

New Hampshire’s “Right-to-Know” Law

Statutory Purpose: The purpose of the Right-to-Know Law “is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” RSA 91A:1 (2013).

What does the law do?: The Right-to-Know Law grants every citizen “the right to inspect all government records in the possession, custody, or control of such public bodies . . . except as otherwise prohibited by statute . . .” RSA 91-A:4, I (2013).

Time Period to Respond to Request: The Right-to-Know law mandates that an agency make public records available when they are immediately available for release, or otherwise, it must within five business days of the Right-to-Know request: (1) make the records available; (2) deny the request in writing with reasons; or (3) acknowledge receipt of the request in writing with a statement of the time reasonably necessary to determine whether the request will be granted or denied. *RSA 91-A:4, IV.*

Broad Interpretation: When interpreting the Right-to-Know Law, we broadly construe provisions favoring disclosure and interpret exemptions restrictively. N.H. Right to Life, 169 N.H. at 103.

What records are exempted?: RSA 91-A:5, IV exempts from disclosure:

[r]ecords 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.

RSA 91-A:5, IV.

Recent Changes to the Law: Fenniman was the seminal case interpreting the “internal personnel practices” exemption. See Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993). It was recently overruled earlier this year. See Seacoast Newspapers, Inc. v. City of Portsmouth, No. 2019-0135, 2020 WL 2791849, at *9 (N.H. May 29, 2020) and Union Leader Corp. v. Town of Salem, No. 2019-0206, 2020 WL 2791852, at *7 (N.H. May 29, 2020)

- In Seacoast Newspapers, Inc. the New Hampshire Supreme Court overruled Fenniman to the extent that it broadly interpreted the “internal personnel practices” exemption. The Court concluded that the “internal personnel practices” exemption applies *narrowly* to records relating to the “internal rules and practices governing an agency’s operations and employee relations,” and does not apply to “information concerning the history or performance of a particular employee.” Id at. (slip op. at 11).
- In Union Leader Corp. the New Hampshire Supreme Court overruled Fenniman to the extent that it decided that records related to that exemption are categorically exempt from disclosure and are not subject to the balancing test the Court has used for the other categories of records listed in RSA 91-A:5, IV. See Prof’l Firefighters of N.H. v. Local Gov’t Ctr., 159 N.H. 699, 707 (2010) (setting forth a three-step analysis to determine whether disclosure will result in an invasion of privacy).

Disclosure Balancing Test: _Does disclosure result in invasion of privacy? The Supreme Court of New Hampshire developed a three-step analysis to determine whether disclose will result in an invasion of privacy. See Prof’l Firefighters of N.H.,v. Local Gov’t Ctr., 159 N.H. 699, 5050. First, the New Hampshire Supreme Court evaluates whether there is a privacy interest at stake that would be invaded by the disclosure. *Id.* Second, the Court assess the public's interest in disclosure. *Id.* Third, the Court balances the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. *Id.* If no privacy interest is at stake, then the Right-to-Know Law mandates disclosure. *Id.*

**It is also important to note, “whether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.” *Id.*

PRESENTATION

Police stop: (Jacqueline and Geoff)

- **NH Center for Public Interest Journalism & A.C.L.U. v N.H. Department of Justice** (Recent case dealing with Laurie List);
 - P sought a declaration that the “Exculpatory Evidence Schedule” (aka Laurie List) - (EES), excluding the names of police officers with pending requests to be removed from the list, must be made public

pursuant to the Right-to-Know Law, RSA chapter 91-A, and Part I, Article 8 of the New Hampshire Constitution.

- Trial Court denied Motion to Dismiss – Supreme Court remanded.
 - DOJ's argues that the EES is "confidential" under RSA 105:13-b (2013) and that it is exempt from disclosure under the Right-to-Know Law either because it is an "internal personnel practice" or a "personnel file" under RSA 91-A:5, IV (2013).
- NH SC held trial court's determinations that the EES is neither "confidential" under RSA 105:13-b nor exempt from disclosure under the Right-to-Know Law as an "internal personnel practice" or a "personnel file."
- NH SC vacated and remanded to determine whether, as the DOJ contends, the EES constitutes an "other file[]" whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV.
- **NH RSA 105-13-b** (statute making police personnel files confidential);
- **State v. Laurie** (case that started the ball rolling towards the creation of the Laurie List)
 - See State v. Laurie, 139 N.H. 325, 327, 330, 333 (1995) (overturning a defendant's murder conviction because the State failed to disclose certain employment records of a testifying detective that "reflect[ed] negatively on the detective's character and credibility").
 - "**Laurie List**" **Contains:** Name, Department, Date of incident, Date of Notice, Category of Behavior

Reporter Request:

- **Union Leader v. New Hampshire Hous. Fin. Auth.** (what happens when an inadequate response is made);
 - Court can order a party to submit a *Vaughn* index.
 - The lower court is not required to review each document.

