the doctrine of executive] privilege"); see also Mathews v. Pyle, 75 Ariz. 76, 81 (1952) (suggesting that any privilege to deny a right to inspection of public documents must be determined by a court, not by sole determination of the executive).

The Plaintiffs concede that an executive privilege is recognized under New Hampshire law, but assert that the contours of the privilege are set out in N.H. Democratic

Party v. Craig Benson, as Governor, 2004-E-0092 (N.H. Super. Ct., June 3, 2004) (Fitzgerald, J.). In Benson, the court held that when a claim of executive privilege is asserted, the court should "balance the public harm that disclosure would cause against the benefits to the public of disclosure." (Order, 1, 9 (citing Annot. Construction and Application under State law of Doctrine of Executive Privilege, 10 A.L.R.4th 355 § 2[a])). The court reasoned that the test set forth in the ALR annotation is "comparable to that established by the New Hampshire Supreme Court for addressing claims for exemption from the Right to Know Law under RSA 91-A: 5." (Order, at 9.) It quoted Goode v. N.H. Legis. Budget Asst., 148 N.H. 551, 554 (2002) which states that ""to determine whether records are exempt as confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure to the government." Id. The Benson court then concluded that it would "therefore judge the claim of executive privilege by the same standard applied to claims of 'confidentiality' under the right to know law, and weigh the public interest in disclosure against the Governor's interest in nondisclosure." (Order, at 9.)

While not explicitly so stating, the Benson court seemed to conflate executive privilege and deliberative privilege. (Order, 1, 11 ("The Governor argues that the documents at issue are predecisional in nature, *deliberative and reflect a consultative process between the Governor and executive department advisors*. The Governor argues that because he requested these documents to aid him in formulating policy they are covered by the executive privilege . . . ." (emphasis supplied and internal citation omitted))). It is generally recognized, however, that a claim of executive privilege is constitutional in nature, and arises from the inherent powers of a branch of government,

while the deliberative process privilege is a common-law privilege. In re Sealed Case, 121 F.3d 729, 736-37 (D.C. Cir. 1997); see also U. S. v. Nixon, 418 U.S. 683, 705 (1974).

Most well-reasoned state court decisions began their analysis of executive privilege with United States v. Nixon in which the United States Supreme Court held that a President has a right to the confidentiality of his conversations and correspondence, similar to the confidentiality of judicial deliberations, which is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." Id. at 708. The United States Supreme Court recognized that:

> [T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705-706.

Thus, in State ex rel. Dann v. Taft, 109 Ohio St. 3d 364, 377 (2006), a divided Ohio Supreme Court held that the principle of separation of powers requires that the Governor of Ohio have "a qualified gubernatorial-communications privilege that protects communications to or from the governor when the communications were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking." Id. The majority reached this conclusion even though Ohio does not have a constitutional provision specifically addressing the concept of separation of powers, and even though the drafters of the Ohio Constitution contemplated that the executive and judicial branches would be subordinate to the legislative branch. Id. at 376.

Similarly, the New Mexico Supreme Court held that the separation of powers clause in the New Mexico Constitution required recognition of an executive privilege to safeguard the decision-making process of the government by "fostering candid expression of recommendations and advice and to protect this process from disclosure." Republican Party of N.M. v. N.M. Taxation and Revenue Dep't, 283 P.3d 853, 866 (2012); see also Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 782 (Del. Super. Ct. 1995).

Pt. 1, Art. 37 of the New Hampshire Constitution contains an explicit guarantee of separation of powers. The New Hampshire Supreme Court has regarded the separation of powers principle as a fundamental basis for the liberties established by the New Hampshire Constitution. See, e.g. Gould v. Raymond, 59 N.H. 260, 275 (1879). While separation of powers is a description of the operation of government in the federal Constitution, it is an explicit right under the New Hampshire Constitution which has been said to be the foundation of all other constitutional rights:

> In this state the unlimited power transferred from the British parliament to the revolutionary and provisional government of 1776, and exercised by that government in legislative decrees banishing persons and confiscating property without trial and without notice, came to an end on the second day of June, 1784. On that day private rights were protected by a separation of the powers of government.

Ashuelot Railroad v. Elliot, 58 N.H. 451, 452 (1878).

The Court believes that the standard to be applied in considering whether or not executive privilege exists involves more than a determination of a balance of harm to the public by withholding and harm to the public by release. Such an analysis places the Court in the position of, ultimately, making a policy decision about what information should be disclosed and is arguably inconsistent with the legislative policy to provide the greatest possible public access to the actions, discussions, and records of all public bodies.

Caremark PCS Health, 167 N.H. at 587.

The separation of powers principle is violated "when one branch usurps an essential power of another." Pet. of Mone, 143 N.H. 128, 134 (1998). There can be no doubt that the Legislature lawfully may pass a law requiring openness in government, such as RSA 91-A, and the courts may determine whether or not information a government seeks to maintain as privilege must be disclosed. But in doing so, with respect to a claim of executive privilege, the proper standard must be whether or not requiring disclosure will impair a governor's ability to carry out the functions of his or her office effectively. Pet. of S. N.H. Med. Ctr., 164 N.H. 319, 328 (2012) (discussing the overlap in powers between the legislative branch and judicial branch to promulgate rules of evidence). While "[t]he phrase 'executive privilege' has not been used with precision or uniformity by courts," see Killington, Ltd. v. Lash, 153 Vt. 628, 632 n.3 (1990), the Court believes that since the privilege is based upon separation of powers, under New Hampshire constitutional law a functional analysis is appropriate to determine whether or not a court can pierce the executive privilege possessed by a governor. The scope of the privilege depends upon the needs of the executive[3].

