ACLU New Hampshire
18 Low Avenue
Concord NH 03301
(603) 224-5591
aclu-nh.org

Devon Chaffee
Executive Director

nefac
New England First Amendment Coalition
111 Milk Street,
Westborough MA 01581
(508)983-6006
nefac.org

September 6, 2023

BY EMAIL ONLY (Thomas.kehr@sos.nh.gov)

Thomas F. Kehr
Right to Know Ombudsman
State House Annex, Room 313
25 Capitol Street
Concord, NH 03301

Re: Proposed Rules for Right to Know Ombudsman Process;
Public Hearing on September 6, 2023 at 1:00 p.m. at Room 405 of State House Annex

Dear Ombudsman Kehr:

We write on behalf of the ACLU of New Hampshire ("ACLU-NH") and the New England First Amendment Coalition ("NEFAC") to provide comment on the proposed rules for the Right to Know Ombudsman process. *See* Proposed N.H. Admin. R. Rko 100 and Rko 200 (Initial Proposal July 26, 2023). The ACLU-NH and NEFAC regularly litigate cases on the Right-to-Know Law[1] and are dedicated to promoting the right to government transparency that exists in both the Law and Part I, Article 8 of the New Hampshire Constitution.

We initially cite the Preamble of New Hampshire's Right to Know Law at RSA 91-A:1. It reads as follows: "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." We believe that the rules promulgated by the Right to Know Ombudsman should be consistent with and supportive of these constitutional and statutory presumptions in favor of disclosure. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance ….") Furthermore, we believe that the Ombudsman's Office should exercise caution in setting out restrictive rules on access to documents. This is because, as

[1] For example, our offices have co-litigated the following: *Union Leader Corp. and ACLU-NH v. Town of Salem*, 173 N.H. 345 (2020) (overruling 1993 *Fenniman* decision in holding that the public's interest in disclosure must be balanced in determining whether the "internal personnel practices" exemption applies to requested records); and *New Hampshire Center for Public Interest Journalism, et al./ACLU-NH v. N.H. Department of Justice*, 173 N.H. 648 (2020) (holding that a list of over 275 New Hampshire police officers who have engaged in misconduct that reflects negatively on their credibility or trustworthiness is not exempt from disclosure under RSA 105:13-b or the "internal personnel practices" and "personnel file" exemptions; remanding for application of public interest balancing test).

ACLU New Hampshire
Devon Chaffee
Executive Director

18 Low Avenue
Concord NH 03301
(603) 224-5591
aclu-nh.org

nefac

New England First Amendment Coalition
111 Milk Street,
Westborough MA 01581
(508)983-6006
nefac.org

the rules are coming from the "Right-to-Know" Ombudsman, they may be taken as the gold standard for towns and agencies looking to update their own rules.

Our specific concerns with the proposed rules include the following:

1. Proposed Rko 103.01(b): "Pursuant to RSA 91-A: 4, VII, requests for information which would require the office to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by the office shall be denied."

    a. This language is overinclusive relative to the statutory language. RSA 91-A: 4, VII states the following: "Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency." This statutory language only says that an agency is not required to compile or assemble information; however, it does not bar an agency, like the Ombudsman's Office, from compiling or assembling information if that is a more efficient or easier way to respond to a request. In other words, while an agency may not be required to compile information under the statute, it ***may*** do so under the statute. Indeed, Proposed Rko 103.01(c) seems to recognize this flexibility. However, Proposed Rko 103.01(b) seems to outright bar such compilation, which is overinclusive.

    b. Accordingly, we recommend that this provision change as follows: "Pursuant to RSA 91-A: 4, VII, requests for information which would require the office to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by the office ***may*** be denied."

2. Proposed Rko 103.01(d): "Hard copy documents that are existent and available for public inspection may, subject to the limitations, exemptions and restrictions of RSA 91-A, be copied by the office, but not by the requester themselves, at a cost of $0.25 per page, to be paid by the requester in advance of the delivery of the information."

    a. We believe that this provision is needlessly restrictive, especially insofar as it (i) prevents requesters from copying the records themselves at no cost to the Ombudsman's Office and (ii) requires that payment be done in advance of delivery. We recommend deleting such provisions. Moreover, we recommend allowing requesters to copy the requested documents by taking photographs with their phones, which is a common way for reporters to copy records without the need for usage of a photocopier.

