



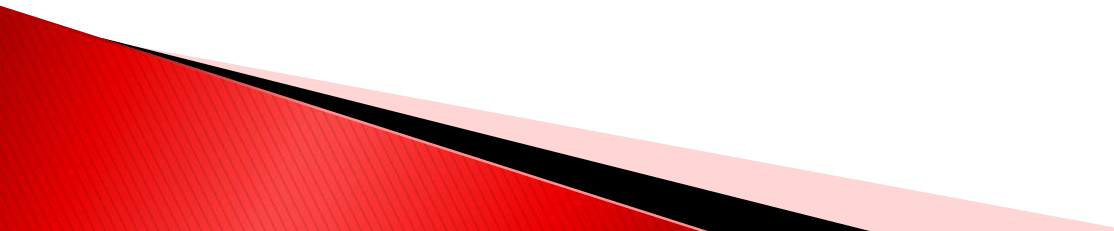
## RIGHT TO KNOW LAW 2016

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New Hampshire · Maine

# Presentation

- ▶ 1. Public Meetings
  - ▶ 2. Non-Public Sessions
  - ▶ 3. Non-Meetings
  - ▶ 4. Minutes of Meetings
  - ▶ 5. Governmental Records
  - ▶ 6. Use of Email
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# 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.*

# Definition of a Public Meeting

- ▶ A public meeting is defined as the convening of a quorum of the membership of a public body, 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, 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 public meeting if no decisions are made regarding such matters.

# Quorum of the Public Body

- ▶ Generally, a quorum of the public body is a majority of the members appointed or elected to serve on the public body.
- ▶ The public body may, by rule, stipulate a greater number than a simple majority as a “quorum” of the body.

# Definition of a Public Body

- ▶ 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.

# Example of Public Bodies

- ▶ Town Council
  - ▶ County Commission
  - ▶ Zoning Board of Adjustment
  - ▶ Planning Board
  - ▶ Conservation Commission
  - ▶ Library Trustees
  - ▶ Parks and Recreation Committee
  - ▶ Agricultural Commission
  - ▶ Ethics Committee
  - ▶ Any advisory or subcommittee to the above
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# Requirements of a Public Meeting

- ▶ Must be open and accessible by the public.
- ▶ Must have a quorum of the public body physically present (unless emergency).
- ▶ Minutes must be taken.
- ▶ Notice of the meeting must be posted in two appropriate places at least 24 hours in advance, excluding Sunday and holidays, unless an emergency exists.
- ▶ All communications between members of the public body must be discernable to those in attendance.



# Emergency Public Meetings

- ▶ Emergency exists when chair or presiding officer concludes that “*immediate and undelayed action is imperative.*”
- ▶ Notice shall be posted of the time and place of the emergency meeting as soon as practicable.
- ▶ The public body must use whatever further means are reasonably available to inform the public of the emergency meeting.
- ▶ The minutes of the Meeting must clearly state the reason for emergency meeting.
- ▶ Quorum is not necessary at the meeting location.
- ▶ RSA 91-A: 2, II.

# Electronic Participation

- ▶ Members may participate electronically only when physical attendance is not practical.
- ▶ Each member participating electronically must be able to communicate contemporaneously with all members of the public body.
- ▶ The communications of the member(s) appearing electronically must be audible or observable by the public in attendance.
- ▶ The person appearing electronically must identify anyone else present with that member.
- ▶ The minutes must state the reason attendance was not practical.
- ▶ Except in an emergency, quorum must be physically present at the location indicated in the posting.

# Non-Public Meetings

- ▶ Limited to the following purposes:
  - The dismissal, promotion, disciplining, or compensation of any public employee, unless the employee has the right to have the meeting public and requests so (RSA 91-A:3 II, a).
  - The hiring of any public employee (RSA 91-A:3 II, b).
  - Matters which if discussed in public would adversely affect the reputation of any person, other than a member of the body itself (unless requested to be in public session by the person so affected) (RSA 91-A:3 II, c).
  - Applications for assistance, tax abatement requests, or waiver of fee, fine or other levy, ***based on the inability to pay or the poverty of applicant*** (RSA 91-A:3 II, c).

# Non-Public Meetings (cont.)

- Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would benefit a party whose interest are adverse to the general community (RSA 91-A: 3, II, d).
- Consideration or negotiation of pending claims or litigation threatened in writing or filed until the matter is fully adjudicated. Does not apply to tax abatement applications (unless ability to pay is a factor). (RSA 91-A:3 II, e) (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 immediate safety of security personnel or inmates at county correctional facilities (commissioners or superintendent. (RSA 91-A:3 II, g).

