



New Hampshire School Boards Association
25 Triangle Park Drive, Suite 101
Concord, NH 03301
(603) 228-2061
(603) 228-2351 (fax)
Barrett M. Christina, Deputy Executive Director
bchristina@nhsba.org

School Board Use of Electronic Communication 2012

A. E-mails as Public Records

- Review the definition of “public records” above.
- With this definition in mind, there are essentially three elements to what constitutes a public record for Right-to-Know purposes. The document/record 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.
- If we apply these elements to e-mail communications among school board members, it appears that e-mails would be considered public records, assuming the e-mail was:
 - (1) Created by a school board member or administrator;
 - (2) Discussed official board business in furtherance of the board’s duties; and
 - (3) Is received or read by a quorum of the board.

B. Are Simultaneous or Contemporaneous E-Mails an Illegal Meeting?

The second concern school boards must consider when communicating via e-mail is whether or not such communications constitute illegally held meetings under the Right to Know Law.

The New Hampshire Attorney General's Office offered this statement regarding e-mail use by a public body and whether or not such communications are considered a "meeting" under the Right to Know Law:

"E-mail use should be carefully limited to avoid an inadvertent meeting, albeit one where there is a failure to have a physical quorum at a noticed meeting place. Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote on a matter within the jurisdiction of the body would constitute an improper meeting. Sequential e-mail communications among members of a public body similarly should not be used to circumvent the public meeting requirement. For example, e-mail among a quorum of members of a public body in a manner that does not constitute contemporaneous discussion or deliberation and does not involve matters over which the body has supervision, control, jurisdiction, or advisory power does not technically constitute a meeting under the Right-to-Know law. E-mail discussions of a quorum concerning matters over which the public body has supervision, control, jurisdiction, or advisory power would run counter to its spirit and purpose."

C. New Hampshire Case Law

Sending emails in two batches in order to avoid a quorum of members violates the law because it circumvents the public meeting requirement. A board member's email indicating that she intended to make a motion at the next meeting and implying which way she would vote, and why, improperly discussed, proposed...and thus constituted an improper meeting. Taylor v. Oyster River Cooperative School Board, Strafford County Superior Court, January 17, 2012.

Even if the [board] members did not discuss the email or their nominations, the Board's response to the email was improper. A quorum of the Board received an email from [the superintendent] suggesting a particular action. Its members tacitly approved [the superintendent's] proposal by "act[ing] upon a matter...over which the public body has supervision." The Board violated the statute when more than a quorum of its members action upon the email. Taylor v. Oyster River Cooperative School Board, Strafford County Superior Court, January 17, 2012.

The Right to Know law explicitly states that matters within the Board's competence may only be discussed in meetings. Out-of-meeting communications cannot be used to effectuate an end-run around the statute. RSA 91-A:2-a. Cameron v. Town of Marlborough Board of Selectmen, Cheshire County Superior Court, January 31, 2012.

The Board improperly communicated outside meetings, in violation of RSA 91-A:2-a when it corresponded by email. Also, based on at least one email correspondence, on at least one occasion, the Board engaged in improper communications with non-members outside of a meeting, i.e. before and after a public hearing. Cameron v. Town of Marlborough Board of Selectmen, Cheshire County Superior Court, January 31, 2012.

Alternatively, the above-recited correspondence constituted improper meetings of the Board. The topics discussed in emails by a quorum fell within the Board's jurisdiction. The fact that the communications were by e-mail does not defeat their cumulative purpose of fulfilling the function of a meeting under RSA 91-A:2, I. As such, the Board held improper meetings, in violation of the Right to Know law.

Cameron v. Town of Marlborough Board of Selectmen, Cheshire County Superior Court, January 31, 2012.

D. What Types of E-Mail Communications Are Permissible?

The Attorney General’s Office stated “e-mail among a quorum of members of a public body in a manner that does not constitute contemporaneous discussion or deliberation and does not involve matters over which the body has supervision, control, jurisdiction, or advisory power does not technically constitute a meeting under the Right-to-Know law.”

Given this statement, certain e-mails may be permissible. For example, RSA 91-A:1, I(d) states that “circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting” is not a meeting under the Right to Know law. Therefore, it seems likely that school boards can circulate draft documents via e-mail of contracts, reports, budgets, etc. However, it is advised that board members do not engage in specific discussions about these documents via e-mail, as such discussions may run contrary to the Right to Know law.

Additionally, certain e-mails containing “informational discussions” are likely allowable under the Right to Know law. Examples of these types of e-mails may include an e-mail asking that a particular item be included on the agenda of the next meeting, e-mails notifying board members that a meeting has been rescheduled, etc.