Changes to the Right-to-Know Law in 2024: *A Guide for Municipalities*

An Advisory of the New Hampshire Municipal Association

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During the 2024 session, the legislature enacted one piece of legislation that affects the Right-to-Know Law, RSA 91-A. This guide serves as a summary of the effect of those changes.

Summary of Changes Pursuant to HB 1002

HB 1002 alters the way a municipality may respond to a Right-to-Know request in two ways: (1) it permits a public body or agency to communicate with a requestor about modifying the scope of a request if it would help the public body or agency respond to the request more efficiently or affordably, and (2) it immunizes a public body or agency from damages in a civil action if information exempt from disclosure is released in responding to a Right-to-Know request where the public body or agency acted in good faith, which use of a redacting software identified as good faith.

HB 1002 also provides a *local option* to charge requestors a fee in certain circumstances.

Responding to a Right-to-Know Request: Changes to RSA 91-A:4, IV

Paragraph (e) allows a public body or agency to suggest to the requestor a reasonable modification of the scope of the request, if doing so would enable the body or agency to produce records sought more efficiently and affordably. The legislative intent and plain language of this paragraph was aimed at capturing the *dicta* about cooperation between requestors and the government in *Salcetti v. City of Keene*, No. 2019-0217 (N.H. June 3, 2020).[1]

Paragraph (f) provides a public body or agency immunity from penalties in a civil action due to an inadvertent disclosure of information that would have been exempt from disclosure. This immunity only applies when the public body or agency has acted in "good faith," and will not apply if it is shown the public body or agency has acted in a wanton or reckless manner. The provision also identifies that use of an automated software to produce redactions more quickly, along with "spot checks," will

[1] In that case, the New Hampshire Supreme Court stated: "The salutary purpose of the Right-to-Know Law ... is best served when the members of the public and the governmental bodies are guided by a spirit of collaboration. We take this opportunity to encourage all public bodies, and members of the public making Right-to-Know requests, to embrace that spirit, and work together to efficiently and effectively resolve disputes involving RSA chapter 91-A."

automatically qualify as "good faith." This provision is designed to encourage the government's use of such automated software[2] but must be done with appropriate spot checks.

Local Option: RSA 91-A:4, VIII and IX

HB 1002 retains the existing ability of the government to charge requestors the actual cost of providing a copy, while now *also* providing for a local option to charge requestors a fee in certain circumstances where the municipality is being asked to produce hundreds of pages of electronic records whether or not paper copies are being produced. This fee – the "reasonable per electronic communication charge" – may not exceed $1.00 per communication and may be charged whether the records are delivered in hard copy or electronically. However, no charge may be incurred for the first 250 electronic communications.[3] Additionally, certain requestors are exempt from being charged.

The statute defines an "electronic communication" to include several constituent parts. First, all e-mails and responses to that email under a single subject line are deemed a single communication. Second, text or chat message threads regarding the same subject or topic shall be considered a single communication unless exceeding 50 individual messages, at which point, each additional group of 50 messages shall be considered another single message.[4] Attachments to electronic communications are part of their originating communication.

> For example, a request for a month of emails sent by the town administrator may result in a search that reveals 1,000 e-mails that are, presumably, disclosable pursuant to the request prior to further analysis. It is possible that some of those emails will fall under a "single subject line," resulting in a lower final cost to the requestor, but that will likely be unknown at the time of the initial 'keyword' or 'time limited' search performed for the purposes of estimating the number of records, the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay, and an itemized estimate of the cost of making the record available, if a charge would be incurred.
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> It may take some time to determine whether the estimated charge will be $750 (which would be the case if each e-mail had its own subject line and the initial 250 e-mails are subtracted from the 1,000 e-mail total) or some lesser amount due to multiple e-mails falling under a "single subject line." If that estimate is not available within the five days before sending acknowledgment of receipt, it should be provided to the requestor as soon as it can be determined as a requestor may raise a challenge to that estimate with either the Right-to-Know Ombudsman or the Superior Court.
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> As a second example, if a request sought a month of text messages sent by the town administrator to town officials about town business the search may reveal 1,000 text messages

[2] This type of software is still evolving and it is likely that any best practices produced today will be outdated by next year. However, the general idea behind this provision was for use with large volumes of records where an automated system could be set up to redact specific provisions. In the case of the W2s of all employees, for instance, redactions would occur for their social security numbers, home addresses, etc., and spot checks would validate the redactions without need for review of *all* documents. The liability protection would provide protection against inadvertent disclosure if, for instance, one document was accidentally scanned upside down and the redactions occurred in the incorrect place.

