

May 16, 2017

7:00 PM

Selectmen

Jim Waddell, Chairman
Regina Barnes, Vice-Chairman
Phil Bean, Selectman
Rusty Bridle, Selectman

Town Administration

Frederick Welch, Town Manager
Mark Gearreald, Town Attorney
Trevor McCourt, Town Intern

NHMA Members

Stephen Buckley

Budget Committee

Stephen LaBranche
Bob Ladd
Sunny Kravitz
Barbara Kravitz
David Maurer
Daniela Augustine
Tim Jones
Michael Plouffe
Brian Lapham

Cable Committee

Brian McCain
Paul Paquette

Cemetery Trustees

Tom Harrington
Maryrae Preston

Conservation Commission

Jay Diener
Pat Swank

Mosquito Control

Ann Kaiser

Planning Board

Fran McMahon

Ann Carnaby

Trustees of the Trust Fund

Stephen Falzone

Zoning Board

Bill O'Brien

SALUTE TO THE FLAG

RSA 91-A PRESENTATION

Attorney Gearreald introduced Stephen Buckley, Attorney for NHMA

Attorney Buckley: Right to Know Law divided into two sections: Public Meetings, which includes non-public sessions and Governmental Records and talk about the remedies that are available under the Right to Know Law and Retention of Public Records.

- Part 1, Article 8 of the NH Constitution: Government...should be open
- Section 1 of RSA 91-A – ensure public access and accountability to the people
- NH got Right to Know Law 1967
- No cutting corners with the Right to Know Law

Local Rules of Procedure will govern

RSA 91-A:2 (II):

- If the rules of procedure of any public body require a broader public access to official meetings or records then those provisions will govern.
- No requirement that you have an agenda; but have to give notice of the date, time and place of meeting; minimum compliance for a public body to meet and comply; local rules of procedures become your local Right to Know Law.

Public Meetings – RSA 91-A:2

- Public Notice
- Public Attendance
- Meeting Minutes - produced within 5 days of public meeting

What is a public meeting?

- What is a “Meeting,” RSA 91-A:2?
- Quorum of a public body
- Convenes so that they can communicate contemporaneously (in person, telephone, electronic communication, etc.)
- To discuss or act upon matters over which the public body has supervision, control, jurisdiction, or advisory power.
- What is a quorum? A majority of any board of committee constitutes a quorum, unless an applicable statute states otherwise. RSA 21:15.

Public Body

- What is a “Public Body”? RSA 91-A:1-a, VI
- Any legislative body, governing body, board, commission, etc.
- Any committee or subcommittee
- Any Sub-Group of a public body is also a public body and have to comply with the Right to Know Law

Electronic Meeting Participation

- Public body may allow member to participate electronically – RSA 91-A:2, III
- Personal attendance not practical
- Quorum present
- Everyone can be heard
- All votes by roll call

“Open to the Public” 91-A:2, II

- Anyone can attend public meetings, but does not mean they have the right to speak
- Can record, photograph, videotape, live stream
- Can have public comment period, First Amendment, Free Speech, can regulate time, place and manner of regulation; have rules
- Ability to attend does not give public right to disrupt the activity of government; limits to free speech; cannot use speech to prevent government from doing its job.
- Have written rules, limit time people speak, encourage or require addressing something on agenda

What is not a “Meeting”?

- Social or other encounter, no decisions
- Collective Bargaining
- Consultation with legal counsel
- Political Caucuses
- Circulation of draft documents

Email as a Meeting?

- No electronic meeting – don’t hit reply all!
- No “meetings” by email string
- Public bodies may only deliberate in properly held meetings
- May occur accidentally
- Does not mean you cannot use email; never express ideas, concerns, opinions on issues related to business of the public body
- Keep communications to narrow non-business topics; if distribute something by email have administrative person do it
- Put all recipients email addresses in the bcc line
- Communicate through official email address
- Do not use personal email account; use g-mail account
- Give notice
- Post in two public places

- 24-hour minimum notice
- Emergency notice

Public Meetings, Minutes

- Kept and made available upon request within 5 business days
- Include members present, people participating, summary of subject matter and decisions reached or action taken
- Certain times roll call vote
- Right to know law has nothing in it that says minutes have to be approved
- Mark minutes as draft until approved

