Right To Know NH (RTKNH)

We are a nonpartisan organization dedicated to improving adherence to and strengthening the Right-to-Know Law (RSA 91-A)

What We Do

• Educate citizens on their Right To Know what their government is doing
• Assist citizens in exercising their Right To Know
• Provide resources on the Right-to-Know Law
  • RTKNH Blog www.RightToKnowNH.org
  • Facebook www.facebook.com/RightToKnowNH
• Propose legislation to strengthen the Right-to-Know Law (RSA 91-A)
• Monitor and advocate for or against proposed legislative changes to the Right-to-Know Law
Notable Quotations

“The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them... To cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man” – Patrick Henry

“I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion.” Thomas Jefferson
Foundation of Right To Know in NH

• Part I, Article 8 of NH Constitution
  • All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. [1784]
  • 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. [1976]
Right-to-Know Law (**RSA 91-A**)

- Established a citizen’s right of access to:
  - Meetings of public bodies and proceedings of public agencies
  - Governmental records of public bodies and public agencies
- First enacted August 26, 1967
- Numerous [updates](#) to the law since it was enacted
- Numerous [NH Supreme Court Cases](#) further clarify the law

**Right-to-Know (RTK) Law 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.”
Right-to-Know (RTK) Law Overview

• Governmental Records – How public business is documented
  • Meeting Minutes
  • Other Records

• Meetings – Where public business is transacted
  • Public
  • Non-public Session
  • Exclusions (a.k.a Non-meeting)
What is a Governmental Record?

Any information

• Created, accepted, or obtained
• By or on behalf of a public body/agency or a quorum or majority thereof
• In any format (paper, electronic, etc)
• Received at any time whether at meeting or outside a meeting
• In furtherance of the public body’s official function
What is a Public Body/Agency?

- **Public Agency**
  - 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

- **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
  - General court including executive sessions of committees
  - Executive council and the governor with the executive council
  - Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire
  - ...or any committee, subcommittee, or subordinate body thereof, or advisory committee
  - Any corporation that has as its sole member a tax exempt NH public body or agency

Generally, it is a representative organization with legislative, executive, or advisory powers.
Citizen’s Right to Public Records

• Every person has a right to:
  • Inspect public records (see RSA 91-A:4)
  • Make memoranda or abstract of the record
  • Make a copy of the record by any method
  • Receive a copy of the records

• Fees
  • No cost or fee can be charged to inspect or deliver records
  • Public agency may ONLY charge actual cost for making copies
Records Exempt from Disclosure

• Partial List
  • Preliminary drafts
  • Attorney-client privilege / work product doctrine
  • Personal school records of pupils
  • Certain video and audio recordings made by law enforcement officers using body camera
  • Constitutes an invasion of privacy
    • Personnel, medical, welfare, library
    • Internal personnel practices
    • Confidential, commercial, or financial information
    • Test questions / scores for licensing/employment exams

• See RSA 91-A:5 and other federal/state statutes per AG memo
• Public body bears the burden of establishing that records are exempt
Invasion of Privacy Exemption & Redaction

• A three-step analysis is used to evaluate whether disclosure constitutes an invasion of privacy:
  • Is there a privacy interest at stake that would be invaded by the disclosure?
  • Would disclosure inform the public about the conduct and activities of its government?
  • Balance the public interest in disclosure against the government’s interest in non-disclosure and the individual’s privacy interest in non-disclosure.

• Law does not specifically address redaction
  See AG memo for best practices
Law Enforcement Records

Per AG Memo, the following is considered to determine what will be withheld or disclosed (Follows federal FOI law):

1. Interference with law enforcement proceedings
2. Accused’s right to a fair trial
3. Unwarranted invasion of privacy
4. Confidential sources
5. Investigative techniques and procedures
6. Endangering life or physical safety of any person
Record Retention Requirements

- Public body must retain records in its custody
  - At its regular office or place of business
  - According to minimum retention schedule
    - Public body must provide access to records for the mandated period per RSA: 5:35-40 (State), 33-A (City/Town), 189:27&29 (School Districts)
    - 10 years for settlement agreements for claims or lawsuits (RSA 507:17)
- In paper, microfilm, or portable document format/archival (PDF/A)
- Electronic records
  - Retention period same as paper
- Misdemeanor if records destroyed to prevent disclosure (RSA 641:7)
- Records shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A is pending
How to Exercise Your Right to Inspect Records

