Public Notices & Minutes
Right to Know Law
Webinar
Tuesday May 22, 2018
Noon – 1:00 pm
Repeat 5:30 pm to 6:30 pm
Center At Triangle Park
Concord, NH 03301

Right to Know Law Basics
RSA 91-A
Introduction

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. *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.*

*New Hampshire Constitution, Part 1, Article 8: "Accountability of Magistrates and Officers; Public’s Right-to-Know“ (Emphasis Added).*

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Introduction

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”.
- Meeting notices and minutes implicate both core areas.
- Notice of a meeting is essential for the public to know when to attend, and minutes are, at their core, the public’s record of the actions taken during the meeting.
- Meeting notices and meeting minutes will always constitute governmental records (even though some minutes may be sealed).
**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.

“**Meeting**” – means the convening of a quorum of the membership of a public body ... whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, ... for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power.” 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;
• 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.

Non-Meetings

“Non-meeting” – although not a term used in 91-A, is a term in Right-to-know parlance reflecting four exceptions found in 91-A:2, I to the definition of a “meeting”, three of which pertain to school boards:

• Chance, social or other encounters not convened for the purposes of considering jurisdictional matters;
• Strategy or negotiations relative to collective bargaining; and
• Consultations with legal counsel.

If the discussion is one of these, no notice, minutes or public location is required.
RSA 91-A:2, II provides, in part:

“Except in an emergency* . . .

• a notice of the time and place of each such meeting, including a nonpublic session,

• shall be posted,

• in 2 appropriate places one of which may be the public body's Internet website*, if such exists, OR shall be printed in a newspaper of general circulation in the city or town,

• at least 24 hours, excluding Sundays and legal holidays, prior to such meetings.”

NOTE: An emergency is defined as “a situation where immediate undelayed action is deemed to be imperative by the chair[...” 91-A:2, II
Meeting Notices
Agenda v. Notice

The meeting notice required under the Right-to-Know law is much narrower than even the sparest form of what we know as an agenda.

Under 91-A:2, II, the only content required for a meeting notice is:

- The body convening the meeting (presumably); and
- time and the place* of the meeting.

The basic definition of agenda is: the list of things to be discussed a formal “meeting.”

Meeting Notices
Agenda v. Notice

While a “notice” tells you when and where a public body will meet, the agenda tells the public what the meeting is about.

Although there is no specific requirement under 91-A for boards, committees and other public bodies to post an agenda, NHSBA strongly encourages boards to do so.

One of the easiest ways for a body to lose support of the public is to gain the reputation of not being transparent. A detailed agenda is a basic step to keeping public confidence.
Meeting Notices
Agenda v. Notice

In very rare circumstances, a provision of a statute may require "notice" of subject matter in an agenda. For instance, under 198:20-b, if a local board policy allows expenditure of unanticipated funds of less than $5,000 without a public hearing, then the board “shall post notice of the funds in the agenda...” In this context, NHSBA recommends that the board read “agenda” to mean the notice required under 91-A.

Public Notice of Meetings  RSA 91-A:2, II

- If using an agenda (for Board meetings especially), include:
  - A statement alerting the public that matters other than the posted items may be considered.
  - A statement alerting that the Board reserves the right to make agenda adjustments as needed;
  - Any rules that might apply to public comment periods (if any is allowed);
  - A statement that in certain instances the Board might suspend allowance of a public comment period (assuming that the Board includes one).
School board meetings fall within two types relative to scheduling and notices* – emergency and non-emergency:

- **Non-Emergency** – includes both “regular” (e.g., 2nd & 4th Mondays of each month) and “special” (e.g., for extra workload, or special circumstances);

- **Emergency** – defined in 91-A:2, II, to be a “situation where immediate un-delayed action is deemed to be imperative by the chairman or presiding officer of the public body”
Some statutes require hold “public hearings” (e.g., budgets, bonds, expenditures from expendable trust funds, etc.), and some require specific notice requirements. For instance, RSA 198:20-c requires notice of the public hearing be published in the newspaper.

Not all statutes requiring a public hearing include the newspaper requirement (e.g., 189:68, IV, regarding use of recording for teacher evaluations). Most boards elect to publish all such notices, but if your board/district would prefer not to, it is important that you review the particular statute creating the public hearing requirement.

