Bill as Introduced

HB 606 – AS INTRODUCED

2003 SESSION

03-1016
01/09

HOUSE BILL ***606***

AN ACT establishing a right-to-know study commission.

SPONSORS: Rep. Thomas, Belk 31; Rep. J. Pratt, Ches 24; Rep. Bergin, Hills 47; Rep. Patten, Carr 7; Rep. Rowe, Hills 47

COMMITTEE: Judiciary

ANALYSIS

This bill establishes a commission to study the right-to-know law, including the issue of electronic communications.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 606 – AS INTRODUCED

03-1016
01/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Three

AN ACT establishing a right-to-know study commission.

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

1 Purpose. The general court hereby establishes a commission to study clarifying the right-to-know law in light of the supreme court's December 31, 2001 decision in *Hawkins v. N.H. Department of Health and Human Services* and increasing use of electronic communication in the transaction of governmental business. The general court recognizes that guidance is needed for all government officials as well as for members of the public regarding what meetings and what documentation are considered subject to RSA 91-A, the right-to-know law.

2 Commission Established. There is established a commission to study the right-to-know law in light of the supreme court's decision in *Hawkins v. N.H. Department of Health and Human Services* and increasing use of electronic communications in the transaction of governmental business.

3 Membership and Compensation.

I. The members of the commission shall be as follows:

(a) Three members of the house of representatives, one from the science, technology and energy committee, one from the municipal and county government committee, and one from the judiciary committee, appointed by the speaker of the house.

(b) Three members of the senate, appointed by the president of the senate.

(c) Three municipal officials, appointed by the New Hampshire Municipal Association.

(d) One school board member, appointed by the New Hampshire School Boards Association.

(e) One school administrator, appointed by the New Hampshire School Administrators Association.

(f) Two county officials, appointed by the New Hampshire Association of Counties.

(g) Four members of the public, one of whom shall be an attorney who has knowledge of and experience with the right-to-know law, one of whom shall be an information technology professional, and one of whom shall be a telecommunications professional, all appointed by the governor with the consent of the council.

II. Legislative members of the commission shall receive mileage at the legislative rate when attending to the duties of the committee.

4 Duties. The commission shall study:

I. The need for disclosure requirements or guidelines for email and other electronic communication occurring between and among state, county, and local government appointed and elected officials and employees of governmental entities.

II. The need for disclosure requirements or guidelines for electronic communications with constituents of state, county, and local government appointed and elected officials and employees of governmental entities.

III. Archival requirements for electronic documents.

IV. The status of proprietary data within the definitions of the right-to-know law.

V. The ability to recover costs relative to the retrieval of electronic files and communications.

VI. Issues relative to public records posted to web sites of governmental entities.

VII. Whether a member of a body subject to the right-to-know law may participate in a meeting by teleconference or other electronic means.

VIII. The extent to which the public will be provided access to stored computer data under the right-to-know law.

IX. Any other matter deemed relevant by the commission.

5 Chairperson; Quorum. The members of the commission shall elect a chairperson from among the members. The first meeting of the commission shall be called by the first-named house member. The first meeting of the commission shall be held within 45 days of the effective date of this section. Nine members of the commission shall constitute a quorum.

6 Report. The commission shall make an interim report on or before November 1, 2003 and a final report on or before November 1, 2004, together with its findings and any recommendations for proposed legislation to the speaker of the house of representatives, the senate president, the house clerk, the senate clerk, the governor, and the state library.

7 Effective Date. This act shall take effect upon its passage.

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB 606 Date March 5, 2003

Committee Judiciary

** Please Print All Information **

Name	Address	Phone	Representing	(check one) Pro	Con
Rep Barbara Hagan	Manchester		Dist 50	✓	
Heather Anderson	Town of Merrimack	423-8558	local government	✓	

Hearing Minutes

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HB 606

BILL TITLE: establishing a right-to-know study commission.

DATE: Mar. 5, 2003

LOB ROOM: 208 **Time Public Hearing Called to Order:** 1:00 p.m.

Time Adjourned: 1:30 p.m.

(please circle if present)

Committee Members: Reps. Mock, Rowe, Jacobson, Ford, Dudley, Soltani, Woods, Rice, Souza, Desmarais, Haytayan, Mooney, Morris, Sorg, L. Wheeler, Wall, J. Pratt, Craig, Lasky, Potter and Franklin.

Bill Sponsors: Rep. Thomas, Rep. J. Pratt, Rep. Bergin, Rep. Patten, Rep. Rowe

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Rep. John Pratt, Sponsor - Supports - Will introduce due to absence of prime sponsor. Brought forward at request of House Counsel and Attorney General's office.

Rep. John Thomas, Prime Sponsor - Supports - Commission was in effect last year. Cited cases where leaders (i.e., Select Board, Council member, etc.) decides to email one another on issues before them. Example: If you file your income taxes electronically, the IRS now has access to any information contained within your computer.

Mary Schwarzer, Assistant Attorney General - Supports - Prosecuted case noted in the bill - Hawkins vs. the NH Department of Health & Human Services. Will be available to answer any questions a commission might have in regard to this matter (if commission is formed).

Rep. Harriet Cady, Rockingham District 73 - Supports - Would be happy to support this bill.

Maura Carroll, NH Municipal Association - Supports - Struggle ensues as more and more officials use email to communicate with one another. Happy to include the Attorney General's office.

Respectfully submitted,

Terri C Dudley

Rep. Terri C. Dudley, Clerk

Testimony

CASSANDRA HAWKINS v. NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES
147 N.H. 376; 788 A.2d 255; 2001 N.H. LEXIS 229
No. 2000-012
December 31, 2001, Decided
SUPREME COURT OF NEW HAMPSHIRE
BROCK, C.J. BRODERICK, NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Print Case **Save Case**

Disposition Vacated and remanded.

Counsel New Hampshire Legal Assistance, of Portsmouth and Manchester (Kay E. Drought and Kenneth J. Barnes on the brief, and Ms. Drought orally), for the plaintiff.

Philip T. McLaughlin, attorney general (Mary E. Schwarzer, assistant attorney general, on the brief and orally), for the defendant.

Malloy & Sullivan, P.C., of Manchester (Gregory V. Sullivan on the brief), for Union Leader Corporation, as amicus curiae. Orr & Reno, P.A., of Concord (James P. Bassett on the brief), for Keene Publishing Corporation, as amicus curiae.

Opinion

FILE

Editorial Information: Prior History

Rockingham.

Editorial Information: Subsequent History

Released for Publication January 28, 2002.

Opinion by: BROCK

{147 N.H. 377} {788 A.2d 256}

BROCK, C.J. The plaintiff, Cassandra Hawkins, appeals a Superior Court (*Coffey*, J.) order dismissing her petition for declaratory and injunctive relief under the Right-to-Know Law, RSA ch. 91-A (2001 & Supp. 2001), seeking access to certain records kept by the defendant, New Hampshire Department of Health and Human Services (HHS). We vacate and remand.