[3] It is not clear that a claim of deliberate process privilege is being made by the Defendants. Deliberative process privilege, akin to executive privilege, "exempts from disclosure communications between executive officials that are both pre-decisional and deliberative." Aland v. Mead, 327 P. 3d 752, 760 (Wyo. 2014). The New Mexico Supreme Court has declined to recognize a deliberative privilege, noting that the New Mexico Rules of Evidence contemplate privileges only as required by the Constitution, the Rules of Evidence, or other rules adopted by the Supreme Court, not common law privileges. Republican Party of N.M., 283 P.3d at 867. The New Hampshire Rules of Evidence contain almost identical language. However, the New Hampshire Supreme Court has suggested that a deliberative process privilege is included within the statutory language of RSA 91-A: 5 IV which allows the government to withhold confidential information: "[a]s previously noted, however, any 'decisions' must be completed by October 1, and, therefore, there is no deliberative process provided for in the statute after that time. While it is arguable that the interaction between the Governor and department heads prior to October 1 constitutes "a deliberative process" which might be protected, that is not an issue presently before us". Chambers v. Gregg, 135 N.H. 478, 41 (1992. The Court believes that to the extent the deliberative process privilege exists in New Hampshire it exists to the extent necessary for the Executive to carry out the functions of his or her office.

C

The Plaintiff also asserts that in order for an executive privilege to be recognized, the Governor must provide an affidavit, with respect to each document, setting forth the reason for withholding the documents. The Court disagrees. In Benson, the court stated that it adopted the view of the Vermont Supreme Court in Herald Ass'n, Inc. v. Dean, 816 A.2d 469 (Vt. 2002) in holding that an executive privilege exists coextensive with the deliberative process privilege, and that for it to be asserted the executive must support a claim by affidavit based on actual personal consideration by the responsible official. (Order, p.11.)

Dean involved a claim of executive privilege covering the Governor's entire calendar, some of which the Vermont Supreme Court recognized "does not fall within the class of advisory communications" which would be privileged as related to executive policymaking or deliberations. Herald Ass'n, Inc., 816 A.2d at 475. In the narrow context of that case, the Vermont Supreme Court ordered that the Executive must specifically identify the documents for which the privilege is claimed and explain why the documents are protected by the privilege. The Vermont Supreme Court appears to have conflated its analysis with the far narrower state secrets privilege.[4] Dean's application to the instant case is therefore limited.

Accordingly, the Defendants must provide a privilege log which sets forth the basis

---

[4] The Vermont Supreme Court in Dean cited United States v. Reynolds, 345 U.S. 1, 7-8 (1953), which actually involved a claim of state secrets, for the proposition that an affidavit of a member of the executive branch explaining the claim of privilege must be provided. Dean was relied upon by the Benson court for the proposition that documents which were produced, but as to which a subsequent claim of executive privilege was made and no privilege log produced, could not be withheld since the defendants failed to make a showing that the documents were protected by executive privilege by even identifying the specific document were providing an affidavit of an executive who claimed privilege. See Ludtke . N.H. Insurance Dep't, et al, No.

for their claim of executive privilege with respect to each document, and with reference to the constitutional basis for withholding the document. While there is no requirement of an affidavit by a particular individual, as is the case for an attorney-client privilege log, the privilege log must provide the Court a basis from which it can determine whether the privilege is properly invoked, whether *in camera* review is necessary to determine if privilege is properly invoked, or whether the document must be produced. The updated index must be filed with this court on or before February 3, 2017.

III

The Plaintiff also challenges the Defendant's withholding of certain documents pursuant to the draft exemption to RSA 91-A, contained in RSA 91-A: 5, IX. The statute provides that Government records which are exempted from the provisions of RSA 91-A:I include "[p]reliminary 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." RSA 91-A:5, IX; see also ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 757–58 (2011). The Plaintiff argues that in order for documents to be withheld according to the draft exemption, the Defendants must make a showing that the interest of the government in nondisclosure outweighs the benefit of public disclosure. However, Plaintiff has cited no controlling authority for this proposition, and the Court disagrees. The exception for preliminary drafts and memoranda is contained in the statute itself. In fact, the New Hampshire Supreme Court has held that there is no requirement of a Vaughn index at the initial stage of responding to a Right to Know request if the document holder relies on this exception. ATV Watch, 161 N.H. at 757–58. Plaintiff's claim

---

2011-CV-368 (N.H. Superior Court, May 21, 2014,) (McNamara, J.), 1, 6–7.

that documents have been improperly withheld pursuant to the draft exception to RSA 91-A is OVERRULED.

1/17/17
DATE

s/Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/

The State of New Hampshire

MERRIMACK, SS. SUPERIOR COURT

NO. 217-2018-CV-00029

MICHAEL K. ADDISON

v.

STATE OF NEW HAMPSHIRE

ORDER

Michael K. Addison, filed a complaint under RSA 91-A and Part I, Article 8 of the New Hampshire Constitution, seeking an order compelling the State of New Hampshire to provide: (1) certain court records related to the assignment of Superior Court Justice Kathleen McGuire to criminal matters involving Mr. Addison; (2) documents showing the work schedule of Superior Court Justice Gillian Abramson during 2007; and (3) documents related to the determination of what constitutes a "related" case pursuant to Superior Court Administrative Order No. 33. The State moves to dismiss the petition, and Mr. Addison objects.

