

Summary of 2008 Changes to New Hampshire's Right-to-Know Law (RSA 91-A)

By John A. Lassey,¹ July 14, 2008

Author's note: To the extent possible without causing confusion, I have endeavored to include hyperlinks to the sources cited in this article. However, with respect to individual sections of RSA 91-A that were changed or added by the new law, the reader desiring online access will have to be content with links to the final bill itself until the [Revised Statutes Online](#) have been updated on the State's web site.

With the passage of [House Bill 1408](#),² the 2008 New Hampshire Legislature responded to a request made in 2001 by the Supreme Court that the Legislature amend the State's Right-to-Know Law ([RSA 91-A](#)) to explicitly recognize the major role of electronic communication and computerization of government records in the 21st Century.³

Two years after the Supreme Court's request, the Legislature created a commission to study access to governmental proceedings and records in light of advancing computer technology and the increasing sophistication with which government at all levels conducts the public's business.⁴

After meeting regularly over a one-year period, the Right-to-Know Study Commission recommended extensive changes to [RSA 91-A](#) in its [Final Report of October 29, 2004](#). However, because of controversy over certain proposed changes to the law, attempts over the next few years to enact such legislation were defeated until this year when the Legislature passed [House Bill 1408](#), which became effective July 2, 2008.⁵

Local officials will notice many new provisions in the legislation, but most of them will not require substantive changes in the way in which municipalities conduct their business. The passage of the changes will in no way dilute the overall purpose of the Right-to-Know Law, as expressed in its preamble, which is "to ensure both the greatest possible public access to the actions, discussions and

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² [2008 N.H. Laws, ch. 303](#).

³ [Hawkins v. N. H. Dept. of Health & Human Svcs.](#), 147 N.H. 376, 380, 788 A.2d 255, 258 (2001).

⁴ [2003 N.H. Laws, ch. 287 \(House Bill 606\)](#). The duties of the Right-to-Know Study Commission, by the terms of its enabling legislation, ended October 31, 2004. The Commission was renewed in 2005 by an act of the New Hampshire Legislature ([2005 N.H. Laws, ch. 3 \(House Bill 41\)](#)) as a five-year oversight commission. See [RSA 91-A:11, et seq.](#)

Since its inception, the Commission has been chaired by Representative John Thomas (Belknap, District 5). Commission members are public officials, legislators and private citizens appointed by the Governor and Council, the House and Senate, and by many organizations concerned with access to the workings of government at all levels. They serve on a completely volunteer basis, and have dedicated many hours of hard work over the last five years to bring this needed legislation to fruition.

⁵ Although the bill specifies an effective date of July 1, 2008, the Governor did not sign it until July 2.

records of all public bodies, and their accountability to the people.”⁶ Nor will the new changes affect what has been a long-standing practice of the courts to “broadly construe provisions favoring disclosure and interpret the exemptions restrictively.”⁷

The new legislation *clarifies* how technological advances in communication and computerized data storage fit into the way government conducts its business and interacts with its citizens, but most government officials recognize that the Right-to-Know Law has always applied to these advances, even though they may not have been dealt with explicitly.⁸

Determining where modern methods of communication fit into the law as it existed prior to passage of [House Bill 1408](#) has been the subject of much discussion among officials and their legal advisors at all levels of government. Many analysts have believed that when a quorum of a public body communicates with each other (*e.g.*, by e-mail) the courts may regard such communication as a “meeting.” This was of particular concern to municipal officials, such as boards of selectmen, where as few as two members could constitute a quorum. There was a widespread fear that *any* communication outside the traditional setting of a public meeting might be illegal and subject the participants or their communities to court-imposed sanctions. That fear was heightened by litigation in which just such claims were made: *i.e.*, that e-mail communication among a quorum of a board amounted to an illegal meeting.

In light of such concerns, the Commission felt that one of its primary duties was to recommend changes which would clarify differences between “meetings” and other forms of communication, while protecting the public’s right to be involved in the business of government as much as reasonably practicable.

