Right-to-Know Law Overview for New School Board Members

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Center At Triagle Park
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Today’s Materials Can Also Be Found..

- To download today’s presentation or any additional documents please visit our website at:
  www.nhbsa.org/documentslegal.asp
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).*

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".

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.
“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...
“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.

NOTE: For this presentation and 91-A, “email” or “electronic communications” will include all forms/platforms of digital or electronic communication technology and media, e.g., social media, blogs, text messaging, instant messaging, group chats, etc., irrespective of whether ordinary usage of that platform normally includes contemporaneous exchanges.

Meetings
RSA 91-A:2
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;
  - There is no statutory or regulatory requirement for most meetings that an agenda be posted.
  - However, once an agenda is established, the agenda and accompanying materials must be immediately available to members of the public upon request (except to the extent exempt under 91-A:5).
- 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”

Even though a “meeting” occurs when:

- A quorum of the body
- Convenes so they can communicate contemporaneously (email, telephone, etc.)
- To discuss or act upon something over which the public body has supervision, control, jurisdiction or advisory power;
- Consistent with the second and third of those points, additional language of 91-A:2 makes clear that “chance” or “social” encounters by a quorum are not meetings – even when they happen to discuss jurisdictional matters – UNLESS decisions are made.
- Additionally, 91-A:2, I also carves out four* narrow exceptions to the definition of a meeting.

Non-Meetings

RSA 91-A:2, I
RSA 91-A:2, I

“Meeting shall also not include:”

(a) Strategy or negotiations with respect to collective bargaining.

• This non-meeting exception applies equally to:
  • strategy discussions by the board, the board’s negotiating team (e.g. committee), and
  • negotiations with the union.

• It is also NHSBA’s opinion that this exception:
  • is not limited to boards which specifically employs the employees of the union
    (e.g., an SAU board for which constituent member districts are negotiating CBA’s), and
  • the strategy session could include other participants at the pleasure of the
    board committee chair.

(b) Consultation with legal counsel

• This non-meeting exception only applies when the attorney is either present, or at the very least able to participate in a “contemporaneous exchange of words” with the public body. Ettinger v. Town of Madison Planning Board, 162 N.H. 785 (2011)

• The contemporaneous exchange language of Ettinger is widely understood to allow for telephone conferences with the attorney, whether the board members themselves are in one location or not.

• Any discussion of advice from the board’s attorney when the attorney is not so “present”, may occur in non-public session, provided the circumstances satisfy the requirements of 91-A:3, II (i) - discussed later.

(d) Circulation of draft documents which, when finalized, are intended to formalize decisions previously made in a meeting...

Seems simple, right? Maybe, but there’s a trap...

Assume the Board makes a decision, or gives general instructions to a board member or the superintendent about a letter or other written document (e.g., a vendor contract). The board member then circulates the draft. While that act simply memorializes the decision the Board had already made, once any of the members start suggesting substantive edits, the exception no longer applies. A practice suggestion would be to indicate in the original transmittal email/cover sheet, that if any member has suggested substantive edits, then he/she should indicate that further Board discussion is needed.
“Meeting vs. Session”

- Once you determine that a quorum of the public body
  1) has convened to discuss or act upon something over which the
     public body has supervision, control, jurisdiction or advisory
     power,
  2) There is no “non-meeting” exception, then the subject matter
     must be discussed at a public meeting.

- However, although all such discussions must occur at a public
  meeting, some matters may be discussed in non-public session.

Non-Public Sessions

RSA 91-A:3

- Under 91-A:2, I, all “meetings” are public.
- Under exceptions set out at 91-A:3, a board may enter non-public session
  to discuss and potentially act on certain limited matters.
- Unlike a “non-meeting”, the notice and minute requirements of a public
  meetings apply to any public meeting that includes a non-public session.
- Non-public sessions do not require specific notice beyond the meeting
  notice.
- A public meeting can be held solely for the purpose of going into a non-
  public session – with no other discussion of business in the public session
  of the meeting. (E.g hearings, or discussions regarding litigation response.)
- Either way, the board must first meet in public and then vote to enter the
  non-public session (procedures are discussed later).
RSA 91-A:3, II

Acceptable Reasons to Enter A Non-Public Session

RSA 91-A:3, II provides an exclusive list of reasons for which a public body may enter a non-public session.

