



New Hampshire School Boards Association

Excellence in Public Education Through School Board Leadership

Right to Know Law Webinar

Meetings: Emails, Electronic Communications & Remote Participation

Wednesday, February 21, 2018

Noon – 1:00 pm

Repeat 6:30 pm to 7:30 pm

RSA - 91-A

Right to Know Law Basics

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).

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*”.

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.

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.

Right To Know Law Basics

Key Definitions

“Governmental Record” – includes *“any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, ... in furtherance of its official function.”* 91-A:1-a, III

This webinar presentation will focus on the “meeting” implications of board emails and electronic communications, although the governmental records concerns with respect to such communications are as complex and important.

Right To Know Law Basics

Key Definitions

“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.

***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., text messaging, instant messaging, group chats, social media, etc., irrespective of whether ordinary usage of that platform normally includes contemporaneous exchanges.*

Where Technology and the Open Access Law Collide

From those definitions, it should be clear that email and other electronic communication among board members, **can easily implicate both** the governmental records and open meeting provisions of the 91-A.

So, where are the intersections between electronic communications and the Right to Know Law?

The answer is more nuanced than almost any other concerning application of 91-A.

Or, more simply stated, *it depends.*

“Meetings”

Right To Know Meetings

As quoted above, RSA 91-A:2 establishes a three prong test for whether a board communication (of whatever medium or form) should be deemed a meeting. A **meeting** occurs when:

1. A **quorum** of the body convenes;
2. In **any manner** in which they can **communicate contemporaneously**;
3. For the **purpose of discussing or acting** upon something over which the public body has supervision, control, **jurisdiction** or advisory power.

On the issue of emails and other electronic communications, it is the second prong that is the most problematic and distinct from other encounters/communications.

Prong #1 - Quorum

1. *A quorum of the body convenes -*

In almost all matters, a school board quorum is a majority of the then sitting members. *RSA 21:15*

A couple of caveats/pointers:

- If a board/committee member has a conflict on a matter, and has recused (should recuse) him/herself, then quorum is based upon the remaining membership.
- Define the core membership of any standing or ad hoc advisory committee. This does not preclude additional, active, participants, but it at least helps with the determination of how 91-A applies in a situation (who is responsible for the committee's charge).

Prong #3 - Jurisdiction

3. For the purpose of discussing or acting upon something over which the public body has **supervision, control, jurisdiction or advisory** power.

Almost any matter which directly or indirectly relates to the school or school district will likely fall within the school board's "jurisdiction", *even when it doesn't*.

NOTE: *91-A:2, I excludes from the definition of "meeting", "chance, social or other encounter not convened for the purpose of discussing or acting upon [jurisdiction] matters" provided that "no decisions are made regarding such matters."*

Prong #3 - Jurisdiction

3. Jurisdiction continued...

For example: what if a quorum of the board discusses the possibility of the board taking up a resolution on DACA?

For most New Hampshire school districts DACA would have - at best an indirect connection to the statutory powers and duties of the board/district. Is DACA a matter within the “supervision, control, jurisdiction or advisory power” of a small town, New Hampshire school board?

Probably not, but *the power to make the resolution itself* – is!

In other words, don't get caught up on the “jurisdiction” language. If board is talking about a subject as board business, then it probably meets the “jurisdiction” threshold.

Prong #2 - Contemporaneous Communication

2. Convenes in any manner in which they can communicate contemporaneously

It is this prong that seems to present the most difficulty for public officials when identifying the intersection of the meeting provisions of 91-A with emails or other electronic communications.

Assume a board member sends an email to all of the other board members regarding a matter within the “jurisdiction” of the board.

- Does that constitute a meeting?
- Even if none of the other members respond?
- What if a community member sent it to the board? The Superintendent?

Prong #2 - Contemporaneous Communication

2. Contemporaneous communication – continued...

If a board member sends an email to all of the other board members regarding a matter within the “jurisdiction” of the board, but none of the other members respond, is it a meeting?

At least one N.H. Superior Court Judge thinks so. In *Porter v. Town of Sandwich*, (Carroll Cty. Super. Ct., Do. #212-2014-CV-180), the Judge ruled that the “ability” to communicate contemporaneously was the key factor rather than whether such communication actually occurred.

This is not the prevailing view among school and municipal attorneys, and at least one other Superior Court judge, but that decision highlights the ambiguity.

RSA 91-A:2-a – Just to Be Clear

Taken on its own, the three pronged meeting definition of 91-A:2, I would seem to open the door to all sorts of misinterpretations which had the effect of public bodies effectively and improperly conducting business outside of public meetings.