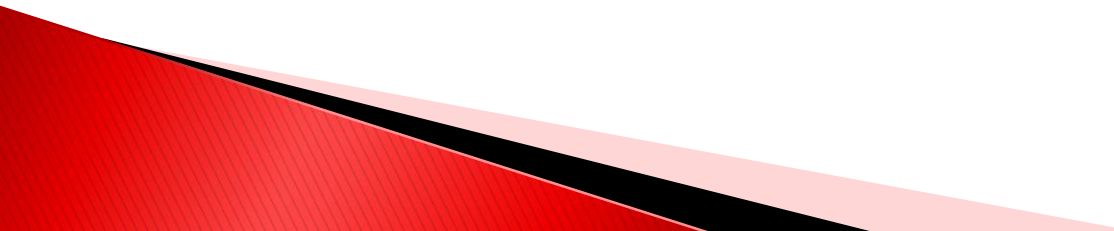
# Non-Public Meetings (cont.)

- ▶ Consideration of applications by the business finance authority under RSA 162-A:7-10 & 162-A:13. (RSA 91-A:3 II, h).
- ▶ Consideration of matters relating to carrying out emergency functions and related trainings intended to thwart widespread or severe damage to person or property (RSA 91-A:3 II, i).
- ▶ Consideration of confidential, commercial or financial information that is exempt from disclosure under RSA 91-A:5, IV (personnel & employment information that would constitute an invasion of privacy) (RSA 91-A:3 II, j).
- ▶ The consideration of school tuition agreements (agreement must be made public prior to approval (RSA 91-A:3 II, k)

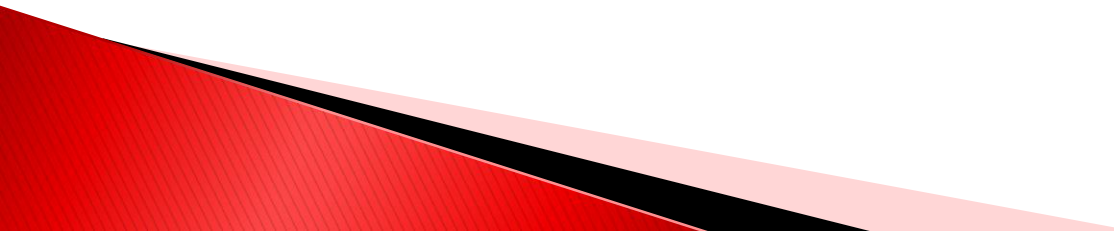
# Requirements of Non-Public Sessions

- ▶ Must open meeting of the public body in public session first.
- ▶ Motion must be made to enter into non-public session including a reference to the specific non-public purpose (cite relevant statutory purpose).
- ▶ Roll call vote must be taken and noted in the minutes of public session.
- ▶ Majority vote of members present is required.
- ▶ Minutes of the non-public session must be taken.
- ▶ Discussions limited to specific non-public purpose.

RSA 91-A:3



# Examples of Inappropriate Discussions in Non-Public Session

- ▶ Discussing issues or topics beyond the cited non-public purpose.
  - ▶ Using non-public session to interview or discuss the appointment of or a replacement for member of a public body.
  - ▶ Entering into non-public session to discuss the misconduct of a member of the public body.
  - ▶ Considering the termination/disciplining of an employee without providing the employee prior notice (if required by law, policy or contract).
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# Non-Meetings

- ▶ Non-Meetings are meetings of the public body that are not considered public meetings or non-public meetings. Examples:
  - Strategy or negotiations with respect to collective bargaining;
  - Consultation with legal counsel;
  - Chance, social, or other encounters of a quorum of the public body not convened for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power, if no decisions are made regarding such matters;
  - Circulation of draft documents intended to formalize decisions made in a previous meeting.

RSA 91-A2, I.

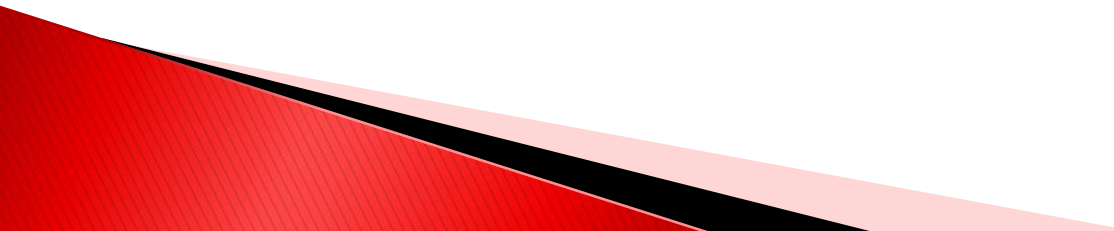


# Difference Between a Non-Meeting and a Non-Public Session

- ▶ No minutes are required for a non-meeting.
- ▶ No posting is required for a non-meeting.\*
- ▶ No public meeting is required before entering into a non-meeting.
- ▶ No roll call vote is required to go into a non-meeting.
- ▶ No quorum is required to be physically present for a non-meeting.