Unless one or more of those exceptions applies to a particular topic, or the topic is properly considered in a non-meeting under 91-A:2, I, a quorum of a board or committee may only discuss the topic during the public part of a public meeting.

RSA 91-A:3, II

A board may enter non-public session to consider or act upon:

(a) dismissal, promotion, compensation or disciplining of any public employee, or the investigation of any charges against him or her, unless that employee has a right to an open meeting and requests the meeting be open;

• This language does not create a right to an employee to have or even attend a non-public session concerning him or her. Such a right typically would derive from a CBA, statute, Board policy or other such source (e.g., board level grievance hearing, non-renewal hearing under RSA 189:14-a, individual contract, etc.)

• As to such hearings, even when an employee requests an open hearing, the board may nonetheless go into non-public for those parts of the hearing which concern specific students, or impacts the reputation of one or more persons (other than a member of the board itself) or the employee who is the suspect of the hearing.

RSA 91-A:3, II

A board may enter non-public session to consider or act upon:

(b) The hiring of any person as a public employee.

• This only applies to employees, and does not apply to appointed positions, whether board created (e.g., ad hoc committees as committee members), or not (board member vacancies). In those instances, one might look instead at the next exception regarding reputation.

• When considering appointments to non-employee positions, a board could conduct the interviews and general fact of potential appointees, and then consider whether to enter non-public under the reputation exception (91-A:3, II(c)).
RSA 91-A:3, II
A board may enter non-public session to consider or act upon:

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the school board itself, unless such person requests an open meeting:

• This exception is likely the most common reason used for non-public.

• The reputation section applies to almost all matters concerning specific students.

• Most municipal and school attorneys maintain that the last clause does not give the person whose reputation is at stake the right to request the discussion be open unless the person otherwise has a right to a hearing (manifest hardship, 193:13, etc.).

RSA 91-A:3, II
A board may enter non-public session to consider or act upon:

(d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

• This exception allows discussion of things such as sale price range, or various other issues involved in either general listing, or specific offers.

• The exception only applies to contracts involving sale/lease of property.

The exception does not allow non-public discussion of any other type of contract, such as transportation, fuel supply, etc.

RSA 91-A:3, II
A board may enter non-public session to consider or act upon:

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled….

• The main requirement here is that the litigation has to have risen to the document stage, either by threat, or actual filing.

• As a result of an amendment in 2015, the exception no longer applies only to situations where the board/district/member would be defendant(s).

• Counsel does not need to be present, or even retained yet.
RSA 91-A:3, II
A board may enter non-public session to consider or act upon:

(f) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

- This exception only applies to threats of deliberate conduct intended for widespread injury or property damage – e.g., terrorist acts, mass shooters.
- Not generally applicable to schools, but in certain instances it could apply (lock down procedures and drills, specific threats, etc.).

(h) Consideration of entering into a tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations.

- The language does not allow for non-public sessions to discuss existing contracts.
- The exception allows joint discussion by boards negotiating an agreement.
- Before final approval by the District, the proposed contract, all proposals, all non-public minutes, and certain other documents shall be made public.
- Also, final approval of the contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate.

(i) Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.

- This exception was added in 2016 in response to a 2011 Supreme Court decision indicating that a board could not discuss legal advice outside of the public view unless the board had the ability to “have a contemporaneous exchange of words” with the attorney.
- New paragraph (i) allows not only discussion of advice in writing, but also advice given orally to at least one member of the body.
Procedures Required for Non-Public Sessions
91-A:3, I & III

RSA 91-A:3, I

Entering Non-Public Sessions

- Requirements to enter non-public session:
  - A motion properly made and seconded occurring during public session;
  - The motion must state the specific exemption under 91-A:3, II which allows a non-public session;
  - Vote on the motion shall be by roll call vote; and
  - With approval of a majority of those present.
  - All of the above must be reflected in the public minutes.

- A motion may include more than one statutory basis per item, and more than one matter. However, each separate matter must have at least one independent basis.

Non-Public Sessions

- The notice for the public meeting does not require reference to a non-public session:
  - There is no statutory or regulatory requirement for most meetings that an agenda be posted.
  - However, once an agenda is established, the agenda and accompanying materials must be immediately available to members of the public upon request (except to the extent exempt under 91-A:5).

