



SUMMARY OF THE CENTER'S POSITION ON HB 1356

March 11, 2010

It is NH Center for Nonprofits' position that House Bill 1356 will negatively impact the nonprofits directly affected and could well be the first step on a path leading to problems for the entire nonprofit sector if the reach of the law is extended to all nonprofits at some future date.

New Hampshire's Right-To-Know Law, RSA 91-A, establishes a person's right of access to meetings of "public bodies" and to the records of "public bodies" and "public agencies." To read the right-to-know law, go to: <http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-VI-91-A.htm>

To read the NH Attorney General's Memorandum on New Hampshire's Right-to-Know law, go to: <http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-VI-91-A.htm>

HB 1356 as amended makes certain 501(c)(3) nonprofits "public agencies."

STATUS: HB 1356, as amended, is scheduled to be taken up on the House floor on March 17 or 18, depending on how the House progresses with the business before it.

CONTENT OF THE BILL: This bill makes 501(c)(3) any nonprofits and their affiliates subject to the open records portion of the Right-To-Know Law if they have annual revenues exceeding \$100,000 and receive 50% of funding from state and local government sources. Records exempt from the law include natural person donor records, client-attorney records, and juvenile records. Other laws make other types of records exempt (HIPAA for example). Most "public agency" meetings are not subject to the open meetings portion of the Right-To-Know Law, unless they hold hearings. It is doubtful that 501(c)(3) organizations would hold such hearings.

1. There are already many levels of public accountability for nonprofits that accept government funding. Therefore, this bill is unnecessary.

- Government contracts and grants require a great deal of reporting and oversight. Therefore, the public already has access to significant information.
- The public has access to the Form 990 that nonprofits file with the IRS and the Annual Report required by NH law; both provide detailed information on governance and finances.
 - Annually the IRS Form 990(new for 2008) requires information in detail on governance and management, all revenues and expenses, a balance sheet with detailed assets and liabilities, contracts, leases, compensation, a description of exempt purpose program achievements. These are publicly available. Form 990 contains 16 schedules requiring detailed information. A person can request the Form 990 from the nonprofit or they can view it on Guidestar.org.

- Annual financial reports must be filed at the NH DOJ Charitable Trusts Division. These are publicly available. These reports include a detailed statement of revenues and expenses, a description of individual program services provided and their cost and revenues, a listing of names and addresses of officers, directors and trustees, a balance sheet with detailed assets and liabilities.
- State contracts are written by the State, which imposes reporting requirements and obtains information from nonprofits that is discoverable according to the terms of the existing right-to-know law. Contracts over \$5,000 are subject to Governor and Council approval.
- State grants funding passes through the Legislature in the budget process, and grants are generally subject to Governor and Council approval. Information supplied by nonprofits in response to reporting requirements set by the State are discoverable according to the terms of the existing right-to-know statute.

2. Making board and committee records¹ open to the public could have adverse effects on the responsiveness of the nonprofit sector.

- Responsiveness is at risk when significant burdens are imposed on the decision-making structures of nonprofits.
 - How would your staff respond to a right-to-know law request? Would your organization be forced to suspend its operations in order to comply with a major right-to-know request or a plethora of right-to-know requests? An enormous amount of work can be involved in producing records and in reviewing them to remove confidential information exempt from 91-A, then redacting that information, and justifying why it was redacted.
 - Nonprofits work with already-stretched resources and do not have the personnel to dedicate to producing records within the short time period the statute requires. (The good news is that the nonprofit must make the records available for inspection and copying. The requestor pays the expenses of copying.)
 - Personnel would have to be moved from other tasks to comply with right-to-know requests, which would impact the services provided.
 - A right-to-know request does not have to be reasonable, according to the right-to-know law. It stands on its own. A requestor can seek all records for a number of years, for example, and it isn't hard to imagine the burdens imposed on a nonprofit with that kind of request.
 - The cost of legal fees would divert scarce resources from services, affecting the ability to be responsive. All disputes about a nonprofit's compliance with the right-to-know law can be brought to court by the person making the request.

¹ Records that can be requested under the right-to-know law are “any information created, accepted, or obtained by, or on behalf of, any ... public agency in furtherance of its official function. Without limiting the foregoing, the term ... records includes any written communication or other information, whether in paper, electronic, or other physical form.... “Information” means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.” (See, RSA 91-A:1-a, IV.)

3. We have significant concerns about the effect this proposal would have on governance.

- Nonprofit boards consist of volunteer community citizens who serve because of their dedication to the organization's mission, their community connections and their outside experience. These volunteers are held by law to a high standard of conduct and are subject to the fiduciary duties applicable to all non-profit entities.
- Responsible nonprofit stewardship requires board members to freely express their views and provoke a full and frank discussion of issues.
- Having records accessible by the public may inhibit the free expression of ideas and opinion by the volunteer board members.
- Some people may decide never to volunteer for a board, or they may resign from boards—this would diminish the capacity of nonprofits to achieve their missions.

4. The added burden on nonprofits that the bill imposes far outweighs any public benefit.

- Opening records up to the public would provide the public with information, but no mechanism to influence outcomes based on that information. An organization's governing body is not elected by the public and cannot be voted out of office.
 - The governing body of a nonprofit owes a legal duty of loyalty and a legal fiduciary duty to the nonprofit organization.
- There is little benefit to the public when weighed against the added burden to the nonprofit.

5. The public should not have access to organization records and documents that are not related to public funding.

- Nonprofits are supported by many sources besides government funding. The amended bill exempts donor information from being produced. But there are other sources of funding that are not government funding. The bill allows the public to have access to those records.
- Board and committee work and are not organized by funding stream, but they are organized around subject area. Thus minutes (records) will not distinguish between programs and other items related to public funding and those that are unrelated to public funding. Organizing all records by funding stream may not make sense for the vast majority of nonprofits.

Please realize that nothing in this document is legal advice.

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