Chapter One: Public Meetings

This chapter discusses public meetings. For nonpublic sessions, refer to Chapter Two.

General Rule of Public Meetings: A meeting of a public body must have proper notice and be open to the public, and the public body must create minutes.

To understand this rule, and its nuances and exceptions, we must start with the definition of "meeting."

I. "Meeting"

A meeting is defined as "the convening of a quorum of the membership of a public body, ... or the majority of the members of such public body if the rules of that body define 'quorum' as more than a majority of its members, 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...." RSA 91-A:2, I.

Therefore, for a "meeting" to occur, the following must be true:

A. A quorum of a public body

B. Convenes so that they can communicate contemporaneously (in-person, telephone, electronic communication, etc.)

C. To discuss or act upon something over which the public body has supervision, control, jurisdiction, or advisory power.

Let's look at each part separately.

A. Quorum of a Public Body

1. *Quorum*

What is a quorum? A majority of any board or committee constitutes a quorum, unless an applicable statute states otherwise. RSA 21:15. When a quorum is present, a majority vote of those present is all that is needed to take action—again, unless there is a statute to the contrary (for example, RSA 674:33, which requires the concurring vote of three members of a Zoning Board of Adjustment (ZBA) to decide in favor of the applicant). In the rare case that the rules of the body define a quorum as something more than a majority of the members (for example, if a city charter defines a quorum of the city council as two-thirds of the members), the presence of a simple majority will still constitute a "meeting" under the Right-to-Know Law. In other words, a public body can't define "quorum" as more than a majority for the purposes of circumventing the public meeting requirements. For example, although a board of five could define "quorum" as four members for the purposes of voting/acting, three members of that board would still constitute a quorum under the Right-to-Know Law.

2. *Public Body*

"Public body" is defined in RSA 91-A:1-a, VI. That paragraph has five subparagraphs, with subparagraph (d) being the most important part of the definition for municipalities, school districts, and the like:

a) The general court including executive sessions of committees; and including any advisory committee established by the general court.

b) The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.

c) Any board or commission of any state agency or

authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.

d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.

e) Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

Let's look at subparagraph (d) more closely:

- The **legislative body** is also a public body. This means that when the annual town, village district, or school district meeting is going on, a meeting of a public body is occurring. However, those legislative bodies do not have a "quorum." It is simply the conducting of the town meeting that constitutes a meeting of a public body.

- A **governing body**—e.g., select board, town council, city council, library trustees, school board—is a public body.

- Other **boards**, **commissions**, and **committees** in your municipality are public bodies: planning board, conservation commission, trustees of the trust fund, capital improvements committee, just for a few examples.

- **Any committee, subcommittee, subordinate body, or advisory committee *of or to* a public body or agency is a public body** as well. Sometimes this is misunderstood, and it's extremely important. When a public body creates an advisory committee, it's a public body. When a public body creates a subcommittee of itself, it's a public body. Therefore, if the seven-person planning board creates a three-member subcommittee to draft a proposed ordinance, the three-person subcommittee is a public body of its own. It must do all the things a public body must do, including giving notice of meetings and taking minutes, which will be described later in this chapter. Furthermore, if a public agency creates a committee, that committee is a public body as well. So said the New Hampshire Supreme Court, when it ruled that an "Industrial Advisory Committee" created by a mayor constituted a public body, even though that public body was not created by ordinance or statute, because "the committee's involvement in governmental programs and decisions brought it within the scope of the right-to-know law." *Bradbury v. Shaw*, 116 N.H. 388, 390 (1976). Therefore, the focus is on whether the body is engaged in governmental operations; if it is, it should be considered a public body. Err on the side of openness; you can be assured a court will.

- **Note:** "Public body" also curiously includes "agency" in its definition. There is agreement—including from the New Hampshire Attorney General's office—that this was erroneously included in the definition. A "public agency," which is defined as "any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision," is not understood to be a public body. A public agency could be an agency of one, such as the town clerk. An agency might also be made up of a department head and a few employees. Therefore, the definition of a public body has, thus far, not been inter-

preted to include "public agency," which is separately defined in RSA 91-A:1-a. It may just be that "agency" was included to reinforce that any board, commission, committee, etc. acting on behalf of town business is included in the definition of "public body."

As you can see, virtually all groups that perform any governmental function in a governmental entity (town, school district, village district, etc.) are considered public bodies, like the Industrial Advisory Committee in the *Bradbury* case above. However, other civically-engaged groups in town that have no official governmental status would not constitute public bodies under the Right-to-Know Law. For example, a "Friends of the Library" committee, formed on its own as an independent nonprofit organization, is not a public body or agency. However, if the library trustees created such a committee, it would be a public body subject to the Right-to-Know Law.

B. Convenes and Communicates Contemporaneously

The most obvious manner in which a public body "convenes and communicates" contemporaneously is a quorum of the board sitting together, in person, and having a discussion. But contemporaneous communications can occur through other media and in other settings, such as by telephone or email. They key is whether a quorum of the board is having contemporaneous communications—regardless of the forum.

This section addresses important issues related to communications through electronic means.

1. *Remote Participation in a Public Meeting*

It is possible for a board member to participate in a public meeting, even if he or she cannot be physically present. The Right-to-Know Law authorizes a public body—but does not require it—to allow one or more members to participate in a meeting by telephone or other communication, but only if the very specific rules in RSA 91-A:2, III are scrupulously followed:

- The member's attendance must be "not reasonably practical."
- The reason in-person attendance is not reasonably practical must be stated in the minutes of the meeting. Although the law does not indicate what situations would qualify, some obvious examples include physical incapacity and out-of-state travel.
- Except in an emergency, at least a quorum of the public body must be physically present at the location of the meeting. An "emergency" means that "immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action." The determination that an emergency exists is to be made by the chairman or presiding officer, and the facts upon which that determination is based must be included in the minutes.
- All votes taken during such a meeting must be by roll call vote.
- Each part of a meeting that is required to be open to the public must be audible "or otherwise discernable" to the public at the physical location of the meeting. All members of the public body, including any participating from a remote location, must be able to hear and speak to each other simultaneously during the meeting, and must be audible or otherwise discernable to the public in attendance.
- Any member participating remotely must identify anyone present at the remote location.

See Appendix B: Remote Participation Checklist

2. Email & Electronic Communications Outside a Meeting

Even though electronic participation in a meeting is permitted, it must be done in accordance with RSA 91-A:2, III. Remember that one of the most important requirements of that statute is that members of the public and members of the public body who are physically present at the meeting must be able to contemporaneously hear the board member who is participating electronically, and vice versa. When members of a public body are emailing each other, it is impossible for the public to have contemporaneous or simultaneous access to those communications. Furthermore, RSA 91-A:2-a says "[u]nless exempted from the definition of 'meeting' under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III." Therefore, a substantive discussion of matters within a public body's supervision, control, jurisdiction, or advisory power can never take place by email.

This doesn't mean that email is prohibited among a quorum of a public body, but caution must be taken. Remember that the Right-to-Know Law says a meeting is occurring only when a quorum of a public body communicates contemporaneously on matters over which the public body has authority, jurisdiction, advisory power, etc. So, although it is true that a meeting is not technically occurring when one planning board member sends a communication regarding his opinions on a pending application to the other members of the planning board, such an email invites trouble. If and when another planning board member hits "Reply All" and responds to that email, a discussion has begun, resulting in an illegal meeting communication outside a meeting. Therefore, emails of this nature should be avoided.

