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DEPARTMENT OF JUSTICE**

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ATTORNEY GENERAL



June 29, 2011

Honorable William L. O'Brien
Speaker of the House
New Hampshire House of Representatives
State House
Concord, NH 03301-4988

Re: Request for Opinion regarding Legislative E-Mail

Dear Speaker O'Brien:

I am writing in response to your letter dated April 15, 2011, a copy of which is attached hereto. In your letter, pursuant to RSA 7:7¹, you request an opinion as to "whether an e-mail sent to or received by a legislator via a legislative e-mail address constitutes a 'governmental record' as defined by RSA 91-A:1-a, III."

As a preliminary matter, I am mindful that your request asks me to opine generally on the applicability of the Right-to-Know law to unidentified emails of individual legislators. The New Hampshire Supreme Court has determined that the Right-to-Know law's applicability to the legislature, as least with respect to open meetings, merely codifies internal legislative procedural rules. Statutory questions that pertain to internal legislative procedural rules are subject to the complete control and discretion of the Legislature. *See Hughes v. Speaker of the New Hampshire House of Representatives et. al.*, 152 N.H. 276, 284-288 (2005) (Right-to-Know law merely establishes a rule of procedure concerning how the legislature has decided to conduct its business, unless the procedure is mandated by the constitution). "[E]ach branch of each successive Legislature may proceed to make rules without seeking the concurrence or approval of the other branch, or of the executive, and without being bound by action taken by an earlier Legislature. The legislature, alone, 'has complete control and discretion whether it shall observe, enforce, waive, suspend or disregard its own rules of procedure.'" *Id.* at 284 (citations omitted). As such, while we are happy to respond to your request for an opinion regarding the statute generally, to the extent we opine regarding procedures adopted by the General Court for the conduct of its own business within the parameters of its constitutional authority, we do so with

¹ RSA 7:7 states the attorney general "shall, when required by either branch of the general court, give his opinion upon any question of law submitted to him therefrom."

full regard that the General Court may and should consider our opinion in the informational spirit in which it is offered. We expressly decline to offer any opinion about whether this statutory construction of RSA 91-A is binding on either branch of the Legislature, or is consistent with existing legislative rules or practice.

With regard to the substantive issues raised in your letter, we conclude that, with certain exceptions, many emails sent or received by legislators do not constitute governmental records as that term is used in RSA 91-A, as they are not created, accepted, or obtained by or on behalf of the General Court. In addition, even emails that constitute governmental records may be protected from disclosure under the Speech and Debate Clause of the New Hampshire Constitution.²

Scope of RSA 91-A Governmental Record as Applied to Individual Legislator's Emails

RSA 91-A:1-a defines a "governmental record" as any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."

RSA 91-A:1-a, III.

RSA 91-A:4, I describes the public's right to governmental records as follows:
Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5.

RSA 91-A:4, I. The statute further describes the obligations of public bodies and agencies regarding when and how such records must be maintained and made available. *See* RSA 91-A:4.

The term "public body" is defined to include "[t]he general court including executive sessions of committees; and including any advisory committee established by the general court."
RSA 91-A:1-a, VI(a).³

² Where you have requested an opinion regarding the application of the statute generally and not with respect to specific emails, we respond accordingly.

³ This is in contrast to the language in RSA 91-A:1-a, V, which defines a "public agency" to include "any agency, authority, department, or office of the state...." This distinction contributes to the practical differences in the application of RSA 91-A to the legislative and executive branches.

The first issue is whether individual legislator's emails constitute "information created, accepted, or obtained by, or on behalf of," the General Court. There are no New Hampshire Supreme Court cases on point, so there is no controlling authority on the specific issue presented. At least one Superior Court has found that the emails of individual legislators are private and not subject to disclosure under RSA 91-A as governmental records. In *KingCast.net et al. v. Martha McLeod et al.*, No. 08-E-192 (December 23, 2008), the petitioner requested copies of emails from the personal and state email addresses of two legislators that pertained to a House bill. The court concluded that "[e]ven under the amended version of RSA 91-A, which better addresses electronic communications, the emails would not be subject to public disclosure. They are not 'governmental records' because they were not 'created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function.'" *Id.* at p. 4, n.4. The court also stated, "RSA 91-A:4 does not require individual legislators or government officials to personally make documents available."

