New Hampshire's RIGHT-TO-KNOW LAW

2021

Gleason Falls,Hillsborough, NH

Photo by Forest Simon

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INTRODUCTION TO NEW HAMPSHIRE'S RIGHT-TO-KNOW LAW

All states, as well as the federal government, have laws like New Hampshire's Right-to-Know Law, which require government operations to be generally open and accessible to the people.

Part I, Article 8 of the New Hampshire Constitution reads:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.

When RSA chapter 91-A, the Right-to-Know Law, was enacted, Section 1 was written to reflect that purpose:

> Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

Section 1 requires openness and access to "actions, discussions, and records" of the government. Therefore, to understand the Right-to-Know Law, it's best to think of it as having two major components: public meetings and governmental records.

However, the Right-to-Know Law is just the floor; in other words, it sets forth the bare minimum requirements that all public bodies and agencies must comply with. Public bodies and agencies may enact their own local rules that provide more access and openness than is required by the Right-to-Know Law. RSA 91-A:2, II says:

> If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter.

Accordingly, in addition to using this book to ensure compliance with the Right-to-Know Law, you must be aware of any local rules of procedure that require you to do more than what the statutes require. If your municipality has these more restrictive rules, you must follow them. Failure to do so will constitute a Right-to-Know Law violation.

There is no question that there are costs—time, effort, money—associated with compliance. The New Hampshire legislature has decided that the benefits of open government outweigh any inconveniences posed by the Right-to-Know Law, so compliance should be considered part of the cost of governmental operations. A court will always construe the Right-to-Know Law broadly and in favor of the public's right to access. The assumption is that the public is entitled to access, and so it will always be the government's burden to prove that the public should be denied access in certain circumstances.

See Appendix A, RSA chapter 91-A:
Access to Government Records and Meetings

RIGHT-TO-KNOW LAW GLOSSARY OF FREQUENTLY USED TERMS

"Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

"Governmental proceedings" means the transaction of any functions affecting any or all citizens of the state by a public body.

"Governmental records" means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or ma jority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" also includes the term "public records," as defined in RSA 91-A:10, relative to the release of personal information for research purposes. That very limited aspect the Right-to-Know Law is not covered in this book.

"Information" means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.

"Meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, 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, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters.

"Minutes" are a written summary of a meeting. Minutes are required for all meetings, including both public meetings and nonpublic sessions. Minutes must include, at a minimum, the names of the public body members present, the names of persons appearing before the public body, and a brief description of the subject matter discussed and final decisions (if any).

"Nonpublic session" is part of a "meeting" that can be done without the public present. A nonpublic session can be held only for particular purposes, and only if certain procedural requirements are met, as described in RSA 91-A:3. Unlike a "non-meeting," a nonpublic session is still part of a meeting; it's just that public bodies are allowed to conduct that part of the meeting without the public present.

"Non-meeting" is not an official term used in RSA chapter 91-A, but it is a term used to describe situations that are specifically not considered meetings, even though they would otherwise fit the definition of "meeting," above. They are as follows:

- A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters if no decisions are made regarding such matters;
- Strategy or negotiations with respect to collective bargaining;
- Consultation with legal counsel;
- A caucus consisting of elected members of a public body of the same political partywho

were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

- Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting. However, other provisions of RSA chapter 91-A (such as those regarding governmental records) still apply to such documents or related communications.

"Public agency" means 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.

"Public body" means any of the following:

- The general court including executive sessions of committees; and including any advisory committee established by the general court.
- 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.
- 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.
- Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corpo ration, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.
- 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.

"Recorded vote" is a vote that allows the public to ascertain how each public body member voted. A recorded vote may be accomplished by conducting a roll call vote (see next entry), but roll call is not necessarily required, as long as it's clear how each member voted. (Examples: "Motion passes, 4-1, with Mr. Buckley voting in the negative" or "Motion passes unanimously.")

"Roll call vote" is a vote that states, in the public body's minutes, how each individual board member voted. (Example: Byrnes: Yes; Buckley: Yes; Johnston: No.)

"Sealed Minutes" is not an official term in RSA chapter 91-A. However, the term is used to describe minutes of nonpublic sessions that the board has determined, by a 2/3 vote of members present during public session, should not be made available to the public because at least one of the following applies:

- Divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or
- Divulgence would render the proposed action ineffective, or
- The discussions in the nonpublic session pertain to terrorism, more specifically, to 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.

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? It is the number of members who must be present to take action. "In the absence of a statutory directive to the contrary, a majority ordinarily constitutes a 'quorum' which can take effective action." ***First Fed. Savings & Loan Ass'n v. State Board of Trust Co. Incorporation*, 109 N.H. 467, 469 (1969)**. 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, III**, which requires the concurring vote of three members of a zoning board of adjustment to take any action).

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 town charter defines a quorum of the town 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 purpose of circumventing the public meeting requirements. For example, although a board of five could define "quorum" as four members for 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 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 <u>or agency</u> 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 body or 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.

On the other hand, a committee of public officials that provides advice only to planning board applicants, and not to the planning board, is not an advisory committee subject to the Right-to-Know Law. In ***Martin v. City of Rochester*, 173 N.H. 378 (2020)**, the New Hampshire Supreme Court interpreted narrowly the definition of "advisory committee" in **RSA 91-A:1-a**, ruling that the city's technical review group (TRG) was not a public body subject to the public meeting rules of the Right-to-Know Law. The city manager appointed city employees to the TRG to provide advice to planning board applicants on their proposed projects. Each member of the TRG would suggest changes in accordance with city regulations, laws, and policies. After the TRG meeting the city planner prepared a summary of the comments that was provided to the applicant, placed in the planning board file, and made available for public inspection. The plaintiff sought access to the TRG meetings. The supreme court concluded that because the TRG's primary purpose was to provide advice to planning board applicants, not to the planning board, it was not an advisory committee as defined in **RSA 91-A:1-a, I**, and its meetings were not required to be open to the public.

- 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 or town administrator, or the mayor of a city. 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 interpreted 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. 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. 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 video conference. 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 in-person 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.
- 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. Electronic Communications May Violate Public Meeting Requirements

(a) Illegal 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 access to those communications. To emphasize this point, paragraph III(c) states, “No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.”

If members constituting a quorum of a public body have a contemporaneous discussion by telephone or video conference of matters within their jurisdiction, and they have not posted notice and allowed public access, they are conducting an illegal meeting, in violation of **RSA 91-A:2**.

(b) Illegal Communication Outside a Meeting.

Because the statute defines “meeting” as the convening of a quorum “such that all participating members are able to communicate with each other *contemporaneously*,” one might wonder whether the public meeting requirements can be avoided through the use of non-contemporaneous communications. For example, an email discussion that takes place over several days does not involve “communicating contemporaneously,” and therefore is not within the definition of a meeting. Can such a discussion occur in private?

The answer is an emphatic no. **RSA 91-A:2-a** says, “Unless 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 or other private communication,

whether "contemporaneous" or otherwise. Whether one thinks of this as an illegal *meeting* or as an illegal communication *outside* a meeting is largely a matter of semantics; what matters is that it's illegal.

This doesn't mean that all email among a quorum of a public body is prohibited, but caution must be exercised. If one planning board member sends a communication to the other board members with his opinions on a pending application, this is not (yet) a technical violation of the law—but it is inviting trouble. A quorum has not been "convened" for "contemporaneous" discussion of matters within the board's jurisdiction, so there is no "meeting"; and there is no violation of the requirement that the board "deliberate" on matters within its jurisdiction only in properly held meetings, because there has been no deliberation—just an opinion sent by one member of the board. However, if another planning board member hits "Reply All" and responds to that email, a deliberation among a quorum of the board has begun, resulting in an illegal communication outside a meeting. Therefore, emails of this nature should be avoided.

In fact, one superior judge has ruled (incorrectly, in our view) 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 a one-way communication constitutes a meeting—or that the mere *ability* to communicate contemporaneously constitutes a meeting—public body members should avoid sending email or other communications to each other 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). Instead, email and other communications outside of meetings should be saved for administrative or non-substantive purposes. A common example of a permitted communication is the select board chair emailing the packet for the upcoming meeting to the 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, 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 easily 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 when an email communication among a quorum of a public body does not constitute an illegal communication, remember that it is a still a governmental record that must be disclosed to a citizen upon request. Further, 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**. Disclosure and retention requirements are separate issues, and they are discussed in Chapter Three on Governmental Records.

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

✓ Never use email or other communication outside a meeting to express ideas, concerns, opinions, etc. on 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 a proper "non-meeting," as discussed later in this chapter.

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

Not only are email and other communications outside a meeting potentially illegal, but such conduct may also 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 communications among a quorum of the public body but could also take the form of several separate communications among less than a quorum of the board which, in the aggregate, are among a quorum.

For example, on a board of five, a conversation between two members—whether in person, by telephone, or by email or other electronic communication—does not, by itself, violate the law. There is no convening of a quorum, and there is no deliberation by "the public body"—only by two members of the body. However, if one of those members then communicates with a third member about the same subject, there is a potential violation of the law, because a quorum has now engaged in a discussion outside a public meeting.

Similarly, if the chair of the board contacts each of the other board members, one at a time, to ask their opinions on a matter before the board, each discussion between the two board members would involve 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 communication 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 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 body should 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." This "exception" is really just a redundancy in the statute, because the definition of "meeting" is premised on the convening of a quorum "for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power." If the gathering was not convened for that purpose, and if no decisions are made regarding such matters, it is by definition not a meeting.

Even if the gathering was not held for the purpose of discussing official matters, general conversation could 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" can be misleading, because it might suggest that public bodies can discuss matters within their jurisdiction outside of a public meeting, as long as no decisions are made. That is not the case. While it still may not be a "meeting," such a discussion would constitute "deliberation" outside a meeting, which is prohibited. (See Section I B.2.(b) above.) The purpose of this non-meeting exemption is to allow a quorum of a public body to be in the same place at the same time—such as the town's Old Home Day or other social event, or a chance encounter on the street—without that presence turning into a meeting, as long as no official matters are discussed.

Of course, any gathering of less than a quorum does not constitute a "meeting" in any event, regardless of what is discussed. But a series of gatherings of less than a quorum creates the same potential for a violation as the "sequential communications" discussed in Section I.B.3, above.

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 (either in person or by telephone or other electronic means) and actively discussing and giving legal advice to the public body. It 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 hold 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. (At the time of this publication, there are no such municipalities in New Hampshire.)

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 member 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 I.B.2, above.

In addition, select board members may sign manifests non-contemporaneously 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**.

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 that a meeting of a public body will be occurring, there are three basic things that must happen:

- Notice must be given to the public prior to the meeting;
- The meeting must be open to the public; and
- 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 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.

The public body is not *required* to post meeting notices on its internet website. However, if it has a website—and almost all municipalities do—the public body must either (a) post meeting notices on the website "in a consistent and reasonably accessible location" or (b) post and maintain a notice on the website stating where meeting notices are posted. **RSA 91-A:2, II-b(b)**.

If an individual public body has its own page on the municipality's website, its meeting notices may be posted on that page. Alternatively, the municipality's home page may have links to meeting notices for all public bodies or a notice stating where the meeting notices are posted. If the municipality chooses to post meeting notices for some but not all public bodies, the website must indicate where the other meeting notices are posted.

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 under **RSA 91-A** 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 (unless, again, another statute requires that information). 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 is 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 needing to provide new abutter notification, however the 24 hour notice posted in two public places requirement must still be complied with.

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 these requirements are found in **RSA 91-A:2, II**.

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 body 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.

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 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 the municipality's residents, may attend any public meeting. 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, 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, and do not even need to 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 I.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. 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 certain individuals 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, many public bodies, including most local governing 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 to speak 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 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 to words and to 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.
- Speakers must sign in to indicate an intent to speak during public comment.
- Speakers must identify themselves 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.

<u>Note:</u> 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 to 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 even to 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. *See* ***Thomas v. Telegraph 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 a 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 the above reasons, no public body should ever have or enforce a rule that prohibits "defamatory" speech, "offensive" speech, or the like. Ultimately, comments both complimentary and critical must be allowed. As the Supreme Court of the United States has put it: "As a general matter, we have indicated that in public debate, our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space 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 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 sessions. For the detailed requirements for minutes of nonpublic sessions, see Chapter Two.

1. Contents of Minutes

The Right-to-Know Law does not 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; (4) any final decisions reached or action taken; and (5) the names of the members who made or seconded each motion. **RSA 91-A:2, II**.

Sometimes there's a sixth requirement: Some provisions of **RSA chapter 91-A** require a vote to be by roll call, while others require 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 voted. 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:

- Any vote taken when a member (or in an emergency, perhaps more than one member) is participating electronically/remotely, **RSA 91-A:2, III**.
- 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:

- Any vote taken while in nonpublic session, **RSA 91-A:3, III**.
- 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. **RSA 91-A:2, II**. 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.

Although there is no requirement to post minutes, the statute does require that if a public body has an internet website, it must either (i) post its *approved* minutes (see paragraph (c) below) "in a consistent and reasonably accessible location on the website" or (ii) post and maintain on the website a notice stating where the minutes may be reviewed and copies requested. **RSA 91-A:2, II-b(a)**.

As mentioned earlier with respect to meeting notices, almost every municipality now has a website, so either the minutes themselves or the notice of where minutes may be reviewed must be posted on the website. If an individual public body has its own page on the municipality's website, the minutes or notice may be posted on that page. Alternatively, the municipality's home page can have links to minutes of all public bodies or a notice stating that minutes of all public bodies may be obtained at the town hall (or wherever). If the municipality chooses to post minutes of some but not all public bodies, the website must indicate where minutes of the bodies that do not post their minutes may be found.

(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 (if such recordings are made) at least until the written record (*i.e.*, the written minutes) is 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.

The five-day requirement means that, 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:

- Make changes in red pen or some other discernable color on the original draft minutes, so that it's clear what has been changed.
- 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.
- 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 C: Draft Meeting Minutes – Practical Considerations and Insert: Public Meeting Poster.