Issue:

Were the "Right To Know" regulations (RSA 91A) violated on March 11th 2019 when an email, generated by Jenifer [redacted] (Alternate), was dispersed to the Hudson Conservation Commission regarding a secondary review of a legislative topic. The Email including both the town selectmen liaison, David Morin, as well as the town's engineering assistant, Doreena Stickney.

Additionally, was the email that was sent from Brett [redacted] (Commission Vice Chair) to Randy [redacted] (Commission Chair), while also carbon copying (CC) to Conservation Commission Liaison, David Morin, as well as blind carbon copying (BCC) the rest of the commission also a violation of RSA 91A?

Email in Question:

From: Jennifer [redacted]
Sent: Monday, March 11, 2019 5:00 AM
To: [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; [redacted]; S_ckney, Doreena dstickney@hudsonnh.gov>; Dhima, Elvis <edhima@hudsonnh.gov>; Morin, Dave dmorin@hudsonnh.gov

Subject: Agenda Item: Discussion of Rec Use of CH Land

Hi Everyone,
As a reference, I have attached the revised letter that was sent to Mr. LaBonte on February 19th as well as a color map of the North Conway recreation Path that I shared as a comparative agreement at our last meeting. I have heard back from Mr. LaBonte and will provide an update tonight. I will be arriving to our meeting late, my interview for member position of ConCom is with BOS at 7pm.

Best Regards,
Jen [redacted]

From: "Dhima, Elvis" <edhima@hudsonnh.gov>
Date: March 11, 2019 at 8:36:10 AM EDT
Subject: RE: Agenda Item: Discussion of Rec Use of CH Land

Please refrain from mass emails as they do constitute a meeting.

E
Elvis Dhima, P.E.
Town Engineer
Town of Hudson, NH
12 School Street
Hudson, NH 03051
Phone: (603) 886-6008
Mobile: (603) 318-8286
<image001.png>

[redacted].brett <[redacted]> Mon, Mar 11, 2019 at 9:07 AM
To: [redacted]
Cc: dmorin@hudsonnh.gov
Bcc: [redacted]

For Informational Purposes Only: this is not for discussion via email.

A "meeting" occurs any time a quorum discusses business matters. A meeting can be held via e-mail, as well as in person. Private conversations that start innocently can easily end up as a train of discussions that ultimately includes a quorum of the Board.

https://www.udallshumway.com/blog/2014/06/23/why-youve-go-mail-may-mean-an-open-meeting-law-violation/

Cliff notes: A meeting must consist of DISCUSSION with three or more members. Furthermore, the law is truly based around JUDICIAL decisions (ie. an applicant). Information being distributed is considered LEGISLATIVE. A discussion IF it were to happen does not affect a vote when talking about legislative ideas. This law is trying to stop discussion that would make people bias in judicial topics.

Definition of a Discussion:
- The Action of process of talkinga bout something in order to reach a decision or to exchange ideas
- The conversation or debate about a certain topic

Letter from town officials:

Dear Mr Gagnon

As you are aware the board of selectmen appoint all regular and alternate members to the Conservation Commission pursuant to RSA 36-A:3. As the appointing authority, the board of selectmen are further authorized to remove an such appointed regulator or alternate member of the conservation commission

It has come to the attention of the board of selectmen that you sent an email on March 11th 2018 to a majority of the members of the Conservation Commission. The email addressed a substantive matter pending before the Conservation Commission, and was likely a violation of RSA 91-A:2-a, which provides that "[c] communication outside a meeting, including, but not limited to sequential communication among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1". The selectmen note that this communication happened notwithstanding the fact that recent Right To Know law training was provided to the Conservation Commission by the NH municipal association.

Compliance with the Right To Know law is a responsibility of all public officials. The purpose of this letter is to let you know that the board of selectmen consider violations of the Right To Know law to be cause for removal from the Conservation Commission. Any future violations of the Right To Know law may be deemed grounds for your removal. As such, it is of the utmost importance that you make sure that your communications with the Conservation Commission going forward are in compliance with the Right To Know law.

