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School Board Use of E-Mail

I. Common Questions

1. Is an e-mail a public record?
2. What categories of e-mail communications are permissible?
3. What are the disclosure requirements for electronic communications?
4. Does a quorum of the Board have to receive the e-mail in order for it to be made public?
5. Are contemporaneous e-mails among board members considered a “meeting” for Right to Know purposes?

II. What constitutes a “public record?”

RSA 91-A:1-a defines “governmental record” as:

- 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.
- 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.
- The term "governmental records" shall also include the term "public records."

With this definition in mind, there are essentially three elements to what constitutes a public record for Right-to-Know purposes. The document/record must:

- (1) Be created or maintained by the school district;
- (2) Discuss official board business; and
- (3) Be viewed/read by a quorum of the Board.

These elements are relatively easy to distinguish when dealing with traditional type of paper records and documents. However, questions may arise when an e-mail or other electronic document has not yet been reduced to a paper printout.

If we apply these elements to e-mail communications among school board members, it appears that e-mails would be considered public records, assuming the e-mail was” (1) created by a school board member or administrator; (2) discussed official board business in furtherance of the board’s duties; and (3) is received or read by a quorum of the board.

Further, the New Hampshire Attorney General’s Office issued a Right to Know Memorandum on July 15, 2009. In that memo, the AG opined that “Electronic

Government Records may include, but are not limited to: (a) documents stored in a computer; (b) e-mail; (c) voice mail; (d) PDF documents; (e) instant message; and (f) electronic photos (digital).”

The New Hampshire Supreme Court has not yet addressed the issue of when e-mail communications become public records. However, the issue was addressed in Rockingham County Superior Court in 2003.

In Miller v. Fremont School Board, Rockingham County Superior Court, No. 03-E-152, the petitioners sought access to copies of e-mail communications among school board members, claiming that the board had been using e-mail communications in violation of the public meetings provisions of RSA 91-A. The Miller case is instructive in helping school boards and administrators assess whether or not electronic communications are or may become public records subject to public disclosure.

(1). Miller case: E-mail as a public record

1. The court ruled e-mail communications between board members are in the nature of public records governed by RSA 91-A:4.
2. The court ruled the public is entitled to access of e-mails, not because the e-mails constitute a “meeting” but rather because the substantive written communications are RSA 91-A:4 public records.

(2). Miller case: Quorum requirements

1. The court found that the public is entitled to access to e-mails between a quorum of school board members, when the e-mails discuss official board matters.
2. The court specifically did not address the issue of whether substantive e-mail communication between members of the board must be disclosed when no quorum is involved.

(3). Miller case: Disclosure requirements

1. RSA 91-A does not require copies of the e-mail communications to physically attached to the minutes, so long as the substance of the e-mail communications is properly disclosed and included in the minutes of the next board meeting.

III. Are Simultaneous or Contemporaneous E-Mails an Illegal Meeting?

The second concern school boards must consider when communicating via e-mail is whether or not such communications constitute illegally held meetings under the Right to Know Law.

RSA 91-A:2 defines a “meeting” as “the convening of a quorum of a public body for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power.”

The New Hampshire Attorney General’s Office offered this statement regarding e-mail use by a public body and whether or not such communications are considered a “meeting” under the Right to Know Law:

E-mail use should be carefully limited to avoid an inadvertent meeting, albeit one where there is a failure to have a physical quorum at a noticed meeting place. Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote on a matter within the jurisdiction of the body would constitute an improper meeting. Sequential e-mail communications among members of a public body similarly should not be used to circumvent the public meeting requirement. For example, e-mail among a quorum of members of a public body in a manner that does not constitute contemporaneous discussion or deliberation and does not involve matters over which the body has supervision, control, jurisdiction, or advisory power does not technically constitute a meeting under the Right-to-Know law. E-mail discussions of a quorum concerning matters over which the public body has supervision, control, jurisdiction, or advisory power would run counter to its spirit and purpose.

IV. What Types of E-Mail Communications Are Permissible?

NHSBA advises school boards to use caution if and when communicating via e-mail.

The Attorney General’s Office stated “e-mail among a quorum of members of a public body in a manner that does not constitute contemporaneous discussion or deliberation and does not involve matters over which the body has supervision, control, jurisdiction, or advisory power does not technically constitute a meeting under the Right-to-Know law.”

Given this statement, NHSBA advises that certain e-mails may be permissible. For example, RSA 91-A:1, I(d) states that “circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting” is not a meeting under the Right to Know law. Therefore, it seems likely that school boards can circulate draft documents via e-mail of contracts, reports, budgets, etc. However, it is advised that board members do not engage in specific discussions about these documents via e-mail, as such discussions may run contrary to the Right to Know law.

Additionally, NHSBA also takes the position that certain e-mails containing “informational discussions” are likely allowable under the Right to Know law. Examples of these types of e-mails may include an e-mail asking that a particular item be included on the agenda of the next meeting, e-mails notifying board members that a meeting has been rescheduled, etc.

V Revisiting the Common Questions

Q: Is an e-mail a public record?

A: Yes, e-mails may become public records provided the traditional hallmarks are present: (1) it is created or maintained by the public entity; (2) it discusses official school business; and (3) the e-mail is either created or in the possession of a quorum of the board.

Q: Do e-mail communications among a quorum of the board constitute an illegally held meeting?

A: Possibly. Depending on the nature of the e-mail and any subsequent discussions, the board may be engaging in an illegally held meeting.

Q. What are the disclosure requirements for electronic documents?

A: Per the Miller case mentioned above, actual copies of the electronic communications do not need to be disclosed - the substance of the communications must be adequately reported in the minutes of your next public meeting. However, it may be a better practice to print off and include a hardy copy of the e-mail(s) with the minutes of the next meeting. Full disclosure may be in the board's and the public's best interest.

Q. Does a quorum of the Board have to receive the e-mail in order for it to be made public?

A: Presumably, but this issue has not been fully addressed by the courts. If a quorum of the board discusses a matter via e-mail, it must be disclosed. The law is unclear as to the disclosure requirements when an e-mail is distributed to less than a quorum.

VI. Best Practices and Policies

When considering whether or not to communicate via electronic communication, the New Hampshire School Boards Association recommends the following practices:

1. Avoid electronic communications if possible. Rather than be faced with potential litigation and Right-to-Know challenges, NHSBA recommends that school boards do not communicate via e-mail if at all possible.
2. If it is necessary to communicate via e-mail, avoid discussing personal, private information about students and staff. Keep the communications merely “informational” - dates of meetings, items to be added to an agenda, documents for review (so long as no discussion will follow). The risks outweigh the benefits of communicating in this fashion. (Hackers, accidentally sending the e-mail to an unintended recipient, etc.)
3. Avoid forwarding a e-mail to one member at a time. Because the law states that the e-mail communication is a public record if received by a quorum of the board, determining when a quorum is established may not be clear if the message is relayed to one board member at a time.
4. If the Board chooses to communicate via e-mail, despite the possibility that such communications may be interpreted by a court as a meeting, it is probably a better practice to include all board members and the Superintendent as recipients of the e-mail.
5. When in doubt, fully disclose the contents of e-mail communications between board members that discuss official board business. Though it is not required by law (as of yet) the best practice might be to attach copies of the e-mail communications to minutes of the next meeting.

6. Via school board policy, assign the Superintendent (or other designee) the responsibility of retaining copies of board e-mails. Of course, this entails including the Superintendent as a recipient of the e-mails.