

The New Right to Know Law

By Cordell Johnston
Government Affairs Attorney
The Local Government Center
25 Triangle Park Drive
P.O. Box 617 03302-0617
Concord, NH 03301
603-224-7447

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New Hampshire's Right to Know Law, RSA chapter 91-A, was enacted in 1967, when almost all public records existed only on paper, and decades before e-mail and other forms of electronic communication existed. In recent years, questions about how the law applies to electronic records and communications have plagued local officials, citizens, the courts, and the legislature. After several years of wrangling, the legislature this year passed a comprehensive amendment to the Right to Know Law, which addresses many of those questions. Those amendments were contained in House Bill 1408, which became Chapter 303 of the New Hampshire Laws of 2008. The new law took effect July 2, 2008.

The first thing municipal officials need to know about the new legislation is that although it rewrote the Right to Know Law significantly, it should not require major changes in existing practices. The new law does not significantly expand or narrow the public meeting or public record requirements under the Right to Know Law. Rather, it *clarifies* how the law applies to electronic records and communications, as well as certain other matters. In large part, the changes are consistent with the interpretations of the pre-amendment Right to Know Law that are shared by most municipal attorneys. If municipal officials have been careful about their use of electronic communications and have maintained their electronic records conscientiously, they should not have to make significant changes in their practices.

The following is a summary of the significant new features of the Right to Know Law, with an emphasis on how the new law affects municipal land use boards.

I. A REMINDER

The two basic principles of the Right to Know Law have not changed: (1) *meetings* of public bodies must be open to the public, and (2) *records* of public bodies and public agencies must be made available to the public upon request. In every situation where a Right to Know Law issue appears to arise, it is important to consider whether the issue has to do with the open *meeting* requirement or the public *records* requirement—or both.

One of the best examples of this distinction is the use of e-mail. As the discussion below explains, there are situations in which the use of e-mail may violate the Right to Know Law's open meeting requirement, and other situations where it clearly does not violate that requirement. But regardless of whether the e-mail implicates the open meeting requirement, it may separately result in the creation of a record that is subject to disclosure.

II. NEW DEFINITIONS

A. Public Agency and Public Body. The old law used the terms “public agency” and “public body” somewhat randomly, without defining either. The new law defines both terms and uses them much more carefully. These definitions are critical, because the law’s open meeting requirements apply only to public *bodies*, while the rules regarding disclosure of governmental records apply to records of both public *bodies* and public *agencies*.

A “*public agency*” is “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.”

Examples: The town clerk, the police department, the highway department, the town manager, the town library, and the town planner are all public agencies, because each is an “agency, authority, department, or office” of the town.

A “*public body*” includes, among other things, “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.”

Examples: The board of selectmen or city council, planning board, zoning board of adjustment, conservation commission, library board of trustees, and historic district commission are all public bodies.

Note: The definition of “public body” appears somewhat duplicative, because it includes any “agency [or] authority” of a municipality within its definition. One might read this to mean that each public agency is also a public body. This does not appear to be the legislative intent, because other sections of the statute make it clear that a public body is one that has “members” who meet to make decisions.

B. Governmental Records. The Right to Know Law has always required the disclosure of “records,” but, strangely, it never defined the term. The law now defines “governmental records” as

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.”

The word “information,” in turn, 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.”

The importance of the new definition of governmental records is discussed at length in section IV.A below.

III. MEETINGS OF PUBLIC BODIES

A. Meeting Requirements.

The basic requirements for meetings of public bodies have not changed, but there are some changes in how those requirements apply. There are three fundamental requirements for all meetings:

1. *Open to the public.* RSA 91-A:2, II, now states, “Subject to the provisions [regarding nonpublic session], all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public.” Although this language differs somewhat from the provision in the old statute, the effect is exactly the same: all “meetings” of public bodies must be open to the public. The new reference to meetings held by telephone or electronic communication merely states expressly what was already obvious: public meeting requirements may not be avoided through the use of technology.

2. *Notice required.* The requirement that notice of public meetings be posted at least 24 hours in advance, either in “two appropriate places” or in a newspaper of general circulation in the municipality, has not changed. *See* RSA 91-A:2, II.

Posting on website permitted. One new feature, however, is that the public body may choose to post one of the two notices on its Internet website.

