

Bill as  
Introduced

HB 285 - AS INTRODUCED

2015 SESSION

15-0571  
01/09

HOUSE BILL           **285**

AN ACT               relative to discussion with legal counsel under the right-to-know law.

SPONSORS:          Rep. Bickford, Straf 3

COMMITTEE:        Judiciary

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ANALYSIS

This bill clarifies meetings with legal counsel under the right-to-know law.

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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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Fifteen*

AN ACT                   relative to discussion with legal counsel under the right-to-know law.

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

- 1           1 Right-to-Know Law; Meetings with Legal Counsel. Amend RSA 91-A:2, I(b) to read as follows:
- 2                   (b) Consultation with legal counsel *which shall include instances where the legal*
- 3 *counsel has communicated by written correspondence;*
- 4           2 Effective Date. This act shall take effect January 1, 2016.

HB 285 - AS AMENDED BY THE HOUSE

11Mar2015... 0237h

2015 SESSION

15-0571  
01/09

HOUSE BILL           **285**

AN ACT           relative to discussion with legal counsel under the right-to-know law.

SPONSORS:       Rep. Bickford, Straf 3

COMMITTEE:      Judiciary

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AMENDED ANALYSIS

This bill adds correspondence with legal counsel to the law governing nonpublic sessions under the right-to-know law.

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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                  Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.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 285 - AS AMENDED BY THE HOUSE

11Mar2015... 0237h

15-0571  
01/09

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Fifteen*

AN ACT                   relative to discussion with legal counsel under the right-to-know law.

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

- 1           1 New Subparagraph; Right-to-Know Law; Nonpublic Sessions. Amend RSA 91-A:3, II by
- 2 inserting after subparagraph (j) the following new subparagraph:
- 3                   (k) Consideration of correspondence from legal counsel.
- 4           2 Effective Date. This act shall take effect January 1, 2016.

CHAPTER 280  
HB 285 - FINAL VERSION

11Mar2015... 0237h  
01/14/2016 3069s  
1June2016... 2031CofC

2016 SESSION

15-0571  
01/09

HOUSE BILL           **285**

AN ACT               relative to discussion with legal counsel under the right-to-know law.

SPONSORS:           Rep. Bickford, Straf 3

COMMITTEE:          Judiciary

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AMENDED ANALYSIS

This bill adds correspondence with legal counsel to the law governing nonpublic sessions under the right-to-know law.

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

CHAPTER 280  
HB 285 - FINAL VERSION

11Mar2015... 0237h  
01/14/2016 3069s  
1June2016... 2031CofC

15-0571  
01/09

STATE OF NEW HAMPSHIRE

*In the Year of Our Lord Two Thousand Sixteen*

AN ACT relative to discussion with legal counsel under the right-to-know law.

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

1 280:1 New Subparagraph; Right-to-Know Law; Nonpublic Sessions. Amend RSA 91-A:3, II by  
2 inserting after subparagraph (k) the following new subparagraph:

3 (l) Consideration of legal advice provided by legal counsel, either in writing or orally, to  
4 one or more members of the public body, even where legal counsel is not present.

5 280:2 Effective Date. This act shall take effect upon its passage.

6 Approved: June 21, 2016

7 Effective Date: June 21, 2016

# Amendments





Sen. Carson, Dist. 14  
December 9, 2015  
2015-3013s  
01/09

Amendment to HB 285

1 Amend the bill by replacing all after the enacting clause with the following:

2

3 1 Right-to-Know; Meetings Open to the Public. Amend RSA 91-A:2, I(b) to read as follows:

4 (b) Consultation with legal counsel, *which shall include consideration of legal*  
5 *advice provided by legal counsel, either in writing or orally, to one or more members of the*  
6 *public body, even where legal counsel is not present;*

7 2 Effective Date. This act shall take effect upon its passage.



Senate Judiciary  
January 7, 2016  
2015-3069s  
01/06

Amendment to HB 285

1 Amend the bill by replacing all after the enacting clause with the following:

2

3 1 Right-to-Know; Meetings Open to the Public. Amend RSA 91-A:2, I(b) to read as follows:

4 (b) Consultation with legal counsel, *which shall include consideration of legal*  
5 *advice provided by legal counsel, either in writing or orally, to one or more members of the*  
6 *public body, even where legal counsel is not present;*

7 2 Effective Date. This act shall take effect upon its passage.

# Committee Minutes

**SENATE CALENDAR NOTICE  
JUDICIARY**

Senator Sharon Carson Chairman  
 Senator Sam Cataldo V Chairman  
 Senator Gary Daniels  
 Senator Bette Lasky  
 Senator David Pierce

For Use by Senate Clerk's Office ONLY	
<input type="checkbox"/>	Bill Status
<input type="checkbox"/>	Docket
<input type="checkbox"/>	Calendar
Proof: <input type="checkbox"/>	Calendar <input type="checkbox"/> Bill Status

**Date: April 14, 2015**

**HEARINGS**

**Tuesday**

**4/21/2015**

JUDICIARY

SH 100

9:00 AM

(Name of Committee)

(Place)

(Time)

**EXECUTIVE SESSION MAY FOLLOW**

9:00 AM	HB108-FN	(New Title) relative to sealing nonpublic session minutes.
9:15 AM	HB285 ✓	relative to discussion with legal counsel under the right-to-know law.
9:30 AM	HB613	relative to governmental records exempted under the right-to-know law.
9:45 AM	HB198	relative to retention requirements for certain motor vehicle records.
10:00 AM	HB118	relative to vehicular assault.

