

Meeting Minutes, Nonpublic Sessions, and Other Thorny Right-to-Know Issues

New Hampshire Library Trustees Association
2024 Spring Conference
Presented by Cordell Johnston, Attorney at Law

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Agenda

- Meeting minutes
- Nonpublic sessions — and more about minutes
- Q&A

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Why keep minutes?

- It's required! (RSA 91-A:2, II)
- Create a historical record of actions taken
 - May need to prove action was taken legally—*e.g.*, approval of contract or adoption of policy
- Create a record in support of board action in the event of an appeal or legal challenge (*e.g.*, personnel actions)

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The Basics

- **Legal requirement:**
 - Minutes must be kept for every meeting of a public body—*i.e.*, convening of a quorum to discuss matters within its jurisdiction. (See RSA 91-A:2, I & II.)
 - Library board expressly included. RSA 202-A:3-a.
 - If no meeting, no minutes are required.
 - Example: Five-person board; only two show up for a meeting. No "meeting" occurs, so no minutes required.

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Minutes must contain:

- Per RSA 91-A:2, II:
 - Names of members of the public body present at meeting
 - Names of other persons appearing before the public body
 - Brief description of subject matter discussed
 - Brief description of decisions made
 - Names of members who made or seconded each motion

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Not required:

- Names of persons who attended but did not participate in meeting
- Detailed recitation of board discussions (but see discussion of public hearings)
- Comments by members of the public (but see discussion of public hearings)
- Record of how each member voted (except for nonpublic sessions)

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Minutes must be open to public inspection . . .

- Within 5 business days after the meeting. (91-A:2, II.)
- It does not matter that they haven't been approved!
 - Minutes, whether draft or final, must be available for review.
- "Open to public inspection" does not mean posted.
 - It simply means available upon request.

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Posting minutes

- Not required (unless by local regulation)
- But, if public body has a website, it must either:
 - Post approved minutes on its website, or
 - Post and maintain notice on website stating where minutes may be reviewed. RSA 91-A:2, II-b(a).
- If minutes are posted on website, they must be "in a consistent and reasonably accessible location."

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Approving minutes

- No deadline, and no formal process required
 - In fact, no actual requirement to approve minutes (other than reference to posting "approved" minutes on website).
- The minutes, in whatever form, are the minutes, period.
- But they should be reviewed for accuracy and corrected.

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Beyond the Basics

What should minutes contain, beyond what's required?

- Answer: Depends on the nature of the meeting
 - If no actions are taken, minutes can be extremely simple.
 - Public hearings require detailed, comprehensive minutes.
 - Other meetings—somewhere in between.
 - Nonpublic sessions are another matter—see discussion later.

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The minimalist option

- **Example:** Trustees meeting where sole agenda item is the monthly financial report.
- Minutes could simply list members present and say, "The library director reviewed the financial report for the month of May and answered questions from the board." The end.

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The standard model

- **Example:** Regular board meeting with several agenda items. No public hearing involved.
- Describe each discussion briefly, avoiding unnecessary detail. Record all votes, including who made and seconded motions.
- No need to capture everything everyone says—summarize if possible. (But motions should be recorded verbatim.)
- More detail = more opportunities for error = more time spent reviewing and correcting.

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Public hearings—detailed minutes required

- Why? Record may be needed in event of legal challenge.
- Recording secretary should understand what action is being considered, and what the issues are.
 - Discuss in advance what needs to be in minutes.
- Members should discuss issues clearly and explain why they are voting the way they are.

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Public hearings, continued

- Minutes should include:
 - Summary of presentations.
 - Questions asked by the board and answers provided.
 - Public comments—who supported or opposed proposed action, and why.
 - Discussion by the board.
 - Clear motion and vote by the board.

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Record your public hearings!

- Use recording to correct and supplement the minutes.
- Check minutes carefully against recording to ensure nothing was left out.
- Recording may be erased after minutes are approved—but do not erase if decision is subject to legal challenge. You may need it!

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Nonpublic Sessions

Strict limits on use and procedure

- Nonpublic sessions allowed only for certain purposes, including:
 - Hiring, dismissal, promotion, or compensation of public employee
 - Matters that may adversely affect reputation, other than that of a board member
 - Consideration of acquisition or sale of property
 - Consideration of advice from legal counsel (even if counsel not present)

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Nonpublic session procedures

- Motion to enter nonpublic session—requires roll call vote
- Motion must state statutory reason for nonpublic session
- May only discuss matters stated in the motion.
- Strongly recommended: use NHMA's "Nonpublic Session and Minutes Checklist Form," available at nhmunicipal.org/right-to-know-law

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Nonpublic Session Minutes

What is required?

- Must include everything required for public meeting minutes (see slide 5), plus:
- Must "record all actions in such a manner that the vote of each member is ascertained and recorded." RSA 91-A:3, III.
 - *E.g.*, "The motion passed unanimously." Or "Members Brown and White voted yes; member Green voted no." Or "The motion passed 4-1, with Member Black voting no."

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Disclosing nonpublic minutes—91-A:3, III

- Nonpublic minutes must be made public within 72 hours unless board votes not to disclose them ("seal" them).
- Minutes may be sealed only if, by 2/3 vote taken in public session, board determines:
 - 1) Disclosure would adversely affect reputation of any person (other than board member);
 - 2) Disclosure would "render the proposed action ineffective"; or
 - 3) Minutes pertain to terrorism.

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A problem arises . . .

- Your board has just finished a nonpublic session. Now you must decide whether to seal the minutes.
- The problem? The minutes don't exist yet! How can you know whether they should be sealed?

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A few possible solutions . . .

