

ADDENDUM TO ANNUAL REPORT OF THE RIGHT TO KNOW OMBUDSMAN

April 14, 2025

Since January 1, 2025, the RKO has received over 40 additional “inquiries,” including 11 newly filed cases relating to the following entities:

Town of Milford

Manchester School District

Town of Hill

Merrimack County

Town of Walpole

City of Keene

Town of New Durham

Town of Mont Vernon

NH Department of Health and Human Services

City of Portsmouth

Town of Seabrook

The Office is currently scheduling hearings in June (hearings and conferences are posted on the RKO website at: <https://www.sos.nh.gov/administration/office-right-know-ombudsman>). Persons filing complaints at present are being advised of the potential expiration or adjustment of the office on July 1, 2025. The office currently has 29 open cases in various stages of finalization. Since the inception of the office, 56 filed cases have now been finally concluded.

***FIRST ANNUAL REPORT OF THE
OFFICE OF THE NH RIGHT TO KNOW
OMBUDSMAN***

Covering the period from January 27, 2023 to December 31, 2024

Date: February 5, 2025

Reporting requirement: Rko 102.04



Thomas F. Kehr

State of New Hampshire
Office of the Right to Know Ombudsman

State House Annex, Rm. 12
25 Capitol Street
Concord, NH 03301
Telephone: (603) 271-3277

Title page per MOP 2500, II, C, 2

Date: February 5, 2025

To:

The Honorable Kelly Ayotte, Governor of New Hampshire
and the Honorable Joseph D. Kenney; Karen Liot Hill; Janet L. Stevens; John A.
Stephen; and David K. Wheeler, members of the Executive Council

The Honorable William Gannon
Chairperson of the NH Senate Judiciary Committee

The Honorable Robert Lynn
Chairperson of the NH House Judiciary Committee

The Honorable Gordon MacDonald,
Chief Justice, New Hampshire Supreme Court

The Honorable Mark E. Howard
Chief Justice, New Hampshire Superior Court

Attached pursuant to the requirements of administrative rule Rko 102.04 please find the first "annual" report of the Office of the New Hampshire Right to Know Ombudsman, covering the period from January 27, 2023 to December 31, 2024.

Respectfully submitted,

Thomas F. Kehr, Esq.
NH Right to Know Ombudsman

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I. Introduction to the Office

The Office of the Right to Know Ombudsman (commonly known as the “RKO”) is an independent executive branch state agency created by Laws 2022, Ch. 250 with the somewhat competing goals of providing the public with a “simpler, less expensive, and faster” alternative to the Superior Court in resolving complaints under RSA 91-A, the State’s “Access to Governmental Records and Meetings” law, commonly known as the “Right to Know Law.” See Laws 2022, Ch. 250:1. The Office was first staffed entirely by one individual on January 27, 2023, and remains so staffed today. Unless renewed (and funded) prior to July 1, 2025, the office is currently set by law to expire on that date. See Laws 2022, Ch. 250: 1, 6 and 7. A bill (HB 111, 2025 session) has been drafted which would, if adopted, extend the existence of the office by two years. Future funding of the agency, if any, would presumably be through either the normal state budgetary process or through a stand-alone bill such as HB 111.

The current RKO’s term of office (and hence the functions of the office) will end on July 1, 2025, unless the RKO is recommissioned or replaced by another funded appointee *prior* to that date. The current administrative rules of the RKO establish what will become of pending cases should the office expire, or should the RKO himself die or become incapacitated while in office. See administrative rules Rko 218.02 and Rko 218.03.

The office hears cases involving all levels of state and local government, including agencies of the state itself, cities, towns, counties, school districts and other entities. See Section VII D below. It performs all of its own scheduling and clerical tasks, and virtually all of its own administrative duties.¹ The RKO’s workload is entirely dependent upon whether a member of the public has a dispute with New Hampshire state, local or county government that cannot be informally resolved between the parties, and if that person elects to bring the matter to the RKO’s attention, rather than to pursue a potentially broader action in the New Hampshire Superior Court.

¹ Personnel of the Secretary of State currently perform functions including processing of the RKO’s payroll; processing of filing fees paid to the RKO; preparation of RKO-generated materials for posting on a web site hosted by the Department of State; fulfillment of some requests for agency procurement; and, pursuant to RSA 21-G: 10, I, the physical submission of required reports and budgetary submissions, without change.

The office is not a court, and hence does not possess the broad jurisdiction to address the wide variety of underlying matters which might ultimately give rise to a separate request/dispute under the Right to Know Law. Although at times it might seem counterintuitive to participants in the process, the office (unlike a court), does not possess the institutional authority to directly decide whether or not a matter which comes before it involves a violation of the constitutional provision that RSA 91-A implements and buttresses (NH CONST., Pt. 1, Art. 8, "Accountability of Magistrates and Officers; Public's Right to Know"). Like all agencies of New Hampshire government, however, it must nonetheless be mindful of that provision in all of its operations, including when assessing the requirements of RSA 91-A. Like a court, the single-person agency is institutionally unable to simultaneously serve both as a neutral decision-maker and as an advocate for those involved in cases which come before it.

In short, the RKO's core task is *limited* to assessing whether the facts of a case demonstrate that the provisions of RSA 91-A itself have been violated, while simultaneously endeavoring to encourage parties to informally resolve complaints. See RSA 541-A:38.² At times the RKO's task includes determining what, if any, remedies might appropriately be imposed upon a party in case of a violation the Right to Know Law by a public entity, or in the case of conduct by a claimant which is "frivolous, unjust, vexatious, wanton, or oppressive," or which is pursued in "bad faith." See RSA 91-A: 8.

As the office's operative statute is written, only a "party aggrieved" by a violation of RSA 91-A, and not a public body or agency itself, may initiate a claim before the office. See RSA 91-A: 7-b, I and II.

Although the RKO is its own state agency, it is attached to the Department of State for administrative purposes. It nonetheless exercises its powers, duties, functions and responsibilities independently of that department, and without the approval or control of the Secretary of State. See RSA 91-A: 7-a; RSA 21-G: 10, I (a).

² As a matter of policy, in cases before an executive branch state agency "[e]xcept to the extent precluded by law, informal settlement of matters by nonadjudicative processes is encouraged. This section does not require any party or other person to utilize informal procedures or to settle a matter pursuant to informal procedures." RSA 541-A:38.

Review of the RKO's substantive work is by way of appeal to the Superior Court. See RSA 91-A: 7-c.

II. Preface

The requirement that the RKO submit an annual report to **(1)** the Governor and Executive Council; **(2)** the New Hampshire Senate and House Judiciary Committees, and **(3)** the Chief Justice of the New Hampshire Supreme and Superior Courts first arose on May 20, 2024, the effective date of the administrative rules adopted by the RKO during its first year and a half of existence. See Rko 102.04. Accordingly, this is the first "annual" report submitted by this office. In fact, it covers activity from January 27, 2023 to December 31, 2024.

RSA 21-G: 10 I (c) states that an "administratively attached" agency shall submit required reports through the agency to which it is attached. Hence, this report has been submitted through the Department of State. The Right to Know Ombudsman is, however, entirely responsible for its content.

Chapter 2500 of the Governor and Executive Council/Department of Administrative Service's Manual of Procedures ("MOP") establishes instructions regarding the preparation and submission of annual reports to the Governor and Executive Council. The present report includes the elements set forth in the Manual, but since the RKO is a new and experimental agency (the first of its kind in this state), and since this report must also be submitted to entities in addition to the Governor and Executive Council, it includes additional detail so as to allow those entities to consider the progress of the agency.

III. Organizational Chart (MOP 2500, II, C, 3)

Right to Know Ombudsman

Thomas F. Kehr, Esq.

IV. Outline of Agency Functions and Organization as Designated by Statute, Regulations or Other Guideline (MOP 2500, II, C, 4)

A. *General Overview*

The functions of the Office of the Right to Know Ombudsman are primarily set forth in RSA 91-A: 7-a through 7-d, as well as in the provisions of the State's Administrative Procedure Act (RSA 541-A).

Broadly, RSA 91-A: 7-b:

1. Enables the RKO to accept "signed, written complaint[s], along with a \$25 filing fee" (unless waived due to an "inability" to pay) from a "party aggrieved," if the complaint "states facts constituting a violation of this chapter" (RSA 91-A);
2. Requires the RKO itself to provide governmental units with a copy of the complaint, and allow those units 20 days to answer;
3. Authorizes the RKO to review complaints and take various actions thereon;
4. Authorizes the RKO to issue rulings upon whether there have been any violations of RSA 91-A within 30 calendar days of the "deadline for receipt of the parties' submissions"³;
5. Enables the RKO to extend or expedite certain dates for good cause;
6. Enables the RKO to conduct *in camera* reviews⁴ to determine whether materials previously withheld should be released;

³ Given principles of procedural due process, the time when a matter is actually "submitted" for decision varies greatly from case to case.

⁴ That is, private reviews, not open to the public.

7. Enables the RKO to "order attendance at hearings"⁵;
8. Instructs that RKO hearings shall generally be open to the public;
9. Specifically allows the RKO to draw negative inferences from a party's failure to participate and comply with orders during the review process;
10. Enables the RKO to address the "remedies" available under RSA 91-A: 8 to the same extent as may the Superior Court; and
11. Authorizes the RKO to issue findings (decisions) in writing to all parties.

By its nature, the RKO deals with "contested cases." Accordingly, laws relating to the established administrative procedures for "contested cases" in the executive branch also govern its functions. In addition to addressing requirements relating to the conduct of "adjudicative proceedings" (formal "hearings"), the provisions of the Administrative Procedure Act include RSA 541-A: 38, which admonishes that informal resolution of complaints between the parties is encouraged, and RSA 541-A: 29, which provides in part that within 60 days of the receipt of an "application, petition, or request" of a party, an agency shall either approve it, deny it or commence an adjudicative proceeding by issuing an Order of Notice.

RSA 91-A: 7-c provides that appeal of the RKO's final decisions are to the NH Superior Court. On appeal, the Court is to "treat all factual findings of the ombudsman as prima facie lawful and reasonable, and shall not set them aside, absent errors of law, unless it is persuaded by a balance of probabilities on the evidence before it that the ombudsman's decision is unreasonable." There is no

⁵ Unlike a court, the RKO does not possess specific subpoena power to order the attendance of witnesses who are not a party to a case (and over whom it therefore presumably has no jurisdiction) and, unlike a court, the RKO does not have the independent ability to enforce any order of appearance. Presumably, its orders would be enforceable through action in Superior Court. See RSA 91-A: 7-c, IV.

requirement that the RKO be notified of whether or not a case decided by the office has been appealed.

RSA 91-A: 7-d requires the RKO to adopt certain administrative rules in accordance with the long-established processes of RSA 541-A. See Section IV, B and VII, C below.

In brief, during the period covered by this report the RKO was tasked by the legislature with performing quasi-judicial functions within the confines of various statutes, while also undertaking organizational, clerical and administrative duties, as well as the functions which are incumbent upon any state executive branch agency, such as responding to fiscal note worksheets from the Legislative Budget Assistant; answering Right to Know requests; posting notices of public proceedings; and considering its budget.

B. Background Information

"Inquiries" regarding the filing of complaints were first received by the RKO prior to the effective date of his commission.⁶ Upon assuming office, the RKO's immediate responsibilities included the requirement that it establish administrative rules relating to:

1. Procedures to streamline the process of resolving complaints under RSA 91-A;
2. Hearing procedures; and
3. Other matters necessary to the proper administration of RSA 91-A: 7-a through RSA 91-A: 7-c.

See Section VII, C below ("Rulemaking").

Administrative rules are not legally capable of being adopted prior to the time that a rulemaking authority empowered to do so exists. Thus, the office's

⁶ An "inquiry" is defined by the RKO as "a potentially disputed matter brought to the attention of the office by a potential party prior to the filing of a complaint, or a general question presented to the office regarding its procedures or issues involving RSA 91-A." See Rko 101.01 ("Definitions"), paragraph (q).

proposed administrative rules were incapable of being adopted by the RKO prior his assumption of office.