**Decide** what records you wish to inspect
- [RTKNH](https://www.righttoknownh.org) blog: How To – Request Record
- Determine the public body which has possession, custody, or control of records to be requested
  - Request policy on RTK requests
  - Discuss with public body what you are trying to learn and enlist their help
- Decide which available record format
- Decide to inspect only or get copies
How to Exercise Your Right to Inspect Records

Define ‘reasonably described’ request for the records

• Be as specific as possible while not excluding records you may want
  • Types of documents, date ranges, and formats (electronic, paper, etc)
  • Other information which can limit search including exclusions

• Be careful how you word your request
  • Public body is not required to ‘create’ records, ‘compile’ data, or ‘answer’ questions
    • Ask for records which will provide you with the information you need to ‘compile’ data or ‘answer’ the questions yourself

Do your part to minimize the task of fulfilling record requests

• Be clear, concise and courteous
How to Exercise Your Right to Inspect Records

• **Ask to ‘Inspect’ records** to avoid copying costs

• Remind public body to cite, in writing, any exemption it is relying on for withholding any information not provided

• No requirement to identify yourself or provide any reason for the request

• Maintain a personal copy of the written request
Sample RTK Requests - Which is Better

1. How much was paid to
   a) How much was paid to All Thumbs Roofing?
   b) All payments made to All Thumbs Roofing from 1/1/2016 to 12/31/2016

2. Why did the selectmen decide to
   a) Why did the selectmen buy the 64 Main Street property?
   b) All records regarding the discussion, approval to purchase, and purchase of the 64 Main Street property

No right to force government to explain WHY a decision was made if not already disclosed in a public document
RTK Request Template

RTKNH Blog provides more guidance and template for filing a RTK request

RTK Request Template
Custodian Response to Request

• Custodian cannot require you to:
  • fill out a form
  • provide any personal information

• Custodian shall:
  • Provide records immediately when records are available for immediate release OR within 5 business days:
    • Provide the records
    • Deny the request
    • Deny access to records or portions thereof
      • Must provide written statement citing specific exemption authorizing the denial and how exemption applies
    • Provide written statement of the time reasonably necessary to determine whether the request shall be granted or denied with reason for the delay
Records Provided by Custodian

• Result of a reasonably conducted search
• No requirement to create new records
• Must be in the format it already exists or one reasonably calculated to comply with the request
• Records made available during regular business hours
Copy of Records Made Available

• Once records are made available, requestor inspects records
• Requestor may make copies of the records by any method
• Requestor may ask public body to make copies
  • Public body may charge for the “actual cost” of providing the copies
    • If a statutory fee applies, then no other costs shall be charged
  • Electronic records may be provided in electronic format
    • If electronic media is not reasonably practicable, or if a different method is requested, public body may use means reasonably calculated to comply with the request, including, but not limited to, providing a printout of the records
• No restriction on use of records once disclosed
Requests - Common Pitfalls

• Not knowing your rights before submitting request
• Not putting your request in writing
• Submitting request to someone other than the custodian
• Asking questions instead of asking for records
• Failing to be specific enough in describing records
• Paying for copies when inspection of records would suffice
• Failing to verify record exemptions claimed by custodian
• Giving up!
What constitutes a Meeting?

• A Meeting occurs when a quorum of a public body convenes
  • whether in person, by telephone or electronic communication, or any other manner
  • such that all participating members can communicate with each other contemporaneously (i.e. at the same time)
  • for the purpose of discussing or acting upon matters over which the public body has supervision, control, jurisdiction, or advisory power.

EXCEPTION: 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 deliberations are conducted and no decisions are made regarding such matters.
Quorum of a Public Body

• The minimum number of members who must be present to legally transact business
  • Typically this is a majority of the members OR
  • Less than a majority of the members if the rules of that body define "quorum" as less than a majority

• Business cannot legally be conducted unless a quorum is present
What is not a Meeting?

These are NOT Meetings under the law:

• Non-meetings
  • Strategy or negotiations with respect to collective bargaining
  • Consultation with legal counsel
  • 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
  • Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting. However, they are governmental records.