A motion to dismiss is granted when the allegations in the complaint are not "reasonably susceptible of a construction that would permit recovery." *Bohan v. Ritzo*, 141 N.H. 210, 212 (1996) (quotation omitted). No weight is given to mere conclusions of law, *Mt. Springs Water Co. v. Mt. Lakes Village District*, 126 N.H. 199, 201 (1985), but assertions of fact

are taken as true and all inferences from those facts are drawn in the plaintiffs' favor. *Id.* at 213.

The complaint describes the following background. Mr. Addison is incarcerated at the New Hampshire State Prison, subject to a capital sentence arising from his conviction in 2008 for the shooting death of Officer Michael Briggs. (Compl. ¶ 5.) Before this conviction, Mr. Addison was convicted of robbing a convenience store in Hudson, New Hampshire and a restaurant in Manchester, New Hampshire, as well as criminal offenses related to a shooting in Manchester. (*Id.* ¶ 7.) The State relied on these convictions in the sentencing phase of Mr. Addison's capital murder case. (*Id.* ¶ 8.) Judge McGuire was the presiding judge at all of Mr. Addison's trials. (*Id.* ¶ 9.)

After Mr. Addison's indictment for capital murder, Judge McGuire contacted former Superior Court Chief Justice Robert Lynn and asked for assignment to the capital case. (*Id.* ¶ 10.) He denied her request and the case was assigned at random to another superior court judge. (*Id.* ¶¶ 11–12.) When that judge excused herself from the case for unrelated reasons, it was assigned randomly to Judge McGuire. (*Id.* ¶¶ 13–15.) Because of her assignment to the capital case, Judge McGuire was designated to oversee proceedings in Mr. Addison's other pending criminal cases. (*Id.* ¶ 16.)

On June 22, 2016, Mr. Addison, through his counsel, made a right-to-know request to the Administrative Office of the Courts for the following records:

> A. Any and all emails, notes, records, correspondence or other documents related to the assignment of Superior Court Justice Kathleen McGuire to

the criminal matters involving Michael Addison in or about 2006 and 2007. This request includes, but is not limited to, materials involving:

i. Then Chief Superior Court Justice Robert Lynn;
ii. Retired Superior Court Justice William Groff;
iii. Retired Superior Court Justice James Barry, Jr.;
iv. Clerk John Safford; and
v. Clerk Marshall Buttrick

B. Any and all documents reflecting the work schedule of Superior Court Justice Gillian Abramson during 2007.

C. Any and all process, guidelines, procedures, or other documents related to the determination of what constitutes a "related" case pursuant to Superior Court Administrative Order No. 33, dated March 22, 2004. This request includes any documents discussing or anticipating what might constitute a related case prior to the entry of Administrative Order No. 33.

(Compl. ¶ 17; State's Mot. Dismiss, Ex. A at 3.) The State advised Mr. Addison's counsel that it didn't believe it was required to respond to the request for the records (Compl. ¶ 18), but at the State's suggestion Mr. Addison resubmitted it, at which point the State formally denied it. (*Id.* ¶¶ 19– 20.) Mr. Addison then initiated the present action, contending that Part I, Article 8 of the New Hampshire Constitution and RSA chapter 91-A entitle him to the documents.

The State first argues that Part I, Article 8 doesn't require disclosure because citizens have no constitutional right to access the courts' administrative records. Mr. Addison disagrees, and contends the requested records concern information about the governmental activity of assigning judges to particular cases. He says that such information is plainly informative concerning the workings of the judiciary.

The law regarding the public's right of access to court records and proceedings is well settled. See generally *State v. Decato*, 156 N.H. 570 (2007); *Associated Press v. State*, 153 N.H. 120 (2005). "There can be no dispute that Part I, Article 8 [of the New Hampshire Constitution] applies to court records and that the public is generally afforded unfettered access to them." *In re Union Leader Corp.*, 147 N.H. 603, 604 (2002). However, Part I, Article 8 is not read "so broadly as to mandate public access to all records related to any superior court activity, including its nonadjudicatory activities." *Id.* at 605. The Supreme Court describes the public's right to view court records as, in essence, the right to inspect "things which are filed in court in connection with a pending case." *See Thomson v. Cash*, 117 N.H. 653, 654 (1977); *Union Leader Corp*, 147 N.H. at 605 (petitioner sought "documents that have not been filed in court in connection with a pending case" (citing *Thomson*, 117 N.H. at 654 and *F.T.C. v. Standard Financial Management Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("documents which are submitted to, and accepted by, a court of competent jurisdiction in the court of adjudicatory proceedings, become documents to which the presumption of public access applies")).

Here, the documents Mr. Addison seeks were not filed or generated in connection with judicial proceedings, but relate to the assignment of a superior court judge to criminal matters in 2006 and 2007, the work schedule of a superior court judge in 2007, and the background to Superior Court Administrative Order No. 33. Part I, Article 8 doesn't confer a right upon the public to access these documents because they pertain to the internal management and operation of the court system and not to the superior court's adjudicatory

functions. See *Union Leader Corp.*, 147 N.H. at 605 (holding "court records" under Part I, Article 8 does not include records of meetings of superior court judges concerning internal management and operation of the court that do not directly relate or pertain to court proceedings or the superior court's adjudicatory functions).

With respect to the request for documents relating to the assignment of Judge McGuire to criminal matters involving Mr. Addison and documents reflecting Judge Abramson's work schedule, no authority supports a conclusion that the public is constitutionally entitled to view them. This is particularly true given that the records would not have come before the court in the course of an adjudicatory proceeding. *See Standard Financial Management Corp.*, 830 F.2d at 409 (presumption of public access applies to documents that are submitted to a judge as those documents "can fairly be assumed to play a role in the court's deliberations.")