Since the office's core duties, including the acceptance of complaints, were required to commence immediately upon the RKO's swearing-in on January 27, 2023, the RKO was required to engage in the resolution of cases even while developing the rules that would ultimately define the operations of the Office of the Right to Know Ombudsman.

RSA 541-A: 30-a, V provides that a state agency which does not have administrative rules addressing its procedures shall apply the rules on model procedures relative to adjudicative proceedings developed by the Department of Justice. Accordingly, subject to certain modifications, the RKO used the Department of Justice's "model rules" (known as "Chapter Jus 800") in addressing contested cases that arose in the period before the office could itself adopt procedural rules. Within the first month and a half of the office's actual existence (by which time a number of cases had already been formally filed), the RKO issued a "General Procedural Order" honing the model rules to more closely fit the abbreviated timeframes applicable to the Office of the Right to Know Ombudsman. **See Appendix F**, attached.⁷ The office operated under the model rules and "RKO General Procedural Order 1 (Pre-Rulemaking)" (3/17/23) until May 20, 2024, when its own rules became effective. Some older cases remained subject to Chapter Jus 800. The RKO's own rules have applied to all cases with docket numbers after RKO 2024-017.

The RKO must hold the qualifications set forth in RSA 91-A: 7-a (including the requirement that he be an experienced member of the New Hampshire Bar). The RKO must therefore be cognizant of a significant number of ethical obligations and constraints. Those are now more specifically enumerated in Chapter Rko 300 of the office's administrative rules. The RKO endeavors to make it clear to persons contacting the office that, although the title of his office might suggest otherwise, the office has effectively been established as a neutral quasi-judicial entity, and that, accordingly, the RKO cannot *also* serve as a party's advocate, and

⁷ Although not required, General Procedural Order 1 was initially presented to attorneys of the Office of Legislative Service's Rules Unit to confirm compliance with operative administrative law.

cannot represent either party in proceedings before the office. See e.g. Sample Notification Letter at **Appendix C**, attached.

V. Personnel Data, Including Current Number of Unclassified, Classified, and Temporary Employees (MOP 2500, II, C 5)

One unclassified employee, the Right to Know Ombudsman, (appointed December 21, 2022, effective January 27, 2023, for a term ending July 1, 2025), Labor Grade GG, Step 5. See RSA 94: 1-a, I.

VI. Summary of Receipts and Expenditure data, Including Disbursements to Cities, Towns and to State Agencies (MOP 2500, II C 6)

There have been no disbursements by this office to cities, towns and state agencies. In light of the RKO's functions, this is not a matter which would generally arise in the course of the office's activities.

Succinctly stated, the RKO has strived to keep its expenses to the bare minimum necessary for the performance of its required functions, within the confines of its limited appropriations. In other words, in the period covered by this report, the RKO has endeavored to expend as few state funds as possible while it establishes its existence and identifies its true, basic, minimal needs (should the office continue to exist into the future).

At the outset of the office, work space, electronic/computer equipment, cubicle space, a telephone, paper supplies, filing cabinets, and miscellaneous other supplies were provided for the RKO's use by the Department of State, without charge to the RKO itself. Ownership of significant equipment remained (and remains) with the Department of State. When the RKO began its operations in 2023, personnel of the Secretary of State also procured certain materials for the RKO under the RKO's own budget (e.g. a digital recording device for the required recording of hearings; flash drives; cassette backup tapes; paper supplies; mailing envelopes; and one treatise). Miscellaneous small items were loaned to the RKO

by the Department of Administrative Services (“DAS”), and the RKO brought some furnishings and equipment of his own to the assigned office space, so as to immediately facilitate commencement of operations on January 27, 2023 (e.g. a cassette recorder with tapes, chairs, small tables, lamps, a camera, office supplies and white boards). During 2023, after the office’s establishment within the state’s accounting system, RKO agency funds were used to obtain from the DAS Surplus Property Program a conference table and chairs for conducting in-office proceedings. Other materials for office use, such as additional filing cabinets, a clock, a backup microcassette recorder and a heavy-duty stapler were obtained without charge to the RKO through the DAS State Surplus Property redistribution program. See DAS administrative rules, Part Adm 611.

During 2024, due to renovations of the State House Annex, and while still receiving pleadings and hearing cases, the RKO was required to physically move the location of its office to space which was not able to accommodate hearings and conferences. The RKO returned or transferred most of its previously acquired furnishings, retaining in its possession the more significant equipment owned by the Department of State, and items personally belonging to the RKO.

In calendar years 2023 and 2024, most offices in the State House Annex were required to move their location so as to accommodate renovations. The resultant clearing of offices enabled the RKO to literally retrieve additional supplies from refuse piles in the building. The RKO has endeavored to maintain a written inventory of all items procured, obtained, salvaged or borrowed by the office, regardless of its value.⁸ Currently, as the State House Annex undergoes renovations, hearings and conferences are generally scheduled by the RKO for an available facility controlled by the Department of State which is located near the RKO’s office in the State House Annex.

The RKO’s budgets for fiscal years 2023, 2024 and 2025 (July 1, 2022 to June 30, 2023; July 1, 2023 to June 30, 2024; and July 1 2024 to June 30, 2025) were developed before the RKO was staffed, and the office was therefore not involved in any discussion of its practical operational needs. The next state budget that will

⁸ DAS MOP 2400 provides that only items with an original purchase price of \$250 or more and a life expectancy of one year or more is “equipment” subject to state fixed asset reporting. The RKO itself has no such equipment.

be under consideration (FY 2026 -2027) relates to a period when the RKO might or might not exist.

Expenditures during the period covered by this report consisted primarily of the RKO's salary and benefits, miscellaneous expenses such as office supplies, and postage related to the required mailing of notifications, orders and other items. As to the magnitude of those expenses, in the period from July 1, 2024 to December 31, 2024, the RKO has incurred \$402.854 in actual postage charges plus \$35.280 for the DAS mail room surcharge (**\$438.134** total). In full FY2024 (July 1, 2023 – June 30, 2024, the only full fiscal year of the RKO's actual institutional existence), postage and surcharges totaled **\$789.362**.⁹ Various other expenditures made or arising in the period covered by this report (January 27, 2023 – December 31, 2024) amounted to under \$5,000. It should be noted, however, that the Department of State absorbed some of the RKO's costs, including the cost of about 6 ink/toner cartridges, about 60 reams of paper and about 1,000 envelopes of various size. Most significantly, it has provided the RKO with office space without charge to the agency.

The office received \$25 per case for 74 of the 75 cases filed in calendar years 2023 and 2024 (a total of **\$1, 850**), which was allocated as general fund revenue.

VII. Major Accomplishments of Agency During the Period, With Statistical Information Kept to a Minimum (MOP 2500, II C7)

The major accomplishments of the office in the period covered by this report fall into the following categories:

- A. Establishment of Office Procedures;
- B. Public Information;
- C. Rulemaking; and

⁹ Postage figures do not include 54 first class postage stamps used for office mailings in the period before the RKO possessed a state mail code, or which were otherwise used by necessity.

D. Case and Inquiry Management.

A. Establishment of Office Procedures

During the period covered by this report, the RKO was required to establish both its administrative and practical existence. Apart from administrative tasks, such as identifying the need for its own state postage and photocopier code so as to properly allocate agency expenditures, the RKO endeavored to swiftly create methods to document and streamline its internal procedures, operations, and activities. Perhaps most significantly, it created an "Intake Sheet" and "Intake Checklist" to assure its swift and proper management of incoming cases for which a fee is received. See "Intake Sheet" and "Intake Checklist," **Appendices A and B**, attached.¹⁰ These items in part highlight the initial expenditure of RKO time that is required when a case is first received. See also Section VIII, A below. From the outset of its operations, the RKO has also kept a binder of forms used by the office, as well as operative templates for common correspondence, such as initial letters of notification and Orders of Notice; a running "case and contact list" so as to document all contacts with the office and to ensure that they are addressed; a "Right to Know" tracking list; and, for the purposes of internal case management, a narrative report identifying the status of each case. The "status report" is normally a draft internal case management tool, but it is finalized on a periodic basis, as time allows. When ultimately finalized, and no longer in "draft" form, it is available for public review.

B. Public Information

Since the Office was established in 2022 but could only began its actual institutional existence on January 27, 2023, it became evident almost immediately that much of the RKO's time would be devoted to advising interested parties of

¹⁰ Different intake sheets and checklists exist for cases in which no fee accompanies the complaint, highlighting the internal procedures which would generally be used for processing such cases. Internal management tools are periodically revised and updated based upon actual case experience.

the nature of the office; the general outline of its responsibilities, limitations, and operations; and what it is “up to.”

1. Web Page and Telephone Information

While simultaneously engaged in addressing actual cases and initiating required rulemaking, the RKO sought to announce its existence by establishing an internet presence. The content of the RKO’s web site, now located at <https://www.sos.nh.gov/administration/office-right-know-ombudsman>, is the responsibility of the RKO alone, but the actual mechanics of posting materials in an accessible manner was undertaken by personnel of the Department of State, who (with the thanks of this office) continue to regularly update materials as requested by the Ombudsman.

The website evolved over the course of time, as recorded in the “past notices” section now found on that website. At present, the main page contains a brief overview of the office; a frequently-updated list of case hearings; a link to the administrative rules of the office; fillable complaint, response and appearance forms; answers to frequently asked questions; and such important notices as may arise.

The RKO is himself responsible for scheduling and rescheduling case conferences and hearings. This time-consuming necessity occurs often. Each time a matter is scheduled or rescheduled, notice of this fact is publicly posted almost immediately, both on the office’s web page and in hard copy at locations around the State House complex. Physical postings are done by the RKO himself. A copy of the notice is at the same time forwarded to personnel of the Secretary of State for placement online. Updates of the “Notice of Case Hearings” on the RKO’s website generally occur at least once a week, and frequently more often.

On September 27, 2023, the John W. King New Hampshire Law Library requested from this office “substantive and procedurally substantive” decisions of the RKO, and began regularly posting them on its *own* website, thereby providing an accessible source of public information about the general activities of the RKO without substantial burden to either this office or the personnel of the Department of State. Those posted materials are available at <https://courts-state->

nh-us.libguides.com/c.php?g=1314994&p=10101511 (also accessible through a link found in the “past notices” of the RKO website, [4/3/24]). Due to administrative changes at the library, on September 24, 2024 it suspended its request for copies of RKO decisions. Accordingly, substantive and “procedurally substantive” decisions of the RKO have not been publicly posted since that time, but are available from the RKO upon request.

It became immediately obvious in January of 2023 that telephone inquiries posed an issue for the RKO. The office, like all state agencies, is required to be responsive to public inquiries, but telephone inquiries which are placed to a one-person office that is tasked with being a neutral decision-maker (sometimes about an existing dispute) can be problematic. *Ex parte* contact¹¹ with the office is generally prohibited. Unsolicited calls to the RKO have the potential to place him in a difficult position should a call be from a claimant or potential claimant seeking guidance from an agency which, as structured, is institutionally incapable of serving as an advocate. Communications with the RKO about issues in a case without the involvement of the opposing party runs the risk that the RKO will be accused of bias; requires the RKO to document the contact lest the caller is, or may become, a party to case; and raises the possibility that it will be claimed that the RKO should recuse himself from a matter.¹²

Regrettably, the practical difficulties presented by unsolicited calls ultimately required the RKO to avoid regularly answering unknown incoming calls. Instead, the RKO crafted a voicemail message in which it endeavored to address the types of questions or procedural misconceptions that became common. Based upon actual experience in telephone communications, the message was

¹¹ Contact is “*ex parte*” if it is “done for, in behalf of, or on the application of, one party only.” BLACK’S LAW DICTIONARY 517 (5th ed. 1979).

