

OPEN GOVERNMENT GUIDE

Access to Public Records
and Meetings in

NEW HAMPSHIRE

**REPORTERS
COMMITTEE**
FOR FREEDOM OF THE PRESS

Sixth Edition
2011

OPEN GOVERNMENT GUIDE
OPEN RECORDS AND MEETINGS LAWS IN
NEW HAMPSHIRE

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NEW HAMPSHIRE

**SIXTH EDITION
2011**

Previously Titled
Tapping Officials' Secrets

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Introductory Note

The OPEN GOVERNMENT GUIDE is a comprehensive guide to open government law and practice in each of the 50 states and the District of Columbia. Fifty-one outlines detail the rights of reporters and other citizens to see information and attend meetings of state and local governments.

The OPEN GOVERNMENT GUIDE — previously published as *Tapping Officials' Secrets* — is the sole reference on open government laws in many states.

Written to follow a standard outline to allow easy comparisons between state laws, the compendium has enabled open government advocates in one state to use arguments successful in other states to enhance access rights at home. Press associations and lobbyists have been able to invoke other sunshine laws as they seek reforms in their own.

Volunteer attorneys, expert in open government laws in each state and in Washington, D.C., generously donated their time to prepare the initial outlines for the first incarnation of this project in 1989. In most states these same attorneys or their close associates updated and rewrote the outlines for the 1993, 1997, 2001 and 2006 editions as well this current 2011 edition.

Attorneys who are new to the compendium in this edition are also experts in open government and access issues, and we are grateful to them for their willingness to share in this ongoing project to create the first and only detailed treatise on state open government law. The rich knowledge and experience all the participating attorneys bring to this project make it a success.

While most of the initial users of this compendium were journalists, we know that lawyers and citizens have discovered it and find it to be indispensable as well.

At its core, participatory democracy decries locked files and closed doors. Good citizens study their governors, challenge the decisions they make and petition or vote for change when change is needed. But no citizen can carry out these responsibilities when government is secret.

Assurances of open government exist in the common law, in the first state laws after colonization, in territorial laws in the west and even in state constitutions. All states

have passed laws requiring openness, often in direct response to the scandals spawned by government secrecy. The U.S. Congress strengthened the federal Freedom of Information Act after Watergate, and many states followed suit.

States with traditionally strong access laws include Vermont, which provides virtually unfettered access on many levels; Florida, which was one of the first states to enact a sunshine law; and Ohio, whose courts have issued several access-friendly rulings. Other jurisdictions, such as Pennsylvania and the District of Columbia, have made significant changes to their respective open government laws since the fifth edition was published designed to foster greater public access to information. Historically, Pennsylvania had a reputation as being relatively non-transparent while the District of Columbia was known to have a very restrictive open meetings law.

Some public officials in state and local governments work hard to achieve and enforce open government laws. The movement toward state freedom of information compliance officers reflects a growing activism for access to information in the states.

But such official disposition toward openness is exceptional. Hardly a day goes by when we don't hear that a state or local government is trying to restrict access to records that have traditionally been public — usually because it is feared release of the records will violate someone's "privacy" or threaten our nation's security.

It is in this climate of tension between broad democratic mandates for openness and official preference for secrecy that reporters and good citizens need to garner their resources to ensure the passage and success of open government laws.

The Reporters Committee genuinely hopes that the OPEN GOVERNMENT GUIDE will help a vigorous press and citizenry to shape and achieve demands for openness, and that it will serve as a primer for those who battle in government offices and in the courts for access to records and meetings. When challenges to secrecy are successful, the news is better and so is the government.

User's Guide

Whether you are using a guide from one state to find a specific answer to an access issue, or the complete compendium encompassing all states to survey approaches to a particular aspect of open government law around the country, knowing a few basics on how the OPEN GOVERNMENT GUIDE is set up will help you to get the most out of it.

Following the outline. Every state section is based on the same standard outline. The outline is divided into two parts: access to records and access to meetings.

Start by reviewing the table of contents for each state. It includes the first two tiers of that state's outline. Once you are familiar with the structure of the outline, finding specific information is simple. Typically, the outline begins by describing the general structure of the state law, then provides detailed topical listings explaining access policies for specific kinds of records or meetings.

Every state outline follows the standard outline, but there will be some variations. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

In general, outline points that appear in boldface type are part of the standard outline, while additional topics will appear in italicized type.

Whether you are using one state outline or any number of outlines, we think you will find the outline form helpful in finding specific information quickly without having to read an entire statute or search through many court cases. But when you do need to consult statutes, you will find the complete text of the relevant portions at the end of each outline.

Additional copies of individual state booklets, or of the compendium covering the 50 states and the District of Columbia, can be ordered from The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, Virginia 22209, or by calling (703) 807-2100. The compendium is available in electronic format on CD.

The state outlines also are available on our World-Wide Web site, www.rcfp.org/ogg. The Internet version of the outlines allows you to search the database and compare the law in different states.

Updates: The Reporters Committee published new editions of THE OPEN GOVERNMENT GUIDE in 1989, 1993, 1997, 2001, 2006, and now in 2011. We expect future updates to follow on approximately the same schedule. If we become aware of mistakes or material omissions in this work, we will post notices on this project's page on our World-Wide Web site, at www.rcfp.org/ogg. This does not mean that the outlines will constantly be updated on the site — it simply means known errors will be corrected there.

For our many readers who are not lawyers: This book is designed to help journalists, lawyers, and citizens understand and use state open records and meetings law. Although the guides were written by lawyers, they are designed to be useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a "legal citation" for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute supporting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 A.2d 456 means the case could be found in the Atlantic (regional) reporter, second series, volume 123, starting at page 456.

Note that the complete citation for a case is often given only once. We have tried to eliminate as many cryptic second-reference cites as possible, but you may encounter cites like "Jackson at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively.

Except for these legal citation forms, most "legalese" has been avoided. We hope this will make this guide more accessible to everyone.

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FOREWORD

The New Hampshire “right to know” law is contained within RSA Ch. 91-A, as amended, and is entitled “Access to Government Records and Meetings” (hereinafter “Statute”).

The Statute was enacted in 1967. It received broad bipartisan support in the legislature and from the governor. During legislative consideration one state senator underscored the Statute’s purpose and function in a democratic society:

The public has a “right-to-know” what its public servants are doing and how they are responding to the people who put them there. An informed and knowledgeable electorate is the life-blood of a democratic society. Ignorance on the other hand, breeds the type of situation which opens the door to those who would destroy the democratic process.

. . . I submit, Sir, that when an individual runs for or accepts a position of responsibility to serve the people, he should be ready to call his shots openly and without equivocation.

Another reason I favor this measure is because the press will be able to accurately report what has transpired on a given occasion and not garble, distort or misrepresent when they have to speculate or accept second hand information on a vote or decision of some governmental body.

Since enactment, the Statute has been amended on numerous occasions. In most of these instances, the amendments have clarified or broadened the scope of the Statute. More changes are in the works as the legislature has under consideration a bill that would explicitly extend the Statute to electronic records in the transaction of governmental business.

One of the most significant amendments occurred in 1977, when the legislature added a preamble. It reads:

Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

The legislature amended the Statute in 2008 to make explicit its application to “governmental Records” in “electronic” form.

In New Hampshire, the public’s right to know is further safeguarded by a state constitutional provision. In 1976 Part 1, Article 8 was amended to provide:

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* (emphasis added).

In any case where it is unclear whether a record or proceeding is covered by the Statute, the person seeking access should ground his request on Part I, Article 8.

Open Records**I. STATUTE -- BASIC APPLICATION****A. Who can request records?****1. Status of requestor.**

Any person may seek relief under the Statute. RSA 91-A:4 provides that “every citizen” has access to “public records” of public agencies and public bodies, while RSA 91-A:2 provides that “all persons” may attend public proceedings. In addition, RSA 91-A:7 provides that “any person” aggrieved by a violation of the chapter may petition the superior court for injunctive relief. Thus, there is no basis to believe that “citizen,” in section 4, is a limiting term.

2. Purpose of request.

Access to records under the Statute is not governed by the requester’s purpose. *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996) (plaintiff’s motives irrelevant).