\*Note: The public body may decide to post the non-meeting so the public knows why the body is meeting in private.

# Non-Public Session Minute Requirements

- Names of all persons present.
  - Time non-public session started and ended.
  - A brief description of the subject discussed.
  - All final decisions made including any motions made, the names of the persons making and seconding all motions, and the tally on all votes.
  - Minutes are not required to be a verbatim transcript; *DiPietro v. Nashua*, 109 N.H. 1974 (1968).
  - Public Body may take final action in non-public session.
  - Minutes must be disclosed to the public not more than seventy two (72) hours after the meeting (draft minutes are sufficient) unless the minutes are sealed.
  - The motion, second, and vote to leave non-public session.
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# Sealing Non-Public Session Minutes

- ▶ Minutes of Non-public session may be sealed by a 2/3rds vote for three (3) limited reasons:
  - Disclosure would likely adversely affect the reputation of a person other than a member of the body itself; or
  - Disclosure would render the proposed action ineffective; or
  - The topic discussed pertained to terrorism.
- ▶ If no action is taken by the body, consideration should be given to drafting the non-public session minutes in manner so that sealing is not required.
- ▶ Before sealing the non-public minutes they should be reviewed by the body to determine if sealing is necessary.
- ▶ The motion to seal must be taken in public session and shall state one of the three (3) reasons for sealing the minutes.

# Governmental Records

- ▶ Governmental records are defined as any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. 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.

# Examples of Governmental Records


- ▶ Employee contracts and salary information.
  - ▶ Property tax information, including field record cards. *Menge v. Manchester*, 113 N.H. 533 (1978).
  - ▶ Some law enforcement investigative files.
  - ▶ Records of payments made to an employee upon separation other than regular salary and/or accrued leave.
  - ▶ Electronic records including email, voice mail, pdf's, and electronic photos which meet the definition of a governmental record.
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# Governmental Records Exempt from Disclosure

- ▶ Records relative to the preparation and carrying out of emergency functions intended to thwart acts intended to impose widespread injury to persons or property.
- ▶ Any notes or other materials made for personal use that do not have an official purpose.
- ▶ Preliminary drafts, notes, memoranda, and other documents not in their final form which have not been circulated or available to a quorum of the public body.
- ▶ Personal pupil school records.

RSA 91-A: 5, III, VIII & IX.

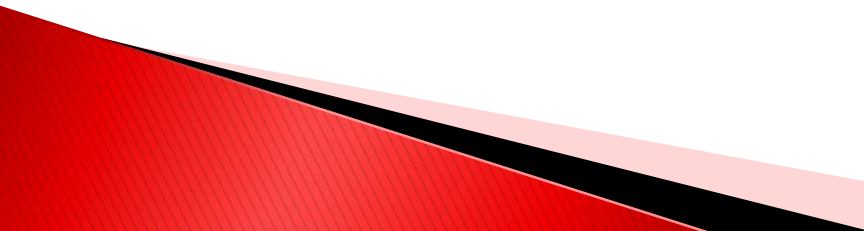
# Other Governmental Records Exempt from Disclosure (cont.)

- ▶ Written legal advice that is subject to the attorney/client privilege.
  - ▶ Documents and information received in non-public session if disclosure would frustrate the purpose of the non-public session.
  - ▶ Information sought to probe the mental processes of a governmental decision maker.
  - ▶ Teacher certification records maintained by the department of education.
  - ▶ Internal investigations of suspected employee misconduct.
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# Other Governmental Records Exempt from Disclosure

- ▶ Electronic records that have been initially and “*legally*” deleted (not just in trash folder).
- ▶ 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, and other files whose disclosure would constitute invasion of privacy.

RSA 91-A: 1, III.

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# Disclosure of Governmental Records that Would Constitute an Invasion of Privacy

- The Courts will apply a three (3) part test to determine if disclosure would constitute an invasion of privacy:
  - Is there a privacy interest that would be invaded by disclosure?
  - Would disclosure inform the public about the conduct and activities of the government?
  - Balance the public's interest in disclosure against the interests of those favoring non-disclosure (including those alleging an invasion of privacy will result from disclosure).
- Generally, information about private citizens in governmental files that reveals nothing about the agency's conduct “***is not within the purpose of the Right to Know Law.***” *Lamy v. N.H. Public Utilities Commission*, 152 N.H. 106 (2005).