**Sponsors:**

**HB108-FN**

Rep. Timothy Horrigan

Rep. Janet Wall

Rep. Marjorie Smith

Sen. David Boutin

**HB285**

Rep. David Bickford

**HB613**

Rep. Tara Sad

Rep. Carol McGuire

Sen. John Reagan

**HB198**

Rep. Karel Crawford

**HB118**

Rep. Stephen Shurtleff

# SENATE JUDICIARY COMMITTEE

*Susan Duncan, Senior Legislative Aide*

HB 285 – AN ACT relative to discussion with legal counsel under the right-to-know law.

Hearing Date: April 21, 2015

Time Opened: 9:16 a.m.

Time Closed: 9:41 a.m.

**Members of the Committee Present:** Senators Carson, Cataldo, Lasky, Pierce and Daniels

**Members of the Committee Absent:** No one

**Bill Analysis:** This bill adds correspondence with legal counsel to the law governing nonpublic sessions under the right-to-know law.

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**Sponsors:** Representative David Bickford

**Who supports the bill:** Representative David A. Bickford; Representative Robert Hull; Representative Robert Rowe; Barrett M. Christina on behalf of the NH School Boards Association; Attorney Judy Silva on behalf of the NH Municipal Association;

**Who opposes the bill:** David K. Taylor

**Others testifying without taking a position:** Attorney Lisa English, DOJ

**Summary of testimony presented in support:**

**Representative Bickford**

Explained that the bill allows a board to hold a non-meeting in order to consult with legal counsel and was filed as a result of a NH Supreme Court ruling, Ettinger, which said that you cannot have a non-meeting for conversation with your attorney. In the Ettinger ruling, the Supreme Court said that if the Legislature had wanted groups to have non-meetings to meet with legal counsel, they would have said so in statute. He distributed copies of both the Ettinger decision as well as NHMA's testimony presented in the House. Senator Daniels asked about correspondence with legal counsel and sealing the minutes to which Representative Bickford responded that this would be a non-meeting of the body. Senator Pierce pointed out that the bill as amended by the House places this into the non-public

meeting section (A-3) as opposed to non-meeting (A-2) – that was reflected in the bill as introduced, not as amended by the House.

**Representative Hull**

Provided written testimony which he read explaining that this allows the body to meet to consider written correspondence from legal counsel without requiring the attorney to be present. Senator Daniels asked if this is covered under the non-public section of the meeting, would the minutes be sealed? Representative Hull responded that they could also have a discussion in public session as this would be up to the body as to whether to make something confidential or not.

**Attorney Judy Silva, NHMA**

Explained that they do support this proposal and commented that Representative Bickford was explaining the bill as introduced, but the House amended it to create a new section under the non-public session to consider written advice from legal counsel without the attorney having to be present. She explained that many of their boards prefer to consider consultation with legal counsel to be non-public and that because many of them meet at night, it could be via correspondence since they may not be available at that time. Senator Pierce asked why the House Committee moved the section. Attorney Silva responded that it is a way to know that there was a discussion as you do have to post the meeting. She explained that legal advice is not subject to right-to-know but this does let the public know that a discussion is taking place. Senator Daniels asked if this includes written as well as verbal communications. Attorney Silva responded that she did not believe that verbal would be covered. Senator Daniels asked if there is any place where correspondence is defined solely as written. Senator Lasky asked if a phone conversation would be covered. Attorney Silva responded that they believe that Ettinger would allow a “live” exchange with counsel. Senator Pierce then asked about A: III which says that correspondence becomes available within 72 hours unless . . . and listed the three exceptions. He said if the correspondence does not fit into one of these three categories, it becomes available. He felt that there is a conflict here. Attorney Silva responded that this may need to be looked at as the written legal advice is not subject to right-to-know. Senator Pierce responded that the minutes would be subject, however. Attorney Silva asked the committee if this could please be dealt with.

**Barrett Christina on behalf of the NH School Boards Association**

Testified in support and said that they view this as a cost-savings matter.

**Testimony in opposition:**

**David Taylor**

Provided written testimony and said that from his perspective, this is absolutely not needed and could be easily abused. He said that in essence, this is just another exemption from accountability. He said that if a proposal does not

make sense, then simply ask the public. This bill is very rough and could be very easily abused. He said that he is strongly opposed as legal advice is already excluded in statute. Senator Cataldo asked him if he testified before the House. Mr. Taylor responded that he did.

**Other testimony:**

**Attorney Lisa English, NH DOJ**

Testified for information purposes only and explained that as introduced, the matter would have been handled as a non-meeting. As amended, the item would be discussed in non-public session that requires minutes which could be requested. Senator Pierce asked her to please work with Attorney Silva to see if this can be addressed.

**Fiscal Note:** No fiscal note is attached.

**Action:** The Committee took the bill under advisement.

sfd

Date hearing report completed: April 22, 2015  
[file: HB 0285 report]

# Speakers





# Testimony

Representative Robert Hull  
House Judiciary Committee  
Room 208, LOB

April 21, 2015

Re: Introduction of HB 285

To the Honorable members of the Senate Judiciary Committee:

Good morning, I am Representative Robert Hull and I represent Grafton District 9. I am here today to introduce House Bill 285, relative to discussion with legal counsel under the right-to-know law.