In this case, the better practice would have been for you to send that email ONLY to town staff who would have then distributed your email and any attachments to the members of the Conservation Commission for consideration at the next meeting. The Concern is not regarding the substance of your email, but rather, that you elected to engage in this communication with the conservation commission outside of a public meeting.

The selectmen recognize that compliance with the Right To Know law may appear burdensome at times and that it is sometimes difficult for people to be mindful of their duty to comply with the Right To Know law, particularly with email, nonetheless, it is your responsibility as a public official to make sure that your communications are compliant.

If you have any questions regarding the Right To Know Law please let us know

Regulations being reference:

91-A:2-a Communications Outside Meetings. –

I. 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.

II. Communications 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 as expressed in RSA 91-A:1

91-A:2 Meetings Open to Public. –

I. For the purpose of this chapter, a "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.

Interpretation:
No deliberations outside a public meeting. Public bodies may deliberate on matters of official business "only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III"—i.e., only in properly noticed public meetings. This does not mean that any mention of a matter of official business outside a public meeting is illegal; however, it is illegal for the body to deliberate on such a matter outside a meeting—i.e., to discuss the matter with a view toward making a decision. This includes discussions by e-mail!

Definitions:
Deliberate –
To think about or discuss issues and decisions carefully
To think about deliberately and often with formal discussion before reaching a decision

Discussion **-**
The Action of process of talking about something in order to reach a decision or to exchange ideas
The conversation or debate about a certain topic

Synopsis:
If there were over 3 members involved (making it a quorum), but there was not an active DISCUSSION and/or DELIBERATION (as the describes in the definition above), then the Right To Know law was not violated.

The Right to Know law is designed to keep discussions on a JUDICIAL topic in the public eye in order for voters to know how their representatives feel/act about certain issues. Said representatives cannot make decisions behind "closed doors" to manipulate decisions or outcomes in which the public does not have access to see.

Authorization of Initial Email:

Please refer to RSA 91-A:2 I [c]

Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

The wording used in the original email

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Sent: Monday, March 11, 2019 5:00 AM
To: [redacted] S_ckney, Doreena dstickney@hudsonnh.gov>; Dhima, Elvis <edhima@hudsonnh.gov>; Morin, Dave dmorin@hudsonnh.gov

Subject: Agenda Item: Discussion of Rec Use of CH Land

Hi Everyone,
As a reference, I have attached the revised letter that was sent to Mr. LaBonte on February 19th as well as a color map of the North Conway recreation Path that I shared as a comparative agreement at our last meeting. I have heard back from Mr. LaBonte and will provide an update tonight. I will be arriving to our meeting late, my interview for member position of ConCom is with BOS at 7pm.

Best Regards,
Jen Parkhurst

References From The Right To Know Association:

**Note: David Taylor is the Vice President of Right to Know group. It may not be an official legal opinion but he is an extremely credible source.* https://righttoknownh.wordpress.com/about-us/

From: David Taylor <[redacted]>
Date: March 20, 2019 at 4:39:53 PM EDT
To: Jennifer [redacted]
Cc: "assistrtknh@googlegroups.com" <assistrtknh@googlegroups.com>
Subject: Re: [SOCIAL NETWORK] Fwd: [Right to Know NH] Contact Us

OK. I think I understand what is going on. First, you should take what I say with a large grain of salt. I am not a lawyer and I am not trained in the law. I can't give legal advice. This is just my personal opinion. You need to decide for yourself what you should do in this case.

I think there are a couple of issues you are dealing with. First, did you violate the Right-to-Know Law? Second, regardless of whether or not you violated the Right-to-Know Law, should you follow the recommendation in the letter?