¹² Although the RKO is not a court, its inability to engage in case communications outside of the context of an established proceeding; its inability to express informal impressions based upon undeveloped or extraneous facts; its inability to serve as a party’s advocate; and the rules regarding recusal from a case all foster the broad state constitutional principle that it is the right of every citizen to be heard by decision-makers “as impartial as the lot of humanity will admit.” NH CONST., Pt. 1, Art. 35.

honed over time, increased in length, and continues to be periodically updated. It is now in its lengthy twelfth iteration. See Appendix G.¹³

As has been suggested by several persons, the RKO believes that it would be useful to create an "RKO's User's Guide" which succinctly and accurately provides the public with information regarding RSA 91-A and summarizes the functions, limitations and rules of the office. The RKO has to date been unable to turn to this task while simultaneously performing his other duties. Although this is a matter outside of the scope of this report, if the office of the RKO continues to exist (and should budgetary constraints allow), the RKO would recommend that it be provided with assistance in matters including the creation of a "User's Guide," either by the loan of an employee from another agency, the securing of an independent contractor, or by the assignment of a knowledgeable part time employee.

2. Right to Know Requests

As of the end of calendar year 2024, the Office had received 43 inquiries which might best be described as either "Right to Know" requests to the Office itself, or the "substantial equivalent thereof." These have generally been requests for case information; copies of decisions or pleadings (or a request for review thereof); and requests forwarded to the office based upon a misunderstanding of what information the office actually holds, or based upon a misunderstanding of what the office actually does. All such requests, whether mistakenly directed or not, must be addressed in a manner that is in accordance with RSA 91-A: 4, IV, and all 43 have been personally addressed by the RKO.

C. Rulemaking

Administrative rulemaking can be a daunting and time-consuming task. Since administrative rules are law, their creation involves not only the formulation of workable concepts, but also public input; technical drafting according to the

¹³ The message is in need of update to reflect, *inter alia*, the posting of the RKO rules in the NH Code of Administrative Rules, but issues involving the telephone system to which the RKO is connected have delayed the creation of the 13th iteration of the voicemail message.

well-established (but generally unfamiliar) principles of RSA 541-A (the New Hampshire Administrative Procedure Act) and the *New Hampshire Drafting and Procedure Manual for Administrative Rules*; and review by the General Court's Joint Legislative Committee on Administrative Rules ("JLCAR").

Public involvement in the rulemaking process is encouraged, and may be of even greater importance in the case of the RKO, an agency which in part focuses upon the responsiveness of government.

The RKO began to address agency rulemaking immediately after assuming office. As a new entity, it received numerous comments regarding the potential functioning of the agency, both by way of informal communication; in the course of rulemaking; and in the course of actual cases. In view of this interest, the RKO began rulemaking proceedings by soliciting general public input about the office. This was done by the issuance of a formal "Request for Advance Public Comment on Subject Matter of Possible Rulemaking." See NH Rulemaking Register of February 16, 2023. The RKO presided over an advance public comment hearing, which is an entirely optional step in the New Hampshire rulemaking process, on March 1, 2023, about a month after the office began operations.

Thereafter, in accordance with the *New Hampshire Drafting and Procedure Manual for Administrative Rules*, the RKO drafted "Initial Proposals" for Chapter Rko 100 (Organizational Rules); Chapter Rko 200 (Procedural Rules); and Chapter Rko 300 (Ethical Standards).¹⁴ As required by law, the substance of the proposed rules, and the date of an associated mandatory public comment hearing, were noticed in the *NH Rulemaking Register of August 10, 2023.* See Rulemaking Notices 2023-172 and 2023-173. Notification of rulemaking proceedings was also made by posting hard copy notices in the State House complex, and by notification on the RKO's website. That website was routinely updated to advise the public of the agency's progress in rulemaking. Those updates also sought to familiarize the public with New Hampshire's generally unknown rulemaking process. The progress of the RKO's rulemaking, as well as explanations of suggestions made during public comment periods, can be reviewed in the "Past

¹⁴ RSA 541-A: 16 specifically requires all agencies with rulemaking authority to address at least the topics covered in Rko Chapters 100 and 200.

Notices" section of the RKO website at

<https://www.sos.nh.gov/administration/office-right-know-ombudsman/past-notices> (2/7/23 - 6/3/24).

The required public comment hearings on the Initial Proposals for the rules were held on September 6, 2023. The RKO again personally presided. Comments were received, and adjustments to the proposals were made. It was evident from the required hearing that members of the public desired even *further* opportunity to comment on the office's final rulemaking proposals. Accordingly, on January 22, 2024 (although again not a required step in the New Hampshire rulemaking process), the RKO held an additional public comment hearing on its draft final rule proposals. See *NH Rulemaking Register* of January 11, 2024.

In addition to attorneys of the Office of Legislative Services rules unit, persons or organizations offering oral or written comment over the course of the RKO's rulemaking included members of the public, participants in cases before the office, the New Hampshire Municipal Association, Right to Know NH, the NH Press Association, the New England First Amendment Coalition, and the American Civil Liberties Union of NH. The majority of the comments related to obtaining copies of items held by the RKO's own office. Other comments would have expanded the RKO's institutional authority beyond that which the RKO believes is found in its enabling statute, or involved commentary on the requirements of rulemaking themselves.

The "final proposals" for Rko 100, 200 and 300 which the RKO ultimately drafted were submitted to JLCAR for review on March 15, 2024, and were unanimously approved on the Committee's "consent calendar," without debate.

After a period of required "proofing" for public posting in the NH Code of Administrative Rules (accomplished with the assistance of a legal intern loaned from the Department of Justice, to whom the RKO expresses his thanks), the RKO formally adopted Chapter Rko 100 (Organizational Rules), Chapter Rko 200 (Procedural Rules) and Chapter Rko 300 (Ombudsman's Ethical Obligations) on April 9, 2024. The rules apply to cases filed on or after May 20, 2024 (that is, to cases coming after case docket number RKO 2024-017).

The adoption of the rules necessitated changes to the RKO's website, including creating and posting technologically workable complaint, appearance and response forms. The RKO's internal documents, such as the office's standard notification letter, also required adjustments. The rules went into effect shortly before the RKO was required to physically move the location of his office. This required editorial revision to rule Rko 102.02 (a), which states the address of the office.

The agency's rules may now be found in the Code of Administrative Rules at gc.nh.gov/rules/state_agencies/rko.html

D. Case and Inquiry Management

1. Inquiries

In calendar year 2023, the RKO received 138 "inquiries."¹⁵ Inquiries vary greatly in type, ranging from requests for procedural or substantive guidance, to press inquiries, to questions regarding particular cases, to Right to Know requests, to misunderstandings regarding the authority of the office, to other matters. Like all state agencies, the RKO must be responsive to inquiries. The RKO must also, however, be cognizant of the limitations placed upon an agency which consists of a single quasi-judicial official, at times making the office unable to provide all of the informal case guidance that an inquirer might wish. In calendar year 2023, **37** of the **138** inquiries became formally filed cases.

132 inquiries were received in calendar year 2024, **38** of which became filed cases. Thus, there have been a total of **270** "inquiries" to the office from the time it was first staffed until December 31, 2024. The office endeavors to respond to all inquiries, regardless of their nature, within 5 business days.

¹⁵ Included in the 2023 total are 4 inquiries that were received in December 2022/January 2023, before the RKO took office. In other words, inquiries to the RKO nominee/appointee regarding office procedures and/or the filing of complaints began prior to the time that there was an RKO, while the current office-holder was actively employed by a different state agency. The first inquiry received after the office was staffed came within approximately two hours after the RKO took his oath of office and, 3 days later, became the office's first filed case.

As noted, some of the inquiries received were, or became, filed cases. All other inquiries have been concluded. Considerable RKO time is spent reviewing, documenting and responding to inquiries, the majority of which currently arrive by e-mail. Not infrequently, other work of the office is slowed due to the need to respond to walk-in, e-mail or hard copy inquiries.

At times, the simple existence of the RKO might be used in a manner which helps to amicably and informally resolve disputes under RSA 91-A. For example, a claimant who believes that access to available public documents has been delayed contrary the requirements of RSA 91-A: 4, IV might communicate with a public body or agency (with or without copying the RKO) to say that they plan to file a complaint with the office unless a particular record which is not exempt from public disclosure is swiftly provided. Such communication might aid in familiarizing a public body or agency with the existence of this nascent office, and of the fact that action might now be pursued by submission of a relatively small filing fee, rather than the substantially larger fee required to pursue an RSA 91-A complaint in court. The RKO suspects that this shared knowledge might at times motivate potential parties to communicate meaningfully, and/or lead to the production of available materials without the necessity of actual intervention by the RKO.

As of the date of this report, the RKO has fielded a total of 282 inquiries of various types. Of this this total, 77 constituted filed cases. This includes inquiries (including 2 filed cases) so far received in calendar year 2025.

2. Cases

For ease of statistical reference, each case filed with the RKO is assigned a docket number indicating the year in which it was filed and a number indicating the order in which it was received (for example, "RKO 2026 – 012"). As suggested by commentators during the rulemaking process, cases are also assigned a title which indicates the number of filed claims made to the RKO against that particular public body or agency since January 27, 2023 (for example, "In Re: Town of X – 002.")

As of the date of this report, 29 matters are currently open. Those cases are in varying stages or development or finalization. Since the office is scheduled to

expire on July 1, 2025, it is possible that cases will be pending before the office at that time. If so, they would presumably be addressed in accordance with Rko 218.02.

A review of the RKO's cases reveals the number of persons submitting complaints against particular governmental entities. This, and the office's system of case docketing, allows for the general overview that appears in **Table 1** below. It should be noted that some single cases are filed against more than one entity, and that some cases filed against one or more entities have subsequently been consolidated. This results in what might appear to be slight discrepancy in various statistics, depending upon precisely what information is actually being analyzed, and the time period under consideration.

Table 1

Total "respondent" governmental units from the initial staffing of the RKO on January 27, 2023 to 12/31/24 (i.e., up to case # RKO 2024-038)

<u>Municipalities:</u>	<u>Number of Matters</u>
Belmont	1
Brookline	1
Canterbury	1
Chester	1
Deering	1
Effingham	1
Epping	1
Franklin	1
Goffstown Public Library	1
Grafton	2 (same claimant in both cases)
Hampton	1
Haverhill	4 (3 by one claimant)

Hill	1
Hinsdale	1
Hudson	1
Kensington	1
Littleton	2
Milford	2
Moultonborough	1
New Boston Planning Board	1
Newbury	1
Newmarket	3 <i>(same claimant in all 3 cases)</i>
Northumberland	1
Nottingham	1
Pelham Cemetery Trustees	1
Portsmouth	1
Raymond	1
Rochester	4 <i>(2 cases filed by one claimant were subsequently consolidated)</i>
Roxbury	1
Salem	1
Sunapee	1
Thornton Zoning Board	1
Wakefield	1
Warner	1
Wolfeboro Police Commission	1 <i>(single complaint also filed against Carroll County)</i>

Total: 46

State entities:

Department of Corrections	2
Department of Education	1
Department of Environmental Services	1
Department of Health and Human Services:	3
Department of Natural and Cultural Resources	1
Department of Safety	1
Department of State	2 (both cases involved the same matter. The first case was dismissed for failure to pay the required fee. It was subsequently refiled with payment)
Department of Transportation	1
Office of Professional Licensure and Certification (Real Estate Commission)	1
Governor's Office for Emergency Relief and Recovery ("GOFERR")	1 (subsequently consolidated with Housing Finance Authority case below)
NH General Court - House Election Committee	1
NH Housing Finance Authority	1 (subsequently consolidated with GOFERR case above)
Office of the Governor	1
Total:	17

School Districts

(does not include entities which have been identified as "school departments" of a municipality)

Amherst	3
Laconia	2
Milton	1
Newfound	1
White Mountains (Profile District)	1
<i>Total:</i>	8

Counties:

Carroll:	3 (2 by one claimant; one other case also involving the Wolfeboro Police Commission as a co-respondent)
Merrimack (Sheriff)	1
<i>Total:</i>	4

NH Technical Institute: **1**

Total respondents complained against (some duplicate): 76 (in 75 cases)

Since some governmental entities were respondents in more than one case, as of December 31, 2024, RKO cases were filed against **56 different** respondent entities (**35** municipal units, **13** state entities [one in the legislative branch], **5** school districts, **2** counties and **1** technical institute [college]).