Notice of emergency meeting. The notice requirement for an emergency meeting has changed slightly. The old law merely required the chairman or presiding officer to “employ whatever means are available to inform the public that the meeting is being held.” The new law requires that person to *post notice* of the meeting as soon as practicable, *and* employ whatever additional means are reasonably available to inform the public.

Although this is a somewhat stricter requirement, it should not be a significant burden. If there is enough time to get to town hall for a meeting, there probably is enough time to tape a notice to the door just before the meeting starts. In the most urgent of emergencies—the midnight telephone meeting when the sewage treatment plant fails—it is possible that “as soon as practicable” may not

be until after the meeting has been held. As under the old law, it is still necessary to keep minutes of an emergency meeting.

3. Minutes required. There is no change to the requirement of keeping minutes. Minutes must include the names of members present and persons appearing before the public body, and a brief description of matters discussed and final decisions. Minutes must be open to public inspection within five business days.

B. What Is a Meeting?

Because the holding of a meeting of a public body gives rise to the requirements discussed above, it is critical to understand exactly what constitutes a “meeting.”

A “meeting” is now defined as

the convening of a quorum of the membership of a public body, . . . 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.

RSA 91-A:2, I.

There are four elements to this definition: (1) the “convening” (2) of a quorum (or majority) of the members of a public body (3) in any manner such that all participating members are able to communicate with each other contemporaneously (4) for the purpose of discussing or acting upon matters over which the body has supervision, control, jurisdiction, or advisory power.

1. “Convening.” There is no meeting unless a quorum has been “convened.” The dictionary definition of “convene” is “to cause to assemble.” Obviously, if members of a public body are called together in one location, they have been “convened.” Similarly, if they engage in a telephone conference call, they have been convened, although not necessarily in one place. (Note that the definition expressly refers to telephone conferences.)

If members of a public body discuss official business by e-mail, one could argue about whether they have been “convened.” If, by prior agreement, they all sit down at their computers at 8:00 p.m. and begin e-mailing each other, perhaps they have been “convened.” More likely, however, the e-mail discussion is a series of messages separated by hours or even days. In that case, one can hardly say that the members have

been “convened.” However, this is probably just an academic argument, because *if a majority of the members of a public body are discussing substantive matters by e-mail, they are almost certainly violating the law’s rule about communications outside a meeting. See section III.C below.* Thus, even if it is technically not a “meeting,” it is illegal. For this reason (and others, *see* section IV.B below), *e-mail communication among members of a public body is strongly discouraged.*

2. A quorum. This element should be self-explanatory. In the rare case where the rules of the public body define a quorum as something more than a majority (for example, if a city charter defines a quorum of the city council as two-thirds of its members), the presence of a simple majority will constitute a “meeting” for purposes of the Right-to-Know Law, even though under the rules of the public body itself, there are not enough members present to conduct business. The reason for this is that even if a simple majority does not constitute a quorum for the purpose of conducting business, that majority will be able to control any decisions when a quorum is actually convened. Thus, they should not be able to meet privately to discuss matters that will ultimately come before the full body.

3. All members able to communicate contemporaneously. This element is clearly satisfied if all participants are in a room together, or on a telephone conference call. At the other end of the spectrum, if members are sending letters back and forth by first-class mail (admittedly an unlikely event), there is no meeting. The answer is less clear if the participants are using e-mail or instant messaging. Again, however, it is not necessary to venture an answer to this unanswerable question. As explained in the discussion of “convening” above, the use of these electronic means to discuss substantive matters would circumvent the purpose of the statute and therefore violate the rule about communications outside a meeting.

4. For the purpose of discussing or acting upon matters It is perfectly legal to convene a quorum of a public body, without public notice and without allowing public attendance, if the purpose of the gathering is to watch a movie, play horseshoes, or discuss national politics. The selectmen or the planning board may have a private party, so long as it truly is a purely social event and there is no intent to discuss or act upon “a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power.” Such gatherings are not recommended, of course, because there is a strong likelihood that the conversation will eventually turn to board business.

5. Summary: Are we having a meeting? To understand whether the notice, open meeting, and minute requirements of the statute apply to any given event, always ask the following questions:

Have we convened a quorum of the public body?

Are all members able to communicate with each other contemporaneously?

