



May 2005

*"Only together can we really make a difference."*

**NHSBA Officers**

**Cindy Chagnon**  
President, Bedford

**Susan Allen**  
1st Vice-President, Gilford

**Rebecca Ayers-Moore**  
2nd Vice-President/Treasurer, Conway

**Kent LaPage**  
Immediate Past President, Portsmouth

**Executive Director**  
**Theodore E. Comstock, Esq.**

Contact for *focus*:  
**Kathleen O'Sullivan**  
Director of Communications,  
Policy Services & Finance  
Email: kosullivan@nhsba.org

**NH School Boards Association**  
25 Triangle Park Drive, PO Box 1599  
Concord, NH 03302-1599

Phone: 603-228-2061  
Toll Free: 1-800-272-0653  
Fax: 603-228-2351

# focus

on New Hampshire School Boards

Volume 2, Number 5

## **NH's Right to Know Law and the Challenges of Technology**

Under New Hampshire RSA 91-A, known as the *Right-To-Know Law*, school boards are required to conduct their proceedings in public (with the exception of non-meetings and non-public meetings specifically defined by RSA).

This has always been a straightforward requirement, and generally easily met – by boards gathering in an easily accessible public location, the public being noticed of the meeting, and the board then meeting to discuss and act upon school business.

### **Technology challenges**

The heightened popularity of communications tools such as email, websites, faxes, and teleconferencing has changed the usual "thoughts" about meetings and the Right-To-Know Law.

It is evident that email has become the communications vehicle of choice for much of society, and most school board members have availed themselves of electronic communication in one form or another.

The "law" in this area is very fluid, and judicial interpretations regarding electronic communication/Right-To-Know laws varies significantly from state to state, however, some generalities are emerging. For example, a single e-mail from one board member to another on a matter of school business may not constitute a violation of Right-To-Know type laws. However, when such an e-mail is then forwarded to a third board member with comment, especially if three constitutes a quorum, the e-mail could be in violation.

School communications by school officials, specifically including board members, where a majority of the officials are "present" in a chat room or using groupware, intranet, listserv or similar media, may be viewed by a court as a "meeting," making such a "meeting" then subject to open meeting requirements.

In addition, in email communications, there is generally a record left of the communication, unlike usual conversations.

When board members communicate via email, and those messages are saved on a com-

puter, printed out, or are somehow retrievable, they create a record and can be used as evidence of the discussion, with a possibility of an open meeting violation.

Board members are cautioned that such "records" may fall under the disclosure requirements of the Right-To-Know Law, in certain circumstances. And, even if not legally disclosable, such emails can be embarrassing if released as part of some kind of litigation.

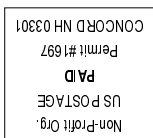
### **Definition of a "meeting" – other states' experiences in dealing with technology issues**

"Right-To-Know Laws" exist in all 50 states. Generally they all define a meeting as an actual gathering of a quorum of a board to discuss or act upon school business. The meeting can be in person or via phone or video conferencing, but simultaneous communication is required.

The definition of "meeting" varies by state, and many have taken steps to update their definition to address issues of email and quorums. By way of example:

- **California's** Brown Act defines a meeting as "...any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members..."
- In **Montana** a meeting is defined as "the convening of a quorum...whether corporal or by means of electronic equipment to hear, discuss or act upon a matter..."
- **Colorado** defines meeting as "any kind of gathering convened to discuss public business, in person, by telephone, electronically, or by other means of communication."
- The Freedom of Information Act in **Virginia** provides that any governing body conducting a meeting where the "public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically present" violates the law.
- A 1998 **Florida** Attorney General opinion concluded that because state law required

(Continued on page 2)



NH School Boards Association  
25 Triangle Park, P.O. Box 1599  
Concord, NH 03302-1599  
Address Service Requested



school boards to meet at "a public place in the county," a quorum of the school board must be physically present. The board, however, could use electronic means to enable a minority of members who were absent to be included.

- A 1995 **Kansas** AG opinion defines a meeting to include any "gathering, assembly, telephone call, or any other means of *interactive communication*." However, the AG further defined *interactive communication*: "if a sender of a message does not receive an immediate response, the communication is not interactive."
- **Nevada's** state code includes a provision that "electronic communication...must not be used to circumvent the spirit of the letter of the [law]."

#### ***Where New Hampshire stands***

New Hampshire's Right-To-Know Law does not address whether the definition of a "meeting" includes electronic communications.

To address these issues, our legislature created a Right-To-Know Commission in 2003.

This commission has developed and released a comprehensive report, which was released in October 2004 (available at <http://www.nhsba.org/documents/RighttoKnowStudyCommissionReport102904.pdf>). This report has resulted in various legislative bills, including House Bill 626, which proposes technical changes to RSA 91-A.

It significantly includes an expansion of the definition of a public meeting to include the words: *whether in person, by means of telephone or electronic equipment, or in any other manner, such that all participating members are able to communicate with each other contemporaneously...* This would appear to cover situations in which board members engage in discussion exchanges that occur **at the same time**, which would then, under this definition, likely constitute a meeting.

On the other hand, the proposed law would seem to exclude extemporaneous communication (not occurring simultaneously) - such as email - from coming under the definition of "meeting."

However, the bill proposes that:

- If a quorum of a board participates in an email exchange, such communication shall be fully disclosed at the next meeting prior to any decision on the matter, including a decision not to act.
- Communications among less than a quorum of members need not be disclosed.
- Sequential communication on the same matter shall be disclosed if the total number of members participating would constitute a quorum if meeting contemporaneously. Such disclosure to be made by those who know, or should know, that the number participating constitutes a quorum.

The legislation also includes a "warning clause" stating that any communication that takes place outside of meetings shall not be used to circumvent the spirit of RSA 91-A.

#### ***Practical Considerations***

E-mail is a useful tool to gather information and communicate with staff, other officials, agencies, and the public. But school board members must be alert that any such communication may be subject to NH's Right-To-Know law, and we suggest the following for your consideration:

- Treat all electronic communications as potentially subject to RSA 91-A. Do not put anything in an e-mail you would not want to read in the newspaper.
- Keep public and personal communication totally separate. Do not put personal messages in e-mails discussing public business. Do not send or receive personal e-mails on school computers unless you do not care about eventual disclosure.

#### ***Future considerations***

This is an area in transition in New Hampshire. As legal and legislative developments occur, we will keep you fully informed through timely emails (of all things!) to board chairs, the NHSBA website, articles in the *NHSBA Policy Update*, and in comprehensive updates in other NHSBA publications.

***Stay tuned – and watch your email!***