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Town of Durham
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Administration Office

Right to Know Law **Guide**

GENERAL GUIDE TO THE RIGHT TO KNOW LAW

1. What is the "Right to Know" Law, RSA 91-A? It is New Hampshire's statute that emphasizes that the business of the town is the public's business. It makes clear that, with very few exceptions, the public has a right to inspect and copy town records, and to attend and record meetings of public bodies held in connection with local government. The law requires that, generally, the business of a governing body must be conducted at a public meeting, rather than by private communications between individuals.

2. Who does the law cover? It covers all "public bodies," which includes elected officials, employees, or volunteers serving on boards, committees, or subcommittees of a municipality.

3. What does the law cover? It covers all "meetings" of public bodies. A "meeting" occurs whenever a quorum or majority of a board, committee, or subcommittee convenes and discusses or acts upon a matter over which that board, committee or subcommittee has supervision, control, jurisdiction or advisory power. The law's definition of "meeting" includes telephone or electronic communication such that a quorum of members are able to communicate contemporaneously.

4. A "meeting" does not include:

- ✓ Strategy or negotiations with respect to collective bargaining.
- ✓ A chance, social, or other encounter that is not convened for the purpose of discussing or acting on government business, so long as no decisions regarding government business are made;
- ✓ Consultation with legal counsel; or

- ✓ The circulation of draft documents that, when finalized, are intended only to formalize decisions previously made in a meeting.
5. Unless a matter is exempted from the definition of “meeting,” public bodies must deliberate in meetings on all matters over which they have supervision, control, jurisdiction, or advisory power.
 6. Communications outside of a meeting, including e-mail and other sequential communications among members of the public body, may not be used to circumvent the purpose of the Right-to-Know Law.
 7. What is required to hold a lawful public meeting?
 - ✓ A notice of the time and place of the meeting must be posted at least 24 hours in advance, excluding Sundays and legal holidays, in at least 2 public places, one of which may be the public body’s website. If the town or public body decides to post meeting notices on a website, those notices must be in a consistent and reasonably accessible location on the website or the website must contain a notice of where the meeting notices are posted. Alternatively, the notice may be posted in a newspaper of general circulation in the municipality at least 24 hours in advance, excluding Sundays and legal holidays, prior to the meeting.
 - ✓ The notice requirement does not apply in an “emergency,” which the law defines as “a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body.” The public body must post a notice of the time and place of the emergency meeting as soon as practicable, and must employ whatever further means are reasonably available to inform the public of the meeting. Once in the meeting, the board must ensure that the minutes clearly describe the need for the emergency meeting.

- ✓ The public is entitled to attend and may record or video tape the proceedings.
- ✓ All votes, with the very few exceptions itemized below, must be taken in open session.
- ✓ Minutes must be taken and made available to the public within 5 business days. If your town or public body maintains a website or contracts with a third party for same, the approved meeting minutes must be posted in a consistent and reasonably accessible location on the website or the website must contain a notice stating where the minutes may be reviewed and copies requested.

8. A public body may, but is not required to, allow one or more of its members to participate in a meeting by electronic or other means of communication, but only when physical attendance at the meeting would not be reasonably practical.

- ✓ A quorum of the public body must be physically present at the location specified in the meeting notice, except in an emergency. An “emergency” means that immediate action is imperative and that the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination of emergency must be made by the chair or presiding officer of the public body, and the facts upon which the determination are made must be included in the minutes of the meeting.
- ✓ Each member of the public body who participates electronically or otherwise must be able to simultaneously hear all other members, speak to all other members, and be audible or otherwise discernable to the public.
- ✓ No meeting may be conducted by e-mail or any other form of communication that does not permit the public to hear, read, or

otherwise discern the meeting discussion contemporaneously at the meeting location.

- ✓ The reason why attendance is not reasonably practical must be stated in the minutes of the meeting.
- ✓ All votes must be taken by roll call.

9. When can we hold a nonpublic meeting? Rarely. The Right to Know Law lists some limited situations that allow a board to go into nonpublic session to discuss and act upon certain matters. Those situations are:

- ✓ Dismissal, promotion, or setting compensation for public employees, or the disciplining or investigation of any charges against an employee. (Note: the employee may have a right to be present at such a meeting and, if so, has the right to require the meeting to be open to the public.)
- ✓ Consideration of the hiring of a public employee.
- ✓ Matters that, if discussed in public, would likely adversely affect the reputation of any person including any application for assistance or tax abatement or waiver of a fee, fine other levy based on inability to pay or poverty. However, this “reputation” exception does not apply where the reputation to be protected is that of a person who is a member of the public body. (Note: the person whose reputation might be harmed has a right to request an open meeting, however no notice of this meeting is required to be given to that individual.)
- ✓ 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.

- ✓ Consideration or negotiation of pending or threatened (in writing) litigation by or against the public body, and subdivision thereof, or by or against any member due to his or her membership. "Litigation" does not include an application filed for tax abatement.
- ✓ Consideration of matters related to the preparation for, and carrying out of, emergency functions intended to thwart deliberate acts intended to cause widespread property damage, personal injury, or loss of life.
- ✓ 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.
- ✓ Consideration by a school board of entering into a student or pupil tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations. A contract negotiated by a school board shall be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, shall be made public. Approval of a contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate.
- ✓ 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.

- ✓ Consideration of whether to disclose minutes of a nonpublic session due to a change in circumstances under paragraph III. However, any vote on whether to disclose minutes shall take place in public session.

10. How do we go into nonpublic session? A motion must be made that specifically identifies the statutory category that is the reason for going into nonpublic session and then a roll-call vote must be taken in which each member's vote on the motion must be recorded.

