

SB 313-FN - AS AMENDED BY THE SENATE

03/07/2019 0651s

2019 SESSION

19-0950

01/10

SENATE BILL

313-FN

AN ACT establishing a citizen's right-to-know appeals commission and a right-to-know law ombudsman and making an appropriation therefor.

SPONSORS: Sen. Giuda, Dist 2; Sen. Carson, Dist 14; Sen. Fuller Clark, Dist 21; Rep. Cushing, Rock. 21; Rep. DiLorenzo, Rock. 17

COMMITTEE: Judiciary

ANALYSIS

This bill establishes procedures to streamline the resolution of complaints under RSA 91-A. This bill establishes the citizens' right-to-know appeals commission and the office of the right-to-know ombudsman. This bill also establishes an alternative process to resolve right-to-know complaints.

This bill is a result of the commission established in 2017, 126.

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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.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

AN ACT establishing a citizen's right-to-know appeals commission and a right-to-know law ombudsman and making an appropriation therefor.

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

1 1 Statement of Intent. The purpose of this act is to provide the public with a simpler, less
2 expensive, and faster alternative process to resolve complaints under RSA 91-A.

3 2 Right-to-Know; Violation. Amend RSA 91-A:7 to read as follows:

4 91-A:7 Violation.

5 ***I.*** Any person aggrieved by a violation of this chapter may petition the superior court for
6 injunctive relief. In order to satisfy the purposes of this chapter, the courts shall give proceedings
7 under this chapter high priority on the court calendar. Such a petitioner may appear with or
8 without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of
9 this chapter, and may be filed by the petitioner or his or her counsel with the clerk of court ~~[or any~~
10 ~~justice thereof]. [Thereupon the clerk of court or any justice shall order service by copy of the~~
11 ~~petition on the person or persons charged. Subject to objection by either party, all documents filed~~
12 ~~with the petition and any response thereto shall be considered as evidence by the court. All~~
13 ~~documents submitted shall be provided to the opposing party prior to a hearing on the merits.~~
14 ~~When any justice shall find that time probably is of the essence, he or she may order notice by any~~
15 ~~reasonable means, and he or she shall have authority to issue an order ex parte when he or she~~
16 ~~shall reasonably deem such an order necessary to insure compliance with the provisions of this~~
17 ~~chapter.]~~

18 ***II.*** *In lieu of the procedure under paragraph I, an aggrieved person may file a*
19 *complaint with the ombudsman under RSA 91-A:7-b and in accordance with RSA 91-A:7-c.*

20 ***III.*** *A person's decision to petition the superior court forecloses the ability to file a*
21 *complaint with the ombudsman pursuant to RSA 91-A:7-c.*

22 ***IV.*** *A person's decision to file a complaint with the ombudsman forecloses the*
23 *ability to petition the superior court until the ombudsman issues a final ruling or the*
24 *deadline for such a ruling has passed.*

25 3 New Sections; Citizens' Right-to-Know Appeals Commission; Office of the Ombudsman;
26 Complaint Process; Appeals. Amend RSA 91-A by inserting after section 7 the following new
27 sections:

28 91-A:7-a Citizens' Right-to-Know Appeals Commission Established. There is established a
29 commission to provide oversight for an alternative right-to-know complaint resolution process.

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

1 (a) One member of the senate, appointed by the president of the senate.

2 (b) One member of the house of representatives, appointed by the speaker of the house
3 of representatives.

4 (c) Ten citizen members, one from each county, no more than 2 of whom shall be
5 current, local, county, state or federal employees or currently serving in any elected or appointed
6 capacity with any political subdivision, public agency or public institution, appointed by the
7 governor with advice and consent of the council.

8 II. The members of the commission shall serve without compensation, but shall be
9 reimbursed for necessary travel and other necessary expenses. Legislative members shall receive
10 mileage at the legislative rate when attending to the duties of the commission.

11 III. Legislative members of the commission shall serve a term coterminous with their term
12 in office. The members appointed under subparagraph I(c) shall serve for a term of 3 years, except
13 that the initial appointment of such members shall be for staggered terms of one, 2, and 3 years. No
14 member shall serve more than 3 consecutive terms. No member under subparagraph I(c) shall be a
15 current lobbyist or an attorney for any entity subject to this chapter, or an attorney for any
16 organization representing the interests of such entity. Nor shall any such member be employed by
17 any such lobbyist or attorney.

18 IV.(a) The commission:

19 (1) Shall establish rules of procedure, pursuant to RSA 541-A, to establish the
20 process to resolve complaints under this chapter consistent with the final report of the commission
21 established in 2017, 126.

