




**New Hampshire  
School Boards Association**  
Excellence in Public Education Through School Board Leadership

**Right to Know Law:  
*Digital Communications By and Among  
School Board Members***


Thursday, September 19, 2019

## Today's Discussion

- Slide 2*      **RSA 91-A Right to Know Law Key Concepts & Definitions**
- Slide 15*    **Emails, Social Media Comments & Other Electronic Communications Pitfalls & Practice Tips**
- Slide 22*    **Individual Board Member Engagement on Social Media**
- Slide 32*    **Contact Information**




*Slide 1*



**RSA - 91-A**  
**Right to Know Law**

**Key Concepts & Definitions**

*Slide 2*



**Right To Know Law Basics**

*... the public's right of access to governmental **proceedings and records** shall not be **unreasonably restricted**.*

*New Hampshire Constitution, Part 1, Article 8*

- More important than codifying what is already the right of access granted by the Constitution, is that 91-A establishes the parameters for "reasonable restrictions" – i.e., exceptions and exemptions to access - as contemplated by Article 8.
- Parameters which are continuing to evolve or become more defined through the legislative process.

*Right to Know Law Key Concepts*

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*Slide 3*

## Right to Know Law Key Concepts

- The two core areas of right of access under 91-A are “*meetings*” of “*public bodies*”, and access to “*governmental records*”.
  
- The statutory definitions of those three words/phrases, along with a few others, are key to understanding the breadth of 91-A as it applies generally to school boards, and more specifically to their emails and other electronic communications.

## Right To Know Law Basics Key Definitions

“**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.*” 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.*”

91-A:1-a, I.

## Right To Know Law Basics

### Key Definitions

RSA 91-A:2, I states that a “**meeting**” occurs when:

- *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.** “Jurisdictional Matters”*

## Right to Know Law

### Meeting Requirements

If/when the elements of a meeting are present, then 91-A:2, II requires:

- *Posted notice (24 hours, absent an emergency);*
- *Board deliberations (discussion) and decisions occur only during the meeting;*
- *That no votes occur by secret ballot (except for annual meetings & elections);*
- *The public is able to physically attend (subject to 91-A:3);*
- *Physical presence of a quorum at the location specified in the meeting notice, except in cases of emergency, 91-A:2, II & II-a; and*
- *Appropriate minutes.*

## Right to Know Law Sequential Communications

*“Communications outside a meeting, including, but not limited to sequential communications ... shall not be used to circumvent the spirit of this chapter...” 91-A:2-a, II.*

- Applies to forwarded emails, telephone calls, and any other mode of communication;
- Could also apply to the “passive majority”;
- What about the situation where you know someone will be recused, but the communications occur prior to the meeting.

## Right To Know Law Meeting Exceptions and Non-Meetings

*When a meeting is not a meeting...*

*91-A:2, I - excludes from the definition of “meeting”, “chance, social or other encounter not convened for the purpose of discussing or acting upon [jurisdiction] matters” provided that “no decisions are made regarding such matters.”*

## Right To Know Law Non-Meetings

“**Non-meetings**” - 91-A:2, I also carves out four specific categories of communications which, notwithstanding meeting the criteria above, are excluded from the definition of “meeting”. Only three apply to school boards, they are:

- Strategy and negotiations regarding collective bargaining;
- Consultation with legal counsel (must include ability for contemporaneous communication); and
- Circulation of draft documents.

*NOTE: The concept of a “non-meeting” is not to be confused with non-public sessions under 91-A:3, which are beyond the scope of this presentation.*

## Right To Know Law Meeting Exceptions and Non-Meetings

Are all contemporaneous communications about jurisdictional matters by a quorum of a body subject to the meeting requirements of 91-A?

**NO.** Remember, the meeting requirements under 91-A are triggered by those communications which fall within the definition of a “meeting” (quorum, public body, ability to communicate contemporaneously, discussion about a jurisdictional matter).

## Right To Know Law Basics Records\*

**“Governmental records”** - means any information created, accepted, or obtained by, or on behalf of any public body, or a quorum or majority thereof, of any public agency in furtherance of its official function. Without limiting the foregoing, the term **“governmental records”** includes any written communication or other information, whether in paper, electronic or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body... 91-A:1-a, III

*\*As this presentation focuses on board member digital communications, most records requirements, e.g., those relating to requests, production, maintenance etc. are not covered or included in the materials.,*

## Right To Know Law Basics Key Definitions

**“Information”** means:

- Knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained.
- Including, but not limited to, written, aural, visual, electronic, or other physical form.

RSA 91-A:1-a, IV

**“Electronic records”** means:

- Information created or retained in digital format.

RSA 5:29, VI

**In addition to emails, can include text messages, voice mails, DM's, IM's, social media comments, etc..**

## Right To Know Law Basics Records

*III. Each public body or agency shall keep and maintain **all governmental records** in its custody at its regular office or place of business ...*

*III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts...*

RSA 91-A:4

## Emails, Social Media Comments and Other Electronic Communications

### Pitfalls & Practice Tips



## Communications Outside of Meetings Slippery Slopes/Violations

- *“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, so they couldn’t communicate “contemporaneously” even if they wanted to”;*
- *“Bob doesn’t have a Facebook account”;*
- *“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 & Social Media Best Practices

- 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

- When communicating on informational matters via email, use BCC for all recipient (other than perhaps your own, or an administrator) (helps limit intentional or inadvertent use of “reply all” and wandering into substantive discussions).
- Don’t use “reply all”.
- Include reminders/warnings to other board members in your own text – “Please do not respond to this email outside of a meeting”.