11. What rules govern the conduct of the nonpublic session?

- ✓ Minutes must be taken just as you would in an open session.
- ✓ Decisions can be made in nonpublic session, but must be recorded in the minutes just as they must in a public session including the vote of each member present and which member made any motion or offered any second.
- ✓ You must stick to the subject which was the reason for going into the nonpublic session; if there is the need to discuss other matters which discussion would be covered by a different exemption, you need to first come out of nonpublic session and then vote to go back in under that different exception. It is only in this way that a proper record can be prepared for public review.
- ✓ A member of the public body who believes the public body is violating the requirements of RSA 91-A:2 may object to the discussion; if the public body continues despite the objection, the objecting member may request that the objection is recorded in the minutes and may then continue to participate in the discussion without being subject to the some of the penalties of RSA 91-A:8. If such a request is made, the public body shall record the objection in the minutes; if the objection is to a discussion in

nonpublic, the objection shall be recorded in the public minutes, but the notation in the public minutes shall include only the objecting member's name, a statement that he/she objected to the nonpublic discussion, and a reference to the provision of RSA 91-A:3, II that was the basis of the nonpublic discussion during which the objection took place.

- ✓ The minutes from the nonpublic session must be made public within 72 hours unless two-thirds of the members, determine during the nonpublic sessions, but then take a vote during the public session, that the divulgence of the information likely would adversely affect the reputation of any person other than a member of the public body, render the proposed action ineffective, or pertain to terrorism. Under those circumstances, the minutes may be withheld until those circumstances no longer apply.

- ✓ For all meetings held in nonpublic session, where the minutes or decisions were determined to not be subject to full public disclosure, a list of such minutes or decisions shall be kept and this list shall be made available as soon as practicable for public disclosure. This list shall identify the public body and include the date and time of the meeting in nonpublic session, the specific exemption under paragraph II on its face which is relied upon as foundation for the nonpublic session, the date of the decision to withhold the minutes or decisions from public disclosure, and the date of any subsequent decision, if any, to make the minutes or decisions available for public disclosure. Minutes related to a discussion held in nonpublic session under subparagraph II(d) 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.

12. Access to Public Records. The public may inspect and copy all records in the possession, custody, or control of public bodies, including minutes of meetings, unless those records:

- ✓ fall under one of the exemptions listed in RSA 91-A:5, such as personnel files or other files whose disclosure would constitute invasion of privacy;
- ✓ are notes or other materials made for personal use that do not have an official purpose, including notes and materials made prior to, during, or after a public proceeding;
- ✓ are 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 public board, committee or subcommittee;

Note: Every agreement made by a municipality to settle a claim or lawsuit against it, or a threatened lawsuit or other claim, must be filed with the municipal clerk's office and kept there available for public inspection, for a minimum of 10 years.

Also, records of any payment made to an employee or his representative upon resignation, discharge or retirement must also be made available for inspection, even if the matter has been considered or acted upon in non-public session.

13. How quickly do the records need to be provided after the request is received? If you are unable to make a public record available for immediate inspection and copying, you must, within five (5) business days of the request, make the record available, deny the request in writing with reasons, or furnish written acknowledgment of receipt of the request with a statement of the time reasonably necessary to determine whether the request shall be granted or denied.

14. In what format can the public demand that town records be produced? Most records are available for photocopying, but the Right to Know Law also extends the right to obtain electronic copies of records that are maintained in that format by the public body. A public body that maintains governmental records in electronic format may, in lieu of providing original records, copy the government records requested to electronic media using standard or common file formats. In no case, however, does a member of the public have the right to demand that the town compile, cross-reference, or assemble information into a form in which it is not already kept or reported.

15. What costs can the town recover from the right to know process? RSA 91-A:4 allows the town to implement a “reasonable charge” to cover the cost of providing the copies or electronic media. Additionally, the town may charge up to \$1.00 per electronic communication requested over 250 communications. The town may charge for electronic communications even if they are delivered electronically, rather than in hard copy. A single electronic communication is:

- a. All e-mails and responses under a single subject line, including their attachments; or
- b. Up to 50 individual messages making up a text or chat message thread regarding the same topic.

A town that seeks to charge fees for right to know requests must implement a policy so that practices are transparent, uniform, and consistent, and must allow for the waiver of fees for requesters who cannot afford to pay.

16. Governmental records created or maintained in electronic form must remain accessible for the same amount of time as their paper counterparts. However, if the governmental records in electronic form are maintained beyond the retention period, they must remain accessible and available to the public.

NOTE: RSA 33-A may require that you also retain records in other formats.

17. Governmental records created or maintained in electronic form are not subject to disclosure after they have been initially and legally deleted. A record in electronic form is considered “legally deleted” if it is no longer readily accessible to the public body or the agency itself. The mere transfer of an electronic record to a readily accessible “deleted items” folder or similar location on a computer is not considered “legally deleted.”

18. If a request for records is denied, in whole or in part, the public body must provide a written statement of the specific exemption authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

19. If there is a question as to whether a particular record is available to the public, what should I do? Please consult with the selectmen and they will get advice from town counsel if it is deemed necessary to do so.

This document is intended only as a general outline of the "Right To Know" Law and for that reason it is simplified and does not attempt to address some of the more difficult and complex situations that can arise under the law. If you have questions about a particular situation involving the "Right to Know" Law, we suggest that you contact the board of selectmen so a decision can be made about how best to proceed. As this document is meant as a guide only, reliance thereon is made at the sole risk of the user and the Mitchell Municipal Group, P.A., is not responsible for decisions made. — September 2024