It is our conclusion that whether or not a specific legislator's email communication falls within the definition of a governmental record is a fact specific determination. Legislators are voted into office by the citizens and act independently as legislators in their interactions with citizens and each other. Individual legislators receive communications from their constituents seeking information, urging the legislators to take certain positions on pending bills, making complaints about state officials, or on a wide range of other subjects. In conducting these activities, legislators may well be acting within the scope of their duties as legislators. However, performing such duties as individual legislators does not necessarily constitute the performance of an official function by or on behalf of the General Court (including executive sessions of committees and any advisory committee established by the General Court). Individual legislators typically act on behalf of the General Court as a body when they participate in legislative sessions or meetings, vote on specific legislation, or act in a specific leadership role. Each email communication would require a separate factual analysis of whether or not it was created or received by the legislator acting in his or her individual legislative capacity, or was created, accepted or obtained on behalf of the General Court (including executive sessions of committees and any advisory committee established by the General Court). For example, an email exchange between an individual legislator with a constituent on a issue of local interest or pending legislation is unlikely to be a governmental record subject to a requirement of disclosure under RSA 91-A. An email exchanged among a quorum of a standing legislative committee, on the other hand, is more likely to be deemed a governmental record.

You have inquired whether an email would fall outside the scope of a governmental record because the statutory definition refers to a "public body" as opposed to members of the public body. We conclude the phrase "public body" is instructive, but not strictly limiting. A public body of necessity acts through its members. In most instances, a public body acts through an authorized quorum or majority of its members. *See, e.g.*, RSA 21:15; RSA 91-:1-a, VI(c) (public body includes any board or commission of any state agency or authority). However, the definition of governmental records refers to information created, accepted, or obtained by or on behalf of a "public body, or a quorum or majority thereof...." Thus, if an individual member is imbued with authority to act on behalf of a public body, including the General Court, the individual member could presumably create or obtain governmental records. This is further

supported by the statutory language “[w]ithout limiting the foregoing” preceding the provision that includes any written communication or other information, whether in paper, electronic, or other form, “received by a quorum or majority of a public body in furtherance of its official function.” See RSA 91-A:1-a, III. In determining whether particular email constitutes a governmental record, a determination should be made as to the capacity and authority under which the individual legislator is acting in creating or receiving the email.⁴

Finally, you have inquired whether an email would be a governmental record by virtue of being accessible through a “back-up” made by the General Court. We believe a court would conclude that an email is not made a governmental record simply by virtue of its being accessible through a back-up. The accessibility of an email in this manner would not change the nature of the email or its intended purpose. At least one Superior Court has found that back-up tapes created for purposes of disaster recovery and not intended to serve as a record copy of electronic information or as a record retention tool are not governmental records subject to disclosure under RSA 91-A. See *Twomey v. N.H. Department of Justice*, 10-CV-503 (November 24, 2010).

If you conclude that an email is a governmental record, the email may still be exempt from disclosure if it constitutes a confidential record under RSA 91-A:5. For example, an email that is subject to the attorney client privilege would constitute a confidential record exempt from disclosure. See *ATV Watch v. NHDOT*, ___ N.H. ___, slip op. at 12-13 (April 26, 2011). Similarly, to the extent an email reflects a preliminary draft, not in its final form and not disclosed, circulated, or available to a quorum or majority of the members of the public body, it may fall within the draft exception in RSA 91-A:5, IX. See *ATV Watch*, slip op. at 9-10. Thus, if you conclude a particular email a governmental record, you should next consider whether any exemptions apply to the governmental record. In addition to the types of exemptions that arise generally with respect to governmental records, communications by legislators may, by their very nature, give rise to certain confidentiality issues unique to the legislative process, which are discussed in more detail below.

Justiciability of Issue

Whether or not the House or Senate determines that a particular email is a governmental record, to the extent the determination presents a question of the General Court’s compliance with procedures associated with governmental records under RSA 91-A, the issue is likely to be found non-justiciable. In *Union Leader v. Chandler*, 119 N.H. 442 (1979), the newspaper had made a request for a copy of a tape recording of the April 11, 1979 session of the House of Representatives. The Speaker allowed the public to listen to the tape recording, but declined to produce a copy of the tape, and asked for a vote of the full House to support his decision, which was approved. *Chandler*, 119 N.H. at 444. Although not explicit, the Court held, in effect, that

⁴ While the determination would be case specific, some of the factors that would typically be considered in assessing individual email would include the identity of the sender and recipient, the identity of persons copied on the email, the intended purpose of or motivation for the email, and the timing or context of the email. The use of a legislative email address is not necessarily determinative of whether a particular email is a governmental record, although it may show intent or context.

the issue under RSA 91-A was nonjusticiable. *Chandler*, 119 N.H. at 444-45. The Court concluded that:

The House of Representatives, as a separate and coequal branch of government, is constitutionally authorized to promulgate its own rules. N.H. Const. pt. 1, art. 37; N.H. Const. pt. II, art. 22. *See Opinion of the Justices*, 63 N.H. 625 (1885). The House could properly decide, consistent with the right of reasonable public access required by N.H. Const. pt. I, art. 8, that its official tape should not be duplicated or subjected to a so-called voice stress analysis.