22 (2) Shall make recommendations to the legislature concerning proposed changes to
23 this chapter.

24 (3) May provide educational materials relative to this chapter.

25 (b) The members of the commission shall act as a resource for all political subdivisions
26 in the member's respective counties.

27 V. The members of the commission shall elect a chairperson and a vice chairperson
28 annually from among the members. The first meeting of the commission shall be called by the
29 senate member. The first meeting of the commission shall be held within 45 days of the effective
30 date of this section. Five members of the commission shall constitute a quorum.

31 VI. The commission and the ombudsman shall be administratively attached to the
32 department of state.

33 VII. Beginning November 1, 2020, and each November 1 thereafter, the commission shall
34 submit an annual report of its findings and any recommendations for proposed legislation to the
35 president of the senate, the speaker of the house of representatives, and the governor. The report
36 shall also include the total number of complaints received, the number of complaints received
37 concerning public records and public meetings, the number of complaints received concerning state
38 and county agencies, municipalities, school administrative units, and other public entities, the

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1 number of complaints in which a ruling was rendered by the ombudsman, the number of violations
2 of each provision of this chapter found by the ombudsman, and the number of ombudsman rulings
3 that were appealed to the superior court, including whether the appeal was from a complainant or a
4 public agency or official, and whether the ombudsman's ruling was sustained before the superior
5 court or overturned.

6 91-A:7-b Office Established. There is hereby established the office of the right-to-know
7 ombudsman to be administratively attached to the department of state under RSA 21-G:10. The
8 ombudsman shall work no more than 20 hours per week. The ombudsman shall be appointed by
9 the governor and council, after consultation with the commission, and shall have the following
10 minimum qualifications:

- 11 I. Be a member of the New Hampshire bar.
12 II. Have a minimum of 10 years full-time practice of law in any jurisdiction.
13 III. Be experienced with and knowledgeable of the provisions of this chapter, the federal
14 Freedom of Information Act, and all state laws regarding right-to-know.
15 IV. Annually, complete a minimum of 3 hours of continuing legal education courses or other
16 training relevant to the provisions of this chapter.

17 91-A:7-c Complaint Process.

18 I. Any party aggrieved by a violation of this chapter shall have the option to either petition
19 the superior court or file a signed, written complaint, along with a \$25 fee, with the office of the
20 ombudsman, established under RSA 91-A:7-b. The ombudsman shall have the discretion to waive
21 the \$25 fee upon a finding of inability to pay. Any signed, written complaint filed with the
22 ombudsman shall attach, if applicable, the request served on the public agency or official and the
23 written response of the public agency or official. The complaint shall be deemed sufficient if it
24 states facts constituting a violation of this chapter.

25 II. Once a complaint has been filed and provided by the ombudsman to the public body or
26 public agency, the public body or public agency shall have 20 calendar days to submit an
27 acknowledgment of the complaint and an answer to the complaint, which shall include applicable
28 law and, if applicable, a justification for any refusal to or delay in producing the requested
29 information, access to meetings, or otherwise comply with the provisions of this chapter. This 20-
30 day deadline may be reasonably extended by the ombudsman for good cause.

31 III. In reviewing complaints, the ombudsman shall be authorized to:

32 (a) Compel timely delivery of records within a reasonable time, regardless of medium
33 and format, and conduct a confidential in-camera review of records where the ombudsman
34 concludes that it is necessary and appropriate under the law.

35 (b) Compel interviews with the parties.

36 (c) Order attendance at hearings within a reasonable time if the ombudsman
37 determines that a hearing is necessary. Such hearings shall be open subject to the provisions of
38 RSA 91-A.

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1 (d) Issue findings in writing to all parties.

2 (e) Order a public body or public agency to disclose requested records within a
3 reasonable time, provide access to meetings, or otherwise comply with the provisions of this chapter,
4 subject to appeal.

5 (f) Make any finding and order any other remedy to the same extent as provided by the
6 court under RSA 91-A:8.

7 IV. The ombudsman may draw negative inferences from a party's failure to participate and
8 comply with orders during the review process.

9 V. In implementing the provisions of this section, the ombudsman shall follow the
10 procedures established by the commission pursuant to RSA 541-A.

11 VI. The ombudsman shall determine whether there have been any violations of this chapter
12 and issue a ruling within 30 calendar days following the deadline for receipt of the parties'
13 submissions. This 30-day deadline may be extended to a reasonable time frame by the ombudsman
14 for good cause. The ombudsman may also expedite resolution of the complaint upon a showing of
15 good cause. Rulings on expedited complaints shall be issued within 10 business days, or sooner
16 where necessary.