There is no requirement to keep a record of these non-meetings.
Consultation with Legal Counsel

- Counsel must be present or connected electronically or by telephone so all present may hear and participate in the consultation.
- Public body cannot receive documents from counsel and then conduct a non-meeting to review or discuss the documents.
  - As of 6/21/16 they can use a non-public meeting to discuss these documents.
Public Meetings

• Public meeting must:
  • have proper meeting notice
  • be open to the public
  • have quorum present
  • have minutes recorded
Non-public Sessions

• Originate in a legal public meeting
  • Proper notice, open to public, quorum present, minutes taken

• Actions by public body to enter non-public session
  • Make a motion that
    • is properly made and seconded during a public meeting
    • states the specific exemption which is relied upon for the session (RSA 91-A:3, II)
  • roll call vote is taken and recorded in the minutes
  • If motion passes, public is excluded and then non-public session begins

• Limitations with non-public session
  • All discussions held and decisions made must be confined to the matters set out in the motion
Meeting Notice

• Time and place of meeting
• Minimum 24 hour notice (excluding Sundays & legal holidays)
• Published or posted in at least two appropriate places
  • One place may be the public body’s website
  • Visible to all at all times – not behind a locked door
  OR
• Published in newspaper of general circulation in city or town with at least 24 hour notice (excluding Sunday & legal holidays)
• Law sets the minimum - must also comply with other laws
Meeting Notice – Website Posting

Does the public body posts meeting notices on their website?

• **Yes** – then it shall do so in a consistent and reasonably accessible location on the website

• **No** – then it shall post and maintain a notice on the website stating where meeting notices are posted
Meeting Agenda

• Agenda and any other details are optional
• If agenda is published, it may be changed at any time
Exceptions for 24 hour notice

• Emergencies – immediate undelayed action is imperative
  • Determination of emergency made by presiding officer
  • Post the notice as soon as practicable
    • employ whatever further means are reasonably available to inform the public that a meeting is to be held
    • must state the need for the emergency meeting in the minutes

• Recessed/continued sessions
  • If the date, time, and place of the session was announced at the previous meeting no additional notice is required
Electronic Communications

• 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.
Remote Participation in Meeting

• A public body may, but is not required to, allow members to participate remotely if
  • Attendance in person is not reasonably practicable
  • Emergency excepted, a quorum shall be physically present in the noticed location
  • Each member is able to simultaneously hear all members speak, speak to other members, and be discernable to the public in attendance at the meeting’s location
• Reason for remote participation is stated in the minutes
• Member shall identify other persons present at remote location
• All votes must be by roll call vote
Meeting Open to the Public

- Open to anyone
- Anyone may take notes and use recording devices
- Shall be audible or otherwise discernable to the public at the location specified in the meeting notice
- No secret ballot voting*
- Invitation for public to speak not mandatory
  - Law insures public awareness & attendance, not public participation
  - Attendees may only speak if the public body allows for public input

* Town meetings, school district/village district meetings, and elections excepted
Meeting Minutes - Contents

Minutes must be kept as a permanent governmental record

• Official record containing:
  • Names of members
  • Persons appearing before the public body
  • Brief description of subject matter discussed
  • Names of members who made or seconded each motion. Effective 1/1/2019.
  • Final decisions (i.e. actions)
    • Non Public Only: Motions & final decisions must be recorded so that the vote of each member can be ascertained. Effective 1/1/2017

• No requirement for electronic recording or transcript
Meeting Minutes – Availability to the Public

Minutes must be kept as a permanent governmental record

- Available for public inspection, upon request, during regular business hours*
  - Notes, materials, tapes, etc used to compile the minutes
  - Draft or unofficial version if not yet officially approved

* means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays
Meeting Minutes

As of 1/1/2018, minutes must now include any objections made to any discussions during a meeting by a member of the public body when:

• Member believes the discussion is in violation of the RTK Law
• The discussion continues
• Objecting member requests that the objection be recorded in the minutes

• Minutes must record
  • Objecting member’s name
  • Reason for objecting
  • If objection made during nonpublic session
    • Also record objecting member’s name but exclude reason for objection in public meeting minutes

• Objecting member may continue to participate in the discussion without being subject to the penalties of RSA 91-A

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Meeting Minutes – Website Posting

Does the public body have a website?

• Yes
  • Does it post minutes to the website?
    • Yes - must post its approved minutes in a consistent and reasonably accessible location on the website
    • No – must post and maintain a notice on the website stating where the minutes may be viewed and copies requested
Reasons for a Non-public Meeting

The matters that *may* be considered or acted upon in a non-public meeting are strictly limited to:

• Public employee personnel matters
  • Hiring (II.b)
  • Dismissal, promotion, or compensation (II.a)
  • Investigation of charges against employee (II.a)
  • Discipline of public employee (II.a)

• Unless the employee has a right to a meeting and requests that the meeting be public
  • Employee rights to a meeting is based in law, contract, or policy
More Reasons for a Non-public Meeting

These matters may also be discussed in a non-public meeting:

• 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 (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 (II.d)
More Reasons for a Non-public Meeting