Under current New Hampshire law, public bodies are permitted to conduct meetings in nonpublic session for specific enumerated purposes. This bill as amended creates a new permitted purpose for the nonpublic session for public bodies to consider correspondence from counsel. Currently in order for public bodies to meet legally in a nonpublic setting to consider correspondence from counsel, counsel for the public body must be present. The House Judiciary Committee is of the opinion that this bill would be a cost saving measure for public bodies, as legal counsel would no longer need to be present in order to consider correspondence from counsel in a nonpublic environment.

The House Judiciary Committee recommended OTP-A with a vote 18-0.

Thank you.

Respectfully submitted,

Representative Robert Hull

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <http://www.courts.state.nh.us/supreme>.

THE SUPREME COURT OF NEW HAMPSHIRE

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Carroll  
No. 2010-688

THOMAS ETTINGER & a.

v.

TOWN OF MADISON PLANNING BOARD

Argued: October 13, 2011  
Opinion Issued: December 8, 2011

Hastings Law Office, P.A., of Fryeburg, Maine (Peter J. Malia, Jr. on the brief and orally), for the plaintiffs.

Mitchell Municipal Group, P.A., of Laconia (Laura A. Spector on the brief and orally), for the defendant.

LYNN, J. The defendant, Town of Madison Planning Board (the Board), appeals, and the plaintiffs, Thomas and Margaret Ettinger, cross-appeal, the decision of the Superior Court (Houran, J.), which: (1) held that a private session by the Board on March 3, 2010, violated the Right-to-Know Law, RSA 91-A:2 (Supp. 2010); and (2) denied the plaintiffs' request for attorney's fees. We affirm.

I

The trial court found the following facts. In June 2009, the Pomeroy Limited Partnership (Pomeroy) received conditional approval from the Board to

convert the buildings on its property to a condominium ownership form and to convey part of the property to the Nature Conservancy. In January 2010, the plaintiffs, whose property abuts the Pomeroy property, requested a public hearing to allow them to challenge the approval of the condominium plan. The Board scheduled a public hearing for March 3, 2010, to consider whether to grant final approval of the Pomeroy application. The plaintiffs' attorney appeared at that hearing.

At 7:00 p.m., the scheduled time of the hearing, the Board, joined by its administrative assistant, went into a private session for thirty minutes. In that session, they read and discussed emails from the Board's attorney, a memorandum summarizing legal advice relayed over the phone from the Board's attorney to the Board's administrative assistant, and letters from the plaintiffs' attorney. The Board then reopened the hearing at 7:34 p.m. and, after hearing the plaintiffs' attorney on the matter, granted final approval to the Pomeroy application.

The plaintiffs filed a petition in superior court, arguing that the private session violated New Hampshire's Right-to-Know Law, RSA ch. 91-A (2001 & Supp. 2010), and seeking an award of attorney's fees under RSA 91-A:8, I (Supp. 2010). The superior court agreed that the private session violated the Right-to-Know Law, but refused either to invalidate the Board's approval of the Pomeroy application or to award the plaintiffs attorney's fees. This appeal followed.

## II

The Board argues that its members were permitted to read a letter from counsel and discuss its contents in a private session under the "consultation with legal counsel" exclusion from the definition of a "meeting" in the Right-to-Know Law. See RSA 91-A:2, I(b). The Board's view is that a consultation with legal counsel encompasses discussions of the advice of its attorney even when the attorney is not present at the discussion, or, in the alternative, that the legislature intended nothing more than to "codify the common law attorney client privilege as it applies to public bodies." The meaning of the Right-to-Know Law in this context is a question of first impression.

The interpretation of the Right-to-Know Law is to be decided ultimately by this court. Murray v. N.H. Div. of State Police, 154 N.H. 579, 581 (2006). We apply the ordinary rules of statutory construction to our review of the Right-to-Know Law, and we accordingly first look to the plain meaning of the words used. Union Leader Corp. v. City of Nashua, 141 N.H. 473, 475 (1996). Words and phrases are construed according to the common and approved usage of the language unless from the statute it appears that a different meaning was intended. RSA 21:1, :2 (2000). We resolve questions regarding

the Right-to-Know Law with a view to best effectuate the statutory objective of facilitating open access to the actions and decisions of public bodies. See Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 546 (1997). As a result, we broadly construe provisions favoring disclosure and interpret the exemptions restrictively. Goode v. N.H. Legislative Budget Assistant, 145 N.H. 451, 453 (2000). A public body bears the burden of proving that it may hold a nonpublic assembly of its members. Cf. Hampton Police Assoc. v. Town of Hampton, 162 N.H. 7, 14 (2011); Lambert v. Belknap County Convention, 157 N.H. 375, 379 (2008).

The Right-to-Know Law provides that “all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public.” RSA 91-A:2, II (Supp. 2010). RSA 91-A:1 (2001) expresses the legislative policy of the statute: “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.” The statute defines a meeting as the convening of a quorum of the membership of a public body “for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power.” RSA 91-A:2, I (Supp. 2010). “Consultation with legal counsel,” however, is excluded from that definition and is therefore not subject to the various requirements for open meetings contained in RSA 91-A:2, II. RSA 91-A:2, I(b) (Supp. 2010).