- There are no requirements as to when a non-public session may occur, other than the requirement that the non-public session must occur during a public meeting.
- If the Board is aware ahead of time of the need for a non-public session, as a courtesy to the public, as well as any known participants to the non-public, to hold the non-public at the end, or near the beginning of the public session.
- No specific procedure is required for exiting a non-public session.
Attending Non-Public Sessions

Who may attend a non-public session?

• The public body’s own members;
• Typically the Superintendent, and (with some matters), the Business Administrator;
• When warranted, essential staff and/or guests may attend the non-public session.
  • In non-public sessions regarding specific individuals, such as hearings, the persons in attendance frequently changes. For instance, a witness to an event that is the subject of a discipline hearing, would only be present during his or her testimony.
  • Although most boards use either one of the members or even the Superintendent to take minutes, a board could use its typical minute taker, provided there was a high level of confidence in that person’s ability to keep matters confidential.

Exiting Non-Public Sessions

• There are no specific requirements for exiting a non-public session.
• As a best practice, however we would recommend that whenever possible do by formal motion and vote. This provides clarity to not only the minute taker, but the board members themselves.

Public & Non-Public Minutes

91-A:2, II & 91-A:3, III
Minutes of Non-Public Sessions

- Minutes are required for all meetings— including non-public sessions.
- Whether public or non-public, minutes must include:
  - 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.
- Minutes for non-public sessions must also include 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).

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.
- Notwithstanding whether minutes are sealed, what is discussed in non-public must remain confidential.

RSA 91-A:3, III
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).

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*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.*
Governmental Records
RSA 91-A:1-a, :4 & :5

The public has a right to:
• Inspect and/or copy
  • all non-exempt governmental records
  • in the custody or control of a public body or agency
• during regular or business hours

If records aren’t immediately available, they must be made available later.

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.
Electronic Records

- Any information created or retained in digital format.
- May include:
  - Documents stored in a computer
  - Email
  - Voicemail
  - Instant messages
  - Digital Photos

Retention of Records

- Period of retention for government records is defined by a retention schedule.
- Each public body must create a retention schedule.
- School districts are covered by RSA 189:29-a, HOWEVER, it simply states that the local board “shall establish a retention schedule for all official records of the school district”.
- Policy EHB & Administrative Procedures EHB-R

Retention of Electronic Records

- Electronic records must remain accessible for the same retention or archival periods as their paper counterparts.
Retention and Deletion of Electronic Records

- An electronic record is not subject to disclosure after it has been legally deleted.
- Legally deleted means deleted in accordance with protocols for the record at issue.
- An electronic record is deleted only if it's not readily accessible to the public body or agency.
- Transferring an electronic record to a readily accessible "deleted items" folder or similar location on a computer is not sufficient.

Exemptions From Disclosure

“Invasion of Privacy” - RSA 91-A:5, IV
- Internal personnel practices.
- Confidential, commercial, or financial information.
- Test questions, scoring keys, examination data.
- Personnel, medical, welfare ... and other files whose disclosure would constitute invasion of privacy.

Exemptions, cont'd

- Notes or other materials made for personal use that do not have an official purpose. RSA 91-A:5, VIII
- Preliminary drafts, notes, memoranda, other documents not in final form and not disclosed or circulated to a quorum or majority of board. RSA 91-A:5, IX
Other Exemptions

- Written legal advice from counsel. - *Society for the Protection of N.H. Forests v. Water Supply and Pollution Control*

- Documents or material that a public body received in non-public session to the extent disclosure of such records would frustrate the purpose for the non-public session.

Remedies / Penalties

91-A:7-9

- Public body liable for costs if lawsuit necessary to insure compliance with the statute.
- Public body liable for attorney's fees if agency knew or should have known conduct was a violation.
- Court may invalidate the action.
- Court may enjoin future violations.
- Employee, officer or official found to have acted in bad faith fined $250-$2,000, and may be required by court to reimburse public body/agency any attorneys’ fees or legal costs awarded to the petitioner.
RSA 91-A:9
Criminal Violations and
Preservation Requirement

• It is a misdemeanor for any person “information” to prevent disclosure after a request is made.

• Irrespective of any applicable retention schedule or policy, if information is withheld from inspection or disclosure under a claimed exemption, must be retained for 90 days or the resolution of any lawsuit brought under RSA 91-A:7.