In 1998, the plaintiff's counsel, on behalf of the plaintiff and other families, requested HHS to make available records of dental services provided to New Hampshire Medicaid recipients under the age of twenty-one and of Medicaid reimbursement payments made to their dental healthcare providers from 1993 to 1998. The plaintiff asserted that the purpose for obtaining this information was to evaluate HHS' compliance with federal Medicaid law regarding dental services for recipients under twenty-one. In response to the plaintiff's request, HHS provided "pre-formatted" tabular summary reports. The plaintiff claims these reports were unresponsive to her request because most of the data provided did not distinguish between recipients by age and the few records specific to individuals under twenty-one offered no information regarding the dental services provided to them.

In 1999, the plaintiff filed a petition for declaratory and injunctive relief requesting access to the aforementioned records pursuant to RSA chapter 91-A. In her **{788 A.2d 257}** petition, the plaintiff requested the court to find that under **{147 N.H. 378}** RSA chapter 91-A: (1) the data sought were public records subject to disclosure; (2) HHS could be required to copy onto tapes the requested computer data; and (3) the plaintiff was required to pay only for the actual cost of the tape itself. HHS argued that the information was stored in the Medicaid claims processing system as "input data," which are discrete bits of information, and therefore did not constitute existing documents subject to disclosure under RSA 91-A:4 . HHS asserted before the trial court that none of its programs was capable of generating the information in the format requested. In addition, the agency contended that the plaintiff was required to pre-pay for the cost to create the documents.

The plaintiff moved to compel production of the data. HHS then moved to dismiss the plaintiff's petition. The superior court granted HHS' motion, concluding:

The plaintiff here does not simply seek a copy of a particular government document, but rather asks the Court to order the defendant to create a new document to meet her request. The cost of creating

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an entirely new data manipulation program, assembling the diverse pieces of data, and encrypting or removing any confidential information would exceed $ 10,000, by the defendant's estimate. As a matter of law, RSA Chapter 91-A does not intend such a result.

This appeal followed.

On appeal, the plaintiff argues the trial court erred in granting HHS' motion to dismiss because: (1) HHS admitted that it possessed the "input data" requested; (2) the data constituted public records under RSA 91-A:4 ; and (3) the court considered the alleged cost of compliance in determining whether the data constituted public records under RSA 91-A:4 .

"In ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the plaintiff's pleadings sufficiently establish a basis upon which relief may be granted." *Provencher v. Buzzell-Plourde Assoc.*, 142 N.H. 848, 852-53, 711 A.2d 251 (1998). In making this determination, the court should assume the truth of the plaintiff's well-pleaded allegations of fact and construe all reasonable inferences from them most favorably to the plaintiff. *Hacking v. Town of Belmont*, 143 N.H. 546, 549, 736 A.2d 1229 (1999).

The trial court's interpretation of a statute is a question of law, which we review *de novo*. *Fichtner v. Pittsley*, 146 N.H. 512, , 774 A.2d 1239, 1241 (2001). The starting point in any statutory interpretation case is the language of the statute itself. *Kaplan v. Booth Creek Ski Group*, 785 A.2d 412, 2001 N.H. LEXIS 199 (2001). Where the language of a particular statutory provision is at issue, "we will focus **{147 N.H. 379}** on the statute as a whole, not on isolated words or phrases." *Snow v. American Morgan Horse Assoc.*, 141 N.H. 467, 471, 686 A.2d 1168 (1996).

The information the plaintiff is requesting is derived from Medicaid claims received by HHS, either in hard copy or electronic form. HHS argues that the information does not constitute a public record because the unlinked electronic information is not already part of an existing document. RSA 91-A:4 , V provides:

In the same manner as set forth in RSA 91-A:4 , IV, any body or agency which *maintains its records in a computer storage system may, in lieu of providing original documents, provide a printout of any record* reasonably described and which the agency has the **{788 A.2d 258}** capacity to produce in a manner that does not reveal information which is confidential under this chapter or any other law.

(Emphasis added.)

We have previously considered whether information stored on a computer tape is a "public record" within the meaning of RSA 91-A:4 . In *Menge v. Manchester*, 113 N.H. 533, 537, 311 A.2d 116 (1973), we recognized that a duplicate of a computerized tape of field record cards compiled by the City of Manchester for real estate tax assessment purposes was a public record. Likewise, a Medicaid claim form does not lose its status as a public record simply because it is stored within a computer system.

To the extent the plaintiff's request is for copies of the individual Medicaid claims, it does not require that HHS create new records. RSA chapter 91-A does not require HHS to compile data into a format specifically requested by a person seeking information under the statute. It does, however, require that public records received by HHS be maintained in a manner that makes them available to the public. *See* RSA 91-A:4 , III-V. The trial court correctly ruled that HHS was not required to create a new document. However, to the extent that the plaintiff requests the Medicaid claims compiled in their original form, we remand for further proceedings.

The next issue is whether under RSA chapter 91-A cost is a factor that may be considered in determining whether information is a public record. In its analysis determining that the requested information was not a public record, the trial court used cost as a factor. Under RSA 91-A:5 , cost is not listed as an exemption to disclosure of otherwise public **{147 N.H. 380}** information. In addition, in RSA 91-A:4 , IV, where cost is addressed directly, it is not contemplated as a factor that could prohibit disclosure. The statute provides:

If a photocopying machine or other device maintained for use by a body or agency is used by the body or agency to copy the public 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 body or agency.

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RSA 91-A:4 , IV. Therefore, we find that cost is not a factor in determining whether the information is a public record.

We do not reach the question of who bears the burden of paying for the cost of producing the information requested, because the issue is not ripe for our review.

The issues in this case foreshadow the serious problems that requests for public records will engender in the future as a result of computer technology. 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 the context of advancing computer technology.

Vacated and remanded.

BRODERICK, NADEAU, DALIANIS and DUGGAN, JJ., concurred.

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FILE

N. H. Municipal Association

PO Box 617, Concord, NH 03302 ▪ (603) 224-7447

NHMA
New Hampshire Municipal
ASSOCIATION
Health Trust • Property-Liability Trust

TESTIMONY ON HB 606
HOUSE JUDICIARY COMMITTEE

Wednesday, March 5, 2003

Mr. Chairman and members of the Committee, my name is Maura Carroll and I serve as General Counsel for Legal Services and Government Affairs fro the New Hampshire Municipal Association. I appear here today in **STRONG SUPPORT** of **HB 606** as the number one action item recommended by the General Government, Revenue and Intergovernmental Relations Committee of the Association. It was adopted without dissent by the membership in attendance at NHMA's Biennial Legislative Policy Conference in September, 2002.

This is a simple bill in that it creates a study commission. However, the subject matter of the study is of the utmost importance to government officials and to members of the public. Technology has advanced quickly in our world, and well beyond the anticipation of those who drafted the right to know law only a few decades ago. RSA 91-A addresses well the issues of public documents and public meetings as far as it goes. Yet, we have the technological capability to hold a meeting among people in different cities and towns, and even in different countries. How do we address notice and participation in those meetings so that the public both knows about the meetings and can participate in discussions about public issues? How do we address e-mail and the ability to communicate in seconds with several people at once? How should we address items that are accessible on the Internet and are part of governmental websites?