- Summary disclosures is an appropriate remedy where a public agency has improperly withheld agency records or where the party who controls the documents in question fails to supply an adequate *Vaugh* index.
- The Court further defined the “confidential, commercial, or financial information” exemption of the Right-to-Know law.
- **Seacoast Newspapers, Inc. v City of Portsmouth** (what happens when it isn’t clear if a response is deficient);
- **Salcetti v. City of Keene** (recent unpublished opinion dealing with adequateness of responses);
 - Students in Keene State College Professor’s, Marianne Salcetti, public affairs reporting class requested public records from the City of Keene.
 - City stated it did not provide some of the records because the records did not currently exist.
 - The Right-to-Know statute states: “[n]othing 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.” RSA 91-A:4, VII.
 - This provision shield agencies from having to create a new document in response to a Right-to-Know request, it does not shelter the agency from having to assemble existing documents in their original form. Salcetti v. City of Keene, No. 2019-0217, 2020 WL 3167669, at *8 (N.H. June 3, 2020); See also New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 440 (2003).
- **N.H. Right to Life v. Dir., N.H. Charitable Trusts Unit** (applicability of 91-A and privacy implications for records under 91-A);
- **Martin v. City of Rochester** (what can a municipality charge to produce records);
 - The City’s copy fee schedule is prohibited pursuant to RSA 91-A:4,IV.

- **Censabella v. Hillsborough County Attorney** (who can make 91-a requests and who has standing under the statute)
 - The requesting person can remain anonymous. See Censabella v. Hillsborough Cty. Attorney, 171 N.H. 424, 429 (2018).
 - Federal courts have developed a more restricted definition of standing under FOIA. See Id. at 428.
 - It is important to note that the United States Supreme Court, in dicta, has suggested that 91-A relief is only available to NH citizens. See McBurney v. Young, 569 US 221, 226 (2013).

Town Board meeting:

- **Martin v. City of Rochester** (what is a meeting and when is an entity subject to the open meeting requirements of 91-A);
 - The Court held the City of Rochester’s Technical Review Group is not a group that renders advice or makes recommendations and, therefore, is not a “public body” or “advisory committee” under the Right-to-Know law.
 - **Definition of 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.” RSA 91-A:1-a, VI(d).
 - **Definition of advisory committee:** “Any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.” RSA 91-A:1-a, I.

- **Definition of a Meeting**: The convening of a quorum of the membership of a public membership of a public body “for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power.” *RSA 91-A:2, I* (Supp. 2010).
- **Ettinger v. Town of Madison Planning Bd.** (discusses issues related to public vs. non-public sessions during governmental meetings and what happens when governmental action occurs in violation of 91-A);
 - **Holding**: Private session by the Planning Board under the “consultation with legal counsel” violated the Right-to-Know Law, RSA 91-A:2.

Internal Investigation Cases:

- **Union Leader v. Town of Salem** (overrules Fenniman and holds that internal investigations are no longer treated differently under 91-a);
- **Seacoast Newspapers, Inc. v City of Portsmouth** (overrules Fenniman and is companion case to Union Leader v. Town of Salem);
- **Union Leader v. Fenniman** (overruled by newer cases – held that internal investigations are treated differently under 91-a than other governmental records);
- **Reid v. N.H. A.G.** (deals with “internal policies practices” exemption has to be taken in light of Seacoast and Union Leader., the plaintiff in this action (former deputy county attorney in Rockingham) wanted his own file which was held by the AG...)
 - The AG was investigating into the alleged wrongdoing by former Rockingham Country Attorney James Reams.
 - The Court found that the “investigation” must take place within the limits of an employment relationship.

Practice tips

Before you make a request:

- Determine what specific records you want.
- Determine if you want copies or just want to inspect the records. It is important to note that if you only inspect records, there is no cost. You can be charged for copies.
- For copies, decide what available format you want them in. If the document is stored electronically, then you may request electronic or paper format.
- Identify the custodian of the records and proper contact information.

Your request:

- Put your 91-A request in writing. You do not need to sign the request. You also do not need to disclose your identity (i.e. the attorney can make the request for his or her client without disclosing identity of client). You do not need to have a reason or justification for your request.
- Be clear in your request so it is not denied for being too vague or too broad. Clarity will also eliminate the need for the discloser to make their own reasonable interpretation of your request. Of note, you only need to “reasonably describe” the government records you are seeking. However, the discloser is not required to create a record that does not exist.
- Ask for an estimate of the fees.

Letter Template

BY E-MAIL or FAX or MAIL

[Date]

[Name of Custodian of Records]

[Title]

[Public Agency Name]

[Street Address]

[City, State Zip Code]

RE: Right to Know Request per RSA-91A

Dear **[Custodian of Records]**:

Pursuant to the Right to Know Law (RSA. 91-A), I am requesting public access, within 5 business days, to the governmental records reasonably described as follows:

- all documents, no matter what form, including but not limited to, printed documents, electronic documents, e-mails, or any other form of documents regarding **[Detailed description of records sought]** for the period from **MM/DD/YYYY** to **MM/DD/YYYY**.

- **[Insert additional record(s) description]**

Per RSA 91-A IV(b)(3), if you deny any portion of this request, please cite the specific exemption used to justify the denial to make each record, or part thereof, available for inspection along with a brief explanation of how the exemption applies to the information withheld.

Please let me know when these records are available for inspection or you may email the records to me at **[Email]**. [If requesting copies ask for estimate of fees].

Thank you for your prompt attention to this matter.

Sincerely,

[Your Signature]

[Printed name]