In my opinion, you did not violate the law with that email. Contrary to what was in the reprimand letter, the contents of your email does make a difference. You did not state a position, propose a course of action, try to persuade other members toward your position, or state how you would vote on an issue before the commission. You merely provided updated documents for the commission to prepare for an upcoming meeting. There was no discussion or deliberations and no other member responded. To me, this does not violate RSA 91-A:2-a. You were not trying to "circumvent the spirit and purpose" of the law. You were just helping the commission to have the information they needed to prepare for a meeting.

In spite of that, I think the recommendation in the letter is a good idea. You should send the letter to the staff and have them forward it to the rest of the commission. This not only makes it harder for a discussion to get started, but it also allows the staff to filter out any emails that might cross the line and makes sure they have a good record of all communications among the members in their files.

I hope this helps.
Thanks,
-David

References From the NH Municipal Law Group:

From: Legal Inquiries <legalinquiries@nhmunicipal.org>
Date: March 27, 2019 at 10:30:32 AM EDT
To: "[redacted]>
Subject: Hudson: Clarification on RSA 91-A:2-a Violation
Good morning Jennifer:

I am not sure if you are aware, but Attorney Buckley was consulted by the select board prior to issuance of this warning letter. I have reviewed the notes of the consultation precipitating this letter and NHMA stands by its prior assessment.

Our concern was that the way in which you communicated regarding Mr. LaBonte's application may invite a response from other members of the commission. There is at least one superior court case in which a "reply-all" was contemplated. In that case, the court ruled that "[t]he key to the contemporaneous communication requirement [under RSA 91-A] is the ability to communicate contemporaneously-as opposed to whether contemporaneous communication occurred." Porter v. Town of Sandwich, Docket No. 212-2014-CV-180, Pg. 19 (Carroll Super. Ct. Aug. 14, 2015). That is a very stringent standard. As such, our advice has consistently been that the better practice in a situation like this is to send such emails **only** to town staff who would then distribute them – and any attachments – at the meeting.

This is a very nuanced and complex area of the law and, while superior court cases technically do not have precedence in our state, their decisions are often persuasive when these issues arise again. Therefore, we advocate an abundance of caution in this area of the law. If you need any further explanation, please do not hesitate to reach out.

Natch Greyes
Municipal Services Counsel
NH Municipal Association
25 Triangle Park Drive
Concord, NH 03301
Tel: (603) 224-7447

Recap:

Did the either email involve a quorum?

- Yes. The communication sent by Jenifer [redacted] was distributed to the entire conservation commission and there was a possibility that a reply all could have been used to potentially start a discussion

- No. The communication sent by Brett [redacted] was distributed to only one other member of the conservation commission (Randy [redacted] – Chair). The selectmen liaison is not considered a "Member". Additionally, the other members who were BCC'd could not start a discussion with more than 2 members thus removing even the possibility of a quorum.

Did the either email start sequential communication?

- No. The original email sent by Jenifer [redacted] was simply for reference purposes as stated in the text. The email did not provoke discussion, nor did it pose a question that required feedback.

    - *It should be noted that the court case referenced by the NH Municipal Law Association may hold some weight in understanding the laws intent, technically speaking superior court cases do not have jurisdiction in New Hampshire.*

- No. The email sent by Brett [redacted] was directed at one individual with the selectmen liaison (via a town email address for document retention) in copy.

Was the meeting and/or its topic open to the public?

- Yes. The topic being discussed was already reviewed and voted on IN PUBLIC SESSION during the last conservation commission meeting, thus the public had complete transparency with the actions associated.

- The original email was sent to the town assistant for documentation retention incase a member of the public was interested in reading the email notice.

Did either email "circumvent the spirit of the law"?

- No. Based on the feed back from the vice president of the Right To Know association, he does not believe either email "circumvented the spirit of the law".

Did either email allow for the possibility of discussion?

- Yes, Jenifer [redacted] original email had the potential to start a discussion if another member were to "reply all" thus including a quorum of members with a sequential communication.

- No. Brett [redacted] email utilized the BCC function and only included one other member within the "to" line, thus removing the possibility of a discussion with a quorum and/or sequential communication

-

Did the original email have authorization to be sent under RSA91A?