Since December 31, 2024, 2 additional cases have so far been filed.¹⁶ Thus, as of the date of this report, the office has handled **77** separate cases (some of which were subsequently consolidated).

¹⁶ The 2 cases so far filed in 2025 involve the Town of Milford (Conservation Commission) and the Manchester School District.

In regard to the 75 cases filed with this office from January 27, 2023 to December 31, 2024:

59 respondent governmental units have appeared through an attorney;

53 claimants have appeared entirely *pro se*, without another representative;

7 claimants have appeared through an attorney;

6 respondent governmental units have appeared solely through a non-attorney representative;

5 respondent governmental units have appeared both through an attorney and a non-attorney representative;

3 claimants have appeared through a non-attorney representative;

3 claimants have appeared both as their own representative and through an attorney;

3 claimants have appeared both as their own representative and through a representative not admitted to the NH Bar;

1 claimant appeared through out-of-state in-house counsel;

1 claimant was an attorney appearing on their own behalf;

In **5** cases it was unclear at the time of case resolution whether a respondent governmental unit would appear through an attorney or non-attorney representative;

In **4** cases it was unclear at the time of case resolution whether a claimant would appear through a representative or instead pursue the matter solely as their own representative.

One case involved the participation of an intervenor in addition to the claimant and respondent. In that case, the intervenor appeared through a New Hampshire attorney.

VIII. Case Management/Case Flow

A. *Initial Intake*

The number and timing of complaints filed with the office is entirely outside of the control of the RKO, and the filing of a complaint requires immediate action on the part of the office, regardless of other work obligations. It is therefore important that the office document cases and inquiries that are pending, and that the RKO have the ability to swiftly adjust priorities. At times, this alone involves a significant commitment of time.

Under RSA 91-A: 7-b, II, once a complaint has been filed, the RKO must himself provide copies of the complaint to representatives of the public body or agency complained against. See RSA 91-A: 7-b, II. Administrative rule Rko 203.06 (a) provides that this must be done within 3 days of receipt of the complaint. Thus, when a case is received, it requires the RKO to immediately:

(1) Verify proper payment of the required \$25 fee under RSA 91-A: 7-b, I, or verify the "inability of pay" the fee. See administrative rule Rko 203.04;

(2) Document payment and deliver it for processing by personnel of the Department of State (Corporate Division);

(3) Conduct internet research to determine which individuals within the public body or agency must appropriately be notified. See Rko 203.06 (c), implementing RSA 510: 10 (which in part sets forth generally accepted means of providing legal notice to various entities);

(4) Make the appropriate number of copies of the complaint and any attachments, for the governmental unit complained against, with a copy to the claimant and another for the RKO's case file;

(5) Calculate and internally calendar operative dates, such as the date by which the respondent's answer to the complaint is due under RSA 7-b, II, and the date by which an "Order of Notice" must be issued by the RKO under RSA 541-A: 29;

(6) Review the complaint for potential deficiencies and potential provision of notice thereof;

(7) Review the RKO's case and contact list to assign the matter a case name and docket number;

(8) Craft a letter advising appropriate parties of the filing of the complaint and of the next steps in the RKO process. See sample notification letter at **Appendix C** to this report;

(9) Open an electronic and hard copy case file, updated as necessary;

(10) Begin a narrative case history, updated as necessary;

(11) Produce and make copies of case-specific appearance and response forms;

(12) Make copies of the signed notification letter;

(13) Prepare a package for mailing to the parties, containing, at least, the complaint, the notification letter, and the required appearance and response forms;

(14) Create mailing labels; and

(15) Mail the notification package.

The foregoing generally consumes about two hours of the RKO's immediate time for each new complaint that is filed, and sometimes substantially longer, depending upon the magnitude of material that a claimant chooses to submit with a complaint, and the nature of the complaint itself. Case filings arise on an unpredictable basis (see **Appendix E**, "Case Filings by Month, 2023 – 2024").

As noted in Section VII, A above, the office has developed intake sheets and intake checklists to assist in case management. See *e. g.* "Intake Sheet" and "Intake Checklist" for cases in which the fee is received, **Appendices A and B**, attached.

The RKO requires hard-copy filings by parties. Parties' e-mail communication with the office is not generally encouraged. Unlike a court, the RKO possesses no potentially costly (but secure) electronic filing system which

would, as a practical matter, enable it to accept electronic payments and confirm the authenticity of electronic submissions. It also does not possess the buffer of a clerk to assist in precluding intentional or unintentional attempts to engage in prohibited *ex parte* contact with the decision-maker. The RKO believes that hard copy pleadings are presently the most efficient way for the RKO to deal with submissions in cases, although in particular cases e-mail pleadings have sometimes been allowed. Moreover, if a case from the RKO is appealed, it is possible that a court might request the office's file on the matter. A member of the public might also seek to review pleadings in a case. A hard copy file exists in complete physical form and generally might be delivered relatively easily. If a matter involves email communications, the provision of a full file requires the RKO to spend otherwise avoidable administrative time locating and printing messages for inclusion in the official case record.

B. Post-Response Activity

After a response to a complaint is received, the RKO must review the pleadings, and (within 60 days from the date of the filing of the complaint) either approve the claimant's complaint (that is, find a violation of RSA 91-A), deny the complaint (that is, dismiss it, or find no violation), or issue an Order of Notice establishing dates for future conferences or hearings. See RSA 541-A: 29. As a general matter of due process, many matters filed with the office require the issuance of an Order of Notice and, at least, an on-the-record conference. A sample "Order of Notice" appears at **Appendix D** to this report.

Although time expenditures vary greatly depending upon what the parties have chosen to submit to the RKO, the creation and issuance of an Order of Notice, generally requires about 2 hours of RKO time. This includes file review; drafting the document; scheduling matters so as not to conflict with other cases or other RKO duties; booking appropriate and available hearing space; and actual issuance of the order. As of the date of this report, the RKO is scheduling proceedings in the months of April and May, 2025.

The RKO's current office is of insufficient size to hold public proceedings and, like initial case intake, issuance of notices has considerable impact upon the

time available for the RKO's other duties. RKO proceedings are generally open to the public, see RSA 91-A: 7-b, III (c) and RKO 211.03. Accordingly, each time a proceeding is scheduled, the RKO must update the hearing list appearing on the agency's website and physically post notices of proceedings in appropriate locations around the State House complex.¹⁷ See RSA 91-A: 2, III. Scheduling updates (and rescheduling as requested by the parties) generally occurs at least once or twice a week, often more frequently.

C. *Motions and Conferences*

A "motion" is defined as "a request to the presiding officer for an order or ruling directing some act to be done in favor of the proponent of the request, which includes a statement of justification or reasons for the request." Rko 101.01 (t). Such requests may arise in a case (or, simultaneously, in a number of cases) at any time, and might cover a virtually limitless array of topics, including but not limited to motions to dismiss a claimant's case; requests to continue or reschedule case proceedings; motions for the use of alternative procedures; requests for *in camera* review of withheld documentary materials; motions for expedited rulings; motions for a default judgment under RSA 541-A: 31, V (a); and requests for the award of costs and fees against an opposing party. Motions are usually followed by an objection from the opposing party. When a motion is filed, the RKO must document it for the purposes of internal case management; review it; determine whether a hearing is required; and ultimately issue a ruling. Under RSA 541-A: 29, a determination on a motion must generally be issued by an executive branch agency within 60 days, but, in view of the provisions of RSA 91-A: 7-b, V, the RKO generally endeavors to issue a ruling upon motions in approximately half that time (30 days from the date of [or set for] the filing of any objection). If possible, motions requiring a hearing are generally heard at the time of the prehearing conference in a case.

¹⁷ Web postings require the RKO to update the hearing list, but actual posting of that document to the web in an appropriately accessible format is done for the RKO by personnel of the Department of State, to whom thanks is extended. Currently, hard copy notices are posted on the RKO notice board outside Room 12 of the State House Annex; on the public notice board found in the basement of the State House near the cafeteria; and on the door of the location where hearings and conferences are to be held. Due to renovations of the State House Annex, there is currently no public notice board on the main floor of the State House Annex.

Informal prehearing conferences are generally held between the RKO and the parties *in person* in Concord, the state capital and a relatively central geographical location. The RKO has found it productive for parties in a case to actually meet both the RKO and each other face to face. Initially, conferences were held in space provided to the office by the Department of State at Room 313 of the State House Annex. That space proved functional for the work of the office, but renovations to the State House Annex required the Department of Administrative Services to move agency offices in that building as work is being conducted. In May and early June of 2024, the Department of State Corporate Division, and hence the "attached" RKO, was required to physically relocate its office to other space made available to the Department of State. During that move, the office was also required to receive new pleadings and conduct other business on pending cases, notifying all parties and potential parties of its new location. Some disruption to office operations ensued, and the RKO expended substantial time in relocating to Room 12, in the basement of the Annex.

Since the relocated space cannot accommodate public conferences and hearings, the RKO undertakes the task of booking conference space in that building as needed.¹⁸ As a general matter, conferences and hearings are held in Room 5 of the State House Annex, which the RKO books through the Secretary of State's Corporate Division. That space is itself undergoing renovations.

It has been noted by various persons that the term "ombudsman" is not one that is typically applied to an agency charged with being a neutral decision-maker in contested cases. However, the legislature's use of that term for the office, combined with (1) the admonition that the office is to "resolve complaints" (disputes) arising under RSA 91-A: See Laws 2022, Ch. 250:1, and (2) the state's policy that "informal settlement of matters by nonadjudicative processes is encouraged" (RSA 541-A:38), suggests that, to some degree, the RKO's role should *also* resemble that of a mediator between the public and governmental units in matters relating to the requirements and limitations of the Right to Know Law.

¹⁸ All hearings held during in the period covered by this report have been conducted at the State House Annex in Concord. In January of 2025, for reasons particular to the case, the RKO held its first off-site hearing at the Grafton, NH Town Hall.

The RKO endeavors to explore the possibility of nonadversarial resolution at prehearing conferences. Although such conferences are open to public observation and held on the record, and although they might at times involve hearings on motions, conferences are generally conducted informally. The RKO usually covers a broad range of issues at these informal conferences, including the statutory functions of the office; the limits of the RKO's authority; the rules or proceedings that will be applied in resolving the matter (with or without modification); his general understanding of RSA 91-A; issues within the scope of the RKO's authority which the parties actually believe are in dispute; as well as other matters. See RSA 541-A: 31, V (b) – (c) (providing potential topics for discussion at prehearing conferences). In other words, it is at prehearing conferences where the RKO endeavors to determine whether the parties can reach an informal agreement that might resolve the case, and perhaps foster a greater joint understanding of the provisions of the Right to Know Law.

The time spent on motions varies significantly from case to case. For example, a motion to compel production might be addressed in a few hours. A motion to reschedule might itself require little time for consideration, but if a matter is then actually rescheduled, as often occurs, the RKO must spend time adjusting his, and potentially the parties', schedules. Disruption of the office's operations, and needless expenditure of the RKO's time, occurs if a party simply fails to appear for a duly scheduled proceeding without prior notification, as sometimes occurs. In this regard, the RKO may "draw negative inferences from a party's failure to participate and comply with orders during the review process." RSA 91-A: 7-b, IV.

