The Right-to-Know Law and the Duty of Confidentiality

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Where does the Right-to-Know end and the oath of confidentiality begin?

The purpose of the Right-to-Know Law 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." RSA 91-A:1. As the New Hampshire Supreme Court has said many times, a court will interpret the law in favor of openness and access. If a public body or agency seeks to withhold information or conduct conversations behind closed doors, the body or agency has the burden of proving it is justified in doing so under the law.

However, despite this mandate of openness, under certain circumstances, a public official is required to keep information confidential—or else face removal from office.

RSA 42:1 requires all town officers to take the oath of office found in Part 2, Article 84 of the New Hampshire Constitution. The next section, RSA 42:1-a, I, provides that a town officer who violates the oath can be removed from office by petition to the superior court. Paragraph II goes on to say that a violation of the oath of office occurs when a town officer divulges information to the public that he or she learned through his or her official duties or official position in the municipality, under narrow circumstances found in II (a) and (b).

A. Public Body Voted to Withhold Information

For a municipal officer to violate subparagraph A, three elements must be met: (1) the officer learned the information in a properly-held nonpublic session, (2) the public body properly sealed the minutes of that session, and (3) the information divulged from that nonpublic session would do one or more of the following: (a) constitute an invasion of privacy, (b) adversely affect the reputation of a person, other than a member of that public body, or (c) render some action ineffective if disclosed. (Note that "reputation" and "render a proposed action ineffective" are also proper purposes for sealing nonpublic session minutes under RSA 91-A:3, III.)

Therefore, assume the library trustees hold a proper nonpublic session to discuss an investigation of misconduct and potential dismissal of a library employee. The minutes are sealed, perhaps because they are "likely to adversely affect reputation" under RSA 91-A:3, III. One of the trustees, feeling his fellow trustees are not being fair to the employee, takes to Facebook and posts the details of the charges and why he believes they're unfounded. With this post, the library trustee has likely violated his oath of office—since the information would likely constitute an invasion of privacy or adversely affect the employee's reputation (or both)—and he could be removed from office through a court action.

RSA 42:1-a should also serve as a reminder that public bodies must think carefully about which non-board members will be present during a nonpublic session. Only officers who have taken the oath of office under RSA 42:1 are subject to removal for releasing confidential information under RSA 42:1-a, II (a) and (b). The Right-to-Know Law does not address *who* may be present in a nonpublic session, and so it is at the discretion of each public body, when conducting each nonpublic session, to determine whether other individuals should be present, such as a department head when an employee's performance or misconduct is being discussed.

B. Officer Knew or Should Have Known

Subparagraph B covers divulgence of *any* information, not necessarily information learned in a nonpublic session, but only under particular circumstances. Under this paragraph, three things must be true: (1) the officer knew or should have known that (2) the information was exempt under RSA 91-A:5 and (3) divulging the information publicly would do one or more of the following: (a) constitute an invasion of privacy, (b) adversely affect the reputation of some person other than a member of the public body or agency, or (c) render proposed municipal action ineffective.

Municipal officials are expected to know the Right-to-Know Law. It is not a defense to the "knew or should have known" requirement that the officer did not know certain types of records were exempt from disclosure—in other words, it is not a defense that the officer does not know what the law says! It could be a defense if, at the time of disclosure, it was unclear, or the facts did not tend to show, that the information disclosed fell under an exemption.