With this statutory scheme in mind, we must determine whether the Board’s private session qualifies as a “consultation with legal counsel” under RSA 91-A:2, I(b). At the outset, we note that, although the Board members merely read the memoranda and emails containing the advice of counsel during the first twenty-five minutes of their private session, they also discussed the contents of those documents at the end of the session. Since any part of the private session found to violate the Right-to-Know Law would be grounds for affirming the superior court’s decision, and since the statute defines a meeting as convening a quorum “for the purpose of discussing or acting upon” matters within a public body’s purview, RSA 91-A:2, I, we focus here only on whether the Board’s brief discussion violated the Right-to-Know Law.

We agree with the trial court that the literal meaning of the “consultation with legal counsel” exclusion does not encompass the discussion among the board members and its administrative assistant that occurred here. A “consultation” is “a council or conference (as between two or more persons) usually to consider a special matter.” Webster’s Third New International Dictionary 490 (unabridged ed. 2002); accord Ballentine’s Law Dictionary 257 (3d ed. 1969) (“The deliberation of two or more persons on some matter; a council or conference to consider a special case.”). Read together with the

phrase “with legal counsel,” a “consultation” does not encompass a situation in which the public body convenes a quorum of its membership, as set out in RSA 91-A:2, I, only to discuss a legal memorandum prepared by, or at the direction of, the public body’s attorney where that attorney is unavailable at the time of the discussion. At the very least, that clause requires the ability to have a contemporaneous exchange of words and ideas between the public body and its attorney.

Anticipating the difficulties a literal construction of the statute poses for its argument, the Board argues that a consultation with legal counsel is coextensive with the common-law attorney-client privilege, and therefore allows public bodies to enter nonpublic sessions to discuss the written advice of counsel. We disagree.

As an initial matter, the attorney-client privilege is an evidentiary rule allowing the attorney or client to withhold information shared in the course of the attorney-client relationship. The classic articulation of the privilege is as follows:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives.

Riddle Spring Realty Co. v. State, 107 N.H. 271, 273 (1966) (citing 8 J. Wigmore, Evidence §§ 2292, 2327-2329, at 554, 634-41 (McNaughten rev. 1961)). New Hampshire Rule of Evidence 502 embodies that rule, providing that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . .” N.H. R. Ev. 502(b); accord N.H. R. Prof. Conduct 1.6(a) (prohibiting lawyers from revealing information “relating to the representation of a client”).

By contrast, the Right-to-Know Law is a statute mandating that all public bodies open their meetings to the public unless one of several specific, enumerated exceptions or exclusions applies. We do not, in general, interpret a statute to abrogate the common law absent a clear legislative expression of intent to do so. See State v. Hermsdorf, 135 N.H. 360, 363 (1992). Here, however, we discern no reason why the attorney-client evidentiary privilege and the Right-to-Know Law cannot coexist. See 1A N. Singer & J.D. Singer, Statutes and Statutory Construction § 23.10, at 481 (7th ed. 2009) (“The presumption against implied repeals is overcome . . . by a showing that two acts are irreconcilable, clearly repugnant as to vital matters to which they

relate, and so inconsistent that they cannot have concurrent operation.”); see also State v. Wilton Railroad, 89 N.H. 59, 61-62 (1937) (requiring a “positive repugnancy” between two provisions before repealing by implication). Whereas the common law attorney-client privilege reflects a policy of encouraging clients to consult with lawyers by enabling the free and open exchange of information between the two, the Right-to-Know Law expresses a more specific policy governing the disputed situation in this case – namely, a public body meeting to discuss matters within its purview. Moreover, to the extent that the attorney-client privilege helps prevent a public body’s adversary in litigation from gaining an unfair advantage, the legislature has safeguarded that interest by its enactment of RSA 91-A:3, II(e) (Supp. 2010), authorizing nonpublic sessions to consider or negotiate “pending claims or litigation which has been threatened in writing or filed against the body . . . , or against any member thereof because of his membership in such body or agency . . . .” In any case, the privilege is the client’s to waive, and RSA 91-A:2 operates “as a statutory public waiver of any possible privilege of the public client . . . except in the narrow circumstances stated in the statute.” District Atty. v. Bd. of Selectmen, 481 N.E.2d 1128, 1131 (Mass. 1985); accord Smith County Educ. Ass’n v. Anderson, 676 S.W.2d 328, 333 (Tenn. 1984).

Our legislature’s decision to enumerate specific exceptions to the open-meetings requirement compels our conclusion that these provisions provide the only circumstances in which a public body may enter into a private session for discussion. “[E]xceptions are not to be implied. . . . Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied.” 2A N. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47.11, at 328-30 (7th ed. 2007) (footnotes omitted). Notably, RSA 91-A:3, II (Supp. 2010) allows public bodies to consider or act upon “[o]nly” certain matters in nonpublic session. The legislature contemplated the need for private discussions among the board members when it enacted these ten exceptions to the open meetings mandate. The terms “discussed” in RSA 91-A:3, II(c) and “consideration” in RSA 91-A:3, II(d)-(j) stand in marked contrast to the narrower phrase “consultation with legal counsel” in RSA 91-A:2, I(b). Whereas the former provisions allow government bodies to consider and discuss the enumerated matters, the latter provision permits a far narrower category – consultation with legal counsel. When the legislature uses different language in the same statute, we assume that the legislature intended something different. See State Employees Assoc. of N.H. v. N.H. Div. of Personnel, 158 N.H. 338, 345 (2009). Had the legislature intended the exclusion in RSA 91-A:2, I(b) to cover not just consultations with legal counsel but also “consideration or discussion of the advice of counsel,” the statute would have said as much. In this case, the Board met in a private session not only to read the memorandum prepared at the direction of the attorney, but also to “discuss” and “consider” the memorandum without counsel present. In the absence of an applicable exception, the clear legislative



mandate of the Right-to-Know Law requires that they do so in the open. See District Atty. v. Bd. of Selectmen, 481 N.E.2d at 1131.