3. Use of records.

The Statute places no restrictions on use of information. Once a record is made public anyone may use it for any purpose. *Lamy v. New Hampshire Public Utilities Comm’n*, 152N.H. 106 (2005)

B. Whose records are and are not subject to the act?

The Statute applies to “governmental records” maintained by “public agencies” and “public bodies” A “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. A “public body” means 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; (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.

Specific Bodies Subject to the Statute.

See above for list of specific bodies. Further, the Statute covers a nonprofit corporation formed by an association of governmental entities to provide health insurance benefits for public employees. *Professional Firefighters of N.H. v. Healthtrust Inc.*, 151 N.H. 501 (2004); *Prof’l Firefighters of N.H. v. Local Gov’t Center*, 159 N.H. 699 (2010).

Specific Bodies Not Subject to the Statute. The following are not subject to the statute:

The Governor. Only the Governor acting together with the Executive Council is subject to the Statute. RSA 91-A:1-a,VI(b). Records may be requested from the Governor based on Part I, Article 8 of the New Hampshire Constitution.

Department of Employment Security: RSA 91-A:6 specifically excludes from disclosure records maintained by the department under RSA 282-A:117-23.

Courts: The Statute nowhere defines courts as public bodies, nor imposes upon courts any requirements of access or disclosure. Access to court records is provided by Part I, Articles 8 and 22 of the New Hampshire Constitution as interpreted by judicial decisions. *The Associated Press v. State*, 888 A.2d 1236 (2005), and cases cited.

1. Executive branch.

a. Records of the executives themselves.

The Statute covers public records maintained by executive branch employees only to the extent they maintain records on behalf of a public agency or public body, such as chair of the entity, executive director or record custodian.

b. Records of certain but not all functions.

Subject to some exceptions, the Statute most often exempts governmental records from disclosure based on the *content* of the record, not the function of the public agency or public body. *But see*, RSA 91-A:5, I and II, exempting the records of grand and petit juries, and parole and pardon boards; and RSA 91-A:6, exempting records of the Department of Employment Security.

2. Legislative bodies.

The Statute's definition of "public body" covers "[t]he general court [i.e., the New Hampshire House and Senate] including executive sessions of committees; and including any advisory committee established by the general court," as well as "[a]ny 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." Nevertheless, in *Hughes v. Speaker of the New Hampshire House of Representatives*, 152 N.H. 276 (2005), the Court held that the Statute did not apply to a House and Senate conference committee on a bill concerning school funding. "[W]e hold that the public interesting in protecting the legislature's prerogative to set its own procedural rules and engage in free and frank debate significantly outweighs the public's right of access to the contested negotiations." *Id.* at 295. The Court also held that whether the defendants had violated the Statute was "a non-justiciable political question." *Id.* at 287. The plaintiff, a member of the House, claimed that the closed conference committee proceedings violated the Statute. *See also, Union Leader v. Speaker*, 119 N.H. 442 (1979) (Statute does not require disclosure of tape recording made by the House of Representatives).

3. Courts.

As discussed, the Statute does not cover the courts.

4. Nongovernmental bodies.

b. Bodies whose members include governmental officials.

In *Professional Firefighters of New Hampshire v. HealthTrust, Inc.*, 151 N.H. 501 (2004), the Court held that a quasi-public non-profit New Hampshire corporation formed by an association of 322 governmental entities to provide general health insurance benefits for public employees under a pooled risk management program was covered by the Statute. *Accord, Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 703 (2010); *see, Union Leader Corp. v. N.H. Housing Fin. Author.*, 142 N.H. 540 (1997), holding that the Statute applied to the New Hampshire Housing Finance Authority, a distinct legal entity separate from the State.

5. Multi-state or regional bodies.

The Statute defines "public body" to include "[a]ny 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.

6. Advisory boards and commissions, quasi-governmental entities.

As discussed, the definition of "public body" covers advisory boards and commissions and the two *Professional Firefighters* cases hold that the Statute can apply to quasi-governmental entities. *See* RSA 91-A:1-a, VI.

C. What records are and are not subject to the act?

1. What kind of records are covered?

The Statute applies to "governmental records," which includes "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. "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.

"Governmental records must be made public unless they are exempted from disclosure by the Statute, *see* RSA 91-A:5 and 6, or by some other law.

The Statute provides for access to "notes, materials, tapes, or other sources used for compiling the minutes of [public] meetings," RSA 91-A:4, II, but these need only be kept until the minutes are approved. *Brent v. Paquette*, 132 N.H. 415 (1989).

Raw data collected by an agency subject to the act may not constitute a public record until it is compiled. *Brent v. Paquette*, 132 N.H. 415 (1989) (names and addresses of school children on separate response cards but not compiled into list were not public record). The Statute does not require public officials to retrieve and compile into one record information gathered from numerous documents, if a record of this information does not already exist. *Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001); *Brent v. Paquette*, 132 N.H. 415 (1989).

Public records that contain confidential information or otherwise protected information (disclosure would constitute an invasion of privacy) are not exempt from disclosure because the information can be redacted. *See Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001).

Note: RSA 91-A:9 makes it a misdemeanor for a person "who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter. RSA 641:7 makes it a misdemeanor to make false entries in public records, or to impair the "variety or availability" of records.

Records specifically held to be public records.

Minutes of meetings of public bodies. RSA 91-A:4, I.

Medicaid claims forms redacted to protect any information that would constitute an invasion of privacy. *Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001).

Interview materials prepared by Office of the Legislative Budget Assistant in connection with preparation of audit report of state property and casualty loss program. *Goode v. N.H. Office of the Legislative Budget Assistant*, 148 N.H. 551 (2002).

Consensual photographs taken by police department of people stopped but not arrested. *N.H. Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003).

Settlement agreements made by public bodies or their insurers. RSA 91-A:4, VI.

“Records of any payment made to an employee of any public body . . . or to the employee’s agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave.” RSA 91-A:4, I-a.

Minutes of nonpublic sessions of public bodies must be disclosed unless protected by the exception within the Statute. RSA 91-A:3, II; see *Orford Teachers Ass’n v. Watson*, 121 N.H. 118 (1981) (school board).

Salary and contract information regarding public school teachers and public employees. *Rochester Sch. Bd. v. N.H. PELRB*, 119 N.H. 45 (1979); *Mans v. Lebanon Sch. Bd.*, 112 N.H. 160 (1972); salaries of public employees. *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 703 (2010).

Construction plans for proposed town industrial park. *Gallagher v. Town of Windham*, 121 N.H. 156 (1981).

Names and addresses of substitute teachers. *Timberlane Regional Educ. Ass’n v. Crompton*, 114 N.H. 315 (1974).

Names and addresses of school children and parents if compiled into one record. *Brent v. Paquette*, 132 N.H. 415 (1989).

Agency budget requests and income estimates submitted to governor. *Chambers v. Gregg*, 135 N.H. 478 (1992).

Consensual photographs taken by police departments of people who were stopped but not arrested. *New Hampshire Civil Liberties Union v. City of Manchester*, 149 N.H. 437 (2003).

Applications submitted by candidates to be appointed to unexpired term of county sheriff, an elective office. *Lambert v. Belknap County Convention*, 157 N.H. 949 (2008).

Records specifically held not to be public records.

Records of collective bargaining sessions involving a police union. *Appeal of Town of Exeter*, 126 N.H. 685 (1985).

Appraisal reports of state condemnation authority. *Perras v. Clements*, 127 N.H. 603 (1986).

Private notes of the secretary of a meeting beyond those used for creating the minutes. *Brent v. Paquette*, 132 N.H. 415 (1989).

Report of investigation of complaint of harassment made against a precinct employee. *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006)(exempt from disclosure under Statute’s exemption for “[r]ecords pertaining to internal personnel practices.” RSA 91-A:5, IV).

Names of residential customers, but not business customers, who had filed voltage complaints with a public utility and whose names were redacted from public reports released by the Public Utilities Commission. *Lamy v. New Hampshire Professional Utilities Com’n*, 152 N.H. 106 (2005).

Specific rights of access may apply.

Where a public body provides for access to records that is broader than the access provided by the Statute, the specific provision will apply. RSA 91-A:2, II.

2. What physical form of records are covered?

Public agencies and public bodies that maintain governmental records in “electronic format” have the authority, “in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any

other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.” RSA 91-A:4, V.

In *Menge v. City of Manchester*, 113 N.H. 533 (1973), the Court held that a records maintained in a computer storage system where subject to the Statute, and ruled that the city had to provide the requester with a computer tape of such records.