Is the purpose to discuss or act upon matters over which the public body has supervision, control, jurisdiction, or advisory power?

If the answer to all questions is “yes,” *it is a “meeting,”* and compliance with the Right to Know Law is required.

If the answer to any of these questions is “no,” *it is not a meeting.* ***However, you should ask the following additional questions to make sure you are not violating the law:***

Even if the *original purpose* of the gathering was not to discuss matters over which the body has supervision, control, jurisdiction, or advisory power, are we nevertheless making decisions on such matters?

Even if it is not technically a “meeting,” are we using communications *outside* a meeting to circumvent the spirit or purpose of the law? In particular, are we using sequential communications that, in the aggregate, involve a quorum or majority of the board to discuss matters over which the body has supervision, control, jurisdiction, or advisory power? ***See the discussion in the following section.***

For a graphic presentation of these questions, see Appendix B.

C. Communications Outside a Meeting.

The law contains an entirely new section, RSA 91-A:2-a, limiting the use of communications outside a meeting. Although the language is new, again, it merely confirms what most people understood the law to be already.

1. No deliberations outside a public meeting. The first paragraph of RSA 91-A:2-a states that public bodies shall deliberate on matters of official business “only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III”—*i.e.*, only in properly noticed public meetings. This does not mean that any mention of a matter of official business outside a public meeting is illegal; however, it is illegal for the body to *deliberate* on such a matter outside a meeting—*i.e.*, to discuss the matter with a view toward making a decision. The intent of the law is that such matters should be deliberated in public.

For example, suppose two members of a three-person board of selectmen happen to meet on the street, and one of them says, “I think the town hall is about ready for a new roof. Do you think we should put it on the agenda for the next meeting?” The second selectman agrees to put it on the agenda. The conversation does not violate section 2-a, because, although they have discussed the subject, there has been no deliberation. On the other hand, if they actually proceed to discuss the pros and cons of re-roofing the building, they are probably violating the law. And if the conversation ends with one of them saying, “Great. I’ll call the town administrator and tell him to start soliciting bids,” there is a definite violation.

Note: There is an exception for those events that are exempted from the definition of a “meeting.” These include (among others) consultations with legal counsel, strategy or negotiation sessions with respect to collective bargaining, and chance or social encounters not convened for the purpose of discussing or acting upon matters of official business.

2. *No circumvention of spirit or purpose of the law.* The second paragraph states that 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.” This is intended primarily to prevent public bodies from skirting the “meeting” definition by deliberating or deciding matters via a series of communications, none of which alone involves a quorum of the public body, but which in the aggregate include a quorum.

Example 1: Two members of a zoning board of adjustment discuss a pending matter by e-mail. One of the members then sends a copy of the discussion to a third member and continues the discussion with that member. Although no quorum was ever convened, this clearly violates the spirit of the law, and is illegal.

Example 2: The planning board chairman calls each member sequentially to get an informal vote on a matter that is on the agenda for the next meeting. Again, this is illegal.

D. Electronic Meetings.

The new law expressly recognizes, for the first time, the possibility of one or more members’ participation in a meeting by telephone or by other electronic means. The law states that a public body *may*, but is *not required* to, allow participation in such manner. *See* RSA 91-A:2, III.

A member may participate other than by in-person attendance at the location of the meeting only when the member’s attendance is “not reasonably practical.” The reason that in-person attendance is not reasonably practical must be stated in the minutes of the meeting. Although the law does not indicate what situations would qualify, some obvious examples include physical incapacity and out-of-state travel. (Again, if the board does not believe these are sufficient reasons for not attending in person, it does not have to allow the member to participate by phone.)

Except in an emergency, at least a quorum of the public body must be physically present at the location specified in the meeting notice as the location of the meeting. 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 “immediate action is imperative” standard is similar to that used for defining an

emergency meeting under the existing law's notice requirement. *See* RSA 91-A:2, II.) The determination that an emergency exists is to be made by the chairman or presiding officer, and the facts upon which that determination is based must be included in the minutes.

Each part of a meeting that is required to be open to the public must be audible "or otherwise discernable" to the public at the physical location of the meeting. All members of the public body, including any participating from a remote location, must be able to hear and speak to each other simultaneously during the meeting, and must be audible or otherwise discernable to the public in attendance. No meeting may 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."