Finally, we disagree with the Board's contention that, because the written communications from the Board's counsel may be protected from disclosure under RSA 91-A:5 (Supp. 2010), the meeting itself need not have been open to the public. RSA 91-A:2 governs whether a meeting of a public body must be held in the open; nothing in that provision requires public bodies to share internal legal documents with the meeting's public attendees. RSA 91-A:4 and RSA 91-A:5 concern the disclosure of public records. Indeed, as the Board correctly observes, the public records disclosure law contains an exemption, in RSA 91-A:5, IV, for any "confidential" information – further evidence that the legislature did not intend the consultation with legal counsel exclusion of RSA 91-A:2 to allow a public body to close a meeting whenever its discussion turns to advice received from its attorney who is neither physically present nor present telephonically and is therefore unable to participate in the discussion.

### III

In their cross-appeal, the plaintiffs argue that they are entitled to attorney's fees under RSA 91-A:8, I (Supp. 2010). That provision allows courts to award attorney's fees to a person who has been refused access to a public proceeding after reasonably requesting such access if the lawsuit was necessary in order to make the proceeding open to the public and the agency knew or should have known that its conduct violated the Right-to-Know Law. RSA 91-A:8, I. The plaintiffs contend that the Board should have known as "a matter of common sense" that their private session violated RSA 91-A:2. We agree with the superior court, however, that attorney's fees are not warranted here. As is evident from this decision, we have had no occasion, before today, to answer the particular question presented by the Board's actions: whether a public body's closed session to discuss the written advice of counsel who is absent fits within the "consultation with legal counsel" exclusion of RSA 91-A:2, I(b). See Goode, 145 N.H. at 455 (concluding that defendant neither knew nor should have known that its conduct violated RSA chapter 91-A due, in part, to the state of case law). We cannot say that, lacking guidance from this court on the narrow issue before it, the Board should have known that its nonpublic session violated the Right-to-Know Law.

Affirmed.

DALIANIS, C.J., and DUGGAN, HICKS and CONBOY, JJ., concurred.



February 3, 2015

Honorable Robert Rowe, Chair  
House Judiciary Committee  
LOB Room 208  
Concord, New Hampshire 03301

Re: HB 285—*relative to discussion with legal counsel under the Right to Know law*

Dear Representative Rowe:

I write on behalf of the members of the New Hampshire Municipal Association (NHMA) to strongly **SUPPORT** HB 285, which adds a provision to the Right to Know law exclusion for consultation with legal counsel to also exclude the discussion of written legal advice from a municipality's legal counsel. NHMA Policy provides:

**NHMA SUPPORTS** legislation to amend RSA 91-A so that exempt consultation with legal counsel would also include discussions about written legal correspondence provided by legal counsel, without requiring the presence of counsel at the meeting.

RSA 91-A:2(I) sets forth the definition of a "meeting" under the Right to Know law.

**91-A:2 Meetings Open to Public. –**

I. For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. ...

This definition is important because pursuant to RSA 91-A:2(II), all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, **shall be open to the public**, unless the circumstances exist to support a motion for a nonpublic session under RSA 91-A:3. Nonpublic sessions are allowed **only** for the reasons stated in the statute. A nonpublic session must start as a properly noticed public meeting, during which a motion is made to go into nonpublic session stating one of the statutory reasons, which is approved by a roll call vote. Minutes must be kept of nonpublic sessions, although they may be sealed.

over

The Right to Know law contains another provision for public bodies to meet outside the presence of the public, and that is for meetings that are specifically excluded from the definition of a meeting—often called “non-meetings.” These “non-meetings” are not covered by the Right to Know law, and need not start in a noticed public meeting, nor must minutes be kept. RSA 91-A:2 (I)(b) specifies four limited exclusions from the definition of meeting:


~~"Meeting" shall also not include:~~

- ~~(a) Strategy or negotiations with respect to collective bargaining;~~
- ~~(b) Consultation with legal counsel;~~
- (c) 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
- (d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

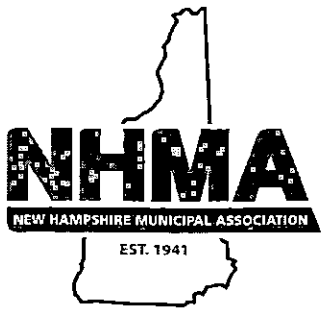
NHMA policy and HB 285 deal with the highlighted language above. The bill seeks to amend the statute so that when a board's legal counsel provides a written legal opinion, that board is able to review and discuss that legal opinion without the attorney present. This would avoid the expense of bringing the attorney to the board meeting, a meeting often taking place at night and at some distance from the attorney's office—and all at an additional cost. HB 285 would allow a body to review and discuss the written legal opinion in a “non-meeting” without the attorney present, just like they could discuss a written legal opinion in a “non-meeting” with the attorney present. Not only will this provide a cost savings to municipalities, but it will also allow boards to work more efficiently. We urge your **SUPPORT** for HB 285.