3. Are certain records available for inspection but not copying?

There is no distinction between access to records for inspection and for copying. See RSA 91-A:4, I

D. Fee provisions or practices.

1. Levels or limitations on fees.

The Statute provides: “If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged. RSA 91-A:4, IV.

2. Particular fee specifications or provisions.

See RSA 91-A:4, IV. See 1. above.

3. Provisions for fee waivers.

The Statute does not address this issue.

4. Requirements or prohibitions regarding advance payment.

The Statute does not address this issue.

5. Have agencies imposed prohibitive fees to discourage requesters?

There is no reported case suggesting that public bodies have imposed prohibitive fees. *But see Hawkins v. N.H. Dep’t of Health and Human Services*, 147 N.H. 376 (2001) (trial court accepted State’s evidence that cost of creating a new data manipulation program would exceed \$10,000, in denying right-to-know request on other grounds).

E. Who enforces the act?

Any “person” or legal entity, such as a news organization, has the right to enforce the Statute.

1. Attorney General’s role.

The Attorney General does not enforce the Statute. The Office advises state agencies that receive right-to-know requests, and it also responds to requests from the public for information about the Statute. The Attorney General has provided a helpful memorandum on the Right-to-Know Law which is available at its Web site (www.doj.nh.gov/publications/right_to_know).

2. Availability of an ombudsman.

There is no ombudsman.

3. Commission or agency enforcement.

There is no commission or agency to enforce the law.

F. Are there sanctions for noncompliance?

The Statute provides for reasonable attorneys fees if the court finds that a public body “knew or should have known that the conduct engaged in was a violation of” the Statute. RSA 91-A:8,I. Should the court find that a public official or employee of a public body has acted in bad faith, it may award such fees personally against the public official or employee. *Id.* Costs are awarded if the court finds that the lawsuit was necessary to make the information available or proceeding open to the public. On the other hand, the court may award attorneys fees in favor of a public body if it finds that the lawsuit was in “bad faith, frivolous, unjust, vexatious, wanton, or oppressive.” RSA 91-A:8,I-a.

In addition to awarding attorneys fees and costs, the court may invalidate action taken by a public body in violation of the Statute, and it may enjoin future violations of the Statute. RSA 91-A:8,II and III.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open records statute.

1. Character of exemptions.

The exemptions to governmental records are set forth in RSA 91-A:5, and established by case law. *See, e.g., Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005) (court uses a three-step analysis to determine whether disclosure of public record constitutes an invasion of privacy); *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540 (1997) (court will balance asserted private, confidential, commercial or financial interest against public’s interest in disclosure); *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996) (records concerning private citizens must reveal what the government is up to to serve the public’s interest in disclosure; adopting *Reporters Committee* test); *Lodge v. Knowlton*, 118 N.H. 574 (1978) (court looked to exemptions contained in FOIA section 552(b)(7) to determine whether police records were exempt from disclosure); *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579 (2006)(reaffirming *Lodge v. Knowlton* and the six-prong test under FOIA for evaluating access to police investigative files).

The Attorney General and private practitioners also look to records that contain information with respect to which public bodies may meet in nonpublic session, as authorized by RSA 91-A:3,II (a)-(j), to be exempt from disclosure, e.g., records of the “hiring of any person as a public employee,” or “relating to the preparation for and the carrying out of 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.”

a. General or specific?

The exemptions under RSA 91-A:5 are both general – e.g., “confidential, commercial, or financial information” – and specific – e.g., “personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.”

b. Mandatory or discretionary?

Neither the Statute nor case law address this issue.

c. Patterned after federal Freedom of Information Act?

The Court has looked at the *Reporters Committee* Case, decided under FOIA, to rule that absent a specific provision requiring disclosure, records subject to the Statute must show “what its government is up to. *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 705 (2010). It has also looked to FOIA in deciding cases seeking access to law enforcement files. *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579 (2006); *Lodge v. Knowlton* 118 N.H. 574 (1978).

2. Discussion of each exemption.

The Statute contains specific categories of records that are exempt from its reach.

a. *Records of grand and petit juries.* RSA 91-A:5, I. Grand jury transcripts are not subject to disclosure. *State v. Purrington*, 122 N.H. 458 (1982).

b. *Records of parole and pardon boards.* RSA 91-A:5, II.

c. *Personal school records of pupils.* RSA 91-A:5, III. Names and addresses of students kept by the school may not be disclosed. *Brent v. Paquette*, 132 N.H. 415 (1989). The exemption refers simply to “personal school records of pupils.” Several decisions allow access to school-related records. *Mans v. Lebanon Sch. Bd.*, 112 N.H. 160 (1972) (teachers’ contracts); *Timberlane Regional Educ. Ass’n v. Crompton*, 114 N.H. 315 (1974) (names and addresses of substitute teachers).

d. *Minutes of non-public sessions of boards and agencies*, if “in the opinion of 2/3 of the members present, divulgence of the information likely would affect adversely the reputation of any person other than a member of the body or agency itself. . . . [this] information may be withheld until, in the opinion of a majority of [the Board’s] members,” the confidentiality is no longer necessary. RSA 91-A:3, III.

e. *Catch-all exemption.* RSA 91-A:5, IV. “Records pertaining to internal personnel practices; confidential, commercial or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosures would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be effected.” Notwithstanding this exemption, the Supreme Court has ruled with respect to “confidential, commercial, or financial” information that “these categorical exemptions mean not that the information is *per se* exempt, but rather that it is sufficiently private that it must be balanced against the public’s interest in disclosure.” *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 553 (1997); *Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005) (records of names and addresses of residential customers filing voltage complaints exempt from disclosure; names and addresses of business customers must be disclosed); *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006)(report of investigation of Precinct employee).

f. *Teacher certification records.* In the Department of Education, including teacher certification status information. RSA 91-A:5,V.

g. *Emergency function records* directly intended to thwart deliberate acts that might result in widespread or severe property damage, injury or loss of life. RSA 91-A:5,VI.

h. *Unique pupil identification information* collected pursuant to RSA 193-E:5. RSA 91-A:5,VII.

i. *Personal notes* made by public officials or members of public bodies that do not have an official purpose, including notes and materials they make prior to, during or after public proceedings. RSA 91-A:5,VIII.

j. *Preliminary drafts*, notes, memoranda and other documents not in final form and not disclosed, circulated, or available to a quorum or a majority of public bodies. RSA 91-A:5, IX.

B. Other statutory exclusions.

RSA 91-A:4, I provides that public records must be made available for inspection and copying “except as otherwise prohibited by statute.”

(1). Welfare records. RSA 161-B:7, (III); 167:30, 31.

(2). Child abuse reports. RSA 169:44.

(3). Records of the registry of vital statistics. RSA 126:14.

(4). Records pertaining to adoptions and parental terminations. RSA 170-B:19; 170-C:14.

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

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

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

(8). Certain consumer protection and antitrust records of the Attorney General's Office. RSA 365:10, V; 358-A:8, VI.

(9). Hospital quality assurance committee records, RSA 151:13 et seq., and patient records at health facilities operated by the state. RSA 151:21, IX.

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

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

(12). Records relating to guardianships. RSA 463:7-a.

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

(14). Internal police investigation records. RSA 516:36, II.

See the Attorney General's memorandum at (www.doj.nh.gov/publications/right_to_know) for a comprehensive list of exclusions from public disclosure.

C. Court-derived exclusions, common law prohibitions, recognized privileges against disclosure.

There is no case law that addresses this issue.

D. Are segregable portions of records containing exempt material available?

Yes, see *Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001).

E. Homeland Security Measures.

The Statute addresses national security matters by exempting such records from disclosure and further providing that a limited release of such records "to persons whose health or safety may be effected" will not waive the exemption. RSA 91-A:5,IV and VI.

III. STATE LAW ON ELECTRONIC RECORDS

A. Can the requester choose a format for receiving records?

The Statute permits a public body that maintains records in a computer storage system to provide a printout of a public record rather than producing the original document. RSA 91-A:4, V. That said, if a requester can demonstrate substantial burden in terms of time or expense the public body may be required to produce the public record(s) in the format requested. See *Menge v. City of Manchester*, 113 N.H. 533 (1973) (City ordered to copy its computer tape instead of producing individual property tax card records); compare *Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001) (Statute does not require public bodies to create new records).