# Law Enforcement Information

- ▶ Information that is part of an *open* investigation can be withheld if disclosure would reasonably interfere with law enforcement proceedings.
- ▶ Information that is part of a criminal investigation can be withheld if disclosure would reasonably be expected to compromise a confidential source.
- ▶ Information that is part of a criminal investigation can be withheld if disclosure would reasonably disclose investigative techniques and procedures.
- ▶ Information that is part of a criminal investigation can be withheld if disclosure would reasonably endanger the life or safety of any person.

*Murray v. State Police* 154 N.H. 579, (2006).

# Law Enforcement Information

- ▶ Information from a completed investigation (pending trial) can be released if the information does not compromise the accused right to a fair trial.
- ▶ Evidence that should not be released:
  - Speculative evidence
  - Unreliable evidence
  - Information gained from unlawful interrogations
  - Information gained without the necessary warrant(s)
  - Evidence that would constitute an invasion of privacy
- ▶ Information from closed investigation can be released although consideration should be given to confidential sources, investigative techniques, health and safety of persons, and whether the release of information would constitute an invasion of privacy.

# When Must the Government Make Records Available for Inspection?

- ▶ Immediately when records are readily available.
- ▶ When records are not readily available, the agency shall within five (5) business days of the request:
  - Make the record available; or
  - Deny the request in writing with reasons; or
  - Acknowledge receipt of the request and give a reasonable estimate of the time to either:
    - Make the record available, or
    - Determine eligibility for disclosure.
- Only requires they be made available for inspection (not copy and send).

RSA 91-A:4, IV.

# Burdon of Proof in Nondisclosure Cases

- ▶ The burden of proof in nondisclosure cases is always on the public body/agency resisting disclosure.
- ▶ The court may employ an in-camera review of documents to ensure compliance with the Right to Know law.
- ▶ Generally accepted practice is to prepare a list of documents withheld citing the applicable category or claimed exception from disclosure.
- ▶ If disclosing the category of document(s) would itself defeat the purpose of withholding the document a miscellaneous category may be used.

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

# Use of Email

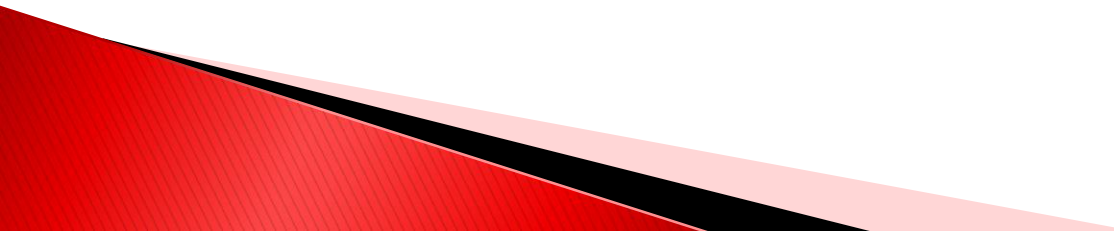
- ▶ The single most sought after records in contemporary right to know law cases.
- ▶ Should be used solely for scheduling purposes.
- ▶ Since use of email may result in the creation of a governmental record, always use governmental email address (record must be available for inspection).
- ▶ Cannot use email to circumvent or violate the spirit of the right to know law (deliberation).
- ▶ Sequential emails can create an illegal meeting – Avoid reply to all.
- ▶ Use of personal email can result in a subpoena for personal email account information, computer or hard drive.
- ▶ Union Leader Rule.

# Violations

- ▶ The first and foremost remedy is disclosure.
- ▶ Injunctive relief ensuring future compliance.
- ▶ Attorneys' fees and cost can be awarded against a public employee or official **personally** in cases of bad faith. RSA 91-A:8, I.
- ▶ Attorney's fees and costs can be awarded against the public body if:
  - The lawsuit was necessary to bring about compliance (costs only); and
  - The public body knew or should have known nondisclosure was a violation of the right to know law (attorneys fees also).

*ATV Watch v. N.H. Department of Resources and Economic Development*,  
155 N.H. 434 (2007).

# Violations

- ▶ A person who knowingly destroys information to prevent disclosure in response to a right to know law request is guilty of a misdemeanor.
  - ▶ The court may invalidate any action taken by the public body in violation of the right to know law (often occurs for posting violations).
  - ▶ Attorneys' fees may be awarded to the public body if the case is brought in bad faith or is frivolous, unjust or vexatious.
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# Pending Legislation–2016

- ▶ HB285
- ▶ Amends RSA 91–A:2, I (b):
- ▶ Consultation with legal counsel, *which shall include consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.*
- ▶ All others either Inexpedient to Legislate or referred to study committee (fees for copies).

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