Thank you for your consideration, and please do not hesitate to contact any of us at NHMA if you have any questions about this letter or the NHMA position on this bill.

Sincerely,

  
Judy A. Silva  
Executive Director

Cc: Committee members  
Representative Bickford



## Testimony on HB 285

### Senate Judiciary Committee April 21, 2015

My name is Judy Silva and I am here representing the New Hampshire Municipal Association (NHMA) to offer our **strong support** for **HB 285**, as a policy position adopted by NHMA members.

The problem giving rise to the policy was the Supreme Court decision of *Ettinger v. Madison* (162 NH 785 (2011)) which prohibited a municipal board, such as a planning board or the board of selectmen, from reviewing written legal advice without the attorney present. Up until then, the practice for a number of municipalities had been to treat the review of correspondence from an attorney like a consultation with legal counsel—which could be done outside the provisions of the Right to Know Law under RSA 91-A:2 (I).

The bill originally extended the consultation with legal counsel provisions to include review of attorney correspondence. The House took a different approach, and amended the bill to add the review of correspondence outside the presence of the attorney as a new purpose for a nonpublic session, under RSA 91-A:3. As you know, nonpublic sessions are allowed **only** for the reasons stated in the statute; they must start as a properly noticed public meeting, during which a motion is made to go into nonpublic session stating one of the statutory reasons, which must be approved by a roll call vote, and minutes must be kept, although they may be sealed. I think requiring this process gave the House Judiciary Committee additional comfort.

From NHMA's perspective, the important issue is to make sure that when a board's legal counsel provides advice in writing, that board is able to review and discuss that legal opinion in private without the attorney present. This would avoid the expense of bringing the attorney to the board meeting, a meeting often taking place at night and at some distance from the attorney's office—all at an additional cost.

HB 285 as amended would allow a board to review and discuss legal correspondence in a nonpublic session without the attorney present. Not only will this provide a cost savings to municipalities, but it will also allow boards to work more efficiently. **We urge your SUPPORT for HB 285.**

**Duncan, Susan**

---

**From:** Judy Silva [jsilva@nhmunicipal.org]  
**Sent:** Wednesday, April 29, 2015 11:08 AM  
**To:** Duncan, Susan; Carson, Sharon; Pierce, David  
**Cc:** Lehmann, Richard; lisa.english@doj.nh.gov  
**Subject:** HB 285 Right to Know

**Attachments:** 285 amend re minutes.docx

Hello Susan, Sen. Carson and Sen. Pierce—

I wasn't sure who to send this to, so I have copied all of you, as well as Rick Lehman. I have also copied Lisa English, from the AG's office, with whom I have discussed (by email) this proposal.

The attached provides two versions of an amendment to HB 285 to address the questions about minutes relative to a nonpublic session held for the purposes of reviewing legal correspondence. Both versions specify that minutes shall not be required for such nonpublic sessions. The first version adds language to the same paragraph that allows a nonpublic session for the purposes of reviewing legal correspondence; the second version adds the language to the end of the paragraph relative to minutes of a nonpublic session.

I prefer the first version, because I think it will provide clearer, more straightforward guidance to board members that they do not have to try to figure out what the minutes should say and how to handle the subject matter discussed and the possibility of sealing the minutes.

Please do not hesitate to contact me if you have any questions or if I can provide additional information. My direct line is 226-1399.

Thank you to Lisa for her assistance and thank you for addressing this issue.

Judy

**Judy A. Silva**  
Executive Director

**New Hampshire Municipal Association**  
25 Triangle Park Drive  
Concord, NH 03301  
603-224-7447 ext 3408  
800-852-3358 ext 3408  
[www.nhmunicipal.org](http://www.nhmunicipal.org)



**74th New Hampshire Municipal Association  
Annual Conference**

**Thursday & Friday, November 19-20, 2015**  
Radisson Hotel, Manchester, NH

HB285

Testimony of David Taylor

April 21, 2015

Thank you for allowing me to testify today. I am opposed to HB285 because it is not needed and it is easily abused.

My name is David Taylor and I live in Durham, New Hampshire where I served for 12 years on the school board.

A public body like a school board doesn't get legal advice for its own sake. They get legal advice for some other issue. It could be a lawsuit, or a contract, or an investigation of an employee. None of these reasons would be affected by HB285 because they are already exempt. They are some of the long list of specific subjects exempt for non-public meetings.

If anyone says they want another exemption, ask them specifically why. What is the subject they would get legal advice about? Odds are good it is already covered. If it is not, then identify the subject, and if it makes sense to keep secret, then add another specific exemption for that subject. If it does not make sense to keep secret, then meetings about it should remain open.

Some say they need this exemption to follow up on legal advice. They ask how is a public body able to ask follow up questions. I ask, how did they ask for legal advice in the first place? They can simply ask follow up questions in the same way, whatever that was. In most cases, the subject is already exempt so they can already discuss it in secret.