B. Can the requester obtain a customized search of computer databases to fit particular needs?

No, RSA 91-A:4,VII states: "Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency." See *Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001).

C. Does the existence of information in electronic format affect its openness?

No, the definition of governmental record includes information in electronic format. RSA 91-A:1-a,III and IV. See *Hawkins v. N.H. Dep't of Health and Human Services*, 147 N.H. 376 (2001).

D. How is e-mail treated?

1. Does e-mail constitute a record?

Yes. The Statute has been amended to define information to mean: "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. Moreover, it expressly covers information maintained in "electronic format." RSA 91-A:4,V.

2. Public matter on government e-mail or government hardware

Yes, but the content of the message would govern whether it must be disclosed.

3. Private matter on government e-mail or government hardware

If "private matter" means information that does not reveal "what the government is up to," the message probably would not be disclosed.

4. Public matter on private e-mail

It depends on the message and whose "private hardware" is at issue. RSA 91-A:2-a states that a public body is not to communicate in a manner that "circumvent[s] the spirit and purpose of this chapter as expressed in RSA 91-A:1." If the message related to a function of a public body and was on the hardware of an official or employee of that public body, a court probably would rule the message is covered by the Statute and it would have to be disclosed unless it came within an exemption.

5. Private matter on private e-mail

No.

E. How are text messages and instant messages treated?

1. Do text messages and/or instant messages constitute a record?

Yes, the Statute covers "government records" which, in turn, includes "information," defined to include "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,III-IV.

2. Public matter message on government hardware.

Yes, but the content of the message would govern whether it must be disclosed.

3. Private matter message on government hardware.

If "private matter" means information that does not reveal "what the government is up to," the message probably would not be disclosed.

4. Public matter message on private hardware.

It depends on the message and whose "private hardware" is at issue. RSA 91-A:2-a states that a public body is not to communicate in a manner that "circumvent[s] the spirit and purpose of this chapter as expressed in RSA 91-A:1." If the message related to a function of a public body and was on the hardware of an official or employee of that public body, a court probably would rule the message is covered by the Statute and it would have to be disclosed unless it came within an exemption.

5. Private matter message on private hardware.

No.

F. How are social media postings and messages treated?

Because the Statute defines "information" include "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, social media postings would be covered. The content of the posting would determine whether it would have to be disclosed.

G. How are online discussion board posts treated?

See F. above.

H. Computer software

1. Is software public?

Yes, the Statute covers “government records” which is defined to include “information,” which, in turn, includes “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,III-IV.

2. Is software and/or file metadata public?

See 1. above.

I. How are fees for electronic records assessed?

The only provision of the Statute that addresses fees is RSA 91-A:4,IV, which reads: “If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.”

J. Money-making schemes.

1. Revenues.

The reason why a person requests a governmental record is not relevant to whether the record must be disclosed except to the extent that if a record is disclosed it is public for all purposes. *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996); *Lamy v. New Hampshire Public Utilities Comm’n*, 152 N.H. 106, (2005). That said, the Statute does provide for some limited disclosure. RSA 91-A:5-a authorizes the disclosure of “[r]ecords from non-public sessions under RSA 91-A:3, II(i) or that are exempt under RSA 91-A:5, VI may be released to local or state safety officials. Records released under this section shall be marked “limited purpose release” and shall not be redisclosed by the recipient.”

2. Geographic Information Systems.

Yes, the Statute covers “government records” which is defined to include “information,” which, in turn, includes “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,III-IV.

K. On-line dissemination.

The Statute does not address this issue.

IV. RECORD CATEGORIES -- OPEN OR CLOSED

A. Autopsy reports.

Pursuant to RSA 611-A:8,III, autopsy reports are available only to the Department of Justice in situations involving homicide investigations. Autopsy reports are “confidential medical records which shall not be released without authorization of next-of-kin.” RSA 611-A:8,IV.

B. Administrative enforcement records (e.g., worker safety and health inspections, or accident investigations)

1. Rules for active investigations.

Under *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579 (2006), which reaffirmed *Lodge v. Knowlton*, 118 N.H. 574 (1978), the

Court applies the six-prong test under the Freedom of Information Act for evaluating access to investigative files under 5 U.S.C. § 552(b)(7).

2. Rules for closed investigations.

See 1. above. Under the six-prong test, the records probably would be disclosed.

C. Bank records.

Bank examiner report held to be exempt. *Appeal of Portsmouth Trust Co.*, 120 N.H. 753 (1980).

D. Budgets.

Chambers v. Gregg, 135 N.H. 478 (1992).

E. Business records, financial data, trade secrets.

Confidential, commercial or financial data may be exempt. RSA 91-A:5, IV; see *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540 (1997).

F. Contracts, proposals and bids.

Contract records are public records unless they are exempt from the Statute because they relate to the “acquisition, sale or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community,” RSA 91-A:3, II, (d), or they constitute a preliminary draft under RSA 91-A:5, IX. See *Gallagher v. Town of Windham*, 121 N.H. 156 (1981).

G. Collective bargaining records.

Exempt. *Appeal of Town of Exeter*, 126 N.H. 685 (1985); cf. *Talbot v. Concord Union Sch. Dist.*, 114 N.H. 532 (1974).

H. Coroners reports.

Autopsy reports are “confidential medical records which may not be released without authorization of next-of-kin.” RSA 611-A:8,IV.

I. Economic development records.

Unless the records are exempt “confidential, commercial or financial information” (or another provision of RSA 91-A:5), the records would be disclosed. *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540 (1997).

J. Election records.

Neither the Statute nor case law addresses this issue.

L. Hospital reports.

No reported decision under the Statute. Compare RSA 329:26 (physician-patient records); RSA 151:13 et seq. (quality assurance records); RSA 151:21, IX (patient records at state hospital).

M. Personnel records.

Personnel records are exempt if they pertain to “internal personnel practices . . . test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy” are exempt. RSA 91-A:5, IV. Also exempt are records of the hiring, dismissal, promotion or compensation of a public employee or disciplining of such employee unless the employee consents to their disclosure. RSA 91-A:3, II (a) and (b). See *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006)

1. Salary.

Yes. See *Professional Firefighters of New Hampshire v. Local Government Center*, 159 N.H. 699 (2010).

2. Disciplinary records.

No. RSA 91-A:5,IV exempts records pertaining to “internal personnel practices.” See *Hounsell v. North Conway Water Precinct*, 154

N.H. 1 (2006); *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993)).

3. Applications.

It depends on the nature of the position. See, e.g., *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008), holding that applications to be appointed to fill unexpired term of county sheriff, an elective office, are public.

4. Personally identifying information.

Neither the Statute nor case law addresses this issue.

5. Expense reports.

Neither the Statute nor case law addresses this issue.

N. Police records.

1. Accident reports.

Although neither the Statute nor case law addresses this issue, such reports have usually been made public.

2. Police blotter.

See 1. above.

3. 911 tapes.

See 1. above.

4. Investigatory records.

a. Rules for active investigations.

Under *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579 (2006), which reaffirmed *Lodge v. Knowlton*, 118 N.H. 574 (1978), the Court applies the six-prong test under the Freedom of Information Act for evaluating access to investigative files under 5 U.S.C. § 552(b) (7).

b. Rules for closed investigations.

See a. above. Under the six-prong test, the records probably would be disclosed.

5. Arrest records.

Although neither the Statute nor case law addresses this issue, arrest records usually have been open to public inspection.

6. Compilations of criminal histories.

Neither the Statute nor case law addresses this issue.

7. Victims.

Neither the Statute nor case law addresses this issue.

8. Confessions.

Neither the Statute nor case law addresses this issue.

9. Confidential informants.

Neither the Statute nor case law addresses this issue. Under *Murray v. New Hampshire Div. of State Police*, 154 N.H. 579 (2006); *Lodge v. Knowlton*, 118 N.H. 574 (1978), applying the six-prong test under the Freedom of Information Act for evaluating access to investigative files under 5 U.S.C. § 552(b)(7), such records probably would not be disclosed.

10. Police techniques.

See 9. above

11. Mug shots.

Neither the Statute nor case law addresses this issue.

12. Sex offender records.

Neither the Statute nor case law addresses this issue.

13. Emergency medical services records.

Neither the Statute nor case law addresses this issue.

O. Prison, parole and probation reports.

Exempt. See RSA 91-A:5, II (records of parole and pardon boards).