Chandler, 119 N.H. at 445.

In other cases, the Court has made it clear that legislative compliance with procedures set forth in RSA 91-A is not subject to judicial review. In *Hughes v. Speaker of the House*, 152 N.H. 276 (2005), the petitioner sought a ruling, in part, that the House of Representatives violated RSA 91-A:2 when members of the House privately negotiated a compromise of a Senate bill. The Court wrote:

We emphasize that the question before us is not whether the Right-to-Know Law applies to the legislature. By the statute's express terms, it does. ... The question before us is whether the legislature's alleged violation of the Right-to-Know Law is justiciable. We have concluded that this question is not justiciable because this legislative enactment "merely establishes a rule of procedure concerning how the legislature has decided to conduct its business," and the legislature has sole authority to adopt such rules of procedure.... "Of course, having made the rule, it should be followed, but a failure to follow it is not the subject of judicial inquiry."

Hughes, 152 N.H. at 288 (citations omitted); *see also Baines v. N.H. Senate President*, 152 N.H. 124, 131 (2005) (whether the legislature violated statutes concerning non-constitutionally mandated legislative procedures is not justiciable).

Underlying its conclusion in *Hughes* that the Legislature's compliance with open meetings requirements of RSA 91-A was not justiciable, was the Court's conclusion that RSA 91-A, like other states' open meeting statutes, is a statute that codifies procedures. In *Hughes*, the particular provision of RSA 91-A at issue pertained to the conduct of meetings. Read broadly, one could argue that *Hughes* stands for the proposition that RSA 91-A in its totality is a statute that codifies procedures, and therefore all claims against the Legislature for asserted noncompliance with the Right-to-Know law would be nonjusticiable. A more narrow reading of *Hughes* would limit the Court's holding to only the specific provisions of RSA 91-A regarding the conduct of meetings. Regardless, we believe a persuasive argument can be made that the provisions of RSA 91-A at issue here regarding governmental records are also procedural in nature.

RSA 91-A:4 sets forth a right to inspect governmental records in the possession, custody, or control of public bodies and the mechanism for doing so. Subparts I and II of this section are

couched in language regarding the rights of citizens to inspect governmental records and minutes of meetings. See RSA 91-A:4, I (“Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records....”); RSA 91-A:4, II (“After the completion of a meeting of a public body, every citizen, during the regular business hours of such public body, and on the regular business premises of such public body, has the right to inspect all notes, materials, tapes, or other sources used for compiling the minutes of such meetings....”). Subparts I-a, II, III-b, IV, V, VI, VII provide directives to public bodies and agencies regarding the methods and procedures for maintenance and production for inspection of governmental records. Reading this section as a whole, it seems fair to characterize it as a statute that codifies procedures for conducting the business of the General Court, in much the same manner as the language at issue in *Hughes*, which addressed what constitutes a meeting and whether they must be conducted in public.

In matters of statutory interpretation, the Court determines the intent of the Legislature as expressed in the words of a statute considered as a whole, rather than construing the provisions in isolation. It construes the statute in harmony with the overall scheme, and in a manner that does not lead to an absurd result. See, e.g., *Chase v. Ameriquest Mortgage Co.*, 155 N.H. 19, 22 (2007); *Monahan-Fortin Properties v. Town of Hudson*, 148 N.H. 769, 771 (2002). While the language in RSA 91-A:4, I, regarding the right of the citizenry to inspect governmental records arguably does not specify procedures for the public body, it cannot fairly be segregated from the corresponding language in RSA 91-A:4, IV, which sets forth a directive to the public body, upon request, to make the governmental records available for inspection. Moreover, a statute defining whether and how the General Court must keep records and make them available to the public seems no less procedural in nature than a statute defining whether and how the General Court must hold meetings.

The House of Representatives could adopt rules of procedure governing legislative meetings and communications that occur outside of meetings, including communications by email. Presumably these procedures would include whether and how such communications by individual legislators would be subject to public disclosure. Compliance with such procedures would not be subject to judicial review. Even in the absence of adopting additional procedures, a fair reading of RSA 91-A and the relevant case law suggests that the Legislature has already adopted as procedures the specific directives in RSA 91-A, compliance with which, again, is not likely subject to judicial review. It is important to note, however, that the New Hampshire Supreme Court has not ruled specifically on the applicability of the nonjusticiability doctrine to emails of individual legislators.