HB285 is very broad so it would be easy to abuse. The exemption would be the only one for a non-public meeting that is not specific to a subject. It could cover any subject that a lawyer wrote a letter about, particularly because it applies to all written correspondence, and not simply written legal advice. That is a wide open door for those looking to avoid the law.

I strongly oppose HB285 and ask you to ITL this bill. But, if you do not agree, I ask you to at least change the language to be "written legal advice" instead of "written correspondence" to shut the door for abuse at least part way.

Thank you.

# Committee Report

STATE OF NEW HAMPSHIRE  
SENATE

REPORT OF THE COMMITTEE  
FOR THE CONSENT CALENDAR

Date: May 26, 2015

THE COMMITTEE ON Judiciary

to which was referred House Bill 285

AN ACT relative to discussion with legal counsel under the right-to-know law.

Having considered the same, the committee recommends that the Bill:

**BE RE-REFERRED TO COMMITTEE**

BY A VOTE OF: 5 - 0

AMENDMENT # s

CONSENT CALENDAR VOTE: 5 - 0

Senator Sharon M. Carson  
For the Committee

This is one of three bills on the right-to-know statute, RSA 91-A, being re-referred to Committee. The purpose is to look at all three aspects in the different bills in the larger context of the entire statute.

Susan Duncan 271-3076



## New Hampshire General Court - Bill Status System

**Docket of HB285**

Docket Abbreviations

**Bill Title:** relative to discussion with legal counsel under the right-to-know law.*Official Docket of HB285:*

<b>Date</b>	<b>Body</b>	<b>Description</b>
1/8/2015	H	<b>Introduced</b> and Referred to Judiciary; <b>HJ 12</b> , PG. 216
1/21/2015	H	Public Hearing: 2/3/2015 11:00 AM LOB 208
2/4/2015	H	Executive Session: 2/4/2015 12:45 PM LOB 208 ==RECESSED==
2/25/2015	H	Continued Executive Session: 3/3/2015 10:30 AM LOB 208
3/5/2015	H	Committee Report: Ought to Pass with Amendment #2015-0237h for Mar 11 (Vote 18-0; CC); <b>HC19</b> , PG. 403
3/11/2015	H	Amendment #0237h: AA VV; <b>HJ 24</b> , PG. 793
3/11/2015	H	<b>Ought to Pass with Amendment</b> #0237h: MA VV; <b>HJ 24</b> , PG. 793
3/19/2015	S	Introduced and Referred to Judiciary; <b>SJ 10</b>
4/15/2015	S	Hearing: 4/21/15, Room 100, SH, 9:15 a.m.; <b>SC18</b>
5/27/2015	S	Committee Report: Rereferred to Committee, 6/4/15; Vote 5-0; CC; <b>SC24</b>
6/4/2015	S	Rereferred to Committee, MA, VV, <b>SJ 17</b>

NH House

NH Senate

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE  
FOR THE CONSENT CALENDAR

Friday, January 8, 2016

THE COMMITTEE ON Judiciary

to which was referred **HB 285**

AN ACT

relative to discussion with legal counsel under the  
right-to-know law.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS WITH AMENDMENT

BY A VOTE OF: 5 - 0

AMENDMENT # 3069s

CONSENT CALENDAR VOTE: 5 - 0

Senator Sharon Carson  
For the Committee

This legislation is amended to be consistent with a recent NH Supreme Court decision dealing with public meetings and communication with legal counsel.

Susan Duncan 271-3076

## New Hampshire General Court - Bill Status System

**Docket of HB285**

Docket Abbreviations

**Bill Title:** relative to discussion with legal counsel under the right-to-know law.**Official Docket of HB285:**

<b>Date</b>	<b>Body</b>	<b>Description</b>
1/8/2015	H	<b>Introduced</b> and Referred to Judiciary; <b>HJ 12</b> , PG. 216
1/21/2015	H	Public Hearing: 2/3/2015 11:00 AM LOB 208
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3/11/2015	H	Amendment #0237h: AA VV; <b>HJ 24</b> , PG. 793
3/11/2015	H	<b>Ought to Pass with Amendment #0237h</b> : MA VV; <b>HJ 24</b> , PG. 793
3/19/2015	S	Introduced and Referred to Judiciary; <b>SJ 10</b>
4/15/2015	S	Hearing: 4/21/15, Room 100, SH, 9:15 a.m.; <b>SC18</b>
5/27/2015	S	Committee Report: Rereferred to Committee, 6/4/15; Vote 5-0; CC; <b>SC24</b>
6/4/2015	S	Rereferred to Committee, MA, VV, <b>SJ 17</b>
1/11/2016	S	Committee Report: Ought to Pass with Amendment <b>#2015-3069s</b> , 01/14/2016; Vote 5-0; CC; <b>SC1A</b>
1/14/2016	S	Committee Amendment 3069s, AA, VV; 01/14/2016
1/14/2016	S	<b>Ought to Pass with Amendment 3069s</b> , MA, VV; OT3rdg; 01/14/2016; <b>SJ 2</b>
4/6/2016	H	House Non-Concurs with Senate Amendment 3069s and Requests CofC (Rep. Rowe): MA VV 04/06/2016 <b>HJ 31 P. 3</b>
4/6/2016	H	Speaker Appoints: Reps. Rowe, Rouillard, Woodbury, Wuelper 04/06/2016 <b>HJ 31 P. 3</b>
5/12/2016	S	Sen. Carson Accedes to House Request for Committee of Conference, MA, VV; 05/12/2016; <b>SJ 17</b>
5/12/2016	S	President Appoints: Senators Carson, Cataldo, Pierce; 05/12/2016; <b>SJ 17</b>
5/20/2016	H	Conferee Change: Rep. Hagan Replaces Rep. Rowe 05/19/2016
5/20/2016	H	Conference Committee Meeting: 05/24/2016 10:00 AM LOB 208
5/26/2016	S	Conference Committee Report Filed, <b>#2016-2031c</b> ; 05/26/2016
6/1/2016	S	Conference Committee Report 2031c, Adopted, VV; 06/01/2016 <b>SJ 19</b>
6/1/2016	H	Conference Committee Report 2031c: Adopted, VV 06/01/2016
6/15/2016	S	Enrolled (In recess 06/01/2016); <b>SJ 20</b>
6/15/2016	H	Enrolled 06/01/2016
6/22/2016	H	Signed by Governor Hassan 06/21/2016; Chapter 280; Eff. 6/21/2016