When the members of NHMA's policy committee met to discuss these issues, a number of questions arose. Some local boards have used e-mail to schedule the dates and times of board meetings but have not discussed any substantive items that would be on a meeting agenda. Should those e-mails be subject to the right to know law? If two members of a five member board discuss a substantive issue via e-mail, should that be subject to the right to know law? Currently, a telephone conversation between those two individuals is not subject to RSA 91-A. Some public boards and agencies have access to teleconferencing and videoconferencing and can hold

meetings without all board members physically present in the same room. How does the public participate and how is notice given of the meeting? Is broader notice required when a meeting has the technical capability of being in more than one place at one time?

It was very difficult for municipal officials to narrow the questions regarding the right to know law and technology. They found it hard to recommend a specific policy without input from schools, counties and the State. Thus, the NHMA policy resulted in this legislation. We appreciate the willingness of the sponsors to bring this forward and will work with all of you to see this study carried out. We think that this is an important study and until various public officials have a detailed discussion, there will be more questions than answers to the concerns raised.

We urge you to recommend **HB 606 Ought To Pass.**

Thank you for the opportunity to be heard.

State of New Hampshire

HOUSE OF REPRESENTATIVES

CONCORD

RECEIVED
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By

MEMORANDUM

DATE: October 29, 2004

TO: Honorable Craig Benson, Governor
Honorable Gene G. Chandler, Speaker of the House
Honorable Thomas R. Eaton, President of the Senate
Honorable Karen O. Wadsworth, House Clerk
Honorable Steven J. Winter, Senate Clerk
Michael York, State Librarian

FROM: Rep. John H. Thomas, Chair

SUBJECT: Final Report of the Right To Know Study Commission (Chapter 287:2, Laws of 2003)

Pursuant to HB606 Chapter 287:2, Laws of 2003, enclosed please find the Final Report of 2004 of the Right To Know Commission.

Commission Members

Rep. John H. Thomas, Chair
Rep. Harry M. Haytayan, Jr.
Rep. James E. Twombly
Rep. Harriet E. Cady, Clerk
Mr. Peter Smith
Ms. Mary Schwarzer
Mr. James Pitts
Ms. Randy Lyman
Ms. Corrine Cormiea
Mr. Dean Shankle (resigned, replaced by Mr. Pitts)
Sen. John Barnes
Sen. Robert Boyce
Sen. Sylvia Larsen
John A. Lassey
Ms. Eileen Bolander
Mr. Steven Judge
Mr. Daniel Harkinson
Mr. Peter Croteau
Dr. Raymond Yeagley

JHT/sg
Enclosure

Report of Right To Know Study Commission

(with Appendices A and B)

Recommendations regarding RSA 91-A

BACKGROUND

In 2001, the New Hampshire Supreme Court issued its decision in the case of Cassandra Hawkins v. New Hampshire Department of Health and Human Services.[1] Hawkins involved a request under the Right-to-Know Law for computer records of individual Medicaid recipient's dental bills showing services, charges and payments. After deciding the issues presented, the court said:

> **The issues in this case foreshadow the serious problems that requests for public records will engender in the future as a result of computer technology. 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 the context of advancing computer technology.[2]**

The Right to Know Study Commission ("the Commission") was formed in 2003 by the New Hampshire Legislature "to study the right-to-know law in light of the supreme court's decision in *Hawkins v. N.H. Department of Health and Human Services* and increasing use of electronic communications in the transaction of governmental business."[3]

The specific areas of RSA Chapter 91-A that House Bill 606 directed the Commission to study were:

I. The need for disclosure requirements or guidelines for email and other electronic communication occurring between and among state, county, and local government appointed and elected officials and employees of governmental entities.

II. The need for disclosure requirements or guidelines for electronic communications with constituents of state, county, and local government appointed and elected officials and employees of governmental entities.

III. Archival requirements for electronic documents.

IV. The status of proprietary data within the definitions of the right-to-know law.

V. The ability to recover costs relative to the retrieval of electronic files and communications.

VI. Issues relative to public records posted to web sites of governmental entities.

VII. Whether a member of a body subject to the right-to-know law may participate in a meeting by teleconference or other electronic means.

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[1] 147 N.H. 376, 788 A.2d 255 (2001).

[2] *Id.*, 147 N.H. at 380, 788 A.2d at 258.

[3] N.H. Laws 2003, 287:2 (House Bill 606).

VIII. The extent to which the public will be provided access to stored computer data under the right-to-know law.

IX. Any other matter deemed relevant by the commission.[4]

The Commission is comprised of the following members:

- Three members of the house of representatives, one from the science, technology and energy committee, one from the municipal and county government committee, and one from the judiciary committee, appointed by the speaker of the house.
- Three members of the senate, appointed by the president of the senate.
- Three municipal officials, appointed by the New Hampshire Municipal Association.
- One school board member, appointed by the New Hampshire School Boards Association.
- One school administrator, appointed by the New Hampshire School Administrators Association.
- Two county officials, appointed by the New Hampshire Association of Counties.
- Four members of the public, one of whom shall be an attorney who has knowledge of and experience with the right-to-know law, one of whom shall be an information technology professional, and one of whom shall be a telecommunications professional, all appointed by the governor with the consent of the council.
- The attorney general, or designee.[5]

The Commission is required to submit "a final report on or before November 1, 2004, together with its findings and any recommendations for proposed legislation to the speaker of the house of representatives, the senate president, the house clerk, the senate clerk, the governor, and the state library."[6]

The Commission has held 24 meetings commencing on October 23, 2003. Early in its deliberations, the Commission came to realize that many complicated and subtle issues presented themselves when attempting to integrate the new and rapidly changing world of electronic communications into a statute that was designed to give maximum access to the meetings and records of public bodies at a time when a "meeting" constituted a group of persons all physically sitting together in a room and a "record" typically consisted of paper that could be held in one's hands. The Commission recognized during its deliberations that the changes it would recommend would have to be implemented not only by agencies of the state government, but also by all municipalities, whether large or small, and having very different available resources.

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[4] *Id.*, 287:4.

[5] *Id.*, 287:3, I.

[6] *Id.*, 287:6.

In addressing what changes in the Right to Know Law to recommend to the Legislature, the Commission tried to stay within the scope of the enabling legislation and the Supreme Court's request in the *Hawkins* decision, that is, to "examine the Right-to-Know Law in the context of advancing computer technology."[7] In some cases, however, the Commission found it necessary to address some provisions of the law which have application to both traditional methods of governance and those specifically made possible by advancing technology. If the Commission were to do its job comprehensively, certain provisions which have, to date, been acceptable when applied primarily to traditional methods, needed to be expanded or defined more precisely in order to make the law universally understandable and applicable.