[3] Note: Multiple requests from any person or entity to the same public body within a 30-day time period are considered one request.

[4] Note: "Text or chat message threads" after often not cleanly delineated into different subject lines, like e-mails. Instead, they often lack subject lines altogether. As such, dividing threads into separate communications based on "subject or topic" will likely be a content-specific analysis.

that are, presumably, disclosable pursuant to the request prior to further analysis. Those text messages are treated slightly differently under the statute. Instead of a "single subject line," the statute divvies up text messages about the same subject into 50 message blocks. The statute specifies that 50 messages within "text and chat message threads" will equal one "communication," if they are about the same topic. Therefore, if those 1,000 text messages contain five different topics (with 200 text messages per topic), then the statute would identify only 20 "communications" and the municipality could not charge a fee. But, if the 1,000 text messages contain 500 different topics, then the statute would identify 500 different communications and the municipality could charge a $250 fee. (Remember, the first 250 communications are always free.)

If a municipality wishes to enact the local option electronic communications charge, it must create a policy about when a charge will be incurred, and that policy must include a provision exempting certain requestors who are statutorily exempt from being charged the electronic communications charge. The law exempts the following from the charge:

- Indigent individuals, as established by the federal poverty line; or
- When the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, except for media requestors.[5]

If a waiver is denied, the requestor may challenge that decision by bringing a petition either to the Right-to-Know Ombudsman or Superior Court, according to the existing provision in the Right-to-Know law that allows anyone "aggrieved by a violation." While the statute is silent on which party has the burden to show whether the waiver was improperly denied, a municipality which denies a waiver should be prepared to demonstrate why the waiver was denied.

Additionally, in advance of charging a specific requestor the electronic communication charge, the municipality must provide an itemized estimate of the cost of making the record available in advance in the five-day letter that acknowledges receipt of the request. The best practice is to include this estimate alongside any written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay. However, if that estimate is not available within the five days before sending acknowledgment of receipt, it should be provided to the requestor as soon as it can be determined. If a requestor believes that the estimated cost to make the records available is unreasonable, they may raise a challenge to that estimate to either the Right-to-Know Ombudsman or the Superior Court according to the existing provision in the Right-to-Know law that allows anyone "aggrieved by a violation."

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[5] The intent of this exception for charging is to allow both public interest requests and media requestors, as defined by the statute, to receive records without charge. The statute defines "media requestors" as "organizations or individuals who publish information in accepted digital, print, or broadcast formats and to standards generally recognized by professional news organizations that do not serve primarily as a platform to promote the interest and/or opinions of a special interest group, government, individual or cause."

Additionally, disclosure of the information is in the public interest when, for example, it reveals information that leads to criminal charges being filed against a current or former public official.

Model HB 1002 Policy

Definitions:

1. "Individual electronic communication" includes the communication itself as well as the responses and attachments to each communication, under a single subject line. However, text or chat message threads regarding the same topic shall be considered an individual electronic communication unless a thread exceeds 50 individual messages, at which point a group of 50 messages shall be considered an individual electronic communication.
2. "Media requestors" means organizations or individuals who publish information in accepted digital, print, or broadcast formats and to standards generally recognized by professional news organizations that do not serve primarily as a platform to promote the interest and/or opinions of a special interest group, government, individual or cause.

Policy:

A per electronic communication charge of $1 per individual electronic communication, regardless of whether the records are delivered in hard copy or electronically, shall be charged of any requestor subject to the following provisions:

1. No charge shall be issued for the first 250 individual electronic communications;
2. No charge shall be issued for the following individuals or entities:
    a. An individual who can demonstrate they are indigent as established by the federal poverty line, as issued each year by the Federal Department of Health and Human Services;
    b. Media requestors;
    c. Any individual requesting information where the disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor, except media requestors.
3. Multiple requests from any person or entity to the same public body within a 30-day time period shall be considered one request.

The requestor shall receive an itemized estimate of the cost of making the record available. This estimate shall accompany any written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay, if it is estimated that making the record available will take longer than 5 business days, or as soon as the fee can be ascertained.