Motions for *in camera* review (a request that the RKO review documents that are claimed as confidential, in private, so as to make a determination of the appropriateness of claimed redactions or exemptions) vary greatly in magnitude. Some request review of only a few pages, and some request simply that the public be excluded from the presentation of particular evidence. On the other hand, the first case actually filed with this office in January of 2023 involved the RKO's independent *in camera* review of over 700 pages of redacted material. One matter involving a request for expedited action required immediate ruling by the

RKO prior to the date of a public meeting, regardless of the status of other cases which were then pending. That matter was resolved within 8 days for filing.

In short, time expenditures on the myriad of motions which might be filed by the parties arise on an unpredictable basis, and are of unpredictable magnitude, frequently involving scheduling adjustments. All require the RKO to issue a written order, and, of course, each prehearing conference must be followed by "a prehearing order incorporating the matters determined at the prehearing conference." RSA 541-A: 31, V (d). Thus, the RKO is generally engaged in substantial deliberation, writing, and administrative work even before a "final decision" is issued in a case.

D. Adjudicative Proceedings

If the RKO concludes that a matter cannot be decided on the written pleadings, and if the parties are unable to resolve their dispute informally, the office holds an adjudicative proceeding. Each case filed with the office is different, and adjudicative proceedings do not occur in the majority of cases. When they do occur, such proceedings have similarities to the judicial process. As in court, testimony is heard under oath, and documents and other materials are marked for the record as formal exhibits. The process might be viewed as somewhat daunting to some (but not all) nonattorneys, but it is designed by laws including the Administrative Procedure Act to be less daunting than pursuit of an action in the judiciary.

To the extent necessary, the RKO endeavors to explain an adjudicative proceeding at prehearing conferences, as well as in written materials. Neither RSA 541-A; RSA 91-A, 7-b; Chapter Jus 800 ; nor the RKO's own rules require a party's representative to be admitted to the New Hampshire Bar in order to appear before the Ombudsman.¹⁹ Perhaps the most significant difference between an adjudicative proceeding and an action in court, however, is that RSA 541-A: 33, II

¹⁹ The matter of the potential creation of a rule on "common representation" by non-attorneys was raised at the time of the RKO's initial rulemaking proceedings, but no such rule was adopted at that time. Rule Rko 202.02 was specifically "reserved" to address that issue should the RKO deem it necessary in the future.

clearly provides that the rules of evidence which apply in court “*shall not* apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence” (emphasis added).

Once a conference or hearing is held, the RKO downloads an electronic audio of the proceeding on the office’s computer system so that it will be readily available by transfer to a thumb drive, should the recording be requested. The RKO also maintains a magnetic cassette backup tape of proceedings.

The work of the office, including conferences and hearings, is often interrupted by the need for the RKO to locate parking near the facility and/or to feed a parking meter so as to avoid receiving a citation.²⁰

E. Decisions

The Right to Know Law is to be interpreted to provide “the *utmost* information to the public about what its “government is up to,” Colquhoun v. City of Nashua, 175 NH 474 (2022) (emphasis added); See also RSA 91-A: 1 (the purpose of the statute “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). RSA 91-A: 7-b, V provides that the RKO is to “determine whether there have been any violations of this chapter [*RSA 91-A*] and issue a ruling within 30 calendar days following the deadline for receipt of the parties’ *submissions*,” unless extended for good cause (emphasis and parenthetical added). The statute does not specifically state when a case is actually “submitted” for a decision, and motions; the allowance of time to fully answer a complaint; the need to clarify pleadings; failures to attend; continuances; and other procedural matters normally means that a case is not ripe for decision within 30 days of its first being filed. Most deadlines imposed upon the RKO are expressed in calendar days.

²⁰ As parties to cases before the RKO are aware, parking which is convenient to the RKO’s work location is often extremely limited, particularly when the legislature is in session. The RKO’s parking is at his own expense, amounting to approximately \$5 - \$10 per day of office work, Sundays and holidays excluded.

Accordingly, when combined with other duties, weekends, evenings and holidays are often "work time" for the office.

The types of issues which have come before the RKO have been extremely varied, in some cases involving broad, contentious and unresolved issues of law, including but not limited to the question of the meaning of the word "citizen" as used in RSA 91-A. See Order on Prehearing Conference, In Re: City of Rochester – 002, RKO 2023-018. Some matters have involved the question of who might properly be considered an "aggrieved party" under the Right to Know Law. Other cases have involved issues concerning police investigations or the potential identity of individuals involved in other investigations; whether an individual may bring a claim under RSA 91-A *not* because a governmental unit has *failed* to provide requested information, but instead because it might have provided more information than might technically be required; and the problematic issue of what occurs when a single-agency decision-maker believes there are grounds to recuse himself from a case. See Decision on Recusal, In Re: Town of Hill – 001, RKO 2023-023. Some cases have involved claims by members of public bodies against other members of public bodies. One matter involved the need for an expedited ruling in advance of a public meeting. See Decision Regarding Expedited Proceeding, In Re: Town of Chester – 001, RKO 2024 – 015. The majority of the cases brought to the attention of the office have, however, primarily involved a claim that a governmental entity failed to properly respond to a document request within 5 business days (by either granting the request, denying it, or providing a written statement of the time reasonably necessary to determine whether the request will be granted or denied), rather than a claim regarding an allegedly improper meeting. Of the "document" cases, the greatest number relate to either unreasonable delay or an allegedly improper claim of exemption from disclosure, sometimes requiring the RKO to conduct a private review of documents under RSA 91-A: 7-b, VI. See e.g. Order Regarding In Camera Review, In Re: NH Department of Transportation – 1, RKO 2023-001.

Following a substantive decision in a case, the RKO is at times asked by the prevailing party or parties to address an additional matter: the availability of "remedies" under RSA 91-A: 8. While such requests are often for costs and fees against one or both of the parties, the statute also allows the RKO to impose other

remedies, such as “civil penalties,” or order that public officials undergo “appropriate remedial training” in the requirements of the Right to Know Law. The Supreme Court has observed that the ability to obtain an award under RSA 91-A: 8 is critical to securing the rights guaranteed by the statute, since without it the statute would often be a “dead letter.” Colquhoun v. City of Nashua, 175 NH 474 (2022). Not surprisingly, disputes regarding the application of RSA 91-A: 8 are sometimes among the most contentious matters addressed in a case.

Final rulings of the RKO are subject to appeal to the Superior Court. See RSA 91-A: 7-c. The RKO is not necessarily advised if a case has been appealed and therefore cannot provide data in that regard. To date, no cases have been remanded to this office for further action.

IX. Significant Legislation Passed During the Current or Special Session Directly Affecting the Agency’s Responsibilities (MOP 2500, II C 8)

In the period covered by this report, no significant legislation has been passed which directly affects the agency’s responsibilities, but changes to RSA 91-A are not uncommon, and any change to that statute potentially impacts the work of the RKO if a complaint is brought which relates to those legislative changes. Since January 27, 2023, RSA 91-A: 2, RSA 91-A:3 and RSA 91-A: 4 have been amended. The changes to RSA 91-A, 2 deal with “the quorum of meetings open to the public to include remote presence.” See Laws 2023, Ch. 188. The changes to RSA 91-A: 3 deal with “minutes from nonpublic sessions under the right to know law.” See Laws 2023, Ch. 189. The changes to RSA 91-A: 4 deal with costs for electronic copies; the scope of liability of public body for damages in a civil action relating to the disclosure of exempt information; and with suggestions to modify a Right to Know request. See Laws 2024, Chapter 49.

If passed in the 2025 session, HB 111 would directly affect the RKO by extending the existence of the office for two years.

Although not “legislation,” but rather an overall discussion of the law relating to RSA 91-A, and therefore a resource for members of the public, public bodies, and public agencies alike, on March 14, 2024 the New Hampshire Attorney General updated the Department of Justice’s “Right to Know Memorandum.” It is

currently available on the Department of Justice's website at:
<https://www.doj.nh.gov/resources/forms-publications/right-know>.

Although also not "legislation," but nonetheless constituting law (see RSA 541-A: 22, II), the administrative rules of the Office of the Right to Know Ombudsman became effective on May 20, 2024 and can be found at:
https://gc.nh.gov/rules/state_agencies/rko.html.

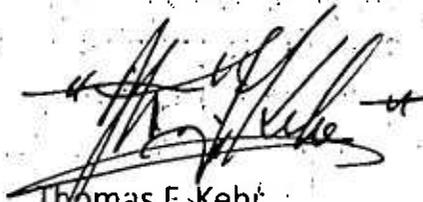
X. Conclusion

In the period covered by this report, the Office of the Right to Know Ombudsman has evolved from an experimental legislative concept into an executive branch agency of state government which, on a limited budget, performs functions traditionally associated with the judiciary, albeit within the confines of its enabling legislation and the Administrative Procedure Act. Its basic rules and protocols have been established, and it has assisted in resolving or averting a number of cases which might otherwise have been the subject of judicial dispute. Since, by its nature, the office deals with contested cases, it is likely that at least 50% of those who are involved in the RKO process will be dissatisfied with the office's actions. The parameters of the office's duties remain somewhat misunderstood by those who become aware of its existence, suggesting the need for better educational outreach. Public participation in the evolution of the office has been welcomed, particularly through the established procedures of the New Hampshire rulemaking process.

In endeavoring to fulfill the statutory objectives of Laws 2022, Ch. 250, the RKO has been required to be something of a "jack-of-all-trades," including by performing functions traditionally associated with a neutral, intellectually independent, quasi-judicial decision-maker; a research assistant/law clerk; a rule-writer; a scheduling clerk/clerk of court; a "mediator;" an administrative assistant; a public information officer; a purchaser; a receptionist; a mover; and an agency head (albeit an agency head with personnel management responsibilities relating only to himself), often at the same time. Moreover, the current RKO believes that the office has been a productive initial experiment, the success or failure of which

cannot fairly be judged based solely upon its brief and formative period of initial institutional existence. If the office continues to exist beyond July 1, 2025, and if it is hoped that it might undertake additional initiatives, the RKO believes that its current staffing is unsustainable in the long-term, particularly if it experiences an increase in case filings as its existence and core functions become better known.

