

# Legal Q and A:

## Sealing of Nonpublic Session Meeting Minutes

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A great deal of confusion exists over "sealed" meeting minutes, probably because the term "sealed" suggests that the meeting minutes are somehow literally sealed and unavailable for viewing-by anyone, forever. This is not the case.

### **Q. What does it mean "to seal" meeting minutes?**

**A.** Sealing meeting minutes is the phrase used to describe the action of a board to withhold meeting minutes of a nonpublic session from public inspection. RSA 91-A:3, III allows a board to vote to withhold minutes when any of three circumstances exist: (1) when divulgence of the information would likely adversely affect the reputation of any person, other than a member of the board itself; (2) when release of the minutes would render the proposed action ineffective; or (3) the information relates to terrorism planning functions. The nonpublic session minutes may be withheld until, in the opinion of a majority of members, the circumstances described above no longer apply.

### **Q. Are all nonpublic session meeting minutes sealed?**

**A.** Not automatically. In order to withhold nonpublic session meeting minutes from public inspection, the board must first take a vote to withhold them, or to seal them. The recorded vote of 2/3 of the members present is needed in order to seal the minutes. If the 2/3 vote is not obtained, or no vote is taken, then the minutes must be available within 72 hours, much sooner than the five business days for regular meeting minutes. RSA 91-A:2, II; RSA 91-A:3, III.

### **Q. Can the board vote to seal the minutes forever?**

**A.** While some boards routinely do this, it is not a good practice since the law does not provide for this. Instead, nonpublic meeting minutes may be withheld only until such time as the conditions which lead to the sealing continue to exist. As discussed above, the law provides specific reasons why nonpublic session minutes may be withheld from public inspection. Arguably, the subject of the nonpublic session might be one that continues to be deserving of the protection that nondisclosure to the public affords it, and thus will be withheld for many years. However, the better practice is to vote to seal the minutes with no set time period and, instead, periodically review the sealed minutes to determine if they continue to meet the requirement for withholding from the public.

### **Q. How does a board go about reviewing sealed minutes?**

**A.** Reviewing and discussing sealed minutes by a quorum of the board should be done in nonpublic session to ensure that the minutes are not inadvertently made part of a public record that is subject to disclosure. The board could have a procedure where office staff continuously monitors sealed minutes to alert the board when circumstances have changed such that minutes may be "unsealed" and made available to the public. When in doubt, the board may vote to go into nonpublic session in the usual manner to discuss the original subject of the nonpublic session, and then discuss whether the minutes should be released.

**Q. When is the vote to seal the minutes taken-in the nonpublic session or in the public session?**

**A.** Although the law is not entirely clear on this issue, the important point to keep in mind is to limit detailed discussion of nonpublic session issues while in the public session. Since there may be discussion about the propriety of sealing versus allowing them to be available to the public within 72 hours, the discussion and vote will most likely occur within the nonpublic session. Once the board returns to its public session, an announcement about the sealing can be made to alert the public that the minutes will, or will not, be made available for public inspection.

**Q. What happens if the board forgets to take the vote to seal the minutes?**

**A.** As discussed previously, nonpublic meeting minutes may only be withheld upon the recorded 2/3 vote of the members present. If the board intended to have the minutes sealed, but merely forgot to take the formal vote as required, one possible remedy would be to hold another meeting as quickly as possible, go back into nonpublic session to discuss the issue and take the proper vote to seal the minutes. Such a situation may benefit by use of the electronic meeting provisions allowed under RSA 91-A:2, III.

The best way to avoid this issue, of course, is to have a checklist available when entering a nonpublic session to record the reason for the nonpublic session, the results of the roll call to enter the nonpublic session, and a reminder to consider the issue of whether the meeting minutes will be sealed or not and, if so, the vote taken.

**Q. Must sealed minutes actually be sealed and placed in a safe?**

**A.** No, but they should be stored in such a manner so that they will not be inadvertently released to the public. Placing them in a location well away from the area where the public meeting minutes are stored is a good way to ensure they won't be released in error. The same can be said for the computer files where the minutes reside.

**Q. Can board members ever look at the sealed minutes again?**

**A.** Withholding the minutes from *public* inspection does not require the minutes to also be withheld from the public officials on the board that created the minutes originally. As discussed previously, the minutes may remain sealed only so long as the circumstances continue to exist that allowed them to be sealed in the first place. Thus, boards should have a schedule of reviewing sealed minutes periodically to ensure minutes that should be unsealed, are unsealed. Moreover, the sealed minutes may contain important information on issues that are on-going, and board members may benefit from reviewing them in dealing with the issues going forward. This may be particularly relevant to the new board member who must "come up to speed" on an on-going issue that predates his or her tenure on the board.

**Q. Can a board member who wasn't on the board when the minutes were created look at them?**

**A.** Yes. Subject to any rules of procedure that may be adopted by the board, there is no requirement that only members who were actually on the board when the nonpublic session was held are able to review the minutes. All board members must take the oath of office required by RSA 42:1 and, thus, all members have an obligation not to divulge the contents of sealed nonpublic-session meeting minutes, whether or not they were at the meeting. And, as previously noted, a new member may be involved with making decisions that involve information received in prior nonpublic sessions.

**Q. Can a board have a policy that sealed meeting minutes will not be available for review by individual selectmen, but, instead, only be reviewed after a majority vote of the board?**

**A.** Yes. One selectman has no authority, as the authority rests with the board acting as a whole. RSA 41:8. Thus, a board may adopt a policy that sealed meeting minutes will only be made available for review by a selectman upon a majority vote of the board.

**Q. What happens if a board member divulges what transpired in the nonpublic session when the meeting minutes have been sealed?**

**A.** This would be a breach of confidentiality that could result in removal from office. RSA 42:1-a, II(a). This begs the question of what happens when a *former* board member divulges the contents of a nonpublic session when the minutes have been properly sealed. Obviously, the penalty of removal from office will be ineffective. However, in most cases, former local officials continue to take their oath seriously and do not breach confidentiality even after they leave office.

**Q. Does a member of the public who was in attendance at the nonpublic meeting have a right to review the minutes if the board votes to seal them?**

**A.** No. If the board invites a non-board member into the nonpublic session, that person has no right to review the minutes if the board has voted to withhold the minutes from public inspection. Care should be taken whenever non-board members are included in the nonpublic session as these people are not under the same oath as local officials to keep the information confidential. Additionally, such a person may also take notes or make a recording of the session that will not be under the control of the board with regard to withholding from public inspection.

The public's right of access to governmental proceedings may only be denied for certain specified reasons when a public body takes a specific vote to do so. Even then, minutes of the proceedings must be taken and must be made available to the public unless the body takes yet another vote to keep them from public inspection. Given that the purpose of the Right to Know Law is to ensure "both the greatest possible public access to the actions, discussion and records of all public bodies, and their accountability to the people," nonpublic session meeting minutes should be given the utmost consideration when deciding if they should be sealed. When the decision to seal the minutes is made, the board has a continuing obligation to ensure that once those conditions for sealing no longer exist, the minutes are unsealed and made available for public inspection.

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