

## Understanding New Hampshire's Right-to-Know Law

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## OVERVIEW

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## Public Policy and the Right-to- Know Law

### Constitutional Basis: Part 1, Article 8

“Government, therefore, should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.”

### Statutory Basis – RSA 91-A:1

“Openness in the conduct of public business is essential to a Democratic society. The purpose of [the Right-to-Know Law] is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.”

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Practice Pointer: When you are caught up in the thicket of details pertaining to a request for access to public records or whether a topic should be discussed in a public or nonpublic meeting, it is vital that you step back and consider the underlying public policy considerations. Ask yourself the following questions:

- Am I unreasonably restricting access to records or proceedings?
- Does my position preserve the fundamental presumption of openness, accessibility, accountability and responsiveness?
- Will my position will further the public policy favoring the “greatest possible public access?”

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## Public Meetings and Non-Public Sessions

All meetings are “open” and “public” – i.e., they are required to be open to the public. RSA 91-A:2, II.

“Non-public sessions” are parts of a public meeting, during which the board is authorized by RSA 91-A:3 to exclude the public from discussion and decision-making regarding specific issues.

“Non-meetings” are non-quorum discussions and specified exclusions of certain “conventions” or quorum discussions from the RSA 91-A:2 definition of and requirements for a “meeting.”

NOTE: non-public sessions require meeting minutes; non-meetings do not.

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## Defining “Public Meeting”

A public meeting occurs when:

- (1) A quorum of the membership of the public body is convened, whether in person, by means of telephone or electronic communication (as described below), or in any other manner such that all participating members are able to communicate with each other contemporaneously; and
- (2) The purpose of the meeting is to discuss or act upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power.

RSA 91-A:2, I.

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### Traps for the Unwary:

- RSA 91-A:2-a: “Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.”
- “Convene” does not necessarily mean that all members are physically present, and informal gatherings may become meetings.
- Subcommittees and delegated bodies: quorum and authority defined within context of subcommittee/body.

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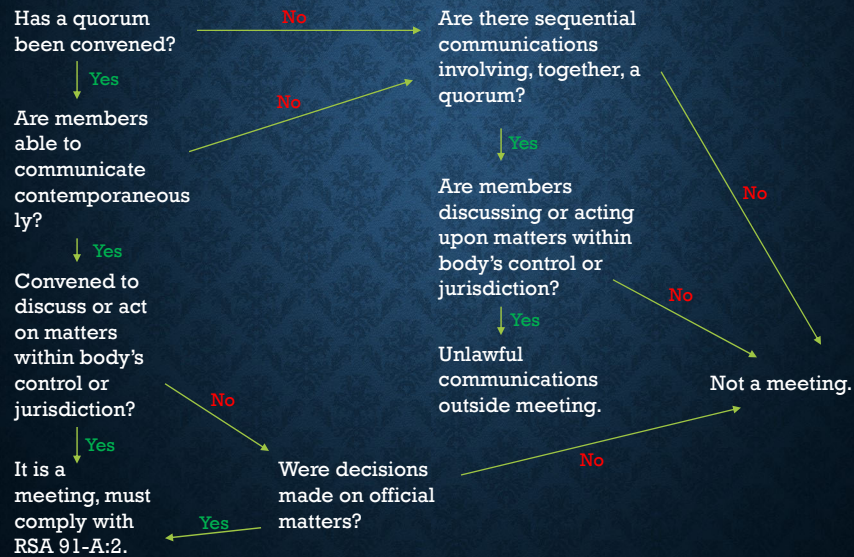
### Statutory Exclusions from Definition of “Meeting”

- A “chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters.
- Strategy or negotiations with respect to collective bargaining.
- Consultation with legal counsel.
- A caucus consisting of elected members of a public body of the same political party.
- Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting.

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## Is it a Meeting?



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Practice Pointer: Just because communications or the exchange of documents may not constitute a "meeting" does not mean that such communications or documents are not subject to disclosure as "public records."

Example: Superintendent sends meeting agenda via email to Board members.

Question: Is this a meeting?