In fact, one superior judge has ruled that even a one-way communication from one board member to his other board members does constitute a meeting, even though no "discussion" among the board members had taken place. The judge decided that the potential for an email discussion to arise out of that original email was enough to create an "illegal meeting": "The key to the contemporaneous communication is the ability to communicate contemporaneously—as opposed to whether the contemporaneous communication actually occurred." *Porter v. Town of Sandwich*, No. 212-2014-CV-180 (Carroll County Superior Court, August 14, 2015) (emphasis added).

Although the New Hampshire Municipal Association does not agree that the one-way communication constitutes a meeting—or that the mere *ability* to communicate contemporaneously constitutes a meeting—no public body member should ever send an email to the other members discussing any substantive topic that the board acts upon, conducts business upon, or is involved with in any way (i.e., "official matters" of the public body).

Ultimately, one board member should never send an email to his other board members on a topic that should be discussed in a public meeting or proper nonpublic session. Instead, email communication should be saved for administrative or non-substantive purposes. The most obvious example is the select board chair emailing the packet for the upcoming meeting to her other select board members. The public body can take even further precautions by having an administrative person send the email, if such a person is available in your municipality, and/or putting the email addresses for the other board members in the "BCC" line rather than the "To" line of the email. Using the BCC line prevents a board member from being able to click "Reply All" and respond to all members of the board. Instead, a response email, even if "Reply All" were used, would reply only to the sender of the original email.

Even though an email communication may not constitute an illegal meeting, remember that it is a still a governmental record. Depending on the content of the email, just like any other record, it may be subject to a particular retention period

under the Municipal Records Retention Statute, RSA Chapter 33-A. That is a separate issue, and it is discussed in Chapter Three on Governmental Records.

❖ To summarize, here are some basic tips on using electronic communications:

✓ Never use email to express ideas, concerns, opinions, etc. on issues or matters related to the business and duties of your public body.

✓ Use an administrative person (i.e., someone who is not a member of the public body) to send an email to members of a public body, if you have that option.

✓ Put the recipients' email addresses in the BCC line of the email to prevent the possibility of "Reply All" and a discussion ensuing among a quorum of the public body.

✓ Always use official email addresses issued by the municipality, school district, or other governmental entity for communicating town business because such communications constitute governmental records that will be subject to disclosure, as discussed in Chapter Three.

✓ Leave discussion and deliberation of official matters for a public meeting, a properly-held nonpublic session, or proper "non-meeting," as discussed later in this chapter.

3. ***Communications that Circumvent the "Spirit and Purpose" of the Law***

Not only are email communications outside a meeting potentially illegal, such conduct may signal to the public that the body is trying to circumvent the open meeting requirement.

In fact, circumventing the spirt and purpose of the Right-to-Know Law is a violation of the law in and of itself. RSA 91-A:2-a, II says that "[c]ommunications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter." Such circumvention may come in the form of email communications among a quorum of the public body, but could also take the form of several separate oral communications among less than a quorum of the board, which, in the aggregate, are among a quorum. For example, on a board of five, if the chair contacted each of her other board members by phone, one at a time, to ask their opinions on a matter before the board, each phone call between the two board members would constitute less than a quorum. However, in the aggregate, a quorum of the board has communicated, sequentially, on a matter within its jurisdiction. Therefore, the board has engaged in illegal communications and violated RSA 91-A:2-a.

4. ***A Site Visit Is a Meeting***

A site visit or site walk most often occurs when a land use board, usually a planning board, goes to the physical site where a new land use project is being proposed. Although a site visit is most common for land use boards, it could also occur when, for example, a select board goes to view a property it has taken by tax deed or a school board goes to view the progress on a new auditorium being built.

If a quorum of the public body is attending the site visit to view and consider a property/location, it is a meeting. Although this gathering occurs outside of the normal meeting space, it is still a public meeting of the board if a quorum is present. This is so because the site walk is the "convening of a quorum of the membership 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." RSA 91-A:2, I. The rule of thumb here is to treat site walks like any other public meeting and give appropriate written notice, take proper minutes, and allow unfettered public attendance. If land use board members opt to visit the property individually on their own time, there is no Right-to-Know Law issue, as long as a quorum of members is not present on the site at one time.

Two notes about site visits, particularly for land use boards. First, a land use board has the right to enter property for purposes of gathering information. The board has a right to obtain all the information it needs to make an intelligent and informed decision on the application. If it has decided in good faith that a site walk is necessary, the applicant's refusal to allow access to the site ought to be a sufficient basis for denying the application, because that applicant has refused to provide access to information necessary to make a decision. It is no different from refusing to provide, say, soil information or a traffic impact study. Further, planning boards have statutory protection in RSA 674:1, IV, which states that "[t]he planning board, and its members, officers, and employees, in the performance of their official functions may, by ordinance, be authorized to enter upon any land and make such examinations and surveys as are reasonably necessary and maintain necessary monuments and marks and, in the event consent for such entry is denied or not reasonably obtainable, to obtain an administrative inspection warrant under RSA 595-B." Note, however, that this authority is created only "by ordinance," so if the town has not enacted such an ordinance, it is of no use. Further, it applies only to planning boards, not other land use boards. In the absence of that tool, the board should be justified in relying on the rationale stated above—it cannot make an informed decision without visiting the site.

Second, the applicant cannot ban the public from the site walk. The applicant needs to understand that a site walk attended by a quorum or more of the land use board is a public meeting under RSA Chapter 91-A and, as such, has to be done in public. Because the board does not have a right to exclude the public, it cannot participate in a site walk where the applicant will not permit public access.

C. To Discuss or Act Upon Matter(s) Over which the Public Body has Supervision, Control, Jurisdiction, or Advisory Power

A meeting occurs when a quorum of a public body is discussing matters related to what it does, whether it has direct supervision, control, or jurisdiction over those matters, or whether it simply has advisory power. Furthermore, even if the public body makes no decision during its discussions, a meeting is still occurring—the law explicitly says to "discuss *or* act upon." And it is important to realize that whether the public body calls the meeting a "meeting," a "work session," or some other term, it is still a "meeting" for purposes of RSA 91-A if it meets the definition of meeting and, therefore, must comply with all requirements for meetings.

II. Exceptions to the "Meeting" Definition (The So-Called "Non-Meeting")

There are several exceptions to the definition of "meeting" described above. The law makes it clear that certain gatherings of public officials are not meetings, even though they would otherwise fit the definition. These types of gatherings are specifically exempt from the requirements of the Right-to-Know Law. They are often referred to as "non-meetings." Make sure you do not confuse them with nonpublic sessions, which *are meetings* subject to the Right-to-Know Law, and which are discussed in detail in Chapter 2.

The non-meetings are listed in RSA 91-A:2, I:

1. **Chance, social or other encounters** "not convened for the purpose of discussing or acting upon" matters over which the public body has supervision, control, jurisdiction or advisory power, "if no decisions are made regarding such matters." Even if the gathering was not held for the purpose of discussing official matters, general conversation may drift into the area of official business. This should be scrupulously avoided, and if it begins, should stop immediately. Keep in mind, too, that the provision "if no decisions are made" is misleading because it *might* suggest that public bodies can talk, outside of a public meeting, as long as no decisions are made. That is not the case. The purpose to this non-meeting exemption is to allow members of a public body to be in the same place at the same time—such as enjoying your community's Old Home Day—without that presence turning into a meeting, as long as no official matters are discussed.

2. Strategy or negotiations relating to **collective bargaining**. This includes discussions within the public body itself ("strategy"), as well as discussions with the other side ("negotiations').

3. **Consultation with legal counsel.** This provision applies only when the attorney is present and actively discussing and giving legal advice to the public body. This provision does **not** apply to a discussion about legal advice previously received that the public body wishes to discuss, such as a legal memorandum or email written by the attorney. To meet in a non-meeting on this basis, at the very least, the body must have the ability to have a contemporaneous exchange of words and ideas with the attorney (for instance, when the attorney is present or is on the telephone with the public body). *Ettinger v. Madison Planning Board,* 162 N.H. 785 (2011). This "non-meeting" is entirely separate from RSA 91-A:3, II(l), which allows a public body to enter nonpublic session for "[c]onsideration 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." For more information on that, refer to Chapter 2 on nonpublic sessions.

4. A **caucus** of members of a public body of the same **political party** who were elected on a partisan basis by a municipality that has adopted a partisan ballot system.

5. **Circulation of draft documents** which, when finalized, are intended only to formalize decisions previously made in a meeting. Be careful! This non-meeting exemption is narrow. What this means is that a board can circulate a draft document to the other board members (e.g., by email), and that circulation will not constitute a meeting. Here's an example: The select board discusses the contents of a letter. The select board decides that the chair will draft the letter after the meeting. The chair drafts the letter and then sends the draft to the other board members. That act of circulating the letter, which memorializes what the board already talked about during a proper public meeting, is not a meeting. There has been no violation of the public meeting requirement if that is all the board members are doing. However, if the board members begin an email discussion about possible edits to the letter or other things to add to the letter, they are no longer protected by the "draft documents" non-meeting exception. For more information on email communications as a meeting, see section B.2, above.

In addition, select board members may also sign manifests noncontemporaneously outside of a noticed public meeting. RSA 41:29, I(a). In a way, this is like another "non-meeting" not listed in RSA 91-A:2, I.

See Appendix C: Is it a Meeting? Flow Chart

See Insert Poster on Public Meetings

III. The Requirements for Holding a Proper Meeting

Now that we understand what is a "meeting" and what is not, we can dissect the second part of that general rule we started with:

> A meeting of a public body must have ***proper notice and be open to the public, and the public body must create minutes.***

Therefore, once you have determined a meeting of a public body will be occurring, there are three basic things that must happen:

1. Notice must be given to the public prior to the meeting;
2. The meeting must be open to the public; and
3. The public body must create minutes.

All of these requirements are described in RSA 91-A:2.

A. Notice to the Public

1. *The Basic Requirements*

The Right-to-Know Law requires a minimum of 24 hours' notice to the public prior to a public meeting. The notice must:

- Be given at least 24 hours in advance, not including Sundays or holidays;
- Include the time and place of the meeting; and
- Be published in a newspaper *or* posted in two "prominent" public places in the municipality, one of which may be the public body's official website

This 24 hours' notice is only a minimum under the Right-to-Know Law. A public body may establish a procedural rule requiring more notice. *See* RSA 91-A:2, II. In addition, other statutes also may require more notice, particularly when a hearing is required. For example, planning board hearings require 10 days' notice under RSA 676:4, I(d); ZBA hearings require five days' notice under RSA 676:7; select board's hearings on highway petitions require 14 days' notice under RSA 43:2 and RSA 43:3; and budget hearings require 7 days' notice under RSA 32:5. Whichever law, ordinance, or rule requires the most notice is the one the public body must follow.

Note also that the only required contents of the notice are the time and place of the meeting (and, logically, of course, the public body that is holding the meeting). The law does not require the purpose of the meeting or a meeting agenda to be included in the notice. However, many public bodies do include such information, which certainly can benefit the public. And, if your own local rules of procedure require you to post an agenda, then you must (remember local rules giving more access take precedence, RSA 91-A:2, II).

Finally, even if the public body's only discussion will be done in nonpublic session, public notice is still required because every nonpublic session must begin in a public meeting. See Chapter Two.

2. *Cancelling a Meeting*

There's nothing in the law regarding cancelling a meeting. Of course, if a public meeting has been noticed and the public body subsequently has decided to cancel it, giving some level of notice is highly encouraged. This should include putting a sign on the door of the place where the meeting would have taken place and putting a notice on the website, if one exists, or some other visible public place. If the body wants to reschedule that meeting, new notice of the new meeting time and place must be provided.

3. *"Continuing" a Meeting*

Public meetings also generally cannot be "continued." In other words, a public body can't announce at the end of a public meeting that the meeting will be continued to another date and time, thus avoiding the need to post notice of the new meeting. A new meeting requires new notice. There are two statutory exceptions for land use

boards: both a planning board (RSA 676:4, I(d)(1)) and a zoning board of adjustment (RSA 676:7, V) may announce a continuance of a hearing to a specified time and place without the need to post new notice. In the absence of an explicit statutory provision that allows for announcing the continuance of a meeting or hearing, new notice must always be posted.

4. ***Exception to Strict Notice Requirements: An Emergency***

There is one important exception to the general notice requirement. If there is an emergency, defined as a "situation where immediate and undelayed action is deemed to be imperative by the chairman or presiding officer of the public body," a meeting may be held with less than 24 hours' notice. The chair or presiding officer is required to post a notice of the time and place of the meeting as soon as practicable, and "shall employ whatever further means are reasonably available to inform the public that a meeting is to be held." The nature of the emergency must be stated clearly in the minutes of the meeting (and minutes are, of course, required). All of these requirements are found in RSA 91-A:2, II. This portion of RSA 91-A does not override other statutory or local notice requirements.

5. ***Notice of Joint Meetings***

A joint meeting occurs when two or more public bodies meet together. Even though only one actual meeting will occur, for the purposes of the Right-to-Know Law, each public body involved in the joint meeting is holding its own meeting. For that reason, each public body participating in the joint meeting must post its own notice.

A joint meeting can also occur when one public body is attending the meeting of another public body. For example, if a quorum of the library trustees come to a meeting with the budget committee to discuss the proposed library budget, that meeting should really be noticed both by the budget committee as a budget committee meeting, and by the library trustees as a library trustee meeting. As stated in the New Hampshire Attorney General's Memorandum on the Right-to-Know Law:

> The attendance by a quorum of a municipal board of selectmen or planning board at public informational meetings of the Department of Transportation for the purpose of advising the Department concerning a highway project can constitute a "meeting" under RSA 91-A:2, I, requiring appropriate notice. Attorney General's Opinion 93-01. Generally, attendance by a quorum of a public body at a meeting being held by a different public body to discuss or act upon a matter within the first body's jurisdiction should be treated as a meeting for Right-to-Know law purposes by both public bodies. Both bodies should provide notice of the meeting and both bodies should keep minutes, which may be the same document, separately adopted as minutes by both.

Joint meetings or hearings between more than one land use board are governed by RSA 676:2. Such meetings often occur when a planning board and a zoning board of adjustment hold a joint meeting to discuss a project that will require various approvals from both boards. Read that statute carefully: one of the requirements is that the respective boards have rules governing joint meetings and hearings.

B. Open to the Public

1. ***Who are "the public"?***

Anyone, not just local residents, may attend any public meeting. So, a public body cannot limit the audience to residents of the town or school district, or citizens of New Hampshire. All members of the public are welcome.

2. ***What does "open" mean?***

All people in attendance have the right to take notes, tape record, take photos, and videotape the meeting. RSA 91-A:2, II; *See also WMUR Channel Nine v. N.H. Dep't of Fish and Game*, 154 N.H. 46 (2006). Members of the public do not need permission from the public body to engage in recording, or to even inform anyone at the meeting that they are recording. A public meeting is a public place where people do not have a reasonable expectation of privacy, so there is no violation of New Hampshire's wiretap statute for recording without permission or notice to those who are being recorded. *See* RSA 570-A:1, II (definition of "oral communication") and RSA 570-A:2. In addition, individuals can do whatever they want with their recording. A public body cannot, for example, prohibit someone from posting the video recording on YouTube.

The "open" requirement also means that members of the public must have contemporaneous access to the meeting. This goes back to section III.B., above, regarding the requirements for electronic participation of members of a public body, and the prohibition on using electronic communications to circumvent the law.

"Open to the public" does not include the right to speak. In fact, the Right-to-Know Law does not give the public the right to speak—just the right of access, as described above. However, boards often do afford the public the right to speak, which is addressed below.

3. ***Public Comment and the First Amendment***

As stated above, the Right-to-Know Law does not give the public the right to speak at a public meeting. Of course, when a statute requires a public body to hold a public *hearing*—such as a budget hearing—the public must be given the opportunity to speak and weigh in because that's the purpose of a public hearing. Other statutes also provide that specific individuals have a right to speak at a public hearing, such as a hearing on an application for a variance where the applicant, abutters, or other parties whose rights are being determined have the right to participate. But if the public body is holding a regular business meeting, RSA Chapter 91-A simply does not require public bodies to allow public comment. That being said, most public bodies provide a public comment portion of their meeting, usually before or after the body's business is conducted (or at both times). When doing so, the public body must comply with the First Amendment.

a. Public Comment as a Public Forum

When a public body does allow for public comment, it creates a type of "public forum." There are different types of public forums. In a traditional public forum—one that has been historically open for the purposes of First Amendment expression and conduct—the government cannot engage in content-based or viewpoint-based discrimination. In a traditional public forum, the government therefore cannot allow or disallow an individual from speaking based on the topic of the speech (content) or the stance a person has on the topic he or she is speaking about (viewpoint). On the other hand, a "limited public forum" is created when the government intentionally opens up a space for public discourse, but only for a limited purpose. In such a forum, the government can generally restrict the topics of discussion (content) to those consistent with the purpose of the limited forum, but can never restrict speech based on the viewpoint of the speaker. These protections apply both words and expressive conduct.

Many courts have determined that public comment portions of public meetings are limited public forums, *see e.g. Norse v, City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010); *Reza v. Pearce*, 806 F.3d 497 (9th Cir. 2015), while others have held that public comment is a traditional public forum, *see e.g. Mesa v. White*, 197

F.3d 1041 (10th Cir. 1999).

b. Rules of Public Forums

Given the complexity of First Amendment jurisprudence, and the consequences that ensue when the government violates free speech protections, public bodies should regulate the conduct of public comment only through reasonable time, place, and manner restrictions. The key is to have rules of procedure that balance the First Amendment rights of the speakers with the decorum and efficiency of the meeting. These rules must target the so-called "time, place, and manner" of the speech because they apply to everyone, regardless of the content or viewpoint of the individual's speech. The most common and effective of these restrictions is a time limit for each speaker—e.g., two minutes per person. Essentially regardless of *what* the person is saying, each speaker gets his or her two minutes in front of the public body. Other neutral rules could include:

- Public comment will take place after the business portion of the meeting is completed
- One person speaks at a time (no interrupting)
- No one speaks until recognized by the chair
- Signing in to indicate an intent to speak during public comment
- Requiring the speaker to identify him or herself when beginning to speak
- Public comment is a time for members of the public to speak; it is not a "question and answer session" with the public body

Note: It is also important to distinguish between a public comment session and the business portion of the meeting. Public comment is the time for members of the public to speak and to be heard by the public body. But no one has a right to be placed on the agenda, i.e., to speak during the business portion of the meeting. The setting of the agenda is within the purview of the public body.

Another rule of some public comment sessions is to restrict the topics of the public's speech to matters pertaining to the agenda of the particular public meeting. Such a rule would actually be content-based because it would allow speakers to speak only on certain topics. Despite that, at least one federal court has determined that an "agenda-only items" rule is a valid time, place, and manner restriction, stating: "A council can regulate not only the time, place, and manner of speech in a limited public forum, but also the content of speech—as long as content-based regulations are viewpoint neutral and enforced that way." *Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010). While such a rule may be valid, other factors must be considered. First, the public body should have a written rule of procedure to this effect so that the public is on notice. Second, an agenda should actually be posted with notice of the public meeting so that the public is on notice, prior the meeting, of the topics that will be discussed. Third, it is probably wise to provide a "safety valve," giving an individual the ability to request permission to speak on a topic not on the agenda. Finally, this rule may prove difficult in enforcement. A public body should consider carefully whether it wants to take this route, or whether time limits on speech (and other content-neutral rules) may be sufficient to balance the relative interests of both the public body and the public.

Some rules of public comment are entirely inadvisable. For example, public bodies often think it makes sense to have a rule that prohibits "defamatory speech." But these bans run a serious risk of creating viewpoint discrimination, which is never permitted, because they prohibit someone from speaking critically, but allow someone else to speak favorably, on the same issue. For example, if a public body had a rule that prohibited defamatory speech, the body might decide to prohibit someone from accusing the select board of lying, but allow someone else to praise the select board for all its hard work. This is viewpoint discrimination.

In addition, whether something is defamatory is a complicated legal question, and not simply a matter of determining whether speech is hurtful or insulting to someone. Defamation is a civil claim—a basis for one person to sue another. Therefore, the remedy for defamation is an action in a court for damages. Furthermore, an insulting comment alone is not enough to even prove a claim of defamation; defamation requires the public pronouncement of a statement of fact, not a statement of opinion—and most of the less-than-flattering statements made during public comment will be statements of opinion. *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314 (2007). Because the public body is not a judge or jury adjudicating a claim of defamation, it cannot deem comments defamatory and prohibit them without running the serious risk of violating the First Amendment. And, in fact, any rule that gives governmental officials the unchecked authority to use their own discretion to decide what content of speech is appropriate is very likely to violate the First Amendment.

Similarly dangerous rules are those that would prohibit "offensive speech" or "fighting words." These types of speech are, again, not simply what governmental officials deem to be offensive or violence-inciting, but are legal concepts, extensively developed through First Amendment jurisprudence. In fact, many words and actions that a good segment of the public would agree are offensive are protected by the First Amendment.

For all of these reasons, no public body should ever have or enforce a rule that prohibits "defamatory" speech, "offensive" speech, or the like. Therefore, ultimately, comments complimentary and critical must be allowed. As the Supreme Court of the United States has put it: "As a general matter, we have indicated in public debate, our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 213, 322 (1988).

c. Disruptive Conduct

Despite the protections of the First Amendment, nobody has a right to disrupt a meeting or to speak without being invited. But the disruption must focus on the conduct of the individual that causes real disorder in the meeting, and not on the critical or unpleasant content of the individual's speech. The New Hampshire Supreme Court has said that the chair of a public body is in control of who speaks and when, and that an individual can be lawfully removed from a public meeting without violating First Amendment protections if the individual's conduct "prevent[s] the [public body] from continuing their meeting" and impacts "the rights of others to speak in an orderly manner." *State v. Dominic,* 117 N.H. 573 (1977). In *Dominic*, the disruptive individual who was removed was actually one of the members of the select board, but this same principle would apply to a member of the public disrupting the meeting in a severe manner, perhaps by repeatedly trying to speak outside of the

public comment session, by interrupting others during public comment, or by refusing to yield the floor once his or her designated time for speaking during public comment has ended. Such conduct may rise to the level of disorderly conduct, a criminal offense, which occurs when a person "purposely causes a breach of the peace, public inconvenience, annoyance or alarm, or recklessly creates a risk thereof, by . . . disrupting any lawful assembly or meeting of persons without lawful authority." RSA 644:2, III(c).

However, having someone removed from a public meeting should be a last resort, only after all other methods of trying to control the situation have been pursued.

In a 2015 case, the U.S. District Court in New Hampshire determined that a school board chair had lawfully ordered a member of the public removed from a meeting for being disruptive. *Baer v. Leach*, 2014 D.N.H. 214 (November 24, 2015). Baer was arrested for his conduct, but the charges against him were ultimately dropped. Baer then sued the arresting officer, alleging that his constitutional rights had been violated through his removal from the public meeting. The court determined that Leach, the arresting officer, was immune from liability because he had sufficient reason to believe that his arrest was lawful based on the circumstances. Specifically, Leach had observed Baer disregarding the rules governing the public meeting—namely, that public comment was not a "Question and Answer" session and subsequently by interrupting after his allotted time had ended. Furthermore, when the board chair tried to regain order multiple times to allow others to speak, Baer continued to interrupt, mocking them and stating, "Why don't you arrest me?" The chair finally instructed Leach to arrest Baer. These facts demonstrated to Leach that Baer was disrupting the meeting. Although the judge did say that there is no "magic number" of warnings necessary before someone can be removed from a meeting, these facts are instructive and show that multiple attempts to resolve the situation should be made before removal is even considered.

Although the ultimate issue in this case was whether the police officer was immune from liability for making the arrest of disorderly conduct—and the Court determined that he was—the underlying analysis regarding the conduct that led to the arrest is helpful to a public body in determining whether removal from a public meeting is appropriate.

Contrast that to the case of *Clay v. Town of Alton*, No. 15-CV-279 (D.N.H. 2016). The select board allowed five minutes per speaker during public comment. Clay took his turn at the microphone and began criticizing the select board for a variety of alleged misdeeds. One of the board members asked him to refrain from his insulting and defamatory remarks, and then a motion was made and approved to discontinue the public comment session. Ultimately, Clay was arrested for disorderly conduct before he ever reached his five minutes. The criminal charges were dismissed. The judge determined that the arrest was unlawful: Clay had not been engaged in disruptive conduct and had not been violating the rules of the board. In addition, the ban on critical or insulting comments about the select board members was viewpoint discrimination. As a result, a civil rights action, which was ultimately settled, was filed against the town by the New Hampshire Civil Liberties Union.

4. ***Voting***

Except for annual town, school district, or village district meetings (*see* RSA 40:4-a), no vote in a public meeting may be taken by secret ballot. RSA 91-A:2, II. The public has the

right to know how each member of a public body votes on an issue before it in order to hold that member accountable for his or her actions. Voting by secret ballot would frustrate the public's right to this information. *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008). In addition, some votes must be by "roll call," while others must be "recorded" in the minutes. Refer to section C.1. below for more details.

C. Minutes of Public Meetings

This section discusses the requirements for minutes of primarily public meetings. For the detailed requirements for minutes of nonpublic sessions, see Chapter Two.

1. *Contents of Minutes*

The Right-to-Know Law doesn't require a public body to create a transcript of its meetings. Instead, the law says the following minimum contents are required: (1) names of members present; (2) other people participating (although it is not necessary to list everyone *present*); (3) a brief summary of subject matter discussed; and (4) any final decisions reached or action taken. RSA 91-A:2, II.

Sometimes there's a fifth requirement: Some provisions of RSA Chapter 91-A require a vote to be by roll call, while others required a recorded vote. The essence of both is that the public must be able to ascertain the manner in which each public body member voted. However, when the statute requires a roll call vote, the minutes must actually state each member's name, and the manner in which the member vote. Take a look at these examples:

- Roll Call Vote Example

"Byrnes: yes; Buckley: yes; Johnston: no. Motion Passes."

- Recorded Vote Examples

"Motion passes 2-1, with Johnston voting in the negative."

And for a unanimous vote: "Motion passes unanimously."

A roll call vote or recorded vote is required only when the statute says it is required. Otherwise, a public body is not required to do either, unless the public body has its own local rule that requires such practice.

Under RSA Chapter 91-A, a public body must take a vote by roll call under the following circumstances:

1. Any vote taken when a member (or in an emergency, perhaps more than one member) is participating electronically/remotely, RSA 91-A:2, III.
2. Vote to go into nonpublic session, RSA 91-A:3, I(b).

On the other hand, the statute requires a recorded vote under the following circumstances:

1. Any vote taken while in nonpublic session, RSA 91-A:3, III.
2. Vote to "seal" nonpublic session minutes, RSA 91-A:3, III.

2. *Public Availability of Minutes*

a. When must minutes be available?

Minutes of all public meetings must be kept and must be available to the public upon request not more than five business days after the public meeting. A business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays. Although a public body certainly may record meetings, the recording of

a meeting cannot be a substitute for written minutes.

b. What does "available" mean?

"Available" does not mean that public bodies must post their minutes anywhere, such as on the public body's website. It means only that the minutes must be "open to public inspection." However, many public bodies do post their minutes, and this is a good practice.

c. What must be available? Draft minutes v. "approved minutes"

There is no legal requirement for the public body to "accept" or "approve" the minutes. Of course, all public bodies should review and approve minutes as a best practice, but it is not required.

In fact, the only statute that refers to the approval of minutes is RSA 33-A:3-a, LXXX, in the records retention statute, which requires tape recordings of meetings to be kept at least until the written record (i.e., the written minutes) are approved at a meeting. As soon as the minutes are approved, the statute allows the public body to either reuse or dispose of the tape.

This means, at the very least, a public body must have compiled its draft (i.e., "unapproved") minutes by the fifth business day after the meeting. Those minutes, although not yet reviewed and approved by the body, must be made available to anyone who requests to see or copy them. It does not matter that they have not yet been approved—they are still the minutes, and they cannot be withheld. (Unless, of course, they are nonpublic session minutes that have been sealed, which is discussed in Chapter Two.)

Public bodies have different practices for handling the draft v. approved minutes issue. One option is to mark minutes that have not yet been approved as "Draft" or something similar, so that anyone who obtains a copy of minutes prior to approval understands the minutes may change. If, when the public body subsequently goes to approve minutes, changes need to be made to the draft version, there are several options:

1. Make changes in red pen or some other discernable color on the original draft minutes, so that it's clear what has been changed.

2. Create a new set of minutes evidencing any changes. If you take this route, the New Hampshire Municipal Association strongly advises that you retain both the original draft minutes and the final approved minutes. Although no statute explicitly requires this, the records retention statute, RSA 33-A:3-a, LXXXI, LXXXII, and LXXXIII state the minutes of boards and committees, town meeting and town council, and the select board must be kept "permanently," and does not distinguish between draft and approved minutes.

3. Memorialize changes to draft minutes in the minutes of the *next* meeting, so that there is always just one set of minutes for each meeting. If you take this route, it would be wise to put a notation at the end of all minutes that changes or amendments to the minutes of that meeting will be in the minutes of the next meeting.

For more information, See Appendix D: Draft Meeting Minutes – Practical Considerations and Insert: Public Meeting Poster

Chapter Two: Nonpublic sessions

This chapter covers nonpublic sessions. For public meetings, please refer to Chapter One.

I. Basic Principles

A. It's a nonpublic session, not a nonpublic meeting

The first thing that needs to be understood about a nonpublic session is that it is just that: a "session." There is no such thing as a "nonpublic meeting," because every "meeting" must, under RSA 91-A:2, II, be open to the public. A nonpublic *session* is a portion of a public meeting from which the public may be excluded. A nonpublic session may be held only during the course of a meeting that has been the subject of proper notice and that is open to the public. Once the public *meeting* has been convened, the body may enter nonpublic *session* for a proper purpose and by following the proper procedures, discussed in the following pages.

B. A nonpublic session is different from a "non-meeting"

A nonpublic session also must be distinguished from certain events that are *not meetings*. The most common examples of these, discussed in Chapter One, section II, are consultations with legal counsel and strategy or negotiating sessions with respect to collective bargaining. Those events are specifically exempted from the definition of a "meeting," and the Right-to-Know Law therefore does not apply to them at all. Thus, as explained in Chapter One, these "non-meetings" may be held without any notice, without allowing public access, and without keeping any minutes. As far as the Right-to-Know Law is concerned, they simply do not exist.

In contrast to "non-meetings," nonpublic sessions are subject to very strict rules. It is essential that public bodies understand these rules so they do not inadvertently enter a nonpublic session for an improper purpose, or use improper procedures to enter or conduct a nonpublic session. An error, even one made in good faith, can result in legal action that could invalidate the actions taken and lead to other unfortunate consequences, such as liability for attorney fees and costs.

C. Nonpublic session is the exception, not the rule

Most public bodies will only occasionally have a legitimate reason to meet in nonpublic session, and some never will. For example, unless a planning board or zoning board of adjustment is involved in personnel matters dealing with a public employee, such as hiring or firing a planning director, its only likely reason to hold a nonpublic session would be to discuss pending or threatened litigation or to discuss legal advice. A conservation commission, which is less likely to be involved in litigation, will probably have occasion to use nonpublic session only when it is considering the purchase or sale of real estate. Of course, governing bodies, which deal more regularly with public employee matters as well as litigation and real estate transactions, are more likely to need nonpublic sessions.

A public body should never enter nonpublic session just because its members are uncomfortable holding a discussion in public. The need to discuss uncomfortable topics in public is an unfortunate reality of holding public office. If the item for discussion is not within one of the allowed reasons for nonpublic session under the Right-to-Know Law, it must be discussed in public.

D. Nonpublic sessions are permitted, not required

It is also important to understand that a public body is never *required* to enter nonpublic session. The statute contains a list of purposes for which a nonpublic session is permitted, not required. If a public body wants to discuss pending litigation, for example, in public, it is free to do so, although it may not be a good idea.

II. Permitted Purposes

It cannot be stressed enough that a public body may use a nonpublic session only for very limited purposes, all of which are listed in RSA 91-A:3, II. If none of these purposes applies, the discussion may not be held in nonpublic session. The permitted purposes are:

A. Public employee dismissal, promotion, etc.

Nonpublic session is proper to discuss or act upon "[t]he dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted." RSA 91-A:3, II(a).

Notice that the statute does not *create* a right to a meeting for an employee. The language "unless the affected employee has a right to a meeting" indicates that such a right would have to arise from some other source. This would most likely be a collective bargaining agreement, a personnel policy, or a state statute. In the absence of such a right, the public body may enter nonpublic session under this provision without precondition. However, it is always a good idea for the public body to consult with its legal counsel before using this procedure, both for Right-to-Know reasons and for employment law reasons.

> *Note:* The law was different before 1992. Until then, the "unless" clause in 91-A:3, II(a) merely stated, "unless the employee affected requests an open meeting." In *Johnson v. Nash,* 135 N.H. 534 (1992), the New Hampshire Supreme Court ruled that this language would be meaningless if the employee was not given notice that the action was being considered. Thus, a public body could not consider dismissing an employee in nonpublic session unless it first notified the employee and gave him or her an opportunity to request an open meeting. In other words, the statute before 1992 *did* create a right to an open meeting.
>
> That year, the legislature amended the statute to read as it does now. With the revision, nonpublic session is permitted *unless* the employee has a right to a meeting that arises from another source, so *Johnson v. Nash* is no longer applicable. Of course, if the employee does have a right to a meeting, the public body must give the employee notice and an opportunity to exercise that right. And even if the employee does not have that right, there could be reasons to give the employee an opportunity for a meeting, either in public or in private.

B. Hiring

Nonpublic session may be used for "[t]he hiring of a public employee." RSA 91-A:3, II(b). Note that this is strictly limited to the *hiring* of an *employee*. It does not include appointments to a non-employee position, such as a planning board member or budget committee member.

It also does not include appointment of someone to fill a vacancy in a full-time elected position. In *Lambert v. Belknap County Convention,* 157 N.H. 375 (2008), the Supreme Court ruled that the county convention had acted illegally when it used a nonpublic session to discuss candidates for a vacancy in the county sheriff position and subsequently voted on the two finalists by secret ballot. Similarly, if there is a vacancy in the position of town clerk or an elected police chief, that is not something that could be discussed in nonpublic session.

C. Reputation

Nonpublic session is proper for "[m]atters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting." RSA 91-A:3, II(c). This includes any application for assistance or tax abatement, or waiver of fees or fines based on poverty or inability to pay.

This exception should be used only when absolutely necessary—it

should not be used as a pretext just to discuss someone whom a member of the public body dislikes. Further, applying the rationale of *Johnson v. Nash,* discussed above, the clause "unless such person requests an open meeting" suggests that the person must be notified and given an opportunity to request an open meeting, although the Supreme Court has not had occasion to rule on this issue.

D. Property transactions

The statute allows a nonpublic session for "[c]onsideration 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." RSA 91-A:3, II(d). This allows the public body to discuss, for example, how much it is willing to pay for an item of property, or how much it is willing to accept for the purchase of property it is planning to sell, without tipping its hand to a potential seller or buyer.

It does *not* allow the public body to negotiate in private with a potential buyer or seller. Unfortunately, it also does not allow the public body to discuss other contract matters not involving the acquisition, sale, or lease of real or personal property.

E. Pending or threatened litigation

Nonpublic session may be used for "[c]onsideration 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." RSA 91-A:3, II(e). An application for a tax abatement does not constitute threatened or filed litigation. (But an abatement application may be discussed in nonpublic session under paragraph II(c) if the request is based on poverty or inability to pay. See paragraph II.C. (Reputation) above.Note that the public body's legal counsel does not need to be present for this provision to apply--but the discussion does need to be about active litigation or a claim that has been threatened *in writing*.

F. Adult parole board

The adult parole board may consider applications under RSA 651-A in nonpublic session. RSA 91-A:3, II(f).

G. Security at correctional facilities

Nonpublic session is allowed for consideration of "security-related issues bearing on the immediate safety of security personnel or inmates at the county or state correctional facilities by county correctional superintendents or the commissioner of the department of corrections, or their designees." RSA 91-A:3, II(g).

H. Applications to business finance authority

The statute allows a nonpublic session for "consideration of applications by the business finance authority under RSA 162-A:7-10 and 162-A:13, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application." RSA 91-A:3, II(h).

I. Emergency functions related to terrorism

A public body may use nonpublic session to consider "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." RSA 91-A:3, II(i).

Note that this applies only to functions designed to thwart *deliberate acts* that are intended to result in widespread injury, death, or property damage--*i.e.,* terrorist acts. Other emergency management matters (flood, storm, health emergency) are not covered under this subparagraph and are not a proper subject for a nonpublic session.

J. Confidential information in adjudicative proceedings

Nonpublic session is allowed for "consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A." Note that this applies only to adjudicative proceedings under the statutes indicated. RSA 91-A:3, II(j).