Much of the debate on the proposed changes to the Right-to-Know Law has focused on the amount and type of communication allowed among a quorum or majority of the members of a public body outside meetings open to the public. Some have recommended that public officials be forbidden to have *any* substantive communication with each other about public business other than at a meeting to which the public has been invited. Others, including the New Hampshire Municipal Association, have maintained that such draconian provisions would simply be unworkable and would discourage citizen participation in local government.⁹

⁶ [RSA 91-A:1](#). See also [N.H. Const., part 1, art. 8](#).

⁷ [Union Leader Corp. v. N.H. Housing Fin. Auth.](#), 142 N.H. 540, 546, 705 A.2d 725, 730 (1997).

⁸ See, *e.g.*, Cordell A. Johnston, *Electronic Records and Communications Under New Hampshire’s Right-to-Know Law*, N.H.B.J., Vol. 48, No. 3, Fall 2007, p. 38. This excellent article comprehensively discusses most aspects of RSA 91-A and provides considerable guidance concerning how the new changes will mesh with prior law. The author followed the development of the changes to the law closely, and provided a great deal of assistance to the Commission. Therefore, his article may be regarded as particularly authoritative. The full article is available online at <http://www.nhbar.org/publications/archives/display-journal-issue.asp?id=381>.

⁹ As Justice Oliver Wendell Holmes, Jr., once stated: “We must remember that the machinery of government would not work if it were not allowed a little play in its joints.” *Bain Peanut Co. of Texas v. Pinson*, 282 U.S. 499, 501 (1931).

Ultimately, the Commission recommended, and the Legislature agreed to deal with, this issue by inserting a new provision forbidding *deliberation* on public business by a quorum or majority of a public body outside a duly noticed public meeting.¹⁰ This essentially recognizes that there are some forms of communication that do not rise to that level. Deliberation, although not defined in the law, in this context commonly means “a discussion and consideration by a group of persons (as a jury or legislature) of the reasons for and against a measure;”¹¹ *i.e.*, discussion with the intent of reaching a decision about something.¹²

As an example: If two members of a three-person board of selectmen, while walking together on the street, happen to see the rescue squad’s ambulance spewing a lot of black exhaust into the air, it would be permissible for one to say to the other: “Maybe the Chief is right about the ambulance needing a ring job. Let’s put it on the agenda for our next meeting.” On the other hand, if the response to the oil-burning ambulance is: “Looks like the Chief is right about the ambulance needing a ring job; if you agree, I’ll call him this afternoon and tell him to get it scheduled,” they would clearly be “deliberating” in violation of the law, even if the other selectman did not agree.

The following are other highlights of the new law:

- The terms “public agency” and “public body” are now clearly defined in §1-a, which has been rewritten as a “definitions” section.¹³
- The law now uses the terms “governmental records” and “governmental proceedings” in lieu of “public records” and “public proceedings.” The Commission recommended this change because use of the term “public” in this context tends to be misleading; the impression given is likely to be that records and proceedings so described are open to the public (*e.g.*, “a matter of public record”). In fact, however, some records and proceedings of a public body are exempt from disclosure to members of the public.¹⁴ To avoid confusion, the term “governmental” was thought to be less confusing. “Governmental records” include “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.”¹⁵

¹⁰ RSA 91-A:2-a, I. This new provision does not, however, affect the ability of a Public Body to deliberate in nonpublic session, provided that the requisite safeguards are observed. See [RSA 91-A:3](#).

¹¹ *Merriam Webster’s Online Dictionary* (10th ed). <http://www.merriam-webster.com/cgi-bin/dictionary?book=Dictionary&va=deliberation> (last visited July 10, 2008).

¹² The new section also makes clear that attempts to use communications outside a publicly noticed meeting to circumvent the spirit and purpose of the law will not be tolerated. RSA 91-A:2-a, II.

¹³ RSA 91-A:1-a, as rewritten.

¹⁴ See, *e.g.*, RSA 91-A:2, I (a)-(c), as amended, and [RSA 91-A:5](#).

¹⁵ RSA 91-A:1-a, III.

“Governmental proceedings’ means the transaction of any functions affecting any or all citizens of the state by a public body.”¹⁶

- “Information” is defined as “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.”¹⁷
- The law now makes it clear that for communication among a quorum or majority of the members of a public body to rise to the level of a “meeting” it must be carried on “contemporaneously” and involve deliberation or decision-making.¹⁸ Thus, when considered in conjunction with the new §2-a, e-mail exchanges, even among a quorum, would not constitute a “meeting” and would not be subject to the requirement that 24 hours notice be posted and that minutes be kept.¹⁹ However, such e-mail communications would be prohibited under §2-a if they have the flavor of deliberations, and would probably be “governmental records” subject to disclosure after the fact.²⁰
- One form of communication now singled out as exempt from the definition of “meeting” (and from the restrictions of §2-a) would be “circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting.”²¹ However, such documents and related written comments would be “governmental records” subject to the records provisions of RSA 91-A.²²
- The Right-to-Know Law retains the requirement that 24 hours notice of a public meeting be posted in two appropriate places; however, it now allows one of the two places to be the public body’s Internet web site, if it has one.²³
- A new provision in the law limits conduct of a public meeting where some of the members may participate by “electronic or other means of communication” (speaker phone, video hookup, etc.). Unless there is an emergency, a quorum of the body must be physically present for the meeting participants to legally transact business.²⁴

¹⁶ RSA 91-A:1-a, II, as rewritten.

¹⁷ RSA 91-A:1-a, IV.

¹⁸ RSA 91-A:2, I, as amended.

¹⁹ RSA 91-A:2, II, as amended.

²⁰ RSA 91-A:4, as amended.

²¹ RSA 91-A:2, I(d), as amended.

²² *Id.*

²³ RSA 91-A:2, II, as amended. There is no requirement that a public body have a web site; the law merely gives the option to use such a site as one of the two locations in which notice of a public meeting may be posted.

²⁴ RSA 91-A:2, III.

- The new changes to 91-A make it clear that retention of governmental records will be based on the *function* of the records at issue and not their form. The required retention period for records kept in traditional form will not change just because they are now stored electronically.²⁵ For municipalities, retention of governmental records is governed by [RSA 33-A](#). In the selection of media for storage of electronic records, public bodies must take functional obsolescence and physical deterioration into account.²⁶
- The new law also provides that records in electronic form are not subject to disclosure after they have been initially and legally deleted. However, just hitting the “delete” button is not sufficient to avoid the requirement of disclosure. “The mere transfer of an electronic record to a readily accessible ‘deleted items’ folder or a similar location on a computer shall not constitute deletion of the record.”²⁷ Caution must be exercised in deleting or destroying any governmental records. Regardless of whether a record has passed its retention period, it may *not* be deleted or otherwise destroyed after someone has made a right-to-know request for it pursuant to RSA 91-A:4.²⁸
- The law now states that a member of the public may request records in electronic form (*e.g.*, copied to a CD or diskette), if that is the way in which they are kept.²⁹
- A new provision intended to codify court rulings on the subject indicates that public bodies will not have to compile electronic information into a form in which it is not already kept or reported.³⁰ Although this provision is consistent with prior court rulings, over-reliance on it is not recommended. Refusals to, for example, separate confidential from non-confidential information maintained in a governmental records database would probably be given short shrift by most judges. Accordingly, municipalities and other government entities would be well advised to build accessibility into their electronic record keeping to avoid such problems.³¹
- Under a separate bill, the 2008 Legislature made certain non-profit entities subject to the requirements of the Right-to-Know Law.³²

²⁵ RSA 91-A:4, III-a.

²⁶ See, *e.g.*, [RSA 33-A:5-a](#).

²⁷ RSA 91-A:4, III-b.

²⁸ [See RSA 91-A:9](#).

²⁹ RSA 91-A:4, V, as amended.

³⁰ RSA 91-A:4, VII.

³¹ The Right-to-Know Law “require[s] that public records . . . be maintained in a manner that makes them available to the public.” [Hawkins](#), 147 N.H. at 379, 788 A. 2d at 258.

³² [2008 N.H. Laws, ch. 278 \(House Bill 1179\)](#), effective August 26, 2008.