

HB 1408-LOCAL – AS INTRODUCED

2008 SESSION

08-2026

01/03

HOUSE BILL *1408-LOCAL*

AN ACT relative to the right-to-know law.

SPONSORS: Rep. J. Thomas, Belk 5; Rep. Espieffs, Ches 3; Rep. Osborne, Merr 12; Rep. Casey, Rock 11

COMMITTEE: Judiciary

ANALYSIS

This bill clarifies the manner in which the right-to-know law applies to both governmental records kept in electronic form and electronic communication used to transact governmental business.

This bill also clarifies communications outside a meeting for the purposes of RSA 91-A.

Explanation: Matter added to current law appears in ***bold italics***.

Matter removed from current law appears [~~in brackets and struck through~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

08-2026

01/03

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eight

AN ACT relative to the right-to-know law.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Statement of Purpose. The purpose of this act is to clarify how the right-to-know law applies to both governmental records kept in electronic form and electronic communications used to transact governmental business. The general court finds that this act fulfills this purpose in a manner that maintains openness in government, while being in accord with the varied types, sizes, and resources of New Hampshire's public bodies. The New Hampshire supreme court has stated "unless the legislature addresses the nature of computerized information and the extent to which the public will be provided access to stored data, we will be called upon to establish accessibility on a case-by-case basis. It is our hope that the legislature will promptly examine the right-to-know law in context of advancing computer technology."

2 Chapter Heading Amended. Amend the chapter heading of RSA 91-A to read as follows:

ACCESS TO [PUBLIC] *GOVERNMENTAL* RECORDS AND MEETINGS

3 Definitions Added. RSA 91-A:1-a is repealed and reenacted to read as follows:

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, charter 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, charter school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.

4 Meetings; Nonpublic Sessions; Minutes and Records; Exemptions. Amend RSA 91-A:2-5 to read as follows:

91-A:2 Meetings Open to Public.

I. For the purpose of this ~~[section]~~ **chapter**, a "meeting" ~~[shall mean]~~ **means** the convening of a quorum of the membership of a public body, as ~~[provided]~~ **defined** in RSA 91-A:1-a, ~~[to discuss or act]~~ **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, 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) Any chance meeting or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business and at which no decisions are made; however, no such chance or social meeting shall be used to circumvent the spirit of this chapter;~~

~~(b)] (a) Strategy or negotiations with respect to collective bargaining;~~

~~[(e)] (b) Consultation with legal counsel; [or~~

~~(d)] (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. ~~[All public proceedings shall be open to the public, and all persons shall be permitted to attend any meetings of those bodies or agencies.]~~ ***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 ~~[or agencies]~~, 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 ~~[public]~~ meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any **public** body ~~[or agency]~~, 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 ~~[or agency]~~, 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 [~~or agency described in RSA 91-A:1-a~~] 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 [~~or agencies~~] 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 [~~or agency~~] 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 [~~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.

(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 agency~~] or any subdivision thereof, or against any member thereof because of his or her membership in such **public** body [~~or agency~~], 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 [~~, board, or agency~~] 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.

III. Minutes of [~~proceedings~~] **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 [~~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. 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 [~~such~~] **public** bodies or agencies, and on the regular business premises of such **public** bodies or agencies, has the right to inspect all [~~public~~] **governmental** records ***in the possession, custody, or control of such public bodies or agencies***, including minutes of meetings of the **public** bodies [~~or agencies~~], and to ***copy and*** make memoranda[~~]~~ ***or*** abstracts[~~, and photographic or photostatic copies~~] 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, [~~H~~] **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 [~~such~~] **a public** [~~bodies or agencies~~] **body**, every citizen, during the regular or business hours of [~~all~~] such **public** [~~bodies or agencies~~] **body**, and on the regular business premises of such **public** [~~bodies or agencies~~] **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[; ~~photographic or photostatic copies, or tape record~~] **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 [~~public~~] **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 [~~public~~] **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 remain accessible for the same retention or archival periods as their paper counterparts. Methods that may be used to accomplish this requirement 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 [~~public~~] **governmental** record reasonably described, make available for inspection and copying any such [~~public~~] **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 [~~public~~] **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 [~~public~~] **governmental** record [~~or document~~] 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 [~~public~~] **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 [its] **governmental** records in [~~a computer storage system~~] **electronic format** may, in lieu of providing original [~~documents~~] **records**, [~~provide a printout of any record reasonably described and which the agency has the capacity to produce~~] **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[~~both hard copies and computer files,~~] 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 [~~public~~] **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 [~~those entities defined in RSA 91-A:1-a]~~ **the members of a public body**.

5 Violation. Amend RSA 91-A:7 to read as follows:

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.

6 Remedies. Amend RSA 91-A:8, I and I-a to read as follows:

I. If any **public** body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a [~~public~~] **governmental** record or refuses access to a [~~public~~] **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 [~~public~~] **governmental** proceeding or to provide a [~~public~~] **governmental** record, the court may award such fees personally against such officer, employee, or other official.

I-a. The court may award [~~attorneys'~~] **attorney's** fees to a [~~board, agency~~] **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.

7 Reference Change. Amend RSA 42:1-a, II(a) to read as follows:

(a) A public body properly voted to withhold that information from the public by a vote of 2/3, as required by RSA 91-A:3, III, and if divulgence of such information would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body [~~or agency,~~] or would render proposed municipal action ineffective; or

8 Effective Date. This act shall take effect July 1, 2008.