17 VII. The ombudsman shall, where necessary and appropriate under the law, access
18 governmental records in camera that a public body or public agency believes are exempt in order to
19 make a ruling concerning whether the public body or public agency shall release the records or
20 portions thereof to the public. The ombudsman shall maintain the confidentiality of records
21 provided to the ombudsman by a public body or public agency under this section and shall return
22 the records to the public body or public agency when the ombudsman's review is complete. All
23 records submitted to the ombudsman for review shall be exempt from the public disclosure
24 provisions of RSA 91-A during such review.

25 VIII. Nothing in this section shall affect the ability of a person to seek relief in superior
26 court under RSA 91-A:7, I in lieu of this process.

27 91-A:7-d Appeal and Enforcement.

28 I. Any party may appeal the ombudsman's final ruling to the superior court by filing a
29 notice of appeal in superior court no more than 30 calendar days after the ombudsman's ruling is
30 issued. The ombudsman's ruling shall be attached to the document initiating the appeal, admitted
31 as a full exhibit by the superior court, considered by the judge during deliberations, and specifically
32 addressed in the court's written order. Citizen-initiated appeals shall have no filing fee or
33 surcharge. The public body or public agency shall pay the sheriff's service costs if the public body or
34 public agency, or its attorney, declines to accept service. Nothing in this section shall prevent a
35 superior court from staying an ombudsman's decision pending appeal to the superior court.

36 II. A superior court appeal of the ombudsman's ruling shall review the ruling de novo.

37 III. If the ombudsman's final ruling is not appealed, the ombudsman shall, after the
38 deadline has passed, follow up with all parties, as required, to verify compliance with rulings

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1 issued.

2 IV. The ombudsman's final rulings which are not appealed may be registered in the
3 superior court as judgments and enforceable through contempt of court. If such action is necessary
4 to enforce compliance, all costs and fees, including reasonable attorney fees, shall be paid by the
5 noncompliant public body or public agency.

6 91-A:7-e Rulemaking. The commission shall adopt rules pursuant to RSA 541-A relative to:

7 I. Establishing procedures to streamline the process of resolving complaints under this
8 chapter.

9 II. Content of educational materials under RSA 91-A:7-a.

10 III. Other matters necessary to the proper administration of RSA 91-A:7-a through RSA 91-
11 A:7-d.

12 4 Appropriation. The amount necessary to pay for the position of ombudsman established in
13 RSA 91-A:7-b as inserted by section 3 of this act is hereby appropriated to the department of state
14 for the fiscal year ending June 30, 2020. This appropriation shall be nonlapsing and is in addition
15 to any other funds appropriated to the department of state. The governor is authorized to draw a
16 warrant for said sum out of any money in the treasury not otherwise appropriated.

17 5 Right-to-Know; Violation. Amend RSA 91-A:7 to read as follows:

18 91-A:7 Violation.

19 ~~[I.]~~ Any person aggrieved by a violation of this chapter may petition the superior court for
20 injunctive relief. In order to satisfy the purposes of this chapter, the courts shall give proceedings
21 under this chapter high priority on the court calendar. Such a petitioner may appear with or
22 without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of
23 this chapter, and may be filed by the petitioner or his or her counsel with the clerk of court *or any*
24 *justice thereof. Thereupon the clerk of court or any justice shall order service by copy of*
25 *the petition on the person or persons charged. Subject to objection by either party, all*
26 *documents filed with the petition and any response thereto shall be considered as evidence*
27 *by the court. All documents submitted shall be provided to the opposing party prior to a*
28 *hearing on the merits. When any justice shall find that time probably is of the essence, he*
29 *or she may order notice by any reasonable means, and he or she shall have authority to*
30 *issue an order ex parte when he or she shall reasonably deem such an order necessary to*
31 *insure compliance with the provisions of this chapter.*

32 ~~[II. In lieu of the procedure under paragraph I, an aggrieved person may file a complaint~~
33 ~~with the ombudsman under RSA 91-A:7-b and in accordance with RSA 91-A:7-e.~~

34 ~~III. A person's decision to petition the superior court forecloses the ability to file a complaint~~
35 ~~with the ombudsman pursuant to RSA 91-A:7-e.~~

36 ~~IV. A person's decision to file a complaint with the ombudsman forecloses the ability to~~
37 ~~petition the superior court until the ombudsman issues a final ruling or the deadline for such a~~
38 ~~ruling has passed.]~~

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1 6 Repeal. RSA 91-A:7-a through 91-A:7-e, relative to the citizen's right-to-know commission,
2 office of the ombudsman, complaint process, appeal and enforcement, and rulemaking, is repealed.