Similarly, documents relating to Superior Court Administrative Order No. 33, which governs the assignment of "related" cases to a single justice or marital master, are not "court records" under Part I, Article 8, as they pertain to the day-to-day operations of the court. Judge Lynn issued the administrative order in his capacity as the "administrative judge of the superior court." See SUP. CT. R. 54(2), (4)(c). There is no basis to conclude that the court compiled documents pertaining to the administrative order in connection with judicial proceedings. Not only does the request relate to an administrative order issued approximately 3 years before Mr. Addison's indictment, but also it broadly seeks documents on the court's approach to determining what constituted a "related" case prior

to the issuance of Administrative Order No. 33 in March 2004. The holding in *Union Leader Corp.* puts these records outside the scope of any constitutionally required access. For these reasons, Mr. Addison has no constitutional right to the requested documents.

The State next argues RSA chapter 91-A isn't applicable to the New Hampshire Judicial Branch because the Judicial Branch isn't a "public body" or "public agency" as defined by the statute. *See* RSA 91-A:1-a, V, VI. [1] In response, Mr. Addison notes that the Right-to-Know Law specifically exempts from disclosure "records of grand and petit juries" and "the master jury list as defined in RSA 500-A:1, IV," see RSA 91-A:5, II, and argues that the logical inference is that court records generally are subject to disclosure under the statute. (Obj. to State's Mot. to Dismiss, at 15.) The distinction though, is that courts are not the sole repository of records of grand and petit juries. Rather, these records may also be in the possession, custody, or control of other public agencies or bodies that are subject to the Right-to-Know Law. For instance, the Attorney General or a county attorney may have grand jury records. See SUP. CT. R. 52. In order to maintain the traditional secrecy of grand jury proceedings, the Attorney General or a county attorney may only disclose grand jury records in a limited set of circumstances. Similarly, the courts, prosecuting entities, and the New Hampshire Public Defender's Office, may possess records regarding petit juries. As

[1] When the motion to dismiss was filed, there was pending legislation that proposed to insert "All New Hampshire courts" into the definition of "public body" in RSA 91-A:1-a, VI. *See* HB 1337 (2018). It is unclear whether the amendment was intended to clarify the existing definition of "public body" or if it was meant to modify the definition by expanding it to include the courts for the first time. In light of this, the proposed amendment provides no guidance on whether RSA chapter 91-A, as presently written, applies to the Judicial Branch. In any event, the bill failed in the House.

currently written, the Right-to-Know Law exempts these records from public inspection regardless of the entity or authority that possesses them.[2] Thus, the exemption for "records of grand and petit juries" doesn't imply that all other court records are subject to disclosure under the statute, nor does it suggest that courts are "public bodies" or "public agencies" as defined by the statute.

Equally clear is that the exemption for "the master jury list" set forth in RSA 91-A:5, I-a doesn't support Mr. Addison's position. The Administrative Office of the Courts and the trial courts keep master jury lists. *See* RSA 500-A:2. While the statute indicates that the master jury list fits within the definition of governmental records, *see* RSA 91-A:5, it doesn't say that any entity possessing governmental records is subject to RSA chapter 91-A. Rather, it emphasizes the point made in a number of other statutes—information in the master jury list, which is "blended and compiled" from information provided by the secretary of state and the department of safety, both of which are subject to RSA chapter 91-A, is confidential and is not available for public inspection. *See* RSA 500-A:1 ("Information contained in the master jury list shall be private and confidential and shall not be subject to RSA 91-A."); RSA 654:45, VI ("The voter database shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31."); RSA 260:14 ("Notwithstanding RSA 91-A or any other provision of law to the contrary, except as otherwise provided in this section, [motor vehicle records] shall not be public records or open to the inspection of any person.")

---

[2] Worth noting is that prior to 2004, RSA 91-A:5 considered "grand and petit juries" to be a separate body. *See* RSA 91-A:5 (2003) ("The records of the following bodies are exempted from the provisions of this chapter: I. Grand and petit juries . . . .").

Mr. Addison acknowledges "[t]he definitions of 'public bodies' and 'public agencies' in [RSA 91-A:1-a] do not explicitly include the courts," but based on *Union Leader Corp. v. New Hampshire Housing Fin. Auth.*, 142 N.H. 540 (1997), he argues the list of public bodies and agencies in the statute is non-exhaustive. (Obj. to Mot. to Dismiss, at 15.) The case, however, is distinguishable. The issue there was whether the New Hampshire Housing Finance Authority, an entity not easily characterized as solely private or entirely public, was subject to RSA chapter 91-A. *Id.* at 547. Here, there is no argument that the New Hampshire Judicial Branch is a "quasi-public" entity.

When classifying an entity, the Supreme Court recognized, in *Union Leader Corp.* and in other similar cases,[3] that "any general definition can be of only limited utility to a court confronted with one of the myriad organizational arrangements for getting the business of government done." *Id.* (citing *Bradbury v. Shaw*, 116 N.H. 388, 390 (1976)). This proposition is from *Washington Research Project, Inc. v. Dept. of H.E.W.*, 504 F.2d 238 (D.C. Cir. 1974), in which the Court of Appeals for the District of Columbia Circuit was tasked with determining whether an entity was an "agency" for purposes of the federal Freedom of Information Act. *See Bradbury*, 116 N.H. at 389–90. The State Supreme Court has never extended the "essential governmental functions" analysis used in *Union Leader Corp.* to

[3] See, *e.g.*, *Professional Firefighters of N.H. v. Local Government Ctr.*, 159 N.H. 699 (2010); *Professional Firefighters v. HealthTrust, Inc.*, 151 N.H. 501 (2004); *Bradbury v. Shaw*, 116 N.H. 388 (1976).

bring entirely public entities within the scope of New Hampshire's Right-to-Know Law.[4] The analyses in *Union Leader Corp.* and similar cases do not support expanding the definition of public body or agency to include the courts.

