



State of New Hampshire

GENERAL COURT

CONCORD

MEMORANDUM

DATE: November 1, 2017

TO: Honorable Shawn Jasper, Speaker of the House
Honorable Chuck W. Morse, President of the Senate
Honorable Paul C. Smith, House Clerk
Honorable Tammy L. Wright, Senate Clerk
Honorable Chris Sununu, Governor
Michael York, State Librarian

FROM: Senator Bob Giuda, Chairman

SUBJECT: Final Report of the Commission to Study Processes to Resolve Right-To-Know Complaints
(HB 178, RSA 91-A:8-a, Chapter 126:1, Laws of 2017)

Pursuant to HB 178, RSA 91-A:8-a, Chapter 126:1, Laws of 2017, enclosed please find the final report of the commission to study processes to resolve right-to-know complaints.

Should you have any questions or comments regarding this report, please do not hesitate to contact me.

I would like to thank those members of the committee who were instrumental in this study. I would also like to acknowledge all those who testified before the committee and assisted the committee in our study.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bob Giuda".

Senator Bob Giuda, Chairman

HB 178
CHAPTER 126:1, LAWS of 2017
Extended by HB178, Chapter 91-A

An Act establishing a commission to study processes to resolve right-to-know complaints

PREAMBLE

“WE, the members of the Commission to Study Processes to Resolve Right-to-Know Complaints, in order to protect the ideal of a citizen government whereby every citizen is provided open access to government records, advance notice of meetings meant for public scrutiny, and transparency and openness of government actions; in an effort to maintain trust between the people and their government, do hereby present this report to the Honorable Senate President, Chuck Morse, the Honorable Speaker, Shawn Jasper, and His Excellency Governor, Christopher Sununu.”

FINAL REPORT

The above-named Legislative Study Commission studied processes to resolve right-to-know complaints.

DUTIES OF THE COMMISSION

To study ways to reduce both the number and expense of resolving right-to-know complaints consistent with the following:

- (1) Encouraging resolution of right-to-know complaints directly between citizens and public agencies and bodies.
- (2) Reducing the burden and costs of right-to-know complaints on the courts.
- (3) Reducing the burden and costs of right-to-know complaints on public agencies and bodies.
- (4) Reducing the burden and costs of right-to-know complaints on citizens aggrieved by violations of RSA 91-A.
- (5) Increasing awareness and compliance with the right-to-know law to minimize violations.

PROCESS

The first meeting of the Study Commission on HB 178 was held on September 7, 2017 with a final meeting held on October 31, 2017.

Current law requires citizens to file a petition in Superior Court to resolve any right-to-know grievance they may have with a public body or agency. This requirement establishes a high burden and cost on all parties. For example, in the Superior Court case of *Porter v. Town of Sandwich*, Porter was awarded over \$200,000 in attorneys' fees and costs along with the Court vacating a total of six (6) Town administrative proceedings and mandating Town officials and employees to attend remedial training.

Many times, documents are withheld from disclosure, often without any detailed explanation, and there is no independent way to verify the validity of the exemption used to withhold documents without going to court. Additionally, public bodies and agencies tend to err on the side of nondisclosure in matters which involve confidentiality of third parties. For these reasons, the citizen feels documents are inappropriately withheld from disclosure and must seek an independent ruling on their exemption or redaction.

The Center for Public Integrity, winner of the Pulitzer Prize, evaluated the freedom of information laws of all 50 states as part of its broader 2015 State Integrity Investigation. In the Category of Public Access to Information, New Hampshire earned a grade of F, and ranked 49th out of 50 states coming in a mere one point ahead of Wyoming which holds the worst score.

Overall, New Hampshire earned a grade of D- and ranked 34th among the 50 states. In the category titled “In practice, citizens can resolve appeals to access to information requests within a reasonable time period and cost,” New Hampshire received a score of 0. This score is particularly troubling, as noted by this further explanation:

All appeals of Chapter 91-A requests must go through the court system. This has been identified as problematic by government access advocates, not least because the law sets a high bar for the recovery of attorney fees and other costs. Such fees are only to be awarded when a government agent “knew or should have known” that the materials were wrongfully withheld.

