Legal Q&A:

Of Meeting Minutes and Machines

New Hampshire Municipal Association*, New Hampshire Town and City, April 2011*

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Minutes must be created to record the result of meetings of public bodies in order to comply with the Right to Know Law. However, when recording equipment is used, the issues become more complex, and other statutes become involved. In the end, some decisions need to be made by public bodies about how to record meetings, whether the recordings should be preserved and, if so, in what format. The answers are not always straightforward.

Q. In our town, we have equipment that captures the sound and video images of our public meetings. We also create written minutes of that meeting. Which one is the real record of the meeting?

A. There are two statutes which control this question. First is the "Right to Know" law, RSA Chapter 91-A, and the second is the "Disposition of Municipal Records" law, RSA Chapter 33-A. The Right to Know Law at RSA 91-A:2 requires that "minutes" be promptly recorded of every public meeting and thereafter be treated as "permanent records" of the public body, which must be preserved under RSA 33-A:3, -a, LXXXI, LXXXII and LXXXIII. The Municipal Records Law at RSA 33-A:5-a requires any record which is to be retained for more than 10 years to be "…transferred to paper, microfilm, or both." Thus, the "minutes" which will form the "permanent record" of the meeting of the body will be the version that ultimately ends up as the written word on paper. There is no legal requirement that the sound or video images of any public meeting be recorded, or that recordings be preserved.

Q. I understand that we are not required to have these audio or video recordings, but we have them. Are we required to disclose them if a request is made?

A. If the recordings were created using publicly-owned equipment, they are "governmental records" under the Right to Know Law. Under RSA 91-A:4, II, the recordings are subject to disclosure, unless they are exempted from disclosure under some provision of the law. Anyone has a right to inspect these records by viewing or listening to them. They may also have a copy of the record, so you might be required to either make a copy or make some provision to allow a copy to be made. Note also that under RSA 91-A:9, it is a misdemeanor to destroy any information with a purpose to prevent its inspection or disclosure. Thus, if someone has requested inspection or copying of a video or audio recording, it must be preserved at least until that has been accomplished.

If any recordings were created using privately-owned and operated equipment for private and personal use, they are not "governmental records," and they are not official records of what occurred at the meeting of the public body. Since they are not under the control of the municipality, they are not subject to disclosure under the Right to Know Law. RSA 91-A:5, VIII.

Q. Since the recordings are governmental records, do we need to keep them permanently?

A. No. There is a schedule in the Municipal Records Law indicating a minimum period to retain such records. The Municipal Records Law suggests, "…keep until written record is approved at meeting. As soon as minutes are approved, either reuse the tape or dispose of the tape." See RSA 33-A: 3-a, LXXX. There is no statutory provision that mandates that these records either be destroyed or kept

permanently. The Right to Know Law also provides that an electronic record is no longer subject to disclosure after it has been "initially and legally deleted." See RSA 91-A: 4, III-b.

Q. Is there some reason why we might want to keep these recordings?

A. Yes. There may be situations where retention of such records could be helpful, such as recordings of lengthy or contentious land use board hearings, or situations where a public body does not meet frequently. At times, members of a public body may have differing recollections of what occurred at a meeting, and wish to use the recordings to clarify the issue or refresh their recollections. At times, difficult decisions result in litigation, and the municipality or the public body members may be able to use the recordings to assist them in resolving the dispute, or as evidence in court. Finally, some believe that the recordings are significant elements of the historical record, and should be preserved for future use.

Q. If we decide that some or all of these records should be preserved, how do we manage the issue?

A. There is no single answer to the question, so it may be helpful for each board in a municipality to adopt a policy on the issue. The retention period for one board need not be the same as for another board, and it is entirely possible that different boards will use different types of recording equipment to capture their meetings. The Municipal Records Law requires the formation of local committees consisting of the "municipal officers, or their designee, together with the clerk, treasurer, an assessor, and tax collector" to govern the disposition of municipal records. See RSA 33-A:3.

Changes in technology present a challenge. Just in the area of audio tapes, there are several sizes of tape cassettes available. In the video area, there are different formats for different cameras, and different types of tape or digital media used to record the images. If the recording machine wears out or becomes inoperable, there may be no ready replacement, and the tapes or storage media might not be able to be used. How many people still have a betamax video recorder or a reel-to-reel tape recorder, or a 5 ¼ inch or 3 ½ inch floppy disk drive?

Q. Who has the burden of keeping up with all of this change, and maintaining all of this information?

A. So far, the archivists tell us that only paper and microfilm have proven themselves as storage media that definitely last for more than 10 years, and that is why RSA 33-A:5-a requires records with a retention period over that time to be placed in those formats. That doesn't help for video images. For records used frequently, paper and microfilm are harder to search and index than digital computer files.

If the decision is made to retain these records, both the Municipal Records Law and the Right to Know Law make the municipality responsible for assuring that the records remain accessible until they are destroyed. Municipal employees will often wish to keep records they are using in electronic format because access to the information is easier and faster. It is perfectly acceptable to keep multiple copies of information in whatever format is needed or useful. Digital computer files may be part of the answer, since they may be easily copied and maintained, both onsite and at a remote storage location. These files may be more easily transitioned to new equipment. They store the written word, financial information, video, photos and audio. Digital files may also be part of the answer to recovery from a physical disaster, such as a fire or flood, an equipment failure or even a disgruntled employee who sought to impair the ability to perform daily business tasks.

Q. At the local level, who has authority to make these decisions?

A. The local committee required by the Municipal Records Law must plan for equipment and software transitions, to assure that the data on the old machine is still accessible in some way. If there is no way to make a transition, the local committee may decide to keep the old machine in service. If the machine will no longer operate, the data should be transferred to a paper medium until

the information may be lawfully destroyed in accordance with a document retention policy and the requirements of statute. In the end, it is the board of selectmen that, under RSA 41:9, VI, has the responsibility to establish and maintain appropriate internal control procedures to ensure the safeguarding of all town assets and properties.

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