

# New Hampshire Local Government Center

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## The Right to Know Law: Is Disclosure of Registered Dog Owners Required?

By C. Christine Fillmore, Esq.

Most municipal officials are aware that New Hampshire's Right to Know Law (RSA Chapter 91-A) requires them to make public records available for inspection and copying upon reasonable request. On the surface, the requirement is simple, as is the concept that all public records must be disclosed unless they are listed as exempt from disclosure. However, in practice, this requirement can be very problematic.

RSA 91-A:5 lists general categories of information that are exempt from disclosure, but as most municipal clerks can tell you, it is often unclear whether any given piece of information really fits into any of those exempt categories. One exemption that is particularly confusing is "other files whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. The New Hampshire Supreme Court's decisions provide some guidance for public officials, but there are still many gray areas that have yet to be tested in our state's highest court.

Last April, the Court decided a case that may change the way many requests for public records should be considered. *Lamy v. New Hampshire Public Utilities Commission* clearly sets forth the test to determine when the disclosure of a piece of information is an invasion of privacy serious enough that the information is exempt from disclosure. 152 N.H. 106 (2005). However, while public officials now know what test to use, the Court did not provide enough guidance for us to know how to apply the test to any facts except the very specific facts involved in the *Lamy* case. Unfortunately, the requests that public officials receive every day go far beyond that narrow set of facts.

One example currently on the minds of many town and city clerks is the recent increase in requests for the names and addresses of registered dog owners. A growing number of commercial advertisers and solicitors have discovered that municipal records can provide them with, essentially, a ready-made mailing list to advertise their services and products. Disclosure of this information is not directly addressed by RSA 91-A or any New Hampshire Supreme Court decisions. The question of whether it is exempt from disclosure under RSA 91-A is really a question of invasion of privacy. This is almost never a clear-cut issue unless it is one of the narrow factual situations about which the Court has issued a decision.

In the past, clerks have been advised that this information had to be disclosed under RSA 91-A:4 because it did not fit into any of the exemptions listed in RSA 91-A:5. This advice made sense given the Court's long-standing tradition of interpreting the RSA 91-A exemptions narrowly. For example, see *Orford Teachers Ass'n v. Watson*, 121 N.H. 118 (1981). However, the *Lamy* decision may lead a reasonable person to conclude that a list of names with home addresses of registered dog owners is exempt from public disclosure in certain situations. Unfortunately, that decision may have raised more questions than it has answered. While the lack of a clear answer can be frustrating (and we probably will not have one until the Court decides a wider range of cases applying the *Lamy* test), it is important for public officials to be aware of the issues so that they can make an informed decision based on all the risks.

According to the *Lamy* decision, when information might be exempt from disclosure because it would constitute an invasion of privacy, a three-part analysis should be used. 152 N.H. at 109.

- (1) Is there a privacy interest at stake that would be invaded by disclosure?
- (2) If so, what is the general public's interest in disclosure?
- (3) Finally, balance the public's interest in disclosure against (a) the government's interest in nondisclosure and (b) the individual privacy interest that would be invaded.

The party resisting disclosure "bears a heavy burden to shift the balance towards nondisclosure." 152 N.H. at 109. In other words, the court begins by assuming that the information should be disclosed, and the party resisting disclosure must convince the court that it should *not* be disclosed.

To answer the question, it is helpful to go through this test one part at a time:

### **1. Is there a privacy interest at stake that would be invaded by disclosure?**

Because the *Lamy* case involved a list of names and addresses, we do have an answer to the question of whether individuals have a privacy interest in their names and home addresses. The Court ruled that individuals do, in fact, have some “modest” privacy interest in their names and home addresses because that information “serves as a conduit into the sanctuary of the home.” 152 N.H. at 110. This is particularly true because every member of the public has the same right to access public information, including commercial advertisers and solicitors. The Court stated in *Lamy* that “individuals have some nontrivial privacy interest in avoiding the influx of unwanted, unsolicited mail or the telephone calls or visits that could follow from disclosure of their names and home addresses.” *Id.* Therefore, while it does not matter why the person requesting the information has asked for it, or what they plan to do with it, a court will consider what *any* member of the public might do with it and how that might impact the individual.

### **2. Since there is a “modest” privacy interest in names and home addresses, what is the general public’s interest in disclosing that information?**

Again, it is important to distinguish between the interest of the person who has asked for the information (which the Court clearly stated is irrelevant) and the hypothetical “general public’s” interest in disclosure, which a court will need to consider. As a general rule, it is inappropriate to inquire about the reasons for the request for information. It is a question that simply should never be asked. However, while the particular interest or purpose of any person who requests information is not relevant, the general interest of the public in having the information be disclosed is something a court will consider when it decides whether information is exempt because it would constitute an invasion of privacy.

Returning to the test, the Court has explained in *Lamy* that the way to determine what the public’s interest is in having the information disclosed is to see whether this particular information would “increase the public’s knowledge about the way the government works” because that is the basic purpose of RSA 91-A. 152 N.H. at 111.

Although reasonable people might disagree on this point, there are no readily-apparent ways in which a list of names and home addresses of registered dog owners could increase the public’s knowledge about how municipal government is working. Names and addresses do not, for example, provide any information about the number of dog registrations (which could be provided without names or addresses), and would not provide any additional information about the fees generated, the administrative time and cost of the program, the budget and staff impacts, or the efficiency of dog control. The only public interest in this information that might possibly exist is the same one the Court found in the *Lamy* case; there, the Court stated that the names and addresses of (in that case) utility customers, by themselves, would not provide any information at all about the way the government was working, and that the only way it could was if a person used it to gain additional facts. This is called “derivative use.” An example of derivative use would be if a person took the names and addresses of registered dog owners and used it to contact those people and interview them about the actions of the government, such as the efficiency of the registration program or the municipality’s response to complaints. This kind of derivative use appears to be the only way the public could use this information to gain additional information about how the government works.

### **3. The last part of the test is to balance the public’s interest in disclosing the information against the privacy interest of the registered dog owners and the government’s interest, if any, in not disclosing the information.**

It is difficult to see how this information would increase the public’s knowledge about how the government works. Therefore, it could be argued that there is little, if any, relevant public interest in having this information disclosed, except for possible derivative use. And again, this exact situation was the focus of the *Lamy* decision, in which the Court stated that when derivative use is the only general public interest, it will be given “very little weight.” 152 N.H. at 113. In that case, the Court ruled that the information was exempt from disclosure because this small public interest did not outweigh the individual privacy interest involved.

Based on the *Lamy* case, it seems reasonable to conclude that if the only public interest in names and addresses of registered dog owners is for the public’s derivative use, a court reviewing this situation *could* decide that the public’s interest does not outweigh the individual privacy interest of the dog owners.

The difficulty, of course, is that this is simply one opinion based upon hypothetical facts in an area of the law that is not entirely clear. The *Lamy* decision has raised many questions. Unfortunately, because the answer usually depends heavily on the particular facts involved, we won’t know all the implications of the *Lamy* decision until the Court has had the opportunity to rule on different factual situations. Until that time, the best we can do is to analyze each situation based on the law and the opinions the Court has issued so far.

In the meantime, it can be helpful to consider the risks of making the wrong decision. If officials disclose something that should have been kept confidential, the risk is that the municipality will be sued by the individual for invasion of privacy. The magnitude of that risk depends on how sensitive the information is and what the actual damages to the individual might be. Information such as names and addresses probably present a small risk (if any); in contrast, information about mental illness, drug use, or other very sensitive areas may present a much more serious risk if wrongly disclosed. On the other hand, if an official refuses to disclose something that should be disclosed, the risk is a suit against the municipality or the official for violating RSA 91-A. In that case, the municipality or official may be ordered to disclose the information and may also be found liable for the plaintiff’s attorney’s fees and costs. Public officials faced with these questions are encouraged to consult their

local counsel and/or the LGC Legal Services attorneys to discuss the options and weigh the risks.

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