Joint meetings occur in different ways:

- Two public bodies meet together (e.g., school board and budget committee, or school boards of both the sending and receiving districts under a tuition agreement);
- A quorum of one public body attends a meeting of another public body. (e.g., quorum of local school board attends meeting of State Board Education).

Both bodies should independently post notice of the meeting.
RSA 91-A:3, II(a), is grounded in "a legislative concern for protecting the public employee from improper official conduct by compelling the government to make public the considerations on which its actions are based.". *Johnson v. Nash*, 135 N.H. 534, 537-38 (1992)(quoting *Stoneman v. Tamworth School Dist.*, 114 N.H. 371, 374 (1974)).

In most instances, a school board acts in its legislative capacity. In those instances, the notice requirements discussed above pertain.

In some cases, however, a board may be called on to act in its “quasi-judicial“ role, that is, when it is determining rights of a specific individual. These instances are generally referred to as “hearings“, although in 91-A:3, II (a) and (c), the statute uses “meeting“. 
The most common hearings that school boards encounter include:
- Teacher non-renewal hearings under RSA 189:14-a;
- Teacher dismissal hearings under RSA 189:13; or
- Grievance hearings for employees whose positions are within a collective bargaining unit;
- Student manifest educational hardship cases under RSA 193:3;
- Student expulsion or long-term suspension hearings under 193:13.

For most of the above, the statute or corresponding DOE regulations have specific notice requirements above and beyond what is required in 91-A. Whenever a board is called upon to convene a hearing, they should refer to the specific statute/rule.
RSA 91-A:2, II – Required Minutes

Minutes of all such meetings, including nonpublic sessions, shall include:
• Names of members participating;
• Names of persons appearing before the School Board;
• A brief description of the subject matter discussed;
• The identity of members making the first and second of any motion (new legislation); and
• Final decisions.

Recorded Roll Call – When Required

In most instances, there is no requirement that the minutes even reflect a vote tally. However, some situations require a roll call. The most common include:
• When any member is participating remotely (i.e. by phone, Skype, etc. – 91-A:2, III);
• On motions to enter non-public session (91-A:3, I(b));
• All votes taken during non-public session (91-A:3, III uses the phrase “record … in such a manner that the vote of each member is ascertained and recorded”); and
• On motions to seal non-public minutes.

The Chair or majority of members may also choose to take other votes by recorded roll call.
**Timeline for Minutes – Public & ?**

**Public session – 91-A:2, II:** “Subject to the provisions of RSA 91-A:3, all minutes shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, . . . and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception.”

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**Timeline for Minutes – Non-Public**

**Non-public session – 91-A:3, III:** “Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours . . . unless by recorded vote of 2/3 of the members present taken in public session, it is determined” to seal the minutes.*

*The topic of “sealing” minutes will be discussed later.*
General Minute Issues

General complexities regarding minutes…

Although 91-A has several items regarding the minimum content of minutes (both public and non-public – see, e.g., 91-A:2, II, and 91-A:3, III). The statute is silent, however about the approval process for minutes, whether for public or non-public sessions. For public sessions, draft minutes are to be made publicly available w/in 5 days, and for non-public 72 hours (3 days), in either case, long before most boards a board review or approve the drafts.

General Minute Issues – Non-Public

Additional complexities for non-public minutes include:

a. non-public minutes (except to the extent sealed) must be available within 3 days;

b. a vote to seal generally occurs before the minutes exist; and

c. if the Board considered multiple items in non-public, some items may warrant sealing, and some may not.
 Approval of Minutes

Because almost all boards approve their public session minutes at subsequent meetings, sometimes long after the 5 day deadline, it is the draft minutes which must be available.

Also, because those draft minutes were operative as of “5 days”, they are public records which should be maintained with the permanent records.

Changes made in the final “approved”* minutes, should be reflected in the minutes for the meeting when the minutes are approved.

*With the approval of RSA 91-A:2, II (b), effective January 1, 2018, the statute uses for the first time the term “approved minutes”.

Non-Public Minutes

RSA 91-A:2, II

&

RSA 91-A:3, III
“Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section.

Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded.”

RSA 91-A:2, III – Non–Public Session

• Minutes are required for all non-public sessions.
• Non-Public Session minutes must include:
  • For all actions taken, a 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);
  • 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.
• Notwithstanding whether minutes are sealed, what is discussed in non-public must remain confidential.
**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.

