

**2016-2018  
Board of School Committee**

**Yeas and Nays**

**Meeting:** Phone Poll

**Date:** 10/31/17

**Motion:** To release the  
attorney's opinion regarding  
an audio recording of the 9/11/17  
non-public session

Committee Member	Yea	Nay	Abs.
Cmt. Member Ambrogi		✓	
Cmt. Member Langton	✓		
Cmt. Member Georges	✓		
Cmt. Member Want		✓	
Cmt. Member Freeman	✓		
Cmt. Member Bergeron		✓	
Cmt. Member Tessier		✓	
Cmt. Member Girard	✓		
Cmt. Member Terrio	✓		
Cmt. Member Connors		✓	
Cmt. Member Beaudry	✓		
Cmt. Member Avar	✓		
Cmt. Member Desrochers		✓	
Cmt. Member Van Houten		✓	
Mayor Gatsas	✓		
<b>Total:</b>	8	7	

**Confidential Attorney-Client Privilege**

October 30, 2017

Board of School Committee  
Manchester School District  
195 McGregor Street, Suite 201  
Manchester, NH 03102

RE: Legal Opinions

Dear Members of the Board of School Committee:

I have been directed to provide a legal opinion as counsel to the Manchester Board of School Committee (BOSC) with regard to the following:

1. Did the BOSC violate RSA 91-A when it when into non-public session on October 10, 2017?
2. Did Committee Member Girard violate RSA 91-A or New Hampshire's wiretapping statute, RSA 570-A:2, when he recorded the September 11, 2017, non-public session?<sup>1</sup>

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<sup>1</sup> We have been asked to provide this opinion to the BOSC as general counsel for the District. We are not criminal prosecutors nor criminal defense attorneys, nor have we rendered this opinion on behalf of a law enforcement agency. The BOSC has not asked us to refer this matter to law enforcement.

## **2. Request from Committee Member Desrochers**

### **a. Did Committee Member Girard violate RSA 570-A:2, I (class B felony) for willfully recording the non-public meeting without consent?**

On the night of September 11, 2017, Committee Member Girard was asked to take the minutes of a non-public session due to the current clerk's absence. On that night, he placed his cell phone on the top of the shelf in front of his seat and used the record function to record the entire non-public session. Committee Member Girard did not notify the other members of the BOSC that he was using his cell phone to record the meeting. The phone, while thin and inconspicuous, was in plain sight. Committee Member Girard asserts that he used his phone to record the meeting so that he could prepare accurate minutes. There is no evidence that the minutes were used for any other purpose.<sup>2</sup>

RSA 570-A: 2, I, provides in pertinent part, that a person is guilty of a class B felony if that person **willfully** intercepts oral communications. The term oral communications is defined as "*verbal communications uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such exception.*" Further, courts have interpreted the term "willfully" as requiring an intentional or reckless disregard for the lawfulness of the recording. *Fischer v. Hooper*, 143, NH 585 (1999). In other words, a person has not violated the wiretapping statute if he has "a good faith belief that his conduct was lawful." *State v. Mueller*, 166 NH 65 (2014).

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<sup>2</sup> According to Girard, after the minutes were drafted, he forwarded the tape to the Clerk of the BOSC and deleted the record from his phone.

In this case, Committee Member Girard placed his cell phone in plain view for the sole purpose of preparing the non-public minutes. *Cf. State v. Stiles*, 128 NH 81 (1986). At the time, Committee Member Girard had a good faith belief that he was not violating the law and was recording the meeting to aid the BOSC in the production of more accurate meeting minutes. While one could argue whether the circumstances (with the phone in plain view) warranted a reasonable expectation that the communications was not subject to interception, there does not appear to be the requisite mental state (intentional or reckless disregard) associated with Committee Member Girard's recording of the meeting. Similarly, Committee Member Girard stated that he immediately provided to the recording to the clerk and deleted the record from his cell phone. There is no evidence that Committee Member Girard further disclosed the recording or engaged in an other use that would constitute a willful violation of 570-A: 2, I.

**b. Did Committee Member Girard violate RSA 570-A:2, I-a (misdemeanor) for knowingly recording the non-public meeting without consent?**

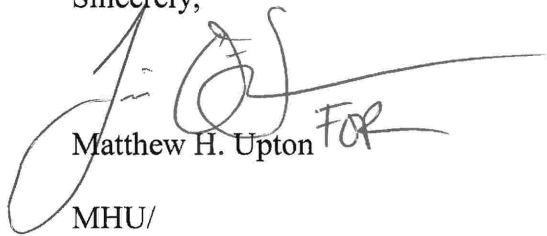
RSA 570-A:2, I-a, provides is pertinent part, that a person is guilty of a misdemeanor if that person **knowingly** intercepts oral communications. The term oral communications is defined as "*verbal communications uttered by a person who has a reasonable expectation that the communication is not subject to interception, under circumstances justifying such exception.*" Unfortunately, the courts have not yet interpreted the term "knowingly" in the context of this statute.

The NH Legislature intended a different standard when it decided to use the term "knowingly" rather than "willfully" in RSA 570-A:2. *See State v. Mueller, supra*. "Knowingly" means that the person is aware that they are engaging in criminal conduct. *State v. Wentworth*, 118 NH 832 (1978). However, and while one could argue whether or not the circumstances (with the phone in plain view) warranted a reasonable expectation that the communications was not subject to interception, there does not appear to be the requisite mental state of knowingly associated with Committee Member Girard's recording of the meeting. Specifically, Committee Member Girard did not believe he was violating the law by recording the discussions. His claim is supported by the fact that he placed the phone on the shelf where persons in the room could see it. It only seems logical that if Committee Member Girard intended to tape the meeting knowing that it was unlawful, he would have kept the phone out of plain view. Additionally, there is no evidence that the requisite mental state of knowingly was present to support a finding that Committee Member Girard violated the wiretapping statute. While it is understandable that persons who did not see the phone would believe they never consented to the recording, there is no evidence that Committee Member Girard recorded the meeting with any awareness that what he was doing violated RSA 570-A.

**c. Did Mr. Girard violate RSA 91-A by making a recording of the non-public session?**

Committee Member Girard was acting in official capacity as a member of the BOSC when he recorded the non-public session. There is no prohibition in RSA 91-A regarding the recording of non-public sessions. Further, and since the recording was given to the clerk of the BOSC, to the degree it represents a governmental record of the BOSC, it is being stored in an appropriate location. RSA 91-A:4. Lastly, there is no evidence that the contents of the recording were shared in a manner that would violate RSA 91-A.

Sincerely,



Matthew H. Upton

MHU/

cc: James O'Shaughnessy