In fulfilling its duties, the Commission has thus far substantively addressed RSA 91-A, §§1 - 5. The Commission recognizes it has not completed all of the tasks assigned in the enabling legislation. In order to accomplish the remaining tasks, the term of the Commission should be extended. To that end Chairman John Thomas has reserved a Legislative Service Request ("LSR") for introduction of legislation in the 2005-2006 session.

What follows is a discussion of the amendments recommended by the Commission to date.

RECOMMENDATIONS

The following are the specific changes to RSA 91-A recommended by the Commission.[8]

Title.

CHAPTER 91-A ACCESS TO ***~~PUBLIC~~ GOVERNMENTAL*** RECORDS AND MEETINGS

To understand the Commission's rationale for recommending use of the term "governmental records," rather than "public records," see the discussion below concerning the proposed changes to RSA 91-A:1-a.

RSA 91-A:1 Preamble.

[7] N.H. Laws 2003, 287:4; *Hawkins*, 147 N.H. at 380, 788 A.2d at 258.

[8] All portions of RSA 91-A which are in this report, including both existing statute and proposed changes appear in Bookman Old Style. In addition, proposed new text is in ***bold italics***; text to be deleted is in ***~~bold, stricken italics~~***

RSA 91-A:1 Preamble. Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

After considering whether to recommend changes, the Commission believes that the preamble should remain unchanged. The purpose of the law has stood the test of time, and applies equally as well to technological advances and computers as it does to traditional governmental record keeping and proceedings.

RSA 91-A:1-a Definition of Public Proceedings.

Discussion of this section presented probably the most difficult part of the Commission's assignment. Most of its time during its earlier sessions was spent in gathering and discussing information regarding how other states and our own courts have addressed the use of computers in the conduct of the public's business, including electronic compilation of data, e-mail communication among members of public bodies and other aspects of government affected by technological advances. Once the compilation of information was completed and discussed, the Commission went on to decide what changes it would recommend for each individual section of RSA 91-A, in order to fulfill its charge under the enabling legislation.

91-A:1-a Definitions ~~***of Public Proceedings.***~~ **–**

The Commission recommends that this section define a number of terms used throughout the chapter. Thus, the title of this section should be simply "Definitions." The members believe that one of the shortcomings of the Right to Know Law has been that many words and phrases appearing in the law are not defined. Moreover, different words are often used to refer to the same or similar concepts. This shortcoming has made it difficult for the courts, government officials, and members of the public to accurately ascertain the legislative intent lying behind many of the law's provisions. The Commission believes that this section would be more useful if it defined some of the essential terms, which could then be consistently applied in other sections of the Right to Know Law.

A list of standard definitions will be especially helpful in the future because the pace of change in information technology is so rapid that there is not yet general agreement as to the meaning of some terms used to describe concepts which deal with the application of computer technology to the conduct of government.

I. The term "public ***body*** ~~***proceedings***~~" as used in this chapter means ~~***the transaction of any functions affecting any or all citizens of the state by***~~ 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 governor's council and the governor with the governor's council; including any advisory committee established by the governor by executive order or by the governor's council;

(c) Any ~~***board or Commission of any***~~ state agency or authority, including ***any board or Commission thereof,*** the board of trustees of the university system of New Hampshire and ~~***including***~~ any ***committee,*** advisory ~~***committee or otherwise,***~~ established by such entities;

(d) Any board, Commission, 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.

Although the focus of this paragraph in the current law is on what constitutes a "public proceeding," practitioners have used it primarily to discern what entities or bodies are covered by the Right to Know Law. The Commission believes that the law would be easier to apply if "public body" were to be a defined term which is standardized throughout the chapter. "Proceedings" by such bodies should be defined separately.[9]

The changes to subparagraph (c) are recommended to make it clear that state agencies are covered by the law, not just their boards or Commissions. The Commission believes that this is consistent with the manner in which the law has been applied.

II. For the purposes of this section, "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.

The Commission recommends no change to this paragraph.

III. "Governmental records," as used in this chapter, means any information created, accepted or obtained by, or on behalf of, any public body in furtherance of its official function.

[9] See proposed new § 1-a, paragraph V, below.

RSA Chapter 91-A currently uses the term "public record" without defining it for the entire chapter.[10] This lack of a universal definition has led to some confusion. The New Hampshire Supreme Court considers the term to mean the records of public bodies that deal with official business, without regard to whether such records may be exempt from disclosure to members of the public.[11] Others have considered the term to mean records which are available to the public, and subject to *no* exemption,[12] e.g., "a matter of public record."

Because of the potential for confusion, the Commission believes that it would be better to define and use the term "governmental records,"[13] as opposed to "public records."

The recommended definition is purposely broad, because the Commission believes that the constitutional mandate that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted"[14] requires such a broad definition. This is consistent with the approach taken by the New Hampshire Supreme Court:

> The interpretation of the Right-to-Know Law is to be decided ultimately by this court. See *Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475, 686 A.2d 310, 312 (1996).* We resolve questions regarding the law with a view to providing the utmost information, see *Menge v. Manchester, 113 N.H. 533, 537, 311 A.2d 116, 118 (1973),* in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents. See *Lodge v. Knowlton, 118 N.H. 574,575, 391 A.2d 893, 894 (1978).* Thus, while the statute does not provide for unrestricted access to public records, see *Orford Teachers Assoc. v. Watson, 121 N.H. 118, 120, 427 A.2d 21, 23 (1981),* we broadly construe provisions favoring disclosure and interpret the exemptions restrictively. See, e.g., *Society for Protection of N.H. Forests v. Water Supply and Pollution Control Commission,* 115 N.H. 192, 194, 337 A.2d 788, 789 (1975).

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

IV. *"Information," as used in this chapter, 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.*

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[10] The term is narrowly defined in §10 as "records available to any person without restriction." RSA 91-A:10, I(j); however, the definition is specifically limited to that section.

[11] See, e.g., *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546, 705 A.2d 725, 730 (1997).

[12] See, e.g., "Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A," New Hampshire Office of the Attorney General, March, 2003 <http://doj.nh.gov/publications/right_to_know.html>.

[13] This is the term used in part 1, article 8 of the New Hampshire Constitution.

[14] *Id.*

Since the term "information" is used as part of the recommended definition of "governmental records," the Commission believes that the former also must be defined so as to make it clear that records kept in other than traditional form are covered by the law.

V. *The term "governmental proceedings" as used in this chapter means the transaction of any functions affecting any or all citizens of the state by a public body.*

The Commission believes that, while most "proceedings" by public bodies are "meetings" subject to RSA 91-A:2,[15] there are still some proceedings which are not necessarily meetings; therefore the former term should not be abandoned. The recommended definition tracks the definition currently used for the term "public proceedings." Some of these "proceedings," however, are not open to the public;[16] therefore, the use of the term "public proceedings" tends to be confusing. For this reason, the Commission recommends replacement of that term with "governmental proceedings."

RSA 91-A:2 Meetings Open to Public.