All votes taken during such a meeting must be by roll call vote.

IV. GOVERNMENTAL RECORDS

The fundamental rule regarding governmental records has not changed: every citizen has the right to inspect and copy governmental records during regular business hours and on the premises of the public agency or public body.

A. What Is a Governmental Record?

Although the basic rule has not changed, the new law contains an important clarification of what, exactly, constitutes a governmental record. As noted in section II above, "governmental record" is now defined as

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."

See RSA 91-A:1-a, III. The word "information," in turn, 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." *See* RSA 91-A:1-a, IV.

There are several important points here:

1. Information in “physical form.” “Information” may be “written, aural, visual, [or] electronic,” but in any case must be in some “physical form.” Thus, for something to constitute a “governmental record,” there must be some physical manifestation of it: for example, a written document, a computer file, a tape recording, a CD or DVD, or a videocassette. If it exists in one of those forms *or any other physical form*, it may be a “governmental record” (if the other elements of the definition are satisfied). In contrast, a face-to-face or telephone conversation that is not recorded does not constitute “information” and therefore cannot be a governmental record. (However, it may very well constitute a “meeting” that is subject to the open meeting requirements.) But if someone takes written notes of that conversation, the notes are a governmental records, assuming again that the other elements of the definition are satisfied.

2. Created, accepted, or obtained by a public body. Information (such as a written communication) will constitute a governmental record when it is “created, accepted, or obtained by, or on behalf of, any public body, *or a quorum or majority thereof*, . . . in furtherance of its official function.” More specifically, e-mail and other written communications constitute governmental records if they are “*received by a quorum or majority of a public body* in furtherance of its official function.” Thus, a communication—electronic or otherwise—that is created, accepted, or obtained by *less than a quorum* of a public body is *not* a governmental record and is not subject to disclosure.

Example 1: A citizen sends an e-mail to one member of a planning board expressing concern about a proposed zoning amendment. The e-mail is not a governmental record and is not subject to disclosure, because it was received by less than a quorum of the board.

Example 2: A citizen sends an e-mail to the entire planning board. The e-mail is a governmental record and is subject to disclosure.

Example 3: A citizen sends an e-mail to one member of the planning board, who forwards it to the rest of the members. The e-mail is a governmental record, because it has now been received by a majority of the board.

Example 4: A citizen sends an e-mail only to the chairman of the board, but it is clear from the context that it is intended for delivery to the board as a whole. The e-mail is a governmental record, because it was obtained “on behalf of” a public body.

Example 5: One member of a planning board sends an e-mail to the rest of the board about a proposed zoning amendment. Regardless of whether any member responds or whether any discussion ensues, the e-mail is a governmental record.

Example 6: Same as 5, except that the member sends the e-mail to only one other member of the board, and the recipient does not share it with anyone else. It is

not a governmental record, because it was not created, accepted, or obtained by a majority of the board.

3. *Created, accepted, or obtained by a public agency.* Information constitutes a governmental record if it is “created, accepted, or obtained by, or on behalf of, . . . any public agency in furtherance of its official function.”

Example 1: A memo from the town administrator to the public works director is a governmental record, because each of those individuals is an “authority” of the town and acts on behalf of a “public agency.”

Example 2: An e-mail from the town administrator to one member of the planning board is a governmental record. Although receipt of the e-mail by the planning board member does not make it a governmental record (unless the context indicates that it is intended for delivery to the board as a whole), it is a governmental record because it was created by an “authority” of the town—*i.e.*, the town administrator.

Example 3: An e-mail from one police officer to another is a governmental record. The e-mail was both created and received by someone acting on behalf of a public agency—the police department.

4. *“In furtherance of its official function.”* Do the examples above mean that every e-mail a municipal employee sends or receives is subject to disclosure? If the town clerk gets an e-mail from his wife asking him to pick up some corn on the way home, with a P.S. that says “I’m sorry I made you sleep on the couch,” is that a governmental record under the Right to Know Law?

No. A governmental record is one created, accepted, or obtained by a public body or a public agency *in furtherance of its official function*. Personal correspondence is not, of course, in furtherance of the public body’s or public agency’s official function, and is not subject to disclosure. (However, if town employees are routinely using the town computers to send, say, obscene material, or for an inordinate amount of personal correspondence, that fact may be a matter of legitimate public concern.)