With respect to the General Court’s obligations pursuant to Part 1, Article 8 of the New Hampshire Constitution, the Court has reached a contrary conclusion on the issue of justiciability. “Claims regarding compliance with these kinds of mandatory constitutional provisions are justiciable.” *Hughes*, 152 N.H. at 288 (quoting *Baines v. N.H. Senate President*, 152 N.H. at 130). As such, even if the Legislature’s compliance with RSA 91-A is not subject to judicial review, its compliance with the public access requirements of Part I, Article 8 is likely subject to judicial review.

Constitutional Right of Access

In considering whether individual legislators' emails are subject to disclosure under Part I, Article 8, a court will determine whether any policy adopted by the General Court on the issue is consistent with the right of reasonable public access. We believe a court would provide significant leeway to the General Court on the issue. As stated in *Hughes*, although the issue may be justiciable, the court will tread carefully when reviewing a legislative determination regarding the conduct of legislative business in open or closed session. 152 N.H. at 290.

Part I, Article 8 of the New Hampshire Constitution provides:

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

N.H. Const. pt. I, art. 8. This provision is not coextensive with RSA chapter 91-A. While the legislature may not completely do away with the Right to Know law, it may, from time to time, determine that some areas should be more or less restricted. *Hughes*, 152 N.H. 286-87.

In upholding the Legislature's denial of public access to the negotiations in *Hughes*, the Court balanced the public's right of access against two constitutional interests: the Legislature's constitutional authority to make its own procedural rules and the Legislature's constitutionally protected right to free deliberation and debate. *Id.* The constitution vests in the Legislature the exclusive authority to adopt its own procedural rules, and the question of whether legislative business should be conducted in open or closed session is such a rule. With respect to the second consideration, the Speech and Debate Clause, as discussed in more detail below, assures that the Legislature, as a co-equal branch of government, will have "wide freedom of speech, debate and deliberation without intimidation or threats." *Hughes*, 152 N.H. at 291-92 (quotation omitted). The Court in *Hughes* concluded that the restriction on public access was reasonable, as the public was denied access to only one part of the process—the informal negotiations that led to the final compromise of the bill. Further, as the Court found, informal negotiations are integral to the legislative process. The Court concluded that "the generally public and open nature of the legislative process and the availability of official journals of that process" were sufficient to meet the constitutional mandate of Part I, Article 8. The Court reasoned that the public interest in protecting the Legislature's prerogative to set its own procedural rules and engage in free and frank debate significantly outweighs the public's right of access to the negotiations at issue. Similar factors would be considered by a court in analyzing any policy adopted by the Legislature regarding the public disclosure of individual legislators' emails.

Speech and Debate Clause

RSA 91-A:4, I provides that "[e]very citizen ... has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies... except as

otherwise prohibited by statute or RSA 91-A:5.” There is an argument to be made that the Speech and Debate Clause in Part 1, Article 30 of the New Hampshire Constitution creates an exception to RSA 91-A. In *Keefe v. Roberts*, 116 N.H. 195 (1976), the Court described the Speech and Debate Clause broadly as follows:

This State, in its constitution of 1784 was one of the first to preserve the principle that the legislature must be free to both speak and act without fear of criminal or civil liability.... The cases have read such clauses broadly to effectuate these purposes.... The immunities are intended to protect the integrity of the legislative process by insuring the independence of individual legislators. In order to determine whether a particular act, other than literal speech or debate, is protected by the constitutional privilege, it must appear that the legislator acted within the sphere of legitimate legislative activity. The language of the constitution must be read broadly to include any act ‘generally done in a session of the House by one of its members in relation to the business before it.’... In articulating which activities are to receive the protection of the legislative privilege, the Supreme Judicial Court of Massachusetts ..., stated, ‘I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.’

