

Public vs Nonpublic Sessions: Knowing the Right Procedures

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Nonpublic sessions always make our trustees nervous. We're afraid we're not handling the process correctly.

Nonpublic sessions frequently create questions and confusion for public bodies. Let's look at the three most common misconceptions about nonpublic sessions:

Misconception #1: Nonpublic sessions are required.

To the contrary! RSA 91-A:3 allows public bodies to go into nonpublic session for specific purposes—but it actually doesn't mandate them to do so. In other words, RSA 91-A:3 is the exclusive list of reasons a public body is permitted to go into nonpublic session.

Misconception #2: No decisions can be made in a nonpublic session.

Wherever this belief came from, it is directly contradicted by the language of the statute. Two places in RSA Chapter 91-A explicitly refer to decisions being made in nonpublic, including RSA 91-A:3, III, which says that nonpublic session minutes "shall record all actions in such a manner that the vote of each member is ascertained and recorded." This is important because it means it must be clear in your nonpublic minutes how the various members of the public body voted. Whether a decision should be made in nonpublic session is for the public body to decide, consistent with the statute. For example, a public body conducting a nonpublic session to discuss which candidate to hire for an employment position may not want their decision to be publicly-known before the offer has been made and accepted! Therefore, the public body may wish to vote on that item in the nonpublic session.

Misconception #3: Nonpublic session minutes are permanently "sealed."

First, it's important to know that you must keep minutes for nonpublic sessions, just like you keep minutes for public meetings. Second, the minutes of nonpublic sessions are not automatically "sealed." Instead, the statute mandates that nonpublic session minutes must be available to the public within 72 hours, unless the board votes otherwise, in compliance with the requirements in RSA 91-A:3, III. Essentially, if the board determines that the minutes should not be available to the public, the public body must come out of nonpublic session—into a public meeting—at which time a vote can be taken on the minutes. We traditionally refer to this as "sealing" the minutes, although the statute doesn't actually use that word. Third, a public body cannot simply vote to seal nonpublic session minutes because the discussion was done in nonpublic. (We might even refer to this as Misconception #3-a). The statute includes three permissible reasons for "sealing" nonpublic session minutes. Finally, as for the length of time for sealing minutes, the statute says the "information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply." The "aforesaid circumstances" refers to the reason for which the minutes are sealed.

In summary, under RSA 91-A:3, the basic process for conducting a nonpublic session is as follows:

- A public meeting is opened. Every nonpublic session starts in a public meeting!
- A motion is made and seconded to go into nonpublic; motion states on its face the specific exemption being used.
- Motion passes by majority roll call vote.
- Any members of the public—and others not necessary for the nonpublic discussion—leave the room.
- The nonpublic session is conducted.
- If the minutes are to be sealed—or, if the board has other public business to discuss after the Nonpublic—the board comes out of nonpublic and back into a public meeting.
- If necessary: A motion is made and seconded to seal the minutes for at least one of the three permitted reasons in RSA 91-A:3, III.
- Motion to seal passes by a 2/3 recorded vote.

NHMA has a step-by-step process public bodies can use each time they go into nonpublic session. This document can be found on our website at www.nhmunicipal.org/Resources/ViewDocument/1185. □