Respectfully submitted,



Thomas F. Kehf
NH Right to Know Ombudsman

APPENDICES

Appendix A - "Fee Paid" Intake Sheet

Appendix B - "Fee Paid" Intake Checklist

Appendix C - Sample Notification Letter

Appendix D - Sample Order of Notice

Appendix E - Case Filings by Month 2023 -2024

Appendix F – RKO General Procedural Order 1 (Pre-Rulemaking)

Appendix G – Twelfth RKO Voicemail Message

Appendix A - "Fee Paid" Intake Sheet

Case No.	Case Name	Case Type	Case Status	Case Date	Case Fee	Case Paid
101
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"FEE RECEIVED" RKO INTAKE SHEET

1. **NAME OF CLAIMANT:** _____

2. **NAME OF RESPONDENT:** _____

3. **FEE RECEIVED?** _____ Y (If no, use Form 9)

4. **MATTER NAME** (*"In re" name of respondent followed by a number indicating number of complaints received against entity since 1/27/23*) Check ongoing electronic case list for any prior complaints against respondent of that name:

5. **DOCKET NUMBER** (*year, followed by what number of case this is for that year; If no fee received, docket with suffix "NF." Strike the suffix if fee subsequently received*)

6. **DATE CLAIM RECEIVED** (*date stamp on document*):

7. **DATE COMPLAINT SENT TO RESPONDENT BY RKO** (*To be done immediately. Use Template/Form 4 - together with an appearance form for both parties; a response form for respondent; [and copy of RKO General Procedural Order 1 for matters initiated before rule adoption]*):

8. **DATE BY WHICH NOTICE OF DEFICIENCIES IN COMPLAINT MUST BE NOTED UNDER RSA 541-A:29** (*Ideally, this is done immediately, if the deficiency is obvious, such as when (A) no fee or request for waiver thereof is received or (B) no copy of the request that was made to the agency and/or agency response is attached to complaint. Deficiencies should be noted no later than 30 days from the date in 6 above. Obvious deficiencies should be included in letter sent under 7 above*)

9. **ACKNOWLEDGMENT AND RESPONSE DUE** (20 calendar days from when RKO provides complaint to respondent, normally calculated from date in line 7 above. See RSA 91-A: 7-b, II):

10. **DATE BY WHICH APPROVAL, DENIAL OR ISSUANCE OF ORDER OF NOTICE DUE** (21st day after filing of complaint [i.e. the day after the response date in 9 above] and, per RSA 541-A: 29, 60 days from initial request or corrected filing [normally the date in line 6 above] at latest):

Earliest: _____ Latest _____

11. **FINAL DETERMINATION DUE DATE** (30 calendar days from deadline for receipt of parties' "submissions." What constitutes the parties' "submissions" will vary by case. For this form, calculate 30 days from response date in 9 above, as this is the earliest possible due date):

12. **"FOLLOW-UP" DUE DATE** (RSA 91-A: 7-c, III; 30 days from date of final ruling, if "required." Whether follow up is "required" will depend upon nature of ruling. Also RKO is not necessarily informed if an appeal is taken. For purposes here, assume ruling date in 11 above, or indicate "not calculated")

13. **HAS THIS MATTER BEEN ADDED TO (1) THE ONGOING CASE LIST _____; (2) CASE STATUS LIST _____ (3) RKO ACTION LIST _____ AND (4) ORDER OF NOTICE DATE LIST _____?**

_____ Yes

14. **HAVE ALL DATES BEEN DOCKETED ON RKO HARD COPY _____ AND ELECTRONIC _____ CALENDARS?**

_____ Yes

Sheet
Completed by:

Date:

Appendix B - "Fee Paid" Intake Checklist

**RKO INTAKE CHECKLIST – HARD COPY, IN-PERSON, US MAIL, OR
MESSENGER DELIVERY**

Conduct intake in this order, immediately upon receipt of the initial filing

**NOTE: DO NOT SIMPLY ISSUE FORM LETTERS (TEMPLATES) NOTED HERE WITHOUT
REVIEWING, SO AS TO BE CERTAIN THAT NO HONING IS NEEDED FOR THE FACTS OF
PARTICULAR CASES**

Matter #: _____ Date(s) of completion of checklist: _____

1. ___ Date-stamp complaint and enclosures received, as well as envelope (Stamped-in envelope should be retained and if possible stapled to complaint).
2. ___ Verify submission of check (do not date-stamp checks themselves) including by confirming that it is made out properly for \$25 to "Treasurer, State of New Hampshire;" that it appears to be signed by the correct person, that it bears person's address, and that it has no other obvious issues, such as curious notations in the "memo" field. If a hard copy complaint is not accompanied by any payment, do not use this procedure. Go to the "No Fee Paid" intake procedure. If cash is received, go to #7 below. If check is to wrong payee confirm with person in #5 that it can be negotiated as is, or return for proper payee (within 30 days per RSA 541-A: 29).
3. ___ Photocopy check
4. ___ Date stamp photocopy of check
5. ___ Immediately deliver original check to _____ SOS Corporate Division _____) for processing and deposit. If _____ is unavailable, give to _____
6. ___ Note on photocopy of check the date of delivery to SOS and to whom
7. ___ PROCEDURES FOR CASH (skip to 8 below if check received). Assuming that payment is being made in person, note that check is strongly preferred, for tracking purposes, and ask for check. If no check is possible during in-person payment:
 - A. ___ Print out two copies of cash receipt form (FORM 12)

- B. ___ Fill in claimant's name on both copies
 - C. ___ Provide one copy to claimant, retain the other
 - D. ___ Confirm that claimant's address is in the filing, or ask for address.
 - E. ___ Stamp in complaint and RKO copy of cash receipt with "received" stamp, in presence of claimant. Advise that no *ex parte* conversation may occur. No further action on claimant's part is needed and he or she may go understanding that their complaint has been filed and will be processed.
 - F. ___ Write address, phone, email on RKO copy of stamped receipt.
 - G. ___ Photocopy stamped RKO copy of receipt
 - H. ___ Give original stamped receipt and cash to [REDACTED] (or other, person noted in 5 above)
 - I. ___ On copy of stamped receipt, note that delivery was made to [REDACTED] (or other) and date
 - J. ___ Place stamped, fully annotated cash receipt in hard copy file, when that is created, stapled to right inside, so as to segregate
8. ___ Obtain yellow Intake Sheet (FORM 5 – FEE PAID)
9. ___ Execute yellow Intake Sheet, filling in all lines, as it instructs.
10. ___ Create hard copy and electronic case folders, labelled with case number
11. ___ Include case number at top of this checklist (calendar year plus the consecutive number in which the matter was received that year)
12. ___ Place check in sealed envelope marked "check – confidential") and staple to right inside of folder so as to segregate. It bears account numbers. If file review is requested, this must be excluded
13. ___ Briefly skim pleadings for potential issues (such as claim not being signed (see UETA guide Re: electronic signatures <https://sunspot.nh.gov/UETA/default.aspx>); claim not being within RSA 91-A since the respondent is a private entity or a court, or the

claim is solely a constitutional, not statutory, obligation, all of which may raise issues requiring discrete attention).

14. ___ Place any notes in regard to 13 in an envelope marked with the case number and the legend "Confidential – draft preliminary personal notes"
15. ___ Attach envelope containing any confidential notes (see 14 above) to left side of hard copy folder, adding to notes as needed.
16. Verify that the following has been done
 - A. ___ List case, with number, on electronic case and contact list
 - B. ___ Create an electronic case folder, listed by number
 - C. ___ Obtain hard copy file folder, list case number on folder.
 - D. ___ Dates accurately calculated on yellow Intake Sheet (by physically counting days on a calendar)
 - E. ___ Dates on yellow Intake Sheet accurately docketed *in pencil* on hard copy calendar, using matter number
 - F. ___ Dates on yellow Intake Sheet accurately docketed on electronic calendar, using matter number
17. ___ Make appropriate number of copies complaint and attachments received (except check) for notification mailing to all persons given notice (see rule Rko 203.06 (c)) and a copy for file. Use copier in State House Annex room [REDACTED] 310, using RKO copy code, or scan and print from desktop). Number of copies made: _____
18. ___ Mark original complaint and attachments with a check mark in the upper right corner, thereby identifying for the record that that document is the original & place in file hard copy file
19. ___ Electronically create a number of address labels (adhesive or plain paper) for claimant and respondent addresses. Update addresses as needed, particularly after appearances received.
20. ___ Place electronic labels in electronic case folder .

21. ___ Print mailing labels and include in hard copy case folder
22. ___ Verify that date of mailing on yellow intake sheet is accurate, or recalculate to actual date (line 7 of yellow intake sheet)
23. ___ Draft Initial Notification Letter from template (found in electronic files, "RKO Office, RKO Forms," Form 4), making certain that letter list all persons copied in "cc" at bottom, and that all enclosures are listed. Anticipate adoption of rules by providing notice not only to person claimant has been dealing with, but also the individuals identified in RSA 510:10/Rko 203.06 (c) (varies depending upon entity claimed against).
24. ___ Retain electronic copy of Notification Letter in electronic file
25. ___ Create individualized appearance form for case (FORM 2) and place in electronic case file
26. ___ Create individualized response form for case (FORM 3) and place in electronic case file
27. ___ Review, revise and print Notification Letter, making certain that date it will be mailed is the same as the date on the intake form, line 7, or all dates will need recalculation
28. ___ Print (or copy) appropriate number of appearance forms for mailing to all persons copied and one for file. Make certain that signature line does not stand alone on one page. Number printed in this matter: _____
29. ___ Print (or copy) appropriate number of response forms for mailing to all persons copied and one for file. Make certain that signature line does not stand alone on one page. Number printed in this matter: _____
30. ___ Sign Notification Letter
31. ___ Make appropriate number of copies of signed Notification Letter. Number made in this matter: _____
32. ___ Mark original, signed Notification Letter with a check mark in upper right corner to identify it as the original
33. ___ Put original signed Notification Letter in hard-copy file

34. ___ Create mailing envelopes for claimant and respondent, suitable for mailing Notification Letter, Complaint, attachments, and copy of Appearance and Response forms.
35. ___ Include copy of Notification Letter, complaint, attachments, appearance and response forms in envelopes to claimant, respondent and all ccs.
36. ___ Place copy of all items mailed to parties and ccs, stapled together, in hard copy folder
37. ___ Stamp #36 "Copy."
38. ___ Place Notification Packet (sealed mailing envelopes containing copy of Notification Letter, Complaint, Attachments, Appearance, Response, and General Procedural Order 1) in RKO outgoing mail bucket or bring to the Mail Room in the basement of the State House Annex [preferably directly to _____], making sure that the RKO return address label bears RKO mail code _____
39. ___ Double check completion of yellow Intake Sheet and staple completed Intake Sheet to inside left of hard copy case file
40. ___ If any unusual circumstance arose (or arise) that have not been addressed in the Notification Letter (which are not confidential), produce a "Case Note" (FORM 11) sheet, entering date of note and description of circumstances
41. ___ Staple #40 above to left inside of hard copy file, updating as needed
42. ___ Make certain case is listed on "Orders of Notice to Issue"
43. ___ Print and post updated "Orders of Notice to Issue" list, for ease of reference
44. ___ Staple this completed checklist to left hand side of folder, on top of yellow intake sheet
45. ___ File hard copy file in _____ If matter is an item currently being addressed, put file in _____. When matter is fully resolved (after appeal period or appeal); move file to _____
_____ Note: RKO is not always informed if a case vis appealed.

Ongoing reminders

As case progresses, update case notes, date stamp all correspondence received, include signed original of all communications issued by RKO in hard copy file, marked with a check mark in upper right corner. Copies of any electronic communications should be placed in hard copy file. Maintain hard copy case files chronologically, with newest item on top, bound by appropriately sized binder clip. Routinely keep files and case status list updated and ordered, or case management will become impossible. Bear in mind that the file is the record for appeal and should be in shape for forwarding at any time (if forwarded, it would be without internal confidential predecisional drafts, personal notes, and so forth, which should be kept separate and clearly designated as such)

Update case status report with every action

Update "decision due" list and "action notes regularly."

Appendix C - Sample Notification Letter

State of New Hampshire
Office of the Right to Know Ombudsman

State House Annex, Rm. 12
25 Capitol Street
Concord, NH 03301
Telephone: (603) 271-3277

Name and addresses of persons notified (see Rko 203.06) and claimant

Date

Dear _____ and _____:

The Office of the Right to Know Ombudsman ("RKO") is a state agency created to provide the public with a "simpler, less expensive, and faster" alternative to the Superior Court in resolving complaints under RSA 91-A, the "Access to Governmental Records and Meetings" Law, commonly known as the New Hampshire "Right to Know" Law. See Laws 2022, Ch. 250:1. It was first staffed by way of the undersigned's commission to office on January 27, 2023. The RKO does not represent any party in proceedings before the office, but instead serves in a neutral quasi-judicial capacity. Pursuant to RSA 91-A: 7-c, the office's final rulings are appealable to the NH Superior Court.

This Office received the enclosed materials and the required filing fee from _____ (who is referred to as the claimant) on or about _____. Accordingly, this is to advise you that a complaint has been filed with this office and assigned the following name and matter number:

In Re: _____

RKO 20 _____

The parties are instructed to include the above matter number on all communications to the RKO regarding this case.

