



NHSBA

NEW HAMPSHIRE SCHOOL BOARDS ASSOCIATION

**Digital Communications and School Boards
and School Board Members: Right to Know
Law and other Considerations**

Fall 2020

Right to Know Law Basics

RSA 91-A



Introduction

New Hampshire's Constitution provides that *“the public's right of access to governmental proceedings and records shall not be unreasonably restricted.”*

N.H. Const., Pt 1, Art. 8: "Accountability of Magistrates and Officers; Public's Right-to-Know" (Emphasis Added).

91-A, puts into statutory form the public's right of access to government, including the "reasonable restrictions" contemplated by Part 1, Article 8.

The two core areas of right of access under 91-A are *“meetings”* of *“public bodies”*, and access to *“governmental records”*.

Introduction

- **“Public body”** - Includes *“Any ... governing body, board ... school district, [or] school administrative unit, ... or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.”* RSA 91-A:1-a, VI.
- **“Advisory committee”** – includes any *“committee ... or other like body whose primary purpose is to consider ... issues designated by the [public body] so as to provide such [body] with advice or recommendations concerning the formulation of any public policy ... that may be promoted, modified, or opposed by such authority.”* RSA 91-A:1-a, I.
- Board committees and statutory committees are always “public bodies”, while committees carrying out administrative functions are generally not.

Meetings

RSA 91-A:2



RSA 91-A:2 **Meeting Defined**

- RSA 91-A:2, I states that a “**meeting**” occurs when three indicia are present:
 - *A **quorum** of the body convenes;*
 - *In any manner in which the participating members **are able to communicate contemporaneously**;*
 - *For the **purpose of discussing or acting upon something over which the public body has supervision, control, **jurisdiction** or advisory power**, (referred to as “jurisdictional or official matters”).*
- The communication indicia includes all digital communication.

RSA 91-A:2, I

Meeting Requirements

If it constitutes a “meeting”, then the law further requires the body (board or committee) to:

- Provide posted public notice of the meeting;
 - No requirement for most meetings that an agenda be posted.
 - Once an agenda/draft agenda is distributed to a quorum, it is a governmental record.
- Allow the public to attend;
- Conduct deliberations and decision making in public, unless a non-public session exception legally applies; and
- Make appropriate minutes of the meeting.

Meetings – Just to be Clear

Although the implications of the meeting provisions of 91-A:2 are fairly clear, the Legislature wanted to be sure.....

- Under 91-A:2-a, I – A public body may “deliberate” upon official matters only “*in meetings held ... in compliance with 91-A:2, II or III.*”
- 91-A:... 2, II provides: “*Communications outside of a meeting, including sequential communications among members of a public body should not be used to circumvent the spirit and purpose*” of 91-A.

Governmental Records

RSA 91-A:1-a, :4 & :5



RSA 91-A:1-a, III

Governmental Records

- Any information created, accepted, or obtained by, or on behalf of, **any public body, or a quorum or majority thereof, or any public agency** in furtherance of its official function.
- Most requirements relative to records are the responsibility of the administration.

RSA 91-A:4

Access to Governmental Records

The public has a right to:

- Inspect and/or copy
 - all *non-exempt* governmental records
 - in the custody or control of a public body or agency
 - during regular or business hours

If records aren't immediately available, they must be made available later.

RSA 5:29, VI

Electronic Records

- Any information created or retained in digital format.
- May include:
 - Documents stored in a computer
 - Email
 - Voicemail
 - Instant messages
 - Digital Photos

Communications – Electronic and Otherwise: Practice Tips



Communications Outside of Meetings Violations and Slippery Slopes

- “I only sent my email to one member (who then forwarded it to another, who sent it to another, etc.).”
- “I knew that 3 of the recipients were at work; they couldn’t communicate “contemporaneously” even if they wanted to.”
- “We were only batting some ideas around, we knew we had to vote at the meeting.”
- “It was only a straw poll.”
- “We were only trying to get a “sense of the board.”
- “We know we have to enter the emails into the minutes of the Board’s next meeting.”

Digital Communications

Pitfalls – Slippery Slopes - Violations

- Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote.
- Forwarding to a board member an email received from another board member regarding a jurisdictional matter.
- Straw polls or communications seeking “a sense of the board”.
- Posting messages regarding jurisdictional matters on any community pages, forums, etc..
- Emojis?

Digital Communication - Best Practices

REMEMBER – Electronic communications can implicate both the meeting and records provisions of the Right to Know law.

- Leave discussion and deliberation of substantive matters for a public meeting.
- Never use comments/email/texts to express ideas, concerns, opinions, etc. on jurisdictional issues or matters.
- Whenever possible, the Superintendent or central office should be responsible for sending communications which are appropriate for the entire board.
- If you have something you want the Board to discuss, check your agenda policy, and or communicate the issue to the Chair and/or the Superintendent.

Digital Communications - Best Practices

- Don't use "reply all".
- When communicating on informational matters via email, use BCC for all recipients.
- Include reminders/warnings to other board members – "Please do not respond substantively to this email".
- Use a district provided email address for all electronic communications including district business, such communications are "governmental records".
- Don't use a district provided email address for communications unrelated to your school board business (*concerns: discovery, electioneering*).

Social Media Engagement by School Districts & School Boards



Considerations For District Social Media

- Strong, comprehensive communication plans are essential.
- Plans must recognize how different school constituency groups access and consume information.
- **Social media platforms can implicate both the records and meeting provisions of the Right to Know law!**
- Board may designate spokesperson to provide board perspective, but may not allow quorum communications.

Considerations For District Social Media

- **Public comment on District social media implicates same speech issues as public comment during board meetings.**
 - Time, place, manner restrictions (number of words, number of comments per day, etc.).
 - May not limit or censure protected speech (e.g., profanity is protected).
- Admin, (PR or Comm Officer) should run/monitor school district site.

Individual Board Member Engagement on Social Media



Considerations For Social Media Engagement - Individual Board Members

REMEMBER – Like all digital communications, social media platforms can implicate both the records and meeting provisions of the Right to Know law!

- Board members do not lose their rights to speak as citizens by virtue of their office, whether in person, writing, or social media.
- Even on private page, the public is likely aware you are a school board member.
- Do not post statements indicating how you are going to vote on a matter.

Considerations For Social Media Engagement - Individual Board Members

- Be clear when communicating personal views or recollections – your statements reflect your views.
- Not official position unless delegated spokesperson & minutes are the official “record” of board actions.
- Failure to be clear regarding individual/official capacity, may create both messaging and notice issues -
 - Litigation exposure
- May not share confidential information (PII, information from non-public).

Considerations For Social Media Engagement - Individual Board Members

- Think before posting – Front page? Public memory?
- Minimize “meeting” risk – do not comment on other member’s pages or in response to other member’s comments (follow? Subscribe?).
- Avoid content portraying other member’s in bad light.
- Use social media to highlight the positive things happening in your District’s schools.
- Use social media to highlight your involvement in schools and District events.

Considerations for Social Media

Disclaimers:

Many of the potential risks for the District can be minimized by appropriate notices/disclaimers included prominently on the Board member's page and even comments.

***Sample Disclaimer:** This page is administered by _____
_____. Although _____ is an
elected member of the School Board, he/she created and maintains
this _____ in his/her personal capacity. The page is in no
way affiliated with or sanctioned by the _____ School District or
its School Board. No comment or post on this page may be construed
as an official communication by, to or with the _____ School
District, the School Board, or any of its members. Furthermore, no
comment posted on this page may be considered as a communication,
- or an endorsement of a communication - by or on behalf of the ____
_____ School District or its School Board.*

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