ACLU New Hampshire
Devon Chaffee
Executive Director

18 Low Avenue
Concord NH 03301
(603) 224-5591
aclu-nh.org

nefac

New England First Amendment Coalition
111 Milk Street,
Westborough MA 01581
(508)983-6006
nefac.org

b. Furthermore, we ask that the Ombudsman exercise caution in imposing a $0.25 per page fee, as many towns have lower fees, and some do not charge any amount at all. Under RSA 91-A:4, IV(d), such costs must be tied to the "actual cost of providing the copy," which does not include staff time. We ask that the Ombudsman tie this standard to any potential actual cost, and give itself an option to charge less than $0.25 or waive it altogether.

c. We also recommend that "in advance of the delivery of the information" in Rko 103.01(e) be deleted.

d. Accordingly, we recommend that this provision be changed as follows: "Hard copy documents that are existent and available for public inspection may, subject to the limitations, exemptions and restrictions of RSA 91-A, be copied by the office at a cost reflecting the actual cost of providing the copy, though this fee can be waived. Payment is not required if a requester uses their own portable device to copy, scan, or photograph the requested documents."

3. Proposed Rko 103.01(k): "Information which is available in electronic form shall be provided in hard copy if one or more of the following factors would render provision of the material in an electronic format impractical to the office: (1) Unavailability of office staff with sufficient expertise in electronic redaction or transfer of data; (2) Unavailability of proper equipment to accomplish the transfer with appropriate redactions, if any; (3) The prioritization of other work of the office; or (4) Other matters which make it impractical for the office to provide available information in electronic format."

a. This rule appears to discourage, rather than encourage, electronic production. RSA 91-A:4, V states that "any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, *copy governmental records requested to electronic media using standard or common file formats* in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1." Further, under these provisions, the electronic format chosen by the Ombudsman's Office must not diminish ease of use or the public's access to the information. *See Taylor v. Sch. Admin. Unit #55*, 170 N.H. 322 (2017); *see also Green v. Sch. Admin. Unit #55*, 168 N.H. 796, 802 (2016) ("We observe that requiring the defendants to produce the requested documents in

ACLU New Hampshire
Devon Chaffee
Executive Director

18 Low Avenue
Concord NH 03301
(603) 224-5591
aclu-nh.org

nefac

New England First Amendment Coalition
111 Milk Street,
Westborough MA 01581
(508)983-6006
nefac.org

electronic format advances the purpose of the Right-to-Know Law, which is to improve public access to governmental records and provide the utmost information to the public about what [the] government is up to.") (internal quotations omitted). In light of these provisions, it is very common in practice for public bodies to produce information electronically, as it can be more convenient for requesters. We believe that these rules should encourage electronic production, and Proposed 103.01(k) should be changed accordingly.

4. Proposed Rko 220.03 "Limitations on Participation": "Public comment hearings shall be open to all persons, including print and electronic media, subject to the following limitations, when such limitations are necessary to allow a hearing to proceed in an orderly manner: (1) Limitation of the number of persons, including media representatives, who are present, if the combined number of persons present exceeds the capacity of the hearing room."

    a. This provision essentially provides that, if the room is full, people (including members of the press) can be removed. As this would needlessly reduce public access, we recommend that it be stricken in its entirety. We believe that the State can locate hearing rooms sufficient to accommodate all interested citizens. We believe that the exclusion of media representatives would be contrary to the letter and spirit of Part I, Article 22 of the New Hampshire Constitution.

As these rules are finalized, we appreciate your consideration of this feedback. Of course, if you have any questions or would like to discuss additional issues, please do not hesitate to contact us.

Respectfully,

/s/ Gilles Bissonnette
Gilles Bissonnette
American Civil Liberties
Union of New Hampshire
18 Low Avenue
Concord, NH 03301
603.333.2081
gilles@aclu-nh.org

/s/ Gregory V. Sullivan
Gregory V. Sullivan, President
New England First Amendment Coalition
59 Water Street
Hingham, MA 02043
781.749.4141
g.sullivan@mslpc.net