Nonpublic Sessions – 91-A:3

- It's a nonpublic session, not a nonpublic meeting
- A nonpublic session is different from a “non-meeting”
- Nonpublic session is the exception, not the rule
- Nonpublic sessions are permitted, not required

91-A:3, II: When to enter nonpublic

- Public employee (a specific employee)
- Hiring
- Reputation
- Real of personal property
- Lawsuits
- Emergency preparation
- Discuss legal advice
- Form available to fill out for nonpublic sessions; who made motion and seconded; cite statutory reason; who is in attendance; limit to essential employees; prepare minutes on form; time start/finish
- Can vote in nonpublic session; roll-call vote
- Limit topic to reason for session
- Indicate time convened;
- Decide whether to seal minutes
 - a) Affect adversely the reputation of any person other than a member of board
 - b) Render a proposed action ineffective
 - c) Pertains to preparation or carrying out of actions regarding terrorism
- Roll call vote to seal minutes
- Use check list each time and will comply with Right to Know Law

Minutes of Nonpublic Session

- 91-A:3, III: make available within 72 hours...or seal
- If forget to seal minutes can reconvene

Jay Diener: if you reconvene, will you go into a nonpublic to take a vote? Attorney Buckley: no, first convene a public session.

Jay Diener: so you would have to post. Attorney Buckley: you would post for a public meeting, and say we held a nonpublic session on this date and then vote to seal minutes of nonpublic session. If member had concerns and need to discuss content of what went on that might merit going back into a nonpublic session to have that discussion, so you would not inadvertently reveal content on what took place.

Attorney Gearreald: has copy of Porter v. Sandwich decision, appealed was dropped; need to be cognizant of consequences of violating the right to know law, by communicating opinions outside of a public meeting among members. Make sure that the business of the body is conducted publically, with public present, with deliberations being conducted where everyone can see and not outside of that public forum. Decisions that resulted from the violating emails were invalidated by the court.

Governmental Records

Any information created, accepted or obtained by of/or on behalf of a public body, or a quorum thereof, or a public agency in furtherance of an official function. Could be electronic, text or email, as long as it is in physical form received by a quorum or majority of a public body, it is a governmental record. A letter received by one select-board member is not a public record, if the letter is then circulated by that member to the rest of the select-board it is a public record; has to be in furtherance of the governmental function.

Step 1: Start by asking, "Is it a governmental record?" RSA 91-A-1-a

Step 2: Determine whether the record is exempt from disclosure. RSA 91-A:5

- RSA 91-A:5
- Other statutes
- Case law establishes and interprets exemptions
- FOIA "Murray Test" (law enforcement records)
- Note: not all exemptions are here!

RSA 91-A:5

- IV. Records pertaining to internal personnel practices; confidential, commercial or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy.
- Internal personnel practices broadened; employer/employee relationship; invasion of privacy; confidentiality
- Public interest in record; private interest in record; practical obscurity test; right to protect information

Notes & Drafts, 91-A:5, IX

- Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

Brian Lapham: what is considered a quorum? Attorney Buckley: a majority of a public body.

Brian Lapham: ok, so there are 12 people on my board and I text? Attorney Buckley: if you are a member of a public body, you should avoid putting things in writing to each other on matters within your jurisdiction; you have 12 members so a quorum would be 7, and if 7 members are communicating on matters within its jurisdiction then you have a public meeting. You call a fellow member and say I want to talk to you about what we are going to vote tomorrow night, that is not a violation of the right to know law; but if you create a conference call where you have 6 more members on that discussion you might have an improper illegal meeting. If you have a sequential series of communications, you might trigger the right to know law. You are member A and call up member B and say let's vote no and then you tell Member B to call Member C and you do a series of sequential communications, that could trigger a conclusion that is a violation of the right to know law. You should try to limit your discussions outside of a meeting, when you are in a public meeting that is when you should discuss to vote for this proposition.

Brian Lapham: if I am talking to 1 or 2 people I am ok. Attorney Buckley: you are not technically violating the law, but if it continues through a series of sequential communication, you could trigger a violation of the right to know law.