It is undisputed that the definitions of "public body" or "public agency" in RSA 91-A:1-a do not explicitly include New Hampshire courts. Mr. Addison asserts that the statute includes the courts because "the courts are public bodies by any conventional understanding of the term." (Obj. to Mot. to Dismiss, at 15) While susceptible of that understanding, the argument circumvents the rules of statutory construction. When interpreting a statute, "[courts] first look to the language of the statute itself and, *where terms are not defined therein*, we ascribed to them their plain and ordinary meanings." *In re Blanchflower*, 150 N.H. 226, 227 (2003) (emphasis added) (quotation & citation omitted). Here, the legislature specifically defined "public body" to mean any of the following:

> (a) The general court including executive sessions of committees; and including any advisory committee established by the general court.
>
> (b) The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.
>
> (c) Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.

---

[4] "In interpreting provisions of the New Hampshire Right-to-Know Law, [the Court] often look[s] to the decisions of other jurisdictions interpreting similar provisions of other statutes for guidance, including federal interpretations of [FOIA]." *Id.* The federal definition of "agency" doesn't include "the courts of the United States," 5 U.S.C. § 551(1)(B), so federal decisions considering whether an organization is an "agency" would not apply the analysis to subject courts to the FOIA.

> (d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.
>
> (e) Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

RSA 91-A:1-a, VI. Where the legislature specifically defined "public body," the term doesn't include entities beyond those described in the definition even if such entities come within a common or usual meaning of the term. I agree with the State, therefore, that the New Hampshire Judicial Branch isn't a "public body" or "public agency" as defined by the statute, and so is not subject to RSA chapter 91-A.

For the reasons discussed above, Mr. Addison is not entitled to an order compelling the State to produce the requested documents under either RSA chapter 91-A or Part I, Article 8 of the New Hampshire Constitution.

The State's motion to dismiss (doc. no. 6) is GRANTED.

SO ORDERED.

DATE: AUGUST 16, 2018

BRIAN T. TUCKER
PRESIDING JUSTICE

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

LOUISE SPENCER

v.

GOVERNOR CHRISTOPHER T. SUNUNU

Docket No.: 217-2020-CV-00252

ORDER

Louise Spencer seeks disclosure of email communications concerning Governor Sununu's veto of redistricting legislation pursuant to RSA 91-A and Part I, Article 8 of the New Hampshire Constitution. The Governor's Office moves for dismissal and summary judgment. Ms. Spencer objects. Ms. Spencer has filed a cross-motion for summary judgment contending the Governor failed to comply with his constitutional and statutory obligations and requesting the release of all non-exempt communications. For the reasons that follow, both the Governor's motion to dismiss and motion for summary judgment are GRANTED.

I. Standard

In reviewing a motion to dismiss, the Court assumes the truth of all well-pleaded facts of the nonmoving party and construes "all reasonable inferences in the light most favorable" to the nonmoving party. Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010). The Court need not, however, "assume the truth of statements . . . that are merely conclusions of law." Clark v. N.H. Dep't of Emp. Security, 171 N.H. 639, 645 (2019). The Court must therefore determine, as a threshold matter, whether the facts

alleged by the nonmoving party "constitute a basis for legal relief" when tested "against the applicable law." Grand Summit Hotel Condo. Unit Owners' Ass'n v. L.B.O. Holding, Inc., 171 N.H. 343, 345 (2018). The Court may additionally consider documents attached to the nonmoving party's pleadings, documents the authenticity of which is not disputed, official public records, or documents sufficiently referred to in the Complaint. Ojo v. Lorenzo, 164 N.H. 717, 721 (2013).

To prevail on a motion for summary judgment, the moving party must establish that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Sabato v. Fed. Nat'l Mortg. Ass'n, 172 N.H. 128, 131 (2019). The Court looks to the "affidavits and other evidence" and to "all inferences properly drawn from them, in the light most favorable to the nonmoving party." Clark v. N.H. Dep't of Emp. Security, 171 N.H. 639, 650 (2019). In deciding the motion, the Court assesses "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed by the parties." RSA 491:8-a, III.

II. Background

On January 6, 2020 Ms. Spencer submitted a request for public records to Governor Sununu's Office. (Pet. Access Public R. ("Pet.") ¶ 16.) Ms. Spencer is a co-founder of the Kent Street Coalition, an advocacy group interested in voting rights and redistricting. (Id. ¶ 5.) Ms. Spencer requested documents pertaining to the Governor's veto of H.B. 706 on August 9, 2019. (Id. ¶¶ 16–17.) H.B. 706 was a bipartisan legislative effort to establish district maps following the 2020 election. (Id. ¶ 10.) Both Republican and Democrat legislators expected the Governor to sign the bill into law.

(Pet. ¶ 12.) Two weeks following the Governor's veto, Scott Walker[1] published an article in the Concord Monitor praising Governor Sununu for vetoing the bill. (Id. ¶ 15.)

In her request for records, Ms. Spencer requested all communications between Governor Sununu and certain members of his staff during August 2019, as well as all communications between Scott Walker and his staffers and redistricting representatives during August 2019. (Id. ¶ 17.) On January 22, 2019, the Governor's General Counsel, John Formella, acknowledged Ms. Spencer's request and anticipated that he would provide a response within sixty days. (Id. ¶ 18.)

