

Background – library trustees are subject to 91-A.



• RSA 202-A:3-a: Library trustees are a "public body" for purposes of the Right-to-Know Law, RSA 91-a.

Open meeting requirement for public bodies

- RSA 91-A:2 Definition of "meeting" convening of a quorum of a public body for the purpose of discussing or acting upon matters within its jurisdiction. Includes discussions by phone, email, videoconference, text, etc.
- Subject to RSA 91-A:3, <u>all "meetings"</u> must be open to the public, with notice posted at least 24 hours in advance.

But within a public <u>meeting</u>, there can be a nonpublic <u>session</u>.

- Note the opening qualifier in 91-A:2, II: "Subject to the provisions of RSA 91-A:3 "
- What is RSA 91-A:3? *Nonpublic sessions.*
- Nonpublic sessions are governed (almost) entirely by RSA 91-A:3.

When can you meet in nonpublic session?

- Only during a properly held <u>public</u> meeting.
- RSA 91-A:3, II: "No public body may enter nonpublic session, except pursuant to a motion properly made and seconded."
- A motion occurs only during a meeting, and a meeting must be public. Therefore, a public meeting must be convened before you can enter nonpublic session.

- You may enter nonpublic session at *any time during the public meeting*, so long as you have a proper reason and follow proper procedures.
- Must the agenda state that a nonpublic session will be held?
 - NO!!
 - You're not even required to <u>have</u> an agenda. (The word "agenda"does not appear anywhere in RSA 91-A.)

Why may a public body meet in nonpublic session?

Only for very limited reasons. (References that follow are to specific paragraphs in RSA 91-A:3, II.)

(a) dismissal, promotion, compensation, or disciplining of a public employee, or investigation of charges against employee

- <u>unless</u> employee (1) has a right to a meeting <u>and</u> (2) requests that the meeting be open, in which case the request shall be granted.
- "Right to a meeting" may arise under statute, personnel manual, collective bargaining agreement, employment contract. (Example: RSA 202-A:17—public hearing for removal of library employee.) Nothing in RTK Law itself creates a right to a meeting.

- Note: Don't just say "personnel matters." Not all "personnel matters" may be discussed in nonpublic session. Only dismissal, promotion, compensation, discipline, or investigation of charges against an employee.
- And only public <u>employees</u>, not public <u>officials</u>. Do not use this provision to discuss problems with members of your board or other local boards.

- (b) Hiring of any person as a public employee.
- Note: Again, only <u>employees</u>. **Not** the appointment of a public official.
 - (c) Matters 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.

- (d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.
- Curiously, does not include consideration of other business transactions—e.g., hiring private contractors to perform services.

(e) Consideration or negotiation of pending claims or litigation threatened in writing or filed by or against the public body, or by or against any member because of his or her membership in such public body.

[Paragraphs (f) through (h) do not apply to municipal boards.]

(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions . . . that are directly intended to thwart [acts of terrorism].

[Paragraphs (j) and (k) do not apply to municipal boards.]

- (*l*) Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.
- This is an alternative to a consultation with legal counsel (discussed later). Town attorney has provided legal advice; board wants to discuss it but does not want to pay for attorney to attend meeting. Board may discuss in nonpublic session.

- (m) Consideration of whether to disclose [previously sealed] minutes of a nonpublic session due to a change in circumstances.
- Use this when reviewing sealed minutes for possible unsealing.
- However, any <u>vote</u> on whether to disclose minutes shall take place in public session. That is, you can use a nonpublic session to <u>discuss</u> whether to unseal the minutes; then come back into public session for the <u>vote</u> to unseal.

Do not abuse these options!

- Exceptions to public meeting requirement are construed narrowly. If there is doubt about whether an option for nonpublic session applies, it probably does not.
- Most frequently abused:
 - Dismissal, promotion, etc. of public employe. Again, it is not a catch-all "personnel" provision.
 - "Reputation." Should be used only if necessary to discuss relevant <u>facts</u> (not opinions) that are not publicly known and need to be discussed.

How to meet in nonpublic session

- Motion to enter nonpublic session must be made and seconded.
- Motion must state "the specific exemption" relied on for the nonpublic session."
 - Either give the statutory citation (e.g., 91-A:3, II(b)) or state it in words (e.g., "hiring of a public employee") or both.
- Vote to enter nonpublic session must be by roll call.

Conduct of a nonpublic session

All discussion and decisions made must be confined to matters set out in the motion (*i.e.*, the purpose cited for the nonpublic session).

Minutes must be kept and must "record all actions in such a manner that the vote of each member is ascertained and recorded."

Minutes: keep them simple.

- Unless there is a specific reason for detailed minutes, keep them as simple as possible.
- Why? Avoids the need to seal them.
- Example: Indicate who was present, then, "The library director informed the board about a complaint regarding an employee. The board instructed him to investigate."
 - That's all! Why say more?

Who, other than board members, may be present for nonpublic session?

- Legally, anyone may be. No restrictions in the law.
- But limit it to only those necessary.
- Public officials are subject to removal for disclosing private information learned in nonpublic session; others do not have the same disincentive.

Can decisions be made in nonpublic session?

Yes! "Decisions made" in nonpublic session are mentioned several times in 91-A:3.

Decisions will become public when (if) minutes are made public.

Before exiting nonpublic session . . .

- Talk about the minutes. What will be in them?
- Discuss whether to seal. But if you're going to seal them, you must vote to do so <u>after</u> returning to public session.

Sealing nonpublic minutes—or not

- Nonpublic minutes must be made available within <u>72 hours</u> unless board votes not to disclose them ("seal" them).
- Minutes may be sealed only if, by 2/3 vote <u>taken in public</u> <u>session</u>, board determines:
 - 1) Disclosure would adversely affect reputation of any person (other than board member);
 - 2) Disclosure would "render the proposed action ineffective"; or
 - 3) Minutes pertain to terrorism.

More on sealing minutes

- Do not vote to seal for a specific period (or "forever"). If you vote to seal them, just vote to seal them. Decision on when to unseal is made in the future, not the present.
- Minutes remain sealed "until, in the opinion of a majority of members, the . . . circumstances [that justified sealing them] no longer apply." RSA 91-A:3, III.

Exiting nonpublic session

- No specific requirements, but motion to exit and return to public session is routine.
- Necessary to return to public session if there is no more business?
 - Not necessarily, but good practice.
 - If minutes are to be sealed, vote
 must be taken in public session.

Nonpublic session is different from a "non-meeting."

Non-meetings: Things expressly excepted from definition of "meeting."

Most common example: consultation with legal counsel.



Non-meeting is completely exempt from RTK Law.



- No public notice requirement.
- No need to begin with a public meeting.
 Can meet anytime, anywhere.
- No minutes required.

If legal counsel is present (or available by phone/video conference) and board needs to consult:

- Don't go into nonpublic session. (You probably could, under 91-A:3, II(*l*), but that's an unnecessary complication.)
- Instead, recess the meeting temporarily, meet with legal counsel, then reconvene the meeting.
 - No motion needed, no minutes needed.

Thank you!

- Cordell Johnston, Attorney at Law
- 33 Maple Street
- P.O. Box 252
- Henniker, NH 03242
- 603-748-4019
- cordell@cajohnston.com



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