Non-Public Sessions & Non-Meetings Under the Right to Know Law

July 31, 2019

Today’s Discussion

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As stated in RSA 91-A:1, 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.”

The statute does not create the public’s right to open government, but codifies into statute a right expressed in Part 1, Article 8 of the New Hampshire Constitution:

- “… the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.”
Right To Know Law Basics

… the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.

New Hampshire Constitution, Part I, Article 8

- The language establishes the two core areas of access under 91-A: “proceedings”, or “meetings” of “public bodies”, and “governmental records”. *

- More important than codifying what is already the right of access granted by the Constitution, is that 91-A establishes the parameters for "reasonable restrictions” – i.e., exceptions and exemptions to access - as contemplated by Article 8.

- Parameters which are continuing to evolve or become more defined through the legislative process.

*Note: This presentation focuses on the open meeting requirements of 91-A.

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, 1.
Right To Know Law Basics

Key Definitions

“Meeting” (defined in 91-A:1) means:

- The convening of a quorum of the body
- “whether in person, by means of telephone, or electronic communication, or in any other manner that allows all participating members to communicate with each other contemporaneously”;
- To discuss or act upon something over which the public body has supervision, control, jurisdiction or advisory power. (Referred to as “official” or “jurisdictional” matters)
Meeting Requirements

If it constitutes a “meeting”, then RSA 91-A:2 further requires the body (board or committee) to:

- Provide posted public notice of the meeting (including a physical location and a time);
- 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.

Meetings – Key Concepts

- Under 91-A:2-a, I – A public body may “deliberate” upon official matters only “in meetings held … in compliance with 91-A:2, II or III.”

- 91-A:… 2, II provides: “Communications outside of a meeting, including sequential communications among members of a public body should not be used to circumvent the spirit and purpose” of 91-A.
Meetings - Digital Communications, Social Media, Etc.

- As used in 91-A, 1 - “electronic communications or in any other manner” includes all forms/platforms of digital or electronic communication.

- Simply, whatever rules apply to in-person or telephonic exchanges apply equally to any form of communication that permits two-way communications.

Open Meetings & Non-Public Sessions,

- All meetings are “open”, in that they are required to be open to the public.

- Non-public sessions are exceptions to the requirement that the public be permitted to be present for all deliberations and decision making.
Non-Public Sessions

The rationale for non-public sessions is that there are certain matters that warrant discussion - and even decision making - out of the public eye (the specific matters/exceptions will be discussed later). In one way or another each of the grounds concern individual privacy, the District’s legal or competitive interests, or safety concerns.
**RSA 91-A:3, II**

**Non-Public Sessions – General Principles**

- 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 upon certain limited matters.
- A “public” meeting can be held solely for the purpose of going into a non-public session – with no business addressed in the public session other than the formalities relating to entering non-public and the minutes.
- Unlike a “non-meeting”, the notice and minute requirements of a public meeting apply to any public meeting that includes a non-public session.

**Non-Public Sessions vs. “Non-Meetings”**

When is a meeting not a meeting?

- While a non-public session is always part of a meeting, 91-A:2, I recognizes four occasions/matters which are excluded from the definition of “meeting” altogether.
- Although not used in the statute, these occasions are commonly known as “non-meetings”.
- While both non-public sessions and non-meetings involve discussion of sensitive matters, the distinction between the two is important: unlike the non-public session, because a non-meeting is not considered a meeting, none of the requirements for open meetings (notice, physical location, public attendance, minutes, etc.) apply.
Non-Meetings

The Recycling Center Exception

The first non-meeting situation is for the “unintended” and “inconsequential” social discussion. RSA 91-A:2, I states in part:

- A chance, social or other encounter
- not convened for the purpose of discussing or acting upon [jurisdictional] matters
- shall not constitute a meeting
- If no decisions are made regarding such matters.

This exception applies only when the quorum discussion was not convened with the intent of discussing a jurisdictional matter, AND no decisions are made.
Non-Meetings
Collective Bargaining

“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.

- We believe that this exception:
  - is not limited to boards which specifically employ 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.

Non-Meetings
Consultation with Legal Counsel

“Meeting shall also not include:”

(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 able to communicate contemporaneously, may occur in non-public session, provided the circumstances satisfy the requirements of 91-A:3, II (l) – discussed later.
Non-Meetings
Circulation of Draft Documents

“Meeting shall also not include: ”

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

➢ Seems simple, right? Maybe, but extra caution is important here.