NH House

NH Senate

# Other Referrals

HB 285 - Relative to discussion with legal counsel under the right-to-know law

# COMMITTEE REPORT FILE INVENTORY

ORIGINAL REFERRAL       RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE AIDE AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

- DOCKET (Submit only the latest docket found in Bill Status)
- COMMITTEE REPORT
- CALENDAR NOTICE
- HEARING REPORT
- PREPARED TESTIMONY AND OTHER SUBMISSIONS HANDED IN AT THE PUBLIC HEARING

SIGN-UP SHEET(S)

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

- AMENDMENT # \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_

- AMENDMENT # \_\_\_\_\_ - AMENDMENT # \_\_\_\_\_

ALL AVAILABLE VERSIONS OF THE BILL:

AS INTRODUCED       AS AMENDED BY THE HOUSE

FINAL VERSION       AS AMENDED BY THE SENATE

OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

House Calendar remarks

DATE DELIVERED TO SENATE CLERK

Aug. 11, 2015

By:

Susan D. [Signature]  
COMMITTEE AIDE

HB 285, relative to discussion with legal counsel under the right-to-know law. OUGHT TO PASS WITH AMENDMENT. Rep. Robert Hull for Judiciary. Under current New Hampshire law, public bodies are permitted to conduct meetings in nonpublic session for specific enumerated purposes. This bill as amended creates a new permitted purpose for the nonpublic session for public bodies to consider correspondence from counsel. This would be a cost saving for public bodies, as legal counsel would no longer need to be present in order to consider correspondence in a nonpublic environment. Vote 18-0.

W/B 285- Relative to discussion with legal counsel under the right-to-know law.

## COMMITTEE REPORT FILE INVENTORY

           ORIGINAL REFERRAL

RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE AIDE AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
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DOCKET (Submit only the latest docket found in Bill Status)

COMMITTEE REPORT

           CALENDAR NOTICE

           HEARING REPORT

           PREPARED TESTIMONY AND OTHER SUBMISSIONS HANDED IN AT THE PUBLIC HEARING

           SIGN-UP SHEET(S)

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

- AMENDMENT # 3069s                                 - AMENDMENT #             
 - AMENDMENT # 3013s                                 - AMENDMENT #           

ALL AVAILABLE VERSIONS OF THE BILL:

AS INTRODUCED                                 AS AMENDED BY THE HOUSE  
 FINAL VERSION                                 AS AMENDED BY THE SENATE

OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

Comm. of Conf. report 2016-2031

*PLEASE INCLUDE THE COMMITTEE OF CONFERENCE REPORT HERE IF IT IS SIGNED BY ALL.*

DATE DELIVERED TO SENATE CLERK

7/25/16

By

Susan H. Duncan  
COMMITTEE AIDE

May 24, 2016  
2016-2031-CofC  
01/09

1 Committee of Conference Report on HB 285, relative to discussion with legal counsel under the  
2 right-to-know law.

3

4 Recommendation:

5 That the House recede from its position of nonconcurrency with the Senate amendment, and  
6 concur with the Senate amendment, and

7 That the Senate and House adopt the following new amendment to the bill as amended by the  
8 Senate, and pass the bill as so amended:

9

10 Amend the bill by replacing section 1 with the following:

11

12 1 New Subparagraph; Right-to-Know Law; Nonpublic Sessions. Amend RSA 91-A:3, II by  
13 inserting after subparagraph (k) the following new subparagraph:

14 (l) Consideration of legal advice provided by legal counsel, either in writing or orally, to  
15 one or more members of the public body, even where legal counsel is not present.



Committee of Conference Report on HB 285

- Page 2 -

The signatures below attest to the authenticity of this Report on HB 285, relative to discussion with legal counsel under the right-to-know law.

Conferees on the Part of the Senate

Conferees on the Part of the House

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Sen. Carson, Dist. 14

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Rep. Hagan, Rock.4

---

Sen. Cataldo, Dist. 6

---

Rep. Rouillard, Hills.6

---

Sen. Pierce, Dist. 5

---

Rep. Woodbury, Hills.5

---

Rep. Wuelper, Straf.3