CONSIDERATION OF ALTERNATIVES

While reserving the right for someone to choose filing a petition in court, the Commission discussed possible alternative mechanisms to resolve right-to-know grievances. The Commission agrees that an “express lane” process to resolve right-to-know grievances which is easier, cheaper, and faster is needed.

Analysis of Other States’ Laws

A review of what processes are in place within all 50 states for addressing right-to-know grievances yielded the following:

- 17 states including NH rely solely on the courts
- 19 states rely on the Attorney General’s Office
- 9 states have an Ombudsman Office
 - Hawaii
 - Indiana
 - Maine
 - Maryland
 - New York
 - Pennsylvania
 - South Dakota
 - Tennessee
 - Washington
- 5 states have an Independent Compliance Board
 - Connecticut

- Iowa
- Maryland (records only)
- Mississippi
- New Jersey (records only)

The Commission members believed the Attorney General’s Office would not be a viable option to consider since the Attorney General’s Office represents state agencies—including in Chapter 91-A disputes—and the Attorney General’s Office itself is the recipient of many right-to-know requests which would be a conflict of interest. For these reasons, and out of concern for citizen’s perceptions, members determined the Attorney General’s Office may have difficulty performing the impartial role of grievance resolution in certain instances. Discussion proceeded and quickly centered around a process which requires some type of impartial Ombudsman and/or Independent Compliance Board as the preferred structure to balance the needs for an easier, cheaper, and faster grievance resolution process while maintaining independence, credibility, impartiality and minimizing any political influence.

During public input, a number of citizens expressed their frustrations with the inherent long delays, high costs, and trepidation with the current grievance process which requires filing a petition in court. Aggrieved citizens frequently find initiating litigation is too intimidating and costly to pursue. Many citizens consider these barriers too high.

Between the representation of the members of the Commission and the opportunity for public input at most of the meetings, all stakeholders had ample opportunity to be heard during these proceedings.

Analysis of Other States Educational Requirements

The commission also reviewed right-to-know education required and/or available within all 50 states. To ensure that members of public bodies know the law and cannot credibly assert ignorance of its requirements, some states mandate that members of public bodies be trained.

Seventeen (17) states require education. The education includes:

- Distribution of the law and/or educational materials to officials (4 states: CA, IN, IA, TN)
- Public body must post the law/summary requirements of the law
 - Place of business (2 states: LA, RI)

- In the meeting room (1 state: NE)
- Officials review education materials
 - Prior to taking office (1 state: AZ)
 - Within 14-120 days after taking office
(8 states: IL, KY, MA, ME, TX, VA, WA, WV)
 - Annually (includes material changes to the law) (1 state: UT)
 - Every 4 years – Additional Refresher education (1 state: WA)

Two (2) states (ME, MA) require that the education be certified and a record kept. The certification shall be evidence that the person has read and understood the requirements of the law and the consequences of violating it.

Iowa statute specifically states “Ignorance of the legal requirements of this chapter shall be no defense to an enforcement proceeding brought under this section.” (Code 21.6)

Optional educational materials provided by government:

- Workshops (12 states)
- Online Presentations – Webinar / PowerPoint / Videos (17 states)
- Handbooks (40 states)
- Online access to case law history, binding and advisory decisions

Some states partner with other nongovernmental nonprofit organizations to develop and/or deliver educational materials.

In New Hampshire, training and educational materials are already available. The New Hampshire Municipal Association (NHMA), New Hampshire School Board Association (NHSBA), and Right to Know NH (RTKNH) provide training. NHMA, NHSBA, RTKNH, Attorney General, and the Committee for the Freedom of the Press publish educational materials on the right-to-know law. However, public bodies, public agencies, and citizens may underutilize these existing training and educational resources.