In considering what changes to recommend for this section, the Commission was guided by the following:

- The increasing use of computer technology has made it more difficult to determine when a "meeting" may be taking place. Currently, the term means "the convening of a quorum of the membership of a public body, as provided in RSA 91-A:1-a, to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power."[17] Determining where modern methods of communication fit within this definition has been the subject of much discussion among governmental officials and their legal advisors. Many analysts believe that when a quorum of a public body communicates with each other, particularly by e-mail, the courts may regard such communication as a "meeting."
- This is of particular concern to municipal officials, e.g., boards of selectmen, where as few as two members may constitute a quorum. There is a widespread fear that *any* communication outside a traditional public meeting setting might be illegal and subject the participants or their communities to sanctions.[18] This fear has been heightened by recent litigation in which just such a claim was made: i.e., that e-mail communication among a quorum of a board amounted to an illegal meeting.[19]

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[15] See below for the Commission's recommendations regarding the definition of the term "meetings."

[16] E.g., collective bargaining strategy or negotiation sessions. See *Talbot v. Concord Union School District*, 114 N.H. 532; 323 A.2d 912 (1974).

[17] RSA 91-A:2, I.

[18] See, e.g., RSA 91-A:8.

[19] See Rockingham Superior Court orders of Smukler, J., dated April 16, 2003, and May 16, 2003, in the matter of *Miller v. Dreyer*, Rockingham No. 03-E-152, copies of which have been attached hereto as Appendices A and B.

- In light of such concerns, and consistent with its charge under N.H. Laws 2003, 287:4, I, the Commission felt that one of its primary duties was to recommend changes to §2 which would clarify the difference between "meetings" and other forms of communication, while protecting the public's right to be involved in the business of government.
- The members of the Commission believe that, insofar as is reasonably possible, the business of the public should be done in full view of the public; however, the members recognize that, practically speaking, some communication among members of public bodies may legitimately occur outside the view of the public in order for government to accomplish its purpose. 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."[20] This statement has particular application to New Hampshire, where so many local boards depend upon citizen volunteers to carry out their functions. The Commission, therefore, recommends providing specifically for communication outside of public meetings, so long as the public's right to know is protected as far as practicable.

The following are the specific changes to RSA 91-A:2 recommended by the Commission.

> I. For the purpose of this section, a "meeting" shall mean the convening of a quorum of the membership of a public body, as ***defined*** ~~***provided***~~ in RSA 91-A:1-a, ***whether in person, by means of telephone or electronic equipment, or in any other manner, such that all participating members are able to communicate with each other contemporaneously,*** to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power. ~~***"Meeting" shall not include:***~~

The proposed changes to this paragraph are intended to make it clear that only *contemporaneous* communications among the members would be considered "meetings." Non-contemporaneous communications among a quorum of the members of a public body would not be "meetings," but would be subject to new rules of disclosure, as shown in the proposed new paragraph II.

Under this new wording, most e-mail communications among a quorum of a public body would not be "meetings" even if they dealt with official business; however, a telephone conference call among the same people would be a "meeting" if its purpose was "to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power."[21]

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[20] *Bain Peanut Co. of Texas v. Pinson*, 282 U.S. 499, 501 (1931).

[21] The Commission has yet to study in detail "[w]hether a member of a body subject to the right-to-know law may participate in a meeting by teleconference or other electronic means." *See* N.H. Laws 2003, 287:4, VII. As written, so long as the legal requirements associated with holding a meeting have been met, the right-to-know law does not preclude members from participating in a meeting by teleconference.

For clarity, the Commission recommends that the term "public body" be defined in the chapter.[22]

II. ***Any communications outside a meeting, in whatever form, among a quorum of the membership of such a body which bear upon such matters shall be disclosed fully at the next meeting of the body before any decision may be made, including a decision not to act. If such communications are in writing, copies or printouts shall be made a part of the minutes. Communications among less than a quorum of members need not be disclosed. Sequential communications on the same matter shall be disclosed if the total number of members participating would constitute a quorum if meeting contemporaneously. Disclosure shall be made by those who know, or should know, that the number of participating individuals constitutes a quorum.***

This new section is recommended because, while such non-public communication among members of a public body may be necessary from time to time, it is nonetheless important that the public know how decisions by public bodies are made. Those citizens who attend public meetings deserve to know the factors which go into making decisions which affect them. The Commission recognizes that if decisions are made by officials *before* a public meeting, even innocently, the public would be inappropriately cut out of the process.

Under the new definitions proposed as amendments to §1-a, e-mail communications among a quorum of a public body, for example, would be "governmental records" subject to public disclosure upon presentation of a right-to-know request pursuant to RSA 91-A:4. Therefore, citizens who wished to know what went on prior to a meeting would theoretically have access to copies of such communications. However, such access would not fully solve the problem because there is no guarantee that such records would be retained for an appreciable length of time. E-mail in particular tends to be ephemeral.

The "sequential communication" provisions are recommended because, while each separate communication may not be "among a quorum," the overall effect would be to involve a quorum in the communication process. This is a common result when e-mail is used to communicate. E.g., A sends an e-mail to B, who forwards it to C, who then forwards to D, etc.

III. The following are not "meetings" and are excepted from the disclosure requirements of paragraph II:

[22] See proposed amendments to § 1-a.

(a) Any chance ~~*meeting*~~ or ~~*a*~~ social ~~*meeting*~~ ***encounter*** neither planned nor intended for the purpose of discussing matters relating to official business and at which no ***such matters are discussed or*** decisions ~~*are*~~ made ***regarding those matters***; ~~*however, no such chance or social meeting shall be used to circumvent the spirit of this chapter;*~~

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

(c) Consultation with legal counsel; ~~*or*~~

(d) 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***

(e) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting.

The unchanged part of this paragraph is currently part of paragraph I. The Commission felt that, except for some chance or social encounters (see discussion below), the exceptions to "meetings" should also be exempt from the new disclosure requirements. This would be clearer if the list came after the new paragraph II.

The Commission felt that use of the term "meeting" in subparagraph (a) to describe things that are, by definition, not "meetings" tends to be confusing. Therefore, it is recommended that the word "encounter" be used instead.

Also, concerning the same subparagraph, the Commission felt that some tightening of the criteria for legitimate "chance" or "social" encounters would be desirable. Because of the pervasiveness of telephonic communication, Internet "chat rooms," and the like, the Commission felt that there would be too much danger of official business being conducted outside of the public eye if the current language were not improved. If, for example, two selectmen on a three-member board accidentally met at the local barbershop where they briefly discussed the need to repair the town's road grader, that would not amount to a "meeting" because it was not "convened. . . to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power." However, such a discussion would still have to be fully disclosed at the next meeting of the body, pursuant to the recommended language of paragraph II.

For an explanation of why the Commission recommends removal of the "no-circumvention" language, see discussion regarding the new recommended paragraph IV below.