B. Maintaining Governmental Records.

The Right to Know Law states, “Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place . . .” See RSA 91-A:4, III. If the agency or body has no office or place of business, the records must be kept in an office of the municipality.

This is not a new requirement, but it has important implications for items such as e-mail correspondence. If an e-mail among members of the planning board or ZBA constitutes a governmental record, then a copy of that e-mail must be kept at the board’s

office, or at the office in the municipality where the board's records are kept. The public has a right to inspect and make copies of such communications.

As a practical matter, this means that a copy of every e-mail communication involving at least a majority of the board should be sent to someone—either the chairman of the board or, perhaps, the municipal planner or planning assistant, if there is such a person—who will be responsible for maintaining all such communications as required by the law. They could be stored on a computer at the town office, but the better practice would be to print them and keep the hard copies in a file or a binder at the town office.

If board members routinely communicate by e-mail, compiling and maintaining (and periodically discarding) these communications could pose a significant burden. That burden provides a compelling reason that *e-mail communication among members of a public body is strongly discouraged*, apart from ministerial matters such as scheduling meetings. This is in addition to the fact that if members are using such communication to discuss official business, there is a good chance that they are violating the law's open-meeting requirements. See section III.B above.

C. Retention Requirements for Governmental Records.

1. How long? If e-mail communications, or at least some of them, are governmental records under the Right to Know Law, does this mean they must be preserved for public inspection forever? Must individual board members preserve board-related e-mails on their home computers forever?

No. First, as to the latter question, if the communications are properly maintained at the board's office as recommended in section IV.B above, there is no need for individual board members to keep them at all.

As for how long the records must be kept at the public body's office, the Right to Know Law does not require that governmental records be kept forever. In fact, it does not deal with retention periods at all. It merely requires that as long as governmental records *are* kept, they are subject to public disclosure. The new law does contain a statement that “[g]overnmental records created or maintained in electronic form shall remain accessible for the same retention or archival periods as their paper counterparts,” see RSA 91-A:4, III-a, but this does not answer the question. It merely confirms what was already implicit—electronic records are subject to the same retention and disclosure requirements as paper records.

The question of how long governmental records must be retained is addressed by a different statute, RSA chapter 33-A, the Municipal Records Disposition Act. That statute contains a list of 154 types of municipal records and states how long each type must be retained. The retention periods typically range from one year (*e.g.*, withdrawn or denied building permits) to “permanently” (*e.g.*, meeting minutes), depending on the type of record. See RSA 33-A:3-a.

Most e-mail communication would likely be considered “correspondence,” which chapter 33-A divides into three categories:

- Correspondence relating to administrative records must be retained for a minimum of one year.
- Correspondence relating to “policy and program records” is subject to the same retention requirement as the record to which it pertains.
- “Transitory” correspondence is required to be “retain[ed] as needed for reference.”

E-mail among land use board members is likely to fall into the second or third category. The term “policy and program records” is not defined, but this category probably includes correspondence relating to specific planning and zoning cases. There are varying retention periods for site plan, subdivision, and ZBA applications, and e-mail that relates specifically to such an application presumably must be retained for as long as the application itself. (And it would make sense to keep the e-mail, along with any other correspondence, in the file relating to that application. Again, it is not a good idea to be engaging in such e-mail communications in the first place, but to the extent it happens, the correspondence should be kept with the file.)

E-mail among board members that does not relate to a specific application may well be considered “transitory.” If there is no need to keep it for reference, it may be deleted immediately.

Note: Remember, however, that a record should *never* be deleted or destroyed once a request for the record has been filed under the Right-to-Know Law, even if the required retention period has expired. The record must be disclosed if the public entity has it, even if it *could* have been destroyed earlier. Destroying a record that has been requested is probably the worst thing a public official can do related to the Right-to-Know Law, because it is the one action that can actually lead to criminal sanctions. *See* RSA 91-A:9.

2. *Soft or hard copy?* Assuming an e-mail, or any other electronic record, is required to be retained for any significant period, another question is whether the record should be retained in electronic or paper form. Chapter 33-A addresses this question as well. If a given record is required, under chapter 33-A’s retention schedule, to be retained for more than 10 years, it must be transferred to paper, microfilm, or both. If the retention requirement is less than 10 years, it may be kept solely in electronic form “if so approved by the record committee of the municipality.” *See* RSA 33-A:5-a. (The statute requires each municipality to have such a committee.)