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**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, then the minutes are public by default, and must be “disclosed” within three days (72 hours).
- The board should consider in its motion the duration that the minutes should be subject to non-disclosure. For instance, reputation matters may be perpetual, while the other reasons may be shorter lived (e.g., authorized range in price relative to sale of a parcel of property).

*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.
Approval of Non-Public Minutes

There are several approaches, some dependent upon the practices of the Board, some on the issue(s) considered in non-public, and some applying more specifically to issues for which the minutes will be sealed (for instance, some "hearings" which occur during non-public, require a more specific "record", and some issues require more detailed minutes).

In all instances, NHSBA recommends that the Board should consider the content of the minutes before exiting non-public. That discussion should include a general discussion about whether that content warrants a motion to seal the minutes.

We will discuss two acceptable common approaches. *Continued*...

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Approach 1: The minute taker in non-public writes/types the information required under 91-A:2, II and 91-A:3, III while in non-public, for the Board to review immediately. The board can approve the minutes while still in the same non-public. Once in public, the vote to seal would then be based upon the actual minutes. If a vote to seal passes, then the minutes can be sealed then and there. If the Board does not vote to seal, then the non-public minutes may be integrated into or attached to the public minutes.

Approach 2: The minute taker prepares the minutes in the same fashion as public (securing notes, etc. while maintaining confidentiality). However, if there was a vote to seal, then the draft should not be disseminated to the Board, but rather delivered and considered only in non-public, with additional copies turned in and destroyed by the recorder.
Review of Non-Public Minutes

The School Board has an “implied” duty to periodically review sealed minutes and decide whether the minutes should be unsealed.

- Minutes sealed to because they may affect adversely the reputation of any person other than a member of the School Board will most often remain sealed;
- Minutes sealed as disclosure would render a proposed action ineffective will often warrant unsealing once the related transaction is completed and public;
- Minutes sealed to protect plans for emergency responses to terrorism, active shooters, etc. most often will remain sealed.

*RSA 91-A:III states: “information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply.”

There is no indication that there is a specific requirement to review.

New Requirements Regarding Notice & Minutes
House Bill 170
Laws of 2017, Chapter 234

Amends RSA 91-A:2, adding a new paragraph II-b to clarify the procedure/requirements regarding posting minutes and meeting notices on the public body's website.

Effective: January 1, 2018

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House Bill 170
Posting Meeting Notices & Approved Minutes

**FORMER LAW**

- 91-A:2, II requires public bodies to either post meeting notices in two “appropriate places”, or to print the notice in a newspaper of general circulation.
- That section also allows, but does not require, the body’s website (if it has one), to serve as one of the two posting places for notices.
- The current statute is silent with respect to the posting of meeting minutes on a website.
The amendment permits local options:

- Post either notices and/or approved minutes on the website; OR

- The address and office hours of the location where people can find the meeting notices posted; AND/OR

- The address and office hours of the location where people can inspect and obtain copies of the approved minutes.

Note: the amendment does not require the body to have a website.

House Bill 170
Posting Meeting Notices & Approved Minutes

This law addresses only “approved minutes.”

In short, a body can elect to have one protocol for website posting of draft minutes, and a different website protocol for approved minutes.

In either event, draft minutes must still be available for inspection and copying – within 72 hours for non-public – (unless sealed), and within 5 days for public sessions meetings.

Note: While neither current law, nor the amendment require final approval by a date certain, once the 72hr/5 day windows close, there is a document, draft or final, which must be available to inspect/copy.
House Bill 460
Amends RSA 91-A:2, adding a new paragraph II-a

Objections in Non-Public Sessions

The new law, effective January 1, 2018, allows a board member to object when he/she is concerned that the discussion in non-public session is straying beyond the purpose or scope of the non-public session which was announced when the Board voted to go into non-public session.

The Board should discuss the objection, and if necessary reviewing the pertinent section of the Right-to-Know law. The Board can then:

- Continue the discussion if a majority believes the discussion is proper under the Right-to-Know law; or
- Discontinue the discussion

If the Board discontinues the discussion, it can go back into public session, and take a new vote to re-enter non-public with a motion stating the correct statutory exception.

Continued....

If the Board continues the discussion:

- The objecting member may request the objection be noted in the minutes;
- The objecting member may participate in the discussion; and
- If in non-public session, a summary of the objection shall be added to the public meeting minutes.

Note: The amendment does not require notation of the objection in the minutes unless the objecting member requests the notation.
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