



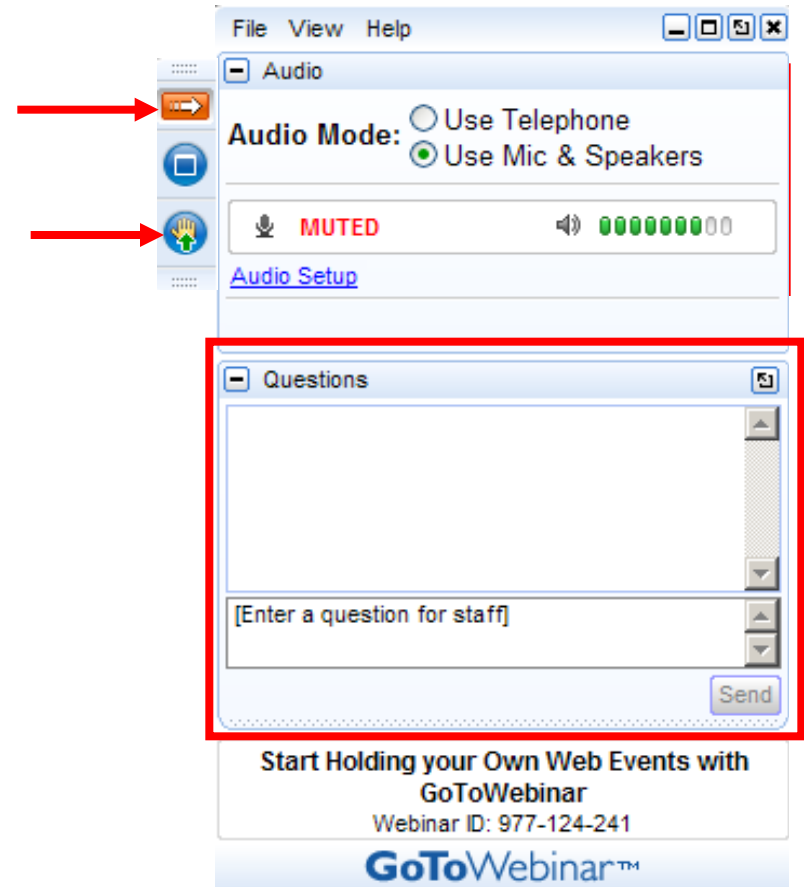
NEW HAMPSHIRE MUNICIPAL ASSOCIATION

Non-Public Sessions under the Right to Know Law – RSA Chapter 91-A

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How to Participate Today

- Open and close your Panel
- Submit text questions
- Q&A addressed at the end of today's session
- “Take a Poll” question



This Webinar will Address Non-Public Sessions as the Exception to the Public Meeting Requirement

- Meetings that can be held without the public present that are not subject to RSA 91-A
- What are permissible reasons for entering non-public session
- How to enter and exit non-public session
- Keeping of minutes for non-public sessions
- Sealing non-public meeting minutes and the duration non-public meeting minutes may be kept from public disclosure
- Penalties for non-compliance

When is a Meeting Subject to 91-A?

- A "meeting" means the convening of a quorum of a public body whether in person, by means of telephone or electronic communication such that all participating members are able to communicate with each other contemporaneously
- For the purpose of discussing or acting upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.

When is a Meeting Not a “Meeting” Subject to RSA 91-A

- A chance encounter not convened to act upon public matters where no decisions are made
- 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 party
- Circulation of draft documents that will formalize decisions previously made in a meeting

What is “Consultation with Legal Counsel”

- Consultation with legal counsel does not include discussing a legal memorandum prepared by a public body's attorney where that attorney is unavailable at the time of the discussion
- “Consultation” requires the ability to have a contemporaneous exchange of words and ideas between the public body and its attorney
- Could possibly include a telephone conference with legal counsel by the public body, but that has not been directly decided by the Court
- See, Ettinger v. Town of Madison, 162 NH 785 (2011)

Circulation of Draft Documents that will Formalize Decisions Previously Made in a Meeting

- Public body makes a decision by way of a motion at a public meeting
- The Chair of that public body is delegated the task to write up a more detailed written decision based upon that adopted motion
- Chair circulates the draft written decision to the members of the public body to make sure the written decision is consistent with the adopted motion
- Members may comment via email on the draft so long as no substantive changes to the decision are made



Is consideration of a request for tax abatement a proper reason for a non-public session?

Yes

No

Maybe

How to go into Non-Public Session Under RSA 91-A:3

- Notice of the time and place of any meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website
- 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 then such charter provisions or guidelines or rules of order shall take precedence over the requirements of 91-A

How to go into Non-Public Session Under RSA 91-A:3

- Any motion to enter nonpublic session shall state on its face the specific exemption which is relied upon as foundation for the nonpublic session
- The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present
- All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion

Dismissal, Promotion, Compensation, Discipline or Investigation of any Public Employee or Hiring

- 91-A:3 (II) (a): The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted
- Right to a hearing by affected employee must be based on local personnel rules or charter provisions

Dismissal, Promotion, Compensation, Discipline or Investigation of any Public Employee or Hiring

- Personal notice to persons whose public employment will be discussed in non-public not required. (Except if public employee has a “right” to a meeting.) *Brown v. Bedford School Board*, 122 NH 627 (1982)
- 91-A:3 (II) (b): The hiring of any person as a public employee

Adverse Impact to Reputation

- 91-A:3 (II)(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. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.
- Reputation standard – is the content of the proposed discussion likely to lower a person in the esteem of any substantial and respectable group, even though it may be quite a small minority. Thomson v. Cash, 119 NH 371 (1979)



After a non-public session of a five-person board of selectmen, there is a motion to seal the minutes. Three members vote yes, one votes no, and one abstains. Does the motion pass?

Yes

No

Maybe

Acquisition of Real Estate – Pending Legal Claims

- 91-A:3 (II)(d) Consideration of the acquisition, sale, or lease of real or personal property --if discussed in public, would likely benefit a party whose interests are adverse to those of the general community
- 91-A:3 (II) (e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the public body or any subdivision thereof, or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. ***Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph. (except if based on inability to pay or poverty, then use reputation)***

Emergency Functions

- 91-A:3 (II) (i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.
- Example – regional SWAT team agreements and planning for response to a terrorist attack

Minutes of Non-Public Sessions and Sealing the Minutes

- Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section.
- Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism.
- In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply.

Consequence for Breach of Confidentiality of Non-Public Session

- It is considered a violation of a town officer's oath for the officer to divulge to the public any information which that officer learned by virtue of his official position, or in the course of his official duties, if:
 - (a) A public body voted to withhold that information as required by RSA 91-A:3, III, and if divulgence of such information would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or would render proposed municipal action ineffective; or
 - (b) The officer knew or reasonably should have known that the information was exempt from disclosure pursuant to RSA 91-A:5, and that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body or agency, or would render proposed municipal action ineffective.

Consequence for Breach of Confidentiality of Non-Public Session

- 42:1-a Manner of Dismissal; Breach of Confidentiality. – Petition for dismissal to Superior Court.

Remedies For and Against Municipality for Violation of 91-A

- Public body shall be required to pay attorneys fees if lawsuit necessary to abate purposeful violation of 91-A; court must find public body knew or should have known conduct was 91-A violation
- Court may award attorneys fees to the public body if the lawsuit was in bad faith, frivolous, unjust, vexatious, wanton, or oppressive
- Court may invalidate action taken by public body at meeting held in violation of 91-A

Remedies For and Against Municipality for Violation of 91-A

- Court may order fine be paid personally by public official for bad faith behavior
- Court can enjoin future violations and order training at public official's expense