• Consideration or negotiation of pending claims or litigation (II.e)
  • which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by 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

• Emergency preparation and response by safety officials to thwart an act of terrorism (II.i)

• Consideration of legal advice provided by legal counsel (II.l)
More Reasons for a Non-public Meeting

Consideration of:

• entering into a pupil tuition contract (II.k)
• confidential, commercial, or financial information (II.j)
• applications by the business finance authority (II.h)
• security-related issues bearing on the immediate safety of security personnel or inmates at the county or state correctional facilities (II.g)
• applications by the adult parole board (II.f)

Nothing in the law requires a public body to use a non-public session to discuss or act upon any matter.
Non-public Meeting Procedure

• Within Non-public Meeting
  • Discussion must be limited to the subject of the motion
  • Discussion to not publicly disclose (a.k.a. seal) the minutes
    • May only seal the minutes if divulgence of the minutes would likely
      • Adversely affect the reputation of any person other than a member of the public body OR
      • Render the proposed action ineffective OR
      • Pertains to terrorism and preparation for related emergency functions

• Return to Public Meeting
  • To not publicly disclose (a.k.a. seal) the non-public minutes
    • At least 2/3 of members present must vote to not disclose
    • Vote must be taken in public meeting (as of 1/1/2016) and recorded in the minutes
Meeting Minutes – Non-public

Minutes must be kept as a permanent governmental record

- Required contents similar to public minutes
- Minutes NOT sealed
  - Available for public inspection
    - Draft/unofficial version if not yet officially approved
    - Must be disclosed within 72 hours
- Minutes may be sealed, but only until, in the opinion of a majority of members, the reasons for sealing them no longer apply
  - Consideration of the acquisition, sale, or lease of real or personal property
    - Minutes shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction. (Effective 1/1/22)
Meeting Minutes – List of Sealed Minutes

For all SEALED minutes/decisions, a list shall be kept (Effective 1/1/2022)

The List must include the following related to the nonpublic session
• Name of public body
• Session date and time
• Specific purpose/exemption used to authorize the session
• Date of the decision to withhold the minutes or decisions from public disclosure
• Date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure

The List must be made available as soon as practicable for public disclosure

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Violations

• No public body is charged with enforcement of the law

• Person aggrieved must petition Superior Court for injunctive relief
  • File petition with clerk of Court
  • Petition receives high priority on Court calendar
  • You may appear with or without counsel (pro se)
Violations

All documents filed with the court petition and any response thereto shall be considered as evidence. (Effective 1/1/2019)

All documents submitted shall be provided to the opposing party prior to the hearing. (Effective 1/1/2019)
Remedies for Violations

The Superior Court judge shall order:

• Public body liable for reasonable attorney’s fees and costs when
  • suit was necessary to:
    • Enforce compliance with the law OR
    • Address a purposeful violation
  • AND the public body or person ‘knew or should have known’ that the conduct engaged in was a violation

• Persons personally liable, if violation was in bad faith
  • Civil Penalty of $250 - $2,000
  • May be required to reimburse attorney’s fees or costs charged to public body
Remedies for Violations

The Superior Court judge may:

• Invalidate action by public body taken in an illegal or noncompliant meeting, if the circumstances justify such invalidation

• Enjoin future violations

• Require persons found in violation to undergo remedial training, at own expense

• Remove an official from office for
  • disclosure of confidential exempt information
  • Violating their oath of office (RSA 42:1-a)

• Award attorney’s fees to public body if lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive
Study Commission on Complaints

In 2017, HB 178 established a 13 member commission to study alternative processes to resolve right-to-know complaints with the goal of:

- reducing the burden and costs of RTK complaints for
  - Citizens
  - Courts
  - Public agencies & bodies
- Increasing awareness and compliance with the law to minimize violations
Study Commission Results

**Study Commission Findings:**
Citizens need a grievance resolution process which is easier, cheaper, faster and results in less cost for all parties while also maintaining independence, credibility, impartiality, and minimizing any political influence.

**Study Commission Recommendation:**
Establish an independent Ombudsman

**Current Status:** Pending in the Legislature
Help Us Improve Your Right to Know

• Join Right To Know New Hampshire
  • Membership is free
  • Email: RightToKnowNH@gmail.com

• Take Action
  • Attend meetings, Read the minutes, Verify compliance
  • Support future legislation to improve government transparency
  • Stay informed - follow the RTKNH blog
  • Follow us on facebook www.facebook.com/RightToKnowNH

Thank You!

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