FINDINGS

Results of our meetings concluded the following:

To insure that a right-to-know grievance resolution process would be easier, cheaper, and faster and have sufficient input and advice from a wide audience of interested parties, it was agreed that an Ombudsman should be established with

oversight by a Citizens' Right-to-Know Appeals Commission. The Ombudsman and Citizens' Right-to-Know Appeals Commission should be established and function as follows:

1. Establish a Citizens' Right to Know Appeals Commission, whose powers shall be:
 - a. Annually, elect a Chairman and Vice-Chairman from among the voting members of the Commission
 - b. Establish rules of procedure in accordance with RSA 541-A, consistent with the objective of making the appeals process easier, faster and less costly for all parties to an RSA 91-A action
 - c. Manage an alternative appeals process for right-to-know grievances.
 - d. Recruit, screen and select Ombudsman candidates, who will serve at the will of the Commission.
 - e. Evaluate the Ombudsman's performance on a periodic basis, at least annually.
 - f. Provide recommendations to the legislature concerning proposed changes to Chapter 91-A.
 - g. Create educational materials concerning the requirements of Chapter 91-A.
 - h. Report annually to the Governor, President of the Senate, Speaker of the House of Representatives on the activities of the Ombudsman and Commission

2. The Citizens' Right to Know Commission shall be comprised of the following:
 - a. Four (4) Advisory Members (non-voting)
 - i. One (1) Attorney from the Attorney General's Office, appointed by the Attorney General
 - ii. One (1) Member appointed by the Chief Justice of NH Supreme Court. This member shall not preside over any Superior Court proceedings involving RTK appeals.
 - iii. One (1) Member from the Secretary of State's office, appointed by the Secretary of State
 - iv. One (1) Member of Right-to-Know New Hampshire, or other citizens-based advocacy organization appointed by the Governor
 - b. Ten (10) Citizens-at-Large (voting), nominated by the Governor with the advice and consent of the Council
 - i. Term is for 3 years; maximum of 3 consecutive terms; appointee can exceed 3-year term as a "holdover" until a successor takes office.
 - ii. Initial terms staggered: 3/3-year, 4/2-year, 3/1-year
 - iii. Terms run from May 1 – April 30.

- c. Three (3) Legislative Members (voting)
 - i. One (1) Member of the Senate, appointed by the President
 - ii. Two (2) Members of the House, appointed by the Speaker

- 3. Qualifications of the 10 Citizens-at-Large:
 - a. Two (2) members from each County (1 regular & 1 alternate)
 - b. Collectively, no more than four (4) members may be a current local, county, state or federal employee, or currently serving in any elected or appointed capacity with any political subdivision, public agency or public institution
 - c. No members will be a current lobbyist or attorney for any entity subject to the right-to-know law, or for any organization representing the interests of such entity, nor be employed by such lobbyist or attorney, or such lobbying or law firm.

- 4. Appeal Process
 - a. A citizen makes a request under Chapter 91-A, and the public body or public agency issues a denial or fails to respond.
 - b. In lieu of filing a petition in the Superior Court under Chapter 91-A, the citizen may appeal to Commission, whose administrator will immediately refer the matter to the Ombudsman.
 - c. Before the Ombudsman, the public body or public agency must make a timely submission acknowledging denial of the alleged violation; denial must include specific answers to the citizen's complaint, cite applicable law, and justify any refusals or delays.
 - d. The Ombudsman acquires and reviews materials, conducts interviews if necessary, and issues a ruling within 30 days following receipt of the parties' submissions and, if applicable, the documents following an in camera review. This 30-day deadline can be extended to a reasonable time frame by the Ombudsman when there is good cause; the Ombudsman may expedite resolution of the request upon a showing of good cause by the citizen; rulings on expedited appeals must be issued within 10 business days, or sooner where necessary.
 - e. Any party may appeal the Ombudsman's ruling to the Superior Court. The Ombudsman's ruling must be attached to the document initiating the appeal, admitted as a full exhibit during the Superior Court hearing, considered by the judge during deliberations, and specifically addressed in the Court's written Order. Citizen-initiated appeals shall have no filing fee or surcharge. The political subdivision/public agency will pay the Sheriff's service costs if the political subdivision/public agency, or its attorney, declines to accept service. Nothing herein prevents a

Superior Court from staying an Ombudsman's decision pending appeal to the Superior Court.