P. Public utility records.

Records relied on by the Public Utilities Commission in rulemaking are public. See *Society for the Protection of N.H. Forests v. Water Supply and Pollution Control Commission*, 115 N.H. 192 (1975). The names and addresses of residential customers filing voltage complaints are exempt, while the records of business customers are public. *Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005).

Q. Real estate appraisals, negotiations.

1. Appraisals.

Exempt. See *Perras v. Clements*, 127 N.H. 603 (1986).

2. Negotiations.

Negotiations are probably exempt. See RSA 91-A:3,II(d) which permits nonpublic sessions concerning “[c]onsideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.”

3. Transactions.

Neither the Statute nor case law addresses this issue.

4. Deeds, liens, foreclosures, title history.

These records are available in public county registries of deeds.

5. Zoning records.

Zoning boards are public bodies under and subject to the Statute.

R. School and university records.

1. Athletic records.

Neither the Statute nor case law addresses this issue.

2. Trustee records.

The Board of Trustees of the University System of New Hampshire is subject to the Statute.

3. Student records.

Neither the Statute nor case law addresses this issue.

S. Vital statistics.

1. Birth certificates.

Neither the Statute nor case law addresses this issue.

2. Marriage & divorce.

Neither the Statute nor case law addresses this issue.

3. Death certificates.

Neither the Statute nor case law addresses this issue.

4. Infectious disease and health epidemics.

Neither the Statute nor case law addresses this issue.

V. PROCEDURE FOR OBTAINING RECORDS

A. How to start.

1. Who receives a request?

The Statute is intended, and has been implemented, to minimize the need for formal procedures. Requests for records should be in

writing and directed to an official of the public agency or public body from which the records are sought. RSA 91-A:4, IV; RSA 91-A:7.

2. Does the law cover oral requests?

Yes. There is no requirement that a request be in writing, but it is advisable to do so to minimize the potential for misunderstanding and delay. See *Brent v. Paquette*, 132 N.H. 415 (1989) (no evidence plaintiff made request other than bare assertion he telephoned).

a. Arrangements to inspect & copy.

A public body may require an appointment to inspect records. *Brent v. Paquette*, 132 N.H. 415 (1989).

b. If an oral request is denied:

The requester is not required to but should submit a written request to avoid a dispute as to what is requested and when the request was made.

(1). How does the requester memorialize the refusal?

Under RSA 91-A:4,IV, the public agency or public body is required to disclose the records or respond to the requester in writing.

(2). Do subsequent steps need to be in writing?

See (1) above.

3. Contents of a written request.

a. Description of the records.

The request — whether in writing or made orally — must “reasonably describe[]” the record. RSA 91-A:4,IV.

b. Need to address fee issues.

Not in making the request.

c. Plea for quick response.

The public agency or public body has to disclose records “immediately available” for release,” otherwise it has five days to disclose the records or notify the requester when the records will be available. RSA 91-A:4,IV.

d. Can the request be for future records?

The Statute does not address this issue, but there is no reason not to do so.

B. How long to wait.

Remedies for Delay. The Statute provides remedies to “any person aggrieved by a violation of this chapter.” RSA 91-A:7. The court is authorized to award attorneys fees if the public body “knew or should have known that the conduct engaged in was a violation of this chapter.” RSA 91-A:8, I.

1. Statutory, regulatory or court-set time limits for agency response.

The Statute contains specific time limitations for response to a request for records. “If a public body is unable to make a public record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgement of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied.” RSA 91-A:4, IV. The Supreme Court has held that an agency may be justifiably “unable” to produce a record immediately if it is simply too busy or is understaffed. *Brent v. Paquette*, 132 N.H. 415 (1989); *Gallagher v. Town of Windham*, 121 N.H. 156 (1981) (permitting removal for use by government official in discharge of official duties).

2. Informal telephone inquiry as to status.

The Statute does not address this issue, but there is no reason not to do so.

3. Is delay recognized as a denial for appeal purposes?

The Statute does not address this issue. But in *ATV Watch v. N.H. Dep’t of Resources & Econ. Dev.*, 155 N.H. 434 (2007), the Court ruled that it was error for the trial court to find that the state agency had complied with the Statute by responding to the request “in a reasonable manner.” The Court held that the 5-day response time in RSA 91-A:4,IV “is absolute.”

C. Administrative appeal.

Not required; the Statute provides an immediate remedy in Superior Court.

2. To whom is an appeal directed?

4. Contents of appeal letter.

D. Court action.

1. Who may sue?

“Any person aggrieved by a violation of this chapter” may sue. RSA 91-A:7

2. Priority.

The Superior Court is directed to “give proceedings under this chapter priority on the court calendar.” RSA 91-A:7.

3. Pro se.

The Statute states that the petitioner “may appear with or without counsel.” RSA 91-A:7. The petition will be deemed sufficient “if it states facts constituting a violation of this chapter.” *Id.*

4. Issues the court will address:

Any issue within the scope of the Statute and raised by the petition will be addressed.

5. Pleading format.

The petition will be deemed sufficient “if it states facts constituting a violation of this chapter.” RSA 91-A:7

6. Time limit for filing suit.

The Statute does not specify a time for filing suit, but delay might effect the court’s view that the petition raises an important public issue.

7. What court.

Superior Court. RSA 91-A:7.

8. Judicial remedies available.

The Statute provides for declaratory and injunctive relief, including *ex parte* relief if the court “shall reasonably deem such an order necessary to ensure compliance with the provisions of this chapter.” RSA 91-A:7. The court may enjoin future violations of the Statute, and it may invalidate action taken at a meeting held in violation of the Statute. RSA 91-A:8, I and II.

9. Litigation expenses.

a. Attorney fees.

The Statute provides for fees where “the public body, public agency, or person knew or should have known that the conduct engaged in was a violation of this chapter.” RSA 91-A:8,I.

b. Court and litigation costs.

Costs may be awarded where the court finds that the lawsuit “was necessary in order to make the information available or the proceeding open to the public.” RSA 91-A:8, I. See *N.H. Challenge Inc. v. Commissioner, N.H. Department of Education*, 142 N.H. 246 (1997); *Veelbel v. Town of Bridgewater*, 140 N.H. 446 (1995); *Chambers v. Gregg*, 135 N.H. 478 (1992); *Orford Teachers Ass’n v. Watson*, 122 N.H. 803 (1982).

10. Fines.

The Statute does not impose fines.

11. Other penalties.

Actions for Damages. The Statute contains no provision for collecting damages on the basis of a violation of the Statute.

RSA 91-A:9 states that a person is guilty of a misdemeanor who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter. If a request for inspection is denied on the grounds that the information is exempt under this chapter, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending.

12. Settlement, pros and cons.

The Statute does not address this issue.

E. Appealing initial court decisions.

1. Appeal routes.

A Superior Court ruling on a petition for access is deemed a final judgment which may be appealed as of right to the New Hampshire Supreme Court.

2. Time limits for filing appeals.

An appeal must be filed within thirty days of the date on the clerk’s written notice of the decision on the merits.

3. Contact of interested amici.

See Supreme Court Rule 30.

F. Addressing government suits against disclosure.

The Statute does not address this issue.

Open Meetings

I. STATUTE -- BASIC APPLICATION.

A. Who may attend?

RSA 91-A:2,II states: “Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public.” RSA 91-A:3 provides for “nonpublic sessions.”

B. What governments are subject to the law?

State, county, municipal and local governments are subject to the Statute. RSA 91-A:1-a.

C. What bodies are covered by the law?

The Statute applies to public agencies and public bodies, defined terms under RSA 91-A:1-a, V and VI. A “public agency” covers “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.” A Public body” includes: “(1) The general court including executive sessions of committees; and including any advisory committee established by the general court. (2) 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. (3) 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) 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. (5) 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.”

Under RSA 91-A:1-a,I an “advisory committee” is “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.”

1. Executive branch agencies.

The Statute applies to executive branch agencies. RSA 91-A:1-a, V and VI.

a. What officials are covered?

The Statute applies to public agencies and public bodies and to their members and employees who hold official positions, such as, “chair” and “executive director.”

b. Are certain executive functions covered?

Yes, the Statute applies to the Governor acting together with the Governor’s Council as well as the Governor’s Council alone, including any advisory committee established by either the Governor or the Governor’s Council, as well as any state public body. RSA 91-A:1-a,VI(b).

c. Are only certain agencies subject to the act?

