

STATE OF NEW HAMPSHIRE
DEPARTMENT OF JUSTICE

MEMORANDUM

TO: State Agencies and Public Bodies

FROM: Gordon J. MacDonald, Attorney General
Nancy Smith, Senior Assistant Attorney General and Right-to-Know Director
J.D. Lavallee, Assistant Attorney General

RE: How to Conduct Emergency Meetings in Compliance with New Hampshire's
Right-to-Know Law (RSA Chapter 91-A) in light of COVID-19 Concerns and
applicable Executive and Emergency Orders

DATE: March 31, 2020

This memorandum provides guidance on how to hold emergency meetings in light of Executive Order 2020-04 (declaring a State of Emergency) and Emergency Order #12 (temporarily modifying public access under RSA Chapter 91-A). It sets forth specific procedures that must be followed during the State of Emergency.

While this memorandum is intended for state agencies and public bodies, it is also being released publicly and will be placed on the Department of Justice website as guidance. Attached to this memo is an outline that public bodies may use to assist with holding a meeting that is compliant with these procedures.

Determination of Emergency

Under RSA 91-A:2, III, a public body may allow one or more members to participate in a meeting by electronic or other means of communication. Under normal circumstances, a quorum of the members of the public body must be physically present in order for the meeting to take place. However, under RSA 91-A:2, III(b) if the chairman or presiding officer of the public body finds that an emergency exists and immediate action is imperative, then the chairman or presiding officer may waive the requirement that a quorum be physically present at the meeting.

Pursuant to Executive Order 2020-04, Section 8, chairs and presiding officers should continue to feel empowered to make a finding that an emergency exists due to the COVID-19 pandemic. Emergency Order #12, Section 3 further waives the requirement for a finding that immediate action is imperative before a public body can meet without a physical quorum present.

As a result, when a chair or presiding officer finds that an emergency exists pursuant to Executive Order 2020-04 and invokes Emergency Order #12, an emergency meeting can be held and no physical quorum of the public body is necessary.

Notice of Emergency Meeting

Whenever it is determined an emergency meeting will be held, a notice of the time and place of such meeting must be posted as soon as practicable. The law requires employing whatever additional means are available to inform the public about the meeting. For example, notice may be given over the radio or by e-mail, social media, or telephone to people known to be interested in the subject matter of the meeting. The nature of the emergency will dictate the type of notice that can be given. In any event, notice must be posted and a diligent effort must be made to reasonably inform the public that a meeting is to be held and the means for public access. Such efforts should be documented.

Even in situations where a majority or all of the public body is participating in a meeting electronically, the meeting must still be properly noticed at least 24 hours in advance unless the chair or presiding officer has concluded that an emergency circumstance requiring immediate action, in addition to the COVID-19 pandemic, necessitates waiving the notice requirement. While not required under the Right-to-Know law, it is generally appropriate that the notice of a meeting include or be accompanied with a brief list of the planned agenda items and a general notice that other matters within the public body's jurisdiction may be considered. Where the rationale justifying the emergency meeting is the risk of exposure to COVID-19 by physical attendance, there should generally not be a need to waive the notice requirement.

Emergency Meeting Procedure

Under the usual statutory framework, where the requirement of a physically present quorum is waived, a meeting of a public body may be conducted with most or all members participating electronically. However, the meeting must still be conducted in a manner that allows for public access. Typically, there must be a physical location specified in the notice where the public can attend at which any members physically present are located, and the remote members must participate in a manner that allows for their statements to be audible to any members of the public who are in attendance. If all members are participating electronically, then the public body must still provide a physical location to allow for public access to the meeting (even if such location is, for example, merely a room with a speaker phone).

The requirement that the public body still provide a physical location to allow public access to the meeting was waived by Emergency Order #12, Section 4, so long as the public body:

- a) Provides public access to the meeting by telephone, with additional access possibilities by video or other electronic means;
- b) Provides public notice of the necessary information for accessing the meeting;
- c) Provides a mechanism for the public to alert the public body during the meeting if there are problems with access; and
- d) Adjourns the meeting if the public is unable to access the meeting.

Emergency Meeting Member Participation

To ensure public access to the meeting, the public body must also take the following steps when a public body is conducting a meeting with remote (telephonic or video conference) members and remote public access under the emergency meeting procedures outlined above:

- a) Any member of a public body participating remotely must identify any other persons present at the location from which the member is participating; and
- b) The member(s) of a public body participating remotely are deemed to be present at the meeting for the purposes of voting.

All votes taken at a meeting at which any member participates electronically must be by roll call vote. This means that the minutes need to list all members participating and their vote on each vote. A total of Yeas and Nays is not sufficient.

Non-Public Sessions and Non-meeting Sessions

Public bodies may need to consult with legal counsel (a non-meeting) or go into a non-public session for an authorized purpose under RSA 91-A:3 or other statutory provision which authorizes a public body meet in non-public session. There has been no expansion of the criteria for non-public sessions or non-meetings under the State of Emergency at this time. Whenever feasible, public bodies should consider the meeting agenda in advance in order to ensure the feasibility of holding such sessions with the remote technology available. Strategies to minimize impact on public accessibility and ensure a coherent meeting include consulting with legal counsel before a public meeting is called to order or deferring such consultation until after the close of public session. Matters appropriate for discussion in non-public session can also be grouped together and addressed at the end of a public session.

To properly enter non-public session a public body is still required to vote, by roll call vote, to adopt a motion for a non-public session. The motion should state the statutory basis for the non-public session and must be approved by the majority of the members. If there are multiple issues to be addressed in the non-public session each issue should be identified and the specific authorization for non-public session stated. The vote to go into non-public session is taken during the public session of the meeting and recorded in the minutes of the public meeting that will be available to the public. The public minutes should explicitly identify each voting member and how he or she voted on the motion to enter non-public session.

If a non-public session occurs, a separate call in number for just the members should be used to be sure the public is properly excluded from the non-public session meeting and no unauthorized listeners remain. The public should be told they can stay on the public line or rejoin, depending on the technology used, and that the public session will resume when the non-public portion is complete. The public session must resume in order to vote on whether to seal the non-public session minutes.

Minutes of an Emergency Meeting

In all cases where the chair or presiding officer determines that an emergency exists pursuant to the COVID-19 pandemic and a quorum of the public body is not physically present,

the minutes should reflect that the public body is holding an emergency meeting pursuant to Executive Order 2020-04, Section 8 and Emergency Order #12, Section 3.

Meeting minutes compliant with RSA 91-A:2 must still be kept during emergency meetings. Minutes must include the names of the members of the public body participating in the meeting; the names of persons appearing before the body; a brief description of each subject discussed; and a description of all final decisions made, including all decisions to meet in non-public session. "Final decisions" include actions on all motions made, even if the motion fails. A clear description of the motion, the member making the motion, and the member seconding the motion must also be included. As noted above, all votes taken at a meeting at which any member participates electronically must be by roll call vote. This means that the minutes need to list all members participating and their vote on each vote.

Minutes must still be taken in non-public session, including documenting any action taken. As noted above, the minutes of non-public sessions are public documents unless the public body determines by a two-thirds roll call vote recorded in public session that the non-public session minutes are properly withheld from disclosure.