K. Student tuition contracts

A school board may use nonpublic session to consider entering into a student tuition contract authorized by RSA 194 or RSA 195-A if a public discussion would likely benefit a party or parties (such as the other school district) whose interests are adverse to those of the general public or of the school district. A meeting between the school boards, or committees thereof, involved in negotiating the contract may also be conducted in nonpublic session. RSA 91-A:3, II(k).

However, a contract negotiated by a school board must be made public prior to its consideration for approval by a school district. Minutes of any meetings held in nonpublic session to discuss the contract, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, also must be made public. Approval of a contract by a school district may occur "only at a meeting open to the public at which, or after which, the public has had an opportunity to participate."

L. Consideration of legal advice

A public body may use nonpublic session to consider legal advice provided by its legal counsel, either orally or in writing, to one or more members of the public body, even if the attorney is not present. RSA 91-A:3, II(*l*). Again, if legal counsel *is* present, the session is not considered a "meeting" at all, see RSA 91-A:2, I(b), and the requirements of the Right-to-Know Law do not apply.

That's all! A public body may not enter nonpublic session for any purpose other than those listed above. Nor may it enter nonpublic session for one of these purposes and then digress to a discussion of something different. Once it has covered the purpose for which it properly entered nonpublic session, it must return to public session (or adjourn, if it has finished its business).

III. Procedural Requirements

In addition to limiting the subjects that may be discussed in nonpublic session, the statute contains very strict procedural requirements for nonpublic sessions. If these are not followed carefully, any action taken in a nonpublic session may be invalidated, and the public body could be subjected to injunctive relief and civil penalties.

A. Entering nonpublic session

The requirements for entering nonpublic session are set out in RSA 91-A:3, I, and are very clear:

- A public body may enter nonpublic session only "pursuant to a motion properly made and seconded."
- The motion must state on its face the specific exemption in RSA 91-A:3, II, that is relied upon as the purpose for the nonpublic session, and all discussions held and decisions made during the session must be confined to the matters set out in the motion.

- The vote on the motion must be by roll call. A simple majority is all that is required.

B. Conduct of nonpublic session; minutes

Other than identifying the matters that may be discussed in nonpublic session, the law says very little about the conduct of the session. It does require that minutes be kept, which must contain the same kind of information that is required for public sessions: the names of members present, the names of persons appearing before the public body, and a brief description of the subject matter discussed and final decisions. See RSA 91-A:2, II, 91-A:3, III.

The minutes also must "record all actions in such a manner that the vote of each member is ascertained and recorded." RSA 91-A:3, III. This is because, with the public excluded from the meeting, there is no other way for the public to know how individual members have voted. This requirement may be satisfied by recording a roll call on each vote, although that is not necessary. If a vote is unanimous, it is sufficient to record that fact, since the minutes will already have indicated which members were present. For a non-unanimous vote, the minutes could say, for example, that the vote was 4-1, with Ms. Reid voting in the negative. If the minutes have properly listed the members present, anyone reading them should be able to identify the four members who voted in the affirmative.

C. Exiting nonpublic session; availability of minutes

There are no specific requirements for exiting nonpublic session, as there are for entering. The law does require, however, that the minutes be "publicly disclosed" within 72 hours after the session, unless the board determines that:

- Disclosure would likely have an adverse effect on the reputation of a person other than a member of the public body;
- Disclosure would "render the proposed action ineffective"; or
- The discussion in nonpublic session pertained to terrorism. (Terrorism is defined as "matters relating to the preparation for and the carrying out of all emergency 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.)

A determination that one of the above circumstances applies must be made by a two-thirds vote of the members present, and that vote must be taken after the body returns to public session.

A decision not to disclose the minutes is typically referred to as "sealing" the minutes, although the statute does not use that term anywhere. If the public body does vote to seal the minutes, the minutes may be withheld "until, in the opinion of a majority of members, the aforesaid circumstances no longer apply."

IV. Practical Considerations

Although the statute is quite clear on a number of points, some things are less clear or are simply misunderstood. Here are some practical suggestions and clarifications.

A. Placement on the agenda

There is no requirement that a nonpublic session be listed on the agenda for a public body's meeting. If it is known that a nonpublic session is going to be necessary, then it may be useful to list it, but given that an agenda is not even required for most public bodies, there certainly is no requirement that the agenda include reference to a planned nonpublic session. Further, sometimes the need for a nonpublic session is not apparent until a meeting is under way, so it would be impossible to mention it in the agenda.

B. Timing

There are no rules or limitations about when during a meeting a nonpublic session may take place, except that it must begin with a motion made during public session—so a nonpublic session may not be held before the public meeting is convened.

All things being equal, it generally makes sense to hold a nonpublic session at the end of the meeting, so members of the public do not have to wait for a continuation of the public session. However, conditions may weigh in favor of holding it at the beginning of the meeting—for example, to accommodate the schedule of a non-board member who needs to be present, or because a decision made in nonpublic session may affect other actions during the meeting, or because the matter is particularly important and needs to be addressed while board members are at their sharpest.

C. Attendance by non-members

Legally, there is no limit on who may be permitted to attend a nonpublic session. The law merely states that the session may be closed to the public. There may be reasons to have people other than board members present—*e.g.,* the town or county administrator or school superintendent, the recording secretary, a department head with knowledge of the issue being discussed, or a professional advisor to the board.

However, for obvious reasons of confidentiality, there should be as few non-board members as possible. At least for city and town boards, board members are required by law (RSA 42:1-a) or charter to maintain the confidentiality of matters discussed in nonpublic session if the minutes are sealed or if the information is otherwise confidential. Disclosure of such information constitutes a violation of their oath of office, for which they are subject to removal. Employees and others who are not municipal "officers" are not subject to the same statutory requirement and penalty, so they may have less of an incentive to maintain confidentiality. An employee's disclosure of confidential information may well be cause for dismissal, but the public body has little control over persons who are neither employees nor members of the body.

In short, it is best to exclude anyone whose presence is not essential. This may mean excusing the administrator and/or the recording secretary and instead having one of the board members take minutes. Whether to do this is a judgment call to be made by the board.

D. Recording during nonpublic session

As discussed in Chapter One, section III.B.2, the public has a right to record all public meetings under RSA 91-A:2, II. However, the public's right of access is explicitly made "subject to RSA 91-A:3" (the nonpublic session section), and nothing in that section provides a right to record during a nonpublic session. Therefore, the body conducting the nonpublic session can prohibit the use of recording devices.

E. Making decisions in nonpublic session

Public body members frequently ask whether it is legal to make decisions in nonpublic session, or whether they must return to public session to take action. It is clear that decisions may be made in nonpublic session. RSA 91-A:3 specifically refers in several places to "actions" taken or "decisions" made during nonpublic sessions.

Of course, any decision made presumably will become public eventually, but there are a number of reasons that it may not be appropriate to make a decision in public—for example, a decision to terminate an employee, or to make an offer to settle litigation. Whether to take a vote in nonpublic session or wait and take it in public is a question for the discretion of the public body. If there is a reason to keep the decision confidential for some period, it will be necessary to take the vote before leaving nonpublic session.

F. Dealing with nonpublic session violations

What should a public body member do if he or she believes the body has entered nonpublic session illegally or, having entered legally, is engaging in an improper discussion? For example, a board of selectmen properly enters nonpublic session to discuss the hiring of an employee, but after finishing that discussion, begins a discussion about filling a vacancy on the board.

The member should raise an objection and explain why the discussion is improper. If a copy of RSA 91-A:3 (or this book) is available, that can be used to point out the violation. Ideally, the members will reach an agreement about whether the discussion is or is not legal.