Law Enforcement Records use FOIA

- Factor A: Interfere with law enforcement proceedings
- Factor B: Interfere with fair trial
- Factor C: Invasion of privacy
- Factor D: Confidential sources
- Factor E: Disclosing investigative techniques and procedures
- Factor F: Endangering life or safety
- These are all standards that the court under the Murray Test say the record would not be subjected to disclosure under the right to know law

Keep in mind...

- Raw Materials to create minutes (91-A:4, II)
- Working documents
- Settlement agreements for claims or lawsuits (91-A:4, VI) are public records

Step 3: Disclose Non-Exempt Information

- Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies,...and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited to statute or RSA 91-A:5. (Pp. 100-104)

How Disclosure is Made

- RSA 91-A:4, IV: 5 days
- RSA 91-A:4, VII: Don't create/compile
- Inspect/Make copies
- Pickup
- Mail

- Electronic records must be produced electronically: RSA 91-A:4, V & Green v. SAU #55
- Deleting electronic records: RSA 91-A:4, III-B

Selectman Bridle: when you give them a copy does it have to be one they can manipulate.
 Attorney Buckley: Finance Department has created detailed spreadsheet, which has number of factors built into cells; algorithms; meta-data; could comply by printing PDF copy; would not have to produce meta-data; just produce raw data

Selectman Bridle: so if you give a paper copy, you do not have to give an electronic. Attorney Buckley: a PDF is an electronic document, not a paper copy; if you print an excel spreadsheet using PDF it creates an electronic version of same document; that would be a compliant response; some people disagree; meta-data is part of governmental record.

Timothy Jones: if a citizen is asking for a spreadsheet to inspect then has a right to come in and inspect spreadsheet. Attorney Buckley: yes.

Timothy Jones: asking for request to inspect a document in its original form, PDF is a derivation of original form. Attorney Buckley: I would concede whether producing a PDF is totally compliant, I think it could be depending upon how the request is presented.

Timothy Jones: precision and requesting is important; this refers to individuals making requests under 91-A, it does not refer to for example request officially made by a Budget Committee for financial records, correct, that does not apply here. Attorney Buckley: the Budget Committee is not a citizen; a member could step outside of their role as a member of the Budget Committee and make a separate independent request as a citizen

Timothy Jones: the example I am putting forth here is the majority of the Budget Committee formally request a spreadsheet. Attorney Buckley: technically the Budget Committee is not a citizen having a right under the right to know law.

Timothy Jones: but it does have rights under RSA 32? Attorney Buckley: RSA 32 is a different set of rules.

Timothy Jones: that would be what we are talking about right now; it does not apply to a body such as a Budget Committee making a majority request of documents; operational under the RSA 32 law, is that correct? Attorney Buckley: RSA 32 talks about the duty of the governing body and the town departments to make information available to the Budget Committee as requested to fulfill the Budget Committee's job.

Timothy Jones: I want clarification of what we were speaking about only applies to 91-A. and does not apply to RSA 32? Attorney Buckley: 91-A is not read into RSA 32

Redact Exempted Information

Redact out information using black magic market; make copy of document and send that; could use Adobe to redact, but do not send electronic copy.

Establish cost of reasonable fee; establish overhead costs to produce record and determine actual cost; per page charge.

Remedies for Violations

- 91-A:7

- 91-A:8
- No agency enforces 91-A

Timothy Jones: is it true if one were take a Government body to court under 91-A that he would have to be the egregious part to file the case; have to demonstrate the harm the court could remedy. Attorney Buckley: the person who is before the court has to establish that they have suffered through a violation of the right to know law, but there is a pretty broad standing. Any citizen can argue that the conduct of a public body is violating the right to know law; that citizen does not have to be a citizen of the town. The court can order the public agency to do remedial training, could issue injunction not to do again.

