



# NHSBA

NEW HAMPSHIRE SCHOOL BOARDS ASSOCIATION

**Right to Know Law Overview  
For New School Board Members**

May 2020

# Tonight's Discussion

- The Right to Know law is one of the most important laws school board members need to know about.
- Public meetings, committee meetings, use of electronic communication are just a few aspects that board members need to be mindful of.
- This webinar is intended to provide an overview of some of the most important aspects of the Right to Know law.

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# **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.

# **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

# Meetings

## RSA 91-A:2



## ***RSA 91-A:2*** **Access to Governmental Records**

- 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.

# **Non-Meetings**

## **RSA 91-A:2, I**



## *RSA 91-A:2, I*

# **“Non-Meetings”**

RSA 91-A:2, I carves out five narrow exceptions to the definition of a meeting, three of which pertain to school boards.

- *“A chance, social, or other encounter not convened for the purpose of discussing or acting upon [jurisdictional matters] shall not constitute a meeting if no decisions are made regarding such matters.”*
- “Unintentional & Inconsequential”
- Action need not be formal.
- If inadvertent discussion of official matters starts, stop as soon as aware.
- Public perception can be as important as reality.



## *RSA 91-A:2, I*

### **“Meeting shall also not include:”**

*(a) Strategy or negotiations with respect to collective bargaining.*

- Includes negotiations, “caucuses”, strategy discussions among the full board and/or administrators and consultants.

*(a) Consultation with legal counsel*

- Requires contemporaneous communication & legal matters.

*(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting...*

\* Interpret narrowly!

***RSA 91-A:2, I***  
**“Meeting vs. Session”**

- Once you determine that a quorum of the public body
  - is/has convened to discuss or act upon something over which the public body has supervision, control, jurisdiction or advisory power, and
  - there is no “non-meeting” exception, then the subject matter must be discussed at a public meeting.
- However, although all such discussions must occur at a public meeting, some matters may be discussed in non-public session.

# **Non-Public Sessions**

## **RSA 91-A:3**



## *RSA 91-A:3, II*

### **Non-Public Sessions – General Principles**

- Under 91-A:2, I, all “meetings” are public.
- Under exceptions set out at 91-A:3, a board may enter non-public session to discuss and potentially act on certain limited matters.
- RSA 91-A:3, II provides an exclusive list of reasons for which a public body may enter a non-public session.
- Unless one or more of those exceptions applies to a particular topic, or the topic is properly considered in a non-meeting under 91-A:2, I, a quorum of a board or committee may only discuss the topic during the public part of a public meeting.

## *RSA 91-A:3, II*

### **A board may enter non-public session to consider or act upon:**

- (a) Dismissal, promotion, compensation or disciplining of any public employee, or the investigation of any charges against him or her, unless that employee has a right to an open meeting and requests the meeting be open;*
- (b) The hiring of any person as a public employee.*
- (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the school board itself, unless such person requests an open meeting;*
- (d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.*

## *RSA 91-A:3, II*

**A board may enter non-public session to consider or act upon:**

*(e) Consideration or negotiation of pending claims or litigation which has been threatened **in writing** or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, **until the claim or litigation has been fully adjudicated or otherwise settled....***

....

*(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.*

## *RSA 91-A:3, II*

**A board may enter non-public session to consider or act upon:**

....

*(k) Consideration of entering into a tuition contract authorized by RSA 194 or RSA 195-A, which, **if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations.***

*(l) Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.*

**Procedures Required  
for Non-Public Sessions  
RSA 91-A:3, I & III**





# **Non-Public Sessions – General Principles**

- Unlike a “non-meeting”, the notice and minute requirements of public meetings apply to any public meeting that includes a non-public session.
- Non-public sessions do not require specific notice beyond the meeting notice.
- A public meeting can be held solely for the purpose of going into a non-public session – with no other discussion of business in the public session of the meeting. (E.g hearings, or discussions regarding litigation response.)
- The board must first meet in public and then vote to enter the non-public session.

## Non-Public Sessions – General Principles

- There are no requirements as to when a non-public session may occur, other than the requirement that the non-public session must occur during a public meeting.
- If the Board is aware ahead of time of the need for a non-public session, as a courtesy to the public, as well as any known participants to the non-public, to hold the non-public at the end, or near the beginning of the public session.
- Even when a meeting notice includes an agenda item for non-public, a member may move to enter non-public on an item when the circumstances warrant.

## ***RSA 91-A:3, I***

### **Entering Non-Public Sessions**

- Requirements to enter non-public session:
  - A motion properly made and seconded occurring during public session;
  - The motion must state the specific exemption under 91-A:3, II which allows a non-public session;
  - Vote on the motion shall be by roll call vote; and
  - With approval of a majority of those present.
  - All of the above must be reflected in the public minutes.
- A motion may include more than one statutory basis per item, and more than one matter. However, each separate matter must have at least one independent basis.