- While still in nonpublic session, discuss what should be in the minutes, and whether they need to be sealed.
 - Although the vote to seal must be taken in public, discussion of whether to seal may occur in nonpublic session.
- If in doubt, vote to seal the minutes (if there is a legitimate reason to do so). Board can vote later to unseal them.

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Avoiding the problem . . .

- Keep nonpublic minutes as simple as possible!
 - If minutes say very little, no need to seal.
- Examples:
 - "The town administrator reported on the Smith litigation."
 - "The board discussed a complaint against a town employee. The town administrator will investigate the matter."

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**Dealing with sealed minutes
How long to seal?**

- **Answer:** Do not specify. Minutes remain sealed "until, in the opinion of a majority of members, the . . . circumstances [that justified sealing them] no longer apply." RSA 91-A:3, III.
- **Wrong:** "Move to seal the minutes for 5 (or 10, or 50) years." **Right:** "Move to seal the minutes." (And state the reason—reputation, etc.)
- Minutes will remain sealed until board decides to unseal.
 - Special rule for sealed minutes related to acquisition, sale, or lease of property under 91-A:3, II(d)—minutes must be unsealed when transaction closes or board decides not to proceed. See 91-A:3, III.

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More about sealed minutes

Reviewing and unsealing minutes – 91-A:3, IV (new last year)

- Effective October 3, 2023, every public body has a choice:
 - a) "Adopt procedures to review [sealed] minutes" and "determine by majority vote" whether to unseal them; or
 - b) "In the absence of an adopted procedure . . . the public body . . . shall review and determine by majority vote" whether to unseal them. This must occur no later than 10 years after last vote to seal them.
- Say again? Does the 10-year requirement really apply only to option (b)? If the board chooses (a) – adopt its own procedure – can it choose to review every 20, or 50, years? Probably not – don't try it!

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Still more about sealed minutes

Reviewing and unsealing minutes, continued

Recommendation: Follow the statutory procedure—review sealed minutes every 10 years (or more often) and decide whether to unseal.

- **Note:** Minutes sealed "prior to the effective date of this paragraph" (*i.e.*, prior to 10-3-2023) must be reviewed within 10 years after the effective date—*i.e.*, before 10-3-2033.
- This applies to all minutes sealed before 10-3-2023, regardless of the year—whether 2022, 2013, 1973, or any other year.
 - **2013 is not a relevant date for this purpose.** Only relevant dates are 2023 and 2033. Minutes sealed before 2023 must be reviewed by 2033.

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Again with the sealed minutes

- Can review and discussion of unsealing occur in nonpublic session?
 - Yes! See RSA 91-A:3, II(m).
 - However, the vote on whether to unseal must take place in public session.
 - Process: Enter nonpublic session for the stated purpose of reviewing sealed minutes. Review and discuss whether they should be unsealed, then return to public session and vote to unseal them (or not).

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One more thing about sealed minutes

Effective 1-1-2022, each public body must keep a list of all sealed minutes. RSA 91-A:3, III. List must include:

- Date and time of nonpublic session
- Specific exemption under 91-A:3 that allowed nonpublic session
- Date of decision to seal
- Date of any subsequent decision to unseal.

Applies only to minutes sealed on or after 1-1-2022.

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A few questions and answers

- Do we need to keep minutes when we have a meeting with our legal counsel?
 - No. A "consultation with legal counsel" is excluded from the definition of "meeting" (RSA 91-A:2, I(b)); no minutes are required. But don't discuss anything other than legal advice.
 - But note that "consideration of legal advice provided by legal counsel," where legal counsel is **not present**, is different. (91-A:3, II(f).) That is the basis for a nonpublic session, which is still a meeting. The rules relative to nonpublic minutes apply.

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A few questions and answers

- A member of the public read a letter at our meeting and demanded that it be included in the minutes. Does the board have to include it?
 - No. The board decides what goes in the minutes. Whether to include it is up to you.
- If we record our meetings, can the recording itself serve as the minutes?
 - Sorry, no. The purpose of minutes is to enable someone to learn what happened without having to listen to the entire meeting. You must have written minutes.

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A few questions and answers

- A citizen wants to see our sealed nonpublic minutes, because she believes (correctly) that we talked about her. Should we let her?
 - Not unless you unseal the minutes and make them available to the public. If there is anything defamatory, discuss with legal counsel first. And next time, be careful what you put in the minutes!
- A citizen requested a copy of the draft minutes from a recent meeting. We reviewed and corrected those minutes and have posted the revised minutes, but we still have the draft minutes. Do we have to provide them?
 - Yes. They are a "government record," and if you still have them, they are subject to disclosure, even though there is a more recent version.

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A few questions and answers

- We have started recording our meetings. Now a citizen is demanding a copy of the recording and a transcript. Do we have to comply?
 - Yes on the recording (91-A:4, II—citizen has right to obtain copy of recording used to create minutes).
 - No on the transcript (unless you have already created a transcript) (91-A:4, VII—not required to compile information into a new form).
- Are we required to keep the meeting recordings indefinitely?
 - No, you may erase/destroy them after approving the minutes. But if there is any controversy and possibility of a legal challenge, keep them until the danger passes.

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A few questions and answers

- A former board member has asked to review a set of sealed minutes from when he was on the board. Should we allow this?
 - No! The minutes belong to the board, and he is no longer a member of the board. He has no rights that the public doesn't have. If you let him review them, you must unseal and make them available to the public.
- A current board member wants to review sealed minutes from before she was on the board. Is she allowed?
 - Yes. Again, they are the board's minutes, and she is a member. But if she is permitted to review them, the other board members should be given the same opportunity.

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Thank you!

Cordell Johnston, Attorney at Law
 33 Maple Street
 P.O. Box 252
 Henniker, NH 03242
 603-748-4019
 cordell@cajohnston.com

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