- *But I only sent my email to one member (who then forwarded it to another, who sent it to another, etc.);*
- *I knew that three of the four recipients were at work, so they couldn't communicate "contemporaneously" even if they wanted to.*
- *We were only batting some ideas around, we knew we had to vote at the meeting;*
- *It was only a straw poll.*

RSA 91-A:2-a – Just to Be Clear

Those misinterpretations – intentional or not - and others like them, led to the passage in 2008 of 91-A:2-a, which includes two paragraphs together serving as the “don’ts” reverse side of the coin to 91-A:2’s “do’s” relative to meetings.

- Paragraph I mandates that a board’s deliberations upon jurisdictional matters only occur in a public meeting (unless falling within one of 91-A:2, I “non-meeting” categories – *a little more on that later*).
- Paragraph II specifically prohibits the use of outside communications, including “sequential communications” to circumvent the spirit and purpose of 91-A.

Sequential Communications

While use of the sequential email to accomplish business which should otherwise occur in a meeting might be a 21st century development, but really is just a new-fangled extension of what is known in some areas as a “walking quorum”.

“*Walking quorum*” - a series of meetings, telephone conferences, or some other means of communication such that groups of less than a quorum are effectively meeting and can arrive at a consensus or understanding regarding governmental business that, collectively, would constitute a quorum. *See, e.g., State ex rel Newspapers Inc. v. Showers*, 135 Wis. 2d 77, 92, 398 N.W.2d 154 (1987).

The Bottom Line

Taken together, 91-A:2, I and 91-A:2-a make it pretty clear:

Discussion or action on official/jurisdictional matters should only occur in a properly held meeting.

This does not mean that any mention of a jurisdictional matter outside of a meeting is improper.

First - only deliberation and action are prohibited. An email on a purely administrative matter concerning the topic would not be (e.g., identifying the topic in order to schedule a meeting to deliberate upon it).

Second - a meeting requires a quorum – e.g., two members (of a 5+ member body) can legitimately discuss board business between themselves, but each should be careful not to pass any information from that discussion on to another board member.

Right To Know Law Basics

Meeting Requirements

If/when the elements of a meeting are present relative to board communication, then – unless and to the extent a basis exists for a non-public session - the Right to Know law requires:

- Posted notice (24 hours, absent an emergency);
- Availability for the public to attend (subject to 91-A:3);
- Board deliberations and decisions in public;
- **Physical presence at the location specified in the meeting notice** (unless 91-A:2, III applies – more on that later); and
- Appropriate minutes.

Right To Know Law Basics

Non-Meetings

When a meeting is not a meeting

“**Non-meetings**” - 91-A:2, I carves out four specific categories of communications which, notwithstanding meeting the criteria above, are excluded from the definition of “meeting”. Only three apply to school boards, they are:

- Strategy and negotiations regarding collective bargaining;
- Consultation with legal counsel (must include ability for contemporaneous communication); and
- Circulation of draft documents.

***NOTE:** The concept of a “non-meeting” is not to be confused with non-public sessions under 91-A:3, which are beyond the scope of this presentation.*

Emails and other Electronic Communications

Best Practices & Pitfalls

Electronic Communications

Best Practices

- Most importantly, leave discussion and deliberation of official matters for a public meeting;
- Never use email/texts to express ideas, concerns, opinions, etc. on jurisdictional issues or matters;
- Don't use "reply all";
- Whenever possible, the Superintendent or central office should be responsible for communications which are appropriate for the entire board;

Electronic Communications

Best Practices

- Use BCC for all recipient addresses (other than perhaps your own, or an administrator (helps limit intentional or inadvertent use of “reply all”));
- Use a district provided email address for all electronic communications including district business, such communications are “governmental records” (see attachments “Government Management of E-mail; What’s in Your Municipality’s In-box and NHBSA Training Document: School Board Use of Electronic Communication”).
- Use caution with what you say in electronic communications both as to content and tone. Remember such communications are subject to the same public disclosure as a formal letter.

Electronic Communications

Pitfalls – Slippery Slopes - Violations

- Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote;
- Forwarding to a board member an email received from another board member regarding a jurisdictional matter;
- Straw polls or communications seeking “a sense of the board”;

Electronic Communications

Pitfalls – Slippery Slopes - Violations

RSA 91-A:1-a, III – “Governmental Records”

- As with hard copy letters, and whether sent or received through a district account or a board member’s personal or business account, an email, etc. will be considered a governmental record if it contains information that is:
 - created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, **or**
 - the school district, **and**
 - which is in furtherance of its official function.
- Think hard before forwarding constituent emails or complaints.