## Attending Non-Public Sessions

Who may attend a non-public session?

- The public body's own members;
- The Superintendent, unless subject matter concerns him/her;
- When warranted, essential staff and/or guests may attend the non-public session.
- CAUTION – while board members have taken an oath, and employees are subject to confidentiality provisions, other attendees do not have the same obligations to maintain confidentiality.
- Although most boards use either one of the members or even the Superintendent to take minutes, a board could use its typical minute taker, provided there was a high level of confidence in that person's ability to keep matters confidential.

## Exiting Non-Public Sessions

- There are no specific requirements for exiting a non-public session.
- As a best practice, we would recommend that whenever possible do by formal motion and vote. This provides clarity to not only the minute taker, but the board members themselves.

**Public & Non-Public Minutes**  
**RSA 91-A:2, II & 91-A:3, III**



# Minutes of Non-Public Sessions

- Minutes are required for all meetings – including non-public sessions.
- Whether public or non-public, minutes must include:
  - The names of each member participating;
  - The name of anyone else attending or appearing before the board in the non-public session;
  - A brief description of the subject matter discussed; and
  - Any final decisions/actions taken.
- Minutes for non-public sessions must also include recorded roll call vote for each action taken (the statute merely requires that the minutes reflect the “manner” in which each member voted, accordingly, if unanimous, a statement to that effect will suffice).

## *RSA 91-A:3, III*

# Sealing Non-Public Minutes

- Unless sealed, such minutes must be disclosed within 72 hours (3 days) of the meeting. For minutes of public sessions, the requirement is 5 days.
- Sealing minutes (i.e., non-disclosure) of non-public minutes requires:
  - a recorded vote;
  - in public session;
  - of 2/3 of the members present that divulgence of the minutes:
    - Likely would adversely affect the reputation of someone other than a board member;
    - render the proposed action ineffective; or
    - pertain to efforts to thwart terrorism.



## *RSA 91-A:3, III*

# **Additional Requirements/Guidelines for Non-Public Minutes**

- A motion to seal\* non-public minutes should be the first item considered upon exiting the non-public session.
- If no motion is made, or, if made, fails to obtain 2/3 approval, minutes must be disclosed within 72 hours, and are public by default.
- The board should consider in its motion the duration that the minutes should be subject to non-disclosure.
- Notwithstanding whether minutes are sealed, what is discussed in non-public must remain confidential.

\*91-A does not refer to “sealing”. Rather, it merely requires that non-public minutes be disclosed unless a contrary vote is taken. Sealing is the term used almost uniformly by boards in NH.

# **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.”

# Electronic 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?

# 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.

# Electronic 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*).

# **Individual Board Member Engagement on Social Media**



# Considerations For Social Media

**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.
- Individual board members do not have authority to speak on behalf of the board, unless so designated.
- Board members must be clear when communicating their own views or recollections as opposed to official positions or the record of the board. (The minutes are the official record.)



# Considerations for Social Media

- Failure to be clear regarding individual/official capacity, may create both messaging and notice issues.
- Let people know what the rules of the game are for your sites. As the “editor” of your own page, you have the right to remove profane comments or other material that could be offensive to others. But often you build more credibility by responding professionally and courteously.
- Although individual member communications do not “represent” the board, they do project an image of the board.

# 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.*

# **Remedies / Penalties**

**RSA 91-A:7-9**



*RSA 91-A:7 - 8*

## **Remedies for a Violation**

- Public body liable for costs if lawsuit necessary to insure compliance with the statute.
- Public body liable for attorney's fees if agency knew or should have known conduct was a violation.
- Court may invalidate the action.
- Court may enjoin future violations.
- Employee, officer or official found to have acted in bad faith fined \$250-\$2,000, and may be required by court to reimburse public body/agency any attorneys' fees or legal costs awarded to the petitioner.

*RSA 91-A:9*

## **Criminal Violations and Preservation Requirement**

- It is a misdemeanor for any person to knowingly destroy information with the intent to prevent disclosure after a request is made.
- Irrespective of any applicable retention schedule or policy, if information is withheld from inspection or disclosure under a claimed exemption, must be retained for 90 days or the resolution of any lawsuit brought under RSA 91-A:7.

**Barrett Christina**  
**Executive Director**  
**bchristina@nhsba.org**

**William Phillips**  
**Staff Attorney**  
**& Director of Policy Services**  
**wphillips@nhsba.org**

**NHSBA**  
**25 Triangle Park Drive, Suite 101**  
**Concord, NH 03301**  
**(603) 228-2061**

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