## Electronic Communications Best Practices

- 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*).
- Use caution with what you say in electronic communications both as to content and tone. Remember such communications are subject to the same public disclosure as a formal letter.

## Electronic Communications Pitfalls – Slippery Slopes - Violations

### *“Governmental Records” - RSA 91-A:1-a, III*

As with hard copy letters, and whether sent or received through a district account or a board member’s personal or business account, an email, etc. will be considered a governmental record if it contains information that is:

- created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, **or**
  - the school district, **and**
  - which is in furtherance of its official function.
- Think hard before forwarding constituent emails or complaints other than to the Superintendent.

## 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?



# Individual Board Member Engagement on Social Media

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Slide 22

## Introduction – Scenario #1

- It's budget season, you look on the local community Facebook forum, there is a “vibrant” discussion regarding the Board’s proposal to reduce staff.
  - A board member has commented, but you think that the his comment doesn’t tell the whole story, so you chime in and post a comment.
  - Another board member sees the two comments, and, wanting to be helpful, adds some missing information.
- It’s not a community page, but, in fact, your page.

*Individual Board Member Engagement*      *www.nhsba.org*      *Slide 23*

## Additional Considerations For Board Member Pages

- Board members do not lose their rights to speak as citizens by virtue of their office, whether in person, writing or on Facebook.
- However, no individual board member has the power or authority to speak on behalf of the board, without first having that authority approved by the board.
- It is important, therefore, for board members to be clear when they are communicating their own views or recollections as opposed to official positions or the record of the board.

## Concerns Regarding Board Member Pages

- **Notice of problems** - In many instances (e.g., student on student sexual harassment, bullying, etc.), a district's liability might arise only when it "knows or should know" of a situation;
  - If information is posted on a board member's page, will that impute knowledge upon the district?
  - Does the member's administered page make it clear that posting should not be construed as a communication to the district?
  - What if the board member him/herself did not see the post as it was a reply to a reply on another post, or he/she was not fully monitoring the page?

## Additional Considerations For Board Member Pages

- **Messaging** - There is the possibility that an individual believes that the page represents the board/district's policies, statements or positions, and/or suggests that the individual member has authority to speak for the board. Although this generally would not be a substantial liability concern, it could significantly increase the district's exposure to litigation. Examples of this might be if statements on the page were defamatory, or constituted an invasion of privacy. Although the district might ultimately prevail in the suit, the fact of the litigation itself could impose substantial financial and other costs.

## Additional Considerations For Board Member Pages

### **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.

## Practice Tips for Board Member Social Media Pages/Accounts

- Don't blog, tweet, or post anything you wouldn't want splashed across the front page of the daily newspaper.
- Board ethics and conflict of interest policies apply to social media outlets.
- Don't use social media to communicate confidential information (information that is obtained in appropriate non-public sessions, or is otherwise protected or privileged under law).
- Keep the tone conversational and informal, but use proper grammar and show the same sensitivity regarding word choice you would in other venues.


## Practice Tips for Board Member Social Media Pages/Accounts

- Snarky doesn't play well if you're not a teenager. Keep your communications professional, albeit more informal in tone and manner.
- Be transparent — let people know who you are and what you stand for. **Don't hide behind the anonymity afforded by social media.**
- 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.

## Practice Tips for Board Member Social Media Pages/Accounts

- Take the high road. You'll take some unfair hits — that comes with the territory. Don't get into fights with parents, students, teachers, and other bloggers, commenters, etc.. **You will lose.** Barking at a barking dog does not make the dog bark less.
  
- **Take time to reflect on the above before hitting send.**

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A LOOK FOWARD TO  
NHSBA'S UPCOMING WORKSHOPS

- OCT. 2, 2019  
BRADLEY F. KIDDER  
EDUCATIONAL LAW  
CONFERENCE  
8:00am-3:00pm  
Grappone Conference Center
- OCT. 15, 2019  
SETTING THE FOUNDATION: AN  
INTRO TO ED. FUNDING IN NH  
6:30-8:30pm  
25 Triangle Park Dr., Concord NH
- OCT. 18, 2019  
TEACHER/EDUCATOR CODE OF  
CONDUCT  
12:00-1:00pm  
Online Webinar
- OCT. 21, 2019  
NHSBA/VLACS  
COLLABORATION  
6:30-8:30pm  
25 Triangle Park Dr., Concord NH
- OCT. 22, 2019  
SCHOOL DISTRICT POLICY  
DEVELOPMENT  
12:00-1:00pm  
Online Webinar
- OCT. 22, 2019  
SCHOOL CONSTRUCTION  
MATTERS  
6:30-8:30pm  
25 Triangle Park Dr., Concord NH
- OCT. 29, 2019  
PULLING BACK THE CURTAIN:  
NH'S EDUCATION LANDSCAPE  
6:30-8:30pm  
25 Triangle Park Dr., Concord NH
- NOV. 6, 2019  
EFFECTIVE SCHOOL BOARD  
MEETINGS  
12:00-1:00pm  
Online Webinar
- JAN. 3, 2020  
LEGISLATIVE 101  
12:00-1:00pm  
Online Webinar
- JAN. 25, 2020  
NHSBA DELEGATE ASSEMBLY  
10:00am-3:30pm  
25 Triangle Park Dr., Concord NH





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Slide 32