Electronic or Remote Participation of a Board Member at a Meeting

Remote Participation in Meetings

RSA 91-A:3, III provides two allowances for remote, electronic or telephonic board member participation in a public meeting:

- In an emergency, when less than a quorum may be physically present at the noticed meeting site; and
- When a quorum is present on-site, and individual circumstances warrant a member's remote participation.

While the circumstances that would support each type are different, many of the “meeting” rules are the same.

Remote Participation in Meetings



In contrast to nuanced analysis of when board emails constitute a public meeting, the remote participation sections of 91-A are generally clear and simple.

Remote Participation in Meetings

RSA 91-A:2, III (b) – Remote participation by a quorum

- “**Except in an emergency**, a quorum of the public body shall be physically present at the location specified in the meeting notice...”
- An emergency means “immediate action is imperative, and the physical presence of a quorum is not reasonably practical within the time requiring action.” *This definition is slightly different, but consistent with, the “emergency” definition found in 91-A:2, II regarding meeting notices.*
- The determination of emergency is made by the presiding officer, and the facts supporting that determination must be stated in the minutes.

Remote Participation in Meetings

RSA 91-A:2, III (a) – Remote participation by one member

- An individual member* can participate electronically only when attendance in person is not reasonably practical;
- The reason that attendance is not reasonably practical shall be stated in the minutes of the meeting;
- A quorum must be present at the physical location;
- If an emergency meeting is not justified and a quorum cannot attend in person, the meeting should be re-scheduled.

***NOTE*:** More than one member may participate remotely, provided a quorum is physically present at the meeting location.*

Remote Participation in Meetings

RSA 91-A:2, III – Majority Decision

The introductory sentence of paragraph III states:

- “A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication...”
 - Clearly, the decision to permit remote participation of fewer than a quorum is a majority decision.
 - But because the quoted language is introductory to all of paragraph III, including the “emergency” meeting language of (b), a majority may overrule the chair’s determination to hold an emergency meeting remotely.

Remote Participation in Meetings

Provisions Applicable to Both Types of Remote Participation

RSA 91-A:2, III (c) – Open and Audible

- The “discussions” of all meeting participants must be contemporaneously “audible or otherwise discernible” to each other, and to members of the public present at the location of the posted meeting (this applies to emergency meetings as well).
- Each member participating remotely must identify those present at the location from whence that member is participating.

Remote Participation in Meetings

Provisions Applicable to Both Types of Remote Participation

RSA 91-A:2, III (d) – Meeting Procedures Required

- All meetings allowing remote participation shall comply with “all of the requirements of [91-A] relating to public meetings, and shall not circumvent the spirit and purpose of this chapter...”
- Non-public sessions are permitted, but must also adhere to the requirements of 91-A:3.

Remote Participation in Meetings

Provisions Applicable to Both Types of Remote Participation

RSA 91-A:2, III (e) – Member Present – Roll Call Required

- Any member participating remotely “is deemed to be present at the meeting for purposes of voting.”
- “All votes taken during such a meeting shall be by roll call vote.”

Remote Participation in Meetings

Practical Considerations

- **Telephone call using a speaker phone.**
 - Ensure the public in attendance can hear both sides of the phone conversation; the speaker on board member's cell phone is not likely to be sufficient.
 - May require people speaking at the meeting to identify themselves so the member on the phone knows who is speaking.
 - Would not allow for the remote member to share documents without additional technology.

Remote Participation in Meetings

Practical Considerations

- **Skype or Other Video Conference.**
 - If the board can see the remote member(s), the public should be able to see the same screen image;
 - In most meeting rooms this would require more than one screen;
 - May require hooking amplified speakers to ensure the public can hear;
 - Technology needs should be planned ahead of time, ideally before the determination to allow the remote participation.

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APR. 12, 2018

RTK LAW OVERVIEW FOR NEW SCHOOL BOARD MEMBERS

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APR. 25, 2018

ANNUAL NEW SCHOOL BOARD MEMBER ORIENTATION & BOARD CHAIR WORKSHOP

This Orientation will provide both new and experienced board members a crash-course in school board role and responsibilities, the Right to Know law, and the importance of school board policy-making.



APR. 26, 2018

LITIGATION & CONSEQUENCES: WHAT HAPPENS IF OUR BOARD GETS SUED

This webinar will review pertinent statute and case law that address what happens if a school board has a Right to Know law petition filed against it. This webinar will address steps in typical Right to Know law litigation and what the Court can or may order as a remedy.



MAY 2, 2018

ANNUAL NEW SCHOOL BOARD MEMBER ORIENTATION WHITEFIELD, NH

This Orientation will provide both new and experienced board members a crash-course in school board role and responsibilities, the Right to Know law, and the importance of school board policy-making.



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