The primary statutes governing the operations of this office are NH RSA 91-A: 7-a through 8 and RSA 541-A: 31 - 38, which may be found on the "nh.gov" website by clicking on the link to "laws and rules," then on the link to "state statutes online," and then scrolling to the appropriate statute number. The administrative rules of the Office of the Right to Know Ombudsman can be found on the "nh.gov" website by clicking on the link to "laws and rules," then on the link to "Code of Administrative Rules," and then scrolling down to the rules identified as "Rko." Alternatively, a hard copy of these rules is available from this office upon request.

RSA 91-A: 7-b provides in part that the responding party shall have "20 calendar days to submit an acknowledgment of the complaint and an answer to the complaint, which shall include applicable law and, if applicable, a justification for any refusal to or delay in producing the requested governmental records." See also Rko 203.06 (e). This complaint was sent for mailing to the respondent on _____. The _____ is therefore instructed to answer the enclosed complaint in the manner set forth in the statute and Rko 203.07 by no later than _____, providing a copy to both this office and the claimant. The form which is to be used by the respondent (the _____) for that purpose is enclosed. **Forms are also available on the website of this office, located at <https://www.sos.nh.gov/administration/office-right-know-ombudsman>.** Forms executed electronically must at this time nonetheless be submitted to this office at the address above, in **hard copy**. In accordance with Rko 207.02 and Rko 203.06 (a) (4), the

parties are required to file "appearances" in this matter. Following receipt of the parties' appearances, the pleadings, orders and other items filed or issued in this matter shall be sent to the individual identified on the appearance, and the identified individual will serve as the party's representative in these proceedings. Please note that complaints filed in with this office are against a public body or agency, and not a suit in court against a private person.

Pursuant to Rko 207.01, both parties are instructed to submit an appearance containing the information found on the enclosed form of that name by no later than _____, providing a copy to both this office and the opposing party. The claimant must submit an appearance even if _____ is representing _____ self.

Pursuant to RKO 103.03 materials filed with this office, including but not limited to complaints, responses, appearances and motions, and all information contained therein, or attached thereto, shall be open to public disclosure. If you claim that any information submitted to this office should be excluded from public disclosure, see RKO 103.03 (b) and (c).

Please note that correspondence and pleadings in this matter shall be in **hard-copy paper** form. Unless otherwise ordered by this office, all filings made in this case shall be delivered to all other parties to the proceeding. The parties are instructed to avoid *ex parte* contact with the Ombudsman.¹ Parties, their representatives, friends, relatives, attorneys or paralegals shall not call the office for guidance regarding how the party's case should be handled, either procedurally or substantively. Since the RKO is not the legal advisor to, nor the attorney for, any party in this matter (see RSA 91-A: 7-b and Rko Ch. 100 - 300), questions posed to the Ombudsman should initially be investigated by independent review of the statutes and administrative rules which are applicable to this case. If **necessary** on an expedited basis, questions or information for the RKO may be presented in hard copy or electronic writing, *with a copy to the opposing party*. The prohibition on *ex parte* contact does not prohibit the parties from speaking with each other, without the involvement of the RKO. Communication between the parties is encouraged.

The RKO notes that this office is an executive branch state agency, and not a court of general jurisdiction. That being the case, the office's statutory charge is *limited* to reviewing a respondent's alleged actions from the perspective of whether or not they comport with the provisions of *RSA chapter 91-A* (which can be found on the nh.gov website noted at the outset of this letter), as it is written by the Legislature. The office cannot decide matters of general civil law, such as can be addressed by way of a lawsuit in the Superior Court.

Assuming that this matter has not been informally resolved between the parties by the time designated above for receipt of the parties' filings, the RKO anticipates that a notice of further proceedings will be issued. This is generally done by this office's issuance of an "Order of Notice"

¹ Contact is "ex parte" if it is "done for, in behalf of, or on the application of, one party only." BLACK'S LAW DICTIONARY 517 (5th ed. 1979). Neither party should endeavor to contact the Ombudsman (who is the sole employee of the RKO) about any aspect of this matter, by telephone or e-mail, without the direct involvement of the other party. This is generally done by means of filing a motion with the office, copied to the other party.

between the 21st and 60th day after the filing of a complaint, which sets a subsequent date for proceedings. See RSA 541-A: 29 and Rko 204.03. Formal adjudicative proceedings are routinely preceded by an informal prehearing conference with the RKO, held on the record in Concord, NH. At present, and subject to change, this office is currently scheduling conferences and hearings in the month of _____.

In accordance with Rko 217.01 (a), and in view of the provisions of RSA 541-A: 38, the Ombudsman encourages the parties to independently explore the possibility of informal resolution of this matter. Should this matter be resolved between the parties, **both** parties are instructed to so advise this office in writing.

Thomas F. Kehr
Right to Know Ombudsman

Enclosures:

cc [if any]: _____

Complaint; [also claimant's appearance, if already filed – if so, content of letter will require adjustment]

Appearance and Response forms

Appendix D – Sample Order of Notice



Thomas F. Kehr

State of New Hampshire

Office of the Right to Know Ombudsman

State House Annex, Rm. 12
25 Capital Street
Concord, NH 03301
Telephone: (603) 271-3277

In Re: _____

Docket Number: RKO _____

ORDER OF NOTICE

BACKGROUND

The Office of the Right to Know Ombudsman (“RKO”) is a state agency created by Laws 2022, Ch. 250 to “provide the public with a simpler, less expensive, and faster” alternative to the Superior Court in resolving complaints under RSA 91-A, the State’s “Access to Governmental Records and Meetings” law, commonly known as the “Right to Know” law. It was first staffed by a single person on January 27, 2023 and remains so staffed today. Unless renewed prior to July 1, 2025 the office is currently set by law to expire on that date. See Laws 2022, Ch. 250: 1, 6 and 7.

RSA 541-A: 31, I provides that an agency shall commence an adjudicative proceeding if the matter has reached a stage at which it is considered a contested case. Such proceedings may be commenced by the agency (here, the RKO) “at any time with respect to a matter within the agency’s jurisdiction . . .” by issuing a notice to that effect. Such notices are generally issued by this office between the 21st and 60th day after the filing of a complaint. See RSA 541-A: 31, II, III; RSA 91-A: 7-b, II; RSA 541-A: 29. This complaint was filed on _____. The RKO concludes that in order to foster the timely, fair, ordered and expeditious resolution of this matter, the parties should now be afforded the opportunity for an adjudicative proceeding (preceded by a prehearing conference). See RSA 541-A: 31, III. In accordance with RSA 541-A: 31, III, (a)–(f), this notice directs as follows:

1. TITLE AND DOCKET NUMBER (to be included on all communications with this office):

In Re: _____

RKO _____

2. PARTIES (as indicated in appearances):

The claimant _____ by the claimant's representative

Name and address

The respondent, _____, by the respondent's representative

Name and address

3. PRESIDING OFFICER:

Thomas F. Kehr, Esq.
NH Right to Know Ombudsman

4. NATURE OF HEARING:

To address the issues set forth in paragraph 5 below.

5. ISSUES:

Whether

See Paragraph 13 C below regarding modification of issues. Note: The RKO's statutory jurisdiction is *limited to the assessment of alleged violations of RSA 91-A.*

6. DATE, TIME AND PLACE OF ADJUDICATIVE PROCEEDING:

Room _____, State House Annex
25 Capital Street
Concord, NH 03301

Note: Pursuant to RSA 541-A:33 and Rko 213.03, the rules of evidence shall not apply in an adjudicative proceeding. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence, and the rules of privilege recognized by law shall be given effect.

See Paragraph 13 A below regarding requests for alterations of time or date.

7. DATE, TIME AND PLACE OF PREHEARING CONFERENCE:

Room _____, State House Annex
25 Capital Street
Concord, NH 03301

See RSA 541-A:31, V (enclosed) and Paragraph 13 A below

If a motion is pending, note that it will be heard at conference.

8. DATE FOR MANDATORY PRE-HEARING DISCLOSURE OF WITNESSES AND EXHIBITS, PURSUANT TO RKO 213.04 (at least 5 days before hearing):

Parties or their representatives shall provide all documentary materials that they wish the presiding officer to consider at the adjudicative proceeding (other than those, if any, which are claimed to be exempt from public

disclosure) to the other parties or their representatives by the date noted above. Documents provided to the other parties or their representatives shall also be provided to the presiding officer. This includes an *additional* copy of documents which might already have been submitted with the parties' pleadings, but which will be presented for the presiding officer's consideration at an adjudicative proceeding.

Each document shall be sequentially marked with an exhibit number for the purposes of identification. Claimant's exhibit numbers shall be preceded by the prefix "C" (for example, exhibit "C-1, C-2, C-3"). Respondent's exhibits shall be preceded by the prefix "R" (for example, exhibit "R-1, R-2, R-3").

Potential exhibits, if any, which a party claims to be exempt from public disclosure shall be marked for identification but not provided to the presiding officer or the opposing party by the date above. Processes for maintaining the confidentiality of such potential exhibits shall be addressed prior to the hearing, if possible at the prehearing conference. Pursuant to RKO 213.03 (b) (4), purportedly irrelevant, immaterial or unduly repetitious documentary evidence is subject to exclusion by the presiding officer.

The parties shall, by the date set forth above, exchange and provide to the presiding officer a list of any witnesses that they may call at the adjudicative proceeding, and brief summaries of their testimony, as well as a list of exhibits which may be used at the adjudicative proceeding, identified by exhibit number. **Exhibits listed by the parties, and persons listed as potential witnesses at the adjudicative proceeding, are expected to be physically present at the time of those proceedings. It is the responsibility of the parties to arrange for the attendance and availability of any witnesses that they have identified. Objections to exhibits or testimony shall be presented to the RKO at or before the time of the adjudicative proceeding.**

9. AUTHORITY FOR HEARING:

RSA 91-A: 7-b, III (c)

10. APPLICABLE STATUTES AND RULES:

for example: RSA 91-A: 2, 3, 4, 5;

standard:

RSA 91-A: 7-b; RSA 541-A: 30-a through 38

Ch. Rko 200

Should either party believe that other specific statutes, rules or other authority must be addressed; they should so advise the RKO, in writing, with a copy to the opposing party, as soon as is practicable, and be prepared to discuss the same at the prehearing conference.

11. OBTAINING COPIES OF STATUTES AND RULES:

The New Hampshire Revised Statutes Annotated are, *inter alia*, available online at the NH.gov website, specifically as indicated in the RKO's communication to the parties of _____. Chapters Rko 100 – 300 may be found on line at gencourt.state.nh.us/rules/state_agencies/rko.html. Alternatively, hard copies are available from the RKO upon request.

12. REPRESENTATION AND APPEARANCES:

Pursuant to RSA 541-A: 31, III (e) each party has the right to have an attorney present at the hearing or prehearing conference, to represent the party at the party's expense.

13. OTHER MATTERS:

- A. Requests for alteration of times or dates set forth in this order shall be made promptly and shall be submitted in writing to the address contained in subparagraph 13 E below, with a copy to the other party. Parties seeking to alter dates or times shall consult about alternative proposed dates or times with the other party prior to submitting any request to the presiding officer.

Requests submitted to the presiding officer shall note whether or not the other party concurs in the request.

- B. Burden of Proof: At an adjudicative proceeding, it is the task of the party with the burden of proof on an issue to demonstrate to the RKO that the party's factual contentions regarding nonconformity or conformity with RSA 91-A are true by a preponderance of the evidence. See Rko 213.02. The _____ has the burden of proof on the issue presented in Paragraph 5 above.
- C. Requests for Modification of Issues or Alternative Processes. A party shall make any request for an alternative process for the resolution of the issue(s) set forth in Paragraph 5 - including but not limited to any request that this matter be decided on the basis of written pleadings, with or without oral argument - or a request that the issue identified by the Ombudsman in Paragraph 5 above be modified - promptly and in writing. Parties seeking such alterations shall consult about alternatives with the other party prior to submitting any request to the presiding officer. Requests submitted to the presiding officer shall note whether or not the other party concurs in the request.
- D. Informal Resolution. Pursuant to RSA 541-A:38, informal settlement of matters by nonadjudicative processes is encouraged. **Should the parties reach a resolution of this dispute without the further involvement of the RKO, both are instructed to promptly notify this office in writing.**
- E. Filings and Ex Parte Communications

Filings and communications regarding this matter shall be directed to Thomas F. Kehr, Right to Know Ombudsman, Room 12, State House Annex, 25 Capital Street, Concord, NH 03301, in hard copy. Expedited filings and communications **requiring** immediate action by this office may be submitted by e-mail to Thomas.kehr@sos.nh.gov, but must be copied to the other party and must be followed by a hard copy submission of the pleading.