116 N.H. at 198-99 (citations omitted).

New Hampshire’s Speech and Debate Clause is the equivalent of the speech and debate clause in the United States Constitution. *Hughes*, 152 N.H. at 291. The clause protects legislators with both immunity from suit and a testimonial privilege. *Id.* at 292. The New Hampshire Supreme Court has held that in adopting the clause, “the framers recognized that the public has an interest in permitting legislators to deliberate privately. It is ‘obvious...that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front-page news.’ ... The public has an interest not in protecting government secrecy, but in ‘protecting open and frank discussion among those who make [decisions] within the Government.’” *Hughes*, 152 N.H. at 292 (quotation omitted). Given the constitutional protection afforded to legislative deliberations, even if individual legislators’ emails constitute governmental records, they may constitute confidential records exempt from disclosure pursuant to RSA 91-A:5, particularly where the communications are with each other. In any event, because rules of procedure adopted by the Legislature relating to RSA 91-A are not subject to judicial review, and because an analysis of whether emails are exempt under RSA 91-A would to some extent be similar to an analysis under Part I, Article 8 regarding reasonable access, we address the implications of the Speech and Debate Clause in the context of constitutional access.

In considering the application of the Speech and Debate Clause in *Hughes*, the Court considered the practical need for the Legislature to confer in private in some circumstances. The Court recognized that it would be impractical to require a legislative committee to formulate its

final decision, which may be a report of several hundred pages, in the presence of public representatives. Particularly when complex bills are at issue, legislators engage in informal negotiations outside of public committee of conference meetings, sometimes before the committee is appointed. These informal communications and negotiations are integral to the legislative process. *Hughes*, 152 N.H. at 294-95. In upholding the restriction imposed by the Legislature, the Court recognized that the public's right of access should be accomplished without severely curtailing the efficient operation of government.

Significant to the Court's decision was the fact that the public was denied access to only one part of the process. Legislative sessions at which the bill was discussed were posted, open to the public and recorded. Likewise, formal meetings of the committee of conference and legislative sessions at which the committee's report was debated and voted upon were posted, open to the public and recorded. Official journals published the report and transcripts were prepared and publicly available. *See Hughes*, 152 N.H. at 293; *see also Union Leader v. Chandler*, 119 N.H. at 445.

Similar principles can be applied to individual legislators' emails. Informal communication and negotiations between legislators that take place through legislative email are, as a practical matter, equivalent to informal communications and negotiations that occur regularly in person in the halls of the Statehouse. As such, they should be subject to the same basic principles applied in *Hughes*. It is less clear with respect to emails between individual legislators and constituents, lobbyists, or others. The language in *Keefe v. Roberts* suggests that the New Hampshire Supreme Court would construe the scope of the Speech and Debate Clause broadly. *See* 116 N.H. at 198-99 (privilege covers everything said or done by legislator, as a legislator, in the exercise of the functions of that office). However, case law regarding the federal speech and debate clause distinguishes between acts done in relation to the business before Congress and other legislative activities, such as certain constituent services, which, although entirely legitimate, are political in nature. *See United States v. Brewster*, 408 U.S. 501, 512 (1972) (distinguishing between things said or done in the House or Senate in the performance of official duties and a wide range of legitimate "errands" performed for constituents, such as making appointments with government agencies, assisting in securing government contracts and preparing newsletters); *see also Hughes*, 152 N.H. at 291 (New Hampshire's Speech and Debate Clause is the equivalent of the speech and debate clause in the United States Constitution). Sending or receiving communications from constituents or advocates seeking information or urging the legislator to take certain positions on pending bills may therefore constitute acts that are "within the sphere of legitimate legislative activity" for a legislator, but may not be afforded the same protection by a New Hampshire court under Part I, Article 30. Again, the emails should be considered in terms of content and context to determine whether they fall within the scope of legislative business and to balance the public right of access with the Legislature's need to confer in private.

In sum, individual legislators' emails may, in some instances, constitute governmental records under RSA 91-A:1-a. However, they may still be exempt from disclosure pursuant to the exceptions in RSA 91-A:5 and the Speech and Debate Clause in Part I, Article 30. Even if the emails do not constitute governmental records because they were not created, accepted, or

Hon. William L. O'Brien, Speaker of the House

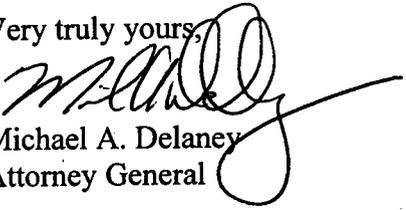
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obtained by, or on behalf of, the public body as opposed to the individual legislators, they would still be governed by Part I, Article 8, and could be subject to disclosure under this provision. Nevertheless, we believe a court would apply the balancing test in *Hughes* and likely conclude in many instances that the emails are exempt from disclosure pursuant to Part I, Article 30.

I trust this responds to your inquiry. If you have further questions, please do not hesitate to contact me.

Very truly yours,


Michael A. Delaney
Attorney General

MAD/smg

Enc.

cc: Honorable Peter Bragdon
Senate President

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