If not, what types of Board member responses might make it a meeting?

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## Electronic/Remote Meetings

- Fully remote meetings are a relic of the COVID-era. A quorum of the public body must now be physically present at all meetings.
  - However, some public bodies continue to use remote meeting platforms as a means to allow the public to attend and/or participate in meetings remotely. This is acceptable.
- When it is “not reasonably practical” for a member of the public body to be physically present for a meeting, that member may participate remotely. RSA 91-A:2, III(a). The minutes must reflect the reason for that member’s remote attendance.
- In an emergency (an issue requiring immediate action where physical presence is not reasonably practical within the period of time requiring action), meetings may occur remotely. RSA 91-A:2, III(b). Again, the reason for the emergency and remote attendance must be specified in the minutes.
- With respect to any meeting at which any member is participating remotely, the remote member(s) should identify themselves and anyone else present in the room with them, and all votes should be taken by roll call.

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## The Notice Requirement: RSA 91-A:2, II

- Proper statutory notice to the public is a precondition to almost any public meeting.
- Notice must contain the following:
  - The time of the meeting;
  - The place of the meeting; and
  - Per the advice of the NH Attorney General, a brief outline of the agenda for both the public session and the statutory basis for any anticipated nonpublic session.
- Absent an emergency, notice of the meeting must be either (1) posted in two places, one of which may be the district’s website; or (2) printed in a newspaper of general circulation. Notice must be posted/printed at least 24 hours, excluding Sundays and holidays, in advance of the meeting.
- In the event of an emergency, the 24-hour notice rule may be waived only if the chair determines that “immediate undelayed action” is imperative. Still, notice must be posted as soon as is practicable, and the public body must “employ whatever further means are reasonably available to inform the public that a meeting is to be held.”
  - Reminder: as with all “emergency” actions, the basis for the emergency and the need to depart from statutory requirements (notice, physical presence, etc.) must be spelled out in the minutes.

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## Non-Public Sessions: RSA 91-A:3, I-II

- Boards may enter into a non-public session, in the course of an otherwise public meeting, for a statutorily authorized reason.
- A non-public session must be preceded by a recorded, roll call vote on a motion, properly made and seconded. The motion must state the statutory basis. The non-public session is strictly limited to the scope of the stated reason.

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## Non-Public Sessions Continued

Non-public sessions may only include matters permitted under RSA 91-A:3, II, which include (as is relevant to schools):

- The dismissal, promotion, compensation, disciplining, or investigation of charges regarding a public employee (*except* when the employee requests an open meeting);
  - The hiring of any person as a public employee;
  - Matters that would likely affect adversely the reputation of any person, *other than a member of the body or agency itself* (*except* when such person requests an open meeting);
  - Consideration of the acquisition, sale or lease of real or personal property;
  - Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the body or agency;
  - Consideration of entering a tuition agreement to the extent necessary to maintain competitive position;
  - Consideration of legal advice (even when counsel is not present);
  - Consideration of matters relating to preparing or carrying out emergency functions; or
  - Consideration of whether to unseal minutes due to change in circumstances (vote must be in public).

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## Procedures Required for Non-Public Sessions

- Notice requirements of public meetings apply to any public meeting that includes a non-public session.
- Requirements to Enter Non-Public Session:
  - A motion properly made and seconded occurring during public session;
  - The motion must state the specific exemption under RSA 91-A:3, II;
  - A roll call vote on the motion, again in the public session;
  - Approval of a majority of those present.

Note: A non-public session (and the underlying motion to enter same) may be supported by more than one statutory basis per item and may include discussion of more than one item if each is statutorily authorized.
- Exiting a Non-Public Session:
  - There are no specific requirements for exiting a non-public session.
  - Best Practices:
    - Discuss contents of non-public minutes or review and vote on non-public minutes before exiting; and
    - When possible, exit by formal motion and vote. Not required, but provides clarity.