3 7 Effective Date.

4 I. Sections 1 and 4 of this act and, RSA 91-A:7-a and RSA 91-A:7-e as inserted by section 3
5 of this act shall take effect July 1, 2019.

6 II. Sections 5 and 6 of this act shall take effect July 1, 2024.

7 III. The remainder of this act shall take effect April 1, 2020.

SB 313-FN- FISCAL NOTE
AS AMENDED BY THE SENATE (AMENDMENT #2019-0651s)

AN ACT establishing a citizen's right-to-know appeals commission and a right-to-know law ombudsman and making an appropriation therefor.

FISCAL IMPACT: ☒ State ☒ County ☒ Local ☐ None

STATE:	Estimated Increase / (Decrease)			
	FY 2020	FY 2021	FY 2022	FY 2023
Appropriation	Indeterminable Increase	\$0	\$0	\$0
Revenue	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Expenditures	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Funding Source:	<input checked="" type="checkbox"/> General	<input type="checkbox"/> Education	<input type="checkbox"/> Highway	<input type="checkbox"/> Other

COUNTY:

Revenue	\$0	\$0	\$0	\$0
Expenditures	Indeterminable	Indeterminable	Indeterminable	Indeterminable

LOCAL:

Revenue	\$0	\$0	\$0	\$0
Expenditures	Indeterminable	Indeterminable	Indeterminable	Indeterminable

METHODOLOGY:

This bill would establish a Citizens' Right-to-Know Appeals Commission and the Office of the Right-to-Know Ombudsman and these provisions would sunset on July 1, 2024. These newly established entities would be administratively attached to the Department of State. While aggrieved parties may still file a petition with the superior court to receive injunction relief pertaining to RSA 91-A violations, this bill establishes an alternative procedure to resolve the complaint with the Office of the Right-to-Know Ombudsman. Additionally, this bill tasks the Commission with establishing administrative rules to implement this bill and making recommendations to the Legislature concerning proposed changes to RSA 91-A.

This bill establishes a \$25 fee, which can be waived, for aggrieved parties to file a complaint with the ombudsman and authorizes the ombudsman to work up to 20 hours a week with their compensation being paid with nonlapsing appropriated general funds in FY 2020. Since it is unknown how many complaints will be filed and how much the ombudsman will be compensated, state appropriations, revenue, and expenditures will be impacted by an

indeterminable amount. Additionally, state expenditures may increase by an indeterminable amount due to this bill authorizing Commission members to be compensated for travel and necessary expenses. Further, any increased administrative costs by the Department of State to support these entities would impact state expenditures.

The Department of State expects the right-to-know commission would be responsible for the preparation and submission of its own budget. The Department has furnished office space available that could be provided to the ombudsman. The Department assumes the position would be classified as an Attorney IV, labor grade 32. Based on the ombudsman working 20 hours per week, the annual salary and benefit cost for the ombudsman would range between \$39,700 and \$56,800 depending on the salary step agreed to upon hiring.

The Judicial Branch states the proposed bill would amend RSA 91-A:7 concerning petitions to the superior court regarding right-to-know violations and would establish an alternative complaint resolution process through the Office of the Right-to-Know Ombudsman established by the bill. The Ombudsman's final ruling would be appealable to the superior court. The potential fiscal impact to the Branch would be in savings if fewer citizens file right-to-know cases in the superior court and do not appeal decisions of the Ombudsman to the superior court. The Branch indicates right-to-know cases have been classified as routine equity cases in the last judicial needs assessment. The Branch has no information on how many fewer right-to-know cases may result from the bill, but provides that the estimated cost of an average routine equity case will be \$265 in FY 2020 and \$269 in FY 2021. These amounts do not consider the cost of any appeals that may be taken following trial. The recent volume of right-to-know cases in the superior court would indicate any savings to the superior court would likely be less than \$10,000. It should be noted that average case cost estimates for FY 2020 and FY 2021 are based on data that is more than ten years old and does not reflect changes to the courts over that same period of time or the impact these changes may have on processing the various case types.

The New Hampshire Municipal Association assumes because the ombudsman process would be less formal than a trial in superior court, the process may be less expensive for litigants than the current process. If so, the Association indicates the bill could reduce municipal expenditures for legal fees. However, the Association suggests a less formal process may encourage filing of more right-to-know complaints. The Association states the effects are likely to vary significantly among municipalities and the impact on municipal expenditures cannot be determined. The Association states there should be no impact on municipal revenues.

AGENCIES CONTACTED:

Department of Administrative Services, New Hampshire Municipal Association, Judicial

Branch, and Department of State