The Ombudsman does not represent either party in this matter and serves as a neutral decision-maker. Parties shall not engage in either oral or written *ex*

parte communication with the presiding officer which would be prohibited by RSA 541-A:36. *E-mail and telephonic communication with the office is not encouraged*. If e-mail communication occurs, all persons that have filed an appearance must be copied on the communication. If telephonic communication occurs without the involvement of all parties, the substance of the communication will be included by the RKO in the record of this matter. See RSA 541-A: 31, VI (i).

- F. Public Hearing. Pursuant to RSA 91-A: 7-b, III-c, the hearing and prehearing in this matter shall be open to the public, subject to the provisions of RSA 91-A. Accordingly, if a party claims that particular information is confidential in nature, in whole or in part, it should not be presented without previously making arrangements with the RKO regarding its disclosure or nondisclosure.
- G. Conduct at Hearing. Parties, witnesses and their representatives in these proceedings are expected to treat the process and all other participants, including the presiding officer, witnesses, parties and representatives, with respect and fairness. See Rko 202.01 (a); See also RSA 91-A: 7-b, IV.

Date: _____

Thomas F. Kehr, Esq.
Right to Know Ombudsman

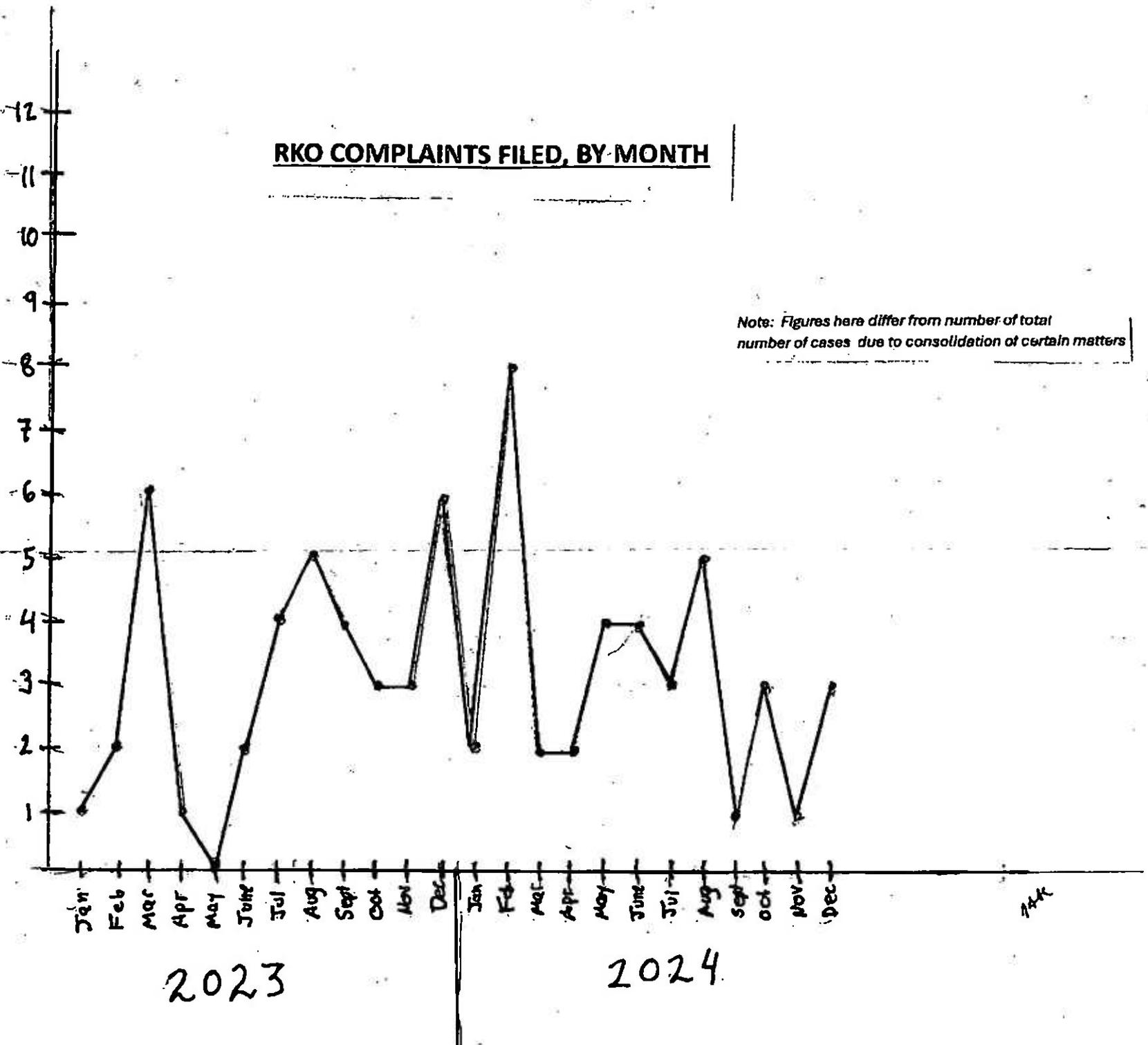
Enclosures:
RSA 541-A:31, V

Copies to:

Appendix E - Case Filings by Month 2023 -2024

RKO COMPLAINTS FILED, BY MONTH

Note: Figures here differ from number of total number of cases due to consolidation of certain matters



Appendix F – RKO General Procedural Order 1 (Pre-Rulemaking)



Thomas F. Kehr

State of New Hampshire

Office of the Right to Know Ombudsman

State House Annex, Rm. 313

25 Capitol Street

Concord, NH 03301

Telephone: (603) 271-3277

RKO General Procedural Order 1 (Pre-Rulemaking)

(March 17, 2023)

This is a General Procedural Order applicable to all cases now pending before the Office of the Right to Know Ombudsman.

As all claimants and respondents in all cases now pending before the office have been advised, the RKO is currently developing procedural rules, and until such time as those rules can be adopted (a formal statutorily-mandated procedure that is likely to take a minimum of several months), the processes which guide proceedings before this office will be informed by the provisions of RSA 91-A:7-b and, pursuant to RSA 541-A:30-a, V, the model procedures relating to adjudicative proceedings adopted by the NH Department of Justice in the administrative rules known as "Jus 800." These rules may be found on the nh.gov website by clicking "laws and rules," then clicking "Code of Administrative Rules" and then scrolling down to the link entitled "Jus." The statutory underpinnings for these rules may be found at RSA 541-A:31-36.

The Jus 800 rules are not specific to the operations of the office established under RSA 91-A:7-a and, in all cases, the provisions of operative statutes would take precedence over any administrative rule. Interim adjustments in the application of the Jus 800 rules may be in order while this office deals with cases pending prior to the adoption of RKO rules. RSA 91-A:7-b imposes certain time frames which direct application of Jus 806.01 (c) may render incapable of ordered application. That rule provides that objections to written motions shall be filed within 30 days of the motion (a motion being a "request to the presiding officer [here, the Ombudsman], for an order or ruling directing some act to be done in favor of the party making the motion, including a statement of justification or reasons for the request." See Jus 802.01 (d)). Unlike Jus 800, New Hampshire Superior Court Rule 13 (a) provides that objections to motions must be filed within ten (10) days. The Ombudsman concludes that a general ten (10) day response period is more conducive to the expeditious operations of this office than is the 30 day period of Jus 800, and therefore establishes 10 days as the normal objection period in cases pending before this office prior to the adoption of its administrative rules.

The formulation of RKO administrative rules is informed in part by proceedings occurring in this office prior to formal RKO rule adoption. Pursuant to RSA 541-A:11, this office held an optional public comment hearing on subject matters of possible rulemaking on March 1, 2023, with a public comment deadline of March 15, 2023. Input received during that optional process will be assessed by the RKO in formulating its initial rulemaking proposal. When that Initial Proposal is finalized, it will be presented for further public comment through the normal rulemaking processes of RSA 541-A. See NH Drafting and Procedure Manual for Administrative Rules, Chapter 3, Part 2 (available on the website of The Office of Legislative Services, Administrative Rules, under the link to "Resources"). Notice of rulemaking proceedings will be issued through the standard processes of RSA 541-A, and will also be posted on the evolving RKO website.

Thomas F. Kehr
Right to Know Ombudsman

Appendix G - Twelfth RKO Voicemail Message

Twelfth voicemail greeting

Issued: 6/19/24, 13:45

Removed: _____

You have reached the office of the New Hampshire Right to Know Ombudsman, also known as the "RKO." Please listen to the following detailed message, as it is periodically updated and may address the reason for your call.

This is not the New Hampshire Department of Health and Human Service's Ombudsman's Office.

The office that you have reached is staffed by a single individual who serves as an alternative to the Superior Court in a neutral, quasi-judicial capacity to resolve actual disputes under the "Right to Know Law" - New Hampshire Revised Statutes Annotated (RSA) 91-A. The RKO cannot engage in communications with only one party to a dispute or potential dispute. The Office also cannot provide direction which might be construed as legal advice regarding how a particular situation should be pursued. Its statutory function is to decide actual cases which have been filed with it according to the RSA 91-A: 7-b. So as to avoid an appearance of bias, the office cannot provide advocacy services for any person or entity and is generally precluded from communicating with only one party to a dispute that is brought to its attention.

If you are a party or a party's representative in any matter pending before the office, if you are calling on their behalf, or if you are seeking advice on a particular situation involving the Right to Know Law in which you or someone else is involved, or may be involved, please do not leave a message explaining your situation. For communications regarding an existing case, put your communication to this office in writing and provide a copy to any other person who has filed an appearance in the matter. This includes questions as to the meaning of any order or decision issued by this office, as well as inquiries concerning the status of a case.

For information about how to file a complaint, see the office's evolving webpage at www.sos.nh.gov/administration/office-right-know-ombudsman including the sections labelled "resources," "frequently asked questions" and "notices." A complaint must be signed, submitted in a hard-copy writing which explains the nature of the alleged violation of RSA 91-A. Unlike a court, the RKO cannot address claims other than those involving an alleged violation of RSA 91-A. Generally, a complaint must also be accompanied by the \$25 statutory filing fee in the form of cash in the exact amount or a check or money order made out to "Treasurer, State of New Hampshire." If applicable the complaint must attach the request that was served on the public agency or official and the written response of the public agency or official. After the filing of a complaint, the RKO will forward a copy of both

the complaint and attachments to the public body or official complained against. A form that may be used to file a complaint is located on the RKO website.

Hearings and conferences with the RKO are generally held on the record in Concord, NH.

The administrative rules of the RKO, known as Chapters Rko 100, 200 and 300, went into effect on May 20, 2024, but there will be a period of administrative work before they can be found in the NH Code of Administrative Rules. If you wish to obtain a copy of the RKO rules, please contact the RKO by e-mail at Thomas.Kehr@sos.nh.gov. The physical location and mailing address of the office is Room 12, State House Annex, 25 Capitol St., Concord, NH 03301.

Callers are strongly encouraged to review the actual language of RSA 91-A.

If you have matters to address with this office other than those covered in this message or on the RKO web page, please leave a message or, preferably, contact the office in hard copy or electronic writing.

Thank you.