No, the Statute applies to any public agency or public body. RSA 91-A:1-a,V and VI.

2. Legislative bodies.

The Statute applies to the Legislature. RSA 91-A:1-a,VI. However, its definition of “meeting” excludes “[a] caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2.”

3. Courts.

The Statute does not apply to courts.

4. Nongovernmental bodies receiving public funds or benefits.

In *Professional firefighters of New Hampshire v. HealthTrust, Inc.*, 151 N.H. 501 (2005), the Court cited the fact that HealthTrust received money from governmental entities as one of five factors that it considered in holding that HealthTrust was subject to the Statute.

5. Nongovernmental groups whose members include governmental officials.

In *Professional Firefighters* (see above), the fact that HealthTrust’s board of directors included governmental officials was another factor considered by the Court in holding that HealthTrust was subject to the Statute.

6. Multi-state or regional bodies.

RSA 91-A:1-a,VI(e) defines “public body” to include: “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.

7. Advisory boards and commissions, quasi-governmental entities.

The Statute applies to “advisory committees.” RSA 91-A:1-a, VI.

8. Other bodies to which governmental or public functions are delegated.

In *Professional firefighters of New Hampshire v. HealthTrust, Inc.*, 151 N.H. 501 (2005), one of the five factors the Court relied on in ruling that HealthTrust was subject to the Statute was the fact that it performed an “essential governmental function”- health insurance to public employees through a pooled risk management program.

9. Appointed as well as elected bodies.

The Statute makes no distinction between elected and appointed bodies.

D. What constitutes a meeting subject to the law.

Generally. RSA 91-A:2,I defines a “meeting” as “the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a,VI, or a majority of the members of such body if the rules of that body define “quorum” as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters.”

1. Number that must be present.

a. Must a minimum number be present to constitute a “meeting”?

A quorum is required but it may not exceed “a majority of the members of such body.” RSA 91-A:2,I.

b. What effect does absence of a quorum have?

The absence of a quorum would mean that the public body had not convened a meeting.

2. Nature of business subject to the law.

The Statute states that a “meeting” is for “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,I.

3. Electronic meetings.

The Statute provides for electronic meetings under limited circumstances. RSA 91-A:2,III reads:

“A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.

(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.

(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an “emergency” means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.

(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting’s location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.”

E. Categories of meetings subject to the law.

1. Regular meetings.

a. Definition.

The Statute does not distinguish between regular and special meetings. RSA 91-A:2, I.

b. Notice.

(1). Time limit for giving notice.

At least 24 hours, unless an emergency meeting is held. The Statute defines “emergency” to mean “a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer

of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held.” RSA 91-A:2,II.

RSA 91-A:2,II further provides that “a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice.”

(2). To whom notice is given.

The public. RSA 91-A:2,II.

(3). Where posted.

Notice “shall be posted in 2 appropriate places one of which may be the public body’s Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town” in which the meeting is to be held. RSA 91-A:2,II.

(4). Public agenda items required.

The Statute does not address this issue.

(5). Other information required in notice.

No other information is specified.

(6). Penalties and remedies for failure to give adequate notice.

Failure to comply with the notice requirement may result in invalidation of the board’s action. *Stoneman v. Tamworth Sch. Dist.*, 114 N.H. 371 (1974); *Carter v. City of Nashua*, 113 N.H. 407 (1973).

c. Minutes.

(1). Information required.

The Statute does not specify the content of minutes of public meetings. That said, it is fair to assume minutes will include any motions and votes on same, such as a motion to go into nonpublic session, including the exemption that permits such session. See RSA 91-A:3,I(b) (“Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present”). Minutes of nonpublic sessions shall record “all actions [and] shall be promptly made available for public inspection, except as provided in [RSA 91-A:3,III].”

(2). Are minutes public record?

Yes. RSA 91-A:4,I.

2. Special or emergency meetings.

a. Definition.

The Statute defines “emergency” to mean “a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held.” RSA 91-A:2,II.

b. Notice requirements.

(1). Time limit for giving notice.

See a. above.

(2). To whom notice is given.

The public.

(3). Where posted.

Notice “shall be posted in 2 appropriate places one of which may be the public body’s Internet website, if such exists, or shall be printed in

a newspaper of general circulation in the city or town” in which the meeting is to be held. RSA 91-A:2,II.

(4). Public agenda items required.

The Statute does not address this issue.

(5). Other information required in notice.

The Statute does not address this issue.

(6). Penalties and remedies for failure to give adequate notice.

The Statute does not exempt emergency meetings from the provision giving the court the discretion to invalidate action taken at such meeting. RSA 91-A:8,II.

c. Minutes.

(1). Information required.

Minutes of an emergency meeting must be kept, and they must “clearly spell out the need for the emergency meeting.” RSA 91-A:2, II.

(2). Are minutes a public record?

Yes. RSA 91-A:4,I.

3. Closed meetings or executive sessions.

a. Definition.

Generally. The Statute permits public bodies to meet in “nonpublic session,” only for matters set forth in RSA 91-A:3,II.

Nonpublic Sessions Authorized by the Statute.

The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open in which case the request shall be granted. RSA 91-A:3, II(a). See *Appeal of Plantier*, 126 N.H. 500 (1985). (employee with a right to meeting must be given notice of the meeting and its purpose.); *Johnson v. Nash*, 135 N.H. 534 (1992) (public posting of meeting without indicating topics to be discussed insufficient). Note, discussions regarding a public official, as opposed to a public employee, do not qualify for this exemption.

“The hiring of any person as a public employee.” RSA 91-A:3,II(b).

“Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the body or agency itself, unless such person requests an open meeting. This exemption shall extend to 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).

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

“Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the public body or any subdivision thereof, or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph.” RSA 91-A:3,II(e).

“Consideration of applications by the adult parole board under RSA 651-A. RSA 91-A:3,II(f).

“Consideration of security-related issues bearing on the immediate safety of security personnel or inmates at the county correctional

facilities by county correctional superintendents or their designees. RSA 91-A:3,II(g).

“Consideration of applications by the business finance authority under RSA 162-A:7-10 and 162-A:13 where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application.” RSA 91-A:3,II(h).

“Consideration of matters relating to the preparation for and the carrying out of 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:3,II(i).

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

b. Notice requirements.

Notice requirements are the same as for regular meetings. Penalties are the same as for any other violation of the Statute. See RSA 91-A:8; *Voelbel v. Town of Bridgewater*, 140 N.H. 446 (1995); *Carter v. City of Nashua*, 113 N.H. 407 (1973); *Stoneman v. Tamworth Sch. Dist.*, 114 N.H. 371 (1974).

c. Minutes.

Requirement of Minutes. Minutes of proceedings in nonpublic session “shall be kept and the record of all actions shall be promptly made available for public inspection.” RSA 91-A:3,III.

Minutes and decisions reached in nonpublic session are to be disclosed within 72 hours of the meeting. The only exception to this requirement is that if the public body “by recorded vote of 2/3 of the members present . . . determine[s] that divulgence of the information likely would affect adversely the reputation of any person other than a member of the body or agency itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency 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:3,III.

d. Requirement to meet in public before closing meeting.

The Statute provides that “(n)o body or agency may enter nonpublic session, except by a motion properly made and seconded.” RSA 91-A:3,I(a).

e. Requirement to state statutory authority for closing meetings before closure.

The Statute requires the motion to “state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session.” RSA 91-A:3,I(b).

f. Tape recording requirements.

The Statute does not address this issue.

F. Recording/broadcast of meetings.

1. Sound recordings allowed.

Persons attending the meetings have the right “to use recording devices, including, but not limited to, tape recorders, cameras and videotape equipment.” RSA 91-A:2,II. Although the Statute does not specifically authorize live broadcast, it would appear that news organizations may do so if the broadcast can be accomplished by a “recording device.” An audio recording of a public meeting to be used to compile the minutes is a public record, and the public has a right to listen to it and make a copy. RSA 91-A:4, II.

2. Photographic recordings allowed.

See 1. above

G. Are there sanctions for noncompliance?

Yes, RSA 91-A:8 provides for invalidation of action taken at such a meeting, court costs and attorneys fees.

II. EXEMPTIONS AND OTHER LEGAL LIMITATIONS

A. Exemptions in the open meetings statute.

1. Character of exemptions.

a. General or specific.