The Commission recommends that subparagraph (e) be added to address situations where a public body is required to file a written decision, or notice of decision, after actually taking action at a public meeting. For example, a land use board (e.g., a board of adjustment) must post a "written

decision containing the reasons therefore . . . within 144 hours of [its] vote."[23] After a vote is taken, many boards will ask one member to draft the written decision for signature by the chairman. The Commission believes that circulation of such draft documents among the members in advance of posting would be helpful to prevent error, but also believes widespread fear that such communication would be regarded as a "meeting" has tended to discourage the practice.

IV. Communications outside a meeting shall not be used to circumvent the spirit of this chapter.

This language is meant to replace similar language which currently applies only to chance or social encounters. The Commission felt that the admonition should apply to *all* communications among members of a public body occurring outside of a formal meeting.

[23] RSA 676:3, II.

V. *Subject to the provisions of RSA 91-A:3, all meetings shall be open to the public.* ~~*All public proceedings shall be open to the public, and all persons shall be permitted to attend any meetings of those bodies or agencies.*~~ 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 within 144 hours of 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*** ~~*or agency's*~~ ***Internet web site, 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 un-delayed 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 aforesaid, 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 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.

The Commission believes that, for clarity, the term "public proceeding" in this paragraph should be replaced with "meeting." Since "meetings" are the only sort of proceedings open to the public that are discussed in the section, it would be more consistent and, therefore, more clear, to stick to the use of one term.

Since the Commission is proposing that a definition of "public body" be added to RSA 91-A:1-a, it recommends that that term be used in place of other terms currently used throughout the chapter to mean agencies, boards and other government entities covered by the Right-to-Know Law.

More and more public bodies, including municipal boards, now maintain web sites on the Internet. And more and more citizens have obtained access to the Internet themselves and rely regularly on such access for information about the world around them. Consistent with its charge under N.H. Laws 2003, 287:4, VI, it seems appropriate to the Commission that official recognition of this trend be given in the Right-to-Know Law by allowing some of the public notice requirement to be met by using the Internet. The proposed change would not require every public body to have a web site, but would give bodies which have such sites the option of doing some of their official posting on them.

The changes proposed for the emergency meeting notice requirements were felt necessary to clarify that notices specified for emergency meetings are *in addition to*, and not in place of, the normal posting requirements.

RSA 91-A:3 Nonpublic Sessions.

For uniformity, the Commission recommends replacement of certain terms which, if the Commission's recommendations are adopted by the Legislature, would be defined in the chapter. However, no substantive changes to §3 are recommended. The following are the specific changes to RSA 91-A:3 recommended by the Commission.

I. (a) ***Public Bb***odies ~~***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, 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 _ 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.

RSA 91-A:4 Minutes and Records Available for Public Inspection.

In determining what changes to recommend for this section, the Commission was guided by the following principles:

- From the standpoint of the public's right to access and the government's concomitant duty to provide access, there is little qualitative difference in most cases between a record kept on paper and a record maintained in electronic form.
- As much as possible, the public's access to governmental records kept in electronic form should not be restricted to any greater extent than it would be if the records were kept on paper.
- In many cases, there are fewer barriers to providing access to public records kept in electronic form than there are presented by having to provide access to their paper counterparts.
- To the extent that there are differences between public records kept in electronic form and those maintained on paper, the law should be updated to reflect those differences and to maximize the public's ability to gain access.

The following are the specific changes to RSA 91-A:4 recommended by the Commission.

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***, 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. ***For the purposes of this section "to copy" shall mean the reproduction of original records by whatever method including, but not limited to, photography, photostatic copying, printing, or electronic or tape recording.***

See prior discussion under proposed RSA 91-A:1-a, III, for the reasons the Commission recommends using the term "governmental records," rather than "public records."

The term "in the possession, custody or control," is recommended to make it clear that records which are kept by third parties on behalf of public bodies are subject to disclosure to the same extent as if they were kept by the public body itself.

The Commission felt that the term "to copy" should be expanded to recognize changes in technology which make many forms of reproduction available besides "photographic or photostatic."

I-a Records of any payment made to an employee of any public body ~~or agency listed in RSA 91-A:1-a, I(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.

If the Legislature adopts the Commission's recommendation that the term "public body" be defined and used throughout the chapter, the language proposed to be stricken will be unnecessary.

II. After the completion of a meeting of such ***public*** bodies ~~or agencies~~, 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 notes, materials, tapes or other sources used for

compiling the minutes of such meetings, and to make memoranda, abstracts, ~~*photographic or photostatic*~~ ***or to copy*** ~~***copies, or tape record***~~ such notes, materials, tapes or sources inspected, except as otherwise prohibited by statute or RSA 91-A:5.

See previous explanations for the rationale behind the Commission's recommended changes to this paragraph.

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.

See previous explanations for the rationale behind the Commission's recommended changes to this paragraph.

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 such as American Standard Code for Information Interchange (ASCII). Selection of electronic media and file formats for copying or maintaining governmental records shall be compatible with the periods of time such records are required to remain available.

Consistent with its charge under N.H. Laws 2003, 287:4, III, the Commission recommends that this paragraph be added to make it clear that the need to retain records does not depend upon the form in which they are kept, but upon their function. The proposed changes also recognize that public bodies must take functional obsolescence and physical deterioration into account when determining the choice of storage media and electronic file format.

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.

This paragraph is recommended to deal with the fact that (at least according to "conventional wisdom") electronic records are never truly "deleted" until the media upon which they are kept is physically destroyed. However, extraordinary effort and expense may be necessary to recover such records once they are initially deleted. The Commission feels that public bodies which legally delete records should not have to be responsible for the effort and expense of recovery thereafter. 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.

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 or entity 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.

The Commission recommends adding computers to the description of equipment which may be used to copy records. See previous explanations for the rationale behind the Commission's additional recommended changes to this paragraph.

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 form*** may, in lieu of providing original ~~*documents*~~ ***records,*** ~~*provide a printout of*~~

~~*any record reasonably described*~~ *copy governmental records requested to electronic media using standard or common file formats such as American Standard Code for Information Interchange (ASCII)* ~~*and which the agency has the capacity to produce*~~ in a manner that does not reveal information which is confidential under this chapter or any other law. ***If copying to electronic media as aforesaid is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body 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.

The changes to this paragraph are recommended to expand the forms in which electronic records may be copied for disclosure to the public pursuant to a right-to-know request. Generally, records kept in electronic form are more useful from the standpoint of those requesting them if provided on electronic media than if they were printed on paper. This recommendation is responsive to the charge imposed by N.H. Laws 2003, 287:4, VIII.

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.

The Commission recommends no change to this paragraph.

VII. Nothing contained in this chapter requires a public body to compile, cross-reference or assemble information into a form in which it is not already kept or reported by that body.

The Commission recommends the addition of this paragraph to codify the principle that "RSA chapter 91-A does not require [public bodies] to compile data into a format specifically requested by a person seeking information under the statute."[24]

RSA 91-A:5 Exemptions.

In considering what changes to recommend for this section, the Commission was guided by the principles previously described.

[24] *Hawkins*, 147 N.H. at 379, 788 A.2d at 258.

The following are the specific changes to RSA 91-A:5 recommended by the Commission.

- **91-A:5 Exemptions.** - The following ***governmental*** records are exempted from the provisions of this chapter:

See previous explanation for the rationale behind the Commission's recommended changes to this paragraph.

I. Records of grand and petit juries.

The Commission recommends no changes to this paragraph.

II. Records of parole and pardon boards.

The Commission recommends no changes to this paragraph.

III. Personal school records of pupils.

The Commission recommends no changes to this paragraph.

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.

See previous explanation for the rationale behind the Commission's recommended changes to this paragraph.

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.

Under the new definitions proposed as amendments to § 1-a, the term governmental records includes hard copies and computer files. If the Legislature adopts the Commission's recommendation for § 1-a, the language proposed to be stricken will be unnecessary.

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.

The Commission recommends no changes to this paragraph.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

The Commission recommends no changes to this paragraph.

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.

The Commission believes that the list of examples of notes and materials made prior to, during or after a governmental proceeding that would be exempt from production was not all inclusive. As a result, the Commission recommends the phrase "but not limited to" be inserted to make clear that also exempt are other items made for personal use that do not have an official purpose made prior to, during or after a governmental proceeding.

See previous explanation for the rationale behind the Commission's recommended change from public proceeding to 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.***

Under the new definitions proposed as amendments to § 1-a, the law will apply to a "public body" and this recommended change will more explicitly identify the potential author of the exempt material.

RSA 91-A:5-a Limited Purpose Release. Not yet addressed by the Commission.

RSA 91-A:6 Employment Security. Not yet addressed by the Commission.

RSA 91-A:7 Violation. Not yet addressed by the Commission.

RSA 91-A:8 Remedies.

For uniformity, the Commission recommends replacement of certain terms which, if the Commission's recommendations are adopted by the Legislature, would be defined in the chapter. However, the substantive provisions of §8 have not yet been addressed by the Commission. The following are the specific changes to RSA 91-A:8 recommended by the Commission.

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~~***, 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~~***, 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' fees to a ~~***board, agency***~~ ***public body*** 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.

II. The court may invalidate an action of a public body ~~***or agency***~~ taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation.

III. In addition to any other relief awarded pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter.

RSA 91-A:9 Destruction of Certain Information Prohibited. Not yet addressed by the Commission.

RSA 91-A:10 Release of Statistical Tables and Limited Data Sets for Research. Not yet addressed by the Commission.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Michael Miller and Susan Miller

v.

Joseph Dreyer, Chairman
Fremont School Board

No. 03-E-152

ORDER

The petitioners, Michael Miller and Susan Miller, brought this action against the respondent to enforce RSA 91-A, referred to as the right-to-know law. The court scheduled a hearing on April 11, 2003. The petitioners appeared with their representative, Harriet E. Cady, who filed a power of attorney executed by the petitioners. The respondent appeared with counsel. On April 14, 2003, the petitioners filed a pleading labeled as a request for findings of fact. The pleading itself proffers facts that were not placed in evidence and raises new issues. The court declines to consider the petitioners' late-filed expansion of the record and the issues to be considered. Because the petitioners did not sustain their burden of showing that the respondent failed to comply with the requirements of RSA 91-A, their petition is DENIED.

The petitioners assert:

1. They requested copies of minutes of the Fremont School Board and respondent did not fully comply with their request;
2. The minutes that were supplied did not contain sufficient detail;
3. The members of the school board have been communicating by e-mail in violation of the requirement that public meetings be noticed; and

4. Certain employees of the Fremont Elementary School, Ellis School produced a newsletter on school time supporting a building bond, thereby using taxpayer funds to promote their preferred outcome.

The court will address these claim in turn.

The petitioners first claim that the respondent failed timely to supply minutes of certain meetings. In his answer, the respondent asserts that the petitioners' written request was addressed to him personally. As a result, it was not processed by the school board staff; rather, it was forwarded to him unopened. The respondent further states that once he opened the letter, he took steps to ensure that the board provided a timely response to the petitioners' request. The petitioners do not contest the respondent's facts. Thus, they have not sustained their burden of showing that the respondent failed to respond timely.

The petitioners next claim that certain minutes discussing the hiring of a superintendent were not supplied. The respondent answers that the decision was not made by the Fremont school board, but rather by the SAU 14 board. Because the petitioners did not request the SAU 14 minutes, there cannot be a finding of non-compliance. Again, the petitioners did not contest the respondent's offer as to the facts. Under this circumstance, the petitioners have not sustained their burden.

The petitioners also claim that the minutes taken and supplied contained insufficient detail of the discussions at the meetings. The board is required to record minutes promptly. RSA 91-A:2, II. The minutes must include "names of members, persons appearing before the [board] and a brief description of the subject matter discussed and final decisions." *Id.* The petitioners have not specified a violation of those specific requirements, nor would the minutes supplied (Exh. 3) support the petitioners' claim of a failure to include that statutory elements. Accordingly, the petitioners have not sustained their burden on this claim.

Next, the petitioners assert that the board members engage in substantive discussions via e-mail. The respondent does not deny the claim, but argues that it treats e-mails involving a quorum of the board as public records. The petitioners agree that they have had access to these e-mail printouts; indeed, they have supplied the court with copies of a set of such printouts. The petitioners claim that the respondent is nevertheless out of compliance with the right-to-know law because the e-mail printouts have not been physically attached to the minutes. Because RSA 91-A does not require such written communications to be physically attached to the minutes and because the communications have otherwise been disclosed in accordance with the right-to-know law, the petitioners' have not sustained their burden on this claim.

Finally, the petitioners assert that certain employees of the Fremont Elementary School, Ellis School produced a newsletter on school time supporting a building bond, thereby using taxpayer funds to promote their preferred outcome. First, the right-to-know law requires disclosure—it does not pertain to the substance of what is required to be disclosed. Thus, the substantive assertion that employees are misusing taxpayer money does not state a claim under RSA 91-A. Even if the petitioners had stated a right-to-know claim, they not only failed to present evidence, also failed to make an offer of proof. Thus, the court would be compelled to deny the claim on the merits.

Based on the foregoing, the prayers for relief as set forth in the petition are DENIED.

So ORDERED.

Date: April 16, 2003

LARRY M. SMUKLER
PRESIDING JUSTICE

APPENDIX B

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Michael Miller and Susan Miller

v.

Joseph Dreyer, Chairman
Fremont School Board

No. 03-E-152

ORDER

On April 16, 2003, the court issued an order denying the requested relief under RSA 91-A (the "right-to-know law") of the petitioners, Michael Miller and Susan Miller. The respondent has since filed a motion for clarification. Without stating any reason, the petitioners object to the respondent's motion. The petitioners have also filed their own motion for reconsideration. The court will address each motion in turn.

At the April 11, 2003 hearing, the respondent's counsel appeared to concede that certain e-mail communications between board members are public records under RSA 91-A. The discussion involved substantive e-mail communications sent by one member of the board to other board members—either directly or as a copy ("cc")—where the number of members sending and receiving the e-mail would constitute a quorum. Counsel appeared to concede that such e-mails are public records subject to RSA 91-A and the court so indicated in its order of April 16, 2003.

In his motion for clarification, the respondent agrees that e-mail communications copied to the administration or employees of the school district are public; however, he "clarifies" his apparent concession at hearing about e-mail communication between a quorum of the school board. Citing *Webster v. Town of Candia*, 146 N.H. 430 (2001), the respondent now claims that e-

mail communication between a quorum of the board is not public unless a the board makes a decision during the communication. The respondent's reliance on *Webster* is misplaced.

In *Webster*, the petitioner, apparently relying on RSA 91-A:2, I, asserted that a board violated the right-to-know law when one of its members contacted other individual members to lobby them about a pending action. The court disagreed, holding:

> Even if true, this allegation did not establish a violation of the Right-to-Know Law. The Right-to-Know Law does not apply to isolated conversations among individual members outside of public meetings, unless the conversations were "planned [or] intended for the purpose of discussing matters relating to official business" and the public entity made decisions during them. *See* RSA 91-A:2 , I (Supp. 2000). Although [the petitioner] alleged that the conversations were intended to discuss matters related to official business, she did not allege that any decisions were made during them.

Webster, 146 N.H. at 444.

As is apparent, the court was considering a claim under RSA 91-A:2, which provides, in pertinent part:

> I. For the purpose of this section, a 'meeting' shall mean the convening of a quorum of the membership of a public body, as provided in RSA 91-A:1-a, to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power. 'Meeting' shall 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....

The statute defines the term "meeting" and provides that certain chance or social encounters are not to be construed as falling within the definition. To the extent that the respondent is claiming that the e-mail correspondence in question is not a "meeting," the court agrees.

The RSA 91-A:2 exception recognizes that members of public bodies may talk with each other or encounter each other in chance or social situations—such as a chance contact at a town general store. It would be absurd to require public bodies to provide "notice" of such social or

The foregoing is dispositive of the petitioners' motion for reconsideration. In their motion, the petitioners complain that the respondent's April 11, 2003 representation of its e-mail disclosure policy was not accurate. As the court has now clarified the matter and as the court expects that the respondent will comply with its obligations under RSA 91-A:4 as clarified herein, no further action is warranted.

Accordingly, the respondent's motion for clarification is GRANTED. The court's April 16, 2003 order is clarified as provided herein. The petitioners' motion for reconsideration is GRANTED to the extent addressed in the court's adjudication of the respondent's motion for clarification and DENIED in all remaining respects.

So ORDERED.

Date: May 16, 2003

Larry M. Smukler

LARRY M. SMUKLER
PRESIDING JUSTICE

MAY 25 2004 (MON) 15:16 ROCKSUPERIOR

Voting Sheets

HOUSE COMMITTEE ON JUDICIARY

EXECUTIVE SESSION on HB 606

BILL TITLE: **establishing a right-to-know study commission.**

DATE: March 10, 2003

LOB ROOM: 208

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: (OTP) OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. James E. Wheeler

Seconded by Rep. Phyllis L. Woods

Vote: 11-0 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: 11-0

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Terri C. Dudley, Clerk

OFFICE OF THE HOUSE CLERK 2003 SESSION

JUDICIARY

Bill #: 606 Title: _____

PH Date: ___/___/___ Exec Session Date: 03/10/03

Motion: OTP Amendment #: _____

MEMBER	YEAS	NAYS
Mock, Henry P, Chairman	✓	
Rowe, Robert H, V Chairman	—	
Jacobson, Alf E	✓	
Ford, Nancy M	✓	
Dudley, Terri C, Clerk	✓	
Soltani, Tony F	—	
Woods, Phyllis L	✓	
Rice, Thomas E P	—	
Souza, Kathleen F	—	
Desmarais, Vivian J	—	
Haytayan, Harry M	—	
Mooney, Maureen C	—	
Morris, Richard W	—	
Sorg, Gregory M	✓	
Wheeler, James E	✓	
Wall, Janet G	✓	
Pratt, John	—	
Craig, James W	—	
Lasky, Bette R	✓	
Potter, Frances D	✓	
Franklin, Peter E	✓	
TOTAL VOTE:	11	0

Printed: 1/23/2003

Committee Report

COMMITTEE REPORT

COMMITTEE: **Judiciary**

BILL NUMBER: **HB 606**

TITLE: establishing a right-to-know study commission.

DATE: March 10, 2003 CONSENT CALENDAR YES ☒ NO ☐

☒ OUGHT TO PASS

☐ OUGHT TO PASS WITH AMENDMENT

☐ INEXPEDIENT TO LEGISLATE

☐ REFER TO COMMITTEE FOR INTERIM STUDY
(Available only in second year of biennium.)

STATEMENT OF INTENT
(Include Committee Vote)

The proliferation of technology in local government has called into question what records fall under the right-to-know law. The use of e-mails and conference calls and the accessibility of information on everyone's computer would indicate a need for this study. There was a study committee in a recent session that could not resolve the questions, so some of the members of the study committee have asked for this study commission to really dig into this issue and make some serious recommendations. The committee felt that this was a very important issue and that this bill ought to pass.

Vote 11-0.

Rep. James E. Wheeler
FOR THE COMMITTEE

Original: House Clerk
cc: Committee Bill file

USE ANOTHER REPORT FOR MINORITY REPORT

CONSENT CALENDAR

Judiciary

HB 606, establishing a right-to-know study commission. **OUGHT TO PASS**

Rep. James E. Wheeler for Judiciary: The proliferation of technology in local government has called into question what records fall under the right-to-know law. The use of e-mails and conference calls and the accessibility of information on everyone's computer would indicate a need for this study. There was a study committee in a recent session that could not resolve the questions, so some of the members of the study committee have asked for this study commission to really dig into this issue and make some serious recommendations. The committee felt that this was a very important issue and that this bill ought to pass. **Vote 11-0.**

HB 606 FN Majority Report

With the proliferation of technology in local government, and use of it in conducting business, such as e-mails and conference calls, has called into question what record fall under the right-to-know law. There was a study committee that could not resolve the questions, so some of the members of the study committee have asked for this study commission to really dig into this issue and make some serious recommendations. The committee felt that this was a very important issue and that this bill ought to pass.x

HB 606 FN Majority Report

~~With~~ the proliferation of technology in local government, ~~and use of it in conducting business, such as e-mails and conference calls~~, ~~has called into~~ question what records fall under the right-to-know law. There was a study committee that could not resolve the questions, so some of the members of the study committee have asked for this study commission to really dig into this issue and make some serious recommendations. The committee felt that this was a very important issue and that this bill ought to pass.

The use of e-mails and conference calls and the accessibility of information on everyone's computer would indicate a need for this study.