

Record Requests Under New Hampshire's Right-to-Know Law (RSA 91-A)

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I. The Basics

What Does the Law Require?

Records must be made available to public. RSA 91-A:4, IV(a): Each **public body** or **agency** shall, upon request for any **governmental record** reasonably described, make available for inspection and copying any such governmental record within its files **when such records are immediately available** for such release.

“Public agency” – includes the city or town clerk’s office.

“Governmental record” – 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**.

“Information” – 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.

Note – law applies only to information “in physical form” – does not require the disclosure of mere knowledge unless it exists in a document, recording, etc.

“In furtherance of its official function” – law applies only to records related to the agency’s work—not personal correspondence or other non-official records.

II. Dealing With Record Requests

A. How Records Are Requested

No magic formula. A request is not required to be in writing. Try to get it in writing for the sake of clarity, but an oral request is sufficient. The requester does not need to mention RSA 91-A or state that it is a “right-to-know request.” Any request for governmental records triggers the law.

Reason for the request. Do not ask why they want the records; they are not required to give a reason, and it is not appropriate to ask.

B. Providing Requested Records

No requirement to send records! The law does not require a public agency to send records to anyone. RSA 91-A:4, I, merely requires that records be made available “during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies.”

You may send records, but are not required to. Tell the person he/she can come in to the clerk’s office and inspect the records (unless your town has a different practice—be consistent).

Immediately available records – Allow the person to inspect the records and make copies (unless an exemption applies).

Records not immediately available – If the requested records are not immediately available, you have five business days to:

- Make the records available; or
- Deny the request in writing; or
- Provide a written statement of the time reasonably necessary to determine whether the request will be granted or denied.

Paper or electronic copy? If a record exists only on paper, there is no obligation to create an electronic copy. If it exists electronically, and the person asks for an electronic copy, and it is reasonably practical to provide an electronic copy, then

you must do so. However, there is no obligation to convert a document from one electronic form to another (e.g., Word to Excel). There also is no obligation to email an electronic copy to the requester; it is permissible to require the person to come to the office and download the document onto a town-provided flash drive (and charge for the cost of the flash drive).

D. Denying a request

Reasons to deny a request:

- You don't have the information requested. (But if you know that a different town office has it, tell them!)
- The information exists, but it is not a "governmental record"--i.e., it does not exist in physical form, or it is not a record "in furtherance of the agency's official function."
- The information exists, but you would be required to compile the information into a new record. RSA 91-A:4, VII, states, "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"
 - E.g., "provide me with a list of all the registered voters named William." You have this information, but not as a separate record—you would have to go through the checklist and pull out all the Williams. The law says you are not required to do this.
- The information is a "governmental record," but is exempt from disclosure under RSA 91-A or under another law.

When denying a request based on an exemption, you 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." (See section III below.)

E. Redacting

If the record requested is not entirely exempt, but it contains some information that is exempt, that information must be redacted—*i.e.*, removed from the record—before it is produced.

When information is redacted before a record is made available, you must explain why the redacted information is exempt, as described in paragraph D above.

III. Exemptions from Disclosure Requirement

Certain records are exempt from disclosure, based on exemptions contained either in RSA 91-A:5 or in another statute. The exemptions in RSA 91-A:5 that are most likely to apply to the clerk's records are:

Personnel information, confidential information, etc.: invasion of privacy. This exemption applies to, among other things:

- records pertaining to internal personnel practices;
- confidential, commercial, or financial information;
- personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.

This exemption must be applied very carefully; the New Hampshire Supreme Court has held that these records are exempt only if disclosure would constitute an invasion of privacy. This requires balancing the public's interest in disclosure against the municipality's interest in nondisclosure and any affected persons' privacy interest in nondisclosure. Except in the clearest cases, if you believe disclosure of a record might constitute an invasion of privacy, you should consult with an attorney. One thing that is clear is that salaries of public employees and officials are not exempt. However, personal information such as insurance coverage, medical conditions, family relationships, and personal contact information is exempt.

Personal notes. "Notes or other materials made for personal use that do not have an official purpose" are exempt. Conversely, of course, notes that do have an "official purpose" are not exempt. Thus, notes related to a specific matter that is part of the clerk's duties are probably not exempt. (But in many cases you don't need to keep these notes for any period of time—throw them away if there is no reason to keep them.)

In addition, notes that are used by a minute taker (often the town or city clerk) to prepare the official minutes of a public body's meeting are not exempt. In fact, the law specifically says these notes, as well as any recordings or other materials used to assist in preparing the minutes, must be made available as long as they exist. (But they may be destroyed after the minutes have been prepared and approved.)

IV. Specific Records of Interest to Clerks

There are quite a few statutes stating that certain records either are or are not subject to disclosure under RSA 91-A. The following are a few of the ones of interest to municipal clerks. (This is not an exhaustive list. Also, some of these are subject to qualifications and exceptions, so check the statute and talk to the town attorney or the appropriate state agency if you are unsure.):

Voter checklist – Is generally subject to disclosure. “The supervisors of the checklist or city or town clerk shall furnish one or more copies of the most recent public checklist of their town or city to any person requesting such copies.” RSA 654:31. The clerk is to charge \$25 for a copy of the checklist, plus 50 cents per thousand names or portion thereof in excess of 2,500. (Note: Under an amendment passed in 2022, the law appears to require the clerk to provide an electronic copy of the checklist if that is requested, but the law is poorly drafted and unclear.)

Voters subject to protective orders. The name and address of a voter who presents a domestic violence protective order under RSA 173-B should be kept on a separate list of voters, not on the public checklist. The separate list is exempt from disclosure. RSA 654:25.

Marked checklist. The supervisors of the checklist must provide one marked copy of the checklist used in every election to the clerk. “The clerk shall preserve such checklists in his or her custody for a public record for a period set forth in RSA 33-A:3-a [seven years].” RSA 659:102.

Other voter information. Other than the information on the public checklist, voter information, including information on the voter registration form, absentee registration affidavit, qualified voter affidavits, domicile affidavits, affidavit of religious exemption, application for absentee ballot, and contact information, is treated as confidential information, and the records containing this information are exempt from disclosure under RSA 91-A. See RSA 654:31-a.

Absentee ballot requests. The clerk’s lists of the names and addresses of applicants to whom absentee ballots have been sent, and of the absentee ballots that have been returned to the clerk “shall not be available for public inspection at any time without a court order.” RSA 657:15.

However, a candidate whose name appears on the ballot may obtain a list of absentee voter applicants from the clerk, excluding voters who have presented a valid protective order.

Ballots sealed after election.

Cast, cancelled, and uncast ballots, including successfully challenged and rejected absentee ballots, sealed and preserved after an election, are exempt from public disclosure. RSA 659:95.

Motor vehicle records

With some exceptions, motor vehicle records are not public records and are not open to inspection by any person. RSA 260:14, II(a).

A municipal agent may provide the name of a person who has registered a motor vehicle together with the permit number, vehicle identification number, and fee paid in such transaction to a nongovernmental contracted agent of a municipality for audit purposes only for the purposes of RSA 41:9, VI and RSA 41:31-c (municipal audit and providing for internal controls).

Vital records

“The [state] registrar or the custodian of permanent local records shall not permit inspection of, or disclose information contained in vital statistics records, or copy or issue a copy of all or part of any such record unless he or she is satisfied that the applicant has a direct and tangible interest in such record.” RSA 5-C:9.

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