The exemptions are specific.

b. Mandatory or discretionary closure.

The Statute is framed in terms of a meeting “shall not include” but there is no reason to conclude that meeting exempted could not, at the discretion of the public body, be open to the public.

2. Description of each exemption.

The Statute excludes from the definition of “meeting” the following:

(1) “A chance, social or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters.”

(2) “Strategy or negotiations with respect to collective bargaining;

(3) Consultation with legal counsel;

(4) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

(5) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.” RSA 91-A:2,I.

B. Any other statutory requirements for closed or open meetings.

No.

C. Court mandated opening, closing.

The Statute does not address this issue.

III. MEETING CATEGORIES -- OPEN OR CLOSED.

A. Adjudications by administrative bodies.

1. Deliberations closed, but not fact-finding.

The Statute does not distinguish between fact-finding and nonfact-finding functions.

2. Only certain adjudications closed, i.e. under certain statutes.

See 1. above.

B. Budget sessions.

Subject to the Statute.

C. Business and industry relations.

Subject to the Statute.

D. Federal programs.

Subject to the Statute.

E. Financial data of public bodies.

Subject to the Statute.

F. Financial data, trade secrets or proprietary data of private corporations and individuals.

There is no case law on this issue but such matters would probably support a nonpublic session. See RSA 91-A:5, IV.

G. Gifts, trusts and honorary degrees.

Subject to the Statute.

H. Grand jury testimony by public employees.

Grand jury proceedings are not within the Statute. RSA 91-A:5, I.

I. Licensing examinations.

There is no case law on this issue but such matters would probably support a nonpublic session. See RSA 91-A:5, IV.

J. Litigation; pending litigation or other attorney-client privileges.

The Statute exempts from the definition of “meeting” “consultation with legal counsel.” RSA 91-A:2, I(c). Further, a public body may go into nonpublic session for “consideration or negotiation of pending claims or litigation which has been threatened or filed against the body or agency or any subdivision thereof, or against any member thereof because of his membership in such body until the claim or litigation has been fully adjudicated or otherwise settled.” RSA 91-A:3,II(e).

K. Negotiations and collective bargaining of public employees.

The Statute excludes from the definition of “meeting” “[s]trategy or negotiations with respect to collective bargaining. RSA 91-A:2,I.

1. Any sessions regarding collective bargaining.

See above.

2. Only those between the public employees and the public body.

See above.

L. Parole board meetings, or meetings involving parole board decisions.

There is no case law on this issue but such matters would probably support a nonpublic session. See RSA 91-A:5, IV.

M. Patients; discussions on individual patients.

The Statute does not cover patient discussions. See RSA 329:26.

N. Personnel matters.

The “dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him” may be held in a nonpublic session, as may discussions regarding “the hiring of any person as a public employee.” RSA 91-A:3,II(a) and (b). However, if the employee to be dismissed has a right to a meeting, he may require an open meeting. RSA 91-A:3,II(a).

O. Real estate negotiations.

“Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community,” may be conducted in nonpublic session. RSA 91-A:3,II(d). This provision should be limited to cases where disclosure of discussions

would prevent or frustrate consummation of the proposed transaction, or inflate its cost to the public.

P. Security, national and/or state, of buildings, personnel or other.

The Statute permits nonpublic sessions for consideration of (1) “security-related issues bearing on the immediate safety of security personnel or inmates at the county correctional facilities by county correctional superintendents or their designees,” and (2) “matters relating to the preparation for and the carrying out of 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:3,II(g) and (i). See also RSA 91-A:5, VI.

Q. Students; discussions on individual students.

There is no case law on this issue. See RSA 91-A:5,VII (exempting “unique pupil identification information collected in accordance with RSA 193-E:5”).

IV. PROCEDURE FOR ASSERTING RIGHT OF ACCESS

Generally. The Statute provides the same remedies for a violation of the public’s right of access to public meetings as it does for a violation of the right of access to public records. RSA 91-A:7-8.

See Open Records Act, Part V.

A. When to challenge.

RSA 91-A:7 provides that when a court finds that “time probably is of the essence, he may order notice by any reasonable means, and he shall have authority to issue an *ex parte* order when he shall reasonably deem such an order necessary to ensure compliance with the provisions of this chapter.” RSA 91-A:8, III authorizes the court to enjoin future violations of the Statute.

1. Does the law provide expedited procedure for reviewing request to attend upcoming meetings?

Yes, see above.

2. When barred from attending.

Yes, see above.

3. To set aside decision.

Yes, see above.

4. For ruling on future meetings.

Yes, RSA 91-A:8,III authorizes the court “to enjoin future violations of this chapter.”

B. How to start.**1. Where to ask for ruling.**

The Statute provides that a person “aggrieved by a violation of this chapter may petition the Superior Court for injunctive [or other] relief. RSA 91-A:7.

a. Administrative forum.

The Statute does not provide for an administrative forum and there is no requirement of exhaustion.

b. State attorney general.

Not applicable.

c. Court.

The Statute provides that a person “aggrieved by a violation of this chapter may petition the Superior Court for injunctive [or other] relief. RSA 91-A:7.

2. Applicable time limits.

The Statute does not require that an action be initiated within any specific time period. But delay might have an impact on how the court views the merits of the case.

3. Contents of request for ruling.

The Statute does not require that a person initiating the court action be represented by counsel, and it states that a petition “shall be deemed sufficient if it states facts constituting a violation of this chapter.” RSA 91-A:7.

4. How long should you wait for a response?

The Statute does not address this issue.

5. Are subsequent or concurrent measures (formal or informal) available?

No.

C. Court review of administrative decision.

Not applicable.

D. Appealing initial court decisions.

1. Appeal routes.

New Hampshire Supreme Court.

2. Time limits for filing appeals.

Thirty days from the date on the notice of the decision on the merits.

3. Contact of interested amici.

Supreme Court Rule 30 provides:

(1) A brief of an amicus curiae may be filed only after leave is granted by order of the supreme court on motion or when accompanied by written consent of all parties to the case. An amicus curiae shall file a brief within the time allowed to the party whose position the amicus will support, unless the court for good cause shown shall grant leave for a later filing.

(2) When consent to the filing of an amicus curiae is refused by a party to the case, an original and 7 copies of a motion for leave to file may be presented to the court within the time allowed for the filing of the brief of the party to be supported. The motion shall concisely state the nature of the movant’s interest, the facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case. A brief may be conditionally filed with the motion for leave.

A party served with such motion may seasonably file an original and 7 copies of an objection concisely stating the reasons for withholding consent.

(3) Consent to the filing of a brief of an amicus curiae is unnecessary when the brief is presented for the State of New Hampshire by the attorney general (as amicus and not as a party); for any State agency authorized by law to appear on its own behalf by its appropriate legal counsel; or for any political subdivision of the State by its authorized law officer.

(4) The court may on motion, in its discretion, permit an amicus curiae to be heard orally.

V. ASSERTING A RIGHT TO COMMENT.

The Statute does not address this issue. By procedural rules and practice public bodies typically announce by notice and hold meetings at which the public may comment and meetings where the public may only listen.

Statute

Open Records and Meetings

New Hampshire Revised Statutes

Title VI. Public Officers and Employees

Chapter 91-A. Access to Governmental Records and Meetings

91-A:1 Preamble. – Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

91-A:1-a Definitions. – In this chapter:

I. “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.

II. “Governmental proceedings” means the transaction of any functions affecting any or all citizens of the state by a public body.

III. “Governmental records” means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term “governmental records” includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term “governmental records” shall also include the term “public records.”

IV. “Information” means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.

V. “Public agency” means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.

VI. “Public body” means 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.

(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.

91-A:2 Meetings Open to Public. –

I. For the purpose of this chapter, a “meeting” means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define “quorum” as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon

such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include:

- (a) Strategy or negotiations with respect to collective bargaining;
- (b) Consultation with legal counsel;

(c) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

II. Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings. Minutes of all such meetings, including names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. For the purposes of this paragraph, a business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays.

III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.

(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.

(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.

(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.

91-A:2-a Communications Outside Meetings. –

I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III.

II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

91-A:3 Nonpublic Sessions. –

I. (a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.

(b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.

(c) All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion.

II. Only the following matters shall be considered or acted upon in nonpublic session:

(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.

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

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to 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.

