New Hampshire School Boards Association
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HOT TOPICS: ELECTRONIC DOCUMENTS AND USE OF E-MAIL COMMUNICATIONS

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The following information is intended as instructional and reference material only. It should not be construed as specific legal advice. You are encouraged to seek the advice of your own attorney regarding specific questions you may have about the following material.

I. Common Questions

1. Is an e-mail a public record?
2. What other types of electronic documents are public records?
3. What are the disclosure requirements for electronic documents?
4. Does a quorum of the Board have to receive the e-mail in order for it to be made public?

II. What constitutes a "public record"?

Curiously, the Right to Know Law does not actually define the term "public record." Essentially, there are three elements to what constitutes a public record for Right to Know purposes. The document must:

(1) Be created or maintained by the school district;

(2) Discuss official board business; and

(3) Be viewed/read by a quorum of the Board.

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These elements are relatively easy to distinguish when dealing with traditional paper records and documents. However, questions may arise when an e-mail or other electronic document has not yet been reduced to a paper printout.

A. Electronic Records

Without specifically addressing the issue of e-mails, the New Hampshire Supreme Court did rule that documents do not lose their status as a public record simply because they are stored in a computer system, and that these electronic records must be maintained in a manner that makes them available to the public. Hawkins v. N.H. Dept. of H.H.S., 147 N.H. 376 (2001). (Case dealt with a request seeking records of Medicaid payments.)

B. Internet Logs/History

Under New Hampshire law, Internet logs maintaining the history of Internet use in schools are also considered public records under the Right to Know Law. In Knight v. SAU #16, Merrimack and Rockingham County Superior Courts, No. 00-E-307 (2000) the court held that the public has the right to view Internet logs because:

- The school district maintained the logs;
- The logs pertained to the education of students, which is the district's business;
- The logs contained a log of staff use, and staff use is clearly official business; and
- "The definition of a public record is, in part, any type of document made or received pursuant to law." (The school district was required by law to adopt an "acceptable use" policy; therefore, the Internet log was made "pursuant to law.")

Best Practices and Policy Suggestion: RSA 194:3-d requires only that school districts adopt an "acceptable use" policy regarding Internet use. The statute does not require school districts to maintain a log of such Internet use. NHSBA Model Policy EGA recommends that school districts *do not* maintain Internet usage logs. If the school district does not maintain such a log, there is no duty or requirement to provide a log to

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the public. However, if you do maintain Internet usage logs, you will be required to provide them if so requested.

III. School District Use of E-Mails

The New Hampshire Supreme Court has not yet addressed the issue of when an e-mail communication becomes a public record, and more directly, what elements would be necessary to make an e-mail a public record. However, this issue was addressed in Rockingham County Superior Court in 2003.

In Miller v. Fremont School Board, Rockingham County Superior Court, No. 03-E-152, the petitioners sought access to copies of e-mail communications among school board members, claiming that the board had been using e-mail communications in violation of the public meetings provisions of RSA 91-A. The Miller case is instructive in helping school boards and administrators assess whether or not electronic communications are or may become public records subject to public disclosure.

A. Miller case: E-mail as a public record

1. E-mail communications between board members are in the nature of public records governed by RSA 91-A:4.

2. The public is entitled to access of e-mails, not because the e-mails constitute a "meeting" but rather because the substantive written communications are RSA 91-A:4 public records.

B. Miller case: Quorum requirements

1. The court found that the public is entitled to access to e-mails between a quorum of school board members, when the e-mails discuss official board matters.

2. The court specifically did not address the issue of whether substantive e-mail communication between members of the board must be disclosed when no quorum is involved.

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C. Miller case: Disclosure requirements

1. RSA 91-A does not require copies of the e-mail communications to be physically attached to the minutes, so long as the substance of the e-mail communications is properly disclosed and included in the minutes of the next board meeting.

IV. Revisiting the Common Questions

Q: Is an e-mail a public record?

A: Yes, e-mails may become public records provided the traditional hallmarks are present: (1) it is created or maintained by the public entity; (2) it discusses official school business; and (3) the e-mail is either created or in the possession of a quorum of the board.

Q: What other types of electronic documents are public records?

A: Internet history logs.

Presumably, the exemptions of RSA 91-A:5 (discussion about personal records of students; records of internal personnel practices; confidential communications; other files whose disclosure would constitute an invasion of privacy; etc.) still apply to e-mails.

Q. What are the disclosure requirements for electronic documents?

A: Actual copies of the electronic communications do not need to be disclosed. However, the substance of the communications must be adequately reported in the minutes of your next public meeting.

Q. Does a quorum of the Board have to receive the e-mail in order for it to be made public?

A: Presumably, but this issue has not been fully addressed by the courts. If a quorum of the board discusses a matter via e-mail, it must be disclosed. The law is unclear as to the disclosure requirements when an e-mail is distributed to less than a quorum.

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V. Best Practices and Policies

When considering whether or not to communicate via electronic communication, the New Hampshire School Boards Association recommends the following practices:

1. Avoid electronic communications if possible. Rather than be faced with potential litigation and Right to Know challenges, NHSBA recommends that school boards do not communicate via e-mail. Likewise, administrators should attempt to communicate official school business to the board via traditional means – hard copied written memorandum, letters, etc.

2. If it is necessary to communicate via e-mail, avoid discussing personal, private information about students and staff. The risks outweigh the benefits of communicating in this fashion (accidentally sending the e-mail to an unintended recipient, interception by hackers, etc.).

3. Avoid daisy-chaining the messages (i.e. forwarding a e-mail to one member at a time). Because the law states that the e-mail communication is a public record if received by a quorum of the board, determining when a quorum is established may not be clear if the message is relayed to one board member at a time.

4. As stated above, the school board's acceptable use Internet policy should not contain a statement requiring the district to maintain an Internet usage log. The district should maintain no Internet usage log.

5. When in doubt, fully disclose the contents of e-mail communications between board members that discuss official board business. Include such disclosures in the minutes of the next public meeting, without providing actual copies of the electronic communication.

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