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## Meeting Minutes: RSA 91-A:2, II & A:3, III

- Minutes are required for all meetings, with additional requirements for non-public sessions.
- All minutes (public and non-public sessions) must include:
  - The names of each member participating;
  - The name of anyone else attending or appearing before the board;
  - A brief description of the subject matter discussed;
  - Any final decisions made; and
  - The names of members who made or seconded any motions.
- Public minutes for meetings that include a non-public session must also include:
  - The identities of members who moved and seconded to enter non-public session during a public meeting;
  - The specific exemption(s) under RSA 91-A:3, II which allows a non-public session;
  - The roll call vote;
  - The motion, second, and any vote to seal non-public minutes;
  - If applicable, any remote participants and the reason therefor.
- Non-public minutes must also include the “manner” in which each member voted.

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## Approval of Minutes

- RSA 91-A is silent on an approval process, but it is very likely that the minutes will not be “approved” by the time they must be made available to the public (5 days for public sessions and 3 days for non-public sessions unless sealed).
- “Approved” minutes, however, must be posted to the Board/SAU/District website OR provide information on the website as to where the public may request and view them. RSA 91-A:2, II-b(a).
- Per RSA 91-A:4, II, materials used to compile minutes (notes, recordings, etc.) must be made available for inspection.

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## Sealing and Approval of Non-Public Minutes

- Before exiting a non-public session, it is best to discuss and review the minutes. The statute does not specify a process for approval, but the Board should at least:
  - Consider the content of the minutes before exiting non-public;
  - Discuss whether content will warrant a motion to seal the minutes and, if so, why; and
  - Discuss the length of time during which the minutes should be sealed (e.g., consideration of a tuition contract vs. a matter that could adversely affect the reputation of a third-party).
- The more efficient approach would be for the minute-taker to write or type the information required under RSA 91-A:2, II and RSA 91-A:2, III (or use prepared templates) while in non-public. The Board can then review the prepared minutes immediately and approve them while in the same non-public. The subsequent vote to seal (in public session) would then be based on the actual minutes.
  - The less-efficient, but still acceptable, approach would be for the note-taker to prepare the minutes as they ordinarily would (using notes, etc., maintaining confidentiality, and drafting the minutes at a later time). However, the subsequently drafted minutes would need to be provided to the Board in the next non-public session for its approval.
- When re-entering public session, the first item should be to seal the non-public minutes.

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## Non-Public Minutes Continued

- Note that a motion to seal, and a vote approving it, are required for the non-public minutes to avoid becoming public by default. The motion must be made, seconded, and pass with 2/3 approval or it will become public and must be disclosed within 72 hours of the non-public session.
- A motion to seal should include the time the Board believes necessary for the minutes to remain sealed. This will assist the Board in the required periodic review of such minutes and assist the Board in meeting its obligation to make previously sealed minutes publicly available as soon as the need for them to remain sealed is removed.
- Note: only the minutes *may* ultimately be made public. What is discussed in non-public must remain confidential. *See, e.g.,* RSA 41:1-a (duty to preserve confidentiality).

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## Recent Amendments to RSA 91-A Imposing Additional Requirement Relating to Sealed Minutes (the “List” and Periodic Review)

### The “List”: RSA 91-A:3, III

- As of January 1, 2022, the following data must be entered onto a “list” in relation to sealed minutes:
  - Identity of the public body;
  - Date and time of the non-public session;
  - Specific grounds for entering non-public;
  - Date of the decision to seal the minutes;
  - Date of the decision, if any, to unseal the minutes.
- This list must be “made available as soon as practicable for public disclosure.”
  - Note: at this point, where public bodies should have a running “list” of this data in relation to all sealed meetings since 1/1/22, this list should be available the following morning.
- In the interest of clarity and to allow the Board to better evaluate whether previously sealed minutes should be unsealed, the data should (but is not required to) include:
  - The specific grounds upon which the minutes were sealed; and
  - The date the Board expects to either unseal the minutes or re-review them.

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## Periodic Review of Sealed Minutes

- Prior to 2022, RSA 91-A only suggested that sealed minutes may, in the future, be unsealed, but there was no requirement that they be reviewed or a process by which sealed minutes would become unsealed.
- Effective as of October 3, 2023, an amendment to the law now requires such a review and either a determination to unseal or a determination to keep sealed.
- RSA 91-A:3, IV:
  - A public body or agency *may* adopt procedures to review sealed minutes and to determine whether the basis for sealing continues to exist.
  - Public bodies must review sealed meeting minutes at least every 10 years. This review must consist of an analysis as to whether the circumstances that justified sealing the minutes no longer exist and a determination, by majority vote, that the minutes will remain sealed in light of those circumstances or that the minutes will be made public.
  - While the Board can establish a set period of time before the minutes will be made public, or at least reviewed again, this period cannot exceed another 10 years.
  - If the sealed minutes are not reviewed within 10 years, they “shall” be made public.
  - Note: there is a 10-year grace period for minutes that were sealed prior to the effective date.

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## Periodic Review of Sealed Minutes

- Reviewing previously sealed minutes under RSA 91-A:3, IV will take place in a non-public session. RSA 91-A:3, II(m). “However, any vote on whether to disclose minutes shall take place in public session.”
- Adopting procedures: not required under the law, but a best practice to have one in place, especially given the burden of reviewing decades-old sealed minutes. Some choose to delegate review of minutes to a subcommittee or individual person who then makes recommendations to the Board. Some choose to establish a schedule for the review by the full Board of previously sealed minutes in batches.
  - Including within the “list” the date the Board expects the sealed minutes to be publicly available, or at least ripe for review (or a 10-year date by default), will help with this process.
- Note: the amendment includes two instances in which certain sealed minutes must be publicly disclosed, irrespective of the 10-year window:
  - RSA 91-A:3, III (relating to sale, purchase, or lease of property – must be disclosed promptly after transaction has closed or decision to not proceed).
  - RSA 91-A:3, II(k) (tuition contracts, minutes disclosed before contract approved).

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## Access to Public Records

Definition of Public 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. 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.”

RSA 91-A:1-a, III.

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## Access to Public Records

The Scope of the Right:

Inspect all public records including minutes of meetings of the bodies or agencies; and

To make memoranda, abstracts, photographic and photostatic copies.

NOTE: Motivation for making the request is irrelevant. Identity of requester is irrelevant. Requests may be made anonymously.

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## The Duty to Keep and Maintain Public Records

Regular office/place of business in an accessible place.

Duty to preserve in an accessible manner.

May have to assemble documents in their original form.

Electronic records

Agreements to settle lawsuits

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## The Duty to Make Records Available

Minutes of public proceedings shall be recorded and open to public inspection not more than 5 business days after the public meeting;

Minutes and decisions reached in non-public session shall be publicly disclosed within 72 hours of the meeting unless sealed by determination of the public body;

Reasonably described public records should be promptly disclosed when such records are immediately available for release;

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Public records which are unavailable for immediate inspection and copying shall:

- a. Be made available within 5 business days of the request;
- b. denied in writing with reasons (within 5 business days); or
- c. Furnish the citizen with written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. RSA 91-A:4, IV.

- If it will take more than 10 hours to make the records accessible, must provide an estimate as to costs. RSA 91-A:4, VIII.

\*\*Must follow up with requester if unable to meet self-imposed "deadline"\*\*\*

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## V. Remedies

- Order access to a public proceeding or record
- Award of attorney's fees and costs if the public body/agency/person "knew or should have known" that the conduct violated RSA 91-A
- Award of fees to a public body/agency for having to defend against a lawsuit filed in bad faith, or that is frivolous, unjust, vexatious, wanton, or oppressive
- Civil Penalties for employees/officials who act in bad faith
- Invalidation of an action taken at an unlawful meeting, if circumstances warrant
- Training
- Injunctive relief

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## Remedies, continued -

- Duty to preserve documents that have been requested.
- Criminal penalties for knowing destruction of information.

A Right-to-Know requester may challenge a public body's or agency's response to a request by way of a Superior Court Petition or a complaint to the Right-to-Know Ombudsman. The same remedies are available in both proceedings.

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# Q & A

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