(d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the public body or any subdivision thereof, or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph.

(f) Consideration of applications by the adult parole board under RSA 651-A.

(g) Consideration of security-related issues bearing on the immediate safety of security personnel or inmates at the county correctional facilities by county correctional superintendents or their designees.

(h) Consideration of applications by the business finance authority under RSA 162-A:7-10 and 162-A:13, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application.

(i) Consideration of matters relating to the preparation for and the carrying out of 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.

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

III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. 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, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency 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. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply.

91-A:4 Minutes and Records Available for Public Inspection. –

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, “to copy” means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

I-a. Records of any payment made to an employee of any public body or agency listed in RSA 91-A:1-a, VI(a)-(d), or to the employee’s agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3.

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

III. 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 and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.

III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible “deleted items” folder or similar location on a computer shall not constitute deletion of the record.

IV. Each 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. If a public body or agency is unable to make a governmental record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a computer, photocopying

machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.

VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk’s office and made available for public inspection for a period of no less than 10 years from the date of settlement.

VII. Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

91-A:5 Exemptions. – The following governmental records are exempted from the provisions of this chapter:

I. Records of grand and petit juries.

II. Records of parole and pardon boards.

III. Personal school records of pupils.

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

V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.

VI. 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.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

91-A:5-a Limited Purpose Release. – Records from non-public sessions under RSA 91-A:3, II(i) or that are exempt under RSA 91-A:5, VI may be released to local or state safety officials. Records released under this section shall be marked “limited purpose release” and shall not be redisclosed by the recipient.

91-A:6 Employment Security. – This chapter shall apply to RSA 282-A, relative to employment security; however, in addition to the exemptions under RSA 91-A:5, the provisions of RSA 282-A:117-123 shall also apply; this provision shall be administered and construed in the spirit of that section, and the exemptions from the provisions of this chapter shall include anything exempt from public inspection under RSA 282-A:117-123 together with all records

and data developed from RSA 282-A:117-123.

91-A:7 Violation. – Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief. In order to satisfy the purposes of this chapter, the courts shall give proceedings under this chapter high priority on the court calendar. Such a petitioner may appear with or without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter, and may be filed by the petitioner or his or her counsel with the clerk of court or any justice thereof. Thereupon the clerk of court or any justice shall order service by copy of the petition on the person or persons charged. When any justice shall find that time probably is of the essence, he or she may order notice by any reasonable means, and he or she shall have authority to issue an order ex parte when he or she shall reasonably deem such an order necessary to insure compliance with the provisions of this chapter.

91-A:8 Remedies. –

I. If any public body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a governmental record or refuses access to a governmental proceeding to a person who reasonably requests the same, such public body, public agency, or person shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available or the proceeding open to the public. Fees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was a violation of this chapter or where the parties, by agreement, provide that no such fees shall be paid. In any case where fees are awarded under this chapter, upon a finding that an officer, employee, or other official of a public body or agency has acted in bad faith in refusing to allow access to a governmental proceeding or to provide a governmental record, the court may award such fees personally against such officer, employee, or other official.

I-a. The court may award attorney's fees to a public body or public agency or employee or member thereof, for having to defend against a person's lawsuit under the provisions of this chapter, when the court makes an affirmative finding that the lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive.

II. The court may invalidate an action of a public body or agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation.

III. In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter.

91-A:9 Destruction of Certain Information Prohibited. – A person is guilty of a misdemeanor who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter. If a request for inspection is denied on the grounds that the information is exempt under this chapter, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending.

91-A:10 Release of Statistical Tables and Limited Data Sets for Research. –

I. In this subdivision:

(a) "Agency" means each state board, commission, department, institution, officer or other state official or group.

(b) "Agency head" means the head of any governmental agency which is responsible for the collection and use of any data on persons or summary data.

(c) "Cell size" means the count of individuals that share a set of characteristics contained in a statistical table.

(d) "Data set" means a collection of personal information on one or more individuals, whether in electronic or manual files.

(e) "Direct identifiers" means:

(1) Names.

(2) Postal address information other than town or city, state, and zip code.

(3) Telephone and fax numbers.

(4) Electronic mail addresses.

(5) Social security numbers.

(6) Certificate and license numbers.

(7) Vehicle identifiers and serial numbers, including license plate

numbers.

(8) Personal Internet IP addresses and URLs.

(9) Biometric identifiers, including finger and voice prints.

(10) Personal photographic images.

(f) "Individual" means a human being, alive or dead, who is the subject of personal information and includes the individual's legal or other authorized representative.

(g) "Limited data set" means a data set from which all direct identifiers have been removed or blanked.

(h) "Personal information" means information relating to an individual that is reported to the state or is derived from any interaction between the state and an individual and which:

(1) Contains direct identifiers.

(2) Is under the control of the state.

(i) "Provided by law" means use and disclosure as permitted or required by New Hampshire state law governing programs or activities undertaken by the state or its agencies, or required by federal law.

(j) "Public record" means records available to any person without restriction.

(k) "State" means the state of New Hampshire, its agencies or instrumentalities.

(l) "Statistical table" means single or multi-variate counts based on the personal information contained in a data set and which does not include any direct identifiers.

II. Except as otherwise provided by law, upon request an agency shall release limited data sets and statistical tables with any cell size more than 0 and less than 5 contained in agency files to requestors for the purposes of research under the following conditions:

(a) The requestor submits a written application that contains:

(1) The following information about the principal investigator in charge of the research:

(A) name, address, and phone number;

(B) organizational affiliation;

(C) professional qualification; and

(D) name and phone number of principal investigator's contact person, if any.

(2) The names and qualifications of additional research staff, if any, who will have access to the data.

(3) A research protocol which shall contain:

(A) a summary of background, purposes, and origin of the research;

(B) a statement of the general problem or issue to be addressed by the research;

(C) the research design and methodology including either the topics of exploratory research or the specific research hypotheses to be tested;

(D) the procedures that will be followed to maintain the confidentiality of any data or copies of records provided to the investigator; and

(E) the intended research completion date.

(4) The following information about the data or statistical tables being requested:

(A) general types of information;

(B) time period of the data or statistical tables;

(C) specific data items or fields of information required, if applicable;

(D) medium in which the data or statistical tables are to be supplied;

and

(E) any special format or layout of data requested by the principal investigator.

(b) The requestor signs a "Data Use Agreement" signed by the principal investigator that contains the following:

(1) Agreement not to use or further disclose the information to any person or organization other than as described in the application and as permitted by the Data Use Agreement without the written consent of the agency.

(2) Agreement not to use or further disclose the information as otherwise required by law.

(3) Agreement not to seek to ascertain the identity of individuals revealed in the limited data set and/or statistical tables.

(4) Agreement not to publish or make public the content of cells in statistical tables in which the cell size is more than 0 and less than 5 unless:

(A) otherwise provided by law; or

(B) the information is a public record.

(5) Agreement to report to the agency any use or disclosure of the information contrary to the agreement of which the principal investigator becomes aware.

(6) A date on which the data set and/or statistical tables will be returned to the agency and/or all copies in the possession of the requestor will be destroyed.

III. The agency head shall release limited data sets and statistical tables and sign the Data Use Agreement on behalf of the state when:

(a) The application submitted is complete.

(b) Adequate measures to ensure the confidentiality of any person are documented.

(c) The investigator and research staff are qualified as indicated by:

(1) Documentation of training and previous research, including prior publications; and

(2) Affiliation with a university, private research organization, medical center, state agency, or other institution which will provide sufficient research resources.

(d) There is no other state law, federal law, or federal regulation prohibiting release of the requested information.

IV. Within 10 days of a receipt of written application, the agency head, or designee, shall respond to the request. Whenever the agency head denies release of requested information, the agency head shall send the requestor a letter identifying the specific criteria which are the basis of the denial. Should release be denied due to other law, the letter shall identify the specific state law, federal law, or federal regulation prohibiting the release. Otherwise the agency head shall provide the requested data or set a date on which the data shall be provided.

V. Any person violating any provision of a signed Data Use Agreement shall be guilty of a violation.

VI. Nothing in this section shall exempt any requestor from paying fees otherwise established by law for obtaining copies of limited data sets or statistical tables. Such fees shall be based on the cost of providing the copy in the format requested. The agency head shall provide the requestor with a written description of the basis for the fee.