Records Retention

- “How long do I have to keep records?”
- RSA 33-A:3-a
- RSA 91-A:4
- There are permanent records and must be maintained; PDF-A

Recordings of Meetings

- Not required
- Use and discard
- Disclose ‘em if you got ‘em

Other Resources

- NHMA website RTK page:
<http://www.nhmunicipal.org/service/right-to-know>
- Attorney General’s Memo:
<http://doj.nh.gov/civil/documents/right-to-know.pdf>
- Text of the statute:
<http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-VI-91-A.htm>

Timothy Jones: confused about the statement you made regarding the creation of minutes; when the minutes become official, you said earlier that as long as they are public by the minute taker, within 3 days everything is good, right? Attorney Buckley: meeting minutes are not required to be approved by public body; they just have to be produced within 5 business days.

Timothy Jones: my follow up question is who is actually, legally speaking responsible for producing the minutes. Attorney Buckley: the public body.

Timothy Jones: so in order for the public body to produce minutes, doesn’t the public body have to by a majority vote approve the minutes that were created. Attorney Buckley: the right to know law does not require approval of public meeting minutes, all it requires is that you produce minutes.

Timothy Jones: that is not to say that other laws do. Attorney Buckley: there is no law I am aware of in NH that requires that meeting minutes of a public body in NH be approved by the public body.

Timothy Jones: that is a point of confusion, if a public body as a whole is responsible for the creation of public minutes, then public body as a whole does not actually have to in the creation

of those minutes, public body not creating those minutes. Attorney Buckley: no, the public body meets, the public body has someone in the meeting room, a member of the public body who takes the minutes, those minutes are produced within 5 business days; do not have to be approved by the public body. A public body could decide within 5 business days to reconvene and approve their minutes, they are not required to; they just have to produce them within 5 business days and it does not matter whether the public body has subsequently met and decided to approve their content.

Timothy Jones: that is what is confusing to me, if the public body does not take explicit action in the creation of the minutes, it is not going to be said that the public body created the minutes. Attorney Buckley: all I can tell you is the statute requires the public body produce them within 5 business days and they do not have to be approved.

Ethical Issues, Incompatibility of Offices & Conflicts of Interest

- How you legislate civility in the social compact we have as local government
- Living in society we all have rules we have to agree to
- Rules of behavior based on ideas about which is normally good and bad

What are “Ethics”?

- Conflicts of Interest v. Incompatibility
- Avoid conflicts of interest
- Disclose financial interests that maybe of merit or concern as a public official
- Avoid criminal behavior
- Respecting confidentiality
- Not abusing authority
- Treating people fairly and equally
- Honesty, integrity and trustworthiness

Incompatibility of Offices

- RSA 669:7
- Statutory incompatibilities

When do you have a conflict?

- Direct personal or financial interest in the outcome

<u>Legislative</u>	<u>Vs.</u>	<u>Quasi-Judicial</u>
Widely felt		Affect rights of specific petitioner
Policy decisions		Notify & hear parties
Must act in public’s interest, but don’t “need to be indifferent”		Weigh evidence
Decision invalidated if deciding vote		Must be indifferent
		Decision invalidated

Avoiding Conflicts

- Recusal, not abstention
- Advisory vote, RSA 673:14, II
- Alternates, RSA 673:14
- Proceeding without a full board
- Disclosure to parties
- If you are in doubt sit-out – leave room

Towns have power under 31:39-A to adopt local conflict of interest ordinances; have statute that has to be adopted by town meeting, cannot be adopted by governing body; ethics board; cannot authorize town remove people from public office.

Riggins Rules; being public official; how to be effective member of a public body; how to make sure business of public body is held up to high standard; do not through conduct at public meeting tarnish reputation of public body or public government as a whole. Do sit down and have a long soul searching session with yourself if you find you are consistently out in left field, that no one seems incline to second your profound motions and that you are quite often a minority of one. You might be theoretically right and probably are, but give some thought to what is practical and just, don't be stiff necking your opinions, give a little bit.

Effective Meetings

- Chair's role
- Rules of procedure
- Balance efficiency & fairness

Rotating chair role is not always best choice, as certain people are really skilled at running public meetings; would not advocate saying the most senior person on your public body becomes your chair; difficult job. Think about whom is most effective to get the business of public meeting done.

Adjournment

Selectman Barnes MOTIONED to adjourn the Public Meeting at 9:20PM SECONDED by Selectman Bridle.

VOTE: 5-0-0

Chairman