Regardless of the form in which the record is kept, the record must remain *accessible* for the duration of the retention period. *See* RSA 33-A:5-a. Although a record may be retained in electronic form, that will not suffice if the technology becomes

obsolete. It would be unacceptable, for example, to respond to a Right to Know Law request in 2008 by handing someone a floppy disk (unless the person asks for it in that form), even though that might have been acceptable in 1999. If a public body or agency's records are stored on media that are outdated, it must be prepared to transfer them to paper or some other medium that is useful to the person requesting the record.

D. Disclosure of Governmental Records.

Again, the basic rules regarding disclosure of governmental records have not changed. All records (unless they are exempt under section 5 of the statute) are subject to public inspection and copying during regular business hours on the premises of the public body or agency. Upon request, the public body or agency must provide any records that are immediately available. If the record is not immediately available, the public body or agency has five business days to make it available, deny the request in writing with reasons, or provide written acknowledgment of the request and a statement of the time necessary to determine whether the request will be granted. The public body or agency may charge the person making the request the actual cost of providing copies of any records. *See* RSA 91-A:4, IV.

As to records in electronic form, the new law states:

[A]ny public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, 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.

See RSA 91-A:4, V. In short, for records kept in electronic form, the public body or agency may provide the record on a disk or other electronic medium if that is acceptable to the person requesting it; if that is impractical, it may provide a paper copy of the record. If the person requests a paper copy rather than an electronic copy, it must be provided.

E. Deletion and Destruction of Records.

As explained in section IV.C, there are specific requirements about how long governmental records must be retained, and those requirements apply to electronic as well as paper records. Once the retention period has expired, the record may be destroyed—or, in the case of a record maintained in electronic form, deleted.

Proper deletion of electronic records at the expiration of their retention periods is important, because governmental records remain subject to disclosure under the Right to

Know Law as long as they remain in the “possession, custody, or control” of a public body or agency—even if the required retention period has expired. Thus, for example, if a record has a three-year retention period but the municipality never destroys or deletes it, someone who requests a copy 20 years later is entitled to get it if the municipality still has the record in its possession. On the other hand, if the municipality has properly deleted or destroyed the record, it has no obligation to produce it.

There are, of course, different levels of “deletion” of an electronic record. Typically, an e-mail that is “deleted” is merely moved to another folder, where it is readily accessible. Other electronic documents that are “deleted” may be stored in a “recycle bin” from which they may be easily retrieved. One could argue that such records are still subject to disclosure under the law even though they have been “deleted” after the expiration of the retention period.

The new law addresses this issue with the following provision:

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.

See RSA 91-A:4, III-b.

The critical phrase here is “initially and legally deleted.” The word “legally” means, of course, that the record must be kept at least for the duration of its retention period under RSA chapter 33-A. At the expiration of that period, it may be “legally deleted.”

The word “initially” means that, assuming the retention period has expired, a deleted record is no longer subject to disclosure even though it could be retrieved through heroic efforts. The second and third sentences make it clear, however, that initial deletion requires something more than just moving the record from one file to another. If the record can be retrieved easily from a “deleted item” folder or a recycle bin, it has not been deleted.

The original report of the Right to Know Study Commission that recommended these changes to the law made the following apt analogy:

The situation is roughly analogous to throwing a piece of paper in the trash. The paper may actually still exist after it is discarded; however, the public body which once had custody of the paper would not reasonably be expected to go through a dumpster or landfill to find it.

See Final Report of the Right to Know Study Commission (Chapter 287:2, Laws of 2003) at 18 (Oct. 29, 2004). On the other hand, if a paper record is sitting in a “to be recycled” tray on a public official’s desk, it probably would be subject to disclosure. Similarly, if an electronic record can be retrieved with a couple of mouse clicks, it is subject to disclosure; but if retrieval would involve a search of backup tapes or other extensive efforts, it need not be disclosed.

If a record has been requested and there is doubt about whether it has been sufficiently “deleted” to be no longer subject to disclosure, a public official can do one of two things: (1) retrieve it and disclose it, or (2) explain that it has been deleted and is no longer readily accessible, and see whether that decision is challenged. In no event should any action be taken to make the record *less* accessible—this could violate the prohibition on destruction of requested records under RSA 91-A:9 and lead to criminal sanctions.