If the member continues to believe the discussion is illegal, but the other members insist on proceeding in nonpublic session, it is appropriate for the objecting member to ask that his objection be noted in the minutes, then leave the session and wait for the body to return to public session. This will not be popular with the other members, but it should insulate the member from personal liability for the violation--and it should send a message that the objecting member takes the law seriously and expects the others to do the same.

G. Returning to public session

As stated above, there are no specific requirements for returning to public session. In theory, the body could just say, "We're back in public session," and invite the public back into the room (if anyone is still there). However, for the sake of clarity, it is best to have a formal vote to return to public session.

In fact, there is no legal requirement to return to public session at all, so if there is nothing remaining to be done in public (such as voting to seal the minutes), the body in theory could simply end the meeting at the end of the nonpublic session. Again, however, for the sake of clarity, it is better to return to public session and then adjourn.

V. Minutes

The keeping of minutes and deciding whether and how to seal them are among the thorniest problems involved in nonpublic sessions.

A. Content of the minutes

In many cases, the issues around the sealing of minutes can be avoided by keeping very simple minutes that do not contain confidential information. If there is nothing confidential or inflammatory in the minutes, then there probably is no reason to seal them, and a problem is avoided.

The law requires only that the minutes include the names of members present, names of persons appearing before the public body, and "a brief description of the subject matter discussed and final decisions." Thus, depending on the circumstances, it might be perfectly legitimate for the minutes to simply list the people present and then state:

> "The board heard a complaint about a town employee. The town administrator was asked to obtain further information and report to the board."
>
> OR
>
> "The board received an update on the litigation involving John Doe. No decisions were made."

In the first case, there probably is no need to include any more information about the complaint. In the second case, no purpose would be served by describing all of the questions that were asked or the strategic discussions about the litigation.

Of course, more detailed minutes will be necessary in some circumstances--most notably, if there is a need to have a record because of a potential for litigation--and there may be occasions when inclusion of confidential discussions is unavoidable; but the public body should think about this, and have a discussion about how much detail should be included *before* leaving nonpublic session.

For the sake of convenience, the nonpublic session minutes should be a separate document from the public session minutes. This is not required by law, but it will be necessary as a practical matter if the nonpublic minutes are going to be sealed. The public session minutes should state that the board entered nonpublic session at a specific time (and include the motion, the basis for the motion, and the roll call vote on the motion), and then indicate that the board returned to public session at a specific time.

B. To seal or not to seal?

As stated earlier, the Right-to- Know Law makes no reference to "sealing the minutes." What it says is that nonpublic minutes must be made available to the public unless the board determines that certain circumstances apply. If the board makes that determination, the minutes "may be withheld until, in the opinion of a majority of the board, the aforesaid circumstances no longer apply."

Thus, a vote to "seal the minutes" is merely a vote that the minutes will not be made available upon request until the board decides otherwise. The minutes are not physically sealed (although perhaps they could be). However, "sealing the minutes" is a useful shorthand way of referring to this action, as long as it is understood what is actually being done.

Remember that the only permissible reasons for sealing the minutes are:

- Disclosure would adversely affect the reputation of a person other than a member of the board;
- Disclosure would render the proposed action ineffective; or
- The discussion in the minutes pertains to terrorism.

If none of these conditions exist, the minutes may not be sealed. There is no need to vote not to seal the minutes; in the absence of a vote, the minutes are automatically not sealed, and must be available to the public within 72 hours (not the five business days allowed for minutes of public sessions).

Remember also that the motion to seal the minutes must specifically cite one of the reasons noted above, and requires the affirmative vote of two-thirds of those present. Do not confuse this with the motion to enter nonpublic session, which must be by roll call but requires only a simple majority.

C. How long to seal?

There is no requirement that the public body vote to seal the minutes for a particular period; and in fact, it probably should not do so.

Again, the law says the minutes may be withheld from the public "until, in the opinion of a majority of members, the aforesaid circumstances no longer apply." A vote by the public body to seal the minutes for a specific period (or forever) is not conclusive, because the body may decide later that the circumstances justifying confidentiality no longer exist, and the minutes should be made public. It may make sense for the public body to set a date after which the minutes *must* be made public, but this would not prevent the board (or a future board) from releasing them at an earlier date.

It is probably better to vote simply to seal the minutes, without specifying a period. If and when there is a request for the minutes, the public body can revisit the question of whether they should continue to be withheld. That question can also be considered as part of the public body's periodic review of its sealed minutes, as recommended below.

D. Review and approval of sealed minutes

The matter of sealed minutes is complicated by the fact that the vote to seal them generally takes place before they even exist. The next step,

of course, is for the person responsible for the minutes to prepare a draft and keep them in a secure location.

Next, they need to be circulated to the board members for review. The board should review and, if necessary, revise them at the next meeting (not by e-mail discussion between meetings!). Because this will be the board's first look at the minutes, it will also provide another opportunity to decide whether they really need to be sealed. The board might decide to delete unnecessary confidential material so that the minutes may be made public.

After the board reviews the minutes and makes any necessary revisions, the board members' drafts should be collected and destroyed.

E. Delayed vote to seal

The law requires that nonpublic minutes be "publicly disclosed within 72 hours" unless the board votes to withhold them. It says nothing about *when* the board needs to vote to seal them (except that the vote must take place in public session). Although the practice is to take that vote immediately upon emerging from the nonpublic session, the board certainly can vote anytime within 72 hours to seal the minutes if they have not already been disclosed.

Whether the minutes may be sealed after 72 hours if they have not yet been provided to anyone is less certain. It is unclear what "publicly disclosed" means, but presumably it is the same as the general requirement that all minutes be "open to public inspection." If the minutes have been available upon request, but no one has actually requested them, and if they have not been posted in a public place (which is not required), perhaps they can still be sealed even after 72 hours. But this is an unresolved question, and the board should consult with its legal counsel before taking such an action.

F. Review by new board members? Former board members?

A new person has been elected to the board, and wants to review all of the board's sealed minutes. Or a former board member wants to review the sealed minutes from when he or she was a member. Should this be permitted?

There is no clear law on this, but they are the board's minutes. So long as they remain sealed, it seems fairly clear that they are subject to review only by the board as it is currently constituted. A new board member has the same rights as other current board members, but if one or more board members want to review the minutes, it is a better practice to make the minutes available to the entire board at a meeting and then return them to their secure location. Alternatively, the board may vote to authorize individual members to review the minutes.

Because they are the board's minutes, it follows that a former board member has no right to see minutes that remain sealed. It does not matter that he or she was on the board at the time of the nonpublic session; a former member is just that—a former member—and has no more right than any other member of the general public.

G. Review and unsealing of old minutes

The law does not impose any obligation on a public body to review and unseal old minutes. It merely states that the minutes "may be withheld until, in the opinion of a majority of members, the circumstances [justifying their sealing] no longer apply."

Legally, the status of sealed minutes does not become an issue until someone asks to inspect them. If no one has requested a given set of minutes, arguably it does not matter how long they remain "sealed," because they are not actually being "withheld."

However, it is a good practice for a public body to review its sealed minutes regularly—probably at least once a year—to determine whether the circumstances that justified withholding them still apply. If the person whose reputation might be adversely affected has died, or if the

information has become a matter of public knowledge and is no longer confidential, or if the lawsuit has been concluded, then the body should vote to make the minutes available. Again, this requires a majority vote of the board.

In the meantime, if someone makes a request to inspect sealed minutes, the response should not be an automatic "No." Unless they are very recent minutes and it is clear that the circumstances have not changed, the board should review the minutes to decide whether the circumstances that justified withholding them in the first place still apply.

For more information, See Appendix E: Nonpublic Sessions Minutes Checklist