- Yes. The original email did not clearly break any of the regulations as stated in RSA 91A as described above, but in fact it could claim authorization to be sent based on Please refer to RSA 91-A:2 I [c]

Conclusion:

Jenifer [redacted] and Brett [redacted] feel as though their emails did not clearly break the Right To Know Law. This can be reinforced by the wording found in the original letter of reprimand where the writer states "was likely a violation". There is no definitive proof that the regulations were broken. Even in the reference provided by the NH Municipal Association, they state that superior court cases are not technically law in NH. With this in mind, Mrs. Parkhurst and Mr. Gagnon would request that the letter of reprimand kindly be withdrawn from the record.

With that said, Mrs. [redacted] and Mr. [redacted] can understand the fine line and seemingly "grey area" in which the NH Municipal Association is referring. If the intent of the law is even to merely have the possibility of a discussion, then the original letter may have stepped into that realm. Although no discussion had come of the original email, the potential was there.

For the record, the details which were provided by the NH Municipal Associations email above were not explained during the training to the Conservation Commission. Thus in the name of "community service" and providing a "helping hand" to others, Mrs. Parkhurst and Mr. Gagnon will take it upon themselves to use this opportunity as a training exercise for their fellow members. It would be requested that a special workshop style meeting be scheduled for the Conservation Commission in order to explain, in detail, how the Right To Know law should be interpreted and used moving forward. This training will outline CLEAR and SIMPLE steps for ALL emails moving forward that ALL members must follow.

Be Aware:

https://www.nhmunicipal.org/TownAndCity/Article/447

There is a general rule, cited in Marsh v. Hanover, 113 N.H. 667, 670 (1973), that

"[t]he power to appoint officers or employees of a municipal corporation carries with it the power of removal of such employees at the municipality's pleasure unless the power of removal is restricted by statutory law."

However, many of the important offices in municipal government have statutes that prevent removal without following prescribed procedures and a showing of just cause. Examples: health officer, RSA 128:4 (removal by commissioner of the Department of Health and Human Services); police chief, RSA 105:2-a; fire chief, RSA 154:5; road agent, RSA 231:65; and land use board member, RSA 673:13.

Moreover, the New Hampshire Supreme Court has held that an official who successfully resists unjustified removal efforts confers a "substantial benefit" on the municipality and is thus entitled to an award of attorney's fees for the effort. Silva v. Botsch, 121 N.H. 1041, 1043 (1981) (attempt to remove selectman as ex officio member of planning board); Foster v. Hudson, 122 N.H. 150 (1982) (attempt to remove appointed police chief). Check the statutes before deciding to remove an appointed official.

Also Reference: 673:13 Removal of Members. –

I. After public hearing, appointed members and alternate members of an appointed local land use board may be removed by the appointing authority upon written findings of inefficiency, neglect of duty, or malfeasance in office.

II. The board of selectmen may, for any cause enumerated in paragraph I, remove an elected member or alternate member after a public hearing.

III. The appointing authority or the planning board shall file with the city or town clerk, the village district clerk, or the clerk for the county commissioners, whichever is appropriate, a written statement of reasons for removal under this section.

IV. The council, selectmen, county commissioners with the approval of the county delegation, or district commissioners may for any cause enumerated in this section remove the members selected by them.

Source. 1983, 447:1. 1989, 266:11, eff. July 1, 1989.

n Foote v. Bedford, 642 F.3d 80 (1st Cir. 2011), the First Circuit Court of Appeals indicated that it can be a violation of an appointed official's First Amendment right to speak out on matters of public concern if a decision not to reappoint the official is based on the official's public opposition to, and criticism of, municipal policies. Foote was a member of the recreation committee, which advised the town council on town recreation policy. Foote publicly opposed the town council's program for a certain park project. When he was not reappointed, Foote filed a suit in federal court for violation of his civil rights. The Court applied the U.S. Supreme Court's three-part test applicable to employee First Amendment rights: