STATE OF NEW HAMPSHIRE
OFFICE OF THE GOVERNOR

CHRISTOPHER T. SUNUNU
Governor

# MEMORANDUM

**TO:** New Hampshire Municipal Officials, State Boards and Commissions

**FROM:** Governor Christopher T. Sununu and Attorney General Gordon MacDonald

**RE:** Compliance with New Hampshire's Right to Know Law (RSA 91-A) in light of COVID-19 Concerns and issuance of Executive Order 2020-04

**DATE:** March 16, 2020

We are providing this memo in response to questions that the State has received over the past several days regarding State and local councils, boards, and commissions' options for compliance with the requirements of New Hampshire's Right to Know Law (RSA 91-A) in light of concerns regarding the spread of COVID-19 and the issuance of Executive Order 2020-04, which declared a State of Emergency in New Hampshire due to COVID-19. Specifically, some communities have asked whether their boards, councils and commissions have any flexibility under RSA 91-A to allow for members to attend meetings by telephone or other electronic means. In addition, communities have asked whether RSA 91-A's requirement that a quorum be physically present may be suspended or altered given concerns regarding COVID-19 and the issuance of Executive Order 2020-04. Various State Boards and Commissions have made similar inquiries.

These questions can be answered by a careful review of the provisions of RSA 91-A, and as such we think it prudent to provide communities and State boards and commissions with the following general guidance[1]:

1. Local councils, boards and commissions, such as a city council, a board of alderman, board of selectman, a town council, a zoning board of adjustment, a planning board, a conservation commission, or others, are all considered public bodies that are subject to the provisions of RSA 91-A. The same is true for State boards and commissions.

2. Under RSA 91-A:2, I, all meetings of a public body must be noticed at least 24 hours in advance and must be open to the public.

3. 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

[1]This memo is being provided as general guidance and not as legal advice. Public bodies should consult with their own counsel if they have further questions regarding the requirements of RSA 91-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 determines that an emergency exists, then the chairman or presiding officer may waive the requirement that a quorum be physically present at the meeting.** For purposes of this provision, 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." Each individual chair or presiding officer should make their determination as to whether an emergency exists based on the specific facts related to their public body and their community. For example, a chair or presiding officer might determine that an emergency exits because a body needs to conduct its regular meeting to continue to move business forward, but enough board members may be sufficiently high risk individuals for purposes of COVID-19 (and thus unable to attend a public meeting) that the physical presence of a quorum is not practical. **Even in cases where a majority or all of the board 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 necessitates waiving the notice requirement.** 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.

4. In cases 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. 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), although in addition to providing physical access they could also provide the public with a call in number for meetings that are conducted entirely by telephone.

5. In all cases where the chair or presiding officer determines that an emergency exists, the facts and circumstances that are relied upon in making such determination should be recorded in the minutes of the meeting.

6. All votes taken at a meeting at which any member participates electronically must be by roll call vote.

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