- f. Superior Court appeals from the Ombudsman's order are de novo.
 - g. Unless rulings are appealed to Superior Court, the Ombudsman will follow up with all parties, as required, to verify compliance with rulings issued.
 - h. Nothing herein shall affect the ability of a citizen to seek relief in Superior Court under Chapter 91-A in lieu of this Citizen's Right-to-Know Commission process.
5. Powers of the Ombudsman
- a. Execute resolution process per procedures established by Commission.
 - b. Compel timely delivery of documents in question, regardless of medium and with assurance of non-disclosure, for confidential in camera review to assist in delivering a ruling.
 - c. Compel interviews with parties to complaint, order attendance at hearings, and may draw negative inferences from a party's failure to participate or produce documents for in camera review.
 - d. Determine whether there has been a violation of RSA 91-A, including whether the public body knew or should have known that the conduct engaged in was a violation of Chapter 91-A.
 - e. Determine whether delays in producing records/documents are warranted or dilatory.
 - f. Order a political subdivision to release requested information to requester, subject to appeal.
 - g. Order any other remedy as provided under Chapter 91-A.
 - h. Un-appealed final Ombudsman orders may be registered in court as judgments and enforceable through contempt of court.
All costs and fees, including reasonable attorney fees, shall be paid by the noncompliant entity, if necessary, to enforce compliance.
6. Qualifications of Ombudsman
- a. Member of the New Hampshire Bar
 - b. Minimum of ten years' full-time practice of law in New Hampshire or any jurisdiction
 - c. Experience with RSA 91-A, the Federal Freedom of Information Act or other states' equivalents
 - d. Must take continuing Legal Education (CLE) courses or other training in RSA 91-A

7. Other Considerations

- a. It is anticipated the Ombudsman position will be compensated and leave compensation to the legislature
- b. The Commission anticipates it is likely the alternative process will result in savings to the public agencies, court system and citizens

Training and Education

Education is essential to reduce risks, costs, and time associated with resolving right-to-know grievances. Education will increase compliance with the law, thus reducing the number of right-to-know violations which will, in the long run, reduce the costs of addressing and resolving violations. With authority goes responsibility.

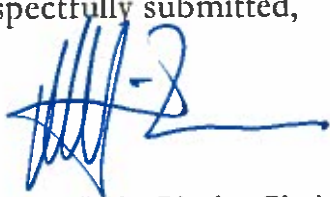
All public bodies and agencies have an obligation to educate officials and employees on their responsibilities to comply with the right-to-know law and should use existing educational resources already available to do so. Educational resources for citizens should also be available so citizens can learn how to reasonably describe the records they are requesting and understand their rights.

RECOMMENDATIONS

The committee suggests the following recommendations be brought forward from this study:

1. 2018 legislation should be brought forward to establish an Ombudsman and Citizens' Right-to-Know Appeals Commission to resolve right-to-know grievances.
2. Right-to-know training should be established for all public officials and employees who are subject to the right-to-know law to increase awareness, compliance, and minimize violations.
3. Costs and fees should be minimal for all citizens to file and adjudicate their right-to-know grievances.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "Bob Giuda", with a long horizontal line extending to the right.

Senator Bob Giuda, Chair
Representative Jordan Ulery, Vice Chair
Honorable Harriet Cady, Clerk
Representative Charlotte DiLorenzo
Representative Gary Hopper
Lisa English, NH Attorney General's Office
Chris Dwyer, NH Municipal Association
Dan McKenna, NH School Boards Association
Honorable Mark Hounsell, NH Association of Counties
Trent Spiner, NH Press Association
David Saad, Right to Know NH
Gilles Bissonette, NH Civil Liberties Union
Honorable Mark Derby, Governor Appointee