Appendix A

Does the Right to Know Law Apply?

Below are examples of common situations faced by local officials that call for a determination of whether the Right to Know Law applies. In some of the situations there is a “meeting” that is subject to the law’s open meeting requirements; in some the actions result in the creation of a “governmental record” that is subject to public disclosure requirements; and in some there is *both* a meeting and a governmental record.

	Facts	Meeting?	Gov’tal record?	Explanation
1	Chance encounter or social gathering—three members of ZBA. Not planned for discussing official business, but business is discussed briefly; no decisions are made.	No	N/A	Exempt from definition of “meeting” because not planned for discussing business, and no decisions made. 91-A:2, I.
2	Same as 1, but members present agree on a course of action.	Yes	Minutes required	Making of decision defeats exemption. Minutes required, but statute already violated b/c no notice or public access.
3	Majority of planning board or ZBA meet in private to discuss board matters.	Yes	Minutes required.	Convening of quorum for purpose of discussing official business. 91-A:2, I. Minutes required, but statute already violated b/c no notice or public access.
4	Two members of ZBA, or 3 members of 7-person planning board, meet in private to discuss board matters.	No	N/A	Not a quorum; therefore no meeting. 91-A:2, I.
5	Same as 4, but one of those present subsequently meets with one or two other members to discuss the same matters.	No, but a clear violation of the law.	N/A	Communications outside a meeting, including sequential communications, shall not be used to circumvent the law. 91-A:2-a, II.
6	Two members of 3-person board of selectmen discuss official	Yes	Minutes required	Convening of quorum by telephone to discuss

	business by telephone.			official business is as meeting. 91-A:2, I. Minutes required, but statute already violated b/c no notice or public access.
7	Planning board member sends information via e-mail to all other members. No member sends a substantive response.	No	Yes	No meeting, because quorum is not convened to discuss the matter. 91-A:2, I. But e-mail is a governmental record because created/received by quorum of public body. 91-A:1-a, III.
8	Same as 7, but a substantive discussion of the matter ensues via e-mail.	Unclear, but exchange clearly violates the law.	Yes	Arguably not within technical definition of meeting because members don't communicate "contemporaneously." 91-A:2, I. But a clear use of communications outside a meeting to circumvent the law. 91-A:2-a, II. Gov'tal record exists for reason stated in 7 above.
9	Two members of 7-person planning board have a lengthy discussion of official business via e-mail.	No	No	Not a quorum; therefore no meeting. 91-A:2, I. No "record" because e-mail not created or received by majority of public body. 91-A:1-a, III.
10	Same as 9, but one member forwards e-mail string to 2 other members and lengthy discussion ensues.	No, but a clear violation of the law.	Yes	See explanation for 5 above. Gov'tal record exists because e-mail is created/received by majority of board. 91-A:1-a, III.
11	One planning board member engages in lengthy e-mail discussion with private citizen regarding a planning board matter.	No	No	No meeting, because only one member involved. No record because e-mail not created/received by

				majority of board (unless context indicates member is acting “on behalf of” entire board). 91-A:1-a, III.
12	Same as 11, but board member forwards e-mail string to rest of board. No discussion ensues.	No	Yes	See 7 above.
13	To avoid the need for a public meeting, town administrator calls each selectman individually to get consensus on hiring a new town employee.	No, but a clear violation of the law.	N/A	Not a meeting, because no convening of quorum. But an unlawful use of “sequential communications” outside a meeting to circumvent the law. 91-A:2-a, II.
14	One planning board member sends an e-mail to town planner regarding proposed changes to subdivision regulations.	N/A	Yes	E-mail is a governmental record, not because sent by a planning board member, but because received by town planner, who represents a “public agency.” 91-A:1-a, III.
15	Same as 14, but e-mail message is a dinner invitation, having nothing to do with town planning matters.	N/A	No	E-mail is not in furtherance of public agency’s official function.

Appendix B

Is It a Meeting?

Use this flow chart to determine whether communications among members of a public body constitute a meeting subject to the Right to Know Law, or, if they do not constitute a meeting, whether they are unlawful communications outside a meeting.