Upon receipt of Ms. Spencer's request, Mr. Formella, immediately forwarded the request to the named individuals. (Governor's Mem. Law, Ex. F ("Formella Aff.") ¶ 6.) However, there were three people that Mr. Formella did not forward the request to, because they did not work at the Governor's Office and, thus, he had no official relationship with them. (Id. ¶ 8.) Along with forwarding Ms. Spencer's request, Mr. Formella instructed each recipient to gather and save any potentially responsive communications, to preserve any relevant communications, and to deliver to Mr. Formella any relevant documents. (Id. ¶ 6.) On the same day of Ms. Spencer's request, January 6, 2020, Mr. Formella received eleven potentially responsive emails from two staff members, Christopher Ellms and Ben Vihstadt. (Id. ¶¶ 9–13.) Both Mr. Ellms and Mr. Vihstadt are employees of the Governor's Office, as well as private political supporters of the Governor and both volunteer on the Governor's campaign. (Id. ¶¶ 11, 13.) The emails were delivered through the personal Gmail accounts of both Mr. Ellms and Mr. Vihstadt. (Id. ¶¶ 10, 12.) Mr. Formella "carefully reviewed" the emails

[1] Scott Walker is the former governor of Wisconsin and now sits as the Finance Chair for the National Republican Redistricting Trust (the "NRRT"). (Id. ¶ 5.)

brought to him by Mr. Ellms and Mr. Vihstadt and saw that they concerned information to be used in the Governor's political messaging by private parties. (Id. ¶ 18.) Mr. Formella ultimately determined that these messages were personal emails and not subject to disclosure. (Id.)

Mr. Formella followed up with the Governor's Office staff to ensure that there were no other potentially responsive communications. (Id. ¶ 19.) Mr. Formella also discussed Ms. Spencer's request directly with Governor Sununu, who determined that he did not have responsive communications. (Id. ¶ 7.)

On March 9, 2020, Mr. Formella provided a formal response to Ms. Spencer's request, stating that there were no responsive governmental records and the eleven emails were of a personal, not official, nature. (Aff. Louise Spencer ¶¶ 10–11; Formella Aff. ¶ 20.) The response stated that it had "withheld 11 emails (along with some associated attachments) which, while in possession of office employees and arguably responsive to [Ms. Spencer's] request, are not considered governmental records because they were not created, sent or received by the relevant employees in furtherance of their official functions." (Pet. ¶ 22.)

On March 11, 2019, Ms. Spencer requested a Vaughn index, which would provide a description of each withheld document and a justification for its nondisclosure. (Pet. ¶ 23.) On March 20, 2019, Mr. Formella responded to Ms. Spencer and alerted her that they would not be providing her with a Vaughn index because the emails are not governmental records. (Id. ¶ 24.) On March 25, 2019, Mr. Formella discussed this determination with Ms. Spencer and her counsel. (Id. ¶ 25.) Mr. Formella told Ms. Spencer that the withheld emails were personal communications and not created in

furtherance of the employees' official duties. (Id. ¶ 30.) Mr. Formella also informed Ms. Spencer that emails in the Governor's Office are subject to a 30-day automatic deletion policy, if they are not saved within a folder. (Id. ¶ 34.) Mr. Formella stated that the official email accounts had limited capacity and employees were encouraged to regularly clean out unnecessary emails. (Id. ¶ 35.) Following the phone call, Ms. Spencer inquired into whether deleted emails are stored elsewhere and if the Governor's Office would search back-up tapes. (Aff. Louise Spencer ¶ 19.) Mr. Formella stated that he "had no reason to believe" that searching back-up tapes would lead to any responsive documents. (Formella Aff. ¶ 23.) He further stated that such a search would be burdensome, as the tapes are not easily searchable because they are not indexed but stored as they are on a normal computer. (Id.)

III. Analysis

A. Applicability of RSA 91-A to the Governor's Office

The Right-to-Know Law under RSA 91-A specifies that "[e]ach public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release." RSA 91-A:4, IV(a). The Right-to-Know Law's purpose 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; CaremarkPCS Health v. N.H. Dept. of Admin. Servs., 167 N.H. 583, 587 (2015). However, the statute does not provide unrestricted access to governmental records; to effectuate important governmental policies, certain types of documents are exempted from the provisions of the statute by RSA 91-A:5. The New

Hampshire Supreme Court has stated that it interprets questions regarding the Right to Know Law "with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives" of providing access to government proceedings that is not unreasonably restricted and accountability to the people. CaremarkPCS Health, 167 N.H at 587 (citations omitted). The New Hampshire Supreme Court has also stated that it looks to the decisions of other jurisdictions interpreting similar acts, including federal interpretations of the federal Freedom of Information Act ("FOIA"), because such laws "are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved." Montenegro v. City of Dover, 162 N.H. 641, 645 (2011) (citations omitted).

Ms. Spencer argues that RSA 91-A applies to the Governor's Office. While the definitions of "agency" and "governmental records" are quite broad,[2] this Court has found that "the Governor's Office is exempt under RSA 91-A" and draws a distinction between the "board or commission of any state agency or authority," which is subject to the Right-to-Know law and the Governor's Office, which is not. State Emp.'s Ass'n v. Hill, No. 04-E-061 (N.H. Super. March 26, 2004 (Fitzgerald, J.) at 4 ("The Right-to-Know Law applies to 'transaction[s] of any function affecting any or all citizens of the state' by '[a]ny board or commission of any state agency or authority.'") (citing RSA 91-A:1-a, I(c)). The Court takes into consideration that the 2008 amendment to the statute, which Petitioner points out, amends the definition of public agency to include "any agency, authority, department, or office of the state." (Pet. ¶ 52.) However, the Court agrees

[2] The statute applies to "each public body or agency," which is defined as "any agency, authority, department, or office of the state." RSA 91-A:1-a, V. "Governmental records" is defined as "any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function." RSA 91-A:1-a, III.

with earlier decisions that the Governor's Office is exempt from RSA 91-A. The New Hampshire Supreme Court has ruled against records requests where, if the request were granted, "the public could demand access . . . to any records regarding meetings between the Governor and staff." Pet. of Union Leader Corp., 147 N.H. 603, 605 (2002). The Supreme Court found that "[i]f the suggested access were permitted, government might become unduly cumbersome and candor among government officials stifled." Id. In addition to the undue burden that applying RSA 91-A to the Governor's Office would present, construing the statute as applying to the Governor's Office would run afoul of the separation of powers doctrine.

The New Hampshire Constitution outlines the separation of powers as follows:

> [i]n the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

N.H. CONST. pt. I, Art. 37. The separation of powers doctrine has been upheld by the New Hampshire Supreme Court as "essential to protect against a seizure of control by one branch that would threaten the ability of our citizens to remain a free and sovereign people." Pet. of Mone, 143 N.H. 128, 134 (1998); see State v. LaFrance, 124 N.H. 171, 176 (1983). The separation of the three co-equal branches of government is protected by the separation of powers clause of the New Hampshire constitution by prohibiting each branch from "encroaching on the powers and functions of another branch." Pet. of Mone, 143 N.H. at 134. (citation omitted). New Hampshire differs from other states in that Part I, Art. 37 of its constitution recognizes that separation of powers in a workable government cannot be absolute but should be "as separate from, and

independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." N.H. CONST. pt. I, art. 37; see Opinion of Justices, 110 N.H. 359, 362 (1970). Ultimately, the separation of powers doctrine is "violated when one branch usurps an essential power of another." Pet. of Mone, 143 N.H. at 134 (citation omitted).

RSA 91-A is legislation passed by the New Hampshire General Court regulating non-constitutional agencies, over which it has control. N.H. CONST. pt. 2, art. 5; see Monier v. Gallen, 120 N.H. 333, 336 (1980) (the General Court has "the authority under N.H. Const. pt. 2, art. 5, to create and abolish nonconstitutional agencies, officials, or positions."). The Governor's Office is a constitutional office. RSA 21-G: 6-b, I(a) ("Constitutional offices are as follows: the executive department, comprising the office of the governor."). Further, the Governor appoints his own legal staff, who are capable of overseeing the office's compliance with their constitutional obligations.

> The governor may appoint such staff, including but not limited to legal counsel, professional persons, consultants, assistants, secretaries, stenographers, and clerks, as he shall need who shall render such services as the governor may require of them. He shall fix their compensation within the limits of the appropriation made for such purposes.

RSA 4-12. RSA 91-A is meant to regulate non-constitutional agencies and how they comply with Part I, Article 8 of the New Hampshire Constitution, whereas the Governor's Office, which is a constitutional agency, utilizes legal staff to ensure it is meeting its constitutional obligations. Each branch of government, including the judiciary[3] and legislative branches, has its own procedure for conforming to Part I, Article 8. Union

[3] See Pet. of State of New Hampshire (Bowman Search Warrants, 146 N.H. 621 (2001).

Leader Corp.v. Chandler, 119 N.H. 442, 445 (1979). "The house of representatives, as a separate and coequal branch of government, is constitutionally authorized to promulgate its own rules." Id.; N.H. Const. pt. I, art. 37; N.H. Const. pt. II, art. 22; see Opinion of Justices, 63 N.H. at 625. Likewise, provided it acts in a manner consistent with its constitutional obligations which is subject to judicial review, the Governor's Office can determine its own methods of complying with Part I, Article 8. Therefore, the Court finds that the Governor's Office is not subject to RSA 91-A.

B. The Governor's Office Obligations Under the State Constitution

The Court now turns to whether the Governor's Office met its obligation under the New Hampshire Constitution. Part I, Article 8 reads:

> [a]ll power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

N.H. CONST. pt. I, Art. 8. As such, the Governor is subject to an obligation to not "unreasonably restrict" the public's access to relevant governmental records. Id.

1. The Governor Conducted an Adequate Search for Records

New Hampshire courts use the FOIA standard to determine whether a search for records was adequate. ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 753 (2011) (citations omitted). Under FOIA, "the adequacy of an agency's search for documents . . . is judged by a standard of reasonableness. The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents." Id. at 753. Crucially, while the search must be reasonable, it does not need to be exhaustive to be adequate. Id. at 753 ("The search

need not be exhaustive.") (quotation omitted). To meet its burden, an agency must "show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." Id. Affidavits are sufficient to meet this burden so long as they are "relatively detailed, nonconclusory, and submitted in good faith." Id.

Here, the affidavit of the Governor's General Counsel, John Formella, was submitted in support of a showing of reasonable search. (Governor's Mem. Law, Ex. F.) Upon receipt of Ms. Spencer's request, Mr. Formella immediately forwarded it to every individual that Ms. Spencer named.[4] (Id. ¶ 6.) In an email Mr. Formella sent to those individuals, he asked each of them to gather and save responsive communications, to not delete any relevant communications, and to deliver to Mr. Formella any found communications. (Id. ¶ 6.) Mr. Formella asked each of those individuals to "gather and save any responsive communications. (Id; see Governor's Mem. Law, Ex. F-3.) Mr. Formella took Ms. Spencer's request to Governor Sununu and reviewed it with the Governor to determine that he did not have any responsive communications. (Formella Aff. ¶ 7.) Mr. Formella received potentially responsive emails from two staffers, which he "carefully reviewed" before determining that they were private emails. (Id. ¶ 18.) Those emails were submitted to the Court for *in camera* review and have been reviewed by this Court.

While Ms. Spencer contends that the search was not reasonable, because the Governor's Office failed to search "all locations," including locations where previously deleted files were kept, the agency's burden is to conduct a reasonable search, not an exhaustive one. ATV Watch, 161 N.H. at 753. (Pet. Memo. of Law at 11.) In his

[4] Mr. Formella did not contact three individuals, because they were not members of the Governor's office staff and because he had no official relationship with them in his capacity as Governor's General Counsel. (Id. ¶ 8.)

affidavit, Mr. Formella states that he "had no reason to believe that a search of back-up tapes would produce additionally responsive documents. . . It is my understanding that undertaking a sweeping search of back-up tapes imposes significant burden and expense on the State . . . the tapes are not readily searchable in the same way as files stored and indexed normally on a computer." (Formella Aff. ¶ 23.) Mr. Formella had no reason to believe that such a search would yield any responsive documents, and the search would come at a great cost and burden, which makes his decision not to search the back-up tapes reasonable.

Mr. Formella represented that he promptly sought to determine if any of the members of the Governor's staff had retained anything that was responsive. (Formella Aff. ¶ 6.) He carefully reviewed potentially responsive documents and concluded that no members of the staff had retained anything relevant within their capacity as governmental employees. (Id. ¶¶ 18–19.) Based on the above, the Court is persuaded that the Governor's Office met its burden and conducted an adequate search for records.

2. The Documents are Privileged from Disclosure

Any emails or communication sent before the Governor's veto are privileged from disclosure. The New Hampshire Supreme Court has assessed the balance between the right to know and the government's need to function efficiently in upholding the deliberative process privilege. See ATV Watch v. New Hampshire Dep't of Transp., 161 N.H. 746, 758 (2011) (determining that restrictions on access to preliminary drafts and related notes do not unreasonably restrict the public's rights to access documents). The deliberative process privilege is a common law privilege that "exempts from

disclosure communications between executive officials that are both pre-decisional and deliberative." N.H. Republican State Comm. v. Hassan, No. 2016-CV-612, 2017 N.H. Super. LEXIS 3, at *14 n. 3 (N.H. Super. Jan. 17, 2017) (quotation omitted).

Similar to the deliberative process privilege, the executive privilege is recognized under New Hampshire law although it is constitutional in nature and is "a necessary complement to the executive power." Id. at *8 (quotation omitted). The United States Supreme Court recognizes executive privilege in regards to a President's "conversations and correspondence, similar to the confidentiality of judicial deliberations, which is 'fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.'" Id. (citation and quotation omitted). "There can be no doubt that the Legislature lawfully may pass a law requiring opening in government, such as RSA 91-A, and the courts may determine whether or not information a government seeks to maintain as privilege must be disclosed. But in doing so, with respect to a claim of executive privilege, the proper standard must be whether or not requiring disclosure will impair a governor's ability to carry out the functions of his or her office effectively." Id. (citing Pet. S. N.H. Med. Ctr., 164 N.H. 319, 328 (2012). This Court finds that "since the privilege is based upon separation of powers, under New Hampshire constitutional law a functional analysis is appropriate to determine whether or not a court can pierce the executive privilege possessed by a governor. The scope of the privilege depends upon the needs of the executive." N.H. Republican State Comm., Super. LEXIS 3, at *14.

When taking the two privileges and balancing both the public's right to access and the Governor's Office's need to operate efficiently and effectively, the Court finds

that the communications sent before the veto should remain confidential. The Court recognizes that the public does have a legitimate interest in how the Governor reached his decision to veto H.B. 706. Nevertheless, the fact that the emails that could potentially shed light on how that decision was reached also supports the need for them to be kept confidential in order that the Governor's Office can continue to have frank conversations during the decision-making process. Considering the nature of the interests involved in this case and the specific emails which the Court has reviewed *in camera*, the Court finds that they were properly withheld.

3. The Subject Emails After the Veto are Not Government Records

The Court now turns to the communications that occurred after the veto, and are not covered by the deliberative process and executive privilege. As previously noted, the Governor's Office must uphold their obligation to not unreasonably restrict the public's right to access governmental records. N.H. CONST. Pt. I, Art. 8. Key to that obligation is the term "governmental records." "Governmental records" consist of "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." RSA 91-A:1-a(III).

All of the communications in question were sent from private, non-government email accounts. (Formella Aff. ¶¶ 10, 12.) They were not "in furtherance of its official function," because even if they relate directly to the veto and the decision-making process, they occurred after the decision was made. Both of the employees whose emails are in question were also private political supporters of the Governor and both had volunteered for his campaign. (Id. ¶¶ 11, 13.) When Mr. Formella reviewed the

emails, he determined that they contained "information for potential use in political messaging related to the Governor's veto by private parties. (Id. ¶ 18.) Thus, the Court finds the requested documents that occurred after the veto are not governmental records, even if they relate to the politics of that decision.

IV. Conclusion

For the aforementioned reasons, the Governor's motion to dismiss and motion for summary judgment are GRANTED. The emails submitted for *in camera* review shall remain confidential and under seal and kept as part of the court record in the event of an appeal.

SO ORDERED.

10/14/2020
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/14/2020