➢ How do you respond if there are concerns with the draft circulated to a quorum? The draft is intended to memorialize a board decision. If any of the members express disagreement with the substance of the draft decision, no discussion should occur regarding that substance without reconvening a quorum at a meeting.

Non-Meetings
Not Subject to Requirements of 91-A:2, II

➢ If one or more of the non-meeting exceptions of RSA 91-A:2, I apply, then the “non-meeting” is not subject to the meeting requirements of 91-A:2, II.

➢ In short, the non-meeting would not require:
  • posted notice;
  • meeting minutes; or
  • physical location at which the public can attend.
RSA 91-A:3, II
Acceptable Reasons to Enter Non-Public Sessions

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

- 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 another source: e.g., CBA, statute (189:14-a, 193:13), Board policy, individual contract, etc.

- Even when the individual with a right to a “hearing” requests that it be open to the public, there may be circumstances when the board may nonetheless go into non-public for the limited purpose of considering information which independently might satisfy a basis for non-public. It may be a good idea to vet those situations prior to 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.

- 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.

(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:

(i) 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, active shooter, etc.
- Not generally applicable to safety, must be specific to the terrorist, mass shooting, etc., situations and planning (lock down procedures and drills, specific threats, etc.).

(k) 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.
- Final approval of the contract by a school district shall occur only after the public has had an opportunity to “participate”.
**RSA 91-A:3, II**

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

1. 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.

   - Allows discussion by the full board of advice given to only one member/agent.

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**CAUTION!**

- The list found in 91-A:3, II for acceptable purposes of non-public sessions is **exclusive**.
- 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.
- Watch for **issue creep** especially when more than one topic being discussed.
91-A:3, I & III

Procedures Required for Non-Public Sessions

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 nonpublic 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, exit by formal motion and vote. This provides clarity not only to the minute taker, but the board members themselves, especially at the end of the meeting, when only board members remain in the building.

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

- As non-public sessions are part of public meetings, minutes for the non-public portion must include all of the information required for public meetings, see RSA 91-A:2, I and II-a, as well as additional information required for non-public sessions, see 91-A:3, I and III.

- When a board decides to “seal”* minutes of a non-public session, there are two sets of minutes (i.e., public and non-public) which must include different pieces of information regarding the non-public session.

  *Note: 91-A does not use the word seal. Rather, 91-A:3, III requires disclosure of minutes unless certain exceptions apply (following slides).

  If sealed, the above is in the non-public minutes, otherwise, it is in the public minutes.

All meeting minutes, including those for non-public sessions must include at a minimum:

- 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;
- The names of members who first and seconded each motion;
- Any final decisions/actions taken; and
- If objection to matter under discussion is made by a board member, & the member requests, notation of the objection, and the basis for which the body continued the discussion. (RSA 91-A:2, II-a)
Minutes Relating to Non-Public Sessions

- For each non-public session, **public minutes** must also include:
  - The motion to enter non-public, including the statutory basis for each matter to be discussed; and
  - Roll call vote of members present (requires a majority).

- **Non-public minutes, whether sealed* or not** (addressed later), must also indicate the “manner” in which each member voted (roll call) for any action taken.

RSA 91-A:3, III

Sealing Non-Public Minutes

- Unless sealed, NP minutes must be disclosed within 72 hours (3 days) of the meeting. For 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. (See also slide 29)
Notwithstanding whether minutes are sealed, what is discussed in non-public must remain confidential.
Question: How do we approve non-public minutes?

Answer: 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.

There are two acceptable common approaches. Continued...

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.
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).

*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.

Multiple Topic Non-Public Sessions
**RSA 91-A:3**

Additional Requirements or Guidelines Regarding Non-Public Sessions and Minutes When More Than One Topic is Considered

- How should a board handle multiple topics for non-public?
  - A board could opt to enter and exit non-public for each separate matter.
  - Most boards, however, consider multiple items in the same non-public session.
  - Each item considered must have been the subject of a proper motion to enter non-public.
  - Each matter considered in non-public might require its own minutes.
  - The presiding officer (and the minute taker) must be disciplined in separating the different subjects, and making clear when discussion of one topic ends and another begins.

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**91-A:2, II-a**

Objections to 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 outside 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.

*By its terms, the new statute applies to discussions in violation of this chapter”, which includes public meetings as well. But the most obvious instance when this might be an issue is during a non-public session.*

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.*